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State of Utah v. David Farnsworth : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Respondent,

—vs.—

DAVID FARNSWORTH,

Appellant.

FILED

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Clerk, Supreme Court, Utah

Case No.
9546

BRIEF OF APPELLANT

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STATE OF UTAH,

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—vs.—

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9546

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This appeal is brought by appellant from an order denying the appellant's motion for a new trial, as entered by the Honorable Charles G. Cowley, District Judge, in the Second Judicial District, In and For Weber County. No evidence was offered at the hearing.

The appellant is hereinafter referred to as Defendant and the Respondent, State, as they appeared below.

The Defendant was charged with the crime of Second Degree Burglary. At trial, where the jury had been waived, the Defendant was found guilty and was consequently sentenced, in the absence of his attorney, to serve not more than twenty years. Defendant had, prior to the imposition of sentence, retained the services of the counsel who now represents him on appeal. During trial, Defendant was represented by another attorney.

Prior to the filing of this appeal, present counsel for the Defendant moved for a new trial on the ground that defendant was denied due process of the law in that:

1. Counsel representing the Defendant at the trial was incompetent and Defendant therefore was denied effective representation.

2. The crime of Second Degree Burglary was never established in that the State failed to prove that the burglary was committed at night.

3. Defendant was denied the right to have counsel present at the time the judgment was rendered and the sentence imposed.

The District Judge denied the motion and defendant prosecutes this appeal.

The appellant raises the following points.

POINT I.

THE DISTRICT COURT DENIED DEFENDANT THE FAIR TRIAL PROVIDED FOR BY THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION AND CONSTITUTION OF THE UNITED STATES IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON THE GROUND OF INCOMPETENCY OF COUNSEL.

POINT II.

THE DISTRICT COURT ERRED IN ENTERING JUDGMENT AND IMPOSING SENTENCE UPON THE CHARGE OF SECOND DEGREE BURGLARY NOTWITHSTANDING THE STATE FAILED TO PROVE THAT THE CRIME WAS COMMITTED AT NIGHT.

POINT III.

THE DISTRICT COURT DENIED DEFENDANT THE FAIR TRIAL PROVIDED FOR BY THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION AND THE CON-

STITUTION OF THE UNITED STATES IN IMPOSING SENTENCE UPON DEFENDANT IN THE ABSENCE OF HIS ATTORNEY.

ARGUMENT

POINT I.

THE DISTRICT COURT DENIED DEFENDANT THE FAIR TRIAL PROVIDED FOR BY THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION AND CONSTITUTION OF THE UNITED STATES IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON THE GROUND OF INCOMPETENCY OF COUNSEL.

The appellant bases this appeal upon the following constitutional provisions:

AMENDMENT V, CONSTITUTION OF THE UNITED STATES:

“No person shall be held to answer for a capital or otherwise infamous crime . . . nor deprived of life, liberty, or property, without due process of law. . . .”

AMENDMENT VI, CONSTITUTION OF THE UNITED STATES:

“In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense.”

AMENDMENT XIV, SEC. 1, CONSTITUTION
UNITED STATES:

“(N)or shall any State deprive any person of life, liberty, or property without due process of law. . . .”

ARTICLE I, SEC. 12, UTAH CONSTITUTION

“In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. . . .”

ARTICLE I, SEC. 7, CONSTITUTION OF UTAH

“No person shall be deprived of life, liberty or property without due process of law.”

Briefly reviewing the trial and other pertinent proceedings, we find that the case is fraught with irregularities which warrant the closest scrutiny, for although these discrepancies may not be, in and of themselves, such as would justify appellate redress, the sum total of these irregularities appear to have contributed heavily to the verdict and judgment, in which case the Defendant should certainly be granted a new trial.

At the outset we find that counsel waived a preliminary hearing (R. 3). This, of course, could be attributed to strategy. Yet, in essence, unless good reasons are

manifest for waiving the preliminary hearing, it would seem that defense counsel waived Defendant's right to one of the most instrumental and perhaps the only discovery device in a criminal proceeding. Also, by this waiver, counsel for the Defendant waived the Defendant's right to demand that the State prove "probable cause" that a crime had been committed and that Defendant committed the crime. It would not seem material that by retrospect, we find that the Defendant was found guilty of the crime; he nevertheless was entitled to demand that the State prove "probable cause" before it could bind him over for trial: A preliminary hearing is a precious and substantial right, to be jealously guarded, and to be waived only upon request by the Defendant himself, or where it would not serve the purposes previously stated, or where the Defendant intends to enter a plea of guilty. This does not appear to be such a case.

In next focusing our attention to the trial, an analysis of the trial records reveals the following course of conduct:

1. The jury was waived by defense counsel (R. 10).
2. No opening statement was presented for the defense.
3. Counsel failed to object to evidence which apparently was illegally obtained (R. 24-15).

4. Only one of six state's witnesses was cross-examined (R. 24-7).

5. Counsel failed to attempt to impeach State's principal witness who was an established felon (R. 24-14).

6. The trial court found it necessary to establish the county in which the crime was committed because of defense counsel's failure to compel the State to do so (R. 24-26).

7. No witnesses or evidence were presented in Defendant's behalf.

8. No closing argument was made by defense counsel (R. 24-25).

9. Defense counsel failed to compel the State to establish whether the crime was committed at night or during daylight hours and to prove that the crime was properly burglary in the second degree, not in the third degree (R. 24-9). (This last item will be discussed more fully in the argument of Point II.)

Again, these irregularities may not, independently, be sufficient to justify a trial *de novo*, yet when all of these discrepancies appear in a single case, the only logical conclusion is that Defendant did not receive effective

and competent representation. In effect, Defendant had no representation. If we arrive at any other conclusion we would, in essence, be adopting the rule that the term “representation by counsel” merely means physical or perfunctory representation.

To substantiate the argument that Defendant was not completely and effectively represented by counsel at trial, we need only to allude to the transcript of the trial. The total efforts of defense counsel during this entire proceeding were:

1. The cross-examining of one witness.
2. Objecting to four questions.

This, by any standard, does not seem to qualify defense counsel’s conduct as effective, substantial or competent counseling.

To quote Judge Walter F. Hoffman, District Judge of the United States District Court for the Eastern District of Virginia,

“The entire trial in the court below had the earmarks of an *ex parte* proceeding. If Defendant had been without the services of an attorney, but had remained mute, it is unlikely that he would have been worse off.” *Johns v. Smyth*, 176 F. Supp. 949, 953, (1959).

In *Johns v. Smyth*, counsel for Defendant waived opening statement, failed to request instructions on the Defendant's behalf, failed to introduce evidence for Defendant's case, and failed to present a closing argument. These discrepancies are practically identical to those in the case before the Court. If any distinctions are to be made between *Johns v. Smyth* and this case, the distinction would be that in the case before this Court, Defendant presents a stronger and more convincing argument. Granted that perhaps the motivating factors which may have led to counsel's misconduct in both cases may differ. In the *Johns'* Case, counsel's misconduct was attributed to his "conscious belief that the Defendant was guilty of the crime charged." In the present case, the reason for counsel's misconduct is not known. Nevertheless, the motive behind counsel's ineffectiveness is not the governing factor in determining whether Defendant was effectively, competently, and substantially represented by counsel. Our primary concern is whether, irrespective of motives, counsel in fact undertook the defense to the best of his ability.

In State ex rel *Parker v. Jameson*, 75 S.D. 196, 61 N.W. 2d 832, 833, (1953) the Court *stated*:

"A lawyer, whether paid or not, whether unsympathetic and disbelieving his client's case or not, whether the offense alleged is abhorrent or in high disfavor with current public view or not,

is bound by the ethics of his profession and our judicial system to present the cause of the deserving and the despicable defendant with equal zeal."

Can we still logically maintain that, notwithstanding all of the irregularities which the trial record reveals, Defendant was effectively, competently, and substantially represented by counsel? On the contrary, the representation was of such low order that it was tantamount to no representation. This case could readily qualify under the test of *People v. Durpee*, 319 P.2d 39, 45, 156 C.A. 2d, 60, where the court *stated*:

"The representation must be of such a low order as to render the trial a farce and a mockery of justice . . . or it must be shown that the essential integrity of the proceeding as a trial was destroyed by the incompetency of counsel."

This case substantiates the rule first stated in *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148, 2d 667, 670.

In the present case, had Defendant waived the right to counsel at the outset, no greater injury could have befallen him than that which he suffered with counsel present. The immediate problem, then, is to determine what tests have been fashioned by the courts which have been confronted with cases similar to this case and to further determine whether this case could qualify under these tests.

In *Powell v. State of Alabama*, 287 U.S. 45, 71, 53 S. Ct. 57, 77 L. Ed. 158, the United States Supreme Court formulated the test of “substantial representation.” That is, unless counsel provides substantial representation, the Defendant is denied his right to effective counsel. Another theory is that Defendant may not complain as to the competency of his attorney “unless the conduct of defense counsel was so bad that the trial judge or prosecutor was required to act in order to preserve the rights of the accused.” *United States v. Warren*, D. C. N.Y. 181 F. Supp. 138, (1959). Still another test requires that defense counsel “vigorously present every legal defense and represent him with his utmost skill and ability.” *Abraham v. State*, 228 Ind. 179, 91 NE 2d 358, 360, (1950). A fourth test requires that the integrity of the trial be destroyed by counsel’s incompetence or that the trial be rendered a farce and a mockery of justice: *People v. Durpee*, *Driggs v. Welch*, *supra*.

In applying our case to the various test fashioned by the courts, there seems to be little doubt, if any, that the trial below was rendered a farce and mockery of justice. Counsel did not present every defense and represent defendant with his utmost skill.

More specifically, *inter alia*, counsel failed to compel the State to prove that the crime was committed within Weber County and this discrepancy was corrected only at the conclusion of the trial and by the judge. Counsel

failed to compel the State to prove that the crime was committed at night, a discrepancy which could spell a difference between a maximum of twenty years imprisonment and a maximum of three years. This discrepancy was never corrected. Counsel failed to take the necessary steps to disclose that the State's principal witness was an established felon. Counsel failed to object to testimony by the police officers even when by their own testimony, these officers indicated that there was a strong probability that the evidence was illegally obtained in that the officers did not have a warrant for the arrest of the Defendant, and thus violated the rule against illegal search and seizure. These are the more flagrant trespasses upon Defendant's rights under the Due Process clause of our Constitution but we need not stop here. Other discrepancies are enumerated on page three of this brief.

In considering the facts of this case, there appears to be but one conclusion: Defendant was not afforded the effective and competent representation which is guaranteed to him by our Constitution; Defendant did not receive the fair trial contemplated by the Due Process clause of the Fifth Amendment. To arrive at any other conclusion would be to condone unscrupulous conduct by counsel. By condoning such misconduct we destroy the integrity of the profession. By placing our stamp of approval on misconduct such as we find in the case before the Court, we would be, in effect, nullifying any Constitutional rights we may have had to a fair trial.

Finally, it is convenient to note that our Constitution does not distinguish between Defendants who retain counsels and Defendants who have counsels appointed to them. Thus, in determining whether defendant, in this case, was properly represented by counsel, we should not distinguish between retained counsel and appointed counsel. In discussing this point, the Indiana Supreme Court *stated*:

“This right (right to effective representation) is not defeated merely because an accused himself employs incompetent counsel who afford inadequate representation.” *Abraham v. State*, *supra*.

The defendant submits that he was not adequately and competently represented at trial and therefore a trial *de novo* should be granted.

POINT II.

THE DISTRICT COURT ERRED IN ENTERING JUDGMENT AND IMPOSING SENTENCE UPON THE CHARGE OF SECOND DEGREE BURGLARY NOTWITHSTANDING THE STATE FAILED TO PROVE THAT THE CRIME WAS COMMITTED AT NIGHT.

In this matter, the State, at best, was able to prove that the crime was committed “shortly after midnight in

the early hourse of the morning.” (R. 24-9). Our legislators have expressly provided:

“When in a prosecution for burglary in the second degree the question as to whether the crime has been committed in the nighttime or in the daytime cannot be definitely arrived at by the jury, (or trier of the facts) a verdict of guilty of burglary in the third degree, as defined in section 76-9-5, Utah Code Annotated, 1953, may be found, provided, the other elements of the crime of burglary in the third degree, as defined in said section 76-9-5, Utah Code Annotated, 1953, have been proved.” Title 76, Chapter 9, Section 3.

In analyzing this provision, some dispute may arise as to whether the wording of the statute requires that the charge of second degree burglary be automatically decreased to third degree burglary or whether the Trial Court has the discretion to uphold the conviction on the former offense notwithstanding the absence of any evidence which would establish the time the crime was committed.

Inasmuch as one of the essential elements of second degree burglary is that it be committed at night, and inasmuch as every element of the crime must be proved before the State's case is complete, the only logical conclusion seems to be that it is incumbent upon the District Judge to decrease the charge, as a matter of law, from

second degree to third degree if the state fails to prove beyond reasonable doubt that the burglary was committed at night.

In the case at bar, the State proved merely that the offense was committed “shortly after midnight in the early hours of the morning.” Aside from this testimony, the record is devoid of any testimony or evidence which would tend to establish that the burglary occurred before sunrise.

As early as 1907, the Supreme Court of Utah, confronted with a similar fact situation, decided that the time of the offense must be conclusively established or the charge of second degree burglary cannot be sustained. The court *stated* :

“From the evidence it appears the goods were stolen sometime between 9:30 in the evening and 6:30 in the morning. But 6:30 a.m. is nearly two hours after sunrise; hence, if it be admitted that the Defendant was proven to have taken the goods, still it is impossible to say from the proof that he took them in the nighttime, for he may have taken them after sunrise and before 6:30 a.m. Nor are there any circumstances in evidence of such a character as to show beyond a reasonable doubt that the prisoner took the goods in the nighttime.” *State v. Miller*, 67 P. 790, 24 U. 312.

Obviously, this case confirms the argument that the State must beyond reasonable doubt prove that the crime occurred before sunrise. It would logically seem to follow that testimony to the effect that the crime was committed "shortly after midnight in the early hours of the morning" does not support the charge of second degree burglary beyond reasonable doubt. At best, we may harbor suspicions that the burglary occurred in the nighttime. In *State v. Miller*, supra, Justice Bartch, speaking for the Supreme Court of Utah, *stated*:

"We may suspicion quite strongly that it was, (committed at night) but suspicions, however strong, are not sufficient to convict men of crimes. There must be evidence of every element of the crime and it must be of sufficient weight to convince an impartial jury beyond a reasonable doubt."

This is the only Utah case in point, but courts of our sister states have arrived at the same conclusion as the Supreme Court of Utah did in *Miller*, supra.

In *State v. Fitzpatrick*, 239 P. 2d 529, 125 Mont. 448, the Supreme Court of Montana indicated that where the information specifically charges a nighttime burglary, the Defendant cannot be convicted unless the State proved beyond a reasonable doubt that such burglary was committed before (5:56 a.m.) the time of sunrise on the morning the crime was discovered. Moreover, the

court indicated that it is not sufficient to convict the Defendant where the evidence merely “discloses that the burglary was committed between 3:15 a.m. when the club building closed and 8:00 a.m. when it next opened.”

The Supreme Court of Kansas, in *State v. Dougherty*, indicated that, where a person is charged with a nighttime crime, it is not enough to show that the crime occurred between 7:30 p.m. and 9:30 p.m. when the record disclosed that the sun set at 7:52 p.m. 352 P. 2d 1031, 186 Kan. 820, (1960). The court further *stated*:

“Where there is nothing to show that the entry may not have been made and that property taken during the daytime, the jury is not warranted in finding the entry was made in the nighttime. In *State v. Rice*, 93 Kan. 589, 144 P. 1016, we held that where defendant was convicted of burglary in the nighttime without evidence showing at what time the offense was committed, burglary in the daytime being the lesser of the two offenses, *the presumption in favor of the defendant is that the crime was committed in the daytime.*” *State v. Dougherty*, *supra*, pp. 1031-32.

As Chief Justice Brontly of the Supreme Court of Montana *stated*:

“When the pleader, as in this case, makes the specific charge of a burglary in the nighttime . . . he must be held to the proof of the charges as made. . . .” *State v. Fitzpatrick*, *supra*.

In the case at bar, the State has charged a nighttime crime, namely; burglary in the second degree. It was thus incumbent upon the prosecution, as pleader, to prove beyond a reasonable doubt that the crime was committed before sunrise. The State failed to carry this burden of proof to a sufficient and convincing degree and the court should therefore remand this case to the District Court with an order to correct this error.

POINT III.

THE DISTRICT COURT DENIED DEFENDANT THE FAIR TRIAL PROVIDED FOR BY THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES IN IMPOSING SENTENCE UPON DEFENDANT IN THE ABSENCE OF HIS ATTORNEY.

As is evidence by the record on appeal (R. 24-4A) upon request of defense counsel, the date and time for sentencing was set for July 10, 1961, at 2:00 p.m. However, as the record indicates, (R. 24-4A) the court below imposed sentence at 10:00 a.m. on the day in question in defense counsel's absence.

Upon this issue, the majority of the courts seem to hold with the rule that defendant is entitled to have counsel present at the time judgment is entered and

sentence is imposed unless Defendant clearly and intelligently waives his right to counsel. The rule is best stated in *People v. Fields*, Cal. App., 198 P. 2d 104, (1948) in which the California Court *held*:

“Inasmuch as the arrignment for judgment and pronouncing of judgment are clearly a phase of criminal prosecution, the defendant herein was denied that constitutional right.”

In a more recent case, the Supreme Court of California affirmed this rule and *held*:

“The denial of counsel at sentence is a denial of a constitutional right.” *Ex Parte Turrieta*; 2 Cal. Reporter, 884, 886, (1960).

Upon this precise point, to-wit: the entering of judgment and imposition of sentence in counsel's absence, the case at bar appears to be one of first impression in this court. However, the Court of Appeals for the Tenth Circuit has clearly indicated its views upon this problem. In *Batson v. United States*, 137 F.2d 288, (1943), the court *stated*:

“We believe that an accused should have the opportunity to be heard by counsel on the sentence to be imposed, and that a court should not impose sentence in the absence of counsel without expressly ascertaining that a defendant does not desire his presence. Many considerations in-

fluence the length of a sentence which is to be imposed, and a defendant should have the opportunity to have his attorney present any mitigating circumstances to the court for its consideration in determining the weight of the sentence."

In *Willis v. Hunter*, this same court again emphasized the importance of counsel's presence at sentencing. The court *stated*:

"Since the right to counsel is a matter of substance, not of form, it is the solemn duty of the trial judge to make sure that representation is not an empty gesture but a fulfillment of the spirit and purpose of the constitutional mandate."

"We think that the right to effective assistance of counsel contemplates the guiding hand of an able and responsive lawyer, devoted solely to the interest of his client; who has ample opportunity to acquaint himself with the law and the facts of the case, and is afforded an opportunity to present them to the court or jury in their most favorable light. If an accused does not have the assistance of counsel when entering a plea or when sentence is imposed, it must be clear to the court that he has competently and intelligently waived such right." 166 F.2d 721, 723, (CA 10th Cir. 1944).

In the case at bar, defendant did not waive his right to counsel at any stage of the proceeding. On the con-

trary, defense counsel expressly indicated that he would be at the sentencing. The court below nevertheless entered judgment and imposed sentence in counsel's absence. Clearly defendant was denied his right to have counsel present at every stage of the proceeding and was consequently denied a substantial right under our Constitution.

Upon these grounds, the cause should be remanded to the District Court to remedy this error.

CONCLUSION

The defendant, in the case before the Court, was clearly denied the fair trial which the Due Process Clause of our Constitution insures us.

Moreover, the trial judge, in failing to decrease the charge against defendant from burglary in the second degree to burglary in the third degree, failed to give the defendant the benefit of the presumption, as provided by our statutes, that the lesser crime was committed.

Finally, defendant's constitutional rights were further infringed upon by the fact that the trial court entered judgment and imposed sentence upon the defendant in defense counsel's absence.

By upholding the decision of the lower court and by placing our stamp of approval upon it, we in fact condone the miscarriage of justice and encourage the trespass upon our civil liberties.

The defendant submits, this cause should be remanded to the District Court with an order for a trial *de novo*.

Respectfully submitted.

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