

1986

State of Utah v. Wesley Allen Tuttle : Petition for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
)
 Plaintiff-Respondent,)
) Case No. 20068
 vs.)
)
 WESLEY ALLEN TUTTLE,)
)
 Defendant-Appellant,)

PETITION FOR REHEARING

Appeal from a judgement and conviction of criminal homicide, murder in the first degree, a capitol offense in the Third Judicial District Court in and for Summit County, State of Utah, the Honorable Philip R, Fishler, Judge, presiding.

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Defendant-Appellant,)	

PETITION FOR REHEARING

STATEMENTS OF FACTS AND PROCEDURAL BACKGROUND

Appellant was charged and convicted of criminal homicide, murder in the first degree under 76-5-202 (1) (q) Utah Code Annotated 1953 as amended in connection with the stabbing death of Sidney Ann Merrick, on September 26, 1983 in Summit County, State of Utah, for which he received a life sentence.

This Court in State V. Tuttle _____ P.2 _____, 106 Utah Adv. Rep. 6 (April 12, 1989) reversed the capitol conviction, finding that the applicable statute if construed to be constitutional, could not apply to the facts to sustain that capitol conviction and therefore this Court reversed the conviction and remanded the case back to the District Court for entry of Judgement and conviction for Second Degree murder and the imposition of an appropriate sentence. Appellant in this petition does not challenge that finding.

This Court however found two issues raised by Tuttle to have been error but made the additional finding that such error

was harmless. The court concluded that the admission of hypnotically enhanced testimony and the exclusion of expert testimony regarding the effect of hypnosis on a person's memory were error but that such error was harmless. It is those findings of Harmless Error that Tuttle now requests the Court to Review in connection with this Petition for Rehearing.

POINT I

THIS COURT HAS OVERLOOKED OR MISAPPREHENDED THE FACTS IN CONCLUDING THAT THE ADMISSION OF HYPNOTICALLY ENHANCED RECALL WAS HARMLESS ERROR.

In finding that the admission of hypnotically induced recall was error but harmless the Court found that the evidence of guilt was overwhelming. In fashioning the harmless error rule in Tuttle the Court directs its attention to several factors which include the importance of the evidence, whether or not the evidence was cumulative, whether or not there was any corroboration of that tainted evidence with other non-tainted testimony, and the overall strength of the State's case against the appellant. In fashioning that rule this Court then concluded that the State's case was very strong and that the hypnotically induced testimony was not important but cumulative and that other relevant parts of the contested evidence had been corroborated by other non-tainted evidence.

Appellant wishes to point out to the Court certain facts which he believes were misapprehended or overlooked by this Court in arriving at that decision.

HANDPRINT EVIDENCE. There was uncontroverted evidence that a hand print located on the front bumper of the Merrick vehicle did not match the hand print of either the appellant or the victim. This is significant because, as the testimony established, this handprint was taken from the area on the bumper where there was testimony indicating that a chain had been attached to the automobile for the purpose of pulling or towing the Merrick vehicle. This evidence is significant in and of itself but it becomes even more significant when understood in view of other relevant testimony. There was uncontroverted testimony that a witness observed a white vehicle, similar to the Merrick vehicle stopped on the side of the road with it's hood up in and around the Lambs Canyon Area which is approximately 3 miles from the crime scene. That same witness testified that there were two people on the outside of that vehicle one of which was a male and another of which was a female and that a pickup truck, not appellant's truck, but another vehicle was parked near the Merrick or the white vehicle.

FORCIBLY EXTRACTED HAIRS. The one hair that may have matched Tuttle's hair which was found in the Merrick vehicle had not been forcibly extracted, or in other words pulled from the head. There was uncontroverted testimony that many hairs which were conclusively established as not being either from the victim or the appellant were found imbedded in Sidney Ann Merrick's blood soaked shirt, or inside the vehicle. The clear

implication of this testimony is that some other person had been in the vehicle with the victim at or about the time of the homicide and had hairs pulled from his head. Those hairs then became imbedded in the victims blood soaked blouse. The victim was found lying on her back in the vehicle.

FINGERNAILS. There was clear and uncontroverted testimony that the victims fingernails were bent back indicating that in resisting her attackers advances she had bent her fingernails back, and there was also blood imbedded underneath the fingernails. This implies that whoever the perpetrator was, that he would have had scratch marks on his arms as a result of the victims defensive maneuvers. The testimony was uncontroverted that when Tuttle arrived in Evanston Wyoming that evening he did not have any kind of scratch marks on his body at all, including his arms which would have been exposed to the victim's defensive maneuvers. Once again the strong implication is that a person other than Tuttle was the perpetrator of this crime.

