1984

The State of Utah v. Gary Vance Saunder : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
-v-	:	
GARY VANCE SAUNDERS,	:	Case No. 19054
Defendant-Appellant	:	

BRIEF OF APPELLANT

An appeal from the conviction of Burglary, A Felony of the Second Degree; Theft, a Felony of the Second Degree; Possession of a Firearm by a Restricted Person, a Felony of the Second Degree; and being a Habitual Criminal, a Felony of the First Degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, GARY VANCE SAUNDERS, appeals for the conviction of Burglary, a Second Degree Felony, in violation of Utah Code Ann. §76-6-202 (1953 as amended); Theft, a Second Degree Felony, in violation of Utah Code Ann. §76-6-404 (1953 as amended); Possession of a Firearm by a Restricted Person, a Second Degree Felony, in violation of Utah Code Ann. §76-10-503(2) (1953 as amended); and being a Habitual Criminal, a First Degree Felony, in violation of Utah Code Ann. §76-8-1001 (1953 as amended).

DISPOSITION IN THE LOWER COURT

The appellant, GARY VANCE SAUNDERS, was tried by jury on December 28-29, 1982, before the Honorable James Sawaya and found guilty of the Burglary, Theft, and Possession of a Firearm by a Restricted Person charges.

On December 30, 1982, appellant was tried before the Court and found guilty of being a Habitual Criminal. Appellant was sentenced to the Utah State Prison for an indeterminate term of 1 to 15 years for the Burglary; 1 to 15 years for the Theft; 1 to 15 years for the Possession of a Firearm, and 5 years to life for the Habitual Criminal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below or a remand of the case to the Third Judicial District Court for a new trial.

STATEMENT OF FACTS

During the early evening of April 23, 1982, a television set, microwave oven, two firearms, a rifle, a box of ammunition, and various items of jewelry were taken from the residence of Mr. and Mrs. Berry Phelps, 1672 East 7000 South, Salt Lake City (T.18). Mrs. Phelps, whose husband was away for the weekend (T.13), was not at home the night of the 24th, having left earlier in the day to stay with a daughter (T.14). One of the firearms and television set were subsequently recovered by the police (T.82, 84).

The State's case was based upon the testimony of Stacy Williams, the brother-in-law of appellant. Mr. Williams who was arrested on May 17, 1982 by Deputy Salt Lake County Sheriff Jim Duncan (T.93), was granted

immunity for his involvement in the burglary and theft [illegible] East 7000 South in return for his testimony concerning the incident (T.40-41, 67). Mr. Williams testified that the appellant participated in both the burglary and theft of the items from the Phelps residence by selecting the place (T.44), springing the lock (T.46), and gathering the items taken (T.49-50). Williams further testified he stored the stolen items at the house of his brother, Timmy Shunk (T.53) and also later sold the guns to a fence, Amos Armijo, and the television to another individual, Marvin Powell (T.56, 57-58). Mr. Williams testified that Mr. Shunk's residence was their "regular place" to store things (T.52), and that Mr. Armijo was "our fence" (T.53).

Several officers testified to a multi-agency operation that resulted in the recovery of items from this burglary from Amos Armijo (T.75-104), and a resulting statement from Stacy Williams (T.90-91). Appellant was not with the Armijos (T.79-80) when they were attempting to drive away with the merchandise.

The appellant did not testify and counsel stipulated to his status as a restricted person, incarcerated at the [illegible] State Prison and housed in a half-way house at the [illegible] of the offense (T.74). Prior to trial, counsel for [illegible] made a motion to sever the count of Possession of a Firearm by a Restricted Person which was denied by

the Honorable Peter F. Leary on December 21, 1982. The Appellant presented evidence that Timmy Shunk was in fact in jail on April 24, 1982, through two officers involved in keeping the records on inmates in the jail (T.112, 130).

Subsequent to Appellant's conviction on the burglary, theft, and possession of firearm counts, the Court conducted a hearing on the habitual criminal charge. The State introduced prior felony convictions and commitments (Exhibits 7, 8, 9). Case No. 31349, State of Utah v. Gary Vance Saunders and Michael Lee White was at times referred to as Case No. 31149. White's name was stricken at some time, a fact which the State could not clarify (T.172). That conviction was on June 21, 1978, and Mr. Saunders was commited to the prison on June 29, 1978 (Exhibit 7). This exhibit was admitted over defense counsel's objections regarding foundation as to whether the person who certified it actually had custody of the record, whether Appellant was adequately represented by counsel and whether the commitment was properly authenticated without a case number on the sheriff's receipt (T.171-73). Exhibit 8, Case No. 18748, State of Utah v. Gary Vance Saunders was admitted over defense counsel's objections as to foundation authentication of who wrote the first page and how it became part of the record and the remoteness of the conviction (T.173-73). Appellant's conviction on that offense was on

June 10, 1964, (Exhibit 8). Furthermore, Appellant stated he pleaded guilty to the 1964 conviction only because he was promised probation by both his attorney and the State's attorney (T.197). He stated he would not have pleaded guilty if he had known he would go to prison (T.198). The State presented no evidence that Mr. Saunders had adequate representation or whether there was a knowing waiver of counsel or his constitutional rights (T.200).

Exhibit 9, Case No. 30202, State of Utah v. Gary Vance Saunders and Buddy Clark Anderson was also admitted in support of the State's habitual criminal charge over defense counsel's objections. Again there was a foundational objection because it could not be verified that the person who certified the record had custody. There was a date change from 1977 to 1976 and there was no evidence as to whose handwriting was on the affidavit. Furthermore, the affidavit stated, "of my own free will I have conferred with my attorney, _____", with no name filled in (T.175-78). The Court subsequently convicted Appellant on the habitual criminal charge.

ARGUMENT

POINT I

IT WAS ERROR TO DENY APPELLANT'S MOTION TO DISMISS THE POSSESSION OF A FIREARM COUNT.

Utah Code Ann. §77-35-9(d) (1953 as amended) provides for the severance of offenses where there is a prejudicial

effect:

> If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information, or by a joinder for trial together, the Court shall order an election of separate trials of separate counts, or grant a severance of defendants, or provide such other relief as justice requires.

In this case, Appellant was greatly prejudiced by the trial of the Possession of a Firearm Count with the Burglary and Theft charges.

The Utah Supreme Court addressed the severance issue in State v. Gotfrey, 598 P.2d 1325 (Utah 1979). In Gotfrey, charges of rape upon the defendant's step-daughters and sodomy involving the step-son were improperly joined. The trial court's erroneous joinder resulted in reversible error. In reversing the Court stated:

> The purpose of that statute is to allow joinder of offenses and thus eliminate multiple prosecutions and conserve time and effort when justice can best be served thereby. But care must be taken that the statute is not misused to deprive an accused of a fair trial.

Id. at 1328.

In State v. McCumber, 622 P.2d 353 (1980), the Utah Supreme Court similarly reversed convictions on two separate sexual assaults that were tried together. The court held that defendant's right to due process of law was violated where the jury had heard evidence relating to the separate offenses. The Court found that the prejudicial impact was too great where the charges were not a single criminal transaction and did not evince a common scheme or design. Id. at 356.

The District of Columbia Court of Appeals announced a similar position in Drew v. United States, 331 F.2d 85 (1964). In Drew, the Court saw judicial economy as the advantage of joinder of offenses. The Court noted four disadvantages: (1) the defendant could become embarrassed or have difficulty in presenting defenses; (2) the jury may infer a criminal disposition and thereby prejudice the defendant; (3) the jury may view the evidence cumulatively; and (4) a prejudicial latent feeling of hostility may surface. Id. at 88. The Court reversed convictions for attempted robbery and robbery on this basis.

Most recently, this Court held that the denial of a motion to sever a Possession of a Firearm by a Restricted Person charge from an Aggravated Assault Charge did not amount to a denial of due process. State v. Studham, 655 P.2d 669 (Utah 1982). The Court, however, did not address the question of whether there was an abuse of discretion in denying the motion under the statutory terms of Utah Code Ann. §77-35-9(d)

(1953 as amended) as the appellant did not make a timely mo

In this case, appellant timely moved to have the Possession of a Firearm count severed from the Burglary and Theft charges. While it may not violate due process of law, the appellant was clearly prejudiced by the joinder of these counts. The appellant did not testify. Therefore, no evidence of prior felony convictions was admissible on impeachment grounds. And yet, evidence of his status as an inmate of the Utah State Prison, and thus the obvious inference of a felony conviction, was admissible to prove he was a restricted person. While judicial economy was served by allowing one trial on all of the counts, appellant was denied his statutory right to a severance where he was prejudiced by the joinder of charges. Jurors, as human beings, can hardly be asked to accept evidence of a criminal past for one purpose and not to consider it when viewing the defendant and the case as a whole. The concerns of the Court in Drew v. United States, supra, were present here. There is no way to know whether the jury inferred a criminal disposition by appellant or what prejudices against appellant this evidence created. The policy behind excluding evidence of felony convictions unless the defendant testifies applies here as well. It was an abuse of discretion to deny appellant's motion to sever the counts in this case.

POINT II

IT WAS ERROR TO DENY APPELLANT'S MOTIONS FOR A MISTRIAL WHEN THE JURY HEARD AND SAW INADMISSIBLE AND PREJUDICIAL EVIDENCE.

Three times during the trial the jury was exposed to inadmissible and prejudicial evidence. Twice a State's witness referred to multiple burglaries and thefts despite the Court's ruling, pursuant to then Rule 55 of the Utah Rules of Evidence, that such evidence was inadmissible. On another occasion, an unrelated firearm was left sitting on the clerk's desk in full view of the jury. Each incident alone, and in combination, created a prejudicial impact on appellant's case and warranted the declaration of a mistrial.

Prior to trial, the Court ruled that the State could not present evidence of other burglaries unless it established a foundation of materiality and gave the defense an opportunity to object (T.10-11). Nevertheless, the State adduced the following testimony:

Q: Did you have a conversation about the two firearms and the television set and the microwave oven?

A: Yeah.

Q: Who was participating in that conversation?

A: Me and Gary.

Q: Who said what in that conversation?

A: Gary told me, "Well, I got to be going back to the halfway house so I might as well take that stuff with me and store it where we are storing it at."

Q: Did you have a regular place to store things?

A: Yeah.

Q: Where was that?

A: My brother's.

Q: What's his name?

A: Timmy Shunk.

Q: (By Mr. Housley) In this conversation that you had at Gary's house, did he tell you what to do after you got it down to the place to store it?

A: Yes.

Q: What did he tell you?

A: He told me to call our fence--his name is Amos--to see what he wanted to buy.

Q: Amos?

A: Yeah.

(T.52-53). There was no foundation as to materiality and no chance for counsel to object prior to the testimony. During the discussions at the bar, counsel for appellant twice moved for a mistrial, which motions the court denied (T.96-97).

motion for mistrial based on the presence of an unrelated juror was similarly denied (T.96).

This Court formulated a two-part test, embodying the former Utah Rules of Evidence 45 and 55, for determining whether evidence of other crimes allegedly committed by a defendant should be allowed to be heard by a jury.[1] The first part of the analysis required a showing that the evidence of other crimes was relevant and probative of a material fact, State v. McCardell, 652 P.2d 942 (Utah 1982); State v. Forsyth, 641 P.2d 1172 (Utah 1982); State v. Kerekes, 622 P.2d 1161 (Utah 1980); State v. Lopez, 22 Utah 2d 257, 451 P.2d 771 (1969). The second part of the analysis required that, if the evidence was relative and probative, its probative value outweighed its prejudicial effect pursuant to the requirements of the former Rule 45 of the Utah Rules of Evidence. State v. McCardell, supra.

In Forsyth, supra, this Court defined what it meant by the terms "relevant" and "probative". Quoting State v. Harries,

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1. Rule 55 provided: Subject to Rule 47 evidence that a person committed a crime or evil wrong on a specified occasion, is inadmissible to prove his disposition to commit such crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion, but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

118 Utah 260, 283-84, 221 P.2d 605, 617,(1950) the Court sa

> Any pertinent fact which throws light upon the subject under judicial consideration, the accused's guilt or innocence of the crime for which he is charged is admissible.

641 P.2d at 1175. The Court also quoted State v. Scott, 111 Utah 9, 20-21, 175 P.2d 1016, 1021-22 (1947) which stated:

> The basic rule of admissibility of evidence is that all evidence having probative value--that is, that tends to prove an issue is admissible....

Id. The Court held in Forsyth that evidence of investors other than the four victims was admissible as to false representations of ownership of real estate, of the amount being raised for development, of the number of investors, and of the overdue status of some of the refunds owing. Evidence that certain investments were not repaid was not admissible, but was held to be harmless error in the case.

Subsequently, in State v. McCardell, supra, this Court held that evidence of the possession of stolen checks from the same owner was admissible against a defendant charged with forgery. The Court held not only that the evidence was relevant to and probative of the defendant's intent and knowledge, but also that the probative value was not substantially outweighed by its prejudicial effect pursuant to Rule 45. The latter balancing test is the second part of the analysis.

This Court has held evidence of prior crimes or ... be inadmissible where the prejudice is too great ... second prong of the analysis. Evidence that the ... had been charged with a crime in the past, even though never tried on the charge, was prejudicial error in State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961). Testimony about a prior arrest for a similar crime required reversal in State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963).

In this case, the trial court ruled that evidence of other burglaries was inadmissible unless a foundation was laid by the State on materiality and the defense had an opportunity to object. There is no legal issue as to which category under Rule 55 such evidence might fall under. Instead, there is a factual issue as to whether the testimony and the gun constituted evidence of other burglaries and whether the State met its obligations pursuant to the Court's order.

Each statement and the gun individually, and in combination, created the obvious inference of other burglaries. ... does not have a "regular place" for storing stolen items ... who is so familiar as to be "our fence" unless ... multiple crimes involved. The obvious conclusion ... make is that appellant was engaged in other ... This conclusion would have been enhanced by ... an extraneous gun by the jurors.

The State laid no foundation and the defense had no opportunity prior to the introduction of the testimony to argue the issue before the court. At no time did the prosecutor attempt to establish why the references to other burglaries was material. The statements arose during the course of simple inquiries as to where the items from this particular burglary had gone. Moreover, taken by surprise, defense counsel could only move for a mistrial without any opportunity to prevent the introduction of this testimony. The court's order was violated and the denials of the motions for mistrial were error as there was no probative value to the evidence and, even if there was any probative value, it was certainly outweighed by the prejudicial effect of the jury knowing other burglaries had been committed.

The prejudicial effect was further exacerbated as the judge did not strike the witness' statement or instruct the jury to disregard it. Without an instruction of that nature, the evidence is left intact for the jury's consideration. State v. St. Claire, 3 Utah 2d 230, 282 P.2d 323 (1955). Thus the jury was left to consider the key witness' testimony as to other unrelated alleged criminal acts by appellant in determining his guilt or innocence.

The admission of the statements to the jury is not the type of error which can be regarded as a mere irregularity or of such inconsequential nature that it could not have been

prejudicial to the substantial rights of the appellant. State v. Dickson, supra; State v. Siebert, 6 Utah 2d 198, 310 P.2d 388 (1957). Consequently, the failure to declare a mistrial in this case was error where the logical inference of the testimony was that the appellant was a bad person, a criminal, and the testimony served no probative purpose.

POINT III

APPELLANT WAS DENIED A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE WHEN THREE JURORS VIEWED HIM IN SHACKLES AND PRISON CLOTHES.

On December 29, 1982, the second day of trial, Mr. Saunders was brought in his prison clothes, in foot chains, and in handcuffs before three jurors who were waiting out in the hallway (Supp. T.133). At that point in time, Appellant's attorney moved for a mistrial in chambers which was denied.

In Estelle v. Williams, 425 U.S. 501, 48 L.Ed. 2d 1194 (1976), the United States Supreme Court stated that a State cannot compel a defendant to stand trial in identifiable prison clothes. Although in that case the Court held that there was no constitutional violation where defense counsel had failed to object, the Court viewed forcing defendant to wear prison clothes as an abridgement of his fundamental rights to due process and equal protection of the law. The Court further stated that the presumption of innocence accorded to the defendant is violated when he wears prison clothes.

> The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of justice.

Id. at 503 [cites omitted]. Close judicial scrutiny is required

to look at any particular procedure. However, with regard to prison clothes, the Court stated:

> The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.

Id. at 130 [cites omitted].

The Utah Supreme Court has unequivocally held that a defendant has a right not to stand trial in prison clothes. In Chess v. Smith, 617 P.2d 341 (Utah 1980), the Court remanded a case on a writ of habeas corpus, stating:

> The prejudicial effect that flows from a defendant's appearing before a jury in identifiable prison garb is not measurable, and it is so potentially prejudicial as to create a substantial risk of fundamental unfairness in a criminal trial.

Id. at 344. The Utah Court has even gone so far as to require that a judge inquire sua sponte if a defendant wishes to waive the right not to appear in prison clothes.

In this case, the appellant was not in his prison clothes during the trial, but the prejudicial effect was the same. In fact, the prejudicial effect is probably sharper where the jurors see appellant on the second day of trial for the first time in prison clothes and chains. A similar situation occurred in McKenzey v. State, 225 S.E.2d 512 (Georgia 1976), where a defendant was brought into the court in prison clothes and handcuffs. Although the Court said the

prison clothes were not prejudicial in a case prosecuting a defendant for escape, it held that the defendant was denied a fair trial due to the handcuffs. The Court said that, where there was no undue security risk, the common law rule applied that the defendant has a right to be tried free of shackles or bonds. In Moore v. State, 535 S.W. 2d 357 (Texas Criminal App. 1976), a Texas Court also reversed where the defendant was brought into the courtroom handcuffed in front of the jury. The Court held that, especially where defendant was not shackled for security reasons during his murder trial, there was no justification for his being viewed by the jury in handcuffs. The defendant's constitutional right to a presumption of innocence was infringed by the jury seeing him shackled.

In this case, close judicial scrutiny of the potential prejudice can only result in a new trial. The appellant walked out of the elevator in prison clothes with handcuffs and ankle chains on. Three jurors were standing nearby. Up until that time, the jurors had only seen the appellant in street clothes. Although the jurors were aware that the appellant was in a [illegible] at the time of the offense, they did not know [illegible] was presently in prison.

However, as the Utah Supreme Court has noted, there [illegible] prejudicial effect for a jury to see a [illegible] chains and prison clothes. This is not a case [illegible] appellant was disruptive in the courtroom or on the

way to court or where there was overwhelming guilt from the other evidence. This is a case that rested on the credibility of one, and only one, witness. The appellant's right to be presumed innocent and to a trial by an impartial jury mandate that he be given a new trial where he is not paraded in front of any jurors in prison clothes and shackles.

POINT IV

APPELLANT WAS DENIED HIS RIGHT TO A PRESUMPTION OF INNOCENCE AND NOT TO TESTIFY WHEN THE PROSECUTOR COMMENTED ON THE FAILURE TO PROVE THE APPELLANT NOT GUILTY.

In a criminal case the State has the burden of proof and cannot comment on a defendant's failure to prove his innocence. In this case the appellant did not testify. The only witness called by the defense was for impeachment purposes. The emphasis of the closing argument on the appellant's behalf was that the State had failed to meet its burden to prove the appellant guilty beyond a reasonable doubt and yet, the prosecutor stated in the rebuttal part of his closing argument that the appellant had not proved his innocence.

> The first thing [that defense counsel said] was that the defendant is not guilty, the defendant did not commit this burglary, the defendant did not commit this theft, the defendant did not possess these firearms. Now, there is no proof of that, absolutely no proof of that.

(T.149).

> In order for you to say a defendant is not guilty you would have to say that Stacy Williams is lying. You would have to say that Stacy Williams is not telling the truth about his participation, about the defendant's participation in this case. Now, that's not proof --- that's not proof that he didn't do it.

...

In Doyle v. Ohio, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), the United States Supreme Court held that a defendant's post-arrest silence cannot be used to impeach him. This protects the defendant's exercise of his Miranda rights. The Court stated:

> In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

49 L.Ed. 2d at 98.

The Utah Supreme Court has similarly recognized error when a prosecutor comments on the defendant's post-arrest silence. In State v. Wiswell, 639 P.2d 146 (Utah 1981), the Court held that a prosecutor's comments during closing argument on defendant's failure to tell an officer he was an unwilling participant in an aggravated robbery was reversible error. This ... violates the defendant's right not to incriminate ... the United States Constitution and not to give ... himself under Article I, Section 12 of the Utah

Even more pertinent to this case, the Utah Supreme Court in State v. Eaton, 569 P.2d 1114 (Utah 1977), held that a prosecutor cannot comment on the defendant's failure to testify at trial. In his closing argument in Eaton, the prosecutor noted that only the defendant "really knows what took place" and queried "what does the defendant tell us?" The prosecutor continued on in his closing to state that the jury had never heard any evidence that a prosecuting witness was "out to get blacks", apparently a defense raised by the defendant. Id. at 1115. The Court found that such remarks were improper and prejudicial. In so doing, the Court distinguished an earlier case of State v. Kazda, 540 P.2d 949 (Utah 1975), where the Court had held the prosecutor's closing argument proper analysis of the evidence. In Kazda, the prosecutor had said that "the defense has presented no evidence as to why the defendant was out there. What was he doing out there?" Id. at 950. The Court said that this was a comment on the total amount of evidence or lack of evidence and not an impermissible comment on the defendant's failure to testify.

If is also impermissible for a prosecutor to misstate the law in his closing argument. In United States v. Segna, 555 F.2d 226 (9th Cir. 1977), the prosecutor stated that the defendant was presumed sane and in essence placed the burden on the defendant to show that he was insane. The Court noted

...ge had produced his expert witnesses no such presumption ... and that the prosecutor then had a burden to show ...fendant was sane beyond a reasonable doubt. The Court thus reversed a murder conviction where it concluded that the prosecutor had misstated the law.

In this case, the prosecutor overstepped the bounds of discussing the totality of the evidence. He misstated the law on the burden of proof, improperly placing a burden to prove the defendant innocent on defense counsel. This is not just discussion of the analysis of the evidence or the lack thereof as in Kazda. As the Court in Eaton stated, it is improper for a prosecutor to make a "thinly disguised" attempt to introduce the fact that the defendant did not testify and then allow the jury to draw inferences of guilt from that failure to testify. 569 P.2d at 1116. In this case, the prejudice is obvious where the jury might then have believed that the appellant had a burden to prove that he was not guilty. This deprived him of his fundamental right to a fair and impartial jury verdict and to his right not to give evidence against himself in any trial.

POINT V

IT WAS ERROR TO SENTENCE APPELLANT UNDER UTAH'S HABITUAL CRIMINAL STATUTE.

... habitual criminal statute under which Appellant ... failed to apply the principle of proportionality ... by the Eighth Amendment's proscription of cruel and

unusual punishment. Further, the admission of documentary evidence of two prior guilty pleas without proper foundation violated the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Utah Constitution where the evidence did not show that Appellant knowingly and voluntarily entered those pleas.

A. SENTENCING APPELLANT UNDER UTAH'S HABITUAL CRIMINAL STATUTE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Utah's habitual criminal statute which provides for sentencing in cases where there have been two prior felony convictions and commitments is unconstitutional as applied to him. Because the statute makes no distinctions between property offenses and offenses involving violence, it fails to meet the first prong of the test set forth in Solem v. Helm 103 S.Ct. 3001 (1983).

In Solem v. Helms, the Supreme Court held that a proportionality review prevented imposition of a life sentence without possibility of parole under South Dakota's recidivist statute where the petitioner had six prior felony convictions. The Court announced objective factors to consider in reviewing sentences. First, courts should be guided by the gravity of the offense and the harshness of the penalty. Second, sentenc imposed on other criminals in the same jurisdiction may be use for comparison. Third, sentences imposed for the same offens in other jurisdictions may provide guidance. Id. at 3010-11.

comparisons can be made in light of the harm caused victim or to society. Id. The magnitude of the crime is also a helpful comparison as does the culpability of the offender. Id. Although the Court in Helms struck down the sentence of life without possibility of parole, the application of a proportionality review analysis should prevent sentencing under Utah's less stringent habitual criminal statute. Utah Code Ann. §76-8-1001 (1953 as amended) provides for a sentence of five years to life for the habitual offender.

This Court recently reviewed Utah's habitual criminal statute in State v. Montague, 671 P.2d 187 (Utah 1983). This Court announced Utah's policy is to punish "persistent offenders" rather than attempt to reform them. In analyzing the statute, this Court left open the question of the constitutionality of the statute under an Eighth Amendment proportionality review.

Appellant's prior felony convictions were all property offenses. In looking at the gravity of the offense and the harshness of the penalty, this Court should compare property offenses to more serious and violent crimes such as assault, rape, and murder. As the Court noted in Helms, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." Id. at 3011.

In this case, Utah's statute constitutes cruel and unusual punishment as applied. Appellant received the most severe punishment the state could impose for any crime short

of a capital offense. Helms similarly received the most severe punishment South Dakota could impose on any criminal for any crime. Id. at 3013. Like Helms, Appellant's record shows no instances of violence. Id. n. 22.

In Helms, the Supreme Court noted lack of incentives for rehabilitation under such recidivist sentencing. Clearly Utah's statute discourages most incentives for rehabilitation of property offenders. The imposition of the sentence under the habitual criminal statute was an unconstitutional punishment where the penalty is so disproportionate to other violent recidivist offenders.

B. IT WAS ERROR TO ALLOW ADMISSION OF GUILTY PLEAS WITHOUT PROPER FOUNDATION TO DETERMINE IF THE PLEAS WERE VOLUNTARILY MADE AND WHETHER APPELLANT HAD ADEQUATE REPRESENTATION.

In Boykin v. Alabama, 395 U.S. 238, 242 (1969), the Supreme Court stated, "[a]dmissibility of a confession must be based on a reliable determination of the voluntariness issue which satisfies the constitutional rights of the defendant." After Boykin courts could no longer presume waivers of the privilege against self-incrimination, the right to a trial by jury, or the right to confront one's accusers where the record is silent. Burgett v. Texas, 389 U.S. 109, 114-15 (1967) similarly stated the waiver of the right to counsel could not be presumed from a silent record. The Supreme Court reversed a conviction in Burgett where evidence of a prior conviction with no indication in the record that counsel had been waived reached the jury, as

though the petitioner was not convicted under recidivist statute [illegible] which he was charged. Id. at 112-13.

In McCarthy v. United States, 394 U.S. 459 (1969), the Supreme Court held that a guilty plea was invalid where the trial judge failed to personally inquire of the defendant whether he understood the charges and the consequences of the plea. The Court rejected imposing the burden on the State of demonstrating from the record that the plea was voluntarily and knowingly entered in favor of setting aside the plea where Rule 11 of the Federal Rules of Criminal Procedure[2] was not strictly complied with. Although McCarthy was based on the Federal rules, the language suggests the defendant must be informed of the nature of the charges and the consequences of the plea for a plea to be valid.

At trial, Appellant's attorney objected to admission of the affidavit from the 1976 conviction on the basis no attorney was listed. "It says 'of my own free will I have conferred with my attorney, _____'--"(T.178). Furthermore, Appellant argues his guilty plea under the 1964 conviction was not voluntarily entered:

> Q: (By Ms. Carter) Why did you enter it?
>
> A: I was promised by the District Attorney and my lawyer that I would get probation.

[illegible] forth the rights the defendant must be advised [illegible] entry of a plea.

Q: And what happened to you?

A: I was committed to the Utah State Prison.

Q: If you had known that was going to happen, would that have changed what you had done?

A: Yes.

Q: And what would you have done if you would have known that?

A: I would have pled not guilty.

(T.198). Specifically, Appellant's attorney asked him whether he was ever read or asked whether he knew he would not have a trial in the case and of what he was advised. Appellant replied "[N]o, it was in the judge's chambers. Just, 'Do you plead guilty?' I said, 'Yes.'" (T.200). The record clearly indicates the standards of Boykin v. Alabama, Burgett v. Texas, and McCarthy v. Unites States were not met in the present case.

In this case Appellant has demonstrated his lack of understanding or knowledge of the consequences of entering a guilty plea or the rights he waived. Admission of the affidavit without adequate foundation denied Appellant's due process rights. Therefore, the habitual criminal conviction based upon a constitutionally infirm plea should be reversed.

CONCLUSION

Appellant's convictions should be reversed and a new trial granted. It was unfair to Appellant to refuse to sever the count alleging possession of a firearm should have been severed; the motion was timely made and the count's joinder unfairly prejudiced Appellant. It was further error to refuse

grant a mistrial when inadmissible evidence of other crimes was admitted to the jury. These errors were further compounded when Appellant was seen by three jurors in shackles. The prosecutor also made improper, prejudicial comments to the jury regarding what Appellant had not proved. Finally, the habitual criminal statute as applied to property offenders is unconstitutionally cruel and unusual punishment. Appellant's conviction under that statute was further infirm as there was no adequate foundation laid for the pleas on two of the three convictions.

For all of the foregoing reasons, Appellant seeks to have his convictions reversed and a new trial ordered.

DATED this 13 day of April, 1984.

Respectfully submitted,

LINDA E. CARTER
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 13 day of April, 1984.