1970

State of Utah v. Roy Lee Poe : Brief of Respondent

In The Supreme Court of the State of Ut

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Plaintiff and Respond

vs.

LEE POE,

Defendant and App

BRIEF OF RESP

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LSON DAY, JUDGE, P

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STATUTES

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

ROY LEE POE,

Defendant and Appellant.

Case No. 11836

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the conviction of the appellant, Roy Lee Poe, for murder in the first degree in violation of Utah Code Ann. § 76-30-3 (1953).

DISPOSITION OF THE CASE IN THE LOWER COURT

The appellant on the 20th day of May, 1969, was found guilty by a jury of first degree murder in the Fifth Judicial District Court of Iron County, the Honorable C. Nelson Day, Judge, presiding. The jury recommended leniency, and the appellant was sentenced to life imprisonment on the 22nd day of May, 1969.

RELIEF SOUGHT ON APPEAL

The respondent submits that the appellant's conviction should be affirmed.

STATEMENT OF FACTS

The respondent agrees generally with the facts as set out in appellant's summary of the evidence. The respondent does, however, wish to take issue with some specific statements and add some facts which are important.

On page 6 of the appellant's brief, the appellant, in the second full paragraph, is not making a statement of the facts, but is arguing his case. These statements are conclusory and reflect only the appellant's opinion as to what the district attorney did.

Mr. Vern Phillips also testified that the appellant told him that he, Poe, had just killed somebody (T. 832). This took place on the 6th day of November 1965, the same day that the victim was shot (T. 83

In the prosecution's rebuttal, Mr. Delton Ray Nance testified that while in the Washington County Jail, with the appellant, Mr. Poe told him that he went to Las Vegas in a station wagon (T. 1037). Also Mr. Cal Whitney testified that he did not go with the appellant to Pete's Wagon Wheel or to Mesquite, Nevada (T. 1049) as a Mr. Dean Anderson had testified earlier (T. 904, 906).

It is a critical fact that the appellant was not given the death penalty, but rather was given life imprisonment (Judgment on Verdict).

Other facts which are relevant are set out in detail in the points of argument.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR BY REFUSING TO VOIRE DIRE THE JURY REGARDING THEIR SPECIFIC RELIGIOUS DENOMINATIONS.

During the selection of the jury members, counsel for the appellant requested that the Court voire dire each prospective juror to determine his specific religious denomination. This motion was made for the purpose of determining whether any of the prospective jurors had established a moral or religious attitude regarding capital punishment (T. 64). The trial judge decided that it was not necessary to ask each prospective juror what church they belonged to (T. 69). He did ask, however, whether any of the jurors had any "religious" or "moral" scruples with regard to the death penalty (T. 84). The court excused two jurors because they answered yes to the question of whether these scruples would cause them to be prejudiced one way or another (T. 84-85).

It should be noted at the outset of this argument that the appellant was not given the death penalty. The jury recommended leniency, and the trial court sentenced the appellant to life imprisonment. (Jury Verdict; Judgment on Verdict.) This fact renders Point I of Appellant's Brief moot. Even assuming that the court erred by its refusal to ask each

juror what his religion was, the appellant has not been prejudiced in any way. He cannot now claim that the court committed "prejudicial" error.

> "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). *See also State v. Seymour*, 18 Utah 2d 153, 417 P.2d 655 (1966).

The appellant has failed to show any prejudice he has not shown any defect or error which affected his substantial rights since the death penalty was never imposed upon him.

The trial court did not commit error by refusing to voire dire the jury regarding their specific religious denominations. In *Witherspoon v. United States* 391 U.S. 510 (1968), the defendant had been convicted of murder in Illinois. An Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, *on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.*" 391 U.S. at 512 (Emphasis added.)

The Supreme Court ruled that the effect of this statute was to stack the jury with those who were not opposed to the death penalty. The imposition of

the death penalty was reversed in *Witherspoon.* The Court said:

> ". . . in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendment." 391 U.S. at 516.

Under Utah law, a challenge for implied bias may be taken:

> "If the offense charged is punishable with death, the entertaining of such conscientious opinions as preclude [the Juror's] finding the *defendant guilty*, in which case he must neither be permitted nor compelled to serve as a juror." Utah Code Ann. § 77-30-19 (9) (1953). (Emphasis added.)

The Utah statute is easily distinguishable from the Illinois statute. Under the Utah law, mere conscientious scruples are not enough to challenge a prospective juror. The bias must be sufficiently strong so as to preclude the juror's finding the defendant guilty. This standard is in harmony with the *Witherspoon* decision. In *Witherspoon* the court never did address itself to the issue of whether or not death-qualified jurors could be excused if their scruples would prohibit an impartial finding on the guilt-innocence issue. *Witherspoon* was limited only to the issue punishment. This is emphasized further by the fact that the Supreme Court affirmed the conviction and reversed only the death penalty. This point alone is sufficient to distinguish *Witherspoon.* In

this case the appellant was not given the death penalty, although he was convicted of first degree murder. This Court can affirm appellant's conviction without having to decide on the basis of *Witherspoon*.

The Nevada Supreme Court, however, has ruled on a statute identical to Utah Code Ann. § 77-30-19(9) (1953). In upholding the conviction the court made the following distinction:

> ". . . the rationale of *Witherspoon* is inapposite to the Nevada statute since the statutory purpose is to disqualify jurors whose opinions against the death penalty would preclude their finding the defendant guilty. The Illinois statute considered in *Witherspoon* did not involve the right to challenge for cause those prospective jurors who stated that their reservations about capital punishment would prevent him from making an impartial decision as to the defendant's guilt." *Howard v. State*, 446 P.2d 163, 165 (Nev. 1968).

This position was confirmed in *Bornes v. State*, 450 P.2d 150 (Nev. 1969).

More recently, this Court has had the opportunity to compare Utah Code Ann. § 77-30-19(9) (1953) with *Witherspoon*. In *State v. Kelbach*, 23 Utah 2d 231, 461 P.2d 297 (1969), the Utah Supreme Court adopted the exclusion of footnote 21 of the *Witherspoon* case. The Court quoted:

> ". . . we repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a

> jury from which the only veniremen who were in fact excluded for cause were those who made it unmistakably clear (1) that they would *Automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at ....., 461 P.2d at 303.

The trial court committed no errors by refusing to voire dire the jury regarding their specific religious denominations, especially since the death penalty was not imposed. The specific denomination is not material.

POINT IA

THE TRIAL COURT ACCOMPLISHED THE OBJECTIVE OF DEFENSE COUNSEL IN VOIRE DIRE BY QUESTIONING THE JURY REGARDING THEIR RELIGIOUS AND MORAL ATTITUDES ABOUT THE DEATH PENALTY.

Although the trial judge did not ask each prospective juror what his religion was, he did inquire whether any juror had "religious" or "moral" scruples about the death penalty (T. 84). The respondent submits that this latter inquiry accomplished the defense counsel's objective to determine each juror's feelings on the death penalty. The fact that a prospective juror is Mormon, Catholic or Jew is not material. Whether one has religious or moral scruples about the death penalty is material. The

judge asked the only question that could have accomplished defense counsel's purpose. By knowing that a prospective juror is Mormon does not mean ipso facto that he is opposed to the death penalty. On the other hand, by asking each juror specifically whether he has scruples, the court and attorneys can then make a determination as to whether these scruples will prejudice the prospective juror. Unless a veniremen states unambiguously that he would automatically vote for or against the imposition of capital punishment no matter what the trial might reveal, it cannot be assumed that this is his position. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Because a person is Mormon, it cannot be assumed that he would vote for the death penalty. It is not necessary that veniremen be asked their specific religion; in fact, the question accomplishes nothing. The judge committed no errors, but rather avoided error by refusing to voire dire about specific religions. The defense counsel's objective was accomplished, and he cannot now claim error. It is also significant here that no death penalty was imposed.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN THE MANNER OF SELECTING THE ADDITIONAL JURORS.

Before answering this argument, it should be pointed out by the respondent that none of the six additional prospective jurors summoned by Judge

Day were on the jury which rendered the guilty verdict. Only one was called as an alternate (T. 128) but he was not needed and was excused before the jury deliberated (T. 1063). Even assuming that the judge committed error in the manner of selecting the additional prospective jurors, no prejudice resulted to the appellant. The appellant has not challenged the manner of selecting the jury which actually found him guilty. It must be presumed that this selection was correct and in accordance with the Utah Statute governing selection. Utah Code Ann. § 78-46-23 (1953); *State v. Moore*, 111 Utah 458, 183 P.2d 973 (1947).

