

1961

State of Utah v. Max Leon Reay : Brief of Appellant

Utah Supreme Court

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Sumner J. hatch; Attorney for Appellant;

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Case No. 9516

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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STATE OF UTAH,

Plaintiff and Respondent,

Clerk, Supreme Court, Utah

vs.

MAX LEON REAY,

Defendant and Appellant.

BRIEF OF APPELLANT

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STATE OF UTAH,
Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case
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BRIEF OF APPELLANT

STATEMENT OF THE CASE

Max Leon Reay was charged with assault with a deadly weapon with intent to commit robbery as Count One, and being an habitual criminal, on the 25th day of September, 1960. He was charged jointly with one Arthur John Witchey (R. 6). Preliminary hearing was had on November 21, 1960 (R. 2). The defendant was bound over to the Third District Court and was tried alone before Judge Ray VanCott, Jr. and a jury on the 6th day of April, 1961.

The information is set forth at R. 8-9 with the first count and so much of the second count as applies to Reay appearing at R. 8. After a jury was impaneled and sworn, the information filed by the District Attorney's office was read by the Clerk in the presence of the jury (R. 15). The State produced evidence and rested. Defendant testified; both parties rested. The jury returned a verdict finding the defendant guilty of assault with a deadly weapon with intent to commit robbery. The jury then received evidence on the habitual criminal charge (R. 67-68) and found the defendant guilty of being an habitual criminal.

Defendant was committed under the statutory sentence for both counts and filed a timely notice of appeal.

STATEMENT OF FACTS

Ronald R. Eatchel testified that on the 25th day of September, 1960, he was employed as the assistant manager of a Safeway Store on the corner of South Temple and Fourth East Streets in Salt Lake City. One of his duties was to close the store at night (R. 23-24). September 25th was a Sunday and the store closed at 7:00 P.M. Sunday, September 25th, his wife Donna arrived at about 15 minutes to 7:00 P.M. She had the automobile. He closed the store about 7:05 P.M., put the money in the safe, went outside, locked the door and then padlocked the door, using two separate locks. He had one key in his pocket and the key to the padlock was on the car key container in the possession of his wife (R. 25).

The Eatchel car was parked parallel directly in front of the store about twenty-five feet from the front door. He went to the car and opened the door for his wife and baby when a fellow approached and pulled a gun out of his pocket (R. 26). This person was identified as Arthur John Witchey. The witness identified the gun as a 22 pistol. It was held by Witchey's leg and never pointed at him (R. 27). He requested them to go back to the door and wanted to enter the store. The witness convinced him that he had only the one key (R. 28). Witchey escorted them back to the car. Another car was parked behind the Eatchel car (R. 29). Witchey got in the other car and it drove down Fourth East behind the witness' car, with the lights out. There was another person in the Witchey car, the witness claims, on the driver's side (R. 30). The Eatchel car turned west on First South Street and proceeded to the Police Station. The Witchey car continued down Fourth East.

Eatchel reported the holdup attempt to the police about 7:20 P.M. (R. 31). The witness testified he had never seen the defendant Reay in the vicinity of the Safeway Food Store (R. 32).

Donna Eatchel testified that she was the wife of Ronald. On September 25, 1960, she called for her husband around a quarter to seven in the evening. She parked the car parallel in front of the store, facing east. Her husband closed the store and locked two locks (R. 34). She had the keys to the padlock on the ring with the car keys. As they were entering the car, a person

approached with a gun (R. 35). She identified this person as Arthur John Witchey. Witchey took them to the door then back to the car. She saw another car which she later identified as a black Buick, license No. DC 4554 Utah. When asked who was behind the wheel, she thought it was the fellow who had the gun (R. 37). They turned west on First South and went to the Police Station (R. 38).

