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The State of Utah v. Leo Barrett Stewart, Jr. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

FEB 6 - 1961

THE STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

LEO BARRETT STEWART, JR.,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No. 9331

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Reference in respondent's brief to the record of proceedings of the trial court will be designated by the letter "R" and to appellant's brief by the letter "B."

STATEMENT OF FACTS

Respondent finds itself in substantial agreement with the facts as set forth in the Brief of Appellant, and hence does not submit a separate statement of facts in connection with its brief.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY RELATING TO PRIOR ACCIDENTS.

POINT II.

EVEN IF THE TRIAL COURT DID ERR IN EXCLUDING TESTIMONY RELATING TO PRIOR ACCIDENTS, SUCH ERROR WAS NOT PREJUDICIAL.

POINT III.

THE TRIAL COURT DID NOT ERR IN THE ADMISSION OF EVIDENCE, AND EVEN IF SUCH ERROR WAS COMMITTED, IT WAS NOT PREJUDICIAL.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY RELATING TO PRIOR ACCIDENTS.

The general rule of law regarding the admissibility of evidence of prior accidents is correctly set forth by appellant. (B. 32)

“It is recognized in numerous cases that for certain purposes, at least, evidence of other similar accidents or injuries at or near the same place or by use of the same appliance suffered by persons other than the plaintiff and in other and different times, not too remote in point of time from the

particular occurrence, is admissible. Evidence of prior similar accidents, when admissible, is generally admissible for the following purposes only: (1) To show the existence of a defective or dangerous condition or appliance and the dangerous character of the place of injury or of the machine or the appliance, and (2) to show the defendant's notice or knowledge thereof."

20 Am. Jur., Evidence, 304, p. 282.

The rule generally is applicable, however, only in those cases wherein there is substantial similarity between the circumstances surrounding the prior accident and the one before the Court.

"The pertinence of such evidence is, of course, drawn from the facts that the various accidents occurred at the same place and under conditions which were at least substantially similar, and the courts have frequently emphasized the necessity of showing such similarity of conditions as a predicate for the admission of the evidence. However, it has usually been held that only substantial similarity of conditions is required, and there is perhaps evident a trend — probably part of a general trend toward the more liberal admission of evidence — toward treating the question of sufficiency of similarity of conditions as primarily a matter for the trial court's discretion, and to freely admit the evidence of the prior accident together with evidence of variations in conditions, which is treated as going to weight rather than admissibility."

Anno.: 70 ALR 2d 170, 171. (See cases cited therein.) The annotation goes on to say that this type of evidence is sometimes excluded on the grounds that

it is inconvenient for the court to investigate prior accidents to determine their relevancy; and further, that whether this evidence shall be admitted is best determined by the court in its discretion.

“The strongest attack of evidence of the type here considered has been based upon grounds of trial convenience rather than upon its lack of relevance. Especially in the earlier cases, the courts have expressed the fear that if the evidence were received the trial would be disrupted by the necessity of investigating all the circumstances of the various incidents in question, and have concluded that the simplest and most desirable solution was to exclude all such evidence. However, in the more recent decisions in most jurisdictions there is apparent a tendency to treat this question ad hoc, leaving it to the trial judge in each case to determine whether the evidence should be excluded on this ground and, if the evidence is admitted, to determine the extent to which the circumstances of the earlier accident can be investigated.” (p. 172)

Appellant cites several Utah cases wherein the general rule regarding admission of evidence of prior accidents has been substantially adopted. It should be noted that in all of these cases the circumstances involving the prior accidents were substantially similar to the ones before the court. The Bamberger case, *Parker v. Bamberger, et al.*, 100 Utah 361, 116 P. 2d 425, dealt with an allegedly defective wig-wag signal. Evidence that this same signal had failed to function on previous occasions was held to be properly admitted. In the Stocker case, *Stocker v. Ogden City, McFarland v. Ogden City*, 88 Utah 389, 54 P. 2d 849, it was alleged that water from a cer-

tain stream was contaminated. The Court admitted evidence showing that others had drunk from the same stream with no apparent ill effects. The Shugren case, *Shugren v. Salt Lake City*, 48 Utah 320, 159 Pac. 530, was concerned with an allegedly defective sidewalk. Evidence was admitted that others had tripped on that same piece of sidewalk.

