

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF WEBER COUNTY
HONORABLE JOHN F. WAHLQUIST, JUDGE

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with aggravated robbery in violation of Utah Code Ann. § 76-6-302 (Supp. 1977).

DISPOSITION OF THE LOWER COURT

Appellant was tried before a jury and found guilty of one count of robbery on July 18, 1977, in the Second Judicial District, in and for Weber County, State of Utah, the Honorable John F. Wahlquist presiding. On August 8, 1977, appellant was sentenced to a term of not less than five years and which may be for life in the Utah State Prison. Appellant was further sentenced to an additional five years because of

the use of a gun. The two terms were to run consecutively.

At the rehearing of appellant's motion for a new trial on May 22, 1978, Judge Wahlquist struck the additional term of five years for the use of a firearm.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgments of the lower court.

STATEMENT OF FACTS

On April 15, 1977, at approximately 7:45 p.m., the By-Rite Gas Station, 809 28th Street, Ogden, Utah, was robbed by a single gunman. Kim Reed, the attendant on duty at the time, was commanded at gunpoint to open the till and give the assailant the money (Tr. 5) which was later determined to be \$34.90 (Tr. 9). After the robber had taken the money, he forced Reed to walk to the car wash area adjacent to the service station, then the robber fled on foot along 28th Street (Tr. 10-12). Reed testified that he observed a faded oxidized red "Toyota or Datsun" automobile parked in the end bay that pulled away from the station down Monroe Street just as the robber was fleeing down 28th Street (Tr. 12-13, 43). Two customers were getting gas at the time of the robbery, but when Reed asked one if he had seen the incident, he replied he had not. (Tr. 26).

Reed called the police immediately upon returning to the gas station office and then continued to wait on customers until the officers arrived (Tr. 25). After the officers arrived and made an investigation, Reed went to police headquarters with Officer Deloy White (Tr. 13). Reed was shown 84 "mug shots" of suspect persons and picked out appellant's photo claiming, "This [is] the guy that had the gun." (Tr. 13-14; R. [2a]). Appellant was subsequently arrested and charged with aggravated robbery (R. 1, 8).

During the investigation and at trial, it was learned that the oxidized car belonged to Yolanda Gomez, a close friend of appellant's, who had loaned the car to appellant that night (Tr. 79-80). It was also learned that LeRoy Guterrez, a friend of appellant's, was with appellant on the night in question (Tr. 83-84, 217-218).

At trial, appellant advanced two alternative defenses: first, an alibi defense; and second, that the offense committed was not aggravated robbery, but a simple till tap.

As to the first defense, appellant offered six witnesses who testified as to appellant's whereabouts from 5:30 p.m. until about 9:30 p.m. on April 15, 1977 (Tr. 143-152; 153-166; 204-214; 214-225; 229-240; 260-268). These witnesses did not all place appellant at a single location at any one given time and the testimony taken as a whole, is

inconsistent not only with the defense's case itself, but also with Yolanda Gomez' testimony who, although she is a close friend of appellant's, was called as an adverse witness for the prosecution. (Tr. 76-113).

The more important of the two defenses was appellant's second claim that the offense was only a class B misdemeanor "till tap" theft. Appellant argues that he and Guiterrez schemed together to steal from the By-Rite station by creating a distraction in one of the car wash bays (Tr. 279-280). They planned to cut a rubber hose on a spray gun in one of the wash bays and then ask Reed to come look at the problem leaving the station's till unattended (Tr. 282-283). Testimony at trial from both Reed and appellant indicates that the two did cut the hose and lured Reed from the station office (Tr. 30-31, 363; 282-292). Reed, however, testified that the cut hose incident occurred about one-half hour before the aggravated robbery occurred (Tr. 30, 363).

It was also brought out in Reed's testimony that the cash box on the office counter was bolted down and always locked (Tr. 22-24). Reed testified that he always had the key on a key ring on his person and never left the key in the cash box lock (Tr. 22-24). Reed said this was the case on April 15 when he left the office to inspect the damaged car wash hose. (Tr. 24).

