2003

State of Utah v. Jean Fred Venord : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **JEAN FRED VENORD,** **Defendant/Appellant.**	**Case No. 20030284-CA**

BRIEF OF APPELLEE

AN APPEAL FROM A CONVICTION FOR ASSAULT BY A PRISONER, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-102.5 (1999), IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH, UTAH COUNTY, THE HONORABLE GARY D. STOTT PRESIDING

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BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for assault by a prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF ISSUES

Where defendant's status as a prisoner was an element of the offense and defendant's self-defense claim relied on his past experience in jail, was defendant's trial attorney constitutionally ineffective in eliciting testimony from defendant that he was in the jail on a warrant for shoplifting and had previously served one year in jail for possession of a controlled substance?

Standard of Review. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS

Defendant was charged with two counts of assault by a prisoner, third degree felonies, in violation of Utah Code Ann. § 76-5-102.5 (1999). R. 5. He waived a preliminary hearing and a jury trial was scheduled. R. 38, 43. The jury found defendant not guilty of count I, but guilty of count II. R. 102-99, 187. After resolving a number of *pro se* motions by defendant, the court sentenced defendant to a suspended prison term of zero-to-five years and placed him on supervised probation. R. 294, 321-18. Defendant timely appealed. R. 312.

SUMMARY OF FACTS

On February 13, 2003, defendant was arrested on a warrant for shoplifting and taken to the Utah County Jail. R. 347: 70-71, 123. Following an inventory search, he was escorted to the booking room to be processed and given a cell assignment. R. 347: 84-85. Two other arrestees—Michael Phillips and Brady Carnes—had just been fingerprinted and were awaiting their cell assignments in an area partitioned off the booking room by a three-foot dividing wall. R. 347: 71, 84.[1] After fingerprinting defendant, Deputy Peter Quittner instructed defendant to join the other two men in the waiting area. R. 347: 71.

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[1] The waiting area has a television, several benches, and telephones. R. 347: 80, 88.

After defendant walked through the gate into the waiting area, Phillips, who was sitting on one of the benches, raised his arm up and struck defendant on the left side of his face. R. 347: 124. In response, defendant swung his hand backward and hit Phillips in the mouth, causing his lip to bleed. R. 347: 126; ; *see also* R. 374: 71, 100-01, 117. Deputy Quittner, who only witnessed defendant's response, asked defendant if he had just hit Phillips. R. 347: 72-73, 86-88.[2] Defendant denied hitting Phillips, but Phillips and Carnes, who was talking on one of the telephones, confirmed that he had. R. 347: 73-75, 87-88.

Asking one of the other deputies in the booking room to assist him, Deputy Quittner instructed defendant to leave the waiting area and come with him to a holding cell. R. 347: 75, 90-91, 113. Defendant exited the waiting area and approached Deputy Quittner, who was waiting for him at a cell. R. 347: 75, 91. However, just before reaching the deputy, defendant jumped over the dividing wall back into the waiting area and assaulted Carnes as he talked on the telephone. R. 347: 75-76, 91-92, 104-05, 115. Before officers could intervene, defendant punched Carnes in the face and abdomen some ten to fifteen times. R. 347: 76, 92, 105-06, 111, 115. He also kicked him multiple times and kneed him in the groin. R. 347: 76-77, 105-06. Carnes did not return punches, but assumed a defensive position in trying to thwart off the blows. R. 347: 77, 107, 109, 115-16. Officers in the

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[2] Deputy Quittner testified that he watched defendant as he passed through the gate and that defendant assaulted Phillips without provocation. R. 347: 71-74, 89-90, 99-100, 141-42. However, the Court reviews the record facts on appeal in the light most favorable to the jury's verdict. *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346. Because defendant was acquitted of assaulting Phillips, the State recites the facts on count I consistent with defendant's testimony.

booking room did not observe Carnes say or do anything to provoke defendant. R. 347: 106, 114-15.

Deputy Quittner and at least two other officers separated defendant from Carnes and placed him in restraints. R. 347: 77-78, 99, 106, 108-09, 116-17. The officers escorted each of the men to individual holding cells for safety reasons and summoned medical personnel to examine the men. R. 347: 78, 117. Defendant refused any medical attention. R. 347: 78-79, 118. Deputy Quittner asked defendant why he would do something like that, to which defendant responded, "What did you expect me to do? He called me a f—ing nigger." R. 347: 79, 108. He then protested that he could not let that kind of thing go. R. 347: 108.

SUMMARY OF ARGUMENT

Defense counsel was not ineffective in eliciting testimony that defendant was at the jail on a warrant for shoplifting and that he had previously served one year in jail for possession of drugs. Because defendant's status as a prisoner was an element of the offense, the jury was already aware that he had been arrested for some crime. Rather than permitting the jury to speculate about defendant's arrest, counsel reasonably made the jury aware that he was only arrested for shoplifting. Moreover, evidence that defendant served one year in jail was necessary to establish his self-defense theory that his actions were necessary in the hostile jail environment. In any event, defendant's acquittal of one of the charges demonstrates that the jury was not unduly prejudiced by the testimony.

ARGUMENT

DEFENDANT'S TRIAL ATTORNEY DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant contends that his counsel was constitutionally ineffective because (1) he elicited testimony from defendant that he was at the Utah County Jail on a warrant for shoplifting, and (2) he had previously served one year in jail for possession of a controlled substance. Aplt. Brf. at 7-9. This claim fails.

To prevail on a claim that counsel did not provide constitutionally effective assistance, defendant must meet the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under that test, "defendant must show: (1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." *Clark*, 2004 UT 25, at ¶ 6; *accord Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Defendant has failed to satisfy either requirement.

