2016

State of Utah, Plaintiff/Appellee, vs. Santiage Aponte, Defendant/ Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SANTIAGO APONTE, Defendant/Appellant	Case No. 20150154-CA Appellant is incarcerated

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CONVICTION, JUDGMENT, SENTENCE AND ORDER FOR COMMITMENT, AND DENIAL OF APPELLANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, THE HONORABLE SAMUEL MCVEY, PRESIDING.

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SUMMARY OF ARGUMENT

1. The State's proposed police expediency exception is one where no suggestive identification procedure could be construed as unnecessary, such that it is more permissive of official misconduct than controlling federal precedent. Accordingly, it must be rejected.

2. Aponte's challenge to the State's 404(b) evidence was fully considered by the trial court, was preserved below, and is therefore properly raised on appeal.

ARGUMENT

I. THE STATE ASKS THIS COURT TO DEVIATE FROM CONTROLLING PRECEDENT AND CREATE A POLICE EXPEDIENCY EXCEPTION TO DUE PROCESS.

The State concedes that an eyewitness's identification of a suspect by photograph that is "unnecessarily suggestive and conducive to irreparable mistaken identity as to deny the accused a fair trial" must be suppressed. Br. Appe. 29 (quoting *State v. McCumber*, 622 P.2d 353, 357 (Utah 1985)). Yet the State quickly abandons this standard and instead adopts the trial court's focus on police expediency, arguing that the single photograph of Aponte that was shown to witnesses at the crime scene "was not unnecessarily suggestive because it helped [police] establish a perimeter around the gas station and apprehend a suspect that was engaged in a reckless, dangerous spree." Brief of Appellee (Br. Appe.) at 13.

Aside from presupposing that the passenger, Rebecca Robertson, was a credible witness and that Aponte was actually the driver of the stolen vehicle, under the State's (and the trial court's) police expediency theory, no identification procedure could be considered unnecessarily suggestive as long as a perpetrator is still at large. Indeed, the State does not articulate any suggestive identification procedure that could be construed as unnecessary under these circumstances. Accordingly, the State's proposed expediency exception that was also embraced by the trial court would obviously swallow the rule against impermissibly suggestive identification procedures and give law enforcement a green light to suggest any suspect they wish without fear of exclusion.

Thus the parties' dispute turns primarily on the scope and meaning of "unnecessarily suggestive." *Neil v. Biggers*, 409 U.S. 188, 196 (1972).[1] As noted, under the State's broad sweeping expediency exception, there is no such thing. Any suggestive identification procedure is not only permissible. It will also be construed as necessary so long as any underlying police expediency can be articulated. However, there is no precedent that supports the State's position. Aside from creating an exception to the right to due process that swallows the rule, the State's theory is also not logical, as due process prohibits any suggestive procedures that result in an inaccurate or unreliable identification and, consequently, an unfair trial.

The correct legal standard requires a court to consider whether law enforcement's identification procedures were suggestive such that they had a corrupting effect on the witnesses' abilities to make an accurate identification. *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 181 L.Ed.2d 694, 80 U.S.L.W. 4073 (2012) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140) ("Where the 'indicators of [a witness'] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed."). Aponte has already demonstrated that they did have a corrupting effect. Br. Appte. 10-17.

Here, police displayed a "fairly large" photograph of only Aponte on a computer screen that was left largely unattended at the "chaotic" scene, while occasionally asking

[1] The State criticizes the trial court's due process/reliability analysis and argues at length that Utah courts should follow the federal model and not even reach the question of a due

witnesses who were milling about and sometimes mingling in groups "if this was the one they seen run from the vehicle." R324:9-10, 18-19; R325:12, 16-17, 29; R328:147; R328:157, 179, 196. The witnesses were also given to understand that police believed the individual in the photograph was the driver of the stolen vehicle. R328:155.

The State cites *Simmons v. United States*, 390 U.S. 377 (1968) as support for its claim that police expediency justified these suggestive identification procedures. Br. Appe. 30-33. In doing so the State does not respond to Aponte's argument in his opening brief demonstrating that *Simmons* actually requires exclusion of the identification evidence in this case. *See*. Br. Appt. 11-13 (distinguishing *Simmons* on several facts, including that in *Simmons* five witnesses were shown six different photographs that included the suspects along with several other people; the witnesses were each alone when police showed them the photographs so they would not taint each other's recollections; and there was nothing to suggest that police led witnesses to believe that any of the individuals portrayed in the photos were involved in the crime). All of these factors that save the identification procedure in *Simmons* do not exist here, as witnesses were shown only Aponte's photo, the witnesses were not alone during the identification process, and the witnesses were led to believe that the individual shown to them was involved in the crime. R324:9-10, 18-19; R325:12, 16-17, 29; R328:147; R328: 155, 157, 179, 196.

The State also does not address or discuss the language in *Simmons* and quoted by Aponte that cautions against the dangers inherent in suggestive identification procedures

– giving concrete examples of what *not* to do that are, coincidentally, identical to the impermissibly suggestive tactics employed here. Br. Appt. 13 ("Even if the police subsequently follow the most correct photographic identification procedures and show [a witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw [...]. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph, rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons*, 390 U.S. at 383-84).

Because it was impermissibly and unnecessarily suggestive, this initial identification procedure also tainted the subsequent one that took place ten months later, as the witnesses were apt to retain the memory of Aponte's image shown to them the first time when they viewed the photo array. *Id.* Compounding that initial taint, police told the witnesses that the photo array shown to them included the person that police believed committed the crime. R325:19-20, 29, 37; R328:160-61, 164-65, 181-82. The State's brief does not address this fact.[2] Rather, like juries, the State "seems to be swayed the

[2] The State's observation that Aponte's counsel misread the record regarding the timing of Warren Smith's internet search for Aponte is correct.

most by the confidence of [the eyewitnesses], even though such confidence correlates only weakly with accuracy." *State v. Clopten*, 2009 UT 84, ¶15, 223 P.3d 1103.

Because there is no police expediency exception to the fundamental right to due process, which includes a trial that is fair and evidence that is reliable, the State's arguments should be rejected. Moreover, if the State's position had any merit, rather than provide a more stringent and protective legal framework for evaluating Aponte's claims, the Utah's state due process standard would be more permissive to police misconduct rather than less so, and thus not only run counter to Utah appellate courts' claims to the contrary, it would violate controlling federal precedent.

Finally, the State presents an alternative argument that even if the eyewitness evidence was the product of impermissible suggestion, the resulting error was harmless beyond a reasonable doubt because Rebecca Robertson was a credible witness. The State also argues that it is Aponte's burden to establish "a reasonable likelihood of a more favorable result had the identification not been admitted." Br. Appe. 45. Regardless of who bears the burden on this issue, Aponte demonstrated the harm and prejudice that resulted from admission of the tainted eyewitness identifications in his opening brief, as well as the record facts undermining Robertson's credibility. *See*, Br. Appt. 16-17. He will not reargue those points here.

II. THE STATE ERRS IN CONCLUDING THAT APONTE'S 404(b) CHALLENGE IS UNPRESERVED.

Aponte's trial counsel consistently objected to the State's 404(b) evidence below on the ground that it was improper character evidence and was thus more prejudicial than probative. R187-191; R:327:3, 6-7, 9-10, 12; R329:208 (renewed objection at trial). Prior to trial, the trial court considered all of the proposed "non-character" purposes of this evidence and expressly concluded that it was not more prejudicial than probative. R327:14.

The State argues that because Aponte's trial counsel did not make specific objections to the purported non-character purposes that the trial court admitted the evidence to prove, his appellate claims are not preserved. The State also misapprehends Aponte's claims and argues that he has abandoned his more-prejudicial-than-probative claim on appeal. Neither of these statements is true.

This Court rejected a similar claim in *State v. Dominguez*, 2003 UT App 158, ¶¶ 18, 19, 72 P.3d 127 (rejecting the State's argument that the defendant "did not properly preserve this issue for appeal because he failed to object at trial on the same rule 404(b) grounds urged at the pretrial proceeding. ... Although Defendant's objections could have been clearer, they were raised during the pretrial hearing and provided the trial court with an opportunity to address the objections. *See id.* at ¶ 10. Therefore, Defendant was not required to object at trial to preserve the issues for appeal because the pretrial hearing was held on the record, Defendant timely objected, the judge made a definitive ruling on

the motion, and the same judge presided at trial.").

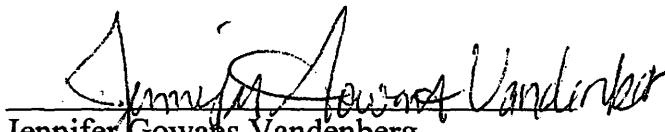
There is no dispute that the trial court did not have an adequate opportunity to consider the purported non-character purposes of this evidence, as the court considered those purposes in substantial detail both at the pretrial hearing on the State's motion to include this evidence and in the court's ruling. R187-191; R:327:3, 6-7, 9-10, 12; R329:208

CONCLUSION

Because his right to due process of law was violated by the admission of unreliable eyewitness identification that was the product of suggestion, and improperly admitted character evidence, Aponte's conviction should be reversed and this case remanded for a new trial.

Submitted this 14th day of March, 2016.

JENNIFER K. GOWANS, P.C.



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CERTIFICATE OF COMPLIANCE

I hereby certify that in accordance with the applicable Rule of Appellate Procedure, this Brief of Appellant complies with all formatting and size requirements.

Jennifer Gowans Vandenberg

CERTIFICATE OF MAILING

I certify that on this 14th day of March, 2016, I caused to be mailed, postage prepaid, two true and correct hard copies and one electronic copy of the foregoing Reply Brief of Appellant to the following:

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