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The State of Utah v. Jerry Peloud Leggroat : Brief of Respondent

Utah Supreme Court

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APR 16 1968

LAW 15
IN THE SUPREME COURT
OF THE
STATE OF UTAH E D

DEC 20 1968

THE STATE OF UTAH,
Plaintiff and Respondent,

Supreme Court, Utah

— vs. —

Case No. 10004.

JERRY DELOUD LEGGROAN,
Defendant and Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
Honorable Marcellus K. Snow, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

JERRY DELOUD LEGGROAN,

Defendant and Appellant.

Case No. 10004.

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant has appealed from his conviction for the crime of robbery in violation of 76-51-1, U.C.A. 1953.

DISPOSITION IN LOWER COURT

The appellant was tried upon jury trial in the Third Judicial District Court, Salt Lake County, and was found guilty of the crime of robbery and sentenced to be committed to the State Prison.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the trial court should be affirmed.

STATEMENT OF FACTS

The respondent adopts the statement of facts set out in the appellant's brief except to the extent that the record

may reveal that they have not been stated in a light most favorable to the jury's verdict, and to the extent that they may be supplemented in the argument portion of this brief.

Appellant raises three points on appeal, all of which relate to the question of whether or not the trial court should have allowed the Preliminary hearing testimony of Robert S. Ross, a witness to the robbery, who was unavailable at trial, to be read to the jury.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE TRANSCRIPT OF THE TESTIMONY OF ROBERT S. ROSS, GIVEN AT THE PRELIMINARY HEARING OF THE APPELLANT'S TRIAL, TO BE RECEIVED IN EVIDENCE IN THE ABSENCE OF AN ATTEMPT BY THE PROSECUTION TO OBTAIN THE PRESENCE OF MR. ROSS, PURSUANT TO 77-45-13, U.C.A. 1953.

Appellant, in his first point, contends that it was error for the trial court to allow the transcript of the testimony of Robert S. Ross, given at preliminary hearing, to be received by the jury in the absence of a showing that the prosecution attempted to procure Mr. Ross pursuant to 77-45-13, U.C.A. 1953. 77-45-13, U.C.A. 1953 is part of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. The Act was adopted in Utah in 1937 and allows the State to secure the attendance of witnesses from outside the jurisdiction where the state in which the proposed witness is also located recognizes by comity the request of the State of Utah. The act provides for the attendance of the witness in the requesting state but after a hearing has been held on the matter. (Uniform Act, Sec. 2).

In the instant case, the witness, Mr. Ross, could not be located in the State of Utah. An attempt was made by the

Salt Lake County Sheriff's Office to serve a summons upon the witness, but he was apparently not present within the State of Utah as the subpoena could not be served and there was no record of any residence in the State of Utah. His last known address was listed as 309A North Street, Sausalito, California. The witness was, therefore, not available to process from the State of Utah in the absence of the application of the Uniform Act.

It is well settled that the absence of a witness from the state is a sufficient reason for allowing the testimony of the witness previously given at preliminary hearing to be read to the jury. *State v. Vance*, 38 Utah 1, 110 Pac. 434 (1910). The appellant argues that the Uniform Act embodied in Chapter 45 of Title 77, U.C.A. 1953, should change that rule, and that an additional requirement should be met that the prosecution attempt to obtain the attendance of the witness pursuant to the act.

It does not appear that this court has previously considered this matter. However, those jurisdictions that have have uniformly rejected the argument now advanced by the appellant. At the outset, it should be noted that 77-45-13 does not make mandatory the requirement that the prosecution attempt to obtain a witness who is out of state. The act expressly states (77-45-12, 13) that the court "may" secure the attendance of witnesses after going through the procedure required by the act, including the right to a hearing. The act in no way indicates that its provisions are mandatory in criminal cases, but rather, the act appears to be discretionary and permissive based upon the needs of the parties, the materiality of the witness's testimony and the hardship to the witness in providing for his return.

