

1960

State of Utah v. Mack Merrill Rivenburgh, Jr. and Leonard Warner Bowne : Appellant Bowne's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Hansen and Miller; Counsel for Appellant;

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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 Appellants.

FILED

NOV 4 - 1960

Clerk, Supreme Court, Utah
Case No. 9089

APPELLANT BOWNE'S PETITION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF

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Plaintiff and Respondent,

— vs. —

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

Defendants and Appellants.

Case
No. 9089

APPELLANT BOWNE'S PETITION FOR RE-HEARING

The Appellant Leonard Warner Bowne respectfully requests the Court to set aside its decision heretofore rendered on September 7, 1960, and to grant a re-hearing in the above entitled matter for the reason that said decision is not in accordance with the law in that:

POINT

THE APPELLANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS IN THAT UTAH CODE ANN. § 77-30-2 (1953) IS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV, AND THE COURT MISCON-

STRUED APPELLANT'S POINT AND ARGUMENT IN THIS REGARD AS IT WAS STATED IN HIS BRIEF ON APPEAL.

The Appellant Bowne submits herewith a brief memorandum in support of the foregoing petition.

Dated November 4, 1960.

HANSEN AND MILLER

By



Gerald R. Miller

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,

- - VS. - -

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

Defendants and Appellants.

Case
No. 9089

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

ARGUMENT

POINT

THE APPELLANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS IN THAT UTAH CODE ANN. § 77-30-2 (1953) IS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV, AND THE COURT MISCONSTRUED APPELLANT'S POINT AND ARGUMENT IN THIS REGARD AS IT WAS STATED IN HIS BRIEF ON APPEAL.

The main point of appeal which the Appellant Bowne relied upon was misconstrued by the Court. It is his posi-

tion that he was denied the equal protection of the laws in that Utah Code Ann. § 77-30-2 (1953) is violative of the Constitution of the United States, Amend. XIV. The Court in its opinion states as follows:

“Counsel for Bowne acknowledges the law of the Nemier case but was attempting to lay a foundation for the Constitutional question, primarily on the clause of the equal protection of the laws, *on the theory that Rivenburgh had 10 and two challenges, whereas his client only had two challenges.*” (Emphasis supplied)

The Court then proceeds to analyze the case on this theory, and finally concludes that there is no denial of a constitutional right.

This was not the theory of the appellant Bowne. A recitation was included in appellant's brief indicating that Bowne had conditionally agreed to the selections of the defendant Rivenburgh. This was merely by way of explanation. At no time has Bowne argued that he was denied the equal protection of the laws in that the other defendant, Rivenburgh was able to exercise a greater number of peremptory challenges.

The appellant Bowne's theory in regards to the 14th Amendment was not restricted to a consideration of one joint defendant in *the* case as against the other joint defendant in *the* case. The class which we were concerned with was that of all and any joint defendants in any criminal case. If any joint defendant can not agree with the other joint defendants as to the exercise of peremptory challenges, then he is denied the right to those chal-

lenges as granted in Utah Code Ann § 77-30-15 (1953). Under the trial court's ruling and under Utah Code Ann. § 77-30-2 (1953) (which modifies § 77-30-15 as to joint defendants), a class is constituted which includes all joint defendants who cannot agree as to the exercise of the peremptories. If the appellant had not been tried jointly he would have been able to exercise all of the peremptories granted under § 77-30-15. Since he was tried jointly and could not agree with the other defendant as to the exercise of the peremptories, he was limited to only two peremptories under § 77-30-2.

From 1878 until 1935, Utah had a statute which entitled any person charged with a felony to a separate trial. See Section 105-32-6 of the Revised Statutes of 1933. As long as a joint defendant had the right to demand a separate trial, he had the means to insure that he would receive at least as many peremptory challenges as were provided for in § 77-30-15. In *People v. O'Laughlin*, 3 Utah 133, 1 Pac. 653 (1882), the Utah Court rejected sound argument of counsel for the defense to the effect that each joint defendant should be entitled to exercise the full number of peremptories. The reason the Court so acted was clearly stated as follows :

“By the statute riot is made a felony, and section 262 of the criminal procedure act gives to any defendant jointly indicted with another or others, for a felony, *the right to a separate trial*, if he requires it. All the defendants having waived this privilege and declared their election to be tried jointly, their defense was joint and not several, and no one of them had authority to control the

conduct of the defense.” (Id. at 1 Pac. 656) (Emphasis supplied)

