1989

State of Utah v. John Quas : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, DOCKET NO. 890601CA

Plaintiff/Appellee,	:	Case No. 890601-CA
v.	:	Priority No. 2
JOHN QUAS,	:	
Defendant/Appellant.	:	

SUPPLEMENTAL BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 890601-CA
v.	:	
JOHN QUAS,	:	Priority No. 2
Defendant/Appellant.	:	

SUPPLEMENTAL BRIEF OF APPELLEE

Introduction

The State regards this Court's initial unanimous decision affirming the conviction to be fundamentally sound, especially that part of the opinion concluding that the State v. Brickey, 714 P.2d 644 (Utah 1986), requirements for refiling the information had been met.

The Court in its Order of August 27, 1991 has invited briefing on whether a circuit court finding of probable cause and a jury trial verdict of guilty beyond a reasonable doubt would render harmless an error at the preliminary hearing stage on the Brickey refiling issue. The answer is yes. The general rule found in numerous cases is that error at the preliminary hearing is harmless unless such error causes defendant to be prejudiced at trial. As explained below, if there were any such error in this case, the subsequent conviction should nonetheless stand under a harmless error analysis, and the Court accordingly would have a sufficient independent basis to affirm.

However, the State respectfully suggests that the Court need not reach this harmless error question because the Brickey standard was so clearly met and exceeded in this case.

ARGUMENT

POINT I

THIS COURT PROPERLY INTERPRETED STATE V. BRICKEY IN ITS ORIGINAL DECISION.

The State briefed the Brickey issue at length last year and invites the Court's review of those materials. The following supplements that argument to reaffirm conclusively the wisdom of this Court's original decision on this issue.

In Brickey, unlike this case, the prosecution engaged in blatant judge shopping to secure a bindover of a case at a second preliminary hearing after the case had been dismissed based on precisely the same evidence presented to a different judge at the first preliminary hearing. The Utah Supreme Court, on interlocutory appeal, decided that "due process considerations" should limit refiling of charges previously dismissed for insufficient evidence. Brickey, 714 P.2d at 647.

To limit unfettered refiling, the Brickey Court, relying on Oklahoma authority, see Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971), required that, if possible, the same magistrate who dismissed at the first preliminary hearing preside over the second preliminary hearing. Brickey also adopted the following standard to justify a new information: "new or previously unavailable evidence has surfaced or that other good cause justifies refiling." 714 P.2d at 647 (emphasis added). By putting the standard in the

disjunctive "or", the Court recognized three bases for refiling: (1) new evidence; or (2) previously unavailable evidence; or (3) other good cause.

Unlike Brickey, in this case there was no judge shopping. The same circuit court judge heard both preliminary hearings.[1] Moreover, the other three Brickey tests were met when only one of them needed to be satisfied. Indeed, this case is the polar opposite of what happened in Brickey. Any other conclusion based on the record in this case would radically alter the manner in which cases are prosecuted in this or any other state, effectively moving the double jeopardy bar from the empanelment of the jury at trial to the beginning of the preliminary hearing.

A. New Evidence

At the second preliminary hearing, the State presented through Kristine Knudson three statements made by the defendant after the first preliminary hearing. Although not outright confessions, the statements were relevant, material, and incriminating in that they conflicted sharply with defendant's previous explanations to law enforcement officials about the

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[1] Other jurisdictions have decided not to impose the restrictions on refiling adopted in Oklahoma. For example, in Richmond v. State, 554 P.2d 1217 (Wyo. 1976), the Wyoming Supreme Court described Jones v. State as a "judicial oddity, completely contrary to the vast majority." Id. at 1221. The Richmond court declared that the central purpose of the Oklahoma refiling cases was to curtail "magistrate shopping." Id. That also seemed to be the primary problem for the Brickey court, which suggests that the other refiling restrictions mentioned in Brickey should not be interpreted or applied onerously. In this case, the State was careful to ensure that the same magistrate heard the second preliminary hearing.

killing of his wife.

By any measure, this was "new evidence" and, without anything more, satisfied the Brickey standard. Petitioner admits this point at page 6 of the petition for rehearing. The analysis easily could stop here. However, the State, to ensure not only that Brickey was met but also that there would be no question about probable cause at the second preliminary hearing, very thoroughly and professionally developed and presented further evidence that satisfied both the Brickey and probable cause standards.

B. Previously Unavailable Evidence

Unlike "new evidence," "previously unavailable evidence" needs further definition. Fortunately, case law authority supplies guidance. In Brickey, Justice Zimmerman declared that this requirement "places a relatively small burden on" the State. Brickey, 714 P.2d at 648. The Oklahoma cases, on which Brickey is based, are particularly instructive.

In Harper v. District Court of Oklahoma County, 484 P.2d 891 (Okla. Cr. App. 1971), a case cited by the Brickey court, the court stated that evidence satisfying the refiling requirement includes "such evidence that with due diligence could have been available at the first preliminary examination." Id. at 897. The reason to limit unbridled refiling, the court said, is so "the prosecutor may not take his dismissed case--with the same evidence--refile it--and submit it to a magistrate more likely to be favorable." Id.

A case not previously cited to this Court that drives the

point home is Chase v. State, 517 P.2d 1142 (Okla. Cr. App. 1973). The State charged defendant with the offense of escape from prison. The case was dismissed at the first preliminary hearing due to insufficient evidence based on information contained in prison records. The charge was refiled after the State discovered that the prison records presented at the first preliminary hearing contained erroneous information. The defendant then was bound over and convicted at trial. The State could have discovered and presented the correct information at the first preliminary hearing. However, because the sufficient additional evidence "was, as a practical matter, not easily available to it at that time," the State's refiling of the case was affirmed. Id. at 1144 (emphasis added). The additional evidence meets the refiling standard if it could not have been "easily acquired" by the State. Id. at 1143.

The previously unavailable evidence presented at the second preliminary hearing in this case required extraordinary "due diligence" (Harper) and plainly could not have been "easily acquired" (Chase). Obtaining it certainly required a great deal more time, effort, and resources than the mere correction of erroneous prison record information involved in Chase. For example, not only did Weber State Crime Lab Director James Gaskill and his assistants devote countless hours in and outside the laboratory conducting and analyzing tests with the murder weapon, this massive effort was the predicate for the State to offer previously unavailable expert opinion testimony at the second preliminary hearing. This evidence was not, as petitioner asserts

in his petition for rehearing (Pet. for rehearing at 5), "readily available to the State" in the first preliminary hearing.[2]

Although the evidence offered through Mr. Gaskill is the prime example, the tests, exhibits, and other evidence developed and offered through Detective Edwards, neighbor Pam Young, State Crime Lab photographer David Farr, and the supplemented opinion testimony of Dr. Grey all, individually and collectively, far surpassed the "due diligence" test for additional evidence to be previously unavailable. To preclude the State from conducting such further investigation and tests for possible use in a refiled case on such a serious offense would cripple law enforcement in a way not remotely contemplated in Brickey.

Even though Justice Zimmerman wrote that Brickey limitations would impose only "a relatively small burden" on the State, because the offense in the case is so serious, because the State thought probable cause was clearly established at the first preliminary hearing, and because the State knew that Brickey governed refiling, the State assumed a heavy burden rather than a small one in developing new or previously unavailable evidence to ensure that Brickey and probable cause requirements easily would be met.

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[2] Later in the petition (Pet. for rehearing at 7), petitioner inexplicably and erroneously defines new or previously unavailable evidence as "evidence that was reasonably available at previous preliminary hearing(s)," a standard that conflicts with page 5 of the petition and that ignores Brickey, Harper, and Chase. Those cases call for the more practical and workable standard of whether due diligence was needed to acquire evidence not easily available to the State, in which case the evidence is considered previously unavailable under the refiling cases.

C. Other Good Cause

Apart from the State supplying new or previously unavailable evidence to satisfy Brickey at the second preliminary hearing, there is in addition a powerful good cause basis to find that Brickey was satisfied: the evidence presented at the first preliminary hearing established probable cause. Therefore, compliance with Brickey in this case should not have been necessary. That the State developed and presented such extensive new and additional evidence at the second preliminary hearing further bolsters this good cause basis for the refiling. That this evidence and more was presented to a jury at trial resulting in a verdict of guilty beyond a reasonable doubt even further validates this point.

