

1994

Utah v. Juan Anthony Portillo : Reply Brief of Appellant

Utah Court of Appeals

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Marian Decker; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Appellee.

Margaret P. Lindsay; Utah County Public Defenders Assoc.; Attorney for Appellant.

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Case No. 940387-CA

Priority No. 2

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Defendant/Appellant.

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,
STATE OF UTAH, FROM A CONVICTION OF SIX COUNTS OF FELONY AND
MISDEMEANOR CONTROLLED SUBSTANCE VIOLATIONS BEFORE
THE HONORABLE LYNN W. DAVIS

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UTAH SUPREME COURT
JAN 12 1960
BRIEF
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Attorney for Appellant

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

JUAN ANTHONY PORTILLO,

Defendant/Appellant.

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Case No. 940387-CA

Priority No. 2

ARGUMENT

POINT I

**IT IS PLAIN ERROR FOR A JUDGE TO INSTRUCT THE JURY
ON THE PENALTY FOR THE OFFENSE CHARGED**

The State argues that the trial court committed no error--obvious or otherwise--in instructing and questioning the jury during voir dire on the punishment mandated by law for each charge because the trial court's "venire voir dire... properly afforded the parties an opportunity to explore whether any venire member held a particular penalty bias and, consequently, to ensure that the jury impaneled could reach an impartial decision unencumbered by irrelevant concerns over the applicable penalties" (Br. of Appellee at 8, 11-13).¹

¹During voir dire the trial court informed the jury panel of the penalty mandated by law for each count (R. 161 at 15-17) and then questioned the venire panel whether "anyone believes that the punishment fixed by law is too severe or too light for the offense charged" (R. 161 at 34).

Portillo, however, asserts that it was, in fact, obvious error for the trial court to instruct and question the venire panel with respect to penalty. Where there is no statutory provision mandating a jury role in penalty determination, both Utah and federal courts have stated repeatedly during the past twenty-years that punishment is the exclusive prerogative of the trial court and should not be considered by the jury in rendering a verdict of guilt or innocence.²

In this case the jury had no statutory role in penalty determination. The possible penalties which could be imposed in

²Utah cases include: State v. Cude, 784 P.2d 1197, 1202-03 (Utah 1989) (Possible punishment is not a proper matter for jury consideration because a determination of guilt or innocence shouldn't be swayed by a jury's feelings towards a defendant because of an anticipated sentence); State v. Shickles, 760 P.2d 291, 296 (Utah 1988) (Jury is ordinarily not informed of the punishment and the length of a possible sentence is generally thought to be irrelevant to the issue of guilt or innocence); Salt Lake City v. Tuero, 745 P.2d 1281, 1283 (Utah 1987) ("Sentencing is the prerogative of the trial court... and the jury has no function in the process. To question the jury panel concerning their opinions of a potential sentence may invite confusion on the jury's part as to their proper role in the trial").

Federal cases are: Shannon v. United States, ___ U.S. ___, 114 S.Ct. 2419, 2424 (1994) (The trial court holds the authority to impose sentences once the jury has rendered a guilty verdict and if jurors are provided with sentencing information they are invited to "ponder matters that are not within their province", they will be distracted from their fact finding obligation, and there will be a strong likelihood of confusion); Rogers v. United States, 422 U.S. 35, 40 (1975) (Jury should reach its verdict "without regard to what sentence might be imposed"); United States v. McCracken, 488 F.2d 406, 424 (5th Cir. 1974) (To inform the jury of punishment "draws the attention of the jury away from their chief function as sole judges of the facts, opens the door to compromise verdicts" and a jury's consideration of the penalty is prejudicial error). Chapman v. United States, 443 F.2d 917, 920 (10th Cir. 1971) (It is error to tell the jury about the consequences of a certain verdict).

this case are irrelevant to the jury's determination of guilt or innocence arising from their fact-finding function. Therefore, it was obvious error in this case for the trial court to instruct the jury on the penalties fixed by law for each count, and to question the panel with respect to their opinions about the mandated punishments, because the jury had no function in the sentencing process.

Because the trial court's error was obvious, under the plain error or manifest injustice standard, it will result in reversal if it was prejudicial. See State v. Verde, 770 P.2d 116, 122 (Utah 1989). The State argues that any prejudice which may have resulted from the trial court's error was cured by the instruction given by the court to the impaneled jury that they shouldn't consider nor discuss the subject of penalty and that possible punishment for the crimes charged mustn't affect their decision as to Portillo's guilt or innocence (R. 78, Br. of Appellee at 14-15).

