

2002

West Valley City, a Utah municipal corporation v. Gordon R. Christensen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
a Utah municipal corporation,	:	
	:	
Plaintiff and Appellee,	:	
	:	Case No. 2002-0623-CA
vs.	:	
	:	
GORDON R. CHRISTENSEN	:	
	:	
Defendant and Appellant,	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
in and for Salt Lake County, State of Utah;
the Honorable Terry L. Christiansen, District Judge

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE I. DID THE TRIAL COURT JUDGE EXHIBIT BIAS TOWARDS CHRISTENSEN IN FRONT OF THE JURY?

Standard of review: Determining whether a trial judge committed error by failing to recuse himself is a question of law and should be reviewed for correctness. *State v. Tueller*, 2001 UT App 317 ¶ 7, 37 P.3d 1180, 1183 (Utah App. 2001).

Because Christensen failed to properly preserve this issue before the trial court, he must now show either “plain error” or “exceptional circumstances” before this issue can be reviewed by the Court of Appeals. To establish plain error, Christensen must show that:

- (1) The error occurred;
- (2) The error should have been obvious to the trial court;
- (3) That absent the error there is reasonable likelihood of a more favorable outcome for Christensen. *State v. Tueller*, 2001 UT App 317 ¶ 9, 37 P.3d 1180, 1184 (Utah App. 2001).

ISSUE II. DID THE TRIAL COURT COMMIT PLAIN ERROR BY REFUSING TO RECUSE ITSELF?

Standard of review: Because Christensen did not object at trial or otherwise preserve the issue of trial court bias, he must now demonstrate plain error on appeal. *State v. Nichols*, 2003 UT App 287 ¶ 25, 76 P.3d 1173, 1178 (Utah App. 2003).

ISSUE III. DID CHRISTENSEN RECEIVE COMPETENT LEGAL REPRESENTATION AT TRIAL?

Standard of review: Utah has adopted the two prong *Strickland* test for analyzing claims of ineffective assistance of counsel. *State v. Clark*, 2004 UT 25 ¶ 6; 496 Utah Adv. Rep.10 (Utah 2004); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* test, the appellant must first demonstrate that his legal counsel's representation fell below an objective standard of reasonableness. The appellant must then show that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. To prevail, the appellant must meet both prongs of the *Strickland* test. *Fernandes v. Cook*, 870 P.2d 870 (Utah 1993).

A claim of ineffective assistance of counsel that is raised for the first time on appeal is a question of law. *State v. Bryant*, 965 P.2d 539 (Utah Ct. App. 1998).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Utah Rules of Evidence

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

- (a) **Calling by Court.** The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

- (b) **Interrogation by Court.** The court may interrogate witnesses, whether called by itself or by a party.
- (c) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

STATEMENT OF THE CASE

West Valley City accepts Christensen's Statement of the Case, with the addition of the following facts to the Statement of the Facts, as set forth below.

STATEMENT OF THE FACTS

- (1) After Christensen exited his car at the traffic stop, Officer Gill testified that he could smell the odor of alcohol coming from Christensen's person. (Transcript p. 55).¹
- (2) Prior to administering field sobriety tests, Officer Gill specifically asked Christensen if he had any injuries or impairments that would stop him from performing the tests. Christensen replied that he had a bad leg, but did not mention his diabetes or low sugar level. (Transcript p. 61-62).
- (3) Officer Evans testified that he did not find any food in the "driving portion" of Christensen's vehicle. (Transcript p. 137).

1. All citations to the transcript in this brief refer to the "corrected trial transcript" found at Page 174 of the Record.

- (4) Officer Gill testified that he did not attend any hearing at the Department of Motor Vehicles regarding the return or suspension of Christensen's license for refusing to take the intoxilyser test. (Transcript p. 120).
- (5) Christensen testified that the Department of Motor Vehicles did not hold a hearing regarding the return or suspension of his license for refusing to take the intoxilyser test. (Transcript p. 214).
- (6) On page 18 of Appellant's Brief, second full paragraph, Christensen mischaracterizes the evidence. Christensen's brief states that "The court informed Christensen and the jurors that diabetes normally means high blood sugar and then asked Christensen...." This phrasing makes it appear as if the judge is telling the jury his opinion, rather than asking one of the questions submitted by the jury. This statement appears in the middle of the juror questions and there is no indication from the record that this was not one of the questions submitted by a juror. (Transcript p. 216).

