

1963

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Patrick H. Fenton; Attorney for Appellant;

Recommended Citation

Brief of Appellant, *State v. Burris*, No. 9939 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4315

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

APR 16 1964

In the Supreme Court
of the State of Utah

LAW LIBRARY

JUL 15 1963

Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

WILLIAM KEITH BURRIS,

Defendant and Appellant.

Case No. 9939.

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH,
IN AND FOR IRON COUNTY, UTAH

Hon. C. NELSON DAY, Judge

PATRICK H. FENTON,
Attorney for Appellant.

Address:

13 West Hoover Ave.
Cedar City, Utah

INDEX

	PAGE
STATEMENT OF THE CASE AND ISSUES INVOLVED	1
ARGUMENT	2
Point I. The Court erred in denying defendant's motion for change of venue	2
Point II. Defendant's rights were denied by the trial court's failing to grant immediate trial	3
Point III. The trial court instructed the jury to disregard some of the evidence	4
Point IV. The jury failed to consider the evidence.	5
Point V. The evidence did not justify a conviction	5
CONCLUSION	13

TABLE OF CASES CITED

State vs. Steadman, 259 P 326, 70 Utah 224	12
State vs. Hunt, 368P2d 263, 13 Utah 2d 32	12
State vs. Reese, 135 P 270, 43 Utah 447	12
State vs. Hammond, 148 P 420, 46 Utah 249	12
Anderson vs. State, 238 P 257, 65 Utah 512	12

TEXTS CITED

Williams on Obstetrics, 12 Edition, revised by Eastman and Hellman, page 105	11
Williams on Obstetrics, 12th Edition, revised by Eastman and Hellman, Page 103	11
10 CJS, BASTARDY, Section 96, page 181	11

CONSTITUTIONS CITED

Constitution of the United States of America, Amendment VI	3
Constitution of the State of Utah, Article 1, Section 12	3 & 4

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

WILLIAM KEITH BURRIS,

Defendant and Appellant.

Case No. 9939.

APPELLANT'S BRIEF

STATEMENT OF THE CASE AND THE ISSUES INVOLVED

This matter comes before the court upon an information charging the defendant with Bastardy, charging in effect that as the result of acts of sexual intercourse on or about the 2nd day of February, 1962, and on or about the 11th day of February, 1962, in Cedar City, Iron County, Utah, with one Bonnie Ann Bauer, an unmarried female, said Bonnie Ann Bauer became pregnant and that the defendant was the father of said child.

A plea of not guilty was entered by the defendant, and after many delays, defendant was tried in December of 1962 before an Iron County jury which unanimously found him guilty. Thereafter an order was filed by the court on

or about the 14th day of February, 1963. Judgment was imposed by the District Court of Iron County, Utah. From this order of judgment and from this verdict of the jury, defendant appeals.

A R G U M E N T

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S
MOTION FOR CHANGE IN VENUE.

On the 12th day of April, 1962, the defendant caused to be prepared a motion for change of venue, which was filed on the 13th day of April, 1962, and which was argued on a regular law and motion day thereafter. The court denied the motion for change of venue. The circumstances of this motion for change of venue were very similar to the old case of State of Utah vs. Brasch and Sullivan that was before the Supreme Court of the State of Utah and the United States Supreme Court several times, in which a motion for change of venue was denied by the trial court by and for the reason that it was not properly supported. In the Brasch and Sullivan case, the only information that could be made available, because of the refusal of people to sign statements and affidavits, was the affidavit of counsel as to the effort that he had made, and the reply he had received. Thereafter, after spending two days and going through approximately 120 jurors and failing to get a jury because of the prejudice that was shown in the prospective jurors, said motion was reinitiated and was allowed. In the case at bar, a motion for change of venue was supported only by the affidavit of the defendant, which showed without any question that the matter had received complete publicity throughout the county, and that it was impossible to call a jury trial on this item. The trial court denied the motion for change of venue, and erred in so doing. The minutes of the court reveal that the jury was

out less than 20 minutes and could not possibly have considered the evidence during that time as well as organize. Under these conditions, there is no question that the jury's mind was made up prior to trial, and that the trial court erred in failing to grant the motion for change of venue.