At the first preliminary hearing, when the Assistant State Medical Examiner, based on a variety of tests and physical examinations as well as extensive training and experience, offers his unimpeached opinion that the cause of death was homicide; when investigating officers testify to physical features of the accused and of the victim that contrast markedly with his feckless explanation about the shooting; when tests with the murder weapon and the victim point to homicide, there is much more than "sufficient cause to believe a crime [had] been committed to warrant further proceedings." Brickey, 714 P.2d at 646. The circuit court clearly erred at the first preliminary examination in failing to use the preliminary hearing device to "ferret out . . . groundless and improvident prosecutions." State v. Anderson, 612

P.2d 778, 783-84 (Utah 1980).

From the beginning of this case to the present the State has maintained strongly that sufficient evidence of probable cause was presented at the first preliminary hearing. If, arguendo, that is incorrect, an alternative good cause basis for the refiling remains based on the totality of circumstances surrounding this case. First, there was clearly an innocent miscalculation about the quantum of evidence the circuit court would require to bind over in this case, which this Court identified correctly in its June 18 opinion as at least a factor to be considered in the good cause analysis.[3] Second, the State thoroughly and methodically investigated, developed, and presented at the second preliminary hearing substantial additional evidence that far exceeded probable cause. Third, defendant had ample opportunity to appeal the circuit court's rulings at the second preliminary hearing and failed to do so, instead proceeding to trial. Fourth, the evidence at trial, including the complete and devastating impeachment of defendant's testimony, caused the jury to convict defendant beyond a reasonable doubt for the homicide of his wife. Fifth, there is no evidence of the State shopping for a more favorable preliminary hearing magistrate or acting in any way otherwise than in a fair and professional manner towards the defendant.

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[3] Petitioner may be correct that innocent miscalculation as a good cause basis for refiling should not be allowed to "eviscerate" the "new or previously unavailable evidence" limitations, but petitioner is wrong to suggest that innocent miscalculation is irrelevant to the good cause analysis. Both Brickey and Harper rest the good cause basis on this ground, and this Court appropriately relied upon it in its June 18 opinion.

There are, accordingly, multiple independent and sufficient grounds to support the refiling of this case: new evidence, previously unavailable evidence, good cause based on the probable cause showing at the first preliminary hearing, and good cause based on the totality of the circumstances.

POINT II

ANY ERROR, IF FOUND, WOULD BE HARMLESS BECAUSE PROBABLE CAUSE TO BIND DEFENDANT WAS FOUND AND DEFENDANT WAS CONVICTED BEYOND A REASONABLE DOUBT AT TRIAL.

In its August 27, 1991 Order, this Court asks whether any error in allowing the information to be refiled was harmless when the circuit court found probable cause at the second preliminary hearing and when the defendant was convicted at trial. Under the circumstances of this case, the answer is yes. The State reiterates, though, that the circuit court and this Court on June 18 correctly decided that the refiling was proper. That would be the preferable basis on which to affirm the conviction.

This case is procedurally distinct from Brickey in that the refiling issue was raised in Brickey through an interlocutory appeal. There was no trial and no conviction in Brickey. By contrast, in this case defendant failed to seek appellate review of the bindover decision in advance of trial. Moreover, defendant has not challenged the sufficiency of the evidence to establish probable cause at the second preliminary hearing or to establish guilt at the trial. Finally, if there were any error in allowing the refiling, there is no basis in the record that any such error tainted the fairness of the trial or prejudiced the defendant in

any way. Accordingly, any such error is harmless.

A. Case Law Authority

Many courts, state and federal, have held that errors at the preliminary hearing stage of a criminal prosecution are subject to a harmless error analysis following conviction at trial. The precedents are strong and clear.

