

1952

State of Utah v. Don Jesse Neal : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clinton D. Vernon; Quentin L. R. Alston; Bruce S. Jenkins;

Recommended Citation

Brief of Respondent, *State v. Neal*, No. 7813 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1718

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court
of the State of Utah

FILED

SEP 16 1952

STATE OF UTAH,

Plaintiff and Respondent,

vs.

DON JESSE NEAL,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 7813

BRIEF OF RESPONDENT

CLINTON D. VERNON
Attorney General

QUENTIN L. R. ALSTON
Assistant Attorney General

BRUCE S. JENKINS
Assistant Attorney General
Attorneys for Respondent

INDEX

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	4
ARGUMENT	5
Point I. Evidence of Defendant's Guilt of the Crime of First Degree Murder Was Legally Sufficient to Submit to the Jury and Sustains the Verdict of The Jury and the Judgment of the Court	5
Point II. The Court Did Not Err in Admitting in Evidence the In- criminating Statements Made by the Defendant After the Homicide	8
Point III. The Cross Examination of the Defendant by the District Attorney Was Not Prejudicial	10
Point IV. The Court Did Not Err in Imposing Sentence on De- fendant in Absence of Defendant's Counsel	18
Point V. It Was Not Error for the Trial Court to Deny a Motion for the Examination of Designated Physical Evidence Nor a Motion for a Rehearing of Motion For New Trial	22
Point VI. The Court Did Not Err in Allowing Officer Clark Over Defendant's Objections to Demonstrate the Movability of His Hands Which Were Handcuffed Behind His Back..	25
Point VII. The Defendant Was Afforded a Fair Trial	27
CONCLUSION	28

STATUTES

103-28-4 Utah Code Annotated 1943	21
105-32-1 Utah Code Annotated 1943	19
105-35-1 Utah Code Annotated 1943	22
105-39-3 Utah Code Annotated 1943	22

AUTHORITIES

8 A.L.R. 18	26
85 A.L.R. 479	26
20 Am. Jur. 473	10
60 C. J. S. p. 86	14
Model Code of Evidence, rule 311	12
Model Code of Evidence, Comment p. 196	13
Jones "Commentaries on Evidence," Second Ed. sec. 1204	8
Warren on Homicide, Permanent Ed., Vol. 2, p. 651	9
Wharton, Sec. 345, p. 490	12
Wharton's Criminal Evidence, Edition II, Vol. 1, Sec. 262, p. 322..	11

INDEX (Continued)

	Page
Wharton's Criminal Evidence, Tenth Ed., Vol. 11, Sec. 622a, p. 1266	10
Wigmore on Evidence, Vol. 1, Section 217	12
Wigmore, Vol. I, Section 10, p. 293	10
Wigmore, Vol. I, Sec. 13, p. 299, p. 300	11
Wigmore, Vol. II, Section 390, p. 331	14

CASES

Batson v. U. S., 137 F2d 288	20
Coates v. Lawrence, 46 F Supp. 414, 416	19
Commonwealth v. Polens, 327 Pa. 544, 194 A. 652	20
Culmer v. Clift, 14 Utah 286	26
El Paso Southwestern R. Co. v. Barrett, 101 SW 1025, 1029; 46 Tex. Civ. App. 14	25
Ex Parte Oliver, Texas, 240 SW 2d 316	19
In re Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149	22
Kent v. Sanford, Warden, 121 F.2d, 216	20
Lovvorn v. Johnson, 118 F.2d 704	21
McQuire v. Hunter, Warden, 138 F.2d 379	21
Martin v. U. S., 182 F.2d 225	19
Martin v. U. S., 182 F.2d 225, at 227	20
Moore v. Aderhold, Warden, 108 F.2d 729	21
Peirce v. Dan Dusen, 78 Fed. 693, 24 C.C.A. 280; 69 L.R.A. 705..	9
People v. Fields, 198 P2d 104	19
Powell v. Alabama, 287 U. S. 45	19
Snowden v. Pleasant Valley Coal Co., 16 Utah 366, 52 P 599	26
State v. Bowen, 43 Utah 111, at 114	14
State v. DeWeese, 51 Utah, 515, 172 P. 290	13
State v. DeWeese, 51 Utah, p. 533; p. 535	14
State v. Hughes, 170 La. 1063, 129 So. 637	18
State v. Kappas et al, 100 Utah 274, 114 P2d 205	14
State v. Montgomery, 37 Utah 515 at p. 520	24
State v. Morgan, 22 Utah 162	14
State v. Prettyman, 113 Utah 36, 191 P2d 142	14
State v. Romeo, 42 Utah 46, 128 P. 530	21
State v. Russell, 106 Utah 116, 145 P2d 1003	6
State v. Scott et al, 111 Utah 9, 175 P2d 1016, p. 20	10
State v. Thatcher, 108 Utah 63, 157 P2d 258	5
State v. Thompson, 110 Utah 113, 170 P2d 153	6
State v. Weaver, 78 Utah 555, 6 P2d 167, at pp 559, 561	23
Thomas v. Hunter, 153 F2d 834	19
Wilfong v. Johnson, C.C.A. 9th, 156 F2d 507	19
Wilfong v. Johnston, 156 F2d 507 at 510	22

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

DON JESSE NEAL,

Defendant and Appellant.

Case No. 7813

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Don Jesse Neal, the defendant and appellant herein, was found guilty by a jury of the crime of murder in the first degree. The verdict was without recommendation and the judgment and sentence of the court entered thereon was that he be shot to death. He now appeals that conviction. The factual narrative in appellant's brief is substantially accurate and complete and while in certain instances the evidence has been presented in a light most favorable to the defendant, it

is felt that no useful purpose would be served by making an independent recitation of the facts at this time. However, where deemed necessary, certain essential evidentiary facts have been set forth in detail in the argument.

STATEMENT OF POINTS

I. EVIDENCE OF DEFENDANT'S GUILT OF THE CRIME OF FIRST DEGREE MURDER WAS LEGALLY SUFFICIENT TO SUBMIT TO THE JURY AND SUSTAINS THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT.

II. THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE THE INCRIMINATING STATEMENTS MADE BY THE DEFENDANT AFTER THE HOMICIDE.

III. THE CROSS EXAMINATION OF THE DEFENDANT BY THE DISTRICT ATTORNEY WAS NOT PREJUDICIAL.

IV. THE COURT DID NOT ERR IN IMPOSING SENTENCE ON DEFENDANT IN ABSENCE OF DEFENDANT'S COUNSEL.

V. IT WAS NOT ERROR FOR THE TRIAL COURT TO DENY A MOTION FOR THE EXAMINATION OF DESIGNATED PHYSICAL EVIDENCE NOR A MOTION FOR A REHEARING OF MOTION FOR NEW TRIAL.

VI. THE COURT DID NOT ERR IN ALLOWING OFFICER CLARK OVER DEFENDANT'S OBJECTIONS TO

DEMONSTRATE THE MOVABILITY OF HIS HANDS WHICH WERE HANDCUFFED BEHIND HIS BACK.

VII. THE DEFENDANT WAS AFFORDED A FAIR TRIAL.

ARGUMENT

POINT I.

EVIDENCE OF DEFENDANT'S GUILT OF THE CRIME OF FIRST DEGREE MURDER WAS LEGALLY SUFFICIENT TO SUBMIT TO THE JURY AND SUSTAINS THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT.

In prosecuting this appeal appellant in Point I and in portions of Points VI and IX challenges the legal sufficiency of the evidence upon which his conviction was based. Such a challenge was first made when a motion to dismiss the Information was interposed and denied. The motion was founded solely upon the claim that the State had failed to prove its case because purportedly there was no evidence that the killing was the willful, deliberate, malicious and premeditated design of the defendant. The rule applicable however when a motion to dismiss challenges the legal sufficiency of the evidence was laid down by this Court in *State v. Thatcher*, 108 Utah 63, 157 P2d 258 as follows:

The rule which must be applied upon a motion to dismiss a criminal case is that all reasonable inferences

are to be taken in favor of the state, and only if the record itself reveals that no reasonable man could draw an inference of guilt therefrom is the trial court justified in taking the case from the jury.

In applying the foregoing rule in this case the trial court could properly have done only what it did do in denying the motion to dismiss.

A challenge to the legal sufficiency of the evidence was again made when an exception was taken to the giving of Instruction 11 in which the court defined the crime of murder in the first degree. The exception was taken for no other reason than that again purportedly there was no evidence to warrant any instruction defining that degree of murder. By inference and innuendo it was argued then as now, first that the defendant did not do the shooting and second that even if he did it occurred during a scuffle and so could not have been the result of a deliberate and premeditated design to kill and hence not murder in the first degree. Assuming, arguendo, that a scuffle did precede the shooting, it does not follow, as is argued by appellant, that the resulting killing could not be the result of a deliberate and premeditated design to kill and hence not murder in the first degree. There is no authority to support such a theory. Whether there is or is not a deliberate and premeditated design to kill in such a case must be determined from an analysis of all the surrounding circumstances and like all doubtful questions of issuable fact is properly a question for the jury. See *State v. Russell*, 106 Utah 116, 145 P2d 1003 and *State v. Thompson*, 110 Utah 113, 170 P2d 153. A careful analysis of all the surrounding circumstances in this case leads to the inescapable conclusion that the killing

was the wilful, deliberate, malicious and premeditated act of the defendant.

The uncontradicted evidence shows that immediately prior to the shooting the deceased was driving the defendant to the police station. While certain witnesses did testify that as the car proceeded through the Third South and State Street intersection there appeared to be some kind of a scuffle or a locking of shoulders by the defendant and the deceased or a movement by the defendant closer and closer to the deceased, the record is entirely void of any evidence indicating the slightest provocation or justification for the shooting. With cool and collected mind the defendant shot the deceased as the deceased was driving him to the police station. The surrounding circumstances pointedly reveal that the defendant, without provocation, justification or excuse, had the choice to shoot or not to shoot. Having made the choice to shoot under such circumstances any other conclusion but that the resulting killing was the deliberate and premeditated design of the defendant would be untenable.

Finally it is respectfully submitted that appellant apparently is not serious about pressing the assignments of error which challenge the legal sufficiency of the evidence because at page 16 of his brief it is conceded that there is not a lack of evidence upon which the verdict of the jury can be sustained. If, as appellant concedes, the evidence does sustain the verdict, it was proper to submit the question of first degree murder to the jury in the first instance. Furthermore it necessarily follows that the judgment of the court based upon that verdict is also sustained by that same evidence.

POINT II

THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE THE INCRMINATING STATEMENTS MADE BY THE DEFENDANT AFTER THE HOMICIDE.

It is urged that the trial court committed error in admitting in evidence certain incriminating statements made by the defendant shortly after the shooting and as he was fleeing from the scene. There is ~~no~~ denial that the statements were made. The sole contention is that they should not have been admitted because they were not part of the *res gestae*.

While there is nothing in the record to reveal the precise amount of time which transpired from the time of the shooting until the statements were made it could have been but a very few minutes at most. Immediately after the shooting the defendant left the DeSoto Sedan in which he and the deceased had been riding, ran across the street and boarded a bus at the intersection of Third South and State Streets. One of the incriminating statements was made as the bus approached the intersection of Fourth South and State Streets which was only one block away and the other was made at the A & W Drive Inn located only one additional block south near the intersection of Fifth South and State Streets. Under the circumstances there can be little doubt concerning the spontaneity of the utterances made by the defendant.

The determination as to what acts or utterances are admissible as part of the *res gestae* is not one which can be made by any arbitrary rule of thumb. As stated in Jones "Commentaries on Evidence," Second Edition, Sec. 1204:

It is impractical to fix, by general rule, any instant of time at which it may be said to be too late for an act or declaration to be part of the *res gestae* and so as to preclude debate and conflict of opinion in regard to this particular point. So long, however, as suspicion of fabrication is absent, and no taint of preconceived action or suggestion of design is present, the fact that there is a slight interval between the declaration and the principal transaction, and that they are not entirely synchronous, does not affect its admissibility as part of the *res gestae*.

The statements objected to in this case were made as the defendant was fleeing from the scene of the crime and attempting to perfect his escape. The circumstances under which they were made do not in the slightest degree indicate "suspicion of fabrication" or "taint of preconceived action or suggestion of design." Rather they show up very definitely as the spontaneous utterances of a fleeing felon. To deny their admissibility in this case would in effect be an attempt to "exclude everything from the *res gestae* which did not occur on the very instant of the grinding of the flesh and bones" to borrow a phrase quoted in *Peirce v. Van Dusen*, 78 Fed. 693, 24 C.C.A. 280; 69 L.R.A. 705.

It is respectfully submitted that not only could the incriminating statements of the defendant be properly admitted in evidence as part of the *res gestae* but also that they could be properly admitted as admissions by the accused. In *Warren on Homicide*, Permanent Edition, Vol. 2, page 651, the rule with reference to admissions is set forth as follows:

A statement by the defendant amounting to an admission, subsequent to the killing, is admissible to show that the defendant committed the crime . . .

In Wharton's Criminal Evidence, Tenth Edition, Sec. 622a, page 1266, the rule is stated in the following language:

. . . admissions are always admissible in evidence under an exception to the rule excluding hearsay evidence, provided such admissions are made against interest . . .

See also 20 Am. Jur. 473.

The incriminating statements made by the defendant shortly after the shooting and as he was fleeing from the scene of the homicide were properly admitted by the trial court either as part of the *res gestae* or as admissions by the accused.

