

1979

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

Utah Supreme Court

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Robert Van Sciver; Edward K. Brass; Attorneys for Appellant;

Robert Hansen; Attorney for Respondent;

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ROBERT VAN SCIVER
EDWARD K. BRASS

321 South Sixth East
Salt Lake City, Utah 84102

Attorneys for Appellant

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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

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

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from a jury verdict finding him guilty of the offense of robbery, in violation of Utah Code Ann. § 76-6-301 (1953), as amended. After the appellant had taken this appeal, he located an additional witness allegedly able to corroborate the defense of alibi raised at trial. Appellant's petition for a writ of coram nobis was dismissed by the trial court. All proceedings were presided over by the Honorable George E. Ballif, District Judge.

DISPOSITION IN THE LOWER COURT

The appellant was tried before a jury by the Honorable George E. Ballif, was found guilty of the offense of robbery,

and was sentenced to imprisonment in the Utah State Prison for an indeterminate term of from one to fifteen years.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the conviction in the court below, as well as an affirmance of the order dismissing the appellant's petition for a writ of coram nobis for a new trial.

STATEMENT OF FACTS

On the evening of June 29, 1978, appellant entered a Texaco Service Station owned by one Leo Carter, struck the service station attendant, Jared Harper, twice on the head, and while Mr. Harper feigned unconsciousness, robbed the establishment of approximately \$143.00 (T. 17, 18, 19, 51). Mr. Harper testified that the crime occurred at about 9:55 p.m. (T. 16), and that he recognized the appellant as a person who had entered the station office earlier; about 8:00 to 8:30 p.m. (T. 15). At the earlier encounter, the victim and the appellant conversed for two or three minutes while the latter looked at car seats in the office (T. 35). At the time of the commission of the crime, the appellant asked Mr. Harper for change for the pop machine and gave him a dollar bill to change (T. 17). As the victim turned to the cash register, he was hit on the head twice from behind and fell to the floor (T. 17, 18).

He remained on the floor, though conscious, until the appellant left and then telephoned the police (T. 20).

When the police arrived, Officer Berhow asked Mr. Harper to describe the person who committed the crime. Harper described a male of medium height and build with dark hair parted in the middle, a beard and moustache, wearing a red pullover t-shirt and faded Levis (T. 65). The following day, June 30, 1978, Mr. harper met with Officer Berhow and gave him the same description as he had given the previous evening (T. 67). He participated in the construction of a composite drawing (T. 56-57). A photocopy of the composite was made by the officer and the original was dismantled (T. 58).

Soon after this process was completed, Officer Berhow presented eight photographs to Mr. Harper, who picked out a photograph of the appellant, whom he identified as the perpetrator of the robbery (T. 60). At the trial itself, which occurred on November 21, 22, 1978, the victim again identified the appellant (T. 14) as the person with whom he had conversed for two or three minutes between 8:00 and 8:30 p.m., and who had returned to the station at about 10:00 p.m asking for change when the robbery and assault

occurred. Mr. Harper testified that on the latter occasion he was able to see the appellant's face for six to ten seconds (T. 35).

At the trial, the appellant raised the defense of alibi and introduced witnesses who testified that he was elsewhere than the scene of the crime at the time it was alleged to have occurred (T. 81,89,97,107,127). Long after the time for moving for a new trial had expired, appellant petitioned for a writ of coram nobis on the basis of newly discovered evidence, which petition was dismissed by the trial court.

ARGUMENT

POINT I.

THE EVIDENCE PRESENTED BY THE STATE OF UTAH WAS SUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT OF GUILT.

The evidence produced by the state in this case was legally sufficient to support the verdict of the jury. The state showed through the testimony of its witness that the robbery did in fact occur and that appellant was beyond a reasonable doubt the perpetrator of the crime. The testimony of Mr. Harper was weighed by the jury against that of five defense witnesses who testified as to the abibi defense, and in the exercise of the discretion

allowed to it to determine the weight of evidence and credibility of witnesses, the jury rejected the testimony of the defense witnesses and returned a verdict of guilty.

This Court has consistently recognized that judging the credibility of witnesses and weight of the evidence is the exclusive prerogative of the jury and that the jury's verdict must stand unless it clearly appears that the evidence was so inconclusive or unsatisfactory that reasonable minds must have entertained reasonable doubts that the crime was committed. Thus, in State v. Wilson, 565 P.2d 66 (Utah 1977), this Court, in affirming a conviction for distribution of a controlled substance, stated:

[w]e are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light most favorable to the verdict. 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.