POINT II

DEFENDANT'S RIGHTS WERE DENIED BY TRIAL COURT'S FAILING TO GRANT IMMEDIATE TRIAL.

It is noted that the alleged acts of sexual intercourse were on the 2nd of February, 1962, and the 11th of February, 1962. The complaint was filed in March, 1962, and a warrant of arrest was issued on the 16th day of March, 1962, and was delivered to the sheriff on the 20th day of March, 1962, and arrest was made on that day. On the day of arrest, had an act of sexual intercourse occurred on the 2nd day of February, 1962, and the complainant was pregnant therefrom, said pregnancy on the date of arrest was approximately six or seven weeks. A preliminary hearing was held on this matter at the request of the defendant on the 26th day of March, 1962, and same was bound over to the District Court. The defendant appeared in the District Court in April of 1962 on this matter, and thereafter, on the 4th day of May, 1962, caused to be made a demand for immediate trial which was filed and served on the 7th day of May, 1962. The trial court denied same on the basis that there could not be a trial until there was a child.

Both the Constitution of the United States and the Constitution of the State of Utah, speaking of rights of an accused person, guarantee a speedy public trial. This is accomplished in Amendment VI to the Constitution of the United States, one of the amendments that constitute the Bill of Rights: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial." And in the Constitution of the State of Utah, Article I, Section 112,

the same language is used, "to have a speedy public trial." In both instances, the terminology is used in criminal prosecutions. This again raises the question as to whether or not a bastardy prosecution is a criminal prosecution. While there are cases of that nature which hold that for certain purposes it is not a criminal prosecution, at the same time it is tried by the State, in the name of the State, by an information filed by the District Attorney, and in most instances, the procedure that is followed is the criminal procedure rather than civil procedure. Under these circumstances, when the trial court denied the demand for immediate trial for the defendant William Keith Burris, it failed to protect his constitutional rights.

POINT III

THE TRIAL JUDGE INSTRUCTED THE JURY TO DISREGARD SOME OF THE EVIDENCE.

In the above entitled matter, during the trial many of the proceedings were put into evidence, the purpose being to show that the prosecutrix had made many conflicting statements as to when the alleged actual sexual intercourse took place. Both the complaint, the amended complaint and the information were placed in evidence for this purpose. Thereafter, in Instruction No. 8, the trial court gave the strict instruction to the effect that pleadings were to serve as a means of placing a matter before the court, and that these items were not evidence. However, when the documents themselves had been entered in evidence, and copies of the documents were entered as exhibits, then and under these conditions, the court's instruction No. 8 became improper, and amounted to an instruction to the jury to disregard a portion of the defendant's evidence. Any instruction that instructs a jury to disregard evidence that has been admitted as evidence is improper. This item alone should be the basis for reversal.

POINT IV

THE JURY FAILED TO CONSIDER THE EVIDENCE.

There is no question that the jury had entered the trial with its mind already made up due to the local publicity on this matter, and it is noted that the jurors were discussing this matter long before the State's case was completed, and had made up its mind prior to the completion of the case of the State. This information is set forth in the transcript on Page 113, Line 16; remarks made by one of the jurors named Stapley had been overheard in the hall during recess. This matter was brought to the court's attention, and upon being questioned by the court, Juror Stapley answered, "I did make the remark in the hall as we was coming in that we did get a little tired sitting here yesterday listening to cross examination and that was all that was said."

Bearing in mind that the transcript of the preliminary hearing was entered in evidence, and the jury was out less than 20 minutes, there is no question that the jury had made up its mind long before submission to the jury, and had made up its mind prior to the trial and resented any time spent on the matter.

POINT V

THE EVIDENCE DID NOT JUSTIFY A CONVICTION.

As the trial court's rule, it is the State's duty to present a preponderance of evidence in connection with this matter. The State did not at any time present a preponderance of evidence, and the evidence as presented by the State did not any any time justify a conviction of the defendant in connection with this matter.

