THE STATE OF OHIO, APPELLEE, v. DICK, APPELLANT

No. 70-226

Supreme Court of Ohio

27 Ohio St. 2d 162; 271 N.E.2d 797

July 14, 1971, Decided

PRIOR HISTORY: [***1]

APPEAL from the Court of Appeals for Stark County pursuant to the allowance of a motion for leave to appeal.

Appellant was indicted by the grand jury of Stark County in the January 1966 term on counts of rape and other offenses involving three different victims on three different occasions.

This is an appeal from the second trial of appellant's case, the first trial having occurred in July 1966.

Prior to appellant's first trial, John Henry Daniels, Jr., an alleged accomplice, after constitutional warnings but not under oath, confessed to the crimes completely implicating the appellant. He then pleaded guilty and was sentenced.

During the first trial, Daniels testified that the appellant had not participated in the crimes and that most of the statements contained in his (Daniels') confession had not been made or were not true. The jury returned a verdict of guilty on all counts in the indictment.

Upon appeal, the Court of Appeals reversed appellant's conviction and remanded the cause for a new trial.

Appellant then appealed the judgment of the Court of Appeals to this court. That appeal was dismissed, *sua sponte*, on June 12, 1968.

The second trial, which is the subject [***2] of the present appeal, took place in 1968. Over objection, the trial court admitted Daniels' confession after a preliminary hearing to determine whether it was voluntarily made.

After having been called as a witness by the state, Daniels, upon the advice of counsel, refused to be sworn and cross-examined, asserting his Fifth Amendment privilege against self-incrimination. No effort was made by the state to compel Daniels to testify. Thereafter, the state was permitted to read into the record the cross-examination of Daniels at the first trial, which contained nothing to support the state's case. But, the court also permitted the state, over objection, to re-offer Daniels' damaging confession, and read it to the jury.

In addition to Daniels' confession, the state produced evidence that one of the victims had made a voice identification of the appellant, that the appellant had fled following arrest, and that the commission of the crimes always followed a similar pattern.

After a verdict of guilty was returned against appellant, his conviction was affirmed by the Court of Appeals.

DISPOSITION:

Judgment reversed.

HEADNOTES:

Criminal procedure -- Evidence -- Witnesses -- Extra-judicial, [***3] *unsworn statement not admissible, when -- Denied under oath -- Witness refusing to be sworn -- May not claim privilege against self-incrimination, when -- Record of cross-examination of witness at former trial inadmissible, when -- Witness available at second trial, refused to testify.*

SYLLABUS:

1. An extra-judicial, unsworn, signed statement of a witness which has been denied by the declarant under oath is not admissible as proof of the allegations contained therein.

2. A witness may not rely on his Fifth Amendment privilege against self-incrimination where he has refused to be sworn and where he has pleaded guilty to a charge arising from the same incident as to which he was being questioned.

3. Where an accused claims a denial of his constitutional right to confront his accusers because a prosecution witness has claimed his Fifth Amendment privilege against self-incrimination and refused to testify, the state may not introduce in a second trial the record of the cross-examination of that witness during the first trial as a foundation for the introduction of an otherwise inadmissible extra-judicial statement.

4. Where the identification of an accused is by voice, the absence of [***4] a voice comparison involves great danger of prejudice.

COUNSEL:

Mr. David D. Dowd, Jr., prosecuting attorney, for appellee.

Mr. Jerry P. Hontas, for appellant.

JUDGES:

SCHNEIDER, J. O'NEILL, C. J., HERBERT, DUNCAN, CORRIGAN, STERN and LEACH, JJ., concur.

OPINION BY:

SCHNEIDER

OPINION:

[*164] [**798] Appellant contends that the trial court committed prejudicial error when it permitted the state to introduce an extra-judicial written confession of an alleged accomplice made in the presence of and implicating [**799] the accused after the alleged accomplice had refused to testify.

By permitting the state to read Daniels' confession to the jury as part of its case in chief, the jury was enabled to accept as substantive evidence the unsworn confession which had been denied by the declarant in the first trial, under oath.

Two views presently exist in this country in regard to the admissibility of an extra-judicial prior inconsistent statement.

Under the generally accepted orthodox view, ". . . a previous statement of the witness, though admissible to impeach, is not evidence of the facts stated . . . . When used for that purpose, the statement is hearsay. Its value rests on [***5] the credit of the declarant, who was not under oath nor subject to cross-examination, when the statement was made." McCormick on Evidence, 74, Section 39. See, also, 3A Wigmore on Evidence, Section 1018, and cases cited therein.

Wigmore, on the other hand, takes the opposite view as follows:

"(b) It does not follow, however, that prior self-contradictions, when admitted, are to be treated as having no *affirmative testimonial* value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the hearsay rule. But the theory of the hearsay rule is that an extrajudicial [*165] statement is rejected because it was made out of court by an absent person not subject to cross-examination . . . . Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve . . . ." 3A Wigmore on Evidence, Section 1018, at [***6] 996.

