1983

State of Utah v. Richard I. Cintron : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 19149
RICHARD I. CINTRON,	:	
Defendant-Appellant,	:	

BRIEF OF APPELLANT

This is an appeal from a verdict of guilty and a judgment based thereon in the Third Judicial District Court and in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of the charge of Aggravated Robbery and Aggravated Burglary felonies of the first degree in the District Court for the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant was sentenced to the Utah State Prison for a term as provided by law of not less than five (5) but which may be for life after a jury found him guilty of both offenses.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered, or in the alternative a new trial.

STATEMENT OF THE FACTS

The appellant, herein, with Joseph James Price, was accused of burglarizing and robbing William E. Parker at his residence at 11760 South

State Street, Salt Lake County, State of Utah, on the 26th of July, 1982. It was alleged that the defendants, in the early morning hours of that day, broke into Mr. Parker's residence, blindfolded and held him at knife point while they ransacked the house taking various items of property. (T. Vol I pg 12)

Appellant was identified as the result of having prior contact with the victim who was able to identify him from a photographic lineup conducted by the Salt Lake County Sheriff's Office. None of the property allegedly stolen was recovered, identified or connected with the appellant. (T. Vol I pg 44)

At the trial of the matter, the State of Utah presented the evidence of Mr. Parker's identification. Appellant produced two witnesses whose testimony attempted to establish an alibi for the date and time of the offense. In rebuttal to that testimony and over objection, (T. Vol I pg 169) the State of Utah produced Detective Dick Forbes, Salt Lake County Sheriff's Office, regarding such witnesses (T. Vol I pg 171). Appellant had duly filed a Notice of Alibi but had not received any Notice regarding the testimony of Forbes.

Appellant testified in his own behalf (T. Vol I pg 141). During the course of cross-examination, the Deputy County Attorney inquired, over objection, whether he had been convicted of a misdemeanor (T. Vol I pg 152). Appellant responded that he had been convicted of a misdemeanor theft in a Salt Lake County Justice of the Peace Court subsequent to the date of this alleged offense.

Co-defendant, Joseph James Price, was represented by Jo Carol Nessett-Sale. During the course of closing argument Ms. Nessett-Sale argued that it was her opinion that appellant Richard I. Cintron had committed the crime and that one of the alibi witnesses, James McCall, matched the description of the co-perpetrator. Such arguments were made over ojection. (T. Vol II pg 34-37 and 38)

ARGUMENT

POINT I

THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A VERDICT.

The evidence at trial consisted of the identification by the victim Parker. He testified that in the early morning hours he was awakend by his dog and went to the back door (T. Vol I pg 14). He turned on the kitchen and porch light. Looking through some sheers covering the window in his back door he observed a person on the porch. Opening the door slightly he inquired as to the purpose for that person knocking and yelling. The door was then shoved open knocking Mr. Parker on his back. A person identified as Joseph James Price then went through the door and threatend the victim with a knife which was placed at his throat. He was then blind-folded and transported to a different room where he was held while the perpetrators of the offense ransacked his house. (T. Vol I pg 18)

Mr. Parker testified that he had observed Joseph James Price as the result of the incident with the knife aided by the lighting in the kitchen (T. Vol I pg 19-20). He further testified that he observed the appellant, herein, as the result of observing him briefly through the sheers

aided by the light from the kitchen and porch. Mr. Parker further testified that he was not wearing his glasses (T. Vol I pg 39). Further, it was established that the lighting on the porch was behind the person who was at the back door (T. Vol I pg 37). Mr. Parker testified that he had observed the appellant on three prior occasions when appellant had come to his house with a request to purchase some gasoline and on subsequent occasions to talk (T. Vol I pg 15). These prior occurrences were brief and without incident.

During the course of the robbery Mr. Parker testified that he heard the "blond man" identified as Price, call the other man "Gary". (T. Vol I pg 23) He also testified that he heard the term "Rich" used. Although Mr. Parker was clear that the name "Gary" referred to the other man, circumstances were such that it was unclear whether the word "Rich" was used as a name. That confusion was apparent because the victim did not hear how the term was used in the conversation. It was spoken as a whisper and after Mr. Parker had been tied, gagged and bleeding for some period of time. (T. Vol I pg 48-50)

In defense, appellant presented two witnesses, Sidney Hatcher (T. Vol I pg 125) and James McCall (T. Vol I pg 153). They testified that, at the time and date of the offense, they were with appellant at the residence of Sidney Hatcher. All three men had been drinking heavily through the day and in the early morning hours had gone to sleep in the Hatcher camper.