565 P.2d 66, 68. [See also, State v. Canfield, 18 Utah 2d 292, 422 P.2d 196 (1967); State v. Allgood, 28 Utah 2d 119, 499 P.2d 269 (1972); and State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960).]

This Court has also held that on appeal from a criminal conviction it will view the testimony as a whole in the

light most favorable to the state. State v. Jones, 554 P.2d 1321 (Utah 1976); State v. Howard, 544 P.2d 466 (Utah 1975); State v. Wilcox, 28 Utah 2d 71, 498 P.2d 357 (1972).

Appellant's sole ground for declaring that the evidence in this case was insufficient to convict the appellant is that since Mr. Harper had only a short time to observe his assailant and appellant introduced alibi witnesses, under no circumstances could the jury have failed to find a reasonable doubt that appellant committed the offense. A rational assessment of this case indicates no such compelling necessity for the jury to have found a reasonable doubt of the identity of appellant with the perpetrator.

First, Jared Harper had more than a fleeting glance of his attacker. He had seen and talked to the person face to face for two or three minutes earlier in the evening, and at the time of the attack he had another six to ten second look at his face--sufficient to convince him that it was the same person who entered the office earlier (T.15,35). The contact between the two at this later time took place in a well-lighted office and was sufficiently close to allow the transfer from appellant to Mr. Harper of a dollar bill (T.17).

Even after being struck on the head, Mr. Harper was able to give to police a coherent description of his assailant that evening and the following day, while his recollection was still fresh, and he was able to pick from similar photographs that of the appellant whom he identified as the perpetrator of the attack (T.65, 67,60). He was further able to identify the appellant at trial (T.14). A reasonable mind could believe from this evidence that the appellant was guilty.

Thus, only if the jury must have believed the testimony of the defense witnesses as to the alleged alibi, would the appellant be able to successfully challenge the verdict upon insufficiency of the evidence grounds, State v. Wilson, id. at 68. Appellant's defense of alibi was allegedly established by the testimony of appellant and four other witnesses who each testified that appellant either could not have been at the station at 8:00-8:30 p.m. or could not have been there at 10:00 p.m. when the crime was committed (T.81,89,97,107,127). All of these witnesses were subject to challenge for bias in favor of appellant, being his father, mother, brother, and close friend. The prosecutor, Mr. Esplin, also established on cross-examination of these witnesses, a likelihood that their testimony was in part the result, not of independent personal recollection, but of collaboration and fabrication

between the witnesses at a meeting in defense counsel's office. An instance of this was revealed in the testimony of Mr. Powell, appellant's friend, to the effect that in the meeting he suggested that appellant was wearing a white shirt on the night of the crime (although Mr. Harper had identified the perpetrator as wearing a red shirt), and that no one else had any independent recollection of this (T.117). Nevertheless, all but one defense witness testified at trial that appellant was wearing a white shirt (T.82,99,117,130).

Based on this impeaching cross-examination, there was nothing to mandate that the jury believe the defense witnesses, but such decision was properly left to their sole discretion to weigh credibility. Appellant has failed to meet the heavy burden of proving insufficiency of the evidence to support the conviction of appellant.

POINT II.

THE IN-COURT IDENTIFICATION OF THE APPELLANT WAS NOT IMPERMISSIBLY INDUCED BY EXTERNAL INFLUENCES, BUT WAS THE RESULT OF THE WITNESS'S INDEPENDENT RECOLLECTION.

Appellant challenges the participation of the state's witness, Mr. Harper, in the process of constructing a composite drawing as having been impermissibly suggestive in the process of identifying the appellant. Appellant argues, briefly, that the composite drawing was the product

of Mr. Harper's impaired memory and that his participation in its construction made it inevitable that the witness would pick appellant's photograph in the photo display and that appellant would be identified by Mr. Harper at trial. Appellant's counsel failed to object to Mr. Harper's in-court identification of appellant (T.14). Under the Utah Rules of Evidence, Rule 4:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground for objection.

Unless this Court finds plain error in the admission by the trial court of such evidence, the trial court's ruling on admissibility does not present a ground for reversal. State v. Smith, 45 Utah 381, 146 Pac. 286 (1915); State v. Kazda, 545 P.2d 190 (Utah 1976).

