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State of Utah v. Edward E. McHenry : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

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STATE OF UTAH,
Plaintiff and Respondent,

vs.

EDWARD E. McHENRY,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.
8756

RESPONDENT'S BRIEF

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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.

Case No.
8756

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The defendant, Edward E. McHenry, was convicted on the 29th day of April, 1957, of having committed the crime of robbery on the 16th day of February, 1957, in Salt Lake City. He was sentenced to the Utah State Prison for an indeterminate term.

There is no question that a robbery was committed on the day and at the place alleged. The evidence admitted indicated the following facts: That on the above mentioned

16th day of February, 1957, Wallace E. Naylor, General Manager of the Safeway Store, located at 17th South and 4th East, was robbed in the morning hours between 7:00 and 8:00 a. m. by two masked men, each carrying guns. Their apparent means of entry was through a hole cut in the roof. The questions raised on appeal go to the identification of the defendant and to the admission of certain evidence which it is alleged was prejudicial.

STATEMENT OF POINTS

POINT I.

IT WAS NOT ERROR FOR THE COURT TO ADMIT EVIDENCE OF A FORMER OFFENSE.

POINT II.

THE COURT DID NOT COMMIT ERROR IN ADMITTING EVIDENCE OF THE OWNERSHIP OF THE MERCURY AUTOMOBILE.

POINT III.

IF THE EVIDENCE RELATING TO THE AUTOMOBILE WAS INADMISSIBLE, IT WAS NOT PREJUDICIAL TO THE SUBSTANTIVE RIGHTS OF THE DEFENDANT.

POINT IV.

IT WAS NOT ERROR TO ADMIT STATEMENTS OF THE DEFENDANT MADE TO POLICE OFFICERS.

ARGUMENT

POINT I.

IT WAS NOT ERROR FOR THE COURT TO
ADMIT EVIDENCE OF A FORMER OFFENSE.

During the trial evidence of a previous crime committed at the same store five days earlier and under somewhat similar circumstances was admitted over objection. It was offered for the purpose of identifying the defendant.

In the law of evidence it is a general rule that evidence of a separate and independent crime is inadmissible to prove the guilt of a person on trial for a criminal offense. There are, however, several exceptions to the rule which are as uniformly accepted as the rule itself, one being that where evidence of a previous crime tends to aid in identifying the accused as the person who committed the crime in question, it is admissible even though it tends to show the guilt of the accused of the other crime for which he is not on trial. Wharton's Criminal Evidence, 12th Edition, Vol. Sec. 181.

The Utah Supreme Court in *State v. Martin*, (1917 Utah), 164 P. 500, a case cited in appellant's brief, recognized the above rule and the exception thereto. The case is not comparable factually and is therefore not analyzed here.

In overruling the defendant's objection to the admission of evidence of the previous offense, the trial judge said at page 17 of the trial record:

"THE COURT: The objection is overruled, but the Court will limit the effect of the evidence.

"Mr. Child has stated in his opening statement that the defendant was recognized by virtue of chance to observe him at the prior event, and for the purposes of identification the Court will let the evidence concerned an earlier robbery or entry into the store.

"But you are not to assume—that is, consider that evidence for any purpose other than identification of the person who entered on the 16th day of February. The defendant is not being tried for that event that happened the week before.

"But if that event assists somebody in identifying him, the theory is that he was in once and saw he was back again, and indicated he was the same man, and if that is all connected up you may consider it on the subject of identification."

The evidence as admitted at trial made direct connection in two instances between the offense of the 16th of February, the offense charged, and the previous offense of the 11th of February, 1957. The 11th of February was a Monday and the 16th a Saturday. Mr. Naylor, the robbery victim, testified as to admissions made to him by the defendant. See page 14 of the trial record. The witness after describing his arrival at the store and being accosted by the men, testified as follows:

"They said, 'This time we are back for everything.'"

And further, on the same page:

"* * * the one fellow said 'We want all the money this time.' He said, 'the last time you lied to us.'"

is testimony was significant as indicating that the men committing the robbery on the 16th of February had previously committed a robbery at the same place and in the presence of this witness. Later in the trial Officer Fillis testified as to statements which the accused had made to him:

"I asked him how many robberies he had committed. He stated 'The one today, and the one last Monday.'"

Defendant objected but was overruled.)

"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.'"

On page 152 of the trial record. These admissions and concessions by the defendant, together with the similarity of the two offenses, constitute sufficient connection of the two offenses, and, therefore, furnish ground to admit evidence of the former offense for the purpose of identifying the defendant.

In the New York decision of *People v. Thau* (1916 New York), 113 N. E. 556, a problem similar to the one at hand was in issue. The defendant had been convicted of assault and evidence had been admitted at trial, over objection, that the defendant had, approximately two weeks previous, committed a crime at the same location as the offense charged. The defense had been an alibi. The court said at page 557:

"The defense of an alibi raised in the most direct manner possible an issue as to the identity of

the person who assaulted the complainant on the 15th of September. Any fact tending to show that the complainant was not mistaken in alleging that that person was the defendant was relevant to that issue. If the defendant to the knowledge of the complainant had visited his shop within a fortnight and had then criminally destroyed some of his goods, that fact would be likely so to impress the mind of the complainant as to lessen the probability that he was mistaken concerning the identity of his assailant on the 15th of September. * * *

In *People v. Stathas* (1934 Illinois), 190 N. E. 661, two defendants were convicted of having robbed a bank on August 18, 1932. Two bank employees testified that they had seen the defendants enter the bank. They were able to identify the defendants in the courtroom. Both employees further testified that they recognized the defendants as being the persons who robbed the bank on May 25, 1932, three months prior to the date of the offense charged. The identity of the defendants became a prime issue. The following is quoted from the court's opinion:

"It is urged that the testimony of the cashier and his brother tended to show a distinct, substantive offense committed by one or both of the defendants on May 25, and that the admission of such evidence was therefore improper and very prejudicial to the defendants' case. The general rule is that evidence of a distinct, unrelated crime is not admissible upon the trial of a defendant charged with the commission of a criminal offense. There is, however, an exception to this rule generally recognized by the courts and text-writers. Such exception is that, when the evidence offered tends to prove the identity of the person who committed the crime for which he is

on trial, or that he was present at and where the crime was committed, such evidence is competent. Such evidence is also proper to meet or rebut the defense of alibi. The rule deducible from the authorities is that, if such evidence is material and relevant, even though it tends to prove the perpetration of another unrelated and separate criminal offense on the part of a defendant, the court may properly receive such testimony. * * *

In *Warren v. State* (1941 Tenn.), 156 S. W. 2d 416, the court has stated the general rule regarding the admission of evidence of a previous offense. The case involved robbery where the issue of identification was raised. The court said:

“The general rule that evidence of separate and independent crimes is inadmissible to prove the guilt of a person upon trial for a criminal offense is subject to a well-defined exception with respect to proof of the identity of the accused. The broad rule is that where evidence tends to aid in identifying the accused as the person who committed the particular crime under investigation, it is admissible, in spite of the fact that it tends to show that the accused is guilty of other crimes for which he is not on trial. This rule is applied in a wide variety of cases, such as arson, burglary, homicide, larceny, liquor law violations, robbery, and many other instances. It is permissible, in those instances where evidence is admitted of the commission of another similar crime for the purpose of showing identity, for the accused to introduce in evidence the record of a court showing his trial and acquittal of such other crime.
* * *

See also *People v. Thompson* (1950 Ill.), 94 N. E. 2d 349. There is an extensive annotation at 42 A. L. R. 2d 862, re-

lating to the admissibility in robbery prosecutions of evidence of other robberies.

It is important to note that in this case the problem of identity was of great importance. The two individuals who committed the robbery wore masks during all of the time they were observed by the victim. Five days previous two masked persons had entered this same store and committed the crime of robbery. There were strong indications, above recited, that the same persons committed both crimes. It was therefore necessary that evidence of the previous crime be used for the purposes of identification.

Any misunderstanding on the part of the jury as to the effect of the evidence of the previous crime was cured by the court's statement in overruling the objection, above quoted, and in the court's Instruction No. 5E.

"You are instructed that evidence has been introduced in this case concerning a robbery alleged to have taken place on the 11th day of February, 1957, which was allegedly committed by the defendant, Edward E. McHenry, on the person and property of Wallace E. Naylor and Oliver M. Nickel. Said evidence is not to be considered by you as showing or tending to show that the defendant, Edward E. McHenry, robbed Wallace E. Naylor on the 16th day of February, 1957, but can only be used by you in determining the manner of the identification of the said Edward E. McHenry by the said Oliver M. Nickel and Wallace E. Naylor."

POINT II.

THE COURT DID NOT COMMIT ERROR IN ADMITTING EVIDENCE OF THE OWNERSHIP OF THE MERCURY AUTOMOBILE.

In appellant's brief, Point 2, it is argued that evidence concerning the ownership of a Mercury automobile was in-

missible. Officer Burton, testifying for the state, related the circumstances of his discovering, shortly after the time of the robbery, a 1957 Mercury automobile, a short distance from the Safeway store. Over the objection that the evidence was hearsay, he was allowed to testify that the car had "temporary stickers" bearing the name of the defendant. See trial record, pages 129 and 130. The testimony is also related on pages 4 and 5 of appellant's brief.

Appellant asserts that this evidence was hearsay and therefore inadmissible. There are two approaches to this problem. The officer's testimony in relating that he saw the sticker and testifying as to the name thereon is not a violation of the hearsay rule. In Section 249, Wharton's Criminal Evidence, 12th Edition, it is stated:

"If the witness makes a statement on the basis of his own observations and not because he was told or informed by another person, his statement is not hearsay. Thus, it is not hearsay for the coroner who had performed the autopsy on the body to state whether there was any kind of tag on the body at the time he performed the autopsy, since the presence or absence of a tag was a fact which he would know of his own observations."

Accordingly, the evidence as to the sticker and name thereon may be admitted as a public record; therefore, an exception to the hearsay rule. The Officer testified that the car was a new 1957 model and that it had "temporary stickers." The temporary stickers he referred to are "temporary permits" provided for in the Utah Motor Vehicle Act, Section 41-1-18,

U. C. A. 1953, providing for the registration of a new automobile. Section 41-1-18 provides:

“It shall be unlawful for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered or for which a certificate of title has not been issued or applied for, or for which the appropriate fee has not been paid when and as required hereunder, except that when application accompanied by proper fee has been made for registration and certificate of title for a vehicle it may be operated temporarily pending complete registration upon *displaying a temporary permit* duly verified, or other evidence of such application, or otherwise under rules and regulations promulgated by the commission.” (Emphasis added.)

A “temporary permit” required by the act to be displayed is in the nature of an official or public document. It is a general rule that a record made for public use is admissible in evidence as an exception to the hearsay evidence rule as evidence of the truth of the statements therein made. See Section 272, Wharton’s Criminal Evidence, 12th Edition.

It has frequently been held that names, tags, license numbers, etc., attached to property may be admitted as raising a presumption of ownership of the property. “Thus, the name or number marked on a shop, a ship, a railroad car, or other chattel or structure may be admissible to show that person’s ownership or control.” Section 150a, Wigmore on Evidence, 3rd Edition. It is a general rule that the fact that an automobile was registered in a person’s name, or that it bore his license plates at a certain time creates a

resumption that he was the owner. See Annotation in 103 . L. R. 138. In the Utah case, *Ferguson v. Reynolds* (1918), 176 P. 267, an action for injuries caused by an automobile striking the plaintiff. The court had before it the question of the ownership of the automobile that caused the injury. Evidence had been offered identifying the automobile by the license number it bore. The court commented on the existing Utah law requiring the owners of motor vehicles to register the same with the Secretary of State. The court said at page 267:

“Defendants’ counsel insist that the evidence is insufficient to sustain the verdict. In this connection, counsel contend that the applications made to and filed with the Secretary of State are not sufficient to establish the ownership of the car. We are unable to conceive why our statute was adopted if it was not for the purpose of furnishing at least prima facie evidence of the ownership of motor vehicles. * * * We think the courts generally hold that the applications and numbers or certificates issued under statutes like ours constitute prima facie evidence that the applicant is the owner of the vehicle which is identified in the application. Under our statute the number issued to one owner may not be transferred, nor, in case the vehicle is sold to another, can the number be transferred to the transferee. Nor can the number issued for one vehicle be transferred to another vehicle. If therefore the person making the application for registry is found using the vehicle described in the application and which bears the number issued by the Secretary of State for such vehicle, it certainly constitutes some substantial evidence that such person is the owner of the vehicle so described and which bears such

number. * * * In *Berry, Automobiles* (2d Ed) § 609, the author, in referring to this subject, says:

“‘Evidence that the automobile which caused the plaintiff’s injuries displayed a certain license number, and that this number was registered in the office of the Secretary of State in the defendant’s name as owner, makes out a prima facie case of ownership in the defendant.’”

Here the Mercury automobile was new and, therefore, had the temporary permits as required by statute. In such case it is only reasonable to apply the same rule as in situations where identification is made by way of a license number.

On this point appellant relies heavily on a recent Utah case, *Utah Farm Bureau Insurance Company v. Chugg* (Utah), 315 P. 2d 277. The facts of that case are clearly distinguishable from the circumstances relating to the identification of the automobile here. There the court was faced with the problem of whether a sample of blood taken to determine alcoholic content was the same blood taken from the defendant on a previous occasion. There the problem of identity was of extreme importance because of the likelihood of confusing one test tube of blood for another, and because the blood might be handled and examined by any number of persons within the hospital or laboratory. Here the “sticker” on the automobile is similar to a license plate on a car or a tag on luggage. When attached to property of this nature, the tag, plate, or sticker raises the presumption of ownership.

POINT III.

IF THE EVIDENCE RELATING TO THE AUTOMOBILE WAS INADMISSIBLE, IT WAS NOT PREJUDICIAL TO THE SUBSTANTIVE RIGHTS OF THE DEFENDANT.

Section 77-42-1, U. C. A. 1953, provides that the commission of error by the trial court will not be presumed to have resulted in prejudice, and that a cause will not be reversed for error unless that error effects the substantial rights of the party. See also, *State v. Neal* (1953), 262 P. 2d 756, and *State v. Justensen*, 99 P. 456. Even in the absence of testimony relating to the automobile, there was sufficient evidence to support the conviction of the defendant. This court has held that the erroneous admission of evidence does not call for reversal of the judgment where the guilt of the accused is otherwise satisfactorily proved. *State v. Cox*, 276 P. 166.

POINT IV.

IT WAS NOT ERROR TO ADMIT STATEMENTS OF THE DEFENDANT MADE TO POLICE OFFICERS.

As to this problem, it is necessary to relate from the record the circumstances of the interrogation. See Trial Record, pages 149 through 155. The crime was committed at about 7:30 to 8:00 in the morning and the defendant was apprehended almost immediately afterwards and taken directly to the interrogation office of the Police Department.

There, in the presence of two police officers, one of whom testified at the trial, he was questioned. The police officer witness testified that the interrogators were identified as police officers; that the defendant was informed that he was under arrest; that he had the right to counsel, and that anything he said might be used against him. See page 151 of the Trial Record. Thereafter, upon inquiry, the defendant stated that he had committed the robbery that day and the previous robbery on the Monday before.

Appeal is made on two grounds. First, that there was no foundation laid for the admission of the confession; and, second, that the confession was not voluntary.

The evidence as to time and place and that defendant was advised of his rights serve as sufficient foundation. This court, in the case of *State v. Crank*, (1943 Utah), 142 P. 2d 178, where the question of the admissibility of a confession was raised, said at page 185:

“* * * In laying a foundation for offering the writing, if a written confession, or the conversation, if an oral confession, the state will of course be required to show the time and place of the conversation, or the writing and signing of the instrument, and also what is generally called a prima facie showing that it was the free and voluntary act of the accused. * * *”

The prosecutor satisfied the requirements of laying a foundation as above prescribed; the time and place were shown. That defendant was advised of his rights and that there was no evidence of compulsion or coercion suffices as a prima facie showing of voluntariness.

The extent of the compulsion or coercion applied in obtaining the confession as alleged by appellant is quoted from the Trial Record on pages 6 and 7 of appellant's brief. The quoted testimony is found on pages 152, 153 and 160 of the Trial Record. The issue of the voluntariness of a confession has been dealt with extensively by this court. In *State v. Johnson* (1938 Utah), 83 P. 1010, it was said:

“* * * In determining whether a confession was voluntary there must be taken into consideration the age and intelligence of the witness, the place and conditions under which the statement was made, the circumstances that invoked the conversation, as well as the nature, content, and import of the statement itself. The court held the statement voluntary and we find no error therein.

“‘A confession is involuntary where the installation of fear or a promise of benefit, related to the legal consequences as regards accused, conveyed by another for the purpose of obtaining the confession, has so acted on the will of the confessor as to fetter the freedom of choice on the matter of whether he or she should confess. The actuating element which must move the will of the accused to confess is an inherent freedom of choice not influenced by fear or hope induced by another for the purpose of obtaining the confession. Whether such freedom of choice has been so interfered with by the conduct of another is a question of fact to be determined from the evidence.’ We think the trial court is in a better position to determine whether advantage was taken of a defendant to obtain a confession in a way not countenanced by the law. * * *”

In this case the circumstances surrounding defendant's confession do not show an atmosphere of coercion or com-

pulsion. Defendant was questioned immediately after he was apprehended. He was advised of his rights to counsel and that anything he said might be used against him. The questioning was extremely brief and it appears from the trial record that defendant made his statements in response to the officer's first inquiry. Defendant's claim that the confession was inadmissible is apparently based on a statement which Officer Fillis is alleged to have made at the time of the interrogation. (Pages 152 and 153, Trial Record.) Appellant's brief, pages 6 and 7, quoting from the trial record, contain this discussion and Officer Fillis' statement. Further on, in re-direct examination of the officer, his explanation of what he meant by the statement is related. See page 160 of the trial record. The statement of the officer, even if misunderstood, is not of such a threatening nature as to have reasonably caused the defendant to fear and confess. Defendant did not testify that he was put in fear or that he understood the statement to be a threat.

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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