1964

State of Utah v. Robert Colvin : Brief of Respondent

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
Robert Colvin; Appellant Pro Se;

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

— vs —

ROBERT COLVIN,
Defendant-Appellant.

Case No. 10080

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Aldon J. Anderson, Judge

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Robert Colvin, appeals from his conviction of the crimes of robbery and grand larceny in the District Court, Third Judicial District, Salt Lake County.

DISPOSITION IN COURT BELOW

The appellant after jury trial was convicted of the crimes of robbery and grand larceny. On May 9, 1962, a timely motion for new trial was filed by appellant's counsel, Galen J. Ross, Esq. While this motion was pending, the appellant duly filed a notice of appeal. On May 28, 1963, this court remanded the case to District Court because the pending motion for new trial had not been ruled on. On December 20, 1963, the motion for new trial was denied. On January 21, 1964, appellant appealed to this court.

RELIEF SOUGHT ON APPEAL

The respondent submits this court should affirm the conviction.

STATEMENT OF FACTS

The appellant was convicted of robbery and grand larceny. Thereafter on 9 May 1962, he timely filed a motion for new trial (R–4) with an affidavit in support (R–6). Subsequently, an appeal was taken from the conviction, without disposing of the motion for new trial. On 7 May 1963, this court rendered its opinion determining that the appeal was premature (R–2). *State v. Wood,* 14 Utah 2d 192, 381 P.2d 78 (1963). On 28 May 1963, this court issued a remittitur remanding the case to the District Court for disposition of the pending motion for new trial. Counsel for appellant, Galen J. Ross, Esq., never made any effort from the time he filed the motion until it was finally heard and disposed of on 20 December 1963 to have the motion called on for hearing. On 20 December 1963, the appellant's motion for new trial was finally heard and denied (R–8–10).

Subsequent to the trial court's denial of the motion for new trial, a notice of appeal was filed (R–11) and a designation of record on appeal (R–12). The designation of appellate record did not designate that a transcript of the evidence at trial was to be included (R–12). Consequently, the record on appeal does not show the evidence at trial.

ARGUMENT

POINT I.

APPELLANT HAS NO BASIS FOR RELIEF BECAUSE OF THE DELAY IN HEARING ON HIS MOTION FOR NEW TRIAL, SINCE:

(1) HE HAS SHOWN NO BASIS FOR PREJUDICE.

(2) APPELLANT COULD HAVE CALLED HIS OWN MOTION ON FOR HEARING AT HIS DESIRE.

(3) THE APPELLANT WAIVED THE MOTION OR IS ESTOPPED TO COMPLAIN.

(1) The appellant contends that the failure of the trial court to dispose of his motion for new trial denied him due process of law. He relies upon 77–38–4, U.C.A. 1953, which provides:

> "* * * The motion must be heard as soon as practicable and the hearing thereof shall not be delayed longer than may be necessary."

In this case, however, the appellant, who was represented by counsel, made no effort to have his motion heard. Further, he does not indicate how he was prejudiced. This is not the case of an accused being held in pre-trial confinement without bail, and without any adjudication as to his guilt or innocence; rather, the appellant complains of post-conviction delay after a full trial. However, appellant does not state that as a result of the delay he was in any way prejudiced in preparing his motion or that the basis of his motion was frustrated because of the delay. 77–42–1, U.C.A. 1953, requires that specific prejudice be shown to the appellant before any irregularity can be claimed as a basis for relief. In this case none is shown. The appellant had been tried, and consequently the question is not one of failure to prosecute.

(2) In 24 C.J.S., *Criminal Law*, Sec. 1498, it is stated:

> "The time for hearing a motion for a new trial is governed by statutes in local practice, * * *."

The local practice in the Third Judicial District is that where the defense makes a motion for specific relief, it is incumbent upon the defense (or moving party) to call the matter on for hearing. This is usually done by contacting

the prosecution and setting a date for hearing. In the instant case the appellant was represented by counsel, who filed the motion. No effort was made to call the motion on for hearing. Indeed, in the intervening period the appellant sought appellate relief from this court, not just limited to the new trial matter, but on the whole record with several other points being raised. *State v. Wood,* 14 Utah 2d 192, 381 P.2d 78 (1963). Much of the delay can be attributed to the fact that appellant sought relief on the full case, and did not seek to have his motion timely disposed of. Further, after remand by this court, no effort was made to call the motion on for hearing in accordance with local practice. In *Howard v. Howard,* 11 Utah 2d 149, 356 P.2d 275 (1960), objection was made to the court's action in hearing a motion for new trial some 15 months after it was timely filed. The court in that case spoke in terms apropos to this case:

> "Plaintiffs' counsel also contends that the motion was not called up for 15 months, which should be regarded as an abandonment. However, he has no cause for complaint for he could have called the motion up at any time. Instead of making such a motion he brought a separate action for a declaratory judgment."

In the instant case, appellant could have called the motion for hearing at any time. Instead he sought appeal and other tactics. Where appellant had full opportunity to obtain relief he cannot complain. In *State v. Bohn,* 67 Utah 362, 248 Pac. 119 (1926), the appellant claimed he was denied a speedy trial. Although concerning a different factual situation, this court noted:

> "* * * A defendant in a criminal action may waive his right to a speedy trial. He cannot remain inactive and afterwards complain that he has not been given a speedy trial and interpose that as a defense."

See also 22A C.J.S., *Criminal Law,* Sec. 469.

The record before this court does not show appellant made any effort to call his motion on for hearing, during the greatest portion of the delay. Further, where much of the delay is the result of the appellant's actions or indifference, he cannot complain. 22A C.J.S., *Criminal Law,* Sec. 471. Consequently, appellant is entitled to no relief.

(3) Finally, where the appellant failed to prosecute his own motion, it must be deemed that he waived the effect of any delay.

POINT II.

THE EVIDENCE WAS SUFFICIENT TO CONVICT, SINCE:

(1) APPELLANT HAS NOT BROUGHT THE TRANSCRIPT OF TRIAL BEFORE THE COURT FOR REVIEW, AND CONSEQUENTLY THE TRIAL MUST BE DEEMED REGULAR.

(2) THIS COURT HERETOFORE FOUND THE EVIDENCE OF APPELLANT'S GUILT SUFFICIENT TO SUSTAIN HIS CONVICTION.

(1) The appellant, in his itemized list of materials to be included in the record on appeal in the instant case, failed to request that a transcript of testimony given in support of his conviction be included as part of the record (R–12). The record contains only the items appellant designated. Consequently, the materials contained in Point II of appellant's brief are not supported by the record. When the record is not before the court, this court must presume the record supported the actions of the trial forum.

In *Watkins v. Simonds,* 14 Utah 2d 406, 385 P.2d 154 (1963), this court had occasion to pass on a similar situation. It noted:

> "* * * Apparently, no oral evidence was taken, as there is no transcript of any such evidence in the record. In short, no evidence of any kind or character, oral, stipulated or otherwise, appears in the record before this Court. Nor is there any suggestion that the plaintiffs were in any way prevented from making and

bringing to this Court any record they may have desired. The nearest approach to anything suggestive of the facts in this case, other than the pleadings, is the statement of facts in appellants' brief, which statement of facts the respondents, in their brief, admit 'are much as set forth' with certain claimed changes. In any event, this Court cannot consider facts stated in the briefs which may be true but absent in the official record. Cooper v. Foresters Underwriters, Inc., 123 Utah 215, 257 P.2d 540.

"Judgments of courts are presumed to be correct if nothing in the record appears to the contrary, and all doubts are resolved in their favor. The record on appeal in this cause being devoid of any and all evidence, it must be assumed that the proceedings in the court below established a sufficient basis to support and justify the court's findings, conclusions and judgment. Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554; Johnson v. Peoples Finance & Thrift Co., 2 Utah 2d 246, 272 P.2d 171."

Consequently, appellant may not complain of matters not of record.

(2) Additionally, it is submitted that this court heretofore passed upon the appellant's claim of evidentiary insufficiency. In *State v. Wood,* 14 Utah 2d 192, 381 P.2d 78 (1963), when this case was last before the court, this court noted:

"Defendants urge error in submission of verdicts, that *the verdicts were contrary to the evidence and the presumption of innocence,* and that the court and prosecutor prejudicially abused defendants' rights by their conduct. The record does not reflect any such abuse, and *the only point on appeal appearing to have any merit is that we decide here* anent prematurity of appeal."

Thus, when case was last before this court, it indicated that there was not merit to the claim that the conviction was contrary to the evidence and the presumption of innocence, which is the same issue raised as appellant's second point. Therefore, there is no merit to appellant's second contention.

CONCLUSION

The appellant's only basis for appeal shows that he is not entitled to relief. As a consequence, this court should affirm.

Respectfully submitted

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