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The State of Utah v. Calvin George Smith, Jr. : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Respondent :
vs. :
CALVIN GEORGE SMITH, JR. : Case No. 19089
Appellant :

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Robbery, a felony of the First Degree and Theft, a felony of the Second Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Calvin George Smith, Jr., appeals from a conviction and judgment of Aggravated Robbery, a felony of the First Degree, and Theft, a felony of the Second Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Calvin George Smith, Jr., was charged with Aggravated Robbery, a felony of the First Degree, in violation of Title 76, Chapter 2, Section 202, Title 76, Chapter 3 Section 203(1), and Title 76, Chapter 6, Section 302 Utah Code Annotated (1953 as amended) and Theft, a felony of the Second Degree, in violation of Title 76, Chapter 2, Section 202, Title 76, Chapter 3, Section 203(2), and Title 76, Chapter 6, Section 404 Utah Code Annotated (1953 as amended). He was

convicted as charged in a jury trial and was sentenced to incarceration at the Utah State Prison for the indeterminate term as provided by law respectfully.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction for Aggravated Burglary and Theft and the judgment rendered below and/or to have the case remanded to the Third Judicial District for a new trial.

STATEMENT OF FACTS

On January 1, 1981, Alma G. Winn was the victim of an Aggravated Robbery and a Theft. Mr. Winn was accosted during the evening hours as he exited his vehicle and attempted to walk from his vehicle through his garage and into his home. Mr. Winn was robbed at gun point by two assailants (T.6-10).

At trial, the prosecution introduced the testimony of two witnesses who both implicated the appellant in the commission of this offense. One witness, Jay Sanchez, received complete immunity for both this first degree felony (T.22) as well as thirty to forty other first degree felonies (T.63). The other witness who implicated the appellant, Edwin Mitchell, was a co-defendant up until the evening immediately preceding the commencement of the trial (T.98). At that late date, Mr. Mitchell struck a deal with the prosecution and agreed to testify against the appellant in return for being permitted to plead to the lesser charge of robbery (T.99). On the strength

of these witnesses, both of whom had a motive to lie, the appellant was convicted by a jury.

During closing arguments, defense counsel for the appellant pointed out for the jury that a reasonable doubt could arise from the absence or a lack of evidence. Specifically, defense counsel pointed to the fact that two witnesses had not been called to testify on behalf of the State. At that point, the Court interrupted counsel and instructed the jury to disregard defense counsel's statements and further instructed the jury that the defendant had just as much right as the State to call the two "missing" witnesses to the stand. The appellant moved for a new trial on the basis that the Court's comment infringed on the appellant's right not to incriminate himself and not to present evidence. The motion for a new trial was denied. (See closing argument transcript pp.35-36.)

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE STATE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT AS TO ANY OFFENSE.

The jury found the appellant guilty of aggravated robbery, a first degree felony and theft, a second degree felony. The evidence presented at trial is insufficient to support the jury's verdict of guilty beyond a reasonable doubt.

The victim of the robbery was not able to identify his

assailants. He testified that it was dark in the garage where the robbery took place (T.10-11) and that both men had black silk stocking caps over their heads (T.6). The only evidence linking the appellant to the robbery was testimony from two individuals who had also been arrested for the same robbery. One of the witnesses was granted immunity for the robbery in return for his testimony against the appellant (T.63). The second witness was given a "deal," allowed to plead guilty to the lesser charge of robbery, in exchange for his testimony (T.99). Both of these witnesses had strong motives to lie. The appellant took the stand in his own behalf and testified that on the night in question he and his co-defendants spent the night with his father and step-mother (T.192). He testified that Mr. Fernandez left at approximately 4:00 a.m. on January 1st (T.199), but the appellant remained at his father's house until late that afternoon (T.203). This testimony was corroborated by Carol Smith, the appellant's step-mother (T.151-154). No physical evidence was presented which tied the appellant to the robbery nor was there any evidence presented to corroborate the testimony of the state's witnesses.

It is well settled that a reviewing court has the authority to review a conviction based upon sufficiency of the evidence. The standard for review was clearly stated in State v. Wilson, 565 P.2d 66,68 (1977):

In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence,

it must appear that upon viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime.

Two conflicting versions of where the appellant was on the night of the robbery were presented at trial. One version was presented by two individuals who both had strong motives to lie. The second version was presented by the appellant and by his step-mother. Both the appellant and his step-mother testified that they did not have a close relationship (T.161,192-93) and therefore, the step-mother was the only witness who really had no personal stake in the outcome and no reason to lie. On a 1978 manslaughter case, State v. John, 586 P.2d 410, 419 (Utah 1978), this court stated:

[A]n accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt. Consequently, if there is any reasonable view of the credible evidence which is reconcilable with the defendant's innocence, it would naturally flow that there would be reasonable doubt as to his guilt.