Federal law is well-established that a conviction will stand even though only hearsay evidence was presented to the grand jury that indicted him, Costello v. United States, 350 U.S. 359 (1956), or if there were other evidentiary errors at the indictment stage, Holt v. United States, 218 U.S. 245 (1910). See also United States v. Blue, 384 U.S. 251 (1966) (fact grand jury presented with self-incriminating evidence obtained in violation of the Fifth Amendment does not bar prosecution).

Indeed, the United States Supreme Court has declared that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . ." United States v. Hastings, 461 U.S. 499, 509 (1983). In fact, the Court has recognized the applicability of the harmless error principle where fundamental constitutional rights of a defendant are involved at the preliminary examination. In Coleman v. Alabama, 399 U.S. 1, 9 (1970), the Court required a harmless error analysis and refused to reverse defendant's conviction in spite of his being denied counsel at the preliminary examination in violation of the Sixth Amendment.

In reviewing Florida court proceedings, the Supreme Court

determined that while a detained defendant may challenge the probable cause for his confinement, once he has been tried and convicted there is no federal constitutional requirement that the conviction be "vacated on the ground that the defendant was detained pending trial without a determination of probable cause." Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

In United States v. Mechanik, 475 U.S. 66 (1986), the Court decided that a conviction could not be upset on the ground that two government agents appeared before the grand jury at the same time in violation of Fed. R. Cr. P. 6(d). The Court explained that the rule "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause . . . but the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." Id. at 70-71. The error was harmless when measured by a standard which required a showing that the error prejudicially affected the outcome of the trial. Id. at 72.

Many state courts have concluded that errors in the preliminary examination phase are subject to a harmless error analysis. The Wisconsin Supreme Court this year held "that a conviction resulting from a fair and error-less trial in effect cures any error at the preliminary hearing." State v. Webb, 467

N.W.2d 108, 110 (Wis. 1991). The defendant claimed his sixth amendment rights were violated through closure of the preliminary hearing. "[A] defendant who claims error occurred at his preliminary hearing may only obtain relief before trial." Id. Accord, State v. Noll, 467 N.W.2d 116 (Wis. 1991) (defendant, having failed to challenge his bindover through permissive interlocutory appeal, cannot challenge his conviction based on improperly admitted evidence at preliminary hearing). See also Whitty v. State, 149 N.W.2d 557 (Wis. 1967), cert. denied, 390 U.S. 959 (1968) (harmless error where defendant was improperly forced to waive his preliminary hearing in exchange for reduced bail).

In a Pennsylvania decision this year, appellant's challenge to his conviction on the ground of constitutional error at the preliminary hearing was sharply rejected: "Once appellant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial." Commonwealth v. Tyler, 587 A.2d 326 (Pa. Super. 1991). See Commonwealth v. McCullough, 461 A.2d 1229 (Pa. 1983) (evidentiary deficiency at preliminary hearing immaterial when case proved at trial); Commonwealth v. Hess, 414 A.2d 1043, 1048 (Pa. 1980) (if evidence at trial is sufficient to be submitted to a jury, any deficiency in evidence at preliminary proceeding is harmless); Commonwealth v. Mignogna, 585 A.2d 1, 4 (Pa. Super. 1990) (same).

Last year the Supreme Court of Michigan held that "an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received

a fair trial and was not otherwise prejudiced by the error." People v. Hall, 460 N.W.2d 520, 521 (Mich. 1990). Accord, People v. Johnson, 398 N.W.2d 219 (Mich. 1986); People v. Meadows, 437 N.W.2d 405, 407 (Mich. App. 1989).

Also last year the California Supreme Court affirmed a murder conviction, rejecting, on the basis of a fair trial conviction, defendant's contention that reversal should be entered because testimony given at the preliminary hearing was involuntary and should not have been relied upon for a bindover. People v. Douglas, 788 P.2d 640, 659 (Cal. 1990), cert. denied, 111 S.Ct. 1023 (1991). The harmless error analysis in California provides that "[i]rregularities at the preliminary examination entitle an accused to reversal on appeal only if he 'can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.'" People v. Aston, 703 P.2d 111, 118 (Cal. 1985) (quoting People v. Pompa-Ortiz, 612 P.2d 941, 947 (Cal. 1980)). Accord, People v. Alcala, 685 P.2d 1126, 1138 (Cal. 1984); People v. Lofink, 253 Cal.Rptr. 384, 390 (Cal. App. 1988).[4]

