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In the Supreme Court of the State of Utah

TE OF UTAH,
Plaintiff and Respondent,

vs.

LYN CLEGG STARLEY,
Defendant and Appellant.

APPELLANT'S

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from Judgment of the Third J
of Salt Lake County
NORABLE ALDON J. AND

DAVE
20 East
Payson,
Attorney

Capitol Building
City, Utah
General of the State of Utah,
Respondent

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In the Supreme Court of the State of Utah

STATE OF UTAH, Plaintiff and Respondent, vs. MERLYN CLEGG STARLEY, Defendant and Appellant.	CASE NO. 19,363

APPELLANT'S BRIEF

Defendant was convicted of resisting arrest. Defendant prays for reversal or a new trial.

STATEMENT OF FACTS

Much of the evidence is conflicting. The State called as its witnesses the arresting officer, an officer who was summoned to the scene of the arrest, and the accomplice. The defendant testified in his own behalf.

The arresting officer testified that he observed the defendant and the accomplice committing an act of sodomy in a parked automobile (Tr. 36). He waited until the au-

tomobile proceeded and then pulled it over (Tr. 40). The defendant walked back to the officer's automobile, asked why he was stopped, requested to obtain his keys, returned to the police vehicle where he was placed in the back seat and the accomplice was placed in the front seat (Tr. 45-47). Without warning, the defendant pulled an object on the officer and squirted him with a substance and a scuffle ensued (Tr. 48). The officer admitted that he was driving an unmarked vehicle (Tr. 55). He also admitted to calling the defendant names (Tr. 57).

The defendant denied the act of sodomy (Tr. 68). He testified: "At no time did I hear a siren. No siren was sounded. The car next to me was unmarked. There was no indication of who it might be, or how many people there may have been in this automobile. The driver jumped out in an aggressive manner, came over to my car and grabbed for the door, and it was not locked, so he pulled it open and at that point, I reached back of the seat where I had this atomizer of this irritant and squirted him, and he averted his face so it caught him on one side and we know most of the rest" (Tr. 64). He stated that he carried the atomizer for protection, since there had been "a series of muggings in Salt Lake" (Tr. 65). Defendant had never been arrested before (Tr. 63). On cross-examination defendant said, "Well, actually the moment I started my car and turned on my lights then he turned on his lights and the white light right back of me, and to the left. It was a simultaneous thing. I think he was just trying to surprise us, and unnerve us with this tactic" (Tr. 71).

The accomplice also denied the act of sodomy, whose

upon the prosecuting attorney proceeded to use a statement, allegedly obtained from the witness for the alleged purpose of refreshing his memory (Tr. 80). Earlier the defendant had testified that this statement had been "wrung out of" the accomplice (Tr. 67). The accomplice testified that the statement was not true. He stated: "I did not give it. Mr. Sexton through his own vicious mouth took it down. I never once said that what he had written down was correct. He wrote it from his own mind . . ." (Tr. 81). The court overruled defendant's objection, stating that the statement "hasn't been offered in evidence" (Tr. 81).

STATEMENT OF POINTS

POINT 1

THE COURT ERRED IN FAILING TO DETERMINE THE ISSUE OF WHETHER THE STATEMENT WAS OBTAINED UNDER DURESS.

The case of **People vs. Hiller,** 2 Ill. 2nd 323, 118 N.E. 2d 11, was a prosecution for rape. The Illinois Supreme Court held that it was error to permit the prosecution to cross-examine from a statement claimed to have been obtained by coercion, where there was an undetermined claim that the prior statements or admissions of a defendant were given under force and duress.

POINT 2

THE COURT ERRED IN PERMITTING THE PROSECUTING ATTORNEY TO IMPEACH HIS OWN WITNESS UNDER THE GUISE OF REFRESHING HIS MEMORY.

The case of **State vs. Leek,** 85 Utah 531, 39 P. 2d 1091, was a prosecution for forgery. Error was assigned where the trial court permitted counsel for the state to interrogate its witnesses by direct and leading questions and in receiving in evidence a written statement purported to have been made and sworn to by the witness and for the purpose of impeachment of him.

This Court held that there must be a showing that counsel has been misled or entrapped. Here there was no such showing and a new trial was ordered.