POINT III

THE CROSS EXAMINATION OF THE DEFENDANT BY THE DISTRICT ATTORNEY WAS NOT PREJUDICIAL.

Appellant contends that the trial court committed prejudicial error in allowing the District Attorney over objection to question the defendant about various crimes for which he had neither been accused nor convicted. This objection harks to the very nature of the admissibility of all evidence. In *State v. Scott et al.*, 111 Utah 9, (175 P2d 1016) at page 20, the court states:

The basic rule of admissibility of evidence is that all evidence having probative value — that is, that tends to prove an issue, is admissible.

This proposition is echoed in Wigmore Volume 1, Sec. 10, page 293:

The second axiom on which our law of Evidence rests is this: *All facts having rational probative value are admissible, unless some specific rule forbids.*

Certainly, a criminal act may be a fact, relevant to, and probative of an issue.

In addition one should remember a second fundamental idea as expressed by Wigmore Volume 1, Section 13, page 299:

It constantly happens that a fact which is *inadmissible for one purpose is admissible for other purposes*
* * *

And, as clarified on page 300:

In other words, *when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.*

The appellant asserts "that the commission of the offense for which a person is on trial cannot be proved by evidence that such person committed another but independent offense." Certainly there is no dispute with this proposition if it means that the prior offenses are inadmissible as evidence for the purpose of showing a disposition to commit offenses, and thence the commission of a particular wrong. Wharton's Criminal Evidence, Edition 11, Volume 1, Section 262 at page 322, states:

* * * other offenses are inadmissible when offered for the purpose of proving the crime charged, or to show that the defendant would be likely to commit the crime with which he is charged. * * *

But it is fundamentally in error to assert, as many have done, that if a party is charged with a specific crime, no evidence of the commission by him of another crime or wrong is receivable against him. As Wharton, *supra*, states in the completion of the above quoted paragraph:

* * * the evidence of other crimes is admissible to show *motive*, and, where relevant for this purpose, the admissibility is not affected by th fact that such evidence may prove other crimes. (Emphasis added).

See also Wigmore on Evidence, Volume 1, Section 217.

Wharton, Section 345, page 490, sets forth the general rule:

In certain classes of cases collateral offenses may be shown to prove the mental processes or mental attitude of the accused. This includes five different things: (1) *Motive* * * * (2) intent * * * (3) absence of accident or mistake * * * (4) identity * * * (5) a common scheme or plan * * *

State v. Scott, *supra*, adopts rule 311 of the Model Code of evidence which states:

Subject to Rule 306 [rule as to character evidence], evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

Therein, the court tracing the history of the rule (viewing it as a narrow exception to a broad rule of admissibility or as an exception to a broad rule of exclusion) states:

* * * Exceptions which are mentioned in the cited cases are: if the evidence tends to show intent or *motive*, if it indicates the offense was not due to accident or mistake, * * * (Emphasis added).

See also the comment in the Model Code of Evidence, page 196:

* * * nothing is more common than to find the unqualified assertion that if a party is charged with having committed a specified crime or civil wrong, no evidence of the commission by him of another crime or wrong is receivable against him. This is true where the series of inferences on which the relevance of the evidence depends is from the commission of the other wrong to a disposition to commit such a wrong or to commit crimes or torts generally, thence to the commission of the particular wrong. *The cases are legion, however, which admit such evidence when offered to prove motive, intent, preparation, plan or identity.* (Emphasis added.)

In State v. DeWeese, 51 Utah 515, 172 P 290, an interesting and bizarre murder case, an autobiography of the accused, listing prior crimes of which he had never been accused or convicted, was introduced and received in evidence. Defendant objected generally and the specific objection was that "proof of the other crimes not tending to prove the crime for which he was being tried only tended to prejudice him in the minds of the jury." The paper was admitted and upon defendant's motion, the judge charged the jury "that they were permitted to consider the burglaries solely upon the question of *motive*." Therein there was a thorough discussion of the authorities and the court stated in 51 Utah, page 533:

* * * None of the authorities referred to dispute the proposition that proof of other crimes, whether

similar or dissimilar, connected or unconnected, may be admitted to prove a *motive* for the specific crime for which the defendant is being tried. (Emphasis added).

The court on page 535 recognizes the danger of such evidence and states:

* * * We admit the danger of permitting evidence of other crimes than the one specifically charged against the defendant, and that such evidence should be admitted with great caution and circumspection, for the tendency to prejudice a defendant in such cases is admittedly great; but when the evidence is relevant, as in this case, to prove *motive*, as we think we have shown, then it is admissible by all of the authorities with which we are familiar. (Emphasis added).

The above quoted authorities sustain the proposition that evidence of prior criminal acts of which one has never been charged or convicted may be admissible in evidence for the limited purpose of showing motive. See also State v. Bowen, 43 Utah 111 at 114; State v. Kappas et al., 100 Utah 274, 114 P2d 205; State v. Prettyman, 113 Utah 36, 191 P2d 142; and State v. Morgan, 22 Utah 162, as having some bearing. 60 C.J.S. at page 86, in a discussion of motive, states:

* * * Motive has to do wholly with desire, and probably a motive does not operate to influence positive action unless there are facts in existence which create the motive.

Wigmore, Volume II, Section 390, page 331 and following, states:

The circumstances which might excite a desire to kill are innumerable. * * * Among the instances most

commonly offered for adjudication, the following may be noted:

* * * The expediency of preventing the *discovery of a former crime*, or of *evading an arrest* or a prosecution for it, may lead to the desire to kill.

It is commonplace that the existence of a fact may be proved in one of two ways or both; (1) through extrinsic records or testimony or (2) by eliciting from the mouth of the accused on cross-examination the existence of certain facts. A close perusal of the cross-examination by the district attorney shows an effort, not to make out accused as an habitual criminal as appellant would have you believe, but to get from the accused himself testimony as to his own past actions, his own knowledge, his own state of mind. In short, the district attorney sought to establish certain facts, from which one may reasonably infer, the *motive for murder—the desire to escape*. The whole line of cross examination was designed to show motive, and was in fact successful in establishing certain important facts from which motive could be inferred.

Q. Well, you knew that they wanted you for stealing payroll checks from the Alamo Cleaners in California, didn't you?

A. Yes (R. 290).

Q. And you said that you had stolen some Alamo Cleaners checks? (R. 294).

A. Yes, sir.

Q. You knew also, did you, at the time that you were leaving, that there would be not only that, (referring to parole violation) but there would be forty-seven counts of forgery if they saw fit to press them, didn't you? (R. 299).

A. Yes, it's one to fourteen (R. 300).

Q. What's that?

A. Term is one to fourteen on that.

Q. For one count of forgery?

A. Yes, and they usually run them c.c. since my restitution. It's not enough to do this thing about.

Q. Well, in other words, there would have been another fourteen years at least?

A. One to fourteen, yes, sir.

Q. And you were very anxious to keep away from any law enforcement officers, weren't you, when you were going to Reno?

A. Well, that's natural, yes, sir.

Questions were put concerning parole violations, tying in with the questions concerning the stealing and forging of checks.

Q. And you knew that that was a violation of your parole, didn't you?

A. Yes, sir, but not a serious violation (R. 290).

Q. I think last night, Mr. Neal, that you said that you didn't know that you had violated your parole. Is that right? (R. 294).

A. No, sir.

After having him admit that the forgeries were parole violations (R. 294), defendant admitted (R. 295) he knew his parole board would be considering his forgeries as a parole violation.

Q. The possession by you of a gun would have violated your parole, wouldn't it? (R. 298).

A. Yes, sir.

Q. And you bought the gun and kept it, didn't you?

A. Yes, sir.

The defendant indicated he knew that he would have four years to serve for parole violation (R. 299).

Q. Now, when you parked the car here on Tuesday night, you figured that the car would be hot, didn't you? (R. 302).

A. Yes, sir.

Q. Now, of course, you were very anxious to escape, weren't you, this officer when he got you? (R. 289).

A. Anybody would be—

The three questions objected to by appellant were merely additional efforts to elicit from the mouth of the accused facts which one could add to the other evidence of motive. The district attorney was successful in eliciting the fact of the Alamo robbery and the perpetration of certain forgeries. Also, the parole violations. These were established by the admissions of the accused without specific objection by appellant's attorney. The district attorney was unsuccessful in gaining admissions concerning certain other robberies. The mere fact that the district attorney failed to put in evidence to contradict the negative answers of defendant and in addition to add to the admitted facts from which we can reasonably infer a motive for murder was not prejudicial. The court, further, tempered the effect of such evidence by giving a limiting instruction in Instruction 7 which states:

There has also been received evidence tending to show that the defendant has committed other felonies

for which he has not been convicted. This evidence may be considered by you only in connection with whether or not the defendant had a motive to kill Owen T. Farley (R. 21).

The cross examination of the district attorney when *so safeguarded*, was not prejudicial.

POINT IV

THE COURT DID NOT ERR IN IMPOSING SENTENCE ON DEFENDANT IN ABSENCE OF DEFENDANT'S COUNSEL.

Point VIII of appellant's brief states that "the court erred in imposing sentence on the defendant in the absence of defendant's counsel." To sustain such a contention, the appellant relies on the constitution, a statute, and one case, all of which assert a fundamental legal proposition that in original prosecutions the accused may "appear and defend in person and by counsel." While the authorities quoted, without dispute, sustain the proposition asserted, a more pointed inquiry and the real issue in question, is whether the presence of counsel at the time of the imposition of sentence is included within that fundamental right.

On that point, there is some division of opinion. The cases go three ways. Group one goes off on the idea that an accused is entitled to assistance of counsel at "trial" that the "imposition of sentence" is after the trial and that counsel is not required at that time. *State v. Hughes*, 170 La. 1063, 129 So. 637 states: "It is not essential to the validity of a sentence

that the attorney for the defendant shall be present when sentence is pronounced; for the sentence is not part of the proceedings which constitute trial according to articles 332, 333 and 334 of the Code of Criminal Procedure." (A statute very similar to Utah statute, 105-32-1 Utah Code Annotated 1943, designating the order of trial.) See also *Ex Parte Oliver*, Texas, 240 S. W. 2d 316, a 1951 Texas case with peculiar facts where sentence is not pronounced until the conviction has been determined on appeal, and the pronouncement of sentence is not considered to be part of the trial.

Group two is made up generally of a number of federal cases which indicate that the right to counsel extends to all stages of the original proceedings. *Thomas v. Hunter*, 153 F2d 834, states:

To hold that the return of the verdict into court and sentence thereafter is not part of the trial is to accord the term "trial" a very narrow and technical definition—too narrow a definition when the question under consideration is the violation of human rights and liberty guaranteed by the constitution.

See also *Wilfong v. Johnston*, C.C.A. 9th, 156 F2d 507; *Martin v. U. S.*, 182 F2d 225; *People v. Fields*, 198 P2d 104; and the basic statement in *Powell v. Alabama*, 287 U. S. 45, that an accused has a right to the guiding hand of counsel at every stage of the proceedings. Also *Coates v. Lawrence*, 46 F. Supp. 414, 416, that "a person accused of crime is entitled to assistance of counsel at all stages of trial including sentence."

On the very point in issue, the federal cases point up the reason for the assistance of counsel at the time when

sentence is to be imposed. In *Martin v. U. S.*, 182 F2d 225 (at 227), the court says:

The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the constitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must then, or shortly, be determined. Then is the opportunity afforded for presentation to the courts of *facts in extenuation of the offense*, or in *explanation of defendant's conduct*; to *correct any errors or mistakes* in reports of defendant's past record; and, in short to *appeal to the equity of the court in its administration and enforcement of penal laws*. Any judge with trial experience must acknowledge that such disclosures frequently result in mitigation, or even suspension of penalty. (Emphasis added.)

In *Batson v. U. S.*, 137 F2d 288, as a matter of dictum, the court states:

* * * We believe that an accused should have the *opportunity to be heard by counsel on the sentence to be imposed*, and that a court should not impose sentence in the absence of counsel without expressly ascertaining that defendant does not desire his presence. Many considerations influence the length of a sentence which is to be imposed, and a defendant should have the opportunity to have his attorney *present any mitigating circumstances* to the court for its consideration in determining the weight of the sentence. (Emphasis added).

The third group of cases comprises a hybrid group where the absence of counsel was not considered prejudicial. *Commonwealth v. Polens*, 327 Pa. 544, 194 A. 652; *Kent v. San-*

ford, Warden 121 F2d 216; Lovvorn v. Johnston, 118 F2d 704; McGuire v. Hunter, Warden 138 F2d 379; Moore v. Aderhold, Warden 108 F2d 729.

Assuming that normally the better road for the law to take in this state is to insist on the presence of counsel at the time of sentence imposition, the state submits the following: (1) The absence of counsel in this particular case in no way prejudiced the defendant. (2) Even if counsel's absence be deemed prejudicial, then the case should be remanded only for the purpose of resentencing defendant.

In support of contention number one, we refer to 103-28-4, Utah Code Annotated 1943, which states:

Penalty for Murder

Every person guilty of murder in the first degree shall suffer death, or, *upon the recommendation of the jury*, may be imprisoned at hard labor in the state prison for life, in the discretion of the court. * * * (Emphasis added.)

State v. Romeo, 42 Utah 46, 128 P 530, states in essence that upon the conviction of murder in the first degree this section gives the jury the discretion to recommend the defendant to life imprisonment. In the absence of such a recommendation, the court upon such a conviction is *required* to impose the death penalty.

