

1960

State of Utah v. Tommy Danks : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

----- :
STATE OF UTAH, :

Plaintiff and Respondent, :

VS. :

No. 9127

TOMMY DANKS, :

Defendant and Appellant
----- :

BRIEF OF DEFENDANT
AND APPELLANT

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TABLE OF CONTENTS

STATEMENT OF FACTS	Page 1
STATEMENT OF POINTS	7, 18,
ARGUMENT.	1, 18,

POINT I.

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN APPELLANT'S CONVICTION.

POINT II.

THE TRIAL COURT ERRORED IN RECEIVING STATE'S EXHIBIT "B" IN EVIDENCE.

POINT III.

THE TRIAL COURT ERRORED IN RECEIVING STATE'S EXHIBIT "C" IN EVIDENCE.

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

No. 9127

TOMMY DAVES,

Defendant and Appellant,

STATEMENT OF FACTS

This appeal is taken from the verdict of a jury finding the Defendant guilty of a crime of robbery.

The charge of robbery stemmed from the activities of the Defendant and one Bill Harbold on the 9th day of May, 1959. While there is considerable conflict in the testimony introduced at the trial, the facts not in dispute are as follows:

On the 9th day of May 1959, Bill Harbold, the one Defendant is accused of robbing, not the Defendant and his wife at about 6:00 p.m. at a bar

in downtown Ogden, Utah. For the next several hours the Defendant, his wife, and Bill Weibold, were together making the rounds of the bars in Ogden, drinking and socializing together. About midnight the parties left the bar they were then in and went to the apartment occupied by the Defendant, his wife, his father and his brother.

It was during the visit that Bill Weibold claims the Defendant robbed him of about \$40.00 or \$45.00, which claim is denied by the Defendant.

During the course of the evening, the facts show that Bill Weibold drank heavily and became highly intoxicated and that he spent a considerable amount of money buying drinks for his party and for friends in the various bars visited.

STATEMENT OF POINTS.

POINT I.

Evidence Presented by the State was insufficient as a Matter of Law to sustain Appellants conviction.

ARGUMENT

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN APPELLANT'S CONVICTION.

The State sought to establish the commission of the alleged crime of robbery by the testimony of its witnesses Bill Newbold, Dennis McCollum, Fred Gill and V. R. Butcher. Since the appellant's claim that the State failed to carry its burden of proof is based upon the many conflicts in the testimony of the State's own witnesses we must look to the record for the Appellant's support.

The Appellant recognizes that generally the Court on Appeal is not authorized to determine the weight of the evidence, but can determine only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. However, Appellant claims that when the evidence is inherently improbable and therefore unworthy of belief, there is presented a question of law upon which an Appellant Court may reverse

The Appellant contends that the evidence and testimony of the witnesses for the State are improbable and unworthy of belief and thus opens the door for this Court to review.

The first area of conflict to be found in the State's case concerns the money that the Appellant and Defendant allegedly took from Bill Harbold during the robbery as claimed.

Bill Harbold testified that he has approximately \$40.00 in his wallet at the time of the robbery; he also testified that he started the evening with \$35.00, and obtained an additional \$20.00 from his wife before starting his rounds of the bars. (R p.6)

Bill Harbold further testified that during the course of the evening he went to his place of employment and borrowed an additional \$20.00 from his employer, even though he did not need the money (R p.14). However, the testimony of Earl O Dail Gray on this point was as follows: (R p.74)

EA. 'Well, he said it was the third pint they was on and, in fact, they killed it

while I was sitting there, and he asked me to go and get another for him. He said he didn't have a liquor card. So I went over and got him another pint, and we were sitting there talking. Well, he said, "I'm almost broke, he said. "I've got a \$5.00 bill left. I went to go down and see my boss. I'll ask him for a twenty, and he'll probably give me ten."

Merl O'Dell Gray testified further (R.078)

"A. The \$5.00 he showed me--The \$5.00 he told me that's all he had. Then he went to his boss and got a twenty, . . ."

