

1960

State of Utah v. Mack Merrill Rivenburgh, Jr. and Leonard Warner Bowne : Brief of Defendant and Appellant Mack Merrill Riverburgh, Jr.

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

STATE OF UTAH,

Plaintiff and Respondent,

vs.

MACK MERRILL RIVENBURGH, JR.
and LEONARD WARNER BOWNE,

Defendant and Appellant.

1 - 1960

Supreme Court, Utah

Criminal Case
No. 9089

APPEALED FROM THIRD DISTRICT COURT
HON. JOSEPH G. JEPSON

BRIEF OF DEFENDANT AND APPELLANT
MACK MERRILL RIVENBURGH, JR.

W. R. HUNTSMAN

Attorney for Appellant

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STATEMENT

The appellant, Mack Merrill Rivenburgh, Jr., and Leonard Warner Bowne, both inmates of the Utah State Prison, were jointly charged with the killing of Leroy Joseph Verner, also an inmate of the prison, on Sunday, August 24th, 1958. Rivenburgh was represented by W. R. Huntsman, and the Defendant Bowne was represented by Phil L.

Hansen. This appeal is made by the Defendant, Mack Merrill Rivenburgh, Jr., from a conviction of murder in the first degree.

The evidence will clearly show that the Defendant Rivenburgh, as well as the convict witnesses for the State, had ready access to, and had been using amphetamine pills known as Drinalfas (the chemical name used by the Squibb Pharmaceutical Company) for a period of days prior to the day of the killing, and that the Defendant Rivenburgh, had been using them in large dosages several days before the killing, and that on Sunday, August 24th, he had taken approximately 60 of the pills amounting to 300 milligrams of the drug. It is his contention that the verdict of murder in the first degree is not supported by the evidence and that the most that he should have been convicted of is murder in the second degree.

It is further contended by the appellant, Rivenburgh, that some of the jurors deliberated on evidence, which resulted in conviction, which was entirely outside any evidence introduced at the trial, and the severity of the penalty resulting therefrom is the reason for this appeal. Defendant Rivenburgh seeks a reversal of the judgment appealed from on account of claimed error committed during the course of the trial in the following particulars.

ASSIGNMENT OR POINT I

THAT THE VERDICT WAS CONTRARY TO THE EVIDENCE.

ASSIGNMENT OR POINT II

THAT THE JURY, IN ITS DELIBERATIONS, WENT OUTSIDE THE EVIDENCE AND TOOK IN CONSIDER-

ATION THE OPENING STATEMENT OF COUNSEL FOR DEFENDANT BOWNE, WHICH IS UNSUPPORTED BY ANY EVIDENCE ADDUCED AT THE TRIAL.

ASSIGNMENT OR POINT III

THAT THE COURT ERRED IN ITS FAILURE TO GRANT DEFENDANT RIVENBURGH'S MOTION FOR A NEW TRIAL.

ASSIGNMENT OR POINT IV

THE COURT ERRED IN ITS FAILURE TO EXCLUDE EVIDENCE PREJUDICIAL TO DEFENDANT RIVENBURGH.

ARGUMENT

ASSIGNMENT OR POINT I

Utah Code annotated, 1953, 77-38-3 provides "When a verdict or decision has been rendered against the Defendant the court may, upon his application, grant a new trial in the following cases.

SUB SECTION (6) "WHEN A VERDICT OR DECISION IS CONTRARY TO THE EVIDENCE."

The jury in this case found the Defendant, Mack Merrill Rivenburgh, Jr., guilty of murder in the first degree and in arriving at this verdict, the affidavits of two of the jurors show, that they considered statements made by Dr. Lincoln D. Clark as conclusive in this: that they believed that the dosages taken by the Defendant Rivenburgh prior to and on the day of the killing, would not in any way affect the defendant Rivenburgh's mind so as to know the difference

between right and wrong. Let us look at the transcript of the doctors testimony and see if the jurors way of thinking corresponds to the doctors testimony. (Tr. P. 441 by Mr. Banks.)

