1980

State of Utah v. Cecil Earl Brooks and James Charles Edward Good : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
v.	:	
CIL EARL BROOKS and MES CHARLES EDWARD GOOD,	:	Case No. 16639
Defendants-Appellants	:	

BRIEF OF APPELLANTS

Appeal from convictions of Aggravated Assault in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF THE FACTS 2

ARGUMENT

POINT I: THE TRIAL COURT DENIED DEFENDANTS THEIR RIGHT TO CONFRONTATION BY ALLOWING THE STATE TO INTRODUCE THE CRUCIAL PART OF THEIR CASE-IN-CHIEF VIA A PRELIMINARY HEARING TAPE. . . 6

POINT II: THE TRIAL COURT ERRED IN ADMITTING THE PRELIMINARY HEARING TAPES IN VIEW OF THE STATE'S FAILURE TO SATISFY THE TWO REQUIREMENTS OF THE CONFRONTATION CLAUSE. 18

POINT III: THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 23 32

POINT IV: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT. 34

CONCLUSION 36

CASES CITED

Barber v. Page, 390 U.S. 719, 724-25 (1968) 18

California v. Green 399 U.S. 149 (1970. 7,29,30,32

Flores v. People, 593 P.2d 316 (1978) 26,27

Fresneda v. State, 483 P.2d 1011 (Alas. 1971) 21

Gallegos v. Turner, 526 P.2d 1128 (1974) 15

Mattox v. United States, 156 U.S. 237, 242-3 (1895). . . 8

Ohio v. Roberts, ____ U.S. ____ (40 CCH S.Ct. B3665, June 25, 1980) 7,8,18,29

Oregon v. Hass, U.S. 714 (1975) 8

People v. Enriquez, 561 P.2d 261 (Cal. 1977) 28

(Continued) Page

People v. Garcia, 382 N.E. 2d 316 (1978) 13
People v. Gibbs, 63 Cal. Rptr. 471 (1967) 11
People v. Horn, 36 Cal. Rptr. 898 (1964) 21
People v. McIntosh, 204 N.W. 2d 135, (Mich. 1973) 23
People v. Reed, 414 N.Y.S. 2d 89 (1979) 14
People v. Rogers, 398 N.E. 2d 1058 (1979) 25
People v. Smith, 597 P.2d 204 (1979) 8
People v. Turner, 353 F. Supp. 672 (1972) 11
State v. Anderson, 599 P.2d 1225 (Or. App. 1979) 28
State v. Brackenbury, No. 16372 (May 29, 1980) 16
State v. Greer, 552 P.2d 1212 (1976) 24
State v. Mannion, 57 P.2d 542 (1899) 8
State v. Moody, 404 A.2d 370 (1978) 10
State v. Oniskor, 410 P.2d 929 (1973) 15,18
State v. Smyth, 593 P.2d 1166 (1979) 17
State v. Wilson, 565 P.2d 66, 68 (Ut. 1977) 34
United States v. Kearney, 420 F.2d 170 (D.C.Cir. 1969) . 30

OTHER AUTHORITIES CITED

Utah Code Ann. §76-2-202 (1953 as amended) 1
Utah Code Ann. §76-5-102 (1953 as amended) 1
Utah Code Ann. §76-5-103 (1953 as amended) 1
Utah Code Ann. §77-1-8(4) (1953 as amended) 15
Utah Code Ann. §77-15-19 (1953 as amended) 10
Utah Code Ann. §77-15-25 (1953 as amended) 27
Utah Code Ann. §77-15-26 (1953 as amended) 27
Utah Code Ann. §77-44-3 (1953 as amended) 15

(Continued) Page

Utah Constitution, Article I, Section 12 6

United States Constitution, Sixth Amendment 6

Rule 63(3) Utah Rules of Evidence 15

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent v. CECIL EARL BROOKS and JAMES CHARLES EDWARD GOOD, Defendant-Appellants	: : : : : : : :	Case No. 16639

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from convictions of Aggravated Assault in the Third Judicial District Court in and for Salt County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

DISPOSITION IN THE LOWER COURT

In a jury trial conducted before the Honorable Peter F. Leary of the Third Judicial District Court, appellants were found guilty of two counts of Aggravated Assault, a Third Degree Felony, in violation of Utah Code Ann. §76-5-102, 103 and §76-2-202 (1953 as amended), and sentenced to an indeterminate term of zero to five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the conviction and judgments rendered below and a remand of the case to the Third Judicial District for a new trial.

STATEMENT OF THE FACTS

The alleged crime in the instant case took place in the "hobo jungle". The participants, four transient hobo-types, were camped at Roper Yards on the property of Denver and Rio Grande Railroad (T.4). The fourt had recently joined to ride the rails together, and were enroute to Grand Junction, Colorado. (PH 17, 18) From there, Donald Storie and Richard Vinson, (referred to as "Rico" in the record) were headed to Wyoming and eventually to Montana to work on a ranch. (PH 7,17,66,90,115 Cecil Brooks and Jim Good were traveling east and would probably wind up in Michigan. (T.334)

On April 23, 1979, Vinson, Brooks, and Good left the camp at an early hour to go downtown and give plasma for money. (PH 19, 89) Storie remained in camp alone until late afternoon when the three returned with food, wine, and tobacco. (PH 19,22) Storie cooked up a meal over a fire and the group passed around the jugs of wine. (PH 21,33,58) Later on, an argument developed concerning money, and the four decided to split up. (PH 22,25)

At preliminary hearing Donald Storie testified that while the four were traveling together they had agreed to pool their money. (PH 9) But a dispute developed over $14.00 which Storie said he saw Good stick down his boot. (PH 24) Good said that he lost the money, and Storie didn't believe him. (PH 24) As a result of the disagreement, the men decided to split up. Brooks and Good left the campsite, but returned later in the evening while Storie was making coffee and Vinson was asleep. (P

Storie testified that Brooks came at him with a knife, said "I didn't steal the $14.00", and then stabbed him in the chest. (PH 10) Storie claimed that as he struggled with Brooks, Jim Good hit him with an ax handle. (PH 11) He was knocked unconscious and fell down in a swampy area. (PH 12) When he came to, he observed Brooks and Good standing over Vinson, who was lying on the ground. Good said, "that son-of-a-bitch down there [referring to Storie] is dead. . . if you're going to kill him, hurry up and kill him." Brooks responded, "well, I don't want to kill him, I just want to make him remember." (PH 12) Storie blacked out again, and when he came to, he crawled up to Vinson and saw that he was "bleeding real bad." (PH 13) He then made his way to the trainmaster's shack to get help. (PH 13)

Richard Vinson also testified at preliminary hearing, although his memory of the events was somewhat foggy. He testified that after the four ate dinner and drank wine, he fell asleep. He didn't recall any dispute over $14.00 (PH 98) nor did he know of Good putting money down his boot. (PH 105, 118) Moreover, he was unaware that the other men had decided to "split". (PH 100) He remembered waking up when it was dark and seeing a man standing over him. (PH 99, 106). He said he was hit suddenly before he could rise up, and then he was unconscious. (PH 108)

Both men were medically treated for the injuries they sustained. (T. 20203, 214) Storie had a stab wound in his left breast, lacerations on both thumbs, a fractured left thumb, two lacerations on his scalp, and bruises on his left wrist and

forearm. (T. 2-215) Rico suffered two blunt lacerations on his forehead, one black eye, a laceration on his left arm, and a laceration of the neck. (T.203-204)

At trial the preliminary hearing transcript (the testimony of Donald Storie and Richard Vinson) formed the basis of the State's case. The balance consisted of the testimony of several police officers, the custodians of the court recordings, and employees of the Denver and Rio Grande Western Railroad. Both Cecil Brooks and James Good took the stand in their defense. (T.2-297,338)

Brooks' testimony regarding the day's events was for the most part the same as Storie's. However, he mentioned that Good didn't eat any dinner, because he and Storie "had had words about the food". (T.307) He remembered Storie and Good arguing about the $14.00 (T.309), and heard Vinson tell Good to get out of camp. Brooks retorted, "If Jim goes I'm going with him." (T.309) When Good attempted to take the tobacco, Storie told him "he wasn't taking a damn thing." (T.309) Storie then came at Brooks with a knife, and turned toward Good. (T.310) Meanwhile, Vinson, who was several feet from Brooks, came down a small slope toward him. Brooks testified that since Vinson had told him that he'd done fifteen years for killing someone with a knife he (Brooks) was "scared like hell." (T.311) He added that he had no reason to doubt Vinson because he had scars all over him from knife fights. Brooks and Vinson scuffled until Good pulled Vinson off and said "let's get out of here." The two walked down by the railroad tracks and encountered Scott Broussard, an investigator for the railro

They asked him when the next train was leaving, and he told them to get out of the railroad yards. (T.2-53) The two men then walked north toward the viaduct, and later turned to walk back toward the "flashing lights". They were arrested as they were walking back toward camp. (T.320) Brooks sustained a cut in the palm of the left hand. (T.314)

Good's testimony revealed that on the way downtown Vinson ran into a man whom he had previously fought with. The man had a scar on his face where Vinson claimed to have hit him with a hammer. (T.342) Back in camp and drunk (T.351), Good argued with Storie about peeling potatoes too thick and wasting food. (T.348) Storie responded with "If you would take the $14.00 out of your boot, we would have more food." Vinson then told Good he could "get the hell out of camp", and Good responded, "Suits me". (T.350) When Good attempted to take the tobacco, Storie objected and came up with a knife. Good grabbed an ax handle and took two swings at Storie. (T.354) When Storie staggered back and fell in the swamp, Good turned and hit Vinson with the club to get him off of Brooks. (T.355) Brooks and Good walked up the path toward the railroad yards, and were later arrested as they headed back toward the flashing lights near camp. (T.357)

POINT I

THE TRIAL COURT DENIED DEFENDANTS THEIR RIGHT TO CONFRONTATION BY ALLOWING THE STATE TO INTRODUCE THE CRUCIAL PART OF THEIR CASE-IN-CHIEF VIA A PRELIMINARY HEARING TAPE.

At trial, and over appellant's strenuous objection, the State was allowed to introduce the taped preliminary hearing testimony of Donald Storie and Richard Vinson. The State was therefore able to introduce, not only the major part, but the critical part, of their substantive evidence through a tape recording machine. Appellants contend that the introduction of this evidence denied them their constitutional right to confront their accusers in open trial, as guaranteed by the Utah Constitution, Article I, Section 12. That section provides:

> [I]n criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him.

The United States Constitution provides the same protection within the contours of the Sixth Amendment. In illuminating the scope of that protection, the United States Supreme Court, while paying homage to the long valued right of confrontation, has recognized that it may be dispensed with under some circumstances. One of these circumstances concerns the use of preliminary hearing testimony at a criminal trial.

Most recently in the case of Ohio v. Roberts, ____ U.S. (40 CCH S.Ct. B3665, June 25, 1980), the Supreme Court expanded the State's freedom to introduce preliminary hearing testimony at trial where the witness is unavailable. There the defendant was charged with forgery and possession of stolen credit cards in the name of Bernard Isaacs. The Isaacs' daughter, Anita, was questioned by defense counsel at preliminary hearing concerning her interaction with the defendant. She testified that she had permitted him to use her apartment for several days while she was away, but denied giving him use of checks and credit cards belonging to her parents. Counsel did not ask the court to declare Anita a hostile witness, nor did the prosecutor question her. At trial, newly appointed defense counsel objected to the use of the preliminary hearing transcript on the basis that it violated the defendant's right to confrontation. The Court held that there was no constitutional violation where Anita was unavailable to testify at trial, and the preliminary hearing transcript bore sufficient "indicia of reliability" to afford the "trier of fact a satisfactory basis for evaluating the truth of [the] prior statement," citing California v. Green, 399 U.S. 149 (1970). Thus, because the prior statement was made under oath, and defense counsel was not "significantly limited in any way in the scope or nature of his cross-examination," 399 U.S. at 166, the transcript was admissible at the subsequent trial.

