1969

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

In The Supreme
of the State

STATE OF UTAH,

Pl

vs.

HAROLD HEEMER,

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BRIEF OF

APPEAL FROM A JU
THE SECOND JUDICIA
FOR WEBER COUNTY
HONORABLE CHARLES

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
vs.
HAROLD HEEMER,
Defendant-Appellant.

Case No. 11688

BRIEF OF RESPONDENT

STATEMENT OF CASE AND DISPOSITION IN LOWER COURT

Defendant appeals from a jury conviction on March 27, 1969, for passing and uttering a ficticious check in violation of Utah Code Ann. § 76-26-7 (1953). He was sentenced to an indeterminate term in the Utah State Prison of one to ten years by Judge Charles G. Cowley of the Second Judicial District Court, in and for Weber County, State of Utah.

RELIEF SOUGHT ON APPEAL

Respondent submits that the jury verdict of guilty and sentence passed thereupon should be affirmed.

STATEMENT OF FACTS

Appellant's recital of facts is substantially correct. Respondent's additions and corrections are made hereinafter.

ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN PERMITTING THE STATE TO INTRODUCE DEFENDANT'S ALIAS IN EVIDENCE.

It is an elementary proposition that the trial judge has wide discretion in passing upon the admissibility of evidence. Ernest F. Kyriopoulos of the State Driver's License Division testified for the prosecution that the defendant used an alias, Richard Feeney, on his application for a driver's license. After an objection by the defense, Judge Cowley reserved a ruling on the materiality of this evidence upon the prosecution's offer to connect it up to the jury issues (T. 41). Contrary to appellant's allegation, the State did endeavor to demonstrate the materiality of the alias. The check in issue at the trial, allegedly signed by an "Ethel Norris", bore a handwritten account number differing in only one digit from defendant's own account number (T. 51-53). The prosecution attempted to show, by reference to another of defendant's checks signed Richard Feeney bearing a handwritten account number, that defendant knew from memory his own account number (T. 100-03). The evidence of the alias was necessary to connect the two checks, and hence, an essential part of the evidential chain.

Further, it is difficult to imagine how this evidence could have inflammed the jury to the point that reversible error was committed. Appellant

strangely regards admission of the alias more prejudicial than his own evidence of his two prior convictions for writing checks on insufficent funds (T. 69-70).

> **"After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The Court must be satisfied that it has that effect before it is warranted in reversing the judgment." Utah Code Ann. § 77-42-1 (1953).**

POINT II

APPELLANT'S WAIVER OF AN EIGHT MAN JURY AND HIS CONSENT TO BE TRIED BY A JURY OF SEVEN ARE VALID IN LAW.

When one of the jurors tryng appellant's case became ill, the defense stipulated that the trial could continue with seven jurors.

> MR. RICHARDS: "Your Honor, based upon the fact that one of the jurors has become ill since the beginning of the trial, the defendant is willing to stipulate that the jury now empaneled may determine the case with a number of seven on the jury in lieu of the eight." (T. 61)

It is well settled in all federal and state courts which have considered the matter that a defendant

may waive his right to a full jury and consent to be tried by fewer than the constitutional or statutory number. This rule is most frequently applied in the "sick juror" cases, to-wit: *Patton v. United States*, 281 U.S. 276, 312 (1930); *Beatty v. United States*, 377 F.2d 181, 185 (1967); *Williams v. United States*, 332 F2d 36, 39 (1964); *Timmons v. State*, 223 Ga. 450, 156 S.E.2d 68, 69 (1968); *State v. Robbins*, 176 Ohio 362, 199 N.E.2d 742 (1964); *Holloway v. State*, 365 P.2d 829, 831 (Okla. Crim. 1961).

Appellant contends that Utah Code Ann. § 78-46-5 (1953) makes an eight man jury in a felony case "unwaivable."

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

Although this statute does not specifically give appellant the right to stipulate to be tried by a jury of fewer than eight, the right to waive a trial by a full jury has existed historically and is not extinguished by the statute. California has dealt several times with this identical problem. Article 1, Section 7 of the California Constitution after which the Utah statute was patterned provides as follows:

> "In civil actions and cases of misdemeanors the jury may consist of twelve, or of

> any number less than twelve upon which the parties may agree in open court."

The argument that this impliedly excludes, by failing to mention, felony cases has been rejected in a number of cases, to-wit: *People v. Ragsdale*, 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1964); *People v. Patterson*, 169 Cal. App. 2d 179, 186-87, 337 P.2d 163, 168 (1959); *People v. Williams*, 128 Cal. App. 2d 458, 465, 275 P.2d 513, 517 (1954); *People v. Clark*, 24 Cal. App. 2d 302, 74 P.2d 1070 (1938).

The ancient rule of *expresso unius est exclusio alternius* should not be applied when it will serve to extinguish an established custom, usage or practice. 2 Sutherland Statutory Construction, § 4917 at 421 (3d. ed. F. Horack, 1943). As indicated by the cases cited above, it is a standard practice to permit defendant to waive trial by a full jury and consent to be tried by a smaller jury. No worthwhile purpose would be served by permitting appellant to affirm at trial, then deny on appeal, the competency of a seven man jury to decide his case.

CONCLUSION

Permitting an alias used by the defendant to be introduced in evidence was not an abuse of the trial court's broad discretionary powers. The prosecution connected up the evidence, but even if it had not, its admission cannot be considered reversible error. Appellant should not be granted a new trial on the

grounds that he should not have been permitted to stipulate to a smaller jury. Even if this were error, it was appellant's own error.

Respectfully submitted,

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