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IN THE SUPREME COURT OF THE STATE OF UTAH

- -

JOE S. VALDEZ,	:	
Appellant,	:	Case No. 11352
-vs-	:	
STATE OF UTAH,	:	
Respondent.	:	

- -

BRIEF OF APPELLANT

- -

An Appeal From the Judgment of the District Court of Salt Lake County, the Honorable Leonard W. Elton, Judge

- -

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Joe S. Valdez, the appellant, was convicted of the crime of assault with a deadly weapon and of being an habitual criminal, in the District Court of Weber County, State of Utah, in December, 1966. State v. Valdez, 19 Utah 2d 426; 432 P.2d 53 (1967). Subsequent thereto he applied for a writ of coram nobis to obtain a new trial. He appeals from the denial of the complaint for coram nobis.

DISPOSITION IN THE LOWER COURT

A hearing on appellant's complaint for a writ of coram nobis was had on the 19th day of April, 1968, in

the District Court of Salt Lake County, before the Honorable Leonard W. Elton, Judge. The purpose of the hearing was to determine whether new evidence discovered since appellant's original trial warranted a new trial being granted. The evidence was heard and arguments made by both sides. On June 28, 1968, it was ordered that the petition for the writ of coram nobis be dismissed. (R. 16).

RELIEF SOUGHT ON APPEAL

The appellant submits that the lower court erred in refusing to grant appellant a writ of coram nobis, and that the lower court's decision should be reversed and a writ of coram nobis be ordered to issue for a new trial.

STATEMENT OF THE FACTS

On the morning of November 19, 1966, at approximately 7:30 A.M., Joe S. Valdez was driven to the dentist in Ogden, Utah, by a friend, Miss Shirley Wilkerson. Mr. Valdez arrived early and decided to go to Gus' Tavern for a beer. All of the chairs in the front of Gus' Tavern were occupied so he and Miss Wilkerson went to the rear of the bar. (T. 68-86). Mr. Valdez stood at the bar with Miss Wilkerson, since there were no chairs in the back. Next to the appellant, at the back of the bar, was a large Indian. (T. 86)

The same morning, Jose Don Valerio, the victim, was also in Gus' Tavern drinking beer. He testified at the trial that he had gone to Gus' that morning because he had been doing a lot of drinking the night before and that he felt bad and needed a drink to make him feel better. (T. 30).

According to Valerio's version of the story, Valdez walked up to Valerio and stabbed Valerio in the stomach with a knife. (T. 31). Valerio stated that there was no one close to him except Valdez when the stabbing occurred. (T. 33). At the trial, one Rose Hewitt testified that she was sitting some four or five feet away and that appellant hit or punched Valerio but that at no time did she see a knife used. (T. 42).

Both appellant and Shirley Wilkerson gave a much different account of the facts. According to their story, Valerio came over and asked for a beer and appellant obliged. Appellant complained that Valerio kept putting his hands on him and "slobbering all over" him. Mr. Valdez asked Valerio to keep his hands off him. (T. 63). When Valerio kept bothering him, he pushed Valerio into a pay phone. When Valerio came right back, appellant hit him in the jaw knocking him down. (T. 64, 86). As Valerio fell down, the Indian also jumped on him either

grabbing or pushing him down. (T. 65).

No person in the bar saw the stabbing except for Valerio himself. The investigating officer could find no traces of blood on the floor. (T. 45, 46).

After appellant's trial, and while appellant was in prison, he discovered that Kelly Valdez, a distant cousin of Joe S. Valdez, had visited Valerio's home after the stabbing, but prior to the trial. While there, Valerio told Kelly Valdez that he "wasn't sure who stabbed him." (R. 42). This evidence was not known by appellant's attorney, nor by Mr. Valdez, so that it could not be used at the time of trial. (R. 46). There were no factors at the time of trial which could have connected Kelly Valdez to the case and warranted interviewing him. Appellant was in the Weber County Jail at the time Kelly Valdez and Valerio had their conversation. There was no lack of diligence on the part of appellant's attorney in failing to discover this evidence at the time of trial. The evidence that was given by Kelly Valdez at the coram nobis hearing tends to directly contradict the testimony of Valerio at the trial and would create a material issue of fact as to whose testimony to believe a jury would have to decide. The testimony of Kelly Valdez is also consistent

with the testimony of Joe S. Valdez and Shirley Wilkerson, and corroborates their testimony in a major fashion.