This demonstrates the complete lack of discretion on the part of the judge in this case. He could only pronounce death. He could not in any way modify the statutorily described penalty. This factor distinguishes this case from the many federal pronouncements which indicate that counsel should

have an opportunity to be heard on the sentence, in order to introduce mitigating circumstances for the purpose of influencing the discretion of the judge. The judge here can go in but one direction regardless of statement of counsel.

At the return of the verdict, the attorney may pursue two possible courses of action. 105-39-3, Utah Code Annotated 1943, allows a motion for a new trial. 105-35-1, Utah Code Annotated 1943, provides for a motion in arrest of judgment. No motion in arrest of judgment was filed. Motion for a new trial was filed (R. 338-39), was denied outside presence of counsel (R. 340), and on the filing of a subsequent motion for rehearing was heard and denied (R. 346), thereby curing any defect, if there be any, in not having an opportunity for oral argument on the original motion for new trial.

Though the action in imposing sentence sans counsel may have been technically in error, under the circumstance of this case, neither the "guiding hand of counsel" nor the skilled advocacy of mitigating circumstances could have produced a different result. The judge had an affirmative statutorily imposed duty. He could do only that which he has already done. Defendant has in nowise been prejudiced.

If the court was technically in error, the case should be remanded only for the purpose of resentencing defendant. See *Wilfong v. Johnston*, 156 F2d 507 at 510. See also *In Re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149.

POINT V

IT WAS NOT ERROR FOR THE TRIAL COURT TO

DENY A MOTION FOR THE EXAMINATION OF DESIGNATED PHYSICAL EVIDENCE NOR A MOTION FOR A REHEARING OF MOTION FOR NEW TRIAL.

Point VI of appellant's brief charges error in denying (1) motion for rehearing on motion for new trial and (2) motion for an order requiring examination of designated physical evidence (R. 346). The foundation of both motions as indicated in appellant's brief was "newly discovered evidence."

The law concerning newly discovered evidence is well stated in the case of *State v. Weaver*, 78 Utah 555, 6 P2d 167. At page 559, the court states:

Newly discovered evidence, to be ground for a new trial, must satisfy several elementary requirements. The courts are not in accord respecting all these requirements, but fairly agree that the newly discovered evidence be such as could not with reasonable diligence have been discovered and produced at the trial, that it be not merely cumulative, that that it be such as to render a different result probable on the retrial of the case. Note, 46 L. R. A. (N. S.) 903.

And at page 561:

* * * It is the general rule that the granting or refusing of a motion for a new trial rests in the sound discretion of the trial court, and that an appellate court will not disturb its action unless it appears that this discretion has been abused to the prejudice of the defendant. 16 C. J. 1119; 20 R. C. L. 290; *People v. Sullivan*, 3 Cal. App. 502, 86 P. 834. It was the duty of the trial judge to give careful attention to the affidavit filed in support of the motion and to consider

it in connection with the evidence given at the trial. Having had the defendant and the witnesses before him, he was in a better position than we are to judge of the probable effect of the testimony now proposed. To justify him in granting a new trial he should be satisfied that the proffered evidence is such as to render a different result probable on a retrial of the case. Note, 46 L.R.A. (N. S.) 903; *Perry v. People*, 38 Colo. 23, 87 P. 796. Or he might have granted it had he any reasonable doubt as to the guilt of the defendant. *People v. Markle*, 89 Cal. 82, 26 P. 642. Before we are authorized to reverse the action of the trial court and direct the granting of a new trial, it must appear that the evidence proposed is of such character, when viewed with the other evidence given on the trial, as to raise a reasonable presumption that the result of a second trial would be different from that in the first and that the trial court had abused its discretion or was manifestly wrong in overruling the motion. *State v. Montgomery*, 37 Utah 515, 109 P. 815

State v. Montgomery, 37 Utah 515, at 520 states:

* * * In no event, * * * is this so-called newly discovered evidence "so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first," which would have to be the case in order to authorize us to grant a new trial.

In considering the motion for the examination of designated physical evidence, we must note that it is one step removed from the normal concept of newly discovered evidence—in fact it deals not with newly discovered evidence but with evidence yet to be discovered and which, in fact, ascertained, may have no material relationship with the issue in question

and which may not, in all probability, raise a presumption of a different probable result. The state submits that by the exercise of due diligence, counsel could have discovered the sought for evidence prior to trial or during trial by a timely motion for a continuance. See *El Paso Southwestern R. Co. v. Barrett*, 101 S. W. 1025, 1029; 46 Tex. Civ. App. 14. In the application of the law to the circumstances, we must conclude that the motion's denial was not in error.

