

1979

# State of Utah v. Ronald G. Bacon : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *State v. Bacon*, No. 15932 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
STATE OF UTAH, :  
In the interest of :

RONALD G. BACON, :  
: :  
: :  
: :

Case No. 1584

A person under eighteen years :  
of age. :

-----  
BRIEF OF RESPONDER  
-----

APPEAL FROM THE VERDICT OF THE DISTRICT JUVENILE COURT FOR SALT LAKE COUNTY STATE OF UTAH, THE HONORABLE JOHN FARR LARSON, JUDGE, PRESIDING

-----  
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FILED

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----

STATE OF UTAH	:	
In the interest of	:	
RONALD G. BACON,	:	Case No. 15932
	:	
A person under eighteen years	:	
of age.	:	

-----

BRIEF OF RESPONDENT

-----

STATEMENT OF THE NATURE OF THE CASE

Ronald Bacon, a juvenile, was charged under Utah Code Ann. § 76-6-302 (1953) as amended, with the crime of aggravated robbery of Cheryl's Gift Shop wherein \$120.00 was taken on or about March 10, 1978, from Terri Lium, an employee.

DISPOSITION IN THE LOWER COURT

The case was heard on June 16, 1978, before the Honorable Judge, John Farr Larson, Second District Juvenile Court for Salt Lake County, who sat without a jury and who reached a verdict of Guilty.

## RELIEF SOUGHT ON APPEAL

Respondent urges this Court to affirm the trial court's decision finding appellant guilty of the offense charged.

### STATEMENT OF THE FACTS

On the evening of March 10, 1979, Teri Lium was working at Cheryl's Gift Shop at the Olympus Hills Shopping Center. At 7:45 p.m., she noticed an individual (described as between 15 to 17 years old, about 5'7" or 5'8", blonde, weighing about 150 pounds, wearing a red ski parka with black ski gloves, blue denim pants and shirt and had "rosy" sunburned cheeks), browsing through the shop. She became suspicious he might be a shoplifter (Tr. 4). Miss Lium had direct eye contact with the individual several times as she watched him (Tr. 4), and at one point he picked up a poster and asked her the cost (Tr. 4, 12, 13).

The individual approached Miss Lium, put a paper sack on the counter and told her to "put all the money in there" (Tr. 6-9). Miss Lium testified that she was no more than one foot away from the individual facing him directly (Tr. 8). Miss Lium said "what" and he repeated himself (Tr. 9). Miss Lium testified that she placed the money (\$120.00) in the paper sack. She

stated she was scared because the individual had unzipped his coat exposing a gun which was stuffed in his pants (Tr. 9).

The robber then asked Miss Lium for the keys to the store, escorted her to the backroom, and locked her in (Tr. 10, 11). She escaped into the alley through the back door and called the police from the store next door. She glanced at the clock in Fernwoods and it was 8:15 p.m. (Tr. 11).

Miss Lium told the officers about the poster the robber had handled and several prints were lifted. One ultimately matched appellant's right thumb print. (Tr. 12, 13, 30, 32). The officers instructed Miss Lium to go home and look through some yearbooks to see if she could find the robber's picture (Tr. 16). She found the robber's picture in the Churchill Junior High yearbook and phoned the police (Tr. 16).

After Miss Lium had identified appellant's picture, the officers went to appellant's residence around midnight (R. 43). The officers asked appellant's mother if they could speak to him (Tr. 43), and then asked her if appellant owned a red parka and she stated yes and retrieved it for them along with some black ski gloves (Tr. 45).

The officers questioned appellant about his whereabouts that night. Appellant denied being in the gift shop and told the officers he was not sure even what gift shop they were talking about (Tr. 46, 55, 56). The officers asked appellant to get the clothes he was wearing that night. Appellant went downstairs and returned with a denim shirt and some levis (Tr. 45, 55 69). Appellant was arrested and the articles of clothing were taken as evidence.

At trial, Miss Lium positively identified appellant as the one who robbed her (Tr. 3). Appellant admitted being at the shopping center that night but claimed he was home when the robbery took place (Tr. 63). When confronted with the fingerprint on the poster, appellant explained he had been in the shop two days prior on March 8, 1979, and handled it then (Tr. 70). It should be noted that appellant denied ever being in the shop when the officers initially questioned him (Tr. 45, 55, 56). Also, two fingerprint experts testified that even under ideal conditions, a fingerprint would probably last a maximum of 36 hours (Tr. 39, 60).