Notwithstanding the disposition of the issue in the context of federal constitutional law, appellants submit that

this court can and must afford them greater protection than the Roberts decision. It is well recognized that a state is free to construe its own constitution more narrowly than the federal constitution, even though the provisions involved are similar. See, Oregon v. Hass, 420 U.S. 714 (1975). The right to confront one's accusers in open trial is a cherished and vital right. It envisions

> A personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Mattox v. United States, 156 U.S. 237, 242-3 (1895).

Utah has recognized, since the early case of State v. Mannion, 57 P.2d 542 (1899), that these rights are essential to a fair trial. This Court must therefore take notice of the manner in which these rights have been sacrificed in the instant case, and re-examine the policy and spirit behind Utah's confrontation clause.

Other states have recently tackled the issue, and have resolved the dilemma in favor of the defendant. In People v. Smith, 597 P.2d 204 (1979), the Supreme Court of Colorado considered the question of whether a transcript of preliminary hearing testimony should be admissible at a subsequent trial. The defendant in Smith was initially the subject of a civil suit brought by Carmack Motors to recover possession of a tractor. Smith and John Burnside

testified at trial that they were together at Carmack Motors on a certain date, and Smith made a cash payment for the tractor. The controversy was resolved against Smith and he was subsequently charged with perjury, conspiracy to commit perjury, and tampering with a witness. Burnite testified at Smith's preliminary hearing; only this time he recanted his earlier testimony. Under oath, he admitted that he had agreed to go along with Smith's story because of Smith's poor luck, inability to make a living, and concern that a prior felony conviction might undermine his credibility. Burnite died prior to trial, and a transcript of his testimony was admitted into evidence at Smith's trial, over the latter's objection. On appeal, the State Supreme Court held that in view of the limited scope of a preliminary hearing, the State Constitution precluded the admission of a preliminary hearing transcript at a subsequent trial, even though the witness was clearly unavailable.

The Colorado court acknowledged the general admissibility of recorded testimony taken at a prior judicial proceeding where the witness has become unavailable and the right of cross-examination has been exercised. The court observed that "transcripts from a previous trial provide no basis for objection since the defendant presumably has received the full panoply of procedural and substantive protections." Id. at 207. But where the prior judicial proceeding is a preliminary hearing, the court was convinced that critical differences come into play. A preliminary hearing, the court noted,

is limited to a determination of probable cause and in effect functions as a screening device. Furthermore, evidentiary and procedural rules are relaxed, and the credibility of witnesses is generally not explored (cf Utah Code Ann. §77-15-19 (1953 as amended)). As a result counsel does not have the same motive to cross-examine at preliminary hearing as he does at trial. To illustrate, the court pointed to the transcript; counsel did not cross-examine regarding the prejudicial statement that Smith was afraid a prior felony conviction would undermine his credibility, and counsel did not explore Burnite's credibility even though the issue was ripe since he was recanting previous testimony.

The above considerations, then, led the Colorado Court to conclude that a preliminary hearing is too limited in scope to allow testimony recorded at it to be introduced at a subsequent trial, regardless of the availability of the witness. New Jersey has also modified its rule to reflect an appreciation for the differences between evidence given at a preliminary hearing and evidence given at a trial. In State v. Moody, 404 A.2d 370 (1978), the court construed its rule of evidence providing for the admission of testimony given at a prior hearing where the witness is unavailable to include only testimony given at a prior trial. The court noted that the legislature intended to exclude testimony given at a preliminary hearing for the reason that cross-examination in such proceedings is either nonexistent or inadequate.

Other courts, while not as a matter of law excluding preliminary hearing testimony, recognize the importance of exercising caution in admitting such evidence. In Poe v. Turner, 353 F. Supp. 672 (1972), the court held that an unavailable witness' recorded testimony from a prior trial was admissible in the defendant's second trial. The court observed that the defendant was unable to point to any deficiencies in the confrontation or cross-examination of the witnesses at the first trial. The court went on, however, to distinguish the nature of cross-examination in the context of a preliminary hearing:

> Nor can petitioner point to any reasons counsel might have had on that occasion for exercising restraint in the conduct of the cross-examination, as petitioner perhaps could do had the testimony in question been offered at a preliminary hearing. At a preliminary hearing, where the standard to be met by the prosecution is probable cause, rather than guilt beyond a reasonable doubt, a vigorous defense is less important and might serve only to harden and preserve the prosecution's case. Id at 677.

Similar considerations were discussed in People v. Gibbs, 63 Cal. Rptr. 471 (1967). There the court held that an informer's transcribed testimony taken at preliminary hearing was inadmissible at defendant's trial due to inadequate cross-examination. The court suggested that several qualitative factors play a role in determining whether cross-examination at a prior proceeding has been adequate. Those factors are the nature of the proceeding, the character of the witness and his connection with the events, the extent and subject

of his direct testimony, and the time and preparatory opportunities available to the accused and his attorney. The court elaborated on the significance of the nature of the proceeding:

> [T]he preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement - an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistrate's court. The prosecution need show only "probable cause," a burden vastly lighter than proof beyond a reasonable doubt. Committing magistrates usually accept the prosecution evidence at face value, leaving credibility judgments for the trial of guilt. The tactical influences pervading the process tend to induce shallow cross-examination. Limited cross-examination at the preliminary hearing is a frequent tactic of adept and skilled defense lawyers. Cross-examination may lack width and depth, not because counsel lacks opportunity, but because he chooses to defer his real effort until the trial itself. The choice creates no defense disadvantage if the prosecution witness testifies at the trial. He is then available for painstaking and incisive cross-examination. If the witness disappears and his transcribed testimony is read to the jury, the opportunity for cross-examination disappears with him. [T]hat situation . . . exposes the defense to grave tactical damage. [Citations and footnotes omitted] Id. at 475

In the instant case, appellants asserted a number of arguments in support of their motion to exclude the preliminary hearing tapes. Consistent with discussion in the above-cited cases, defense counsel argued that a preliminary hearing in Utah is ordinarily a much less searching exploration into the merits of the case than a trial because the burden of proof is probable cause as opposed to reasonable doubt. (T.M. 57-58) Counsel contended that trial tactics

are different at a preliminary hearing, and so may change the nature of the questions asked and the witnesses called.

Moreover, at the time of preliminary hearing defense counsel was ignorant of several statements made to police officers since that information was unavailable under Utah's discovery rules. (T.M. 70) Counsel argued that the lack of this sort of information severely curtailed their ability to impeach the witnesses by confronting them with their prior statements. Support for the exclusion of the tapes on this basis alone is found in the case law. In People v. Garcia, 382 N.E. 2d 316,(1978) the court admitted a witness' preliminary hearing testimony at trial. Defendant contended that this was a denial of his right to confrontation since the preliminary hearing occurred before he was permitted discovery. On appeal, the court held the evidence admissible and observed that a defendant is not denied adequate cross-examination if further cross-examination would be of no benefit to him. Since the defendant was unable to show that cross-examination of the witness at the preliminary hearing would have been enhanced by material made available through discovery, he was denied relief on appeal.

Appellants contend that in the present case availability of prior inconsistent statements made by Vinson and Storie would have enabled them to impeach their credibility and substantially weaken the State's case.

Additionally, where witnesses are unavailable to testify at trial, the trier of fact is deprived of any opportunity to observe

demeanor and evaluate credibility. An absent witness can't be confronted with prior inconsistent statements made at the preliminary hearing, nor can his "sweating brow" or "twitching cheek" be observed. (T.M. 70). If a defendant's right to confrontation is to have any substance, it must be accompanied by a convergent right to impeach the confronted witness. Prior recorded testimony should be excluded where that right has not been fully exercised. In People v. Reed, 414 N.Y. S. 2d 89 (1979), the court did exclude a preliminary hearing transcript where defense counsel was unaware of the chronic alcoholism of the witness at the time of preliminary hearing, and hence, did not go into the credibility of the witness or his accuracy of recollection.

Similarly, in the instant case, counsel did not explore the victims' history of alcohol abuse or propensity for violent behavior. Defense counsel was unable to use such information to either buttress the defendants' claim of self-defense or impair the credibility of the victims' recollection of the alleged crime. Appellants submit that in this case credibility of the State's witnesses was critical to a conviction. The victims and defendants had traveled together for several weeks and were ostensibly "friends". A disagreement and split occurred, and two versions of the evening's events emerged. The State's failure to provide any observable witnesses to present the victims' version precluded the jury from pursuing its task with any efficacy. A judgment of credibility cannot adequately be

made when only half the "picture" is viewed. It was essential that the jury physically observe the stature and demeanor of all four participants, hear all possible defenses, and weigh the evidence accordingly. For the State's failure to provide the jury with this opportunity, appellants submit that they were denied not only their constitutional right to confrontation, but their right to a fair trial.

Appellants are aware that this court has allowed prior testimony to be introduced at a subsequent trial under some circumstances. (See State v. Oniskor, 410 P.2d 929 (1973); at trial State may introduce testimony given by witnesses at preliminary hearing if good faith effort to secure attendance of witnesses is shown; Gallegos v. Turner, 526 P.2d 1128 (1974); on petition for habeas corpus testimony of rape victim at first hearing was admissible at second hearing where witness was shown to be unavailable.) However, it is interesting to note that the statutory authority which may have in part formed the basis for the admissibility of such testimony has been repealed under the new Code of Criminal Procedure, effective July 1, 1980. (See provisions of old code; Utah Code Ann. §77-44-3, and §77-1-8(4), 1953 as amended) Only one remaining provision arguably authorizes the introduction of testimony recorded at a preliminary hearing, and that is Rule 63(3) of the Utah Rules of Evidence. However, appellants submit that admission of the prior testimony in the instant case does not comport with the guidelines set forth in subsection (3) of Rule 63. Specifically, "on the former occasion" appellants

did not have "an interest and motive similar" to that which they had at trial.

The Utah Supreme Court recently discussed the defendant's right to certain procedural safeguards in the context of a preliminary hearing in State v. Brackenbury, No. 16372 (May 29, 1980). The court described the fundamental purpose of the preliminary hearing as the "ferreting out of groundless and improvident prosecutions," Id. at 7, and went on to state:

> Several ancillary purposes supplement the primary purpose of the hearing. The examination provides a means of effectively advising the defendant of the nature of the accusations against him. The hearing also provides a discovery device in which the defendant is not only informed of nature of the State's case against him, but is provided a means by which he can discover and preserve favorable evidence.
>
> The discovery available at the preliminary hearing represents an important step in the preparation of the defendant's defense for the subsequent trial. [footnotes omitted] Id. at 8.

Thus, the preliminary hearing is a step, albeit an important one, towards a trial which will afford the defendant the full panoply of procedural and substantive safeguards. A defendant's interest and motive at preliminary hearing is primarily informational and assists in the preparation of an effective defense.

