1983

The State of Utah v. Gary T. Coles : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	
GARY T. COLES,	:	Case No. 19376
Defendant-Appellant.	:	

BRIEF OF APPELLANT

An appeal from a conviction of Driving Under the Influence, a Class B Misdemeanor, in the Second Circuit Court in and for Rich County, State of Utah, the Honorable Ted S. Perry, Judge presiding; said conviction having been appealed to and affirmed by the First Judicial District Court in and for Rich County, State of Utah.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Gary T. Coles, appeals from a verdict of guilty in a criminal proceeding in which he was charged with the offense of Driving Under the Influence, a Class B Misdemeanor, in violation of Utah Code Annotated §41-6-44 (1953 as amended), in the Second Circuit Court in and for Rich County, State of Utah, the Honorable Ted S. Perry, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant was tried in a non-jury trial on August [illegible], 1982, in the Second Circuit Court and was found guilty of

the offense of Driving Under the Influence, and sentenced on September 28, 1982, to serve sixty days in the Rich County Jail and pay a fine of Two Hundred Ninety-Nine Dollars ($299). That conviction was appealed to and affirmed by the First Judicial District Court in and for Rich County, State of Utah.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment and conviction rendered against him reversed and have the case remanded to the Second Circuit Court in and for Rich County for a new trial.

STATEMENT OF THE FACTS

On July 13, 1982, the appellant, Gary T. Coles, was arraigned in the Second Circuit Court in Rich County, Utah.[1] At that hearing he requested the opportunity to retain and consult with counsel.[2] The Court gave him time to do that and ordered him to appear in court on July 27, 1982.[3] On that date the appellant appeared in court, entered a plea of not guilty and informed the Court that he would be represented by Mr. Ron Yengich from Salt Lake City, Utah.[4] The Court informed the appellant that his trial was scheduled for August 24, 1982, at 9:30 a.m., and if he desired a jury a written demand would have to be filed prior to that date.[5]

On August 24, 1982, the case was called for trial.[6]

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1. See: Transcript of Proceedings held on July 13, 1982.
2. Ibid.
3. Ibid.
4. See: Transcript of Proceedings held on July 27, 1982.
5. Ibid.
6. See: Transcript of Proceedings held on August 24, 1982 at p. 3.

neither the defendant nor his counsel of record were present.[7] However, pursuant to a filing of a demand for a jury trial a jury venire was present, but was dismissed by the Court.[8] The Court ordered that the trial proceed without the defendant being present.[9] A highway patrol trooper testified that he stopped the defendant's automobile for a traffic violation: speeding.[10] The trooper observed that the defendant had glassy, bloodshot eyes, staggered or wobbled as he walked and had an odor of alcoholic beverages upon him.[11] Field tests were requested, which the trooper felt that the defendant did not pass,[12] and a breathalyzer test was administered.[13] Testimony was also admitted that indicated that the breathalyzer machine was working properly before and after the administration of the test in question,[14] and a sample taken from the batch of ampules used in the test in question had the proper chemicals in it.[15]

The defendant-appellant appeared at sentencing with Mr. Yengich's law partner.[16] At that time the Court was informed that counsel had instructed the defendant not to appear for trial because a jury demand had been filed which would put the case

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7. See: Transcript of Proceedings held on August 24, 1982 at p. 3.
8. Ibid, at p. 3.
9. Ibid, at p. 3.
10. Ibid, at p. 5.
11. Ibid, at p. 7.
12. Ibid, at pp. 7-9.
13. Ibid, at pp. 11-15.
14. Ibid, at pp. 17-18.
15. Ibid, at pp. 17-18.
16. See: Transcript of Proceedings held on September 28, 1982, at p. 2.

on a different calendar.[17] Affidavits were submitted which indicated that Mr. Yengich was not aware that a jury trial was to be held on the same day as a bench trial and he was not so informed by the Court and that Mr. Yengich's secretary made attempts to telephone the court clerk to confirm a trial date and her calls were not returned.[18]

ARGUMENT

POINT I

THE DEFENDANT-APPELLANT DID NOT VOLUNTARILY ABSENT HIMSELF FROM TRIAL AFTER RECEIVING NOTICE. THUS, THE COURT COMMITTED ERROR BY TRYING HIM IN HIS ABSENCE IN VIOLATION OF HIS RIGHT TO DEFEND HIMSELF IN PERSON.

The trial in this case was held in the absence of the defendant. Such a procedure violated the defendant-appellant's right to confrontation of witnesses and due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Constitution of Utah. The applicable part of Article I, Section 12 provides: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel."[19] The exceptions to the right are described in both the case law and by statute. The statutory exceptions are described in Utah Code Annotated §77-35-17(a) (1953 as amended). It states:

> In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial

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17. See Transcript of Proceedings held on September 28, 1982, at pp. 2-4.
18. Ibid, at p. 3.
19. Utah Code Annotated §77-1-6(1)(a) (1953 as amended) provides the same protection.

with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if the defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at trial. [Emphasis added.]

It is important to note that the first portion of this statute is mandatory in requiring the attendance of the defendant. In this case there was no written consent to hold the trial in the defendant-appellant's absence. Nor was it the situation where the defendant appeared and the Court ordered him removed from the courtroom because of his behavior. The only applicable exception is that he voluntarily absented himself after receiving notice of the trial date.

Taking the notice first, there is no question that the appellant was informed that his trial date was to be August [illegible] 1982. However, there is also no question that his attorney instructed him that trial would not be held on that date, and the appellant would be notified by his attorney of when the actual trial date would be. Such reliance is in accordance with the Utah Rules of Criminal Procedure. Rule 3, Utah Code Annotated [illegible]-3(b) (1953 as amended), provides:

> Whenever service is required to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the

> party himself is ordered by the court. Service upon the attorney or party shall be made in the manner provided in civil actions.

At the arraignment the Circuit Court Judge did not enter an order requiring that the defendant-appellant be personally notified of any change in the trial date or be personally served with any motions. At that hearing the Court was provided with the name of the appellant's attorney. However, in obvious violation of this rule, a notice of the trial date was not provided to Mr. Yengich.[20] Since the appellant was acting on the advice of counsel and additionally, counsel was not properly notified of the trial date, the State has not shown that the appellant was given notice of the trial date. Consequently, it was improper to try the appellant in his absence.

Under the circumstances of this case there is also no showing that the appellant's absence from trial was voluntary. Black's Law Dictionary defines the word "voluntary" as follows:

> Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. Done by design or intention, purpose, intended. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from choosing. The word, especially in statutes, often implies knowledge of essential facts.

In one case the Supreme Court of Utah has held that the defendant did voluntarily absent himself from the trial. State v. Myers, 29 Ut.2d 254, 508 P.2d 41 (1973). In that case the defendant was charged with forgery. The State presented

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20. See Affidavit of Counsel.

its evidence on the first day of trial, at which the defendant was in attendance. The defendant requested a six-day continuance to bring witnesses into Utah from out-of-state. The trial court granted the motion. On the day that the trial was to recommence the defendant's attorney was present, but neither the defendant nor his witness appeared. The Court denied a motion by the defense for a mistrial and ordered defense counsel to proceed. The Supreme Court of Utah held that the defendant did have a right to be present for trial, but what occurred in that case was that he was attempting to gain an advantage in a new trial by refusing to appear. The holding in that case is consistent with the definition of voluntary, i.e., that an act be done on one's own volition with a design or motive underlying it.

In this case the appellant had nothing to gain by failing to appear. At best a warrant would be issued for his arrest, and the worst, in fact, occurred: a trial being held where he was not present to defend himself. Likewise, the record shows that the failure to appear was not an act done by the appellant on his own volition. His attorney had instructed him that he need not appear on the date he was told that his trial would be held. Consequently, there is no showing that the appellant's absence at trial was voluntary, and holding the trial in his absence violated his rights as guaranteed by the Constitution of the United States and the State of Utah.

There is no question that holding the trial in the absence of the defendant-appellant and his counsel resulted in prejudice requiring reversal of the conviction and judgment.

