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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
JUN 18 1965
Su... Court, Utah

STATE OF UTAH,

Plaintiff-Respondent

- vs. -

LEWIS ELMER FRAYER, alias
WILLIAM CLIFFORD LYNN

Defendant-Appellant.

Case No.
10175

BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial
District Court for Davis County
Honorable Thornley K. Swan, *Judge*

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TABLE OF CONTENTS

Page

Disposition in Lower Court 1

Statement of Nature of the Case 1

Argument 5

POINT I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE DISTRICT ATTORNEY CROSS EXAMINED DEFENDANT ON HIS PRIOR JUVENILE RECORD, AND COMPOUNDED ERROR BY INSTRUCTING THE JURY TO CONSIDER SUCH EVIDENCE TO REFUTE AFFIRMATIVE EVIDENCE OF DEFENDANT'S GOOD CHARACTER. 5

POINT II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE, OVER COUNSEL'S OBJECTIONS, EXTRAJUDICIAL STATEMENTS OF THE ACCUSED INVOLUNTARILY GIVEN, DURING A PERIOD OF ILLEGAL ARREST AND DETENTION, UNDER CIRCUMSTANCES INHERANTLY COERCIVE AND IN VIOLATION OF DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS. 11

POINT III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING THE JURY AN INTRUCTION ON SECOND DEGREE MURDER WHEN THE PROSECUTION PROCEEDED UNDER THE FELONY MURDER THEORY AND THERE WAS NO EVIDENCE INTRODUCED TO SUPPORT A CHARGE OF SECOND DEGREE MURDER. 15

CASES CITED

Berge v. State, 96 Tex. Crim. Rep. 32, 255 S.W. 754; (1923) 9

Commonwealth v. Davis, 396 Pa. 158, 150 A.2d 863; (1959) 10

Culombe v. Connecticut, 367 U.S. 568; (1961) 15

Dickens v. People, 67 Colo. 409, 186 P. 277; (1919) 7

Ellis v. People, 164 P.2d 733; (1945) 17

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TABLE OF CONTENTS

Page

Fikes v. Alabama, 352 U.S. 191; (1957) 15

Gallegos v. Colorado, 370 U.S. 49; (1962) 15

Green v. United States, 218 F.2d 856; (1955) 17

Lowe v. State, 63 So. 2d 285 9

Malloy v. Hogan, 378 U.S. 1; (1964) 14

Malone v. State, 130 Ohio St. 443, 200 NE 473; (1936) 8

Robinson v. State, 110 Tex. Crim. Rep. 345, 7 S.W. 2d 571; (1928) 9

Schafer v. State, 51 SW 2d 356 9

Smith v. State, 113 Tex. Crim. Rep. 124; 18 S.W. 2d 1070; (1929) 9

State v. Condit, 101 U. 558, 125 P. 2d 801; (1942) 17

State v. Cox, Mo. 263 5 W 215; (1924) 9

State v. Dunkley, 85 Utah 546, 39 P. 2d 1097 14

State v. Kelley, 169 La. T53, 126; (1930) 9

State v. Mewhinney, 43 U. 135, 134 P. 632; (1913) 17

State v. Morinski, 139 Ohio St. 559; 41 N.E. 2d 287; (1942) 9

State v. Thorne, 39 U. 208, 117 P. 58; (1912) 17

Thomas v. United States, 74 App. D.C. 167, 121 F.2d 905; (1941) 9

U.S. v. Rundle, 221 F. Supp. 10031; (1963) 15

STATUTES CITED

Utah Code Annotated, 1953, as amended:

55-10-26 7
55-10-33 7
77-13-17 12
76-30-3 15
76-9-3 15

TEXT CITED

147 ALR 446 8

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

- vs. -

LEWIS ELMER FRAYER, alias
WILLIAM CLIFFORD LYNN

Defendant-Appellant.

Case No.
10175

BRIEF OF APPELLANT

DEPOSITION IN LOWER COURT

The appellant was tried by a jury and convicted of Murder in 2nd Degree, from which conviction the appellant appeals.

STATEMENT OF NATURE OF THE CASE

This is a criminal appeal brought by the Appellant from a verdict of guilty rendered by a jury to the charge of Murder in the Second Degree.

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The facts offered at trial were that in the early morning hours of July 7, 1963, Louis Sylva Garcia, an itinerant musician, was fatally shot through the head by a firearm presumably of 22 calibre. (Tr. 130-134) The shooting apparently occurred while the deceased was sleeping in a seated position behind the steering wheel of a 1958 Oldsmobile parked along the roadside of Highway 91, West of Centerville, Utah, just South of Parrish Lane. Charles Roger "Rocky" Bierschwal, age 18, also an itinerant musician and Mrs. Barbara Haarman, divorcee, were present at the time of the shooting, but both claimed to be sleeping in the front seat of the auto, when the shot was fired without knowledge of when the fatal shot was fired. (Tr. 28, 46, 47)

Rocky testified that when he first awoke he observed the defendant with a pistol in his hand "in the process" of entering the automobile through the front door on the right-hand side of the automobile, where he was seated. When challenged, the Defendant assured Rocky he didn't want to hurt anyone, that he was only looking for a place to sleep, and that the gun was harmless. (Tr. 47, 48)

Rocky got into the back seat to prepare a place for defendant to rest but became enraged when he thought defendant was making advances toward the sleeping Mrs. Haarman. He pulled defendant from the front seat of the automobile and began striking him about the head and shoulders with a stick. (Tr. 29-30, 48-49) Defendant be-

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gan crying and asked for his gun back. Rocky checked the pistol, found it empty, and returned it to defendant. It was then agreed that defendant should be given a ride into Salt Lake City. (Tr. 29-31, 48-52)

When Rocky and Mrs. Haarman attempted to awaken deceased they found him to be unconscious and discovered traces of blood. (Tr. 31, 52) They slid deceased from the driver's seat into the middle of the front seat and Rocky drove to Saint Mark's Hospital in Salt Lake City. The defendant rode in the back seat and upon arrival at the hospital disappeared. (Tr. 31-34, 52-54)

On July 10, 1965 at 12:45 A.M. the defendant was picked up in a Salt Lake City tavern by Davis County Sheriff deputies and taken before a police lineup at the Salt Lake City Police Station (Tr. 190, 191). About an hour later he was transported to Farmington, Davis County for two additional lineups. (Tr. 191) Defendant was then formally notified that he was under arrest, charged with First Degree Murder, and booked in the Davis County Jail. (Tr. 201, 202, 205)

Three different and conflicting statements were taken from the accused between the hours of 3:00 A.M. to 5:30 P.M. on July 10, 1963. (Tr. 245-255) In the third statement defendant stated he accidently discharged the pistol while attempting to open the glove compartment of the parked vehicle while searching for dope (Tr. 147, 148)

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This appeal raises for review by this Court, three questions of Law.

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE DISTRICT ATORNEY CROSS EXAMINED DEFENDANT ON HIS PRIOR JUVENILE RECORD, AND COMPOUNDED ERROR BY INSTRUCTING THE JURY TO CONSIDER SUCH EVIDENCE TO REFUTE AFFIRMATIVE EVIDENCE OF DEFENDANT'S GOOD CHARACTER.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE, OVER COUNSEL'S OBJECTIONS, EXTRAJUDICIAL STATEMENTS OF THE ACCUSED INVOLUNTARILY GIVEN, DURING A PERIOD OF ILLEGAL ARREST AND DETENTION, UNDER CIRCUMSTANCES INHERANTLY COERCIVE AND IN VIOLATION OF DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

POINT III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING THE JURY AN INSTRUCTION ON SECOND DEGREE MURDER WHEN THE PROSECUTION PROCEEDED UNDER THE FELONY MURDER THEORY AND THERE WAS NO EVIDENCE INTRODUCED TO SUPPORT A CHARGE OF SECOND DEGREE MURDER.

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE DISTRICT ATORNEY CROSS EXAMINED DEFENDANT ON HIS PRIOR JUVENILE RECORD, AND COMPOUNDED ERROR BY INSTRUCTING THE JURY TO CONSIDER SUCH EVIDENCE TO REFUTE AFFIRMATIVE EVIDENCE OF DEFENDANT'S GOOD CHARACTER.

The prosecution cross-examined the Defendant as follows. (Tr. 572)

> "Q. You have testified on direct-examination as to your reputation for working, and not having been before the authorities, no trouble or problems; is that right?
>
> A. No, Sir. Mr. Hansen asked me if I was ever in prison.
>
> Q. Let me ask you this: Have you been before the juvenile authorities for things that would be tantamount to felonies, if you weren't a juvenile—be the same as felonies?
>
> A. Yes, Sir.

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Q. And how many times have you been before the Juvenile Court for serious offenses that would be the same as felonies if you had been an adult?

A. About three, four, something like that.

Q. Did one involve burglary, and setting fires?

A. Yes, sir.

Q. Another involve unlawful entry and damage to property?

A. I believe so.

Q. Another one involve theft of some money from a church in Murray?

A. Yes, sir."

Whereupon counsel for defense asked for a mistrial (Tr. 575) The court denied appellant's motion stating that the defense opened the question on direct examination and the defense failed to object to the questions (Tr. 580) The court failed to admonish the jury to disregard completely such statements and in Jury Instruction No. 32 advised the jury that such evidence was admissable "for the purpose of refuting affirmative evidence by defendant of his good character." (Tr. 606) The trial court's ruling is without foundation in fact and without merit in law.

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Defense introduced no evidence which could be construed as putting the defendant's character in issue. On direct examination no reference was made to his juvenile record. He testified as to his age, education, broken homelife, places he had lived, who he had lived with, former employment, and as to his intentions and actions leading up to and subsequent to his arrest for the incident for which he was on trial. (Tr. 512-534)

When asked by his counsel, "Have you ever been convicted of a felony, Louie, by imprisonment in a state prison, here, California or anyplace?", he replied "No." (Tr. 516) His stating he had no prior convictions of a felony was proper, truthful and not misleading. By statute juvenile proceedings are not criminal in nature, U.C.A. 55-10-26 (1953), and adjudications are not to be deemed convictions.

Trial court's instructions to the jury authorizing them to consider such evidence to refute evidence of good character is without precedence and flys in the face of a statutory prohibition.

Utah law prohibits admissions of such evidence against the party involved in any case or proceeding in any court. Utah Code Annotated 55-10-33 (1953 amended) provides:

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> "Judgment not criminal in nature-Inadmissible in Evidence. — No adjudication upon the status of any child by the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by a conviction in a criminal case, nor shall any child be deemed a crimnal by reason of such adjudication, nor shall such adjudication be deemed a conviction. Neither the record of the disposition of a child nor any evidence given in Juvenile court shall be admissible as evidence against the child in any case or proceedings in any other court."

Under statutes such as this there appears to be no disagreement that the prohibition against the use of any evidence of juvenile court matters in any other courts has received liberal construction. Such is inadmissible for any purpose against one who was a juvenlie offender and testifies in another proceeding. 147 ALR. 446.

In *Malone v. State* (1936), 130 Ohio St. 443, 200 NE 473 the Ohio Supreme Court reversed a lower court conviction of First Degree Murder where prosecution was allowed to cross-examine defendant as to matters which had been the subject of proceedings in the juvenile court and observed that to permit the use of such evidence "to discredit him or mark him as one possessing a criminal history" would be contrary to both the letter and spirit of the legislative enactment.

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Again in *Lowe v. State*, 63 So. 2d 285 a conviction of 2nd Degree Burglary was reversed due to trial courts permitting solicitor to cross-examine defendant as to a prior sentence to a reform school for breaking into places. See also *State v. Kelley* (1930) 169 La. T53 126 49; *Thomas v. United States* (1941) 74 App. D.C. 167, 121 F. 2d 905; *State v. Cox* (1924, Mo.) 263 SW 215; *State v. Morinski* (1942) 139 Ohio St. 559; 41 NE 2d 287; *Berge v. State* (1923) 96 Tex. Crim. Rep. 32, 255 S.W. 754; *Robison v. State* (1928) 110 Tex Crim Rep. 345, 7 S.W. 2d 571; *Smith v. State* (1929) 113 Tex. Crim. Rep. 124; 18 S.W. 2d 1070 for general holdings that witnesses may not be cross-examined as to prior juvenile records under statutes simliar to Utah.

In *Schafer v. State*, 51 S.W. 2d 356 the district attorney cross-examined the accused in a murder case regarding a prior sentence to a reformatory and upon objection by defense, stated he expected to show conviction and sentence to the reformatory. The trial judge promptly instructed the jury to disregard the prosecutor's question and statement. The appellate court declared the prosecutors statements improper and prejudicial if they "could have affected the fairness of the trial." It was held the circumstances of that case did not justify reversal because (1) the trial court promptly instructed the jury to totally disregard such statements and (2) the jury has already in possession of facts as to other offenses not in the nature of juvenile proceedings which

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showed the accused had been indicted for shooting at deceased before the alleged homicide and also had information as to indictments for other felonies and convictions of misdemeanors the gravity of which made a minor reference to a sentence to a reformatory inconsequential.

The trial court's added assertion that the defendant failed to timely object is also without merit, and in no way corrects court's error in instruction. The prosecution is a quasi-judicial office and it is his duty to see that defendant gets a fair trial. He is not at liberty to raise questions for the purpose of forcing defendant to object. The damage is completed when the objection is made as implied in the Schafer case, supra.

For waiver see *Commonwealth v. Davis,* 396 Pa. 158, 150 A. 2d 863 (1959). The Pennsylvania Supreme Court, *where the issue was not ever raised until oral argument on appeal,* reversed a First Degree Murder conviction where prosecutor during cross-examination made repeated references to defendant's criminal record which could not be justified as an attack on defendant's credibility declaring such to prejudice a fair trial.

In the case at bar the cross examination of the district attorney was improper and unlawful by statute. The trial judge made no attempt to cleanse the record but in fact advised the jury to consider such evidence.

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The cross-examination was clearly prejudicial to a fair trial for defendant with references to burglary, unlawful entry, setting fires, destruction of property and theft of property. The defendant did not and could not open up the subject to inquiry; nor did he or could he waive his statutory protection against impeachment by such evidence; nor did he nor could he waive his right to a fair trial. A trial interrupted and delayed by the tragic assassination of President Kennedy.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR JECTIONS, EXTRAJUDICIAL STATEMENTS OF THE ACCUSED INVOLUNTARILY GIVEN, DURING A PERIOD OF ILLEGAL ARREST AND DETENTION, UNDER CIRCUMSTANCES INHERANTLY COERCIVE AND IN VIOLATION OF DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Defendant at the time of his arrest was an 18 year old boy having completed the 9th grade in school. He is the product of a broken home plagued with frequent shifts in residences between parents. Substantial evidence introduced during the trial indicates he was prone to excessive consumption of alcohol and had been drinking just prior to his arrest, detention, and interrogation. (Tr. 249) The record is filled with instances showing his emotional instability and susceptability to suggestion.

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Sheriff Hammon admitted the written and oral statements were taken after defendant requested counsel and attempted to obtain such. The statements were taken prior to any contact with anyone outside the Sheriff's department. (Tr. 229, 408, 409)

The arrest and detention of Defendant were illegal and prejudicial. He was taken into custody without a warrant, by Davis County Sheriff's officers while at a bar in Salt Lake City, Salt Lake County, and transported to the Salt Lake City Police Station for identification. He was not taken before a magistrate, advised of charges against him or provided legal counsel. Within an hour he was transported to the Davis County Jail in Farmington, Utah, without a warrant of arrest, or other legal hearing or process

Utah Code Annotated 77-13-17 (1953) clearly prohibits such action declaring, "when an arrest is made without warrant by a peace officer or private person, the person arrested must without unreasonable delay be taken to the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person must be made before such magistrate."

Defendant was taken out of Salt Lake County without an opportunity to contact friends or relatives and booked in the Davis County Jail in Farmington, Utah

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where he knew no one and had no one to advise him. Even though allowed to use the telephone defendant was effectively deprived of any outside counsel. He had no funds to retain counsel and apparently knew nothing about the process for doing such. When he placed a call to a friend asking for witnesses and an attorney the Sheriff stood by and later introduced portions of his conversation into evidence as attempts to establish an alibi. (Tr. 229) By the time his sister was able to get from Salt Lake City to Farmington and get in to see defendant (Tr. 207) three inconsistent statements had been given each of which were admitted in to evidence.

The record clearly indicates defendant became distraught over the fact that no one came to help him and sought counsel from the sheriff (Tr. 203) who admittedly had won defendant's confidence. (Tr. 209) Sheriff Hammon testified, "I'm sure he had faith in me, and he thought I would help him, or he wouldn't have told me." (Tr. 220) The sheriff then advised the boy it was in his best interst to give a statement if it was an accident. (Tr. 395)

Sheriff Hammon acknowledged the defendant was frightened and crying when he gave the statement (Tr. 210) and didn't voluntarily narrate the fact situation (Tr. 210) and that such had to be elicited on a piece-meal basis by questions and answers with defendant first denying and then admitting numerous facts and allegations. (Tr. 406)

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In several places the record indicates that defendant was in very general terms "advised as to his right to counsel," (Tr. 192) and "told that anything he said could be used *for or against* him" (Tr. 199) or that any statements he made "should be given of his free choice." (Tr. 204)

Nowhere in the record is there any indication that he was told he had an absolute right to remain silent and to sign nothing in terms which a youth of his age and emotional development could be expected to understand.

Sheriff Hammon flatly admitted that he did not advise the defendant again of his rights when the final and most incriminating statement was given. (Tr. 232)

The burden of proof as to volutarinous is upon the State. *State v. Dunkley,* 85 Utah 546, 39 P. 2d 1097. Clearly the prosecution failed to meet this burden and the trial court erred in overruling defense's motion to suppress such statements.

Since the admissibility of a confession in a state criminal case is tested by the same standard applied in federal prosecutions (*Malloy v. Hogan,* 378 U.S. 1 (1964) it is necessary to look to the standard set by our Federal Courts.

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Taken collectively the conditions under which these statements were obtained violate due process and refute any allegation that such were "an essentially free and unconstrained choice" by their maker. *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Gallegos v. Colorado,* 370 U.S. 49 (1962); *Fikes v. Alabama,* 352 U.S. 191 (1957); *U.S. v. Rundle,* 221 F. Supp 1003, (1963).

POINT III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING OVER DEFENSE COUNSEL'S OBJECTION THE JURY AN INSTRUCTION ON SECOND DEGREE MURDER WHEN THE PROSECUTION HAD PROCEEDED UNDER THE FELONY MURDER THEORY AND THERE WAS NO EVIDENCE INTRODUCED TO SUPPORT A CHARGE OF SECOND DEGREE MURDER.

Utah Code Annotated (1953) 76-30-3 provides "Every murder . . . committed in the perpetration of, or attempt to prepetrate, any arson, rape, burglary or robbery . . . is murder in the first degree."

Utah Code Annotated (1953) 76-9-3 provides "Every person who . . . enters any automobile . . . with intent to steal or to commit any felony whatever therein is guilty of burglary . . ."

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The prosecution's case for a first degree murder charge was based upon a statement given to officers by defendant declaring he entered the automobile looking for dope and while he was looking in the glove compartment, he pointed the gun at the driver and the gun discharged.

All evidence is circumstantial and the deceased's companions testified they were asleep and did not know when the weapon was fired or when the act occurred. The firearm used was never located or placed into evidence. When first observed defendant was inside the vehicle with a pistol in his hand.

Statements introduced by former cellmates together with circumstantial evidence leading up to and subsequent to the incident are in no way in conflict with the statement given to the sheriff and there is no evidence to support an instruction on murder in the second degree.

The prosecution established the criminal agency element of the corpus delecti by using the felony murder theory and was thus able to introduce the statement of defendant. (Tr. 164-167) Upon introducing such evidence the state is bound by it.

Under the evidence the defendant was guilty of first degree murder or not guilty at all. Trial Court's giving of the instruction on second degree murder (Tr. 597, 598) over defense counsel's timely objection (Tr. 720) was

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clearly prejudicial and reversible error. See *Ellis v. People,* 164 P.2d 733 (1945, Colorado); *Dickens v. People,* 67 Colo. 409, 186 P. 277 (1919); *Green v. United States,* 218 F. 2d 856 (1955); see also *State v. Thorne,* 39 U. 208, 117 P. 58 (1912); *State v. Mewhinney,* 43 U. 135, 134 P. 632 (1913); *State v. Condit,* 101 U. 558, 125 P. 2d 801 (1942).

CONCLUSION

The appellant respectfully submits that for the reasons above enumerated the case be reversed and remanded.

Respectfully submitted,

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