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State of Utah v. Alfred Bernie Wilson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
vs. : Case No. 16198
ALFRED BENNIE WILSON, :
Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a jury verdict in the Fourth
Judicial District Court in and for Utah County, the
Honorable George E. Ballif presiding, finding the
defendant guilty of robbery.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The defendant appeals from a jury verdict finding him guilty of the offense of robbery. The defense of alibi was raised at trial. Subsequent to the taking of this appeal, defendant located an additional witness to corroborate his defense. Defendant submitted her affidavit to the Court below in an attempt to obtain a writ of coram nobis mandating a new trial. The petition for the writ was dismissed. All proceedings were presided over before the Honorable George E. Ballif, District Judge.

DISPOSITION IN THE LOWER COURT

On August 9, 1978, an information was filed in

with robbery, a violation of Section 76-3-301 (all statutory references are to Utah Code Annotated 1953, as amended), unless otherwise noted. Appellant raised the defense of alibi at his trial, which was held on November 21 and 22, 1978. Five witnesses, including appellant, testified in his behalf. At the conclusion of the trial the jury found him guilty as charged.

Appellant's family subsequently retained the counsel bringing this appeal. The appeal was filed in this Court on February 28, 1979. After the appeal was filed here and long after the time for making a motion for a new trial had expired a witness who was not known to the appellant came forward with information corroborating the alibi defense raised at trial. Appellant's counsel sought a new trial in the court below by way of a petition for a writ of coram nobis which set forth the new information. The petition was dismissed, the Court having ruled that there was no legal justification for the issuance of the writ.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the verdict and judgment below on the grounds that the evidence was insufficient to sustain a finding of guilt. In the alternative appellant seeks a new trial for several reasons. Appellant contends that a new trial should be held because the lower court erred in admitting a photocopy of a composite

drawing created by the robbery victim rather than the original. Also, the identification of the defendant in a photographic lineup was impermissably suggestive. Finally, the lower court improperly rejected the petition for a writ of coram nobis.

STATEMENT OF FACTS

On June 29, 1978, a Texaco station in Orem, Utah, owned by one, Leo Carter, was robbed of approximately \$143.00. The robbery was accomplished by a person who struck the attendant, Jared Harper, in the head with an object. While Mr. Harper lay stunned, the perpetrator took the money from the cash register.

Appellant was charged with this offense. He raised the defense of alibi (record 43). At the trial, the victim testified that on the same evening as the crime, an individual had come in to the station on foot about 8:00 to 8:30 P.M. (transcript 15). He described this person as wearing blue jeans and a red pullover t-shirt (T-15). He had a neatly trimmed beard, was shorter than Harper, had a somewhat prominent nose, and was muscular (T-35). Mr. Harper engaged this individual in a conversation for approximately two or three minutes (T-35) and the person then left the station, again on foot. At trial, Mr. Harper identified this person as the appellant (T-14).

According to the testimony of Harper, the same

person returned to the station that evening at 9:55 P.M. (T-16). He asked for change for the pop machine and as Harper turned to get it, he struck him in the head. Harper fell to the floor and the person took the money (T-17, 18). During this entire time, the victim only observed the individual's face for 5 to 10 seconds (T-35).

The next day Harper met with an Orem police officer, Tim Berhow, to discuss the crime. Harper gave Detective Berhow a description of his assailant (T-38) and they began to prepare a composite drawing. The composite, like all composites, was prepared by Harper selecting from various facial features those which appeared most like the person he had seen that night. The features are then assembled into a facial likeness (T-56, 57). The original prepared by Harper was disassembled, but, over defendant's objection, that it was not the best evidence (T-74-78), a photocopy of the drawing was admitted into evidence.

The next stage in the identification process was for Detective Berhow to show Harper 8 photographs only 5 of which could have possibly been suspects (T-44). Harper selected the appellant's photograph from these.

At trial, 5 witnesses, including the appellant testified in support of an alibi defense. Afton Frances Wilson, his mother, Paul Wilson, his father, and Terry Wilson, his brother, all testified that the appellant had been

working on a car in the family yard from 7:00 P.M. until 9:15 to 9:20 P.M. the same evening as the crime. Obviously, this is the same time as when Harper first saw the person who robbed him. At 9:15 or thereabouts appellant was picked up by Mitch Powell, according to each of the Wilsons. Mitch Powell testified that he and the appellant drove to pick up Jim Hindley at his grandmother's house in Orem at approxiately State Street and 10th North.

After Hindley joined them, shortly before 10:00 P.M., they drove to Casey's Billiards in Provo, arriving at 10:10 P.M. They left after 10 minutes and drove to Reed's Billiards, where they remained until 12:30 A.M. Appellant's testimony was to the same effect.

After the trial, one Jane Elsmore, grandmother of James Hindley and onwer of the home where he resided, informed the Wilsons that she could corroborate the testimony to the effect that Benny Wilson had come to her home with Mitch Powell to pick up her grandson. Appellant had until that time been unaware that she had been home that night and in any event during the time of the trial she was residing in Florida. Appellant's counsel desired to make a motion for a new trial, but was precluded from doing so because the time had expired and also because the record was on appeal. Appellant attempted to make the motion through the vehicle of a petition for a writ of coram nobis.

The lower court dismissed the petition ruling that appellant's contentions "did not fall within the legal grounds" for issuance of such a writ.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT.

Appellant is well aware that he must sustain a heavy burden in order to satisfy the Court that there was insufficient evidence to convict him of robbery. "In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime," State v. Wilson, 565 P. 2d 66 (Utah 1977). In the present case, appellant submits that he can meet that burden.

The only issue in this case is the identity of the perpetrator of the crime. The State's case is grounded entirely upon the ability of one witness to recall the facial characteristics of his assailant. He had the opportunity to observe this person, a person he had never seen before, for a period of no more than three minutes on one occasion and no more than 10 seconds a second time that same evening. It is to be remembered that he also received a rather serious

blow to the head which might possibly have interfered with his ability to recall the events which transpired. It must also be repeated that the individual seen by Mr. Harper was wearing a red t-shirt.

Mr. Harper's recollection must be balanced against the testimony of Paul Wilson, Frances Wilson, Terry Wilson, Benny Wilson and Mitch Powerll. Each one of the Wilsons testified that the appellant had been in the yard of his own home working on a car during the entire time Mr. Harper first encountered the person who ultimately robbed him. They each testified that he had on a white shirt. Mitch Powell and the appellant each testified that they were on their way to Jim Hindley's house or on their way to Casey's Billiards when the robbery actually took place.

Appellant recognizes that the judging of the credibility of the witnesses and the weight of the evidence is exclusively the province of the jury, State v. Wilson, Id., at 68. Nevertheless, appellant contends that the evidence here is such that reasonable minds could not have concluded beyond a reasonable doubt that the appellant committed this offense. The State's sole witness had only a fleeting opportunity to observe a person whom he had never seen before. In contrast, family members and a friend who all had known Mr. Wilson a substantial period of time

all placed him nowhere near the incident in question. The jury, in order to convict, would have had to accept the recollection of Harper's brief encounter as correct and simply concluded that the testimony given by defense witnesses was fabricated or the product of poor memories. Considering the conditions under which Harper had an opportunity to perceive his attacker, appellant argues that reasonable minds could not have reached such a conclusion beyond a reasonable doubt. Appellant, therefore, is entitled to have the verdict against him overturned by this Court on the ground that the evidence was insufficient to convict him.

POINT II

THE IN-COURT IDENTIFICATION OF THE APPELLANT WAS IMPERMISSABLY TAINTED AND SHOULD HAVE BEEN SUPPRESSED.

When this matter came to trial, Mr. Harper identified Mr. Wilson as the perpetrator of the crime. His selection of Mr. Wilson came as the apparent result of his opportunity to twice observe, for brief times, the person who robbed the gas station. However, his identification was heavily influenced by the process he went through with Detective Berhow in preparing a composite drawing and selecting a photograph. This process impermissably focused attention upon the defendant and should have been suppressed despite the fact no objection had been made.

