

1963

State of Utah v. William Keith Burris : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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APR 13 1964

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

— vs. —

WILLIAM KEITH BURRIS,

Defendant-Appellant.

FILED

1963

Case

No. 9939

BRIEF OF RESPONDENT

Appeal From the Judgment of the
Fifth District Court for Iron County

HONORABLE C. NELSON DAY, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
 Plaintiff-Respondent,
— vs. —
WILLIAM KEITH BURRIS,
 Defendant-Appellant.

} Case
No. 9939

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an appeal from a judgment of the Fifth District Court of the State of Utah, finding the appellant, William Keith Burris, guilty of the crime of bastardy, in violation of Section 77-60-1, et seq., Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

Pursuant to an unanimous verdict, appellant was adjudged by the court to be guilty and was ordered to pay the clerk of the court the sum of \$40.00 per month for support, maintenance and education of the child born to

the complaining witness until the child should reach her 18th birthday. Appellant was further ordered to pay the actual hospital expenses incurred by the mother in prenatal care and delivery of said child, determined by the court to be \$309.30. Moreover, appellant was ordered to pay to the clerk of the court all costs of prosecution in the matter.

RELIEF SOUGHT ON APPEAL

Respondent requests this honorable court to affirm the judgment of the Fifth District Court.

STATEMENT OF FACTS

Respondent adopts the Statement of Facts contained under the heading, "State of the Case and the Issues Involved," in appellant's brief.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED NO ERROR IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Article VIII, Section 5, of the Constitution of Utah, provides in part:

“* * * All civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law. * * *”

This section, insofar as is pertinent to this case, is supplemented by Section 78-13-7, U.C.A. 1953, which provides as follows:

“In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; provided, that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this section. If none of the defendants resides in this state, such action may be commenced and tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where any of the parties resides or service is had, subject, however, to the power of the court to change the place of trial as provided by law.”¹

Section 77-60-1, U.C.A. 1953, holds that,

“When an unmarried female, pregnant or delivered of a child which by law will be deemed a bastard, *shall make complaint to a justice of the peace within the county where she may be so pregnant or delivered, or where the person accused may be found*, and shall accuse, under oath or affirmation, a person with being the father of such child, it shall be the duty of such justice to issue a warrant against the person so accused and cause him

¹ This statute was found to be constitutional and not inconsistent with Article VIII, Section 5 of the Utah Constitution above quoted, in the case of *Sanipoli v. Pleasant Valley Coal Co.*, 31 Utah 114, 86 Pac. 865, 10 Ann. Cas. 1142, which held that Article VIII, Section 5 means that the court shall transact the business of the court, the trial and disposition of all matters civil and criminal, in the county where the business exists unless a change of venue be had as by law provided.

to be brought forthwith before him, or, in his absence, before any other justice of the peace in such county.” (Emphasis supplied)

Assuming the statutes not to be exclusive of each other, and assuming them to be supplemental to one another, venue in bastardy cases can properly be (1) in the county where the unmarried female resides, or (2) in the county where the unmarried female delivers the child, or (3) in the county where the accused may be found, or (4) in the county where the cause of action arises (i. e., presumably where the child is born). In any event under no possibility under the facts of this case could the action be brought in any other county than Iron.

A bastardy proceeding, although prosecuted in the name of the state and criminal in form, is nevertheless civil. *State v. Reese*, 43 Utah 447, 135 Pac. 270; *State v. Steadman*, 70 Utah 224, 259 Pac. 326; *State v. McKnight*, 76 Utah 514, 290 Pac. 774; *State v. Kranendonk*, 79 Utah 239, 9 P. 2d 176.

Section 78-13-9, U.C.A. 1953, controls in regard to a change of venue. This statute provides:

“The court may, on motion, change the place of trial in the following cases:

“(1) When the county designated in the complaint is not the proper county.

“(2) When there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint.

“(3) When the convenience of witnesses and the ends of justice would be promoted by the change.

“(4) When all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon.”

