

1979

State of Utah v. Charles F. Conrad : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH)	
)	
Plaintiff-Appellant)	
)	
vs.)	
)	Case No. 15922
CHARLES F. CONRAD)	
)	
Defendant-Respondent)	

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County
Honorable John F. Wahlquist, Judge

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EXHIBIT

Affidavit of LeRoy Gutierrez - "Exhibit A"

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CHARLES F. CONRAD)	
)	
Defendant-Respondent)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the defendant, Charles F. Conrad, from a jury verdict finding appellant guilty of the crime of robbery, and from the trial court's refusal to grant to the appellant a new trial.

DISPOSITION IN THE LOWER COURT

The defendant was charged by an information with the crime of robbery, and was tried by a jury and convicted of the

crime, as charged. Prior to the trial, defendant made a motion for continuance, in order to allow him to subpoena an essential witness whom he was unable to locate prior to the trial, even though attempts to locate the witness had been made. This motion was denied. After the trial, the witness, who was at that time in police custody, was available to testify, and based thereon, the defendant made a motion for a new trial. The trial court denied defendant's motion, but by its minute entry agreed to reconsider the motion for a new trial, upon presentation of testimony of the claimed witness. The testimony of the witness was thereafter reduced to an affidavit, and filed with a motion for a new trial, which motion was argued to the court and denied by the court.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the court's rulings set aside, and to have the matter remanded to the District Court for a new trial.

STATEMENT OF FACTS

On the 15th day of April 1977, one Kim Reed was employed by a By-Rite Gas Station, located on the corner of 23th Street and

Monroe Street in Ogden, Utah. He was employed as an attendant at such station, and as such operated the same, serving customers and collecting money for products purchased. At approximately 7:45 p. m. , on April 15th, while two customers were at the gas pumps serving themselves, the witness Reed testified that a gentleman came toward him, entered the building, and told him to open up his till, stating, "I want the money, open the till. " The witness Reed further testified that the gentleman had a gun, so Reed opened the till. After removing the money from the cash till, the same gentleman walked backwards out of the building, told the attendant Reed to walk to the car wash bays on the premises, and departed the area on foot. During the entire episode, at least two other customers were in the immediate vicinity, servicing their automobiles, neither of whom was identified, nor did either of them appear as a witness for the State.

After the alleged incident, the witness Kim Reed telephoned the police, claimed the robbery, and continued to wait on customers. Upon investigation by the police, the witness was shown eighty-four photographs, and from the photographs shown,

the witness identified the defendant, Charles F. Conrad, as the person committing the robbery.

The defendant testified in his defense, and by his testimony stated that he and LeRoy Gutierrez, the witness unavailable for trial, had agreed to burglarize the building, and that in order to accomplish this, the defendant was to divert the attention of the attendant and have him leave the building, at which time LeRoy Gutierrez was to remove money from the cash till of the business. In furtherance of this, the defendant Conrad drove an automobile into the car wash bay of the By-Rite Gas Station, cut the hose of the car wash with a knife, and then contacted the attendant, Kim Reed, advising him that the car wash did not work properly, and requesting that he come and examine it; that the attendant, Kim Reed, went to the car wash bay, observed that the car wash hose was not working properly and, with the assistance of Mr. Conrad, closed off the car wash bay. During this period of time, LeRoy Gutierrez entered the building, removed some money from the cash till of the business, and left the building. Thereafter, the defendant left the premises, drove a few blocks, where he picked up LeRoy Gutierrez, and departed the area. The testimony of LeRoy Gutierrez, as shown by his affidavit, corroborates the testimony of the appellant.

POINT I

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT A NEW TRIAL.

On June 2, 1977, prior to the commencement of trial of the defendant, defendant's attorney filed his affidavit with the court (R-17), requesting a continuance in order to allow him to locate an essential witness, one LeRoy Gutierrez, which motion was denied by the court (R-21).

On August 12, 1977, defendant's attorney filed an affidavit and motion for a new trial, based upon the fact that the missing witness, LeRoy Gutierrez, had been arrested and was incarcerated in the Weber County Jail, and therefore was available for testimony, which was sufficient basis for a new trial, since he could not be located by diligent effort prior to the time of trial. This motion was filed after defendant's trial had been concluded on July 18, 1977. On September 26, 1977, the court heard the defendant's motion and denied the same, with the provision that if the claimed witness would appear and present his testimony, the court would reconsider the motion for a new trial (R-81).