This court has long adhered to the principle that "when taken by surprise by the adverse testimony of its own witness, . . . the state may interrogate such witness concerning his prior inconsistent . . . statement . . . for the purpose of refreshing the recollection of the witness, but *not for the purpose of offering substantive evidence against the accused*." (Emphasis supplied.) *State* v. *Duffy* (1938), 134 Ohio St. 16, 17. See *Hurley* v. *State* (1888), 46 Ohio St. 320, 322; *State* v. *Minneker* (1971), 27 Ohio St. 2d 155.

The fact that the appellant did not have the opportunity to cross-examine Daniels when the statement was made, nor during the second trial, is sufficient in itself to avoid any consideration of Wigmore's position.

Therefore, to hold that it was proper to read Daniels' confession to the jury as evidence of the truth of the allegations contained therein would "allow men to be convicted on unsworn testimony of witnesses -- a practice which runs counter to the notions of fairness on which our legal system is founded." *Bridges* v. *Wixon* (1944), 326 U.S. 135, 153.

Appellant claims that he was denied his constitutional right of confrontation [***7] when, after Daniels refused to testify, the trial court permitted the state to introduce the cross-examination of Daniels taken at the first trial.

We agree with the state's contention that Daniels' refusal to testify on the grounds that he would be violating his privilege against self-incrimination was ill-founded. Daniels' refusal to be sworn (*In re Groban* [1955], 164 Ohio St. 26), [*166] and the fact that he had already pleaded guilty to a charge arising from the same incident as to which he was being questioned (*United States* v. *Cioffi* [1957], 242 F. 2d 473; *United States* v. *Romero* [1957], 249 F. 2d 371), negated [**800] his invocation of the privilege. We cannot, however, agree that the burden was upon appellant to put questions to Daniels and to compel answers by him. Therefore, it does not follow that the state had the right to introduce Daniels' former testimony merely to obviate a claim by appellant that he was denied the right of confrontation.

As part of its case in chief, the state had the burden of showing a valid excuse for the non-production of Daniels. For, ". . . the validity of the excuse for non-production lies upon the party [***8] seeking to

introduce the former testimony." Paragraph one of the syllabus of *New York Central Rd. Co.* v. *Stevens* (1933), 126 Ohio St. 395.

With Daniels being available and competent to testify, it was error to allow the record of the cross-examination of Daniels at the first trial to be introduced at the second trial as the foundation for the introduction of the otherwise inadmissible extra-judicial statement.

Whether the admission of the statement was prejudicial depends upon a consideration of appellant's second contention, which is that the trial court erred in overruling appellant's motion for a directed verdict on the basis of the state's failure to identify the appellant as the perpetrator of the offenses for which he was charged.

Testimony of the three victims showed that each was raped twice; however, only a voice identification by one of them was offered to connect the appellant to the crimes for which he was charged.

The opportunity for suggestion inherent in the procedure used by the police to secure the voice identification lends little credence to the state's attempt to connect that voice identification to the appellant.

Before listening to the voice in response [***9] to the detectives in the police station, one of the victims had been told to appear to make an identification of the suspect. "Any identification process, of course, involves the danger that [*167] the percipient may be influenced by prior formed attitudes . . . ." *Palmer* v. *Peyton* (1966), 359 F. 2d 199, 201. This is especially so when the identifier, as in the instant case, is presented with no alternative choices.

Normal police procedure requires the call of a lineup to assure appellant of his rights. This device was not used. In their "understandable zeal to secure an identification," by not allowing a comparison of voices, the police "destroyed the possibility of an objective, impartial judgment" by the victim as to whether the accused's voice was in fact that of the man who attacked her. *Palmer* v. *Peyton, supra* (359 F. 2d 199, 202).

Without the confession *and* absent any in-court identification by the victim, it is questionable whether the voice identification, standing alone, was of sufficient probative value to have permitted the jury to find the accused guilty beyond a reasonable doubt.

The state, in a further attempt to connect the accused with [***10] the crimes, presented testimony of the three victims to show that the crimes followed a similar plan, system and methodology.

In *State* v. *Carter* (1971), 26 Ohio St. 2d 79, 83, this court held that:

". . . where evidence tending to prove commission by an accused of a similar act is offered by the state . . . it is not necessary for the state to establish by proof beyond a reasonable doubt that the accused was the perpetrator of the similar act.

"In such case, it is sufficient for the admission of such evidence that it offers *substantial proof* that the alleged similar act was committed by the defendant." (Emphasis supplied.)

In that case, two employees made *positive* in-court identifications of the accused. [**801] In the instant case, two of the three victims could not identify the accused whatsoever. The single-voice identification did not offer "substantial proof" that the alleged similar act was committed by the defendant.

Thus, in the absence of any "substantial proof" to [*168] connect the appellant to the offenses for which he was charged, we find that the trial court committed prejudicial error in allowing the state to introduce an extra-judicial, [***11] unsworn, signed statement of a witness as proof of the allegations contained therein. The judgment of the Court of Appeals is reversed and the cause remanded for further proceedings in accordance with law.

Judgment reversed.