

2008

Harry Miller v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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HARRY MILLER,

Petitioner and Appellant,

vs.

STATE OF UTAH ,

Defendant and Appellee.

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Appeal No. 20080921-CA

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APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. SHEILA MCCLEVE

REPLY BRIEF OF APPELLANTS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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HARRY MILLER,	:	REPLY BRIEF OF
	:	APPELLANT
Petitioner and Appellant,	:	
	:	
vs.	:	
	:	
STATE OF UTAH ,	:	Appeal No. 20080921-CA
	:	
Defendant and Appellee.	:	

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SUMMARY OF ARGUMENTS

The Trial Court erred in dismissing Petitioner’s Petition for failing to state a prime afacie case for factual innocence. Petitioner has clearly shown sufficient facts upon which a finding of factual innocence could be made. Even the Trial Court concedes that the evidence “makes it unlikely that Petitioner committed the crime”. Thus, the Trial Court erred in its statement that there was an insufficient prime afacie case before that factual innocence.

The State argues that some or most of the evidence presented was known to Defendant and/or his counsel at the time of Trial, but was not properly presented to

the Jury. The State incorrectly maintains that only evidence not known to Defendant or his counsel at the time of Trial may be presented here. The original conviction has no legal effect, having been reversed; and all evidence of innocence must be presented and considered.

ARGUMENT

POINT I

APPELLANT HAS MADE A PRIMA FACIE CASE FOR FACTUAL INNOCENCE

The State, in its Statement of Facts, referred to the robbery and the trial. As to that trial, the State made the following statement (St. Br. P.7):

In closing argument, the State pointed out that, although Miller was living in Louisiana at the time of the robbery, nobody could account for his whereabouts between November 28, 2000, and December 13, 2000. The State explained that this time gap allowed Miller time to travel to Salt Lake City to visit his brother, commit the robbery, and return to Louisiana. The State also noted that the effects of Miller's stroke were likely mild as he was released from the hospital after only four (4) days. (Page Citations Omitted) .

At trial, the State presented a case which contained a two (2) week gap during which Mr. Miller could have come to Utah, ostensibly to visit his brother. Since that time, the gap has substantially narrowed. It is true that Judge McCleve, on remand from the Court of Appeals, heard additional evidence which did not impress her as sufficient to alter the results. She was still not impressed by the evidence presented

to her in support of this Petition. Nevertheless, the two (2) week window that was presented to the Jury was reduced substantially; by good, firm evidence from a Court proceeding in Louisiana, and the notes and verified statement of the home care nurse. The trial judge, in her ruling of September 30, 2008, backed off substantially from her previous ruling, but ended up with the same decision:

Although the evidence makes it unlikely that Petitioner committed the crime, the Court reviewed this evidence as part of a remand from the court of appeals and determined that there was “no reasonable probability of a different outcome at trial even if [the new witnesses] had testified.” (Emphasis added).

That statement is now internally inconsistent to the point that it cannot sustain the Trial Court’s ruling. If “the evidence makes it unlikely that Petitioner committed the crime” there is a substantial “probability of a different outcome at trial.” That, of course, was acknowledged by the Salt Lake District Attorney in his decision not to prosecute further. The State, (St. Br. 31) points out that even a “not guilty” verdict does not mean the same as actual innocence. The jury could have believed the Defendant probably committed the crime, but was not convinced beyond a reasonable doubt. In this case, the trial judge found that it is “unlikely” that Defendant committed the crime. That is far stronger than the existence of a reasonable doubt; and Defendant suggest that it approaches the “clear and convincing” standard of

innocence close enough to defeat a motion under Rule 12(b) of the Utah Rules of Civil Procedure.

POINT II

IT IS NOT SIGNIFICANT THAT SOME OF THE EVIDENCE OF INNOCENCE WAS AVAILABLE, OR MIGHT HAVE BEEN AVAILABLE AT THE ORIGINAL TRIAL

In Point II of its Brief, the State contends that the fact that Defendant's conviction was reversed on appeal, and that there was no retrial, is not evidence of actual innocence. The State goes on to quote the Senator who sponsored the legislation under which this action is brought: "the mere fact that the prisoner has been released from jail does not establish the right to have a claim under this fund." The State goes on to say "cases are frequently reversed or dismissed for reasons that have nothing to do with whether the defendant is factually innocent." While that may well be true, this is not such an instance. It is extremely important that the foundations for the State's case, which resulted in a guilty verdict at trial, have since been severely eroded. Under those circumstances, it is not important whether defense counsel knew, should have known, or might have known, more about possible defenses at the time of trial. It is not important to note that he was not found to have been ineffective, in a constitutional sense, upon remand from the Court of Appeals.

