

1976

Utah v. Gill Thomas : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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COURT

OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff and Respondent, *

-vs- *

GILL THOMAS, *

Defendant and Appellant.

14416
Case No. 28353

APPELLANT'S BRIEF

Appeal from the Judgment of the 3rd
District Court for Salt Lake County
Honorable Judge Peter F. Leary

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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STATE OF UTAH,

*

Plaintiff-Respondent

*

-vs-

*

Case No. 28353

GILL THOMAS,

*

Defendant-Appellant

*

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APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction, on the charge of distributing a controlled substance, Utah Code Annotated 58-37-8 (1) (a) (ii) (1953).

DISPOSITION IN LOWER COURT

Appellant was tried in the District Court of the Third Judicial District in and for Salt Lake County, Honorable Judge Peter F. Leary presiding, on December 10, 1975. Upon trial to the court, the Appellant was found guilty of the offense of distributing a controlled substance.

RELIEF SOUGHT ON REVIEW

Appellant prays that the judgment of the lower court be reversed and the case be remanded for a new trial.

STATEMENT OF FACTS

On August 10, 1975, Police Officers Mike Roberts and Jerry Mendez, with the Salt Lake Police Department, picked up Denise Giertz at her home

and transported her to the Hall of Justice. Denise Giertz was then searched by Sandy Ellison, a clerk/typist for the Salt Lake Police Department. Sandy Ellison's training in search technique consisted of oral instructions from Officer Roberts and one prior search. She did not have any equipment with which to perform a proper search and stated that she did not make a complete search of Denise Giertz's body.

After the search, Denise Giertz was transported to the Rio Grande Depot in Officer Roberts' car and given \$150.00 with which to make a buy. She spotted Appellant, who she knew previously, in front of a duplex at approximately 900 West Second South and approached him. After waiting for him to finish a conversation with another person she accompanied Appellant into the duplex.

Some 5 to 15 minutes later, Denise Giertz returned to the officer who had transported her to the depot and gave him \$100.00 and a small foil packet containing cocaine. Immediately after Denise Giertz returned, Officer Roberts responded to a suspected robbery. He dropped Denise Giertz off at Pioneer Park while he checked out the robbery situation. He states that from the time Denise Giertz returned to the car, to the time he returned to the police station, he held the money and the packet in his left hand, including during the time he investigated the robbery. Denise Giertz remained in Pioneer Park for a period of time, perhaps 20 minutes, while Officer Roberts investigated the robbery situation.

When Officer Roberts returned he picked up Denise Giertz and took her to the Hall of Justice, where she submitted to a second search, again by Sandy Ellison, and the packet was checked in to evidence.

Appellant was subsequently arrested and charged with distributing a controlled substance. At the preliminary hearing, Officers Roberts and Mendez, and Denise Giertz were called. No other persons were named on the information or called at the preliminary hearing

ARGUMENT

POINT I.

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF WITNESSES WHO WERE NOT NAMED IN THE INFORMATION.

Two witnesses were called at trial by the prosecution who were not named on the information nor called during the preliminary hearing. These two persons were Sandy Ellison, who conducted the search of Denise Giertz, and Donald Gunderson, the toxicologist who testified as to the content of the packet which Denise gave to Officer Roberts after her visit to the Appellant. The testimony of both these witnesses should have been excluded as prejudicial to the defence.

In State of Utah v. Rohletter, 108 Utah 1, 452, 375 Pac. 2nd 392 (1948) the Utah Supreme Court held, in a case involving the prosecutor's attempt to add a charge to the information during the course of the trial, that no amendment can be made which would essentially alter the nature of the case so as to prejudice the defendant in making his defense.

Appellant recognizes that the admission of witnesses is a matter within the discretion of the trial court, but this discretion must be tempered to exclude those witnesses which will surprise the defense and award an unfair advantage to the prosecutor. In this case there was no reason why these persons should not have been included on the information

as both were known and available to the prosecution at every stage of the case. Likewise, there is no reason why these persons should not have been called at the preliminary hearing. The fact that they were not, however, negates any argument by the state that defendant could or should have requested a bill of particulars or made a motion to quash as he had no notice that there was any need for such.

The introduction of testimony by Sandy Ellison and Donald Gunderson created substantial prejudice against the defense in that Appellant was not able to prepare to examine these witnesses or to marshall a competent cross examination. They created an element of surprise to the substantial detriment of Appellant.

The trial court's admission of the testimony of these two persons was a prejudicial error which warrants reversal of Appellant's conviction and entry of a new trial.

POINT II.

THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED MORE THAN ONE WITNESS TO USE THE SAME CHART AFTER THE EXCLUSIONARY RULE HAD BEEN INVOKED.

The trial court allowed the prosecution to examine Officers Roberts and Mendez and Denise Giertz with the aid of a drawing, first made by Denise Giertz, which depicted the layout of the streets around the place where Appellant is alleged to have sold a controlled substance to Denise Giertz. This drawing was used to show the vantage points of the two officers during the events of August 10, 1975, here in question.

In as much as the witnesses were not able to agree as to the details of construction of the duplex, the clothing of persons on the premises and the distances involved, the use of this diagram was unduly influential and suggestive, thereby counteracting the effects of the exclusionary rule.

