

1979

## State of Utah v. Byron S. Ambrose : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
16148

BYRON S. AMBROSE, :

Defendant-Appellant. :

----- :  
BRIEF OF RESPONDENT  
-----

APPEAL FROM A CONVICTION OF ATTEMPTED  
HOMICIDE IN THE SECOND DEGREE IN THE FOURTH  
JUDICIAL DISTRICT COURT, IN AND FOR  
UTAH COUNTY, STATE OF UTAH, THE HONORABLE  
GEORGE E. BALLIF, JUDGE, PRESIDING  
-----

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Clerk, Supreme Court, Utah

# TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I: THE PROSECUTION DID NOT BREACH ANY DUTY TO APPELLANT TO PRESERVE EVIDENCE-----	4
POINT II: APPELLANT WAS NOT DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL-----	12
POINT III: APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY-----	16
CONCLUSION-----	20

## CASES CITED

Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969)-----	14
Anderson v. Leake, 248 S.E.2d 120 (S.C. 1978)-----	11,12
Brady v. Maryland, 373 U.S. 83 (1963)-----	7
Heinlin v. Smith, 542 P.2d 1081 (Utah 1975)-----	14
People v. Harmes, 560 P.2d 470 (Colo.App. 1976)-----	5,6
Scales v. City Court, City of Mesa, 594 P.2d 97 (Ariz. 1979)-----	5
State v. Falk, 567 P.2d 235 (Wash.App. 1977)-----	7
State v. Gray, ____ P.2d ____, No. 15550, decided October 2, 1979-----	15
State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974)-----	15
State v. McNicol, 554 P.2d 203 (Utah 1976)-----	13,14
State v. Stewart, 544 P.2d 477 (Utah 1975)-----	6
State v. Totten, 577 P.2d 1165 (Idaho, 1978)-----	7
Taylor v. State, 253 S.E.2d 191 (Ga. 1979)-----	11
United States v. Agurs, 427 U.S. 97 (1976)-----	8
Ward v. Turner, 12 Utah 2d 310, 366 P.2d 72 (1961)---	12

## STATUTES CITED

Utah Code Ann. § 76-4-101 (1953), as amended-----	1,2
Utah Code Ann. § 76-5-203 (1953), as amended-----	1,2
Utah Code Ann. § 76-3-203(1) (1953), as amended-----	2

IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BYRON S. AMBROSE,

Defendant-Appellant.

Case No.  
16148

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a jury verdict finding him guilty of intentionally or knowingly attempting to cause the death of Gordon Birrell, in violation of Utah Code Ann. §§ 76-4-101 and 76-5-203 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was convicted by a jury of attempted homicide in the District Court of the Fourth Judicial District, in and for Utah County, the Honorable George E. Ballif, Judge, presiding. Pursuant to the verdict, Judge Ballif sentenced appellant to imprisonment in the Utah State Prison for an indeterminate term of one to fifteen

years, an additional term of one year to run consecutively, pursuant to Utah Code Ann. § 76-3-203(1) (1953), as amended, and an additional term not to exceed five years also to run consecutively.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and sentence entered by the lower court.

#### STATEMENT OF THE FACTS

Appellant was tried before a jury on September 14 and 15, 1978, on a charge of intentionally or knowingly attempting to cause the death of Gordon Birrell, in violation of Utah Code Ann. §§ 76-4-101 and 76-5-203 (1953), as amended (all statutory references herein are to Utah Code Ann. unless otherwise indicated). Gordon Birrell was at the time of the shooting the husband of appellant's ex-wife, LaVonda Birrell. While appellant and Mrs. Birrell were married they had one child and appellant adopted Mrs. Birrell's child from a previous marriage (T.39). The shooting which was the focus of the charge in this case was precipitated by disagreement between the Birrells and appellant as to appellant's right to visit his children during the summer of 1978.

On June 28, 1978, Gordon Birrell telephoned the appellant, who resided in Colorado Springs, Colorado,

at that time; appellant demanded to see his children within a short time (T.68). Mr. and Mrs. Birrell denied the request based upon the fact that appellant's visitation rights had been suspended by a judge in Las Vegas, Nevada, until July 31, 1978 (T.40). On July 6, 1978, Gordon Birrell again telephoned appellant to recommend that they resolve the dispute through the Birrells' attorney. Appellant became angry and threatened to kill Gordon Birrell if he was not allowed to see his children (T.69,189).

On August 2, 1978, appellant traveled from Colorado Springs to Orem, Utah, to attempt to locate the Birrells (T.192). Before leaving Colorado he purchased a shotgun and sawed the barrel of the gun off (T.193). Appellant located the Birrells' property through the County Recorder's Office and proceeded to the location on August 3, 1978 (T.194-197).

Mr. Birrell had on August 3, 1978, learned that appellant was in town, and accordingly armed himself with a pistol strapped to his leg (T.72). As appellant drove up to Birrells' property, Mr. Birrell recognized appellant and scrambled to take cover behind a tree (T.74-75). Shortly thereafter, Mr. Birrell was shot by appellant, sustaining wounds in the arm,

hand and eye (T.76-78). Appellant admitted at trial that he (appellant) fired the first shot, but denied that the shot hit Mr. Birrell (T.201). Mr. Birrell then returned appellant's fire by shooting at appellant's truck, attempting to "mark it" so that he could prove appellant was there (T.77).

Appellant, after firing five shots at Mr. Birrell, then departed the scene and turned himself in to Officer Boyd Olsen of the Orem City Police, who placed appellant under arrest (T.102-104). After being informed of his Miranda rights while at the Orem City Police Department, appellant told Officer Dan Howlett his story (T.164-174).

#### ARGUMENT

##### POINT I

THE PROSECUTION DID NOT BREACH  
ANY DUTY TO APPELLANT TO PRESERVE  
EVIDENCE.

Appellant contends that he was denied his right to due process because the prosecution "failed to preserve" the truck which the appellant drove to and from the scene of the crime. After the Orem City Police took photographs of the truck to be used in evidence, the truck was released to the registered owner who resided in Colorado (T.151). Appellant alleges that the police

should not have released the truck and that such conduct constitutes destruction or suppression of evidence material to his guilt or innocence. Specifically, appellant urges that "If the accused had the opportunity to test the evidence, he may have bolstered his credibility before the jury and received an acquittal [sic]." Appellant's Brief, p. 6.

Under the standards set by cases cited by appellant and by other cases, appellant has failed to allege or prove error sufficient to require reversal of his conviction. First, there was no "loss" or "destruction" of evidence in the case at bar such as was involved in the cases cited by appellant involving destruction of the results of breathalyzer tests or loss or destruction of tape recordings. See, e.g., People v. Harmes, 560 P.2d 470 (Colo. App. 1976); Scales v. City Court, City of Mesa, 594 P.2d 97 (Ariz. 1979). In this case, the truck was available to appellant and his trial counsel to conduct independent tests throughout the time that the truck was impounded by the Orem City Police. Nevertheless, appellant made no request to make such tests during that time. In addition, even after the truck was released to the true owners, appellant could have issued a subpoena to obtain access to the truck to perform tests. Thus, the evidence

was not "lost" to the appellant in the sense that a videotape or recorded tape may be lost by destruction. For example, in People v. Harmes, 560 P.2d 470 (Colo. App. 1976), relied upon by appellant, the court emphasized that destruction of a videotape of the assault for which the defendant was charged precluded the defendant from ever demonstrating whether or not he was guilty.

Finally, the photographs of the truck taken by the police were made available to appellant's trial counsel during the trial, and were actually introduced into evidence as defendant's exhibits (T.140-142). The relevant "evidence" as to the bullet markings on and damage to the truck was before the jury and appellant had the opportunity to raise any possible defenses based upon this evidence. Respondent submits that the prosecution here complied with the recommendation of this Court in State v. Stewart, 544 P.2d 477 (Utah 1975):

We think it advisable that those charged with investigation and prosecution of crime should retain intact all records and other evidence pertaining to the case until it is finally disposed of.

