

1976

State of Utah v. Gary Alred Mitcheson : Brief of Appellants on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff and)	
Respondent,)	
)	
vs.)	Case No. 14629
)	
GARY ALFRED MITCHESON,)	
)	
Defendant and)	
Appellant.)	
)	
)	
)	

* * * * *

APPELLANTS' BRIEF ON APPEAL

* * * * *

Appeal From a Judgment Of The
Seventh District Court of Carbon County,
Honorable Edward Sheya, Jr., Judge

* * * * *

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FILED

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and
Respondent,

vs.

GARY ALFRED MITCHESON,

Defendant and
Appellant.

Case No. 14629

* * * * *

APPELLANTS' BRIEF ON APPEAL

* * * * *

STATEMENT OF NATURE OF CASE

Appellant, Gary Alfred Mitcheson, was accused of having committed the crime of Murder In The Second Degree as a result of the shooting death of Richard Herrera at Price, Utah on the 7th day of February, 1976.

The case was tried in the District Court of Carbon County, State of Utah before the Honorable Edward Sheya, sitting with a jury.

A verdict was returned by the jury, finding appellant, Gary Alfred Mitcheson, guilty of having committed the crime of Murder In The Second Degree.

DISPOSITION IN THE LOWER COURT

Gary Alfred Mitcheson, appellant, was sentenced and committed to the Utah State Prison to serve a term of five (5) years to life by the Honorable Edward Sheya, and appellant has undertaken this appeal to the Supreme Court of the State of Utah.

RELIEF SOUGHT ON APPEAL

Appellant, Gary Alfred Mitcheson, seeks a reversal of the Judgment entered by the trial Court and a new trial.

STATEMENT OF FACTS

On December 15, 1975, Ernie Herrera, younger brother of Richard Herrera, the shooting victim, sold his 1967 model Chevrolet Van automobile (State's Exhibit 2) to Alfred Mitcheson, father of appellant, Gary Alfred Mitcheson. A Bill of Sale (State's Exhibit 3) was prepared and possession of the 1967 Chevrolet Van automobile was transferred from Ernie Herrera to Alfred Mitcheson.

Wheels and tires on the 1967 Chevrolet Van automobile were substituted by "Mag Wheels" and tires. Ernie Herrera claimed the "Mag Wheels" and tires were not included in the sale evidenced by State's Exhibit 3 (R-12, 13), appellant claimed the "Mag Wheels" and tires were included in the sale (R-213, 214). In January, 1976, some two or three weeks before the shooting of Richard Herrera, Ernie Herrera, Richard Herrera, Mike Manzanares and Louis Grant appeared at the home of Alfred Mitcheson and began removing the "Mag Wheels" and tires from the 1967 model Chevrolet Van automobile (R-22, 219 and 220). Officer Tilton, responding to a call from Alfred Mitcheson, arrived at the home of Alfred Mitcheson and instructed Ernie Herrera, Richard Herrera, Mike Manzanares and Louis Grant to put the wheels and tires back on

the Van and to go to Court to resolve any issue over the ownership of the "Mag Wheels" and tires (R-22, 219, 220 and 222).

At a time just before midnight on February 6, 1976, appellant was parked in the 1967 Chevrolet Van automobile at the Taco Time drive inn at Price, Utah talking with Karen Thorsen when Richard Herrera came up to the parked Van, opened the door and struck the appellant on the jaw and in the eye while appellant was seated in the Van (R-28, 222 and 223). Richard Herrera then informed the appellant that he (Richard) was "coming down and get them tires tomorrow even if I have to put you under" (R-222).

Some two hours after the incident at the Taco Time when Richard Herrera struck the appellant on the jaw and in the eye, and after appellant had related the Taco Time incident to his sister Debbie and five others, Debbie and one of the five and the appellant with the other four left in two separate vehicles from the residence at 432 South Fourth East, Price, Utah where the appellant sometimes stayed with his sister, Debbie (R-206, 224 and 225). The vehicle in which Debbie and Tom Banks were riding and the vehicle in which the appellant and the four other persons were riding went in separate directions from 432 South Fourth East, but arrived at the residence of Jerry Giraud, where the car of Richard Herrera was observed, at approximately the same time (R-225). Appellant instructed his sister to go to the house of Jerry Giraud and tell Richard Herrera that if he (Richard Herrera) wanted to fight appellant to come outside and fight. No fight took place between Richard Herrera and appellant at the residence of Jerry Giraud; however, a fight between Richard Herrera and the appellant was arranged to take place the following afternoon at two o'clock (R-225, 226 and 227).

After the arrangement of the afternoon fight at the park between Richard Herrera and the appellant, as appellant was leaving the house of Jerry Giraud, appellant testified to hearing the words, "if you're still alive tomorrow" uttered (R-227).

