

2015

**Todd Wayne Mulder, Plaintiff/Appellant, vs. State of Utah,
Defendant/Appellee**

Utah Court of Appeals

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Case no. 20140642-CA
In The
Utah Court OF Appeals

Todd Wayne Mulder
Plaintiff / Appellant
V.
State of Utah
Defendant / Appellee

Reply Brief of Appellant
Argument

I

Most of everything concerning this issue was thoroughly presented in the Appellant's P.C.R.A. petition and Appellate brief. Although Appellant would like to clarify a few things,

B-1 The state argues that if somehow Cambell had given his recantation before trial, it's only use would have been to impeach his testimony. Even though the District Court declined to rule on whether this was mere impeachment evidence, the State would like you to rule that it was.

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This is not merely impeachment evidence, Cambell's testimony was the crux of the States case.

Cambell was unquestionably the testimony that persuaded the jury to find Mulder guilty. The physical evidence, the pawn slip, only shows that Mulder pawned a coin. And Mulder had already admitted to buying coins from Cambell. That's it! And the only other evidence was Schlegel's testimony, and she only knew what she was told before the fact and then after the fact. The jury knew that she was not there so they relied on Cambell's testimony. So it was not merely impeachment evidence.

B-2 The State claims that Mulder failed as a matter of law to establish that no reasonable juror could have convicted him.

First the state says that a new jury could rationally choose to believe Cambell's earlier account rather than his new one.

Mulder asserts that Cambell's new account is totally consistent with his own trial testimony. Cambell did not

Sit in the Courtroom during Mulders testimony. Cambell's affidavit states That he has not talked to or seen Mulder since the trial. With this in mind, Cambell could not possibly have made those statements unless they were the truth.

Also to be considered is the two statements by inmates Floyd Robinson and Derek Clay who stated that Cambell admitted to them that he had lied at trial about Mulders involvement in the crime.

When Considering this, no reasonable trier of fact could possibly have found the petitioner guilty of these crimes. So the affidavit does satisfy the Controlling standard.

Second, the State claims that this affidavit conflicts with Mulders account at trial because Cambell says "he did it completely alone". In context, he is saying he went to St. George alone and committed the robbery. So when Mulder said that the idea to rob the coin shop was Schlegels idea, does not conflict with Cambells new statement. R255:565
The same thing is true with the other statements the State referred to

that Mulder made.

So if Cambells recantation were introduced at a retrial it would certainly not undermine Mulders defense. Actually, Cambells recantation strongly corroborates Mulders account from the beginning, and he would most likely be exonerated as shown in his Appellate brief and P.C.R.A. petition.

Third, the state claims that a jury could still convict based on Schlegels testimony, wherein she testified that Mulder actively and voluntarily participated in the planning and execution of this crime.

The state claims that Mulder himself corroborated much of Schlegels account. The state claims that when Mulder left, he told her that he was going to St. George to assist Cambell in the robbery. But, the last thing that Mulder said to Schlegel before he left was "when we come back we will have money, but not near as much as you think we will have". See transcript March 5 pg. 473 line 9-11, 22-25. Mulder says this because he thinks that Cambell is going to do his Casino thefts, not a robbery. The state left out the fact that all through Mulders testimony he made it clear that he was just saying these things to mislead Schlegel.

Then the State claims that Schlegel would be the most credible witness because she didn't have a criminal record.

Had Mulders trial counsel not been ineffective they could have easily shown the jury that Schlegel's credibility was questionable. Mulder even informed them of many instances where she narrowly avoided going to jail. They did literally no investigation on her. But a new lawyer at a new trial could easily put her credibility in question.

The State claims that Cambells recantation would be counteracted by Schlegels account, Mulders admissions at trial that he was involved in multiple aspects of this crime, and the physical evidence linking him to the crime. [which is a pawn slip where he pawned a coin.]

Throughout Mulders p.c.r.A. petition and Appellate brief he has shown how Schlegel lied while on the stand about the gun. She was totally immunized from prosecution even though she was possibly facing the same charges as Appellant. And she was not even in the same State as where the crime happened. She only knew what she was being told by Mulder and Cambell.

The state now relies on Mulders admissions at trial. But, the state is trying so hard to make it look like Mulder has admitted to elements of this crime. The state repeatedly points to references to the record where, according to the state, Mulder would appear to be admitting to elements of the crime. This is misleading because if you read all of Mulders testimony you can see that he "Never" admitted to planning or committing the crime. He only talked about it to make Schlegel think he was going to do it.

The only physical evidence in this entire case is the pawn slip. But, Mulder admitted to buying some coins from Cambell shortly after the crime. It should be noted that Mulder was in the business of buying and selling coins, jewelry and other items on a daily basis.

Finally, the state relies on Schlegel's credibility which is suspect for many reasons. (2) What the state calls "Mulders admissions", but as explained, is not any admission at all. (3) The physical evidence, "The pawn slip". That's no proof of murder, robbery and kidnapping. Especially after all the testimony explaining it.

Considering the foregoing, this leaves no doubt that no reasonable juror could convict.

II

Most of everything concerning this issue was thoroughly presented in Appellant's brief and his P.C.R.A. petition. But he would like to clarify a few things.

The State Claims that Mulder had to prove more than just that counsel overlooked a meritorious claim, because Appellate counsel has no constitutional obligation to raise every non-frivolous issue. Petitioner would like to point out that he informed his Appellate counsel about this issue and the letter to his attorney is included with his Appellate brief as Attachments A1 and A2. So counsel didn't simply overlook this meritorious issue, she refused to include it in his appeal. It should also be noted that his Appellate attorney only raised (1)-one issue on Appeal. And this was a long trial.

The State was claiming that Mulder himself corroborated much of the accomplices testimony. The State said that Mulder admitted that he recieved some of the stolen coins after the robbery. This is not true. Mulder testified that he only purchased some coins from Cambell days after the robbery.

And Mulders testimony clearly detailed how he gave Schlegel a ride to a pawn shop across town so she could pawn her gold coin. Schlegel forgot her liscence so Mulder pawned it for her.

Finally, the state claims that the instruction was unlikely to be given. We will never know now. The fact remains that the Judge had the option to allow this crucial instruction. If the jurors were told to view Cambell's and Schlegel's testimony with caution and distrust the outcome would have very likely been different.

III

Most of everything concerning this issue was thoroughly presented in the Appellants brief and P.C.R.A. petition. Although, there is one issue petitioner would like to cover.

Throughout the States brief the States Attorney focuses on what they call a "contradiction" in Schlegel's testimony. Although, the issue that petitioner claimed in his Appellate brief concerning Schlegel's description of the gun is not brought up in the States brief. It was just skipped over. And that is the claim that the

prosecutor knowingly presented false evidence.

When Schlegel testified at trial she said the gun was a huge gun. She showed how big with her hands, which was over 12" long. She described it as a "Dirty Harry" type gun. Any criminal prosecutor should know with absolute certainty that a 32 caliber revolver could not in any way be misconstrued as a "Dirty Harry" gun. This fact alone shows that Schlegel was perjurying herself.

The prosecutor should not have allowed this witness testimony to stand or even be heard by the jury.

IV

This issue is thoroughly covered in appellants brief and P.C.R.A. petition and no further argument is needed here.

V

This issue is thoroughly covered in Appellants brief and P.C.R.A. petition and no further argument is needed here.

VI

This issue is thoroughly covered in Appellants brief and P.C.R.A. petition and no further argument is needed here.

VII

This issue is thoroughly covered in Appellant's brief and P.C.R.A. petition, but petitioner would like to touch on an issue briefly.

The States argument is that Mulder was allowed to present his defense theory. Mulder argues that, but also he complained to the Judge about a total breakdown of communication between he and his attorney's. Mulders attorneys were very upset because Mulder refused to seek a plea bargain. His attorney, Boyack even threw the papers across the room at that time. This was a conflict of interest that hindered Mulders defense greatly. Judge Beacham just denied Mulders request for alternate counsel without any inquiry whatsoever.

Conclusion

For the reasons stated herein, petitioner respectfully prays that this Court will issue its order to vacate his convictions and grant him a new trial.

Certificate of Mailing

I hereby certify that on this 18th day of June 2015, I provided true and correct copies of the foregoing reply brief, and motion for leave to deviate from the requirements for filing brief to each of the parties listed below by placing the copies in the U.S. mail, first class postage pre-paid, and addressed as follows:
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