At the coram nobis hearing, Shirley Wilkerson offered additional testimony that she actually saw a poking motion made toward Valerio by the Indian after he was hit by Joe Valdez. After that motion, she saw the Indian put a knife in his pocket. (R. 51).

ARGUMENT

POINT I

THE LOWER COURT ERRED IN REFUSING TO GRANT APPELLANT A NEW TRIAL ON A WRIT OF CORAM NOBIS.

A. Nature of the Writ

The function of the ancient writ of coram nobis is to call to the attention of the trial court facts and circumstances outside the record which would have precluded entry of the judgment had such facts been known and established at the time of conviction. State v. Woodard, 108 Utah 390, 160 P.2d 432 (1945). In In Re Dyer, 85 Cal. App. 2d 394, 193 P. 2d 69 (1948), the court said that the "recognized present purpose [of the writ] is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding.

The writ of coram nobis is strikingly similar to a

motion for a new trial on the grounds of newly discovered evidence. Utah Code Annotated § 77-38-3 (1953) provides:

> "When a verdict or decision has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:
>
> * * *
>
> (7) When new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial."

Appellant must rely on the common law writ of error coram nobis for a new trial, since § 77-38-4, Utah Code Ann., (1953) sets a five day statute of limitations after the verdict in which to make a motion for a new trial. Unlike the statutory time limitation of § 77-38-4, there is no limitation on a writ of coram nobis. See, e.g., Cole and Small, State Post-Conviction Remedies, 40 N.Y.U. L. Rev. 154, 178-179 (1965).

Another similarity between the writ of coram nobis and motion for a new trial is the element of newly discovered evidence. In 18 Am Jur. 2d, Coram Nobis, § 14, P. 471, it is said:

> "A writ of coram nobis will ordinarily not lie to permit the review of a judgment for subsequently or newly discovered evidence relating to matters litigated at the trial or going to the merits of the issues, tried in the court below. . . .
> However, the writ may be granted where it

appears that <u>because of undiscovered evidence of such a conclusive character that if it had been introduced the verdict most probably would not have been rendered</u>, and there is a strong probability of a miscarriage of justice unless the writ is granted. There is also authority that coram nobis will lie where the defendant desires to bring some new fact before the court <u>which could not have been discovered by due diligence on his part in time to have been presented at the trial or on his motion for a new trial</u>." (Emphasis added)

B. <u>The Conditions to be Met</u>

(1) <u>Newly Discovered Evidence</u>

In <u>State v. Woodard</u>, supra, Justice Wade said:

> "It is essential to the availability of the remedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by the exercise of reasonable diligence, have been discovered by him in time to have been presented to the court. . ."

and in Note, 8 Utah L. Rev. 362 (1963-64), it is said:

> "Traditionally, a petition for a writ of error coram nobis requests a trial court to vacate its judgment because of an error of fact which if known at the time of trial, would have prevented the judgment."

The Utah Supreme Court held in <u>Butt v. Graham</u>, 6 Utah 2d 133, 307 P.2d 892 (1957), that where the record disclosed that no newly discovered evidence was produced at a hearing for a writ of coram nobis that could not have been produced at trial, the court properly refused to grant

the writ. The necessary implication from this case is that if there would have been newly discovered evidence produced at the hearing which, if known at the time of trial, might have precluded entry of judgment, then the writ must be granted.

By way of analogy, the test is the same under a § 77-38-3, Utah Code Ann. (1953) on motion for a new trial on the grounds of newly discovered evidence. In State v. Weaver, 78 Utah 555, 6 P.2d 167 (1931), the court declared newly discovered evidence to be that which has been brought to light since the lower court rendered its verdict against defendant. In Opie v. State, 422 P.2d 84 (Wyo. 1967), the court held that the party seeking a new trial on the grounds of newly discovered evidence must satisfy the court that the evidence has come to his knowledge since trial, and that it was not due to a lack of diligence in discovering it.

Kelly Valdez, a witness for defendant at the coram nobis hearing, testified at the coram nobis hearing to the new evidence:

> "A. Yes, for a while. When we was leaving, that was Miss Wilkerson, Joe's sister, and myself, Mrs. Valerio stayed right by the door, by the screen door and I stayed there talking to her. Miss Wilkerson and Jose Valerio's wife, they walked away a little ways, and me and Joe started talking, and I asked him if he was sure. He says -- he hesitated there for a while. He said he was not sure.

Q. Not sure who stabbed him?

A. Correct." (R. 42, lines 17-25)

And on redirect examination:

"Q. Is there any question that this conversation actually occurred after he had been stabbed?

A. It was after he had been stabbed.

Q. At that time, he clearly said to you he didn't know who had stabbed him?

A. He hesitated for a while, and he told me. I asked him if he was sure it was Joe and he hesitated for a while. He said, 'I really don't know for sure.'

MR. BOYCE: All right, Thank you." (R. 45, lines 21-29).

The appellant testified:

"Q. You've heard the conversation that Mr. Kelly Valdez testified to in court here today, is that right?

A. Yes.

Q. Were you aware of that information prior to the time of your trial?

A. Didn't know anything about it.

Q. When did you first become aware of this information?

A. I think was not to be exact the same -- I don't know the date, but it was during the Catholic Men's Club Anniversary, one of the anniversaries at the State Prison.

Q. And from what source did you receive information concerning that fact?

A. From what source?

Q. Yes.

A. From Kelly.

Q. And he was at the Catholic Men's Club party that they have?

A. Yes." (R. 46, lines 18-30, R. 47, lines 1-5).

Appellant submits that the conversation between Kelly Valdez and Jose Valerio meets the test of newly discovered evidence. Appellant testified that he had no knowledge of this discussion between these witnesses until after the trial was concluded. There is no evidence to contradict the testimony of appellant or Kelly Valdez.

"Q. (By Mr. Boyce) Mr. Valdez, did your attorney know anything about the possibility that Mr. Kelly Valdez might have this information?

MR. GUNDRY: Objection. It's a compounded question.

THE COURT: Well, he can answer it, if he can.

THE WITNESS: No, sir.

Q. (By Mr. Boyce) You received no information?

THE COURT: Now, that's part of the record during the trial for the offense of assault with a deadly weapon.

MR. BOYCE: Right." (R. 47, line 30, and R. 48, lines 1-11).

(2) The Evidence Must be Material

The materiality of the newly discovered evidence to the defendant's case is most frequently expressed in terms

of whether it is sufficient to warrant a different result on re-trial. State v. Woodard, supra, said that the writ "seeks to obtain a review of a judgment on the ground that certain mistakes of fact have occurred which were unknown to the court and to the parties affected, and that but for such mistakes the judgment would not have been rendered." (Emphasis supplied).

In new trial cases under § 77-38-3, the test is stated in the same terms. See e.g., State v. Weaver, supra, where the court said:

> "To justify him in granting a new trial he should be satisfied that the proffered evidence is such as to render a different result probable on a retrial of the case. (citing cases) Or he might have granted it had he any reasonable doubt as to the guilt of the defendant. (citing cases)"

This test was also reiterated in State v. Cooper, 114 U. 531, 201 P.2d 764 (1949), quoting Jensen v. Logan City, 89 U. 347, 57 P.2d 708 (1936):

> "It is only under very special circumstances, because of the quality or type of proposed evidence and where it makes clear a fact which was formerly in doubt that new trials are granted to allow the defeated party to add cumulative evidence, newly discovered and then only where there is a clear probability that the result of a new trial will be different."

This test was also used in State v. Sneed, 98 Ariz. 264,

403 P.2d 816 (1965), where a state prisoner's admission that he had committed a robbery for which the defendant was convicted was newly discovered evidence which had it been admitted at defendant's trial, would most probably have changed the verdict.

