1971

Edward Harold Schad, Jr. v. John W. Turner : Brief of Appellant

Utah Supreme Court

Vernon Romney; Attorney for Respondent

In The Supreme
of the State

EDWARD HAROLD

-vs-

JOHN W. TURNER
State Prison,

BRIEF

Appeal from
Third District
Hon.

VERNON ROMN
Attorney General, State

State Capitol
Salt Lake City, Utah

Attorney for Respondent

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In The Supreme Court of the State of Utah

EDWARD HAROLD SCHAD, JR.,
Petitioner,

-vs-

JOHN W. TURNER, Warden Utah State Prison,
Respondent.

Case No. 12485

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of the trial court denying petitioner's Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

Peitioner's Writ of Habeas Corpus was denied.

RELIEF SOUGHT ON APPEAL

Petitioner seeks a reversal of the judgment of the lower court denying his Writ of Habeas Corpus.

STATEMENT OF FACTS

At 7:30 p.m. on July 5, 1968, Lynda Lea Olson discovered the nude body of her brother, Clare Odell Mortensen, in a closet in his apartment on the lower Avenues in Salt Lake City, (T 112). The decedent's hands were bound behind his back with leather thongs and small diameter nylon cords which were tied rather loosely and with simple overhand knots (T 118, 419). The ankles were also bound (T 155), and two pieces of cloth had been tied around the face and neck (T 157, 403). At the time the body was found the front door of the apartment was locked (T 148), but the back door was ajar (T 105).

A post-mortem examination disclosed that the decedent had engaged in both active and passive anal sodomy (T 405, 417), as well as fellatio (T 416) near the time of death. Bruises and scratches were found on the knees and legs of the deceased and there were superficial abrasions on the penis and scrotum (T 405). Dr. James T. Weston, the medical examiner who performed the autopsy, testified that the cause of death was restricted venous return of blood from the brain caused by the ligature placed about the decedent's neck (T 408). Dr. Weston testified, however, that the ligature was not tight enough to impair the supply of blood to the brain (T 431). From this, Dr. Weston concluded that the purpose of the ligatures had been to heighten

erotic stimulus during an act of sodomy immediately prior to death (T 439, 655), and that the death had been accidental (T 494). The time of death was fixed between noon and 10:00 p.m. July 4, 1968 (T 409).

It was shown at trial that the decedent had for a long period of time engaged in acts of anal sodomy (T 405). In addition, he had suffered from paralysis (T 162), which was attributed to a tumor found in the decedent's brain (T 439). There was testimony that the decedent had experienced frequent dizzy spells (T 172) and had constantly used a variety of prescription drugs for his various physical ailments (T 96, 172). Dr. Weston testified that the drugs and the tumor could have contributed to the cause of death (T 435, 442).

Appellant had been seen in the company of decedent at 11:30 p.m. on July 3, 1968 (T 89). A neighbor testified that she had talked with appellant outside decedent's home at 9:15 p.m. on July 4 (T 184), but had not seen appellant enter or leave the decedent's residence at that time (T 226). Another neighbor testified that he had seen appellant replacing a window screen outside the decedent's apartment at 8:15 a.m. on July 5 (T 209). Appellant testified that he left Ft. Lewis, Washington on July 1, 1968, and arrived in Salt Lake City at 4:45 a.m. on July 3 (T 470, 472). Upon his arrival he went to a cafe, where he met the decedent (T 474), who invited appellant to stay at his apartment (T 475). Appellant accepted, and followed decedent

to the apartment at 6:00 a.m. on July 3 (T 477). Thereafter, he accompanied decedent to a local tavern, a friend's house, and another tavern, returning to the apartment at 3:00 p.m. (T 518, 519). At about 4:45 p.m., the two again left the apartment and visited two taverns (T 520, 522). Decedent left appellant alone at midnight (T 522) and appellant accompanied three other persons on a trip to the Great Salt Lake (T 289, 5254). Returning at 6:00 a.m. on July 4, appellant went again to a tavern (T 527) where appellant testified that the decedent carried on an intimate conversation with a heavy-set man (T 530). The two invited appellant to attend a rodeo with them, but appellant declined (T 531). The decedent then took appellant to another tavern and left him there at 12:30 p.m., after which appellant testified he never saw the decedent (T 531).

Appellant left the tavern at 9:00 p.m. on July 4, and walked to the decedent's apartment (T 533), where he talked with the neighbor and picked up his belongings from the back porch of the decedent's apartment (T 536). He denied returning to the apartment and replacing a window screen on the morning of July 5 (T 621), and the evidence indicated that the neighbor might well have been mistaken as to the description of the person who replaced the screen (T 467-8).

It was shown at trial that appellant had purchased an airplane ticket to Germany (T 273), and that

he had used a credit card belonging to the decedent to obtain money with which to purchase the ticket (T 279). Appellant admitted having used the credit card unlawfully (T 623), and testified that he found it in the pocket of a shirt which he had loaned decedent and which decedent had returned (T 616). There was also testimony that appellant had discarded certain items of the decedent's personal property at a motel where he stayed on July 4 (T 246, 250), but appellant denied this (T 543).