It should be pointed out, furthermore, that these additional jurors were summoned only for the purpose of selecting one additional juror for purposes of allowing ten preemptory challenges for each side (T. 91). There were only 31 jurors in the box and one more was needed to allow the preemptory challenges (T. 91). The six were also selected for the purpose of selecting one alternate juror (T. 91). After the jury had been selected, not one of the additional six were on the panel (T. 110). Only one was selected as an alternate (T. 128). There is nothing in this result which could have prejudiced the appellant. The jury which determined the appellant's guilt was a "body truly representative of the community." *Glasser v. United States*, 315 U.S. 60, 86 (1941). Even assuming that the court was in error to select persons from the small community of Parowan, the result was still that the jury ***finally*** selected

was "drawn from the cross-section of the commu
ity." *State v. Dodge*, 12 Utah 2d 293, 365 P.2d 798 (196

In criminal cases, where the venire of the juro
summoned for term has been exhausted, and th
court directs additional names to be drawn from th
box, names of jurors not readily accessible becaus
residing at a distance may be properly laid asid
and other names drawn. *State v. Cluff*, 48 Utah 10
158 Pac. 701 (1916).

The implication of his holding is that jurors ma
be selected from the immediate surrounding are
of the court. Other names may be drawn *until* thos
not "at a distance" are found. This is in accord wit
the Utah Statute.

> **"If during any term of a district court any additional . . . trial jurors shall be drawn from the said box by the sheriff or his deputy in open court; but *if in the judgment of the court* the attendance of any drawn *cannot be obtained within a reasonable time*, they may be laid aside and other names *may* be drawn in their place and in the same manner. If all names become exhausted at any term, the judge may order an open venire for such number of jurors as he deems necessary, who shall be summoned to serve." Utah Code Ann. § 78-46-23 (1953). (Emphasis added.)**

In this case Judge Day determined that because of the time involved, it was more expedient to sum
mon the additional jurors rather than take the time to draw out names when the result would be the

same, i.e., the additional prospective jurors would be from the surrounding area *regardless* of the manner in which they were selected. Those names drawn which could not be summoned within a reasonable time, would have been drawn until those not at a distance could be summoned. It is more expedient in the interest of time and because of the circumstances, i.e., only one additional juror was needed, for the judge to summon the jurors directly. The trial court committed no error, and the appellant was not prejudiced in any way.

POINT III

THE TRIAL COURT DID NOT COMMIT ERROR BY ADMITTING CERTAIN TESTIMONY OF THE PRIOR TRIAL TO BE READ TO THE JURY.

Utah Code Ann. § 77-44-3 (1953) provides:

> "Whenever in any court of record the testimony of any witness in any criminal case shall be stenographically reported by an official court reporter, and thereafter such witness shall die or be beyond the jurisdiction of the court in which the cause is pending, either party to the action may read in evidence the testimony of such witness, when duly certified by the reporter to be correct, in any subsequent trial of, or proceeding had in the same cause, subject only to the same objections that might be made, if such witnesses were upon the stand and testifying in open court."

This statute is clear that, in Utah, testimony of prior trials may be read at a subsequent hearing where

it is determined that the witness is outside the jurisdiction of the court.

The appellant cites *State v. Kazda*, 15 Utah 2d 313, 392 P.2d 486 (1964), for the proposition that there must be a showing that the witness "is in fact beyond the jurisdiction of the court." (Appellant's Brief p. 15). *Kazda* does not contain such a proviso. Nothing in *Kazda* goes to the effort or degree of proof that one must show before the court will allow testimony from a prior trial to be read in a subsequent hearing on the same cause. Respondent submits that this assertion is false and not based on the *Kazda* case. The Court held only that "A witness outside of the state is 'beyond the jurisdiction of the court.'" 15 Utah 2d at 316, 392 P.2d at 488.

The general common law rule is, that, if due diligence to locate a witness has been exerted, and the witness cannot be located, then testimony from a prior trial can be read at a subsequent hearing. *Oklahoma Alcoholic Beverage Control Board v. Lobo*, 391 P.2d 819 (Okl. 1964); *Bird v. State*, 362 P.2d 117 (Okl. Cr. 1961).