The Supreme Court of this state in an early case, which has been adopted and followed in all subsequent cases on this question, held that the matter of a change of venue in any case where the court has jurisdiction is within the sound discretion of the trial court, subject to review and reversal only for an abuse of the discretion. See *State v. Carrington*, 15 Utah 480, 50 Pac. 526 (1897); *State v. Certain Intoxicating Liquors*, 53 Utah 161, 177 Pac. 235 (1918); *Winters v. Turner*, 74 Utah 222, 278 Pac. 816 (1929); *Chamblee v. Stocks and Tibbetts*, 9 U. 2d 342, 344 P. 2d 980. It seems obvious that there are no facts set forth in appellant's brief or in the record which would substantiate any claim that Judge Day abused his discretion in refusing to grant appellant's motion for a change of venue.

In regard to appellant's assertion that the fact that the jury took a relatively short time to reach its verdict is indicative of pre-judgment of the case. It is a well-established principle that the fact the jury returns a verdict after deliberating only a short time does not, standing alone, justify a conclusion the jury acted capriciously or was actuated by passion or prejudice. See *Thomas v. Atlantic Coast Line R. Co.*, 221 S. C. 462, 71 S.E. 2d 403

(1952), where in a negligence action the jury returned a verdict for plaintiff after only twenty minutes' deliberation.

It certainly cannot be asserted that the fact that the jury took a short time to reach its verdict is indicative of any pre-judgment of the case on their part, particularly considering the extended and tedious examination and cross-examination of all witnesses.

POINT II

THE REFUSAL OF THE TRIAL COURT TO GRANT APPELLANT AN IMMEDIATE TRIAL DOES NOT CONSTITUTE A VIOLATION OF ANY CONSTITUTIONAL, STATUTORY, OR COMMON LAW RIGHT OF APPELLANT.

In support of appellant's position that error was committed by the trial court in denying appellant's motion for an immediate trial, appellant cites Article I, Section 12, of the Utah Constitution, which provides in part as follows:

*“In criminal prosecutions the accused shall have the right * * * to have a speedy public trial by an impartial jury * * *.”* (Emphasis added)

It is well established in the State of Utah that even though prosecuted in the name of the state and criminal in form, a bastardy proceeding is nonetheless civil. *State v. Reese*, supra; *State v. Steadman*, supra; *State v.*

McKnight, supra; *State v. Kranendonk*, supra. Thus, it is clear that the constitutional provisions cited by appellant are inapplicable.

Moreover, the Federal Constitution, which uses exactly the same language, is only applicable to federal criminal action, and has no pertinency in state litigation whatsoever. See *Falkowski v. Mayo*, 173 F. 2d 742.

Section 77-60-4, U.C.A. 1953, says:

“If the defendant pleads not guilty to such information and the case is set for trial on the issue of fact, and *at the day appointed for such trial the woman has not been delivered or is unable to attend, the court may continue the case*, but shall require the defendant to give such security as the court may deem just to insure his presence to answer such information after the birth of the child; and if such mother is not able to attend on the day appointed, such security shall remain in full force until she is able to attend.” (Emphasis supplied)

The record (p. 10) indicates that appellant filed his motion May 7, 1962. At that time Miss Bauer was not yet delivered and indeed did not deliver until October 14, 1962, (See R., p. 14, Defendant’s Exhibit No. 1) about two months prior to the time the trial was actually convened.

Appellant may contend that this statute is not appropriately asserted because Judge Day had not set this matter for trial and there was not a continuance. While this may be true, the statute manifests the policy which

justifies Judge Day in denying the demand for immediate trial, for if the trial court is authorized by statute to grant a continuance until the injured woman is delivered, why can it not refuse to set down a trial date *initially* until the child is born?

Even assuming that the federal and state constitutional requirements for a speedy trial were present in this case, the facts herein still don't reveal prejudicial error. A "speedy trial" guaranteed to one charged with a criminal offense by both federal and state constitutions is relative, and dependent upon the surrounding circumstances. *Hanson v. Ragen*, 166 F. 2d 608, cert. den. 334 U.S. 849, 68 S. Ct. 1501, 92 L. Ed. 1772. It has been held that even a lapse of three years did not deprive defendant of a speedy trial where defendant didn't show that he was adversely affected in the preparation or prosecution of his defense. *U. S. v. Holmes*, 168 F. 2d 888.

POINT III

THE TRIAL JUDGE'S INSTRUCTIONS, INDICATING THAT THE FACT AN ACCUSATION WAS MADE AGAINST DEFENDANT WAS NO EVIDENCE, DID NOT CONSTITUTE AN INSTRUCTION TO IGNORE SOME OF THE EVIDENCE AND, THEREFORE, WAS NOT PREJUDICIAL ERROR.

