1960

State of Utah v. Mack Merrill Rivenburgh, Jr. and Leonard Warner Bowne : Petition by Mack Merrill Rivenburgh, Jr., For Rehearing

Utah Supreme Court

W. R. Huntsman; Richard P. Chamberlain; Attorneys for Petitioner;

IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

MACK MERRILL RIVENBURGH, JR., and LEONARD WARNER BOWNE,
Defendants and Petitioners.

Case No.
9089

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PRELIMINARY STATEMENT

On September 7, 1960, the Supreme Court of the State of Utah affirmed a verdict returned by a jury in the Third Judicial District Court convicting the petitioner Mack Merrill Rivenburgh, Jr., of first degree murder without recommendation.

It is submitted and alleged that the court was in error in affirming this verdict because a full consideration of the evidence discloses that the petitioner was mentally incapable of performing first degree murder.

Petitioner further submits for the consideration of the Court the sufficiency of the trial judge's jury instruction number twenty-two. This instruction is being questioned for the first time on this petition. It is well established, however, that in capital cases when the interests of justice so require, the entire proceeding should be reviewed to determine whether errors occurred as a consequence of which the accused did not have a fair trial, even though not assigned and argued. *State v. St. Clair*, 3 U. 2d 230, 282 P. 2d 323.

The primary defense of the petitioner was that he was so under the influence of drugs prior to and at the time of the killing of the deceased that he was not capable of committing murder in the first degree. Without a proper instruction on this crucial point, the jury would be unable to determine whether or not the petitioner was capable of, and did in fact, commit first degree murder.

For the reasons set forth above, your petitioner, Mack Merrill Rivenburgh, Jr., herewith petitions the Court to rehear this matter based on the facts and points as set forth hereafter.

STATEMENT OF FACTS

Your petitioner and Leonard Warner Bowne were jointly charged, tried and convicted of murder in the first degree. The jury returned a verdict without recom-

mendation as to petitioner Rivenburgh and with recommendation as to defendant Bowne. Subsequently the petitioner was given the death penalty and Bowne was granted a life sentence. The defendants were represented by different counsel and prosecuted separate appeals.

The defendants, who were inmates of the Utah State Prison, were convicted of killing LeRoy Joseph Verner, also an inmate, in the attic to cell block A of the prison on August 24, 1958. Another inmate, Jesse M. Garcia, Jr., was also involved, but he was separately charged and convicted.

STATEMENT OF POINTS

POINT I

JURY INSTRUCTION NUMBER TWENTY TWO WAS AN INCOMPLETE AND IMPROPER INSTRUCTION WHICH DID NOT PROPERLY INFORM THE JURY OF THE CONSIDERATION THEY SHOULD GIVE TO THE EFFECT OF DRUGS ON THE MENTAL STATE OF THE PETITIONER.

POINT II

JURY INSTRUCTION NUMBER TWENTY TWO WAS MISLEADING AND CONFUSING.

POINT III

THE COURT ERRED IN ITS OPINION OF THE FAILURE OF CORROBORATION IN THE DEFENDANT'S TESTIMONY AS TO THE PILLS CONSUMED.

ARGUMENT

POINT I

JURY INSTRUCTION NUMBER TWENTY TWO WAS AN INCOMPLETE AND IMPROPER INSTRUCTION WHICH DID NOT PROPERLY INFORM THE JURY OF THE CONSIDERATION THEY SHOULD GIVE TO THE EFFECT OF DRUGS ON THE MENTAL STATE OF THE PETITIONER.

The Court instructed the jury as to the effect of the influence of drugs on the petitioner as follows:

INSTRUCTION NO. 22

"An act committed by a person who is voluntarily under the influence of drugs is not less criminal by reason of his having been in such condition, except that the jury can take into consideration the evidence of the influence of the said drugs upon the defendant Rivenburgh, in connection with determining the intention with which an act was committed, and you should consider the influence of such drugs, if any, in connection with the subject of planning or premeditating the commission of a crime.

"Hence if you believe from the evidence that the defendant Rivenburgh was so much under the influence of drugs at the time LeRoy Joseph Verner was killed that he could not form a specific intention to kill, you cannot find him guilty of murder in the first degree, and if you find that the defendant Rivenburgh was under the influence of drugs at the time of the killing of LeRoy Joseph Verner to such an extent that he could not form a specific intention to kill or to do great bodily harm, you cannot find the said defendant Rivenbugh guilty of murder in the second degree.

