

1964

# Darrell Devere Poulson v. State of Utah : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

*Plaintiff and Respondent,*

vs.

DARREL DEVERE POULSON,

*Defendant and Appellant.*

Case  
No. 10208

## BRIEF OF APPELLANT

Appeal from the Order of the Fourth Judicial District  
Court in and for Utah County, State of Utah,  
Honorable R. L. Tuckett, Judge

FILED

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH

*Plaintiff and Respondent,*

vs.

DARREL DEVERE POULSON,

*Defendant and Appellant.*

} Case  
No. 10208

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## BRIEF OF APPELLANT

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### STATEMENT OF THE KIND OF CASE

On December 14, 1961, the defendant was convicted in the Fourth Judicial District Court in and for Utah County of murder in the first degree. He has been sentenced to be shot to death. On May 8, 1964, defendant filed with the Fourth District Court a Petition for Writ of Coram Vobis.

### DISPOSITION IN LOWER COURT

The Petition for Writ of Coram Vobis was heard by

Court. This appeal was taken from the order of the Honorable R. L. Tuckett denying the petition.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order denying the Petition for Writ of Coram Vobis as a matter of law.

## STATEMENT OF FACTS

Included in the Record is the Transcript of the original proceedings which will be referred to by the designation "T." The Transcript of proceedings on Petition for Writ of Coram Vobis will be referred to by the designation "R."

Prior to the original trial of this matter on the merits, the defendant caused a Notice of Proposed Defense of Insanity to be filed with the Court. The Court previously had caused three alienists to be appointed in accordance with the provisions of Section 77-24-17, Utah Code Annotated, 1953. The alienists designated by the Court were Carl Kivler, M.D., a medical physician then responsible for the mentally retarded unit at the Utah State Hospital, Louis A. Moench, M.D., a Salt Lake City physician, and C. H. Hardin Branch, M.D., a Salt Lake City psychiatrist. Doctors Kivler and Moench were called by the State to testify in the original proceedings (See T. pp. 418-431, 433-439). Both witnesses were offered in rebuttal to a defense witness, Ija Korner, Chief

of the Section of Psychology and Associate Professor of Psychiatry in the Medical School of the University of Utah, who testified in substance as follows: That he examined the defendant in November, 1961, with respect to his "mental capacities" (T. 363); that using the verbal part of the Wechsler Bellvue Test the defendant had an I.Q. of 67, "which would put him in what you would call the feeble-minded range" (T. 364); that "I came to the opinion that it [finding with respect to the defendant] could be explained \* \* \* that mental illness is very frequently in specific cases of this kind, namely from very early childhood on \* \* \*" (T. 365); that between 30 and 40 percent of all individuals who are at the present time in institutions and held to be feeble-minded, actually are not feeble-minded, but are mentally ill" (T. 366); that "In my opinion the feeble mindedness is related to a condition of mental illness (T. 367); that the little the defendant has in terms of intelligence is useless when he is under the impact of an emotional strain, under any kind of emotional impact. In such situation we are capable of kind of holding our emotions back, or kind of postponing them, or talking to ourselves. In such instances Mr. Poulson has nothing available to help him stem whatever he is in. He resembles at that time a human being without a head without a brain. He would not be much different from an animal in such instances. He has not got the use of these faculties in such a situation" (T. 368); that the defendant, "once launched on an impulse, whatever it is on, something which stirs him up, once launched upon that he has no



built-in mechanism in his machine, so to speak, which can stop him from completing the act. \* \* \* in him there is very little difference between thinking, talking and doing. \* \* \* I don't think he knows whether he thinks something, whether he does it, or whether he has talked about it" (T. 373); and, on redirect examination, that the defendant's response to the Rorschach Test was "very deviant statistically speaking" (T. 399).

Dr. Kivler testified that he has examined the defendant on several occasions (T. 420); that he diagnosed the defendant as "mentally retarded in a degree as mild" (T. 421); that the defendant "knew the difference between right and wrong" at the time of the offense (T. 423); that he "understood the nature and the consequences of his act" (T. 423); that he found no evidence of psychosis (T. 424); that the defendant "has an unrestrained drive" and is "sane" (T. 428). On cross examination Dr. Kivler agreed that a person could be "mentally ill" without having "delusions" (T. 430-1).

And, Dr. Moench observed that the defendant was "mildly mentally retarded" (T. 435); that he is suffering from no psychosis (T. 436); that the defendant, on the night of the incident had "an understanding of the difference between right and wrong" (T. 437); and in response to a hypothetical question posed by the prosecutor, that the defendant had control of his impulses on the night of the offense (T. 438).

The matter of insanity as a complete defense to the crime charged was presented to the jury in the court's



instructions, the issue having reasonably been raised by the evidence. Appeals to the Supreme Court of Utah and the Supreme Court of the United States on this and other issues produced no change in the resulting conviction.

After the original trial upon the merits, counsel for the defendant was advised of the existence of a communication circulated by Dr. Moench to Doctors Kivler and Branch purporting to seek or insure uniformity in their testimony. Upon the basis of this information, and the belief that a copy of the communication was available in the files of Dr. Branch, the instant petition was filed with the Court having original jurisdiction of the matter. The petition was supported by the affidavit of Dr. Ija Korner, a Doctor of Psychology, who personally had examined the communication contained in the file of Dr. Branch.

A hearing was held before the Honorable R. L. Tuckett upon the Petition for Writ of Coram Vobis, at which hearing the testimony of Doctors Moench, Kivler and Branch was elicited.

At the hearing, Dr. Kivler was unable to produce any of his reports or correspondence relative to the defendant because the week prior to the hearing he had destroyed all of his correspondence (R. 9, 19). He acknowledged receiving from Dr. Moench a copy of a letter after receiving notice of his appointment as an alienist (R. 8). He denied having received any other information from Dr. Moench (R. 9). The original of the communi-

cation was mailed to Dr. Branch (R. 9). The witness then testified that the letter expressed “His [Dr. Moench’s] evaluation of the case (R. 10); that “generally it was an agreement with what I had evaluated the case” (R. 11-2, 14-5); that he didn’t recall whether the latter contained anything which differed from his own opinion (R. 14); that he didn’t recall whether it contained historical data (R. 14); that he notified no one of his receipt of the communication (R. 15); but, that he did not alter his conclusions (R. 16). On cross-examination he stated that he received the communication only after completing his own examination of the defendant (R. 18). On re-direct examination the doctor was unable to recall whether he consulted other sources for information in making his report (R. 22).

Dr. Moench testified that he caused the defendant to be examined in response to his appointment as an alienist. His entire file relating to the defendant was identified as Defendant’s Exhibit A, and was received in evidence (R. 32). The witness testified that prior to the trial he forwarded to the other alienists “a simple note of transmittal” and “details of my examination of Mr. Poulson” (R. 29). He acknowledged receiving correspondence prior to trial from both Doctors Branch and Kivler (R. 32-3), and that he familiarized himself with the information (R. 36).

Dr. C. H. Hardin Branch, a psychiatrist, professor and chairman of the Department of Psychiatry at the University of Utah, testified that he examined the de-

fendant on one occasion pursuant to his appointment by the Court as an alienist (R. 43-4). He acknowledged receiving a "typewritten note" from Dr. Moench, dated October 30, 1961, and received in evidence as Defendant's Exhibit B, together with details of Dr. Moench's examination of the defendant (Defendant's Exhibit C, R. 26), and a Report of Psychiatric Examination (Defendant's Exhibit D, R. 46). The witness examined the information furnished by Dr. Moench prior to the preparation of his own report (R. 47). His report was based in part upon "Doctor Korner's psychological evaluation, Doctor Moench's report, and a discussion with Doctor Moench" (R. 48).

Defendant's Exhibit B was sent both to Dr. Kivler and Dr. Branch by Dr. Moench (R. 56). Written on what appears to be a prescription sheet with the letterhead of the Salt Lake Clinic, the memorandum was as follows:

"Dear Hardin: I understand that you are going to examine Darrel Poulson in Provo, too. Enclosed are my notes, for whatever use they may be in saving your time. If you have any serious disagreement with my conclusions, would you mind letting me know? *I think it is good public relations if we present as unanimous an opinion as practical, and review any differences between ourselves before appearing in court.* If you have no serious differences, would you have Marg. call me, so I can send my report to the attorney? Yours Louis" (Emphasis Supplied).

According to Dr. Kivler, he examined the defendant on "five or six" occasions (R. 8); Dr. Moench examined

the defendant on only "one occasion," spending "approximately three hours" (R. 27, 36); and Dr. Branch examined the defendant on "one occasion," for "about an hour to hour and a quarter" (R. 44).

