

1967

## Wendell Ray Newton v. State of Utah : Brief of Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

LINDELL RAY NEWTON, :  
Appellant, IN PRO SE: :  
vs. :  
STATE OF UTAH, :  
Appellee. :

CASE NO. ~~10894~~ 10638

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a criminal proceeding in which the defendant, along with a co-defendant, Sherill Chesnut, was charged with the crime of robbery in violation of Utah Code Annotated Section 76-51-1 (1953). By information signed by David Bunnell, District Attorney, Grand County, Utah.

DISPOSITION BY LOWER COURT

Appellant Lindell Ray Newton, and co-defendant, Sherill Chesnut, were tried before a jury on April 22, 1966, before the Honorable A. H. Ellett, then a judge of the Third Judicial District Court, sitting by invitation in the Seventh Judicial District. Both defendants were found guilty by the jury by verdicts signed April 23, 1966, of the crime of robbery as charged in the information. Defendant Newton was recommended for leniency by the jury; Newton was sentenced to a term of five years to life at Utah State Prison.

## RELIEF SOUGHT ON APPEAL

Appellant Newton seeks a New Trial de novo.

### STATEMENT OF FACTS

The State of Utah produced the testimony of Leonard Jewkes, and William J. Himes Jr., both of the Utah Highway Patrol (Tr 99 - 130). Trooper Jewkes testified that on the evening of October 8th 1965, he and Trooper Himes were patrolling Interstate 70 near Crescent Junction. The Officers observed an automobile, traveling in the opposite direction, which failed to turn on its lights for a car immediately in front of the patrol car (Tr 100). The patrol car turned and followed the car and observed it at a speed of 88 miles an hour, the speed limit being 70 miles per hour (Tr 101). And the driver of the automobile was identified as Sherill Chesnut, co-defendant in the case at bar (Tr 101-102). The Officers administered a field test for determining whether or not the driver was driving under the influence of alcohol, as alcohol was smelled on the drivers breath (Tr 102). At this time Officer Himes searched the interior of the car without a search warrant; and your appellant Lindell Newton, who had been sleeping in the back seat awoke; (Tr 103). In addition the trunk of the car was searched and the Officers found three six-packs of beer and an Air Force overnight bag. Defendants were placed under arrest pursuant to the illegal search and seizure. Appellant was asked for the registration for the automobile he informed Officers that the car had Texas license. Under Texas Law there were no registration required thus he was arrested at this time for a non-existent crime (FAILURE TO REGISTER IN HIS AUTOMOBILE). Defendant Chesnut went back to the car and got another .25 calibre Revolver, pointed it at the Officers and demanded that they raise their hands (Tr 137-138). Defendant-Appellant Newton relieved the Officers of their sidearms (Tr 108). When the Officers had walked to and stood a fence as directed defendant Chesnut took the wallet of Trooper Jewkes, (Tr 110). Said action would never have been committed had officers adhered to statutory and constitutional provisions regarding search and seizure of their personal belongings rendering them under a mental stress from such unjust treatment.

The defendants fled the scene in their automobile after a transfer of vehicles and taking shelter in a truck were apprehended by the police (Tr 172).

The instant case at bar was first tried in the News-  
via Salt Lake Tribune and the Deseret News, Oct 9th, 10th  
11th, 1965. Said Newspaper articles assuming defendants to  
guilty, before they had been tried; rendering a fair and im-  
partial trial to be impossible; consequently subjecting your  
Appellant to Trial by Ordeal through unjust publicity.

Appellant Lindell Ray Newton, was denied equal pro-  
cess and due process of law through the courts denial of  
a fair trial motioned for by Appellants Attorneys, Hatch &  
Sons, December 7, 1965. Subsequently denying Appellant an  
equal witness in his behalf; (Witness co-defendant Chesnut).

Trial Court refused to instruct the jury as to the  
offenses of simple assault, and obstruction of a public  
officer in the performance of his duty. See defendants requested  
instructions; 3,4, and 5. Exceptions to the Courts failure to  
give these instructions (Tr 205-206), and after the jury had  
heard further exceptions were taken by both defendants with  
respect to the Courts failure to give instructions on these  
or included offenses.

Trial Court showed extreme prejudice in the instant  
case that under Utah Statutes a Union of Act and intent must  
be to constitute a criminal offense; The trial Court denied  
instructions that in the case at bar were essential in order  
for your Appellant receive a fair and impartial trial. See  
requested instructions 1 through 7). Tr 204-205-206).

