

1992

The State of Utah v. Frank L. Powell : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
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DOCKET NO. 920162CA

IN THE COURT OF APPEALS IN AND FOR

THE STATE OF UTAH

THE STATE OF UTAH	:	
	:	Case No. 920162-CA
Plaintiff and	:	
Appellee,	:	
	:	
vs.	:	BRIEF OF APPELLANT
	:	
FRANK L. POWELL,	:	Priority Classification No. 2
	:	
Defendant and	:	
Appellant	:	

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM THE CONVICTION OF
THE DEFENDANT - APPELLANT ON THE CHARGE
OF BURGLARY OF A DWELLING, A SECOND DEFREE FELONY

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FILED

OCT 19 1992

Mary T Noonan
Clerk of the Court
Utah Court of Appeals

IN THE COURT OF APPEALS IN AND FOR

THE STATE OF UTAH

THE STATE OF UTAH :
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 Plaintiff and : Case No. 920162-CA
 Appellee, :
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 vs. :
 : BRIEF OF APPELLANT
 FRANK L. POWELL, :
 : Priority Classification No. 2
 Defendant and :
 Appellant :

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920162-CA
vs. :
FRANK L. POWELL, :
Defendant-Appellant. : Priority Classification No. 2

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal concerning the conviction of the defendant by jury trial in the Fourth Judicial District Court.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

The issues on appeal are first:

1. The testimony of the eyewitnesses, Pam and Brent Jackman was not reliable, and therefore did not allow the defendant, Frank L. Powell the benefit of due process.

2. The trial court erred in allowing the past criminal history of witnesses and the defendant to be admitted as testimony.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on

appeal is contained in the body of this brief.

STATEMENT OF THE CASE

The defendant, Mr. Powell, was charged and convicted of Burglary, a second degree felony.

The defendant was said to have been driving the car that was present at the time of the burglary and therefore allegedly aided and abetted a burglary. However, there was testimony at the trial that the eyewitnesses could not properly identify the defendant as the driver. There was also testimony at the trial that Mr. Powell was at a card game in Utah County when the burglary took place in Juab County.

STATEMENT OF FACTS

On December 2, 1989, at approximately 8:30 p.m., Pam Jackman was getting groceries out of her van. She heard a noise and looked across the street, just in time to see feet going through the window of a vacant home. She then yelled, "What the heck do you think you're doing?" She got no response from the individuals entering the house. She then told her husband to call the police. Her husband told her to go call the police and he would go out on the porch. (T. page 71.)

After completing the call to the police, Mrs. Jackman joined her husband Brent on the porch. The individuals had come

out of the house, they proceeded to walk down the road in front of the Jackman's home. One of the individuals walked up to the front porch of their home. The Jackman's did not have a front porch light and therefore the individual was in a shadow. The individual had about a ten minute conversation with Brent Jackman. (T. page 72.) Pam Jackman overheard from the conversation that the individuals believed that they would find close to \$8,000.00 in the vacant house. (T. page 73.)

Then the individuals proceeded to walk west and walked behind the school bus parked to the side of the Jackman's house. Pam Jackson then testified that she saw tail-lights and heard doors shutting like someone was getting in the car. (T. page 75.) Mrs. Jackman then testified that she could see the vehicle in the street lamp and there were three people in the car. She also testified that she could see that the driver was wearing a sheep-lined coat and a dark colored hat that was covering his face so she really couldn't see the drivers face. (T. page 75 and 76.)

The testimony of Brent Jackman is essentially the same as his wife. The consensus is that they could not clearly identify the driver of the car. (T. page 75, 76, 95, 100 and 107.)

There was also testimony at the trial that Mr. Powell was at a card game. Three different individuals testified that he was playing cards on that night at 8:30 p.m. (T. page 195, 204, and

216.)

The next day, the defendant was found, by police officers driving the car that was identified as the car that was leaving the scene of the burglary.

ARGUMENT

The trial court failed to caution the jury of the unreliability of the testimony of Pam and Brent Jackman, and thus denied the defendant due process. The Jackman's testimony did not sufficiently establish the defendant as the driver of the vehicle on the night of the burglary.

In addition, the Court Improperly admitted the criminal record of the defendant and a defense witness into evidence. This material was highly prejudicial and not materially probative of the issues before the court. Therefore the court did not apply the correct law to the facts.

POINT I

EYEWITNESSES TESTIMONY WAS NOT RELIABLE AND THE ADMISSION

THEREOF DID NOT ALLOW DEFENDANT DUE PROCESS

Since the Defendant was not actually observed clearly by Pam and Brent Jackman as the driver of the car on the night of the burglary, their testimony should have been considered carefully by the trial court. The jury should have been cautioned as to the reliability of eyewitness testimony, so that the jury could have

had a better understanding of the validity of the testimony.

In a similar case State v. Ramirez 817 P.2d 774, involving eyewitnesses to a crime, the court found; quoting State v. Long, 721 P.2d 488 (Utah 1986);

Although research has convincingly demonstrated the weakness inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness. Moreover, the common knowledge that people do possess often runs contrary to documented research findings.

That court then continues to state that jurors may not completely understand the fallibility of eyewitness testimony and therefore may give the testimony of an eyewitness too much weight.

There are many conditions that could have affected the reliability of Pam and Brent Jackman's eyewitness testimony. First, it was 8:30 p.m. in December, they have both testified that they could not see clearly, let alone see the driver of the car, because of the lighting conditions. They have also testified that they could not see the face of the driver, only that the driver had a thin face and was wearing a cowboy hat.

The United States Supreme Court set out in Neil v. Biggers, 409 U.S. 188, that the court must take into consideration all of the circumstances surrounding the identification, and must use five factors to find the validity of the identification. These

factors are as follows:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Based on previous rulings by the courts, the testimony of the eyewitnesses, and the facts presented, the trial court should have cautioned the jury that eyewitness testimony is not always accurate.

POINT II

THE TRIAL COURT ERRED IN ALLOWING PAST CRIMINAL HISTORY OF WITNESSES AND DEFENDANT TO BE ADMITTED AS TESTIMONY

There were several individuals who had been playing cards with the Defendant on the night that the burglary had taken place. Tracy Valdez, Bud Comer, and Alfonso Valdez all testified that Mr. Powell was at a party with them, playing cards at the time of the burglary.

The trial court, over the objection of the defendant, allowed the State to present evidence that made these individuals look unreliable in the eyes of the jurors. Courts have found that testimony which may cause doubt in the jurors minds as to

credibility of the witnesses to be inadmissible if under prejudice will result. In Patterson v. Serafini, Colo., 532 P.2d 965 that court states:

we cannot allow countenance - questions, such as that propounded here, which can cause a doubt in the jury's mind as to the prosecutrix' credibility when there is no reasonable basis in fact for the interrogation.

In the present case the State referred several times to the past criminal record of the defendant's witnesses. This was not relevant to the case and was only used to discredit the witness when there was no basis for the questioning.

Based on the lack of good judgement of the trial court in allowing the past criminal records of the defendant's witnesses to be admitted as testimony, this court should find that the criminal record of witnesses is irrelevant in this particular case and should not have been admitted into testimony.

CONCLUSION

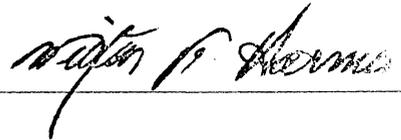
Based on the foregoing arguments, this court should reverse and remand the trial courts decision and remand the matter for a new trial.

DATED this 15th day of October, 1992.


MILTON T. HARMON
Attorney for the Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to: Mr. Frank L. Powell, c/o Angie Longman, 315 E. 100 N. Pleasant Grove, UT 84062; Mr. Donald J. Eyre, Jr., Juab County Attorney, 125 North Main, Nephi, UT 84648; and to Mr. R. Paul Van Dam, Utah Attorney General, State Capitol Building, Salt Lake City, UT 84114; first-class postage prepaid, this 15th day of October, 1992.



ADDENDUM

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

[Criminal actions — Provisions concerning —
Due process of law and just compensation
clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 12. [Rights of accused persons.]

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. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.