"To satisfy the first part of the test, defendant must overcome the 'strong presumption that [his] trial counsel rendered adequate assistance' by persuading the court that there was *no* '*conceivable tactical basis* for counsel's actions.'" *Clark*, 2004 UT 25, at ¶ 6 (emphasis in original) (internal citations omitted). This Court "'give[s] trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them.'" *Id.* (quoting *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996)). Contrary to defendant's claim, Aplt. Brf. at 9, his trial attorney had a reasonable basis for eliciting testimony regarding both defendant's arrest and prior conviction.

Defendant was charged with two counts of assault by a prisoner. R. 5. Accordingly, the State was required to prove, as an element of the offense, that defendant was a prisoner. *See* Utah Code Ann. § 76-5-102.5 (1999) (providing that "[a]ny prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree"). Where the evidence established that defendant had been arrested for some unknown crime or crimes, the jury might have speculated about defendant's crimes, imagining them to be more serious than they were. Rather than face this risk, counsel might reasonably conclude that defendant's prospects at trial were better if the jury was made aware of the reason for his arrest. It was better for the jury to know that defendant was arrested on a warrant for shoplifting than to speculate that he had been arrested for a crime of violence. *Cf. Smulls v. State*, 71 S.W.3d 138, 156 (Mo. 2002) (*en banc*) (holding that "[i]t is a common and proper defense strategy to mention convictions first in order to soften the blow"), *cert. denied*, 537 U.S. 1009, 123 S.Ct. 503 (2002); *United States v. Williams*, 939 F.2d 721, 723 (9th Cir. 1991) (recognizing that counsel might reasonably introduce a defendant's criminal history to soften the impact later).[3]

A decision to elicit testimony regarding defendant's conviction for possession of a controlled substance was likewise reasonable. Defendant did not deny that he hit Phillips and Carnes, but claimed that they represented a threat to him at the jail and he therefore acted

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[3] Although these cases addressed defense counsel's preemptive introduction of evidence that could be introduced later by the prosecution, the strategy of ameliorating potentially damaging evidence is equally reasonable here.

in self-defense. R. 347: 124, 128-32; *see also* R. 347: 63-64, 156-58 (defense counsel's opening statement and closing argument). In cross-examining Deputy Quittner, defense counsel attempted to demonstrate that officers cannot always protect prisoners from other prisoners. *See* R. 347: 94-97. To establish the immediacy of the threat at the jail and the need to take proactive measures, defendant testified about his previous experience in the jail and the consequences of not taking immediate action to defend oneself. R. 347: 127-32. Trial counsel's decision to elicit this testimony, therefore, was an integral part of the defense and sound trial strategy.

Additionally, the decision to acknowledge both crimes reflected a strategy to establish defendant's candor and thus increase his credibility. *See* R. 347: 157 (stating in closing argument that they "were not saying this is a perfect man who's never done anything wrong"). Establishing the candor and honesty in a defendant is a valid trial strategy. *See State v. Moody*, 779 So.2d 4, 10 (La. App. 2000) (accepting counsel's explanation that she introduced defendant's prior arrests to establish his candor before the jury), *cert. denied*, 803 So.2d 40 (La. 2000). Moreover, by making the jury aware that defendant's prior criminal history consisted of only a drug possession conviction and a shoplifting arrest, counsel removed any risk that the jury would speculate that he had a long or violent criminal history.

Defendant contends that because his prior crimes were inadmissible if offered by the prosecution, his attorney's decision to introduce them was error. Aplt. Brf. at 9. This claim is unavailing. Even where a successful objection to evidence could be made, counsel's decision to refrain from objecting will not be deemed deficient if it "might be considered

sound trial strategy." *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (internal quotes omitted). As discussed, the decision to introduce the evidence was reasonable.

Defendant also fails to satisfy the second prong of the *Strickland* test. To satisfy the second prong, defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687, 104 S.Ct. at 2064. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. at 2067. Instead, defendant must demonstrate that "but for his counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different." *State v. Hovater*, 914 P.2d 37, 42 (Utah 1996) (*citing Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068), *abrogated on other grounds in State v. Litherland*, 2000 UT 76, 12 P.3d 92.

Defendant claims, without explanation or analysis, that but for the admission of his criminal history, "the jury would have returned a more favorable outcome." Aplt. Brf. at 9. This bald claim is insufficient. Indeed, counsel's strategy worked at least in part—the jury acquitted defendant of the first count charging him with assaulting Phillips. In the face of the deputies' unwavering testimony that defendant assaulted both Phillips and Carnes without provocation, it was no small accomplishment that defense counsel was successful in obtaining an acquittal on one of the two counts. In any event, the jury's knowledge that defendant was in jail would already have the effect of tainting defendant's image. Admission of testimony demonstrating that his criminal history was neither long nor violent would not add to that taint.

* * *

Defendant has failed to satisfy either prong of the *Strickland* test. His claim therefore fails. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 (holding that the Court need not "address both components of the inquiry if the defendant makes an insufficient showing on one").

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction.

Respectfully submitted July 16, 2004.

MARK L. SHURTLEFF
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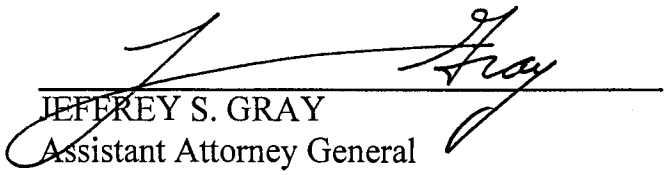

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2004, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Jean Fred Venord, by causing them to be delivered by first class mail to his counsel of record as follows:

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