- Q. Say someone took approximately two dozen of those, which would be 120 milligrams, over, say a 7 hour period, could you tell us what his reactions would be probably?
- A. I have had no experience with this dose of drugs, and again the fact as mentioned before, of tolerance, and another thing would come into play here. I have the experience of 60 milligrams of amphetamine intravenously, to a normal individual which of course would be half the amount, given intravenously it would reach a higher level. This individual shows essentially the same thing as I described before, of talkativeness, and restlessness, no disorganizations.
- Q. From a persons behavior doctor, while under the influence of Drinalfa, would that,—could you tell from his behavior as to whether or not he experienced amnesia during that period of time?
- A. I would say that if amnesia, one could not say definitely, no, but if there were evidence that a toxic delirium had occurred, following the ingestion of a large amount of any drug, one would expect an amnesia to be present for this episode. (Again Tr. P. 442, By Mr. Banks.)
- Q. Now with reference to the mental processes, as to destroying mental processes, would there also have to be toxic delirium present?
- A. I do not like the word “destroy” because to me, this implies a total obliteration of functions.

Q. Let us use the word "impair", doctor.

A. Yes, I would say that amphetamine does alter mental state, changes self awareness, etc. (Tr. 448 by Mr. Banks.)

Q. Doctor, assuming that an individual had had, say anywhere from 6 to 24 Drinalfa pills, either taken orally or intravenously, and assuming that during this period of time of consumption over a seven hour period, that events that occurred say the last two hour period, etc. (Trans. 448 Line 20.)

It is clear from the hypothetical questions asked by the District Attorney in his examination of Dr. Lincoln Clark that they do not fit the situation as to the defendant Mack Merrill Rivenburgh, Jr. When Mr. Banks went into the larger and progressive dosages, the witness could only say that he had no "actual experience" in the reaction to such dosages. Yet, from the doctors testimony, came the verdict, and the affidavits of jurors Ellis M. Dawson (Ct. Rec. PP. 185 and 186) and Arnold T. Barnes (PP. 187-188) show that they considered the statements of Dr. Lincoln Clark as conclusive, whether or not the dosages of pills taken by the defendant Rivenburgh were progressively large. The testimony of the defendant Rivenburgh, as well as all of the convict witnesses for the state, show that these Drinalfa pills came into the prison with much regularity.

Let us look at the testimony of States witness, convict Randle. (Tr. 286-Line 21.)

Q. Now did you ever have a conversation with Bowne, or were you present when a conversation was had with Bowne, when his injuries to his left leg were discussed?

A. Yes.

Q. And will you tell us where and when that took place?

A. That was Monday or Tuesday. I was pretty high. I don't remember exactly what day.

Mr. Huntsman: What did you say — he was pretty high?

The witness: Yes, loaded on pills. (Again Tr. P. 291 — Line 24.)

Q. Now Mr. Randall you said a minute ago that you were high on pills.

A. Yes, sir.

Q. Now what kind of pills were those?

A. Drinalfa.

Q. Where did you get these?

A. From different people.

Q. And how many had you had?

A. Well we had better than 400 of them.

Q. And how many had you had?

A. A whole bunch, I don't know. . . .

Q. And how many had you had by 6 o'clock?
(He is talking of August 24th, 1958 around 6 o'clock that evening.)

A. Dozens, I lost track.

Q. Well are they sleeping pills?

A. No sir, amphetamine. . . .

Q. Do you recall making the statement that you were so strong with pills that the polygraph operator couldn't even take a test of you?

A. Couldn't get a good reading off me, no.

(Trans. P. 298 Line 16.)

Q. You are sharp on what you are concentrating on at the moment.

Then after you concentrate on that for a moment, and go to the next thought, you are confused about every thing except the thought you are on at the time.

A. Yes. You are a little absent minded.

Q. And they cause you to be extra talkative, don't they?

A. Yes.

(Randel again Tr. P. 298 Line 20.)

Q. Were you and many other inmates using pills that day?

A. Yes, quite a few of us was on them.

Q. And without necessarily respecting or telling the truth; isn't that right? In other words, a person who takes them rattles on without caring for the consequences or knowing exactly what he is saying? Don't you just sort of talk to be talking?

