

1984

The State of Utah v. Ibrian Ortiz : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff and Respondent, : BRIEF OF APPELLANT
vs. :
IBRIAN ORTIZ, : Case No. 19082
Defendant and Appellant. :

BRIEF OF APPELLANT

Appeal from a conviction of aggravated robbery, a first degree felony, in the Third Judicial District Court in and for Salt Lake County, Utah, the Honorable J. Dennis Frederick presiding.

* * * * *

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STATUTE CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff and Respondent, :
vs. : BRIEF OF APPELLANT
IBRIAN ORTIZ, :
Defendant and Appellant. : Case No 16566

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from a conviction of aggravated robbery entered in the Third District Court.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty on February 15, 1983, following a two day jury trial. On March 4, 1983, he was sentenced to from five years to life in prison and a consecutive sentence of at least one year but not more than five for using a firearm to commit the offense.

RELIEF SOUGHT ON APPEAL

A reversal of the conviction and a new trial are sought.

STATEMENT OF FACTS

At approximately 9:00 a.m. on September 20, 1982, Richard Bullock was working at a gas station at 3900 South

and Ninth East in Salt Lake County, (Transcript-9-10). Two men entered the business. One of the men pulled a gun and ordered him to lie on the floor (T-12-13). Money was then taken from the cash register (T-13). Bullock identified the men with the gun as one Leonardo Rayes (T-14) and the other man as the appellant (T-15).

A second witness to the robbery was Becky Edwards, a woman who had just purchased some gas when it occurred (T-47). She too identified Rayes as one of the robbers (T-52). She also said the appellant was the other man (T-52), but that she had seen him only briefly (T-52), had really looked only at one of them (T-51), and had some questions as to her identification of the appellant (T-53).

The appellant denied being with Rayes that evening specifically and denied ever spending time with him socially or otherwise in general (T-138). He denied committing the robbery or going to the gas station (T-142). His defense was that he had spent the entire evening with a Pedro Revas and Santiago Crisbo (T-137, 139), including being questioned by an officer that evening (T-142).

The officer who stopped them confirmed that the three were together after 9:00 p.m. and perhaps closer to 10:00 or 10:30 p.m. (T-118). However, the defendant was not permitted to put on further testimony to establish an alibi.

The defendant's alibi notice identified Santiago

Crisbo as a witness and gave the Salt Lake County Jail as his address (T-126-127). It was filed one week in advance of trial but the Court felt it "was in compliance with the rule," (T-130). Unfortunately, Crisbo, who had apparently not been subpoenaed, was released from jail the same week the notice was filed (T-126). The appellant's counsel then learned that Pedro Revas was also in jail and on the Thursday preceding the Monday trial she asked the prosecutor if she could substitute Revas for Crisbo (T-127). The State objected (T-129) and the Court ruled that the notice as to Revas was inadequate (T-131). Counsel for the defendant then stated that the failure to timely file the notice of alibi may have rendered her representation inadequate or incompetent (T-131, 132). No corroboration of the defendant's version was presented and he was convicted. Present counsel was then appointed by this court to conclude the appeal.

A R G U E M E N T

POINT I

THE LOWER COURT ABUSED ITS DISCRETION BY REFUSING TO PERMIT AN ALIBI TO BE PRESENTED.

The defense of alibi is governed by section 77-14-2, U.C.A. (1953, as amended), which requires a notice of alibi to be filed no less than ten days before trial. Subsection (3) of the present statute provides, "If a defendant or prosecuting attorney fails to comply with the requirements

of this section, the court may exclude evidence offered to establish or rebut alibi." The use of the word "may" clearly leaves the decision to exclude or admit alibi evidence to the discretion of the trial judge when the notice given is defective. In the present case the judge abused his discretion by excluding the proffered evidence.

State v. Anderson, 25 v. 2d 26, 474 P.2d 735 (1970), is apparently the sole case in which the failure to give the required notice was deemed to be sufficient reason to exclude the alibi testimony. The case is unique in that the defendant's attorney made absolutely no effort, even when coaxed by the trial court, to justify his failure. In three other cases involving the prosecution's failure to give the required statutory notice, this Court has consistently found "good cause" to waive the notice requirement where ". . . the defense is not so surprised and thus prejudiced when it has implied prior knowledge of the State's [alibi] rebuttal witnesses," State v. Haddenham, 585 P.2d 447, 448 (Utah 1978); State v. Case, 547 P.2d 221 (Utah 1976); Gentry v. Smith, 600 P.2d 1007 (Utah 1979).

In the present case, the State could not have been "so surprised and thus prejudiced" by the testimony of Revas because it had "implied prior knowledge" of his existence and the content of his testimony. The appellant's defense was that he spent the entire evening in question with Crisbo and

Revas. The police officer's testimony established that the three were together at 10:00 p.m. The Court found the notice with respect to Crisbo to be adequate. All that the appellant proposed when he learned that Crisbo had been released but Revas was now incarcerated was to substitute Revas for Crisbo. It strains credulity to believe, considering the three purportedly spent the evening together, that Revas would somehow testify markedly different than Crisbo and the appellant, thus "surprising" the State. The appellant did not attempt to change the nature or content of his alibi, he merely proposed that the witness he originally intended to call be substituted for by another. The refusal to permit the substitution was an abuse of discretion.

The prejudice caused to the appellant by the refusal to permit his witness to testify is manifest. The jury was left solely with the word of the defendant against two questionable identifications. It cannot be concluded that the refusal to permit him to present corroboration of his version was harmless error.

POINT II

INADEQUACY OF COUNSEL

Appellant's trial counsel questioned on the record and in her docketing statement whether she had rendered effective assistance of counsel. Her concern must be examined against the principles most recently reviewed in Codeinna v. Morris, 660 P.2d 1101 (Utah 1983).

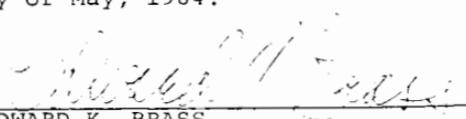
The Court set forth three requirements when such a claim is made. First, the defendant must prove a demonstrable reality that counsel was inadequate. Second, the questioned area must not appear to be the product of a legitimate exercise of trial tactics. Third, the deficiency in performance must be prejudicial. Id., at 1109.

In the present case, tactics are not implicated in the failure to file a notice in the statutorily mandated time. Counsel missed the deadline and offered her own opinion that she was therefore inadequate. The prejudice the defendant suffered was in his inability to present corroboration of his alibi.

CONCLUSION

For either of the foregoing reasons a new trial should be granted.

Dated this 10 day of May, 1984.



EDWARD K. BRASS
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114; and to Ibrian Ortiz, Box 250, Draper, Utah 84020 this 10 day of May, 1984.

Edward Brass