SUMMARY OF THE ARGUMENTS

I. THE TRIAL COURT DID NOT EXHIBIT PREJUDICE OR BIAS TOWARDS CHRISTENSEN WHEN IT ALLOWED THE JURORS TO SUBMIT QUESTIONS TO BE ASKED OF CHRISTENSEN.

The entire basis for Christensen's appeal is based on the false assumption that the trial court judge improperly questioned Christensen in front of the jury, thereby showing bias. A

careful reading of the transcript reveals that the judge was merely reading questions that had been submitted by the jury in accordance with Utah law. The trial court was consistent throughout the trial and allowed similar questioning of prosecution witnesses. The questioning was proper and is not evidence of bias by the trial court.

Even if the questions had been asked by the trial court, there is still no evidence of bias against Christensen. The questions were directly related to the evidence and only served to allow Christensen to clarify or explain questions about his defense. Furthermore, such interrogation by the trial court is specifically allowed by Rule 614 of the Utah Rules of Evidence.

II. THE TRIAL COURT JUDGE DID NOT COMMIT PLAIN ERROR IN THIS CASE.

Christensen failed to object at trial to the conduct that he now complains about. Therefore, he must show that a plain error was committed by the trial court in order to raise the issue of bias on appeal. Christensen's entire appeal is based on the argument that the trial court was improperly asking questions of the jury. Since that argument is factually incorrect because the judge was properly reading questions submitted by the jury, there was no error in this case. Since there is no error there can be no "plain error," which is a blatant and obvious error that the court should have recognized. Also, Christensen must show that the outcome of the trial would have been different if his alleged "error" had not occurred. Therefore, he is unable to satisfy the "prejudice" portion of the plain error test. The evidence

against Christensen was overwhelming and even if the trial court committed an error, the error would be harmless.

III. CHRISTENSEN RECEIVED THE BENEFIT OF A COMPETENT DEFENSE WHICH RESULTED IN A FAIR AND JUST TRIAL.

In order to prevail on his argument of ineffective assistance of counsel Christensen must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. He fails to meet either standard.

The only alleged substandard conduct that Christensen points to is his counsel's failure to object to the jury questions presented by the judge. Since such questioning is allowed by law and the questions were not improper, no competent attorney would have objected in that situation.

Christensen can also not meet the second part of the test. The evidence against Christensen was virtually overwhelming and his counsel's objection to the few juror questions that were posed by the court would not have changed the outcome of the trial.

DETAIL OF THE ARGUMENTS

I. THE TRIAL COURT DID NOT EXHIBIT PREJUDICE OR BIAS TOWARDS CHRISTENSEN WHEN IT ALLOWED THE JURORS TO SUBMIT QUESTIONS TO BE ASKED OF CHRISTENSEN.

The trial court judge in this case exhibited absolutely no bias or prejudice towards Christensen. Christensen's argument to the contrary is like a house of cards. When the foundation cards are removed, all of his arguments will fail.

The foundation for Christensen's appeal is his assertion that the trial court judge improperly questioned Christensen while the jury was present. Christensen believes that the questioning exhibited bias on the part of the judge which then improperly influenced the jury, resulting in Christensen's conviction. While under some circumstances that scenario may provide grounds for a proper appeal, in this case it simply isn't true.

Christensen has his facts wrong. A thorough review of the transcript makes it apparent that the trial court judge asked no questions of his own while the jury was present. What actually occurred was that at the end of the examination of Mr. Christensen, the judge allowed the jurors to submit any questions they may have. It was these juror questions which the court then read that Christensen now points to as evidence of bias. The argument is based on a false premise.

The entire exchange between the trial court judge and Christensen is as follows:

THE COURT: Any further questions?

MR. ROBINSON: No.

THE COURT: All right. Does any member of the jury have a question (inaudible)?

[INAUDIBLE.]

THE COURT: All right. Mr. Christensen, the first question: Why did you refuse to test, that's referring to the breathalyzer test, if you were not intoxicated?

THE WITNESS: Well, at that point I just couldn't understand why my requests were completely ignored and I would keep being asked to take the tests that I didn't think were necessary.

THE COURT: Do you know what your current blood sugar level is?

THE WITNESS: Right now?

THE COURT: Yes.

THE WITNESS: No, but I know it's usually low.

THE COURT: What is considered a normal blood sugar level?

THE WITNESS: On my little ultra tester that I use about 150 to – well, 100 to 150.

THE COURT: Do you know what precipitated your low blood sugar level? Or low blood sugar, I'm sorry.

THE WITNESS: Yes. My doctor told me to lose some weight so I starved myself all day.

THE COURT: Usually diabetes means high blood sugar. Eating sweets would increase your blood sugar level. Is that your understanding?

THE WITNESS: If you have low blood sugar eating sweets will raise it to a normal level.

THE COURT: Will you write the question one more time to make sure I ask the right question? Do you know why your wife didn't testify as to your condition?

THE WITNESS: Well, I know why my wife didn't come out here today because it was her temple day and she had three or four other riders and it was her turn to drive. Every Tuesday they go to the temple.

THE COURT: Any questions from counsel based on questions of (inaudible)?

MR. ALLRED: I have none.

THE COURT: Any other questions of the jury? All right. Mr. Christensen, you may step down (inaudible). (Transcript p. 215-217).

As the transcript above demonstrates, the trial court judge is clearly asking questions that have been submitted by the jury. In fact at one point, the court states "will you write the question one more time to make sure I ask the right question?"). (Transcript p. 216). Christensen characterizes the above exchange as the judge acting as a prosecutor. (Appellant's Brief pp.19, 26). However that is obviously not the case. The judge is simply passing along questions asked by the jurors to help clarify issues that had been raised by previous testimony. There is no case law or coherent argument that such action by the trial court is a demonstration of bias. To the contrary, Utah law allows the judge the discretion to permit jurors to submit questions for witnesses. *State v. Anderson*, 108 Utah 130, 158 P.2d 127, 128 (Utah 1945); *State v. Martinez*, 7 Utah 387, 326 P.2d 102, 103 (Utah 1958). The

foundation of Christensen's house of cards defense is based on a false premise. The wrong assumption that it was the trial court judge making up the questions, not the jurors.

The trial court's actions were consistent throughout the trial. At the end of Officer Gill's testimony, the judge asked the jury if they had any questions of Officer Gill. (Transcript, p. 121). The judge made two similar requests at the end of Officer Evans cross examination testimony and after the re-direct testimony following the judges reading of the juror's questions. (Transcript, p. 147, 151). In response to the judge's offer, several questions were posed by the jury to Officer Evans. These questions were read by the judge in the same manner that he read the juror questions to Christensen. (Transcript, p, 147-148). Treating both sides in the same manner hardly seems to be evidence of bias on the part of the trial court.

It should also be noted, that the questions asked by the jury are not improper. The questions are all logical extensions of previous testimony and are being used by the jurors to clarify certain issues in their minds. A good example is the question about Christensen's refusal to take the intoxilyzer test. Because of Christensen's evasiveness on cross examination, that topic had been the subject of previous confusing testimony. (Transcript p. 202-206, 210-214). The question by the juror was simply to clarify what had been a confusing and often interrupted portion of the testimony. The next several questions related to blood sugar levels and the effect of eating sweets on blood sugar levels. These questions relate directly to Christensen's defense of diabetes and to his previous testimony.

Christensen had testified that sugar “would tend to alleviate the situation more than aggravate it.” (Transcript, p. 198). Apparently the jurors wanted to be clear in their minds about the effects of diabetes and Christensen’s alleged low blood sugar level. Finally, the question regarding why Christensen’s wife did not testify is also perfectly understandable. Christensen’s testimony was very much in doubt. He had been evasive during cross examination and had been forced to admit that portions of his testimony had been mistaken or an outright lie. (Transcript p. 195). Certainly the jury would wonder why his wife was not present to corroborate his story. Christensen was not prejudiced at all by the questions of the jury. They were all questions that could have been asked on either direct or cross examination and provided Christensen with an additional opportunity to correct and misconceptions and clarify his position.

There were several times when the jury was excused that the trial judge directly questioned Christensen, and at least one instance where the judge asked questions in front of the jury, although Christensen does not seem to rely on these instances. (Transcript p. 190). That questioning was also allowable under Utah law. Rule 614(b) of the Utah Rules of Evidence specifically allows the court to interrogate witnesses. This rule allows such interrogation by the court even if the jury is present. The Utah Court of Appeals has stated that “It is within the judge’s prerogative to ‘ask whatever questions of witnesses as in his judgment is necessary or desirable to clarify, explain or add to the evidence as it relates to the disputed issues.’ [citation omitted]” *State v. Boyatt*, 854 P.2d 550, 553 (Utah App. 1993).

In this case, the trial court judge should be given credit for proceeding with the juror questions in a careful and appropriate fashion. The court acted in accordance with the advice of Justice Worthen in his concurring opinion in *Martinez*. Justice Worthen stated:

In my opinion no juror should ever be allowed to ask questions of the witnesses. If a juror indicates that he has a question the court should invite the juror to disclose to the court the question and the court, if the question suggested is *not germane to the issues involved* or is such as would *be clearly improper and therefore prejudicial to the rights of the defendants to a fair and impartial trial* should not permit the question to be propounded. If the question is germane to the issues, and would not be prejudicial to the rights of the defendants to a fair and impartial trial, the judge in turn should ask the question himself.

Martinez, at page 104 (Worthen concurring opinion) (italics in original).

The trial court was not asking questions of Christensen as he asserts in his brief, but rather, was following established Utah law in asking questions propounded by jurors. Therefore no bias, not even the appearance of bias, can be shown on the part of the trial court. The first card in the foundation of Christensen's argument comes tumbling down.

Christensen also cannot satisfy the second part of the bias test and prove that he was prejudiced. Even if the trial court did error, any such error was harmless. The evidence of Christensen's guilt in this case is virtually overwhelming. For example the following evidence had been presented:

- (1) Officer Gill of the West Valley City Police Department testifies that Christensen fails to stop, despite officer Gill's overhead lights and siren, for a

period of ten blocks and while traveling at approximately twice the normal speed limit. (Transcript p. 47-51).

- (2) Christensen was unable to follow simple directions to exit his vehicle. (Transcript p. 53-55, 130-131) .
- (3) Officer Gill and Officer Evans both testify that they detected the odor of alcohol on Christensen. Evans testifies that he can smell alcohol from as far as seven feet away. (Transcript p. 55, 217, 218).
- (4) Officer Gill and Officer Evans testify that an empty bottle of whiskey and shot glasses are found in Christensen's truck. (Transcript p. 57, 135-137)
- (5) Officer Evans testifies that while being processed at the police station Christensen urinates in his pants. (Transcript p. 138, 218).
- (6) Officer Gill testifies that Christensen is unable to perform the field sobriety tests that Officer Gill explains to him. (Transcript p. 68-72).
- (7) Christensen repeatedly gave Officer Gill his wrong age. (Transcript p. 60).
- (8) Christensen refuses to take an intoxilizer test which would have shown his actual blood alcohol level. (Transcript p. 76-79).
- (9) Christensen is the only defense witness and the voracity of his entire testimony is in question because he is caught lying about how long it had been since he consumed alcohol (Transcript p. 195) and his testimony on cross examination is extremely vague and evasive. (Transcript p. 209)

Based on the evidence that had been presented at trial, there is little doubt that Christensen is guilty of driving while under the influence of alcohol. There is also little doubt that the jury would have found him guilty of that crime regardless of the juror questions that were asked by the trial court judge at the conclusion of Christensen's testimony.

Also, the questions that were asked by the jury were entirely appropriate and did not damage Christensen in any way. As was described above, the questions related directly to the evidence and provided Christensen with an additional opportunity to clarify or explain his actions and testimony. The second card in the foundation fails and the entire house of cards that is Christensen's argument falls. His claims of judicial bias are completely without merit and the jury's verdict of this case should be upheld.

II. THE TRIAL COURT JUDGE DID NOT COMMIT PLAIN ERROR IN THIS CASE.

Christensen failed to preserve the issue of judicial bias for review by this court. Therefore, he must establish that a plain error occurred before the issue can even be raised on appeal. In order to prove plain error, Christensen must demonstrate that all three parts of the plain error test have been satisfied. First, he must show that an error occurred; second, he must show that the error should have been obvious to the trial court; third, he must show that error had not occurred and there is a reasonable likelihood that Christensen would have been

found not guilty. Tueller at ¶9; *State v. Dunn*, 850 P.2d 1201, 1208-1209 (Utah 1993).

Christensen fails on all three prongs of the plain error test.

No error occurred in this case. Trial court judges have the discretion to allow questions by jurors. The Utah Supreme Court in the *Anderson* case stated that “whether a jury would be permitted to ask questions of the witnesses within the discretion of the trial court.” The court did go on to note that if the questions are not germane to the issues involved or are clearly improper that that may be an error on the part of the trial court. *Anderson*, at 133.