The factors relevant to a determination of whether the pre-trial photo identification process was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification (Simmons v. U. S. 390 U. S. 377 [1968]), were set out in State v. Wettstein, 28 U. 2d 295, 501 P. 2d 1084 (1972):

"In Stovall v. Denno, 388 U. S. 293 (1967) the court stated that a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. The question to be resolved is whether the suggestive elements in the identification procedure made it all but inevitable that the witness would identify defendant, whether or not he was, in fact, 'the man'. In Simmons v. United States, 388 U. S. 293 (1967), the court suggested certain questions be considered in an evaluation of the totality of the circumstances in an identification procedure. First, was there justification for using the procedure; was there a necessity for using the type of identification employed; were the circumstances of an urgent character? Second, under the circumstances was there a chance that the procedure utilized would lead to misidentification? The court mentioned factors such as the opportunity and length of time that the witness had to observe the accused, and the period of time of the incident to the identification, i.e. was the memory still fresh? " 501 P. 2d 1084, 1087.

Appellant does not challenge the need for photo identification in this case. A crime with some degree of violence had been committed and it was important that the police apprehend a suspect. It is appellant's contention that the way in which the procedure was conducted which

made it "all but inevitable" that appellant would be identified as "the man".

Mr. Harper's opportunity to observe the suspect, as discussed previously, was brief, no more than a total of three minutes at one time and 10 seconds another, after which he received a hard blow to the head. This person was one of many people who had been in the station that night. Twelve to eighteen hours later he was asked to prepare a composite drawing of one of the people he had seen, the one who struck him. The composite was prepared by selecting from a series of standard facial features shared by many persons. At best, it could be an approximation of the person he saw that night. His time to view that person was short, the blow to the head may have clouded his recollection, and at least half a day had elapsed since the incident.

Detective Berhow then selected eight photographs to show to Harper, only 5 of which could have been suspects. From these appellant's photograph was chosen. Superficially, it may appear that there was no undue suggestion. However, Harper had just prepared a composite drawing which could only bear some resemblance to the suspect. Detective Berhow selected photographs not which bore a resemblance to the suspect, since he hadn't seen him, but which looked like the composite drawing. Jared Harper then selected the photograph

which appeared most like his composite drawing and which may have appeared something like the person he saw that night. It is submitted that the selection was based primarily on his composite drawing and not on his recollection of the individual he saw. That recollection must have been seriously impaired for the reasons discussed.

Appellant is aware that this Court has held, in State v. Volberding, 30 U. 2d 257, 516 P. 359 (1973), that there is nothing impermissably suggestive in showing six to eight photographs to witnesses. Volberding does not apply here. There there were two witnesses, here only one. There the witnesses viewed the suspect for one hour, here for anywhere between two minutes to three minutes. Finally, here there was the composite drawing.

It is the introduction of the composite drawing into the identification process to which appellant objects. Appellant recognizes that Harper testified that he would have identified him even without the photographic process. His conclusion must be balanced against the fact that he had very little time to see the suspect. Appellant argues that the composite drawing was the product of this impaired recall. The photos selected by Detective Berhow were selected because of their resemblance to the drawing. The ultimate selection by Harper of the appellant's photo was influenced by the limited pool presented to him by Berhow and because it was

person he saw. This process made it inevitable that appellant would be selected as he seemingly most closely resembled the composite prepared by Harper. The process so influenced Harper's recall that it must be concluded that when he identified appellant at trial he could distinguish between his memory of what happened that night and his memory of the drawing and the photograph which looked like the drawing.

Identity was the crucial issue in this case. The identification of the defendant based upon this tainted process was so prejudicial that the Court could have, and should have, suppressed it although no objection was made.

POINT III

ADMISSION OF A PHOTOCOPY OF THE COMPOSITE
DRAWING VIOLATED THE BEST EVIDENCE RULE.

At the trial of this matter, a photocopy of the composite drawing just discussed was introduced as evidence over appellant's objection that this was a violation of the best evidence rule, Rule 70 U.R.E. The original had been disassembled prior to the trial. Nevertheless, the photocopy should not have been admitted.

The photocopy was apparently introduced to show how Harper had ultimately identified the appellant. If that was its purpose, the best evidence would have been the composite itself. The original would have been free from

any distortions in depth, light, shading, or texture caused by the photocopier. The jury would have had the actual product of Mr. Harper's memory before it to compare with the appellant.

The police disassembled the original after making the copy, apparently with no malicious motive. This would appear to bring it within the exceptions of Rule 70. Appellant would contend, however, that where the proponent of the evidence knows the original is to serve as evidence then a duty arises to preserve it. Otherwise, in every case the original could be destroyed and the opponent would be in the difficult position of proving it had been done without fraudulent intent. Production of the original here was especially critical where the finding of guilt hinged on identity. Only the "best" evidence should be received in such a case.

POINT IV

THE LOWER COURT IMPROPERLY DISMISSED THE PETITION FOR A WRIT OF CORAM NOBIS.

After this case was on appeal to this Court and long after the time for making a motion for a new trial under 77-38-4 had passed, a witness came forward who could corroborate his alibi defense. This witness, an elderly woman whom appellant did not know had seen him that evening, would testify that on the evening in question, at

approximately the time of the crime, appellant was on her back porch with her grandson. This is precisely where appellant testified he was at that hour. During the trial this woman was residing in Florida. She told appellant's family of her knowledge after this case was on appeal.

The foregoing information was contained in a petition for a writ of coram notis which appellant filed in the lower court. The purposes of that writ were set out in State v. Gee, 30 U. 2d 148, 514 P. 2d 809. In Gee, the appellant had sought the writ to correct assertedly improper jury conduct during his trial. This Court said:

"Defendant is precluded from resorting to the common law, since the legislature has provided a remedy, a motion for a new trial. There is an additional reason that the writ may not issue: it would not have been available at common law, for coram nobis was to correct an error of fact. It neither issues to correct an error of law nor to redress an irregularity occurring at the trial, such as misconduct of the jury, court, or officer of the court, except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial on the merits. The writ will be issued only where it clearly appears that the petitioner had a valid defense in the facts of the case, which, without negligence on his part was not made because of duress, fraud or excusable mistake, or he was prevented from asserting or enjoying some legal right through duress or fraud or excusable neglect; and these facts, not appearing on the face of the record, if timely known, would have presented the rendition and entry of judgment."

In the present case, the lower court dismissed the petition without an inquiry into its merits. The Court ruled that the allegations contained in the petition fell beyond the bounds which legally justify the issuance of such a writ.

The foregoing quotation from the Gee case would seem to mandate the opposite result, or would at least require the lower court to inquire into the merits of the petition. Appellant did not have the remedy of a motion for new trial. Through no fault of his own, the time for making the motion had expired. In any event, the case was on appeal to this Court and no court had jurisdiction to entertain the motion.

Further, appellant was precluded from fully asserting his alibi defense through no fault of his own. He had no way of knowing this woman had seen him. She would have been a very effective witness for him in that she was not a friend nor related to him, factors the prosecutor used to criticize the other witnesses who appeared in his behalf. In closing, he made much of their relationships to appellant in arguing that they were biased.

The Court below should have considered the merits of appellant's petition. Unless coram nobis is available in this case appellant will be placed in the position of having apparent grounds to at least make a motion for a


new trial but will have no way to present them to any court.

CONCLUSION

This Court is presented with several alternatives by this appeal. First, it is requested to reverse the verdict below because it was based on insufficient evidence. If it rejects that solution, it may grant a new trial for one of two reasons. The identification of the appellant in court by the victim was the product of an impermissably suggestive process and should have been suppressed. The composite drawing, so critical to the issue of identity should have been produced in its original without the distortions of a photocopy. Finally, the Court may choose to require the court below to inquire into the merits of appellant's petition for a writ of coram nobis. This is the only vehicle available to the appellant to present to a court the evidence he claims would justify a new trial. He should not be deprived of a forum to do so.

DATED this 9th day of May, 1979.


ROBERT VAN SCIVER


EDWARD K. BRASS

Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to Robert B. Hansen, Attorney General for the State of Utah, 236 State Capitol Building, Salt Lake City, Utah, this day of May, 1979.
