1973

# State of Utah v. Arthur Ray Shreve : Brief of Respondent

# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
*Plaintiff-Respondent,*

- vs -

ARTHUR RAY SHREVE,
*Defendant-Appellant.*

Case No. 13109

# BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FIRST DISTRICT JUVENILE COURT, STATE OF UTAH, THE HONORABLE CHARLES E. BRADFORD, JUDGE, PRESIDING

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## STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding in which the defendant was charged with a violation of Utah Code Ann. § 55-10-80, contributing to the delinquency of a minor in the Juvenile Court of the First District.

## DISPOSITION IN LOWER COURT

The defendant was tried without a jury before the Honorable Charles E. Bradford, on August 23, 1972. On that day a judgment was entered finding the appellant, Arthur Ray Shreve, guilty as charged.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment rendered by the trial court.

## STATEMENT OF FACTS

Respondent agrees with appellant's statement of the facts with the following inclusions and exceptions.

1. The birth dates of two of the complaining witnesses were taken from court records (T. 35).

2. The trial transcript does not show that the judge refused to take judicial notice of the age of the complaining witnesses because of their physical appearance. It shows that after the motion that such notice be taken was made by the prosecutor, the judge requested the clerk of the court to produce court records which contained the birth dates of two of the complaining witnesses.

> THE COURT: Mr. Roberts with respect to the ages of the boys I gather from the way you couched your argument I gathered that you were suggesting the Court take judicial notice of their age or their minority. On what basis do you suggest that the Court take judicial notice of this?
>
> ATTORNEY ROBERTS: Because it is so apparent and common as to be obvious Your Honor.
>
> THE COURT: Ms. Parker do we have a record on any of these three juveniles?
>
> THE CLERK: We have a record on Putnam boy, the rest I don't know without looking.
>
> THE COURT: We will take a short recess and I would like you to produce that record. (T. 35).

3. The three complaining witnesses testified that they were at defendant-appellant's house from approximately 9:00 p.m. July 7, 1972, until 10:00 a.m. July 8, 1972. During that time each testified that they smoked marijuana provided by defendant-appellant by means of a pipe also supplied by him.

## ARGUMENT

### POINT I

### THE TRIAL COURT WAS CORRECT IN TAKING JUDICIAL NOTICE OF THE AGES OF THE COMPLAINING WITNESSES.

The physical appearance of the complaining witnesses was a valid basis upon which to take judicial notice of their age. This basis was noted in *People v. Montalvo,* 4 Cal. 3d 328, 93 Cal. Rptr. 581, 482 P.2d 205 (1971) when the Supreme Court of California noted:

> "Our holding should not be interpreted so as to require the prosecution in every instance to prove the actual age of the defendant. There will be occasions when his physical appearance will be such that the jury could not entertain a reasonable doubt that he was over the age of 21 years." *Ibid.* at 336.

In addition, the Court said:

> "Similarly, a view of the defendant by the trier of fact in an appropriate case may be sufficient to support a finding that the defendant is an adult." *Ibid* at 336.

In *Cunningham v. United States,* 86 A.2d 918 (Mun. Ct. App. D.C. 1952), the Municipal Court of Appeals for the District of Columbia said in responding to objections made by defense counsel that the prosecution had not introduced evidence to establish the age of two witnesses:

> "But both officers were in court and were examined and cross-examined at some length. This gave the judge a full opportunity to observe them and to form an opinion as to their ages from their physical appearance, manner and voice. We therefore apply the rule which has been followed in Federal as well as state courts that when the age of a person becomes an issue and the person is present in court, the trier of the facts may use his senses and draw an inference as to the age of such person by personal observation." *Ibid.* at 919.

Wigmore on Exidence states:

> "Experience teaches us that corporal appearances are approximately an index of the *age* of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular, the *outward physical* appearance of an alleged minor may be considered in judging of his age; a contrary rule would for such an inference be pedantically over-cautious." 2 Wigmore, Evidence, § 22 (3d Ed. 1940).

This passage was cited with approval by both the California Supreme Court in *People v. Montalvo, supra,* and the Municipal Court of Appeals for the District of Columbia in *Cunningham v. United States, supra.* The age of a defendant and the age of witnesses may therefore be established by the physical appearance of the individual.

The trier of fact, in this case the trial judge, was entitled to take judicial notice of the age of the complaining witnesses after observing their physical appearance.

Rule 9 of the Utah Rules of Evidence parts (d) and (e) state with regard to the propriety of taking judicial notice:

> "(2) Judicial notice may be taken without request by a party, of . . . (d) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (e) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."

The physical appearance of the witnesses falls within the language which authorizes the implementation of judicial notice of facts "generally known or of such common notority."

Rule 10 of Utah Rules of Evidence(2) states:

> "(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judges may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply."

The Rules of Evidence give the judge discretion to consult other sources in order to determine the propriety of the fact that is judicially noticed. Also see Rule 9(2)(e). This the judge did by consulting the court records of J. R. Putman and Brian Schrolder in order to substantiate

their minority which was noticed as a result of their physical appearance. The action of the judge in taking notice of the complaining witnesses' age and substantiating this through the use of court records is contemplated and sanctioned by the Utah Rules of Evidence.