On March 14, 1935, section 105-32-6 was amended to read substantially the same as Utah Code Ann. § 77-31-6 (1953). From that time to the present, a joint defendant has had no right to demand a separate trial. A separate trial may only be granted in the discretion of the trial judge. The laws of this state no longer insure that a joint defendant will have the right to the full number of peremptory challenges granted by § 77-30-15. A separate class is thus created by § 77-30-2, and joint defendants who cannot agree as to the exercise of peremptory challenges, and thus find themselves in that class, are limited to two peremptories, if the offense charged is punishable by death, or one peremptory, if the offense charged is not punishable by death. This class is, of course, to be contrasted with defendants generally who in similar circumstances would be entitled to exercise the number of peremptories provided for in § 77-30-15, which reads as follows:

“The state and defendant shall each be allowed the following number of peremptory challenges:

- (a) Ten, if the offense charged is punishable by death.
- (b) Four, if the offense charged is a felony not punishable by death.
- (c) Three, if the offense charged is a misdemeanor.”

It is clear that a joint defendant who cannot agree with the other joint defendants as to the exercise of per-

emptory challenges will have under § 77-30-2, the right to exercise far fewer peremptories than a defendant who is tried separately. In fact in the instant case the appellant was restricted to only two peremptory challenges. Even a defendant charged with a misdemeanor is entitled to three peremptory challenges. See Utah Code Ann. § 77-30-15 (1953). In other words, § 77-30-2 differentiates between two classes of defendants one of which is excluded from the substantive provisions of § 77-30-15. The effect of this section is to discriminate against any joint defendant who cannot agree with the others.

This Court set forth the proper standard with which to determine the constitutionality of an act which is questioned as denying the equal protection of the laws in *State v. Mason*, 94 Utah 501, 78 P. 2d 920 (1938). In this case, which has become a classic to students of jurisprudence, Justice Wolf indicated that a denial of equal protection, in order to be unconstitutional, required discrimination which was unreasonable or arbitrary. The Court further stated as follows:

“It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional.”

What is the differentiation between the classes created by § 77-30-2? The only differentiation is the procedural

aspect of a joint trial. Certainly this is not a *reasonable* differentiation. The differentiation has nothing to do with the crime charged. The defendant in either class must make his own defense, and if he is unsuccessful, the defendant in either class must pay for the crime personally. The differentiation is unreasonable in view of the fact that the defendant cannot determine the class in which he may find himself. The basis for the Court's reasoning in *People v. O'Laughlin, supra*, has disappeared. Whether a defendant is included in the operation of § 77-30-15 or excluded by virtue of § 77-30-2 has nothing to do with his own intent or power. A significant indication of the arbitrary nature of this differentiation lies in the fact that the deputy county attorney, who perchance drafts the complaint, has more control over the class in which a defendant will be placed than any other person. In the instant case one of three persons implicated in the crime was tried separately, while the appellant Bowne was tried jointly with another. In all substantive aspects the classes are the same. It is not reasonable to discriminate against a defendant merely because, for the convenience of the state, he is tried jointly with others. Such a rule can only be productive of abuse and injustice. Such a rule makes shallow mockery of our Constitutional rights.

There is no reasonable basis upon which to differentiate here. In attempting to deduce the purpose behind the successive acts of the legislature, we find conflicting intents which can best be explained by inadvertence. In granting a right to certain peremptories, the legislature

displayed an intent to safeguard a fair trial to everyone. Peremptory challenges are ordinarily held to be within the discretion of the legislature. Section 77-30-15 granted rights which under the majority rule, individuals could not demand as a matter of constitutional right. Section 77-30-2 modified § 77-30-15 to accommodate a joint trial. The only valid purpose of § 77-30-2 is to expedite the administration of justice. Certainly it was not the intent of the legislature to limit the joint defendant charged with a felony to any number of peremptory challenges short of that set forth in § 77-30-15. The legislature in fact granted the joint defendant extra challenges which could be exercised separately. In the beginning and for fifty-seven years, these two sections were in perfect harmony with the legislative intent to safeguard to all a fair trial. During all of this time and until 1935 if a joint defendant could not agree as to the exercise of the peremptories, then he could demand a separate trial and thereby secure the full number of peremptory challenges provided for in § 77-30-15. When the defendant could no longer demand a separate trial, it became possible for § 77-30-2 to produce a result contrary to the original legislative intent. Such a result was achieved in the instant case. Had not the defendant been in the class excluded from the operation of § 77-30-15 by § 77-30-2, he could have exercised ten peremptory challenges. As it was he could exercise but two such challenges.

The purpose of expediency is still present in § 77-30-2. This is not sufficient to justify the arbitrary differentiation found herein. Expediency must be

weighed against our traditional guarantees of liberty and justice. The constitutional right of the appellant to the equal protection of the laws far outweighs any considerations of expediency.

In the opinion in the instant case, which was rendered on September 7, 1960, the Court relies on two California cases. Both of these cases can be distinguished from the instant fact situation. In *Mutler v. Hale*, 138 Calif. 163, 71 Pac. 81 (1902), the joint defendants joined in challenging three jurors. The defendant Hale challenged a fourth, but since the other defendant (the San Francisco District Telegraph Company) refused to join in this final challenge, the court overruled the challenge. The defendant Hale brought the appeal. The California court rejected the contention that Hale was denied the equal protection of the laws. The court indicated that the same rule applied to all the parties to *an action* where they are united with others either as *plaintiffs or defendants*. In this *civil* action the court confined its reasoning to a consideration of the individual case and the parties before it. In a civil case this may be quite proper. In a civil case one judgment only is recorded. One satisfaction pays for all. The court's concern is necessarily the measure of fairness as between the parties before it. This is not so in a criminal case where the measure of fairness requires a *single procedural standard* for all who may be charged.

In *People v. Pilbro*, 85 Cal. App. 789, 260 Pac. 303 (1927), the defendant Pilbro refused to join in any of the challenges and merely stated that he was satisfied with

the jury as it was. In this criminal case, the other defendant, Walsh, brought the appeal. It will be noted that in both *Muller* and *Pilbro* the appellant was the defendant who was anxious to agree as to the challenges. It is not evident from the opinion in *Pilbro* that the constitutional question of equal protection was even argued. The *Muller* case was cited with a brief explanation of its holding. It is not apparent that this brief mention of equal protection in anything but dictum in the *Pilbro* case.

Certainly the theory of the *Muller* case, which apparently influenced the Court in the instant case, is not the theory upon which the appellant Bowne raised this constitutional question. The Court's opinion on this point is shallow and ill-reasoned. The Court states as follows:

“Section 77-30-2 does not deny the equal protection of the laws, and thus violate the Fourteenth Amendment, for the reason that *the same rule applies to all the defendants alike when they are tried jointly and does not discriminate against any one defendant* when the statute is followed as interpreted by the *Nemier* case. In other words the test of equal protection under the statute in question is not based on its application to a joint defendant who refuses to follow the statute in the collective exercise of his peremptory challenges, as contended by defendant Bowne. Since *the statute applies the same to each joint defendant in the exercise of their peremptory challenges collectively*, it is not discriminatory, and Bowne was not denied the equal protection of the law.”

With this reasoning the Court could never find an unreasonable differentiation between classes within the

meaning of *State v. Mason, supra*. The Court in fact looks only to *one* class, and states that there is no discrimination since all defendants within that *one* class are treated equally. With this analysis the Court could justify a statute which flatly provided that all persons tried jointly could exercise no peremptories whatsoever. This same reasoning would support a statute which denied any peremptory challenges to defendants having red hair, since the same rule would apply to all the defendants alike when they had red hair and would not discriminate against any one defendant.

The Court's reasoning renders the 14th Amendment to the Constitution meaningless. While it is true that in construing a statute, all doubts should be resolved in favor of constitutionality, this rule does not require us to ignore the Constitution, or apply it in such a manner as to reduce it to a set of meaningless generalities — the vestige of a determination to be governed by laws rather than men. If it is to have any meaning at all, the 14th Amendment must be applied as suggested in *State v. Mason, supra*. Certainly § 77-30-2 creates a separate class of defendants, *viz.*, those tried jointly who cannot agree with the other joint defendants as to the exercise of the peremptory challenges, the other class being all other defendants granted rights under § 77-30-15. Certainly there is discrimination, since these defendants are excluded from the substantive provisions of § 77-30-15. Certainly the discrimination is unreasonable and arbitrary. The two classes of defendants are in all respects identical except for the procedural aspect of the joint

trial in one class. There is no purpose which would justify such a differentiation, in fact the legislature probably never intended it. When the 14th Amendment is applied properly, there is only one answer, the appellant was denied the equal protection of the laws in that Utah Code Ann. §77-30-2 (1953) is violative of the Constitution of the United States.

CONCLUSION

The Appellant Bowne respectfully urges that the Court will find its decision rendered in this case to be untenable and therefore grant a re-hearing.

Respectfully submitted,

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