

1956

# State of Utah v. Frederick Ray Sibert : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,  
*Plaintiff and Respondent,*

— vs. —

FREDERICK RAY SIBERT,  
*Defendant and Appellant*

CASE NO.  
8564

**FILED**  
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Clerk, Supreme Court, Utah

## Appellant's Brief

GORDON I. HYDE

*Attorney for*  
*Defendant-Appellant*  
863 First Security Bldg.  
Salt Lake City, Utah.

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## Appellant's Brief

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### STATEMENT OF FACTS

The defendant in this action was charged with the armed robbery of one, Lyle Thomas Butters. The case was tried before a jury and a verdict of guilty returned by the jury. At the trial, the complaining witness, Lyle Thomas Butters, testified regarding the facts surrounding the alleged robbery, and after having been cross-examined by counsel representing the defendant, the

State offered as a corroborating witness Police Officer John J. Ferrin who testified to what the complaining witness had told him at the time he investigated the alleged robbery. This evidence was permitted to be given over the objections of counsel (Tr. p. 47-50). The Court then admitted in evidence, over counsel's objection, the notes which Officer Ferrin had taken regarding the conversation that he had had with the complaining witness Butters (Tr. p. 51).

On the 9th day of June, 1956, the defendant was sentenced by the Honorable Ray VanCott, Jr. The Court denied the defendant probation on the ground that he still denied his guilt after the verdict of the jury (Tr. p. 121).

From the verdict of the jury and the judgment entered thereon, and from the sentence of the trial court, the appellant appeals.

## POINT I.

### THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF OFFICER FERRIN AND IN ADMITTING HIS NOTES IN EVIDENCE.

The State called as its second witness at the trial of this case Officer John J. Ferrin. The State had Sergeant Ferrin's notes marked as "Exhibit 1" and presenting them to Sergeant Ferrin asked him to testify regarding the notes. From these notes Officer Ferrin was allowed, over the defendant's objection, to testify to the conversation between himself and the witness Butters

subsequent to the alleged robbery (see Tr. pp. 46-51). The testimony of Sergeant Ferrin as to what the witness Butters told him was in considerable more detail than was the testimony of the witness Butters. It included a description of the alleged robber, given in some detail, a description of his clothing, the color of the car, and the license number, and of the conversation that allegedly took place between the robber and the witness Butters.

Apparently, to corroborate the testimony of Sergeant Ferrin the State offered notes of Sergeant Ferrin which he had used to refresh his recollection regarding the hearsay testimony just admitted in evidence. Over the objection of defendant's counsel the notes of Officer Ferrin were admitted in evidence (Tr. p. 51). It should be noted that up until the time that Sergeant Ferrin testified, the State's entire case rested upon the rather weak and unsatisfactory testimony of the witness Butters.

The somewhat narrow question on appeal is whether or not it was proper for the trial judge to permit Officer Ferrin to testify to facts that the witness Butters had told him occurred, and whether it was improper to admit the officer's notes of his conversation with Butters. It should be noted that prior to the offering of the testimony of Sergeant Ferrin, no witness had been offered to contradict the testimony of the witness Butters. Butters had been subjected to cross-examination regarding his testimony and regarding inconsistent testimony that he had given at the preliminary hearing of the case. The State apparently offered Sergeant Ferrin's testimony under the theory that the witness Butters had been im-

peached, and the Ferrin testimony should be allowed to rehabilitate Butters.

A minority of jurisdictions have held that where a witness is impeached *by testimony* that he told a different story on another occasion than the one that he told under oath at the trial, evidence may be offered to show that he told a consistent story at a time prior to the alleged inconsistent statement. The majority of courts, and certainly the better-reasoned decisions, reject this exception to the Heresay Rule that some courts have attempted to make, and prohibit the admission of heresay testimony to rehabilitate a witness *even when he has been impeached by the positive testimony of another witness*.

The Supreme Court of the United States has examined this problem, and in the case of *Ellicott vs. Pearl*, 10 Peters 412, 9 Law Ed., 475, Justice Storey stated the majority rule, and the reasoning for it:

“Where *witness proof* has been offered against the testimony of a witness under oath in order to impeach his veracity establishing that he has given a different account at another time, we are of the opinion that in general evidence is not admissible in order to confirm his testimony to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact, and that is not evidence. *His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far, as his oath.* We say, in general, because there are exceptions, but they are of a peculiar nature not applicable to the circumstances of the present case.” (Italics supplied)



In the case of *Nicholas vs. Stewart*, 20 Ala. 358, the Court said that when the credibility of a witness is impeached by the fact that he has given a different account of the transaction from that to which he swears the fact that upon another occasion he stated the transaction precisely as he now testifies to it, does not disprove the inconsistency, and to allow inconsistencies in the testimony of a witness shown by his sworn testimony previously given to be removed by his own declarations out of court would be a dangerous departure from the rule which requires all evidence to be given under the sanction of an oath.

It would be an unfortunate situation indeed if the defendant's counsel by cross-examining a State's witness would open the case up to a host of corroborating witnesses who could follow the witness just cross-examined and testify that he had told them at a previous time the same story that he testified to in court. If this were the rule, defendant's counsel would not dare to cross-examine a State's witness regarding any inconsistency in his testimony without running the risk of opening the case up to a host of witnesses offering hearsay testimony under the guise of corroborating an impeached witness.

In *People vs. Doyell*, 48 Cal. 85, the Court said regarding this problem:

“The witness cannot be confirmed by proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not under oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does



not in general carry his credibility further than, nor so far as, his oath.”

In *Chicago City Realty Co., vs. Matthieson*, 212 Ill. 292, 72 N.E. 443, the Court in analyzing this problem said:

“If two statements are contradictory, they cannot both be true, and the fact that they were made tends to show that the witness is unreliable on account of an uncertain memory or want of truthfulness. *It seems clear that such evidence could not be overcome or explained by proving that the witness at some other time made a statement consistent with his testimony.* The witness is discredited by the fact that he has contradicted himself and related the transaction in different ways, and to admit evidence that at some time he has made a statement consistent with his testimony would only show that at different times he has been making different statements about the same matter.” (Italics supplied)

Even those poorly reasoned cases which permit the State to rehabilitate an impeached witness by offering another witness to testify that he told the same story to this witness that he testified to under oath, would not permit such hearsay testimony in a case such as the one presented by this appeal, where the witness was simply asked about prior inconsistent statements made under oath. It should be noted that the only inconsistency that the witness Butters was examined in regard to was his testimony about the color of the automobile, and yet the Court permitted Officer Ferrin to recount what Butters had told him regarding the facts of the robbery, the description of the alleged robber, and an even more complete account of the incident than the witness Butters himself offered to give.

Manifestly, if the testimony of Officer Ferrin was heresay and inadmissible, the admission of Officer Ferrin's penciled notes (Exhibit 1) was also error, and permitting the jury to examine and read the notes constituted a powerful heresay corroboration of the witness Butters' testimony which was highly prejudicial to the defendant's case.

The dangers of permitting such a thing are obvious. Investigating officers are professional witnesses, and ordinarily are impressive witnesses. At the trial of any criminal action, the jury is asked to pass upon the credibility of the State's witnesses. If, thereafter the defendant's counsel attacks the credibility of a State's witness on cross-examination, the rule contended for by the State would permit the State to reinforce this testimony by experienced and impressive witnesses who could tell the jury the story of the crime just as the State's eyewitness had told it to them. The jury might very well, having no knowledge of the rules of evidence, be far more impressed by the testimony of the police officers than they would be by the testimony of the eyewitness and treat it as substantive evidence, and to permit this would open the door to all of the evils that the Heresay Rule was designed to prevent. The police officers could not be cross-examined, and their credibility could not be put on issue since they are only telling to the jury what one of the State's witnesses told to them.

The defendant submits that to permit Officer Ferrin, a powerful professional witness, to testify about the facts that he had heard from the witness Butters, and to admit

his notes of such conversation in evidence, was highly prejudicial to the defendant's case, and the admission of this improper evidence was reversible error on the part of the trial judge.

## POINT II.

### THE TRIAL JUDGE'S REFUSAL TO GRANT THE DEFENDANT PROBATION ON THE GROUND THAT HE WOULD NOT CONFESS HIS GUILT CONSTITUTES ERROR.

Title 77-35-17, Utah Code Annotated, 1953, provides that:

“Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the Court having jurisdiction may suspend the imposition or the execution of sentence, and may place the defendant on probation for such period of time as the Court shall determine.”

This statute contemplates that if it is compatible with the public interest a defendant convicted of a crime may be placed on probation, and it vests in the trial judge discretionary power to determine whether or not it is compatible with the public interest that the defendant be placed on probation. The exercise of any such discretion must be based upon a sound and proper basis. The Court in this case in sentencing the defendant Sibert refused the defendant probation and based this refusal largely upon the fact that the defendant would not confess his guilt. The Court said:

“the judgment and sentence of the court is that for the crime of robbery, of which you were

convicted, you are sentenced to the indeterminate term as provided for by law, in the penitentiary of the State of Utah. Now, I can't grant you probation for several reasons, one of which, of course, is that you deny your guilt in this matter, and of course, we do not put defendants on probation as a rule where they do that, because there is no reformation to be made. They are not guilty in their own minds, so there is nothing that the Probation Department can do for them'' (Tr. p. 114).

If this reasoning of the Court's is sound, and is a valid basis for the exercising of the Court's discretion, then a defendant in a criminal action must decide after he is convicted whether to confess guilt to the Probation authorities, or face the denial of probation and be committed to the penitentiary. The defendant cannot bring a motion for a new trial, or appeal his conviction until after he has been sentenced, and yet under the theory of the trial court in this case, if he denies his guilt after a verdict of conviction he cannot have probation. If he were to confess guilt in order to avoid losing his right to probation, and he was granted a new trial or his conviction reversed and the case remanded for a new trial, the officials of the Probation Department could appear as witnesses against him. Thus the effect of the Court's reasoning in this case is to force the defendant to either testify against himself, or have probation denied him. Such a requirement would certainly violate the Fifth Amendment of the Constitution of the United States, and would be a deprivation of any defendant's rights.

We must be realistic and recognize that many an innocent man has been convicted by a jury, and to adopt a

rule that a man after having been convicted by a jury must confess guilt to the Probation authorities in order to be entitled to consideration for probation, places upon a defendant a burden that is unjust and repugnant to the western system of law. I have examined the authorities to find any case in western law that would support such a doctrine and I am unable to find any such authority. On the other hand, this philosophy is in harmony with eastern systems of law where it is considered entirely appropriate to require a confession before the defendant is granted any consideration for clemency by the court.

This question, as far as I have been able to determine, has never before been presented to the Supreme Court of the State of Utah, or to any other appellate court in the United States, and is presented here in this appeal for the consideration of the Court without a citation of authorities, because this rule as announced by the trial court is without precedent so far as the appellant has been able to determine.

## CONCLUSION

This appellant respectfully contends that the trial judge in permitting the hearsay testimony of Officer Ferrin, and in permitting the admission of his notes in evidence, committed reversible and prejudicial error, and that in denying the defendant probation because of his refusal to confess guilt, showed that it based its exercise of discretion on an erroneous legal theory which, if permitted to stand, would require this defendant to testify

against himself, and deny him the protection of the Constitution.

Respectfully submitted,

GORDON I. HYDE

*Attorney for*

*Defendant-Appellant*

863 First Security Bldg.

Salt Lake City, Utah.