An appeal was filed with this court, and while pending, the matter, upon motion of the defendant, was remitted to the trial

court for reconsideration of defendant's motion to dismiss, based upon the affidavit of LeRoy Gutierrez, which affidavit set forth in narrative the testimony of the said LeRoy Gutierrez. The matter was remanded to the district court for consideration of defendant's motion for a new trial, and defendant filed a motion for a new trial, based upon the previous determination of the court, and upon the affidavit of LeRoy Gutierrez. The motion was heard by the court on the 22nd day of May 1978, at which time the court denied the motion, stating as follows (R-478):

THE COURT: "Insofar as the motion is concerned, considering the testimony that was given from the defense is inconsistent totally with the testimony now given, that it could not intelligently have presented both this testimony and the defense which he did present, which was defeated. In the total of the situation, I do not think this witness would have made a difference. For that reason, I will deny the motion for a new trial."

In the foregoing reasoning, the court has erred by reason of the fact that the testimony of LeRoy Gutierrez is completely supportive of the appellant's testimony given in his defense at the time of the trial. While the Gutierrez affidavit is, for some unknown reason, not included in the transcript and record herein, it is on file in appellant's previous file before the Supreme Court of the State of Utah, in Case No. 15374, and a copy thereof is attached hereto as

"Exhibit A". Paragraph 3 of the affidavit of LeRoy Gutierrez states, as follows:

"3. That on or about the 15th day of April 1977, your affiant and Charles F. Conrad drove to the By-Rite Station at 809 - 28th Street, Ogden, Utah. That prior to reaching the station, Charles F. Conrad, who was driving the automobile being used by us, let me out of the automobile and then drove to the car wash bays on the By-Rite Station. When Charles F. Conrad arrived at the car wash bay, he cut the hose of the car wash with a knife, and then proceeded to speak with the attendant, whereupon the attendant went with Charles F. Conrad to examine the car wash bay, where Charles F. Conrad had stopped his car. While the attendant was at the car wash bay with the said Charles F. Conrad, your affiant entered the building of the By-Rite station and took some money from a cash box located in the building. I immediately left the building of the By-Rite Station and observed Charles F. Conrad and the station attendant at the car wash bay. I then proceeded to the corner of Quincy Street and 28th Street in Ogden, Utah. Within a very short time, Charles F. Conrad drove to where I was standing, and I entered the automobile and we left the scene."

At the time of trial, the defendant testified as follows

(R-63/64):

"A. And LeRoy was down on 28th, and he told me that when I distracted that guy that he would see him come from the office and that at that time he told me to keep the guy there, that he would go in and he said that he could get some money.

Q. Did he tell you how he was going to do that?

A. He told me before that he had been in the gas station before and had seen money bags underneath the

drawer, at the bottom of the drawer.

Q. He said he had been there on prior occasions?

A. Yes.

Q. Did he indicate to you that that was his intention?

A. Yes, that was our intention was getting some money bags.

Q. Did he have a gun?

A. No, he didn't.

Q. Did you?

A. No, I didn't.

Q. Was there a gun in the car?

A. No, sir. "

Further, the defendant testified (R-366):

"A. I got the knife and then I just held the hose in my hand, and I just slashed it. So I bent it back to make sure it was slashed, and I put the knife back in the car. I put 50 cents in the car wash.

Q. Is that what it took to run the car wash?

A. Yes. I put the 50 cents in the car wash and held the hose and turned it on, and it worked just how I had it planned, intended it to do so. "

Q. Did the machine come on?

A. Yes, it did.

Q. Start spraying from where it had been severed?

A. Yes, it was spraying on me, so I shut it off.

Q. How did you shut it off?

A. Just with the button.

Q. There is a switch there, is there not?

A. Yes, there was.

Q. Is it a wash and rinse switch?

A. Yes, I put it on off.

Q. Okay. And then what did you do with the nozzle?

A. I stuck it back in there. There was like a pipe that I stuck it back in.

Q. Okay. After that, did you walk up in the front to see Mr. Reed?

A. Yes, I did.

Q. Where was he when you approached him?

A. He was standing right by the gas pump, the closest one to the office."

(R-367):

"Q. Okay. Now, in fact, how did you approach him? Did you walk out of the west end of the washing bay towards Monroe, or go around the back?

