1994

State of Utah v. Melvin Eugene Smith : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS 940580 CA

STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
vs.	:	Case No. 940580 - CA
MELVIN EUGENE SMITH,	:	Priority 2
Defendant and Appellant.	:	

APPELLANT'S BRIEF

APPEAL FROM A CONVICTION OF ONE COUNT OF AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, AND ONE COUNT OF POSSESSION OF A WEAPON BY A RESTRICTED PERSON, AND SECOND DEGREE FELONY, FROM THE FOURTH DISTRICT COURT, JUDGE BOYD L. PARK, PRESIDING

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this appeal by virtue of Rule 3 of the Utah Rules of Appellate Procedure; Rule 26 of the Utah Rules of Criminal Procedure; UCA 78-2a-3(2)(f); and by virtue of the fact that the case was poured over to this Court by the Utah Supreme Court pursuant to a letter dated September 26, 1994 from Geoffrey J. Butler directed to the Fourth District Court Clerk of Utah County.

STATEMENT OF ISSUES

A. Did the trial court commit error by refusing to dismiss the case for failure to prosecute within 120 days? The standard of review is based upon a review of correctness of the trial court's conclusions of law. No deference is accorded to the trial court *State v. Wilcox*, 808 P.2d 1028, 1031 (Utah 1991).

B. Was the counsel afforded to the defendant ineffective? The standard of review is based upon an objective standard of reasonableness. No deference is accorded to the trial court, *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

C. Was the evidence presented insufficient to support the verdict of the jury? The standard of review is based upon a review of the facts in the light most favorable to the jury's verdict, *State v. Saunders*, 893 P.2d 584, 586 (Utah App. 1995).

CONSTITUTIONAL PROVISIONS, STATUTES

Utah Code Annotated Title 77, Chapter 29, Section 1, Subsections (1) and (4) are presented for interpretation by this Court. Such subsections provide the following.

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
>
> (4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding, If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

STATEMENT OF THE CASE

A. Nature of the case. This case involves a conviction of the defendant/appellant of an attempted burglary and the possession of a weapon by a restricted person. Defendant was incarcerated at the Utah State Prison during all relevant times of the proceedings. Accordingly, Defendant demanded that he have the charge brought to trial within 120 days. The trial was delayed by a motion from the prosection. Defendant's attorney brought a motion to dismiss the case which was denied by the trial court.

At trial, the defendant's counsel demonstrated that he did not have a proper knowledge of the rules of evidence and was admonished by the Court. In addition, defendant's counsel failed to bring a motion to suppress and/or brought the motion in an improper fashion.

Finally, defendant has requested that this court review the evidence. Defendant feels that the evidence of identification was insufficient to support the verdict.

B. The course of the proceedings. Defendant's motion to dismiss was brought on the morning of trial. The trial court refused to hear the motion at the time of trial, but gave leave to defendant's counsel to file the motion upon the completion of trial. Upon conclusion of the evidence, the jury found the defendant guilty of (1) Aggravated Burglary and (2) Possession of a Weapon by a Restricted Person.

Following trial, counsel for the defendant filed his motion to dismiss on the basis of the court's failure to complete prosecution of the case within 120 days. The trial court denied the motion pursuant to a memorandum decision.

C. Statement of facts. On September 14, 1993, after conclusion of the preliminary hearing, defendant requested that his counsel prepare a demand for disposition of pending charges. His attorney prepared a hand written demand which was signed and delivered to the transporting officer from the Utah State Prison with the directive that he deliver it to his supervisor (R, at 149 and 150).

On October 18, defendant, acting pro se, prepared an Affidavit of Impecuniosity and Demand for 120 Day Disposition and gave the documents to prison officials along with a request that they be mailed to the Fourth District Court. However, prison officials refused to mail the documents as directed, on the basis that the defendant did not have the money to pay for postage. The documents were, however, mailed to the Utah County Public Defender Association at no charge. Upon receipt

of the Demand for 120 Day Disposition and Affidavit of Impecuniosity, the Utah County Public Defender Association mailed the documents to June Hinckley, the record's officer at the Utah State Prison, with a cover letter dated October 27, 1993 (R, at 150).

On October 28, 1993, Defendant was arraigned before the Honorable Boyd L. Park on the charges of Aggravated Burglary and Possession of a Weapon by a Restricted Person. Defendant entered a not guilty plea and requested a trial setting. A jury trial was set to commence on November 8th and 9th of 1993 (R, at 16 and 17).

