1979

the State of Utah v. Walter Preston Boggess, Jr. : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

WALTER PRESTON BOGGESS,

Defendant-Appellant.

BRIEF OF

APPEAL FROM A
JUDICIAL DI
COUNTY, ST
J. ROBERT

DAVID PAUL WHITE

525 East Third South
Salt Lake City, Utah 84

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS
(Continued)

Page

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16232
WALTER PRESTON BOGGESS, JR.,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by complaint and information with one count of second degree murder in violation of Utah Code Ann. § 76-5-203 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury of eight persons on May 18, 1978. The Honorable J. Robert Bullock of the Fourth Judicial District presided. The jury found appellant guilty of manslaughter and he was sentenced, following a presentence report, to a term of one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction and sentence.

STATEMENT OF THE FACTS

On the afternoon of March 2, 1978, appellant and his wife, Tammy, were sitting across from each other at their kitchen table (T. at 22). Appellant was smoking a pipe of marijuana (T. at 27), and playing with his pistol (T. at 22), a single-action .44 magnum caliber revolver (T. at 41). He was pointing the gun at various objects in the room and "dry-firing" it, or causing the gun to operate without ammunition (T. at 74). He had loaded and unloaded the gun at least once as they were sitting there (T. at 55). Tammy asked that he unload the gun. Appellant responded by pointing the gun at his wife and saying, "it's not loaded," as he fanned it or held the trigger and caused the hammer to strike. The gun went off, striking Tammy in the chest (T. at 55). She later died from the wound (T. at 87).

The police responded to a telephone call from appellant and found Tammy nearly dead, lying on the floor (T. at 18). Appellant was holding the baby and sobbing (T. at 19). Later, after being advised of his rights,

appellant gave several statements (T. at 21 and 54). He admitted shooting his wife and that he did not know why he had shot her. He said that what he had done was a "Hell of a way to show it (the gun) was unloaded." He further noted that he should have looked to see if the gun was loaded but did not (T. at 55-56). An FBI expert testified that the victim had been shot from very close range (T. at 69).

After both sides had rested, appellant's attorney informed the court in chambers of information he had received indicating that one of the jurors had stated before the trial that he would like to "hang appellant for killing his wife." (T. at 111). No affidavit or testimony was presented and defense counsel reserved the right to move for a mistrial until after the verdict had come in (T. at 112).

The jury was instructed on both second degree murder and manslaughter (R. at 16-18). No objections were made to the jury instructions (T. at 110). Appellant was found guilty of manslaughter (R. at 26) and no motion for mistrial was ever made.

ARGUMENT

POINT I

THERE WAS NO ERROR IN THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON NEGLIGENT HOMICIDE BECAUSE NEGLIGENT HOMICIDE IS NOT AN INCLUDED OFFENSE OF MANSLAUGHTER OR SECOND DEGREE MURDER, SUCH AN INSTRUCTION WAS NOT REQUESTED, AND THERE WAS NO EVIDENCE TO SUPPORT A VERDICT OF NEGLIGENT HOMICIDE.

Utah Code Ann. § 76-1-402(3) (1953), as amended, defines lesser included offense as when:

> (a) It is established by proof of the same or less than all the facts required to establish the commission of the (greater) offense charged; or
> (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or,
> (c) It is specifically designated by statute as a lesser included offense.

Negligent homicide is not specifically designated as an included offense of manslaughter, and neither is it any form of attempt or preparation to commit homicide since the ultimate end proscribed by both crimes, the death of the victim, is the same. If negligent homicide is included within the crime of manslaughter, it must be so under subsection (a) of Section 76-1-402(3). Subsection (a) is a codification of preexisting Utah law. As this Court noted in State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962):

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all of the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense.

13 Utah 2d at 198.

It is readily apparent that proof of manslaughter or second degree murder does not establish proof of the crime of negligent homicide. In fact, proof of second degree murder or manslaughter disproves any possibility of negligent homicide.

As appellant notes, the major difference in these crimes is the state of mind required to establish each (Appellant's Brief, p. 7). The portion of the second degree murder statute applicable to this case, subsections (a), (b) and (c) of Utah Code Ann. § 76-5-203(1) (1953), as amended, provide:

> (1) Criminal homicide constitutes murder in the second degree if the actor:
> (a) Intentionally or knowingly causes the death of another; or
> (b) Intending to cause serious bodily injury to another, he commits an act clearly dangerous to human life that causes the death of another; or
> (c) Acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another and thereby causes the death of another.

