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State of Utah v. Leamon George : Brief of Respondent

Utah Supreme Court

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SEP 19 1958

Clerk, Supreme Court, Utah

In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEAMON GEORGE,
Defendant and Appellant.

UNIVERSITY UTAH

DEC 19 1958

Case No.
8788

BRIEF OF RESPONDENT

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In the
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STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEAMON GEORGE,
Defendant and Appellant.

Case No.
8788

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On September 9, 1957, the jury impanelled to sit at the trial of the appellant returned a verdict of guilty of the crime of robbery (R. 114).

The State's first witness at that trial, Verle L. Butler, testified that during the early morning hours of June 5, 1957, while employed as a grocery clerk at the Day and Night Market (R. 14), he was accosted by a man with a gun (R. 17). The robber was later identified as the appellant by Mr. Butler (R. 16, 22). The robber first approached

Butler saying he wanted to buy a package of cigarettes. He reached for his wallet but rather than taking money from it to pay for the cigarettes, he extracted several papers, one of which he handed to the witness Butler with the command to "read the note" (R. 17). The note said, "This is a hold-up" (R. 18). He ordered Butler to empty the cash from two cash registers into a paper sack, (R. 18), and Butler did so because he was afraid that if he didn't he would be shot or otherwise harmed (R. 53). During this exchange, Butler and the robber were only three feet apart (R. 18). Because of the circumstances, he took special note of the man's features and clothing (R. 21).

While Butler was filling the paper sack with the money from the cash registers, another person, Mr. Veenendaal, started to enter the store. The robber, noticing Veenendaal, commanded him to stand outside the door (R. 19), but changing his mind a moment later, told him to come in the store and stand behind him (R. 20). This Veenendaal did. After Butler had put all the bills in the sack, the robber said "That's enough. I'm leaving. Put the note in the sack" (R. 20). With the money sack in hand, the robber left the store, turned to the right and disappeared (R. 20).

While the robber was in the store, Butler observed his features and saw that there was no unusual marks or characteristics, and also listened carefully to his voice (R. 21). He testified that the gun which the robber used was a 45 caliber semi-automatic hand gun (R. 22).

The Monday following the robbery, July 10, 1957, a police officer called Butler and asked him to go to Ogden to

see if he could identify a man being held in custody as the robber of the Day and Night Market (R. 22). In Ogden the appellant was positively identified by Butler as the robber (R. 22).

The afternoon of that same day, June 10th, Butler was present at a police lineup in the Salt Lake Police Station in which the appellant appeared. In the lineup were two other Negroes, the appellant and a Mexican. Out of this group the appellant was identified as the robber (R. 23).

The State's next witness, Richard Veenendaal, testified that during the early hours of June 5, 1957, at approximately 3 o'clock a. m., he was in the Day and Night Market. Just as he started to enter the store, he noticed a man standing at the counter with a gun in his hand, who turned to him and said "That is far enough. Stay right there" (R. 36). In obedience to the armed man's command, Veenendaal stopped just outside the door to the store, no more than three feet away from the armed man (R. 36). Veenendaal testified that the store was well lighted, and, he was therefore able to carefully observe the armed man. A moment later Veenendaal was told to come inside the store and stand by the magazine rack (R. 38); this he did, and being only five feet away from the armed man, had ample opportunity to again study his appearance (R. 38, 40). Veenendaal testified that the gun used by the robber was an Army 45 (R. 41).

A gun similar to the one used by the robber was offered into evidence for illustrative purposes, there being no ob-

jection raised by appellant's attorney, it was received (R. 41).

About a week later in a lineup at the Police Station, Veenendaal again saw the appellant and identified him (R. 42), and during the trial, he positively identified the appellant as the robber (R. 43).

The next witness called on behalf of the State was H. A. Orencole, who testified that, as a Salt Lake police officer, he arranged for a lineup to be held at 1 o'clock on June 10, 1957, in which he had three colored men and one Mexican man (R. 50). At the time of the lineup he had each individual in the lineup speak, turn around and otherwise show himself (R. 50).

The defense produced two witnesses, who testified as follows:

Cornelia C. Johnson, the first witness, testified that she was acquainted with the appellant and that during the first part of June, 1957, he was a roomer in her home (R. 57). She testified that during the early morning hours of June 5, 1957, the appellant was in her home and was engaged in a card game with witness's daughter, son-in-law and another roomer. She testified that around 2:30 she observed the defendant lying on the floor drunk (R. 63).

The next witness called by defense was Jerry L. Carter, Jr., who testified to substantially the same facts as did Mrs. Johnson, but added that he helped carry the appellant up to his bed at approximately 2:30 or 3 o'clock on the morning of June 5th and that it was necessary to carry him to his bed because he had passed out (R. 86).

Because the next witness for the defense would testify to the same facts as had Jerry L. Carter, counsel for the State and defendant stipulated that her testimony would be the same as the previous witness, and the jury was instructed by the Court that if the witness were to testify she would have testified to the same facts, and that "She has in effect by this stipulation testified" (R. 99).

STATEMENT OF POINTS

POINT I.

THE STATE'S WITNESS IDENTIFIED THE APPELLANT IN OPEN COURT AND THE SUFFICIENCY OF SUCH IDENTIFICATION IS A MATTER FOR THE JURY TO DETERMINE.

POINT II.

OBJECTION TO THE ADMISSION INTO EVIDENCE OF THE 45 CALIBER AUTOMATIC PISTOL CANNOT NOW BE RAISED SINCE COUNSEL DID NOT OBJECT TO ITS ADMISSION DURING TRIAL.

ARGUMENT

POINT I.

THE STATE'S WITNESS IDENTIFIED THE APPELLANT IN OPEN COURT AND THE SUFFICIENCY OF SUCH IDENTIFICATION IS A MATTER FOR THE JURY TO DETERMINE.

On pages 16 and 17 of the Record appears testimony relative to the State's witnesses' identification of appellant as the robber. Mr. Child, Assistant District Attorney, in examining Mr. Butler, elicited the following information:

"Q. Have you seen him since that time?

"A. Yes.

"Q. Is he in the courtroom today?

"A. Yes.

"Q. Will you point him out for the jury please?

"A. The gentleman to the right of Mr.—

"Q. Mr. Oliver?

"A. Oliver.

"THE COURT: You mean 'left,' don't you?

"THE WITNESS: To my right.

"Q. (By Mr. Child) To your right. Would that be to Mr. Oliver's left?

"A. Yes.

MR. CHILD: May the record show that the witness has indicated the defendant, Leamon George?

"THE COURT: It may so indicate.

"Q. (By Mr. Child) Mr. Butler, upon Mr. George's entering the store, can you tell us what happened?

"A. Well, he came in the store. This other fellow was still in there, and he just kind of walked around looking at various shelves, and so forth, until this other fellow had left.

"Q. And then what happened?

"A. Then he came to the counter and asked me for a pack of Pall Mall cigarettes, which I got for

him. He reached for his wallet to pay for them, and as he was looking for the money in his wallet he took several papers, like he had a dollar bill folded up inside the wallet. He took a bunch of papers out, laid them on the counter. He got the dollar, handed it to me. I rung up the sale and was making change and when I looked up he had a gun pointing at me and said, 'Read the note.'

"While I was ringing up the sale and getting the change he put all his papers but the one back in his wallet. There was this one little white paper folded up to about a two-inch square lying on the counter. I picked up the note and read it and it said, 'This is a hold-up' " (R. 16-17).

Also, on page 22 of the Record, Butler again asserted positive identification of appellant as the robber.

"Q. When you saw that man, had you seen him before?

"A. Well, he held us up.

"Q. Have you seen him since?

"A. Yes.

"Q And who was the person in Ogden at the jail?

"A. Mr. George.

"Q. And that is the defendant in this action?

"A. Yes" (R. 22).

Mr. Veenendaal, positively identified the appellant as the robber. On page 43 of the Record appears the following:

"Q. And have you seen the person that held the gun on you on June 5th of this year, which you

watched take the sack with the money in it from Mr. Butler, have you seen that person today?

“A. Yes, I have.

“Q. Is he in the courtroom at the present time?

“A. Yes, he is.

“Q. Will you point him out for the jury, please?

“A. The gentleman in the cream colored suit next to Mr. Oliver.

“Q. Sitting at counsel table, to the far left of counsel table?

“A. Right.

“MR. CHILD: May the record show that the witness has indicated the defendant, Leamon George?

“THE COURT: It may so indicate” (R. 43).

Sufficiency of identification of an accused has always been held to be a question for the jury. *State v. Lanos*, 223 P. 1065, 63 Utah 151. See also: *People v. Barnett*, 323 P. 2d 96, . . . Cal. App. 2d . . . ; *People v. Weims*, 321 P. 2d 884, . . . Cal. App. 2d

Appellant contends that the evidence is insufficient to show he robbed the store. It is made to appear that appellant was not identified but that the effect of the State's witnesses' testimony was merely that he looked like the robber. This circumstance is urged as a reason why the identification was insufficient. But it is not a question of law. Whether there was any distinct characteristic that was observed or not by the witnesses were questions of fact for the jury. It certainly cannot be said that there was no substantial evidence that the appellant was the person who robbed the Market. To the contrary, the testimony of the

State's witnesses was sufficient to convince the jury that the appellant was the robber, in spite of the testimony of witnesses produced in his defense.

The question of extra-judicial identification raised by the appellant in his brief has no bearing upon the identification of appellant in court. Although the District Courts of the state have for years allowed testimony of extra-judicial identification to be admitted at trial, the Supreme Court of this state has never ruled upon this problem. Our courts have apparently adopted the rule used in California, that there is no error in admitting testimony concerning extra-judicial identification. See *People v. Hale*, 222 P. 148, 64 Cal. App. 523; *People v. Garcia*, 256 P. 876, 83 Cal. App. 463.

There are very few cases in Utah concerned with the problem of identification. Other than the *Lanos* case above cited, the only other two that the writer could find were *State v. Karas*, 136 P. 788, 43 Utah 506, and *State v. Kilpatrick, et al.*, 173 P. 2d 284, 110 Utah 355. Both cases concern the identification of the accused by his voice rather than by physical appearance, and in both cases the identification made by the State's witness was held to be sufficient. In the *Kilpatrick* case, it was not even required that the identifier be familiar with the voice of the person identified since the identification was spontaneous and occurred very soon after the criminal act of the accused.

It is submitted that the identification made by the State's witnesses at the trial was sufficient and any question concerning the extra-judicial identification cannot now

be raised, since the appellant failed to raise an objection to it at trial.

POINT II.

OBJECTION TO THE ADMISSION INTO EVIDENCE OF THE 45 CALIBER AUTOMATIC PISTOL CANNOT NOW BE RAISED SINCE COUNSEL DID NOT OBJECT TO ITS ADMISSION DURING TRIAL.

On pages 40 and 41 of the record appears the following, relative to the admission of the 45 caliber automatic pistol into evidence:

“Q. Did you have an opportunity to observe the gun that he was holding?

“A. Yes.

“Q. What type of gun was it?

“A. Army 45.

“Q. Are you familiar with such weapons?

“A. Yes, I am.

“Q. I will now show you what has been marked Exhibit P-1 and ask if you have seen this before?

“A. Very similar to it, same type he was holding.

“* * *

“MR. CHILD: We would offer Exhibit P-1 in evidence for illustrative purposes, Your Honor.

MR. OLIVER: There is no objection.

“THE COURT: It will be received.”

No objection was raised to the admission of the pistol into evidence. A well established rule of appeal law is that only

those questions raised and reserved during the hearing may be considered by the Appellate Court. See 3 Am. Jur. 25, Sec. 246, Appeal and Error. The rule has been thus established because it is only just to require that reversals shall not be granted upon grounds of objections which might have been obviated by a timely objection raised at trial. The claimed error in this case is of minor significance. The 45 caliber automatic pistol was submitted for illustrative purposes; only to prove one of the elements of the crime appellant had been charged with. It is submitted that inasmuch as appellant failed to raise an objection at trial, he cannot now demand the court consider the question.

CONCLUSION

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

Respectfully submitted,

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