A. You just go on trips.

Reviewing Randels examination by Mr. Banks, (Tr. P. 314, Line 2.)

A. Yes — (Witness examined and tasted tablet.)

Q. What is it?

A. It is a Squibbs Drinalfa.

Q. Is that the type of tablet all of you fellows were taking that day?

A. Yes.

Q. Is that the type Bowne took that day?

A. Yes.

Q. Is that the type Mack Rivenburgh took that day?

A. Yes.

Q. And the type you took?

A. Yes.

There isn't any just argument against the theory, that the defendant Rivenburgh, as well as all of the convict witnesses, on the day of the murder, were "hopped" up on these drugs called Drinalfa, and known to the pharmacologist as amphetamines, and that the defendant Rivenburgh had been taking excessive and progressive dosages of the drug from Wednesday, the 20th of August, until Sunday, August 24, 1958, the day the murder was committed. The defendant Rivenburgh admits participation in the murder and when placed on the stand admitted the excessive usage of the drug. Let's review his testimony. (Tr. P. 514 Line 20.)

Q. Now I will call your attention to Wednesday, August 20, 1958 — did you have access to any pills such as metamphetamine at the penitentiary?

A. I did.

Q. And did you take any pills that day?

A. I did.

Q. How many did you take?

A. About 35.

Q. Would you tell the jury what effect, as best you know, these 35 pills had upon you Wednesday; did they sharpen you or what effect?

A. First — the way I take them, would be about four or five at a time; probably eight would make you feel real sharp, and after that you just get a coasting feeling.

Q. What did you say, a “coasting feeling”?

A. Yes.

Q. What do you mean by coasting?

A. Well, you just — you don't know you are in prison, I mean, if you are in a depressed mood, you feel like the waters are closing in on you, you don't have that feeling.

Q. It relieves you of worry and punishment?

A. It does.

Q. Now how often — did you always take them in a series of four?

A. No. I started increasing them as I went along.

Q. How often did you take them?

A. About every hour or hour and a half.

Q. Did you have any mental urge to take them, through some physical reaction of any kind — what causes you to retake them?

- A. Well, I guess you would say when you feel you are running down, you want to take some more to get that charge back.
- Q. In other words, they keep you going.
- A. They do.
- Q. Now, on Thursday, August 21, did you have access to innumerable pills that day?
- A. What date was that, sir?
- Q. Thursday, August 21. We were talking about Wednesday, August 20, now Thursday, August 21.
- A. Yes, I did.
- Q. Did you take pills during the night of August 20th, Wednesday night?
- A. Yes, I did. (Tr. P. 516.)
- Q. Will you tell the jury whether these pills caused you to remain awake as long as you took them?
- A. Yes, you cannot sleep on them.
- Q. You cannot sleep; how do they affect your appetite?
- A. You have no desire to eat any food at all.
- Q. You have no desire to eat any food; is there any increased desire for sex relationship?
- A. That is right, after you can't continue on them.
- Q. Did you continue on them Thursday?
- A. Yes, I did.
- Q. How many did you take on Thursday?
- A. About 30 or 35 maybe (Tr. 516, line 21.)

Q. Did you take these pills at intervals during the Thursday night of August 21st?

A. Yes.

Q. How about Friday, the 22nd?

A. I had pills on Friday too.

Q. How many pills on Friday, too?

A. Pretty close to 40, I would say.

Q. In any of these times also, did you have any access, or take any of these nasalators?

A. Yes.

Q. (Tr. 517.) Now just what is a nasalator?

A. A nasalator is an inhaler you use for colds, to breathe through your nose. Inside of the inhaler is a strip, a piece of cotton about two inches long, a cylinder like, you cut a piece off and chew it, and drink it down with coffee.

Q. Did you do this on any of the days that I have mentioned; I have got Wednesday, Thursday and Friday?

A. On Thursday, I did.

Q. In addition to all of these pills?

A. Yes.

Q. Did you continue to take pills through Friday?

A. Yes, I did.

Q. (Tr. 518 Line 4.) Now we get to Saturday, August 23rd. Did you — were you continuing to use pills Friday night and Saturday morning?