At trial, the defendant's interest and motive is presenting an effective defense, which necessarily includes the

opportunity to impeach the credibility of the evidence against him. Confrontation of a witness enables him to demonstrate to the jury the witness' demeanor. This display in the courtroom should not be underestimated. As the Supreme Court of Oregon, in State v. Smyth, 593 P.2d 1166 (1979), recently said:

> In our system a defendant is not tried on a dossier compiled in prior hearings, no matter how fairly and judiciously conducted. His guilt must be established at the trial by evidence that convinces a fact finder beyond a reasonable doubt. But the earlier opportunity to question the witness will often avail little when the jury at the trial sees neither the witness nor the effect of the cross-examination recorded in a cold transcript. As the United States Supreme Court stated in Barber, '[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.' 390 U.S. at 725, Id. at 82.

Appellants submit that the denial of this crucial trial right has prevented them from obtaining a fair trial, and urge this court to revitalize the spirit behind Utah's constitutional right to confrontation by ruling that the preliminary hearing tapes should have been excluded.

POINT II

THE TRIAL COURT ERRED IN ADMITTING THE PRELIMINARY HEARING TAPES IN VIEW OF THE STATE'S FAILURE TO SATISFY THE TWO REQUIREMENTS OF THE CONFRONTATION CLAUSE.

Most recently in Ohio v. Roberts, ___ U.S. ____, (40 CCH S.Ct. B 3665, June 25, 1980), the United States Supreme Court reiterated two crucial requirements which must be satisfied before a court may admit the preliminary hearing testimony of an absent witness at a subsequent trial. The party offering the testimony must first demonstrate that a good faith effort has been made to procure the attendance of the witness at trial. Secondly, the hearsay is admissible only if it bears sufficient indicia of reliability so as to assure its trustworthiness. Neither requirement has been satisfied in the instant case, and admission of the preliminary hearing tapes was therefore error.

THE STATE FAILED TO MAKE A GOOD FAITH EFFORT TO OBTAIN THE WITNESSES AT TRIAL.

In Barber v. Page, 390 U.S. 719, 724-25 (1968), the United States Supreme Court declared that "[a] witness is not 'unavailable' for purposes of [an] exception to the confrontatio requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." Utah has recognized the constitutional standard set out in Barber and has held that the State's failure to exercise due diligence in securing the attendance of witnesses at trial does indeed operate as a denial of the defendant's rights. See State v. Oniskor, 410 P.2d 929 (1973). Whether the state has

exercised reasonable diligence must be determined from the facts and circumstances of each particular case.

The facts of the instant case militate against a finding that the State exercised due diligence in procuring the attendance of Donald Storie and Richard Vinson at trial. James Foster, a detective for the Salt Lake Police Department, testified that, following the preliminary hearing on May 16th, he returned Vinson and Storie to Saint Mary's Home (an alcoholic rehabilitation center). Six days later, on May 22nd, he received a phone call from Vinson informing him that Storie had left town on May 18. (T.H.M. 8) Foster notified the prosecutor of this development on May 25, and she directed that they "wait and see" if Storie returned. (T.H.M. 9) Subsequently, on June 19th, Foster was contacted by Jessie Barker (victim witness department, County Attorney's Office) who indicated that Storie had left an address of next of kin in Bakersfield with his physician, Dr. Berman. (T.H.M. 9) Through contacting the Bakersfield Police Department, Foster was able to locate a phone number for Everett Tracy, Storie's half-brother. When contacted, Tracy said he hadn't seen his "brother", but told Foster that Storie had visited a brother-in-law in Fresno during the latter part of May. (T.H.M. 12) Foster also checked with the Greyline and Trailways Bus Co. and welfare assistance on June 19th, but was unable to uncover any leads. (T.H.M. 11, 17) No further effort was made until July 6, just 3 days before the date set for trial. At that time Foster contacted

Joe Cavenetti, Storie's brother-in-law in Fresno. Cavenetti had not seen Storie but suggested that Foster call Storie's twin brother in Phoenix. (T.H.M. 14) A check with the brother, and also with the Rescue Missions in Fresno and Sacramento, revealed no information as to Storie's whereabouts. Foster and Sgt. Fontaine also checked the post office, Saint Mary's Home, the Salt Lake Rescue Mission, and Pioneer Park, to no avail. (T.H.M. 13, 17, 18) It is undisputed that Detective Foster never received a subpoena for Donald Storie. (T.H.M. 17)

During this period of time Foster had contact with Richard Vinson on two occasions. Vinson, as indicated above, called Foster on May 22nd to inform him of Storie's disappearance In addition Vinson contacted Foster on May 25th to tell him that he had moved to the Tower Hotel, a halfway house. When Foster received a subpoena for Vinson, a call to the manager of the hotel revealed that Vinson had moved out approximately a week and one-half earlier. (T.H.M. 17) On June 18th special agent Scott Broussard informed Foster that he had seen Vinson down at the railroad yards, but merely advised him to get off railroad property. (T.H.M. 16) Neither Vinson nor Storie was ever located by Detective Foster. Subsequent to the day set for trial, on July 10th (the subpoena ordered Vinson to appear on the 9th) Detective Foster finally contacted the Cross Ranch in Montana, but to no avail. (T.290)

When viewed in light of relevant case law, these facts plainly do not rise to the level of due diligence required of the State. In Fresneda v. State, 483 P.2d 1011 (Alas. 1971), on facts markedly similar to those in the present case, the court found the State's efforts to be lacking in due diligence. There the District Attorney's secretary made a few limited efforts to locate the missing witness earlier in the month before the trial, but no systematic search was begun before December 22, with trial scheduled for December 29. At that time police records were checked, and several hours of telephone conversations revealed a strong possibility that the witness had joined the army. At trial the witness' enlistment was verified, but his actual location was never determined. Significantly, no subpoena for the witness was ever issued. The court found the efforts to locate and return the witness did not rise to a level of due diligence, and therefore the prior testimony of the witness was inadmissible.

A factor noted by the court in Fresneda, and identified by another court as an "important element to be weighed", is the lapse of time between the State's awareness of the necessity of procuring a missing witness for trial and the start of the search to locate him. People v. Horn, 36 Cal. Rptr. 898 (1964) In the instant case, the State was notified that Storie had disappeared on May 22nd, yet no effort was made to locate him until a month later, and then only in response to a lead offered by a third party. Moreover, another one-half month

passed before the State attempted to follow up on the information disclosed by Tracy on June 19th. Cavenetti was not contacted until July 6th, nor were other possible leads pursued until that date. Since the trial date was known on May 25th, it is obvious that the inquiries made on July 6th were little more than last-ditch efforts to find witnesses for a trial fast approaching.

While appellants don't begrudge the prosecutor and detective their rights to a summer vacation, they do question the limited vitality with which the State pursued its obligation to afford them fundamental protections. (See T.H.M. 29, 51) Serious efforts to locate the witnesses commenced only after the prosecutor returned from her vacation. Investigation was further thwarted by the fact that Detective Foster had been on vacation for a week and in Denver for a week. (T.H.M. 28) He also admitted that due to a heavy case load and his assignment to more important cases, appellants' case had been relegated to a lower priority. (T.H.M. 29) While independently these collateral concerns may be understandable, and even excusable, their cummulative effect in the instant case was to preclude a systematic and thorough effort to locate the missing witnesses.

It is also essential that a prosecutor pursue all specific leads, as well as other reasonable alternatives, in his search for a witness. In People v. Starr, 280 N.W. 2d 519 (1979) three attempts to serve a missing witness with a subpoena were

unsuccessful. During the last attempt, on June 29th, officers learned that the witness was out-of-state on vacation and his whereabouts was unknown. On July 5, the day before trial, the prosecutor contacted the witness' mother and was told that she didn't know when he was coming back. The preliminary hearing testimony of the witness was admitted at trial over appellant's objection.

On appeal, the court held that the State failed to make a diligent effort to find the witness. The court noted that other steps were feasible and should have been undertaken. The State could have contacted five individuals who were present on the night of the incident, including the witness' girlfriend, or checked out a rumor concerning the witness' whereabouts, or talked to officers where defendant was incarcerated who were well-acquainted with the movement of people in the area in which the principals lived. The fact that the inquiries may not have been fruitful was immaterial to the court. The prosecutor still had a duty to pursue not only specific leads, but also those endeavors reasonably likely to produce them:

> Where there are no leads as to a witness' whereabouts, the prosecutor should inquire of known persons who might reasonably be expected to have information that would help locate the witness. Where there are specific leads as to a witness' location, the prosecutor must check them out. Id. at 521. (Emphasis added)

(See also People v. McIntosh, 204 N.W. 2d 135, (Mich 1973); no due diligence where "most specific lead was not checked out at all by prosecutor.")

In addition, the prosecutor has a duty to supervise and coordinate the effort to locate the missing witness. In State v. Greer, 552 P.2d 1212 (1976), an investigator was requested to locate a witness for trial on January 20th. When the defendant failed to appear for trial a bench warrant was issued, and trial was reset for July 1. On June 23, the investigator received another request to locate the witness. He checked the Motor Vehicle Department, Driver's License Bureau, talked to the witness' sister-in-law who referred him to the witness' mother who was unaware of his whereabouts, and attempted to serve a subpoena on the witness at an address obtained through the Motor Vehicle Department.

The court held that the trial court erred in its finding that the State made sufficient effort to place the witness under subpoena. Where the investigator failed to check the witness' previous place of employment, or to question the witness' mother or sister-in-law in sufficient depth or to check an address listed in the police report, such failure was fatal to the State's claim of "due diligence". The court emphasized the responsibility of the prosecutor to supervise and coordinate the investigation. Since the prosecutor neither instructed the investigator to make further efforts nor suggested additional leads, he was unable to show that due diligence had been exercised.

The investigation engaged in by the State must consist of something other than the mere dialing of telephone numbers. In People v. Rogers, 398 N.E. 2d 1058 (1979) the court held that effort consisting of eight to ten telephone calls to contact the witness did not amount to a good faith effort by the state. The court observed that

> [T]he mere failure to successfully contact a missing witness by telephone falls far short of a demonstration of due diligence in attempting to locate the witness. Clearly, some effort other than telephone communication should have been employed to secure [the witness'] presence. Id. at 1060.

In the present case, efforts to locate Storie and Vinson consisted primarily of telephone calls made on June 19th and July 6th. Other reasonable efforts could have and should have been employed to locate the witnesses. For instance, at no time did Detective Foster visit Roper Yards in order to obtain leads on the hobos' whereabouts. It is likely that he could have seen them in the "jungle" or at least conversed with other hobos who might have been able to aid in the search. Indeed, Agent Broussard did see Vinson at the yards on the 18th. Nor did Detective Foster attempt to contact the "Cross Ranch" in Montana prior to trial or the authorities in Oroville. Both Storie and Vinson mentioned going to the Cross Ranch numerous times at the preliminary hearing. (PH 7, 17, 66, 72, 90, 115) The hobos also talked about going up to a ranch in Montana to work when they made their statement to Foster. (T.R.M. 38) But

despite these specific references to their intended destination no attempt whatsoever was made by the State to follow up on the lead.

The prosecutor failed to supervise and coordinate the effort to locate the witnesses. She was aware of the numerous references to the "Cross Ranch" and yet failed to instruct Detective Foster to pursue the lead. She also failed to inform Foster of the trial date which was known to her on the 25th of May, so that Foster could have relayed the information to Vinson when he called from the Tower Motel. Moreover, Foster never received a subpoena from the prosecutor for Donald Storie. Clearly, the State was remiss in its duty to adequately supervise and coordinate the search for Storie and Vinson.

Due diligence also requires that the State take steps to insure the appearance of a witness when there is reason to know that he might not appear for trial. In Flores v. People, 593 P.2d 316 (1978), the preliminary hearing testimony of a priest was admitted at trial, where on the trial date the priest was in the hospital in critical condition as a result of complications due to leukemia. On appeal, defendant argued that the testimony was inadmissible because the State failed to exercise due diligence in procuring Father Dudley's presence at trial. The Colorado Supreme Court agreed and found that the State's efforts fell below the standard required. The court observed that the district attorney not only knew of the priest's potentially terminal illness four months before trial, but also knew of his whereabou

The court felt that in light of those facts, the State had an obligation to preserve Father Dudley's testimony by way of deposition. In conclusion, the court stressed that

> Where a party seeking to introduce testimony from prior judicial proceedings has notice of facts which probably would render a witness unavailable on the day of trial, that party has a duty to pursue means of preserving the witness' testimony. Id at 319.

In the instant case, no effort was made to either preserve the testimony of the witnesses or assure their attendance at trial. Both the prosecutor and Detective Foster were aware of the transient habits of hobos riding the rails. They had reason to know that Vinson and Storie had no intention of remaining in Salt Lake for any extended time, especially since neither had sought employment. Yet, it would have been possible to take any of several steps to insure their presence at trial. As the court suggested in Flores their testimony could have been preserved via a deposition. Or a subpoena could have been issued at the preliminary hearing to advise of an approximate trial date, pending verification. Additionally, no attempt was made to utilize the provisions in Utah Code Ann. §77-15-25 and §77-15-26 (1953 as amended). Those sections provide that a witness may be required to post a bond or surety if the magistrate is satisfied that there is reason to believe that the witness will not appear at trial.

The mere fact that these witnesses were transients doesn't absolve the State of its responsibility to produce them

at trial. While transients naturally are more difficult to locate, the standard of due diligence is not modified accordingly. The State's burden nevertheless remains high. In People v. Enriquez, 561 P.2d 261 (Cal. 1977), a transient's preliminary hearing testimony which was critical to the prosecution's case was admitted at trial. The California Supreme Court found this to be error and listed the steps the people could have taken to locate Prieto, the transient 17 year old. The State could have checked the high school Prieto testified that he expected to attend. Prieto had also indicated that he might be picking fruit "up north"; yet the prosecution failed to try and reach him through employer organizations, farm labor unions, or other employee organizations. In addition the court observed that no effort was made to ascertain the names of Prieto's friends or acquaintances who might have been able to provide information. The court rejected the argument that such efforts would be unsuccessful and disapproved of the prosecutor's remark that ". . . [t]rying to serve a warrant on an itinerant fruit picker is like looking for a needle in a haystack." Id. at 271. [cf State v. Anderson, 599 P.2d 1225 (Or. App. 1979), where the court found that due diligence had been exercised in locating a transient "hippie-type" individual; subpoena taken to last known address on two occasions, local post office contacted and other addresses checked, sheriff's deputies spoke with other persons living in the cabin and surrounding areas, follow-up contacts with people in the area and calls to District Attorney in

California. The search began in early May, 1978, as soon as a trial date was set for August 29, 1978, and continued to the day of trial.]

A comparison of the State's efforts in the instant case to those employed in the above-cited cases compels the conclusion that these witnesses were not "unavailable" for purposes of admitting their prior testimony. It is obvious that something less than a "good faith" effort was utilized to track them down. Substantial, positive leads were ignored. The brunt of the investigation was postponed until the last minute, and even then it consisted of little more than a half-hearted, perfunctory attempt. This court should not allow the prosecution to so casually dispense with appellants' vital constitutional rights.

THE PRELIMINARY HEARING TAPE DID NOT BEAR SUFFICIENT INDICIA OF RELIABILITY TO PERMIT ITS ADMISSION AT TRIAL.

The United States Supreme Court, in Ohio v. Roberts, supra observed that there are sufficient "guarantees of trustworthiness in the accoutrements of the preliminary hearing itself. . . " so as to permit the admission of an unavailable witness' preliminary hearing testimony at trial, citing California v. Green 399 U.S. 149 (1970). Appellants submit that a blanket application of this principle to the facts of the instant case would be manifestly unfair. Rather, a more cautious evaluation of the reliability of Storie and Vinson's preliminary hearing testimony should be undertaken.

While a closer scrutiny is not constitutionally mandated, this court can nonetheless afford appellants greater protection of important constitutional guarantees.

Counsel for appellants requested the trial court to grant them a hearing on the reliability of the tapes prior to their admission at trial. (T.H.M. 83) As support for the court's ability to grant them such a hearing they cited the case of California v. Green, 399 U.S. 149, at 186 n. 20, wherein Justice Harlan, concurring, stated:

> It will, of course, be the unusual situation where the prosecution's entire case is built upon hearsay testimony of an unavailable witness. In such circumstances the defendant would be entitled to a hearing on the reliability of the testimony. (Emphasis added) [citations omitted]

The Circuit Court in United States v. Kearney, 420 F.2d 170 (D.C. Cir. 1969), also approved such a procedure. There the trial court held a hearing out of the jury's presence to determine whether certain hearsay testimony was reliable enough to be admitted.