Ample evidence was presented at trial to indicate that the appellant was at home with his family on the night that the robbery occurred. This evidence was refuted only by two individuals with strong motives to lie. There must be reasonable doubt as to which of the witnesses' stories was true and, therefore, there must be reasonable doubt as to the guilt of the appellant. In light of this doubt, the verdict cannot stand.

POINT II

IT WAS REVERSIBLE ERROR FOR THE COURT TO
COMMENT ON THE EVIDENCE DURING DEFENSE
COUNSEL'S CLOSING ARGUMENT.

During the closing argument by counsel for the appellant, the following exchange took place:

MR. BUDGEN: Why does he--you know, why do these guys use Jay Sanchez?

All he does is supply the gun. Isn't that interesting? Do you honestly believe that that is all that Jay Sanchez did in these cases? This case? Do you think all he did was supply a gun, that that was it, that he was just along for his good companionship beyond that?

Jay Sanchez planned these things. They gave immunity to the bad guy. The bad guy. That is who they gave immunity to.

What else does he tell us about the gun? He always had it handy, he kept it at his cousin, Dickie Carrillo's house. Dickie Carrillo, who we know he did another robbery with. We know that. He can't deny that because Dickie is caught with him and he tells the authorities that at that time. Dickie always keeps his gun.

Well, I wonder if Dickie Carrillo wasn't at the Winn robbery. I wonder if Dickie Carrillo wasn't there with a gun, too, and where was Dickie Carrillo? Whose burden of proof is it?

It's Mr. Soltis's burden of proof and evidence can arise not from what is actually presented, but a reasonable doubt can always exist with respect to what is never presented.

Where is Dickie Carrillo? Where is Shawna Johnson? Where are these witnesses? The State never produced those witnesses.

THE COURT: I am going to tell the jury you had as much right to bring them in as anybody and they were not necessary, and the State did not have any requirement to bring them into this case regarding as to other matters. And the jury will disregard what Counsel said, where is Shawna Johnson and Dickie Carrillo, because the State had no burden as relates to them in this case and the

defendant had all of the rights of the State to bring them in.

MR. BUDGEN: May I proceed, your Honor?

THE COURT: Now, let's proceed and keep within our rules.

(Closing argument T.35-36.) The court's comment on the evidence and refusal to allow defense counsel to comment on the absent witnesses was reversible error on a number of separate grounds.

A. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE UTAH CONSTITUTION FORBID COMMENT ON THE ASSERTION OF THE RIGHT TO REMAIN SILENT AND NOT INCRIMINATE ONESELF.

It has been well settled since the decision in Griffin v. California, 380 U.S. 609 (1965), that comment on a defendant's decision not to take the stand and hence to remain silent is reversible error. In Griffin, the U.S. Supreme Court was asked to rule on the constitutionality of a California rule allowing comment on the fact that a defendant had not testified. In finding the rule unconstitutional, the court stated:

[C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 12 L.Ed. 2d 678, 681, 84 S.Ct. 1594, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. . . . We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

ii at 614-15.

The Utah Supreme Court has also held prosecutorial comment on the evidence reversible error. In State v. Eaton, 569 P.2d 1114 (Utah 1977), the prosecutor, in his closing argument, stated that "only [the] government witness and defendant 'really knows what took place in that house' and 'What does the defendant tell us?'" Id. at 114. The prosecutor also remarked that they "never heard one shread of evidence from the defendant' in support of defendant's contention. . . ." Id. This court held that those remarks constituted reversible error despite the fact that the prosecutor did not directly comment on the defendant's failure to testify. The court stated that the prosecutor's remarks were

. . . but a thinly disguised attempt to do indirectly what the prosecutor knew could not properly be done directly: that is, to comment on the fact that the defendant had chosen not to take the witness stand; and to persuade the jury to draw inferences as to his guilt because of his exercise of that constitutional privilege.

Id. at 1116.

In a more recent case, State v. Urias, 609 P.2d 1326, 1335 (Utah 1980), this court said: "[W]hen a person invokes his constitutional right, the prosecution should not comment thereon nor so use it in any way that will tend to impair or destroy that privilege."

In the present case, as an offshoot of the defendant's constitutional right to remain silent, a decision was made not to use particular witnesses. The court erred in commenting on this decision and the comment clearly tended to impair the

defendant's right not to produce the witnesses.

- B. EVEN IF IT IS FOUND THAT THE COURT'S COMMENT DID NOT VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT, THE COMMENT DID IMPERMISSIBLY SHIFT THE BURDEN OF PRODUCTION OF EVIDENCE TO THE APPELLANT IN THE EYES OF THE JURY.

It is a well established tenet that it is the burden of the prosecution to prove every element of the offense charged. This court clearly stated in State v. Mitcheson, 560 P.2d 1120, 1122 (Utah 1977), "The entry of a plea of not guilty places upon the State the burden of proving every element of the offense beyond a reasonable doubt." The defense has no burden of proof and no burden of production of evidence. "The ultimate burden of proving the defendant's guilt beyond a reasonable doubt remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not." State v. Torres, 619 P.2d 694, 695 (Utah 1980). The comment of the court made it appear to the jury that the appellant had a duty to call witnesses. From the appellant's failure to call these witnesses then the inference that their testimony would have been harmful to the appellant was clear. As the appellant had no burden to produce evidence, the inference that he should have called the mentioned witnesses which must be drawn from the court's comment was clearly prejudicial and reversible error.

POINT III

IT WAS REVERSIBLE ERROR FOR THE COURT TO REFUSE TO ALLOW DEFENSE COUNSEL TO COMMENT IN HIS CLOSING ARGUMENT ON THE ABSENT WITNESSES.

A recent Utah Supreme Court case, State v. Potter, 627 P.2d 74,78 (1981) stated: "The trial court has a duty to instruct the jury on the law applicable to the facts of the case. Encompassed in this duty is the right of the defendant to have his theory of the case presented to the jury in a clear and understandable way." See also State v. Stone, 629 P.2d 442 (Utah 1981); State v. Brown, 607 P.2d 261 (Utah 1980); State v. Eagle, 611 P.2d 1211 (Utah 1980). By refusing to allow the appellant's counsel to comment on the missing witnesses, the court effectively prevented the defense counsel from presenting the defense theory of the case to the jury.

It was obvious from the testimony that the defense theory of this case relied heavily on the appellant's ability and the likelihood that two other individuals, the missing witnesses, were the actual participants in the robbery. The court would not allow defense counsel to present this theory.

The requirements to allow comment on missing witnesses were well articulated in United States v. Mahone, 537 F.2d 927 (7th Cir. 1976). The requirements mentioned in that case include (1) that the absent witness is particularly within the other party's power to produce; and (2) that the testimony of the

witness would elucidate issues in the case and not be merely cumulative. Both of these requirements were met in the present case.

The first requirement, according to the Mahone case, either when the witness is physically available only to the opposing party or when "the witness has a relationship with the opposing party 'that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability.'" Id. at 926. The situation in the case at bar falls within the second alternative. Since the purpose of having Carrillo and Johnson testify would have been to clear the appellant by incriminating themselves, it is not reasonable to believe that either missing witness would have testified for the defense. The second Mahone requirement is also met in this case. The testimony of the absent witnesses would not have been cumulative and would have elucidated some critical issues in this case.

Because the facts meet the requirements established by United States v. Mahone, supra, the defense counsel should have been allowed to comment on the absent witnesses during this closing argument. The failure to allow such comment prevented the defense from effectively presenting its theory of the case which is a right long recognized by Utah courts. The court's refusal to allow comment on the missing witnesses was clearly prejudicial to the appellant and must therefore be considered reversible error.

CONCLUSION

The evidence presented at trial was not sufficient to sustain a verdict of guilty beyond a reasonable doubt of aggravated robbery and theft. Not only was the evidence presented contradictory and inconclusive but there was also ample evidence presented to give rise to a reasonable doubt under the standard articulated in State v. John, supra. The conviction therefore, cannot stand and must be reversed.

The comment made by the court during the closing argument of defense counsel was reversible error as it violated the appellant's right against self-incrimination and it shifted the burden of production of evidence to the appellant in the eyes of the jury. The court's refusal to allow defense counsel to comment upon the missing witnesses was error as it prevented the defense from adequately presenting its theory of the case.

In State v. Eaton, 569 P.2d 1114, 1116 (Utah 1977), this court stated:

Consistent with the nature of criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the state to prove the defendant's guilt beyond a reasonable doubt, we believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. Consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse

effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless, and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial and warrant granting a new trial.

In the instant case, the error was prejudicial and the court's comment clearly had a substantial adverse effect upon the defendant's right to a fair trial. Because of this, the conviction cannot stand.

DATED this 20th day of June, 1984.

Respectfully submitted,



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DELIVERED two copies of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 21 day of June, 1984.