A. Yes.

Q. Did you take them at intervals during Saturday?

A. Yes, I did.

Q. How many of them did you take on Saturday?

A. About 30. . . .

Q. When did you start taking these pills, after you got in the penitentiary last May?

A. In June.

Q. Is that the first time you knew what Drinalfa was when you got in the Penitentiary in Utah?

A. It is, sir.

Q. Now, did you continue to take these pills through Saturday, all day Saturday?

A. I did.

Q. And Saturday evening?

A. Yes.

Q. Had you had any sleep or anything during these four days?

A. About an hour or two hours would be the most.

Q. These pills kind of exhilarated you?

A. Yes.

(Tr. P. 519.)

Q. Now what — when you walk down the tiers, or pass peoples cells, and you see someone smiling, do you have any peculiar ideas about that particular expression when you are taking these pills like this?

A. Yes.

Q. Just what is that?

A. Well, to me, there have been occasions when I felt people had been talking about me when I see them smiling.

Q. You thought they were talking about you?

A. Yes.

Q. Did you have an urge to find out about it?

A. Yes. I would go up and ask them.

Q. What would you say?

A. Ask them what they were talking about me for.

Q. Did you continue taking these pills through Saturday night, right into Sunday morning, August 24th?

A. I did.

Q. And up to 7 or 7:30 o'clock Sunday evening, how many pills did you take that day, do you think?

A. Between 55 and 60. . . .

(Tr. P. 520, line 2)

Q. Had Randel been taking the pills a great deal that day too?

A. Yes, he had.

Q. How many hundred pills did you have on hand then?

A. A little over 400.

Q. Sunday?

A. Yes.

Can this court, under undisputed evidence of this kind, permit a jury to say — “This is murder in the first degree.” Does this Court believe that a man so filled with drugs that he could coolly and deliberately premeditate a plan to murder so as to conform with the definition of murder in the first degree as set out in the Utah Case of State vs. Russell 106 Ut. 116-145 P. 2nd 1003. The evidence conforms more properly to the courts interpretation of murder in the second degree as set out in State vs. Thompson, 110 Utah 113-170 P. 2nd 153 and State vs. Trujillo, 214 P. 2nd 626.

One of the most acceptable definitions of murder in the second degree is found in Warren on Homicide, Vol. 1, P. 390.

“Murder in the second degree exists where the circumstances show that the homicide was committed under the influence of a wicked and depraved heart, and with cruel and reckless indifference to human life, and without express malice, or where there is a reckless and wanton killing evidencing a depraved heart regardless of human life.

“A ‘depraved mind’ or ‘depraved heart’ means the kind of malice, which, in the commonly popular accepted term connotes ill will, hatred, spite or evil intent. It may be properly said that the killing of a human being without sedate, deliberate and formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death but committed suddenly, without justification or excuse and without provocation to reduce the crime to man-slaughter, is murder in the second degree.

“‘Malice,’ a necessary essential in second degree murder, may arise by implication from the manner and circumstances of the killing. If the defendant sits with another upon implied malice in killing deceased, he is guilty of murder in the second degree.”

The above definition of murder in the second degree precisely covers this case.

That the verdict is contrary to law is further shown by all the better medical authorities as to the effects upon users of the amphetamines.

Doctor Louis S. Goodman, Professor of Pharmacology, University of Utah, in conjunction with Dr. Alfred Gilman, Professor of Pharmacology, College of Physicians and Surgeons, Columbia University, wrote a work called "The Pharmacological Basis of Therapeutics" (2nd Edition). This text is widely used in medical colleges of the United States, and is the standard text at the University of Utah College of Medicine. On the question of dosage and toxicity caused thereby they say this: Page 523.

"The toxic dose of amphetamine is difficult to estimate. Individuals vary in their reactions to amphetamine, and disease also alters susceptibility to the drug. Occasionally, small doses may elicit alarming symptoms as a result of idiosyncrasy.

"Toxic effects are relatively infrequent after the ingestion of single doses of 15 mgm. or less. Although alarming reactions have occurred after 30 mgm. of amphetamine and death has resulted from 120 mg. ingested after a short period of time. Much larger doses (400 to 500 mgm.) have been survived. The reports of very large doses of amphetamine taken daily over an extended interval of time cannot be taken as evidence of the benignity of the drug because of probability that tolerance may have occurred. Based on toxic data for monkeys, the acute lethal dose for children would be 5 mgm. per kilogram; that for adults, 20 to 25 mgm. per kilogram."

The testimony of the defendant Rivenburgh shows that he had taken extreme dosages of the drug from Wednesday, August 20th to Sunday, August 24, and that on Sunday, the day of the killing, he had taken from 275 to 300 mgm. of amphetamine. Goodman and Gilman, *Supra*. Page 523 further say on the question of toxicity:

“Acute toxic effects produced by amphetamine are usually extensions of the therapeutic actions of the drug and, as a rule, result from overdosage. Most prominent among the toxic signs and symptoms are those due to the cerebral actions of amphetamine, restlessness, dizziness, increased reflexes, tremor, insomnia, talkativeness, tenseness, and irritability are common. Confusion, assaultiveness, increased libido, hallucinations, delirium, anxiety, panic states, and suicidal or homicidal tendencies have also been observed, especially in mentally ill patients.”

Chauncey D. Leake, Professor of Pharmacology, Ohio State University, in his book entitled “The Amphetamines, Their Actions and Uses”, says: (This work is also standard at the University of Utah Medical College) Chapter 5, Pages 60-61.

“The most common of the toxic symptoms of the amphetamine in humans are those which are due to the effects on the brain, and include restlessness, dizziness, tremor, tenseness and irritability. There may be confusion, delirium, anxiety and hallucinations.

“In man (Leake quotes Dr. W. E. Erlich) it was noted that large doses of the amphetamines cause restlessness, dilation of the pupil, rapid pulse, increase in blood pressure, nausea, flatulence, and shallow respiration. Extreme overdose in man may

cause rapid shallow breathing, pallor. collapse, with extreme restlessness and nausea.”

It is undisputed that all of the convict witnesses, and the defendants, had been using these amphetamines several days before the murder, and that the appellant and Defendant Rivenburgh had been using them to great excess, and from the authorities above cited, it is evident that such dosages as Rivenburgh indulged in, would produce a pronounced effect upon his brain, causing tenseness, tremor, irritability, delirium and hallucinations, which would preclude him from forming the requisite intent to commit murder in the first degree.

The jury arrived at their verdict on the testimony of Dr. Leonard Clark, who admittedly had had no experience with dosages taken in any quantity, such as those taken by the defendant Rivenburgh, and this defendant is entitled to a reversal of the verdict on this ground.

ASSIGNMENT OR POINT II

THAT THE JURY, IN ITS DELIBERATIONS, WENT OUTSIDE THE EVIDENCE AND TOOK INTO CONSIDERATION THE OPENING STATEMENT OF COUNSEL FOR THE JOINT DEFENDANT LEONARD WARNER BOWNE, WHICH IS UNSUPPORTED BY ANY EVIDENCE ADDUCED AT THE TRIAL.

The opening statement to the jury of Phil L. Hanson, Attorney for joint defendant Leonard Warner Bowne shows (Tr. P. 661, Line 12):

“And he will tell you that he feared Mack Merrill Rivenburgh to the point that when Mack Rivenburgh said ‘You stand point for sex’ he stood point, and the reason he will tell you, why he feared Mack Rivenburgh, is because Mack Rivenburgh had spent a good many years of his life in an institution of a penal nature such as a prison, and he will tell you, in his own words, how as a boy, 18 years old, he walked into that prison and is confronted with the conditions of narcotics or pills, knives, sex perversion, no segregation of the hardened criminal who has spent at least 12 years, I believe, is Mr. Rivenburghs own admission, of the time in jail. 29 now, 17 when he went in, and that when one of these head guys that had been in there that long, such as Mack Merrill Rivenburgh, told a young boy, coming in for the first time, what to do, he will tell you how fearful he was of him, and he will tell you that he thought ‘Either I do that or else’.” (Tr. P. 663.)