Appellant left Salt Lake City for Germany at 10:30 p.m. on July 5 (T 308), and was arrested by the military authorities in Hauau, Germany, at 11:30 a.m. on July 8, for being absent without leave (T 336). At the request of the American military authorities, the German Police recovered appellant's two suitcases and turned them over to the military approximately one hour after appellant's arrest (T 33). The suitcases and other items taken from appellant were then mailed to the United States Army Criminal Investigator at Fort Douglas, Utah (T 353), and were opened by a Salt Lake City Police Officer (T 537). Certain items of evidence taken from the suitcases, as well as the suitcases themselves, were admitted in evidence at appellant's trial over the objection of defense counsel (T 341).

At the close of the evidence, the trial court withdrew from the jury's consideration the charge of mur-

der in the first degree (T 690). In its instruction to the jury the court charged that appellant could be found guilty of murder in the second degree if the jury believed that the killing of the decedent was committed by the appellant during the perpetration of an act of sodomy by appellant with the decedent (T 697, R 40). Timely exception was taken to this instruction (T 776-777). The jury returned a verdict of guilty of murder in the second degree (R 29). Appellant's motion for a new trial (T 778, 785) was denied (T 795).

ARGUMENT

POINT A

THE SEARCH AND SEIZURE OF THE APPELLANT'S SUITCASES AND THE ITEMS CONTAINED THEREIN BY THE GERMAN POLICE, THE U.S. ARMY, AND THE SALT LAKE CITY POLICE WERE UNLAWFUL UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE ADMISSION INTO EVIDENCE AT PETITIONER'S TRIAL OF SUCH ITEMS SEIZED DURING THE SEARCH WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

The law is well settled that a search made by official authorities will be reasonable under the Fourth

Amendment only under one of the following three circumstances:

(1) Pursuant to search warrant. *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed.2d 723 (1964)

(2) Incident to a lawful arrest. *Ker v. California,* 374 U.S. 23 10 L.Ed.2d 726 (1963)

(3) With the consent of the owner of the place or item searched. *Stoner v. California,* 376 U.S. 483, 11 L.Ed.1d 856 (1964).

In the case at bar, the search made by officer Wesley was admittedly made without a search warrant and without the consent of appellant. Indeed no warrant or official order was issued, even in Germany, by the United States military authorities which directed the seizure of the evidence in question. Accordingly, the search of appellant's suitcases and the use of items taken therefrom in evidence against appellant at trial were justified only if made incident to a lawful arrest. Clearly, however, such was not the case. In a recent decision, *Chimel v. California,* 395 U.S. 752 89 S.Ct. 2034 (1969), the United States Supreme Court examined the purpose of the rule permitting a search incident to a lawful arrest, and noted that the rule was one of necessity to prevent:

(a) The destruction of evidence by the person arrested; and

(b) the danger to police officer inherent in a situation where the person arrested might be armed, and therefore potentially a threat to the safety of the officer.

Since these two functions may be completely satisfied by a search limited to the arrested person's body and the area within his immediate control, the court in *Chimel* declared that searches incident to a lawful arrest are valid only if they do not extend beyond that area.

A search is "incident" to an arrest only if it is reasonably contemporaneous therewith. In *Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881 (1964), one of the major cases relied on by the court as authority for *Chimel,* the court disallowed a search of the defendant's car as incidental to arrest, because the search took place when the defendant was already in jail and the car was in custody in the police garage. In this case the Supreme Court laid down the standards for search incidental to arrest that were reiterated in *Chimel, supra.* The court reversed stating:

"But these justifications are absent where a search is remote in time or place from the arrest." Id at 367.

In following *Preston* the 10th Circuit reversed in

Welch v. United States, 411 F.2d 66 (10th Cir. 1969), stating "In order for a search incident to an arrest to be reasonable, it must be contemporaneous both in time and in place with the arrest." In *Faubion v. United States,* 424 F.2d 437 (10th Cir. 1970), another 10th Circuit case, the defendant, while in transportation from one state to another, stopped the officers and after being advised of his rights told them that two hand guns were in his suitcase which the authorities had in custody. The authorities then searched the suitcase without a warrant, the evidence was introduced and the case was reversed for that reason.

The reason for the *Preston-Chimel* standard is to limit search incident to arrest to its position as an exigency to be used only when it is unreasonable to require a search warrant. In the case at hand the seizure by German authorities took place one hour after appellant's arrest, and the search by the Salt Lake City authorities occurred several days thereafter. Thus, both the seizure and search of the suitcases were in no way sufficiently close in time to appellant's arrest to be deemed "incident" thereto, and therefore cannot be justified on that ground. This, coupled with the fact that the suitcases were far beyond appellant's access and control at the time of the seizure and search, required that the authorities obtain either a search warrant or appellant's consent before proceeding with the

search. The record is clear that they did neither. As a result, the seizure of the suitcases by German police at the request of United States Army authorities, and the search by Salt Lake City Police Officials was not a lawful search under the United States Constitution.

