1968

Anthony Montoya v. State of Utah : Brief of Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 11260

ANTHONY MONTOYA, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from the judgment of the Third Judicial District Court of Salt Lake County, Honorable Bryant H. Croft presiding.

VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent

ANTHONY MONTOYA
In Pro Se
P. O. Box 250
Draper, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

CASES CITED

TABLE OF CONTENTS

Page

CASES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 11260
ANTHONY MONTOYA,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Anthony Montoya, appeals from a conviction of robbery.

DISPOSITION IN THE LOWER COURT

The appellant was charged with and convicted by a jury of robbery. The Honorable Bryant H. Croft imposed the statutory

indeterminate sentence of not less than five years and which may be for life.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the Third Judicial District Court of Salt Lake County, State of Utah.

STATEMENT OF FACTS

Late in the evening of January 30, 1967, three men entered a tavern at 706 South State Street in Salt Lake City. While one of the men stood at the door holding a gun on the owner, the two others approached the owner and one of them struck him, then ordered him to lie on the floor. The other opened the cash register and removed $135.00. The three then fled (R.45-51).

Subsequently, the tavern owner identified appellant from a photograph, and later

picked appellant out in a line-up, indicating that he was one of the men who had robbed him three days earlier (R.73).

Appellant was represented at trial by a competent attorney who had been a member of the bar for seven years, and who had extensive experience in the trial of criminal cases. Three witnesses, as well as the appellant himself, testified in appellant's behalf that he had been at home at the time of the robbery. However, the jury, in its discretion, chose not to believe the alibi defense and returned a verdict of guilty.

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE CONDUCT OF HIS DEFENSE.

The fundamental privilege of an accused to the effective assistance of counsel in the conduct of his defense is well established in our system of law. Powell v. Alabama, 287 U.S. 45 (1932); State v. Farnsworth, 13 Utah 2d 103, 368 P.2d 914 (1962). This court has recognized that the right to effective representation entitles an accused to representation by a reputable member of the bar who is in a position honestly and conscientiously to represent his interests, State v. Farnsworth, supra, and who "shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession." Alires v. Turner, Sup. Ct. Utah, No. 11207 (Jan. 3, 1969).

The cases in which an unsuccessful

defendant has asserted the incompetence of his trial counsel are legion, and from these cases the following principles emerge: In order for the defense of an accused to be deemed constitutionally inadequate, an extreme case must be disclosed, Maye v. Prescor, 162 F.2d 641 (8th Cir. 1947), so that counsel's lack of diligence or competence amounted to no representation at all, People v. Heirens, 4 Ill.2d 131, 122 N.E.2d 231 (1955), and reduced the trial to a farce or a sham. Cross v. U.S., 392 F.2d 360 (8th Cir. 1968); Cardarella v. U.S., 375 F.2d 222 (8th Cir. 1967); People v. Ibarra, 60 Cal.2d 460, 386 P.2d 487 (1963); People v. Heirens, supra; Maye v. Prescor, supra.

The burden of establishing ineffective trial representation is always upon the defendant, for duly appointed members of the

bar are presumed to be competent to act for the defense in a criminal case. Michel v. Louisiana, 350 U.S. 91 (1955); Commonwealth v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967); Waltz, Inadequacy of Trial Defense Representation, 59 N.W.L.Rev. 289, 303 (1965). Accordingly, courts have been reluctant to second-guess the considered actions of apparently qualified lawyers, Note, 78 Harv. L. Rev. 1434 (1965), and mere improvident strategy, bad tactics, mistaken carelessness or inexperience do not necessarily amount to ineffective representation. Edwards v. U.S., 256 F.2d 707 (D.C.Cir. 1958), cert. denied, 358 U.S. 857 (1958); Tompa v. Virginia, 331 F.2d 552 (4th Cir. 1964); Note, 78 Harv. L. Rev. 1434, 1443 (1965). The standard to be applied when counsel's adequacy has been called into question was

expressed in Brooks v. Texas, where the 5th Circuit Court of Appeals said that the right to effective counsel means:

> . . . not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. 381 F.2d 619, 625 (5th Cir. 1967).

Smotherman v. Beto, 276 F.Supp. 579 (N.D. Tex. 1967) states the rule as follows:

> When the adequacy of a defense rendered by an attorney is subjected to attack the relevant consideration is not whether the case was lost where it could have been won, but whether counsel stood still and did nothing . . . to the extent that his representation failed to render reasonably effective assistance to the accused. 276 F.Supp. at 586.

This court has similarly judged the effectiveness of defense counsel according to a rule of reason. In State v. Farnsworth, 13 Utah 2d 103, 368 P.2d 914 (1962), a reputable attorney, during the conduct of

a criminal defense, had waived preliminary hearing and a jury; he made no opening statement, failed to object to the introduction of certain evidence, and cross-examined but one of the prosecution witnesses. In affirming the subsequent conviction, the court quite properly observed:

> The record indicates no action or inaction by the trial attorney which could not rationally find explanation in a legitimate exercise of strategy. . . . 368 P.2d at 915. (Emphasis added.)

Employing the same analysis, this court similarly declared defense representation to be effective in State v. Ledbetter, 17 Utah 2d 354, 412 P.2d 312 (1966) and State v. Dennis, 14 Utah 2d 404, 385 P.2d 152 (1963).

Let us turn to the case at bar. The appellant has set forth general and conclusory allegations of ineffective trial representation, quoting the same from Coles v.