Appellant dropped his friends off at town, except for Wendell Johnson who accompanied appellant to the home of Alfred Mitcheson. Appellant picked up the rifle with which Richard Herrera was shot, informed his father he was staying at Debbie's place, went back to town, met Albert DiCaro, arranged for a card game at Debbie's place, and arrived at Debbie's in the company of Wendell Johnson sometime after 2:00 o'clock a.m. (R-227 and 228).

Subsequent to the arrangement, at Jerry Giraud's house, by Richard Herrera and the appellant for the afternoon fight at the park, Richard Herrera began a roundup of some of his friends to go to the house where appellant was staying with his sister for the purpose of taking the wheels and tires from the Van (R-51, 160, 161, 167 and 169). Two cars of people (R-53, 161 and 170), consisting of five males and three females (R-30, 31, 51, 53, 168, 169 and 170) proceeded to the house at 432 South Fourth East where appellant was staying with his sister, Debbie, arriving there at approximately 3:30 o'clock a.m. (R-161). Debbie Mitcheson came out of the house and told the intruders to get off the property, a command which was ignored (R-171). Debbie was screaming, hollering and yelling (R-52, 161 and 174) and the appellant appeared in the doorway of the front porch; there was a shot and Richard Herrera fell to the ground (R-162).

ARGUMENT

Point 1

The Trial Court committed Reversible Error in failing to give appellant's Requested Jury Instruction expressing The Defense Of Justification as a theory of appellant's case.

Appellant, by his Requested Jury Instruction No. 15, requested that the trial Court present one of the theories of his case, use of deadly force in defense of his habitation, to the jury for its (jury's) consideration. The trial Court refused appellant's requested instruction, and exception to the Court's failure to give the requested instruction was taken (R-328).

Appellant's requested instruction is a verbatim expression of 76-2-405 (1), Utah Code Annotated, 1953, as amended, and this Court has on numerous occasions held that a party is entitled to have his theory of the case which is supported by competent evidence, submitted to the jury by appropriate instructions; and that failure to present for the jury's consideration a party's theory by appropriate instructions constitutes reversible error. State vs. Newton, 105 Utah 561, 144 Pa 2d 290 (1943); State v. Johnson, 112 Utah 130, 185 Pa 2d 738 (1947); State v. Castillo, 23 Utah 2d 70, 457 Pa 2d 618 (1969).

The question presented by this appeal then comes down, it would seem, to a determination of whether or not there was enough competent evidence presented to the jury to support one of the theories of appellant's case-- that the appellant was justified in taking the life of Richard Herrera by the use of deadly force, believing that such deadly force was necessary to

prevent or terminate Richard Herrera's unlawful entry into or attack upon the habitation of the appellant.

First of all, there was evidence presented that appellant lived at 432 South Fourth East, the place where the life of Richard Herrera was taken (R-206 and 207).

There can be no question but that the entry of Richard Herrera upon the property as 432 South Fourth East was unlawful in that his expressed purpose of going there was to remove wheels and tires from a vehicle, knowing full well that ownership of the wheels and tires was disputed (R-160 and 161).

Was the entry upon the property at 432 South Fourth East by Richard Herrera made in a violent and tumultuous manner? It was 3:30 o'clock a.m. The appellant heard automobiles pull up; saw a couple of people coming through the driveway; and noticed doors swinging open on another automobile (R-236). There was shouting, yelling and hollering in the yard (R-53, 54 161 and 162). The appellant heard a big bang on the front door -- somebody beating on the door (R-236). One of the State's witnesses, Larry Michael Giraud, would have seemed to have sensed that trouble was in the air as he escorted his brother Jerry from the yard before the shooting (R-51 and 52).

Was there evidence that the appellant believed that the entry of Richard Herrera upon the premises at 432 South Fourth East was made for the purpose of assaulting or offering personal violence to any person, dwelling or being therein and that the force was necessary to prevent the assault or offer of personal violence? Remember that Richard Herrera was recognized by the

appellant as one of the persons coming onto the property at 432 South Fourth East at 3:30 o'clock a.m. (R-236). Remember also that some three or four hours earlier at the Taco Time, Richard Herrera had struck the appellant on the jaw and in the eye (R-221 and 222) and informed him (appellant) that he (Richard Herrera) was coming down to get the tires even if he (Richard Herrera) had to put him (appellant) under (R-222). Richard Herrera had been drinking and an afternoon fight at the park had been arranged between appellant and Richard Herrera (R-223 and 226). Appellant heard a big bang on the front door and somebody beating upon the door (R-236). Appellant was scared and frightened and asked Albert DiCaro if he (Albert) was going to help fight, and got a negative response from Albert (R-237).

CONCLUSION

There was ample evidence for the jury to consider, showing that Richard Herrera came upon the property where appellant was residing in an unlawful manner; that the entry upon the property was violent and tumultuous; that appellant could reasonably believe that violence would be done to his (appellant's) person; and that the use of deadly force was necessary to prevent an assault upon his (appellant's) person.

The trial Court therefore committed reversible error by not giving appellant's instruction upon one of the theories of appellant's case, and appellant should be granted a new trial.

Respectfully submitted,



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