544 P.2d 479. The truck itself could not have been introduced in evidence at the trial. However, the prosecution took photographs of the truck and preserved and made them available at trial. The prosecution has

no affirmative duty to anticipate a defendant's defenses nor to affirmatively collect and produce evidence which would be favorable to the defense, especially where the source of such evidence is equally available to the defense. State v. Totten, 577 P.2d 1165 (Ida. 1978); State v. Falk, 567 P.2d 235 (Wash.App. 1977). Thus, there was in this case no "loss" or "destruction" of the truck and it follows that the prosecution did not breach its duty to preserve evidence.

Two cases decided by the United States Supreme Court have established a general rule regarding suppression of evidence by the prosecution. In Brady v. Maryland, 373 U.S. 83 (1963), Brady and his companion, Boblit, were convicted of first-degree murder and were sentenced to death. Brady's counsel specifically requested before trial that the prosecution disclose any extrajudicial statements made by Boblit in the possession of the prosecution. Although some statements were turned over, one was not, which contained an admission that Boblit had done the actual killing. In Brady's post-conviction hearing, the Maryland Court of Appeals held this suppression violated defendant's right to due process and remanded the case for reconsideration of the punishment, but not the guilt, of Brady.

In what has since become known as the "Brady rule," the United States Supreme Court wrote:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.

373 U.S. 83, 87. Thus, the rule adopted in Brady applies where the defense made a request for the material allegedly suppressed before trial.

The Supreme Court further clarified the Brady rule in United States v. Agurs, 427 U.S. 97 (1976). In Agurs, the defendant was convicted of second-degree murder for killing James Sewell with a knife. The defendant and Sewell had engaged in intercourse in a motel room, Sewell then left briefly, and when he returned, apparently found defendant attempting to steal his money. A struggle ensued in which Sewell was stabbed by the defendant with one of two knives Sewell had been carrying. At trial, the defendant alleged that she acted in self-defense and that Sewell was a violent person.

Defendant's counsel discovered after trial that Sewell had a prior criminal record, including charges of carrying a deadly weapon (a knife), and that the prosecution knew of this record but failed to disclose it to the defense.

Defendant's motion for a new trial based upon "newly discovered" evidence was denied by the district court judge who found that the evidence was not material. The Court of Appeals reversed, on the basis of the fact that if the evidence had been disclosed it "might" have affected the jury verdict.

The United States Supreme Court carefully distinguished this case from Brady, supra:

In Brady, the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

427 U.S. 97 (emphasis added). However, in cases in which the defendant or his counsel either makes no request or makes a general request for "any exculpatory material," the latter of which the Court states is the same as making no request at all, a different standard applies.

In such cases, the information in the possession of the prosecution is generally unknown to the defense and thus the issue becomes when the prosecutor must volunteer information from his files to the defense. The Court, in

answering this question, focuses on the concern that the failure to disclose is of "sufficient significance to result in the denial of the defendant's right to a fair trial," 427 U.S. 97, 108. In rejecting the standard of "materiality" of the undisclosed evidence adopted by the Court of Appeals, the Supreme Court wrote:

The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

427 U.S. 97, 109-110. Rather:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt or whether or not the additional evidence is considered, there is no justification for a new trial.

427 U.S. 97, 112-113. In a case as the present one where there is no specific request for disclosure of exculpatory material, the prosecution has a duty to sua sponte turn evidence over to the defense only where the evidence would have created a reasonable doubt as to guilt which did not otherwise exist.

Respondent submits that under the Agurs standard, appellant has not established that had he been able to introduce evidence as to the truck it would have created a reasonable doubt as to his guilt which did not otherwise exist. Appellant has never contested that he was present at the scene of the crime, that he fired five shots from a shotgun at Gordon Birrell, or that he drove a white Dodge pickup to and from the scene of the crime. Rather, he alleges only that if he had performed independent ballistics tests and introduced such evidence it might have "bolstered his credibility" before the jury. Bolstering credibility is not the same as creating an otherwise absent reasonable doubt as to guilt or innocence. It should be noted that appellant has not challenged the sufficiency of the evidence to authorize his conviction. See Taylor v. State, 253 S.E.2d 191, 194 (Ga. 1979).

Further, several courts have recognized that where evidence is equally available to both the prosecution and the defense, there can be no "suppression" of such evidence by the prosecution. In the case of Anderson v. Leake, 248 S.E.2d 120 (S.C. 1978), the Supreme Court of South Carolina, in discussing the issue of prosecutorial suppression of evidence, wrote:

Although not expressly stated in the opinion, we think it is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant. . .

[W]here the evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved.

248 S.E.2d 120, 122 (emphasis in original).

The Court in Anderson cited with approval this Court's holding in Ward v. Turner, 12 Utah 2d 310, 366 P.2d 72 (1961), to the same effect. Since the truck in the case at bar was equally available to appellant and to the state, there was no prosecutorial "suppression" of material evidence.

## POINT II

### APPELLANT WAS NOT DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL.

Appellant alleges that he was denied his constitutional right to effective assistance of counsel in the trial of this case. Specifically, appellant complains that his counsel's failure to take adequate steps to preserve the availability of the truck which appellant drove to the scene of the crime (see Point I, supra) or to move for dismissal based upon the "loss" of the truck as evidence constituted ineffective assistance.

Appellant correctly identifies the case of State v. McNicol, 554 P.2d 203 (Utah 1976), as stating the standard set by this Court in evaluating a claim of ineffective assistance of counsel:

. . . the right of the accused to have counsel is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. He is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession. . .

The record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of a crucial defense, reducing the trial to a "farce and a sham."

554 P.2d 202, 204. This Court further stated in McNicol:

A defendant bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter.

554 P.2d 202, 204. Respondent submits that appellant has failed to meet this burden in that his allegations do not establish with any degree of certainty what "crucial defense" was not presented on the basis of the failure to preserve the truck as evidence.

As discussed in Point I, supra, appellant's only contention with respect to the truck is that had he

been able to perform independent ballistics tests he "may have bolstered his credibility before the jury." This does not establish the withdrawal of a crucial defense, but is rather a matter of pure speculation, which does not support the claim of ineffective assistance of counsel.

This Court has recognized that counsel's performance should not be evaluated in the benefit of hindsight and that the failure to make certain motions or objections which would have been futile if raised does not constitute ineffective assistance. State v. McNicol, supra; Heinlin v. Smith, 542 P.2d 1081 (Utah 1975). Since appellant's claim of loss or destruction of the truck as evidence is groundless (see Point I, supra), a motion to dismiss on that ground by his trial counsel would have been useless..

In Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969), this Court recognized that an important inquiry in deciding upon a claim of ineffective assistance of counsel is whether better representation might have had some effect on the result of the trial. If such a probable different result does not appear, there is no prejudicial error warranting reversal of the conviction.

To the same effect is the statement in the recent case of State of Utah v. James M. Gray, No. 15550, decided October 2, 1979:

There is the further proposition to be considered: that even if his counsel did not perform as skillfully as the now-convicted defendant might have desired, his guilt was so clearly evident that even in the absence of any misjudgment of counsel we do not believe there is any reasonable likelihood that there would have been a different result, wherefore, there should be no reversal of the conviction. The defendant has not established anything more than mere speculation as to prejudice because of ineffectiveness of his counsel.

Id. at page 3 of the opinion.

Respondent submits that in the case here, appellant's guilt of the crime charged was proved beyond a reasonable doubt. There is no likelihood that even had his trial counsel performed tests upon the truck and introduced such evidence at trial the appellant would not have been found guilty based upon the evidence presented by the state and the fact that appellant did not seriously dispute his involvement in the shooting. This case presents an example of the concern voiced by Justice Crockett in State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974):

. . . we are impelled to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service, when the real difficulty was that he had a guilty client.

517 P.2d 1313, 1315.

Based upon the foregoing argument, appellant was given effective assistance of counsel at trial and thus his conviction should be affirmed.

#### POINT III

APPELLANT WAS NOT DEPRIVED OF HIS  
RIGHT TO TRIAL BY AN IMPARTIAL JURY.

Appellant alleges that the trial judge failed to take proper measures to isolate the jury from possibly prejudicial information. During the trial, Frank Mitchell, the victim of a crime for which appellant had previously been tried entered the courtroom. Judge Ballif immediately called a recess, and held a hearing in his chambers with both counsel, appellant, and Mr. Mitchell present (T.113-114). In that hearing the following exchange occurred:

THE COURT: And what is your position, Mr. Mitchell? Why are you here? Did you realize the possibility exists of any kind of disruption that may occur with your presence here because of the prior incident?