There is no question that Miss Bauer, the prosecutrix, made several conflicting statements as to when the alleged

acts of sexual intercourse took place, which should entirely discredit her testimony. In the first place, according to her testimony, both in the preliminary hearing and the trial, and the transcript of the preliminary hearing was submitted to the jury, Miss Bauer went to Dr. Williams two or three weeks after the alleged act of intercourse. At that time she told him that the act of intercourse was on the 4th of February. This may be found in the transcript of the preliminary hearing at Page 15, Line 24, "she mentioned that she'd had intercourse, I believe, it was the 4th of February. That's the only date she mentioned to me."

The complaint which was entered in evidence was sworn to by Miss Bauer and states that there was an act of sexual intercourse on or between the 2nd day of February and the 11th day of February, 1962. At a later time she told two individuals there was only one act of sexual intercourse. This is found in the transcript of the preliminary hearing on Page 61, Line 1, "Q—And you told them specifically that there was only one act of sexual intercourse, didn't you? A—I told them that at the time."

Also, when Miss Bauer first told her parents concerning the alleged acts of sexual intercourse, she told them the act took place on different days from those she has stated in the complaint. On 26 March, 1962, when her mother was testifying in relation to the preliminary hearing, Page 68. Line 29, Q—And did she tell you there had been more than one time?" This discussion continues on Page 69, Line 1, "A—No, not right then. She just told us when it happened. Q—And when did she say? A—She said it was Friday at his home. Q—What date would that be? A—I don't remember the dates. Q—And when she first told you about it, it would have been somewhere near the last of February or early in March? A—It was—it would be the last of February, yes. Q—It was definitely after the 11th, was it? A—Yes."

It was rather disconcerting that this discussion took

place on the 26th of March in the preliminary hearing on the above entitled matter, in which a young lady tells her mother she is pregnant from an act of intercourse on a Friday, and has made this statement within a month of the time of the alleged acts of sexual intercourse, and an examination of the 1962 calendar for February reveals the 9th of February was a Friday, and Mrs. Bauer called Mr. Burris about Friday, Feb. 9, 1962. Under these circumstances, where a young lady tells her mother one date, the doctor another, signs a complaint to the fact that it was between the 2nd of February and the 11th of February, and then signs an amended complaint to the effect that it was on the 2nd of February and the 11th of February, It cannot help but lead one to the question as to whether or not the act every took place at all. Certainly these dates were much better remembered in February and March immediately after the act, if there was one, than in December after a child had been born. Certainly the doctor's being told the 4th of February raises the question as to when the act took place. History is replete with instances in which a young lady becoming pregnant looks around to see who the best catch is. In this instance, having told her mother that it was the 9th of February, finding out the defendant could account for himself on the 9th; then switching to the 4th of February, and finding out the defendant could account for himself on the 4th; then switching to a double occasion on the 2nd and 11th of February, after having told two other individuals, same being her bishop and a stake president, that it was a single act, the question is raised as to whether or not she knows when said alleged act of intercourse took place, and if so, when?

Also, the testimony of Bruce Decker, which is in no way contested, raises a serious question as to whether or not Miss Bauer was in Cedar City on the night of the 2nd of February, 1962. In the transcript of the trial on Page 91, Line 29, in response to a question, "Did you see the basket-

ball game between Cedar and St. George that was played in St. George," Miss Bauer answered, "Yes, I went to one game there." The testimony of Bruce Decker who was the coach of the team, to the effect that his team played in St. George on 2 February, 1962, is found in the transcript of the trial on Page 172, commencing on Line 13, to and including Line 3 on Page 174. One cannot help wondering as to the authenticity and reliability of Miss Bauer's testimony pertaining to the alleged act of sexual Intercourse in Cedar City the evening of the 2nd of February, 1962, and her testimony that she saw the ball game at St. George, which according to the records of Mr. Decker, was played in St. George on the 2nd of February.

Also, the probability of conception under the circumstances related by Miss Bauer lends very little creditability to her testimony. Although in the preliminary hearing Miss Bauer testified that did climax as part of the act of sexual Intercourse, Dr. Graff said that this could not happen. The testimony of Miss Bauer to this effect is found in the transcript of the preliminary hearing on Page 39, Line 23, where in response to the question, "What do you mean by 'we did finish?'," she answered, "Well, we went to the climax." From this point on in the transcript of the preliminary hearing, to line 8 on Page 40, a good deal of detail was gone into by the cross-examiner to make certain that this testimony was not a mistake. It became quite apparent that the young lady meant what she said. Dr. A. LaMar Graff, Jr., at the time of the trial testified, in his opinion, to the effect that there is no possibility of a female having a climax as part of her first sexual act. This is found commencing at Page 221, Line 27, being a question and answer and the next question and answer, commencing "Now, Doctor, from a medical standpoint, what is the probability that a female will climax on her first sexual act?, and ending, "If an opinion means anything, I'd say it was nil." Also, the medical testimony in connection with

this matter is such that there appears to be very little probability that there was any conception or could have been conception at the time testified by Miss Bauer. Under the circumstances of this matter, it is necessary to entirely discount the testimony of Dr. Williams because of admitted prejudice against the defendant. This prejudice is found in the transcript of the trial at Page 151, Line 6, "Q—Doctor, have you ever objected to your daughter going out with Mr. Burris? A—Yes." It is further apparent that there was a definite prejudice on the part of Dr. Williams in his various attempts to say that the child was born premature. A very definite answer on the question can be found in the transcript on Page 141, Line 10, 'Q—Now, Doctor, in that first paragraph about 14 lines down, there is a sentence, 'There is general agreement that 2500 grams (5 pounds eight ounces) should make the upper boundary of prematurity, that is, the borderline between a premature and a mature infant.' Would you tell us what that means please?" A—"Well, it doesn't mean anything specific." From that point on, there is a great deal of vague testimony from Dr. Williams to the effect that the child was premature. However, there is no question that this is an afterthought. Although Dr. Williams attended at the delivery, the records of the delivery room were brought into the courtroom and identified by the custodian. Then Berniece Bulloch, who was a nurse in the delivery room and who made the records, and show definitely that at the time of the birth the entry was made on the records, "Apparently normal male child." This is found in the transcript of the trial, Page 209, Line 12, and stopping on Page 210, Line 12. Although Dr. Williams supervised the delivery, no evidence of abnormality was recorded at the time of delivery, and no record was made of same in any hospital record, and at the same time a question comes up, why was Dr. Williams, even though present, attempting to show an apparently normal male child was in effect

premature? The answer is, of course, the child was born on 14 October, 1962, and could just as easily have been conceived a month earlier than Miss Bauer testified. The testimony of Dr. Graff on this point, Page 221 of the transcript, was to the effect that in a normal situation with the last menstrual period having commenced on 22 January, the child would have been born between the 22nd of October and the 5th of November; also that if the normal period last named commenced on the 23rd of December, 1961, the child would have been born between the 22nd of September and the 5th of October of 1962; also to the effect that if a boy, they generally went over. Under these circumstances, where the child was born the 14th of October, which would be between the midway of the two normal periods for the child to have been born, based upon the various times the last menstrual period commenced, and with the probability that if a boy it would be over, and where a male child was born, and will all hospital indications, normal, it seems that there is a strong probability that the conception was prior to the time indicated by Miss Bauer. This is even more important when it is taken into consideration that on 2 February, 1962, Miss Bauer was to a basketball game in St. George between Cedar City and St. George, which according to Coach Bruce Decker, was played the 2nd of February, 1962. Also, that Dr. Graff, on Page 224, Line 14, of the trial transcript, was asked questions to the effect that if an act of intercourse took place on the 2nd of February and conception followed therefrom, what would be the normal birth date of a boy, and he answered to the effect that it might be as late as November, this pertaining to the actual alleged act of intercourse, which was claimed to have taken place the night Miss Bauer was in St. George, when she testified she was in Mr. Burris' apartment in Cedar City. In the event of an alleged act of intercourse on the 11th of February, which would be nine days later, this date shifts all the

dates nine days later, on which Dr. Graff testified on Page 224, commencing Line 23, to the effect that it could be as late as the 9th of November, and that if a boy it might go over a few days. Under these circumstances, with a male child born on 14 October, and it was apparently normal according to hospital records, one is led to question the time of conception of Miss Bauer. While the testimony of Dr. Graff, and to a certain extent, Dr. Williams, even though prejudiced, does not rule out completely the possibility of conception during the period indicated by Miss Bauer, it certainly shows that this was improbable. This is especially true when one takes into consideration that this testimony was given showing what was meant by a chart on Page 105 of Williams on Obstetrics as revised by Eastman and Hellman 12 Edition, and where this is accepted as complete authority on obstetrics, and is today being used as the text on obstetrics and gynecology at the University of Utah Medical School. In court, part of the testimony was given to explain a chart on Page 103 of said text, and photostats of the charts in both instances have been entered in evidence, and the testimony, together with the charts, shows that there is very little probability of conception from either alleged act of intercourse, both of which acts are denied by the defendant. This defendant has never admitted intercourse with Miss Bauer under any conditions whatsoever, and maintained throughout the trial that there was no intercourse.

10 C.J.S. on Bastardy, Section 96, Page 181, pertaining to the period of gestation, advances the premise that the evidence must be sufficient to show intercourse by the defendant with the prosecutrix within the period of gestation. Under the circumstances of this matter, there is no probability that the alleged acts of intercourse as testified by the prosecutrix were within the period of gestation and produced the child. This rule is endorsed by the State of Utah by the Supreme Court thereof, in the case of

State vs. Steadman, 259 P. 326, 70 Utah 224; also in State vs. Hunt, 368 62d 263, 13 Utah 2d 32. In addition, the showing of within the period of gestation is endorsed by the Utah Supreme Court on the following items, State vs. Reese, 135 P. 270, 43 Utah 447; State vs. Hammond, 148 P. 420, 46 Utah 249, and Anderson vs. State, 238 P. 557, 65 Utah 512. In the case of the State vs. Reeves, which was reversed and remanded on this basis, there is a specific statement to this effect:

“Before the accused can be found guilty, however, the State must prove by a preponderance of the evidence that he had sexual intercourse with the prosecutrix within the period of gestation, and unless this is done, both his conduct and that of the prosecutrix outside of that period are, ordinarily, wholly immaterial and irrelevant.”

This should be applied to the case at bar where there is testimony from the prosecutrix that the alleged acts took place outside the normal period of gestation, where it is more than probable from a medical standpoint that conception had taken place a month earlier than the prosecutrix testified, where the defendant admits no intercourse whatsoever, and where an individual witness testified that at the time the alleged act of intercourse took place, the prosecutrix was in another situation, and where the prosecutrix told her parents that the alleged act of intercourse took place on the 9th of February, told the doctor that it took place on the 4th of February, swore to one complaint that it was between the 2nd of February and the 11th of February, swore to an amended complaint that it was **on** the 2nd of February **and** the 11th of February. Bearing all this in mind, one would raise the question as to whether or not the young lady knows whether or not she at any time had sexual intercourse, and where in all probability the sexual intercourse took place a month earlier than the testimony of the prosecutrix.

One should also bear in mind that this was an item that had been discussed in a small rural community for a period of time in excess of the normal birth time of the child; that the defendant had been denied immediate trial and change of venue, and that the jury at no time paid any attention to the testimony being offered by the defense and resented being called upon to listen to the cross-examination of the first witness. The conviction of this defendant appears to be an endorsement of the age-old saying, "The minute a girl points a finger at a man, he doesn't have a chance."

CONCLUSION

That there is no evidence upon which to base a conviction. That the evidence rather than being a preponderance of evidence of the guilt of the defendant, is actually a preponderance of evidence of his innocence. That the defendant's rights were abridged by the court. That the jury had a pre-conceived opinion and paid no attention to the evidence. That the Judge instructed the jury to disregard part of the evidence. That the defendant was denied his constitutional right of an immediate trial, and was erroneously denied a change of venue. Because of these errors the acquittal of the defendant should be ordered.

Respectfully submitted,

PATRICK H. FENTON,
Attorney for Appellant