

1975

Utah v. Galveston Sonny Scott : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

-vs-

GALVESTON SONNY SCOTT,

Defendant-Appellant.

Case No. 13889

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court in
and for Salt Lake County, State of Utah, The Honorable
Jay E. Banks, District Judge, Presiding

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE-----	1
DISPOSITION IN LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT:	
POINT I: THERE WAS NO ERROR IN THE TRIAL COURT RULING THAT THE JURY COULD VIEW THE CRIME SCENE UNDER THE SUPERVISION OF DEPUTIES BUT WITHOUT THE PRESENCE OF DEFEN- DANT OR HIS COUNSEL-----	6
POINT II: AFTER A MISLEADING REMARK MADE BY DEFENSE COUNSEL DURING SUM- MATION, THE TRIAL COURT CORRECTLY POINTED OUT THAT AN AGGRESSOR IS DETERMINED AT THE TIME THAT SELF DEFENSE IS CLAIMED AND NOT BY EVENTS THAT OCCURRED TWO DAYS BEFORE THE FATAL ENCOUNTER AND PRIOR TO A MUTUAL WITHDRAWAL-----	14
CONCLUSION-----	25

AUTHORITIES CITED

CASES

Abell v. State, 109 Tex. Crim. 380, 5 S.W.2d 139 (1928)-----	7
Adams v. State, 35 Tex. Crim. 285, 33 S.W. 354 (1895)-----	20
Allen v. United States, 150 U.S. 551, 37 L.Ed. 1179, 14 S.Ct. 196 (1893)-----	18
Bizup v. People, 150 Colo. 214, 371 P.2d 786 (1962), cert. den. 371 U.S. 873, 9 L.Ed.2d 112, 83 S.Ct. 144-----	16, 17
Commonwealth v. O'Connell, 274 Mass. 315, 174 N.E. 665 (1931)-----	16
DeVaugh v. State, 232 Md. 447, 194 A.2d 109 (1963), cert. den. 376 U.S. 927, 11 L.Ed.2d 623, 84 S.Ct. 693-----	18
Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed2d 977, 84 S.Ct. 1758 (1964)-----	10
Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967)-----	11
Johnson v. United States, 318 U.S. 18, 63 S.Ct. 549, 87 L.Ed. 704 (1943)-----	12, 13

TABLE OF CONTENTS

	Page
Jones v. Commonwealth, 187 Va. 133, 45 S.E.2d 908, (1948)-----	21
Lee V. People, 170 Colo. 268, 460 P.2d 796 (1969)---	16
Massenberg v. United States, 19 F.2d 62 (4th Cir. 1927)-----	7
People v. Estrella, 116 C.A.2d 713, 254 P.2d 182 (1953)-----	16
Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330 (1953)-----	7
State v. Aikers, 87 Utah 507, 51 P.2d 1052 (1935)---	13
State v. Baran, 25 Utah 2d 16, 474 P.2d 728 (1970)---	17
State v. Delaney, 15 Utah 2d 338, 393 P.2d 379 (1964)-----	9
State v. Fair, 28 Utah 2d 242, 501 P.2d 107 (1972)---	13
State v. Feeley, 194 Mo. 300, 92 S.W. 663 (1906)---	22
State v. Gilbert, 65 Idaho 210, 142 P.2d 584 (1943)---	16
State v. Gilreath, 107 Ariz. 318, 487 P.2d 385 (1971) <u>cert. den.</u> 406 U.S. 921, 32 L.Ed.2d 121, 92 S.Ct. 1781-----	14
State v. Goodin, 8 Or. App. 15, 492 P.2d 287 (1971)---	16
State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974)-	18
State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963)---	22
State v. Johnson, 25 Utah 2d 160, 478 P.2d 491 (1970)-	17
State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297 (1969)-	17
State v. Lee, 85 S.C. 101, 67 S.E. 141 (1910)-----	23
State v. Mortenson, 26 Utah 312, 73 P. 562 (1903), appeal dismissed in 27 Utah 16, 74 P. 120----	8,9
State v. Neal, 1 Utah 2d 756, 262 P.2d 756 (1953)---	17
State v. Phippen, 280 Kan. 962, 494 P.2d 1137 (1972)---	14
Stilley v. People, 160 Colo. 329, 417 P.2d 494 (1966)-	14
United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967)-----	10,11
Wallace v. United States, 162 U.S. 466, 40 L.Ed. 1039, 16 S.Ct. 859 (1895)-----	19