When questioned concerning these statements about having only \$5.00, Bill Newbold admitted that he may have made that statement. (R p.14).

After receiving the \$20.00 from his boss, Newbold went back to the bar where the Defendant and others were, and the drinking continued.

Bill Newbold during his entire testimony stated that he could not remember how much he

spent during the evening of May 9, 1939, but did testify that he had done a lot of drinking and purchased two bottles of whiskey. (R. p.12).

In addition Bill Newbold admitted that he was carrying money in his shirt pocket during the evening. (R p.16) and the testimony of Merl O Bell Grey established that just prior to getting the \$20.00 from his boss, Newbold has no money in his wallet and only about \$5.00 in change and \$1.00 bills in his shirt pocket. (R, p77,78).

In addition to his lack of knowledge concerning how much he spent during the evening Bill Newbold testified that he was free with his money during that evening. (R p.18).

Even in view of his testimony and contradictions made, Newbold was certain that he had between \$30.00 and \$40.00 in his wallet when he was allegedly robbed. (R p.7). To further confuse this matter the testimony of Dennis McCollum was as follows: (R p.45).

'Q. The money was taken out and put on the floor by Mr. Newbold?

"A. There wasn't any money in the wallet."

From the testimony introduced by the State and witnesses it is apparent that there was a great deal of doubt as to whether or not Bill Newbold has any money when he left the last bar and went to the Appellant's apartment. Newbold, in his intoxicated condition did not know, and the testimony of Dennis McCollum was that there was no money in Newbold's wallet.

The next area wherein the State failed to carry its burden of proof concerns the facts surrounding the actual robbery as alleged. Here, as in all of the testimony and evidence presented, there is confusion and doubt.

Newbold testified that he, the Appellant and others arrived at the Defendant's apartment shortly after midnight and that he sat down on the couch in the apartment. (R p.6). The actions following their arrival are described by Newbold as follows: (R p.6)

"A. Well after we was there for a while,

Tommy the Defendant kicked me in the eye

with his knee and I run for the door to get out, but it had the latch on, and he grabbed me and hauled me back and told his wife to get the butcher knife out of the kitchen. She brought the knife, and he held the knife in my ribs and threatened me. "

"Q. Will you show the jury how he held the knife? Describe that to the jury, please. "

"A. Well, he held the point of it into my ribs. (indicating). "

"Q. Did he say anything to you at that time?

"A. Yes, he said he was going to rob me and that he wanted my wallet. I did what he said. I took the wallet out, and he wanted me to throw it on the floor, which I did, out in front of me. "

"Q. Why did you do that? "

"A. Well, he had that knife there, and was going to do what he said. "

"Q. After your wallet was on the floor;

what happened then, if anything?"

"A. Well he told Dennis, one of the young fellows that was there, to go through it and get him the money out of it and give him the money, which he did."

"Q. Do you recall anything particularly being done to your wallet after the money was removed?"

"A. Well, he handed the wallet to me and gave me the wallet back and I put it in my pocket, and a few minutes later he wanted it again. I threw it on the floor again, and this time he cut it in two with the butcher knife."

By his testimony Newbold said that he was ordered to give his wallet to Dennis McCallum, however in the statement that he made to the Ogden City Police the same night as the alleged offense, (Defendant's Exhibit 1), he said that he gave his wallet to Mrs. Denker, and that it was the

Defendant who searched the wallet and removed the money. At the trial Newbold again contradicted himself when he testified; (2 p. 33)

"Q. Where was the wallet at that time?"

"A. On the floor. "

"Q. The wallet was not on top of the money?"

"A. 'Oh, I don't know if it was on top of the money. I know it was on the floor.'"

"Q. You saw this money handed by Dennis to Tommy? You saw the green?"

"A. 'Yes. "

"Q. You saw the green?"

"A. That's right. "

"Q. 'Was the wallet on top of that money when it was handed by Dennis to Tommy, or was the wallet on the floor, Mr. Newbold?"

