

2004

James Earl Lee v. Utah : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Lee v. Utah*, No. 20040560 (Utah Court of Appeals, 2004).

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IN THE UTAH SUPREME COURT

JAMES EARL LEE)	
Appellant,)	
v.)	Case No. 20040560-CA
STATE OF UTAH)	
Appellee.)	Priority: 2

REPLY BRIEF OF APPELLANT

APPEAL FROM A JURY VERDICT ENTERED ON MARCH 25, 2004.

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**UTAH SUPREME COURT
BRIEF**

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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IN THE UTAH SUPREME COURT

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Appellee.)	Priority: 2

REPLY BRIEF OF APPELLANT

ARGUMENT I

In Mr. Lee’s brief he relies heavily on State v. King, 2004 UT App 210, 95 P.3d 282, cert. granted, 100 P.3d 220 (Utah 2004), in which the Utah Court of Appeals affirmatively stated the trial court has an independent duty to see that the constitutional right of an accused to an impartial jury is safeguarded. Id.

The State of Utah in its’ brief argues that King, should be overruled because the standard of review is clearly erroneous. Appellee brf. at 10. Mr. Lee asserts that the independent duty placed on trial courts and articulated by the Utah Court of Appeals is consistent both with case law and state statute.

“It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands in court and declare themselves biased.” King, 2004 UT

App 210, ¶ 22 (citing State v. Ball, 685 P.2d 1055, 1058 (Utah 1984). With this insight in mind, “[t]he Utah Supreme Court has consistently emphasized that ‘it is [the trial judge’s] duty to see that the constitutional right of an accused to an impartial jury is safeguarded,” Id. at ¶ 15, citing State v. Dixon, 560 P.2d 318, 319-20 (Utah 1977), and has reversed criminal convictions based solely on the appearance that such right may have been jeopardized.” Id. at ¶ 15, citing Woolly, 810 P.2d at 442.

Further, Utah Code Annotated Section 78-46-8 imposes a duty on the court.

The court, **on its own initiative** or when requested by a prospective juror, shall determine whether the prospective juror is disqualified from jury service. The court shall base its decision on the information provided on the juror qualification form, or by interview with the prospective juror or other competent evidence. The clerk shall enter the court’s determination in the records of the court. (Underlining and bold added).

This section of the code does not specifically define the term “disqualified” or “qualification”. It appears from the language of the statute that a trial court has an independent duty to determine the qualifications of each prospective juror.

Mr. Lee also believes that this duty imposed on trial judges by Section 78-46-8 is broader than merely determining whether a person is “competent” to serve as a juror, which includes determining the following: Whether the prospective juror is: (1) a citizen; (2) 18 years of age or older; (3) a resident of the county; (4) able to read, speak, and understand the English language; and (5) determining if the prospective juror has been convicted of a felony. The reason that Mr. Lee argues that Section 78-46-8 imposes a broader duty than determining whether a juror is competent is that 78-46-8, uses the

words “disqualified” and “qualification” which implies a broader meaning. A prospective juror may be “competent” to be a juror, but be “disqualified” based on prejudice or bias.

In addition, it appears that Utah Rules of Criminal Procedure, Rule 18 (a)(3)(b) implies a duty on the trial court. It states:

The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

Rule 18 contemplates two types of examinations conducted on prospective jurors. One method is where the attorney or defendant asks the prospective jurors questions. The other method is where the judge controls the examination of prospective jurors. In the present matter the judge conducted the examination of prospective jurors. When the judge conducts the examination of the prospective jurors the judge is then allowed to have control and power over the order of the questions, the tempo, the form of the questions, the tone of voice when asking the questions, the follow up or rehabilitation questions, etc.

Mr. Lee argues that when a judge chooses to control the voir dire by examining the prospective jurors himself, that this imposes a duty or responsibility upon the judge to insure that the prospective jurors are properly questioned and removed for cause if required. This assertion is clearly codified in Rule 18, which states, “on its own the court may remove a juror upon the same grounds”. (Utah Rules of Criminal Procedure, Rule 18 (e)). Meaning, the court can remove a juror for cause for all the same reasons that

either party may remove a juror.

Wherefore, Mr. Lee requests that this Court uphold the Court of Appeals Ruling that the trial court has an independent duty to insure that a defendant's constitutional rights are reserved during the jury selection process.

If this Court overrules the holding in King, Mr. Lee believes that the voir dire was process was nevertheless flawed based on a plain error standard. "Plain error requires a showing that '(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome". State v. Garcia, 18 P. 3d 1123 ¶ 6, (Utah Ct. App. 2001).

Whether this Court upholds King and applies an independent duty on the trial judge, applies a plain error standard or applies both standards, the voir dire process afforded Mr. Lee was clearly flawed, denying him due process and, therefore, this matter should be reversed for a proper voir dire process.

The specific improper or questionable conduct in this matter involves two prospective jurors, Holi Merkley, juror number 17 and Kim Jackson, juror number 18. With regard to Holi Merkley, juror number 17, Mr. Lee alleges two errors. Holi Merkley indicated that she was a close personal friend with Scott Blackburn, one of the officer who testified for the State of Utah during the trial. R. 217, Tr. p. 75, lines 24 &25 and R. 217, Tr. p. 76, lines 6-14. Although this prospective juror indicated a close personal relationship there was no follow-up questions regarding the nature of their relationship.

Second, the juror indicated that she was friend with the victim. R. 217, Tr. p. 94, lines 4-12. The prospective juror and victim went to school together and partied together. R. 217, Tr. p. 94, lines 4-12. Holi Merkley, juror 17, should have been removed for cause, but Mr. Lee was required to remove her as his third peremptory challenge. R. 168-169.

In this matter an error clearly occurred. First, Holi Merkley stated she had a personal relationship with Scott Blackburn. Although she acknowledged the relationship neither the court nor Mr. Lee's attorney requested further questions into the relationship. It should have been clear to all involved that further investigation into the relationship was required. Further, Holi Merkely acknowledged a close relationship to the victim. Mr. Lee was harmed because he was required to use a peremptory challenge to remove Holi Merkley.

The second error that occurred involved Kim Jackson, juror number 18. During the voir dire process, Kim Jackson acknowledged being a relative to Dylan Rooks, one of the peace officers who testified for the State of Utah at trial. Later, Kim Jackson was actually one of the jury panel members that was selected for the jury. R. 217, Tr. p. 108, line 5-6. Mr. Lee believes that because of the relationship between Kim Jackson and officer Dylan Rooks that the juror should have been removed for cause. It is unrealistic to expect Kim Jackson to have the candor and openness to declare herself biased. Even without further question, it appears that Kim Jackson's relationship to Dylan Rooks was too close for her to be impartial and she should have been removed for cause. Since she

was selected to be on the jury, Mr. Lee was definitely harmed.

ARGUMENT II

“Merger is most commonly applied to situations involving a defendant who has been charged with committing both a violent crime, in which a detention is inherent, and the crime of kidnapping based solely on the detention necessary to the commission of the companion crime”. State v. Diaz, 2002 UT App 288, ¶ 17, 55 P.3d 1131, cert. denied, 63 P. 3d 104 (2003). Using the three part test articulated in State v. Finlayson, 2000 UT 10, ¶ 21, the charge of Kidnapping should merge with the aggravated assault.

1) Was the movement slight, inconsequential and merely incidental to the other crime? The State of Utah would have the Court believe that the movement of the people involved was mainly contributed to Mr. Lee restraining or moving or dragging Judy Hullinger. The State of Utah claims the movement was a tenth of a mile. Appellee Brf. p. 28. However, the majority of the distance traveled can be contributed to the victims not Mr. Lee. First, Mr. Lee was kicked in the groin by Judy Hullinger. R. at 218, Tr. p. 60, lines 2-7. After kicking Mr. Lee, the girls ran. R. at 218, Tr. p. 60, lines 4-10. The movement involved was partly the girls running, and the fighting between the girls and Mr. Lee.

2) Was the movement the kind inherent in the nature of the other crime? The movement of Judy Hullinger was inherent in the aggravated assault. Judy Hullinger had kicked Mr. Lee in the groin. The girls then started to run with Mr. Lee pursuing them.

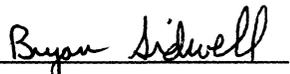
Once he caught the girls he struck them. A fight ensued where he hit, kicked and grabbed both girls. Movement such as , holding, kicking, dragging is inherent in fighting.

3) Did the movement or confinement have independent significance from the aggravated assault? As stated above, Mr. Lee had been kicked and he retaliated. Mr. Lee was larger and stronger and his retaliation towards the girls although brutal was no more than pure aggression towards the girls for kicking him in the groin.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand to the trial court for either a new trial or to be sentenced under the doctrine of merger.

DATED this 25 th day of April, 2005.

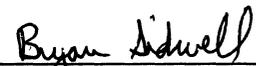


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's brief was sent to the following by placing them in the U.S. mail, postage prepaid on April 25th, 2005.

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