STATUTES

Revised Statutes of Utah, Section 4870 (1898)-----	8
Utah Code Ann. § 76-2-401, 402 (1973)-----	18,19
Utah Code Ann. § 77-31-26 (1953)-----	9
Utah Code Ann. § 77-42-1 (1953)-----	17

OTHER AUTHORITIES

40 Am.Jur.2d, <u>Homicide</u> , § 45-----	23
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RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction of Galveston Sonny Scott should be affirmed.

STATEMENT OF FACTS

On January 1, 1974, a Tuesday, at 1:50 a.m., David Allen Gray was shot and killed while in the Beehive Lodge of Elks at 248 West South Temple, Salt Lake City, Utah. Three other people were also shot, one dying shortly afterwards. Appellant, Galveston Sonny Scott, was tried before a jury and convicted of manslaughter for the slaying of David Gray.

The shooting in the early hours of January 1st was the final act in a series of altercations between appellant and Gray. The first major conflict between the two occurred at the same Elks Lodge on Saturday, the 29th of December. During some other fighting appellant shoved Gray and the two started shoving each other. (T-394) Gray then left. Someone told appellant that Gray had gone to get a rifle. Appellant sent someone to get him a gun but meanwhile borrowed a .45 caliber pistol from someone else. (T-395,396). Gray was outside when appellant left the Lodge. Gray shot first and appellant returned the fire. Both then left the scene (T-396-399).

There was no further trouble until the night of the killing. About 8:00 p.m., on the 31st of December, appellant, while driving, saw Gray walking along Second South Street in Salt Lake City with a Mr. Blood. Appellant shot at Gray three times but missed. Appellant then yelled, "We going to settle this tonight." (T-399-402) Three hours later appellant went to Gray's home. He did not see Gray but when he saw some movement behind a curtain he shot into the house at least twice. (T-407) After two more hours appellant proceeded to the Elk's Lodge. He left his car in the alley, took his gun from the glove compartment, stuck it in his belt, and went into the club. (T-410).

Appellant and a friend, Binky Coleman, entered the club at an entrance at the south end of the room. The Elks Club is long and narrow inside. At the north end, opposite the entrance, is the bar. About 300 people were at the club celebrating the new year. The lighting was low and a band played. Gray was standing at the far north end of the room, by the bar, buying some drinks and talking to Brenda Moore who was sitting on a bar stool. (T-46,51) Thelma Cross sat at a table right next to Gray (T-93-97) and Estralita Davis sat at the bar. (T-241) Appellant proceeded north toward the bar area, pushed a man out of his way, took his gun in both

hands and aimed at Gray. (T-418) Brenda Moore testified that Gray grabbed her from the barstool and threw her to the floor to get her out of the way. (T-47,48) Appellant shot and saw Gray go down. He shot at least once more where he saw Gray fall. (T-386,387) Thelma Cross, sitting by Gray, was hit by a bullet in the side of her head. (T-95,96) Estralita Davis, sitting at the bar, was shot through both legs (T-218,219) No bullet holes were found anywhere except in the bar area behind where Gray had been standing. (T-31,429)

Gray died within seconds from the effects of a bullet which entered his left shoulders, passed through his left lung, heart and liver, and exited above his right hip. A spent .38 caliber slug was found under his body. (T-61) Phillip Dawson was also killed during the shooting. He died from the effects of a .22 caliber slug which passed through his abdomen. Witnesses testified that Binky Coleman, who accompanied appellant, was also doing some shooting, (T-367) and that he was using a small pistol. (T-211) Later the same day, January 1st, 1974, appellant phoned the widow of Phillip Dawson to tell her that he did not kill Phillip. Appellant explained that he had only been after Gray and Gray's friend Blood, and that he had only shot Gray but that he still was going to kill Blood. (T-262).