Appellant's mother testified that appellant was home shortly after eight, when the robbery was alleged to have taken place (Tr. 99). She admitted that she had not actually looked at the time her son came in (Tr. 102).

She also admitted being defensive about the time because of its importance and that she "knew her son and there was no way he could do such a thing" (Tr. 103).

Judge John Farr Larson, sitting without a jury, concluded that based on Miss Lium's testimony and the fingerprint, appellant was guilty beyond a reasonable doubt of the crime of aggravated robbery (Tr. 121). The appellant's claim of error focuses on the sufficiency of the evidence presented at trial.

#### ARGUMENT

#### POINT I.

THE EVIDENCE WAS SUFFICIENT TO  
SUPPORT THE VERDICT OF GUILTY  
BECAUSE THE EVIDENCE WAS SUCH  
THAT REASONABLE MINDS COULD  
BELIEVE BEYOND A REASONABLE  
DOUBT THAT APPELLANT COMMITTED  
THE CRIME OF AGGRAVATED ROBBERY.

Appellant was convicted of aggravated robbery under Utah Code Ann. § 76-6-302 (1953), as amended, which provides:

A person commits aggravated robbery if in the course of committing robbery, he:

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or deathly weapon; or . . .

Robbery is defined by statute as "the unlawful and intentional taking of personal property in the

possession or presence of another person, against his will,

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accomplished by means of force or fear." Utah Code Ann. § 76-6-301 (1953), as amended.

Appellant's contention is that the trial judge erred in finding the prosecution had proved all of the elements of the offense beyond a reasonable doubt.

The rules governing the scope of appellate review as to sufficiency of the evidence in juvenile court cases are well settled. In State v. Middlestadt, 579 P.2d 908 (Utah 1978), this Court in referring to the juvenile court stated:

. . . that court must conform to practices and procedures provided for by law or rule of court in district court criminal proceedings. Those procedures include a requirement that guilt must be proved beyond a reasonable doubt. However, this Court will not overturn the judgment of the trial court absent a showing of error, prejudice, or insufficient evidence. The test to be applied is that the evidence submitted must be so improbable so as to make it completely unbelievable such that the conviction could not possibly stand.

579 P.2d at 909.

Moreover, this Court in State v. Romero, 554 P.2d 216 (Utah, 1976), also said:

This court has long upheld the standard that on an appeal from conviction the court cannot weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long

as the evidence given is substantial. 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.

554 P.2d at 218.

Reasonable doubt is described as follows:

"Reasonable doubt" is not a mere imaginary, captious, or a possible doubt, but a fair doubt, based upon reason and common sense, and growing out of testimony in the case, and it is such doubt as will leave juror's mind, after a careful examination of all evidence, in such condition that he cannot say he has an abiding conviction, to a moral certainty, of defendant's guilt.

State v. Taylor, 21 U.2d 425, 446 P.2d 954 (1968).

State v. Sullivan, 6 U.2d 110, 307 P.2d 212 (1957) cert.

denied 355 U.S. 848, 2 L.Ed.2d 57, 78 S.Ct. 74 (1957),

further adds:

. . . proof beyond all peradventure of doubt could seldom be had, nor does the law require it.

Respondent submits that the evidence presented at trial, viewed under the above standards, is substantial and more than sufficient to support the verdict that appellant was guilty of the crime of aggravated robbery.

Terri Lium positively identified appellant and at trial stated that there was no doubt in her mind that appellant was the robber (Tr. 18). Miss Lium also picked out appellant's picture from among hundreds (Tr. 16).

This Court in Middlestadt, supra, ruled that, in general, the uncorroborated testimony of the victim alone may sustain a conviction even where that testimony conflicts in some respects. See also State v. Rasmussen, 92 Idaho 731 449 P.2d 837 (1969), Morse v. State, 438 P.2d 309 (Okla. 1968), Ballard v. Sup. Ct. of San Diego City, 410 P.2d 838 (Cal. 1966).

In this case, Miss Lium's testimony does not conflict in any respects. The only conflicts which arise are in the identification of shirt and levis which Miss Lium stated were different from the ones appellant wore during the robbery (Tr. 6, 7, 19 20). It is important to note, however, that appellant is the one who retrieved the clothes for the officers (Tr. 69). Miss Lium was certain, however, that the red parka (Exhibit 3), was worn by the robber. She stated she recognized the unique "slit" in the pockets (Tr. 3, Exhibit 3).