As is shown in the transcript quoted above, the questioning of Christensen by jurors was not extensive nor was it improper. The few questions that were asked by jurors were primarily designed to clarify issues which had been addressed by prior testimony. Since allowing the questioning was within the sound discretion of the trial court and the questions themselves were not improper, there is simply no error in this case.

Christensen also fails to satisfy the second prong of the plain error test. Christensen argues that the error by the trial court was obvious. However, the only factor he can point to are the juror questions which were asked by the trial court judge. As was set forth in the previous argument, the trial court was within its discretion in allowing the jurors to submit questions to Christensen. That action by the trial court in and of itself does not constitute an error at all, let alone an obvious error.

Finally, Christensen makes no credible argument that the outcome would have been different had the jurors not been allowed to ask questions. As was set forth in the argument above, the evidence of guilt is virtually overwhelming. The questions that the jurors asked of Christensen demonstrate that they were already questioning his defense. All of the questions related directly to concerns about his previous testimony and its lack of corroboration and actually provided him with an additional opportunity to clarify or explain his testimony.

Based on the foregoing, it is clear that no error occurred as suggested by Christensen and that even if the trial court's decision to allow juror questions was in error, the outcome of the trial was not affected. Christensen has failed to meet the plain error standard and therefore the issue of judicial bias should not be addressed on appeal. The verdict of the jury in this case should be upheld.

III. CHRISTENSEN RECEIVED THE BENEFIT OF A COMPETENT DEFENSE WHICH RESULTED IN A FAIR AND JUST TRIAL.

Christensen's argument of ineffective assistance of counsel must be measured against the two part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). That test requires that Christensen demonstrate that his trial counsel's representation failed below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. *Fernandez v. Cook*, 870 P.2d 870 (Utah 1993).

Christensen spends very little time in his brief explaining how his attorney's performance failed to meet an objective standard of reasonableness. The only failure that he points to is his counsel's failure to object to the jury questions presented by the judge. The mere failure to object to those juror questions simply cannot meet the *Strickland* standard. Allowing jurors to pose questions to witnesses is specifically within the trial court's discretion under Utah Case Law. Since such questioning is allowed by law and the questions were not improper since they related to the evidence, no competent attorney would have objected in that situation.

Christensen can also not meet the second part of the *Strickland* test. As has been set forth previously in this brief, the evidence against Christensen was virtually overwhelming and his counsel's objection to the few juror questions that were posed by the court would not have changed the outcome of the trial.

Christensen was represented by competent counsel at trial and received a fair and impartial trial. No competent attorney would have been expected to object to juror questioning that is allowed under Utah law. The jury verdict in this case should be upheld.

CONCLUSION

Christensen's entire appeal is based on the argument that the trial court was biased because the court asked him questions and "assumed the role of prosecutor." This argument is based on the false premise that the judge was formulating the questions himself. The transcript reveals that the questions were actually propounded by the jurors, at practice that

the judge had consistently used throughout the trial. Because the questions were posed by the jury, the questions were related to the evidence and were not improper, and Christensen suffered no prejudice as a result, there is no evidence of bias by the trial court.

Christensen failed to object to the juror questions at trial, therefore, he can only raise the issue of bias on appeal if he can show plain error. He cannot meet any of the requirements for showing plain error. Since the juror questions are allowed under Utah law, there was not error at trial. Since there was no error, it certainly couldn't have been an "obvious" error. Finally, since there was no error, Christensen couldn't have been prejudiced by the trial court's actions. The plain error test has not been satisfied and Christensen cannot raise the issue of judicial bias on appeal.

Christensen's final argument is that he suffered from ineffective assistance of counsel at his trial. However, since the type of juror questioning that he complains of is allowed by Utah law no competent counsel would have been expected to object to the trial court's actions. Christensen has failed to prove either prong of the Strickland test. He cannot show that his counsel was incompetent, nor can he show that the outcome of his trial would have been different had his counsel objected to the questions posed by the juror.

Based on the foregoing, it is clear that Christensen was represented by competent counsel, that the trial court committed no plain error, and that the trial court exhibited no bias toward him. Christensen's arguments are wholly without merit and the verdict of the jury should be upheld.

DATED this 20TH day of MAY, 2004.

WEST VALLEY CITY

A handwritten signature in black ink, appearing to read "J. Richard Catten", written over a horizontal line.

J. Richard Catten, Deputy City Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the __ day of May, 2004, I served upon J. Franklin Allred, Attorney for Defendant/Appellant, two (2) copies of the Reply Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

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