The Supreme Court reasoned:

> "Here the impeaching document was especially damaging as the very thing sought to be established by the document was corroboration of the accomplice requiring direct evidence, which was sought to be secured by way of impeaching one's own witness. The fact that the witness stated out of court, certain matters which, if competent proof, would tend to show the defendant's guilt, does not establish the existence of such matters as facts. After counsel, and for that matter the court, had discovered that the witness was not inclined to help the cause of the state, or did not intend to testify to anything adverse to defendant's cause, it was improper for the District Attorney to pursue the examination and thereby secure affirmative testimony prejudicial to the state and then make use of the situation thus created for the purpose of securing by impeachment affirmative testimony favorable to his cause by showing that the witness had made statements out of court and out of the presence of the defendant, although written, which were prejudicial to her." P. 1095, 1096.

In **State vs. Herrera,** 8 Utah 2d 188, 330 P. 2d 1086.

the defendant was prosecuted for rape. The prosecuting attorney repeatedly cross-examined the defense witness relative to certain charges and arrests, as he thumbed through some papers. No official records were offered to substantiate the implications arising from them nor was the disposition of any charges or arrests given.

In reversing and remanding the case, this Court stated:

> "If the line of cross-examination indulged here were to be permitted, the accused would find himself in a wilderness without witnesses, since none would volunteer the truth nor would the truth flow free under compulsory process, a witnese knowing the extent to which he could be subjected to questions not pertinent to the issues involved, but designed to destroy his veractiy by the simple device of calling attention to a series of incidents in his past life, perhaps harmless per so, perhaps true but having nothing to do with his truthfulness or the lack of it." P. 1087.

The Court went on to point to another ground which constituted prejudicial error:

> "The same sort of objection to such procedure can be levelled at the attempted impeachment of the prosecution's own witness, a physician, who testified that he saw no evidence of abrasions on the limbs of the prosecutrix, only to be called to account by the prosecution through questions implying that he had made an official report to the contrary, thus casting the doctor in the role of prevaricator—**without offering to introduce such report of evidence (which was available)**". P. 1087. Emphasis added by the Court.

In **People vs. Zammora,** 66 Cal. App.2d 166, 152 P.2d 180, 1944, a prosecution for homicide, the court found error

in permitting the District Attorney while examining a witness for the state, to call the witness' attention to the official transcript of the Grand Jury and proceeded to read therefrom, it appearing from the line of questions propounded that the District Attorney was not attempting to reconcile a variance with former testimony or to refresh an absent recollection, but rather to impeach the witness.

The court stated:

> "If the purpose of the examination is to reconcile or examine testimony, the memory of the witness may be refreshed, but if it is to contradict or discredit the present testimony of the witness and to have the contradiction stand unreconciled and unexplained, then it is impeachment, and a pretense of refreshing the memory by reading former testimony can not be made a subterfuge to get before the jury incompetent evidence or statements which aid the case of the prosecution." P. 206.

POINT 3

THE COURT ERRED IN PERMITTING THE PROSECUTING ATTORNEY TO ASK QUESTIONS RELATING TO CRIMES NOT IN ISSUE.

State vs. Kazda, 14 Utah 2d 266, 382 P.2d 407, 1963, was a prosecution for assault with intent to commit murder and robbery. Defendant had made statements to an F. B. I. agent after he had been arrested and incarcerated, but for other crimes. The only pertinent, and admissible, statement by the defendant to the agent was that he was an accessory to the fact. Over objections of the defense, the prosecuting attorney elicited from the agent the entire

conversations he had with the defendant, which included questions relating to various crimes.

The court held this to be prejudicial error. "It implied that the defendant was implicated in other crimes, none of them proven, and could have no other effect than to degrade the defendant and give to the jury the impression that he had a propensity for crime." P. 409.

CONCLUSION

The defendant was tried for the crime of resisting arrest. The record shows, however, that in fact the defendant was prosecuted for sodomy. Without claiming surprise the state was permitted to impeach its own witness by a statement obtained under duress, not for the purpose of proving the charge of resisting arrest but to establish that the infamous crime against nature had been committed. This created an unfavorable and prejudicial image of the defendant before the jury.

Respectfully submitted,

DAVE McMULLIN
20 East Utah Ave.
Payson, Utah
Attorney for Appellant