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State of Utah v. Jack Zimer : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE
OF UTAH

STATE OF UTAH,

Plaintiff and
Respondent,

vs.

JACK ZEIMER,

Defendant and
Appellant.

Case No.

9013

FILED
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BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees with appellant's statements of facts.

STATEMENT OF POINTS

POINT I.

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL
ERROR IN THE LANGUAGE USED IN HIS INSTRUCTIONS TO THE JURY.

POINT II.

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL
ERROR IN GRANTING A NEW TRIAL ONLY AS TO

THE ISSUE OF WHETHER DEFENDANT WAS AN HABITUAL CRIMINAL.

ARGUMENT

POINT I.

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL ERROR IN THE LANGUAGE USED IN HIS INSTRUCTIONS TO THE JURY.

Respondent readily admits that the Trial Judge used words which are inartistic. However, respondent cannot see how the jury could have misunderstood its rather simple obligation in this case or how the words "guilt," "guilty," "convict," "convicted," "convicting" and "offense" could have misled them. The jury's members were not trained lawyers, and while such words have rather specific significance in the minds of attorneys and judges, they do not bear the same meanings to the minds of laymen.

It would not seem to the jury at all out of line for the judge to use the term "offense" in relation to one's having the status of habitual criminal, nor would it seem at all odd for him to use the terms "guilt" or "guilty" with reference to such a status.

Even the term "convict" used as a verb, is not sufficiently precise in the mind of a lay person to cause him to regard the status of habitual criminal as being a crime when it is not actually called a crime in the instructions.

The courts are aware that judges must deliver their instructions in a timely way and cannot fully avoid an occasional misuse of a word or a phrase. 23 C.J.S., Sec. 1300, page 881,

states:

“A large discretion is vested in the trial judge as to the language to be used in expounding principles of law. The exactness of statement which is required in pleadings is not necessary.”

And on the next page, the text continues:

“An instruction is not erroneous because of verbal or technical inaccuracies or mistakes which are not misleading to the jury or prejudicial to the rights of the accused.”

As to the usage of particular words, our Utah Court has not said a great deal. However, in the case of *State v. Cerar*, 60 U. 208, 207 P. 597, the court discussed the matter of a judge using an instruction containing the word “can” where the statute upon which his instruction was based used the term “must.” The court concluded that while the language of the statute had not been used, that it reflected the true intent and purpose of the statute and said:

“Any juror with sufficient intelligence to sit in any case could not be misled by what the court said.”

Clearly the jury in this case could not have been misled as to the necessity of determining defendant’s status.

Moreover, even if the jury thought that being an habitual criminal was a “crime” instead of a “status,” still the defendant’s rights could not have been prejudiced, since the jury would not have been less inclined to give a defendant fair consideration when trying him for a crime than when making a determination as to his status.

Instructions aside, defendant was not charged in the in-

formation with having committed any supposed "crime" of habitual criminal. While it is true that the usual printed information form was used, the actual wording typed in the information was "that the said defendant is a habitual criminal." Nowhere on page 2 of the information is any reference made to any supposed "crime" of habitual criminal. R. 14.

Furthermore, the sentence and judgment ordering defendant to serve a term in the Utah State Prison refers to "status of an habitual criminal." R. 73, R. 75.

From a consideration of the language used in the information and in the sentence and judgment, and verdict R. 56, it is difficult to see how appellant successfully can allege that he was convicted of a "crime" of habitual criminal, regardless of the terms used in the instructions.

There can be no doubt that the information, along with the sentence and judgment, and verdict must prevail over the instructions in determining whether the habitual criminal proceeding was held to determine the perpetration of a crime or the existence of a status.

In the Washington case of *Williams v. Smith*, 171 P.2d 197, the court held that a form of verdict finding defendant guilty of the "crime of being an habitual criminal" was technically improper, but did not affect any of his substantial rights, and was sufficient to fix his status as habitual criminal. Reasoning therefrom it would seem to be immaterial whether or not the jury thought it was determining a crime or a status.