Appellants submit that a hearing in the instant case would have demonstrated the patent unreliability of the preliminary hearing testimony of both Donald Storie and Richard Vinson. Of noteworthy significance is the fact that the hearsay testimony of these two hobos, who were ostensibly friends of the two defendants, formed the crux of the prosecution's case. Their testimony, therefore, must be scrutinized closely. Storie and Vinson had every reason to lie at preliminary hearing. They knew they would not appear at trial, and so the threat of perjury prosecution was

nonexistent. Moreover, it was advantageous for both men to testify for the State at preliminary hearing since the State picked up the medical bills and made every effort to keep its prosecution witnesses comfortable. (T.H.M. 71)

The testimony itself is replete with internal inconsistencies and incredible statements. Storie testified that Good put the $14.00 down his boot, and they later argued about Good losing it. (PH 24) Yet Storie goes on to testify that Brooks came at him with a knife, saying "I didn't steal the $14.00" (PH 10) There was testimony by Storie that the ax handle which was used to hit Good was taken from a box car. (PH 11) Yet the firewood the hobos were burning was comprised solely of ax handles. (PH 33) Storie testified that after the "fracas" Vinson was laying motionless on his front (face down), and Vinson testified that he was laying on his back. (PH 41, 108) Vinson also testified that, despite his inability to recall the events of the scuffle, he was certain that it occurred around 8:00 p.m. since he could tell time by the stars. (PH 113) These examples of some of the statements made by the two hobos illustrate the unreliability of the testimony that, in and of itself, convicted the appellants. Perhaps the jury would have been more sensitive to the incredibility of the testimony had they seen the seedy characters who offered it. In any event, where the hobos were missing at trial, and the evidence was critical to the State's case, it was incumbent on the court to conduct a hearing on the

admissibility of such unreliable testimony.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 23

Defense counsel excepted to the refusal of the trial court to give Instruction No. 23 (T.2-388), which stated that:

> The absence of a testifying witness who could provide the jury with material evidence is one factor you may consider when weighing their credibility. The jury should view with caution such testimony if you find that the witness could have made themselves available for trial.
>
> You should always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Counsel maintained that the jury was entitled to a cautionary instruction on the use of extensive hearsay evidence at trial. As support for the contention, counsel referred the court to California v. Green, 399 U.S. 149, 186 (1970), note 20, Justice Harlan, concurring, which said that:

> Due process also requires that the defense be given ample opportunity to alert the jury to the pitfalls of accepting hearsay at face value, and the defendant would, of course, upon request be entitled to cautionary instructions. (cf. §6.17, Manual on Jury Instructions, 33 FRD 501 (missing witnesses). (Emphasis added)

Appellants submit that such an instruction is not only appropriate, but necessary, under the unique circumstances of this case. The prosecution's case was built principally on hearsay, and the jury was in a poor position to appreciate the implications of that fact. They were likely to accept the hearsay at face value, and disregard inconsistencies in testimony that would otherwise impeach a witness on the stand before them. Moreover, their judgment was hampered by being deprived of additional material evidence (for instance, evidence relating to appellants' claims of self-defense) because the witnesses chose to absent themselves from the process of the Court.

The effect of all of this in the courtroom is obvious. The jury observes two motley-looking characters sitting at defense table, and ultimately views their somewhat "seedy" demeanor on the witness stand. Meanwhile, via tape recordings, they only hear innocent cries of the alleged victims. Were the victims available to testify, their "seedy demeanor" would match that of the defendants, and the jury would be forced to fully evaluate the credibility of all four. The decision would become more difficult; Internal inconsistencies in testimony would assume greater relevancy as they bore on the witnesses' credibility. And appellants' claims of self-defense would be scrutinized in the context of the "total picture". Thus, when both the loss of critical demeanor evidence and the unearthing of additional material evidence hampers an effective defense,

at the very least the defendant is entitled to an instruction cautioning the jury in their evaluation of the hearsay.

POINT IV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT

Appellants contend that the evidence was insufficient as a matter of law to support the verdicts in Count I, Aggravated Assault upon Richard Donald Vinson, and Count II, Aggravated Assault upon Donald L. Storie.

The standard in Utah for review of the sufficiency of the evidence for a confiction is that "it must appear that upon so viewing the evidence reasonable minds must necessarily entertain a reasonable doubt that the defendant committed crime." State v. Wilson, 565 P.2d 66, 68 (Utah 1977). An application of this standard to the facts of the instant case mandates a reversal of the convictions on both counts.

The testimony of Donald Storie and Richard Vinson was replete with internal inconsistencies and contradictions. Richard Vinson specifically remembered that James Good hit him on the right temple with a stick or pick handle, and yet had been "sleeping" immediately before the blow was struck. Curiously, Storie provoked the argument regarding the lost money in Good's boot, yet lacked any knowledge whatsoever of how the men's possessions were split up. The witnesses testified inconsistently as to who was drunk, and to what extent. Other examples of the unreliability of the testimony appear under Point II. In short, the testimony of these two unavailable witnesses was unbelievable.

However, it is equally arguable that the testimony of Brooks and Good was lacking in credibility as well. Thus, the jury was left with a choice between two far-fetched accounts of an evening's events. They could believe that Brooks and Good defended themselves when Storie and Vinson attempted to kick them out of camp and keep the tobacco, or they could accept Storie's and Vinson's version that Brooks and Good later returned to the campsite to assault them.

Where either story is plausible, a verdict of guilt beyond a reasonable doubt is impossible. In all probability this was simply an altercation between four hobos who ganged up on each other and argued over the dividing of possessions. Reasonable minds could not therefore believe Brooks and Good were guilty of aggravated assault beyond a reasonable doubt.

CONCLUSION

The State has failed to sustain its burden of proof beyond a reasonable doubt. A finding of guilt on these facts amounts to nothing more than a conviction on the basis of probable cause. Considerations of due process prevent convictions based on insufficient proof and an unreliable evidentiary basis. Appellants are therefore entitled a reversal of the verdicts rendered against them.

Respectfully submitted this 15th day of September, 1980.

On behalf of defendant-appellant CECIL EARL BROOKS, I can see no other issues that should be raised that are not included in this brief.

GLENN K. IWASAKI
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On behalf of defendant-appellant JAMES CHARLES EDWARD GOOD, I can see no other issues that should be raised that are not included in this brief.

JO CAROL NESSET-SALE
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