The requisite mental element may be restated as that the actor must either intend to cause death or great harm or that the actor be reckless.

Manslaughter is defined in Utah Code Ann. § 76-5-205 (1953), as amended:

> (1) Criminal homicide constitutes manslaughter if the actor:
>
> (a) Recklessly causes the death of another; or
>
> (b) Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse;
>
> (c) Causes the death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

Manslaughter thus requires that the actor recklessly kill, or kill while reasonably disturbed, or with a reasonable though mistaken belief that he is justified. In the latter two instances, the actor intends to cause the death of the victim but kills because of emotional upset or mistake. State v. Norman, 580 P.2d 237, 240 (Utah 1978); LaFave and Scott, Criminal Law, 1972 § 76; and Wharton's Criminal Law and Procedure, 1957, Vol. I § 272.

For either of these two crimes, second degree murder or manslaughter, the actor must know or intend that death will result or he must act recklessly. Recklessness is defined in Utah Code Ann. § 76-2-103(3) (1953), as amended, as when the actor:

> . . . is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Recklessness requires that the actor be aware of the risk of his actions but that he ignore the risk. To establish second degree murder or manslaughter, then, the state must prove that the actor knew that death would or might result and yet acted anyway.

Negligent homicide, however, is defined in Utah Code Ann. § 76-5-206 (1953), as amended:

> (1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

Criminal negligence is when the actor:

> . . . ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Utah Code Ann. § 76-2-103(4) (1953), as amended (emphasis added). The use of the terms "ought to be aware" and "failure to perceive" imply that the actor is not in fact aware of the risk caused by his actions.

Clearly, an actor cannot both know of the risk of death or intend death as required for second degree murder or manslaughter, and also not know of the risk, even though he should, as required for negligent homicide. Proof of one mental state inherently disproves the other. It follows,

under Brennan, supra, and Section 76-1-402(3), that negligent homicide is not an included offense of manslaughter.

In State v. Gillian, 23 Utah 2d 372, 463 P.2d 8[illegible] (1970), this Court outlined when a court must instruct a jury as to lesser offenses:

> One of the foundational principles in regard to the submission of issues to the juries is that where the parties so request they are entitled to have instructions given upon their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict.

Id. at 812 (emphasis added). See also State v. Mitchell, 3 Utah 2d 70, 278 P.2d 618, 621 (1955).

Initially, it must be noted that appellant made no objection to the instructions as they were given to the jury (T. at 110). As a threshold matter, an appellant may not claim error in failure to instruct on lesser offe unless he requested such instruction, Gillian, supra. In this case, however, even if appellant had requested an instruction on negligent homicide, no reasonable view of the evidence could have supported such a verdict. To have made out negligent homicide, the evidence would have had have shown that appellant was unaware that pointing a gu towards his wife from point blank range and doing everyt

mechanically necessary to fire the gun constituted a risk. Such naiveté in a grown man is unbelievable. Moreover, appellant indicated that he appreciated the danger associated with the weapon. He stated that he should have looked to see if the gun was unloaded, but did not (T. at 56, lines 6-7). He noted that his action was a "Hell of a way to show it's unloaded" (T. at 55 and 103-104). Even though he thought the gun was unloaded, appellant knew it was dangerous to do what he did. No reasonable view of the evidence could lead to the view that he did not. The logical conclusion, then, in light of Gillian, supra, is that the trial court was correct in not instructing the jury on the elements of negligent homicide because (a) the instruction was not requested, and (b) no reasonable view of the evidence could support a jury verdict of negligent homicide.

Appellant argues that even though an instruction on negligent homicide was not requested, it was erroneous for the court to fail to give such an instruction under State v. Dougherty, 550 P.2d 175 (Utah 1976) (Appellant's Brief, pp. 4-5). Dougherty applies to lesser included offenses. As has been shown, infra, negligent homicide is not a lesser included offense of second degree murder or manslaughter. Nevertheless, even if it is assumed, arguendo, that negligent homicide was a lesser included

offense, there was no error in the court's failure to instruct on negligent homicide. A legitimate, recognized trial tactic is to avoid instruction on lesser included offenses in hopes of obtaining outright acquittal, State v. Mitchell, supra at 621. Moreover, appellant misreads State v. Dougherty, supra. In that case, this Court considered Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), and stated:

> The court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.
>
> Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and

> there is no evidence tending to reduce the greater offense. The court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested, give an appropriate instruction. (Emphasis added.)

As may be seen, the court is required to instruct the jury as to a lesser included offense in the absence of a request to do so only when "there is evidence which would absolve the defendant from guilt of a greater offense or degree, but would support a finding of guilt of a lesser offense." There was no such evidence in this case. On the contrary, the evidence clearly indicated that appellant knew that pointing a gun at his wife and "fanning it" constituted an unreasonable risk. There was no evidence to indicate that appellant did not know that handling a gun in this manner was foolish and dangerous. He may have thought that he could avoid the possible harm, he may have even thought he had taken precautions but he still knew that what he did was a "Hell of a way to show it was not loaded." The inherent danger in the use of firearms plus the ever present possibility that they may not be completedly unloaded make the act of pointing a gun at someone and pulling the trigger a substantial and unjustifiable risk even if the actor thinks the bullets have all been removed. There was no evidence to show that appellant did not know of this

risk. The trial court did not err in failing to instruct the jury on negligent homicide absent a request to do so. In fact, even if negligent homicide were a lesser include offense of second degree murder and/or manslaughter, whic it is not, and even if appellant had requested an instruc on negligent homicide, which he did not, the trial court would have been correct in not instructing the jury on negligent homicide because the evidence simply would not have supported such a verdict.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO DECLARE A MISTRIAL SINCE APPELLANT NEVER MOVED TO HAVE A MISTRIAL DECLARED; NEVER PRESENTED COMPETENT EVIDENCE THAT JUROR BIAS EXISTED; AND THE JURY RETURNED THE LEAST ONEROUS VERDICT POSSIBLE IN LIGHT OF THE EVIDENCE.

Although it is true that bias unrevealed in voir dire in one of the jurors might be grounds for a new trial State v. Morgan, 23 Utah 212, 64 Pac. 356 (1901), that bia must be clearly established. In State v. Mickle, 25 Utah 70 Pac. 856 (1902), the court held that even though affidavits indicated bias in one of the jurors, there were conflicting affidavits and the verdict was affirmed:

> While it is well settled that when, in a criminal case, a juror has, before his selection, made statements . . . (indicating prejudgment and bias) and such statements were unknown to either the accused or his attorney until after the trial, a verdict of guilty

> should, on motion of the accused, if made in proper time, be set aside and a new trial granted . . . (citations omitted) it is also an equally well settled rule of law that the verdict of guilty should not be set aside on such grounds except when it is clearly and satisfactorily made to appear on motion for a new trial that the juror, previous to his examination on voir dire, made the prejudicial statements alleged, and the onus of showing that fact is upon the accused.

Id. at 848 (emphasis added).

In a more recent case, this Court has noted:

> . . . our major concern in this, as in any case, is with the lawfulness and justice of a conviction; and notwithstanding a showing of minor impropriety or irregularity, there should be no reversal of a conviction unless it appears that a party has been prejudiced in that in the absence of such impropriety there is a reasonable likelihood that the verdict would have been different.

State v. Durand, 569 P.2d 1107, 1109 (Utah 1977).

In the instant matter, a motion for a mistrial was never made. Utah Code Ann. § 77-38-3 (1953), as amended, provides:

> When a verdict or decision has been rendered against the defendant the court may, upon his application, grant a new trial. . . . (Emphasis added.)

There was no duty for the trial court to declare a mistrial, sua sponte. Appellant's attorney reserved the right to move for a mistrial following the return of the verdict but never so moved (T. at 112). The only evidence before the court indicating the possibility of juror bias

was some double hearsay submitted by appellant's attorney (T. at 111). No affidavits were ever submitted, nor was any testimony heard. One could hardly say that appellant had met his burden of establishing bias.

Even if the bias is admitted, however, appellant was not harmed by it. Whether appellant had actually killed his wife was not at issue. Virtually all of appellant's actions were established or substantiated by his own testimony. Given the nature of the act (see Point I, infra), the only question for the jury was whether appellant had the mental state required for second degree murder or manslaughter. The unanimous jury verdict was that he had only acted recklessly, not intentionally. If the bias was present, it was overcome since the verdict of guilty of manslaughter was the least onerous verdict the jury could reasonably have arrived at.

