1983

State of Utah v. Jake Poteet, aka Elmer Laverne Poteet : Appellant's Brief on Appeal

IN THE SUPREME COURT

OF THE STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	Case Number:
	)	19132
v.	)	
	)	
JAKE POTEET, a/k/a ELMER LAVERNE POTEET,	)	
	)	
Defendant-Appellant.	)	

APPELLANT'S BRIEF ON APPEAL

Appeal from two Jury Verdicts
and two Judgments
of the Sixth Judicial District Court
for Garfield County, State of Utah,
The Honorable Don V. Tibbs Presiding

* * * * * * * * * * * * * * * * * * * *

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

v. : Case No. 19132

JAKE POTEET, :

Defendant-Appellant. :

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

This case is an appeal from a final "Judgment and Order of Committment" in Garfield County Criminal No. 2914 and a final "Judgment and Order of Committment" in a companion case, Garfield County Criminal No. 2985. Both judgments were rendered by the Sixth District Court on March 13, 1983.

DISPOSITION IN LOWER COURT

The District Court entered a Judgment finding the Defendant-Appellant guilty of aggravated assault, a third degree felony, following a jury verdict in a trial held February 28th and March 1st of 1983 in Criminal No. 2914. The District Court entered a judgment finding the Defendant-Appellant guilty of bail jumping, a third degree felony, following a jury verdict in a trial held March 10, 1983. On March 31, 1983, the Defendant-Appellant was sentenced to two consecutive terms, not to exceed

five years, at the Utah State Prison. Mr. Poteet was also fined $5,000.00 in each case.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant asks that the convictions and judgments be reversed, the informations be dismissed, and he be released from custody in both cases.

STATEMENT OF FACTS

Defendant-Appellant was charged in the Sixth District Court of Garfield County, State of Utah, with the offenses of aggravated robbery, a first degree felony, attempted criminal homicide, a first degree felony, and aggravated assault, a third degree felony, in Garfield County Criminal No. 2914. The Defendant was charged with bail jumping, a third degree felony, in Garfield County Criminal No. 2985. The aggravated robbery, attempted criminal homicide, and aggravated assault charges arose out of an incident on October 31, 1981, in the Circle T Motel in Escalante, Utah. The State alleges that the Defendant beat and robbed one Rodney Jones inside Mr. Jones' motel room, taking approximately $600.00 in cash and leaving Mr. Jones for dead. Mr. Poteet, his uncle, and two brothers were arrested on November 1, 1981, and taken to the Circle T Motel for a line-up procedure where identification of Mr. Jim Poteet and his two brothers was allegedly made by Mr. Jones. Rodney Jones was to identify the uncle of Mr. Poteet.

Based upon the incident of October 31, 1981, Mr. [illegible]

was initially charged with assault, a class B misdemeanor, in the Justice of the Peace Court in Escalante, Utah. Mr. Poteet posted $146.00 bail and was released. The Defendant-Appellant reappeared in the Justice of the Peace Court in Escalante, Utah, on November 7, 1981, and was rearrested on charges of aggravated assault. At that time he posted $3,000.00 bail and was again released. On November 25, 1981, the Defendant-Appellant appeared in the Tenth Circuit Court in Richfield, Sevier County, State of Utah, for a preliminary hearing on that date but was rearrested on charges of aggravated assault, attempted criminal homicide, and aggravated robbery. A preliminary hearing on those charges was held on December 10, 1983, in Panguitch, Utah, the county seat of Garfield County. Mr. Poteet, his two brothers, and his uncle were all held to answer in the District Court of Garfield County as a result of the preliminary hearing. Mr. Poteet posted $10,000.00 bail on December 14, 1981, and was again released from jail.

On January 7, 1982, the Defendant-Appellant did not appear before the District Court of Garfield County for arraignment, and a warrant was issued for his arrest. He was arrested on January 13, 1982, in the State of California, and following extradition proceedings was returned to the State of Utah on April 27, 1982. In May of 1982, Mr. Poteet was arraigned in the District Court for Garfield County on the information charging aggravated robbery, attempted criminal homicide, and aggravated assault. He was also arraigned on

bail jumping charges, even though he had not been given a preliminary hearing on those charges.

In June of 1982, Mr. Poteet was discovered to be missing from the Garfield County Jail. He was later arrested in the State of Montana and returned to the State of Utah in August of 1982. Mr. Poteet was again arraigned in the District Court on an amended information charging aggravated robbery, attempted criminal homicide, aggravated assault, bail jumping, injury to a jail, and escape. The injury to a jail charge was a third degree felony and the escape was charged as a class B misdemeanor. At the time of Mr. Poteet's arraignment of this amended information, he had not been afforded a preliminary hearing on the bail jumping, injury to a jail, or escape charges. Mr. Poteet was finally given a preliminary hearing on those charges on December 9, 1982.