Mike Clark testified that he was a police officer with the Salt Lake Police Department, with three years' experience in traffic and radio patrol. He was at the County Hospital at 7:00 P.M. on September 25, 1960. He had proceeded north on State Street when he received a general alarm 920 (robbery). It was at about 17th South and State (R. 40). Between 13th and Ninth South on State Street, he received an automobile description—1949 Buick, License No. Utah DC 4554. At Sixth South and State he saw the described car facing east waiting for a red light. He made a left turn, then a U-turn and pulled behind the car and verified the license number (R. 41). He got out and asked the occupants to get out. He identified the defendant Reay and Arthur John Witchey as the occupants. Reay was driving; Witchey was on the passenger's side. He found a 22-caliber revolver under the right front seat (R. 42). The revolver was entered as Exhibit 1 without objection. Five expended cartridges and four live cartridges were entered as Exhibit 2. At the time he first sighted the car, it was 7:21 P.M.

Reay made no statement to the officers; was told by the officers not to say anything. The State rested.

The defense put on the defendant (R. 46). He testified that he knew Witchey; had seen him on September 25, 1960, in Salt Lake City; he lent Witchey a car belonging to Rex Marsh about 6:00 P.M. (R. 47). Witchey let Reay out at Walgreen's Drug Store on Main Street and said he would pick him up again in thirty to forty minutes. Reay never saw the gun, Exhibit 1 (R. 48). When picked up, he asked the officer why he was arrested. The officer did not tell him (R. 50).

After Witchey dropped him at Walgreen's, he had two beers and waited for Witchey on Walgreen's corner. He is not too familiar with Salt Lake City streets (R. 53). He believed Witchey lived on Fifth East or Second East. Witchey left for about forty minutes (R. 56).

The defendant testified on cross-examination that he had been convicted of two felonies; that he had known Witchey for about two or three years. After Witchey dropped him at Walgreen's he went north up Main Street. The car belonged to Rex Marsh and he had been living with Rex Marsh and using the car for several days. Defense rested.

The jury was instructed by the court. No instructions were requested nor exceptions taken by either side (R. 56). The jury returned a verdict of guilty of the crime of assault with a deadly weapon with intent to commit robbery, as charged in the information (R. 84).

Court reconvened and instructed as follows:

“Mr. Liston, will you read the information with reference to the second count (sic) and the plea the defendant has entered thereto?” (R. 67).

The State offered and the court received over objections, Exhibits 3 and 4. Exhibit 3, an exemplified copy of a commitment of one Max Leon Reay from Idaho, and Exhibit 4, certified copy of a commitment from the Clerk of the District Court for Salt Lake County.

The State rested without testimony or other proof connecting the defendant with the Exhibits 3 or 4 (R. 67-68). The jury was instructed on count two charging defendant with being an habitual criminal (R. 68-69-70), retired and returned with a verdict of guilty of being an habitual criminal.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AS A MATTER OF LAW.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION NO. 4.

POINT III.

THE COURT ERRED IN HAVING THE ENTIRE INFORMATION READ TO THE JURY UPON BEGINNING THE TRIAL OF THE ASSAULT CASE.

POINT IV.

THE COURT ERRED IN ADMITTING EXHIBITS 3 AND 4 WITH NO FOUNDATION WHATSOEVER TO CONNECT THE EXHIBITS WITH THE DEFENDANT.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AS A MATTER OF LAW.

A careful review of the evidence and that portion of the case concerning the assault with a deadly weapon with intent to commit robbery does not disclose a scintilla of evidence connecting the defendant Reay with the crime. Ronald Eatchel, one of the State's witnesses, stated that another person was in the Witchey automobile in front of the Safeway Store on South Temple, but did not identify that person even as to sex (R. 30). On cross-examination, he unequivocally stated that he did not see Reay on September 25th at 7:00 P.M. (R. 31). He (Eatchel) further states that the only place he ever saw Reay was at the city jail (R. 31). Mrs. Eatchel stated that there was another fellow sitting in the car, but didn't purport to identify him as being the defendant Reay (R. 37).

Officer Clark identified the defendant as being in the Buick car earlier identified by Mrs. Eatchel, at a later time when the car, facing east on Sixth South Street at that street's intersection with State Street, was waiting for a red light (R. 41). Reay was driving. The police car made a left turn in front of the Buick and then a U-turn on Sixth South Street and pulled up behind the Buick. Reay made no attempt to flee (R. 41). Reay made no admissions to the officers that might connect him with the crime charged; in fact, he was told by

the officers not to talk. There is no other evidence connecting Reay with the crime, and no evidence putting him closer than ten blocks to the scene of the attempted holdup. There is no evidence connecting him with the weapon found in the car and no evidence even inferring a knowledge of what Witchey's intentions or plans had been.

The sole circumstance causing the arrest and the charging of the defendant Reay was his presence in an automobile with Witchey twenty to forty minutes after the attempted holdup and more than ten city blocks from the place of the attempted holdup, headed in a direction which would take the car closer to the scene of the crime rather than in apparent flight. Witchey did not testify.

In *State v. Marasco*, 81 Utah 325, 17 P. 2d 919, the court considered and reversed a case directly in point with this case. In the *Marasco* case there were further facts to back up the one circumstance. In that case the defendant was charged with arson of a store owned by him in Helper, Utah. After the explosion that started the fire, a man was seen running away from the building by two witnesses, neither of whom could identify. The explosion was between 2:30 A.M. and 3:00 A.M. At 3:30 A.M. the defendant, together with Turzo, was seen in Castlegate, Utah, approximately four miles from the scene of the explosion and fire. He there hired a man, who was later a witness in the case, to take him to Salt Lake City. Defendant asked this man "to say nothing about taking him in" and later "to say nothing

in court" and "say it wasn't him." Turzo was connected with an automobile that was found burned and contained kegs containing gasoline at the scene of the explosion and fire. The defendant Marasco had a defense of alibi and on the stand denied being in Carbon County on that date. The court, in reversing the Marasco conviction, states at page 922-923:

"That some of such testimony shows suspicious circumstances may well be conceded. Perhaps the most probative is the testimony that the defendant at Castlegate, about 4 miles from the scene of the crime, about thirty or forty minutes after the building was demolished and on fire, hired a man to drive him to Salt Lake City and admonished the driver to say nothing about it, from which some elements in the nature of a flight might be inferred. The corpus delicti being proven, the fact that an accused fled from the vicinity where a crime was committed, and having knowledge that he was likely to be arrested for the crime or charged with its commission, or suspected of guilt in connection therewith, may be shown as a circumstance of guilt, and may be considered in connection with other evidence or circumstances tending to connect the accused with the commission of the offense. But it is only a circumstance. It alone will not justify conviction of the defendant, in the absence of other evidence tending to connect him with the commission of the crime. 8 R.C.L. 192. A leading and well-considered case on the subject to that effect is *State v. Poe*, 123 Iowa, 118, 98 N.W. 587, 101 Am. St. Rep. 307. To that effect also are *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *Smith v. State*, 106 Ga. 673, 32 S.E. 851, 71 Am. St. Rep. 286."

Reay, in the instant case, took the stand for the purpose of explaining his presence in the car with Witchey at the time of arrest. It is apparent that the jury chose not to believe him. Whether their disbelief arose from the evidence of his prior convictions or his demeanor on the stand is immaterial. Again citing from the Marasco case, at page 923:

“There is the further circumstance, the statement of the defendant to the city marshal that at the time of the commission of the offense he was in Salt Lake City and disputed by the testimony of the witness that just after the fire the defendant was at Castlegate and the testimony of another witness that at 8 o’clock on the morning of the fire he was seen at Provo, about 73 miles from Helper, and about 45 miles from Salt Lake City; a claimed alibi being a shield or weapon of defense, which, if disbelieved or discredited, may not be turned by the state into an offensive weapon or as affirmative proof connecting the accused with the commission of the offense. There being no direct evidence connecting the defendant with the commission of the offense—no such evidence is claimed by the state—and considering all of the suspicious or shown circumstances together, we are of the opinion that the evidence is insufficient to connect the defendant with the commission of the offense and to let the case go to the jury.”