In State v. Fowler, 101 Ariz. 561, 422 P.2d 125 (1967), the defendant asserted that he was attacked by the decedent, and that he had shot in self-defense; that decedent had had a reputation for carrying a knife; that the police had discovered a knife within a short time after the shooting near the scene of the crime. But the prosectuion concealed this fact and brought it to the jury's attention that there was no evidence that decedent was carrying a knife at the time of the shooting. The court there held that defendant was denied due process and a new trial was required because of the newly discovered evidence.

The "different results" test is also followed in State v. Wright, 5 Ariz. App. 357, 427 P.2d 338 (1967); People v. Ing, 55 Cal Rptr. 902, 422 P. 2d 590 (1967); Patton v. People, 114 Colo. 534, 168 P.2d 266 (1946); State v. McConville, 82 Ida. 47, 349 P.2d 114 (1960); Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965); and Ortiz v. State, supra, 422 P. 2d 84 (Wyo. 1967).

The facts in appellant's case are most material to the issue of who actually stabbed Jose Valerio. In Valerio's own words, he "didn't know". The evidence given by Kelly Valdez at the coram nobis hearing tends to raise a material question of fact for a jury to decide: Did Joe S. Valdez actually stab Jose Valerio, or did Jose Valerio only think Valdez was the one who stabbed him? Appellant submits that this conflicting testimony of Kelly Valdez and Shirley Wilkerson, as opposed to Jose Valerio, is within the "different results" test. A jury could reasonably reach a different verdict based on this new evidence.

When there is a reasonable doubt as to defendant's guilt, State v. Weaver, supra, and State v. Woodard, supra, is even stronger in favor of defendant. There is a reasonable doubt in appellant's case, and this doubt coupled with the additional facts discovered since the trial add to the materiality of the issue to be put before a jury. This reasonable doubt of defendant's guilt is illustrated by Shirley Wilkerson's testimony:

> "MR. BOYCE: It is material, Your Honor. It's additional evidence. I indicated in my opening statement that I believed that I could present evidence as to someone who actually saw a knife and I intend to do that.
>
> THE COURT: Objection overruled.

Q. (By Mr. Boyce) Would you please answer the the question?

A. Well, I saw the Indian put the knife in his pocket.

Q. You saw the Indian, who I referred to in my opening statement, who was standing at the bar?

A. Yes.

Q. And what did you see him do?

A. Well, he also hit the man beside Joe.

Q. And then what did you see happen?

A. He stuck a knife in his pocket real fast. The police didn't search him.

Q. All right, then, you saw a knife in the possession of that large Indian fellow on that day?

A. Yes.

Q. And that knife, you saw on his possession shortly after Mr. Valdez struck Mr. Valerio?

A. Yes." (R. 51, lines 9-29)

The newly discovered evidence also makes clear a fact which was formerly in doubt, State v. Cooper, supra: that question which has already been stated - did Joe S. Valdez stab Jose Valerio? The newly discovered evidence points to a result opposite to that found in the trial court below. This fact was never really clear in the original trial. Joe S. Valdez was convicted on the testimony of Jose Valerio, that appellant was the one who had stabbed him. But the evidence discovered since the trial shows two persons

to corroborate appellant's testimony, and further, refute Valerio's. The testimony of Kelly Valdez and Shirley [illegible]son demonstrate that appellant did not stab Valerio, but instead only struck him with his fist after provocation.

Appellant has met the test required for the granting of a writ of coram nobis on the grounds of newly discovered evidence. He was without knowledge of these additional facts at the time of trial. He could not have, with reasonable diligence, discovered these facts. The evidence did not come to his attention until after he was convicted and committed to the State Prison.

The newly discovered evidence is material to defendant's case since it makes clear a fact which was formerly in doubt. The new evidence raises a reasonable doubt as to defendant's guilt. Finally, a jury could very probably reach a different result with the aid of this newly discovered evidence on retrial.