Appellant was tried before a jury and convicted of manslaughter in the Third Judicial District Court in and for Salt Lake County. During the course of the trial a motion was made by defense Counsel to permit the jury to view the crime scene. The trial court took the matter under advisement. (T-266) After both parties rested counsel for the defendant renewed the motion. The court granted the motion and called three deputies to conduct the jury to the crime scene. (T-432,433) Defense counsel excepted to the court's ruling that neither the defendant nor his counsel could accompany the jury. (T-434,435) The prosecution was also precluded from viewing the crime scene.

Also, during the course of his summation, Defense Counsel called the jury's attention to the fact that the first bullet fired between the appellant and the decedent, David Gray, was fired by the decedent with a rifle during the Saturday incident. Defense counsel was implying that because Gray shot first on Saturday, he was the probable aggressor on the night of the fatal shooting. The trial court interrupted the Defense Counsel in order to correct and clarify what had been said by saying that an aggressor is determined at the time that self-defense is claimed and not by prior acts. (T-488) Defense Counsel excepted to the Court's remark and now claims

that the trial court erred and prejudiced the defendant's right to present his defense to the jury. Appellant now appeals from the verdict.

ARGUMENT

POINT I

THERE WAS NO ERROR IN THE TRIAL COURT RULING THAT THE JURY COULD VIEW THE CRIME SCENE UNDER THE SUPERVISION OF DEPUTIES BUT WITHOUT THE PRESENCE OF DEFENDANT OR HIS COUNSEL.

During the course of the trial a motion was made by the defense counsel to permit the jury to view the crime scene. The trial court took the matter under advisement. (T-266) After both parties rested, counsel for defendant renewed the motion. The court granted the motion and implemented the action by calling in three deputies who each swore to conduct the jury to the designated place, to preclude any person from speaking to the jurors, to preclude the jurors from speaking to each other, and to return the jury without further delay. (T-432,433) The court also instructed the jury that the scene of the crime was not evidence, that they were not to ask questions, talk to others, or talk among themselves. (T-433) Counsel for the defendant excepted to the court's ruling that neither the defendant nor his counsel could accompany the jury. (T-434-435) The prosecution was also precluded from viewing the crime scene with the jury. (T-434,435)

Although some statutes and rules of the court limit the jury in, or restrict them from viewing the scene of a crime, (Abell v. State, 109 Tex. Crim. 380, 5 SW 2d 139, (1928)) the majority of jurisdictions operate on the assumption that the trial court has the power and discretion to grant a view of the scene. (Massenberg v. United States, 19 F.2d 62 (4th Cir., 1927)) In those jurisdictions that do allow viewing of the scene there is a further conflict of opinion on the question of whether the accused has the right to be present when the view is taken by the jury. The Supreme Court of the United States discussed the question extensively in the case of Snyder v. Massachusetts, 291 U.S. 97, 78 L.ed. 674, 54 S. Ct. 330 (1953). The court outlined the variations in case law on the subject and described the dithering legal philosophies underlying the various viewpoints. The Supreme Court pointed out that some state courts consider that a view is part of the trial while others hold that it is not. The Supreme Court also explained that some state courts hold the view to be equivalent to an examination of a witness, requiring the defendant's attendance, but that the better reasoning is that physical objects are not witnesses and it is questionable whether the defendant has a privilege to attend. Finally, the court pointed out that in other states the defendant may be excluded at the discretion of the trial judge. (291 U.S. at 118-120) (citations omitted)

The court ultimately held that it was not necessary for a defendant to be present at a viewing of the crime scene by the jury. The court reasoned that:

"There is nothing he [defendant] could do if he were there, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene."
(291 U.S. at 108)

The Utah Supreme Court examined the same question in State v. Mortensen, 26 U. 312, 73 P. 562 (1903), appeal dismissed in 27 U. 16, 74 P.120. In the opinion the court quoted the existing statute which authorized a view by the jury of a crime scene. Revised Statutes of Utah, Sec. 4870 (1898).

"When in the opinion of the court it is proper that the jury should view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of an officer, to the place, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time." (73 P. at 571)

After quoting the statute, the court concluded:

"It will be observed that, by the terms of the statutory provision above quoted, the granting of the view is left to the sound discretion of the trial court. Neither the presence nor absence of the accused is made a requirement." (73 P. at 571) (emphasis added).