Peyton, 389 F.2d 224 (4th Cir. 1968), an extreme example of ineffective assistance of counsel. These borrowed allegations, however, simply do not fit the instant case. In order to show that he has been deprived of the effective assistance of counsel, appellant must "descend to particulars," setting forth specific acts or omissions on the part of defense counsel which would substantiate the charge of ineffective representation. Gilpin v. U.S., 252 F.2d 685 (6th Cir. 1958). Here, neither the record nor appellant's brief suggest any basis for the sweeping allegations of failure properly to prepare for trial, failure to advise appellant of his rights, failure to elicit matters of defense, and failure to conduct appropriate factual and legal investigations. To the contrary, the record discloses a

carefully prepared defense of alibi supported by thorough questioning of defense witnesses and detailed cross-examination of prosecution witnesses.

Appellant has made only two specific charges relating to the adequacy of his defense which are worthy of inquiry. He first contends that the failure of counsel to object to evidence of the robbery victim's identification of appellant from a line-up amounted to ineffective representation. In support of this charge, appellant alleges facts relating to this general appearance of other persons in the same line-up. The alleged dissimilarity of appellant and the other persons in the line-up is not supported by facts of record, and thus appellant's contentions in this regard are not properly to be considered by this court, for on appeal,

appellant is bound by the trial record and his claim must be exemplified within its four corners. Waltz, 59 N.W.L.Rev. 289, 295 (1965). However, assuming these factual allegations to be true, it is clear that counsel's failure to elicit such matters prior to or during the trial, even if not a legitimate exercise of strategy, was not prejudicial to appellant. The record is clear that the victim identified appellant prior to the line-up in question (Tr.31). This prior independent identification thus renders harmless any alleged error in failure of counsel to object to the line-up, and it is clear that the use of harmless error rules is constitutionally permissible in adequacy of counsel cases. Note, 78 Harv. L. Rev. 1434, 1435 (1965).

Appellant's second contention, that his

defense counsel was ineffective for failure to object to hearsay evidence regarding the victim's statements to a police officer, is similarly without merit. It is well recognized that trial strategy often dictates that objections to hearsay evidence be withheld for a number of reasons. The objection may unduly annoy the jury to the defendant's prejudice, or the witness' demeanor may be such that allowing him to testify will permit the jury to detect inconsistencies which injure the witness' credibility. In the instant case, counsel might well have concluded that the hearsay evidence was harmless, so that an objection to the testimony would accomplish very little, and at the risk of prejudicing his client. Indeed, the evidence here in question merely reiterated the earlier testimony

of the victim, and thus counsel's failure to object cannot be deemed prejudicial to the appellant. It is therefore apparent that counsel's decision not to object to this evidence was clearly within the bounds of legitimate strategy and in no way may be said to amount to ineffective representation.

POINT II

THE CIRCUMSTANCES SURROUNDING APPELLANT'S IDENTIFICATION BY THE VICTIM DID NOT AMOUNT TO A DENIAL OF DUE PROCESS.

Appellant's second point on appeal sets forth several allegations relating generally to the victim's identification of appellant as one of the men who committed the robbery. First, it is alleged that the victim was unable to identify appellant on the night of the robbery. The record does not support

this conclusion. Indeed, there is an ample showing that the victim did identify appellant at that time from photographs shown to him by the police (R.52,72).

It is next contended that the victim was unable to identify appellant at the preliminary hearing. However, a careful reading of the record discloses that any difficulty encountered at preliminary hearing by the victim in identifying the men who robbed him related not to appellant, but to appellant's brother, who was also implicated in the robbery. Officer Barton, who was present at the preliminary hearing, testified at trial that the victim "was not sure" as to identifying Richard Montoya at that hearing (R.74). As to whether the victim had any difficulty identifying appellant at the preliminary hearing, Officer

Barton testified that he did not (R.74).

Appellant also contends that the victim identified him "from a mug-shot photo through coaching of the police." There is nothing in the record to support this claim. To the contrary, the record clearly shows that the victim's identification of the appellant, both from photographs (R.52,72) and a line-up (R.52,73), was positive and without hesitation (R.74), and was later corroborated by the victim's identification of appellant at trial (R.74).

Finally, appellant contends that the line-up in which he was identified by the victim was prejudicial. Again, the record discloses the opposite. Detective Barton testified at trial that the other persons in the line-up were "similar in appearance to the defendant," (R.74), and "were all of

Mexican-American descent" (as is the appellant) "except one . . . who is of dark complexion." (R.73).

Appellant cites People v. Ahmed, 20 N.Y.2d 958, 286 N.Y.S.2d 850 (1967) and Biggers v. Tennessee, 390 U.S. 404 (1968) in support of his argument that the circumstances surrounding the victim's identification of him were "highly suggestive of a denial of due process." Both cases are inapposite to the case at bar. In Ahmed, the robbery victim was unable to identify the defendant from a police photograph on the night of the robbery. But as discussed above, no such failure occurred in the instant case, where the victim did indeed identify the appellant from photographs, and later at a line-up. Similarly, Biggers v. Tennessee involved a factual background

entirely unlike that in the case at hand. In Biggers, a one-man show-up was conducted some seven months after a rape had been committed, and the victim's identification of the defendant was made largely upon the sound of the defendant's voice. In addition, the circumstances surrounding the identification in Biggers clearly suggested questionable police practices. In contrast, the instant case involved not a one-man show-up seven months after the crime, but instead a five-man line-up, composed of persons similar in appearance to appellant, conducted a mere three days after the robbery. It is thus clear that the case at bar is completely devoid of circumstances like those which led to the decision in Ahmed and Biggers.

CONCLUSION

The record in the case at bar clearly demonstrates that appellant's defense was conducted by a competent member of the bar who was willing to and did identify himself with appellant's interests, and who skillfully presented appellant's defense. It is equally evident that the victim's identification of appellant was positive and without police coaching.

The judgment of the trial court should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent