1972

State of Utah v. andrew George Kish, aka William Walter Snyder : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

ANDREW GEORGE KISH, a/k/a
WILLIAM WALTER SNYDER,
Defendant-Appellant.

BRIEF OF RESPONDENT

An Appeal from a Conviction Entered in the District Court of the Fifth Judicial District, Hon. [illegible] Burns, Presiding.

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ANDREW GEORGE KISH, a/k/a WILLIAM WALTER SNYDER,
Defendant-Appellant.

Case No. 13004

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was originally charged with a codefendant. Appellant was granted a separate trial.

DISPOSITION IN THE LOWER COURT

A jury found appellant guilty of assault with intent to commit robbery from which appellant appeals.

RELIEF SOUGHT ON APPEAL

Respondent prays that the verdict of the trial court be affirmed.

STATEMENT OF THE FACTS

Respondent agrees basically with the facts as stated by appellant except as hereinafter set forth.

During the hearing in which the court granted a motion to sever appellant's case from that of his codefendant, appellant said: "That wasn't the main problem, you know, I was trying to bring up, it was just the fact that I wanted a jury trial." The court said, "All right, and you are going to have a jury trial." Appellant replied, "Right. So I am satisfied with that, then." (March 17, 1972, T.R. 14).

During appellant's trial, counsel for appellant moved for a mistrial when counsel for the state indicated it might call the codfendant as a witness. When the state indicated that it might not call the codefendant, counsel for appellant said: "Well, if he is not called, I see no problem." (March 20 and 21, 1972, T.R. 15).

Before trial, appellant was given a voluntary statement form which contained a printed portion. He filled it in and signed it. (March 17, 1972, T.R. 42-43). The court sustained appellant's motion to suppress because the facts did not shown that appellant read it or that it was read to him. Part of the printed portion contained a waiver of the right to presence of counsel (March 20 and 21, 1972, T.R. 3-4).

One witness was called who had not been endorsed. The court allowed his testimony only to the extent that

it laid a foundation regarding the security of the exhibits held in the police office. (*Supra* at 121).

ARGUMENT

POINT I.

BECAUSE THE LOWER COURT HAD INSUFFICIENT EVIDENCE UPON WHICH TO JUSTIFY APPOINTMENT OF SEPARATE COUNSEL, IT DID NOT ERR.

Unless there is a conflict of interest or prejudice, courts have allowed codefendants to be represented by the same attorney and such representation has not been held a denial of effective assistance of counsel per se. The Tenth Circuit Court of Appeals has held that "The sixth amendment is not violated by joint representation of codefendants unless a conflict of interest or prejudice results from such procedure." *Fryar* v. *United States*, 404 F. 2d 1071, 1073 (10th Cir. 1968). This court has indirectly so held in the peculiar fact situation in *Combs* v. *Turner*, 25 Utah 2d 397, 483 P. 2d 437 (1971).

The Supreme Court of Arizona, in *State* v. *Andrews*, 106 Ariz. 372, 476 P. 2d 673, 678 (1970), held:

> "In order for assistance by counsel for an accused to be impaired by representation of the same attorney, actual conflict must in fact have existed or be inherent in the facts of the case from which a possibility of prejudice flows."

The facts of the case must be analyzed to decide whether an actual conflict exists. In *McHenry* v. *United States*, 420 F. 2d 927, 928 (10th Cir. 1970), the court held:

> "So, too, codefendants may have effective representation by a single attorney under circumstance that negative a conflict of interest. Each issue must be considered under the totality of circumstances that prevailed during all the pre-trial and trial proceedings."

The record in the present case does not support the contention that between the codefendants there existed an actual or potential conflict of interest, or a possibility of prejudice. Before trial, the lower court held a hearing on March 17, 1972, during which the court granted a motion to sever appellant's case from that of his codefendant, Mr. Vincent. After assuring appellant that he and Mr. Vincent would not be tried at the same time, the court asked appellant if he still claimed relief under the motion for other counsel. Appellant said: "That wasn't the main problem, you know, I was trying to bring up, it was just the fact that I wanted a jury trial." The court said, "All right, and you are going to have a jury trial." Appellant replied, "Right. So I am satisfied with that, then." (March 17, 1972, T.R. 14).

During appellant's trial, counsel for appellant had a "visceral feeling" that there would be a conflict of interest if Mr. Vincent were called as a witness. Counsel for appellant said, "I would have to move that if Mr. Vincent is called as a witness that a mistrial be declared inasmuch as I have confidential information." Counsel for the state indicated that Mr. Vincent may not be called. Counsel for appellant then said, "Well, if he is not called I see no problem but if he were called at that point I would re-

quest permission at that point to renew my motion for a mistrial." (March 20 and 21, 1972, T.R. 15). Mr. Vincent was not called as a witness.

No attempt was made on behalf of appellant to bring forth facts upon which the lower court could have reason to substitute separate counsel for appellant. Both times that the issue of conflict between codefendants was presented to the court as stated above, either appellant himself or his counsel was satisfied with the court's solution. Since the record is devoid of evidence it is improper to contend that the court erred in failing to substitute separate counsel when in fact appellant failed to show the court why it should appoint substitute counsel.

Counsel for appellant contends that the reason he was unable to argue and expound upon the reasons for the appointment of separate counsel was because of his concern that anything he might say to the court "might in fact be harmful or deleterious to the cases of one or the other of his two clients." (Appellant's Brief at p. 24). Counsel's reasons for believing there was a potential conflict of interest were not part of the record. Counsel for appellant stated in Appellant's Brief that the sources of potential conflict were largely based (1) on concern over upsetting negotiations for Mr. Vincent (P. 18-20), and (2) on what Mr. Vincent might say if called as a witness (P. 20-21). Both of these concerns are more properly described as trial tactics and in absence of clear error are generally not subject to appellate review. In any event, these concerns should have been raised in the lower court.

If the lower court does commit error, this court is competent to correct such error. However, fear that a lower court might err should not justify a defendant in refraining from presenting his best case to that court.

POINT II.

THERE IS NO REQUIREMENT THAT A COURT IMPOSE IDENTICAL SENTENCES WHEN ONE CODEFENDANT PLEADS GUILTY TO A LESSER CRIME AND THE OTHER CHOOSES A JURY TRIAL ON THE GREATER.

The court in *Cuzick* v. *State*, 4 Ariz. App. 455, 421 P. 2d 537, 538 (1966), held, "There is no requirement that the court impose identical sentences upon codefendants." In this case, appellant, a codefendant, pled guilty to first degree burglary and was sentenced to a prison term of not less than five nor more than eight years. Later, the state amended the information to second degree burglary, to which the other codefendant, his brother, pled guilty and received a sentence of not less than four and one-half nor more than five years imprisonment.

The court held:

> "The appellant could not complain (1) if the prosecutor failed to prosecute his brother, or (2) if a jury convicted him and acquitted his brother, or (3) if identical sentences were not imposed on both." *Id.*

In the present case, appellant was given the opportunity to plead guilty to a lesser charge (March 17, 1972, T.R. 4). Appellant chose a jury trial and was convicted. Since there is no requirement that identical sentence be imposed upon codefendants, the fact that Mr. Vincent pled guilty to a lesser crime really has no bearing on appellant's lawfully imposed sentence.

POINT III.

INCONSISTENT STATEMENTS MADE BY AN ACCUSED WHICH ARE NOT IN COMPLIANCE WITH THE REQUIREMENTS OF *MIRANDA*, MAY BE ADMISSIBLE TO IMPEACH THE ACCUSED'S CREDIBILITY.

In *Harris* v. *New York*, 401 U. S. 222 (1971), a defendant allegedly made statements at a police interrogation. The evidence did not show that the defendant was warned of his right to appointed counsel before he answered the questions put to him. No question was raised as to the voluntariness of the statements. The statements were not used in the prosecution's case in chief but were used for purposes of impeaching defendant's credibility. In upholding the use of the statements for impeachment purposes the court said: "The shield provided by *Miranda* cannot be prevented into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226. Thus, it is clear that inconsistent statements made by an accused may be used for impeachment purposes.

In the present case, appellant stated that he would write a statement. He was given a form for making a voluntary statement which contained a printed portion. The printed portion was not read to the appellant; he was only told to fill in the blanks and sign it. Appellant wrote for about fifteen minutes and then signed it (March 17, 1972, T.R. 42-43). The court sustained appellant's motion to suppress because the facts did not show that appellant had read the printed portion or that it was read to appellant. Part of the printed portion contained a waiver of the right to presence of counsel (March 20 and 21, 1972, T.R. 3-4). Since appellant raises no issue as to the voluntariness of his statement, since the statement was never used, and since the Supreme Court has upheld the use of prior statements for impeachment purposes, there was no error on the part of the lower court when it stated:

> "[I]t may be that upon a proper presentation the District Attorney can use that for impeachment purposes and you may stand forewarned of that fact." (March 20 and 21, 1972, T.R. 4-5).

POINT IV.

THERE WAS NO MATERIAL PREJUDICE RESULTING FROM THE MANNER IN WHICH THE NAMES OF THE WITNESSES WERE ENDORSED ON THE INFORMATION.

This court in *State* v. *Redmond*, 19 Utah 2d 272, 430 P. 2d 901, 904 (1967), stated:

> "Courts have consistently held that the endorsement of additional names of witnesses on the Information even during trial rests in the sound discretion of the trial court, and material prejudice must be shown before it constitutes reversible error."

In the present case there was no showing of material prejudice. Counsel for appellant objected to the omission of certain names from the amended information (March 20 and 21, 1972, T.R. 12). Counsel for the state reminded counsel for appellant that the names were included in the bill of particulars. The court granted appellant's motion (*Supra* at 14). However, one name was left off and counsel for appellant objected (*Supra* at 120). The court overruled the objection because the only purpose of calling the witness was to lay a foundation regarding the security of the exhibits held in the police office (*Supra* at 121). Appellant has not shown any prejudice, and certainly no material prejudice, in the manner in which the names of the witnesses were endorsed on the information.

CONCLUSION

The facts contained in the record of the lower court show no error in failing to substitute counsel or prejudice in the manner of endorsing witnesses. It is also clear that the law does not require a codefendant to receive an identical sentence or that inconsistent statements be excluded for purposes of impeachment. Wherefore, the conviction of the lower court should be affirmed.

Respectfully submitted,

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