

1978

State of Utah v. Paul David Van Dyke : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Andrew A. Valdez; Attorney for Appellant;

Robert Hansen; Attorney for Respondent;

Recommended Citation

Brief of Appellant, *State v. Van Dyke*, No. 15687 (Utah Supreme Court, 1978).

https://digitalcommons.law.byu.edu/uofu_sc2/1149

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
PAUL DAVID VAN DYKE,	:	Case No. 15687
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, presiding.

ANDREW A. VALDEZ
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

FILED

SEP 25 1978

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
PAUL DAVID VAN DYKE,	:	Case No. 15687
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, presiding.

ANDREW A. VALDEZ
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF THE FACTS.	2
ARGUMENT	
POINT I: DUE PROCESS OF LAW DEMANDS THAT WHEN CITIZENS' HOMES ARE SEARCHED AND SEIZED PURSUANT TO A SEARCH WARRANT THE WARRANT MUST BE ISSUED BY A LAW-TRAINED JUDGE.	4
POINT II: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF OTHER BAD ACTS BY THE DEFENDANT.	7
CONCLUSION.	11

CASES CITED

<u>Shelmidine v. Jones</u> , 550 P.2d 210, 211 (Utah 1976).	5
<u>State v. Case</u> , 547 P.2d 221 (Utah 1976)	11
<u>State v. Dickson</u> , 12 Utah 2d 8, 361 P.2d 412 (1961)	7
<u>State v. Goodliffe</u> , _____ P.2d _____ (No. 15363 Utah, 1978).	10
<u>State v. Hartman</u> , 101 Utah 298, 119 P.2d 112 (1941)	11
<u>State v. Lopez</u> , 22 Utah 2d 257, 451 P.2d 772 (1969)	7
<u>State v. Mantayne</u> , 18 Utah 2d 38, 414 P.2d 958 (1966)	9
<u>State v. St. Clair</u> , 3 Utah 2d 230, 282 P.2d 323 (1955).	11
<u>State v. Treadway</u> , 28 Utah 2d 160, 499 P.2d 849 (1972).	6

TABLE OF CONTENTS
(Continued)

	PAGE
OTHER AUTHORITIES CITED	
United States Constitution, Fourteenth Amendment, Due Process Clause	4
Utah Code Ann. §77-12-1 (1953 as amended)	4,5
Utah Code Ann. §77-54-11 (1953 as amended).	6
Utah Code Ann. §78-5-4(2) (1953 as amended)	4,5
Utah Constitution, Article I, Section 7	4
Utah Rules of Evidence, Rule 45	9,10
Utah Rules of Evidence, Rule 46	10
Utah Rules of Evidence, Rule 47	9,10
Utah Rules of Evidence, Rule 48	9
Utah Rules of Evidence, Rule 55	9

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
PAUL DAVID VAN DYKE,	:	Case No. 15687
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, PAUL DAVID VAN DYKE, appeals from a conviction of Aggravated Robbery in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, PAUL DAVID VAN DYKE, was charged with Aggravated Robbery in violation of Utah Code Ann. §76-6-302 (1953 as amended). On January 18, 1977, appellant was found guilty as charged. The appellant was sentenced to the Utah State Prison for the indeterminate term of five years to life.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered by the court below and a new trial.

STATEMENT OF THE FACTS

On October 8, 1977, at approximately 11:20 p.m. the Villa Theatre, located at 3092 Highland Drive, Salt Lake County was robbed by a man wearing a dark ski mask and carrying an automatic weapon. Mr. Terry N. Eckberg, an employee, was working that night in the box office. Upon hearing a loud noise, Mr. Eckberg was confronted by a man wearing a dark mask and carrying what looked like an automatic weapon. The man directed Mr. Eckberg to open the safe and give him the money (T. 34, 35, 36).

The robber was behind Mr. Eckberg during the opening of the safe (T. 37). When the safe was opened the contents were placed in a drawstring laundry bag which had been thrown at Mr. Eckberg by what appeared to be another robber (T. 37).

Mr. Eckberg was then told to get in a closet in the office and the robber left. The entire incident took approximately ten minutes (T. 39).

Two patrons at a lounge next door to the Villa Theatre were walking towards their car and noticed, at approximately 11:25 to 11:30 p.m. a man come out of the Villa Theatre with a ski mask on (T. 49). As the car drove off one of the patrons ran to get the license plate number of the vehicle and shouted back to the other, "RJD__58." The description of the vehicle given by the patrons was a red car sedan (T. 50).

At approximately 11:52 p.m. Detective James Lewis of the

Salt Lake City Police Department was staking out a white single dwelling house with an attached garage. The address of the home was 232 East 200 South, Bountiful, Utah (T. 152).

Officer Lewis observed a red Oldsmobile Cutlass pull into the driveway. The license number on the vehicle was RJD458. The driver got out of the car and went into the house. A moment later a Toyota pulled in and parked behind the Cutlass. Both vehicles were then moved into the garage. The driver of the Cutlass was later identified by Officer Lewis as Randy Reid. The driver of the Toyota was subsequently identified by Officer Lewis as Kirt Moyes. The passenger in the Toyota was subsequently identified by Officer Lewis to be the appellant (T. 154, 155, 156).

During his surveillance Officer Lewis observed four other people arrive and leave the house (T. 159).

At 4:20 a.m. October 9, 1977, a search warrant was served on the residence at 232 East 200 South, Bountiful. After knocking on the door three or four times, according to the police officers involved, no one answered so the door was kicked in (T. 11, 12).

The entire home was searched, the appellant was arrested, tried to a jury and convicted as charged in the Information of Aggravated Robbery.

The aforementioned search warrant was issued by Judge John Stewart, who is a Justice of the Peace for the precinct in Davis County, Utah (T. 7).

ARGUMENT

POINT I

DUE PROCESS OF LAW DEMANDS THAT WHEN CITIZENS' HOMES ARE SEARCHED AND SEIZED PURSUANT TO A SEARCH WARRANT THE WARRANT MUST BE ISSUED BY A LAW-TRAINED JUDGE.

Due Process of Law pursuant to Article I, Section 7 of the Utah Constitution as well as the Fourteenth Amendment, Due Process Clause, of the United States Constitution, provides that no person shall be deprived of life, liberty or property without due process of law. Essential to the protection of citizens' liberty is the right to be tried by a law-trained judge.

In 1976 the Utah Legislature passed the statutory right for all citizens to be accorded the right to be tried by a member of the Utah State Bar, Utah Code Ann. §78-5-4 (1953).

The Legislature's intent enacting §78-5-4, supra, and pertinent provision follows:

(2) Notwithstanding any provision of this code relating to jurisdiction on venue of justice courts, in any matter in which the judge has the option of imposing a jail sentence, the defendant may demand and shall be accorded the right to have the case tried before a judge who is a member of the Utah State Bar . . .

The limited authority delegated to justices of the peace is further apparent with respect to issuance of a warrant of arrest.

Utah Code Ann. §77-12-1 (1953) provides in part:

. . . when the magistrate before whom the complaint is made is a justice of the peace, before issuing the warrant, the complaint, if made by an person other than the county attorney for the county, and the evidence taken by such magistrate relating to the offense charged, must be submitted to such county attorney, and he must examine into the charge and enter his approval or disapproval of the issuance of a warrant upon such complaint. If the county attorney disapproves, no warrant shall be issued . . . (Emphasis Supplied)

A warrant for arrest involves fine legal elements analogous to a search warrant. The limiting language of §77-12-1, supra, further emphasizes the legislature's apprehensions with respect to non-law-trained individuals determining the sufficiency of those legal elements necessary to warrant the intrusion of one's liberty or security.

Utah Code Ann. §78-5-4 (1953) protects citizen's liberty from non-legal, untrained individuals, mostly from rural areas who are accustomed and authorized to handle only minor law enforcement cases.

In Shelmidine v. Jones, 550 P.2d 210, 211 (1976) the Supreme Court of Utah succinctly stated why the founding fathers created the justice of the peace system:

. . . they created the system in the realization of the necessity and desirability of providing a realistic and expeditious means for law enforcement . . . It seems to be a sound observation that our justice of the peace system has and continues to serve a useful purpose by providing a readily accessible and expeditious means of handling of minor cases. (Emphasis Supplied)

In the case at bar, although immediate deprivation of liberty

did not occur, a citizen's home was searched and seized pursuant to the expeditious issuance of a search warrant by a justice of the peace. The justice was unable to understand all the intricate legal elements involved in this instance or any lawsuit other than minor offenses.

For example, in the instant case the search warrant contained a form provision for a nighttime search, absolutely no reason or explanation were given for the nighttime search (T. 8, 9, 10).

If a search warrant is to be executed during the nighttime, the affidavits upon which the warrant is based must be positive that the property to be seized is on the person or in the place to be searched as provided by Utah Code Ann. §78-54-11 (1953 as amended).

The Utah Supreme Court in State v. Treadway, 28 Utah 160, 499 P.2d 846 (1972) construed Utah Code Ann. §77-54-11 (1953 as amended) and stated:

. . . to satisfy the statute the supporting facts in the affidavit must show positively that the property is in the place to be searched.
(Emphasis Supplied)

The affidavit in the instant case did not so indicate lending further credence to appellant's claim that a non law-trained individual such as a justice of the peace is incapable of understanding the intricate legal protections developed through case law and legislative mandate, as stated, supra, to protect citizens from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers and effects from unreasonable searches and seizures

by police officers pursuant to a warrant, requires that the warrant be issued by a law-trained judge, who is capable of understanding all the intricate, legal arguments involved. The appellant thus argues that any evidence seized pursuant to the improper search warrant should have been suppressed.

All products of this unconstitutional search should have been excluded.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF OTHER BAD ACTS BY THE DEFENDANT.

Evidence of crimes other than the one alleged in the Information cannot be admitted to convict an accused of the crime charged in the Information or indictment. State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969); State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961).

On direct examination of Randy Earl Reid the prosecutor elicited statements that connected the appellant with other bad acts and statements that disparaged the appellant's character (T. 69). At no time did the appellant introduce any evidence about his character.

On direct examination of Reid by the prosecutor, the following exchange took place:

Q. Did he mention the Villa Theatre in general or specific terms on that occasion?

A. There was a general term.

Q. What was it that he generally mentioned about the Villa Theatre on that occasion?

A. There was a possibility they were going to have to go and find some place that was bigger, that brought in more money because they had been hitting a few rinky-dink places.

Counsel for the appellant moved for a mistrial out of the presence of the jury (T. 70, 71, 72 and 73). The motion was denied (T. 73).

Later on direct examination of Maria Newman, by the prosecutor, the following exchange took place:

Q. Anything else mentioned about him going to work on that evening?

A. Not that I can remember.

Q. When you went to the grocery store, who paid for the groceries?

A. Paul.

Q. And did you see or were you able to see how he paid for them?

A. Cash.

Q. And did you see any money that he had on him at that crime?

A. I wasn't lookin'.

Q. Now, in all the times that you've known Mr. Van Dyke, have you ever known him to have a job?

MR. KELLER: Objection.

THE WITNESS: No.

MR. KELLER: May we approach the bench?

Whereby the objection was sustained, the answer stricken and the jury instructed to disregard the last answer of the witness (T. 172).

With respect to the first statement about the appellant hitting a "few rinky-dink places" (T. 69), such testimony can be admissible only if it tends to prove one of the material issues before the court. State v. Mantayne, 18 Utah 2d 38, 419 P.2d 958 (1966).

Under Rule 55 of the Utah Rules of Evidence, evidence of other crimes or civil wrongs is inadmissible unless it fits within one of the exceptions to that rule. Subject to Rules 45 and 48 such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

In the instant case the elicited testimony implicates the appellant with other crimes. It shows that the appellant was allegedly violating the law allowing the jury to infer on the basis of the appellant's bad character that he committed the robbery in the case at hand.

With respect to the second elicitation, the court did in fact instruct the jury to disregard the remark. Nevertheless the jury did hear the remark and its resulting effect on the jury was to substantially prejudice the right of the appellant to a fair trial. Under Rule 47 of the Utah Rules of Evidence, it states:

Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his

conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character. (Emphasis Supplied)

In the case at bar, when said testimony was elicited, the appellant had not introduced any evidence of his good character (T. 1. 172). Under Rule 47 evidence of his bad character is clearly inadmissible at this point and violated the appellant's right to a fair trial. The fact that appellant was not employed during this period of time, or in fact was ever employed, is clearly a character trait which the State intended to use to prove appellant's guilt of the offense charged. Furthermore the State tended to show appellant's propensity to commit a robbery due to appellant's unemployed character trait.

In a most recent decision this court remanded for a new trial a case where the implications of a witness' testimony were an attempt to demonstrate defendant's propensity to commit crimes of the nature he was presently charged with, State v. Goodliffe, ____ P.2d ____ (Utah No. 15363, 1978). The court stated:

Bare, unproven allegations or "complaints" of prior incidents of similar conduct have no relevancy to the issue of defendant's truthfulness or veracity. The admission of such evidence without further

explanation could only have caused the jury to speculate about defendant's propensities to commit such crimes and confuse the issues, all to the prejudice of defendant, which necessitates a new trial. (Emphasis Supplied)

This court has ruled that a mistrial be granted when the prosecutor intentionally elicits inadmissible statements from a witness. State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941); State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955); and State v. Case, 547 P.2d 221 (Utah 1976).

In the instant case out of the presence of the jury defense counsel's motion for a mistrial was heard and denied (T. 188, 189, 190, 191).

The prejudicial effect far outweighed any probative value and the trial court erred in not granting a mistrial. The jury was made aware of the fact that prior crimes and bad character traits may have been committed by appellant. The prejudice which accompanied this knowledge could not be diminished by the instruction by the judge to disregard the remarks.

CONCLUSION

For the aforementioned reasons, the appellant respectfully submits the lower court erred in admitting certain evidence and allowing testimony as to prior bad acts and character traits. The result of such error has been to prejudice the right of the appellant to a fair trial. Appellant respectfully submits that the judgment

and sentence of the court below be reversed and the case be remanded for a new trial.

Respectfully submitted,

ANDREW A. VALDEZ
Attorney for Appellant