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State of Utah v. Carl Archie andrew, Amd Kenneth Ervin : Brief of Appellant

Utah Supreme Court

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff and Respondent,

vs.

KENNETH WILLIAM ERVIN and CARL
ARCHIE ANDREW,

Defendants and Appellants.

Case No.

11122

Defendants and Appellants' Brief

Appeal from Judgment of Fifth District Court

Juab County, Honorable C. Nelson Day, Judge

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff and Respondent,

vs.

KENNETH WILLIAM ERVIN and CARL
ARCHIE ANDREW,

Defendants and Appellants.

} Case No.
11158

Defendants and Appellants' Brief

STATEMENT OF THE KIND OF CASE

This is a criminal case wherein the defendant Kenneth William Ervin was found guilty of Assault with a Deadly Weapon with the Intent to Commit Robbery and the codefendant Carl Archie Andrew was found guilty as an Accessory to an Assault with a Deadly Weapon with the Intent to Commit Robbery.

DISPOSITION IN THE LOWER COURT

This matter came on for trial by Jury on the 25th day of September, 1967, in the District Court in and for Juab County, Nephi, Utah, the Honorable C. Nelson Day, Judge of the Fifth Judicial District,

Presiding. The plaintiff and defendant offered evidence and argument to the jury and the same was submitted for their decision and a verdict of guilty rendered as to both defendants on both offenses. On the 26th day of September, 1967, defendants' counsel made a Motion of and for Judgment of Acquittal notwithstanding the verdict and in the alternative Motion for a New Trial. The Motion for Judgment of Acquittal notwithstanding the verdict was denied on September 26, 1967, and the Motion for a New Trial continued until the 10th day of October, 1967, for argument and offering of evidence by defendants. Said day was also the day set for pronouncement of Judgment and Sentence.

On October 10, 1967, evidence in support of the Motion was heard and after argument upon same, was denied. The defendants were sentenced by the Honorable C. Nelson Day with the defendant Kenneth William Ervin sentenced to the indeterminate sentence as provided by law, at the Utah State Prison of from five years to life.

The defendant Kenneth William Ervin moved the Court for a Certificate of Probable Cause and the same was granted and the commitment stayed during the pendency of this appeal. Bond was fixed by the Court in the amount of Ten Thousand Dollars (\$10,000.00) and the defendant Kenneth William Ervin ordered to reappear in execution of said sentence at the conclusion of the appellate review.

The defendant Carl Archie Andrew was sentenced to serve a term of not more than five years

in the Utah State Prison and the execution upon same suspended and the defendant Carl Archie Andrew placed on probation.

RELIEF SOUGHT ON APPEAL

The appellants seek a declaration of this Court that the lineup identification of defendants was a denial of due process of law, reversal of defendants' convictions as a result of said denial, and if reversal and retrial is ordered outlining said procedures for Courtroom identification upon retrial.

STATEMENT OF FACTS

Kenneth William Ervin, a 26-year-old male Negro Computer Operator from Los Angeles, California, was bound for Rawlins, Wyoming, to visit his mother, Theola Ervin. He left Los Angeles at approximately midnight on the 25th day of June, 1967, and experienced car problems approximately 12 hours later three miles south of Levan, Utah (T pg. 160-162). He was assisted to the nearest gas station located in Levan where the engine problem was diagnosed as serious, whereupon he called his mother in Rawlins, Wyoming, to assist him. Kenneth's mother, Mrs. Ervin, in the company of Carl Archie Andrew and Mrs. Ervin's youngest son, known as Dino, age 9, arrived in Levan at noon on

the 26th day of June. Kenneth and Carl disconnected the drive shaft and chained the cars together for the return trip to Rawlins, Wyoming. As they did not have a chain to affix the cars together, they rented one from a gas station operator by the name of Von Rosequist (T pg. 151 lines 21-30) whose station was located in Levan, Utah. This served as the source of identification leading to the eventual arrest.

With the cars thus joined, Kenneth, Carl, Mrs. Ervin, and her youngest son left Levan at 2:00 p.m. on the 26th day of June, headed north toward Rawlins. (T pg 168 lines 8-28). The towing car overheated and stops were necessary for water, but the trip was generally uneventful and placed them in Salt Lake County later that afternoon between five and six o'clock. (T pg 182 line 27 and pg 190 line 12).

On the 26th day of June at the approximate hour of four o'clock, (T pg 34 lines 21-25), the accused allegedly entered the home of Gaydra Jackman located four blocks west of Highway 91 and north of Nephi, Utah, five miles. (T pg. 32 lines 9-26). Mrs. Jackman was bludgeoned with a gun and robbed of \$7.00 and a wrist watch. (T p. 42-49). The perpetrators of the offense remained in the Jackman home until approximately 4:45 o'clock (T pg. 60 lines 27-30 pg. 61 lines 1-11) (corroborated at pg. 135 lines 10-18).

The defendants Kenneth William Ervin and Carl Archie Andrew were arrested in Rawlins, Wyoming, on the 29 day of June, 1967, waived extradition.

tion and were returned to Juab County, Utah. The defendants were interminately interned at the Juab and Utah County Jails until August 6, 1967.

On July 5, 1967, a lineup was conducted (Tr Motion for New Trial pg. 21 line 20), at the Utah State Prison. Six men were in the lineup comprised of the accused, two men of Mexican descent, and two Negroes. (See Defendants' exhibits 1 and 2). The victim, Gaydra Jackman, identified the defendants from said lineup. The lineup was reproduced at the time of trial (T pg. 75-83). The lineup was conducted without the benefit of counsel (Tr of Motion for New Trial pg. 15 lines 6 and 7 and pg. 18 lines 3-7 and pg. 20 lines 3-5 and pg. 30 lines 6-7). Counsel was appointed by the Court one month after the arrest of the defendants. (Tr Motion for New Trial pg. 29 lines 24-25). The record is not clear, but the defendants did not see counsel or talk to a defense attorney until after the lineup. (Tr Motion for New Trial pg. 31 lines 10-14).

ARGUMENT

POINT I

THE LINEUP WHEREIN THE IDENTIFICATIONS WERE MADE VIOLATES THE NEWLY FASHIONED EXCLUSIONARY RULES AND AN IN COURT IDENTIFICATION BASED UPON SAME SHOULD BE EXCLUDED.

The lineup, conducted at the Utah State Prison, on July 5, 1967, was without the benefit of counsel. The United States Supreme Court in the companion

cases of **US vs. Wade**, 1 CRL 3106, 388 US 218, **Gilbert vs. California**, 1 CRL 3094, 388 US 263, and **Stovall vs. Denno**, 1 CRL 3102, 388 US 293, recognized and used the Sixth Amendment rights to counsel arguments in holding a pre-trial police lineup to be a critical stage of the proceeding and a prosecutorial process to the extent the right to counsel attaches.

In recognition of the realities of the modern criminal prosecution, the Court noted, the Sixth Amendment guarantee has been construed as applying to "critical" stages of the proceedings. Hence, in addition to counsels' presence at trial, the accused must be guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where the counsels' absence might derogate the accused's rights to a fair trial.

A confrontation compelled by the State between the accused and the victim to illicit identification evidence is, in the majority's opinion, peculiarly riddled with innumerable dangers and variable factors that might seriously, even crucially, derogate from a fair trial. The grave potential for prejudice, intentional or not, in the pre-trial lineup, and the possibility that counsel can often avert prejudice and assure a meaningful confrontation led the majority in those cases to the conclusion that a pre-trial lineup is a critical stage of the prosecution at which the accused has a right to counsel.

It is interesting to note in reviewing the transcript how much evidence was marshalled to implicate the defendants in the crime. No fingerprints, or tire tracks, of the defendants' person or vehicle were established. The defendant Kenneth William Ervin's coat was admitted in evidence and was allegedly one and the same coat as that worn by the defendant while committing the offense. However, as severely beaten as the victim was, no hair or blood was found on the coat or any of the defendant's clothing.

A complete search was made of the defendant's house and the objects that were stolen were never located or recovered.

An examination of the victim's initial description (T pg. 61 line 15 to pg. 63) reflects the brief and undetailed account by the victim of the perpetrators of the crime. The victim's recollection was limited to age, not in years, but only as to relative age between the two accused and to color of coats. (T pg. 61 lines 15-26), and color of skin or racial origin and mustaches (T pg. 63 line 4).

A further review of the transcript reflects the victim's inability to give any detailed information about any other physical characteristic, mannerism, or peculiarity. The alleged perpetrator of the crime, Kenneth William Ervin, was in the house 45 minutes and stood next to the victim and their respective faces were six inches apart. (T pg. 41 line 31). But yet, note her response to questions about her ability to identify him on cross examination. (T pg. 75

line 5). At the lineup, compare the stocky Negro who stood next to Kenneth William Ervin and determine if the physical similarities are such as to render a test of her ability to identify a shame?

The one strong salient feature the victim recalled was the presence of mustaches on the perpetrators. None of the other men in the lineup had mustaches and no inmate at the prison is permitted to wear one (T pg. 81 lines 20-23).

The presence of counsel at the lineup would have assured to the defendants an effective and meaningful test of the victim's ability to identify. Substantial prejudice to defendants' rights existed in this confrontation and counsel should have been present to avoid this prejudice.

A recent California Supreme Court case **People vs. Caruso**, 2 CRL 3135 (1968) resolved the issue relative to basic unfairness at the lineup by advancing a due process argument. Assuming this Court finds an unfair lineup which may have resulted in a tainted in Court identification even though previous objection or invocation of an exclusionary concept was not made, the convictions could be reversed, as the lineup was unnecessarily suggestive and conducive to irreparable mistaken identification, **Stovall vs. Enno, supra**. The Caruso case, *supra*, held:

“That its grossly unfair makeup deprived defendant of due process of law.”

The defendant herein advances the due process argument as incorporated in the Utah Constitution

Article 1 Section 7 and advanced by the Caruso case, *supra*, and requests that this Court rule as a matter of law that the recently propounded rules of exclusion be invoked. The victim's testimony and in Court identification should now be inadmissible or the convictions vacated due to the lineup and resulting identifications as being so fundamentally unfair as to deprive the appellants herein of due process of law.

Not one shred of evidence connects the defendants with the commission of this crime except the vague recollections of the victim whose identifications were formed and matured as a result of the unfairly suggestive lineup held in the absence of counsel.

POINT II

CARL ARCHIE ANDREW'S CONVICTION SHOULD BE VACATED AS THE EVIDENCE DISCLOSED THAT HIS CONDUCT WAS SUCH THAT HE WAS NOT AN ACCESSORY AS A MATTER OF LAW.

Carl Archie Andrew's conduct, was such that he could not be an accessory after the fact, but rather he should have been regarded as a principal. The Utah Penal Code describes and defines a principal in 76-1-44 Utah Code Annotated (1953):

All persons in the commisison of a crime, either felony or misdemeanor whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, having advised and encouraged its commission, and all

persons counselling, advising, or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance, or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command, or coercion compel another to commit any crime, are principals in any crime so committed."

An accessorie is defined in Utah Code Annotated at Title 76, Chapter 1, Section 45 as follows:

"All persons who, after full knowledge that a felony has been committed, conceal it from a magistrate or harbor and protect the person who committed it, are accessories."

It is appellants' position that one who is a principal cannot be an accessory after the fact. An examination of the record discloses that if Carl Archie Andrew was present at all times during the offense and as such was concerned with the offenses commission he was a principal within the meaning of the statute. A person is an accessory after the fact only after he has full knowledge that a felony has been committed and then conceals that knowledge from a magistrate, or harbors and protects the person charged or connected therewith. **State vs. Bowman**, 70 P2d 459. **People vs. Chadwick**, 7 U 134, 25 P 737.

There is also authority that an accessory after the fact and an accomplice are not as a matter of law synonymous in definition and meaning by the law of Utah. The two defendants in this case were tried jointly. Carl Archie Andrew as an accessory

after the fact as charged could not be tried with the principal defendant, but if tried at all, he must have been tried after the conviction, if any, of Kenneth William Ervin. *People vs. Chadwick*, *supra*.

No evidence at any stage of the trial showed an effort on the part of Carl Archie Andrew to conceal knowledge from a magistrate or harbor and protect the principal, Kenneth William Ervin. The evidence disclosed that Kenneth William Ervin, Carl Archie Andrew, Theola Ervin, and Stephen Randall Ervin were travelling companions. However, assisting Kenneth William Ervin to leave the scene of the Jackman home is not harboring and protecting within the meaning of the statute, but rather the conduct of a principal.

