

1958

## State of Utah v. Leamon George : Brief of Appellant

Utah Supreme Court

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Lon Rodney Kump; Attorney for Appellant;

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IN THE  
SUPREME COURT OF THE STATE OF UTAH

FILED

JUL 30 1958

STATE OF UTAH,

Plaintiff and Respondent, )

vs. )

LEAMON GEORGE, )

Defendant and Appellant. )

Clerk, Supreme Court, Utah

Case No.

8788

BRIEF OF APPELLANT

LON RODNEY KUMP,

Attorney for Appellant.

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**IN THE  
SUPREME COURT OF THE STATE OF UTAH**

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|----------------------------------|---|-----------------|
| <b>STATE OF UTAH,</b>            | ) |                 |
|                                  | : |                 |
| <b>Plaintiff and Respondent,</b> | ) |                 |
|                                  | : |                 |
| <b>vs.</b>                       | ) | <b>Case No.</b> |
|                                  | : | <b>8788</b>     |
| <b>LEAMON GEORGE,</b>            | ) |                 |
|                                  | : |                 |
| <b>Defendant and Appellant.</b>  | ) |                 |

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**BRIEF OF APPELLANT**

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**STATEMENT OF FACTS**

**This is an Appeal from the Judgment of the Third Judicial District Court in and for Salt Lake County, the Honorable Stewart M. Hanson presiding (R. 122).**

**The Appellant, Leamon George, was arrested in Ogden, Weber County, Utah, on or about the 10th day of June, 1957 (R. 120). Verle**

L. Butler, a grocery clerk at the Day & Night Market, (R 14), was called to Ogden in the early morning of Monday, June 10th to see if the Appellant was the one who had held up the store on the morning of the 5th of June, 1957 (R. 22).

Witness Butler identified the Appellant as the one who held up the store, without being confronted with any other persons of similar characteristics, and without the Appellant having the benefit of a police lineup (R . 22).

The Appellant returned to Salt Lake City in the same automobile with State's witness Butler (R. 23).

Later that same afternoon, (R. 23), the Appellant was identified by witness Butler (R. 24), and by witness Richard J. Veenendaal (R. 42), at a lineup with two other negroes and a Mexican. Witness Veenendaal and witness Butler were not

separated at this lineup (R. 42).

On June 10, 1957 a complaint was filed charging defendant with a crime of robbery (R. 2). On June 11th Appellant was brought before the City Court and bail was set (R. 2). On July 30, 1957 the City Court ordered Appellant bound over to the District Court for trial (R. 2).

Defendant filed a Notice of Alibi on the 30th day of August, 1957 (R. 9). The trial was held on the 8th day of September, 1957 in the District Court of Salt Lake County (R. 11). At the trial three witnesses were called by the State: Verle L. Butler, Richard J. Veenendaal and A. J. Grenoble. Two witnesses testified in behalf of the Appellant's alibi, Cornelia C. Johnson and J. L. Carter. It was agreed between the State and defense counsel that Mildred Carter's testimony would have been the same as the witness, Jerry Carter (R. 39).

Witness Cornelia C. Johnson testified that



Appellant resided with her at 303 Post Street in Salt Lake City, Utah (R. 57). She testified that Appellant was at her home during the evening preceding, and during all of the morning in which the robbery was alleged to have taken place (R. 58). Mrs. Johnson's testimony was not merely an assumption on her part that appellant was at her home, but she states that there was a party at her home that evening which allowed her to recall the event more vividly (R. 61, 62). She stated that she had to get up three or four times that evening because they were noisy (R. 63). She testified that the appellant was asleep and carried to his bed around three or three thirty in the morning of the alleged robbery (R. 64).

Witness Butler testified that the robber was in the store at five minutes to three or three , 15 (R. 13).



Defense witness J. L. Carter testified that he was acquainted with the Appellant (R. 84). He testified that he played cards with the Appellant and others at 502 Post Street on the morning of the robbery (R. 86). He stated that appellant passed out from drunkenness and was carried to bed (R. 86).

Because of an inability to serve subpoenas, two other eye witnesses as to defendant's alibi of being at another place at the time of the robbery were not present at the trial. These witnesses are: Milo Savage, who was out of town at the time of trial (R. 118), and Mildred Carter (R. 116).

Appellant was found guilty of the crime of robbery by verdict of the jury dated September 9, 1937 (R. 114). Appellant filed a motion for new trial on the 13th day of September, 1937 (R. 119), which was denied on October 3, 1937 (R. 121a).

Appellant was committed to the Utah State Prison

on October 11th, 1957 (R. 122). Appellant filed Notice of Appeal on the 29th day of October, 1957 (R. 125).

### STATEMENT OF POINTS

There was insufficient evidence to allow submission of Appellant's guilt to the jury, and to justify a verdict of guilty because:

**1. THE TWO STATE'S EYE WITNESSES FAILED TO PROPERLY IDENTIFY THE APPELLANT AS THE ONE WHO COMMITTED THE ROBBERY, IN THAT:**

**(a) THE PROCEDURE IN WHICH THE APPELLANT WAS FIRST CONFRONTED WITH THE EYE WITNESSES WAS IMPROPER AND WOULD LEAD ITSELF TO FAULTY IDENTIFICATION;**

**(b) THEIR IDENTIFICATION OF THE**

APPELLANT WAS NOT BASED UPON  
SUFFICIENT KNOWLEDGE; and

(c) THEIR IDENTIFICATION WAS NOT  
AN IDENTIFICATION, BUT MERELY  
AN ASSERTION THAT THE APPELLANT  
LOOKED LIKE THE INDIVIDUAL WHO  
COMMITTED THE CRIME.

II. THE 46 CALIBER AUTOMATIC RIFLE  
WAS IMPROPERLY ADMITTED INTO  
EVIDENCE IN THAT IT WAS NEVER IDENTI-  
FIED OR CONNECTED WITH THE APPELLANT.

### ARGUMENT

I. THE TWO STIPULATED EYE WITNESSES FAILED  
TO PROPERLY IDENTIFY THE APPELLANT  
AS THE ONE WHO COMMITTED THE ROBBERY,  
IN THAT:

(a) THE PROCEDURE IN WHICH THE

APPELLANT WAS FIRST CONFRONTED  
WITH THE LYF WITNESSES WAS  
INTERFERED AND WOULD LEAD ITSELF  
TO FAULTY IDENTIFICATION;

Appellant is aware of the rule that an eye  
witness' identification is sufficient to convict an  
accused of a crime. Appellant does not take  
exception to this rule, nor seeks to distinguish  
this rule. Appellant does contend, however, that  
he was not identified by either of the witnesses  
called by the State.

In Volume No. 3 of his Treatise on  
Evidence, Professor Wigmore in Section 786,  
at page 182 states:

In identifying persons or material  
objects, it is of course more effective  
if the thing to be identified is so placed  
with others that the witnesses' selection  
appears to be unaided."

**In Section 786 A, Professor Wigmore continues:**

**"Some of the most tragic miscarriages of justice have been due to testimonial errors in this field, the error being chiefly due to imperfect Recollection, with the occasional further complication of defective Perception and of Suggestion."**

**In discussing the technique for identification of accused persons, Professor Wigmore suggests that when presenting the accused for recognition he should be presented in company with a dozen others of not too dissimilar personalities (Volume 3, page 184). It is to be noted from the record in this appeal that State's witness Butler first pointed out Appellant while no other possible suspects were around. The method was stated by Mr. Butler as follows:**

**It would have been the next Monday morning after the robbery. It was my night off. I was home in bed, and the Police Department called me and asked if I would go up to Ogden with them to**



see if a man they had up there was the man who held up the store, which I did. And when we got up there I saw this man that held up the store up there in custody." (R. 22)

and;

"Q. And what happened after you saw Mr. George in Ogden?"

A. Well, he rode back to Salt Lake in a car with us, with myself and the two policemen, and then they took me home, and the next time I saw him was in the lineup that afternoon." (R. 22, and 23)

The Appellant did not have the advantage of anyone of similar characteristics or even dissimilar characteristics, standing by him when he was initially pointed out by witness Butler. Professor Wigmore states that at least a dozen persons of not too dissimilar personalities should be presented in company with the accused. Appellant had none.

State's witness Veenendaal did have to

decide between the Appellant and two other negroes. However, he had the assistance of witness Butler in pointing out the Appellant.

Line 16 of page 23 and line 2 of page 42 of the record show that Mr. Veenendaal and Mr. Butler, the two witnesses, were together at the only lineup of Appellant.

The following is a summary of objections which can be made to the method and procedure of initially linking the Appellant with the crime charged:

1. State's witness Butler was allowed to see the Appellant, without his being paraded with other persons in a lineup.

2. The Appellant was not placed among persons who were as far as possible of the same age, height, general appearance and color in



a lineup, when witness Butler just pointed him out.

3. The witnesses Butler and Veenendaal were together while waiting to see the accused paraded with the other two negroes at the lineup in which witness Veenendaal pointed out the Appellant.

This procedure casts grave doubt upon the usefulness of the testimony of witness Butler and Veenendaal, because of the errors possible due to imperfect recollection, defective perception, and the possibilities of suggestion.

1. THE TWO STATE'S EYE WITNESSES FAILED TO PROPERLY IDENTIFY THE APPELLANT AS THE ONE WHO COMMITTED THE ROBBERY IN THAT:

(a) THEIR IDENTIFICATION OF THE

**APPELLANT WAS NOT BASED UPON  
SUFFICIENT KNOWLEDGE.**

The record in this case shows that the State's witnesses could testify as to little more than the fact that the Appellant looked like the person who held up the Day & Night Market. At page 21, line 4 of the record, State's witness Butler was asked on direct examination:

**"Q. Did you observe any unusual marks or characteristics?"**

**A. No."**

On cross-examination witness Butler answered the following questions:

**"Q. Now, can you give us some more detail as to the exact color of this person that held you up?"**

**A. Well, he was brown, but I can't say what shade of brown." (Page 30, line 23)**

**"Q. What kind of face did this hold-up man have? Was it brown, long, wide?"**

A. I wouldn't say it was any longer, wider, or rounder than a normal face. Just average shaped face." (Page 31, line 8).

The testimony of State's witness Veenendaal was no more helpful in identifying Appellant as the one who committed the robbery.

At page 30, line 15, witness Veenendaal was asked:

Q. What type of hair did that person have?

A. He had short, black, choppy hair.

Q. What nationality or race was he?

A. He was from the Negro race.

Q. The person you saw at that time, when you say he was of the Negro race, what type of Negro would you say that would be for coloring?

A. He was a dark type.

Q. Was he tall or short?

A. He was about five feet six, seven."

At page 30, line 1, the prosecuting attorney

asked witness Veenendaal:

"Q. Did you look for any identifying features at that time?"

A. Yes. He didn't have any scars or anything on him that would identify him."

On cross-examination witness Veenendaal was asked:

"Q. Do you know that there are Negroes around here now of his general size and color and build?"

A. I could only assume that there are some." (R. 45, line 18)

and:

"Q. The only thing, the distinguishing mark that you can point out about this fellow that you saw in the Day and Night Market on June 5th is that he had a dark skin, and I believe you said something about his hair. What was that about his hair?"

A. Short, choppy hair.

Q. You have seen many Negroes with short, choppy hair, haven't you?

A. Yes, I have.

Q. And you have seen many Negroes with dark skin?

A. Yes, I have." (R. 45, line 25 and R. 46, line 1).

Thus, it is to be seen from the record that neither of the State's witnesses had any particular or specific trait, custom, or characteristic that they relied upon in saying that the Appellant was the one who had robbed the store. Their description of him was always in general terms, and he being one of average weight, height, characteristics and color, for his particular race, their description would fit any number of people who would be of similar characteristics.

# I. THE TWO STATE'S EYE WITNESSES FAILED TO PROPERLY IDENTIFY THE APPELLANT AS THE ONE WHO COMMITTED

**(c) THEIR IDENTIFICATION WAS NOT AN IDENTIFICATION, BUT MERELY AN ASSERTION THAT THE APPELLANT LOOKED LIKE THE INDIVIDUAL WHO COMMITTED THE CRIME.**

**The record speaks for itself as to this point.**

**At line 17 of page 31 witness Butler testified:**

**Q. And at that time this defendant looked like the man who had held up your store?**

**A. Yes.**

**Q. And that is about all you can say now, that he looks like that man?**

**A. Why, yes.\***

**And at line 38 of page 46 witness Voennendaal testified:**

**Q. So the truth is, the best you can say is that this defendant looks like the man you saw in this store that night, isn't it?**



A. Very close to him, yes.

Q. What was that? I didn't get your answer?

(The last answer was read by the reporter.)

A. Yes, he does look very, very similar to him."

## **II. THE .45 CALIBER AUTOMATIC PISTOL WAS IMPROPERLY ADMITTED INTO EVIDENCE IN THAT IT WAS NEVER IDENTI- FIED OR CONNECTED WITH THE APPELLANT.**

One of the basic rules of evidence is that an object must be properly authenticated prior to being admitted into evidence.

The principle of authentication requires that some evidence connecting the object with the accused be introduced before or at the time of introducing the object itself. That such an

**error in admitting an object without proper**



authentication is highly prejudicial to the rights of an accused, is pointed out by Professor Wigmore in Volume No. 4 of his Treatise on Evidence, Section 1167, page 251. Professor Wigmore points out two reasons why such evidence is objectionable:

"First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." (Ibid, page 254).

In Volume 7, Section 2129, at page 365.

Professor Wigmore states:

"Now, beyond all this, there is a general mental tendency when a corporeal object is produced as proving something, to assume, on sight of the object, all else that is implied in the case about it. The sight of it seems to prove all the rest. Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by

Roe, to understand, when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it; the missing element can clearly be kept separate as an additional requirement. But if the witness to the theft were to have to have a horse brought into the court room, and to point it out triumphantly, 'If you doubt me, there is the very horse!', this would go a great way to persuade the jury of the rest of his assertion and to ignore the weakness of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder.

This tendency, illogical though it may be, is deeply rooted in all persons, even the most intelligent and reflective; \*\*\*."

In support of the above proposition the Utah case of *State v. Aikers, et al*, 87 Utah 507, 51 P. 2d 1052, is cited. In the Aikers case the gun was held to have been properly admitted into evidence. However, it is to be noted that the gun was properly identified as belonging to one of the defendants. The Supreme Court stated in that case at page 1058 of 51 P. 2d:

**"The objection was properly overruled, since it would be necessary to identify the exhibit and connect it with one or both of the defendants before it could be received in evidence."**

**Thus it can be seen that Utah has accepted the universal rule that such incriminating evidence must be identified and connected with the defendant before it is admissible in evidence.**

**The record in this case is completely bare of any testimony whatsoever connecting the Appellant with the 45 Caliber Semi-Automatic Pistol admitted into evidence. The most that can be found in the record are statements by the State's witnesses that the pistol is the type that was probably used by the person committing the robbery. For instance, at page 33, line 4 of the record the gun was marked Exhibit P-1 for identification after the following testimony:**

**"Q. (By Mr. Child) I would like you to examine what has been marked as Exhibit P-1, and tell us, if you will,**

if you have seen this before?" (The gun referred to was marked "Exhibit P-1" for identification.)

"A. Well, I don't know whether I have actually seen this gun or not, but it was one substantially identical to it.

Q. To what?

A. That the hold-up man was holding at me, pointing at me."

The highly prejudicial nature of this exhibit cannot be denied. As Professor Wigmore has pointed out, the reasonable, but illogical inference in the minds of a jury arising from the sight of such a weapon is that the Appellant used this weapon. This inference is made while overlooking the fact that no connection between the gun and the Appellant has been shown.

It is to be noted that no objection was made at the trial to the admission of the pistol. If this had been the only irregularity it might well



he found that it did not constitute reversible error. But, coupled with the lack of a proper identification of the accused, the wrongful admission of the pistol into evidence tends to further implicate the Appellant with the crime. Though the jury may not have relied on the testimony of the two State witnesses, they may well have found the Appellant guilty by relying upon their testimony, bolstered by the presence of the pistol.

### CONCLUSION

The evidence in this case did not justify submission of Appellant's guilt to the jury, or a verdict of guilty.

While it is true that two State witnesses pointed out the Appellant as the one committing the robbery, they could point to nothing distinguishing about the Appellant. The most they

could say was that the Appellant looked like the one who committed the crime.

Coupled with the lack of identifying characteristic is the method in which the Appellant was first pointed out by both witnesses. As to the first witness, Butler, the Appellant was confronted with no other persons of similar or dissimilar characteristics. Witness Butler merely had to look at the Appellant and say he was the one -- not being required to pick the Appellant from anyone else. Witness Veenendaal pointed out the Appellant in a lineup consisting of only two other Negroes, with witness Butler in his presence. The pointing out of the Appellant in the court room is of little force, after all that intervened, it would seldom happen that the witnesses would not have come to believe in the Appellant's identity.

In addition, the admission of the 45 Caliber

Pistol into evidence without it being linked with the Appellant, was highly prejudicial. It allowed the jury to make the reasonable, but illogical, inference that the Appellant used this weapon. The sight of the weapon allowed the jury to assume all else that is implied in the case about it. Appellant was thus associated with the crime by the admission of the pistol, without the pistol ever being associated with the Appellant.

The conviction in the court below should be set aside, and a new trial granted Appellant, or in the alternative, that the conviction be reversed and Appellant set free.

Respectfully submitted,

Lon Rodney Kump,  
Attorney for Appellant.