1969

State of Utah v. Harold Reemer : Appellant's Brief

In the Supreme Court of the State of Utah

STATE OF UTAH
Plaintiff-Respondent,

- vs -

HAROLD HEEMER
Defendant-Appellant.

Case No. 11688

APPELLANT'S BRIEF

Appeal from the Judgment and Order of the Second Judicial District Court for Weber County, Utah
Honorable Charles G. Cowley, Judge

RICHARD J. LEEDY
263 South Second East
Salt Lake City, Utah
Attorney for Appellant

Vernon B. Romney
Attorney General
State Capitol Building
Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—(Continued)

TEXTS CITED

STATUTES CITED

In the Supreme Court of the State of Utah

STATE OF UTAH
Plaintiff-Respondent,

- vs -

HAROLD HEEMER
Defendant-Appellant.

Case No. 11688

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an appeal from a conviction of passing and uttering a fictitious check.

DISPOSITION IN THE LOWER COURT

Defendant was found guilty and convicted of passing an uttering a fictitious check by unanimous verdict of seven jurors; Defendant was sentenced to indeterminate term at the Utah State Prison.

STATEMENT OF FACTS

Defendant-Appellant was tried on March 27, 1969 in Weber County for the charge of passing and uttering a fictitious check.

During the course of the trial, the prosecution introduced evidence that the Defendant, at various times not relevant to the facts in this case, had used an alias; the name Richard Feeney. (R. 39043)

During the noon recess of the trial, one of the jurors became ill; it was stipulated that said juror could be excused; and that the remaining seven jurors could render a verdict in the case. (R. 61)

The seven jurors returned a unanimous verdict of guilty.

RELIEF SOUGHT ON APPEAL

On appeal Defendant-Appellant checks reversal of the jurisdiction and remand for a new trial.

ARGUMENT

POINT ONE

INTRODUCTION INTO EVIDENCE THAT DEFENDANT HAD USED AN ALIAS WAS PREJUDICIAL ERROR WHEN THE DEFENDANT'S USE

OF THE SAID ALIAS WAS NOT RELEVANT OR MATERIAL TO THE ISSUES TO BE TRIED BY THE JURY.

In the present case, the Defendant was charged with uttering and passing a fictitious check. At no time was there any question that the Defendant had not used his own name, Harold Heemer, throughout the transactions on which the charge was based. The prosecution in its case in chief, called, as a witness, an officer from the State Drivers License Division to testify that the Defendant, Mr. Heemer, had used the name Richard Feeney in applying for a Utah Drivers License. The substance of said testimony was:

Q. Would you state your full name for us?

A. Ernest F. Kyriopoulos.

. . .

Q. And where are you employed?

A. I am employed at the Department of Public Safety, Drivers License Division.

. . .

Q. What generally are the duties involved?

A. I have custody of the records. . . .

Q. I see. Now, Mr. Kyriopoulos, did you receive a request from our office to investigate the driving record of a gentleman by the name of Harold Heemer and also Richard Feeney?

A. I had a request from the District Attorney.

MR. RICHARDS: (interposing) Your Honor, at this time I would object to the line of questioning upon the grounds that it's immaterial, and the question involved in this trial here today is whether or not there is an Ethel Norris and whether or not this is a false and fictitious check.

It matters not whether Mr. Heemer has a driver's license under another name than Mr. Harold Heemer.

I don't see how it makes any difference. We're willing to admit or stipulate that Mr. Heemer has also used the name of Mr. Richard Feeney, but I don't know how it plays a role in the trial today.

THE COURT: Did you say Richard?

MR. RICHARDS: Richard.

THE COURT: Richard Feeney?

MR. RICHARDS: Yes.

THE COURT: Do you stipulate that he has also used the name of Richard Feeney?

MR. RICHARDS: Yes, we do. But I think it's immaterial and I don't see why we need to be delayed —

THE COURT: (interposing) Well, what did you want to show?

MR. SHARP: We intend, Your Honor, to tie this is specifically to the action involved.

THE COURT: Well, you want the stipulation?

MR. SHARP: What I want in evidence is a copy of the driving record — not the driving record, but the application and the photograph identifying him along with the number attached to the driver's license, Your Honor. We intend to use it in a later identification.

THE COURT: Well, you mean identification of the defendant?

MR. SHARP: Identification of the defendant with another transaction which ties in with the present one.

I think it might be appropriate, Your Honor, at this time, rather than go into a lot of detail, maybe we'd better excuse the jury.

THE COURT: Well, I think I'll overrule the objection. Go ahead and proceed with it — what it amounts to. I'll see if it's material later.

At this point the witness testified that a Richard Feeney had a Utah State Drivers License and that based upon his departments record, he was able to determine that Richard Feeney was the same person as Harold Heemer.

At no time after this point did the prosecution tie in the name Richard Feeney or, for that matter, even refer to it. Nor did the prosecution produce evidence of another transaction as proffered. Although the judge indicated that he would allow the testimony of the alias in evidence conditionally upon the prosecutions tying it in later, the court never did reconsider the materiality of that evidence. Appellant asserts that the testimony concerning the alias was irrelevant, immaterial, and designed only to prejudice him in front of the jury. Inasmuch as the use of the alias could have no possible relevancy or materiality to the issues involved in the prosecutions case, the evidence could only have been offered to discredit Appellant's character. The record shows other examples of this type of irrelevant, prejudicial, character evidence. The record reveals the following testimony when the prosecution examined a police officer witness.