The Utah Supreme Court finally held that since the view was neither a part of the trial nor the taking of evidence, the defendant's attendance was not required. (73 P. at 570 and 571).

The present statute which permits the jury to view a crime scene is Utah Code Annotated § 77-31-26, (1953). This statute is identical to Revised Statutes of Utah, Sec. 4870 (1898), quoted supra. The Utah Supreme Court reviewed section 77-31-26 in the more recent case, State v. Delaney, 15 U.2d 338, 393 P.2d 379 (1964), as follows:

"When a view of the scene is ordered, the trial court should appoint somebody to conduct the jury thereto, and should simply maintain order, but without any further participation." 393 P.2d at 380 (emphasis added)

It is very clear that the trial court in the present case handled the matter of the viewing of the crime scene properly. All of the provisions of the Utah Code and the pertinent case law were followed explicitly.

There are three rights which appellant has claimed were violated by not allowing him to accompany the jury; (1) the right to monitor the viewing; (2) the right to be present when evidence is taken; (3) the right to be present at all "critical" stages. None of these claimed rights are valid under the facts of this case. There was no need for the defendant or his counsel to monitor the view. Three deputies and the ballif adequately took care of supervising the thirteen jurors. Each deputy was sworn to monitor the jurors in the appropriate manner. No evidence was taken or allowed to be taken.

Finally, the view by the jury was not a "critical" stage of the prosecution. The United States Supreme Court has said that a defendant has the right to have counsel for his defense at "critical" stages of the prosecution. United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967). "Critical" stages are defined as any time counsel's presence is necessary to assure a meaningful defense. (388 U.S. at 225). If the defense counsel is present he can preserve the defendant's basic right to a fair trial by being better prepared to cross-examine the witnesses and to lend greater assistance during trial. (388 U.S. at 225-227). Custodial interrogation of the accused is recognized as a critical stage (Escobedo v. Illinois, 378 U.S.

478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964)), as is out-of-court identification of the accused. United States v. Wade, supra. Counsel can make sure that a confession is not coerced or that a line-up is not conducted in a prejudicial manner. However, the Supreme Court has recognized that many stages are not "critical." requiring the presence of counsel. Taking a handwriting sample is not a "critical" stage because there are very few ways in which the sample can be taken. The accused can always confront the state's findings at trial through ordinary cross-examination and the use of expert witnesses. Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967). Likewise, scientific analysis of the accused's fingerprints, blood, clothing, hair, and the like are not critical stages. United States v. Wade, supra. The Court noted that there is minimal risk that the absence of counsel at such analysis would derogate the accused's rights to a fair trial. (388 U.S. at 228).

Following the reasoning of the Supreme Court, it is evident that a view by the jury is not a "critical" stage. There are very few ways to view a room, counsel was not going to cross-examine the jury, and no evidence was taken. There is no right of the accused which counsel could have better protected by being present at the viewing.

Even if the trial court did err in allowing the jury to view the crime scene in the absence of the defendant, the conviction should be affirmed. Appellant moved the court to proceed in a certain manner and therefore cannot assign error to such procedure.

Utah, along with numerous other jurisdictions, limits the rights of appellants in what can and cannot be appealable errors. Such situations come into existence where defendant pled error to some facet of a trial where they induced the court into error or acquiesced to the decision made. This "after-the-fact" argument is exactly what appellant is doing on this appeal. Simply stated, he is attempting to better his chances by claiming error to the ruling of the court which he asked the court to make. This "afterthought" approach claims "prejudice" when in fact no such prejudice existed.

A leading case of the United States Supreme Court in this area, Johnson v. United States, 318 U.S. 18, 63 S.Ct. 549, 87 L.Ed.704 (1943), held that the practice of claiming error on appeal from self-induced requests at trial cannot be sustained. The Court said:

"We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial."

Whether the cases have been criminal or civil, the Utah Supreme Court has been quick to uphold the position referred to above. In State v. Aikers, 87 Utah 507, 51 P.2d 1052 (1935), the Court said:

"We think the rule applicable that a party cannot successfully assign as error a ruling which he himself induced the court to make."

This position was reaffirmed in the brief opinion of the court in State v. Fair, 28 Utah 2d 242, 501 P.2d 107 (1972), where the defendant's counsel chose to examine a witness outside of the presence of the jury and claimed on appeal that it was prejudicial error for the judge to have granted such motion. The court made it clear that the error complained of was self-induced and that it would not be permitted to stand on appeal. The court said:

"Counsel chose not to do so, whether as a matter of strategy or otherwise--and it does not lie in the mouth of defendant now to claim error having either wittingly or unwittingly invited it."

See also, State v. Phippen, 280 Kan. 962, 494 P.2d 1137 (1972); State v. Gilreath, 107 Ariz. 318, 487 P.2d 385, (1971), cert. den. 406 U.S. 921, 32 L.Ed.2d 121, 92 S.Ct. 1781; Stilley v. People, 160 Colo. 329, 417 P.2d 494 (1966).

In the instant case, since the trial court allowed the jury a view of the scene at the insistence of the defense counsel, such action cannot be assigned as error on appeal by the defense counsel. If defense counsel did not want the jury to view the scene in the absence of the defendant, he could have recalled his motion.

Applying the rationale of the above-cited statutes and authorities to the instant case, it is clear that the decision of the trial court in not allowing the defendant or his counsel to accompany the jury was completely within the proper bounds of discretion and constituted no reversible error. The conviction of appellant should be affirmed.

POINT II

AFTER A MISLEADING REMARK MADE BY DEFENSE COUNSEL DURING SUMMATION, THE TRIAL COURT CORRECTLY POINTED OUT THAT AN AGGRESSOR IS DETERMINED AT THE TIME THAT SELF-DEFENSE IS CLAIMED AND NOT BY EVENTS THAT OCCURRED TWO DAYS BEFORE THE FATAL ENCOUNTER AND PRIOR TO A MUTUAL WITHDRAWAL.

During the course of his summation defense counsel called the jury's attention to the fact that the first bullet fired between the appellant and the decedent, David Gray, was fired by the decedent with a rifle during the Saturday incident. Defense counsel was implying that because Gray shot first on Saturday, he was the aggressor on the night of the fatal shooting. As is demonstrated infra, defense counsel's remarks were misleading to the jury. The trial court interrupted in order to correct and clarify what had been said. The trial court correctly pointed out that an aggressor is determined at the time that self-defense is claimed and not by prior acts, although prior acts may have an influence on what occurs. Defense counsel excepted to the correction and now claims error. Appellant claims that the judge's remarks confused and misled the jury as to whether the defendant, in self-defense, could pursue and seek out his assailants. Appellant also claims that the remark prejudiced his right to present his defense to the jury. Respondent submits that the trial judge gave the correct version of the law and properly interrupted defense counsel to avoid his misleading the jury.

The trial court may and should regulate the argument of counsel, and it is proper for the court,

of its own motion, to interpose when counsel is transgressing the rules or misstating the law. In Commonwealth v. O'Connell, 274 Mass. 315, 174 N.E. 665 (1931), the court said:

"The presiding judge should be the 'directing spirit and dominating force of a trial to the end that a just result is reached.' [Cite omitted.] To accomplish this result he may in his discretion stop them when they occur" [Cites omitted.] 174 N.E. at 668.

An accused has the right to have his counsel argue the law insofar as the law is not misstated, State v. Gilbert, 65 Idaho 210, 142 P.2d 584 (1943). But the trial court has the duty to make certain that members of the jury are not led astray by improper statements of attorneys. People v. Estrella, 116 CA2d 713, 254 P.2d 182 (1953).

This responsibility to regulate the arguments of counsel is part of the discretion that is given a trial judge. It is particularly important for the trial court to be attentive to counsel's closing arguments to make certain that the jury is properly informed as to the law. Therefore, control of the closing argument is left to the trial court, which is granted broad discretion to control the conduct of the trial Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969); State v. Goodin, 8 Or. App. 15, 492 P.2d 287 (1971). Appellate courts will only interfere when gross abuse of discretion is made to

(1962), cert. den. 371 U.S. 873, 9 L.Ed.2d 112, 83 S.Ct. 144.

In the instant case defense counsel gave an incorrect interpretation of the law of self-defense to the jury. The trial court, in the proper discretion and exercise of its authority, interrupted defense counsel in order to clarify the law. It was the trial court's duty to furnish the jury with correct information.

Even if there was any abuse of discretion, there was not that gross abuse that is necessary before an appellate court should interfere. The Utah Supreme Court in State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297, 301, 302 (1969), wrote with regard to alleged error:

"...the alleged error must be evaluated in conformity with the provisions of Section 77-42-1, U.C.A 1953; an appellate court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. This court may not interfere with a jury verdict, unless upon review of the entire record, there emerges errors of sufficient gravity to indicate that defendants' rights were prejudiced in some substantial manner, i.e., the error must be such that it is reasonably probable that there would have been a result more favorable to the appellant in the absence of error."

State v. Baran, 25 Utah 2d 16, 474 P.2d 728 (1970); See State v. Johnson, 25 Utah 2d 160, 478 P.2d 491 (1970); State v. Neal, 1 Utah 756, 262 P.2d 756 (1953).

The Utah Supreme Court reaffirmed the principle in State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322, (1974), where the court stated in a criminal trial for robbery:

"that there should be no reversal of a conviction merely because of error or irregularity, but only if it is substantial and prejudicial in the sense that in the absence there is a reasonable likelihood that there would have been a different result."
30 Utah 2d at 370, 371.

The law of self-defense is universally recognized. When one is under the necessity of killing another in order to save himself from death or great bodily harm, he may kill the other without fear of punishment. Allen v. United States, 150 U.S. 551, 37 L.Ed 1179, 14 S.Ct. 196 (1893). However, among other restrictions on the use of self-defense, the slayer must establish that he was not the aggressor and that he did not provoke the fatal conflict. DeVaugh v. State, 232 Md.447, 194 A.2d 109 (1963), cert. den. 376 U.S. 927, 11 L.Ed.2d 623, 84 S.Ct. 693.

The pertinent Utah self-defense statute is Utah Code Ann. §§76-2-401, 402 (1973).

"Section 76-2-401. Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

(1) When the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2 402, through 76-2-406 of this part;

* * *

Section 76-2-402. (1) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony.

"(2) A person is not justified in using force under the circumstances specified in paragraph (1) of this section if he:

"(a) Initially provokes the use of force as an excuse to inflict bodily harm upon the assailant; or

(b) Is attempting to commit, committing, or fleeing after the commission of a felony; or

(c) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force." (Emphasis added.)

It is obvious that self defense is not available to one who is the aggressor. The aggressor is the one who performs the acts which produce the specific occasion and bring on the difficulty. Wallace v. United States, 162 U.S. 466, 40 L.Ed.2d 1039, 16 S.Ct.

859 (1895). Therefore, even if the deceased struck the first blow, or fired the first shot, the accused may not rely on self-defense if he was the aggressor. Adams v. State, 35 Tex. Crim. 285, 33 S.W. 354 (1895).

As the transcript is reviewed, it is evident that the defense counsel gave incorrect and misleading information to the jury concerning the term "aggressor." He said:

[MR. HANSEN:] Let me tell you, Ladies and Gentlemen, what the court has defined the aggressor as. 'An aggressor is the one who first' --and underline that word and put it in quotes and circle -- first 'is the one who first does acts of such a nature as would ordinarily lead to a deadly combat or as would put the other person involved in fear of death or serious bodily injury.'

It's undisputed, there isn't one witness that disputes that the first shooting involved in this couple of days' spree was with a rifle by Gray and Blood at Sonny Scott in the alley Saturday night, and with their way of life -- (T. 488)"

It was then the duty of the trial court information on the law. The trial court said:

"THE COURT: Mr. Hansen, I am going to have to interrupt you.

MR. HANSEN: That's fine.

THE COURT: The aggressor is determined at the time that the self defense is claimed, not by prior acts, although prior acts may have an influence on what occurred at the time. You may proceed. I'm sorry to interrupt you.

MR. HANSEN: May I note my exception to that?

THE COURT: You may.

MR. HANSEN: Thank you. (T. 488-489)"

The jury was, in fact, confused by the remarks of the defense counsel. After several hours of deliberation they asked the following question:

"FOREMAN: How far can a man go in pursuing someone under the law, under the guise of self defense. That is, basically, is a man justified under the rules of self defense to go after the man or -- (T. 540)."

