1973

The State of Utah v. Thomas E. Duran : Brief of Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

THOMAS E. DURAN,
Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from jury verdict of guilty in the District Court in and for Salt Lake County, the Hon. Marcellus K. Snow, presiding.

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

THOMAS E. DURAN,
Defendant-Appellant.

Case No. 13035

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Thomas E. Duran, appeals from a conviction by a jury of Assault by a Convict With a Deadly Weapon, Without Malice Aforethought, in the Third District Court, Salt Lake County, State of Utah, the Honorable Marcellus K. Snow, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Thomas E. Duran, was found guilty by a jury of Assault by a Convict With a Deadly Weapon, Without Malice Aforethought, on May 5, 1972, and was thereafter sentenced to be committed to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of his conviction of Assault by a Convict With a Deadly Weapon, Without Malice Aforethought and a new trial.

STATEMENT OF FACTS

On January 18, 1972, one Thomas Gallegos was stabbed with a knife while residing in the Utah State Penitentiary. On the 18th day of April, 1972, the defendant went on trial for the assault on Mr. Gallegos.

During the trial, the State, over the objection of the defendant, put into evidence a prior commitment of the defendant which showed that he had plead guilty to an offense identical to the one for which he was now on trial (T. 106).

Also, during the trial the attorney for the State cross-examined two of the defendant's witnesses, one Mr. Chestnut and one Mr. Sanchez, as to prior convictions. It was brought out that Mr. Chestnut had been convicted of a felony which had been overturned on a writ of habeas corpus (T. 406) and that Mr. Sanchez had been convicted of a misdemeanor. Both of the above convictions were elicited over defense counsel's objection (T. 464).

ARGUMENT

POINT I.

AT THE TRIAL OF THE PRESENT CASE, WHEREIN THE DEFENDANT DID NOT

TESTIFY, EVIDENCE WAS ERRONEOUSLY ADMITTED WHICH SHOWED THAT THE DEFENDANT HAD COMMITTED A PRIOR FELONY OF THE SAME TYPE FOR WHICH HE WAS PRESENTLY ON TRIAL.

This Court in *State* v. *Dickson*, 12 U. 2d 8 (1961) stated that:

> "It is the sound and salutory policy of the law to indulge everyone, including convicted felons, with the presumption of innocence, and to require the state to obtain and present sufficient evidence to convince the jury of the defendant's guilt to the crime beyond a reasonable doubt. If this were not so, serious and perhaps insuperable obstacles to reformation and rehabilitation would exist for a man who had once acquired a bad reputation." At 12.

Defendant contends that because of errors which occurred at trial, he was convicted in violation of the above principle and, therefore, he is entitled to a reversal of his conviction and a new trial.

The defendant predicates his first assignment of error on the general rule of law that evidence of prior felonies committed by the defendant are not admissable unless the defendant testifies, and then only for purposes of impeachment. That Utah follows this general rule is shown by the statement in *State* v. *Lopez*, 22 U. 2d 257, 451 P. 2d 772 (1959) wherein the Court said:

> ". . . Concededly, evidence of other crimes is

> not admissable if the purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged . . ." At 262.

In *State* v. *Kazda*, 14 U. 2d 266, 382 P. 2d 487 (1963) the Court dealt with the major exception contained within the rule:

> "The apparent purpose and reason for permitting the prosecution to question the accused regarding prior felony convictions is to affect his credibility as a witness." At 269.

Here, however, we are dealing with a case where the defendant did not take the stand as a witness on his own behalf and, thus, the major exception (i.e. impeachment) does not apply.

Evidence of prior felonies has been held to be admissable as an exception to the general rule, if relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. Cf. *State* v. *Lewis*, 405 P. 2d 769 (Kan. 1965). The Utah Court has also said that such evidence is admissable if it,

> ". . . has relevancy to explain the circumstances surrounding the instant crime . . . :" *Lopez*, supra at 775.

In the present action the defendant was charged with a crime under 76-7-11 and 76-7-12, Utah Code Annotated, which relate to assaults by convicts on other persons, including other convicts. Clearly, one of the essential

elements of the crime in this case is that the actor must have been a convict at the time of the alleged assault. The burden is on the State to prove that element. The State attempted to prove this by calling as a witness James W. Johnson, (T. 101) who was the personnel and I.D. officer at the Utah State Prison. As such, he was in charge of the inmate records. The State asked Mr. Johnson if he had brought the records of the defendant with him. At this point, defense counsel stated that the defendant was willing to stipulate that both the defendant and the victim were in fact inmates at the Utah tSate Prison at the time of the alleged incident (i.e. January 18, 1972). The prosecutor then agreed to accept the stipulation as to the victim, but not as to the defendant. Defense Counsel then stated that the defendant would concede that he was a convict on the date of the alleged offense. The Court ruled that the State was not bound to accept this stipulation. The witness, under direct examination, then testified that the defendant had been received on February 14, 1963, and then released and received again on February 19, 1965, on a parole violation. The State then offered Exhibit Two, the latest commitment on which the defendant was serving. It was received over defense counsel's objection. The witness, on direct examination, further testified in an answer to a State's question about the victim, that the *defendant* had been committed to to the prison for the crime of "assaulting a fellow convict" (T. 106-7).

Subsequent to the reception of the commitment and

the above testimony into evidence, defense counsel moved the Court to grant a mistrial on the basis that the commitment contained the fact that the defendant had been convicted of a felony previously and more specifically because said felony was the same type of offense for which the defendant was now on trial. The motion was denied (T. 110-113).

The only possible exception that this four-year-old commitment containing the record of a prior felony conviction for "assault by a convict" could come in under would be that it "has relevancy to explain the circumstances surrounding the instant crime . . ." *Lopez*, supra. Plaintiff would assert that only a strained reading of the above exception would allow such admission. However, even if such a strained interpretation is given to the "circumstances" exception, the evidence of a prior conviction should not have been admitted. In *State* v. *Lopez*, supra, after setting forth the "circumstances" exception to the general rule, the Court set forth the test which must be used in deciding whether or not to allow such proffered evidence. That test is,

> ". . . Such harm as there may be in receiving evidence concerning another crime is to be weighed against the necessity of full inquiry into the facts relating to the issues." At 775.

The test simplified is, the possible harm done to the defendant must be weighed, in this case, with the necessity of receiving the commitment which stated that the

defendant had been previously convicted of the type of felony with which he was now charged.

What necessity did the State have in introducing the commitment it did? The only necessity which the State had in relation to the commitment was that the State had the burden of proving that the defendant was a convict. This burden was lifted by the fact that the defense offered to stipulate and, in fact, concede that the defendant was a convict on the date of the alleged offense. Although the State accepted the stipulation as to the victim, it refused as to the defendant. It is important to note that on cross examination of Mr. Johnson (T. 107-8) it was shown that the defendant was serving under two commitments, one issued in 1963 and the one offered in evidence. It is obvious why the State wanted to introduce the latest commitment. As stated previously, that commitment was a result of a guilty plea by the defendant to the charge of "assault by a convict without malice". Since the defendant was on trial for the same type of crime, it would be easy for the jury to infer that since he had done it once before, he probably did it again.

After the stipulation there was absolutely no need to offer any commitment. Although in some instances, such as in qualifications of an expert witness, counsel is not bound to accept a stipulation as to the expert's qualifications. Such is not the case here. In the case of an expert, the party is entitled to have a jury hear the expert's qualifications. Here we are concerned about an element, that is, whether or not the defendant was a con-

vict on January 18, 1972. After the stipulation was offered the element was no longer an issue. Had the State offered the original commitment (i.e. 1963) the harm to the defendant, in light of the attempted stipulation, would have been great and also could have constituted reversible error. But when the State deliberately offered the *second* commitment the harm was greatly magnified because of the identity of the location and elements of the prior conviction with the charge on which he was presently on trial.

McCormik on Evidence (Cleary Ed.) sets forth the problem that faces the accused who takes the stand:

> "if the accused is forced to admit that he has a 'record' of past convictions, particularly if the convictions are for crimes similar to the one on trial, there is an obvious danger that the jury, despite instructions, will give more heed to past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to the legitimate bearing of the past conviction or credibility. §43.

In the present case, even though the defendant did not take the stand, the State was still allowed to introduce evidence that the defendant on a prior occasion had committed the same felony with which he was now charged and, as it turned out, convicted.

The defendant contends that admission of such evi-

dence is reversible error in view of the standard enunciated in *State* v. *Dickson*, supra:

> "Inasmuch as we cannot say with any degree of assurance that there would not have been a different result in the absence of error . . . , it must be regarded as prejudicial and the case remanded for a new trial." At 13.

POINT II.

THE COURT ERRONEOUSLY ALLOWED TWO OF THE DEFENSE WITNESSES TO BE QUESTIONED ABOUT PRIOR CONVICTIONS WHICH, IN ONE INSTANCE HAD BEEN OVERTURNED AND IN THE OTHER INSTANCE WAS A MISDEMEANOR.

In Utah, a witness can be asked if he has been convicted of a felony, 78-24-9 UTAH CODE ANNOTATED, and the nature and date of the felony. Cf. *State* v. *Younglove*, 17 U. 2d 268, 409 P. 2d 125. The State is not permitted to impeach a witness through questions concerning crimes which are not felonies.

During the cross examination of Mr. Sherrill Chestnut, a witness for the defendant, he was asked if he had ever been convicted of a felony (T. 406). He answered, "Two, I believe." He was then asked the dates and he replied 1961 and 1966. He then related what type of felonies they were. The prosecuting attorney then asked Mr. Chestnut, "How about 1959, burglary and grand lar-

ceny" (T. 406). Mr. Chestnut replied that he had been acquitted of that crime. He then testified that he had been convicted in 1956 of burglary and grand larceny and released on a writ of habeas corpus in 1959. It is defendant's contention that this testimony, over defendant's objection, of a prior conviction which had been overturned by a writ of habeas corpus, was improper and was prejudicial to the defendant. The effect of such improper cross examination and impeachment was compounded when it was repeated on another witness.

On cross examination of Mr. Jimmy Sanchez, the prosecuting attorney asked Mr. Sanchez, over the defendant's objection, if he had ever been convicted of a felony. Mr. Sanchez answered that he had been convicted twice for breaking and entering and burglary, in 1964 and 1969 (T. 464). The prosecuting attorney then asked Mr. Sanchez, "What about 1967?" to which the witness replied, "No" (T. 464). The witness was then asked by the prosecuting attorney, "Have you ever been convicted of manslaughter?", to which the defendant objected. The witness answered "Yes, involuntary manslaughter" (T. 464). The defendant, through his attorney made a motion for a mistrial, (T. 467) which was denied. The prior conviction which was asked about is, under 76-1-13 UTAH CODE ANNOTATED (1953) which was in effect at the time of trial, a misdemeanor, as stated above, Utah does not permit showing of prior misdemeanors for impeachment purposes. Defendant contends that in light of the improper impeachment of these two witnesses, the dneying

of the motion for mistrial was in error, and this Court should reverse his conviction and order a new trial.

CONCLUSION

For the reasons stated above, appellant respectfully submits that the conviction be reversed and a new trial granted.

Respectfully submitted,

BRENT A. GOLD

Attorney for Appellant