The only item of evidence connecting Reay with the offense charged is his presence in an automobile which had been identified as being at the scene of the holdup, but at a different place and at a different time.

“Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and cannot be presumed, and the circumstances proved must be consistent with the main fact sought to be presumed. They must be not only consistent with the theory which is sought to be established, but absolutely inconsistent with any other rational theory.” 20 Am. Jur., Evidence, Weight and Sufficiency, Sec. 1190, citing *Carter v. Standard Accident Insurance Co.*, 65 Utah 465, 238 P. 259, 41 A.L.R. 1495, among other cases.

The court instructed the jury in compliance with this citation (Instruction No. 5, R. 74), but it is apparent from the entire record that the jury did not follow said instruction.

While it is unfortunate that neither a motion to dismiss was made at the end of the State’s case, nor a motion for directed verdict upon both sides resting, the crime charged carries a sentence of five years to life, 76-51-3, Utah Code Annotated 1953. It is also the third conviction charged in an habitual criminal count under 76-1-18, Utah Code Annotated 1953, carrying a minimum fifteen-year sentence. An appellate court cannot in good conscience refuse to consider the utter lack of evidence due to failure of counsel at the trial level to make proper motions, or the failure of the trial court to invite such motions.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION NO. 4.

In Instruction No. 4, the court instructed the jury as follows:

“You are instructed that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid or abet in its commission, are principals in any crime so committed, and where two or more persons with a common intent engage jointly in the commission of an unlawful act, each is responsible for the act or acts of the other done in the furtherance of their common design.” (R. 75).

Neither the evidence nor the pleadings called for such an instruction and it was prejudicial to the defense. While we agree that under the laws of Utah one who aids or abets is a principal, the information (R. 8) does not charge Reay with aiding or abetting Arthur J. Withey in assaulting Ronald and Donna Eatchel, but jointly charges him with the assault itself. The evidence as discussed in the preceding point gives no inference that Reay loaned the car to Withey for the purpose of committing a crime or with the knowledge that he (Withey) contemplated the commission of a crime. There is no evidence of Reay’s advising or encouraging the commission of a crime. The evidence does not put Reay at the scene of the crime. The mere fact that he was driving the automobile at a later time, even combined with evidence of the knowledge of the commission of a crime or flight (neither of which is shown by the evidence), could only justify a charge of being an accessory after the fact and would not support or justify Instruction No. 4, *supra*.

The Marasco case, *supra*, citing *State v. Baum*, 47

Utah 7, 151 P. 518-19, with regard to a similar instruction, says:

“There was no evidence to show and no one claimed that the defendant but aided and abetted in the commission of the offense, advised or encouraged its commission. There, hence, was no occasion to give that kind of a charge. Under the circumstances we think it was misleading and harmful.

“The Baum case in such particular was approved and followed in the case of *State v. Sid-doway*, 61 Utah 189, 211 P. 968. To the same effect were further cases cited in 17 P. 2d at 924. It is familiar doctrine that it is erroneous to give instructions based on a state of facts of which there is no evidence tending to prove, though such instructions abstractly contain correct statements of the law. We, here, think as was stated in *State v. Baum*, that the giving of the instruction as modified was erroneous and prejudicial.”

It is again admitted that the record shows no exception to have been taken to this or any other instruction by either party. However, it is the policy, in fact, the very essence of our appellate system, that a person should not be allowed to be convicted of crimes carrying penalties of the magnitude here involved due to failure of counsel or the trial court to take advantage of procedural steps contemplated by our trial system.

The court instructs on “aid and abet” and totally fails to define those terms. The jury could have well believed that the mere presence in the automobile at a time following the crime could constitute aiding and

abetting, or either of them, even in the absolute absence of evidence showing Reay's "knowledge" or "intent", as is displayed by the record.

POINT III.

THE COURT ERRED IN HAVING THE ENTIRE INFORMATION READ TO THE JURY UPON BEGINNING THE TRIAL OF THE ASSAULT CASE.