While it may be true that extenuating and mitigating evidence regarding the conduct of Carl Archie Andrew was received it cannot alter or change the character of his conduct. If Carl Archie Andrew was at the scene of the offense, he was posted as an observer or lookout for approaching cars and to this extent aided or abetted the commission of the offense within the meaning of the statutory definition of a principal.

POINT III

THE LINEUP AS CONDUCTED WAS SO INHERENTLY SUGGESTIVE THAT IT CONSTITUTED A DENIAL OF DUE PROCESS OF LAW.

The lineup was preserved in this case due to the unique restrictions imposed upon its partici-

pants. Each were confined at the Utah State Prison at the time of the lineup and each were still confined at the time of trial so they could be reproduced for the jury's observation.

The jury's ability to observe permitted them to discover its inherently suggestive nature. However, the Jurors were not sophisticated and even though they could observe, they did not appreciate the lineup's suggestive nature.

In discussing the technique of identification of accused persons, Professor Wigmore in 3 Wigmore on Evidence (3rd Ed 1940) Section 786 A (B) 2, comments:

"2. The process also calls for precaution in taking measures beforehand objectively to reduce the chances of testimonial error.

(a) At the time of original observation, the investigator (police) should obtain from the observer a note of any marks of the personality observed, so that there will be less need to depend later on the observer's memory.

(b) At the time of presenting for recognition, whether upon arrest or at trial in the courtroom, measures should be taken to increase the stimulus of association and to decrease the risk of false suggestion. (a) The person to be identified should be clothed and placed (so far as feasible) in the same conditions as when originally observed. (b) The person to be identified should be presented in company with a dozen others of not too dissimilar personalities."

The transcript reflects that selection, if any, of the proposed participants was left to Warden Tur-

ner and Utah County Sheriff Chappel. They apparently selected the personnel based not upon observation of the defendants so that similarities could be matched, but by some vague description given over the phone.

Why the presence of persons of a different race? (See Defendants' Exhibits 1 and 2). What power of suggestion was present when the two men she had to identify allegedly wore mustaches and the only occupants of the lineup with mustaches were the suspects? Why were the suspects the only two persons in the lineup that fit the general description of the suspects?

Appellants contend that the lineup and identifications were made under conditions of unfairness and unreliability. The State took unfair and prejudicial advantage of the accused in arranging the lineup.

The Supreme Court of Illinois had addressed itself to the subject of the manner in which identifications are conducted in the case of *People vs. Martin* 380 Ill. 328, 44 NE 2nd 49; *People vs. Gold*, 361 Ill. 23, 196 NE 729. In each instance as true with appellants herein the defendants were strangers with the identifying witnesses. In weighing such evidence, the Court stated that the matters to be considered were:

"The attendant circumstances, together with the probability or improbability of an adequate opportunity for a definite identification."

The Court concluded as appellants urge this Court to conclude:

"Where the conviction of a defendant rests upon an identification which is doubtful, vague, or uncertain and which does not produce an abiding conviction of guilt to a moral certainty, it should be reversed."

See the highly suggestive atmosphere and how it developed and assisted in the identification in *Palmer vs. Peyton*, 359 F2d 199 (4th Cir. 1966). The Court held that:

"The highly suggestive atmosphere that had been generated could not have failed to affect her judgment."

The Court seemingly held that a police lineup is essential for purposes of comparison and that this

"Procedure fails to meet those canons of decency and fairness established as part of the fundamental law of the land."

No one will ever really appreciate or understand Gaydra Jackman's power of observation, detection, and memory characteristics. The identification she made should have been the product of a free, spontaneous, independent, and unprompted effort of an unaided mind. It was anything but that type of selection. This identification appellants urge, was suggestive and formulated her thought to the extent that it left to her only the selections she made.

CONCLUSION

The appellants respectfully submit that the verdict and judgment as to each defendant should be set aside as they were not represented by counsel at the lineup, the defendant Carl Archie Andrew was a principal as a matter of law, and that the lineup was so unfairly suggestive as to be fundamentally prejudicial.

Respectfully submitted,

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