"A. I don't know. The wallet was laying on the floor. "

"Q. Then the wallet could have been on top of the greenbacks; could it?"

"A. 'I don't know if it was on top of it or not. "

"Q. You think back what you saw. Did you see the wallet on top of that money when it was handed by Dennis to Tommy?"

"A. I don't know. I seen him hand the money to Tommy."

"Q. Did you, or did you not, when the money was handed by Dennis to Tommy, see that the wallet was on top of it?"

"A. No, I didn't say the wallet was on top of it."

"Q. You did not?"

"A. No."

"Q. This money that was handed by Dennis was loose bills; is that right?"

"A. Yes."

"Q. What did Mr. Banks do with those loose bills?"

"A. I don't know what he did with it. Put it in his pocket, I guess."

"Q. You didn't see that?"

"A. (Shakes head)

"Q. You see then, Mr. Banks with his hands on your money? "

"A. That is right. "

"Q. Now, at the preliminary hearing did you say you saw Mr. Banks with his hands on your money? "

"A. I don't remember if I did or not. "

"Q. Did you testify that you didn't know who got your money, at the preliminary hearing? "

"A. I didn't think I testified, I didn't know. "

At page 35 of the record, Harbold continued:

"Q. Did you see Dennis McCollum take money out of your wallet, actually? "

"A. I didn't actually see it, no. "

"Q. You didn't see that? "

"A. No. "

"Q. Where were you at that time; do you know? "

"A. I was standing there by the couch.

Setting up. "

"Q. And when did you see Dennis McCollum give Tommy Dante the money? "

"A. Well, it was just after Tommy told him to get the money out and he got it. I seen the transaction. "

"Q. You didn't see him get it? "

"A. I didn't see him get it out, no. I seen him hand the money to him. "

"Q. You saw Dennis pick the wallet up? "

"A. Yes. "

"Q. You saw that? "

"A. He picked it up. "

"Q. You saw that? "

"A. Yes. "

"Q. Did you testify at the preliminary hearing that you did not know what happened to the money, or who took it? All you know was it was done? Did you use that phrase? "

"A. I may have done, yes. "

Dennis McCollum testified concerning the wallet

"Q. Did you hear Tommy tell Mr. Newbold to take everything out of the wallet and put it on the floor?"

"A. Yes."

"Q. Was that done?"

"A. Yes."

"Q. The money was taken out and put on the floor by Mr. Newbold?"

"A. There wasn't any money in the wallet."

Here we have another contradiction in testimony since Dennis McCollum has previously testified as follows: (R p.39-40)

"Q. What was done with the wallet when Mr. Newbold took it out of his pocket?"

"A. He threw it on the floor."

"A. Tom told me to pick it up, and so I picked it up."

"Q. Did you do anything else with it?"

"A. Yes, Tom told me to hand him the money."

"Q. Did you go through it, then?"

"A. Yes, I went through it, and I got some

money out of it."

"Q. What did you do with the money?"

"A. I gave it to Tom."

"Q. "Tom" by "Tom", you mean Tommy Danks,
the Defendant?"

From this testimony it is apparent that there was considerable confusion and doubt concerning the happenings that took place at the Danks' apartment. The only fact that is agreed upon by all the witnesses is the fact that sometime after the arrival of the participants at the Danks' apartment there was an altercation and that most of the men were fighting. Even in light of this, Hebbels stated that he didn't recall any argument. (R p. 66).

The State presented to the jury the fact that the Defendant required Hebbels to place his wallet on the floor where the Defendant cut it in two. (R p. 7). Thereafter the State called officer Fred Gill of the Ogden Police who testified that when the arrest of Mr. Danks was made that they searched Mrs. Danks purse and found a \$10.00

bill that was "almost severed in two." (R p. 49). This, of course, tended to give strength to the previous testimony of Bill Newbold on the same subject except that Newbold testified that the Defendant cut his wallet in two after the money had been removed. It would therefore have been impossible for the \$10.00 that Mrs. Donke had when arrested to have been cut by the Appellant as claimed by the State. Mrs. Donke testified that she was given the torn bill earlier in the evening, but that it was not torn as much as it appeared at the trial. (R p. 93).