The United States Supreme Court, in Stovall v. Denno, 388 U.S. 293 (1967), and Simmons v. United States, 390 U.S. 377 (1967), has delineated the test which appellant must meet to show that his due process rights were violated by the identification process. The Stovall case involved an allegedly impermissible identification by the victim while she was near death in the hospital in which the

defendant was the only person presented to be identified. The court held that under the extreme circumstances, this "lineup of one" was permissible. In Simmons, defendant was identified from photographs by bank employees the day after the robbery of the bank. The Court stated the applicable test as follows:

[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground (suggestiveness) only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

390 U.S. 377, 384.

In finding no violation present, the court looked at the fact that the witnesses observed the defendant in good conditions for up to five minutes, that they made the identification the following day while their recollection was still fresh, and that photographic identification was necessary because the perpetrator was still at large.

This Court adopted the Stovall and Simmons test in State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972), in which the defendant was convicted of robbery based upon an in-court identification which was allegedly tainted by an improperly suggestive photo display. In finding that even though defendant's picture was the only one within the

group which depicted a man with a moustache, in the circumstances this was not impermissibly suggestive.

The Court stated:

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, the period of time of the incident to the identification, i.e. was the memory still fresh?

501 P.2d at 1084, 1087.

A year later, in State v. Volberding, 30 Utah 2d 257, 516 P.2d 359 (1973), this Court was again confronted with an appeal based upon an allegedly improper in-court identification. The defendant was convicted of petty larceny after taking money from a bar. The bartender and his wife, after seeing the defendant for about one hour when the crime was committed, picked his photograph from

a group of six to eight the following day while their memories were still fresh. Again looking to the totality of the circumstances, the court held that the identification procedure was permissible.

In the most recent United States Supreme Court decision on this issue, Manson v. Braithwaite, 432 U.S. 98 (1977), the Court reaffirmed Stovall in holding that the in-court identification of defendant by an undercover officer did not violate the Due Process Clause of the Fourteenth Amendment even though the trial was held eight months after the initial photo identification. The court in its analysis applied the following tests to the facts of the case: (1) the opportunity to view, (2) the degree of attention, (3) the accuracy of the description, (4) the witness's level of certainty, and (5) the time between the crime and the confrontation.

Applying this analysis to the case at bar: first, it was established that Mr. Harper had a two to three minute conversation with appellant and that appellant was in the office between 8:00 and 8:30 p.m. for about five minutes while the sun was still up (T.15,16). At the time the crime was committed, Harper had the opportunity to view appellant for another six to ten seconds in the bright lights of the station (T.17,35). This was enough time to form a mental impression of appellant.

Second, Harper testified that he likes to study people in his job and notices their appearances (T.37). This is a much greater level of attention to appearance than most people observe. Third, even though Mr. Harper had been struck on the head, he was able to give a complete and accurate description of the appellant soon after the attack (T.64,65). He never wavered from that description through the time of trial. Fourth, Mr. Harper, though he carefully deliberated over the photos presented to him, had no trouble selecting that of appellant (T.22). He further testified that there was no doubt in his mind that appellant was the assailant (T.48). Fifth, the actual photo identification was made within ten to twelve hours after the crime occurred, while Mr. Harper's memory was still fresh. This was about the same amount of time as that approved in Simmons and Volberding, cited above. Looking to the totality of the circumstances, the identification process in this case was permissible.

As to appellant's specific challenge to the fact that the photograph identification was influenced unduly by his construction of the composite drawing, the procedure used here was that which is accepted as the standard. The witness

constructs the composite from his memory which may or may not aid in choosing from photographs. In this case, Harper testified that it had not been used by him at all in picking appellant's photo from the group (T.41). As Mr. Schumacher pointed out in his closing arguments for the defense, the composite drawing did not resemble appellant very closely (T.171).

There were no external, suggestive elements in the identification procedure used in this case which made it all but inevitable that Jared Harper would identify the appellant as his assailant, State v. Wettstein, supra. The composite drawing was the product of Harper's memory, which was not influenced by any suggestive conduct by the officers involved in the identification procedure (T.57, 59). Even if Harper had used the composite drawing in making the photo identification, such use would not be impermissible unless some external, suggestive influence tainted his identification.

In the absence of some showing of an external, suggestive influence upon Jared Harper's memory which effected him during the identification procedure, appellant's argument that the composite drawing impermissibly tainted the photo identification by making it inevitable that Harper would choose appellant's photo, fails to meet the high burden established by the United States Supreme Court and the

POINT III.

THE ADMISSION OF A PHOTOCOPY OF THE COMPOSITE DRAWING IN EVIDENCE DID NOT VIOLATE THE "BEST EVIDENCE RULE" AND EVEN IF IT DID, ITS ADMISSION WAS NOT PREJUDICIAL AND DOES NOT MERIT REVERSAL.