Appellant never sought a mistrial nor presented competent evidence concerning juror bias. The lightest possible verdict was returned by the jury. There was no error in the court's failure to declare a mistrial on its own motion.

POINT III

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

This Court has enunciated in Alires v. Turner,

Utah 2d 118, 449 P.2d 241 (1969), the test to be utilized whenever the question of ineffective counsel is raised. In Alires, supra, the Court first stated that ". . . we do not reverse for mere error or irregularity, but only where it is substantial and prejudicial." Id. at 120.

The Court then stated that the right of an accused to counsel is included in the concept of due process of law, embodied as it is in the United States and Utah Constitutions. The requirement of counsel, said the Court:

> . . . is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused.

Id. at 121.

Immediately following the above quoted sentence, the Court turns its attention to the standard required by due process to be applied to appointed counsel:

> The entitlement is to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession.

Id. at 121.

This standard has been consistently reaffirmed. See Johnson v. Turner, 24 Utah 2d 439, 473 P.2d 901 (1970);

Kryger v. Turner, 25 Utah 2d 214, 479 P.2d 480 (1971); State v. McNicol, 554 P.2d 203 (Utah 1976).

In the instant matter, appellant contends that he was denied effective counsel because of three errors: (1) failure to present a negligent homicide theory of the case, (2) failure to move for a mistrial, and (3) failure to perfect a timely appeal (Appellant's Brief, pp. 12-13).

As has been noted, a legitimate, recognized tactic of defense counsel is to avoid instruction on lesser offenses in hopes of obtaining outright acquittal, State v. Mitchell, supra at 621. Negligent homicide is not an included offense of second degree murder or manslaughter and the evidence in this case simply would not reasonably have supported a negligent homicide verdict. Appellant's attorney is held, under Alires, supra, to present only legitimate arguments. The failure to argue negligent homicide in this case was certainly not violative of that standard.

The failure to move for a mistrial is also not error, prejudicial or otherwise. The verdict of the jury was as favorable as could have been hoped for, given the evidence in the case. Even if the motion for a mistrial had been made and successfully supported by the necessary affidavits, it is highly unlikely that appellant could ever receive a less burdensome verdict from any other jury.

admitted shooting his wife (T. at 55 and 57). He admitted that his act was a fooolish risk (T. at 55-56). The fact that the jury found him guilty of the lesser of the offenses charged was as good as he could have hoped for. It would have been a mistake for his attorney to have moved for a mistrial following such a verdict.

Finally, although it may have been improper for appellant's attorney to have failed to file a timely appeal, the fact that the court is considering the instant appeal demonstrates the lack of prejudice to the appellant. Moreover, there were no issues of merit to be considered in an appeal.

Appellant's attorney at trial was active and involved. He participated in vigorous cross-examination of the state's witnesses and successfuly convinced the jury that his client was not guilty of the greater offense of second degree murder. Although he did recognize the impropriety of having a biased juror, he also wisely chose to not disturb a relatively favorable jury verdict. He did not fail to provide appellant with effective assistance of counsel.

CONCLUSION

Negligent homicide is not an included offense of manslaughter or second degree murder. The court was not requested to instruct the jury as to negligent homicide and failure to do so in any event was not error since the

evidence of the case could not have reasonably supported such a verdict.

Appellant never moved for a mistrial because of juror bias nor was competent evidence ever produced demonstrating such bias. In any event, the jury returned the least onerous verdict reasonably possible under the evidence indicating that if any bias existed, it was overcome.

Appellant was not denied effective assistance of counsel since his attorney actively participated in his defense and successfully convinced the jury that appellant was guilty of a lesser offense than that charged, even though appellant admitted killing his wife.

Respondent consequently urges this Court to sustain the conviction and sentence of the lower court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent

TABLE OF CONTENTS

counterclaimed against Plaintiff setting forth the fact that Defendant turned over the personal property which was secured for the personal note and further alleged that Plaintiff failed to provide the Defendant notice of the disposition of personal property as required by Section 70 A-9-503, Utah Code Annotated, 1953, as amended. Defendant's counterclaim was for $10,000.00, plus the amount provided for in the formula set up by Section 70 A-9-504, Utah Code Annotated, 1953, as amended. By virtue of the amount of the counterclaim the Circuit Court lost jurisdiction and the pleadings and papers in the Circuit Court file were forwarded to the Clerk of the District Court of Salt Lake County. It should be noted that Plaintiff's Motion for Summary Judgment, it's notice thereof, reply to counterclaim and attached exhibits were all filed with the Circuit Court for Salt Lake County, Murray Department, with the case number assigned by the Clerk of that Court. The Plaintiff, as a basis for the Motion for Summary Judgment, submitted an Affidavit signed by Leonard Cenatiempo, with exhibits attached, setting forth facts the Plaintiff alleged were sufficient grounds to indicate Defendant had received notice of the sale and, therefore, sufficient to form the basis for a summary judgment against the Defendant.