C. <u>The Jury Function in Coram Nobis</u>

In <u>Ward v. Turner</u>, 12 Utah 2d 310, 366 P.2d 72 (1961), this court said:

> "In order to justify a release of a convicted person under a writ of habeas corpus or coram nobis, or other special writ, the evidence of his innocence must be stronger than would be necessary in the first instance in support of a motion for a new trial, for such special

> writs are applied for after the defendant's conviction has been affirmed or denied on appeal, and in a sense they invade the usual rules for the finality of judgments. The most that can be said for this application for a special writ is that had the evidence been promptly disclosed it might have justified the granting of a new trial. In order to sustain the granting of a special writ in a case like this, something more is required than merely that the evidence might have justified the granting of a new trial had it been promptly disclosed."

In that case, appellant sought a special writ on the ground that the prosecution knowingly used perjured testimony of a doctor who had examined a woman who had been victim of an alleged raping. After appellant's conviction, new evidence disclosed that the doctor had found that the woman had had sodomy committed upon her, and not rape. Further, in a psychiatric examination of appellant during the course of the trial below, it was found that he did not have deviate tendencies of the type required to have committed sodomy instead of rape.

Appellant contends that the court in that case stated too strict a test for a special writ to issue. Ward v. Turner cannot be used as stare decisis in appellant's case. The court was enunciating a very strict decision upon the narrow issue in that case only. The question there was whether the newly discovered evidence was of a sufficient

...ture that a new jury could have believed a reversal necessary and on that narrow question of fact the court held "no". Further, on collateral review, the United States Court of Appeals, Tenth Circuit granted relief from the judgment. Turner v. Ward, 321 F. 2d 918 (10th Cir. 1963).

The law is generally in opposition to that narrow holding in Ward v. Turner, supra. Appellant can find no other authority which sets such constraints as the test for relief. Generally stated, other authorities have taken an opposite view. The rule has been stated as whether the jury could reasonably find a different verdict on re-trial because of the weight of the newly discovered evidence when examined in the light of all of the other evidence presented upon the original trial. The function of the jury is to try the factual issues in a case. In order to do this, they must be aided by the use of every fact which bears upon the guilt or innocence of the defendant. It is not material whether the judge sitting at a coram nobis petition hearing believes the testimony of a witness whose testimony has bearing upon the new evidence, in this case, Kelly Valdez. But it does matter whether a jury could reasonably believe the credibility of the testimony of Kelly Valdez.

In Turner v. Ward, 321 F. 2d 918 (10th Cir. 1963),

The court believed that the materiality of the perjured testimony of the doctor was of such weight that the jury would have probably reached a different verdict, and affirmed the Utah Federal District Court's grant of a petition for a writ of habeas corpus. The court said, in speaking of the effect of the testimony upon the jury in the lower court:

> "Such testimony clearly left the inference with the jury that the crime of rape had been committed, which was contrary to the opinion of the doctor, and withheld from the jury his true opinion."

CONCLUSION

Appellant submits that the testimony of Kelly Valdez and Shirley Wilkerson, when compared with that of Jose Valerio is of such nature that it would have the distinct effect upon a different jury of causing them to reach a verdict different from that reached in the first instance. A new jury ought to have the duty of weighing the credibility of the opposing testimony. A new jury ought to have the responsibility of determining Joe S. Valdez' guilt in light of the weight of this newly discovered evidence.

These facts weigh heavily in favor of a new trial on writ of error coram nobis:

1. That there was no blood found at the scene of

stabbing.

2. That no knife or similar weapon was found.

3. That there was an Indian standing nearby who concealed a knife.

4. That this Indian made a "stabbing motion" towards Valerio.

5. That Valerio had been drinking heavily the night before the fight, as well as that morning.

6. That Joe S. Valdez struck Valerio with a blow sufficient to confuse Valerio's mind.

7. That Valerio said to Kelly Valdez that he "didn't know" who had stabbed him.

8. That Joe S. Valdez had no knowledge or possibility of knowing of this evidence until after the trial below.

If taken individually, as in Ward v. Turner, supra, these facts would admittedly be insufficient to warrant a jury finding a different result on re-trial. But in the totality of the circumstances, when weighed together, they have a commanding effect to the point that a new jury would most probably reach a different result. For this reason, appellant is entitled to a writ of error

coram nobis for the purpose of a new trial.

Respectfully submitted

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