OTHER EYEWITNESS TESTIMONY. While it is true that there was other testimony from eyewitnesses identifying a black truck towing a vehicle, there was also testimony indicating that at the location of the homicide there was a white car, presumably the Merrick vehicle, and in front of that white car there was a box trailer with two individuals on the outside, one was a man and the other a woman. The witness who testified to such a description was an engineer with Gibbons and Reed and had

absolutely no interest in the investigation other than as a disinterested eyewitness. That person testified that he was certain about that testimony because as he crested the Summit there was glaring from the sun on the box trailer which attracted his intention to that area.

The Court in focusing on the corroborative evidence establishing the fact that Tuttle was present at the Summit and had an opportunity to commit this crime simply ignores other testimony from eyewitnesses which is inconsistent with the States account of the events.

POINT II

THE DENIAL OF DEFENDANT'S DUE PROCESS RIGHT TO PRESENT EVIDENCE IN HIS BEHALF IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS AND REQUIRES THIS COURT TO REVERSE HIS CONVICTION AND ORDER A NEW TRIAL.

The defendant has the right to due precess of law under Article 1 Section 7 of the Utah State Constitution and its Federal counter part.

The United States Supreme COURT in Chambers vs. Mississippi, 92 S.Ct. 1038, 1945 (1973), held that

the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right to confront and cross-examine witnesses and to call witnesses in ones's own behalf have long been recognized as essential to due process. Mr. Justice Black writing for the Court In re: Oliver (citation omitted), identified these rights as among the minimum essentials of a fair trial: 'A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of juris prudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel'. (emphasis

added).

In Chapman v. State of California, supra the United States Supreme Court held, in fashioning a constitutional harmless error rule that there were some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. Citing Payne vs. State of Arkansas, 356 U. S. 560 (Coerced confession), Gideon vs. Wainwright, 372 U.S. 355 (right to counsel), and Tumey vs. State of Ohio, 273 U.S. 510 (Impartial judge).

The United States Supreme Court also held in Washington vs, State of Texas, 87 S.Ct. 1920, 1923 (1976), that due process includes as a minimum the right to call witnesses and put on a defense.

The United States Supreme Court in Rose vs. Clark, 39 Cr.L. 3278, (1986), applied the Chapman Constitutional Harmless Error Rule to a Sandstrom burden shifting instruction, concluding that such instruction was harmless beyond a reasonable doubt, but recognized that some errors necessarily render a trial fundamentally unfair. Noting at 39 Cr.L. 3279, F.N. 6, that each of the examples, Chapman cited as error that could never be harmless either aborted the basic trial process or denied it all together, and held at 39 Cr.L. 3279 as follows:

Harmless error analysis thus presupposes a trial at which the defendant represented by counsel may present evidence and argument before an impartial judge and jury. (Emphasis added).

The United States Supreme Court in Halloway vs. arkansas, 98 S.Ct 1173, 1182 (1978), held that a claim of

conflicting interest by an attorney was not subject to harmless error analysis pursuant to Chapman because it would consist of speculation. Where it said:

In the case of joint representation of conflicting interest the evil - it bears repeating-is what the advocate finds himself compelled to refrain from doing, thus our inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. (Emphasis added).

The error complained of here should not be subject to Chapmans harmless error analysis because it aborted the "basic trial process" i.e.. Mr. Tuttle's right to call Witnesses to challenge the accuracy of an eye witness. It is one thing to find the introduction of tainted eyewitness testimony harmless. It is quite another to refuse to allow Tuttle to explain to the trier of facts the reasons why it is tainted.

It may well be that the jury believed in hypnosis much like a group of grade school kids believe in Raveen and people walking like chickens on stage. Tuttle should have been able to explain to the jury what this court recognizes in this case that hypnosis is unreliable and creates in the mind of a person hypnotized a false sense of accuracy of recall which cannot be broken down by even the most skilled of cross-examiners. A trial has been described as a search for truth. We have no quarrel with that proposition and in this case Tuttle should have been able to present the truth on hypnosis.

CONCLUSION

The important interest in protecting constitutional rights of all persons accused as well as protecting the central

integrity of the criminal justice system requires that Mr. Tuttle's conviction be reversed because the error complained of denied Mr. Tuttle the basic trial process and under the circumstances of this case can never be harmless.

CERTIFICATION OF COUNSEL

Pursuant to Rule 35 of the Rules of the Utah Supreme Court Counsel herein certifies that the Petition for Rehearing filed herewith is presented in good faith and not for delay.

DATED the _____ day of May, 1989.

BROWN & COX

By _____
KENNETH R. BROWN
Attorneys for Defendant-Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the _____ day of May, 1989, I mailed four copies of the foregoing Petition for Rehearing to R. Paul Van Dam, Attorney General, and Sondra Sjogren, Assistant Attorney General, Attorneys for Plaintiff-Respondent, Attorney Generals Office, 236 State Capitol Building, Salt Lake City, Utah 84111