In People v. Ketchel, 381 Pac. 2d (1963) the California Supreme Court dealt with a robbery/homicide appeal in which this same objection is raised, i. e. that witnesses used and added to a single diagram. The court held in that case that the record did not disclose any flagrant misuse of the diagram but went on to list the factors it considered in coming to this conclusion. Among the factors the court cited as indicating that there was no prejudice was the absence of any explanation to witnesses subsequent to the first one as to what earlier marks meant, except for land marks. In this case the prosecutor also pointed out the location of the various parties, as indicated by prior witnesses. These locations were important in establishing corroboration of Denise Giertz's testimony, and therefore, where the prosecutor, in fact, pointed out such aspects of the chart during his examination of the two officers, it was an error for the court to allow more than one witness to use the chart. It is clear from the record that the markings of prior witnesses must have had a substantial influential effect on the testimony of subsequent witnesses. Violation of the exclusionary rule in this case is prejudicial error which warrants granting a new trial to Appellant.

POINT III.

THE STATE HAS NOT PROVED IT'S CASE BEYOND A REASONABLE DOUBT; DEFECTS IN THE SEARCH OF THE INFORMER AND IN CUSTODY OF THE EVIDENCE RAISED REASONABLE DOUBTS ABOUT APPELLANT'S GUILT.

The basic reason for search of an informant before a buy is made is that an informant is buying something, generally his freedom, with the information he gives and the convictions he participates in. This puts a large amount of pressure on the informant to perform, to produce buys, even if they must be manufactured. The police department recognizes this risk and takes the precaution of making a search. In this case, however, the search was incompetently done, and as such was as good as no search at all.

Sandy Ellison, at the time she had made the search in question, had been given only oral instructions as to the procedure for such a search. She had participated in only one search prior to her search of Ms. Giertz. She was apparently not aware that there exists equipment by which a proper search of the vagina is made, nor did she seem inclined to make a complete search, yet it is not unheard of for narcotics to be hidden in such areas of the body.

Denise Giertz had opportunities, while out of the sight of Officers Roberts and Mendez, to retrieve any narcotics which she might have had hidden on her person and which an inexperienced searcher might not have found. It should be noted at this point that Denise did opt to take off in a different direction from where she had been directed to go, a course

which took her out of the sight of Officer Roberts and which required Officer Mendez to change his position before he could establish surveillance.

Denise Giertz testified that she has been involved with heroin and other drugs in the past and that she is presently taking methadone. She testified that she had not been given any immunity or any deal in exchange for her testimony, but that the officers knew that she was an addict at the time they enrolled her as an informer though she was not arrested then or at any time subsequent for use of a controlled substance.

MR. WHITE: Isn't it a fact that one of those police officers knew you were a user?

DENISE GIERTZ: I couldn't answer that, I don't know for sure.

MR. WHITE: Isn't it a fact that one of them got you a line with one of the treatment programs?

DENISE GIERTZ: Yes.

MR. WHITE: So he knew you were a user, didn't he?

DENISE GIERTZ: I imagine so, yes.

MR. WHITE: When did you enroll in that?

DENISE GIERTZ: August 5th.

MR. WHITE: But you were on their payroll the 31st?

DENISE GIERTZ: Yes.

MR. WHITE: And you were using then?

DENISE GIERTZ: Yes.

MR. WHITE: Well, did anybody ever say anything about why you weren't being arrested for using while you were working for the police?

MR. BOWN: Your Honor, I would object to this, this is not relevant to the case, this happened August 10th.

COURT: Objection is sustained.

It is easily inferred from the testimony given above that the police had ample opportunity to put pressure on Denise Giertz and that she, therefore, had sufficient motivation to manufacture a bust.

Further, Denise Giertz was hazy as to many of the details of what happened on August 10th, though this was the only buy she made that day, so that there were no others to confuse it with. Denise Giertz's testimony was sharp and clear only as to those facts which would be essential to convict the defendant. Other than those things, she could not gauge the time of her stay at any place that day, the complexion of a man or the color of a shirt or a car.

While it is important that Denise Giertz had the motivation and the opportunity to set Appellant up, there is one other aspect of the custody of the tin foil packet which bears scrutiny. Officer Roberts testified that at the time Denise Giertz handed him the packet, he took it in his right hand, transferred it to his left, and then carried it in his left hand during investigation of a suspected robbery and up until the time it was turned in to evidence at the Hall of Justice. Officer Roberts is adamant that the packet never left his hand from the time he received it from Denise Giertz until he placed it in evidence. The improbability of this story also casts some doubt on the credibility of Officer Roberts.

Either Denise Giertz or Officer Roberts could easily have set Appellant up. Denise Giertz, especially, had strong motivation, due to her vulnerable position as a user, or past user, of heroin, and ample opportunity, aided in this respect by the incompetent search performed by Sandy Ellison.

Under these circumstances, the state did not present sufficient evidence to overcome Appellant's defense that he was framed, and therefore leaves a reasonable doubt, sufficient to warrant a new trial, as to Appellant's guilt.

CONCLUSION

In conclusion, the Appellant did not receive a fair trial, consistent with the concepts of due process because of the admission of testimony by prosecution witnesses who were not named in the information nor called at the preliminary hearing, violation of the exclusionary rule, and because defects in the custody of evidence and credibility of the witnesses as to that evidence result in a failure of the state to prove it's case beyond a reasonable doubt. Because of the cumulative effect of the points relied on by Appellant, it is urged that Appellant be granted a new trial.

RESPECTFULLY SUBMITTED,

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