Utah Rules of Evidence, Rule 70, provides:

(1) As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided in these rules, unless the judge finds (a) that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent, . . .

(2) If the judge makes one of the findings specified in the preceding paragraph, secondary evidence of the content of the writing is admissible.

This is a statement of what is commonly referred to as the "best evidence rule." The purpose of the rule is, ". . . to secure the most reliable information as to the contents of documents, when those terms are disputed." McCormick on Evidence, 2nd Ed. (1972) p. 578. Appellant complains that the admission of a photocopy of the composite drawing made by Mr. Harper violates this rule and justifies reversal. The original of the composite drawing was disassembled for use in other cases (T. 58).

The trial court admitted the photocopy after it was authenticated by both Mr. Harper and Officer Berhow over objection of defense counsel (T. 77). Defense counsel did

not dispute the authenticity of the photocopy, nor that it had not been tampered with, but only objected to its quality. (T. 72-74). Further, defense counsel rejected the court's proposal that the state reconstruct the composite (T. 77). Thus, the trial court found that the photocopy was the best available evidence and that the destruction of the original was not done with fraudulent intent. It appears from this that the situation here falls squarely within the exception found in Rule 70(1)(a) as cited above and that secondary evidence was admissible.

Even if this Court finds the admission of the photocopy violated the best evidence rule, its admission did not prejudice the substantive rights of appellant and thus does not justify reversal of the conviction. Section 77-42-1, Utah Code Ann., 1953, as amended, provides that:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

If the identification of appellant in this case had been based solely on the composite drawing, appellant's contention that the quality of the photocopy was objectionable

might have shown prejudicial error in its admission. However, the identification was based primarily on the photo-identification and in-court identification of appellant, and it is extremely unlikely that the jury verdict would have been different solely because they were able to view the original as opposed to a photocopy of the composite drawing. Further, the burden on law enforcement officials to preserve each original composite would necessitate an unlimited supply of replacement parts for each composite kit. This would present an unreasonable burden upon the process and would virtually assure that composites would never be used in evidence.

POINT IV.

A WRIT OF CORAM NOBIS DOES NOT LIE ON THE GROUND OF NEWLY DISCOVERED EVIDENCE WHERE SUCH EVIDENCE IS MERELY CUMULATIVE AND COULD HAVE BEEN DISCOVERED IN THE EXERCISE OF DUE DILIGENCE.

After this appeal was taken, appellant petitioned in the lower court for a writ of coram nobis on the ground that he had recently discovered a new witness who could corroborate the defense of alibi presented at trial. The witness, Jane Elsmore was the grandmother of Jim Hindley, who allegedly would have testified that she observed appellant and Mitch Powell at her house on the night of June 29, 1978. For the reasons stated below, a writ of coram

nobis should not be issued in a situation such as this, and the trial court did not err in ruling that the petition did not allege facts legally sufficient to justify the issuance of such a writ.

In the case of State v. Gee, 30 Utah 2d 143, 514 P.2d 809 (1973), this Court dealt with the question of when a writ of coram nobis is properly issued. The defendant in that case was convicted of first-degree murder and later petitioned for a writ of coram nobis on the ground that a juror had seen a picture of the victim of the murder in his coffin during a recess of the trial. The trial court denied the petition, and the Utah Supreme Court recognized that the writ of coram nobis is a common law remedy which is only available where the defendant is wholly without other remedy. In Gee, the writ was properly denied because the defendant could have moved for a new trial under Section 77-38-3(2), Utah Code Ann., 1953, as amended. The Court added another reason that the writ could not issue and established the test which a petitioner must meet:

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 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 prevented the rendition and entry of judgment.

514 P.2d 809, 811 (emphasis added).

In the case of Sullivan v. Turner, 22 Utah 2d 85, 448 P.2d 907 (1968), this Court affirmed the rejection of a petition for a writ of coram nobis on the ground of facts allegedly discovered after the conviction which might have changed the defendant's guilty plea. The Court found that such facts were known to the defendant at the time of trial. Concerning the nature and burden of proof in coram nobis proceedings, the Court wrote:

Petitions in habeas corpus and coram nobis are generally regarded as being analagous procedurally to civil proceedings. The petitioner has the burden of persuading the trial court by a preponderance of evidence facts which will entitle him to relief.