The other conflict in testimony is to the time element. Appellant claims he was home at the time the robbery took place. His mother, although she did not look at a clock, stated that she was sure he was home at

that time (Tr. 102, 103). This is simply an issue of witness credibility. This Court in State v. Howard, 544 P.2d 466 (Utah, 1975), in a rape case, was forced with only the conflicting testimony of the assailant and the victim. This Court stated:

As opposed to the foregoing, the defendant argues some inconsistencies and what he considers unreasonable aspects of the prosecutrix's story, which should leave at least a reasonable doubt as to his guilt. The State's correct rejoinder to this is that the credibility of the witnesses was the exclusive prerogative of the trial court; and that it is neither the duty nor the privilege of this court to disagree and substitute its judgment thereon.

544 P.2d at 468.

Respondent points out that if the defendant's self-serving statements were all that was required to raise a reasonable doubt, successful prosecution would be impossible.

The testimony of Miss Lium alone would be sufficient to sustain the verdict. However, in addition, appellant's fingerprint was found at the scene. The Court in State In the interest of Marquez, 560 P.2d 342 (Utah, 1977), held that the defendant's fingerprint found at the scene of the burglary was sufficient to sustain his

conviction. In that case, the defendant was unknown to the victim and offered no explanation as to why the fingerprint was there.

In this case, appellant was unknown to Miss Lium. She told the officers which poster the robber had handled and the print was in fact lifted from the poster (Exhibits 5, 9-12, Tr. 31, 32). Appellant attempted to explain that he had been in the shop two days prior to the robbery and had handled the poster then (Tr. 70). Again, appellant's credibility is in issue in light of the investigating officer's statements that appellant denied being in the shop or even knowing which shop they were referring to (Tr. 45, 55, 56). Also, the testimony of the fingerprint experts indicating a fingerprint will last only thirty-six hours maximum (Tr. 39, 60), directly contradicts the possibility of appellant's print lasting 48 hours as appellant claims. Applying the rule in Howard, supra, the trial court could reasonably believe appellant was in the shop the night of the robbery and following Marquez, supra, conclude appellant in fact did rob the shop.

Appellant contends that since no gun and no money were found, the prosecution has failed to prove those elements of aggravated robbery.

Miss Lium stood facing the appellant no more than one foot apart. She said the appellant had an automatic pistol stuffed in his pants with the handle clearly visible (Tr. 8, 9). She stated she was afraid that the appellant might use the gun (Tr. 10, 11).

Following appellant's argument to its logical conclusion, convictions for aggravated robbery could easily be circumvented by the robber merely throwing the weapon into a nearby lake or canal. The law does not require that the actual weapon be found. This Court has ruled that the victim's testimony is enough even where no gun is found. In State v. Turner, 572 P.2d 388 (Utah 1977), the victim testified that the defendant had what looked like the barrell of a gun protruding from his shirt. The victim stated he thought it was a gun, but no gun was actually found. This Court upheld the jury's verdict finding defendant guilty of aggravated robbery in that case.

Furthermore, respondent submits that Miss Lium's testimony that the money was taken is enough to show that element of the offense. As stated in Middlestadt, supra, the victim's testimony alone may be enough to sustain the conviction, and a fortiorari it is sufficient as to this element.

Appellant has presented no evidence to impeach Miss Lium's testimony. The only factual inconsistencies in her testimony result directly from appellant's own self-serving testimony which is suspect.

#### CONCLUSION

The prosecution presented evidence to establish beyond a reasonable doubt each element of the offense of aggravated robbery. Miss Lium's unimpeached testimony conclusively establishes appellant's guilt. Moreover, the physical evidence of the fingerprint and identification of the parka and gloves are more than substantial to support the trial court's verdict and corroborate Miss Lium's testimony.

As stated in Middlestadt, supra, the trial court was in a better position to judge the demeanor of witnesses and pass on their credibility. Appellant's testimony was directly contradicted by himself and fingerprint experts. Respondent submits the trial court properly exercised its discretion, weighed the evidence, and found appellant guilty beyond a reasonable doubt of aggravated robbery.

Respectfully submitted,

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