1968

State of Utah v. Val Taylor : Brief of Respondent

In The Supre
of the Stat

STATE OF UTAH,

VAL TAYLOR,

BRIEF O

Appeal from
District Juvenile
Honorable

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TABLE OF CONTENTS

CASES CITED

In The Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

VAL TAYLOR,

Appellant,

Case No. 11052

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Val Taylor, appeals from a conviction of the crime of contributing to or becoming responsible for the neglect or delinquency of a child, in violation of Repl. Vol. Utah Code Ann. § 55-10-80(1) (Supp. 1967).

DISPOSITION IN LOWER COURT

The appellant was tried without a jury in the Second District Juvenile Court of Salt Lake County, State of Utah, for the crime charged in the complaint. The Honorable John Farr Larson found appellant guilty and imposed sentence on the appellant of confinement in the county jail for a term of six months.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Second District Juvenile Court should be affirmed.

STATEMENT OF FACTS

The respondent, State of Utah, submits the following statement of facts as being more in keeping with the rule that evidence will be reviewed on appeal in a light most favorable to the trial court's determination.

On or about February 9, 1967, appellant led his two stepdaughters, Shana and Christine Sleater, into the bathroom of the family home, removed their clothing, and proceeded to wash their pubic areas with a washcloth (T. 8, 23). Appellant then took the children into the master bedroom (T. 14) and told the children to get on the bed (T. 23). Appellant was nude at this time (T. 24). Appellant then had both children commit an act of fellatio (T. 8, 24) referred to in the record as "oral sodomy." There is also direct evidence of appellant committing cunnilingus on the children (T. 8, 24).

ARGUMENT

POINT I. THE JUVENILE COURT WAS CORRECT IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS SINCE THE TIME OF OCCURRENCE OF THE OFFENSE WAS SUFFICIENTLY PROVED AS A MATTER OF LAW.

Appellant contends that the trial court erred in not granting his motion to dismiss on the failure of the state to prove the exact time of the offense in question. Respondent submits that Utah statutes do not require the exact time to be shown unless required to charge the offense and that the case law requires only that the offense occurred within the statute of limitations and before indictment.

Utah Code Ann. § 77-21-12 (1953) provides: (1) an information or indictment need contain no allegation of the time of the commission of the offense unless such allegation is necessary to charge the offense under Section 77-21-8. (2) The allegation in an information or an indictment that the defendant committed the offense shall in all cases be considered an allegation that the offense was committed after it became an offense and before the filing of the information or indictment, and within the period of limitations prescribed by law for the prosecution of the offense. (3) All allegations of the information, indictment and all bills of particular shall, unless stated otherwise, be deemed to refer to the same time.

The Complaint herein states that the offense occurred "on or about the 9th day of February 1967." The general rule is that the State is not bound by the allegation of "on or about" in an indictment as to the date of the commission of an offense, but may rely on any date within the period of limitations. **Ellis v. State,** 318 S.W.2d 655 (Texas 1958). In crimes involving sexual offenses, time is not a neces-

sary element, and the State may elect to prove any such offenses which occurred prior to the filing of complaint and against which the statutes of limitation has not run. **State v. Jameson,** 103 Utah 129, 134 P.2d 173 (1943), citing **State v. Sheffield,** 45 Utah 426, 146 Pac. 306 (1915).

The allegation of time of the commission of an offense is immaterial and regardless of the time alleged, except where made certain by a bill of particulars, the State may prove the offense at any time within the period of limitations. **State v. Cox,** 106 Utah 253, 147 P.2d 858 (1944).

The fact that these proceedings occurred in juvenile court do not affect the outcome of the case. Repl. Vol. Utah Code Ann. § 55-10-81 (1963) provides:

> **In proceedings in adult cases the practice and procedure of the juvenile court shall conform to the practice and procedure provided by law or rule of court for criminal proceedings in the district court except that the proceedings may be commenced by complaint and a jury shall consist of four jurors.**

The statute of limitations applicable to the offense here charged permits the prosecution and conviction of a person for such an offense when committed within a period of two years anterior to the presentment of the information and complaint. Utah Code Ann. § 77-9-6 (1953).

There was sufficient evidence before the trial court to show that the offense in question occurred within a six week period prior to February 12, 1967.

The respondent would, therefore, submit that the Juvenile Court was correct in not granting defendant's motion to dismiss on the grounds of failure to prove the commission on the exact date.

POINT II. EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

The appellant contends that the trial court committed error in allowing Shana and Christine Sleater to testify. At the time of the testimony Shana was seven years old and Christine was six years old. Prior to their testimony the deputy county attorney interrogated both witnesses in the presence of the court and the appellant's counsel. They indicated where they lived, acknowledged they were attending school, and gave the names of their brothers and sisters. They further indicated they knew what it was to tell the truth and knew what happened if they told a lie. They acknowledged that they knew it was bad not to tell the truth and that they intended to tell the truth. They undersood that if they testified falsely they would be punished. No objection was made at any time to the testimony of either Shana or Christine Sleater.

The appellant's position is that the trial court did not examine the children to ascertain whether they were capable of receiving correct impressions and therefore able to relay facts accurately. It is submitted that the appellant's position is without merit.

The appellant is in no position to challenge the court's action since no objection was raised at the time of trial. It is the general rule that a person challenging the competency of a witness must object prior to the time the witness is sworn or at least as soon as the incompetency of the witness is discovered. Abbott, **Criminal Trial Practice,** 4th ed., § 268. If the appellant felt the trial court had acted improperly in allowing the girls to testify, it was incumbent to raise the objection at the time of trial. The failure to impose any objection indicates a waiver on the part of the appellant and further tends to support the conclusion that those who saw the witnesses and heard the responses to the questions put to them felt that there was no question as to the children's competency.

It is well settled in Utah law the questions of competency of an infant witness is one within the sound discretion of the trial court and this court will not overrule the trial court's decision in the absence of a clear showing that the trial court abused its discretion. **State v. Blythe,** 20 Utah 378, 58 Pac. 1108 (1899); **State v. Morasco,** 42 Utah 5, 128 Pac. 571 (1912); **State v. McMillan,** 46 Utah 19, 145 Pac. 833 (1915); **State v. Zeezich,** 61 Utah 61, 210 Pac. 927 (1922); **State v. Williams,** 111 Utah 379, 180 P.2d 551 (1947).

The testimony of a six-year old child is not rendered completely incompetent nor entirely discredited solely because of her age. As this court has previously observed, no particular age nor any specific standard of mental ability can be set as the

qualification for giving testimony, but it is an important factor to be considered, along with others, in determinating whether she should be allowed to testify. What is essential is that it appears that the child has sufficient intelligence and maturity that she is able to understand the questions put to her; that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth. Whether she meets these tests and is therefore a competent witness is within the sound discretion of the trial court to determine. That ruling will not be disturbed in the absence of a clear showing of abuse. **State v. Smith,** 16 Utah 2d 374, 401 P.2d 445 (1965).

The Utah State Supreme Court will presume neither error nor prejudice and the burden of so showing is on the defendant who seeks to upset the judgment of conviction. **State v. Hamilton,** 18 Utah 2d 234, 419 P.2d 770 (1966). The reviewing court is required to analyze evidence and reasonable inferences to be drawn therefrom in light most favorable to judgment. **State v. Knepper,** 18 Utah 2d 215, 418 P.2d 780 (1966). The competency of a six and one-half year old prosecuting witness to testify in a prosecution for committing lascivious acts upon a child was a question for the determination of the trial court in the exercise of a sound discretion. The trial court's determination would not be disturbed in the absence of a showing of an abuse of such discretion. **People v. O'Connor,** 44 C.A.2d 301, 112 P.2d 279 (1941).

POINT III. THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN NOT ALLOWING APPELLANT TO RECALL PROSECUTION WITNESSES FOR FURTHER EXAMINATION.

Appellant contends inconsistency in the testimony of the grandparents, Mr. and Mrs. Hedberg; the children's mother, Carolyn Taylor; and the testimony of the children themselves. As appellant has stated, it is left to the discretion of the trial court to allow the recalling of witnesses for further examination. As this court has pointed out on numerous occasions, the extent to which redirect examination may be permitted rests largely in the sound discretion of the trial court and unless abuse of discretion can be shown in admitting or excluding testimony, the ruling of the trial court will not be disturbed on appeal. **State v. Cooper,** 114 Utah 531, 201 P.2d 764 (1949).

The Arizona Supreme Court in **State v. Baca,** 102 Ariz. 83, 425 P.2d 108 (1967) held that the trial court has large discretionary power in the control of cross-examination and, in order to find error, the reviewing court must find that the trial court has abused that discretion.

The respondent therefore urges that there is not such an inconsistency in the testimony of the prosecuting witnesses or their mother to require further grueling cross-examination of the two children. The children testified as to the acts and as to the time of these acts. Since the appellant did not take the stand, pursuant to his constitutional right to do