In relation to the motion for a new trial on the basis of Officer Jackson's affidavit (R. 345) evidencing the fact of a search of Don Neal's car prior to his arrest and the then disclosure of no secreted weapon, the state submits that due diligence on the part of counsel would have produced such evidentiary fact prior to or during trial. Conceding for purposes of argument that due diligence could not have produced the desired evidence, it is submitted that that evidence when considered in relation with all of the other evidence, is not of such a character as to raise a reasonable presumption that the result of the second trial would be different from that of the first. If such be true, then the conclusion, of course, follows that the trial court was not in error in exercising its broad discretion by denying such motion for a re-hearing of the denial of a motion for a new trial.

POINT VI

THE COURT DID NOT ERR IN ALLOWING OFFICER CLARK OVER DEFENDANT'S OBJECTIONS TO

DEMONSTRATE THE MOVABILITY OF HIS HANDS WHICH WERE HANDCUFFED BEHIND HIS BACK.

Appellant's Point III relates to a certain demonstration performed before the jury and detailed on page 238-239 of the record. Over the general objection of appellant as to its competency, relevancy and materiality (R. 238) the Court allowed Officer Harold Clark to sit on an armless chair, hands handcuffed behind his back, and demonstrate the ability of a person so situated to move his hands and point a gun. After the demonstration and after the jury had observed the ability of one so seated and cuffed to move his hands and point a gun, the appellant then interposed a specific objection claiming dissimilarity of conditions between the conditions of the demonstration and the conditions when Officer Farley was shot.

As a preliminary observation it should be borne in mind that it is elementary in the law that objections should be timely put and except where proffered evidence is inadmissible for any purpose, the basis of the objection must be stated with particularity. See *Snowden v. Pleasant Valley Coal Company*, 16 Utah 366 and 52 Pac. 599 and *Culmer v. Clift*, 14 Utah 286.

It is submitted that the objection when first made was without sufficient particularity to justify the trial court in excluding the evidence. Likewise, the specific objection made after the demonstration was not timely put.

Bypassing the argument concerning the timeliness of objections and turning to the substance of the matter we find that the law relating to experiments is well summarized in 8 A.L.R. 18 and 85 A.L.R. 479. There the cases are collected

which pertain to experimental evidence as affected by similarity or dissimilarity of conditions. From the cases therein cited one is struck by four fundamental ideas which state the law. (1) The conditions present at the demonstration or experiment must be substantially similar to the conditions existing at the time of the occurrence. (2) The limit of permissible dissimilarity is drawn where such variation is likely to confuse or mislead the jury. (3) The admission of experimental evidence is peculiarly within the discretion of the trial judge and will not be interfered with in the absence of abuse. (4) Given essential conditions substantially similar, then any departure of minor variation goes to the weight rather than the admissibility of the evidence.

A close reading of the record reveals that the demonstration performed by Officer Clark in no wise purported to be a complete re-enactment, pantomime, or demonstration of the crime. It did show that a person sitting down, hands cuffed behind his back, is not incapable of so moving his hands and body as to be in a position from which he could shoot a person. It is submitted that for this purpose that the conditions present at the demonstration were substantially similar to the conditions existent at the time of the occurrence; that what dissimilarity existed did not in any way confuse or mislead the jury; that the evidence was properly admitted in the sound discretion of the court, and the existing variations were taken into consideration by the jury in its evaluation of the weight to be given to the demonstration.

POINT VII

THE DEFENDANT WAS AFFORDED A FAIR TRIAL.

Analysis of the record reveals that the defendant was afforded a fair and impartial trial. He was represented by able and experienced counsel. He had opportunity to present witnesses and confront and cross examine those witnesses presented against him. The newspaper incident referred to in appellant's brief when considered with all the other facts and circumstances of the case in no way affected the essential fairness and impartiality of defendant's trial and was acquiesced in by defendant's counsel. The burden of showing any essential unfairness in connection with the trial has not been met and it is respectfully submitted that the proceedings by which the defendant was convicted of the crime of first degree murder are free from prejudicial error.

CONCLUSION

A review of the entire proceedings and the law in relation thereto shows that the defendant, Don Jesse Neal, was afforded a fair trial in accordance with established legal principles and that the proceedings were free from prejudicial error. It is respectfully submitted therefore that the verdict of the jury and the judgment and sentence of the court should be affirmed by this Honorable Court.

Respectfully submitted,

CLINTON D. VERNON

Attorney General

QUENTIN L. R. ALSTON

Assistant Attorney General

BRUCE S. JENKINS

Assistant Attorney General

Attorneys for Respondent