In each of these cases the relevancy of the evidence admitted to the question before the court is apparent. In one case the same wig-wag signal is involved; in another the same stream and source of water; and in the third the same defective piece of sidewalk.

But as regards the instant case, this requirement of similarity of conditions is not met. The appellant's proffer of proof (B. 20; R. 91) is to the effect that Mr. Challis, if allowed to testify, " * * * would testify with reference to the number of accidents which occurred at the intersection in the year 1959, the total of 24 in all, to show their relationship to the present or to the case at bar and the similarities that existed between them."

Also, Mr. Challis would have testified that the intersection in question had one of the highest accident ratios in Salt Lake City for the five years preceding 1959; that studies had been made of the dangerous condition of the intersection; and that, among other things, changes in the semaphore system were recommended because of the difficulty in detecting the color of the light when the rays of the sun were directly upon it. (See appellant's proffer of proof.)

Apparently, appellant wanted Mr. Challis to testify concerning the history of accidents at the intersection for a period of at least one year, and possibly as many as five. Appellant testified at the trial that he observed the semaphore some 150 feet from the intersection, and that it was green at the time. (R. 88) He further testified that the rays of the sun were bearing down into the signal as he approached it. (R. 86) Apparently it is appellant's contention that the sun may have been shining upon the signal in such a way as to prevent him from detecting that it had turned red against him. That being so, testimony as regards prior accidents occurring at this intersection involving the affect of the sun upon the semaphore would be admissible under the rules set forth above. But appellant's approach is that of a scattergunner. In his proffer of proof he fails to show how any of the prior accidents were related to the problem of the sun shining into the signal. He urges that testimony based on studies of all accidents over a protracted period of time be admitted.

It is conceivable, but not probable, that all the prior accidents involved this question of the effect of the rays of the sun. Perhaps some of them did. But in absence of a more definite showing to that effect in appellant's proffer of proof, the trial court was justified in assuming that the testimony of Mr. Challis would in the main be irrelevant and it was therefore properly excluded.

“Where excluded evidence is not material unless other proof is made, and no evidence is received

or offered to establish that proof, such exclusion will not justify a reversal.”

5A C.J.S., Appeal and Error, 1080.

The Court’s ruling on the proffer of proof is not a part of the record. However, the Judge’s statement regarding the admissibility of the Challis testimony (R. 81-83) indicate that he was not satisfied that the prior accidents met the test of substantial similarity. He was also concerned about the inconvenience involved in analyzing many prior accidents to determine their relevancy. This latter reason is in accord with the holding of at least some courts, particularly as regards cases dealing with dangerous condition as opposed to notice. These cases are collected in annotation at 70 ALR 2d 170, 192.

That portion of the record dealing with the refusal to admit the Challis testimony is printed below: (*Italics supplied*)

“THE COURT: I’m not sure I am going to let Mr. Challis testify to that effect, Mr. McCullough, because I have ruled heretofore that that is immaterial. Whether a lot of other people have been negligent or whether a lot of other people have run stop signs is no concern of ours. Whether this defendant was negligent is a concern of ours; if he is negligent, whether it is of such a grave nature as to constitute recklessness so as to bring him within this charge; and I don’t believe that this jury or I would be interested in knowing that on other occasions other people have done the same thing. I think I would not take our time on that.

MR. MCCULLOUGH: Well, I think the testimony that he can give with reference to this intersection

and subsequent changes that have taken place are material and go to the very issue that we are trying to decide, this question of recklessness.