In the first place, because neither the defendant nor his counsel were present the trial court dismissed the jury. (Tr. 8-24-82, p. 3.) Thus, the State needed only to convince one rather than four persons of the defendant-appellant's guilt. More importantly, the appellant was precluded from presenting a defense, both through the presentation of evidence and by cross examination of the State's witnesses. In Pointer v. Texas, 320 U.S. 400 (1965), the Supreme Court stated, " . . . probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross examination in exposing falsehood and bringing out the truth in the trial of a criminal case." 320 U.S. at 404. Cross examination of the arresting officer reasonably may have shown that the appellant's actions were not the result of intoxication or that certain other actions of the appellant were inconsistent with intoxication. Likewise, cross examination of the breathalyzer maintenance officer could reasonably have shown malfunctions or problems with that machine, thus raising doubts as to the reliability of the breathalyzer results.

Consequently, there are reasons to believe that had the appellant or counsel been present at trial the result would have been different. The error here cannot be said to be harmless beyond a reasonable doubt; thus requiring reversal of the judgment and conviction and an order for a new trial. Chapman v. California 386 U.S. 18 (1967).

POINT II

THE TRIAL IN ABSENTIA DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHT TO COUNSEL.

The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." That portion of the Sixth Amendment was made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). Article I, Section 12 of the Constitution of Utah provides a similar protection. With respect to misdemeanor prosecutions the Supreme Court of the United States has required that counsel be appointed where a misdemeanor will result in actual imprisonment. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). The protection afforded by the Utah statutes is even broader. Utah Code Annotated §77-32-1 (1953 as amended) requires appointment of counsel whenever a defendant "faces the possibility of the deprivation of his liberty or other serious criminal sanction." In this case a sixty day jail sentence was imposed. (Tr. 9-28-82, p. 8.) Clearly, the defendant-appellant was entitled to be represented by counsel at his trial, and he had informed the court at his initial appearance not only that he desired to have counsel, but also that he had in fact retained counsel. (Tr. 9-28-82, pp. 2-3.)

Since the appellant was entitled to effective assistance of counsel, the question arises if there was State action

involved in convicting him in the absence of his retained counsel. In Cuyler v. Sullivan, 446 U.S. 335 (1980), this issue was addressed. The court there reasoned that in a criminal trial the State initiates the proceeding and that is an action of the State within the meaning of the Fourteenth Amendment. The court went on to state with respect to ineffective retained counsel, "When a state obtains a criminal conviction through such a trial, it is the state that unconstitutionally deprives the defendant of his liberty." 446 U.S. 343.

Counsel's failure to appear at trial and the Court's proceeding in his absence denied the appellant of his right to counsel. In Powell v. Alabama, 287 U.S. 45 (1932), the court discussed some of the functions an attorney plays in a criminal trial, stating:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

In Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court

that defendants with conflicting interests who were represented by a single attorney were denied their right to effective assistance of counsel. Other functions that counsel provides were described. There the court noted that a denial of the right to effective assistance of counsel affects plea negotiations, the admission of evidence and arguments at sentencing. In that case the court held that once a denial of the right to counsel has been demonstrated there is no need to show prejudice and a new trial is automatic. This was because when a defendant is denied his right to counsel it usually involves actions not taken. Assessing the impact on the trial of actions not taken by counsel is a virtual impossibility.

In this case counsel did not even appear at trial. Consequently, none of the normal functions of counsel at trial were undertaken by anybody. There can be no question that the appellant was denied his right to effective assistance of counsel at trial. Consequently, reversal of the judgment and conviction are automatic and a new trial should be ordered. Holloway v. Arkansas, supra.

CONCLUSION

The appellant was denied his constitutional rights to be present at trial and to counsel. The trial court consequently committed error by holding the trial in the absence of both the appellant and his attorney. With a denial of the right to counsel, no prejudice need be shown to obtain a new trial.

With the denial of the right to be present, the appellant was denied the opportunity to present a defense through cross examination and by presenting evidence himself. Consequently, the errors committed below require that a new trial be ordered.

RESPECTFULLY SUBMITTED this 5 day of September, 1983.

RONALD C. YENGICH
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served two copies of the foregoing Brief of Appellant on the Attorney General by delivering said copies to the Attorney General's Office, 336 State Capitol, Salt Lake City, Utah 84114, and one copy upon Richard D. Lamborn, Rich County Attorney, by mailing said copy to P.O. Box 331, Randolph, Utah 84064, this _____ day of September, 1983.