1964

State of Utah v. Virgil Lee Wood and Robert Colvin : Brief of Respondent

Utah Supreme Court

Galen Ross; Mitsunaga and Ross; Attorneys for Appellants;
A. Pratt Kesler; Attorney General;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Respondent,

vs.

VIRGIL LEE WOOD,
Appellant.

Case No.
10080

BRIEF OF RESPONDENT

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Aldon J. Anderson, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant Virgil Lee Wood was convicted of grand larceny and robbery in the Third District Court, State of Utah.

DISPOSITION IN LOWER COURT

The appellant Virgil Lee Wood was tried and convicted upon jury trial with his accomplice Robert Colvin. Subsequent to conviction, a motion for new trial was filed by both defendants. Before the trial court ruled on the motion for new trial, the appellant, Virgil Lee Wood, and Robert Colvin, appealed to the Utah Supreme Court. This court

remanded the case for action on the motion for new trial and determined that the appeal was premature. *State* v. *Wood,* 14 U. 2d 192, 381 P. 2d 278 (1963). Subsequently, the trial court denied the motion for new trial and Robert Colvin appealed separately from the judgment to this court. Virgil Lee Wood has appealed and although the brief of the appellant purports to cover Robert Colvin, by order of the Supreme Court upon motion of the State to dismiss appellant Wood's brief, the brief of the appellant Wood was limited to himself.

RELIEF SOUGHT ON APPEAL

Respondent submits that the trial court acted properly in denying the appellant's motion for new trial.

STATEMENT OF FACTS

The facts relevant to the instant appeal are that subsequent to the conviction of the appellant, a motion for new trial was filed on behalf of the appellant by appellant's counsel. The part of the motion relevant to this appeal is based upon an affidavit of Mr. Harold C. Brandley (R. 6). Mr. Brandley's affidavit was to the effect that subsequent to the trial of the appellant, a Mr. Thomas H. Sark, who was apparently a juror, told Mr. Brandley that the reason he found the appellant Wood guilty was that Wood had testified that he did not own a blue jacket, when, in fact, Mr. Sark had seen the appellant wearing such a jacket in the affiant's office. The trial court denied the motion for a new trial, apparently rejecting the affidavit as providing any basis to impeach the jury's verdict.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL SINCE THE APPELLANT'S MOTION WAS BASED UPON EVIDENCE WHICH MAY NOT PROPERLY BE CONSIDERED ON A MOTION FOR NEW TRIAL, AND WAS AN ATTEMPT TO IMPEACH THE JURY'S VERDICT.

The sole basis for the appellant's claim before this court that the trial court erred in not granting his motion for new trial is that the affidavit of a third person, Mr. Harold C. Brandley, furnished a basis for requiring a new trial. Mr. Brandley was not a juror and the sum and substance of his affidavit merely goes to the reasoning process of one of the jurors in the case.

It is well settled that affidavits which have as their effect the impeachment of a jury's verdict may not be considered by the trial court in determining whether or not to grant a new trial and that it is improper to allow a jury's verdict to be impeached by their own affidavit or affidavits of third persons which relate to the deliberation processes of the jury. In 24 C. J. S., *Criminal Law*, Section 1495, it is stated:

> "Affidavits or testimony of third persons as to statements of jurors tending to impeach their

> verdict are inadmissible, not only as hearsay, but also for the same reason which excludes the affidavits or testimony of the jurors themselves, the admission of an affidavit concerning only hearsay statements of a juror would amount to an indirect way of permitting a juror to impeach his own verdict."

This proposition of law is generally recognized in previous decisions from this court. In *People* v. *Flynn,* 7 Utah 378, 26 Pac. 1114, and *People* v. *Ritchie,* 12 Utah 180, 42 Pac. 209, it was early recognized that an attempt by jurors to impeach their own verdicts would not be allowed and that affidavits from jurors or third persons which had the effect of impeaching the deliberations of the jury could not be received in evidence and would not afford a basis for the trial court granting a new trial.

In *State* v. *Rosenberg,* 84 Utah 402, 35 P. 2d 1004, a motion for new trial was made, supported by the affidavits of two jurors that they did not believe that the defendant was present at the time of the crime. The trial court denied the motion for a new trial. The Supreme Court, in affirming the action of the trial court, stated:

> "* * * In denying the motion for a new trial, it is not made to appear whether the affidavits were stricken or not as being incompetent, and, if not stricken, whether the affidavits were or were not considered by the court in denying the motion for a new trial. The affidavits were incompetent. The view generally prevails that affidavits of jurors cannot be received to show that the verdict was the result of a misconception of instructions of the court, or of a failure of the jury

> to correctly comprehend them, or a mistake as to the meaning of them, or of the verdict. 16 C. J. 1238, 1239. The affidavits should have been stricken. Whether they were or not, since the motion for a new trial was denied, it may be assumed they were not considered by the court."

