1992

State of Utah v. Don W. Dunbar : Reply Brief

Utah Court of Appeals

Patrick B. Nolan; Deputy Cache County Attorney; Attorney for Appellee.
Ted S. Perry; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee) Case No. 920341-CA

vs.

DON W. DUNBAR, Priority No. 2

Defendant-Appellant)

REPLY BRIEF OF APPELLANT

DEFENDANT'S APPEAL OF JUDGMENT ENTERED BY THE FIRST CIRCUIT COURT OF CACHE COUNTY, UTAH, THE HONORABLE ROGER S. DUTSON, PRESIDING

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REPLY BRIEF OF APPELLANT

This reply brief is submitted by the appellant pursuant to the provisions of Rule 24 (c) of the Utah Rules of Appellate Procedure which permits appellant to respond to any new matter raised in appellee's brief and is also submitted for the convenience of the Court in relating the points raised in appellee's brief to the points raised on appeal in the appellant's brief.

ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

No new issues are presented by this reply brief and the standard of appellate review is the same as is set forth in the appellant's brief and in the appellee's brief.

ARGUMENT

POINT I: THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION:

As was discussed in Point No. Ten of appellant's brief the evidence before the trial court was insufficient to sustain the defendant's conviction as there was no evidence the Don W. Dunbar named on the driving record (Exhibit "1") was the same Don W. Dunbar on trial in this case as there was no evidence that the birth dates were the same, that there was no evidence that the Don W. Dunbar in this case ever lived at 1212 4th Avenue, Salt Lake City, Utah (indeed Exhibit "1" shows that mail addressed to Don W. Dunbar at that address was returned unclaimed), that there was no evidence that the Don W. Dunbar on trial in this case was ever arrested for driving under the influence, ever refused to give a breath test, and was ever convicted of driving under the influence of alcohol.

In the appendix to the appellant's brief all the evidence was marshalled which could support the jury's verdict on this issue (see State v. Moore, 802 P. 2d 732 [Utah App. 1990] requiring the appellant to marshall the evidence in support of the verdict). Appellee does not dispute appellant's contention that all the evidence was marshalled in the appendix to appellant's brief. It is respectfully submitted that the evidence does not show that any effort was made by the State of Utah to show that the Don W. Dunbar named in Exhibit "1" was the same Don W. Dunbar as was on trial in this case.

POINT II: THE DEFENDANT WAS DENIED A SPEEDY TRIAL.

This point is discussed in Point No. One of the appellant's brief. Appellee makes an incorrect statement on page 10 of its brief which indicates that the appellee misses the entire thrust of appellant's argument. Appellee claims the information was served on June 3, 1991. The information was not served, only the summons. The information was held by the deputy until June 6, 1991 so there was no way the defendant could appear and answer the information when he appeared on another matter on June 3, 1991 (R. 186; T-3 6, 7; T-8 65-66). By its deceptive actions the State of Utah prevented the defendant from having a speedy trial.

POINT III: DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS.

This point is discussed in Point Two of appellant's brief, but again the appellee misses the entire thrust of the appellant's argument as on page 12 the appellee again incorrectly states the information was served on the defendant with the summons. As stated in Point II above the information was not served with the summons but was concealed for nearly three days. The information in criminal proceedings is never served with the summons but is delivered to the defendant at the time of first appearance (see Rule 7(4)(a) Utah Rules of Criminal Procedure).

POINT IV: THE TRIAL COURT DID NOT HAVE JURISDICTION.

This point is adequately discussed in Point Three of appellant's brief and no additional argument is necessary.

POINT V: THE METHOD OF SEATING THE JURY PANEL CONTRARY TO THE REQUIREMENTS OF LAW IS NEVER IRREVALENT.

As discussed in Point Four of appellant's brief the jury panel was not drawn by lot as required by Rule 18(a) of the Utah Rules of Criminal Procedure. Appellee does not dispute this fact but claims it is irrevalent. It is respectfully submitted that the United States Supreme Court has held that the method of selecting a jury must not discriminate because of Amendment XIV of the United States Constitution requiring the States to give equal protection to its citizens (see Georgia v. McCollum, 112 S. Ct. 2348 [1992] holding racial discrimination offends equal protection).

As was discussed in Point No. Nine of appellant's brief there is some possibility that juror Don Corbridge was biased. Selecting the jury panel alphabetically assured he stood a good chance of being selected. If the jury panel had been drawn by lot as required by law, Don Corbridge may not have been selected. The equal protection assured by the United States Constitution should not be ignored when the trial court does not follow the law with respect to selection of the jury panel (see Eubanks v. Louisiana, 356 U. S. 584, 78 S. Ct. 970, 2 L. Ed 2d 991 cited in appellant's brief at page 27).

POINT VI: THE JURY WAS NOT PROPERLY IMPANELED.

This point is discussed in Point Five of appellant's brief. Appellee again makes a misstatement of fact when on page 14 appellee states the record does not show that any juror raised a hand "indicating no hand was raised." It is respectfully submitted that a silence

does not indicate anything. It is clear in appellant's brief at pages 32 and 33 that all the jurors said they would not like a juror in their present frame of mind to sit on the case if they were the defendant even after the trial court had explained presumption of innocence. If each juror felt they were so biased that they would not want a juror in their frame of mind to sit on the case if they were the defendant it seems obvious the defendant did not receive a trial by an impartial jury.

POINT VII. THE MENTION OF DRIVING IN RIVER HEIGHTS WAS NOT IRREVALENT.

This point is discussed in Point No. Six of appellant's brief and appellee seems to ignore the fact that the Logan River (which forms the boundary of Logan on the east by River Heights) would be a fact well known to the members of the jury and a statement that Officer Meacham followed the defendant one and a half to two miles after first observed obviously placed in him River Heights which permitted the state to emphasize that fact even though previously cautioned by the Court (T-8 47).

POINT VIII: THE EXPIRATION OF DEFENDANT'S DRIVER'S LICENSE IS NOT IRREVALENT.

This point is discussed in appellant's brief in Point No. Seven. It is respectfully submitted that the meaning of "suspension" is relevant and defendant suggests the Court consider an example of a suspension bridge. As long as it is suspended it has some meaning for the traveler, but if the bridge expired it would place the traveler in a entirely different situation.

POINT IX: DEFENDANT WAS NOT ENTITLED TO AN INSTRUCTION OF A LESSER INCLUDED OFFENSE.

Defendant concedes the error in Point No. Eight of the appellant's brief and apologizes to the Court for misreading the penalty for a violation of Section 41-2-104 Utah Code Ann. 1953 as it is indeed a Class C Misdemeanor as noted by appellee but the penalty is more severe for driving on suspension than for driving without a license (see 41-2-127(2)(a) Utah Code Ann. 1953.

POINT X: THERE WAS IMPROPER CONTACT WITH A JUROR IN THIS CASE.

This point is adequately discussed in Point No. Nine of the appellant's brief.

POINT XI: THE DEFENDANT WAS NOT PROPERLY IDENTIFIED IN THIS CASE.

This point has been discussed in Point No. I of this reply brief. The only additional information that should be noted by the Court is that the information is not evidence as was instructed by the Court and the information was never submitted to the jury as evidence so any date of birth that may appear on the information is irrevalent so far as the evidence is concerned in this case.

POINT XII: THE STATUS OF THE OFFICER AS A BAILIFF WAS NOT IRREVALENT.

This point is discussed in Point No. Eleven of the appellant's brief.

POINT XIII: DEFENDANT'S OBJECTION TO THE FAILURE OF THE COURT TO RULE ON THE STATE'S MOTION TO AMEND THE INFORMATION WAS PREJUDICIAL.

This point is discussed in Point No. Twelve of the appellant's

brief.

CONCLUSION

It is respectfully submitted that the many errors in this case deny the defendant his constitutional rights as stated and the decision of the trial court should be reversed and the defendant discharged. If the Utah Court of Appeals should not be of the opinion that a reversal is warranted, then at the very least the defendant should be granted a new trial in a court of proper jurisdiction.

Respectfully submitted this 1st day of September, 1992.

Ted S. Perry
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 1992, I served four copies of the foregoing appellant reply brief in this matter by personally serving the same upon Attorney for Appellee, Patrick B. Nolan at the following address: 110 North 100 West, Logan, Utah.

Attorney of Record