## ARGUMENT

THE FAILURE OF THE DULY APPOINTED ALIENISTS TO FULLY AND INDEPENDENTLY EXAMINE THE DEFENDANT, IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH, CONSTITUTED A SUBSTANTIAL AND MATERIAL DENIAL OF DUE PROCESS OF LAW

Prior to the trial of the original issues presented in this case, it was apparent to the court and counsel that the defendant was suffering from an obvious mental illness, defect or derangement which had a bearing upon not only his conduct at the time of the offense, but his ability to stand trial for the offense itself. In accordance with the provisions of Section 77-24-17, Utah Code Annotated, 1953, the court caused three alienists to be appointed for the purpose of examining the defendant and investigating his sanity. The provision provides as follows:

"When a defendant gives notice of the defense of insanity the court must select and appoint two alienists to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and in-

investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. Said alienists so appointed by the court shall be allowed such fees as in the discretion of the court seem just and reasonable, having regard to the services rendered by the witnesses. The fees allowed shall be paid by the county where the information was filed or the indictment was found.

“Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence as to the sanity of the defendant; where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court.

“Any alienist so appointed by the court may be called by either party of the action or by the court itself and when so called shall be subject to all legal objections as to competency and bias and as to qualification as an expert. When called by the court, or by either party to the action, the court may examine the alienist, as deemed necessary, but either party shall have the same right to object to the questions asked by the court and the evidence adduced as though the alienist were a witness for the adverse party. When the alienist is called and examined by the court, the parties may cross-examine him in the order directed by the court. When called by either party to the action the adverse party may examine him the same as in the case of any witness called by such party.”

The clear purpose of the statute is to provide an impartial examination by two alienists so as to insure

at least two, separate and independent reports. The Act has the further purpose of assuring to the indigent defendant competent medical evidence to support a defense based upon mental condition.

The appointment of three alienists doubtless was prompted by a laudable desire to insure a thorough examination in the light of the offense charged and the mental history of the defendant.

Our law recognizes as a basic ingredient of our criminal process the entry of a plea of "not guilty by reason of insanity," a full and complete inquiry at the expense of the State into the issue of mental competency, and a possible verdict reflecting a finding of mental incompetency. To this end, the selection of competent psychiatrists to act as alienists of the Court, and the manner in which they perform their vital function can, as in this case, virtually save a life or condemn the defendant to death.

#### A. EVIDENCE BEARING UPON MENTAL INCOMPETENCY SUFFICIENT TO RAISE ISSUE AS A DEFENSE TO CRIME CHARGED AND TO WARRANT APPOINTMENT AND EXAMINATION BY IMPARTIAL ALIENISTS.

Much of the evidence which lead to the entry of the plea of not guilty by reason of insanity and the appointment of alienists to examine the defendant was produced at the original trial. In substance, the evidence of mental impairment revealed the following facts: That



the defendant had an I.Q. of 67, "which would put him in what you would call the feeble-minded range" (T. 364); "that mental illness is very frequently in specific cases of this kind, namely, from very early childhood on . . ." (T. 365); that "feeble-mindedness is related to a condition of mental illness" (T. 367); that the defendant's response to the Rorschach Test was "very deviant statistically speaking" (T. 399); that the defendant "was a mentally deficient person with some personality difficulties along with it" (T. 364); that the defendant was confined to Utah State Training School at American Fork, and that a vasectomy operation was performed on the defendant on August 7, 1957, to sterilize him (T. 340); that the defendant's juvenile court record reflected a history of "mauling over women on street," and a "sexual attack on half sister" (Defendant Exhibit 24); that on the very evening of the commission of the principal offense the defendant had been questioned by a deputy county sheriff in connection with an earlier attack upon another girl with a piece of iron (T. 288-201); and, according to an expert witness on behalf of the defendant, "once launched, launched on an impulse, whatever it is on, something which stirs him up, once launched upon that he has no built-in mechanism in his machine, so to speak, which can stop him from completing the act . . . In him there is very little difference between thinking, talking and doing . . . I don't think he knows whether he thinks something, whether he does it, or whether he has talked about it" (T. 373). The prosecution witnesses characterized the defendant as a "mild" mental de-



ficient (T. 413); that the defendant "has an unrestrained sexual drive" and that a person could be "mentally ill" without having "illusions" (T. 430-1).

**B. THE RESPECTIVE REPORTS AND TESTIMONY OF THE APPOINTED ALIENISTS WERE NOT BASED UPON INDEPENDENT AND IMPARTIAL EXAMINATIONS OF THE DEFENDANT, FAILING THEREFORE TO MEET THE MINIMAL REQUIREMENTS OF DUE PROCESS OF LAW.**

Significantly, the alienists were circularized by Dr. Moench with historical data, conclusions as to "mental status," and a Summary and Conclusions based upon the data gathered by the witness. This action alone constitutes a grievous departure from the requirements and purposes of the statute. But, to accompany all of this information with the gratuitous suggestion that "it is good public relations if we present as unanimous an opinion as practical," is to make a mockery of their own obligation to the law, to their profession and the defendant. That this has been the practice of our alienists according to testimony at the hearing upon the Petition (T. 55), makes it neither laudable nor acceptable by any rational construction of the statute.

By his own admission, the report of Dr. Branch was based in part upon the data furnished him by Dr. Moench, including a conversation with Dr. Moench. We have no way of knowing what Dr. Kiver may or may not have relied upon as his recollection is egregiously lack-

ing and the destruction of his records most unprofessional and most untimely.

It is worthy to note that something caused Dr. Moench to characterize the defendant in his written report to be mentally retarded to a "moderate" degree (Defendant's Exhibit D), whereas his testimony was to the effect that defendant's mental retardation was "mild" (T. 435). This alteration remains unexplained by Dr. Moench, although the distinction between the terms is significant, medically speaking (R. 52-3). By Dr. Moench's testimony he familiarized himself with information furnished by Doctors Kivler and Branch. And, a disagreement as to I.Q. was the apparent subject of a conversation between Doctors Branch and Moench (R. 51).

The Court effectively was denied the services of Dr. Branch, the only fully trained and qualified psychiatrist of the three, because of his reliance upon information furnished by Dr. Moench.

The statute speaks of more than one alienist—in this case three—for a specific reason: The court desires multiple judgments, not the single judgment of the group. Diagnosis can produce varied reports—treatment might require a single procedure based upon consultation. We are not interested here in treatment. In the instant case the court and counsel sought, and were entitled, to three separate reports, each based upon facts independently investigated and analyzed.

Psychiatrists, as other expert witnesses, can be expected to furnish different and varied testimony depending upon their own examination and diagnosis. As Jerome Hall observes in his article, *Psychiatry and Criminal Responsibility*, at 65 Yale Law Journal 761, at 771:

“And, as Dr. Davidson points out, disagreement among psychiatrists is to be expected; indeed, a lack of disagreement would in many cases raise doubts regarding the integrity or competence of the witnesses.” (Citing Davidson, *Psychiatrist in Administration of Criminal Justice*, 45 J. Crim. L. 12, 13-14 (1954).

Unfortunately, those of us who must try these matters and review the issues raised are not medical specialists. Nonetheless, it is submitted that the three hours spent by Dr. Moench and the one hour spent by Dr. Branch in examining and interviewing the defendant simply is inadequate. Contrasted with sparse time involved in the psychiatric examination of the defendant here is the proposed requirement of the Model Penal Code that the court may order the defendant committed for a period not greater than sixty days for the purpose of such an examination (Model Penal Code, Sec. 4.05). Under the laws of many states, hospitalization for observation is specified permitting exhaustive examination of the defendant (see Table XI-A, *the Mentally Disabled and the Law*, The Report of the American Bar Foundation on the Rights of the Mentally Ill, P. 373).

Compliance with the statutory procedure is mandatory if the defendant is not to have his life taken with-

out due process of law (*Christiansen v. Harris*, 109 Utah 1, 163 P. 2d 314). In a Louisiana decision, failure to strictly comply with the statutory procedure relating to the report of a "lunacy commission" was held a denial of due process (*State v. Winfield* (1952) 222 La. 157, 62 So. 2d 258).

The role of the psychiatrists was indispensable to the Court, counsel and the defendant. Whether the mental condition of the defendant could act as a complete or partial defense to the crime charged depended almost exclusively upon the testimony of the alienists. The jury was entitled to know the sources of their information, the extent of testing, the relationship between past and present behavior, a diagnosis in understandable terms, and, above all, the assurance that their testimony was impartial and independent. This duty is well stated in *Carter v. United States*, 252 F. 2d 608, as follows:

"Mental 'disease' means mental illness. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. They differ widely in origin, in characteristics, and in their effects on a person's mental processes, his abilities, and his behavior. To make a reasonable inference concerning the relationship between a disease and a certain act, the trier of the facts must be informed with some particularity. This must be done by testimony. Unexplained medical labels—scizophrenia, paranoia, psychosis, neurosis, psychopathy—are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief

functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion. The ultimate differences *vel non* of relationship, of cause and effect, are for the trier of the facts." (See also Guttmacher, M.S., "Current Trends in Regard to Criminal Responsibility," Amer. J. Psychiatry, 117 (1961) pp. 684-691.)

## CONCLUSION

It is respectfully urged that a new trial be directed. The defendant was deprived of meaningful compliance with the provisions of Section 77-24-17, Utah Code Annotated, 1953, in that the alienists did not fulfill their responsibility to the court, counsel or the defendant. The failure of the alienists independently and impartially to examine the defendant, their failure to give adequate time to such psychiatric examinations, and the overt attempt to seek a uniform diagnosis constitute a denial of due process of law.

Respectfully submitted,

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