1974

The State of Utah v. Von Atkinson : Brief of Respondent

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CASES CITED

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

VON ATKINSON,
Defendant-Appellant.

Case No. 13771

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an appeal from a pre-sentence hearing, its findings, and the subsequent sentence given by the Honorable Marcellus K. Snow, Judge of the Third Judicial District Court, State of Utah, following a plea of guilty to sodomy by the appellant.

DISPOSITION IN THE LOWER COURT

After testimony and argument, the Court found appellant to have knowingly entered a plea of guilty to sodomy, and sentenced appellant to the indeterminate term of one to fifteen years prescribed by statute.

RELIEF SOUGHT ON APPEAL

Respondent seeks that the decision of trial court be affirmed.

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts as outlined in the Brief of Appellant.

POINT I.

THE COURT DID NOT ERR IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO FORCIBLE SODOMY AND IN SENTENCING APPELLANT TO LESSER PENALTY UNDER THE NEW CRIMINAL CODE.

A. THE BURDEN OF ESTABLISHING ERROR OR PREJUDICE IN CASES ON APPEAL RESTS UPON THE APPELLANT.

The established rule is that all presumptions favor the validity of the verdict and judgment; and they will not be overturned unless the appellant shows that error is substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence the result would have been different. *Simpson* v. *General Motors*, 470 P. 2d 399, 24 Utah 2d 301 (1970); *Anderson* v. *Johnson*, 268 P. 2d 427, 1 Utah 2d 400 (1934).

Respondent suggests that no matter how the acceptance of this plea is viewed, whether for "forcible" sodomy under the 1973 Utah Criminal Code (henceforth "New

Code), or under the 1953 Utah Criminal Code (henceforth "Old Code), no error is shown and no substantial prejudice to appellant occurred.

B. THE CIRCUMSTANCES SURROUNDING APPELLANT'S PLEA OF GUILTY TO SODOMY ARE CONFUSING AND COMPLEX. THEY SHOULD NOT BE CONVENIENTLY DISMISSED BY EITHER APPELLANT OR RESPONDENT.

Appellant's plea of guilty came after several continuances and subsequent attempts to "bargain" appellant so that he would not have to enter the Utah State Prison. Eventually, resigning himself to the fact that prison was inevitable, appellant accepted the "bargain" of pleading guilty to sodomy (under the Old Code) upon the victim, Gred Todd Peck, age 14, at the time of the crime, upon the agreement that charges, filed in City Court, of sodomy by the appellant upon the victim's brother, Brian Peck, age 13, would be dismissed; that no habitual criminal charge would be filed and that no other related criminal charges would be filed. (Trial transcript, 24927, pages 91-92, lines 28-30, 1-3.) At the time of bargaining, it was contemplated by both sides that the penalty given would be that for "forcible" sodomy under the New Code.

C. IT IS HIGHLY UNLIKELY THAT ANYONE INTENDED APPELLANT TO

PLEAD GUILTY TO "FORCIBLE" SODOMY.

In appellant's attorney's interrogation of appellant, the attorney informed appellant that the penalty for the crime he was pleading guilty to was "three to twenty years in the Utah State Prison." (Trial transcript, 24927, page 92, lines 8-9.) The quoted penalty is applicable to sodomy under the Old Code and is incorrect for "forcible" sodomy under the New Code.

There would have been no reason to the subsequent hearings on the "forcible" element of appellant's crime if he had previously pleaded guilty to "forcible" sodomy.

But even so, such a plea is valid if made intelligently, understandably, and voluntarily, *Brady* v. *United States*, 397 U. S. 742, 25 L. Ed. 747, 90 S. Ct. 1463 (1970); *Boykin* v. *Alabama*, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969). And this Court has held, in *State* v. *Stewart*, 171 P. 2d 383, 385 (1946):

> "Unless timely withdrawn, a plea of guilty places a defendant in the same position as a verdict of a jury finding him guilty of the charge after a fair and impartial trial. A plea of guilty is a *confession of the correctness of the accusation* which dispenses with the necessity of proof thereof." (Emphasis added.)

Therefore, appellant's plea is construed as a confession of the correctness of the charge and a confession to *all elements* of the charge, dispensing with the neces-

sity of proof. If so, appellant was correctly found guilty of forcible sodomy and sentenced to one to fifteen years in the Utah State Prison for "forcible" sodomy.

D. UNDER THE OLD CODE, THE LEGISLATURE DID NOT DIFFERENTIATE BETWEEN THE CRIME OF SODOMY PERPETUATED UPON THE VICTIM BY FORCE AND SODOMY PARTICIPATED IN BY WILLING, CONSENTING PARTIES.

The crime of sodomy under the Old Code applied equally as harshly to the sadistic child molester as to the consenting couple in the privacy of their own bedroom. Realizing the disparity within the statute, the Legislature destroyed the old crime of sodomy and created two different crimes (or degrees) — unconsented (forcible) sodomy and consented sodomy. The Legislature's intent was to clarify that, while the act of sodomy was still a crime in the State of Utah, it was a far more serious crime if *forced* upon the unconsenting victim than if indulged in by both parties' consent. To emphasize this clarification, the Legislature set the disparate penalties of second degree felony (one to five years in prison) for unconsented (forcible) sodomy and class B. misdemeanor (no more than six months in jail) for consented sodomy.

When appellant pleaded guilty to sodomy under the Old Code, he admitted all the elements of the crime as defined under the Old Code, and no proof of those ele-

ments were necessary. His guilt as to all elements of sodomy being thus resolved, it was necessary for the court to determine the penalty.

This Court has held many times that where the sentencing of a defendant follows a change reducing the penalty for certain offenses, the defendant was entitled to the benefit of the lesser penalty. *State* v. *Tapp*, 26 Utah 2d 392, 490 P. 2d 334 (1971). But this Court has not ruled on the situation where a change in the Utah Code Annotated results in the fission of one crime into two unique crimes, each with its own distinguishing requisite elements of proof.

The trial court realized that the appellant could not have pleaded guilty to consented sodomy, because that element was lacking in the indictment. Likewise, the plea could not have been for unconsented (forcible) sodomy, as that element was also lacking. Thus, for the sole purpose of giving the appellant the benefit of the lesser penalty (and in no way affecting appellant's plea of guilty to all elements under the Old Code), the trial court held a hearing for the presentation of mitigating and aggravating factors prior to sentencing. Many states agree with this procedure. See Utah Code Ann. § 77-24-9 (1953); Utah Code Ann. § 77-35-2 (1953); *Smith* v. *People*, 32 Colo. 251, 75 P. 914 (1904); *Arrano* v. *People*, 24 Colo. 233, 49 P. 27 (1897); *State* v. *Vennum*, 149 Wash. 670, 272 P. 62 (1928); *State* v. *Arnold*, 39 Idaho 589, 229 P. 748 (1924); and 77 A. L. R. 1211.

The trial court found that the missing element pre-

cluding sentencing was the element of nonconsent on the part of the victim. The trial judge then sentenced appellant appropriately to one to fifteen years in the Utah State Prison.

Thus, the defendant's plea, whether that of "forcible" sodomy under the New Code or that of sodomy under the Old Code, was properly accepted and either plea properly resulted in the appellant being appropriately sentenced to the Utah State Prison for one to fifteen years.

POINT II.

THE FINDINGS OF THE TRIAL COURT THAT FORCIBLE SODOMY WAS PROPER BASIS FOR SENTENCE WAS CORRECT.

This Court has held that where full and fair opportunities for both parties to present their arguments and evidence upon the issues has been given and the trier of fact has had full deliberation and due consideration thereto, then the administration of even-handed justice demands that there be some solidarity as to the results so that the decision may be reviewed. "Accordingly, the established rule is that all presumptions favor the validity of the verdict and judgment. . . ." *Simpson* v. *General Motors*, 24 Utah 2d 301, 470 P. 2d 399 (1970).

This is especially true when the key witness to the crime is a child. This Court has repeatedly expressed the importance of the trial judge's in-the-courtroom observations, especially when children are testifying. *State*

v. *Morasco*, 42 Utah 5, 128 P. 571 (1912); *State* v. *Williams*, 180 P. 2d 551 (1947).

In *State* v. *Williams*, *ibid* at page 552, where this Court held that the trial court had not abused discretion in finding a retarded child witness competent. The importance of the trial judge's immediate observation was stated:

> "However, the trial judge had the advantage of having the witness before him. He was in a position to observe not only her demeanor but the tempo of question and answer, the attitude and tone of voice of counsel, and the probable effect of the courtroom environment. Hence much of importance to his decision . . . was available to the trial judge which the record does not reveal to us. He exercised his discretion in the light of such additional factors, and we are unable to say with conviction that his ruling thereon was an abuse of such discretion."

This opportunity of the trial judge to pick up inferences and nuances from the interaction in the courtroom, lacking to this Court, which must base reactions on the coldprint of the transcript, is very important when dismissing the test of "resistance."

Section 76-5-506 of the New Code specifies when sodomy is "unconsented." The three clauses important to this argument are:

> "(1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances; or

(2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or

(3) The victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist; or . . ."

This Court has held that appropriate resistance in rape cases is determined by the factors of age, strength, surrounding facts, and all attending circumstances making it reasonable for her to do, in order to manifest her opposition. *State* v. *Horne*, 364 P. 2d 109, 12 Utah 2d 162 (1961); *State* v. *Roberts*, 63 P. 2d 584 (1937). Such factors are helpful in the present case, though the test itself may be inappropriate.

The Court has held a very strict test in relationship to:

1. Ease of assertion of the forcible accomplishment of the sexual act.

2. Impossibility of defense except by direct denial.

3. The assertion of force or violance by the woman to cover her disgrace or minimize fault. *State* v. *Horne*, 12 Utah 2d 162, 364 P. 2d 109 (1961).

In the present case, while ease of assertion is present, the appellant confessed the act. A woman's assertion may be based on fear of losing her husband, breaking up the home, losing her children, and or loss of financial

security. None of these factors influence the boy's assertion.

Also, the boy has less to lose in a sodomy attack than a girl in a rape attack. The girl must fear internal injuries and unwanted pregnancy. The boy, on the other hand, had little to lose by allowing the act to terminate. Fear of violent injuries is generated *only* if there is resistance. No long term effects, such as pregnancy, are present. There is the element of disgrace, but that element was present before the boy gained full consciousness and realization of what was occurring.

The significant facts in this case are:

1. The boy was fourteen years of age (right on the borderline of the protected age group).

2. The appellant was two to three times larger than the boy.

3. The appellant was respected by the boy's parents and was viewed in an authoritarian position (as counselor in Alpha dynamics) by the parents.

4. The appellant held an authoritarian position over the boy (as "baby-sitter").

5. The appellant practiced Alpha dynamics upon the boy and at the time of the offense the boy was in a semi-conscious state. (Trial Transcript, page 68, lines 1-27.)

At no time did the boy ever consent to the appellant's acts of sodomy. He was aroused from his slumber

by the appellant's oral copulation of the boy's penis. The man was physically dominant over the boy (pre-sentence hearing transcript, page 70, lines 18-28); he was authoritatively dominant over the lad. The possible threat of violence was apparent to the boy (pre-sentence hearing transcript, page 73, lines 10 and 21-22). "I didn't, I didn't know what he would do." "I didn't know what he would do, so I didn't say anything." "I didn't know what he would do." (Pre-sentence hearing transcript, page 76, line 23.) In such answers, the trial judge's opportunity to evaluate the tone, force, intonation, and gestures behind such statements are invaluable and an asset to judgment lost through the type of the transcript.

Under such circumstances, where the boy felt that resistance might be countered by discipline or violence or both, what might be reasonably expected is exactly what the boy did; wait until his parents returned to report the incident and let the adults in authority handle the situation.

CONCLUSION

Respondent respectfully submits that the decision of the trial court should be affirmed.

Respectfully submitted,

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