MR. MITCHELL: No, sir.

THE COURT: It could cause a mis-trial in this case.

MR. MITHCELL: I didn't know that, sir.

THE COURT: Apparently you hadn't been advised of that fact, and that is why I recessed proceedings in this matter. I would hope that you would understand that, and I'm going to have to ask you if you will leave for that very reason.

MR. MITCHELL: Okay. I just thought the trial was open to the public.

THE COURT: It is. But this is a matter where I know there are some very hard feelings and some very serious problems between the two sides here in this matter, and we just don't want to have any error committed in this trial. I don't want to have to try it again. I hope we have handled this in a way that we have done it without any embarrassment to you. I hope, if you don't mind, that you will leave.

MR. MITCHELL: Can I stay on this floor?

THE COURT: I think it would be better if you weren't here right now. I think we would all feel more comfortable about the situation, and we would be able to pay full attention to the matter of a good legal, fair trial, if you would leave the area here.

MR. MITCHELL: Okay.

THE COURT: I appreciate that very much. Thank you.

(T.113-114). Judge Ballif thus requested that Mr. Mitchell leave the area, which he apparently did.

It should also be noted that Judge Ballif was very careful to admonish the jury not to talk to anyone else or between themselves about the case while

the court was in recess. He emphasized this necessity at the start of the trial in light of the fact that there was no jury room in the courthouse (T.18,80, 112,160,221,238).

Appellant has failed to allege that there was in fact any contact between Mr. Mitchell and any of the jurors. Allegations of possible contact do not establish prejudicial, reversible error. Nevertheless, it is apparent from the record in this case that no such contact did occur. The following exchange occurred just prior to Judge Ballif's instructing the jury:

MR. MUSSELMAN: I have one thing further, your Honor. We would ask that the Court informally, prior to, or as a part of the instructions, ask or encourage the jurors, in the event anyone has tried to discuss the case with them outside of the court, to bring that to the attention of the Court. I don't want to imply that anyone has, but if they have, we would like to be sure that they call that to the Court's attention.

My reason for the request is that after our discussion yesterday, Mr. Frank Mitchell remained in the building down near the snack bar--

THE COURT: He was off this floor? Wasn't that my order?

MR. MUSSELMAN: Was it just off this floor?

THE COURT: I thought it was, yes.

MR. AMBROSE: You told him to get out.

THE COURT: Well, I meant off this floor.

MR. MUSSELMAN: I remember him asking if he couldn't stay around this floor, and the Court asked him to leave, and probably the intent was just to leave this floor.

THE COURT: It was.

MR. MUSSELMAN: I'm not saying that he violated the Court's order. I'm just saying that in the event there was any discussion, or any attempt to influence the jurors on their way out, and I don't want to tell them that in that respect, but I would just request that the Court, in a general manner, and if it can sound like part of the instructions, encourage the jurors to bring that to the Court's attention, and that it is their duty if anyone has tried to do that.

THE COURT: All right. . .

(The following proceedings are being held in the courtroom with the jurors and all court personnel being present. These proceedings are starting at 9:45 a.m.)

THE COURT: Before the Court proceeds with the reading of the Instructions to the jury, I want to make a few comments. First of all, I hope you understand that the comments I make to you about out-of-court communications would mean, and carry with it the obligation on your part to convey to the Court any attempt anyone would make to influence you, or in any way comment about the case to you out of the court. And I assume that you would have done that, had that occurred? That has not occurred, as I understand it? All right. Fine. Thank you very much.

(T.242-243). The jurors were not in fact contacted or approached by Mr. Mitchell or anyone else and thus were not improperly influenced by outside sources. Appellant was not denied his right to trial by an impartial jury and his conviction should be affirmed.

## CONCLUSION

Respondent submits that the appellant has failed to allege or prove any prejudicial error occurring at his trial, as is shown in the foregoing argument and citation of authorities. Wherefore, respondent urges this Court to affirm appellant's conviction and sentence.

Respectfully submitted,

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