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State of Utah v. Theodore Samuel Pacheco : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

THEODORE SAMUEL PACHECO,

Appellant.

Case No.
~~17342~~
9559

BRIEF OF APPELLANT

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APPEAL

STATEMENT OF THE CASE

This is an appeal brought by the Appellant from a verdict of guilty rendered by a jury on the counts of 2nd Degree Burglary and Grand Larceny.

The facts offered at trial were that Defendant together with two co-defendants were apprehended in the Payless Builders Supply approximately 1:30 a.m. on the 12th day of December, 1960. Further, that there was missing out of the cash box the sum of $124.67; none of which was found in the possession of the Defendant at the time he was apprehended.

Approximately three hours before the apprehension, one Gerald D. Shelton, co-defendant, notified a member of the Salt Lake City Police Department, namely, Gary Parks, that a burglary was to be committed at the Ream's Bargain Basement located at 2700 South State Street, Salt Lake City, Utah. After notifying Gary Parks, Gerald D. Shelton went looking for the Defendant-Appellant and located him at a house belonging to the Defendant's fiance. Shortly thereafter, the Defendant, Gerald D. Shelton and Johnny Murkham went down to Ream's Bargain Basement, but no crime offense was committed. Having decided not to commit the crime, the three went to the Payless Builders Supply. Enroute, they stopped at a gas station at the request of Gerald D. Shelton. At that point, Shelton gave the attendant a slip of paper bearing Gary Park's home phone number and informed the attendant that he was an undercover agent for the Salt Lake Police Department and to call the number on the slip of paper and to say "the Payless Lumber the time has been changed." After the Defendant left, the attendant called the number and a woman answered.

The woman indicated that she knew nothing of the situation. Whereupon, the attendant called the Salt Lake Police Department and released the information. Shortly thereafter, Gary Parks, in the company of Sheriff Pete Haywood, Salt Lake City Sheriff Department, arrived and took possession of the piece of paper. From the gas station they proceeded up to Payless Builders Supply and apprehended the Defendant-Appellant and co-defendants.

This appeal raises for review by this court, three questions of law:

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S TO DISMISS THE SECOND COUNT OF THE INFORMATION, TO WIT: GRAND LARCENCY, ON THE GROUNDS THAT THERE WAS INSUFFICIENT EVIDENCE OF THAT CHARGE.

POINT II

TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE JURY TO SEPARATE AFTER THE CASE WAS SUBMITTED TO THEM FOR THEIR DELIBERATION.

POINT III

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE JURY IN FINDING THE DEFENDANT GUILTY OF SECOND DEGREE BURGLARY AND GRAND LARCENY ON THE GROUNDS THAT THE EVIDENCE SHOWED THAT THE DEFENDANT WAS ENTRAPED INTO THE COMMISSION OF THE CRIME.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S TO DISMISS THE SECOND COUNT OF THE INFORMATION, TO WIT: GRAND LARCENCY, ON THE GROUNDS THAT THERE WAS INSUFFICIENT EVIDENCE OF THAT CHARGE.

Grand Larceny is defined in Utah Code Annotated (1953) 76-38-1 and 4 as "The felonious stealing, taking, carrying, leading or drawing away of personal property of another." Said property taken is of the value exceeding $50.00.

The testimony produced at trial indicated that the cash box contained $124.67 (R. 37). Also, the evidence adduced by the State indicated that the sum of $80.00 was taken from Johnny Markham (R. 66), and that the sum of $50.00 was found to be in the possession of Gerald D. Shelton (R. 135). No money was found on the Defendant's person (R. 54, R. 78, R. 108). It was further borne out at trial that the money was never taken from the premises of the Payless Builders Supply.

Possession under the above quoted section has been construed as meaning personal, conscious, and exclusive

possession. *State* vs. *Dyitt,* 114 Utah 379, 199 P. 2d 155 (1948); *State* vs. *Brooks* (1942), 101 Utah 584, 126 P. 2d 1044. There was no evidence elicited to the effect that the Defendant had possession of any of the monies taken from the cash box. Further, the fact that the participants of the crime were apprehended in the very room where the money was kept, the money had not yet been reduced to the exclusive possession of any of the participants.

It is respectfully submitted that possession must be of the type inconsistent with the possession of the true owner and until said property is taken from the premises or room, the possession of the participants is not sufficient to warrant exclusive domination of the property.