> Q. Is it my understanding that some people write these checks sort of not caring about the results; was that what you said?
>
> A. Yes. . . . (R. 31)

Q. And would you say that sometimes some of the things they might do might be a little dumb?

A. Right. (R. 32)

The prosecution's right to produce adverse character evidence, such as the use of an alias, is well outlined in the law and is very limited. Such evidence may only be introduced to rebut good character evidence or, in some circumstances, if it would tend to prove intent or knowledge of the crime charged. 29 *AM Jur.* 2d 389-390 *Evidence* § 340 states:

> "The character of a person accused of a crime is not a fact in issue in a prosecution for such a crime, and the prosecution cannot, in its evidence in chief, for the purpose of inducing belief in the accused's guilt introduce evidence tending to show his bad character or reputation . . . unless . . . the accused first introduces evidence of good character or reputation.

Utah follows this general rule. See *State v. Hougensen,* 91 Utah 351 (citing *State v. Thompson,* 58 Utah 291, 199 Pac. 161). In the Utah *Hougensen case,* Mr. Justice Wolf. in writing for the Court at page 365 Utah Reports, stated:

> "One can affect it by showing that the Defendant in a criminal case has a bad character as to a particular trait involved in the commission of the crime, but only after evidence of the Defendant's good character has been received."

The courts usually refuse to admit such character evidence on grounds or relevancy or materiality, See *e.g., State v. Gress,* 250 Minn. 337, 84 N.W. 2d 616; *State v. Garceau,* 122 Vt. 303, 170 Atl. 2d 623. However, the real rationale behind the rule is one of prejudice. See *e.g., Topeca v. Harvey,*188 Kan. 841, 365 P. 2d 1109 *State v. Garceau,* 122 Vt. 303, 170 Atl. 2d 623. While use of an alias may be logically relevant or have some probative value to finding guilt, the prejudice from such evidence certainly outweighs the probative value. Such evidence is sometimes characterized as "bad man" evidence and the courts fear that a Defendant may be punished by a jury for being a "bad man" rather than because he was proven guilty of a specific crime. See 29 *Am Jur* 2d 390, *Evidence* § 340.

The record shows in this case that after the prosecution had admitted evidence of Defendant's use of an alias, the Defendant then took the stand and explained why he had used an alias in applying for a drivers license. However, this does not clear the error of the prior alias evidence. See 29 *AM Jur* 2d page 390, *Evidence* § 340 citing *State v. Beckner,* 194 Mo. sp 281, 91 S.W. 892 which provides:

> (W)here the accused has previously not submitted evidence of his good character, an error in admitting evidence on behalf of the prosecution as to the bad character of the accused is not cured by his submission of evidence in rebuttal thereof.

CONCLUSION

When the state proferred the evidence of Defendant's alias the prosecutor represented to the court that he would tie in Defendant's alias to the same or similar transaction. The court allowed the evidence conditionally on the prosecutors' later showing of materiality. The prosecution did not ever attempt to tie the alias into the transaction or offer any other reason for its materiality. There could not possibly have been a material reason to show why the Defendant had used the name Richard Feeney in applying for a State Drivers License when the check in the present case was made out to the real name of the defendant Harold Heemer and all the persons involved in the case had known the Defendant by the name of Harold Heemer. Therefore the only possible use for such evidence was to show questionable character on the part of the accused. This is clearly prejudicial error in the law unless defendant had first offered of good character. Since defendant had not put his character in issue, the case should be reversed and remanded for a new trial.

POINT TWO

A VERDICT RENDERED BY A JURY OF SEVEN PERSONS IN A FELONY CASE IS INVALID.

In the present case one of the jurors became ill during the course of the trial. For some reason no alternate

juror was chosen. The Defense counsel stipulated that the case should be tried with seven jurors and the sick juror was excused. The verdict rendered was the unanimous verdict of seven jurors.

The Utah Constitution requires that a jury consist of eight jurors. Art. 1 Sec. 10 provides: "A jury shall consist of eight jurors." The issue raised is whether the presence and verdict of one juror may be waived. There is no question that certain personal constitutional rights may be waived and that the right to a trial by jury is one of those rights. See Sec. 77-27-2 *Utah Code Ann.* (1953). There is also no question that certain constitutional requirements cannot be waived. For example, parties may not stipulate or agree to submit to the jurisdiction of a court when the constitution does not impower the court to act. See *Muskrat v. United States,* 219 U.S. 346.

Appellant argues that the constitutional requirement for eight jurors is that type of requirement that cannot be waived so as to allow a jury of seven in a felony case. The implications of the constitutional language that "a jury shall consist of jurors" is that seven jurors would not even be deemed a jury. Sec 78-46-5 *Utah Code Ann.* (1953) provides:

> A trial jury in capital cases shall consist of twelve jurors. A trial jury in other criminal cases and in civil cases in the District Courts shall con-

> sist of eight jurors; provided, that in civil cases ad cases of misdemeanors the jury may consist of any number less than eight upon which the parties may agree in open court. . . .

Following familiar rules of statutory construction, the inclusion of allowing stipulation for less than eight jurors in civil cases and misdemeanor cases would impliedly exclude a jury composed of a lesser number than eight in felony cases.

Therefore, in light of the Utah Constitutional and statutory language the Appellant contends that there can be no less than eight jurors on a felony cases and to allow a verdict of seven jurors was error.

The case should be reversed and remanded for a new trial.

Respectfully submitted

Richard J. Leedy

263 South Second East
Salt Lake City, Utah

Attorney for Appellant