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West Valley City v. Gordon R. Christensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

PLAINTIFF/APPELLEE,

v.

GORDON R. CHRISTENSEN,

DEFENDANT/APPELLANT.

REPLY BRIEF OF APPELLANT

This is an appeal from judgments, sentences and convictions for D.U.I., a class B misdemeanor, and for speeding and failure to yield to an emergency vehicle, class C misdemeanors, entered in the Third District Court, West Valley Department, State of Utah, the Honorable Terry L. Christiansen, presiding.

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TABLE OF CONTENTS

Table of Authorities	ii
Argument	1
Conclusion	7

Table of Authorities

Cases

<u>State v. Anderson</u> , 158 P.2d 127 (Utah 1945)	1-7
<u>State v. Johnson</u> , 784 P.2d 1135 (Utah 1989)	1-7
<u>State v. Martinez</u> , 326 P.2d 102 (Utah 1958).	1-7
<u>State v. Reyes</u> , 2004 UT App 8, 84 P.3d 841	7

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ARGUMENT

THE TRIAL COURT'S ASKING THE JURORS' QUESTIONS
COMPOUNDS THE ERROR OF HIS BIAS
AND REQUIRES REVERSAL.

In the responsive brief, the government contends that the trial court's conduct in cross-examining Mr. Christensen was proper, because he was merely conveying the jury's questions, as he did throughout the trial. See Brief of Appellee at 4, 7-12, relying on State v. Anderson, 158 P.2d 127, 128 (Utah 1945); and State v. Martinez, 326 P.2d 102, 103 (Utah 1958).

Contrary to the government's repeated assertions that counsel for Christensen mischaracterized the fact that the judge was asking the jurors' questions, e.g., Brief of Appellee at 7, Christensen's opening brief accurately indicated that the trial court asked the jurors if they had any questions, and then proceeded to cross-examine Mr. Christensen. See, Opening Brief of Appellant at 17-18.

The fact that the trial court was conveying the jurors' questions does not mollify, but compounds, the error in his questioning of Christensen. This is confirmed by reference to the Anderson and Martinez cases relied on by the government, and by reference to a more recent case, State v. Johnson, 784 P.2d 1135 (Utah 1989).

In State v. Anderson, 158 P.2d 127 (Utah 1945), the court discouraged trial courts from permitting jurors to ask questions, and cautioned that courts should generally only permit such questions when a juror asks for additional information, and when the juror's question will aid the juror in understanding a material issue. Id. at 128-29. The court cautioned that jurors should not be permitted to take the case out of the hands of counsel, or to disrupt the orderly course of proceedings. Id. at 128. The court recognized that prejudicial error occurs if a trial court permits juror questions which are improper and defeat the defendant's right to a fair and impartial trial. Id. at 128-29.

In State v. Martinez, 326 P.2d 102 (Utah 1958), the court reversed a rape conviction because the trial court not only permitted, but encouraged the jurors to question witnesses during the trial, and to call and question after deliberations had begun a witness who was not called by either party. Id. at 389.

In reversing, the Martinez court referred back to the Anderson and acknowledged that that decision granted trial courts discretion to convey "unsolicited" questions of jurors, but reiterated that such practice should occur only in rare cases. Id. at 103-04 and n.3. The court quoted with apparent approval a concurring opinion of two of the

Anderson justices, which stated,

[W]hile it is proper to permit the juror to ask questions of a witness to clarify some matter in the mind of the juror, the *court should never on its own motion* invite the jury to question witnesses, and should at all times guard carefully the rights of the parties in permitting the witness to answer questions asked by a juror.

Martinez, 326 P.2d at 103-04.

The Martinez court noted one of the problems caused by juror questioning – that lawyers are loathe to object to improper juror questioning for fear of offending the final decision makers. Id. at 103.

More recently, in State v. Johnson, 784 P.2d 1135 (Utah 1989), the court addressed the federal aspects of the defendant's claim that juror questioning during the trial evinced premature deliberation, in derogation of his state and federal constitutional rights to a fair and impartial trial. Id. at 1144-45 and n.34. The court noted that premature deliberation by jurors causes two problems: 1) jurors may assess the evidence without the benefit of the final legal instructions and 2) jurors may become entrenched in their opinions before hearing all the evidence. Id. at 1145. The court again recognized that permitting juror questioning is not encouraged, but found that the questions asked in that case did not demonstrate problems associated with premature deliberation, and were proper to clarify issues for the jurors in that case. Id. at 1145.

From this line of cases, this Court can first determine that the trial court had no business routinely soliciting questions from the jurors, and that the government is thus in

error in touting this consistent conduct as proper. See Brief of Appellee at 10 (noting the trial court's soliciting juror questions for all of the witnesses in this case, and claiming that the fact that he was consistent in doing this disproves bias).

By reviewing the transcript of the trial in this case, this Court can readily confirm that the trial court did not merely convey proper clarifying questions from the jurors, but asked several unnecessary and improper questions, and also made two key factual assertions that were inaccurate, and thus very damaging to Christensen's legitimate defense.

The first question, asking why Christensen did not take the breath test if he was not intoxicated (T. 216), was one that had been asked and answered repeatedly throughout the trial. On direct examination, Christensen testified that when the officer asked him to take a breath test, he told the officer that he had already told him he was not taking any more tests, that he would not take that test, that he would take his chances on losing his driver's license, and that he would rather go to jail than take any more tests (T. 165-66, 168, 171).

On cross-examination by the prosecutor, Christensen testified that the officer asked him to take the breathalyzer, but that this was after they had become "somewhat at arm's length." (T. 203). He testified that upon receiving the warning about consequences with his license, he said he was not taking the test, and would take his chances with the Driver License Division (T. 203). He testified that he believed the

officer conducting the DUI investigation was biased and insisted the Christensen was drunk, and that he did not know if the breath test results would be biased (T. 204). He then testified that he knew the test would give an objective printout of his alcohol level, but maintained that he did not think that would clear things up, given his attitude toward the officer conducting the overall investigation (T. 211). He conceded that the test result would probably be fair and impartial, but still would not take the test (T. 213). On redirect, he testified that at the time of the DUI investigation, it did not occur to him to assess the capabilities of the breath testing machine (T. 215).

Having the court follow up with the question of why he would not take the test if he knew he was innocent was not necessary clarification, but was pointed and redundant prosecutorial questioning by the judge. The fact that the trial court solicited the questions from the jurors was improper under Anderson, Martinez, and Johnson, and the fact that he asked them when they were not necessary was improper under Anderson, Martinez, and Johnson. Particularly when viewed in light of the other questions the judge asked, the questions demonstrate a lack of judicial impartiality.

After the discussion about Christensen's failure to take the breath test, the trial court first reiterated Mr. Christensen's claim that he suffered from low blood sugar (T. 216 lines 5-7), and then stated, "Usually diabetes means high blood sugar." (T. 216 lines 10 and 11). The court then challenged, "Eating sweets would increase your blood sugar level." (T. 216 lines 11-12). He then asked Christensen, "Is that your understanding?"

(T. 216 line 12).

The trial court's factual assertions that diabetes means high blood sugar, and that eating sweets would increase blood sugar, were not questions, but were a key factual predicates to the challenge to Christensen's testimony, that he was eating sweets to counteract the effects of diabetes prior to the traffic stop.

Regardless of whether the factual assertions originated from a juror or the trial court himself, because the assertions conveyed key facts that were not in evidence, were not in fact true,¹ and were disastrously inconsistent with Mr. Christensen's defense that his incoherent and clumsy behavior was caused by diabetic hypoglycemia, rather than alcohol intoxication, the trial court should not have conveyed the assertions and related question, regardless of their source. See, e.g., Martinez, supra.

The questions about Christensen's blood sugar level at the time of trial and about normal blood sugar levels (T. 216) did not clarify any material point in the trial. But see, e.g., Martinez.

The next question as to why Christensen did not call his wife to testify in support of his hypoglycemia defense (T. 216), was clearly inconsistent with fundamental precepts of criminal law recognizing that a criminal defendant is presumed innocent, that the

¹See, e.g., American Diabetes Association Homepage, <http://www.diabetes.org/for-parents-and-kids/diabetes-care/hypoglycemia.jsp> (confirming that diabetics often suffer from hypoglycemia, which may be caused by lack of food, and that drinking juice and eating high sugar foods is in fact the recommended course of treatment to alleviate the symptoms of diabetic hypoglycemia).

government has the burden to prove him guilty beyond a reasonable doubt, and that a defendant has no burden to call witnesses or do anything else to prove his innocence. See, generally, e.g., State v. Reyes, 2004 UT App 8, 84 P.3d 841 (discussing the presumption of innocence and government's burden in the context of a challenge to a jury instruction on reasonable doubt).

The entire line of questioning evinces premature deliberation by the jury, and the fact that the trial court condoned the questions and assertions by propounding them in court confirms the highly prejudicial nature of the proceedings in this case.

While Mr. Christensen was clearly impaired on the night of his arrest, the evidence of the source of that impairment, whether it was alcohol intoxication or diabetic hypoglycemia, was very much in dispute. See Opening Brief of Appellant, Statement of Facts, at pages 4-19.

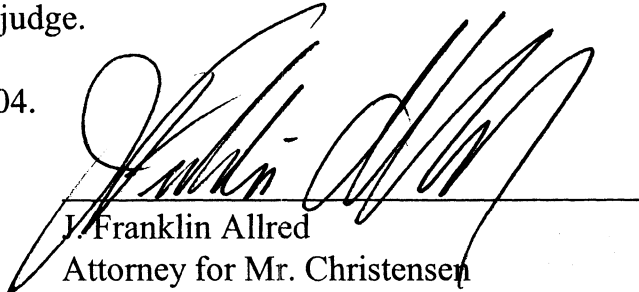
The entire line of questioning and assertions propounded by the judge right before deliberations was grossly improper and exhibited a judicial bias that undermines Mr. Christensen's verdicts and appearance of fairness in our judicial system. See Opening Brief at 19-31.

Because the fact that the judge solicited the improper questions he asked from the jurors compounds the error, this Court should hold that the questions constituted reversible error. See, Martinez, Anderson, and Johnson, supra.

Conclusion

This Court should reverse Mr. Christensen's convictions and remand this matter to the trial court for retrial before an impartial judge.

Dated this 17th day of June, 2004.


J. Franklin Allred
Attorney for Mr. Christensen

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing reply brief to: J. Richard Catten, West Valley City, 3600 Constitution Boulevard, West Valley City, Utah 84119, this 17th day of June, 2004.

