

1978

State of Utah v. Gilbert Lopez : Appellant's Brief

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

v.

GILBERT LOPEZ,
Defendant-Appellant.

CASE NO. 15636

APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court of Utah County
Honorable J. Robert Bullock, Judge

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
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v.
GILBERT LOPEZ,
Defendant-Appellant.

CASE NO. 15636

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The defendant was accused and convicted of robbery, a violation of Utah Criminal Code, Section 76-6-30, in the Fourth Judicial District Court, Utah County, State of Utah.

DISPOSITION IN THE LOWER COURT

Defendant was convicted and sentenced to serve not less than one (1) year, nor more than fifteen (15) years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Counsel for defendant-appellant, after a review of the issues and cases relevant thereto, concludes that no appealable issues are present.

STATEMENT OF THE FACTS

Defendant Gilbert Lopez appeared before the Fourth Judicial District Court and was arraigned by the name of Henry

Lopez. He was subsequently tried under the name of Henry Lopez. After trial, the State moved to amend the record by changing the name of the defendant from Henry Lopez to that of Gilbert Lopez, defendant-appellant's true name.

On the morning of the trial, counsel for the defendant, Sheldon Carter, was taken ill and unable to attend trial. This development was brought to the attention of the trial court in the judge's chambers by the co-defendant's attorney, Michael Esplin, before the jury was impaneled. (R.1) At that time, a conversation was had between His Honor, Mr. Esplin, and the defendant to determine whether the defendant should be granted a continuance, or whether he would be willing to go to trial that day represented by Mr. Esplin. (R.2) The Court explained to Mr. Lopez that a conflict of interest might exist between himself and the co-defendant, Mr. Tippetts. The Court inquired of Mr. Lopez whether he desired a continuance or whether he preferred to proceed to trial with Mr. Esplin as his counsel. (R.4) Mr. Lopez indicated his concern regarding further incarceration pending a new trial date (R.2) and assented to going to trial that day with Mr. Esplin as his own counsel. (R.4) Trial commenced as scheduled.

After voir dire of the jurors, counsel representing both defendants, exercised five (5) pre-emptory challenges without objection.

The testimony at trial showed that on August 30, 1977,

at approximately 12:30 a.m. the Riverbend Lounge (located at the mouth of Provo Canyon) was robbed by two men. Lori Elliot, a part-time waitress at the Riverbend, identified the two men who robbed the lounge as the appellant, Mr. Lopez and his co-defendant, Roy Tippetts. (R. 13-14) Three other witnesses testified that they were customers at the Riverbend on the morning that it was robbed. (R.27,33,38) All three witnesses identified the appellant and his co-defendant as the perpetrators of the robbery. (R.28,35,40,41)

Trooper John Moon testified that he apprehended the appellant, the co-defendant and two other individuals in an automobile near the top of Provo Canyon shortly after he received a radio communication that a robbery had been perpetrated at the Riverbend Lounge in Provo Canyon. (R.43-36) The trooper testified that two other individuals in the car with the appellant and the co-defendant identified themselves as the brothers of Mr. Lopez. (R.52) Some money was located in the automobile (R.51), however, no weapon was located in the automobile nor was any found at the scene where the car was stopped. (R.52)

At the conclusion of the State's case, the defense rested without calling any witnesses. (R.59) Based upon the foregoing, the defendants were found guilty.

CONSIDERATION OF APPEALABLE ISSUES AND
DETERMINATION THAT NO APPEALABLE ISSUES
OF MERIT EXIST:

The three following issues were considered and a determination made that no meritorious appealable issue exists:

1. A denial of one pre-emptory challenge. Mr. Lopez and Mr. Tippetts, co-defendants, exercised five pre-emptory challenges as to the jurors called to serve in the above-entitled matter.
2. Dual representation by one trial counsel for both Mr. Lopez and Mr. Tippetts.
3. Defendant Gilbert Lopez was arraigned in District Court and trial was had for him under a name other than his own.

POINT I

DEFENDANT LOPEZ WAS DENIED HIS STATUTORY RIGHT OF SIX (6) PRE-EMPTORY CHALLENGES TO BE SHARED WITH CO-DEFENDANT, ROY TIPPETTS.

Section 77-30-15, UCA 1953, provides that the number of pre-emptory challenges is four if the offense charged is a felony not punishable by death; three pre-emptory challenges if the offense charged is a misdemeanor; and ten pre-emptory challenges are provided if the offense charged is punishable by death.

Section 77-30-2, UCA 1953, allows one additional pre-emptory challenge for each defendant tried jointly. However, unless trial counsel makes specific objection to the number of pre-emptory challenges, such additional pre-emptory challenges are deemed waived. State v. Roberts, 91 UT 117, 63 P2d 1052.; State v. Aikers, 87 UT 507, 51 P2d 1052.

Mr. Lopez and Mr. Tippetts shared five (5) pre-emptory challenges but no objection was made known to the Court that they were entitled to six (6).

POINT II

DEFENDANT LOPEZ WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Article I, Section 12 of the Utah Constitution and the Sixth Amendment to the United States Constitution guarantee an accused the right to counsel at trial.

It is well settled that one lawyer may represent more than one defendant so long as the representation is effective. Powell v. Alabama, 287 US 45 (1932). When one lawyer shall simultaneously represent two defendants, effective assistance of counsel contemplates that such assistance be "untrammelled and unimpaired". Glasser v. United States, 315 US 60,70 (1942)

In Glasser, defendant Glasser was joined in his appeal by co-defendant Kretske. The defendants had been found guilty of conspiring to defraud the United States. Glasser had retained his own attorney as had Kretske. One day after the scheduled date of the trial, Kretske's attorney advised the Court that Kretske did not wish to be represented by him. The Court then asked if Stewart, Glasser's attorney, could act as counsel for Kretske. Although Glasser expressed his objection, Kretske made no objection and accepted the court's

CERTIFICATE OF DELIVERY

This is to certify that I personally delivered Appellant's BRIEF, Case Number 15636, along with _____ copies to the Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah, this _____ day of July, 1978.

DELIVERED BY:

ACKNOWLEDGEMENT

I do hereby acknowledge receipt of the foregoing Appellant's Brief, delivered to me this _____ day of July, 1978.

RECEIVED BY: