

1984

The State of Utah v. Leonardo Rayes : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff/Respondent, :

-v- :

LEONARDO RAYES, :

Case No. 19092

Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment and conviction of Aggravated Robbery, a felony in the first degree, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent, :
 :
LEONARDO RAYES, : Case No.
Defendant/Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Leonardo Rayes, appeals from the conviction and judgment of Aggravated Robbery, a felony in the first degree, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson presiding.

DISPOSITION IN THE LOWER COURT

On March 10, 1983, the Honorable Homer F. Wilkinson presided at the jury trial where the Appellant was found guilty of the offense of Aggravated Robbery, a felony in the first degree. He was subsequently sentenced to the indeterminate term of five years to life in the Utah State Prison to run consecutively with the sentence he is currently serving. Appellant was not fined for this offense.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction and a remand to the Third Judicial District Court for a new trial.

STATEMENT OF THE FACTS

Mr. Leonardo Rayes, the Appellant, and Mr. Ibian Ortiz, the co-defendant, were brought to trial as co-defendants on January 24, 1983. On that same day, Judge Wilkinson granted a continuance for this trial because defense counsel were given, only after their request, approximately 15 pages of supplemental police reports not previously submitted to them after proper formal discovery request. A second trial date was set for February 7, 1983, and a continuance was granted until February 14, 1983.

During the second trial, which began on February 14, 1983 and was held before the Honorable J. Dennis Frederick, the Judge declared a mistrial as to the Appellant when the jury saw him shackled, and in prison clothes. At that point, a severance was granted between the two co-defendants. Mr. Ortiz's trial proceeded and he was convicted as charged. Mr. Rayes' third trial date was set for March 9, 1983, and provides the basis for this appeal.

Richard Bullock, the prosecution's first witness testified that on September 20, 1982, a robbery occurred at the Quality Oil Gas Station located at 3910 South 900 East. There were two individuals involved in the robbery. Richard Bullock was the cashier and only employee on duty at the time of the robbery, which was approximately 9:00 p.m. that night (T.17).

One of the robbers had a gun and commanded Mr. Bullock to lie down on the floor while the cash register was emptied (T.19). Mr. Bullock originally reported the amount of money taken was under \$170.00, but later admitted he was mistaken about the amount. Mr. Bullock described the clothes the two men were wearing (T.18), and noted that both individuals spoke with an accent and probably were not speaking English, but he could not positively identify the language they were using (T.20).

In his initial account to the police, Mr. Bullock failed to report this accent to the police (T.31). He also originally described both men as black, but then stated that they had black features but were lighter in skin coloring; and then he later stated that one of them could have been Mexican (T.24). Prior to the mistrial granted before Judge Fredrick, he testified under oath that the one he believed was Mexican was the co-defendant, Mr. Iban Ortiz. On his subsequent testimony, Mr. Bullock's description of Mr. Rayes gradually changed to fit Appellant's appearance. Mr. Bullock admitted his original description to the police may have been mistaken (T.30).

During the third trial setting the court sustained the State's objections concerning cross-examination of Mr. Bullock, who was the only eyewitness. Defense counsel attempted to question Mr. Bullock about reports of mistaken eyewitness identification (T.34-5), and was never allowed to fully explore the strength of Mr. Bullock's testimony, a point which the Appellant now appeals.

During this same "third" trial, defense counsel requested a brief mid-trial continuance, as a defense witness, Ozzie Ahmed, had gone unnoticed, due to the State's delay in turning over the

police reports, until the day before the trial when the information was disclosed in a report. Defense counsel's investigator attempted to find Mr. Ahmed throughout the day, but was unsuccessful. Thus, this witness the defense was unable to present critical information to the jury.

At about 8:50 p.m., the evening of the robbery in question, a suspicious vehicle was reported by Mr. Ahmed in the vicinity of the Triangle Service Station at 4200 South Highland Drive--about 1 1/2 miles away from the scene of the robbery (T. 64, 79-80). Mr. Ahmed, supposedly, had not only seen the vehicle but had also noted the number of occupants in the vehicle. Defense counsel was unable to establish this evidence during the trial through any other witnesses (T.81).

The police investigated the suspicious vehicle and established the fact that it was registered to a Ms. Peterson (T.81, 89). Late around 10:00 or 10:30 p.m. that evening, Salt Lake City Police Officer Robert Robinson stopped a car fitting the "suspicious vehicle" description reported earlier. Three Hispanic males were in the car: Pedro Diaz, Santiago Crespo, and Ibian Ortiz. Appellant was not in this car Id., which was probably the reported vehicle.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT ALLOWING FULL CROSS-EXAMINATION OF THE STATE'S CHIEF WITNESS REGARDING EYEWITNESS IDENTIFICATION.