However, it is clear from the question submitted by the jury during deliberation (R. 106), and from the fact that the jury reached a verdict almost immediately after the question was answered (R. 180), that the jury failed to heed the trial court's subsequent instruction to "disregard punishment." Therefore, the trial court's erroneous penalty instructions constituted prejudicial error, which is a sufficient basis to warrant reversal of Portillo's conviction.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR BY INCLUDING IN ITS JURY INSTRUCTIONS TO THE JURY THAT A SUBSTANTIVE ELEMENT OF COUNTS II AND III IS THAT THESE VIOLATIONS ARE A SECOND OR SUBSEQUENT VIOLATION OF THE SAME STATUTE

In Appellant's brief, Portillo argued that the trial court committed two obvious and prejudicial errors in its Jury Instructions 3-5, which resulted in a manifest injustice. The first of these errors is the trial court's use of the term "violation" rather than the statutory term "conviction." However, Portillo concedes that State v. Hunt, 277 Utah Adv. Rep. 30 (Utah 1995), renders harmless any error by the trial court's use of the word "violation" rather than "conviction" in Jury Instructions 3-5 (R. 100-102).

The second obvious and prejudicial error alleged by Portillo concerns the criminal elements of Counts I-III set forth in Jury Instructions 3-5. Counts I-III are all charges of Distribution of Marijuana in violation of Utah Code Annotated § 58-37-8(a)(ii). While count I was charged as a third degree felony, counts II and III were charged as second degree felonies as "second or subsequent convictions" under Utah Code Annotated § 58-37-8(b)(ii).

Jury Instructions 4-5 (counts II and III) add as a seventh essential element: "That this distribution was a second or subsequent violation occurring after a previous violation of the same statute" (R. 100-101). Portillo asserts that based upon the plain language of Utah Code Annotated §§ 58-37-8(1)(a)(ii) and

(1)(b)(ii), whether or not a charge is a "second or subsequent conviction" is not a substantive element of the crime, but a sentencing enhancement.

Subsection (1)(a)(ii) sets out the substantive elements of counts I-III: it is unlawful for any person to knowingly and intentionally distribute or arrange to distribute a controlled substance. On the other hand, subsection (1)(b) sets forth the penalty for a violation of subsection (1)(a): "Any person convicted of violating Subsection (1)(a) with respect to: (ii) ... marijuana, is guilty of a third degree felony and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony." Utah Code Ann. § 58-37-8(1)(b)(ii). In Allison v. American Legion Post No. 134, 763 P.2d 806, 809 (Utah 1988), the Utah Supreme Court declared:

where statutory language is plain and unambiguous, this Court will not look beyond to divine legislative intent. Instead, we are guided by the rule that a statute should be construed according to its plain language.

Therefore, based upon the plain statutory language of Utah Code Annotated §§ 58-37-8(a)(ii) and (b)(ii), Portillo asserts that the trial court committed obvious error in instructing the jury that a substantive element of counts II and III is "That this distribution was a second or subsequent violation occurring after a previous violation of the same statute" (R. 100-101).

Moreover, Portillo asserts that such error in Jury Instructions 4-5 was prejudicial, it resulted in a manifest injustice, and it deprived Portillo of a reasonable likelihood of

a more favorable result, because the instructions as written prevented each charge from being evaluated individually on the evidence presented at trial as required by law. The language of Instructions 4-5 required the jury to make either an all or nothing finding of guilt, i.e., if the jury did not convict Portillo of Count I then it could not convict him of Counts II or III which, according to the given instructions, required a finding of a second or subsequent violation.

During deliberation, the jury submitted a written question to the trial court which stated: "The 3rd charge, instruction #5, element #7 refers to this charge as a subsequent violation. If count one and count two are 'not guilty,' can a guilty verdict be given for count 3" (R. 106). Fifteen minutes after receipt of the court's "no" answer the jury reached a verdict of "guilty" to counts I-III (R. 180). The question, coupled with the fact that the jury reached a verdict almost immediately after the question was answered, clearly demonstrates that the jury was pondering a "not guilty" verdict for Counts I and II, but were swayed from such a more favorable result by the language of Jury Instructions 4-5 which required a finding of guilt under Count I before a finding of guilt could be made under Count II and III.³

³In Appellant's brief, Portillo argues that the evidence produced at trial with respect to counts I and II was insufficient as compared to count III, where a search warrant was executed on Portillo's residence following the controlled buy and drugs and the defendant were both found in the residence (Br. of Appellant at 24-25).