Appellant complains that Judge Day, in Instruction No. 8, by advising the jury that the fact that a complaint had been filed did not necessarily indicate the guilt of

defendant, committed error. In this regard, it should be noted that while the court said:

“You are instructed that this matter arose and came before the court based upon the complaint of Bonnie N. Bauer and the information filed by the district attorney. The complaint and the information are in substance and effect legal pleadings and a way of getting the matter before the court for determination. However, such documents are not evidence and the fact that an accusation is made is not evidence. Also the fact that the court instructs you concerning the making on an accusation against the defendant is in itself no evidence and is not to be taken as any indication that the court either believes or does not believe the allegation of the said legal pleadings.”

The court also submitted to the jury the copies of the complaint which were introduced and accepted into evidence during the course of the trial for the purpose of impeaching the complaining witness's testimony. Therefore, it is obvious that the instruction pertained to the original complaint, which was filed in the matter, and had absolutely nothing to do with the copies which were introduced by defendant in the course of the trial as evidence. These, of course, were submitted to the jury for inspection and for their consideration and there can be no doubt that the jury understood that this instruction pertained to the original complaint and not to the copies which were introduced for the purposes of impeachment by defending counsel.

POINT IV

THERE IS NO EVIDENCE IN THE RECORD TO SUBSTANTIATE THE CLAIM THAT THE JURY FAILED TO CONSIDER THE EVIDENCE.

Appellant concludes from the fact that a juror was overheard to remark that he was getting tired during the course of the tedious direct and cross examinations, and the fact that the jury was out only twenty minutes, that they failed to consider the evidence submitted. Suffice it to say that there is no rule of law which requires individual jurors to make up their minds in the jury room or even to discuss the evidence submitted in the jury room. It seems obvious that jurors at the conclusion of the oral testimony and an examination of the written exhibits could reach an answer to the question of guilt or innocence without discussing with other jurors or mulling over possibilities with other jurors in the jury room. It is, moreover, clear that all of the jurors were of one mind on the first ballot and that extended discussion or argument was totally unnecessary after each juror's opinion was manifested in the jury room. Therefore, any assignment of error based on such a claim is indefensible.

POINT V.

THERE IS SUFFICIENT LEGALLY ADMISSIBLE EVIDENCE TO SUPPORT THE UNANIMOUS VERDICT OF THE JURY.

Appellant takes issue with the conclusion of the jury

on the grounds that the evidence submitted on the part of the State was not sufficient to justify a conviction. In regard to this claim, respondent respectfully calls this court's attention to the case of *State v. McCune*, 16 Utah 170, 51 Pac. 818 (1898), wherein this court appropriately stated:

“* * * But all the surrounding circumstances were shown to the jury, and they found the issues against the defendant. If the jury believed the testimony offered on the part of the prosecutrix, it was clearly sufficient to justify the verdict found. In such cases, and under such circumstances, it is not within the legal power of this court, under the constitution of this state, to substitute its judgment for that of the jury, even if so inclined. This question has been passed upon by this court so frequently that it is unnecessary to give further reasons, or cite authority, in support of the position taken.”

It would be superfluous to state authorities for the often announced principle that if there is substantial evidence to support the conviction, the Supreme Court will not examine the weight of the evidence favoring the conviction even though there is a conflict of evidence.

In regard to appellant's claim that there are substantial conflicts and inconsistencies in the prosecuting witness's testimony, it is clear that if the facts are as appellant urged at trial, there would be inconsistencies. However, the jury either did not accept the facts urged by appellant which would indicate inconsistencies in the prosecuting witness's testimony or they concluded that

notwithstanding these apparent inconsistencies, Miss Bauer's relevant testimony was true.

In regard to appellant's assertion that the latest act of intercourse was not within the period of gestation, it can readily be seen that conception is highly probable on the days alleged in the complaint. (Record, page 151, lines 29-30; page 152, lines 1 to 12.) But, it was also established that if the conception took place on either February 2nd or February 11th, the acts of intercourse would be within the period of gestation. (See Record, page 222, lines 29-30; page 223, lines 1 to 22.) These facts were testified to by defendant's own witness, Dr. Graft.

CONCLUSION

The respondent respectfully submits that appellant has not set forth any reason which would warrant an award of the relief for which he asks.

Respectfully submitted,

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