On several occasions during the trial, Reed re-affirmed his claim that appellant, Charles Conrad, did indeed hold a pistol on him and demanded money from the By-Rite Gas Station cash box. (Tr. 7-8; 57-61; 67; 74; 362-363). Reed was also positive in his identification of appellant, Charles Conrad, as the gunman who committed the robbery on April 15, 1977 (Tr. 6; 13-14).

After both sides had rested, the jury was instructed and given four alternative verdicts to return: (1) aggravated robbery; (2) robbery; (3) class B misdemeanor theft; or (4) acquittal (R. 39-42). After deliberating 46 minutes after a three day trial, the jury returned a verdict of guilty on the charge of aggravated robbery (R. 38).

Prior to trial, appellant moved for a continuance in order to have more time to locate LeRoy Guterrez in order to call him as a defense witness (R. 15-17). When the motion was denied (R. 21), the court reserved the right to reconsider the motion if all defense witnesses were not served. When the trial and sentencing were completed, appellant moved for a new trial on the basis of newly discovered evidence having since located Guterrez (Tr. 69-71). This motion was also denied but the court again reserved the right to reconsider if Guterrez would present himself in court and offered whatever further evidence he had on the matter (R. 81).

Appellant appealed this denial of a new trial to the Utah Supreme Court, but upon motion of the defendant, it remanded to the Second District Court for reconsideration (R. 468). At the reconsideration hearing, Judge Wahlquist determined that since Guiterrez' testimony was inconsistent with appellant's alibi defense and also that it would not have made a difference in the outcome of the trial, the motion for a new trial was denied (R. 478). Also, the additional five year term for the use of the firearm was struck by Judge Wahlquist at this rehearing (R. 478-480).

Appellant now appeals that denial of a new trial to this court.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL INASMUCH AS APPELLANT'S "NEWLY DISCOVERED EVIDENCE" WAS MERELY CUMULATIVE, WOULD NOT HAVE CHANGED THE RESULT AT TRIAL, AND THERE IS NO SHOWING OF ABUSE OF DISCRETION.

About six weeks before trial, appellant filed an affidavit with the trial court asking for a continuance of trial because LeRoy Guiterrez was not available to testify (R. 15-17). In fact, Guiterrez was a fugitive from the law enforcement officers and was avoiding the police (R. 16).

The motion for continuance was denied (R. 21) with Judge Wahlquist reserving judgment as to the importance of any witnesses not called to be determined at trial.

On August 12, 1977, appellant filed an affidavit with the court asking for a new trial on the basis of newly discovered evidence declaring that Guterrez was then available to testify. The court denied the motion on September 27, 1977, but offered to reconsider the motion "if the claimed witness appears in court and presents his testimony for the record." (R. 81). Appellant then appealed this denial of a new trial to this court, and, upon motion of appellant, the matter was remitted to the trial court. (See State v. Conrad, Remittance, No. 15374, March 31, 1978, (R. 468)).

At the reconsideration hearing held on May 22, 1978, Judge Wahlquist considered the affidavit of Guterrez's version of the incident. The court concluded that the affidavit was "absolutely inconsistent with the testimony given" by Kim Reed and also inconsistent with appellant's alibi defense (R. 479-480). Judge Wahlquist ruled:

"Insofar as the motion is concerned, considering the testimony that was given from the defense is inconsistent totally with this testimony now given, that it could not intelligently have presented both this testimony [admission of commission of a crime] and the defense which

he did present [alibi defense] 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." (Emphasis added) (R. 478)

Appellant now claims that this ruling by Judge Wahlquist improperly denied him his right to a new trial. The statutory requirements for the granting of a new trial are set forth in Utah Code Ann. § 78-38-1 et seq. (1953, as amended). Section 78-38-3 outlines the grounds for new trials and subsection 7 deals precisely with the point raised on this appeal:

"When a verdict or decision has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

* * *

(7) When new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial." (Emphasis added).

Thus, if the newly discovered evidence is not material to the defendant or it can be shown that the defendant did not make reasonable efforts to discover the evidence before trial, then the new trial will not be granted. While this latter requirement was questioned by the state at the rehearing (R. 475-476), respondent will assume, arguendo,

that appellant did use reasonable diligence in attempting to locate Guterrez before trial. However, the former requirement was the gist of Judge Wahlquist's ruling; that is, appellant did not show by the Guterrez affidavit that the evidence was "material to the defendant."

Appellant notes in his brief that "for some unknown reason" the affidavit of Guterrez is not included in the present case's record, but is included in the record of the previous appeal. Respondent is unable to locate the alleged affidavit to refer this court to in either court records. But assuming, arguendo, that it does exist somewhere, Judge Wahlquist's rulings are most persuasive. The appellant advanced two alternative defenses at trial: (1) an alibi defense; and (2) that the committed crime was not a robbery, but merely a till tap (class B theft). Thus, the Guterrez affidavit accomplishes two results. First, it completely undermines the alibi defense alternative since the affidavit admits that Guterrez and appellant were both at the By-Rite gas station on the night in question and at the incriminating time. (The alibi defense was also discredited by appellant himself when he took the stand and admitted being at the By-Rite station and participating in a crime that night (Tr. 279-292)).

The affidavit also results in nothing more than a cumulative restatement of appellant's testimony at trial. Appellant admits this in his brief where he states:

" . . . the testimony of LeRoy Guiterrez is completely supportive of the appellant's testimony given in his defense at the time of trial." (Appellant's brief, p. 6).

Appellant's admission that the affidavit is only "supportive of appellant's testimony" is an admission that the evidence is merely cumulative which was precisely the issue dealt with in the case of State v. Jiron, 27 Utah 2d 21, 492 P. 2d 983 (1972). In Jiron, defendant was convicted of robbery and he appealed claiming, inter alia, that he should be granted a new trial. Defendant based this claim on the fact that his wife was in Colorado at the time of his trial and therefore could not testify as to his whereabouts on the night in question. After trial, defendant's wife swore out an affidavit and testified to basically the same story defendant had given at trial. In upholding the trial court's denial of a new trial on defendant's claim of newly discovered evidence, this court ruled:

"The wife's testimony is merely cumulative to defendant's; . . . Finally, the facts recited in the affidavit are not of the type that would indicate the probability of a different result upon the retrial of the case. From the foregoing there is insufficient basis upon which to predicate a determination that the trial court abused its discretion." 492 P. 2d at 985.

Thus, where "new" evidence is only cumulative in its effect, the matter is left to the judgment of the trial court to determine whether a new trial should be granted. Also where, in that judgment, it appears that a new trial would result in the same verdict, a new trial motion may properly be denied.

This principle was also advanced by the Utah Court in State v. Molitz, 40 Utah 443, 122 P. 86 (1912), and State v. Weaver, 78 Utah 555, 6 P. 2d 167 (1931). The Molitz case held that it was proper to deny a motion for a new trial where defendant's newly discovered evidence was only cumulative.

In the present case, Judge Wahlquist's determination that Guiterrez's affidavit was merely a further corroboration of appellant's own testimony given at trial triggers the application of the Jiron and Molitz cases. As above noted, these two cases would affirm the denied new trial motion on the basis of Guiterrez's affidavit being "merely cumulative."

Another principle which trial courts must resolve is whether the newly discovered evidence would result in a different outcome at trial. Several Utah cases hold that a new trial can only be granted where such a probability of a different result is likely.

In Jensen v. Logan City, 89 Utah 347, 57 P. 2d 708 (1936), the court ruled:

"It is only under very special circumstances . . . that new trials are granted to allow the defeated party to add cumulative evidence, newly discovered, and then only where there is a clear probability that the result of a new trial will be different." (Emphasis added.) 57 P. 2d at 723.

In accord, State v. Montgomery, 37 Utah 515, 109 P. 815 (1910); State v. Cooper, 114 Utah 531, 201 P. 2d 764 (1949); State v. Harris, 30 Utah 2d 77, 513 P. 2d 438 (1973); and State v. Jiron, supra.

This is precisely the basis of Judge Wahlquist's ruling. He forcefully determined that "[i]n the total of the situation, I do not think this witness [Guiterrez] would have made a difference." (R. 478). In other words, even had Guiterrez testified at trial, Judge Wahlquist, who presided at both the trial and the rehearing of the motion, determined that there was no likelihood that "the result of a new trial will be different." Id.

One final consideration of the granting of new trials needs to be dealt with here. The reviewing court will only reverse a lower court's ruling if an abuse of trial court discretion is shown. State v. Harris, supra, is dispositive on this point. In considering defendant's appeal from a denied motion for a new trial in Harris, this court ruled:

"It is a matter solely within the discretion of the trial court as to whether it should grant a new trial on the ground of newly discovered evidence. This court cannot substitute its discretion for that of the trial court, whose ruling will be sustained, unless it is clearly indicated that it abused or failed to exercise its discretion. The denial of such a motion will be deemed an abuse of discretion only in such instances where there is a grave suspicion that justice may have been miscarried because of the lack of enlightenment on a vital point, which the new evidence will supply If there be evidence before the court upon which reasonable men might differ as to whether or not the defendant is guilty, the trial court may deny a motion for a new trial."
513 P. 2d at 439-440. (Emphasis added)

This legal principle regarding trial court discretion in the granting of new trials is soundly imbedded in Utah case law and has been cited by this Court on numerous occasions. (Jensen v. Logan City, *supra*; Moser v. Zion's Co-op. Merchantile Inst., 114 Utah 58, 197 P. 2d 136 (1948); State v. Cooper, *supra*; Johnson v. Doctorman, 23 Utah 2d 214, 462 P. 2d 169 (1969); State v. Jiron, *supra*; Lee v. Howes, 548 P. 2d 619 (Utah, 1976); Smith v. Shreeve, 551 P. 2d 1261 (Utah, 1976).)

Thus, appellant's claim that he was improperly denied a new trial only has merit if he can show that Judge Wahlquist abused his discretion. This appellant has not done except to assert such abuse. On the contrary, a careful review of the record reveals a very thoughtful and fair treatment of appellant's claim of newly discovered evidence. After

examination of such and when viewed in the context of the entire case, Judge Wahlquist correctly determined that the Guterrez's affidavit was only cumulative, would not have resulted in a different jury verdict and in so concluding he did not abuse his discretion. This conclusion is a proper application of U.C.A. § 78-38-3 which, as above noted, restricts the granting of a new trial on the ground of newly discovered evidence, to such evidence which is "material to the defense."

Respondent asserts that Judge Wahlquist's ruling was proper in light of the above and submits that appellant's request for a new trial on the ground of newly discovered evidence is not justified by the facts of the case.

POINT II.

A JURY'S VERDICT MUST NOT BE
DISTURBED ON APPEAL MERELY
BECAUSE IT IS BASED ON UN-
CORROBORATED TESTIMONY OF THE
VICTIM, UNLESS SUCH TESTIMONY
IS COMPLETELY UNBELIEVEABLE.

It is a well settled axiom of criminal law in this state that the jury is the sole judge of the credibility of witnesses. (State v. Sullivan, 6 Utah 2d 110, 307 P. 2d 212 (1957)); State v. Estrada, 119 Utah 339, 227 P. 2d 247 (1951); State v. Moore, 111 Utah 458, 183 P. 2d 973 (1947); State v. Mills, 530 P. 2d 1272 (Utah, 1975); State v. Romero.

554 P. 2d 216 (Utah, 1976)); and State v. Wilson, 565 P. 2d 66 (Utah, 1977)).

The more narrow question here involves the credibility of the victim of the crime, Kim Reed, who gave uncorroborated testimony at trial of the events of the robbery (Tr. 1-75). Appellant cites the recent case of State v. Middelstadt, 579 P. 2d 908 (Utah, 1978), which sets out the basis on which a reviewing court must deal with uncorroborated evidence.

"In general, the common-law supports the contention that a conviction may be sustained upon the uncorroborated testimony of the victim, and that such evidence is not insubstantial simply because the testimony is conflicting in some respects. 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. We do not find that to be the case here." (Emphasis added.) 579 P. 2d at 911.

Appellant claims that Reed's testimony of appellant robbing him with two customers present should be categorized in the "so improbable that it is completely unbelievable" category. Appellant notes that the customers were not asked by Reed to tell police what they saw, that, in fact, the customers did not even notice a gunman walking away from the gas station office, and that Reed continued to wait on customers calmly without asking for their assistance. This is a mistaken reading of the trial transcript by appellant.

Reed did testify that he asked one customer if he saw anything, and the customer answered he only "saw a gentleman up there, but that was it" (Tr. 26). Reed also testified that it would have been very difficult for the customers to have seen the gun in the man's hand since it was dusk at about 7:45 p.m. and the gas station lights were on (Tr. 5, 12), the office windows are at about "chest level" (Tr. 180), the bottom half are painted over and the top half has lettering painted on them (Tr. 35), and the two customers were 50 to 60 feet away (Tr. 62), getting gas at the pumps furthest from the office (Tr. 26).

As to his waiting on customers after the event without requesting their aid, Reed had already asked one customer if he saw anything suspicious and was told he had not (Tr. 26). Respondent submits that Reed's behavior, therefore, was not unusual--after being told by the customer that hadn't seen anything peculiar, he continued to wait on customers until the police arrived (Tr. 26).

No where in the record does any witness testify that appellant backed out of the office with gun in hand, as noted in appellant's brief (p. 19). Reed testified that after the robber took the money, the robber commanded him to walk over to the car wash area and they both left the office together (Tr. 10, 25).

Respondent submits that Reed's testimony is not "completely unbelievable," as witnessed by the jury's 46 minute deliberation after a three-day trial and verdict of guilty (R. 38).

In State v. Romero, supra, the Utah court ruled, with regard to a reviewing court's weighing the evidence, that:

"This court has long upheld the standard that on an appeal from conviction the court cannot weigh the evidence. . . . Further, this court has maintained that its function is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendant's testimony. . . . 'We are concerned only with the question of the sufficiency of the evidence to sustain the convictions by showing that the jury would have found beyond a reasonable doubt that defendants were guilty.'" 554 P. 2d at 218.

This jury role was also echoed in State v. Mills, supra, where this court said:

"It is the prerogative of the jury to judge the weight of the evidence, the credibility of witnesses, and the facts to be found therefrom." 530 P. 2d at 1272

And as to the specific evidentiary matter of uncorroborated testimony, State v. Middlestadt, holds:

" . . . there is no rule governing how many witnesses are needed or that the testimony need be corroborated by

other evidence before the trier of fact can decide how to determine the weight of the testimony." 579 P. 2d at 911.

Appellant attempts to discredit the victim Reed's testimony by distorting the record and claims that the "only believable portion of Reed's testimony is that portion found on page 142 of the record . . ." (p. 19). Respondent would only point out that the testimony on page 142 of the record (Tr. 58) is an out of context statement made in response to the leading questions of defense counsel during cross-examination. The actual exchange is quoted below:

[Mr. Farr] 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?

[Mr. Reed] A. Right.

* * *

Q. So you told them about the gun and you remembered Freddy Conrad because he had just been in there, and you later then identified him as the person with the gun?

A. As I stated, it didn't happen that way." (Tr. 58; R. 142)

Thus, where appellant cites to page 142 of the record as the only portion of the trial where Reed was believable, respondent answers that defense counsel, in an attempt to confuse and have Reed contradict his earlier story,

offered defendant's version of the incident in question form. Reed answered "Right" to the portion of the question dealing with the gun being used, but then one question later, refuses to go along with defense counsel's leading questions and re-asserts his earlier position. This is hardly an admission that defendant's story was at that point adopted by Reed or that Reed was only believable when he replied "right" to a multi-faceted, leading question.

Respondent contends that the above authority, when applied to an accurate reading of the trial record, leads to only one conclusion: the uncorroborated testimony of Kim Reed was sufficient, substantial and believable. The jury was, therefore, within its prerogative when it determined appellant's guilt.

CONCLUSION

The appellant's claim of an improper denial of a new trial is not supportable since the Guiterrez affidavit was merely cumulative evidence, would not have resulted in a different jury verdict and there is no showing of any abuse of discretion by the trial court in its ruling.

The uncorroborated testimony of Kim Reed is not per se a deficient form of evidence and can only be deemed insufficient where the court finds the testimony to be "completely unbelievable." The jury's verdict which relied

on Reed's testimony is therefore a proper one since a careful review of the trial record shows that the testimony was sufficiently believable.

On the basis of the above authority and the evidence against appellant shown at trial, respondent prays the verdict and sentence be affirmed.

Respectfully submitted,

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