THE COURT: Well, I'm not going to let him tell about how many people have violated the law or whether or not they have violated the law. I don't think that helps us a bit. *If there is anything peculiar about this intersection or its timing that would help the jury in determining whether this defendant violated the law, then, of course, it would be material; but just for us to get out and try to determine whether other people were violating the law or not won't help us here.* It seems to me it is something like when a man is charged with negligently shooting a deer hunter, and he could show every year so many deer hunters get shot every year. We are not interested in that case. We are interested in what happened in this case, and I will limit you to this case.

MR. McCULLOUGH: Of course, I don't want to dispute the matter with Your Honor since you have the last word any way.

THE COURT: Well, I do temporarily.

MR. McCULLOUGH: But if you are going to limit it to that extent, the only issue is if the light was red, the light was red when he ran it, then he is guilty period.

“THE COURT: No, that is not quite. My instructions will show that is not true. There has got to be an element of recklessness in here before this defendant is guilty.

MR. McCULLOUGH: Well, we will proceed then, Your Honor. If that is going to be Your Honor's ruling—

THE COURT: Yes.

MR. McCULLOUGH: —of course, we would like—

THE COURT: *I am going to rule that this jury has no interest in whether other people have run lights because if we get that before us, we have got to go into every case to find out whether somebody else was negligent, and that is not — well, it seems to me we would be here a month, and I had better stop it before we get started.*”

POINT II.

EVEN IF THE TRIAL COURT DID ERR IN EXCLUDING TESTIMONY RELATING TO PRIOR ACCIDENTS, SUCH ERROR WAS NOT PREJUDICIAL.

Section 77-42-1, U.C.A. 1953, provides that the commission of error by the trial court will not be presumed to have resulted in prejudice, and that a cause will not be reversed for error unless that error affects the substantial rights of the party. See also *State v. Neal* (1953), 262 P. 2d 756, and *State v. Justesen*, 99 Pac. 456.

The evidence against appellant that was admitted at trial was of such weight that the admission of the testimony of Mr. Challis relating to prior accidents would not have had any appreciable effect on the jury's determination.

“* * * the error is considered as harmless where the evidence, if admitted, could not have affected the result.”

5A C.J.S., Appeal and Error, 1069.

Three persons who were eyewitnesses to the accident involving the appellant were called upon to testify by the prosecution. Earl B. Taylor testified (R. 52-59) that he was traveling south on 9th East. At the intersection of 9th East and 21st South he testified that he stopped for a red light and that his auto was directly behind that of the deceased, Mr. Weddington, who also stopped for the light. He further testified that the light turned green and the Weddington auto proceeded into the intersection, and that it was struck broadside by a pickup truck that was traveling west on 21st South by the appellant. The appellant, according to Mr. Taylor, did not stop before proceeding into the intersection.

Another eyewitness, Mrs. Joanne Monroe, testified (R. 62-68) that she was traveling west on 21st South in the right-hand lane of traffic. She was traveling behind another car. The car ahead of hers stopped at the intersection, and she did likewise. She testified that the light was red, and "I didn't notice that I had any difficulty in seeing the light." She further testified: (R. 63)

"A. I had been stopped, oh, approximately three or four seconds when I noticed — there was one car in the lane next to me, and I noticed another car approaching, but he did not seem to be slowing down to stop for the red light.

Q. Okeh. Now, you say he was in the lane to your left?

A. Yes.

Q. All right, and what happened?

A. Well, my first idea was that he was going to run the red light, and as he continued on into the intersection, I noticed another car approaching from the north, and then I thought there was going to be an accident.

Q. And what — will you tell me, did you see the accident happen?

A. Yes, I did.

Q. And what happened?

A. The car that had passed me on the left hit the car that was going south through the intersection.”

The third eyewitness, Douglas Hubbard (R. 68-78), testified that he was traveling north on 9th East and that he stopped for a red light at the intersection of 21st South. The light turned green in his favor and he proceeded into the intersection but stopped when he saw the approaching truck driven by appellant. (R. 69)

Mr. Hubbard further testified: (R. 61)

“A. After the light turned green — I am in the habit of looking at traffic. I don’t trust the light, and as I looked to my right, I saw this truck, pick-up truck, and he seemed to be coming along at a fairly good speed, and I didn’t think he was going to stop, and I had crossed the lane about three feet approximately, so I stopped, and the truck went in front of me.

Q. And did you see what happened to the truck?

“A. Yes. The truck hit I believe it was a gray Plymouth. It hit it approximately in the center. It took just about the front door and back of the front door, approximately the center of the car.”

“Q. All right. Can you tell me what, if anything, you noticed about the speed of this truck from that point on?

A. I would say he was traveling close to twenty-five miles an hour, and as he approached the cross lane, he stepped on it, and I would say at the point of impact he was traveling about thirty. He had increased his speed I would say about five miles an hour.

Q. Will you tell me what makes you think that he increased his speed?

A. Well, just normal observation, and I could hear the sound. It wasn't too new a truck, and you could hear the roar of it as he stepped on it, and you could see the actual movement that it was moving faster.”

In synthesis, the testimony of these witnesses was that there were, in addition to the Weddington car and the truck of appellant, four other automobiles at or near the scene of the accident. Two of these, the Monroe car and another, were traveling west on 21st South, the same as the appellant. The appellant was traveling in the inside lane, the Monroe car and another in the right-hand lane. Both the Monroe car and the one directly in front of it stopped for the red light. Apparently the drivers of both cars were able to see the red light, and indeed, Mrs. Monroe testified she had no difficulty in seeing it. Yet, even though these cars were stopped in the lane next to the appellant and presumably could be seen by him, he did not stop. The two witnesses who were traveling on 9th East, one going south, the other north, testified that the light was green for traffic proceeding on 9th East

at the time Mr. Weddington proceeded into the intersection. This, together with the testimony of Mrs. Monroe, strongly establishes that the light was red when the appellant proceeded through it. Sufficient evidence was presented that the light was against the appellant, and that others traveling in the same direction saw the red light and were stopped at the intersection at the time appellant proceeded through. Appellant was also observed to have increased his speed as he neared the intersection.

The jury weighed the evidence and determined that appellant "did unlawfully and negligently drive said vehicle with reckless disregard for the safety of others." (R. 8) Had this evidence relative to prior accidents been admitted it would not, in light of the weight of other evidence admitted, operated to have changed the verdict returned by the jury. It is therefore urged that the exclusion of the prior accident evidence, even if error, was not prejudicial.

POINT III.

THE TRIAL COURT DID NOT ERR IN THE
ADMISSION OF EVIDENCE, AND EVEN IF
SUCH ERROR WAS COMMITTED, IT WAS
NOT PREJUDICIAL.

Appellant's Point II(A) (B. 34) deals with admission of testimony by Officer Johnson wherein the officer states that appellant made certain statements to him at the scene of the accident. (R. 39) It is not clear whether appellant contends that this testimony was inadmissible, or that the error, if any, consisted in the court's refusal

to allow cross-examination by appellant. In either case, the testimony involves whether appellant did or did not run the red light, and whether he did or did not admit same. As there is sufficient testimony of other parties, which is uncontroverted, that appellant did run the red light, there seems little reason to pursue this issue. If error was in fact committed in this regard, it could not have been prejudicial.

As to appellant's Point II(B) (B. 35), respondent's position in regard to the testimony of Officer Johnson concerning the danger of the intersection is substantially the same as that set forth in Point I of respondent's brief. The fact that this intersection may have been dangerous is not relevant, absent some showing of substantial relationship between the case at bar and the dangers connected with the intersection.

Appellant's Point II(C) (B. 35) also deals with testimony concerning prior accidents. The same reasoning applies here as in the other situations involving testimony of prior accidents.

CONCLUSION

For the foregoing reasons, the conviction of the lower court should be upheld.

Respectfully submitted

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