In the case at bar, eyewitness identification provided a crucial link in the State's case. The Defendant/Appellant had

raised serious questions about the possibility of misidentification, including Mr. Bullock's admission that his original descriptions to the police may have been mistaken (T.30). The Sixth Amendment of the United States Constitution requires the accused "to be permitted to introduce all relevant and admissible evidence." The test of the relevancy of such testimony is "whether the proffered evidence would render the desired inference more probable than [sic] it would be without such evidence." State v. Johns, 615 P.2d 1260, 1263 (Ut. 1980).

Courts have long recognized that identification testimony presents special problems of reliability because the in-court testimony of an eyewitness can be devastatingly persuasive. U.S. v. Hodges, 515 F.2d 650, 653 (7th Cir. 1975). It is essential the Defendant be allowed to fully develop the conditions under which the identification was made and probe whether the identification remains unqualified and certain after full cross-examination. Here, where mis-identification is the defense, the Defendant should have been afforded an opportunity to elicit answers which would impeach the veracity, the capacity to observe, and impartiality, and the consistency of the witness. McCormick, Evidence (2d Cleary Ed. 1972) Section 22 at 49.

On cross-examination of Mr. Bullock, the eyewitness defense counsel stated:

Q: Have you had an opportunity, Mr. Bullock, to read any newspaper articles or watch any television programs dealing with an identification, eyewitness identification?

CA: Objection, Your Honor. Irrelevant.

Q. I think it goes to credibility, Your Honor.

* * *

Q. Have you become aware of situations, Mr. Bull, in which persons who have allegedly made eyewitness identifications have in fact been wrong about those identifications?

CA. Objection, Your Honor. It is irrelevant.

* * *

J. I am going to sustain it. . . .

(T.34-35).

In People v. Clark, 47 Cal.Rptr. 382, 407 P.2d 294 (1965) the defendant's conviction for committing lewd acts on the body of a child under fourteen was based on the testimony of the alleged victim herself. The defendant sought to establish that her testimony concerning sexual intercourse with the defendant was fabricated, but was not allowed to question her about matters that might have undermined her credibility.

The California Supreme Court noted the trial court improperly limited the scope of cross examination and the reception of other evidence that went to the alleged victim's credibility in reversing the conviction. The court explained:

[D]efendant put in issue the prosecutrix' motives, the possibility of fabrication, and the role fantasy may have played. Hence, evidence rebutting her statement . . . was relevant to the issues involved. The impropriety, therefore, of denying such evidence . . . on cross-examination of the prosecutrix . . . is clear.

Id. at 296.

Authorities agree the broadest latitude must be given to cross examination aimed at impeaching a witness. Ill. Evid. Code (Chadborn Revision) Section 994 and McCormick Evidence (1972 Ed. 1972) Section 30. Undue limitation of a criminal defendant's

re-examination of a prosecuting witness further deprives him of Sixth Amendment right to confront his accusers.

In the case of State v. Zolantakis, 70 Utah 296, 259 P.1044, 1927 (1927), this Court reversed a conviction for violation of prohibition laws. This Court expressed its concern for the need to preserve the right of cross-examination by stating, "In a judicial investigation the right of a cross-examination is an absolute right and not a mere privilege of the party against whom the witness is called. . . . [C]ross-examination of a witness may not only modify or explain, but it may destroy the evidence in chief." Failure to allow full cross-examination prejudiced Mr. Rayes just as it had prejudiced the defendant in State v. Zolantakis.

This Court again addressed the question of inhibited cross-examination in Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862, 864-65(1959). In holding there had been improper restriction of cross-examination of the condemnee, this Court stated, "[T]he purpose of cross-examination is to give adversary counsel the opportunity not only to inquire into uncertainties relating to the testimony in chief, but to test its credibility. Whatever may tend to explain, modify, or contradict that direct evidence should be allowed."

The definitive statement from the United States Supreme Court on the limitation of cross-examination and the Sixth Amendment came in Smith v. Illinois, 390 U.S. 129 (1968). The defendant was charged with unlawful sales of narcotics and was not allowed to disclose prosecution for the chief witness' name or address. The Court held that its duty to protect the witness from possible

retaliation for testifying did not outweigh the defendant's right to cross-examination. The Supreme Court stated, "[P]rejudice ensues from a denial of the opportunity to place the witness in proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise the Id. at 132, quoting Alford v. United States, 282 U.S. 687, 688-89 (1931). The Court also noted the important role of cross-examination in exposing falsehood and in bringing out truth. Smith v. Illinois, 390 U.S. 129 (1968), at 131.

In the present case, Appellant's defense was seriously damaged by his inability to challenge the credibility of the one witness and show bias on the part of a witness testifying against him upon whose testimony his conviction rested. Had he been extended the necessary latitude in cross-examination as mandated by Weber Basin Water Conservancy v. Ward, 10 Utah 2d 29, 347 P.2d 364-65 (1959), and Smith v. Illinois, 390 U.S. 129 (1968), the jury could have had a reasonable doubt about his identification.

The trial court's improper limitation of cross-examination in the present case prejudiced Appellant. As a result, his Sixth Amendment right to confront his accuser was effectively denied. His conviction under these circumstances cannot be upheld.

POINT II

THE FAILURE TO CONTINUE THE TRIAL TO ALLOW APPELLANT TO SECURE THE PRESENCE OF A CRUCIAL WITNESS DENIED HIM HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS.

During the first day of trial, Appellant's attorney requested a brief continuance so an essential witness, who had just been discovered, could be brought in to testify. Investigators for Appellant had tried, unsuccessfully, to find the witness, Ozzie Ahmed.

The trial court was aware Appellant would not have been prejudiced by a continuance because he was already serving time at the Utah State Prison (T.77). Ozzie Ahmed, the desired witness, saw and reported a suspicious vehicle around 8:50 p.m. on the evening in question, only minutes before the robbery at Quality Oil. Mr. Ahmed reported this suspicious vehicle to Mr. Rencher who was working at the Triangle Service Station at 4200 South Highland Drive (T.80-2). As a result of his observation, the police investigated and, at about 10:00 or 10:30 p.m., stopped the reported vehicle (T.83-9). Three Hispanic men were in the vehicle, one of them being the co-defendant, Mr. Iban Ortiz; but Mr. Rayes, the Appellant, was not in the car. Ozzie Ahmed's testimony was crucial because he would have testified Mr. Rayes was not in the car at 8:50 p.m., which was just prior to the robbery.

Although there are no Utah cases directly on point, in State v. Watson, 419 P.2d 789 (Wash. 1966), the court held that denial of a continuance requested by the defendant constituted reversible error. In State v. Watson, an eyewitness, who could support the defendant's theory of self-defense to a killing, was located and agreed to testify. The witness failed to appear at the trial, however, and defense counsel's motion for a continuance in that case was erroneously denied. As in State v. Watson, defense counsel here made diligent efforts to locate Mr. Ahmed through investigators. If the defense's motion for a continuance had been granted, Mr. Ahmed, with all likelihood, would have been found.

In Salazar v. State, 559 P.2d 66 (Alaska 1976), the Supreme Court of Alaska reversed and remanded a first degree murder conviction

because the trial court denied a one-day continuance to secure the testimony of an absent police officer. Alaska follows the general rule that the trial court's decision to deny a continuance will remain intact on appeal absent a showing of abuse of discretion. Id. at 71. The court went on to state an arbitrary refusal violates due process and that the issue can be resolved by examining the reasons for the requested continuance. Id. at 72. In addition to the reasons for the request, the court articulated a test to aid in deciding whether a mid-trial continuance should be granted. The seven factors which constitute the test are:

1. Whether the testimony is material to the case;
2. Whether the testimony can be elicited from another source;
3. Whether the testimony is cumulative;
4. Probability of securing the absent witness in a reasonable time;
5. Whether the requesting party was diligent and acting in good faith;
6. The inconvenience to the court and/or others; and
7. The likelihood that the testimony would have affected the jury's verdict.

Although Salazar v. State, is not a Utah case, at least two of the seven factors have been adopted by this Court. State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941); State v. Freshwater, 30 Utah 442, 85 P. 447 (1906). Applying these factors to the case at bar it is clear that Ahmed's testimony was material; it could not be elicited from anybody else; it was not cumulative; the witness could, in all likelihood, be secured in a brief period

defense counsel had acted diligently and in good faith; Appellant would not have been prejudiced by the delay, and inconvenience to the court and the State would have been minimal; and finally, the testimony would probably have affected the jury's verdict.

Washington v. Texas, 388 U.S. 14 (1967), supports Appellant's position. In Washington v. Texas, the court reversed a former conviction because the defendant was denied his Sixth Amendment right to compulsory process when he was not allowed to call a material witness vital to his defense. The court stated:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

In the case at bar, Appellant, in all likelihood, could have produced Mr. Ahmed to testify to the events he personally observed if the trial court had granted a brief continuance. By not allowing Mr. Ahmed to produce this witness, however, the court effectively denied Mr. Ahmed his Sixth Amendment right to compulsory witnesses, and his conviction should, therefore, be reversed.

CONCLUSION

The trial court erred in not allowing full cross-examination of the State's main witness regarding knowledge of eyewitness identification. Failure to allow Appellant to elicit answers from this

witness, which could impeach his veracity, credibility, capacity to observe, and impartiality, denied Appellant his Sixth Amendment right to confrontation. Failure of the trial court to grant a continuance to allow Appellant to secure a material witness who could have testified on his behalf, further denied Appellant's Sixth Amendment right to compulsory process. In the interest of justice, any conviction based on either of these violations of Appellant's Sixth Amendment rights should be dismissed.

RESPECTFULLY SUBMITTED:

14th day of May, 1984.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellant

DELIVERED two copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, on _____ day of _____, 1984.