Assuming, but not admitting, that improper language was used in the instructions, still, respondent does not believe that any such possible error can reasonably be considered prejudicial

to the substantive right of the defendant to a fair trial.

Furthermore, respondent is unable to see, considering all the instructions given at the trial, and regarding them as a whole, as well as the pleadings in the case, how appellant has suffered any loss of substantive rights or that the Judge committed prejudicial error.

After hearing all the instructions read, the jury knew that its one simple function was to determine whether or not the appellant had committed two previous crimes for which he had been sentenced to prison, (the instant conviction for burglary having been stipulated to by counsel), and whether or not, therefore, he had achieved the status of habitual criminal.

It is, of course, necessary that all of the instructions be construed as a whole. See *State v. Evans*, 74 Utah 389, 279 P. 950.

In its first instruction, R. 59, the Judge used the following language:

"You are instructed that the defendant, Jack Zeimer, is charged by page two of the information filed herein of being in the status of an habitual criminal. * * *"

It will be observed that the Judge was very careful to use the phrase "being in the *status* of an habitual criminal." Nowhere does any part of the instruction use the term "crime." This instruction is of primary importance because it is the one which actually sets out the allegations of page 2 of the information, and which informs the jury of the issue to be defined.

Instruction No. 8, R. 64, states as follows:

“The term ‘habitual criminal’ is defined as follows: Whoever has been previously twice convicted of felonies sentenced and committed to any prison, shall, upon conviction of a felony committed in this state, other than murder in the first or second degree, be deemed to be an habitual criminal.”

It will be observed that this is the proper legal definition of the term “habitual criminal,” and in it the judge was careful to use the term “be *deemed* to be an habitual criminal.” The word “deemed” certainly is more consistent with status than with crime.

Some consideration should be given to Instruction No. 5, R. 61, of which instruction, as a whole, appellant complains. In paragraph 1 thereof the court uses the term “being an habitual criminal,” and in the last paragraph of the instruction, uses the expression “status of being an habitual criminal.”

Clearly, the instructions of which appellant complains must be considered in conjunction with those from which we have just quoted. That is to say, all instructions are to be considered together. *State v. Evans*, *supra*.

In *State v. Siddoway*, 61 U. 189, 211 P. 968, the Court’s opinion stated in part as follows:

“Instructions must be considered as a whole and so the court informed the jury. Taking the instructions together, no good reason occurs to us for believing that jurors endowed with common sense and average intelligence could misunderstand, misconstrue or misapply them.”

General rules of law which apply to instructions used in

criminal cases would seem to apply to instructions given in a proceeding such as the one at hand. Therefore the respondent calls to the attention of the Court the case of *Bridges v. United States*, 199 F. 2d 811, wherein the court states:

"Instructions given in a criminal prosecution may not be taken apart and a phrase here and clause, or even a sentence or paragraph there, used to find error."

The following cases, among many others, stand for the proposition that the instructions are to be considered as a whole: *State v. Hansen* (Ida.), 181 P. 2d 192; *People v. Marsh* (Ill.), 85 N.E. 2d 715; *Taylor v. State* (Okla.), 208 P. 2d 185; *State v. Hendricks*, 123 Utah 267, 258 P. 2d 452.

The Marsh case states:

"Accuracy in the use of language in an instruction containing a correct proposition of law would, of course, be desirable, but it is not always obtainable. For that reason we announced the rule that it is sufficient if the series of instructions, considered as a whole, fully and fairly announce the law applicable to the theories of the People and of the defendant, respectively. *People v. DeRosa*, 378 Ill. 557, 39 N.E. 2d 1; *People v. Hichette*, 324 Ill. 170, 155 N.E. 39."

The holding in the Taylor case is particularly interesting in that it holds that where it appeared that the instruction complained of "was most poorly worded," but not misleading in light of *all* the instructions, it did not constitute reversible error. In the instant case the main problem also appears only to be a matter of poor wording in the instructions.

Each instruction used was given with the intent and the

effect of assuring a fair and just trial of the issues. Many of them are regular instructions uniformly given for the protection of those accused of crimes. They also are equally applicable to those accused of having attained a status. Not only are they not prejudicial instructions, but instead are statements calculated only to assure free and fair consideration of the defendant's cause. They were favorable to him rather than unfavorable when considered as a whole.

It should also be pointed out that the defendant's attorney had the opportunity to ask for any additional instructions which might clarify the group of instructions as a whole.

POINT II.

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL ERROR IN GRANTING A NEW TRIAL ONLY AS TO THE ISSUE OF WHETHER DEFENDANT WAS AN HABITUAL CRIMINAL.

Respondent recognizes and admits that the proper procedure to be followed in determining the status of one alleged to be an habitual criminal is that set forth in Section 76-1-19, U.C.A. 1953.

We believe, however, that this statute applies only to the original instance comprising the trial upon the substantive charge and the accompanying proceeding to determine the defendant's status, whether as an habitual criminal or not.

Respondent does not believe that the statute has mandatory application in a situation such as the one at hand where, for one reason or another, the court has found it necessary to order a new proceeding only as to the single issue of defendant's habitual criminal status.

An analogous situation is seen in the case of *State v. Lee Lim*, 76 U. 68, 7 P. 2d 825. There a defendant was sentenced to the state prison on a plea of guilty to a charge of murder in the second degree. He later was released on habeas corpus proceedings because the sentence had been improper, even though imposed within the statutory period. Defendant thereupon was rearrested and upon the basis of his prior plea, resented, this time properly, to the state prison.

On his appeal to the Supreme Court, defendant urged that our statute requiring that sentence be imposed during a period between two and ten days after the conclusion of the trial prevented his now being sentenced, since a period of three and one-half years had passed since the original trial. In disposing of this argument the court stated that:

"It is apparent that Section 9041 of our Code has no application to a case where the trial court in good faith attempted to follow the law but through mistake entered a void judgment instead of a valid one. Our Legislature, however, has made provision with respect to errors and mistakes in the administration of the criminal law in the following language: 'Neither a departure from the form nor mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, shall render it invalid unless it shall have actually resulted in a miscarriage of justice.' Comp. Laws of Utah 1917, Sec. 9365."

See present statute: 77-53-2, U.C.A. 1953.

By the same token the Court in the case at bar did, in fact, follow the required statutory procedure in the original instance. The substantive charge appearing on page 1 of the indictment was tried separately by the same jury from the habitual criminal issue appearing on page 2 of the indictment.

The reasoning in *State v. Lee Lim.*, therefore, would appear to be applicable in the instant case. Here a bona fide effort was made to follow the precise terms of our statute, but because of a mistake made in the habitual criminal aspect of the original trial, the court deemed it necessary to declare a mistrial as to that issue only, and as to it to require a second trial, which of necessity had to be by a separate jury.

Clearly, the Legislature simply did not foresee this exact situation and for that reason failed to make any provision to cover the matter at hand.

Appellant refers to two California cases, both entitled *People v. Morton*. The later Morton case, 41 Cal. 2d 636, 261 P. 2d 523, was decided in 1953. It would appear to be controlling over the other cases cited in appellant's brief and, in fact, gives much consideration to each of the procedural steps suggested in appellant's brief.

The case clearly sets out the proper procedure under the California statute and in so doing affords us some interesting and helpful reasoning. There a defendant was convicted of three counts of first degree burglary and one count of attempted burglary in first degree, for which he was sentenced to serve consecutive terms. In the same proceeding he was adjudged an habitual criminal. His appeal was merely from that part of the judgment adjudging him an habitual criminal and from an order denying his motion for a new trial on the issue of one of the prior convictions. Therefore, while not identical with the instant case, it is closely analogous.

There the court used the following language:

“When the sole question on remand from an appellate court involves the proof of an alleged prior conviction, there is no reason to require the parties to re-try the

question of guilt of the primary offenses when the correctness of the determination of this question is not challenged by either party. There is nothing prejudicial involved in a limited new trial on the issue of the challenged prior conviction by a jury different from that which tried the issue of guilt of the primary offenses. That issue and the proof of prior convictions are clearly severable. *McVickers*, supra; *In Re Seeley*, 29 Cal. 2d 294, 176 P. 2d 24; *People v. Carrow*, supra. Proof of prior convictions or the adjudication that the defendant is an habitual criminal do not involve substantive offenses, but merely provide for increased punishment of those whose prior convictions fall within the scope of these statutes. *In Re McVickers*, supra, 29 Cal. 2d 264, 270-271, 176 P. 2d 40, 44-45, and references cited there. The important relation between the primary offenses and the prior convictions charged is therefore the sentence to be imposed and the jury does not participate in that."

Respondent does not dispute appellant's contention that the California statute in force at the time of the above opinion did not require the trial of the two issues by the same jury. However, appellant reiterates his view that under the Utah statute the trial of the two issues by the same jury is mandatory only in the original instance. Therefore, assuming this, the opinion of the California court should be accorded great weight.

A primary purpose in having the defendant tried on both phases of the case by a single jury might well be that of determining the question of habitual criminal in a timely manner in order that the sentence might be imposed within the statutory period, thus eliminating delays that might come from the impanelling of a new jury and the conducting of a new trial.

In *State v. Stewart*, 110 Utah 203, 171 P. 2d 383 (after

setting out the procedure to be followed in trying a defendant accused of being an habitual criminal—which procedure is substantially the same as that now required by our statute), the court says at page 387:

“While safeguarding the rights of the accused, such procedure does not offend any principle of orderly procedure nor tend to delay justice.”

The Court, at another point in its opinion, indicated clearly that the substantive right sought to be guarded by the statute was to be relieved of being advertised to the jury as one who had previously been convicted of the new offense. Respondent is not aware how this right can better be provided a defendant through having the main issue and the question of habitual criminal tried by the same jury.

As a matter of fact, trial by a separate jury can only benefit a defendant. Clearly a jury which has sat through a long trial and has come to believe that defendant has performed the unlawful acts necessary to constitute the crime alleged in the main issue, would likely be more inclined to believe that such defendant had in the past perpetrated other unlawful crimes than would a fresh jury with no prior exposure to the defendant and his misconduct. In fact, a new jury would be free of any possible prejudice against the defendant and would be completely capable of judging objectively his status as habitual criminal or not.

It would appear to be a totally unnecessary use of time and effort and, in fact, to constitute a burden on the judicial process, to require the retrial of one issue already fully and fairly determined, and which is not in any way vital to the determina-

tion of another, particularly where the two issues are entirely separated in the information.

Finally, even assuming error on the part of the court, both in giving the instructions complained of and in allowing the habitual criminal issue to be tried by a separate jury (after the proper procedure had been used in the first instance), still, the supposed error was not serious enough to be classified as prejudicial, and therefore the judgment below should not be disturbed.

Our court has spoken on this issue on many occasions and respondent sets forth the words of the court in the case of *State of Utah v. Don Jesse Neal*, 1 U. 2d 122, 262 P. 2d 756:

“We are also conscious of the fact that a trial in the courts of this state is a proceeding in the interest of justice to determine the guilt or innocence of the accused, and not just a game. We will not reverse criminal cases for mere error or irregularity. It is only where there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted. The defendant was entitled to a full and fair presentation of the case to a jury of unbiased citizens and to have his rights safeguarded by competent counsel.”

Even considering the fact that the trial of the issue of whether or not one is an habitual criminal is only to determine a status and not to determine the perpetration of a crime, respondent feels the above language is entirely appropriate and relies thereon for his conclusion that even if error complained of was committed in the case, it was not prejudicial.

CONCLUSION

Respondent does not believe that the use of the indicated language in the court's instructions, when properly considered in conjunction with other instructions given, was prejudicial in any way to the substantive rights of appellant.

Nor does the respondent believe that appellants' being tried by a separate jury a second time only as to the habitual criminal issue constituted prejudicial error. In fact, respondent believes that appellant not only was not injured, but instead was given even more favorable and unbiased consideration than he would have been given had both the allegations of the substantive crime and the habitual criminal issue been finally tried by the same jury.

In light of the preceding cases and reasoning, respondent prays the Court for an order affirming the decision of the trial court.

Respectfully submitted

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