A. To the back.

Q. To the back around?

A. Right.

Q. Then you walked over and he was at the pump nearest the office?

A. Yes, he was.

Q. What, if anything, did you say to him at that time?

A. He was waiting on a customer, giving him his change back. I mean a customer was paying him.

Q. Okay.

A. He gave him back his change and then at that time I told him, I said that the car wash hose wasn't working. And he went back and examined it.

Q. Prior to that time, Freddy, were there other cars there getting gas?

A. I think there was one at the front end.

Q. Okay. And then you indicated the problem with the hose to him?

A. Yes, I did.

Q. What did he do then?

A. He walked back there with me.

Q. Did he say anything?

A. No, he didn't talk going back there.

Q. Okay. And how did you get back there? Did you go through the back lot around through towards Monroe?

A. Yes, we went through to the back.

Q. Around the back of the parking lot?

(R-368):

A. Right.

Q. What did you do when you walked into that bay?

A. He walked in and then he grabbed the hose, and I turned it back on, and it was spraying, and he sort of jumped back. He said, yeah, it's not working, and then he looked at it and he said that I should just shut it off and put it back, and then he gave me my 50 cents back.

Q. Okay. What did he say after that, if anything?

A. Well, he didn't say nothing. I was more or less trying to stall him there.

Q. All right. You actually had an idea as to what LeRoy was going to be doing?

A. Right. At that time, LeRoy was getting--I had Mr. Reed's attention back in the car wash, the south car wash.

Q. You fully understood that your friend was going to commit a theft?

A. Right.

Q. And you of course participated in that?

A. Yes, I was.

Q. And you were aware, of course, that participation is a crime?

A. Yes, sir.

Q. A theft?

A. Yes.

Q. Now, after Mr. Reed inspected that and put it back did he give you any money.

A. Yes, he gave me 50 cents back.

Q. All right. And what did he do after he gave you the 50 cents?

A. Well, I told him, I said, I said, "Why don't you grab

(R-369):

one of those barrels, just in case somebody else--the machine is not working," and that and I told him to stick a barrel in front and at that time I was stalling him so he wouldn't go back to see LeRoy inside there taking the money.

Q. Did he move a barrel out in front of the bay?

A. Yes, he did."

Thus, from the testimony of the defendant, and the testimony that would have come from the witness, LeRoy Gutierrez, the determination by the court in denying a new trial does not appear

unreasonable, and seems to evade the trial court's apparent concern when he stated that he would consider a motion for new trial, when he knew what the testimony of Gutierrez would be.

A motion for new trial, when newly discovered evidence is claimed, requires the support of three essentials, as follows:

1) the evidence must have been discovered or obtained after the trial
2) it must be material to the factual issues at trial, and 3) it must be of such a nature that it would probably produce a different verdict in the event of retrial. See U.S. v. Harris (1976); 534 F.2d 1371, and People v. Loplasto (Mich. 1967); 156 NW 2. d 586.

It appears that all three essentials are present in the case before the court. The evidence was discovered and available only after trial, it was material to the factual issues, and it would probably produce a different verdict, since it would believably indicate that no robbery was committed by appellant. Therefore, it can only be concluded that the trial court's failure to grant a new trial, when confronted with the evidence that the court was personally concerned about, was indeed an abuse of discretion, and justifies the granting of a new trial by this court.

POINT II

DEFENDANT'S CONVICTION, BASED UPON
UNCORROBORATED TESTIMONY OF VICTIM,
SHOULD BE REVERSED.

It is recognized that generally the common-law acknowledges that a conviction may be upheld when based upon the uncorroborated testimony of a victim, unless such testimony is completely unbelievable. See State v. Middelstadt, 1978 Utah, 579 P. 2d 908. Appellant submits that the testimony of the alleged victim, which was completely uncorroborated, falls into the category of the "completely unbelievable." This is evidenced from the following testimony of the victim (R-89 - Line 5):

"Q. Okay. Kim, what happened about 7:45 that evening?

A. There was two customers on the outside pumps, and I noticed a gentleman coming towards me, and he entered the building, and he said, 'Open the money, or open the till.' I looked over, and he had a gun, so I opened the till.

(R-94 - Lines 2 and 17):

"Q. All right. This individual took the money then out of the cash register. What happened next?

A. He told me to walk over to the car wash.

Q. Do you recall where the defendant went at that time?

A. He started east on 28th.

Q. East on 28th Street.

MR. JONES: Your Honor, do we have any markers that we might use?

THE COURT: Yes.

MR. JONES: Kim, would you step over here to the blackboard to this diagram 1-P, and I will give you a red marker. Would you indicate for me where the defendant went and how far along 28th Street you saw him? Maybe you can use that red line to show us as he came out of the station.

A. He went from the office, and the last time I saw him he ran to this corner and up that way.

(R-95 - Line 21 to R-96 - Line 9):

Q. Just stay out there, Kim, if you would. Let me give you--try a green marker. You show me where you went after he exited the building.

A. Okay. I came out of the office and walked back behind the car wash.

Q. How far did you get? Is that pretty much where you went?

A. Probably that is pretty close there.

Q. Okay. Kim, when you got over there by the car wash, what did you see?

A. I saw a little Toyota or Datsun parked in the end bay.

Q. Okay. Which direction was that car pointed?

A. It was facing east.

Q. So it would have been facing you?

A. Yeah.

Q. All right. Did you see anyone inside?

A. There was a person inside of it.

Q. Do you know what he looked like?

A. It was dark inside the car. It looked like he had a beard.

(R-109 - Line 14):

Q. And you saw the car pull out and drive down the street. We will get back to that in a minute. After you saw that everybody was gone, what was the first thing you did?

A. Walked back and one of the customers --

Q. Walked back?

A. Well, I walked. I can't run.

Q. Okay.

A. I walked back to the office and one of the customers come up, and I started calling the police. And he was a little upset because I wouldn't wait on him until after I had called the police.

Q. Okay.

A. And I called them, and they come up.

Q. Did you talk to the customer first or call the police first?

A. I told him that I had to call the police first, and I would wait on him after.

(R-110 - Line 25):

Q. What did you do immediately after you called the police?

A. I waited on the customers and they left. I waited for them to come up.

(R-111 - Line 1):

Q. It sure isn't. You didn't scream, raise a general ruckus, anything of that nature?

A. No.

Q. Just simply called the police and then continued to wait on the customers?

(R-134 - Line 8):

Q. But you are telling me he backed out of the building and I suppose right into plain view of the group of customers. Did he still have that gun trained on you in plain sight?

A. Yeah.

Q. Whereupon, he told you to walk to the south?

A. Correct. Behind the car wash.

Q. And you began to do that?

A. Right.

Q. Now, you also tell us that you saw him run east up 28th Street. Did you turn --

A. When I was walking out right before--well, during my turn to walk over to the car wash, I watched him go out and I can remember him turning the corner and heading up 28th. "

(R-137 - Line 24):

"Q. Okay. And during this time, one of the people came over and they were upset that you weren't waiting on them, is that correct?

A. One person was a little upset because I wouldn't wait on him.

Q. You calmly remarked, "I have got to call the police. I have just been robbed. "

(R-142 - Line 12):

Q. You came back, found the cash box was open, and so you called the police and reported it, told them that the person that had taken it had a gun?

A. Right. "

Based upon the foregoing testimony, it would seem that the alleged victim, Kim Reed, would have the jury and court believe that he was robbed in the presence of at least two customers, but that he did not request their assistance when he could have done so,

did not obtain their names to corroborate his claim, or to help in the identity of the culprit. This testimony, when fully considered, is completely unbelievable. It is unbelievable that a robbery could take place as described by the witness, Reed Kim, without one of the customers observing such activity, particularly where the robber was supposed to have backed out of the door of the business, gun in hand, and walked away unnoticed. It is equally unbelievable that after a robbery, as alleged, that the victim would wait on customers without requesting their assistance or aid, or their identity to aid the police.