“Then he will tell you that he and Jesse Garcia, a 16 year old boy, went to the attic for the purpose of standing point for sex, for the man they feared most. (Tr. P. 667, Line 10.) He will tell you, after having had time to ask himself ‘Why would I take out a knife; why would I put myself in a situation of circumstantial evidence at this point’. He will then tell you that it was through fear of Mack Rivenburgh. I might add here that Bowne was committed to the prison in August 1957 and Rivenburgh was committed in May 1958.

A review of the entire testimony of the joint defendant Bowne fails in its entirety to support such statements as Counsel for Bowne made to the jury — (Tr. PP. 684 to 710.)

The statements made by counsel for Bowne to the jury were highly prejudicial to the defendant Rivenburgh and

that the jury considered and deliberated upon it in arriving at a verdict, is evidenced by the affidavit of Ellis M. Dawson (Ct. Record PP. 185-86.) one of the jurors, when he said, "That the defendant, Leonard Warner Bowne, was dominated and controlled in his actions by the defendant Mack Merrill Rivenburgh, Jr. in the perpetration of the offense charged, and that the deductions and conclusions of this affiant, and the other jurors in the case, were of the opinion that the evidence introduced by the State would substantiate the conclusions of this affiant and the other jurors.

This affiant further says that he verily believes that if the evidence considered by this affiant is not supported by the official court record of the case, that this affiant would not have consented to a verdict of murder in the first degree."

And the above affidavit is supported by the affidavit of Arnold T. Barnes, another juror in the case — (Court record PP. 187-88) — wherein he says, "That the said Mack Merrill Rivenburgh, Jr. controlled the actions of Leonard Warner Bowne in the perpetration of said murder". And he further states in said affidavit, "or if the court record discloses that some of the facts considered by this affiant resulted from the statement of counsel for Leonard Warner Bowne in his opening statement, which were not supported by evidence in the record, that this affiant would not have consented to a verdict of murder in the first degree."

The defendant Mack Rivenburgh, though charged with the serious offense of first degree murder, is entitled to a fair and impartial trial, and with a jury taking into consideration the unsupported, yet, prejudicial remarks of

Counsel for the joint defendant, Bowne, he most certainly did not get it.

ASSIGNMENT OR POINT III

THAT THE COURT ERRED IN ITS FAILURE TO GRANT DEFENDANT RIVENBURGH'S MOTION FOR A NEW TRIAL.

1 — The Utah Code, Sec. 77-38-3 provides Sub (6) the court may grant a new trial when the verdict is contrary to the law or evidence.

This question is discussed in Assignment or Point I Supra.

2 — Sub. (5) When the court has allowed any act in the cause prejudicial to the substantial rights of the defendant.

This matter is fully discussed in appellants Assignment or Point II.

ASSIGNMENT OR POINT IV

THE COURT ERRED IN ITS FAILURE TO EXCLUDE EVIDENCE PREJUDICIAL TO DEFENDANT RIVENBURGH.

The court erred in its failure to exclude the hypothetical question propounded by the District Attorney, and objected to by counsel for the defendant Rivenburgh, for the reasons following:

1 — The court erred in admitting the hypothetical question which commences (Tr. P. 444) with the words "Assume further that that individual made preparations such

as securing knives" — and ending with the words "destroying his ability to determine the difference between right and wrong"? This question was objected to by counsel for the defendant Rivenburgh (Tr. P. 445) and overruled by the court.

Defendant Rivenburgh claims prejudicial error because the question as propounded which charges the ability to determine between right and wrong, is the test for insanity and not a test for the degrees of murder, and further the hypothetical question was based on assumptions not then in evidence, and the verdict further shows that the jury was permitted to gamble the fate of the defendant Rivenburgh, and were governed by the negative answer of Dr. Lincoln D. Clark to the hypothetical question, and were misled by the conclusions to be formed by the District Attorney's words in saying, "determining the difference between right and wrong" and the same is supported by affidavits of two of the jurors (Court record — PP 185-188).

WHEREFORE, appellant Rivenburgh prays that the judgment be reversed and a new trial granted.

Respectfully submitted,

W. R. HUNTSMAN

Attorney for Appellant

MACK MERRILL RIVENBURGH, JR.