What is important, is that given the present state of the evidence, there is nowhere near enough evidence to have convicted Defendant of the crime charged. Whether the State wants to admit it in its Brief, the State has previously so admitted it by its actions in stipulating to a reversal and in refusing to retry the case. The example previously cited, new evidence which severely restricts the window in which Defendant could have been absent from the State of Louisiana, is but one example. The State, in its Brief, attacks Appellant's contention that the eye witness identification has since also been severely discounted. On page 26 and 27 of its Brief, the State contends that the concessions of the prosecutor on the eye witness testimony are insignificant. That Brief refers to evidence that one of the eye witnesses had identified the perpetrator of the crime as someone "who came into the store once in a while." The State goes on to say "petitioner apparently believes that the eye witness must be mistaken, because at the time of the crime, petitioner was living in Louisiana." (St. Br. 27). For purposes of this action, what "petitioner apparently believes" is not what is important. What is important is that the Deputy District Attorney assigned to this case (one of the senior Deputy Prosecutors in the office) found this to be a compelling reason not to prosecute further. It is true, of course, that "the fact that the Deputy District Attorney had some questions about this witnesses

[sic] identification of petitioner as a customer does not establish that petitioner is innocent.” (St. Br. 26-27). But the State is simply misstating the facts, when it prefaces this statement by saying: “The credibility of the victim’s eyewitness testimony has never been questioned by the State.” (St. Br. 26). That evidence, given two years after the robbery, was never strong enough to convict without some corroboration. The victim testified that the police report which stated that she had described her assailant as “between eighteen and twenty-one years old” must have been a mistake.(St. Br. 4). (Oops!) The prosecuting attorney’s concerns over the reliability of the eyewitness testimony were sufficient to cause the charges to be dropped. It adds another nail in the coffin of the case. If the eye witness identification is considered unreliable; and if Defendant can be shown to have been in Louisiana for most of the time at issue, there is no longer any case for guilt. In its statement of facts, the State seeks to make “sense” of the thin ice its case rests upon by stating in a footnote (St. Br. 23) that “Petitioner also ignores the fact that, in addition to stealing the woman’s purse, he also tried to steal her car – perhaps in order to drive back to Louisiana”. The State elsewhere alleges, of course, that the only way that Defendant could have been in Utah on the day of the robbery, and in Louisiana just before and just after, was by flying. (St. Br. 22). Such a suggestion only underlines the

flimsiness of the State's position at this time.

The State combines its arguments that there is insufficient evidence of innocence, with its argument that Defendant must “show that the information regarding innocence was unknown to him or his counsel at the time of the original trial”. Defendant contends that if the evidence of innocence is sufficient, and if there is no standing conviction, it does not matter what was known at the time of trial. This statute treads a thin line. It seeks to compensate someone who was incarcerated for a crime that he did not commit; and it seeks to avoid compensating someone whose conviction is set aside because of Fourth or Fifth Amendment violations, or some other “constitutional technicality”. But the State has wound itself up in procedural red tape. What is most important here is that Defendant was incarcerated for four and a half years for a crime that the trial Court concedes that “it [is] unlikely that petitioner committed”. Petitioner is not asking this Court to enter a finding of factual innocence. He is merely asking the Court to order an evidentiary hearing at which all of the evidence, as it stands now, can be weighed, and in which Defendant stands a chance of being found factually innocent. Defendant has indeed stated a cause of action, and this matter should not have been dismissed under Rule 12(b). It is not important, as the State argues (St. Br. 18-19) that some of the evidence was known

to Defendant's trial counsel, but was not presented fully at trial. If there had been a second trial, Defendant could have presented all available evidence, and would not have been constrained by the first trial. Because the conviction now has no legal standing, all evidence available may be presented. If the evidence points to factual innocence, compensation must be awarded.

The State claims that the statutory language is "plain and unambiguous" in requiring the Defendant to jump through all hoops of procedure. But it makes absolutely no sense to suggest that Defendant must prove that his original trial counsel was ineffective in order to obtain the chance now to prove his innocence. Whether or not his original trial counsel was ineffective, the conviction did not stand. Whether or not his trial counsel was ineffective, the State refused to even make an attempt at a second conviction. Whether or not his trial counsel was ineffective, the trial Judge, who ruled that evidence presented to her on remand was insufficient to raise "reasonable probability of a different outcome at trial" has now conceded that "The evidence makes it unlikely that petitioner committed the crime". The State concedes (St. Br. 34) that it earlier stipulated to the reversal of the conviction because "there was an error in the trial proceedings and that the interests of justice dictate that the defendant receive a new trial". This was after the trial judge had found no such

errors. The concession by the State was as major statement to the effect that the trial court had erred. It must be read to call into question the trial court's remand ruling; but the State concedes nothing. Whatever the "error" might have been (which remains a mystery, it seems), it was sufficient to reverse the conviction. Now the State seems to be claiming that there were no serious errors in the trial proceeding., at least not one sufficient to warrant a new evidentiary hearing on factual innocence. That position is untenable.

CONCLUSION

The trial court's ruling that there is insufficient cause to hold an evidentiary hearing on the Petition is neither factually nor legally sound, and this Court should order such a hearing to be held. Since it has been conceded that the trial proceedings contained a serious error sufficient to reverse the conviction, and since the trial judge does not appear to recognize the error, a new district court judge should be appointed

to hear this matter from a fresh viewpoint.

DATED this 17 day of June, 2009.

W. ANDREW MCCULLOUGH, L.L.C.



Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of June, 2009, I did hand deliver two true and correct copies of the foregoing Reply Brief of Appellant to Erin Riley, Assistant Utah Attorney General, 160 East 300 South, Sixth Floor, Salt Lake City, Utah; and that I mailed two copies to Jensie Anderson, Attorney for Amicus Curiae, at 332 South 1400 East, Room 101, Salt Lake City, UT 84112. Additionally counsel were supplied with PDF copies on CD.