Without corroboration, the testimony of Kim Reed is within the quality of testimony referred to by this court in *State v. Middelstadt*, supra, where the court stated:

"As to the quality of the testimony given, it is settled that it must be so improbable that it is completely unbelievable before it is insufficient to uphold a conviction."

The only believable portion of Reed's testimony is that portion found on page 142 of the record, wherein he stated that he returned, found the cash box open, and called the police. The claim of robbery is, under the testimony given, unbelievable.

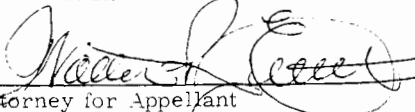
CONCLUSION

From the transcript and entries in the file of this matter, it appears that there was some concern by the trial judge over the fact that the witness, Gutierrez, was not available at the time of trial. A review of the affidavit of Gutierrez would support that concern, since his testimony strikes at the very elements of the alleged robbery. Thus, it seems that the refusal of the court to grant a new trial is an effective denial of the appellant's right to present a full defense. The missing testimony was not only supportive of appellant's defense, but was essential to it. The trial court's abuse of his power and discretion warrants this court's remanding this matter for a new trial.

It further appears from the record that the evidence upon which the appellant was convicted was of such a nature as to be totally unbelievable, and that the matter should therefore be remanded for a new trial.

Respectfully submitted,

WALTER R. ELLETT



Attorney for Appellant

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STATE OF UTAH)
)
County of Salt Lake)

AFFIDAVIT OF
LeROY GUTIERREZ

LeROY GUTIERREZ, being first duly sworn upon his oath,
deposes and states as follows:

1. That he is personally acquainted with Charles F. Conrad,
also known as Freddy Conrad.
2. That on or about the 15th day of April 1977, your affiant
was acquainted with, and a friend of, the said Charles F. Conrad, and did
in fact participate with the said Charles F. Conrad in a theft of money from
a business known as By-Rite Station at 809 - 28th Street, Ogden, Utah.
3. That on or about the 15th day of April 1977, your affiant
and Charles F. Conrad drove to the By-Rite Station at 809 - 28th Street,
Ogden, Utah. That prior to reaching the station, Charles F. Conrad, who
was driving the automobile being used by us, let me out of the automobile
and then drove to the car wash bays on the By-Rite Station. When
Charles F. Conrad arrived at the car wash bay, he cut the hose of the
car wash with a knife, and then proceeded to speak with the attendant,
whereupon the attendant went with Charles F. Conrad to examine the car
wash bay, where Charles F. Conrad had stopped his car. While the
attendant was at the car wash bay with the said Charles F. Conrad, your
affiant entered the building of the By-Rite station and took some money from
a cash box located in the building. I immediately left the building of the
By-Rite Station and observed Charles F. Conrad and the station attendant
at the car wash bay. I then proceeded to the corner of Quincy Street and
28th Street in Ogden, Utah. Within a very short time, Charles F. Conrad

drove to where I was standing, and I entered the automobile and we left the scene.

4. To my knowledge, the said Charles F. Conrad at no time entered the building of the By-Rite Station, nor did he leave the immediate area of the car wash bay, where he had detained the service station attendant during the period of time that I entered the By-Rite Station building.

5. At no time did the said Charles F. Conrad have in his possession or in the automobile a revolver, or any other type weapon, other than a small kitchen knife, which he had with him for the purpose of cutting the hose in the car wash bay.

6. That your affiant has been fully advised of his rights in connection with this affidavit, and acknowledges that he is fully aware that this affidavit acknowledges a participation in a criminal act, and that notwithstanding this information and knowledge, your affiant has given this affidavit of his own free will, without promise, threat or duress of any kind, and states that the occurrences, as set forth in this affidavit, are true.

7. Your affiant further states that at no time was the attendant at the By-Rite Station, on the 15th day of April 1977, robbed by the said Charles F. Conrad, or by your affiant, but that monies were taken from the By-Rite Station under the circumstances hereinabove describ

Dated this 26 day of January 1978.

Subscribed and sworn to before me
this 26 day of January 1978.

Walter R. Ellett

LeRoy Gutierrez

Not. Pub. Res. in Murray, Utah

LeRoy Gutierrez

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