

2001

Utah v. Scott : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT 04 FEB 1976

OF THE STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

STATE OF UTAH,)

Plaintiff-Respondent,)

-v-)

GALVESTON SONNY SCOTT,)

Defendant -Appellant.)

Case No.

13889

BRIEF OF APPELLANT

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

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MAY 23 1975

Clark, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,)	
Plaintiff-Respondent,)	
-v-)	Case No.
)	13889
GALVESTON SONNY SCOTT,)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellant, Galveston Sonny Scott, herein appeals from his conviction of the crime of manslaughter in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks presiding.

DISPOSITION IN LOWER COURT

The jury impaneled in the matter found the defendant guilty of the crime of manslaughter, a felony of the second degree, on October 26, 1974. Subsequently, the trial court sentenced appellant to serve an

indeterminate term in the Utah State Prison of from one to fifteen years, as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the verdict and judgment of the trial court and remand of the matter for a new trial.

STATEMENT OF FACTS

On January 1, 1974, at approximately 1:50 a.m., the appellant herein, accompanied by a friend, one Binky Coleman, entered the Beehive Lodge of Elks at 248 West South Temple, Salt Lake City, Utah. Shortly after appellant entered the Lodge, an altercation ensued between appellant and his companion and two other individuals, one Gray and one "Blood." Numerous shots were exchanged in the altercation and the upshot of the encounter was that two persons, David Allen Gray and Phillip Dawson, were killed.

Conflicting testimony was adduced at trial regarding the facts and circumstances surrounding the shooting. Defendant produced at trial numerous witnesses supportive of defendant's contention that he acted in self-defense. At trial, testimony was had to the effect that (A) the individuals involved in the shootout with the appellant had earlier threatened appellant at his home while armed with weapons in a dispute involving some rings allegedly owned by the decedent David Allen Gray (Tr. 359); (B) that the individuals involved in the shootout with appellant had previously assaulted

appellant on the Saturday night preceding the shootout, that they had used weapons on that occasion, and that numerous shots were exchanged at that time (Tr. 311-313, 321, 380-383); and (C) that on the occasion of the commission of the crime of which defendant-appellant was convicted, the other individuals involved had opened fire on the defendant precedent to defendant shooting back, and that the defendant had returned the fire in self-defense (Tr. 281, 300, 302, 333-334, 338, 372).

During the course of trial, counsel for the defendant moved the trial court to permit the jury to view the crime scene. The trial court took the matter under advisement. (Tr. 266.) At a later juncture, subsequent to both parties having rested their respective cases, defendant's counsel renewed the motion to view the crime scene. The motion was granted by the court with the proviso that neither the defendant nor counsel for the defendant nor any other persons other than the jurors and the deputies who accompanied them could be in attendance upon the viewing. Defendant's counsel duly excepted to the court's ruling upon grounds that the viewing of the crime scene was a critical stage of the prosecution and, therefore, the defendant, counsel, and other court personnel should be in attendance. (Tr. 434-435.)

At a later juncture in the trial, in the course of defense counsel's summation, counsel directed the jury's attention to the fact that the other individuals involved in the shootout at the Beehive Elk's Lodge, the

decedent David Allen Gray and one "Blood," had earlier assaulted the appellant and a companion with a rifle. At that juncture, counsel was attempting to point out to the jury that even though appellant had sought out the individuals who had earlier assaulted him, the defendant acted in self-defense in so doing in response to an earlier incident in which appellant's life had been placed in jeopardy. At this point the court interrupted counsel to advise counsel and the jury that such defense was unavailable because the "aggressor" for the purpose of defining the viability of a defense of self-defense is determined at the time of the commission of the offense charged. The court, by its actions, essentially foreclosed that area of comment by counsel. (Tr. 488-489.)

Subsequent to both parties having rested their respective cases, the jury retired to consider the matter. Upon deliberation, the jury returned a verdict against defendant-appellant of guilty on one count of Criminal Homicide -- Manslaughter, and judgment was duly entered by the trial court accordingly. (Tr. 544.) From that verdict and judgment the defendant-appellant brings this appeal.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RULING THAT NEITHER DEFENDANT, HIS COUNSEL, NOR NECESSARY COURT PERSONNEL COULD BE IN ATTENDANCE UPON THE VIEWING BY THE JURY OF THE CRIME SCENE.

During the course of trial in the instant matter, counsel for the defendant moved the trial court to permit the jury to view the crime scene. The trial court took the matter under advisement. (Tr. 266.) At a later juncture, subsequent to both parties having rested their respective cases, defendant's counsel renewed the motion to view the crime scene. The motion was granted by the court with the proviso that neither the defendant nor counsel for the defendant nor any other persons other than the jurors and the deputies who accompanied them could be in attendance upon the viewing. Defendant's counsel duly excepted to the court's ruling upon grounds that the viewing of the crime scene was a critical stage of the prosecution and, therefore, defendant, counsel, and other court personnel should be in attendance. (Tr. 434-435.)

It is well established as a matter of law that trial courts possess the discretionary power to grant a view of the premises constituting the locus of a crime. Such proposition is so well established as to be beyond all dispute, as shown in the following cases: Schoenfield v. United States, 277 F. 934 (2d Cir., 1921), cert. denied 258 U.S. 623, 66 L. Ed. 796, 42 S. Ct. 316 (1922); Massenberg v. United States, 19 F.2d 62 (4th Cir., 1927); Brown v. State, 229 Ala. 58, 755 So. 358 (1934); Bates v. State, 24 Ala. App. 606, 139 So. 879 (1932); People v. Thorn, 156 N. Y. 286, 50 N. E. 947 (1898); Starr v. State, 5 Akla. Crim. Rep. 440, 115 P. 356 (1911). See also, Roberts v. Commonwealth, 94 Ky. L. Rep. 2207, 80 S. W. 457 (1893); Young v. Commonwealth, 141 Ky. 708, 133 S. W. 791 (1911); State v. Dunn, 161 La.

532, 109 So. 56 (1926); State v. Seal, 175 La. 103, 143 So. 18 (1932); 75 Am. Jur. 2d, Trials, § 72 et. seq.; 21 Am. Jur. 2d, Criminal Law, § 295 et. seq.; 124 A. L. R. 141.

In Starr v. State, supra, the Oklahoma Supreme Court clearly enunciated the basic principle to be applied by a trial court considering a motion for viewing of the crime scene. In its decision the court said:

When requested by the state or the defendant, it is the common practice in the courts of this country to permit the jury to visit and view the premises where it is alleged the crime was committed, when in the discretion of the court a view is deemed expedient to enable the jury to better understand and apply the evidence presented in court. (115 P. at 366.)

Similarly, in People v. Thorn, supra, involving a prosecution for murder, the New York Supreme Court held that the granting or refusing of a view by the jury of the place where the crime was charged to have been committed was within the discretion of the trial court under a statute providing for such view when in the opinion of the court it is necessary to assist the jury in understanding the facts of the case.

In its opinion, the court tersely encapsulated the applicable rule:

(It is) . . . discretionary with the trial judge as to whether the view should be had . . . (50 N. E. at 951.)

From the above cases and authority, it should be immediately apparent that a viewing of the crime scene is properly permitted at the trial court's discretion when such viewing is deemed expedient by the court

to enable the jury to better understand and apply the evidence presented to the court. Thus, there can be no dispute here regarding the authority of the trial court, at its discretion, to grant a viewing of the crime scene by the jury. In this case, the nub issue then is not the trial court's authority to grant such motion, but whether the manner in which the court exercised such authority in this particular instance deprived defendant of substantial rights by denying his opportunity and right to be present at such viewing.

There is substantial authority for the proposition that a defendant in a criminal case must and should be accorded an opportunity, once the trial court has exercised its discretionary power to permit a viewing of the crime scene, to accompany the jurors and necessary court personnel to the scene and participate with them in said viewing. Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923); State v. Garden, 267 Minn. 97, 128 N.W.2d 891 (); People v. Auerbach, 176 Mich. 23, 141 N.W. 869 (1913); State v. Hartley, 22 Nev. 342, 40 P. 372 (1895); State v. Slorah, 118 Me. 203, 106 A. 768 (1919); Freeman v. Commonwealth, 226 Ky. 850, 10 S.W.2d 827 (1928); State v. Saunders, 268 Mo. 202 (); Noell v. Commonwealth, 138 Va. _____, 115 S.E. 679 (1923). See also, Carver v. Commonwealth, 256 S.W.2d 375 (1953).

In Freeman v. Commonwealth, supra, the Court of Appeals for Kentucky had before it the issue of whether a defendant in a criminal case had a right to be present on the occasion of a viewing by the jury of the scene of a homicide. The court concluded that, indeed, a defendant does

possess such right, and particularly in a homicide case where, as in the instant case, counsel had vigorously objected to defendant's absence at the time of the viewing. In its decision, the court said:

The jury was allowed to view the premises where the homicide was committed in the absence of appellant. This appears in an order properly entered which shows the objection of the appellant. The order also shows that appellant was absent when the premises were first viewed by the jury. It has been held that the viewing of the premises is the receiving of evidence, and that it is error to allow the jury to view the premises in the absence of the accused. (10 S.W.2d at 827.)

Similarly, in Pierce v. Commonwealth, supra, the Court of Appeals for Virginia had before it the identical issue of whether the defendant in a homicide prosecution has a right to be present on the occasion of the viewing by the jury of the crime scene. In affirmatively answering the proposition, Justice West observed:

A conviction either of manslaughter or of murder in the second degree would be affirmed but for this fact which is disclosed by the record: The jury were permitted to view the premises while the accused remained in the courtroom. In the judgment of the other members of the court, and for the reasons fully stated in the opinion in the case of Noell v. Commonwealth (Va.) 115 S.E. 679, this day handed down, this was error, because the presence of the accused at the view was essential to the validity of the conviction. (115 S.E. at 692.)

In Noell v. Commonwealth, supra, the Supreme Court of Appeals

for Virginia fully sets forth the rationale behind the rule that a defendant is entitled to be present on the occasion of the viewing by the jury of the locus of the crime charged. In its opinion, the court states:

The next inquiry to be disposed of is this: When a view is ordered in a felony case, does the prisoner always have the right to accompany the jury if he so desires? The answer, by what appears to be a clear majority of the decided cases, is in the affirmative. In 16 Corpus Juris, p. 816, the text says:

"It is generally held that the defendant is entitled to be present when the jury are taken to view the place of the crime, on the ground that this is the taking of evidence and a part of the trial, "

and a number of cases are cited in support of this statement.

In Starr v. State, 5 Okl. Cr. 440, 115 P. 356, the court says that --

"It would be better and safer for him to accompany the jury, if convenient, to see that nothing improper occurs at the view."

And it may be confidently asserted that the authorities generally are in accord in holding that the trial courts ought always to permit the prisoner to attend if he so desires. As said in State v. Slorah, 118 Me. 203, 106 Atl. 758, 4 A.L.R. 1256:

"The right of the accused to be present, * * * if he demands it, is very generally recognized as inherent under a proper consideration of the rights of the respondent in a criminal case." (115 S. E. at 681.)

Applying the rationale of the above cited cases and authority to the facts in the instant case, it is clear that the appellant herein was deprived by the ruling of the trial court of his right to be present on the occasion of the jury's visit to the crime scene. It is submitted that such ruling deprived defendant of his right to monitor the viewing so as to prevent improper or inappropriate conduct on the part of the jurors or others. It is further submitted that such ruling deprived defendant of his right to be present when evidence was taken and of his right to be present at all critical stages of his prosecution. This court should reverse the ruling of the trial court and remand this matter to the court below for a new trial.

POINT II

THE TRIAL COURT ERRED IN INTERRUPTING DEFENSE COUNSEL'S SUMMATION TO REMARK TO THE JURY THAT APPELLANT COULD NOT PROPERLY CLAIM THE DEFENSE OF SELF-DEFENSE IN A SITUATION WHERE APPELLANT HAD SOUGHT OUT INDIVIDUALS WHO EARLIER HAD ASSAULTED HIM.

In the course of defense counsel's summation, counsel directed the jury's attention to the fact that, prior to the shootout at the Beehive Elk's Lodge, the other individuals involved, the decedent David Allen Gray and one "Blood," had assaulted the appellant and a companion with a rifle. At that juncture, counsel was attempting to point out to the jury that even though appellant had sought out the individuals who earlier assaulted him,

the defendant acted in self-defense in so doing in response to an earlier incident in which appellant's life had been placed in jeopardy. Counsel was further attempting to point out that since the other individuals had previously assaulted appellant, it was likely that they and not appellant had fired the first shots at the Beehive Elk's Lodge and that defendant had returned their fire in self-defense.

MR. HANSEN: ...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 behind the Elk's Club, the one who first does it, and that was in the alley Saturday night, and with their way of life --

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.

(Tr. 488-489.)

The extent to which the above reported colloquy confused and misled the jury may be seen at a later juncture when the jury, subsequent

to the giving of the court's instructions and subsequent to several hours of deliberation, returned to the court and requested clarification on the issue of how far and to what extent an individual can go in pursuing another individual in the exercise of his right to self-defense:

COURT: The record may show that the jury has come back into the courtroom, it's my understanding that you have another question, is that correct Mr. Foreman?

FOREMAN: Yes, that's correct.

COURT: And does that refer to any fact situation?

FOREMAN: This is a specific question with respect to the law.

COURT: All right, before we take your second -- well, tell us what your second problem is, what is that with reference to?

FOREMAN: The same section.

COURT: Same set?

FOREMAN: Yes, that's correct.

COURT: All right, I'll allow you to state what the problem is and what doesn't appear to be clear.

FOREMAN: Well, basically the question is, I suppose, under the law --

COURT: Let me put it to you this way, I don't want argument or to know how you're trying to go, but if you can just put it in a way that will tell me your problem.

FOREMAN: I'm not sure that I can.

COURT: Well, just do the best you can.

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 --

COURT: I think I see your problem. Let me see if I see it correctly. Well, is that the second question you had to ask?

(Tr. 540.)

From the above it should be readily apparent that the effect of the trial court's earlier remarks in interrupting counsel's summation was to confuse the jury as to whether or not, in the exercise of his right and privilege of self-defense, the defendant was justified in pursuing the original assailants and seeking them out. The court's remarks constituted, as it were, an additional instruction to the jury to the effect that appellant could not so act consistent with his right of self-defense. As a result, such remarks improperly prejudiced appellant's right to present his defense to the jury and such remarks, therefore, were reversible error.

It is clearly established as a matter of law that the defense of self-defense is available to an individual even though the individual acts affirmatively in response to an act or threat on the part of another and even though that act or threat is removed in time and circumstance from

the fatal encounter that results, so long as the acts of self-defense involved are so closely connected with the original difficulty in time and circumstances as to be fairly regarded as having been brought on by the original difficulty. State v. Lee, 85 S.C. 101, 67 S.E. 141 (1910); 40 Am.Jur.2d, Homicide, § 145. As a correlary, one may go so far in the exercise of his right of self-defense as to seek out the adversary or original assailant and arm oneself precedent to doing so. Jones v. Commonwealth, 187 Va. 133, 45 S.E.2d 908 (1948); State v. Feeley, 194 Mo. 300, 92 S.W. 663 (1906); State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); State v. Doris, 51 Or. 136, 94 P. 44 (1908); Gray v. State, 55 Tex. Crim. 90, 114 S.W. 635 (1908); Beard v. State, 47 Tex. Crim. 50, 81 S.W. 33 (1904); State v. Flory, 40 Wyo. 184, 276 P. 458 (1929); Bonnard v. State, 25 Tex. App. 173, 7 S.W. 862 (1888); and King v. State, 51 Tex. Crim. 208, 101 S.W. 237 (1907).

Am.Jur.2d, Homicide, § 145, states part of the above set forth rule as follows:

The fault . . . is not confined to the precise time of the fatal encounter which results, but may include a fault so closely connected with the difficulty in time or circumstance as to be fairly regarded as operating to bring it on.

In State v. Lee, supra, the South Carolina Supreme Court had before it the issue of whether the trial court erred in refusing to charge the jury that the "fault," for the purpose of determining the viability of a defense of self-defense, must be at the time of the fatal encounter and

not at some previous time. In ruling that such charge would have been improper and unduly restrictive, the Supreme Court said:

The third exception assigns error in refusing to charge the defendant's seventh request as follows: "Fault in bringing on a difficulty so as to deprive one of the right of self-defense must be a fault at the time of the fatal encounter, and not a fault at some previous time." The court refused to charge in that language. The instruction requested was inaccurate and misleading in restricting the fault in bringing on the difficulty to the precise time of the fatal encounter and in excluding from consideration fault, which, although not occurring at the precise time of the difficulty, but previously, may have been so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. (67 S. E. at 142.)

Applying the above quoted rule and the reasoning of the above cited cases to the facts in this case, it is clear that the defense of self-defense would be available to the defendant Galveston Sonny Scott in this case even though he was acting affirmatively in seeking out the individuals who had earlier assaulted him and even though he armed himself precedent to doing so. This is the case since the acts of the decedent and "Blood" in assaulting defendant with weapons on the preceding Saturday were so closely related in time and circumstances to the later encounter at the Beehive Elk's Lodge as to be fairly regarded as having brought on such encounter. Since this is so, counsel for the defendant had a right and, indeed, a duty to present to the jury in his summation his theory that the

decedent Gray and his companion "Blood" were the original aggressors and that defendant had acted in self-defense in seeking them out. The court, by its ruling, effectively precluded presentation of such theory and thereby foreclosed to defendant one of his alternative defenses.

From the above it should be obvious that the defendant-appellant was entitled to rely upon the defense of self-defense, that he was entitled to call the jury's attention to the fact that the other individuals were the original aggressors, and that their aggression was not sufficiently removed in time and circumstance for the defense of self-defense to be unavailable to appellant even though he sought them out subsequent to the initial encounter and even though he armed himself precedent to doing so. As a result, the trial court's remarks were misleading and prejudicial and clearly constitute reversible error. This court should reverse the conviction of defendant-appellant and remand the matter for a new trial.

CONCLUSION

The trial court erred in ruling that neither defendant, his counsel, nor necessary court personnel could be in attendance upon the viewing by the jury of the crime scene. Further, the trial court erred in interrupting defense counsel's summation to remark to the jury that appellant could not properly claim the defense of self-defense in a situation where appellant had sought out individuals who earlier had assaulted him. This court should reverse the verdict and judgment of the trial court and remand

the matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was served on counsel for the respondent, Vernon B. Romney, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah, by mailing three (3) copies thereof in a postage prepaid envelope on the 20th day of May, 1975.