In *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed.2d 171 (1964) the Supreme Court held that a conviction in which illegally seized evidence had been produced at trial must be overturned unless the effect of the introduced evidence could be declared "harmless beyond a reasonable doubt." This is in keeping with the common law rule of shifting the burden to the one admitting the prejudicial error (1 Wigmore, Evidence § 21 3rd ed. 1940).

Three years later the Supreme Court reiterated this position of placing of the burden on the prosecution in cases of constitutional error. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. State of California,* 386, U.S. 125, 87 S. Ct. 824 (1967).

The following circuits have all granted habeas corpus for constitutional error quoting the above language of *Chapman*:

2nd Circuit	*Savino v. Follettee,* Warden 305 F. Supp. 277 (S.D. N.Y. 1969)

3rd Circuit	*Ordog v. Yeager,* Warden 299 F. Supp. 321 (D.N.J. 1969)
5th Circuit	*Brown v. Heyd,* Sheriff 277 F. Supp. 899 (E.D.La. 1967)
9th Circuit	*Imbler v. Craven,* Warden 298 F. Supp. 795 (C.D. Cal. 1969)

The following circuits have all granted habeas corpus for constitutional error on authority of ***Fahy*** before *Chapman.*

4th Circuit	*Banks v. Pepersack,* Warden 244 F. Supp. 675 (D. Md. 1965)
7th Circuit	*Schmitt v. Burke,* Warden 277 F. Supp. 809 (E.D. Wis. 1967)
8th Circuit	*Craig v. Haugh,* Warden 242 F. Supp. 775 (N.D. Iowa 1965)

In ***Fahy,*** *supra,* the courts said,

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In *State v. Scandrett,* 468 P.2d 639 24 Utah2d 202 (1970) on the issue of introduction of illegally obtained

evidence, the Utah Court citing *Chapman* stated "there is a presumption that such error is prejudicial." The court further stated in *Scandrett,* which was a trial to a judge, that a jury may be more readily prejudiced by improper evidence than a trial judge.

It would appear impossible to say that the introduction of the only physical evidence linking the defendant to the deceased did not have the effect, in the words of Chief Justice Warren, of "forging another link between the accused and the crime charged." *Fahy supra.* Thus it harly seems feasible in this case based upon circumstancial evidence (*T* 712) and tried before a jury that the introduction of this evidence either with or without the resulting necessity of the defendant in explaining his possession of it (T 569-570) coupled with the prosecutor's use of the defendant's explanation of his possession of these items (T 729) could be deemed "harmless beyond a resonable doubt" and found not to "have contributed to the conviction. *Fahy, supra.* For this reason, the conviction should be reversed.

POINT B

DURING THE COURSE OF THE TRIAL, THE DISTRICT ATTORNEY MADE IMPROPER INQUIRIES BEFORE THE JURY WHILE CROSS-EXAMINING DEFENDANT REGARDING DEFENDANT'S PRIOR CONVICTIONS (T 545-548). SUCH QUESTIONING

UNJUSTLY PREJUDICED PETITIONER'S POSITION REQUIRING RETRIAL.

The Utah view is that a defendant can be questioned concerning past felony convictions as to the number and type of crime involved. *State v. Hougensen,* 91 Utah 351, 64 P.2d 229 (1936), *State v. Dickson,* 12 Utah-2d 8, 361 P.2d 412 (1961). The prosecution clearly exceed permissible examination on three fronts.

(1) Prosecution counsel's questions on cross, over defense counsels objection, concerning petitioners prior discharge from the service (T 545) were neither probative or relevant, particularly where the defendant was evidently of sufficient character that he was presently in the service and had been there for almost two years.

(2) The repeated questioning of petitioner over defense counsels objections as to the time and place of the admitted convictions, and T 545-56-47, 2nd

(3) the prosecution's questioning of the petitioner at some length concerning the illegal wearing of a United States Army uniform, a fact neither shown to be true or shown to be a felony, clearly went beyond allowable questioning concerning felony convictions. (T. 547)

In regard to these lines of question, none of the information pursued was of probative value nor is it rele-

vant. In speaking of the questions concerning the alleged illegal wearing of an army uniform, the trial court in a memorandum denying this Habeas Corpus stated,

> "such an offense has no relation to murder amidst sex perversion P 21. . ."

This questioning was pursued to emphasize to the jury that defendant had had past trouble. This testimony cast aspersions upon the defendant and implied that because he had possibly been in trouble elsewhere, he was a person of evil character. As such, its effect was to disgrace the defendant and show a propensity to commit crime; a method of jury persuasion not allowed. 1 Warton's Criminal Evidence, Sec 233, (12th Ed. 1955).

From *State v. Dickson, supra,*

> The very purpose of excluding such evidence is to prevent the prosecution from smearing an accused by showing a bad reputation and relying on that for conviction rather than being required to produce adequate proof of the crime in question, 12 Utah2d, at 12, 361 P.2d at 414.

As in *Dickson, supra,* the admission of such evidence is of such prejudicial effect as to necessitate retrail.

CONCLUSION

It is clear that petitioner was prejudiced by the ad-

mission of the unlawfully obtained evidence and the questioning concerning his past this Court should grant his Writ of Habeas Corpus.

Respectfully submitted,

DAVID P. RHODE