Subsequently, in *State* v. *Priestley,* 97 Utah 158, 91 P. 2d 443, affidavits were filed by each of eight jurors to the effect that they could not agree on the verdict of guilt or innocence and, therefore, compromised by finding the defendant guilty but recommended leniency. This court, in rejecting the appellant's contention that he should have granted a new trial, stated:

> "It is the settled law in this jurisdiction that jurors cannot impeach their verdict except in the instances expressly made exceptions by legislative enactment. *People* v. *Flynn,* 7 Utah 378, 26 P. 1114; *People* v. *Ritchie,* 12 Utah 180, 42 P. 209; *State* v. *Rosenberg,* 84 Utah 402, 35 P. 2d 1004. Section 105-39-3, R. S. Utah 1933, Subdivision (4) provides that when a verdict has been determined by lot or by any means other than a fair expression of opinion on the part of all the jurors the court may grant a new trial. The verdict in this case is termed by counsel for appellant a 'compromise verdict.' This is not a 'chance verdict' nor is it a ground for a new trial."

Most recently, in *State* v. *Rivenburgh,* 11 U. 2d 95, 355 P. 2d 689, this court ruled and stated:

> "Defendant Rivenburgh submitted for our consideration an affidavit of each of two jurors to the effect that if the record did not support the conclusion of Dr. Clarke, the state's expert witness, then

> these two jurors would not have voted for the verdict. The conclusion of Dr. Clarke referred to in the affidavits stated in substance that the dosages of drugs taken by Rivenburgh did not impair his mental or physical faculties to the extent that he did not know what he was doing, or cause him to react in any abnormal manner. The general rule in this state is expressed in *State* v. *Priestly*, to the effect that jurors cannot impeach their verdict except in instances expressly made exceptions by legislative enactments. The assignment of error under discussion falls under subsection (6) Utah Code Annotated, 1953, section 77-38-3, dealing with the subject of the verdict being contrary to the evidence. This is not an exception that permits a juror to impeach his verdict. Even so, the affidavits are conditional, and can be of no avail to this defendant, where the record does bear out and justifies the verdict of murder in the first degree."

Clearly, therefore, Utah precedence amply supports the proposition that jurors may not impeach their own verdicts. By the same token, it is improper to allow a third person by hearsay affidavit, reciting a hearsay statement of a juror made subsequent to trial, to impeach the jury's verdict.

In *Mooney* v. *State*, 273 P. 2d 768 (Okla. 1954), counsel for the defendant filed an affidavit, stating that a juror, during the deliberations of the jury, had stated information which he had independent of the trial as to the price of certain candy bars, etc. In holding that the affidavit of counsel could not provide a basis for impeaching the jury's verdict, the Oklahoma court stated:

"It has been held that:

> " 'Affidavits or oral testimony of jurors are inadmissible to impeach their verdict, and affidavits of the defendant, or any other person, of alleged misconduct of a juror, upon information derived from particular jurors, are inadmissible to impeach the verdict.' *Brantley* v. *State,* 15 Okl. Cr. 6, 175 P. 51.
>
> "If jurors cannot impeach their own verdict, certainly defense counsel should not be permitted to do so on the basis of sheer hearsay. For all the above and foregoing reasons the judgment and sentence herein imposed is accordingly affirmed."

In a recent Nevada case, *Pinana* v. *State,* 352 P. 2d 824 (Nev. 1960), a motion for new trial was based on an affidavit of counsel for one of the defendants to the effect that the verdict had been decided by means other than a fair expression of opinion on the part of the jurors. The Nevada court rejected the contention that this provided a basis for relief on appeal, stating:

> "* * * These affidavits concerned only hearsay statements of Richard Haman, one of the jurors, and amounted to an indirect way of permitting a juror to impeach his own verdict. The court properly held that they were entitled to no consideration. *Priest* v. *Cafferata,* 57 Nev. 153, 60 P. 2d 220."

On the basis of the above cases and the reasoning contained in the opinions, it is clear that the trial court in this instance did not err in denying the appellant's motion for new trial. The affidavit, as offered, was merely hearsay upon hearsay and an attempt to impeach the jury's

verdict. There is no claim of merit to the appellant's argument that the trial court erred in denying his motion for new trial.

CONCLUSION

The sole basis for the appellant's request for relief from the Supreme Court in this instance is based upon a faulty legal premise. The appellant is entitled to no relief and this court should affirm.

Respectfully submitted,

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