It is proper that this Court review the evidence submitted in the trial to determine whether it was sufficient to support a verdict of guilty. It is difficult for reviewing Courts to second guess a jury which has, having heard the evidence, found appellant guilty. But, such review

could come to an opposite conclusion from the jury. This Court's review of the evidence is different because it is a review from a transcript with sufficient time to examine and compare the evidence and testimony. This Court is also able to more meticulously apply the legal standards of proof and presumptions in its review of the evidence. Brinegar v. United States, 338 U.S. 160: "If the evidence with respect to any defense...is sufficient to raise a reasonable doubt as to the defendant's guilt, he should be acquitted". State v. Wilson, 565 P.2d 66 (Ut 1977): "It must appear that upon so reviewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed a crime". at page 68. State v. Mills, 530 P.2d 1272 (Ut 1975): "For defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt." at page 1272.

The State's evidence rested solely on Parker's identification. There was no other evidence linking appellant to the crime. There were no fingerprints or other physical evidence. There were no other witnesses who observed any part of the incident. No stolen property was recovered or connected to appellant.

Parker's identification was fraught with reasonable doubt because of the circumstances of the viewing. Parker had been sleeping, and had a brief view of appellant prior to being assaulted by the person identified as Joseph James Price. The lighting was such that no clear view of the defendant

could have been made. Parker was looking through sheers over his back window. The lighting on the porch was behind the person and Mr. Parker did not have his glasses on. The man was referred to as "Gary" with confusion as to whether he had also been called "Rich".

Combine those circumstances with the testimony of two witnesses who established appellant's presence in another location and it must be concluded that there was reasonable doubt and reasonable minds should have had that reasonable doubt.

POINT II

IT WAS ERROR FOR THE PROSECUTOR TO INQUIRE OF THE DEFENDANT'S PRIOR MISDEMEANOR CONVICTION.

The question here ivolves the perameters whereby the prosecuting attorney may inquire of a defendant, who is testifying, regarding prior convictions of misdemeanors.

The State of Utah relies on Rule 21, Utah Rules of Evidence, for the proposition that the testifying defendant may be asked regarding convictions for crimes involving dishonesty and false statement even if they are misdemeanors. Appellant, herein, had been convicted of a misdemeanor theft in a Justice of the Peace Court in Salt Lake County. He had entered a plea to such offense subsequent to his arrest for aggravated robbery and burglary which were the subject matter of the trial. The prosecutor maintained that a theft conviction involved dishonesty as defined by the rule.

78-24-9, Utah Code Annotated (1953 as amended), allows the prosecutor to ask regarding the defendant's prior record only to the extent of a felony conviction. The statute provides:

> "A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction a felony.

In State v. Bennett, 517 P.2d 1029 (Ut 1973), the defendant was required to answer to a prior conviction of a felony and to tell the jury that the conviction was for a second degree murder. The issue in that case was whether the State properly asked as to the particulars of the felony conviction. This Court concluded:

> "Rule 21 by its terms does not apply where a statute otherwise applies; and since the statute does otherwise provide, there was no error in requiring the defendant to answer to his prior conviction of murder in the second degree." at page 1031.

In most of the decisions decided by the Utah Supreme Court in this regard, the issues have involved the extent to which the prosecutor may inquire into a felony conviction. The arguments have revolved around questions by the prosecutor regarding the circumstances of the crime committed or the plea entered on a felony conviction. It would seem however, that the rule that one may not inquire into a conviction other than felony is established. Refer State v. Kazda, 382 P.2d 402 (Ut 1963), State v. Dickson, 361 P.2d 412 (Ut 1961), State v. Roberts, 612 P.2d 360 (Ut 1980), State v. McCumber, 622 P.2d 353 (Ut 1980).

Appellant would urge this Court to conclude that where the statute, in this case, 78-24-9, restricts the inquiry of the prosecutor to felony convictions, no rule of evidence can expand the examination to include a misdemeanor.

The language of Rule 21 does not expand the statutory restriction but may be interpreted as adding a further limitation to the statute. That is to say that Rule 21 is more restrictive than the statute. Rule 21 provides:

> "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility except as otherwise provided by statute."

As the rule is in the negative it should be interpreted as not only restricting inquiry of prior convictions to felonies but requiring that those felonies involve false statement or dishonesty. Rather than expanding the rule as argued by the State to include felonies and crimes of dishonesty and false statement, it restricts the types of felonies about which the prosecutor may ask.

Therefore, under either approach the prosecutor should not have been permitted to ask about the misdemeanor conviction. Either the Rule of Evidence is precluded by statute from being interpreted as allowing such a line of questioning or the Rule of Evidence is more narrow and restrictive in relation to the statute and only provides for questions about convictions of felonies involving dishonesty or false statement.