> **"Where the accused at a former trial or at a preliminary hearing once enjoyed his right to be confronted by a witness against him and had the privilege of cross-examinating the witness, if at a subsequent trial, involving the same issue, it satisfactorily appears that . . . his [witness'] presence with due diligence cannot be had, . . . or where his whereabouts cannot with due diligence be ascertained, a transcript of the testimony of such witness may be intro-**

> **duced as the evidence of such absent witness." 391 P.2d at 821.**

The respondent asks this court to adopt this standard of due diligence and hold that the prosecution did with due diligence attempt to locate both Louis P. Lagana and Mary Miner; and that the trial court did not err in allowing their written testimony to be read at the second trial (T. 804, 821).

Both Louis Lagana and Mary Miner testified at the first trial and both were cross examined, or at least defense counsel had an opportunity to cross exam (T. 173). The court reporter also testified that the prior testimony of Mr. Lagana and Mrs. Miner was accurately reported (T. 803), *State v. Leggroan*, 15 Utah 2d 153, 389 P.2d 142 (1964). The defense counsel, furthermore, stipulated to the above (T. 802-803).

Harry E. McCoy testified that he had subpoenas for both Lagana and Miner (T. 163; 167). Mr. Lagana could not be located in Utah or Nevada (T. 167). Mr. McCoy testified that Mrs. Miner could not be located in Utah or Nevada. Mr. McCoy went to Nevada for the purpose of locating the witnesses and serving them with subpoenas (T. 167; 170). Since a person outside the state is not in the jurisdiction of the court, *State v. Kazda, supra*, the efforts of Mr. McCoy were more than "due diligence" within the meaning of the common law rule.

Phillip Lang Foremaster, the Washington County Attorney, testified that he prepared the sub-

poenas for Mr. Lagana and Mary Miner (T. 729). He testified that to the best of his knowledge Mary Miner was in New York (T. 730).

Clark Robison, a deputy sheriff of Clark County, Nevada, testified that Mary Miner had lived in Mesquite, Nevada, but was not living there at the time he attempted to contact her (T. 744). To the best of his knowledge, Mary Miner lived in Eastern United States (T. 745). He concluded that she was not available for service of process (T. 745). He also testiied that he could not locate Mr. Lagana for service of the subpoena (T. 748).

Mr. McCoy was again called to testify (T. 750). He testified that Mr. Lagana had taken employment in the Midwest somewhere with the Atchison and Santa Fe Railroad (T. 754). He received this information from Mr. Lagana's previous employer (T. 753).

Sheriff Evan Whitehead, Sheriff of Washington County, Utah, checked the Utah directories for Mr. Lagana and Mrs. Miner (T. 761, 764). He also checked with every sheriff in every Utah county. Each department checked their directories and were unable to locate Lagana or Miner (T. 792-795). There were no vehicles registered to either Mr. Lagana or Mrs. Miner or to the husband of Mary Miner (T. 795-797).

It was only after this showing of due diligence that the trial judge admitted the previous testimony (T. 799; 821). The court did not commit error by its

determination that a diligent effort was made to locate Louis P. Lagana and Mary Miner. As far as the judge was concerned the witnesses were out of the jurisdiction of the court and could not be served. The requirements of Utah Code Ann. § 77-44-3 (1953) were met, and the previous testimony was properly admitted at the second trial.

POINT IV

THE TRIAL COURT DID NOT COMMIT ERROR BY ALLOWING CERTAIN PICTURES TO BE ADMITTED INTO EVIDENCE.

The appellant is challenging the admissibility of exhibits 8 and 9. Said exhibits were black and white pictures of the deceased taken before the victim was removed from the scene of the murder (T. 199).

It is a matter of discretion with the trial judge to determine whether the probative value of a picture outweighs the possible adverse effects which the pictures may have upon the jury. *State v. Renzo*, 21 Utah 2d 205, 443 P.2d 392 (1968). "This discretion on the part of a trial judge . . . should not be interfered with by an appellate court unless manifest error is shown." *Id.* at 215, 443 P.2d at 299. *State v. Poe*, 15 Utah 2d 113, 441 P.2d 512 (1968). The trial court judge did not abuse its discretion by admitting exhibits 8 and 9.

The state had the burden of showing beyond a reasonable doubt that the appellant was guilty of first degree murder. The elements of first degree

murder include a showing of "wilful, deliberate malicious and premeditated killing; . . ." Utah Code Ann. § 76-30-3 (1953). The pictures, admitted in evidence, were offered to show malice and premeditation, etc. By showing that the victim was asleep when he was shot, it eliminates any doubt but that there was a wilful and deliberate killing. Such probative value clearly outweighs the fact that the pictures may have been offensive to some.

In *State v. Russell,* 106 Utah 116, 145 P.2d 1003 (1944), the Utah Supreme Court said:

> ". . . **The pictures of the deceased taken after her death and showing her wounds, were clearly admissible. Even though the defendant did admit the killing, he did not admit the intent to kill and the nature of the wounds may be material on that point. The pictures showed the nature of the wounds more clearly than the testimony of witnesses could." *Id.* at 133, 145 P.2d at 1010.**

Also in *State v. Renzo, supra,* pictures of the victim, for whose death the defendant was charged with first degree murder, disclosing in color the bruised condition of the victim's body and perforations of walls of the victim's vagina, offered to show a depraved mind on the part of the defendant, were properly admitted into evidence.

These cases support the trial judge's determination that exhibits 8 and 9 had probative value to

show intent. The court did not err by admitting them into evidence. No manifest error has been shown and this court should not interfer with Judge Day's discretion.

The appellant's reliance on *State v. Poe, supra,* is without proper foundation. In *Poe* these same two pictures were offered and admitted into evidence. 21 Utah 2d at 117, 441 P.2d at 514. The Court did not hold that the admission of these black and white photographs was error. Rather, the court said that the trial judge abused its discretion by admitting colored slides into evidence and permitting them to be shown to the jury. *Id.* Also the court made its decision on the fact that the death penalty was imposed. *Id.* Since no death penalty was imposed at the second trial, the appellant cannot say that the pictures *influenced* the jury to impose the death penalty.

The probative value of the pictures, i.e., to show a wilful, deliberate, malicious and premeditated killing, outweighed any possible adverse effects which the pictures may have had upon the jury. There was no error and appellant's conviction should be affirmed.

POINT V

THE TRIAL COURT DID NOT COMMIT ERROR BY REQUIRING THE JURY TO RETIRE AND DELIBERATE AT A LATE HOUR.

The Utah Supreme Court has said that trial judge has the final responsibility for conducting the trial, and he should be allowed "considerable latitude of discretion with respect to the mechanics of procedure; and his rulings *must* be sustained unless he has acted in some manner which is clearly arbitrary and unreasonable and to the prejudice of the objecting party." *Hanks v. Christensen*, 11 Utah 2d 8, 11, 354 P.2d 564, 566 (1960). The decision of the trial judge was not arbitrary and unreasonable, and the appellant has failed to show how he was prejudiced.

In *Xenakis v. Garrett Freight Lines*, 1 Utah 2d 299, 265 P.2d 1007 (1954), the Court said that it is within the sound discretion of the trial court to determine at what time the jury should deliberate. The court cautions against unreasonable exercise of that discretion and says that the rights of both parties should be safeguarded. The trial judge in *Xenakis* did not abuse his discretion by causing the jury to deliberate at a late hour.

> **"Should it be assumed that he did so, it does not necessarily follow that such procedure adversely affected the plaintiffs." *Id.* at 307, 265 P.2d at 1012.**

Judge Day did not abuse his discretion by allowing the jury to deliberate at a late hour. The appellant has assumed that only he was prejudiced. Both parties were effected equally by the judge's decision. The appellant cannot assume that the jury

would find him guilty just because they deliberated at a late hour.

Furthermore, Judge Day based his decision on the fact that the jury had only heard one hour and twenty minutes of testimony in the morning and only two hours in the afternoon (T. 1059-1060). The jury had had a weekend to recover and rest (T. 1060). They retired to consider the verdict at 7:38 p.m. (T. 1063). They reached their verdict at 3:10 a.m. (T. 1070). There was no abuse of discretion, and the trial judge did not act arbitrarily and unreasonably as evidenced by the above facts. More prejudicial effects could have resulted if the trial judge had interupted the jury's deliberation. The court did not commit error; rather, it avoided error.

POINT VI

THE APPELLANT WAS GIVEN A FAIR AND IMPARTIAL TRIAL.

None of the errors claimed by the appellant were committed. The trial judge took precautions to insure a fair and impartial trial. The appellant, moreover, has not been able to show that he was prejudiced in any way. This Court must presume that a fair trial was held, and it cannot reverse for mere technicalities. Utah Code Ann. § 77-42-1 (1953).

CONCLUSION

The respondent asks this court to affirm Mr. Poe's conviction of murder in the first degree and

hold that the trial court did not commit any prejudicial errors.

Respectfully submitted,

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