On November 4, 1993, the prosecutor filed a motion to continue the trial setting. The motion was based upon the fact that State had been unable to locate an "essential witness", Diane Leroy, the trial court granted the states motion even though the State never called Ms. Leroy as a witness at the eventual trial (R, at 22 and 23).

A new trial date was scheduled for February 7th and 8th of 1994 (R, at 44).

On November 15, 1993, June Hinckley sent a memorandum to the defendant, with an official form used by the prison to file a Demand for 120 Day Disposition. On November 18, 1993, the Defendant signed a Utah Department of Corrections Notice and Request for Disposition of Pending Charges. The form was delivered to prison officials on the date it was signed by the defendant, but the form was not received by June Hinckley until December 7, 1993. None of the above referenced documents were ever forwarded to the trial court. (R, at 150).

On January 20, 1994, the State once again moved for a continuance. The grounds for the continuance were the same as the first motion for continuance, that being that an essential witness for the State would be unavailable for trial (R, at 43).

The trial court granted the State's motion and reset the trial for March 28th and 29th of 1994 (R, at 46).

It is interesting to note that the State filed a third motion for continuance on March 13, 1994 based upon the grounds that its investigating officer would be out of town. Such motion, however, was denied (R, at 53).

The trial finally commenced on March 28, 1994. During the trial, defense counsel improperly attempted to read a statement in order to refresh a witness' memory. The state failed to object yet the trial court admonished defense counsel in the presence of the jury that he was proceeding improperly and informed defense counsel of the proper procedure to refresh a witness' memory (T, at 68).

During the trial defense counsel attempted to make a motion to dismiss on the basis of lack of evidence at the conclusion of the state's case in chief. This attempt was made in front of the jury and defense counsel was admonished by the trial court that this was improper ((T, at 166).

Defense counsel waited until the jury was in deliberations to make what was ultimately interpreted as an effort to suppress evidence which motion was denied (T, at 219).

Troy Thomas, a witness of the state, testified that he had narrowed the selection to two people and then "picked someone else" when he was identifying the defendant at the lineup. Defense counsel failed to probe into the selection process or why Mr. Thomas had changed his mind (T, at 76).

Sherry Nostrom, a state witness, could not identify the defendant from the photo line-up (T, at 84).

SUMMARY OF ARGUMENT

UCA 77-29-1 requires that a written demand be made to a custodial officer to initiate the 120 day statutory disposition of the case. Defendant complied with the statute though the state prison system did not follow through with his request and defendant was not tried within 120 days. Defendant brought a motion to dismiss based upon the state's failure to insure prosecution within 120 days. The trial court denied the motion on the basis that defendant was brought to trial within 120 days after his compliance with UCA 77-29-1 and on the basis that it was proper for the trial court to grant continuances to the state.

Defendant further argues that he was not provided with competent counsel as his counsel did not properly make a motion to dismiss at the close of the state's case and failed to bring a motion to suppress. The prejudice that resulted to the defendant surrounds the fact that the attempt to make the motion was made in front of the jury.

Defendant finally argues that the evidence was insufficient to support the verdict. This argument is based upon the fact that the only two witnesses to the attempted robbery could not adequately identify him.

ARGUMENT

POINT ONE. DEFENDANT WAS NOT PROSECUTED WITHIN 120 DAYS AS REQUIRED BY UCA 77-29-1.

UCA 77-29-1 requires, inter alia, that a "written demand" be made to a "custodial officer" of "agent" of the same. There is no official form or petition that must be filed to initiate the 120 day statutory disposition of the case. In each of the instances cited in the statement of facts, the defendant

POINT TWO. THE COUNSEL AFFORDED TO THE DEFENDANT WAS INEFFECTIVE.

During the trial, defense counsel improperly attempted to read a statement in order to refresh a witness' memory. The state failed to object yet the trial court admonished defense counsel in the presence of the jury that he was proceeding improperly and informed defense counsel of the proper procedure to refresh a witness' memory.

At the conclusion of the state's case, defense counsel attempted to make a motion to dismiss. Such attempt was made in front of the jury and defense counsel was counseled by the trial court that he should not make the motion. Thereafter, defense counsel neglected to make the motion.

Defense counsel obviously thought that he had sufficient grounds to present this motion. However, the defendant was denied the chance to have the motion heard when his defense counsel so quickly gave up.