The State argues that error, if any, was favorable to Portillo because it required "the jury to find that counts II and III constituted second or subsequent violations of the drug statute before it could convict on either count, the trial court essentially required the jury to find more elements than actually required" (Br. of Appellee at 25). The State further asserts that if "the jury had been instructed as now requested by defendant... defendant ran the risk of being convicted for counts II and III, regardless of the jury's decision to convict or not convict for count I. In short, such an instruction would have made it even more likely that defendant would be convicted on all three counts (Br. of Appellee at 25-26).

However, Portillo argues that he was in fact--in spite of the State's assertion of favorable error--convicted of counts I, II and III. In addition, had the jury felt that Portillo was guilty "beyond a reasonable doubt" with respect to count I, there would have been no need to question the court as they did with respect to the effect of "instruction #5, element #7" (R. 106) because the answer would not have mattered--nor would the question have arisen. Moreover, the jury's question also referred to count II in terms of a "not guilty" verdict (R. 106), which suggests that the jury must also have had reasonable doubt as to the State's proof of that charge.

Therefore, absent the erroneous language in Instructions 4-5, there was a reasonable likelihood that Portillo would have been acquitted of counts I and II. This is where the real prejudice

or manifest injustice lies: Had Portillo been acquitted of counts I and II, count III would have been a third degree felony because there would have been no prior convictions. As a result, Portillo would have been convicted of three third degree felonies and a class B misdemeanor. Instead, because of the erroneous instructions, Portillo was convicted of two second degree felonies, three third degree felonies, and a class B misdemeanor.

POINT III

THE ERRORS COMMITTED AT TRIAL CUMULATIVELY PREJUDICED PORTILLO

If the errors committed at trial--including those argued supra--are found by this Court to be harmless individually, Portillo requests that this Court consider if they were cumulatively harmful. "'Cumulative error' refers to a number of error's which prejudice [a] defendant's right to a fair trial." State v. Johnson, 784 P.2d 1135, 1146 (Utah 1989) (quoting State v. Rammel, 721 P.2d 498, 501-02 (Utah 1986)).

Under the cumulative error doctrine, this Court will reverse only if "the cumulative effect of the several errors undermines our confidence. . . that a fair trial was had." Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990). However, "[i]n assessing a claim of cumulative error, [this Court will] consider all the identified errors, as well as any errors we assume may have occurred." State v. Dunn, 850 P.2d 1201, ___, 208 Utah Adv. Rep. 100, 114 (Utah 1993).

Portillo, as argued supra, asserts that the trial court committed two obvious errors at trial. One, the trial court

instructed and questioned the jury with respect to punishment; and two, the trial court erroneously instructed the jury that a substantive element of counts II and III was "That this distribution was a second or subsequent violation occurring after a previous violation of the same statute." Portillo asserts that these errors were individually prejudicial to him. Moreover, he argues that when the effect of these errors is viewed cumulatively, this Court's confidence in the fairness of Portillo's trial should be sufficiently undermined to warrant reversal.

The trial court's instructing and questioning the jury about the possible penalties which could attach to the charges invited the jury, throughout trial, to "ponder matters that are not within their province." Shannon v. United States, 114 S.Ct. 2419, 2424 (1994). The jury's knowledge of the penalty also gave a weightier importance to a finding of guilt under Count III because of its more severe punishment.

This error particularly prejudiced Portillo when it is coupled with the erroroneous seventh element in Jury Instructions 4-5. The jury--which by the wording of the submitted question was clearly pondering a "not guilty" verdict for Counts I and II due to an insufficiency of evidence, particularly with respect to identification--was left with the choice of convicting Portillo of either all or none of the first three charges. The fact that the jury had been instructed by the court as to the punishment

also clearly prejudiced the potentiality of a "not guilty" verdict on Counts I and II.

As a result of these errors, and the cumulative harm and prejudiced which resulted, Portillo requests that this Court vacate his convictions on grounds that the Court's confidence in the fairness of the trial is undermined.

POINT IV

PORTILLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Portillo asserts that the position he takes in Point V of Appellant's brief is correct and should be adopted by this Court. Namely, that this court should conclude as a matter of law that, based upon the obvious and prejudicial errors in the record to which no objections were made, Portillo was denied the effective assistance of counsel mandated by both the Utah and United States constitutions.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the manifest injustice which resulted from the obvious and prejudicial errors set forth above and in Appellant's brief, this court should vacate Portillo's conviction and remand the case for a new trial.

DATED this 10 day of January, 1996.


Margaret P. Lindsay
Attorney for Portillo

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief Of Appellant to the following: Marian Decker, Assistant Attorney General, Jan Graham, Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 10 day of January, 1996.

Margaret Lindsay