This demonstrates that the jury was confused into thinking that appellant had the right to go after Gray on Tuesday morning simply because Gray had assaulted him on Saturday.

There is no authority, including that offered in appellant's brief, for the statement that one may, in the name of self-defense, seek out his original assailant for the purpose of killing him. Appellant offers nine cases but a cursory examination reveals that none of them speak to the professed point.

In Jones v. Commonwealth, 187 Va. 133, 45 S.E. 2d 908 (1948), the defendant was beaten up by X, defendant went home and got a weapon and stayed home. X came to defendant's house and made a move as if to draw a gun. Defendant shot X. But defendant did not go looking for X after X originally withdrew.

In State v. Feeley, 194 Mo. 300, 92 S.W. 663 (1906), defendant came to town looking for a fight. He finally started to pick on X. Defendant mistakenly understood that X had threatened him. Defendant shot X six times while X was unarmed. Defendant was convicted because he sought out and killed the man who he thought threatened him.

State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963), says you can go where you have a right to be, but says nothing about seeking out the adversary to kill him. The other cases cited by appellant are similarly distinguishable on the same basis.

Alternately, appellant claims that self defense is available to an individual if he acts affirmatively in response to acts or threats of another even though the other's acts or threats are removed in time and circumstances from the fatal encounter, so long as there is a close connection. While this statement may be true in the abstract, it has no application to the instant case. The authority offered in support is used entirely out of context and has no bearing to the case at hand except to prove that the conviction should be affirmed. Recalling the facts, it should be remembered that Gray shot at appellant on Saturday. Appellant returned the fire. Both withdrew. Two days later, on Monday night, at 8:00 p.m., appellant, seeing

Gray on the street, fired three shots. Then at 11:00 a.m., appellant, thinking Gray was at home, fired into Gray's house. Finally, realizing Gray was at the Elks Club, appellant sought him there and killed him.

Defendants counsel intended to show that because Gray fired first on Saturday, appellant had the right, in self defense, to act on that assault by killing Gray on Tuesday morning. Defendant's counsel proposes that these are all the same circumstances and that the relation of time is close enough to show appellant that action. Appellant cites State v. Lee, 85 S.C. 101, 67 S.E. 141 (1910), and 40 Am.Jur.2d, Homicide, § 45 as authority. However, if the opinion in the Lee case is examined and if the entire paragraph is read in context in Am. Jur., it is evident that the appellant's conviction must be affirmed. Both authorities stand for the proposition that a jury can look at the accused's activities (faults) shortly before the fatal encounter to determine if he was in fact the aggressor (at fault). They say nothing concerning the faults of the decedent or of the right of the other to kill a faulting decedent. If the two authorities are to be used, they demonstrate that since appellant made three attempts on Gray's life in one night, finally succeeding, and since the times

of the three attempts were so closely connected, appellant was the aggressor and his conviction should be affirmed.

Finally, it should be pointed out that defense counsel himself said the very thing that he excepted to having the judge say. Defense counsel, in effect, admitted that the judge was correct in interrupting him. The trial court had said:

"The aggressor is determined at the time that the self defense is claimed, not by prior acts (T.488)."

Later, defense counsel, while attempting to play down all the shooting by appellant on the night of the homicide, said:

"Prior difficulties have nothing to do with it. It's what happens at the time of the event. (T.492)."

If "prior difficulties" two hours removed from the fatal shooting should not be considered in determining if appellant was the aggressor, then certainly "prior difficulties" two days removed should not be considered as proof that the decedent was the aggressor.

Applying the above rules, reasoning and authority to the facts of the case, it is clear that the defense of self defense is not available to the appellant. It is also evident that the trial court was performing a proper duty in correcting the misleading statements of defense counsel before the jury.

There was no error and the conviction should be affirmed.

CONCLUSION

There was no error in the trial court ruling that the jury could view the crime scene under the supervision of deputies but without the presence of defendant or his counsel. Further, the trial court had a duty to correctly point out to the jury that an aggressor is determined at the time that self defense is claimed and not by events that occurred two days before the fatal encounter and prior to a mutual withdrawal. This court should affirm the verdict and judgment of the trial court.

Respectfully submitted,

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