> "Likewise, if you find that the defendant Rivenburgh was so much under the influence of drugs that at the time LeRoy Joseph Verner was killed that he could not premeditate, then you cannot find the said defendant guilty of murder in the first degree."

The jury was in effect instructed that if at the time of the killing the petitioner was so under the influence of drugs he could not form a specific intent to kill or could not premeditate, then he could not be found guilty of first degree murder. The Court omitted from its instruction the elements of deliberation and malice aforethought. The instruction given by the Court should have conformed to the approved instruction in the case of *State v. Anselmo*, 46 U. 137, 148 P. 1071. On page 1079 in the above mentioned case the Court stated,

> "The court, in effect, should have charged the jury that, while voluntary intoxication (drugs) was neither an excuse nor a defense, yet, if the jury found that appellant was intoxicated (under the influence of drugs) to such an extent that he was mentally incapable of deliberating or premeditating, and to entertain malice aforethought, and to form a specific intent to take the life of the deceased, in such event the jury should not find him guilty of murder in the first degree."

First degree murder requires more than that the accused be in a mental condition which enables him to premeditate and form a specific intent to kill. First degree murder is defined in 76-30-3 U.C.A. 1953, as follows:

> "Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing * * * is murder in the first degree."

Four terms are listed all describing the state of mind the accused must have in order to commit murder in the first degree. An instruction which informs the jury it can consider the influence of drugs on the mind of the accused in regard to only half of the necessary elements is certainly only a half complete instruction.

All of the terms used in the above statute should be given full importance, and though some of them may be somewhat similar, the legislature must not have intended that they be identical. A basic rule of statutory construction is given in Sutherland's Statutory Construction, 3rd Ed., Sec. 4705 as follows:

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. A statute should be construed so that effect is given to all the provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

The omitted word *deliberation* should have been included in the Court's instruction because it requires more coolness of mind and coolness of blood for deliberation than to merely premeditate and think out beforehand. *State v. Thompson*, 110 U. 113, 170 P.2d 153, P. 157.

> "The fact that the term *deliberation* is used in defining murder in the first degree, and the fact that the four terms (willful, deliberate, malicious, and premeditated) are repeated one after the other with similar meaning indicates an intention to emphasize that there must be a cool, careful consideration of the plans before murder in the first degree under this category can be committed." (*State v. Thompson*, supra.)

The Court's instruction clearly was not sufficient to inform the jury that the petitioner's use of drugs should have been considered in determining whether or not he had formed a cool, careful consideration of the plans to kill the deceased.

Malice aforethought was a necessary element omitted. Murder is the unlawful killing of a human being with malice aforethought. 76-30-1, U.C.A. 1953. The Court did not adequately fill this void in instruction No. 22 by stating the petitioner had to form a specific intent to kill. A specific intent to kill cannot mean the same as malice under our definition of murder because voluntary manslaughter is the intentional killing of a human being without malice. 76-30-5, U.C.A. 1953.

Since malice is necessary to constitute murder, let us look at the definition of malice as applied to murder. This court stated in *State v. Trujillo,* 117 U. 237, 214 P.2d 626, the following: (P. 633)

> "Malice as applied to murder * * * is the wish to kill, or to do great bodily harm, or to do an act knowing that its reasonable and natural consequences would be death or great bodily harm. Thus when murder is defined as the unlawful killing of a human being with malice aforethought, it is the unlawful killing of a human being *after giving thought beforehand* to the desire to kill, or to cause great bodily injury ***. (emphasis added)

The gap was not filled by the latter part of instruction twenty two mentioning premeditation. The instruction is in two separate parts with one part dealing with intent and the other dealing with premeditation. The

Court also destroyed the usefulness of the word *premeditate* by attaching it to the phrase *at the time* because malice aforethought requires giving thought *beforehand* to the desire to kill.

POINT II

JURY INSTRUCTION NUMBER TWENTY TWO WAS MISLEADING AND CONFUSING.

The trial court informed the jury they could not find the petitioner guilty of first degree murder if *at the time* LeRoy Joseph Verner was killed petitioner was so under the influence of drugs he could not premeditate or form a specific intent to kill. (emphasis added)

This Court stated in *State v. Thompson,* supra, the following: (P. 159)

> "There can be no murder, either in the first or second degree, without a planned, designed or thought out *beforehand* intention to kill or cause great bodily injury, or to do an act knowing that the natural and probable consequences thereof would be to cause death or great bodily injury to some other person, or to commit certain types of felonies. Anything less does not have the necessary "malice aforethought." (emphasis added)

The Court's misleading phrase *at the time* is clearly inconsistent with the well established acts and state of mind necessary to constitute murder in the first degree or even murder in the second degree. The instruction so limited the jury that they could consider the state of mind of the petitioner only at the time the fatal blow was struck, and yet the important consideration should have

been the petitioner's mental state prior to the killing of the deceased.

It is well established law that premeditation need take no appreciable length of time, however as is stated in *State v. Anselmo*, supra, at page 1078, no attempt should be made to fix any definite space of time which is necessary to constitute the premeditation required by our statute.

POINT III

THE COURT ERRED IN ITS OPINION OF THE FAILURE OF CORROBORATION IN THE DEFENDANT'S TESTIMONY AS TO THE PILLS CONSUMED.

The court said (P 2 line 10) "The only evidence as to how many pills this defendant had taken on the Sunday of the murder and a few days preceding is his own uncorroborated testimony."

It is the contention of the defendant Rivenburgh that his testimony was fully corroborated by the witnesses for the state and particularly states, witness Billy Randle that he was "very high" on the pills the day of the murder and that they had over 400 of them the fatal Sunday.

There isn't any question as to the association of Randle and Rivenburgh while in prison, and that these drugs flowed into the prison freely, and particularly to the cell block wherein the murder was committed. (Warden Marcel Graham was discharged as a result of this case.)

May the testimony of Randle be again reviewed in order to prove corroboration. (Tr. P. 929—Line 24)

"Q. Now, Mr. Randle, you said a minute ago that you were high on pills.

A. Yes sir.

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 6:00 o'clock? (He is talking of August 24, 1958, around 6:00 o'clock.)

A. Dozens, I lost track."

This testimony shows that these pills were in abundance, and that "they" had over 400 of them. Didn't Rivenburgh constitute a part of that "they."

I just want to call the courts attention to this fact. That the complete effect of the use of amphetamines was not fully known in 1958 — that the volume of increase in the manufacture of these drugs jumped from an estimated 16,000 pounds in 1949 to 75,000 pounds in 1958. The Food and Drug Administration estimates that less than one third of these pills are sold legally, the balance flows into bootleg channels.

There are no cases in the various Supreme Courts wherein the effects and misgivings of these pills are discussed so I ask the court to read the statement of the

American Medical Association's Publication entitled, "Today's Health" as condensed in the "Readers Digest" of October 1960, page 55, entitled "Wake Up and Die" The Pep-Pill Menace. Permit me to quote from page 58 of the article.

> "While truck drivers may be the greatest users of amphetamine, the habit is spreading among thrill seeking teen-agers. Moreover, pep pills are a factor in juvenile crime, according to reports from several cities. 'Thrill pills are worse than marijuanna,' one youth confessed, 'because after you take them you feel you can pull off any kind of job.'"

So won't the court please advise itself and read this condensed article. It may present the "snuffing" out of another life under circumstances fully warranted by facts which are now becoming better known to mankind. For this reason the court should reconsider its opinion.

CONCLUSION

In view of the defense of the petitioner, instruction twenty two was the most important instruction given to the jury. Nothing therein should have been inconsistent with prior instructions, nor should this instruction have been incomplete or confusing.

The instruction was incomplete in several essential respects, it was misleading, and viewed as a whole it could only tend to confuse the jury because of its lack of clarity.

Because the petitioner's defense could not have been properly considered by the jury, the petitioner was in effect denied his right to have a jury determine his guilt or innocence in accordance with the law, and the Court should reconsider its former opinion and rehear arguments on the points raised herein.

For the above reasons, this Court should remand the case to the Third District Court for a new trial under proper instructions so the petitioner will have his case determined by a jury under a correct statement of the law.

Respectfully submitted,

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