Not having found proof proving exclusive possession on the part of the Defendant, the trial court relied upon the theory of principals (R. 80), i.e., possession of those who are found to have aided and abetted is sufficient possession. This application of the theory is an erroneous application of the law. As the record abundantly illustrates, Gerald D. Shelton cannot be said to have assumed the role of an accomplice. In the case of *Wilson* vs. *People* (1939), 103 Colo. 441, 87 P. 2d 5, 120 A.L.R. 1501, the court cites *Price* vs. *People,* 109 Ill. 109, P. 115, 116, wherein Defendant contacted the constable, giving true names and place, time, and name of intended victim. After the crime, he went and furnished the particulars of the crime. The court held:

> "That a sane person really guilty of committing a grave crime would thus act is so inconsistent with all human experience as not to warrant the conviction of anyone under the circumstances shown."

The record clearly shows that he executed every effort to contact the police of the change in plans and also was instructed by Gary Parks, Salt Lake Police Department, to go along with planned burglary. The record is void of any intent on the part of Gerald D. Shelton to commit the crime of burglary and grand larceny. Query: Can the Defendant be charged with the aiding and abetting of another participant when the latter cannot be found to possess the requisite intent or possession necessary for the commission of the crime. It is submitted that the only answer is no.

POINT II

TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE JURY TO SEPARATE AFTER THE CASE WAS SUBMITTED TO THEM FOR THEIR DELIBERATION.

The trial court permitted the jury to separate for the noon hour from 12:00 p.m. to 1:30 p.m. (R. 161). The separation occurred without the consent of the Defendant and after the closing arguments of the State and the Defense (R. 161). The instructions to the jury preceded the closing arguments (R. 152, 161).

Utah law in this area is largely derived from statutes wherein the Trial Court is instructed as to the proper supervision over the jury.

Utah Code Annotated 77-31-27 (1953 as amended) states: "The jurors sworn to try a criminal action may, at any time before submission of the case to the jury, in the discretion of the Court, be permitted to separate or be kept in charge of a proper officer" . . . The statutes are silent as to separation of the jury after submission.

Directing our attention to what constitutes "submission", we find that the general rule is that where charges precede the arguments, submission occurs at the close of the argument. 34 A.L.R. 1212. *People* vs. *Von Maltic* (1931), 119 Cal. App. 568, 5 P. 2d 917; *Evans* vs. *State* (1924), ...Okla. Cr. Rep., ...221 P. 794. This would be applicable in the instant case.

Generally, in felony criminal cases, prejudice is presumed from the fact if an unauthorized separation after submission, at least where the circumstances are such as to make it reasonably appear that the jury might have been tampered with. 53 Am. Jur. Sec. 879.

It should be noted that although there does exist a statute allowing the Trial Court, in its discretion, to permit the jury to separate before submission, there is no statute which allows this discretion after the case

has been finally submitted to the jury. Can it be successfully advanced that the Trial Court has the implied authority to that concerning which the law is silent? This precise question confronted North Dakota courts in 1932 and the court clearly indicated that a statute similar to that found in Utah is the only statute which gives the court the authority to separate jurors and that the trial court does not obtain the implied authority to separate the jury. *State* vs. *Tamoreaux* (1932, 241 N.D. 595).

Utah Code Annotated (1953), 77-31-32, states:

> "After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

This statute has been wisely interpreted to safeguard in every possible way the purity of the stream of justice; and to prevent it from in any manner being polluted by influences other than those which are produced by the legal evidence and the law governing the case. *Bilton* vs. *Territory* (1909), 1 Okl. Cr. 566, 99 P. 163.

Again, in *Armstrong* vs. *State* (1909), 2 Okla. Cr. 567, 103 Pac. 658, 24 L.R.A. (N.S.) 776, the court stated that this section imperatively required that the jury cannot be separated after submission and, if such separation is permitted, the verdict is vitiated notwithstanding no affirmative proof of prejudice is offered. The court further stated:

> "When this provision of law if violated, the legal presumption is that it has actually prejudiced the Defendant, or tended to his prejudice, in respect to a substantial right."

Thus, it would appear that the Defendant's substantial rights had been violated by the trial court's permitting the separation of the jury after the cause had been finally submitted.

The precise question here on appeal is a novel one. In *State* vs. *Thorne* (1911), 39 U. 208, 117 P. 58, the question presented dealt with the misconduct of a juror who made unauthorized telephone conversation to someone without the court's permission. The court proper said:

> "After a final submission to the jury and before reaching a decision as to their verdict, to permit a juror without court's permission to leave his fellow jurors and to go to another portion of

> the building and there engage in a private conversation over the telephone is a practice not to be tolerated."

Again, in *State* vs. *Jarrett* (1947), 112 Utah 335, 187 P. 2d 547, this court held that it was not reversible error to deny the motion for new trial on the grounds that some of the jurors separated without leave of the court. The separation was based upon necessity and under the surveillance of the Baliff. The court further states that it is conversation with third parties that are condemned and that the Defendant has a right to have a jury secluded from outside influences while deliberating and that this right should be jealously guarded.

It cannot be said that trial court, in permitting the jury to separate after all of the evidence had been submitted, after the instructions were delivered and after arguments of counsel, jealously guarded the Defendant's right to have the jury secluded from outside influences. Concededly, absolute isolation is not reasonably possible. *State* vs. *Jarrett,* supra. Yet, it is unreasonable to allow separation for lunch after submission without supervision of the Baliff in view of the Utah statute permitting the jurors to be provided with food. See UCA 77-32-1. It cannot be successfully maintained that during the hour and a half lunch period that none of the jurors had any conversations with third persons.

POINT III

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE JURY IN FINDING THE DEFENDANT GUILTY OF SECOND DEGREE BURGLARY AND GRAND LARCENY ON THE GROUNDS THAT THE EVIDENCE SHOWED THAT THE DEFENDANT WAS ENTRAPED INTO THE COMMISSION OF THE CRIME.

Although the doctrine of entrapment is found to exist in all the jurisdictions in the country, there does exist a divergence of views as the basis upon which ths doctrine lies. *Serrells* vs. *United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. 2d 413, wherein the purported basis was founded upon statutory constriction. Later in *Sherman* vs. *U.S.* (1958), 356 U.S. 332, 78 S. Ct. 819, 2 L. Ed. 2 448, the language of the majority indicates that the majority is thinking in terms of Supreme Court's supervisory function over the administration of criminal justce in the Federal Court or in terms of a violation of the constitution protected right. See 49 *Joun. Crim. Law* 449 (1959).

This court as early as 1912 established the policy that this court would, and properly so, carefully scrutinize the evidence the offense was induced by, so-called private detectives and informers. Chief Justice Frick in *City* vs. *Robinson* (1912), 40 Utah 448, 125 Pac. 667, 661 stated:

> "When it is made to appear that an offense charged was induced by a detective or other or that such detective or person was paid for obtaining the evidence necessary to convict, or that he is to receive additional compensation in case of conviction, both the prosecuting officers and the trial courts should carefully scrutinize the evidence and should permit no conviction to be had, or if had, to stand in case the offense was induced as aforesaid, and in case of paid evidence none should be permitted to stand if there is any doubt of the guilt of the accused."

Nine years later, this court endorsed the principles set forth by Chief Justice Frick in a unanimous opinion in *State* vs. *McComish* (1921), 59 Utah 58, 201 P. 637, rehearing denied 1921, wherein the court added:

> "Policemen are conservators of the peace. It is their duty to prevent crime, not to instigate or encourage its commission. Nothing is more reprehensible than to induce the commission of crime for the purpose of apprehending and convicting the perpetrator."

In denying the petition for rehearing, the court reiterated its position by stating:

> "The rule that officers of the law are not permitted to induce acts constituting crimes which would not have been committed but for such inducement and that convictions based upon such inducement will not be permitted to stand, is both wholesome and saluting once should be enforced."

Thus, it would appear that this court bases the doctrine of entrapment on the same grounds as is found in the *Sherman* case, supra, and properly so, inasmuch as the same policy bases for reversal of a judgment as is found in judicial supervision of contempts, or to exclude illegally seized evidence or coerced confessions, to wit:

> "Judicial supervision of administration of criminal justice in Federal courts implies the duty of establishing and maintaining civilized standards of procedure." *McNabb* vs. *U.S.*, 318 U.S. 332 (1943). Also, see *Jones* vs. *State* (1960), 101 Ga. 851, 101 Ga. 851, 115 S.E. 2d 576, wherein the court stated:
>
> "Prosecutor's conduct falls short of the high standards that must be set by law enforcement officers in administration of justice in the sovereign state of Georgia and we cannot approve of it."

This attitude is abundantly exhibited in one of our sister states, namely, California, where the court stated in *People* vs. *Makovsky* (1935), Cal. 2d 366, 44 P. 2d 536, *People* vs. *Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905, 50 A.L.R. 2d 513, and *People* vs. *Bevford* (1959), 53 Cal. 2d 1, 345 P. 2d 928. An excellent discussion is found in the latter case where the court through Justice Schauer stated that California has recognized the defense for reasons substantially similar to those which cause the adoption of the rule that evidence obtained in violation of constitutional guarantees is not admissible, i.e.:

> "Without regard for its own dignity, and in the exercise of its power and performance of its duty to formulate and apply proper standard for judicial enforcement of criminal law, the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime." P. 933.

Thus, it would appear that this court has assumed the supervisory role over the administration of justice in our state and will not permit any conviction to be had where there exists any doubt of the guilt of the accused. *City* vs. *Robinson,* supra. An analysis of the record below clearly indicates a substantial doubt as to the guilt of the defendant-appellant, and further that the evidence abundantly shows that defense of entrapment was clearly proven as a matter of law. Under such circumstances, this court may so declare and reverse the judgment of the jury. *Sherman* vs. *U.S.,* supra, *Accardi* vs. *U.S.* (1958), 257 F. 2d 168 (5 Cir.). Where it was held that the issue of entrapment is a question for the jury, unless as a matter of law the accused has established beyond a reasonable doubt that he was entraped. This criteria places a great burden upon the Defendant than exists this jurisdiction.

Gerald D. Shelton was working for the Salt Lake Police Department through Gary Parks (R. 123, R. 124); he was securing compensation by means of reimbursed gas expenses (R. 124); he was permitted to operate his vehicle despite the fact that his license was revoked

(R. 123); he notified Gary Parks of the proposed burglary at Ream's Bargain Basement and told that he would be protected (R. 122); he was on pre-arranged bond (R. 99, R. 123). On the night in question, he went seeking the Defendant (R. 151, 152) and asked that the Defendant accompany him (R. 104). The Defendant had no intention of committing any crime; he had made other arrangements (R. 150, 151). It was upon the insistence of Gerald D. Shelton that the Defendant accompanied him on the night in question. Further, it was at Gerald D. Shelton's insistence that the automobiles be switched (R. 105, 125). Arriving at Ream's Bargain Basement, the Defendant refused to follow Gerald Shelton's instructions (R. 106). Whereupon, again at Gerald D. Shelton's request (R. 106), the Defendant drove to Payless Builder's Supply where the crime was committed. Just prior to this, Gerald D. Shelton had placed a note in the hands of a gas station attendant, said station being enroute, with instructions to call the police (R. 145, 106; R. 143, 146).

Considering all of of the circumstances elicited on the lower court, it is clear that the commission of the crime with which the Defendant was convicted was the "product of the creative ability" of one Gerald D. Shelton who, by the evidence adduced, was working for the Police Department. *Sherman* vs. *U.S.*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 448, states:

> "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and a trap for the unwary criminal."

There is no evidence that the Defendant was engaged in any unlawful business, or that the Defendant possessed a pre-existing criminal intent. *People* vs. *Malotte* (1956), 46 Cal. 2d 59, 292, P. 2d 517; *People* vs. *Terry* (1955), 44 Cal. 2d 371, 282 P. 2d 19.

Nor is it clear that this court would permit such evidence to be allowed. Our sister state expressly distinguished the Federal Rule and California rule in this regard by stating:

> "In California, Evidence that Defendant had previously committed similar crimes or had reputation of being engaged in the commission of such crimes or was suspected by police of criminal activities is not admissible on issue of entrapment." *People* vs. *Beuford,* supra.

To allow the conviction below to stand, would be to endorse the practices of the law enforcement officials to resort to the utilization of known felons and devious methods to apprehend unwary citizens. The initial contact and negotiations for corruption come from the undercover agent, Gerald D. Shelton. The obstacles by use of agent's automobile was removed by the agent. The police were informed of the time and place of ultimate incident, a situation similar to that found in *Jones*

vs. *State,* supra. Mere willingness to be corrupted cannot be sufficient. The public policy against such conduct has been clearly established. Judicial integrity can only be protected by sustaining the appellant's claim for entrapment.

CONCLUSION

The record below clearly indicated that the court committed error in not sustaining the Defendant's motion to dismiss on the second count, to wit, Grand Larceny.

Further, the court committed reversible error in permitting the jury to separate after the cause had been finally submitted to them for their deliberation.

The evidence adduced at trial clearly establishes substantial doubt as to the guilt of the accused and points out the reprehensible methods employed by the law enforcement officials in regards to apprehension and conviction of the Defendant.

The Defendant-Appellant for reasons aforesaid respectfully requests that the conviction of the Defendant be reversed.

Respectfully submitted,

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