

RUSSELL HUNT

called as a witness on behalf of the Defendant, and having been first sworn, testified as follows, to-wit:

DIRECT EXAMINATION
(OUT OF THE PRESENCE OF THE JURY)

BY MR. FULLER:

Q State your name for the record, please, sir.

A Russell Hunt.

Q Mr. Hunt, are you one of the Defendants' attorneys in this cause now on trial?

A Yes, sir. I am.

Q Okay. Have you ever received a certified copy of the record of the Defendant David Wayne Spence's prior convictions, in accordance with Section 3, Article 37.31a of Vernon's Annotated Texas Statutes?

A No. I have not.

Q As a result of that, have you had an opportunity to examine the records?

A I have only examined parts of the record, and part of a copy of the record in the District Clerk's Office.

Q What part have you examined?

A The Judgment and Sentence and certification sheet.

Q Can you tell the Court whether or not the Judgment and Sentence in that case has been signed by the Judge of the trial court, in accordance with Article 42.01 of the Code

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of Criminal Procedure?

A It has not been signed, in accordance to that provision.

MR. FULLER: I believe that's all we have in support of that motion, Your Honor.

THE COURT: Does the State have any questions?

MR. BUTLER: Your Honor, as I recall it, at the request of the Defense, the entire record of the previous conviction of David Wayne Spence on the Aggravated Sexual Abuse case was introduced as part of the evidence in this trial. The entire pen pack was introduced in that trial, and was part of the record, and is part of the record, and as such, has been included in this case several months previous to this case.

THE COURT: Do ya'll have that pen pack, so I can just look at it before we get out there?

(Whereupon, Court stood at ease momentarily.)

MR. BUTLER: Secondly, Judge, in a capital case it doesn't even have to be a final conviction. Any evidence of any kind of bad act is admissible.

THE COURT: I understand.

Just hand it back to Ned.

All right, in reference to the first motion, I overrule the motion.

1 MR. FULLER: Your Honor, we would object to
2 the Court's ruling, on the basis of the Sixth, Fifth
3 and Fourteenth Amendments of the United States Constitu-
4 tion, that it denies Defendant his right to a fair trial,
5 it denies the Defendant the right to due process of law.
6 And, further, it denies the Defendant his right to
7 effective assistance of counsel.

8 We would also object to the Court's ruling, on
9 the basis of the Texas Constitution, Article I, Section
10 10 and 19, denial of a fair trial, due process of law,
11 and effective assistance of counsel.

12 THE COURT: Overruled.

13 MR. FULLER: The second motion we have, Your
14 Honor, is a Motion In Limine. We would, at this time,
15 outside the presence and hearing of the jury, move the
16 Court to instruct Counsel for the State to approach the
17 Bench regarding the admissibility of any evidence regard-
18 ing specific past bad acts, reputation evidence,
19 psychiatric testimony, or statements made by the Defendant
20 while in the custody, for the reason that, evidence of
21 such would be inadmissible on proper and timely objection,
22 and sustaining objection to such in the presence of the
23 jury would merely draw attention to the improper evidence
24 and reinforce the effect of the questionable evidence.
25 The prejudicial effect thereby would be impossible to

1 overcome.

2 THE COURT: You're saying custody, bad acts,
3 and what else?

4 MR. FULLER: Past bad acts, reputation evidence,
5 psychiatric testimony, and statements made by the Defend-
6 ant while in custody. And, Your Honor, we would move
7 that we take that up outside the presence and hearing of
8 the jury before any evidence of that is presented to the
9 jury, so we can make our objections to the admissibility
10 of such evidence.

11 THE COURT: What kind of evidence are ya'll
12 going to offer, first? Psychiatric evidence, I assume?

13 MR. FEAZELL: Our first witness is a psychia-
14 trist.

15 MR. BUTLER: We're going to offer evidence in
16 every part they talked about.

17 THE COURT: Well, I realize that. But I just
18 wondered about your first one.

19 I assume, other than your proving up your
20 qualifications and so forth of your psychiatrist, ya'll
21 will have a question based on a hypothetical?

22 MR. FEAZELL: No, sir.

23 MR. BUTLER: Not for this one.

24 THE COURT: Oh, I see.

25 MR. FEAZELL: With this one, Your Honor, it's

1 based on an interview that he conducted with Mr. Spence
2 back in April of 1983, when Mr. Spence was given his
3 rights by the Justice of the Peace and in front of the
4 psychiatrist prior to the interview.

5 THE COURT: All right.

6 Well, in reference to that, then, I think we
7 need to take it up first outside the presence and hearing
8 of the jury.

9 Is there any reason why we can't just take it
10 up in the courtroom, rather than back here?

11 Let's do that, it will just be a little easier
12 on everybody.

13 MR. FULLER: Your Honor, with respect to the
14 other parts of that motion, is that granted?

15 THE COURT: Well, I'm going to grant it as to
16 all four of the things that you have presented.

17 MR. FULLER: All right. That's fine, Your
18 Honor.

19 I have some other motions before we go back
20 out there.

21 THE COURT: Okay. Excuse me.

22 MR. FULLER: So, the Motion in Limine is
23 granted?

24 THE COURT: Yes, sir.

25 MR. FULLER: The next motion we have, Your

1 Honor, is for the appointment of a psychiatrist to
2 examine the Defendant, so that the Defendant will have an
3 opportunity to present evidence rebutting that to be
4 presented by the State's psychiatrist. And we would, in
5 conjunction with that, also move the Court for a 24-hour
6 postponement, in order to obtain a psychiatrist and have
7 him examine the Defendant and prepare evidence to rebut
8 the State's psychiatrist. We would offer some testimony
9 in behalf of that, Judge.

10 THE COURT: All right.

11 Raise your right hand.

12 (Whereupon, Mr. Hunt was again sworn.

13 RUSSELL HUNT

14 recalled as a witness on behalf of the Defendant, and having
15 once again been sworn, testified further, as follows, to-wit:

16 DIRECT EXAMINATION (RESUMED)
17 (OUT OF THE PRESENCE OF THE JURY)

18 BY MR. FULLER:

19 Q State your name for the record, please, sir.

20 A Russell Hunt.

21 Q Okay. Mr. Hunt, you are one of the Defendants repre-
22 senting -- or one of the attorneys representing the
23 Defendant, David Wayne Spence?

24 A That's correct.

25 Q Mr. Hunt, have you learned that the State is intending to

1 present psychiatric testimony in the punishment phase
2 of this trial?

3 A I have learned from two sources, one is the amended list
4 of witnesses who have been subpoenaed, which showed the
5 name of Dr. Grigson, who I recognize to be a psychiatrist.
6 And we were given a copy of that name, I think, on June
7 27, 1984. And this morning, for the first time, I
8 learned that the State intended to call a psychiatrist
9 who examined David Spence while he was incarcerated, and
10 the psychiatrist's name is Dr. Jolliff.

11 Q Have you had an opportunity to obtain the services of a
12 psychiatrist to examine the Defendant, with regard to
13 rebuttal evidence to the State's psychiatric testimony?

14 A I have not, in that I was made aware, for the first time,
15 on June the 27th, that they intended to use Dr. Grigson.
16 During that time, I was involved in trial and did not
17 have time to contact a psychiatrist in that regard. In
18 reference to Dr. Jolliff, I believe that I was told
19 previously that Dr. Jolliff was not going to testify.
20 And his name does not appear on any subpoena list.

21 Q Do you have any idea of how much time you would need, in
22 order to retain the services of a psychiatrist to examine
23 the Defendant in this case and prepare rebuttal testimony,
24 if any, to the State's witnesses?

25 A I believe if I was given a postponement of 24 hours, that

1 would be an adequate amount of time.

2 MR. FULLER: That's all the questions I have.

3 THE COURT: Does the State have any?

4 MR. BUTLER: Judge, I would say that this was
5 certainly not timely filed. I can't see that there is
6 any justification for any request being made this late
7 date. I think that, if they want to get somebody to
8 examine the Defendant, it could certainly be done this
9 evening and that testimony be offered tomorrow. Assuming
10 the State finishes its punishment evidence today, I
11 certainly see no reason for a 24 hour delay.

12 THE COURT: Let me ask ya'll this, do you know
13 who you want appointed?

14 MR. HUNT: No. We don't.

15 MR. FEAZELL: In particular, Your Honor, we're
16 opposed to a 24 hour delay, because we have got our
17 witnesses here, we're ready to go. A couple of them are
18 from out of town.

19 THE COURT: Oh, we're going to hear ya'll's
20 testimony today.

21 So, I will appoint you somebody. But, you
22 know, first of all, I think that it's reasonable to anti-
23 cipate that this was going to come up. And, you know, as
24 soon as -- I would like to know today who ya'll want me
25 to appoint.