The Appellant in his testimony stated that there were no activities as testified to by Bill Newbold concerning what took place after the parties arrived at the Donke's apartment. In fact the testimony of the Appellant denied that there was a robbery or that a knife was ever used that evening. (R p. 101). The Defendant appellant did testify that there was a

Newbold gave his wallet to Dennis McCollum for him to see if there was any money in it. (R p.99-100). After this the Appellant, his wife and Bill Newbold drove to downtown Ogden in search of another bottle of liquor. When they arrived in town Bill Newbold left the Appellant and wandered away. The Appellant later went to the Police Station to see if Newbold has been arrested for being drunk and learned that he had not. (R p.101). While at the Station the Appellant advised the desk officer that Newbold might file an assault and battery complaint because of the fight. (R p.101). This testimony of the Appellant is substantiated by the fact that Bill Newbold went to his home after leaving the Appellant, where he got cleaned up before he went to the Police Station and reported that he had been robbed. (R p.101).

The Appellant testified that he saw Dennis McCollum take something from the wallet of Bill Newbold and later pass something to Harley Morgan. (R p.100). Harley Morgan testified that

that he did not know what happened to the money in Bill Newbold's wallet, but that he woke up the next morning with about \$75.00. (R p.110)

It is submitted that the many direct discrepancies in the testimony of the State's witnesses disclose that evidence produced by that testimony is highly improbable and quite unworthy of belief. It is further submitted that the details of the activities of the parties, on the night in question, as set forth by the Appellant and his wife at the trial are the true facts supported not only by the Appellants testimony, but also by the discrepancies found in the evidence of the State, which discrepancies as set forth in this brief are only a few of many to be found in the record of trial.

POINT 11.

THE TRIAL COURT ERRORED IN RECEIVING STATE'S EXHIBIT "3" IN EVIDENCE.

The law is well established that demonstrative evidence must be identified by a witness who can

connect the object with the case. McCormick on Evidence, page 384, Sec. 179. In the case at bar State's exhibit "B" was a butcher knife taken from the Appellant's apartment by one of the investigating officers and identified by the officer as the knife so obtained. However the complaining witness Bill Newbold did not identify the knife, nor was the knife identified by any eyewitness as being the knife allegedly used by the Appellant during the alleged robbery, nor was it identified as being similar to the knife allegedly used. Therefore the exhibit was improperly admitted into evidence and the appellant erroneously injured by its presentation to the jury.

POINT III

THE COURT ERRORED IN RECEIVING STATE'S EXHIBIT "C" IN EVIDENCE.

State's exhibit "C", a \$10.00 bill taken from the purse of Mrs. Danke at the police station after her arrest, was erroneously admitted into evidence by the Court. The argument set forth in

point 1) herein is projected here in that no positive identification was made other than the one by the officer who took the bill from Mrs. Banks. Mrs. Banks explained the presence of the bill in her purse, and the conflicting testimony concerning the cutting of the wallet (W p. 7) required a positive identification. The failure of the State to properly identify and prove this exhibit precluded its receipt into evidence and the appellant was prejudiced by its admission. See People vs. Morgan, 321 2d 873, 157 C.A. 2d 756.

CONCLUSION

It is respectfully submitted that the evidence presented by the State, and upon which the appellant was convicted, was so confused, contradicted and contained so many discrepancies that it was not worth of belief thus becoming unreliable and insufficient for the jury to base a finding of guilty.

It is further submitted that the errors by the trial court in admitting State's exhibits B and C into evidence was prejudicial to the appellants defense and when coupled with the other evidence, resulted in the wrongful conviction of the appellant.

Therefore it is submitted that the conviction of the appellant should be set aside, that he be released from custody, and that he be returned to his status as a citizen of the State of Utah.

Respectfully Submitted,

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