In *People v. Serra*, 301 Mich. 124, 3 N.W.2d 35 (1942), the Michigan Supreme Court was faced with a similar contention that the Uniform Act made it mandatory that the prosecution attempt to obtain the presence of a material witness by the act. The question posed by the court was:

“It is conceded that the prosecution made no attempt to procure the return of Briggs from New York under this statute. Was the failure to do so reversible error? * * *”

The court then went on to note:

“* * * It is not error for the court to refuse to compel the prosecution to call witnesses whose names are endorsed on the information who are not within the State and answerable to process of the court. * * *”

In considering the effect of the Uniform Act, the Michigan Supreme Court stated:

“* * * Does the 1931 statute, *supra*, change the common-law rule? It does not in express terms impose any duty on the prosecutor to apply to the court for a certificate, or to make application to a judge of a court of record in another State for any process under the laws of that State. It imposes no mandate that the court of either State shall act — the issuance of the certificate is discretionary. Seemingly, either the prosecution or the defense may avail itself of the procedure offered.”

* * *

“The Michigan law does not make it mandatory that the prosecution apply to the court in another State for process to compel return of a witness to this State. The procedure is optional with either the prosecution or the defense. In the case at bar, the defendants had full knowledge, and equal opportunity. The showing of diligence was sufficient to excuse the people from the requirement to produce Briggs as a witness. The prosecutor is not required to resort to the procedure referred to in this statute.”

The court went on to note that the necessity of the hearing in the state where the witness is located and the fact that the act is dependent upon comity makes difficult, at best, the securing of a witness by the use of the Uniform Act, and

felt that such difficulties were sufficient reasons so that the Legislature did not intend that the act be an obstacle to be complied with before the prosecution could validly dispense with the testimony of a material witness.

Subsequently, in *People v. Hunley*, 313 Mich. 688, 21 N.W.2d 923 (1946), the Michigan Supreme Court considered the identical problem now before this court. The testimony of a witness subsequently absent from the state was allowed to be received in evidence based upon a transcript of his testimony given at preliminary hearing. The court rejected the same contention made by the appellant in the instant case. It did so stating:

“* * * In *People v. Serra*, 301 Mich. 124, 3 N.W.2d 35, we held that the statute was not mandatory; the prosecution need not apply for a certificate so as to extradite a material witness in a pending cause. The statute authorizing the requiring of bail by a material witness permits the court to demand it if he believes that there would be a loss of the testimony of such witness if he does not attend. There could not be a loss of the testimony of this witness as he had already testified. Testimony taken before a magistrate may be read if the witness is not present and reasonable effort has been made to subpoena the witness. In *People v. Veitenheimer*, 229 Mich. 409, 201 N.W. 475, we held that upon a showing that the witness had enlisted in the army and was not in the State, his testimony taken at the examination could be read. See also, *People v. Gibson*, 253 Mich. 476, 235 N.W. 225; *People v. Droste*, 160 Mich. 66, 125 N.W. 87. Nor is the fact that defendant did not have an attorney at the hearing before the magistrate but cross-examined the witness herself sufficient reason for not using Carue’s testimony. In *People v. Myers*, 239 Mich. 105, 214 N.W. 130, we held that the testimony before an examining magistrate might be read at the subsequent trial even though there had been no previous cross-examination of the witness, it being only necessary that an opportunity for cross-examination had been present. * * *”

The Court of Appeals of Maryland in *Conte v. State*, 184 A.2d 823 (Md. 1962), in a dicta pronouncement recognized and approved the Michigan decisions. In doing so,

the court noted a holding of the Supreme Court of the State of Arizona in *State v. Jordan*, 83 Ariz. 248, 320 P.2d 466, in which that court ruled that the act was permissive and not mandatory.

In *People v. Day*, 219 Cal. 562, 27 P.2d (Cal. 1933), the California Supreme Court was faced with a claim of error that the trial court had acted improperly in allowing the testimony of a witness given at preliminary hearing to be received over objection in the absence of an attempt by the prosecution to provide for the attendance of the witness by bail bond. The court rejected the contention that the District Attorney was under a mandatory duty to proceed pursuant to statute to secure the attendance of the material witness. The court stated:

“The District Attorney was not bound to proceed under that section.”

The court affirmed the conviction.

In *People v. Liner*, 168 Cal. App. 2d 411, 335 P.2d 964 (1959), an objection to the use of the testimony of a material witness given at preliminary hearing was predicated upon the failure of the prosecution to attempt to secure the presence of the witness under the Uniform Act (Penal Code, Secs. 1334 to 1334.6). The court rejected the contention that the trial court acted improperly in allowing the use of such evidence. The court stated:

“Appellant contends that the trial court erred in permitting the testimony of George Katz taken at the preliminary hearing to be given as evidence at the trial, claiming that the prosecution should have been required to utilize sections 1334–1334.6 of the Penal Code relating to procuring the attendance of a witness outside the state of California. The questioned testimony was properly admitted under the provisions of section 686, subdivision 3, of the Penal Code, which provides that the deposition of a witness at the

preliminary hearing may be read at the trial upon it being satisfactorily shown that the witness can not with due diligence be found within the state.

* * *

Apparently the precise question here involved has not been passed upon by the courts of this state. However, in *People v. Cahan*, 141 Cal. App. 2d 891, 297 P.2d 715, Lee Cobert, the victim of a robbery, was in Las Vegas, Nevada, at the time of trial and the court permitted the prosecution to read in evidence his testimony taken at the preliminary hearing. The defendant requested a continuance for the purpose of taking Cobert's deposition under the Uniform Act to secure the attendance of witnesses from without the state in criminal cases. Pen. Code, secs. 1334–1334.6. The request was denied and it was held that the court did not abuse its discretion in denying a continuance.

In the instant case we find no reversible error in the action of the trial court in permitting the prosecution to read in evidence the testimony of George Katz taken at the preliminary hearing."

In *People v. Terry*, 4 Cal. Rep. 597, 180 Cal. App. 2d 48 (1960), the court rejected a contention identical with that now urged by the appellant. It did so stating:

"It is also contended that the attendance of the witnesses should have been compelled by utilizing Section 1334 et seq. of the Penal Code. With the consent of the reciprocating state, this statute provides a method whereby a witness can be compelled to travel to the jurisdiction and to testify even against his will. Appellant concedes, in line with established authority, that the District Attorney has no obligation to resort to this statute as a condition precedent to the introduction of the testimony desired. *People v. Liner*, 168 Cal. App. 2d 411, 415–416, 335 P.2d 964; *People v. Cahan*, 141 Cal. App. 2d 891, 901, 297 P.2d 715. Also, we are not persuaded, as appellant has suggested, that we should overturn the weight of authority thus cited. What has been said with respect to the application of Section 1334 et seq. is also true of Section 879 of the same code, which latter statute provides a technique whereby prospective witnesses can be bound where there is reason to believe that they may leave the jurisdiction. The cases hold that this section is merely permissive. *People v. Day*, 219 Cal. 562, 565, 27 P.2d 909; *People v. Myers*, 77 Cal. App. 10, 15, 245 P. 1106."

The overwhelming weight of judicial authority appears to reject the position urged by the appellant. Indeed, there

is much merit to the position of the courts on this matter. First, the presence of the witness can only be obtained after complicated proceedings dependent, in part, upon the comity of another jurisdiction. Second, where the accused has been afforded an opportunity to examine the witness at preliminary hearing, his constitutional prerogatives have been preserved and, in the absence of some extremely compelling reason, his position would be no different were the witness to appear.

This court should adopt the reasoning of the above cited decisions for the reasons advanced in those opinions. Additionally, since a Uniform Act is involved, uniformity of construction and interpretation should be sought after. Further, since the decisions of other states have construed an act similar to that of this state, sound judicial administration favors a similar result in the absence of some more compelling local policy. The appellant's position is without merit.

POINT II.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE TRANSCRIPT OF THE TESTIMONY OF ROBERT S. ROSS TO BE READ TO THE JURY OF THE WITNESS'S PRELIMINARY HEARING TESTIMONY WHERE THE TRANSCRIPT DID NOT RECITE THE BUSINESS OR OCCUPATION OF THE WITNESS.

The appellant contends that the trial court committed error in allowing the preliminary hearing testimony of Robert S. Ross, a witness unavailable for trial, to be read to the jury where the testimony did not indicate or recite the business or profession of the witness. Appellant relies upon 77-15-14(1), which provides:

“* * * The deposition or testimony of the witness must be authenticated in the following form:

(1) It must state the name of the witness, his place of residence and his business or profession.”

It should be noted that 77-15-14 does not indicate that the authentication is necessary before the testimony may be used in evidence. It merely provides that this will be a means of authenticating the preliminary hearing transcript where (1) the trial involves a homicide, or (2) where the prosecution requests a transcript of the testimony. *State v. Sheffield*, 45 Utah 426, 146 Pac. 306. Since there is nothing in the statute that makes the requirement that the testimony state the business or profession before it may be used as an exception to the hearsay rule under the common law rules, it is submitted that there is no impediment to the use of such testimony at trial. As noted in McCormick, Evidence (1954), p. 481:

“* * * The usual approach, however, is that these statutes on former testimony are ‘declaratory’ of the common law, so far as they go, and not the exclusive test of admissibility. Accordingly, if the evidence meets the common law requirements, it will usually come in even though the permissive provisions of the statute do not mention the particular common law doctrine which the evidence satisfies, * * *.”

See *State v. Ham*, 224 N. Car. 128, 29 S.E.2d 449 (1954), in which the North Carolina Supreme Court indicated that the absence of a proper certification was not an impediment to the use of the testimony given at a former hearing.

77-44-3, U.C.A. 1953, expressly covers the instances when testimony given at a previous hearing and stenographically reported, may be received in evidence in the absence of the witness at the time of trial. That section provides:

“Whenever in any court of record the testimony of any witness in any criminal case shall be stenographically reported by an official court reporter, and thereafter such witness shall die or be beyond

the jurisdiction of the court in which the cause is pending, either party to the action may read in evidence the testimony of such witness, *when duly certified by the reporter to be correct*, in any subsequent trial of, or proceeding had in, the same cause, subject only to the same objections that might be made, if such witness were upon the stand and testifying in open court.”

It should be noted that the only condition to the receipt of the evidence is that the reporter who took the testimony must certify that the testimony as given is correct. There is no indication that the testimony contain any particular questions or answers. Consequently, it is submitted that 77-44-3, U.C.A. 1953, determines the admissibility and use of preliminary hearing testimony and that 77-15-14 relates only to authentication for court purposes, and is no inhibition to the use of the evidence at the time of trial. Much support for this position is to be found from 77-15-31, U.C.A. 1953, which provides for deposition testimony and indicates further that the stenographer need only certify to the evidence. This court has in many instances recognized the use of previous testimony given at a preliminary hearing where the witness is subsequently absent at the time of trial.

In *State v. Vigil*, 123 Utah 495, 260 P.2d 539 (1953), this court noted:

“It was proper for the court to admit into evidence the transcript of the preliminary hearing. The law requires that if such witness is beyond the jurisdiction of the court or cannot with due diligence be found within the state either party may read in evidence the testimony of such witness.

The evidence also shows that one officer testified as to his personal knowledge that the Shorts had left the state. This, with the other facts shown, was sufficient to, and did satisfy the court that the Shorts were beyond the jurisdiction of the court, and thus the requirements of the law were satisfied.”

The court in that case relied upon 77-44-3 and 77-1-8, U.C.A. 1953.

This court has in numerous other instances allowed the testimony of witnesses given at preliminary hearing to be used at the time of trial where the witness is without the jurisdiction. *State v. Gorham*, 93 Utah 274, 72 P.2d 656 (1937); *State v. DePretto*, 48 Utah 249, 155 Pac. 336 (1916); *State v. Anderson*, 68 Utah 551, 251 Pac. 362 (1926); *State v. King*, 24 Utah 482, 68 Pac. 418 (1902); *State v. Vance*, 38 Utah 1, 110 Pac. 434 (1910); *State v. Inlow*, 44 Utah 485, 141 Pac. 530 (1914); *State v. Greene*, 38 Utah 389, 115 Pac. 181 (1910); Annotations 15 ALR 495, 79 ALR 1392; 122 ALR 425.

Even if it were conceded that the authentication provisions of 77-15-14 were a condition that should be complied with for authentication purposes, still it would appear that it is not a condition mandatory in the absence of which testimony given at a preliminary hearing could not be received in evidence. Although appellant makes some argument that the provisions must be deemed mandatory because the word "must" is used, in *People v. O'Shaughnessy*, 26 P.2d 847 (Cal. 1933), the California court had occasion to consider Section 869 of the California Penal Code, which is identical with Section 77-15-14, U.C.A. 1953. The appellant in that case had contended it was error to use the testimony at preliminary hearing in the absence of a showing from the transcript as to the witness's business or profession. The California court without deciding whether or not the compliance with the statute was necessary in the first instance, ruled that the provision relating to business or profession was directory and not mandatory. The court stated:

"The action of the court in receiving into evidence the record of the testimony given by Miss Johnson at the preliminary hearing is assigned as error. It is first urged that this evidence was inadmissible because Miss Johnson was not asked and did not state what was her business or profession. Pen Code, § 869. It appears that

this witness was a female person, that she was living in the home of another woman, and the record does not show her age . If it may not be presumed that she had no business (see *People v. Grundell*, 75 Cal. 301, 17 P. 214) , at least it must be held that this provision is directory merely and not mandatory (*People v. Grundell*, supra; *People v. Buckley*, 143 Cal. 375, 77 P. 169). The appellant argues that had this witness stated her business, it would appear that she was a woman of the streets and that for this reason the jury would not have believed her testimony. Not only does this go to the weight of the evidence and not to its admissibility, but the record contains no evidence of the fact claimed, and it may not be assumed that the jury would have disbelieved her testimony when it coincided in every detail with statements made by the appellant.”

Numerous other cases have ruled in a similar fashion that authentication requirements in preliminary hearing statutes or other statutes relating to depositions are not conditions precedent to the receipt of the testimony. *State v. Maynard*, 184 N. Car. 653, 113 S.E. 682 (1922); *Serna v. State*, 110 Tex. Crim. 220, 7 S.W.2d 543 (1928).

A similar argument to that of the appellant was urged in *State v. Maslick*, 59 Utah 75, 202 Pac. 6 (1921), where there was a failure to file the transcript notes with the court, as required by statute. In rejecting a contention that the use of the preliminary hearing testimony was precluded, the court stated:

“* * * The transcript being concededly true and correct, appellant could not possibly sustain prejudice or injury from the absence of the stenographic notes. * * *”

See 79 ALR 1420.

Finally, since this court must weigh for specific error 77-42-1, U.C.A. 1953, even if the appellant’s position were correct, it must be determined whether the failure to designate the business or profession of the witness Ross could be deemed prejudicial to the appellant at trial. Obviously it

could not. The importance of Ross' testimony was not his connection with the appellant, but whether or not his ability to identify the appellant as the culprit was in anyway diminished. His business or profession would in most instances be irrelevant to this question. It can hardly be said that there was any prejudice from the failure to meet the authentication requirement.

Finally, as noted above in McCormick, *infra*, p. 9, most statutes are not demed to supplant the common law rule, but are felt to supplement it and are declaratory only. Consequently, since in the instant case the parties and issues were the same as at the time of preliminary hearing, the testimony is admissible as an exception to the hearsay rule. Wigmore, Evidence, 3rd Edition, Sec. 1370, 1371; McCormick, Evidence, Ch. 26, p. 480 (1954).

CONCLUSION

The appellant's position, when analyzed against the cases from other jurisdictions which have concerned themselves with the arguments now before this court, is of little merit. An analysis of judicial precedents and the logic and statutory requirements attendant to the use of former testimony can only lead to the conclusion that there was no injustice done to the appellant in the instant case.

This court should affirm.

Respectfully submitted

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