1 MR. HUNT: We will tell you that as soon as
2 we --

3 THE COURT: And, you know, I would like to know
4 by dinner, so that I can -- I will issue an order and
5 appoint them.

6 MR. HUNT: The first break that we get, Your
7 Honor, I will try to contact one.

8 THE COURT: So we can, you know... And he
9 can examine him tonight. And I would anticipate, in all
10 likelihood, we should be able to hear it tomorrow.

11 MR. HUNT: Okay.

12 MR. BUTLER: Your Honor, for purposes of the
13 record, I would like the record to reflect that ya'll
14 have seen a copy of Dr. Jolliff's report, is that
15 correct?

16 MR. HUNT: We have seen Dr. Jolliff's report.
17 We were also told that Dr. Jolliff would not testify.

18 MR. BUTLER: You were told that he would not
19 testify in the case in chief, is that not correct?

20 MR. HUNT: I don't think so. I think you said
21 Dr. Jolliff would not testify.

22 THE COURT: All right.

23 MR. HUNT: And he is not on the subpoena list.

24 THE COURT: All right.

25 In reference to this testimony, is there any-

1 thing else, in reference to this motion?

2 MR. FULLER: For purpose of the record, the
3 Court intends to grant a psychiatrist?

4 THE COURT: Yes, sir.

5 MR. FULLER: Then, I guess we can take up the
6 Motion for Postponement.

7 THE COURT: Okay.

8 MR. FULLER: And which, once we furnish the
9 name to the Court, can you give us some indication as
10 to how much time you will need?

11 THE COURT: Well, we ain't going to take long,
12 I'll tell you that.

13 MR. BUTLER: Judge, I would request that when
14 they contact him, that they make arrangements to have him
15 interview Mr. Spence this evening.

16 THE COURT: All right. That's what I intend
17 to do.

18 MR. FULLER: The next motion that we have,
19 Your Honor, is a motion to require the Court to exclude
20 the jury at the time the prior statement of any witness
21 who is testifying at the punishment phase of this trial
22 is handed to the Defense counsel for examination, along
23 with any criminal record that such witness may have, just
24 hand it to us to use, in order to allow us to examine
25 outside the presence and hearing of the jury the record.

1 Otherwise, this is a form of improper bolstering, in that
2 if we find nothing in there to use while we're sitting
3 there in front of the jury, the jury would then gain the
4 impression that, hey, this witness is all right, when in
5 fact, it's meant to imply nothing of the same. To deny
6 us this right, Your Honor, would be ineffective assistance
7 of counsel. We would move the Court to, on the Court's
8 own motion, at the time any prior statement or criminal
9 record is given to the Defense to examine prior to cross
10 examination, that the Court exclude the jury from the
11 courtroom and give us time to do that, so that we're not
12 constantly requesting it of the Court.

13 THE COURT: Well, in reference to that, we're
14 going to be taking up these matters that I have already
15 said outside the presence and hearing of the jury. You
16 will already have a chance to look at it and make what-
17 ever objections you want to make.

18 MR. HUNT: Your Honor, there's several of the
19 witnesses that I would anticipate that testify, that may
20 have given statements to the police, that may have
21 criminal records. Are you saying we are going to do that
22 before they testify, so we can examine them?

23 THE COURT: We're going to take them -- well,
24 I'm going to start taking them up outside the presence of
25 the jury, so that -- and if the witness testifies, then

1 you will be able to examine him.

2 MR. HUNT: All right.

3 MR. FULLER: I believe that's all we have, Your
4 Honor.

5 MR. HUNT: No, we have one other motion.

6 At this time, we would make a motion to exclude
7 the testimony of Dr. Jolliff, based on the fact that his
8 name does not appear on the subpoena list, and based on
9 the fact that we were told that Dr. Jolliff was not going
10 to testify. We would ask the Court to exclude his
11 testimony.

12 THE COURT: All right.

13 MR. BUTLER: May it please the Court, we have
14 told him that he would not testify in the case in chief.
15 And I know of no law that requires us to furnish them
16 all of the punishment witnesses. Because at the time the
17 witness lists are furnished, we have no idea whether
18 there's even going to be a punishment hearing.

19 THE COURT: All right, sir.

20 I overrule the motion.

21 MR. FULLER: Your Honor, I would object to the
22 Court's ruling, on the basis it denies the Defendant
23 effective assistance of counsel and due process.

24 THE COURT: All right, sir.

25 I overrule it.