### ARGUMENT POINT I

APPELLANT SUBMITS THAT HE WAS SUBJECTED TO TRIAL  
BY ORDEAL THROUGH UNFAIR NEWSPAPER PUBLICITY, DEPRIVING  
APPELLANT OF EQUAL PROTECTION AND DUE PROCESS OF LAW, AND  
THE PRESUMPTION OF INNOCENCE, OR FAIR AND IMPARTIAL TRIAL.

Appellant submits that articles printed in the  
Salt Lake Tribune and the Deseret News Oct 9th 10th and 11th  
were so prejudicial as to render it impossible for your  
Appellant to be afforded the presumption of innocence provided  
by statutory provisions, and subsequently denying Appellant  
equal protection and due process of law, or in substance a fair  
and impartial trial.

Such prejudicial publicity is prohibited under authority.

"To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is PER SE GROUNDS FOR REVERSAL".

Sheppard v. Maxwell, 384 U.S. 333, 351-352.

Mideau v. Louisiana, 373 U.S. 723, 727.

Estes v. Texas, 381 U. S. 532 (1965).

Marshall v. United States, 360 U. S. 310 (1959).

Appellant submits that in the instant case members of the public were admitted to reading of the case in the newspaper and it was assumed in view of such prejudicial articles in the Lake Tribune and Beseret News, October 9th 10th and 11th that opinions were already formed by members of the trial jury making an impartial decision impossible, consequently a New Trial and Reversal is required regarding Point I.

## POINT II

TRIAL COURT ERRED IN FAILING TO GIVE THE DEFENDANTS REQUESTED INSTRUCTIONS ON LESSOR OR INCLUDED OFFENSES.

It is submitted by Appellant Newton that the trial court was prejudicially in failing to give the requested instructions with respect to the Crime of Assault.

The evidence given by the Highway Patrolman were believed in this case, it seems clear that there was sufficient evidence to support a charge of simple assault, or assault with a deadly weapon as defined in Utah Code Annotated 76-7-1 and 76-7-6, respectively as has been stated by this court in State v. Barkan, 574, 65 P. 2d 1130 (1937).

"It is too elemental to require argument, that to point a loaded revolver at another to frighten or wound constitutes an assault; and that shooting at another at him, is with the intent to do bodily harm, unless the things were done under conditions and circumstances which justified the acts in the eyes of the law."

The starting point for further analysis must be Code Annotated, Section 77-33-6 (1953).

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in the offense with which he is charged in the indictment or information or the attempt to commit the offense".

The next question then is whether assault, or assault with a deadly weapon are included offenses within the offense of robbery as defined in Utah Code Annotated, Section 76-7-1 (1953). There are cases which have held that assault with a deadly weapon may be included within the charge of robbery, see, People v. Driscoll, 128 P. 2d 382 (Dist. Ct. Appl., 1942). This however, would seem somewhat questionable, although as robbery, as defined, need not take place with a deadly weapon, rather, it is only required that personal property be taken from the possession of another "against his will", "accomplished by means of force or fear". One can imagine instances in which this could be accomplished without the use of a deadly weapon. However, the case law seems clear to the effect that a simple assault is included within the offense of robbery. See People v. Foss, 259 Pac. 123 (Dist. Ct. App., Cal. 1927), where the court pointed out;

": it follows that the offense of simple assault is also included within robbery, and the court erred in refusing to give instructions requesting on this point".

Additional support for this proposition is contained in People v. Vance, 39 Utah 602, 119 Pac. 309, (1911)., where the court pointed out:

"We think that all of the authorities agree that where violence is a necessary ingredient in committing the offense, and is contained in the charge of murder, then the lesser offense namely an assault, with intent to murder, is necessarily included in the principle charge, that of murder."

It follows, that since the use of force or fear is an element of the crime of robbery that a simple assault is a necessarily included offense since it is an unlawful attempt accompanied with a present ability to commit a violent injury on the person of another". Utah Code Annotated, Section 76-7-1 (1953).

This background plus the fact that it is undisputed record that a request for an instruction on simple assault made on behalf of Appellant and refused by the Trial Court, poses the interesting questions under the law of Utah as to whether this constituted error, and if so, whether it was judicial?