Through the above cited procedure the prosecution did sustain the burden of proof with regard to establishing the minority of the complaining witnesses thus conforming with criminal practice and procedure as set forth in *State v. Taylor,* 21 Utah 2d 425, 446 P.2d 954 (1968) and Utah Code Ann. § 55-10-81 (1953).

Appellant relies on *Ohio v. Mendenhall,* 21 Ohio App. 2d 135, 25 N.E.2d 307 (1969) for the proposition that failure of the prosecution to introduce evidence as to the age of the defendants or the complaining witnesses rendered the case defective. The reasoning used in that case is not applicable to the case at bar because it involved the jurisdiction of the juvenile court rather than the use of judicial notice. The record in that case is void of any attempt by the prosecution to establish the minority of the defendant. As a result the Ohio Court reversed saying the juvenile court did not have jurisdiction. In the case at bar, the issue is not the jurisdiction of the juvenile court but rather the propriety of the actions of the court in taking judicial notice of the ages of the complaining witnesses. No obligation was or has been made by the appellant with regard to the jurisdiction of the juvenile court over the subject matter of the case. If *Ohio v. Mendenhall* is to be followed as appellant requests, the failure of appellant to appeal the jurisdiction of the juvenile court

represents an admission on his part to the minority of the complaining witness. See Utah Code Ann. § 55-10-80 (1953).

Appellant further refers to *People v. Montalvo, supra,* for the proposition that the failure of the prosecution to prove the age of the defendant rendered the case defective. This use of *People v. Montalvo* fails to consider the statement of the California Supreme Court as noted on page 3 of this brief which limits the requirements of proof of age to only those instances when the court is unable to determine from physical appearance the age of the defendant.

It should also be noted that the cases cited by appellant involve instances where the age of the defendant was in question. The case at bar involves the age of victims or complaining witnesses.

These cases do not affect the trial court ruling in the case at hand because the age of the complaining witnesses was established by the prosecution.

Appellant also seeks to reverse the trial court's ruling by relying on the case of *Holbrook v. Carter,* 19 Utah 2d 288, 431 P.2d 123 (1967) and *Music Service Corporation v. Walton,* 20 Utah 2d 16, 432 P.2d 334 (1967) for the proposition that the reviewing court is prohibited from taking judicial notice of instruments filed in the office of the county recorder. These cases involved disputes in which one of the parties requested the court to take judicial notice of instruments pertaining to real property.

The case at bar may be distinguished for the following reasons; (1) at no time were records of the county recorder involved in the proceedings; (2) the judicial notice taken by the court was based on physical evidence before the court, namely the physical appearance of the complaining witnesses as they testified in court.

Another group of cases, *Wunsch v. Wunsch,* 248 Wis. 29, 20 N.W.2d 545 (1945), *State v. Lance,* 23 Utah 2d 407, 464 P.2d 395 (1970) and *McGuire v. McGuire,* 140 S.2d 355 (Fla. App. 1962) are used by the appellant for the proposition that social records may not be used by a court in a proceeding unless they are entered into evidence. These cases are distinguished from the case at bar for the following reasons: (1) the records in question in the above cases were reports of social workers concerning the conditions of the home and treatment of the children in question. The records which were involved in the judicial notice taken in the case at bar were court records; (2) the reports were used against the defendants in each of the above cases; in the case at bar, judicial records were used to substantiate knowledge the court already had of the ages of complaining witnesses; (3) the above cited cases involve custody proceedings in which written departmental reports were considered by the judge in rendering his decision; the case at bar is a result of violation of state statute and records of the court were used only to substantiate common knowledge already before the court; (4) the above cited cases involve social records; there is no indication in the trial transcript that the records in question in the case at bar were social records.

*Los Angeles & S.L.R. Co. v. Public Utility Commission,* 81 Utah 286, 17 P.2d 287 (1932) cited by appellant is inapplicable as it involves proceedings before and instructions by the Supreme Court to that commission as to correct subjects of judicial notice. If applicable at all, this case serves to support respondent's contention that judicial notice was correctly taken in the case at bar.

Appellant relies on Utah Code Ann. § 55-10-96 (1953). The language of the statute renders it inapplicable to the case at bar.

> "For the purpose of determining proper disposition of the child, and for the purpose of establishing the fact of neglect or dependency, written reports and other material relating to the child's mental, physical and social history and condition *may* be received in evidence, and *may* be considered by the court along with other evidence, but the court *may* require that the person who wrote the report or prepared the material appear as a witness if he is reasonably available." (Emphasis added.) Utah Code Ann. § 55-10-96 (1953).

The language of the statute makes the statute permissive. In addition, the statute is applicable for the purpose of determining the disposition of a child and to establish facts of neglect or dependency. The case at bar does not involve neglect or dependency of a child nor is the disposition of a child in question. Rather, the disposition of an adult is in question. Even were the statute applicable, no impropriety occurred because the court used its own records to substantiate facts before it.

## CONCLUSION

Respondent respectfully submits that for the reasons set forth above, the judgment of the trial court should be sustained.

Respectfully submitted,

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