

1984

The State of Utah v. Harvey W. Dorton : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH :
Plaintiff/Respondent :
-v- :
HARVEY W. DORTON : Case No. 19282
Defendant/Appellant :

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Bail Jumping
in the Third Judicial District Court in and for Salt Lake County,
State of Utah, the Honorable Ernest F. Baldwin, Jr., presiding.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH :
Plaintiff/Respondent :
-v- :
HARVEY W. DORTON : Case No. 19282
Defendant/Appellant :

STATEMENT OF THE NATURE OF THE CASE

The Appellant, HARVEY W. DORTON, appeals from his conviction of the offense of Bail Jumping, a Third Degree Felony, in violation of Utah Code Ann. §76-8-312 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., presiding.

DISPOSITION IN THE LOWER COURT

The Appellant was charged by Information with Bail Jumping. On April 27, 1983, the jury returned a verdict of guilty. Appellant was subsequently sentenced on May 23, 1983, to serve an indeterminate term of zero to five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him, and a new trial.

STATEMENT OF THE FACTS

On January 5, 1981, the State of Utah commenced its prosecution of several first degree felony charges against Appellant. (Case CR-81-310; Attempted Criminal Homicide, Aggravated Burglary, Aggravated Kidnapping, Aggravated Robbery, and Aggravated Sexual Assault). Appellant was held in the Salt Lake County Jail until his preliminary hearing on February 2, 1981. Shortly after the hearing, he posted bond in the amount of Seven Thousand Five Hundred (\$7,500) Dollars through Dewey's Bail Bonds, and was released from custody.

His trial was scheduled for January 18, 1982, in Third District Court, the Honorable Bryant H. Croft presiding. (T. 11). Appellant appeared for trial on January 18. At the end of the day, Judge Croft ordered a recess until the following morning, January 19th. All involved with the case, including Appellant, were admonished to return to the courtroom the next day at 10:00 a.m. (T. 12).

On January 19, 1982, Appellant did not appear for his trial. The State finished its prosecution of the case without Appellant's presence. (T. 13, 14). The jury convicted Appellant of the majority of the charges. The Court

ordered that a warrant be issued for Appellant's arrest.

Approximately six months later, James R. Phelps, of Dewey's Bail Bonds, located Appellant in Houston, Texas. On July 5, 1982, he traveled to Houston to apprehend Appellant. (T. 25). Appellant was surrendered by Mr. Phelps to the Houston Police Department and eventually returned to the State of Utah for sentencing. (T. 18).

Based on these facts, Appellant was charged in the instant case with the offense of Bail Jumping, in violation of Utah Code Ann. §76-8-312 (1953 as amended). Trial was held on April 27, 1983. During the State's closing argument, County Attorney Rob Reese made the following statement:

When he [Appellant] was arrested he gave no explanation as to what he was doing there, at least that is what Mr. Phelps told us, and there is no evidence here today that suggests that he had any legal justification for leaving. (T. 49).

Defense counsel contemporaneously objected to the statement as being an improper comment on the defendant's failure to present evidence in his behalf. (T. 49). Later, out of the presence of the jury, counsel made a Motion for a Mistrial based on Mr. Reese's comment. (T. 53). She argued that it was an improper comment on the defendant's post-arrest silence and was thus grounds for a mistrial under

the authority of Doyle v. Ohio. (T. 54). The Court took the motion under advisement. The jury convicted Appellant of Bail Jumping and the Court subsequently denied defense counsel's Motion for Mistrial.

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR COMMENTED UPON APPELLANT'S POST ARREST SILENCE AND HIS FAILURE TO PRESENT EVIDENCE IN HIS BEHALF AT TRIAL.

Appellant asserts that the County Attorney's comments in closing argument constituted prejudicial error. Both comments, that the Appellant offered no explanation of his conduct when he was arrested, and further, that Appellant presented no evidence at trial, are constitutionally impermissible. They denied Appellant a fair trial.

It is fundamental that a person has the right to remain silent when arrested and accused of a crime. Furthermore, his or her silence may not be used in an incriminating fashion to establish the commission of a crime. See U.S. Constitution, Amendment 5, and 14. Thus, the United States Supreme Court has held that where a defendant invokes the Fifth Amendment right to remain silent during his trial, the prosecutor may not comment on the assertion of this right. Griffin v. California, 380 U.S.

609 (1965). The Court has extended this principle to include questioning and comment on a defendant's failure to make a statement upon arrest, after Miranda warnings have been given. Boyle v. Ohio, 426 U.S. 619 (1976).