Furthermore, defense counsel waited until the jury was in deliberations to make what was ultimately interpreted as an effort to suppress evidence. Defense counsel was concerned that the testimony of Troy Thomas, Sherry Nostrum and Joshua Williams was tainted with respect to identification of the defendant. The failure to timely bring a motion to suppress prejudiced the defendant because the trial court never had the opportunity to review the issue of the adequacy of the photo lineup. Had the trial court been able to review the photo lineup issue, there is a reasonable probability that the court would have suppressed the photo lineup evidence.

Defense counsel's failure to properly refresh the memory of the witness and to improperly move to dismiss the case prejudiced the defendant. The jury may have based its verdict not so much on the evidence, but on the basis of the defense counsel's performance.

presented a written demand which clearly established his intent to avail himself of the privilege of a the statute. In addition, all of the documents referenced in the statement of facts were delivered to the custodial officer of the defendant or an appropriate agent of the same as required by UCA 77-29-1.

The state had 120 days to bring the case to trial unless the court entered a finding of "good cause" for a longer delay. The is nothing in the record that constitutes good cause for the excessive delay. The state requested continuances to all three trial settings. The first two requests were granted. It is apparent that the requests were nothing more than a delay tactic by the state inasmuch as the "essential witness" that was allegedly unavailable on the first trial setting was not even called as a witness at the eventual trial.

In *State v. Petersen*, 810 P.2d 421 (Utah 1991), the Utah Supreme Court held that the burden of complying with UCA 77-29-1 was on the prosecution. The Court further held that the defendant was not required to show that he had been prejudiced by the delay. The Court held that if there is not good cause for the delay of the trial beyond the statutory time period, then the case must be dismissed with prejudice.

In this case, the request was delivered initially to the transportation officer and later to June Hinckley. There is not statutory definition of an "appropriate agent" or "custodial officer" as those words are used in UCA 77-29-1. In *State v. Phathammovong*, 860 P.2d 1001 (Utah App. 1993), the court stated that is would not reach a definition of "appropriate agent" because the issue was not properly presented at the trial court. Thus, in the present case, the Court should apply the plain meaning of those words in determining whether or not the defendant filed an appropriate request.

As outlined above, the representation by defense counsel of the defendant fell below the objective standard of reasonableness as defined in *Strickland v. Washington*, 466 US 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

POINT THREE. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

Troy Thomas, a key witness for the prosecution and one of only two witnesses that could have placed the defendant in the office where the attempted robbery occurred, stated that he had narrowed the selection to two people and then "picked someone else" when he was looking at the lineup. Defense counsel failed to probe very deeply into the selection process or why Mr. Thomas had changed his mind. Mr. Thomas indicated that he was not "100 percent sure", but defense counsel did not pursue this line of questioning any further. Sherry Nostrum, a key witness for the prosecution and the second of only two witnesses that could have placed the defendant in the private office, could not identify the defendant from the photo lineup.

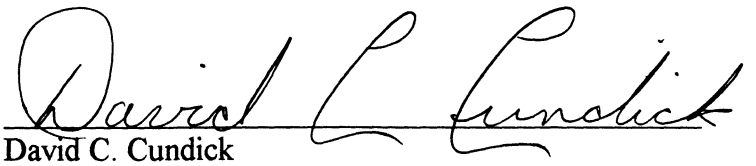
Inasmuch as there is no evidence which would identify defendant as the individual who was in the office at the time of the attempted robbery, the case should have been dismissed at the trial level as the evidence was insufficient to support the verdict.

CONCLUSION

Defendant was not brought to trial within 120 days after he had delivered his written demand to his custodial agent. The trial court should have granted his motion to dismiss on this basis. The

representation afforded to defendant was inadequate as defense counsel made several mistakes that prejudiced defendant. Finally, the evidence was insufficient to support a verdict inasmuch as defendant was not properly identified as the individual who attempted the robbery.

Respectfully submitted this 10th day of July, 1995.



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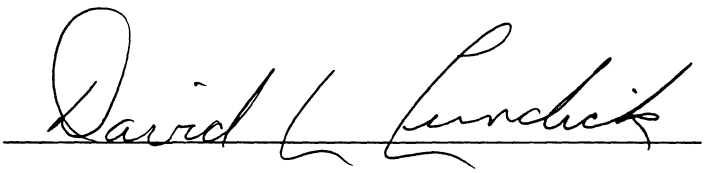
CERTIFICATE OF MAILING

I hereby certify that 2 copies of the appellant's brief were mailed, postage prepaid, to Jan Graham, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 this 10th day of July, 1995.



No addendum necessary
DJA