As an initial proposition several Utah Cases must be distinguished since they deal with the situation where the defendant did not request an instruction on an included case offered. Although an instance this court has held on several occasions that the defendant cannot normally be heard to complain on appeal. See State v. Sullivan, 73 Utah 582, 276 Pac. Rep 166 (1929). See State v. Ferguson, 74 Utah 279 Pac. 55 (1929). However since there are some Utah cases which charge the trial court with the responsibility of instructing the jury on included offenses even though no request is made therefore by the defendant. See State v. Cobo, 90 Utah 89, 60 P. 2d 952 (1936).

The instant case, of necessity, is a much stronger one than these inasmuch as there was a request for the instructions which was denied by the trial court. A case of significance in this regard is State v. Mitchell, 3 U. 2d 70, 278 P. 2d 618 (1956). The question on Appeal in that case was whether the trial court was in failing to instruct on voluntary manslaughter in a first-degree murder case. There was no request for such an instruction at the trial level. After holding that voluntary manslaughter is necessarily included in first-degree murder, the court, in a now holding, stated that failure to give the instruction was within the trial courts' discretion specifically "where instructions are not requested and not given". (Emphasis original). Of interest however is the concurring opinion of Justice Crockett wherein he stated:

"It is elementary that it is the duty of the court to present to the jury a statement of the elements of the offense charged; and that, where the accused is charged with a greater offense, he is nevertheless entitled to an instruction the jury may convict him of a lesser offense if included within the greater..."

In State v. Brennan, 13 U. 2d 195, 371 P. 2d 27 (1962). the state complained of the trial courts; failure to instruct on a lesser included offense of driving while intoxicated in a prosecution of reckless driving. The court concurred and in so doing stated:

"In view of the fact that evidence of intoxication recited above obviously would have been sufficient to prove a prima facie case of driving while intoxicated, we are unable to perceive why the trial court did not submit the case to the jury on that included offense. In refusing the states request to do so it committed error against the state".

Certainly the converse of this situation is true on the defendant also is entitled to instructions on lesser included offense and failure to do so when requested constitutes error on the part of the trial court.

State v. Ferguson, 74 Utah 263, 279 Pac. 55 (1929). As stated, is distinguishable inasmuch as no request was there made for instruction on the lesser offense. However, certain observations made by Justice Straup in his concurring opinion are of significance. His analysis of this general problem is one of the more thoroughgoing to be found on this subject. With considerable emphasis on the defendants right to a jury trial, regardless of the overwhelming nature of the evidence of his guilt, Justice Straup concludes that there is an almost absolute duty on the part of the trial court to instruct with regard to lesser offenses even where not requested. His reasoning is persuasive:

"Where therefore, the essentials of the charged greater offense embrace and include every essential of the lesser offense, and where the evidence is sufficient to support the charged greater offense, I think it follows as does night the day, that of necessity there is also sufficient evidence to support a conviction of the lesser offense. In such case I think it the duty of the court to submit to the jury the whole issue as presented by the indictment of information and not merely a part of it, and that the court so submit the cases as to compel or coerce the jury to find the accused guilty of the greater offense or find him not guilty, or so as to give the jury no alternative or discretion, except to do the one or the other. Where, under such conditions only the greater charged offense is submitted, jurors, or some of them having a reasonable doubt as to the existence of all the essential elements of the charged greater offense, are required or induced to find the accused not guilty".



When had the lesser offense also been submitted might convict him of the lesser offense, while on the other hand, a jury somewhat loath on the evidence to wholly acquit the accused may be induced or influenced to find him guilty of the greater offense; when if the lesser offense also is submitted may find him guilty only of that offense.

Thus, under the conditions stated I think it the duty of the court to submit both the greater and the lesser offense to the jury and to charge the principles of law applicable thereto, whether requested to do so or not. I see no basis for the assertion that the court is required to charge the jury the general principles of law applicable to the charged greater offense whether requested or not, but is not required to charge the general principles of law applicable to the charged lesser offense unless requested to do so."

In State v. Hyams, 64 Utah 285, 230 Pac. 349  
defense counsel at the trial requested that the court with regard to the crime of simple assault, the defendant having been charged with the greater offense of assault with intent to commit rape. The court, noting that it is not a reversible error to fail to give instructions on lesser offenses, continued:

"It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of the lesser or included offense, and determine the question of the state of the evidence as a matter of law. That should be done only in very clear cases."