Defendant, in response thereto, filed an Affidavit in the Circuit Court, Murray Department, setting forth the facts in opposition to Plaintiff's Motion. The aforementioned

Affidavit was filed with the Clerk of the District Court, but due to the fact that the Affidavit still bore the Circuit Court number, it did not get into the District Court file and was unavailable to Judge Taylor at the time the case came on for hearing on the Motion for Summary Judgment. On the day set for hearing on the Motion for Summary Judgment, an agreement was reached between the attorney for Plaintiff and attorney for Defendant, based on the fact that the attorney for Defendant had a conflict in that he had to appear at a trial in the case of Paris Company v. Hans Siebold at the same time the Motion for Summary Judgment was to be heard before Judge Taylor. It was agreed by both attorneys that due to the conflict, the matter of the hearing on Plaintiff's Motion for Summary Judgment could be continued. The Law and Motion Division of the District Court, acting through Judge Taylor, notwithstanding a request by an associate of Plaintiff's attorney, proceeded to render judgment against Defendant on Plaintiff's Motion for Summary Judgment. The judgment was rendered by Judge Taylor without having before him Defendant's Affidavit in opposition to Plaintiff's Motion and without Defendant being afforded the opportunity to be represented and present matters in defense of her case.

After being advised of Judge Taylor's action and receiving the Order prepared by the attorney for Plaintiff, Defendant's attorney ascertained that the Affidavit of

Defendant had not reached the District Court file. A copy of the original Affidavit was filed and a Supplemental Affidavit was filed and a Motion to Vacate the Judgment was filed. After a hearing before Judge Taylor on November 3, 1978, the Court denied Defendant's Motion to Vacate the judgment. It is from this Order that Defendant appeals.

NATURE OF RELIEF

Appellant, by this appeal, asks the court to rule as follows:

1. That the lower court erred in it's action in denying Defendant's Motion to Vacate the judgment against Defendant, which judgment was based on a hearing under circumstances that denied the Defendant the right to be represented by her counsel and the right to present matters in her defense.

2. That the lower court erred in denying Defendant's Motion to Vacate the judgment against Defendant wherein at the hearing on said Motion for Summary Judgment, the court did not have before it, due to clerical error, the Affidavit of the Defendant, which was submitted in opposition to Plaintiff's Motion for Summary Judgment.

3. That the lower court erred in refusing to vacate the judgment against Defendant, wherein said judgment was rendered in the absence of Defendant and in the absence of her attorney, and said absence was due to a conflict in

Defendant's attorney's schedule and the abuse of discretion on the part of the lower court in refusing to grant a continuance, even though both parties to the action, through their attorneys had agreed that the matter might be continued.

STATEMENT OF FACTS

The facts of this case for the purposes of this appeal have been summarized above in the Nature of the Case and Disposition of Case in Lower Court.

ARGUMENT

POINT I

1. THAT THE LOWER COURT ERRED IN IT'S ACTION IN DENYING DEFENDANT'S MOTION TO VACATE THE JUDGMENT AGAINST DEFENDANT, WHICH JUDGMENT WAS BASED ON A HEARING UNDER CIRCUMSTANCES THAT DENIED THE DEFENDANT THE RIGHT TO BE REPRESENTED BY HER COUNSEL AND THE RIGHT TO PRESENT MATTERS IN HER DEFENSE.

The principle applied by this court in the case of Griffith v. Hammon, Utah , 560 P2d 1375, (1977), is applicable to the instant case. This court held that the trial court erred in not setting aside a default judgment entered where the Defendants failed to appear at the trial and where the Defendants had properly objected to the trial date based upon their counsel's inability to appear because

of a previously scheduled appearance in another district court at the same time. In the instant case where the matter came on for hearing on the Law and Motion Calendar as opposed to the Trial Calendar, which was the case in Griffith v. Ha--- and where there was an agreement between the parties that the matter could be continued at no inconvenience or prejudice to anyone concerned, and the Court so advised, the reasons for vacating the judgment rendered in Defendant's absence are even more persuasive here than those in Griffith v. Hann. The case of Warren v. Dixon Ranch Company, et al., 123 Utah 416, 260 P2d 741 (1953), is also apropos . In that case, the Supreme Court, in referring to the trial court's discretion, said,

> "(The trial court) may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and the Supreme Court on appeal will reverse the trial court only where abuse of such discretion is clearly shown."

It is urged by Appellant herein that the factors of fairness weigh heavily in favor of Appellant, being allowed to present her case before the Court. The case of Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P2d 351 (1962), in discussing the discretion of the trial court, states that,

> "(The trial court) cannot act arbitrarily and should be generally indulgent toward permitting full inquiry and knowledge of disputes so that they can be settled advisedly and in conformity with law and justice."

The court further stated that,

> "It is ordinarily an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for failure to appear and timely application is made to set it aside."

It is submitted by Appellant that the principles recited above are persuasive in support of Appellant's contention that the lower court erred in denying Appellant's Motion to Vacate the judgment which was granted as a result of a hearing where Defendant was unable to be present or be represented by her counsel.

POINT II

2. THAT THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE THE JUDGMENT AGAINST DEFENDANT WHEREIN AT THE HEARING ON SAID MOTION FOR SUMMARY JUDGMENT, THE COURT DID NOT HAVE BEFORE IT, DUE TO CLERICAL ERROR, THE AFFIDAVIT OF THE DEFENDANT WHICH WAS SUBMITTED IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

With regards to Point II, Appellant respectfully invites this Court's attention to the Affidavit of counsel for Appellant dated December 8, 1978, wherein the facts surrounding the absence of Appellant's counter affidavit to Plaintiff's Motion for Summary Judgment are recited and it is pointed out in the Affidavit that the lower court did not have it's counter affidavit for it at the time the hearing

on the Motion for Summary Judgment was convened. The Affidavit points out the clerical error which resulted in the absence of the Affidavit from the file at the time of the hearing on the Motion for Summary Judgment. The Court's attention is further invited to the Supplemental Affidavit dated December 19, 1978, which, when combined, set forth the mistake and meritorious defenses which Defendant below would have asserted to Plaintiff's Motion for Summary Judgment had she had the opportunity to be heard at the hearing thereon.

POINT III

3. THAT THE LOWER COURT ERRED IN REFUSING TO VACATE THE JUDGMENT AGAINST DEFENDANT, WHEREIN SAID JUDGMENT WAS RENDERED IN THE ABSENCE OF DEFENDANT AND IN THE ABSENCE OF HER ATTORNEY, AND SAID ABSENCE WAS DUE TO A CONFLICT IN DEFENDANT'S ATTORNEY'S SCHEDULE AND THE ABUSE OF DISCRETION ON THE PART OF THE LOWER COURT IN REFUSING TO GRANT A CONTINUANCE, EVEN THOUGH BOTH PARTIES TO THE ACTION, THROUGH THEIR ATTORNEYS, HAD AGREED THAT THE MATTER MIGHT BE CONTINUED.

The Court's attention is respectfully invited again to paragraph 5 of the Affidavit of Appellant's attorney, dated December 8, 1978, wherein it is pointed out that both parties agreed that the hearing for the Motion for Summary Judgment could be continued and that an attorney from Plaintiff's office requested that the matter be continued o

stipulation of both parties, but that Judge Taylor refused the request and proceeded to render judgment against Defendant on Plaintiff's Motion for Summary Judgment, notwithstanding said request. It is submitted that such action on the part of Judge Taylor was an abuse of discretion and should have formed the basis of the granting of Defendant's Motion to Vacate the Summary Judgment rendered as a result of the hearing on October 27, 1978.

For the reasons set forth above, it is respectfully urged that the action of the lower court in denying Appellant's Motion to Vacate the Summary Judgment granted as a result of the hearing of October 27, 1978, was error such as to require the reversal of said order and the rendition of an order by this Court which has the effect of allowing Appellant to present her defense to Plaintiff's case in the lower court.

Respectfully Submitted,

STEPHEN L. JOHNSTON
431 South Third East
Salt Lake City, Utah 84110

Attorney for Appellant