In Idaho the Supreme Court recently declared that

[4] The California harmless error approach applies to "irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense." People v. Pompa-Ortiz, 612 P.2d 941, 947 (Cal. 1980). The California Supreme Court has made clear that failure of evidence at the preliminary hearing is not a jurisdictional defect. "[W]ere it so, the jurisdictional exception would swallow the rule." People v. Alcala, 685 P.2d 1126, 1138 (Cal. 1984). There can be no contention in this case that the lower courts lacked jurisdiction over defendant in this case. Brickey contemplates a second preliminary hearing, probable cause was shown then, and only then was defendant held for trial.

"[w]here an accused's constitutional rights are violated at a preliminary hearing, any error will be held harmless only if the court is satisfied beyond a reasonable doubt that the violation did not affect the trial." State v. Flint, 761 P.2d 1158, 1161 (Idaho 1988). Any challenge to the sufficiency of evidence at a preliminary hearing will be rejected "where at a fair trial the accused is found guilty upon sufficient evidence to sustain the verdict." State v. Streeper, 747 P.2d 71, 73 (Idaho 1987).

The Colorado courts similarly hold. "[A]ny issue as to the presence of probable cause is rendered moot by the jury's guilty verdict." People v. Alexander, 663 P.2d 1024, 1025 n.2 (Colo. 1983). "Resolution of these questions must be made prior to trial in order to avoid the anomalous situation where a defendant may be found guilty at trial, and then attempt to have the conviction reversed for a preliminary hearing on probable cause." Kuypers v. District Court, 534 P.2d 1204, 1206 (Colo. 1975).

Although appellate courts in Utah have not addressed the precise issue posed in this Court's August 27, 1991 Order, the Utah Supreme Court's opinion in State v. Schreuder, 712 P.2d 264 (Utah 1985), should be mentioned. Defendant argued on appeal that the probable cause statement in the arrest warrant was defective. However, assuming the probable cause statement was defective, the court followed "'the established rule that illegal arrest or detention does not void a subsequent conviction.'" Id. at 271 (quoting Gerstein v. Pugh, 420 U.S. 103, 119 (1975)).

B. Any Error Was Harmless

As explained above, the refiling in this case was proper because the State had new evidence, previously unavailable evidence, and good cause. However, if there were any error in allowing the refiling, defendant's subsequent trial conviction renders any such error harmless. Defendant has never challenged the sufficiency of the evidence to establish probable cause at the preliminary hearing or to establish guilt beyond a reasonable doubt at trial. Nor has he argued, or could he argue, that any error in allowing the refiling affected the fairness of his trial or prejudiced him in any way.[5] As a result, regardless of the degree of burden required for showing harm or harmlessness and regardless of which party bears that burden, the record in this case simply does not permit any other conclusion than that any error in allowing the refiling was benign.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction. On the Brickey issue, the conviction

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[5] In Schreuder, the court noted that the "only prejudice to the defendant resulting from what may have been an invalid arrest was that period of detention he experienced prior to preliminary examination and judicial determination of probable cause for trial. *In light of his subsequent conviction, that temporary period of* possibly wrongful detention is of minimal significance and does not warrant reversal of an otherwise valid conviction." 712 P.2d at 272. Cf. State v. Kelly, 718 P.2d 385, 392-94 (Utah 1986). In this case, any error in allowing the refiling could not have prejudiced defendant at all because he was not detained in connection with the second preliminary hearing until the circuit court found that probable cause had been established, a finding that defendant has not and, based on the evidence presented, could not dispute.

should be affirmed because there was no error in allowing the refiling of this case and because if there were any such error it was harmless.

RESPECTFULLY SUBMITTED this 1st day of October, 1991.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Elizabeth Holbrook, attorney for appellant, 424 East 500 South, Suite 300 , Salt Lake City, Utah, 84111, this 1st day of October, 1991.