1973

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

THOMAS E. DURAN,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT
IN THE THIRD JUDICIAL DISTRICT
AND FOR SALT LAKE COUNTY
THE HONORABLE MARCELLUS K.
PRESIDING.

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CORRECTION SHEET
(Pursuant to U.R.C.P. 75(P)(2))

STATE OF UTAH vs. THOMAS E. DURAN
Case No. 13035
Correction of
Brief of Respondent

Page i

TABLE OF CONTENTS

CORRECTION:

Delete Point I as printed, and insert as Point I:

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR CONVICTION.

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

OTHER AUTHORITIES CITED

CORRECTION SHEET
(Pursuant to U.R.C.P. 75(P)(2))

STATE OF UTAH vs. THOMAS E. DURAN
Case No. 13035
Correction of
Brief of Respondent

TABLE OF CONTENTS

Page ii

(1) Delete from the table of cases:
State v. Sinclair
State v. Neal

(2) Add to the cases cited:
Arrington v. State, 233 So.2d 634 (Fla. 1970)
Cornet Stores v. Superior Ct. In and For Co. of Yavapai, 108 Ariz. 84, 492 P.2d 1191 (1972)
People v. Scheck, 356 Ill. 56, 190 N.E. 108, 91 A.L.R. 1472 (193

(3) Add:
Secondary Authorities
73 Am.Jur.2d, Stipulations, § 17

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

THOMAS E. DURAN,
Defendant-Appellant.

Case No. 13035

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Thomas E. Duran, appeals from a jury verdict of guilty of assault by a convict with a deadly weapon without malice aforethought, in violation of Utah Code Ann. § 76-7-11 (1953), 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 of assault by a convict with a deadly weapon, without malice aforethought on May 5, 1972, in Third District

Court and was thereafter sentenced to be committed to the Utah State Prison for an indeterminate term to run concurrently with his prior sentence.

RELIEF SOUGHT ON APPEAL

Respondent respectfully asks this Court to sustain the verdict of the trial court finding appellant guilty of assault by a convict with a deadly weapon without malice aforethought.

STATEMENT OF FACTS

Appellant was sentenced on May 15, 1972, for an indefinite terms in the Utah State Penitentiary after a jury of twelve had found that appellant, Thomas E. Duran, had stabbed one Thomas Gallegos, a fellow inmate.

The respondent is compelled to ~~the~~ take exception to appellant's characterization of the facts as establishing the admission into evidence of appellant's prior conviction for the same offense, assault by a convict with a deadly weapon. Respondent maintains the portion of the trial transcript cited by appellant (T. 106) cannot support this allegation. (In all other aspects respondent concedes appellant's representation of the facts as given in appellant's Statement of Facts.)

ARGUMENT

POINT I.

THERE IS NO EVIDENCE OF RECORD

CORRECTION SHEET
(Pursuant to U.R.C.P. 75(P)(2))

STATE OF UTAH vs. THOMAS E. DURAN
Case No. 13035
Correction of
Brief of Respondent

Page 2

STATEMENT OF FACTS

The second paragraph should be amended to read:

The respondent is compelled to take exception to appellant's characterization of the facts that admission into evidence of defendant's prior conviction was unnecessary and, consequently, created error. (In all other aspects respondent concedes appellant's representation of the facts as given in appellant's Statement of Facts.

Omit Point I as written and substitute:

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR CONVICTION.

CORRECTION SHEET
(Pursuant to U.R.C.P. 74(P)(2))

STATE OF UTAH vs. THOMAS E. DURAN
Case No. 13035
Correction of
Brief of Respondent

Pages 3 and 4

Omit argument of existing point I and insert:

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR CONVICTION.

It is undisputed that proof of appellant's imprisonment, at the time the offense charged was committed, is an essential element of the offense. Appellant maintains, without supporting authority, the state was obligated to enter into a stipulation with the defense as to defendant's status as a

convict. Respondent submits the trial court judge was correct in holding the state was not obligated to enter into a stipulation as to a material element of the offense charged (T.106).

In a criminal proceeding the burden of proof is placed upon the state. To satisfy the rigorous requirements of proof beyond a reasonable doubt, the state must be afforded the discretion of presenting the evidence which it believes to have the greatest probative value to establish a fact in issue. This position is adopted in 73 Am.Jur.2d Stipulations, § 17, at 557:

> "It has been held that, in a criminal proceeding, the state has the right to prove every element of the crime charged and is not obligated to rely on the defendant's stipulation."

In Arrington v. State, 233 So.2d 634, 636 (Fla. 1970), the Florida Supreme Court discusses the proffer of stipulation by the defendant in criminal cases, and a stipulation to be a mutual agreement between opposing parties and not an agreement to be made obligatory upon a non-consenting party. On this point the court cited the language in People v. Scheck, 356 Ill. 56, 62, 190 N.E. 108, 111, 91 A.L.R. 1472 (1934):

> "It has never been held that the state is barred from proving a fact because the defendant offers to admit it, but, on the contrary, the rule is that when a trial is upon a plea of not guilty, the state is permitted to go ahead and introduce its full proof of the crime charged in the indictment."

In a recent civil case, Cornet Stores v. Superior Ct. In & For Co. of Yavapai, 108 Ariz. 84, 492 P.2d 1191, 1194 (1972), it was held a party to a litigation has a right to prove its case in the manner it sees fit. The rule was applied in that case even though the proof of the fact placed in issue by the plaintiff after rejecting a stipulation, allegedly raised a danger of defendant's trade secrets being disclosed at trial.

Based on the foregoing, the state was clearly not obligated to agree to the stipulation of material evidence by the defendant. The trial court should be

sustained in disallowing defendant's objection to the introduction of defendant's prior conviction into evidence.

WHICH WOULD SHOW DEFENDANT'S PRIOR FELONY CONVICTION FOR ASSAULT BY A CONVICT WAS INTRODUCED AT TRIAL.

Appellant asserts the colloquy, as recorded in the transcript at 106: 17-30, establishes the admission into evidence of defendant's prior conviction. In actuality, the only incontrovertible fact established was that Mr. Gallegos, the victim, had not been convicted for the offense of assault by a convict:

"Q. (By Mr. Yocom) Do you have Mr. Gallegos' records with you, commitment with you, records with you, Mr. Johnson?

A. Yes, I do.

Q. And from those records, does it indicate That Mr. Gallegos is also an inmate at the Utah State Prison?

A. Yes.

Q. And when was he committed to the Utah State Prison, this commitment he is presently serving?

A. We received the commitment, it was issued January 19, 1967.

Q. What offense?

A. The offense of assaulting a fellow convict.

Q. Now, I am talking about Mr. Gallegos now,

A. Oh. Gallegos. I am sorry, sir. I didn't bring his . . ." (T. 106).

It would require a compounding of inferences to logically conclude from this testimony, where defendant's name was never mentioned, that the defendant's prior conviction was brought into evidence and he was prejudiced thereby. Even allowing appellant's theory, it cannot establish an obvious, definite, or compelling error mandating a reversal of a jury verdict for prejudice. Reversible error is not a standard to be applied to every remark having some prejudicial impact. Utah Code Ann. § 77-42-1 (1953), provides the basic sttandard for determining reversible 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."

The statute provision would require more than a presumption drawn from a passing remark to constitute reversible error. Likewise, this Court has required clear and patent error to be demonstrated from the record before reversible error may be found. *State* v. *Sinclair*, 15 Utah 2d 162, 389 P. 2d 465 (1964); *State* v. *Neal*, 1 Utah 2d 122, 262 P. 2d 756 (1953); *State* v. *Valdez*, 19 Utah 2d 426, 432 P. 2d 53 (1967).

POINT II.

EVEN IF EVIDENCE OF DEFENDANT'S PRIOR CONVICTION WAS INTRODUCED INTO EVIDENCE, ITS ADMISSION WAS NOT REVERSIBLE ERROR.

Rules of evidence cannot reflect the talismanic certainty of immutable law, but must draw their vitality and application from the inexhaustable variety of facts and circumstances. In the instant case, reversible error cannot be demonstrated simply by showing a reasonable inference that defendant's prior conviction was brought into evidence. Nothing in the record would sustain a claim that the defendant's name and prior conviction were paraded before the jury or that such alleged error had any prejudicial impact whatever.

This Court in *State* v. *Kelbach*, 23 Utah 2d 231, 461 P. 2d 297, 301, 302 (1969), wrote with regard to alleged error:

> ". . . the alleged error must be evaluated in conformity with the provisions of Section 77-42-1, U. C. A. 1953; an appellate court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. This court may not interfere with a jury verdict, unless upon review of the entire record, there emerge errors of sufficient gravity to indicate that defendants' rights were prejudiced in some substantial manner, i.e., the error must be such that it is reasonably probable that there would

> have been a result more favorable to the appellant in the absence of error."

See also *State* v. *Baran*, 25 Utah 2d 16, 474 P. 2d 728 (1970) and *State* v. *Johnson*, 25 Utah 2d 160, 478 P. 2d 491 (1970).

Further, most of the cases which have considered whether the direct or cross-examination of a witness or defendant as to prior arrests or conduct, constitutes prejudicial error were determined to be such because numerous questions were asked and answered. See *State* v. *Peterson*, 23 Utah 2d 58, 457 P. 2d 532 (1969).

The standard required to invoke reversible error as it relates to testimony of prior convictions is not one to be lightly indulged. In Wharton, *Criminal Evidence*, 13th Ed. § 240 (1973), the standard is stated in the following test:

> "The improper admission of evidence of other crimes does not always constitute reversible error. A conviction may be sustained where the taint of the other crimes was so minor that it is unlikely that the defendant was prejudiced, or the evidence of guilt was so strong that it is improbable that a contrary result would have been reached."

Respondent submits both criteria have been satisfied in the case at bar:

(1) The taint of any other crime was insignificant because of the inadvertent, and diminutive impact of the

alleged introduction into evidenec of such conviction. Further, the jury was instructed to disregard any evidence of prior conviction by defendant except to show his status as a convict, a necessary element of the offense (Rec. on App., Jury Inst. No. 12, p. 47).

(2) The evidence of guilt, from the totality of the record, was so strong that a conviction would have been obtained absent the alleged error. This standard should be required as it was in *State* v. *Scandrett*, 24 Utah 2d 202, 468 P. 2d 639 (1970).

This Court has often held a jury trial raises a strong presumption as to the sufficiency of the verdict and the absence of reversible error. See *State* v. *Valdez*, 19 Utah 2d 426, 429, 432 P. 2d 53 (1967). See also *State* v. *Canfield*, 18 Utah 2d 292, 422 P. 2d 196 (1967); *State* v. *Seymour*, 18 Utah 2d 153, 417 P. 2d 655 (1966).

Respondent believes that the presumption of validity applied to the facts at bar would preclude a reversal of appellant's conviction.

POINT III.

THE ALLEGED ADMISSION INTO EVIDENCE OF A SIMILAR OR LIKE CRIME COMMITTED BY THE DEFENDANT WAS RELEVANT TO THE ISSUE OF INTENT.

While the general rule, as stated in *State* v. *Lopez*, 22 Utah 2d 257, 451 P. 2d 772 (1969), would preclude the general admission of prior convictions by the defendant,

a prior conviction may properly be admitted into evidence to show intent (herein, the specific *mens rea* required to commit the offense charged) where there is a close relationship in time or *circumstance* (Wharton, *supra*, § 245). This Court in *Canfield* at 296 alluded to the proposition, without adopting, that defendant's propensity for violence might be established by demonstrating such conduct as arising in a prior transaction or conviction which is identical or similar to the one at bar. While it is admitted that a mere showing of "propensity" to commit similar crimes is not sufficient to permit the admission into evidence of a prior felony conviction, such conviction should be admitted when the identity of circumstances between the prior felony conviction and the present accusation from a close and material nexus as to a material element of the offense, to include intent. The fact that defendant has resorted to similar acts under similar circumstances is material to proving his intent (i.e., specific mens rea) to injure another prisoner. The prior conviction is closely related to showing defendant's intent to kill those who would deliberately interfere with his activities. This requirement was extensively discussed in *State* v. *Nemier*, 106 Utah 307, 314, 148 P. 2d 327 (1944), wherein evidence as to intent to "shoot it out" with police was admitted to establish the same intent as to prison guards. *Nemier* is cited in Wharton, Vol. I, § 245, *supra*, as supporting the general rule as to admissibility of a prior conviction to establish intent under similar circumstances.

For the reasons aforesaid, evidence of appellant's prior conviction, even if held to have been entered into evidence, should be allowed to establish the specific intent element of the offense and, hence, would not have produced a prejudicial error.

POINT IV.

THE TESTIMONY OF THE DEFENSE WITNESSES AS TO PRIOR CONVICTIONS DID NOT CONSTITUTE PREJUDICIAL ERROR TO THE DEFENDANT, AND THEIR IMPEACHMENT WAS OTHERWISE SUSTAINABLE.

This Court in *State* v. *Simmons*, 28 Utah 2d 301, 501 P. 2d 1206 (1972), would not allow a reversal of a trial conviction where a defendant, having testified as to a prior felony conviction, disclosed on cross-examination the conviction was a misdemeanor.

The equities requiring a reversal for prejudicial error are less compelling in the present case where the witnesses are not defendants and defense counsel rejected a request to have the jury instructed (T. 470).

Specifically, the present case presents no issue of reversible error. Both defendants admitted multiple prior felonies, any error as to the subsequent release on habeas corpus, as in the case of Mr. Chestnut (T. 406) or the clarification of the conviction of manslaughter as a misdemeanor offense in the case of Mr. Sanchez (T. 464),

cannot constitute reversible error for the following reasons:

(1) As noted previously, the record indicates a concurrent admission by both defendants of sufficient impeaching felonies unrelated to those challenged. See (T. 406-407) where Mr. Chestnut admitted two prior felony convictions; and (T. 464) where Mr. Sanchez, likewise, admits to two other felony convictions.

(2) Jury Instruction No. 29 specifically instructed the jury that a prior felony conviction should not automatically discredit a witness.

(3) The admissions do not directly prejudice the defendant and have an insignificant bearing upon the credibility of the witnesses when weighed against the unchallenged admissions of other felony convictions.

(4) The mistake as to the subsequent release of Mr. Chestnut and the degree of offense as to Mr. Sanchez were reasonable and inadvertent errors on the part of the prosecution. See (T. 468) explaining the source of the prosecutions' information. It would require an unreasonable effort and burden upon the prosecution to meticulously research and certify every nuance of every defense witnesses' entire record where there were thirty-three alibi witnesses involved in the present case (T. 267: 28-30). Such errors of information can easily be corrected by the proper admonishment and instruction to the jury. Defense counsel, however, rejected any such suggestion; such rejection should constitute a waiver of objection (T.

470: 4-10); (Rec. on App., Def. Coun. Req. for Jury Inst., p. 31-35).

(5) If the challenged admissions are to be sufficient to constitute reversible error the burden shifts to the defendant to establish the truth, in fact, of any alleged errors.

For the foregoing reasons, respondent submits the admissions cannot constitute reversible error and the failure of defense counsel to agree to jury instructions constituted a waiver of any further objections on appeal.

CONCLUSION

For the reason aforesaid respondent maintains appellant's conviction should not be reversed. Nothing of record would subsantiate a clear showing of an introduction of prejudicial evidence sufficient to constitute reversible error.

To allow reversal on these facts would establish a standard allowing reversal for every inference or nuance of error at the trial level.

Respectfully submitted,

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