

2011

Utah v. Jeremy D. Penick : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH,
Plaintiff/Appellee,

v.

JEREMY D. PENICK
Defendant/Appellant.

Case No. 20110495-CA

BRIEF OF THE APPELLANT

Appeal from a conviction for one count of Attempted Murder, a First Degree Felony, in violation of Utah Code Ann. § 76-5-203(2)(A) in the Third District Court, State of Utah, the Honorable Royal I. Hansen, Judge, presiding.

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UTAH APPELLATE COURTS

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Appeal from a conviction for one count of Attempted Murder, a First Degree Felony, in violation of Utah Code Ann. § 76-5-203(2)(A) in the Third District Court, State of Utah, the Honorable Royal I. Hansen, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-102(2)(j).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

I. Whether defense counsel ineffectively failed to file a motion to suppress evidence obtained as the result of an illegal arrest.

- a. Standard of Review. “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Perry*, 2009 UT App 51, ¶9, 204 P.3d 880.

- b. Preservation of the Argument. Defense counsel did not raise defendant's motion, so this matter must be reviewed under ineffective assistance of counsel.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This appeal is governed by U.S. Const. Amend. IV, VI and XIV, Utah Const. Art. I §§ 7, 12, 14; Utah Code Ann. § 77-7-2.

STATEMENT OF THE CASE

On December 23, 2009, the State charged the defendant by information with one count of attempted murder and one count of aggravated robbery. R. 1-3. On February 1-3, 2011, the case was tried to a jury and on February 3, 2011, the jury found the defendant guilty of both counts in the information. R. 163, 210-12. On February 14, 2011, the defendant filed a motion to arrest judgment. R. 171-77. On April 29, 2011, the court granted defendant's motion to arrest judgment on the aggravated robbery, count two. R. 214. On April 29, 2011, the defendant was sentenced to a term of three years to life in the Utah State Prison. R. 198-99, 214. On May 25, 2011, the defendant filed a notice of appeal. R. 200-01. On July 5, 2011, the Utah Supreme Court transferred the case to this Court. R. 209.

STATEMENT OF THE FACTS

Prior to trial, Mr. Penick had indicated that he wanted to proceed pro se and was dissatisfied with appointed counsel. R. 23-32, 37-45, 52-55, 57-59. However, on the day of trial, Mr. Penick indicated to the court that he wanted the assistance of counsel. R. 210:11-14. During voir dire, Mr. Penick indicated that he wanted a jury composed of people of his age group. R. 210:18. The trial court denied that motion. R. 210:19.

1. Testimony of Joseph Magack.

Joseph Magack was a taxi driver who worked for the Ute Cab Company. R. 210:30. At around 9 pm on December 19, 2009, Mr. Magack was dispatched to a Motel 6 to pick up some people. R. 210:32. When he arrived at the Motel, the defendant and another person were there. R. 210:34. One of the men, a white man, sat behind Magack while the defendant sat to his right. R. 210:36-37. When Magack asked where the men were going, they both gave different addresses. R. 210:37. Magack recognized one of the addresses, the Park Place Apartments, and said he would take them there. R. 210:37.

As they were driving, Mr. Magack commented that there was a lot of fog that night, and one man responded that "yeah, this night is going to be crazy." R. 210:38. The whole drive took about three minutes. R. 210:38. When he arrived at the apartments, the men had him drive in, then they asked him to open the doors. R. 210:39-40. He opened the van's right sliding door, then the men "ordered" him to park in someone

else's parking spot. R. 210:41. This area had other cars parked in it and was the typical parking for the apartment complex. R. 210:79. It was dark outside and the only light came from the dome light in the van that gave "a little light inside the car" R. 210:66. The white man, Ramsay, said that the men wanted to get out. R. 210:45, 68.

As soon as Mr. Magack put the car in park the defendant stabbed him in the right shoulder while the white guy held his neck. R. 210:46. He testified that both men had knives, but he did not know what kind, only that the weapons were shining. R. 210:69-70. He was not able to describe how the defendant held the knife because "it happened so quickly." R. 210:72, 73. In fact, Magack did not tell the police there were two knives; it was only after he "later concentrated" that he remembered two knives. R. 210:82. He testified that "[i]n the beginning I thought there was one knife but later I thought there was two knives because the one behind me had a knife." R. 210:83. The white guy used his left arm to hold Magack's neck and his right arm to punch him. R. 210:47. Jeremy also stabbed Magack twice in the side with a knife. R. 210:48, 59. The defendant's head was about 12-14 inches away from Magack's during the attack. R. 210:67. Magack was not sure if one of the men wore gloves because "everything happened so quickly." R. 210:86. Magack tried to defend himself, but his seatbelt initially restrained him, he was able to push the men back and punch them. R. 210:48-49. He was able to get his seatbelt

off and open the driver's door. R. 210:50. However, the white guy continued to hold his neck and the defendant grabbed his arm with both hands. R. 210:51.

Magack was able to break free of the grip and exit the vehicle. R. 210:52. He estimated the attack took 15-20 seconds in which he was stabbed approximately nine times. R. 210:52. Mr. Magack was a fourth degree black belt and testified he used those techniques to defend himself. R. 210:53. As soon as he escaped the car, the men ran off together. R. 210:54, 56. The defendant did not try to help him, he testified. R. 210:57.

Magack called the police and was taken to the hospital. R. 210:57. Magack testified that he only needed stitches on his face, ear, knuckle and side. R. 210:76. The men never tried to steal any money or the vehicle. R. 210:77. Magack initially told the police that one attacker was a black man and the other was a Hispanic man. R. 210:83. He admitted that he mistook the white man for a Hispanic, in part "because there was fog outside, [so he] couldn't see well who they were." R. 210:83. When the officers showed Mr. Magack single color photographs of the suspects, he "remembered" that one of the men was wearing grey. R. 210:84. As to the second suspect, Magack "thought he was Hispanic but when [the police officer] showed me the picture I saw the picture of a white person." R. 210:84.

2. Testimony of Joseph Michael Ramsay.

Mr. Ramsay refused to answer whether he had already pled guilty to attempted murder, saying that he did not “want to testify against this gentleman here.” R. 211:9-10. He claimed he did not know the defendant, having “[n]ever seen him in my life.” R. 211:9. He said he spoke with officers, but did not remember what he said since he was not taking medication at the time. R. 211:10. He refused to answer questions, saying it was a waste of his time. R. 211:11.

3. Testimony of Joseph Magack.

Mr. Magack retook the stand to say that Mr. Ramsay was the other person who attacked him. R. 211:13-14. Magack admitted he mistook Mr. Ramsay as a Hispanic male and that he originally told the police that this person wore a grey sweatshirt. R. 211:14.

4. Testimony of Derek Coats.

Derek Coats, a detective with the Salt Lake City police department, testified that he followed up on the initial police investigation. R. 211:16-17. He obtained and viewed surveillance footage from the Motel 6 and observed a white and a black male that matched the description of the perpetrators. R. 211:17-18. He was told the suspects were a black male 5’7” to 5’9”, wearing a blue jacket, grey pants and dark shoes with a white

male over 6' tall wearing a yellow hoodie with a jacket over it and pants. R. 211:18. The officer took a still black and white shot from the video and showed it to the victim, who confirmed that these were the two men who attacked him. R. 211:18-19. Mr. Magack told the officer that both assailants wore grey sweatshirts. R. 211:55.

The officer circulated the photos to the news media and subsequently received a tip that people involved might be at the VOA youth shelter. R. 211:20-22. At the VOA, the officer entered and immediately saw the defendant. R. 211:23. The defendant approached him and asked the officer what he was investigating and if he was there for donations. R. 211:24. Later, after talking with the VOA director, the officer returned and "took him into custody. I explained to him that he was being detained on suspicion of an aggravated assault and I wanted to talk to him about it." R. 211:26. Officer Coats transported Mr. Penick to an interview room at the police station. R. 211:26.

The officer left a surveillance photo on the desk and when he returned, the defendant pointed to the photo and said that it was taken when he came from the shelter. R. 211:28-29. The defendant told the officer that he met "Josh" at the shelter, that the two of them called a taxi and that he and Josh then went separate ways. R. 211:30-31. The officer met a person named Josh at the VOA, and while admitting the man also wore a yellow hoodie and "had a similar build and height as the individual the photograph," the officer "personally" felt he did not match. R. 211:31.

Subsequently, the officer *Mirandized* the defendant, who finished the rights for the officer. R. 211:34. Mr. Penick indicated that he did not know the white man's name, other than his street name of "Rabbit," and that they called a taxi from the Motel 6. R. 211:36-37. The officer determined that Joseph Ramsay's street name was Rabbit. R. 211:37-38. The officer then left the interview room and the defendant knocked on the door and motioned for the officer to sit down. R. 211:38. The defendant then told the officer that he got into the taxi van. R. 211:39. He said that they drove to an apartment complex and that suddenly the white guy attacked the driver. R. 211:40. Mr. Penick told the officer that he attempted to stop the white guy, but that it might have looked to the driver like he was attacking him. R. 211:40-41, 58. Mr. Penick said that he received no wounds but that the white male had injuries to his right forearm. R. 211:42. While officers were photographing the defendant, he indicated that he wanted to write a letter to the victim. R. 211:46-47. In the letter, Mr. Penick told Mr. Magack that "I wish I could have helped you more" and that "I was very stupid and I wish I was never there and you never got hurt." R. 211:48-49, 76. In fact, Mr. Penick never admitted in the letter to committing the crime. R. 211:76. While the defendant waited, the video continued to record, and the defendant said that "he was going to go away for a long time for this and he was prepared." R. 211:50-51. He also said that "I'm glad the fool didn't die. I wouldn't want to go up for homicide," and said that "I guess I'm fucked." R. 211:51, 52.

He also requested that he call his girlfriend “to let her know that he was going to go away on this one, she wasn’t going to see him for a long time.” R. 211:52. However, Mr. Penick consistently told the officer that Mr. Ramsay was the attacker. R. 211:61. The officer also admitted that it was a “reasonable” conclusion that Mr. Penick did not confess to the crime, but only admitted he was “in a very dicey situation, having been present at the scene of this attack.” R. 211:62-63.

The officer subsequently located black gloves on Mr. Ramsay. R. 211:60. In viewing the Motel 6 surveillance footage, the officer admitted that the gloves Mr. Ramsay wore were consistent with the gloves the officer found on Ramsay. R. 211:75. He also claimed that Mr. Penick’s pants were the same in both the video and when he arrested him. R. 211:74.

After a recess, the State moved to admit Mr. Ramsay’s hearsay statements to the officer. R. 211:66-71. The court allowed the statements for the limited purpose of impeaching Mr. Ramsay’s statement that he “forgot” what he told the officer. *Id.* The State presented testimony that Mr. Ramsay did make statements to the police, and subsequently rested, reserving the right to call a physician out of order because of scheduling difficulties. R. 211:79-83.

5. Defense Motion to Dismiss.

After the State's partial rest, the defense "concede[d] that there's been probable cause ... on Count 1," however it contended that the State presented insufficient evidence to convict on the robbery count. R. 211:85. The State responded that "the fact that there was no demand obviously doesn't negate the fact" that the two tried to incapacitate Mr. Magack. R. 211:86. The court indicated that "I don't know that the record shows that any property was taken or any demand for property was taken." R. 211:87. The State admitted "the evidence is totally circumstantial" but that intent to rob could be inferred from the circumstances. R. 211:88.

The defense responded that it was possible the men only had the intent to injure Mr. Magack. R. 211:89. The court conceded that this was "a very close question" but denied the motion to dismiss. R. 211:89.

6. Testimony of Jeremy Penick.

Jeremy Penick had been homeless for a few years, using services at the Volunteers of America. R. 211:94-95. One day, Jeremy was talking with someone about getting a job harvesting medicinal marijuana in California when Mr. Ramsay approached him, asking if he needed money. R. 211:97. Ramsay asked him if had experience selling cocaine and if he'd like to sell some; Jeremy answered yes to both questions. R. 211:97. Jeremy told Mr. Ramsay that he would charge him \$30 for every gram he sold. R. 211:98. Ramsay agreed

and left, saying he would be back in several minutes. R. 211:99. Ramsay did not return and Jeremy went back to his work at the VOA. R. 211:99-100.

The next day, Ramsay showed back up and Jeremy decided to “give him the benefit of the doubt” and continue the prior arrangement. R. 211:102-03. The two agreed to meet the next day and Ramsay would go get the drugs that he had. R. 211:103. On the third day, Ramsay showed up at the VOA around 11 am and the two left together in the afternoon after Jeremy did chores. R. 211:103. The two men went to the TRAX stop, Ramsay purchased a train ticket, and the two rode from there to a bus, eventually ending up in Orem. R. 211:104. Once in Orem, the two transferred to a different bus to go to Ramsay’s campsite. R. 211:104-06. The men apparently missed the campsite and Jeremy decided they should head back to Salt Lake. R. 211:107-08.

Once they arrived back in Salt Lake, Jeremy wanted to part ways, but Ramsay produced four, small ring-sized bags of methamphetamine. R. 211:108-11. Jeremy said he didn’t have experience selling meth, but since he wanted Ramsay to pay him for the wasted trip he agreed to find a buyer for the meth. R. 211:112. Jeremy solicited interested persons in front of the shelter and took them to Ramsay. R. 211:113-14. Jeremy watched Ramsay and the clients get together, but Ramsay claimed that he did not sell drugs to the prospective buyers. R. 211:115. Jeremy did not see Ramsay use drugs, but he opined that Ramsay appeared high after getting together with the clients. R.

211:115, 149-50. Ramsay said that he could get more meth and sell it if they went to the Park Place Apartments. R. 211:116-17. By this point, it was nine or ten in the evening. R. 211:117.

The two decided to get a cab. R. 211:118. Ramsay still appeared to be under the influence of methamphetamine. R. 211:118. Jeremy assumed Ramsay would pay for the cab fare. R. 211:122. He also admitted that he was present in the Motel 6 surveillance video along with Mr. Ramsay. R. 211:123. Ramsay wore gloves. R. 211:124.

The two men waited outside for the cab to arrive, and when it did, Ramsay entered first and sat behind the driver, while Jeremy sat on the back passenger side. R. 211:124-25. Ramsay asked to go to the Park Place Apartments and Mr. Magack took them there to the front gate. R. 211:126-29. Jeremy asked Ramsay where the apartment was, then both men asked Mr. Magack to take them to the back. R. 211: 128-29. Mr. Magack kept pulling in and Ramsay told him to keep going toward the back. R. 211:129-30.

Mr. Magack parked the mini-van and as Jeremy opened the door and started to step out, he “noticed that Joseph Ramsay proceeded to attack Mr. Magack.” R. 211:131. At first, Jeremy was confused, but as soon as he understood what was happening, he “proceeded trying to stop Ramsay from attacking Mr. Magack.” R. 211:131-32. Jeremy grabbed Ramsay’s hand, then arm, and pushed him back. R. 211:132. Jeremy succeeded

in pulling Ramsay off Mr. Magack and Jeremy went forward to see if he was alright, trying to unbuckle Mr. Magack's seat belt, but Mr. Magack "took a swing at me." R. 211:132. After the attack, Jeremy stood outside the cab, clearing his head. R. 211:136. Ramsay asked Jeremy if he was going to turn him into the police. R. 211:137. Jeremy didn't answer and eventually fled, since this was a "serious crime and I didn't want to be accused of anything with regard to this." R. 211:137.

Jeremy did not call the police or seek medical attention for Mr. Magack. R. 211:155. Jeremy's girlfriend encouraged him to turn himself in, but he admitted he was scared of "being accused of [Ramsay's] crime." R. 211:159. Jeremy admitted to having prior convictions for false information and other misdemeanor conduct. R. 211:133-35. He also admitted to dealing drugs in the past. R. 211:139-40. However, Jeremy denied knowing of, or participating in the attack. R. 211:133.

7. Rebuttal Testimony of Joseph Magack

Mr. Magack said that at no point did Jeremy attempt to help him. R. 211:169, 170. Mr. Magack said that he was not confused—that Jeremy "attacked me." R. 211:170. While Mr. Magack tried to exit the car, Jeremy held his hand trying to keep him from getting out of the car. R. 211:170-71. Jeremy also fled as soon as he got out of the car. R. 211:171.

8. Testimony of Deanne Long

Ms. Long was an emergency room physician at the University of Utah. R. 211:174-75. She examined Mr. Magack and found potentially serious stab wounds to his neck and chest. R. 211:178. Both wounds could have been fatal. R. 211:179-80. However, when she saw Mr. Magack, he was not bleeding to death. R. 211:183. Mr. Magack only had sutures to repair injuries to the cheek, ear, and chest. R. 211:183-84. In fact, Dr. Long opined that Mr. Magack's injuries were not life threatening. R. 211:187. Nor would there be any major disfigurement but for a scar. R. 211:188-89.

9. Defense Renewed Motion to Dismiss the Robbery and Subsequent Granting of the Motion to Arrest Judgment

Defendant renewed a motion to dismiss the robbery count and the court admonished counsel to put the motion in writing. R. 212:10-11. At sentencing, and after having received motions from the parties, the trial court granted the motion to arrest judgment on Count 2, the Aggravated Robbery count of the information. R. 171-77; 183-86; 206-207, 214:7.

SUMMARY OF THE ARGUMENT

Defense counsel ineffectively failed to file a motion to suppress Mr. Penick's statements made as the result of an illegal arrest. The police officer lacked probable cause, at the time he arrested Mr. Penick, that Mr. Penick was the person who allegedly

committed these attacks. Because probable cause was lacking, defense counsel had an obligation to file a motion to suppress evidence and was ineffective for failing to do so. The victim's identification of the defendant was unreliable at best, and absent the defendant's admissions that he was present at the scene, the jury would not have been able to reasonably conclude that Mr. Penick was responsible. Additionally, defense counsel could have presented valuable evidence of the flaws in eyewitness identifications. Consequently, counsel's failure to file the motion would have resulted in the lack of defendant's statements, which would have led to a not guilty verdict.

ARGUMENT

At no point did defense counsel challenge defendant's arrest. This constituted a critical error that deprived Mr. Penick of a fair trial.

I. DEFENSE COUNSEL INEFFECTIVELY FAILED TO CHALLENGE THE OFFICER'S ARREST OF DEFENDANT

At no point did defense counsel challenge Detective Coats' arrest of the defendant. Counsel's failure to file a motion to suppress, despite clear evidence that defendant's Fourth Amendment rights were violated, constitutes ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, the defendant must show that his counsel's "performance both falls below an objective standard of reasonableness and prejudices his client." *Adams v. State*, 2005 UT 62, ¶ 25, 123 P.3d 400 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial. To satisfy the first part of the test, defendant must overcome the strong presumption that [his] trial counsel rendered adequate assistance.

State v. Ott, 2010 UT 1, ¶ 22, 647 Utah Adv. Rep. 19 (internal quotations and citation omitted).

A. Ineffective Assistance of Counsel – Counsel's Performance Was Objectively Deficient

Defense counsel's failure to move to suppress the evidence was objectively deficient. The United States Supreme Court has held that defense counsel's failure to file a motion to suppress evidence under the Fourth Amendment was constitutionally deficient and that the defendant was entitled to a hearing on whether counsel's failure prejudiced him, also setting the standard for litigating these claims:

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a

reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583, 91 L. Ed. 2d 305 (1986).

1. The Fourth Amendment Claim is Meritorious – The Officer Lacked Probable Cause to Effectuate an Arrest

Both the Fourth Amendment to the United States Constitution and the Utah Constitution protect individuals from “unreasonable searches and seizures.” U.S. Const. amend. IV; Utah Const. art. I, § 14. The Fourth Amendment protects citizens’ “basic” right to a free society and is the “very essence of liberty.” *See, e.g., Winston v. Lee*, 470 U.S. 753, 758, 105 S.Ct. 1611 (1985) (“The Fourth Amendment protects ... ‘the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.’”) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564 (1928) (Brandeis, J., dissenting)); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727 (1967) (“The Fourth Amendment thus gives concrete expression to a right of the people which is ‘basic to a free society.’”) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359 (1949), overruled by, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961)); *Harris v. United States*, 331 U.S. 145, 150, 67 S.Ct. 1098 (1947) (“This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth

Amendment ... are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen ...”) (quoting *Gouled v. United States*, 255 U.S. 298, 304, 41 S.Ct. 261 (1921)).

Defense counsel’s failure to file a motion was objectively deficient, because the officer lacked probable cause to effectuate an arrest of the defendant. Mr. Penick’s statements to the police, therefore, would have been suppressed had counsel filed the motion.

The Fourth Amendment allows for three different kinds of police-citizen encounters, each permitting a different degree of intrusion and requiring a different level of justification.

“(1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an articulable suspicion that the person has committed or is about to commit a crime ...; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed.”

State v. Worwood, 2007 UT 47, ¶ 21, 164 P.3d 397, 405-06. Level two encounters are “brief and non-intrusive” detentions. *State v. Hansen*, 2002 UT 125, ¶ 35, 63 P.3d 650, 661. While a level three encounter “involves an arrest, which has been ‘characterized [as a] highly intrusive or lengthy detention [that] requires probable cause.’” *Id.* at ¶ 36 (quoting *United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir. 1990)).

The defendant was not briefly detained. He was taken, against his will, to the police department, to an interview room, where he confessed to police his presence during the crime. R. 211:26-63. As such, the officer's arrest needed to be supported by probable cause.

Both the United States and Utah Constitutions require probable cause to effectuate an arrest. *State v. Trane*, 2002 UT 97, ¶ 26, 57 P.3d 1052, 1059. Probable cause is defined as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* at ¶ 27, citing *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

Similarly, this court explained that in Utah the determination of whether the police had probable cause to arrest someone without a warrant " 'should be made on an objective standard: whether from the facts known to the officer, and the inferences [that can] fairly ... be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense.' " *State v. Cole*, 674 P.2d 119, 125 (Utah 1983) (quoting *State v. Hatcher*, 27 Utah 2d 318, 320, 495 P.2d 1259, 1260 (1972)); see also *State v. Anderson*, 910 P.2d 1229, 1232-33 (Utah 1996).

Id.; see also Utah Code Ann. § 77-7-2 (2008) (“A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person: (1) (a) for any public offense committed or attempted in the presence of any peace officer; . . . (2) when the peace officer has reasonable cause to believe a felony or a class A misdemeanor has been committed and has reasonable cause to believe that the person arrested has committed it . . .”).

Objectively, at this point, with every fact marshaled in favor of the State, the officer had the following facts at his disposal when he effectuated the arrest:

- The officer had a description that a 5’7” to 5’9” male black adult wearing a blue jacket, grey pants and dark shoes, along with a white male, over 6’ tall, wearing a yellow hoodie with a jacket over that and pants were involved in the attack. R. 211:18.
- Surveillance footage showed two males, one white and one black, call for a taxi from the Motel 6. R. 211:17-18.
- Mr. Magack, after viewing a still image from the photo, confirmed that the men in the photo were the two men who attacked him. R. 211:18.
- The Motel 6 clerk confirmed that these two were the persons who called the taxi. R. 211:18-19.

- The officer circulated still photos to the media, which were run by KSL. R. 211:20.
- An anonymous female tipster told the officer that the attacker might be at the VOA Shelter for Youth, and she named a name. R. 211:22.
- When the officer went to the VOA, he saw a black male “which immediately looked like the individual in the photograph.” R. 211:23.
- This black male, the defendant, “immediately averted his eyes” and looked away from the officer. R. 211:24. Then defendant approached the officer, asked why he was there, if he was helping with donations and what he was up to. R. 211:24.
- The detective asked another officer to watch Mr. Penick, then went to talk with management. R. 211:25.
- The officer talked with the director, returned, then arrested Mr. Penick. R. 211:26.

At this point, cumulatively, with every inference toward the State, the officer could make the following conclusion: Jeremy Penick looked like the suspect and averted his eyes when the officer came in. Yet this is not enough of a basis to make an arrest. Probable cause requires much more. A reasonable and prudent person could not justifiably conclude, based on these facts alone, that Mr. Penick had committed the

offense in question. Yet in this case, the officer's arrest seems to be based on nothing other than a hunch—that Jeremy Penick was his suspect.

An arrest may not be based “on a hunch” or on “mere suspicion” that the person has committed a crime. *State v. Hechtle*, 2004 UT App 96, ¶ 16, 89 P.3d 185. Rather, “the officer must be able to point to specific facts which, considered with rational inferences from those facts, reasonably warrant the [seizure].” *State v. Warren*, 2003 UT 36, ¶ 14, 78 P.3d 590; *see id.* (“In determining reasonableness, ‘due weight must be given, not to [an officer's] inchoate and unparticularized suspicion or “hunch,” but to specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.’ ” (citation omitted) (alterations in original)). In other words, “‘[p]robable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.’ ” *Worwood*, 2007 UT 47 at ¶ 34 (citation omitted); *see Trane*, 2002 UT 97 at ¶ 27.

The officer did not have any particularized or objective facts at his disposal that rose to the level of probable cause that Mr. Penick committed the crime. “Probable cause is an objective standard. Officers’ subjective beliefs, no matter how sincere, about whether they have probable cause, standing alone, neither constitute probable cause nor

foreclose a finding of probable cause.” *State v. Spurgeon*, 904 P.2d 220, 226 (Utah Ct. App. 1995).

Nothing in the record objectively justifies the conclusion that Mr. Penick was the assailant. Nothing in the record links Mr. Penick to the assault at the point of arrest. The officer knew the men in the video were the attackers. He had a tip that they were at the VOA. He suspected Mr. Penick was an assailant, but he took no steps to objectively confirm this fact. In other words, the officer’s arrest was based on nothing other than unparticularized suspicion that Mr. Penick committed the crime.

Mr. Penick’s avoidance of eye contact does not give rise to even reasonable suspicion, much less probable cause. “It is well settled that nervous behavior when confronted by a police officer does not give rise to a reasonable suspicion of criminal activity.” *State v. Lovegren*, 829 P.2d 155, 158 (Utah Ct. App. 1992); *see also State v. Godina-Luna*, 826 P.2d 652, 655 (Utah Ct. App. 1992). “[A]voidance of eye contact, which is ‘consistent with innocent as well as criminal behavior,’ cannot support a reasonable suspicion of criminal behavior.” *State v. Duhaime*, 2011 UT App 209, ¶ 18, 258 P.3d 649, 657 (quoting *State v. Robinson*, 797 P.2d 431, 436 (Utah Ct. App. 1990)).

In fact, it would not take much more investigation to arrive at probable cause to arrest Mr. Penick. The officer simply could have located a picture of Mr. Penick (or Mr. Ramsay) and showed them in a photo lineup to Mr. Magack, who could identify them as

the perpetrators. In fact, at no point was a photo lineup done in this case (other than a photo showup), which would have been a much more reliable identification than that chosen by the police. Instead, the officer chose to arrest Mr. Penick based on his hunch that he was involved in criminal activity. This arrest violated the United States and Utah Constitutions since it was not supported by probable cause.

2. The Defendant's Statements and Letter Written to Mr. Magack Would Have Been Excluded From Evidence

"[I]f an arrest violated a defendant's constitutional rights under either the Fourth Amendment or the Utah Constitution or was otherwise unlawful, then any evidence secured incident to that arrest must typically be excluded from a criminal trial pursuant to the exclusionary rule." *Trane*, 2002 UT 97 at ¶ 23 (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-69, 91 S.Ct. 1031 (1971); *Ker v. California*, 374 U.S. 23, 35, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *State v. Shoulderblade*, 905 P.2d 289, 292 (Utah 1995); *State v. Ramirez*, 817 P.2d 774, 786 (Utah 1991)).

Because the arrest in this case violated Mr. Penick's constitutional rights, he was entitled to have evidence obtained as a result excluded from evidence. *See* Part I.A.1. This would include all of his statements, including his admission that he was present, and the letter he wrote to Mr. Magack. Defense counsel had an obligation to object to

the introduction of this type of evidence, since it constituted virtually the bulk of the State's case against the defendant.

3. Counsel Ineffectively Failed to Move to Suppress

Defense counsel's failure to file the motion to suppress denied Mr. Penick the opportunity to have valuable evidence against him excluded from evidence. *State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (declaring "defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law"). Because there could be no conceivable benefit to failing to file the motion, defense counsel was ineffective. *Gallegos*, 967 P.2d at 976. A defendant challenging his counsel's failure to file a Fourth Amendment motion must overcome the presumption that his counsel engaged in reasonable trial strategy.

Although "failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance," *Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994) (quoting *Codianna v. Morris*, 660 P.2d 1101, 1109 (Utah 1983)), "where a defendant can show that there was no conceivable legitimate tactical basis for counsel's deficient actions, the first prong of Strickland is satisfied." *State v. Snyder*, 860 P.2d 351, 359 (Utah Ct. App. 1993) (finding no tactical basis for failure to file motion to suppress damaging statements within time required under statute).

State v. Gallegos, 967 P.2d 973, 976 (Utah Ct. App. 1998). As argued in Part I.A.1 of this brief, a motion to suppress evidence collected as a result of an illegal arrest would have been granted. Defense counsel would have no legitimate tactical reason for

choosing to allow the jury to hear evidence of the defendant's statements if there were a valid basis to exclude them.

This Court has held in similar situations that counsel's failure to file motions can constitute ineffective assistance. In *State v. Seel*, defense counsel failed to file a motion to sever defendant's prior enhancement. This Court said that "had counsel made a motion to sever the charges requiring proof of prior crimes, the motion probably would have been granted. Hence, in not making the motion, counsel's performance was deficient." *State v. Seel*, 827 P.2d 954, 958 (Utah Ct. App. 1992).

In *Gallegos*, defense counsel filed a pretrial motion to suppress, which was denied based on the preliminary hearing transcript. *Gallegos*, 967 P.2d at 976. At trial, the officer's testimony made the motion more legitimate, but defense counsel failed to raise the issue. This Court held that defense counsel's failure to re-raise the motion to suppress constituted ineffective assistance. *Id.* at 980. "[W]here a defendant can show that there was no conceivable legitimate tactical basis for counsel's deficient actions, the first prong of *Strickland* is satisfied." *Id.* at 976, quoting *Snyder*, 860 P.2d at 359.

In *State v. Walker*, this Court held that defense counsel ineffectively failed to move to suppress statements made in his police interview, since the statements were given without the benefit of *Miranda* warnings. *State v. Walker*, 2010 UT App 157, 235

P.3d 766 cert. denied, 241 P.3d 771 (Utah 2010). This Court determined that it could not “conceive of any reasonable tactical justification for failing to file a motion to suppress the police interview.” *Id.* at ¶ 37.

Similarly, in the case at hand, there can be little doubt that Mr. Penick’s statements were the most prejudicial piece of evidence in the case, since he admitted to being present during the crime. Defense counsel had no basis to allow the jury to hear it, especially when there were valid reasons to have it excluded from evidence.

B. Ineffective Assistance – Counsel’s Failure Prejudiced the Defendant – The Verdict Would Have Been Different Without the Statements

Defense counsel’s failure to challenge the defendant’s statements also prejudiced the defendant’s case. To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (“an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record.”). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Strickland, 466 U.S. at 695, 104 S.Ct. at 2069; *Barnes*, 871 P.2d at 522; *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

There are several reasons why the result would have been different in this case. First, had the statements been suppressed, the State would have been left with Mr. Magack's testimony alone, which is fairly weak on its face. Mr. Magack's attackers sat behind him. R. 210:36-37. He did not get a clear face shot. R. 210:83. There were clear weaknesses to the eyewitness identification, which all could have been pointed out using expert testimony.¹ See *State v. Clopten*, 2009 UT 84, ¶¶ 16-17, 223 P.3d 1103 (expert testimony "has been shown to be the best method for educating the jury about factors that can contribute to mistaken eyewitness identifications."). In fact, in *Clopten*, the Supreme Court held that expert testimony should be routinely admitted in identification cases. *Id.* at ¶ 30. The expert could explain how phenomenon like weapon-focus, brief exposure to the perpetrator, lack of light, distractions, cross-racial identification, witness certainty, and the stress of the crime can produce inaccurate identifications. *Id.* at ¶ 20, 23. Nearly all of these factors were present in Mr. Penick's case.

Mr. Magack's identification was quite contradictory on its face. When he talked to the police, he testified that he "was not really awake." R. 210:83. He told police there

¹ Mr. Penick testified in this case. Had his statements been suppressed, he likely would not have had to take the stand to explain his actions that evening.

was only one knife, but after he “later concentrated,” he thought both men had knives, yet he could not describe the knives because “it happened so quickly.” R. 210:69-73, 83. He told police one of the men was black and the other Hispanic. R. 210:83. It wasn’t until he was shown single photos of the defendants that he “remembered” that the man was wearing grey and that he was not Hispanic. R. 210:84 (“when they told me who was the other person, I told them that I wasn’t sure, I thought he was Hispanic but when he showed me the picture I saw the picture of a white person.”). *See Ramirez*, 817 P.2d at 784 (the “blatant suggestiveness of the showup is troublesome”), holding modified by *State v. Thurman*, 846 P.2d 1256 (Utah 1993). He was unable to identify parts of his attackers’ clothing. He was not sure if one of the men wore gloves because “everything happened so quickly.” R. 210:86. Mr. Magack described Mr. Ramsay, who in the video footage was a six-foot tall male wearing a yellow hoodie with a jacket over it, as a Hispanic male wearing a grey sweatshirt. R. 211:14. The men were in a “fog,” so he “couldn’t see well who they were.” R. 210:83.

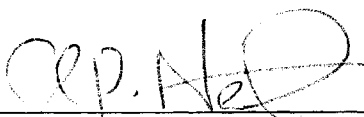
Yet, despite these massive inconsistencies, Mr. Magack conclusively identified the defendant as his attacker. R. 210:34. Defense counsel, had Mr. Penick’s statements not been introduced, could have attacked the validity of Mr. Magack’s identification, using expert testimony as well as cross-examination. Jeremy admitted to the jury that he was present at the scene and that he tried to stop Ramsay from attacking Mr. Magack. R.

211:124-32. Had the defendant's statements to the police been excluded from evidence, Jeremy likely would not have had to testify, and defense counsel could have attacked the validity of the identification. The jury would have been left with a substantially weak identification, and without Jeremy's admission, would not have had solid evidence that Jeremy was even present in the vehicle. The State, without that evidence, would not have been able to prove Jeremy's guilty beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Mr. Penick asks this court to find that his counsel ineffectively failed to challenge the arrest in this case, and that had he done so, Mr. Penick would have received a not-guilty verdict. He asks this Court to suppress the evidence and remand for a new trial.

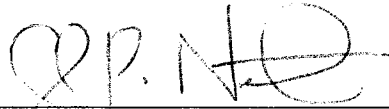
RESPECTFULLY SUBMITTED this 23 day of January, 2012.



SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Garamond Premier Pro 14 point, and contains 7234 words, excluding the table of contents, table of authorities, and addenda.

A handwritten signature in black ink, appearing to read "S.P. Newton", is written over a horizontal line.

SAMUEL P. NEWTON

Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 23 January, 2012, I have caused to be

☐ mailed ☒ hand-delivered eight copies of the foregoing to:

Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114-0230

I certify that on 23 January, 2012, two copies of the foregoing brief were

☐ mailed ☒ hand-delivered to:

Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

A digital copy of the brief was also included: ☒ Yes ☐ No



ADDENDUM A

Constitutional Provisions

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION

Article 1, Section 7

No person shall be deprived of life, liberty or property, without due process of law.

Article 1, Section 12

In 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,

to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

Article I, Section 14.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

ADDENDUM B

Utah Code Ann. § 77-7-2

77-7-2. Arrest by peace officers.

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) (a) for any public offense committed or attempted in the presence of any peace officer; and

(b) as used in this Subsection (1), "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when the peace officer has reasonable cause to believe a felony or a class A misdemeanor has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when the peace officer has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person;

(4) when the peace officer has reasonable cause to believe the person has committed the offense of failure to disclose identity under Section 76-8-301.5; or

(5) when the peace officer has reasonable cause to believe that the person is an alien:

(a) subject to a civil removal order issued by an immigration judge;

(b) regarding whom a civil detainer warrant has been issued by the federal Department of Homeland Security; or

(c) who has been charged or convicted in another state with one or more aggravated felonies as defined by 8 U.S.C. Sec. 1101(a)(43).

ADDENDUM C

Transcript of Police Officer's Testimony Surround the Arrest
R. 211:16-26

1 Q In what capacity?

2 A I'm a detective.

3 Q And how long have you been a detective for Salt
4 Lake City?

5 A For the last three years.

6 Q Mr. Coats, you've been here, I'm going to call you
7 Mr., I don't know if that's right. Detective, you've been
8 here for the last, since yesterday. You know what this case
9 is about.

10 A I do.

11 Q How did you come to be involved with this case?

12 A I was assigned this case as the followup
13 investigator.

14 Q Okay, and how did this case come to your attention?

15 A It was assigned to my que, as a normal procedure
16 for investigation, to follow up on any information should
17 there be ability to develop suspects.

18 Q And what information, initial information were you
19 given?

20 A The initial information I had in the report was
21 descriptions of two male suspects that committed an assault
22 against a taxi cab driver. I also was aware that there was a
23 video.

24 Q Okay. What video?

25 A There was a video from the Motel 6.

1 Q Okay, and when you got this video were you told
2 this was from Motel 6?

3 A I was.

4 Q Were you given an address?

5 A Yeah, there was an address for the Motel 6.

6 Q And what was it?

7 A I don't recall the physical - I think it's like, I
8 want to say it's 176 West on 600 South.

9 Q And you get this video and address, what do you do
10 with this information, sir?

11 A The video was obtained by the initial officers for
12 the night of the investigation and they seized that video
13 placing it into our evidence. So I retrieved the video out
14 of evidence to make a copy of it and then I reviewed the
15 video.

16 Q And what did this video show you?

17 A On the video it showed multiple camera angles
18 throughout the office area of the Motel 6. One of the camera
19 angles shows two males walking into the shot towards a glass
20 window where it appears that there's someone on the other
21 side. I see a male black adult and a male white adult.

22 Q Did that have any significance to you?

23 A Yeah, it did.

24 Q Why?

25 A The males matched the description that was provided

1 to the officers that night.

2 Q And what were you looking for description wise?

3 A I was looking for clothes, I was looking for face,
4 things that I could use to help identify suspects.

5 Q Specifically in this case what description did you
6 have of the suspects?

7 A I had a male black adult. He's around 5' 7" to 5'
8 9"; clothing was like a blue jacket, grey pants, dark shoes.
9 Again the male white was wearing a yellow hoodie, had a
10 jacket on over that and pants. Description was the male
11 white in particulate was significant because he was described
12 as being over six foot tall.

13 Q Okay, and the video that you just testified
14 viewing, did it contain people matching that description?

15 A It did.

16 Q And let me ask you this, how did you come to the
17 conclusion that the two people you saw in the video were
18 connected to this crime?

19 A Well, the same day that I got the video, the victim
20 in this case, Mr. Magack, had come to the police station to
21 get his car out of our impound and I had a black and white
22 photo which I showed him and he confirmed that those were the
23 men and that they were dressed in the way that he saw them
24 that night.

25 Q Okay. You viewed the video. How did you determine

1 that the two people in the video were the two that ordered
2 the taxi?

3 A Based on the statement of the clerk who called the
4 taxi cab, that they had requested a taxi come at the request
5 of the two men that came to the window.

6 Q What did you do with this video?

7 A I made still shots of what I had at the time. The
8 intent was to put it out to the media because I had no names
9 or any identifying information at that time. So I was trying
10 to garner information from the public. So I was preparing to
11 do that.

12 MR. VO-DUC: Your Honor, may I approach?

13 THE COURT: You may.

14 Q (BY MR. VO-DUC) I'm showing you what has been
15 labeled for identification as State's Exhibit 13. Take a
16 look at this. Do you recognize it?

17 A I do.

18 Q And what does it show?

19 A It shows a still shot that I had obtained from the
20 video from the Motel 6. It has a male black adult and a male
21 white adult.

22 Q Does this still shot appear to be a true and
23 accurate representation of that space and time in the video?

24 A Yes.

25 MR. VO-DUC: State offers 13.

1 THE COURT: No objection?

2 MR. HOWARD: No objection.

3 THE COURT: It will be received.

4 (Plaintiff's Exhibit 13 received)

5 Q (BY MR. VO-DUC) Now officer, you said that you
6 circulated - did you circulate still shots?

7 A Correct.

8 Q And was 13 one of the shots you circulated?

9 A Yes.

10 Q Tell me how that works. Was the circulation to a
11 particular media outlet?

12 A It's to all media outlets. What I do is I prepared
13 an information bulletin for what in our department is called
14 a Public Information Unit. They are the liasons to the
15 media, they give them that information, the case number, the
16 description of the crime that's occurred for general
17 disbursement out to the public.

18 Q And who initiated this dissemination?

19 A That was me.

20 Q So you passed this shot out, still Exhibit 13, and
21 what happened after that?

22 A From what I understand, from our Public Information
23 Unit, the only media group to run it was KSL. At the same
24 time that I had, after talking to Mr. Magack and also then
25 dropping the video off to the public information, I received

1 a phone call.

2 Q Okay, and did you receive it at your desk?

3 A Yes, it was at my desk.

4 Q And who was at the other end?

5 A It was an unidentified female.

6 Q Okay, and what did she tell you?

7 A She explained to me that she knew of two males that
8 were talking about attacking a taxi cab driver and then she
9 provided a name and description.

10 Q What name did she provide you?

11 A The name that she provided me was -

12 MR. HOWARD: Your Honor, object to hearsay. He has
13 no personal knowledge. I have no objection to him explaining
14 why he's following up but the identification or the specifics
15 that this person may have provided would be hearsay.

16 MR. VO-DUC: Well, Your Honor, not if it's proof.
17 It's not hearsay if it's not provided to prove. We're not
18 trying to prove that anyone did anything based on this call.
19 It's being offered to explain the actions of the officer and
20 it will be later on confirmed through the testimony.

21 THE COURT: I'm going to allow him to testify as to
22 what he did but I'm going to sustain the objection with
23 regard to the hearsay. So I'm going to allow you to proceed
24 and describe what the officer did based upon that
25 information.

1 Q (BY MR. VO-DUC) Very well. So you received a call
2 and this call tells you what, in essence?

3 A It gives me information as to a possible
4 individuals involved in the only taxi cab assault that I was
5 investigating at the time.

6 Q Did you get names?

7 A There was a name provided.

8 Q And other than the information as to who was
9 involved, did you get any other information from this
10 anonymous caller?

11 A They gave me a place to look.

12 Q What was that?

13 A It was the VOA Shelter for Youth.

14 Q Are you familiar with this place?

15 A Honestly prior to this date, no.

16 Q Are you familiar with it now?

17 A I am.

18 Q And what kind of an establishment is VOA?

19 A It's similar to the shelter for adults but it's
20 geared more towards youths. It's for runaways, individuals
21 that are having problems at home, people in transit. It
22 gives them a place to stay, clothing, food.

23 Q Okay. So the anonymous caller if I'm summarizing
24 accurately said people involved with this taxi stabbing will
25 be found at the VOA?

1 A Correct.

2 Q What did you do with this information?

3 A Because of the nature of the crime, the specificity
4 of the information, the squad that I work with which
5 consisted of my sargent, Sargent Moreno, Detective Anderson,
6 Detective Flores, myself, we went to the VOA to look for the
7 individuals described in this photo.

8 Q Okay, and tell us what happened when you get to the
9 VOA?

10 A Sargent Moreno and I walked inside of the main door
11 and the layout of the place, it's fairly open and immediately
12 upon entering I looked to my left and I saw a male black
13 adult which immediately looked like the individual in the
14 photograph.

15 Q This male black adult that you see at the VOA could
16 recognize him if you saw him again?

17 A I would.

18 Q Do you see him today?

19 A I do.

20 Q Can you show us where he is and describe him?

21 A He'd be the defendant and he's wearing a white
22 shirt with blue tie.

23 THE COURT: The record should reflect the witness
24 has identified the defendant seated at counsel table.

25 Q (BY MR. VO-DUC) Were you in uniform?

1 A Yes, I was.

2 Q Does that mean badge?

3 A It was a winter day so I have a fleece jacket which
4 has a cloth badge on it.

5 Q Okay. So you come into VOA and immediately you
6 notice the defendant. Tell us what happened after that.

7 A Upon - when I walked in, the thing that caught my
8 attention is he immediately looked at me -

9 Q Who?

10 A I'm sorry, the defendant -

11 Q It sounds a little (inaudible).

12 A I totally understand, Jeremy immediately looked at
13 me and then immediately averted his eyes. He looked away from
14 me. Second to that he then approached me, he came back,
15 locked eyes with me and walked up to me asking me why I was
16 there, if I was going to help with donations for the VOA and
17 what was I investigating.

18 Q Before he asked you what you were investigating had
19 you talked to him at all?

20 A Prior to that, no. What I told him is I was there
21 on my business and, you know, I'd talk to him later.

22 Q Did you tell anyone before the defendant approached
23 you and asked you what you were investigating, did you make
24 it clear to anyone that you were investigating anything?

25 A No.

1 Q How long have you been with Salt Lake City, total?
2 A Seventeen years.
3 Q Have you ever been on patrol?
4 A Yes.
5 Q Is the VOA Shelter the kind of place that your
6 agency patrols?
7 A It would be.
8 Q But that was your first time there?
9 A Correct.
10 Q And just to be clear, what date is this that you're
11 at VOA?
12 A This is a Tuesday.
13 Q And how long after the crime?
14 A The attack occurred on the 19th, was reported over
15 the 20th, so approximately two and a half days, three days.
16 Q Sorry to take this out of order. So defendant
17 averts his gaze, then he approaches you and asks you what
18 your investigating. Continue. What did you do?
19 A I told him my - my recollection is I told him
20 basically, you know, I'm going to talk to the management,
21 thanks, and I had - but because he looked immediately like
22 the individual in the photograph, Detective Anderson had come
23 in shortly after me. So I asked him to watch Mr. Penick.
24 Q Okay. And what were you going to do in the
25 meantime?

1 A I went to the director. I think her name was
2 Angie, at the time and -

3 Q Let me ask you, when did you next see Mr. Penick?

4 A It would have been after that.

5 Q After you talked to the Director of VOA?

6 A Correct.

7 Q All right. That's what I'd like you to tell us
8 about, this interaction. You decided to go back to the
9 defendant and talk to him, was this at the shelter?

10 A Correct.

11 Q Tell us what you discussed.

12 A What I did at that time is we took him into
13 custody. I explained to him that he was being detained on
14 suspicion of an aggravated assault and I wanted to talk to
15 him about it.

16 Q Did he agree to talk to you?

17 A It appeared that he did and we took him back to the
18 police station where a formal interview was conducted.

19 Q Did you conduct that interview?

20 A I did.

21 Q Where was it conducted?

22 A The interview was back at the police station in
23 what we call the Robbery Squad Interview Room. It's a
24 recorded video and audio room.

25 Q And was it recorded?