The prejudice of such an inquiry is evident. Where the case involves an eyewitness and a defendant's denial, the credibility of the witness in making the denial is essential. Any evidence which is elicted from the witness tending to detract from his credibility goes to the heart of his testimony. If that evidence is improperly elicited or gets into subject matters not allowed by the rules and statutes it is prejudicial to the extreme.

POINT III

THAT IT WAS ERROR FOR CO-COUNSEL, IN CLOSING ARGUMENT, TO ARGUE HER OPINION REGARDING APPELLANT'S GUILT.

In closing argument, Jo Carol Nessett-Sale, attorney for co-defendant, Joseph James Price, over objection, commented upon the States case against defendant Cintron and his relation to a witness, James McCall, who testified as an alibi witness for appellant. It was Ms. Nessett-Sale's line of argument that the State had established, through strong evidence, that Cintron had indeed committed the offense. McCall matched closely the description of the co-perpetrator; that is young, blonde with receeding hairline. It was Ms. Nessett-Sale's approach that the evidence against Cintron was strong and consequently, if we believed McCall, that he was with Cintron, it would necessarily follow that McCall was the co-perpetrator of the offense. Counsel, in essence, not only gave her opinion regarding the evidence, but indicated that she knew things which the jury was not privy to and consequently set herself up as offering an opinion based on personal knowledge.

> "Then we have the issue of the co-defendant here. You know and the judge has indicated that these men are to be treated separately and certainly my job is to defend and my privilege is to defend Joe Price. It is not to prosecute anyone else. But we can't help but observe that if one of the two men here today charged with this crime is a robber, you know who it is and it is not Joe Price." (T. Vol 2 pg 34-35)

> "When I heard Dick Forbes, from the Prosecutor's Office, that according to his conversation with Mr. Hatcher, the landlord, the last time he saw Richard Cintron was at 3:00 a.m. in the morning when he left he and Mr. McCall out in the camper drinking and when Mr. McCall walked in, I about dropped. I know that you noticed that he was a blonde man with a mustache who could be my client's brother. I looked at him, a man I had never seen before, and I thought, "My god, I wish Mr. Parker were here. I wish he could see this man." Because if Mr. Cintron was with Mr. Hatcher and Mr. McCall all that night

> moving and was with him the next morning at 9:00 a.m. and were drinking in the camper until 3:00 in the morning, then who is the likely blonde who was with Mr. Cintron if Mr. Cintron was the man who did the robbery? Who? Is Mr. McCall brazen enough to walk into this Court and to provide an alibi for his robber companion? Well, we have never said that crooks were very bright." (T. Vol 2, pg 35-36)

In Workman v. Henrie, 266 P. 1033 (Ut 1928), there were comments by counsel that he had personal knowledge of the credibility of certain witnesses and the believeability of their version of the circumstances. In that case, however, it was determined not to be error because the court instructed the jury to disregard such a line of argument as counsel had not been called as a witness and had not testified. The court inquired of opposing counsel whether anything else could be done to correct the situation. Opposing counsel offered no further argument or suggestion regarding instruction or procedures in which the Court could engage to correct the situation

In this present situation there is a similiarity to a prosecutor making exactly the same type of comments. This is not a case in which co-defendant Price, having knowledge that the offense was committed by Cintron offered that testimony and maintained his innocence. Rather, Price maintained that he knew nothing of the offense and it was his counsel, in closing arguments, which alluded to the guilt of appellant and attempted to offer her own opinion regarding how the offense was committed suggesting the co-perpetrator was the alibi witness.

Except for the standard instruction that argument of counsel was not evidence the Court made no attempt to correct the situation. Counsel was permitted to continue this line of argument and observation.

CONCLUSION

Appellant urges this Court to the conclusion that the evidence at trial was insufficient because there was no evidence corroborating the victim Parker's identification which was fraught with circumstances leading to reasonable doubt. The prosecutor's case was further weakend by the presentation of alibi witness' in defense of appellant.

The Utah Rules and statutes do not provide for inquiry into convictions of misdemeanors and consequently the prosecutor's question regarding appellant's conviction of misdemeanor theft was improper. Such an error was prejudicial because it went to the heart of the defendant's case in challenging his credibility.

Co-Counsel's closing argument was improper because it set her up as offering an opinion regarding appellant's guilt and inferred knowledge of which the jury was not aware without being called as a witness and testifying.

RESPECTFULLY SUBMITTED this 22nd day of August, 1983.

JOSEPH C. FRATTO, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I DELIVERED three copies of the foregoing BRIEF OF APPELLANT to the Attorney General of the State of Utah, Office of the Attorney General, State Capitol Building, Salt Lake City, Utah, this 29th day of August, 1983.

Joseph C. Kratto, Jr.