1965

In the Matter of Ronald Lee Kittredge : Brief of Respondent

Utah Supreme Court

Phil L. Hansen; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of
Ronald Lee Kittredge, a Minor over the age of 14 Years,
Defendant-Appellant.

Case No. 10150

BRIEF OF RESPONDENT

Appeal from the Judgment of the 2nd District Juvenile Court for Salt Lake County Honorable Regnal W. Garff, Judge

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PHIL L. HANSEN
Attorney General
Attorney for Respondent

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The instant appeal is prosecuted from a decision of the Juvenile Court for the Second District, Salt Lake County, State of Utah, adjudging the appellant a delinquent.

DISPOSITION IN LOWER COURT

The appellant, Ronald Lee Kittredge, was charged with having had sexual relations through force on or about the 19th day of February, 1964. The Second

District Juvenile Court found that the appellant had sexual relations with a girl of 14 years of age on that date, but the court did not find that the intercourse was accomplished through force. The court decreed that the appellant be committed to the Utah State Industrial School. On April 6, 1964, the court entered amended findings of fact and a decree which suspended the commitment to the Utah State Industrial School on condition that the appellant be accepted for treatment at the Utah State Hospital. The court's findings that the appellant was a delinquent were continued.

RELIEF SOUGHT ON APPEAL

The respondent State of Utah in the interest of the minor child, Ronald Lee Kittredge, submits that the determination of the Juvenile Court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts. The minor child, Ronald Lee Kittredge, was a special student at Irving Junior High School for individuals having an IQ of 58 to 75 (Tr. 3). On or about February 19, 1964, Delores Livings, mother of a 14-year-old girl, Diane Newman, who also attended the same class at Irving Junior High School, noticed that her daughter did not come straight home from school (Tr. 7). Normally, the child would return around 3:45 to 3:55 p.m. (Tr. 7). Subsequently, the

police were called and Diane returned home at approximately 7:30 p.m. (Tr. 10). According to her mother, the child was crying and indicated that Ronald Kittredge had done something bad (Tr. 8). Diane told her mother that she and the appellant had played "nasty" (Tr. 11). She told her mother that the appellant had penetrated her and had an ejaculation over her body (Tr. 12). The child was taken to the doctor and it was there determined that her lower vagina contained live sperm (Tr. 6).

Loretta Kittredge, grandmother of the appellant, observed the appellant and the girl at the family home at approximately 4:40 p.m. on the day in question. The two went into the basement of the home and stayed until approximately 5:20 p.m., at which time they came upstairs and the appellant was told to take the girl home (Tr. 14). Mrs. Kittredge did not notice anything unusual in the girl's demeanor and dress (Tr. 16).

The police were advised by Diane's mother that she was mentally retarded and a police officer indicated that this was her apparent condition (Tr. 19, 20).

Diane Newman testified that when she went to the appellant's house on the day charged, that she and appellant went to the basement and played records (Tr. 22). The appellant told her to lie on the floor in a basement room and the door was closed. She took off her clothes and appellant took off his clothes, except for his shoes. The appellant lay upon Diane and made penetration of her sexual organ (Tr. 23 through 25).

Subsequently, the two left the appellant's home and, according to Diane, went to an apartment building which was apparently under construction (Tr. 26). The appellant then laid Diane on the floor of the apartment building and again had sexual intercourse (Tr. 26 through 28). According to Diane, at one time the appellant struck her in the stomach (Tr. 28).

Officer Dean L. Eskridge, of the Salt Lake City Police Department, questioned the appellant and according to Officer Eskridge the appellant stated that at the time he and Diane went to the basement of his home, Diane took off her clothes, pulled the appellant on top of her and masturbated him (Tr. 33).

The appellant denied the act but did admit being with Diane Newman (Tr. 38) and going with her to an apartment building which was under construction (Tr. 39). The appellant admitted making an incriminating statement to the police but denied telling the police that he had engaged in sexual relations with Diane (Tr. 42). The appellant told a probation officer of the Second District Juvenile Court that he went with Diane to the basement of his home to listen to Elvis Presley records (Tr. 48), that he left the room where Diane was, and, upon returning, she had taken off her shoes. Appellant told the officer that he asked Diane if she was trying to perform a strip tease, but denied any further involvement.

The probation officer also indicated that the boy admitted his zipper might have been open during this time (Tr. 51).

Based on the above evidence, the court adjudicated the appellant a delinquent.

ARGUMENT

POINT I

THE SERVICE OF PROCESS MADE UPON THE APPELLANT'S MOTHER WAS PROPER SERVICE AND THE APPELLANT, HAVING MADE A GENERAL APPEARANCE THROUGH COUNSEL, WAIVED ANY IRREGULARITY.

The appellant appears to challenge the service of process made in the instant case. The record reflects the officer's return on the service of Summons and Notice to the parent or guardian of the appellant as having been made on the 10th day of March, 1964. The service was made upon Katrina Kittredge and Warren Kittredge, mother and father of the appellant, by serving a copy of the Summons and Notice upon Katrina Kittredge and leaving a copy with her for Warren Kittredge. Section 55-10-16, Utah Code Annotated, 1953, provides for personal service upon persons summoned before juvenile courts. It provides, however:

> " * * * that when the parents of a child are to be served with summons and they are living together at their usual place of abode, service on both parents may be made by delivery personally to either parent of attested copies of the summons, one copy for each parent."

It is apparent, therefore, that service was in accordance with the statute in this case.

Further, the appellant appeared at the time of hearing, represented by counsel, and participated fully in the proceedings. No objection was voiced at the time of the hearing as to the propriety of the service made. It is well settled that under these circumstances, an appearance waives any defect in the service of process. 6 C.J.S., *Appearances,* Sec. 17b, provides:

> "It is the general rule, followed in some states by reason of statutory declaration, that, unless the interests of third persons are involved and will be prejudiced thereby, or the appearing party fails thereby to acquire full knowledge concerning the proceedings, a general appearance operates to waive, or dispense with, issuance or service of process, or any notices which would otherwise be prerequisite to the court's jurisdiction, or a return of the same."

It is clearly the recognized rule that when a party enters an action and participates in the proceedings, defects in the service of process may not be claimed on appeal to have impeached the proceedings in the trial court. *Haggerty v. Sherburne,* 120 Mont. 386, 186 P.2d 884; *State v. McCullough,* 3 Nev. 202; 5 Am.Jur. 2d, *Appearance,* Sec. 16; 37 A.L.R.2d 939.

Under the circumstances of this case, it cannot be contended that the proceedings in the court below were voided by any irregularity in the service of process.

POINT II

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS AND NO IRREGULARITY WARRANTING REVERSAL APPEARS OF RECORD.

The trial court found that the appellant was a "delinquent child." Section 55-10-6, Utah Code Annotated, 1953, the law applicable at the time of the instant hearing, provided that the term "delinquent child" included:

> "A child who has violated any state law or any ordinance or regulation of a subdivision of the state.
>
> "A child who by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian.
>
> "A child who is habitually truant from school or home.
>
> "A child who so deports himself as to injure or endanger the morals of health of himself or others."

In the instant case the evidence, when viewed in a light most favorable to the trial court's decision, discloses that the appellant, a 14-year-old child of limited intelligence, engaged in sexual intercourse with a 14-year-old girl who was apparently mentally retarded. The fact that Diane Newman was mentally retarded appears from the statements of her mother, police authorities, and from the child's testimony herself. The

evidence of sexual intercourse is supported by the testimony of the child, her excited utterances to her mother, and the presence of sperm in her lower vaginal vault. Further, the appellant, when questioned by police officers, admitted engaging in a sexual relationship with Diane Newman, though he denied sexual intercourse, which corroborates testimony. This testimony was competent, material evidence supporting the trial court's findings and this court, under such circumstances, may not disturb the judgment on review. *In re Olson,* 111 Utah 365, 180 P.2d 210.

The conduct of the appellant constituted a violation of Utah law and evidenced that the appellant was deporting himself so as to "endanger the morals of himself or others." Under these circumstances it is apparent that the court acted properly in finding the appellant to have been a delinquent child within the definition of that term as defined by Section 55-10-6, Utah Code Annotated, 1953. The disposition of the case was in accord with the provisions of Section 55-10-30, Utah Code Annotated, 1953.

The record discloses that the constitutional rights of the appellant were in no way violated. Appellant had counsel who fully and adequately protected his rights. The vague references and assertions in appellant's brief of constitutional violations are unsupported by the record. *In re State in Interest of Black,* 3 Utah 2d 315, 283 P.2d 887 (1955). The decision of the Juvenile Court should be affirmed.

CONCLUSION

The conduct of the appellant in the instant case clearly demonstrates delinquent behavior. There is substantial and material evidence of record to support the judgment of the Juvenile Court. The actions of the Juvenile Court in handling the hearing and making disposition of the case were in accordance with the Constitution of the United States and the Constitution and statutes of the State of Utah. There is no basis for reversal. This court should affirm.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

Attorney for Respondent