After the jury was impaneled and sworn, quoting R. 15, "The clerk read the information filed by the District Attorney in said case." The information (R. 8-9) contains two counts, the second being the charge of being an habitual criminal under 76-1-18, and alleging and identifying two previous felony convictions. The record does not indicate the reading of only count 1 or a deletion of the words "and of being a habitual criminal in violation of Title 76, Chapter 1, Section 18, Utah Code Annotated, 1953" as set out in the heading of the information (R. 8). 76-1-20, Utah Code Annotated 1953, setting forth the procedure in charging and trying a person charged with being an habitual criminal, states in part:

"The jury *shall not* (emphasis ours) be told of the previous convictions of felony and the trial on the felony committed in the State of Utah shall proceed as in other cases."

State v. Stewart, 110 Utah 203, 171 P. 2d 383, 386, following and approving this procedure as outlined in *State v. Ferrone*, 96 Conn. 160, 113 A. 452, 457, and in *State v. Reilly*, 94 Conn. 698, 110 A. 550, states at page 387:

“ * * * The information should be divided into two parts. In the first the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer. The entire information should be read to the accused and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, the clerk should read to them only that part of the information which sets forth the crime for which the accused is to be tried. The trial should then proceed in every respect as if there were no allegations of former convictions, of which no mention should be made in the evidence, or in the remarks of counsel, or in the charge of the court. When the jury retire to consider their verdict, only the first page of the information, on which the crime charged is set out, should be given to them. If they return a verdict of guilty, the second part of the information, in which former convictions are alleged, should be read to them without reswearing them, and they should be charged to inquire on that issue. Of course, the accused may plead guilty to this part of the information, and then no further proceedings before or by the jury would be necessary. No reason appears why the accused, if he should choose, might not submit this issue to the court without the jury.

“In this way the well-recognized rights of an accused person will be protected, and the principles of justice and our long-established laws which have been designed to secure an impartial

trial in every criminal cause will be recognized, respected, and obeyed.'

"The court also pointed out that until a verdict has been rendered on the principal issue, there is no occasion to mention the prior convictions since previous offenses would not be competent to prove that defendant committed the offense for which he is then on trial. Likewise, the court remarked that by directing attention to prior offenses, a defendant may be deprived of the presumption of innocence, and in doubtful cases a verdict of guilty might be based on prior convictions instead of on the basis of proof of the particular crime for which defendant is on trial."

With regard to the above, also see *State v. Russum*, 107 Utah 94, 152 P. 2d 88, following *State v. Ferguson*, 83 Utah 375, 28 P. 2d 175.

It appears from the record by which this court is bound that the information filed by the District Attorney was read to the jury prior to the trial of the assault with intent to commit robbery case. The information itself (R. 8) shows both counts to be on the same page. Neither the information on its face nor the record of the transcript of the testimony at R. 15 indicates a deletion of either the words "and being a habitual criminal in violation of 78 (with a "6" above the "8" sic), Chapter 1, Section 18, Utah Code Annotated 1953, as follows, to wit:", or a deletion of count 2 of the first page of the information, although there are certain ink marks on count 2 that would indicate only that part of the charge regarding Max Leon Reay was read. Under the situation

as shown by the record, the jury was informed of alleged prior convictions, and though no attempt was made by the State to prove said convictions in the first phase of the case, such reading of the information prejudices the defendant and his counsel in their choice as to whether the defendant should testify or take advantage of his statutory right to silence.

POINT IV.

THE COURT ERRED IN ADMITTING EXHIBITS 3 AND 4 WITH NO FOUNDATION WHATSOEVER TO CONNECT THE EXHIBITS WITH THE DEFENDANT.

The State offered no proof to show that the person or persons named in Exhibits 3 and 4 were the same person as the defendant. The defendant objected to admission of the documents on the ground that they were not the best evidence, and said objections were overruled by the court.

State v. Bruno, 69 Utah 444, 256 P. 2d 109, at page 110 citing 16 C.J. 1342, says:

“In all criminal prosecutions when the State desires to inflict a more severe penalty on account of the defendant having been convicted previously, the burden is on the State to prove all facts necessary to bring the case within the statute authorizing such penalty to be imposed. Thus, like any other material element, the State must prove prior conviction of the accused and must establish his identity as the person previously convicted. (Citing cases and texts).”

And at page 111:

“If it were held that because a person has the same name as a person who has theretofore been convicted of a similar offense, it follows as a matter of law that such person is the same person as was named in the prior proceeding, such holding would be contrary to our fundamental principles and proceedings in criminal actions. It would be a denial of right to trial and determination by jury, one of the essential facts always necessary to be found in order to convict an accused of the graver offense.”

The writer is aware of the case of *State v. Aime*, 62 Utah 476, 220 P. 704 (1923), which is distinguished from the Bruno case, *supra*, on the basis of additional evidence besides the identity of names. 11 A.L.R. 2d 870, et seq. contains an exhaustive annotation on the question, listing the Aime case, *supra*, as holding identity of names to be sufficient, and the Bruno case (a later case) holding identity to be insufficient. Many of the cases go off on a basis of the common or peculiar nature of the name. However, in the case at hand, there is no evidence of the prevalence of the name “Reay” either here or at the location of the Idaho conviction.

Under the procedure set up in the Stewart case, *supra*, the habitual criminal count is, or at least it should be, tried as a distinct count, and the fact that the defendant testified as to two felony convictions should be neither an affirmance or a denial of Exhibits 3 and 4 where the defendant did not choose to testify in the latter phase of the case.

The status of being an habitual criminal carries a

greater statutory penalty than any crime in our code with the exception of the two top homicide counts. Evidence of prior commitments of a person of the same name should not be allowed to go to a jury without substantial foundation to identify the copy of the commitments with the person of the accused, or (as the Bruno case sets forth) it will not meet the fundamental principles and proceedings of our criminal actions and violates the intent of the Utah Constitution, Article 1, Section 12, and 77-1-8(6) and 77-31-4, Utah Code Annotated 1953.

SUMMARY

It is the belief of the writer that a scrutiny of the transcript of the trial is in itself enough to compel a reversal of the conviction of assault with a deadly weapon with intent to commit robbery, and it is elemental that in the absence of that conviction the finding of Reay's status as an habitual criminal cannot stand under the provisions of 76-1-18, Utah Code Annotated 1953.

It is interesting to note that, though Witchey had pleaded guilty and been sentenced on the identical crime, thus depriving him of his right to refuse to testify by his constitutional right against self-incrimination, U.S. Constitution, Fifth Amendment, and though he was in court under the State's subpoena (R. 14 and R. 48), the

State did not see fit to use him as a witness. While he was also accessible to the defense and the reason for his silence remains undisclosed, the State is charged with the burden of proof beyond a reasonable doubt, which burden the record does not sustain.

It is respectfully submitted that the assault with intent to commit robbery charge should be dismissed, carrying with it the key conviction necessary to sustain the count of being an habitual criminal, or in the alternative, that the habitual criminal charge be reversed due to the procedural violations to the intent of 76-1-18 and 19 and the failure of the State to identify the defendant with Exhibits 3 and 4.

With respect to the habitual criminal count, the record indicates that the State and the court did not follow the procedure recommended by *State v. Stewart*, supra, and cases cited therein and, further, that there was absolutely no proof of identity of the defendant with Exhibits 3 and 4.

Upon the above reasoning and errors of the court, defendant contends, first, that the initial charge of assault with a deadly weapon with intent to commit robbery should be dismissed for entire lack of evidence to connect the defendant with the crime and for prejudice arising from erroneous Instruction No. 4 and prejudice arising from the reading of the information to the jury

containing the habitual criminal count, indicating two previous felony violations before the evidence commenced, or in the alternative, to dismiss the habitual criminal count due to prejudice and procedural violations as set forth in Point Nos. 3 and 4, and an entire failure of the State to identify the defendant with Exhibits 3 and 4 other than as to name.

Respectfully submitted,

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