The court went on to hold that in that case a reversible error for the court to refuse to instruct as charged on a lesser included offense.

Likewise, in State v. Barker, 91 Utah 574, 65 1130 (1937) this court held that it was reversible error in prosecution of assault with intent to do bodily harm, to fail to instruct on the crime of simple assault.

In People v. Carmen, 220 P. 2d 281 (Cal, 1951) the court stated that regardless of how weak the evidence may be the lesser offense, the court has a duty to instruct concerning it. People v. Ross, 259 Pac. 123 (Cal. 1927) is not to point. The court there held that it was error to fail to instruct on assault in a prosecution for robbery.

The authorities seem to agree that the instructions the lesser included offense need only be given where there is at least some evidence which would support a conviction of the greater offense. This is in keeping with the general rule regarding instructions. However, it is difficult indeed to imagine a case where there is sufficient evidence to go to the jury with respect to the greater offense and yet no evidence to go to the jury with respect to a lesser and necessarily included offense. As stated by Justice Straup in State v. Ferguson, 1941:

"As a general rule there may be exceptions to it...where there is sufficient evidence to justify a conviction of the charged greater offense of necessity, there is also sufficient evidence to justify a conviction of the necessarily included lesser offense when all of the essentials of the lesser are embraced and included in the greater."

This is only consistent with the defendant's general right to a jury on each and every issue presented by the evidence. Following the reasoning of Justice Straup, we could not but conclude that regardless of how overwhelming the evidence is with respect to the guilt of a defendant on the greater offense charged, the jury may nonetheless, with absolute impunity, return a verdict on not guilty. In criminal cases there is no adequate remedy for the trial judge to in any way preempt the ultimate and conclusive power of the jury to determine guilt or innocence. If it is being so, it can be said in all cases that there is a possibility that the defendant will not be found guilty of the greater offense. To do justice to both the state and the defendant, therefore, it is important that the jury have before it all possible alternatives, including lesser included offenses. Justice Straup noted:

"If in a case of different degrees of the charged greater offense there is sufficient evidence to submit the case to the jury of the charged greater offense, I do not see wherein it is the prerogative of the court to direct the jury of what degree only the jury may find the defendant guilty, or to direct them

charged greater offense they must acquite him. To permit the court to do that is to be the judge of the facts. If the court for such purposes may so consider and waive the evidence and find the facts and thus so determine the degree, I see no reason why the court, in a case where the evidence is conclusively and indisputable shows the defendants guilt of the charged greater offense, where there is no rule or bias either in law or in fact for any doubt whatever may not equally direct a verdict of guilt. It is apparent that the court may not do either, for under the constitution and the statutes making the jury the sole judges of the facts they may render any kind of verdict with respect to any offense presented by and included within the indictment or information."

To further probe the prejudicial nature of a failure to instruct on lesser included offenses, it is only necessary to refer to elemental psychology. In a case such as the instant at bar, or in many criminal cases for that matter it may well be that the defendants have conducted themselves somewhat improperly, the natural response of the jury, faced with such a situation, would be to punish the accused. However, when an instruction is given only on the greater offense, with the sole alternative being acquittal, the natural tendency of the jury may be to find the defendant guilty even though he is not in fact guilty of the greater offense in all respects. Thus, the jury should be given the other indicated alternatives including lesser included offense. It may be properly surmised, giving full credit to our jurors, that if the evidence indeed warrants a conviction of the greater offense, the conviction will be forthcoming. However, corollary protection is found in the case where the evidence with regard to the greater offense is questionable or the subject of a reasonable doubt in which case the jury, if the elements are found, may convict of the lesser included offense. This benefits the state as well as the defendant.

The foregoing discussion is not confined to the academic. There are practical considerations in the instant case which will have been persuasive on the innocence of the appellant with respect to the crime of robbery.

This was not a case where the accused calculated and planned a bank robbery or a strong arm holdup on the street. Nor, the robbery, if indeed any there was, occurred as a result of precipitating actions on the part of the police officers. It might well have been argued at the trial that at the time of taking the patrolmans guns, the intent was not to deprive the owner of his possession thereof, on a permanent basis but merely to disarm the policemen.

It is respectfully submitted therefore that under Utah law the trial court erred prejudicially in failing to instruct the jury, as requested, on the crime of simple assault which is necessarily included in the greater offense of robbery.

Wherefore appellant submits he is entitled to Reversal and a New Trial, regarding Point II.

### POINT III

**TRIAL COURT SHOWED PREJUDICIAL ERROR ALLOWING EVIDENCE TO BE INTRODUCED RESULTING IN ILLEGAL ARREST: THROUGH ILLEGAL SEARCH AND SEIZURE.**

It is submitted that the entire judgment, conviction proceedings in every article or other stage of the proceedings against your Appellant, were unconstitutional and illegal in their entirety. Pursuant to Appellants arrest, in violation of the Fourth and Fourteenth Amendments to United States Constitution, Appellant submits that had the arresting officers adhered to Constitutional provisions, regarding search and seizure, there would not have been a felonious crime of any kind committed;

"The right of the people to be secure in their persons, places and effects shall not be violated;"

"Such immunities provided under the Fourth Amendment, Bill of Rights, to United States Constitution, are basic and fundamental rights provided to the Citizens of the United States."

Under our set of laws there exists certain prerequisites to be adhered to by the dispensers of justice to the masses; to favor the accused; some favor the states; the authorities as stated herein were precedents set forth for the preservation of the Rights of an Accused;" The state will present its own.,

It is submitted that under decided precedent authorities, illegal Search and Seizure is prohibited. Every citizen of the United States is entitled to be secure in his person, places and effects. Deprivation of said immunity is denial of Equal Protection and Due Process of Law provided for the Fourteenth Amendment to United States Constitution, rather, a denial of immunities provided under the Fourth Amendment to the United States Constitution.

Mapp v. Ohio, Supra, at 659.

Boyd v. United States, 116 U. S. 616, 638.

Linkletter v. Walker, Certiorari, No. 95  
Oct., term (1964). United States Supreme Court.

Wong Sun v. United States, 371 U. S. 471 (1963).

Appellant submits that had the Court granted the motion to Suppress certain testimony and evidence obtained through illegal search and seizure, your appellant might in its possibly have been afforded a fair and impartial trial. It is submitted that the court showed prejudicial error in allowing any evidence or testimony to be introduced regarding illegal and unconstitutional arrest resulting through illegal search and seizure of articles from Appellants car subsequently causing the instant crime if the circumstances, could be considered a crime of robbery to occur.

#### POINT IV.

APPELLANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, THROUGH THE COURTS DENIAL OF SEPARATE TRIALS, DEPRIVING HIM OF AN IMPORTANT AND ESSENTIAL WITNESS, SHERILL CHESNUT, Co-Defendant.)

It is submitted by Appellant that the denial of separate trials rendering it impossible or at the very least highly improbable, for appellant to Subpoena Co-Defendant, Sherill Chesnut, who's testimony was essential in that through his testimony, your appellant could have shown, that he had intent to commit a felony, or any other crime. Appellant submits that under provisions of Utah statutes, in order for a felony to be committed there must be a joint union of act and intent, to commit such crime. Utah Code Section 76-1-20.

It is further submitted that under the provisions of the United States Constitution and United States Constitution a defendant in a criminal matter is entitled to witnesses in his behalf.

Under the provisions of Utah Code Annotated (1953),  
Section 77-1-8 (5) to have process to compel the attendance of  
witnesses in his own behalf,

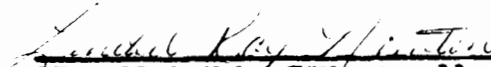
It is submitted that in the instant case at bar, it  
is impossible for him to compel the attendance of Co-Defendant  
Erill Chesnut, who would have, as the records clearly show,  
been an essential and in fact invaluable witness for the defense  
of your appellant at the trial.

Appellant submits that he was in fact during every  
stage of the proceedings deprived of Equal Protection and  
Due Process of Law, required by the Constitution of the State  
of Utah, Article 1, Section 12, and under the Fourteenth Amend-  
ment to the United States Constitution.

#### CONCLUSION

The Appellant respectfully submits that severity of  
the punishment for the crime of Robbery requires strict com-  
pliance with constitutional and decided precedent authorities.  
Further, in view of the trial jury's recommendation of leniency,  
it is clear the court was prejudicial in denying instructions  
to the lesser included offenses, along with the courts  
refusal of various other requested instructions, submitted with  
just newspaper publicity and Illegal Search and Seizure,  
requires that this matter be reversed.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
LINDELL RAY NEWTON, Appellant IN PRO SE  
P. O. Box 250, Draper, Utah