These rules and the policies to be served by the enforcement of them have been recognized by the Utah Supreme Court. In State v. Wiswell, 639 P.2d 146 (1981), this Court reversed the defendant's conviction on the basis that the prosecution attempted, more than once, to put the defendant's post-arrest silence before the jury.

The Court noted that the State not only elicited prejudicial testimony through its witnesses, but also argued the testimony in closing argument. The effect of the witnesses' testimony was diffused to some extent by the Court striking the testimony and admonishing the jury, but the effect of the comments in closing argument were not easily diffused and were highly prejudicial. The Court concluded that the "references to defendant's silence [were] fundamental error, which could have affected the result and [were] therefore prejudicial." Id. at 147.

In the instant case, the prosecutor did what Wiswell prohibits. He argued the Appellant's post-arrest silence in closing argument. He said that when Appellant was arrested he gave no explanation as to what he was doing in Texas. The prosecutor continued on to make another prohibited argument, one not present in Wiswell's facts, that the defendant presented

no evidence at trial to suggest he had legal justification for leaving.

Both of these arguments are constitutionally impermissible. The State was not precluded from arguing the Appellant's prearrest silence as it related to his non-appearance at trial "without just cause", (See Jenkins v. Anderson, 447 U.S. 231, 65 L.Ed. 86(1980)), but the State clearly overstepped its bounds in arguing post-arrest silence and silence at trial.

The prosecutor's conduct in the instant case constituted prejudicial error. The prosecutor asked the jury to infer that the Appellant was guilty because he failed to exculpate himself after he was arrested, and because he failed to offer evidence in his behalf at trial. As a result of the prosecutor's improper Argument, Appellant was deprived of a fair trial.

POINT II

THE PROSECUTOR USED THESE IMPERMISSIBLE COMMENTS AND ARGUMENTS TO SUSTAIN A SUBSTANTIAL PART OF HIS BURDEN OF PROOF ON ONE OF THE ELEMENTS OF THE CRIME OF BAIL JUMPING.

In order for Appellant to be convicted of the crime of Bail Jumping, the State had to establish each of several elements of the crime beyond a reasonable doubt. These elements are:

1. That the defendant failed to appear at a time and place designated for his appearance;
2. That the defendant had been released on bail on the condition that he subsequently appear upon a charge;
3. That the charge or charges were felonies;
4. That the defendant did so knowingly;
5. That he did so without just cause.

The crime cannot be proved without satisfactory proof, that is, proof beyond a reasonable doubt, of all the foregoing elements. The primary evidence offered and argued by the State of Element No. 5 was that Appellant failed to give an explanation as to what he was doing in Texas, and second, that he offered no evidence suggesting he had any legal justification for leaving.

Since both of those arguments are constitutionally impermissible as comments upon the defendant's right to remain silent, they surely cannot be offered as proof on one of the elements of the crime. This court should not allow the Prosecutor to sustain his burden of proving crucial elements by making improper and prejudicial arguments. The accused is entitled to rely on well-settled and thoroughly tested constitutional guarantees. If his or her silence is to become a tool in the prosecutor's hands to make out his or her case, then the Fifth Amendment contains an empty principle indeed.

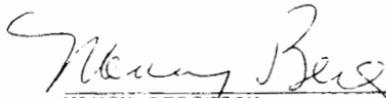
The prosecutor was free to draw on arguments that didn't run afoul of Appellant's constitutional protections. He could have argued the Appellant's pre-arrest silence to law enforcement as it related to the lack of legal justification (Jenkins v. Anderson, supra), and emphasized additional facts supporting the inference that Appellant had no good reason for failing to appear. But he was not at liberty to use the two impermissible arguments that he did in asking the jury to find "lack of just cause."

CONCLUSION

Appellant's right to remain silent, both after his arrest and during trial, were improperly commented on by the prosecutor in closing argument. This argument was not only impermissible and prejudicial, but it was used by him to sustain most of his burden of proof on one of the elements of Bail Jumping. He therefore failed to properly sustain his burden of proof of the crime of Bail Jumping. The prosecutor's errors operated to deprive Appellant of a fair trial and he respectfully asks this Court to reverse his conviction, and to grant him a new trial.

DATED this 19th day of April, 1984.

Respectfully submitted,


NANCY BERGESON
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney
General's Office, 236 State Capitol Building, Salt Lake City,
Utah, 84114, this 26 day of April, 1984.

Carole Johnson