On February 28th and March 1st of 1983, the Defendant-Appellant, Jake Poteet, was tried on the charges of aggravated robbery, attempted criminal homicide, and aggravated assault. Mr. Poteet was found guilty of aggravated assault, but was found not guilty of aggravated robbery and not guilty of attempted criminal homicide. This verdict was rendered by a trial jury in Garfield County. On March 10, 1983, the Defendant-Appellant was convicted by jury verdict of the third degree felony offense of bail jumping. The State of Utah moved to dismiss the injury to a jail felony charge and the escape misdemeanor charge

following Mr. Poteet's conviction on bail jumping.

On March 31, 1983, the Defendant-Appellant was sentenced by the Sixth District Court of Garfield County to two consecutive sentences not to exceed five years each and ordered to pay two $5,000.00 fines as a result of the aggravated assault and bail jumping convictions. (R-268, R-37). At the time of the writing of this brief, Mr. Poteet is incarcerated at the Utah State Prison pursuant to these sentences.

In Case Number 2914 a Motion for compulsory process to produce out-of-state witnesses was denied prior to trial. (R-185; T-20 through T-23). A similar motion in Case Number 2985 was made and denied before the trial of that case. (T-6,7).

An Affidavit of Bias and Prejudice was filed prior to the trial of Case Number 2914 and denied. (R-195, R-200).

A Motion to Suppress Evidence was filed in Case Number 2914 on the grounds that an improper line-up was conducted and the Defendant was improperly arrested in his home without a warrant. (R-179). The trial court withheld ruling on this Motion but allowed the evidence of the line-up and arrest to be presented to the jury. (T-18).

A Motion to Dismiss on the grounds that the Defendant was improperly denied a speedy preliminary hearing was made in Case Number 2914 and Case Number 2985. (R-178, T-4). Those Motions were denied in both cases. (T-17 and T-6,7 respectively).

ARGUMENT

POINT I

THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS DENIED COMPULSORY PROCESS TO SECURE THE ATTENDANCE OF OUT-OF-STATE WITNESSES.

Both the Utah State Constitution, Article One, Section Twelve, and 77-1-6(1)(e), Utah Code Annotated, 1953, as amended, guarantee a Defendant in a criminal action the right to have compulsory process to secure the attendance of witnesses in his behalf. The Defendant-Appellant herein was determined to be indigent by the Circuit Court when the Public Defender was appointed to represent him. Mr. Poteet did not have sufficient funds to bring out-of-state witnesses to the trial in his behalf. Compulsory process was requested by the Defendant-Appellant to bring his brothers, Gary Poteet and Bill Poteet, to the trial from their home in the State of Washington (R-135 in Case Number 2914 and T-6,7 in Case Number 2985).

The testimony of these brothers was essential in both cases. In Case 2914 the brothers were present in the motel room where the fight took place between Ronald Jones and the Defendant-Appellant. Their testimony was needed to establish the Defendant-Appellant's claim of self-defense. The Court's refusal to issue compulsory process and to require the State of Utah to pay for the attendance of these witnesses foreclosed the self-defense theory at the trial of the aggravated assault

(T-20 through T-23).

The testimony of both Gary and Bill Poteet was needed in Case Number 2985 to establish a hostile community climate, giving justification for his failure to appear before the District Court for arraignment. The refusal of the State of Utah to issue process for these out-of-state witnesses forced the Defendant-Appellant to take the stand in his own defense which he determined he could not do. (T-6, T-116).

The refusal of the Trial Court and the State of Utah to assist in bringing these two witnesses to trial denied the Defendant-Appellant the defenses which he should have had available.

POINT II

THERE WAS AN INSUFFICIENT SHOWING OF REASONS FOR THE DENIAL OF DISQUALIFICATION UNDER THE AFFIDAVIT OF BIAS AND PREJUDICE.

The Defendant-Appellant filed a detailed Affidavit of Bias and Prejudice seeking the disqualification of the Sixth District Judge, the Honorable Don V. Tibbs. (R-195). The Affidavit and the issues raised therein were summarily dismissed by an Order of the Honorable Allen B. Sorensen of the Fourth Judicial District. (R-200). Under Rule 63(b), Utah Rules of Civil Procedure, Judge Sorensen was to pass upon the legal sufficiency of the Affidavit. While there is no question that his Order has passed upon the legal sufficiency of the Affidavit,

it is the contention of the Defendant-Appellant that he is entitled to the Court's reasoning in such a finding. The provisions of Rule 52, Utah Rules of Civil Procedure, providing for Findings of Fact and Conclusions of Law should be followed in such procedures.

POINT III

THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN SUBJECTED TO AN ILLEGAL LINE-UP IN ESCALANTE, UTAH ON NOVEMBER 1, 1981.

Chapter 8, Title 77, Utah Code Annotated, 1953, as amended, establishes the procedures to be used in the conduct of line-ups. The line-up procedure in this case is described in detail in the transcript of Case Number 2914. (T-38 through T-349). There was no record made of the line-up procedure or remarks. There was no photograph taken of the line-up. There was no magistrate's order for a line-up. None of the persons in the line-up were represented by counsel at the time of the line-up. The line-up included only persons who were suspects and in custody at the time of the line-up. The line-up took place some eighteen hours after the time of the alleged offense. The transcript would indicate that nearly every provision of the line-up statute, 77-8-1 through 4, Utah Code Annotated, 1953, as amended, was violated or ignored in the present case. It would also appear from the long delay between the offense and the line-up that this procedure could not be justified as a field identification.

POINT IV

THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN NOT GIVEN A PRELIMINARY HEARING ON THE BAIL JUMPING CHARGES WITHIN THE THIRTY-DAY PERIOD MANDATED BY STATUTE.

The preliminary hearing transcript in Case Number 2985 shows that the Defendant-Appellant was not given a preliminary hearing on the bail jumping charge until December 9, 1982, some eleven months after he was first charged with that offense. While it is conceded that the Defendant-Appellant was in custody in California or Montana for some six months during this period, it is still true that he was held without a preliminary hearing on the bail jumping charge from April 27, 1982, until his departure from the Garfield County Jail on June 13, 1982, and from October 20, 1982, until December 9, 1983. When a Defendant is in custody, the code of criminal procedure requires that he be given a preliminary hearing within ten days. The more lenient limit of thirty days is allowed when a Defendant is released on bail. (77-35-7(4)(c), Utah Code Annotated, 1953, as amended). These time limits may be extended only upon order of the magistrate, upon good cause shown. The record in Case Number 2985 is silent on the reasons for these lengthy delays.

POINT V

THE DEFENDANT-APPELLANT WAS ILLEGALLY ARRESTED IN HIS HOME, WITHOUT A WARRANT, AND ALL EVIDENCE DERIVED FROM THAT ARREST SHOULD HAVE BEEN SUPPRESSED.

The Defendant-Appellant, together with his [illegible] and his uncle, was arrested at his home by Chief Don Mosier on November 1, 1981. (T-340). The Chief did not have a warrant for the arrest of the Poteets. The Poteets were informed that they were being arrested for theft, a felony. The case of Payton v. New York, 100 S.Ct. 1371 (1980) requires that police have an arrest warrant before a suspect may be arrested in his own home. The warrantless arrest of the Defendant-Appellant by Chief Mosier was made contrary to the rule set forth in Payton, supra. This illegal arrest cannot be used to procure further evidence against the Defendant-Appellant. All evidence of the line-up identification and following processes should have been suppressed by the trial Court.

POINT VI

THERE WAS INSUFFICIENT EVIDENCE AT TRIAL TO SUPPORT A VERDICT OF GUILTY OF THE OFFENSE OF AGGRAVATED ASSAULT.

There was no evidence produced at the time of trial that the Defendant-Appellant used a deadly weapon in the alleged assault against Ronald Jones. The testimony of Dr. Henrie showed a slight fracture of the lateral aspect of the left orbit together with evidence of a brain concussion, a laceration of the left eyebrow, and other facial bruising and swelling. (T-420 and 421). The testimony of Dr. Henrie showed the only possible that could have caused the death of Mr. Ronald Jones would have been the aspiration of vomitus. (T-414). There was no suffi-

evidence produced at trial to show that Mr. Jones sustained any serious bodily injury as that term is defined in 77-1-601(10), Utah Code Annotated, 1953, as amended.

CONCLUSION

Because of the failure of the trial Court to grant essential compulsory process, the denial of disqualification of the trial judge with no reason given, the illegal arrest and line-up identification of the Defendant-Appellant, the failure to give the Defendant-Appellant the speedy preliminary hearing mandated by statute, and the lack of sufficient evidence to support the conviction for aggravated assault, the Defendant-Appellant's convictions should be reversed and he should be released from custody.

DATED this 21st day of September, 1983.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF ON APPEAL to Mr. Earl Dorius, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 21st day of September, 1983.

JAMES L. SHUMATE