448 P.2d 907, 910.

The "mistake of facts" which appellant contends should entitle him to relief by issuance of a writ of coram nobis is the alleged newly discovered witness whose

testimony allegedly could not have been produced at trial. In Butt v. Graham, 6 Utah 2d 133, 307 P.2d 892 (1957), this Court considered whether allegedly newly discovered evidence could support the issuance of a writ of coram nobis. In Butt, the defendant was convicted of the crime of "carnal knowledge" and later petitioned for a writ of coram nobis on the ground that the district attorney suppressed evidence which would have shown that no intercourse took place. The Court found that the defendant knew of such evidence during the trial and thus that the trial court did not err in denying the petition.

This Court has not directly confronted the question of whether or not a writ of coram nobis may lie based solely upon allegedly newly discovered evidence. However, several other jurisdictions have been presented with the question. The statement of the Tennessee Court in Johnson v. Russell, 404 S.W. 2d 471 (Tenn. 1966), that:

A writ of error coram nobis will ordinarily not lie to permit the review of a judgment for subsequently or newly discovered evidence relating to matters which have been litigated at the trial.

404 S.W. 2d 471, 474.

is representative of the weight of authority. See also Gross v. State, 412 S.W. 2d 279 (Ark. 1967); Hatfield v. State, 529 S.W. 2d 180 (Mo. App. 1975); Divine v. State,

234 So. 2d 28 (Ala. 1970); People v. Wade, 366 N.E. 2d 528 (Ill. App. 1977); Commonwealth v. Ditmore, 363 A.2d 1253 (Pa. Super, 1976); Dobie v. Commonwealth, 96 S.E. 2d 747 (Va. 1957). These cases most often involve allegedly newly discovered evidence which was either cumulative to that offered at trial or which could have been discovered in the exercise of reasonable diligence before trial.

Applying the test formulated in the Gee case to the case at bar, appellant must show that the failure to discover that Jane Elsmore had observed him on the night of the crime was not due to his own negligence, that the testimony which would have been offered by Jane Elsmore would have given him a "valid defense in the facts of the case," Gee, supra, and that the testimony of Jane Elsmore would have prevented the rendition of judgment against him. Appellant has not alleged facts sufficient to meet this burden, and thus the trial court properly denied his petition for a writ of coram nobis.

Appellant had a full opportunity to make his defense of alibi at the trial. The addition of any testimony offered by Jane Elsmore would have been merely cumulative to the evidence appellant presented. Such testimony would not have prevented the entry and rendition of judgment against appellant unless (1) the jury would

have been compelled to believe the testimony, and, (2) the testimony would have perfected appellant's defense of alibi.

The jury would not have been compelled to believe the testimony of Jane Elsmore, but would have weighed such evidence against the testimony of other witnesses. Appellant testified that when he and Mitch Powell went to Mrs. Elsmore's house to pick up Jim Hindley, appellant remained in the car (T. 131). Jane Elsmore apparently was on her back porch at the time (appellant's Brief, p. 14), which makes it unlikely that she could have personally observed the appellant.

Even if the jury might have believed the testimony which Jane Elsmore would have presented, (see affidavit of Jane Elsmore in Supp. Record), it would not have made appellant's alibi defense "valid." The crucial times which apply to appellant's alibi defense are (1) 8:00 to 8:30 p.m., when the perpetrator appeared at the service station for the first time (T. 15), and (2) 9:55 to 10:00 p.m., when he returned to the station and the crime occurred. Jane Elsmore observed appellant at about 9:30 p.m. according to the testimony of both appellant (T. 131) and Mitch Powell (T. 111), and could have observed him only until about 9:35 (T. 111). In her affidavit she claims to have seen appellant at

10:00 p.m. (See supplemental record). Any testimony given by her would not prove, even if believed, that appellant was not present at the service station at either or both of the crucial times. Such testimony would not have prevented the jury from returning a verdict of guilty.

Finally, the failure to discover that Jane Elsmore had observed appellant on the evening of the crime was due to appellant's negligence. Reasonable diligence should have suggested to appellant and his counsel that if Jane Elsmore resided at a place where appellant allegedly was on that evening, inquiry should have been made to determine whether or not she observed the appellant. Although Jane Elsmore was apparently in Florida at the time of appellant's preparation for trial, due diligence in contacting family members of Jim Hindley could have disclosed her location and she could have been served with a subpoena for trial. Alternatively, her deposition could have been taken for use at trial. All of this shows a lack of "excusable" neglect in appellant's failure to produce the facts which he alleges justify a new trial before the court. Thus, the trial court did not err in denying the petition for a writ of coram nobis.

CONCLUSION

Based upon the above-cited authority and argument, respondent prays that this Court affirm the conviction of the appellant and the denial of a petition for writ of coram nobis.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent