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State of Utah v. Edward E. McHenry : Brief of Defendant and Appellant

Utah Supreme Court

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No. 8756

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

—vs.—

EDWARD E. McHENRY,

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

EDWARD E. McHENRY,
Defendant and Appellant.

No. 8756

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT

The defendant was convicted of the crime of robbing Wallace E. Naylor, General Manager of the Safeway Store, located at 17th South and 4th East, Salt Lake City, Utah, on the 16th day of February, 1957, and was sentenced to the Utah State Prison for the indeterminate term as provided by law for the crime of robbery as charged (R. 6, 12, 24).

The facts as presented to the Trial Court are sufficient to prove that a robbery was committed on the day and at the place above mentioned. The defendant denies,

however, that he committed the robbery and alleges that there is not sufficient competent evidence to prove that he committed the same.

This appeal is directed to the insufficiency of the evidence to connect the defendant with the crime committed; to the admissibility of the evidence offered to identify the accused and to the admissibility of certain exhibits and other evidence which prejudiced the defendant and denied him the right to a fair trial.

The defendant is impecunious, was and now is represented by court appointed counsel (R. 7).

The parties will be referred to as in the court below.

STATEMENT OF FACTS

Throughout the entire trial of this case the State was allowed, over the objection of the defendant (R. 17) to introduce evidence of a wholly independent and unrelated crime. The court in overruling the defendant's objection admitted the evidence for the purpose of identification only (R. 17-18).

Mr. Naylor described the defendant as being about 5'10" tall, weighing around 160 pounds, with a little different talk than most fellows and with a blood spot in the corner of his right eye (R. 16). Even though he had given such a vivid description of the defendant, the court, over the objection of the defendant, permitted him to testify concerning a previous robbery on the 11th day of February, 1957 (R. 18). The court permitted this evidence for the purpose of identification only (R. 17).

The testimony of Mr. Naylor concerning the crime of February 11th did not show any connection between

that crime and the one which the defendant was being tried for, and did in no way legally identify the defendant. The evidence merely shows that Mr. Naylor was robbed on February 11th by two persons dressed similarly. During the robbery of February 11th the assailants approached their victim outside of the store, forced him to enter and attempted to force him to open the safe (R. 90-110). The robbery of February 16th was committed by two persons who gained entrance through the roof of the store (R. 13, 39).

Mr. Naylor claimed to be able to describe his assailant by reason of the observations made on the 16th day of February, 1957, from a line-up at the Police Station at noon on that day. He was able to pick out the defendant as one of his assailants. He identified the defendant by reason of a blood spot in his right eye and by reason of his voice and size (R. 21).

The entire testimony of one of the State's witnesses, Oliver Nickel, who was the produce clerk employed by the Safeway Store above mentioned, pertained to a robbery at the same store on the 11th day of February, 1957 (R. 90-110). From a casual observation of Mr. Nickel's testimony it becomes obvious that the same does not in any way add to the identification of the defendant. Mr. Naylor was permitted to so testify even though he was not present at the time the second robbery took place (R. 95-96). Mr. Naylor's first contact with the defendant was at noon on February 16th at the Police Station (R. 97-98). His testimony identified the defendant as being the person in the store on February 11th, but he did

not identify the defendant as being the person in the store on February 16th (R. 98).

A Mercury automobile containing a suitcase with two 22-calibre revolvers, both loaded, was found parked on Westminster Avenue just east of 4th East and approximately two blocks from the scene of the crime (R. 129-131, Exhibits 13 and 14). Over the objection of the defendant, Lyman S. Burton, one of the State's witnesses, was permitted to testify concerning the ownership of the automobile and its contents (R. 129-132). The only evidence offered as to the ownership of the automobile and its contents is the testimony of Officer Burton, which is as follows:

“Q. Did you make an investigation to determine the ownership of the car?

A. Well, it had temporary stickers on it. It had not had license plates yet. It was newly purchased and had temporary stickers on it. I read the name on those.

Q. Did the sticker show the registered owner?

A. It did.

Q. What was the name of the registered owner?
MR. WOOLLEY: Objected to as hearsay.

THE COURT: Overruled.

A. Edward McHenry.

Q. (Mr. Child) Did you gain access to the car?

A. I did.

Q. Did you find anything inside of it?

A. Yes, there was a sport coat.—

MR. WOOLLEY: We object to this line of questioning your Honor. It is irrelevant and immaterial, and has not been connected up with this case?

THE COURT: Objection overruled.

A. There was a sport coat, a pair of slacks, and in the back seat, on the floor, was a suitcase and then there were miscellaneous things in there, flashlight, and can openers, I do not recall.

Q. (Mr. Child) I will show you what has been marked as Exhibit 15 and ask you if you can identify that?

A. Yes, that is the suitcase which was on the back, on the floor of the back seat of the '57 Mercury.

Q. Did you open the suitcase at that time?

A. Not at that time. I did not open it until I took it to the police station.

Q. Did you then open it?

A. I did.

Q. What did you find inside, if anything?

A. Two 22-calibre revolvers, and both fully loaded, and I believe there was a picture, but I don't remember, in the little carrier in the suit case, where you put handkerchiefs and things like that. That was all that was in the suitcase."

Exhibits 13 and 14 were later admitted in evidence over the objection of the defendant (R. 133).

Following the defendant's arrest he was taken to the

interrogation office at the Police Station and interrogated by Officer Clore and Officer Fillis (R. 149-150). Officer Fillis was permitted to testify as to statements made by Officer Clore to him concerning the robbery and the apprehension of the defendant (R. 150-151). Officer Fillis made certain threatening statements to the defendant which caused the defendant to make admissions against his own will, which admissions Officer Fillis was permitted to testify to (R. 152-153, 160). In this connection the record is as follows:

Cross examination

"Q. Then I believe it was about then you stated, 'Look Buddy, we can do this two ways, the easy way or the hard way' and you took about two steps toward me and said, 'I would just as soon do it the hard way.'
Isn't that true?

A. I do not recall any threats being made whatsoever.

Q. Didn't Mr. Clore state in the preliminary that you said that?

A. What Mr. Clore testified to I cannot testify to."

Redirect examination

"Q. Were there any threats of any type used in the interrogation room against Mr. Edward McHenry, the defendant here, in your presence?

A. Not in my presence, no, sir.

Q. Is it possible you said, 'We can either do this the easy way or the hard way'?

A. It is very possible.

Q. If you said that, why did you say it?

A. In any type of work there is always an easier way to do things. The easy way in this instance would have been for him to tell us, as we asked, a particular question, so we could go out and check, rather than go out and bit by bit pull in witnesses and evidence, such as we had to do in this case."

This appeal is directed at the errors committed by the trial court in admitting evidence of a wholly independent and unrelated crime, in admitting evidence as to the ownership of a certain automobile and its contents, and in permitting testimony concerning statements allegedly made by the defendant under compulsion, all of which prejudiced the jury and denied defendant the right of a fair and impartial trial.

STATEMENT OF POINTS

POINT I.

THE COURT IMPROPERLY ADMITTED EVIDENCE OF AN INDEPENDENT AND UNRELATED CRIME.

POINT II.

THE COURT IMPROPERLY ADMITTED EVIDENCE CONCERNING A MERCURY AUTOMOBILE AND ITS CONTENTS.

POINT III.

STATEMENTS OF THE DEFENDANT MADE UNDER COMPELSION WERE ADMITTED IN EVIDENCE.

ARGUMENT

POINT I.

THE COURT IMPROPERLY ADMITTED EVIDENCE OF AN INDEPENDENT AND UNRELATED CRIME.

The court in admitting evidence of a robbery which allegedly occurred on the 11th day of February, 1957, at the same place as the crime of February 16, 1957, prejudiced the defendant and denied him the right to a fair and impartial trial. Evidence of independent and unrelated crimes is inadmissible and prejudicial. This rule is so universally recognized and so firmly established that citation of authorities to support the same is unnecessary. It is the product of that same humane and enlightened public spirit which has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he is proven guilty beyond a reasonable doubt. There are certain exceptions to this rule which state that evidence of another crime is competent to prove the specific crime charged when it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial.

The court in the instant case admitted evidence of other crimes for the purpose of establishing the identity of the accused. Such evidence has been admitted and found competent in almost every court in the United States, including our own in the case of *State v. Martin* (1917), 49 Utah 346, 164 P. 500. If, however, the identity has been otherwise clearly made out, such evidence should not be introduced, since, in such case, it could have no other effect than to prejudice the defendant by estab-

lishing his guilt of an independent crime. 42 *A.L.R.* 2d 862.

In order for evidence to be competent to prove identity the evidence of the independent crime must be connected as a part of a general and composite scheme or plan. Some connection between the crime must be shown to have existed in fact and in the mind of the actor uniting them for the accomplishment of a common purpose. This connection must be clearly apparent from the evidence. To allow the evidence otherwise would be to poison and prejudice the minds of the jurors by the use of irrelevant and dangerous deception. The admissibility of this type of evidence must rest on the facts in each case. There cannot be many cases where evidence of separate and distinct crimes will serve to legally identify the person who committed the crime as the same person who is guilty of another. It is much easier to believe in the guilt of an accused if he is suspected of committing other similar crimes. Evidence of independent crimes unnecessarily burdens the defendant in his attempt to overcome the charge against him. It gives opportunity for conviction upon prejudice instead of competent evidence. *Miller v. State* (1917), 13 Okl. Crim. 176, 163 P. 131, 43 *A.L.R.* 2d 868.

The evidence in the instant case shows that the defendant could be identified without the unnecessary introduction of evidence of an independent and unrelated crime. Mr. Naylor described the person who robbed him as being approximately five feet ten inches tall, weighing one hundred sixty pounds, with a voice different from

that of the general public and a blood spot in the corner of his right eye. He also picked the defendant out of the line-up at the Police Station at noon the day of the robbery for which the defendant is charged by reason of his size, voice and the blood spot in his eye. Even though he so ably identified the defendant he was permitted to testify to circumstances surrounding the crime of February 11th, a wholly independent and unrelated crime. In this connection his testimony was contradictory, uncertain and ambiguous. He was not sure that the defendant wore the same type of clothing when both robberies occurred (R. 17). He was not certain in his description of the gun used. In this connection the best answer he could give was: "I am not sure whether it was that gun." (R. 18).

Oliver Nickel was permitted to testify as to the robbery of the 11th day of February, 1957. He was permitted to so testify even though he was not present at the time of the robbery for which the defendant is charged. His testimony adds nothing to the identification of the accused and was highly prejudicial. The Utah case of *State v. Martin*, supra, can be distinguished from the instant case. In the *Martin* case the State was permitted to introduce evidence of certain letters written by the defendant for the purpose of identification. The contents of these letters clearly indicated that the person attempting the commission of the robbery was the same person who allegedly committed the robbery in question and that it was committed at the same place and upon the same person. In *Miller v. State*, supra, the court states:

“If the defendant wrote the letters in question, and the jury found that he did write them, then the contents of those letters clearly identify the defendant as the person who committed the robbery in question.”

The evidence offered concerning the crime of February 11th does not consist of statements, written or oral, by the defendant, and does not clearly identify the defendant as the person who committed the robbery in question.

Because the defendant could be identified without admitting evidence of a wholly unrelated and independent crime, and because the evidence admitted concerning this alleged independent and unrelated crime adds nothing to the identity of the accused, the evidence should have been excluded, the same being gravely prejudicial to the defendant.

POINT II.

THE COURT IMPROPERLY ADMITTED EVIDENCE CONCERNING A MERCURY AUTOMOBILE AND ITS CONTENTS.

The State was permitted to introduce evidence concerning the ownership of a Mercury automobile and its contents over the objection of the defendant that the same was hearsay. The only evidence offered as to the ownership of the automobile was the testimony of Officer Burton who said that the name on the sticker was that of the defendant. This evidence is incompetent for the reason that it is hearsay and does not come within any of the exceptions to the hearsay rule and further, no proper foundation has been laid.

In the case of *Utah Farm Bureau Ins. Co. v. Chugg* (Utah) 315 P. 2d 277, the court admitted testimony about

the alcoholic content of a blood sample over the objection of the defendant that no sufficient foundation had been laid identifying the blood sample analyzed as being the blood of the defendant, Chugg. This court found that the admission of said evidence was error. The only evidence introduced was that of the medical technician at the hospital where Chugg was taken after the accident. The medical technician did not draw the sample from Chugg, nor was she present when it was taken. No attempt was made to introduce in evidence the actual specimen of blood allegedly taken from Chugg. The court stated:

“Clearly there is a lack of necessary evidence linking the sample analyzed with the blood sample drawn from Chugg and is therefore insufficient to identify the blood sample as being that of Chugg.”

In the instant case Officer Burton did not prepare the sticker found on the automobile, nor was he present when the same was prepared. There is no evidence as to who prepared the sticker or when the same was prepared. No attempt was made to introduce into evidence the sticker or any official record to show the actual ownership of the automobile in question. There is not sufficient evidence to link the automobile with the defendant.

The evidence offered consists of the testimony of an individual concerning what he read from a report of another, which report consisted of a sticker on an automobile containing the name of an individual. The statements were offered in evidence as proof of the matters asserted on the sticker, which is an untested assertion

made out of court and not subject to cross examination.

The evidence is prejudicial to the defendant because the automobile was found so close to the scene of the crime and in said automobile a suitcase was found containing two .22 caliber revolvers, both loaded (R. 131). The revolvers were later admitted in evidence as Exhibits 13 and 14. Again the minds of the jurors were poisoned by the admission of incompetent and prejudicial evidence.

POINT III.

STATEMENTS OF THE DEFENDANT MADE UNDER COMPULSION WERE ADMITTED IN EVIDENCE.

The court permitted Officer Fillis to testify concerning certain statements made by the defendant while being interrogated at the Police Station. In this connection the record is as follows:

“Q. Did you ask him any questions?

A. I asked him how many robberies he had committed? He stated ‘The one today, and the one last Monday.’

MR. WOOLLEY: Objected to on the ground there—that this is going to be in the nature of a confession, no proper foundation laid.

THE COURT: Overruled.

Q. (Mr. Child) Your answer was two robberies he had committed?

A. His answer was two, ‘The one today and the one last Monday.’

Q. Did you ask him specifically as to what robbery he meant as to last Monday?

A. I said, ‘The Safeway Store,’ and he said, ‘Yes.’

I asked him what other robberies he had committed, and he said, 'Just those two.'" (R. 151-152).

There was no proper foundation laid for the admission of this evidence, further the same was admitted even though the alleged statements were made under compulsion. Officer Fillis denied making any threats to the defendant while interrogating him, however, the record shows without doubt that threatening statements were made in an effort to induce the defendant to make a confession.

There are two facts which render a confession inadmissible as evidence. First, one obtained under compulsion, thus violating the defendant's constitutional privilege against self-incrimination, and second, one made under such circumstances rendering the confession untrustworthy. When a confession falls within either one of the above, the law excludes them whether they be direct confessions or other declarations tending to implicate a prisoner in the crime charged. *Miller v. State*, supra. By the admission of this evidence more poison was administered to the jury in an effort to black out justice and deny the defendant the right of a fair and impartial trial.

CONCLUSION

One of our basic fundamental rights under the Constitution of the United States and the State of Utah is that of a fair and impartial trial. Embodied within this constitutional right is the right to be tried for the crime

charged and none other, and to be convicted only upon competent evidence. The trial court in admitting evidence of a wholly unrelated and independent crime, and admitting hearsay evidence and evidence obtained through force and threat, erred. The sole effect of the evidence so admitted was to poison and prejudice the minds of the jurors against this defendant.

In the interest of substantial justice the conviction should be reversed.

Respectfully submitted,

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