

1984

## The State of Utah v. Leonardo Rayes : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
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 plaintiff-Respondent, :  
 :  
 -v- : Case No. 19092  
 :  
 LEONARDO RAYES, :  
 :  
 Defendant-Appellant. :

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BRIEF OF RESPONDENT  
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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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**FILED**

JUN 20 1964

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 19092  
LEONARDO RAYES, :  
Defendant-Appellant. :

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Leonardo Rayes, was charged by information with Aggravated Robbery, a felony in the first degree, in violation of Utah Code Ann. § 76-6-302 (1953 as amended).

DISPOSITION IN THE LOWER COURT

On March 10, 1983, appellant was tried before a jury in the Third Judicial District, the Honorable Homer F. Wilkinson, presiding. Appellant was convicted of Aggravated Robbery, a first degree felony, and sentenced to an indeterminate term of five years to life at the Utah State Prison to run consecutively with the sentence he was then serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the trial court.

STATEMENT OF FACTS

On the evening of September 20, 1982, Richard Bullock was the only attendant on duty at the Quality Oil gas station and convenience store at 3900 South 900 East. Mr. Bullock was in the back room at approximately 9:00 p.m. when two men entered the store. Mr. Bullock returned to the cash register and the two men approached him. One pointed a gun at Mr. Bullock and ordered him to lie down on the floor, which he did (T. 19). The two men emptied the cash register and fled from the station. Mr. Bullock then got up and called the police.

This entire incident was witnessed by Becky Edwards. Ms. Edwards was just leaving the store with her young daughter as the two men entered. Because the attendant was in the back room and the two men looked suspicious, Ms. Edwards paid particular attention to the two (T. 42-44). She returned to her car at the gas pumps and from there watched the entire robbery (T. 45-46).

Both Mr. Bullock and Ms. Edwards were able to accurately identify appellant as one of the robbers. Mr. Bullock identified him as the man who pointed the gun (T. 21). Mr. Bullock gave police a description of the robbers which included what they wore (T. 18) and an accent in their speech (T. 20). The day after the robbery, police showed Mr. Bullock a book of nearly 200 photographs from which he identified appellant as one of the robbers (T. 55-58). Ms. Edwards gave

police a similar description of the robbers' clothes (T. 43) and also identified appellant from the same photo book (T. 44-48). Mr. Bullock and Ms. Edwards also identified appellant in the courtroom (T. 21, 47); both witnesses accurately identified co-defendant Ibrian Ortiz as the other robber (T. 60-61).

## ARGUMENT

### POINT I

CROSS-EXAMINATION OF THE STATE'S CHIEF WITNESS WAS PROPERLY RESTRICTED TO MATERIAL AND RELEVANT ISSUES.

Appellant contends that the trial judge improperly restricted cross-examination of the state's chief witness regarding eyewitness identification. He claims that certain questions concerning the witness's awareness of reports on mistaken identification, which were not permitted at trial, would have gone to the credibility of the witness. This contention is without merit. "The right to cross-examination is an invaluable right embodied in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution which assures the right to confrontation." State v. Maestas, Utah, 564 P.2d 1386, 1387 (1977). This constitutionally protected right of cross-examination, however, does not entitle a defendant "to embark on fishing expeditions." State v. Clayton, Utah, 658 P.2d 621, 623

(1983). The Clayton Court required that a foundation must first be established upon which to base the relevancy of questions during cross-examination. Without such foundation, appellant's cross-examination of the prosecution witness was not improperly restricted. Id.

As appellant accurately states in his brief, cross-examination allows the defendant an opportunity to impeach the truthfulness and impartiality, the capacity to observe, and the consistency of the witness. McCormick, Evidence (2d Cleary Ed. 1972) Section 22 at 49. Appellant fully utilized this opportunity. During the trial, Mr. Bullock, the State's eyewitness, was subject to thorough cross-examination concerning his identification of appellant. Mr. Bullock answered numerous questions concerning appellant's skin color and facial features (T. 24-30), Spanish accent (T. 31), and Mr. Bullock's own certainty of his identification (T. 33-34). The witness's answers in cross-examination apparently served to establish to the jurors' satisfaction the accuracy of his eyewitness identification.

This Court recently established guidelines by which to consider eyewitness identification in State v. Malmrose, Utah, 649 P.2d 56 (1982). The Court held that reliability of identification must be viewed "in light of the totality of circumstances," including the witness's opportunity to view the defendant, the witness's degree of attention during the

crime, the accuracy and certainty of the witness's identification, and the length of time between the crime and the identification. Id. at 59. See also Niel v. Biggers, 409 U.S. 188 (1972). Restated, the issue of credibility focuses on the circumstances surrounding the illegal act and the witness's ability to observe and recall the situation.

Appellant cites several cases in his brief as supportive of a reversal when cross-examination has been restricted. Each of these cases, however, is easily distinguished from the present case. State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927), involved a situation in which the trial judge refused to permit any cross-examination of the State's witness. Such total restriction of cross-examination is clearly violative of defendant's right to confrontation. However, the Zolantakis opinion is inapplicable to the present case wherein appellant was allowed cross-examination.

People v. Clark, 47 Cal. Rptr. 382, 407 P.2d 294 (1965), and Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959), concerned cross-examination which went directly to the basic issue of the case. Here, however, the restriction imposed on appellant's cross-examination was unrelated to the circumstances of the robbery, and unrelated to the witness's credibility.

Finally, the "definitive" position in Smith v. Illinois, 390 U.S. 129 (1968), is limited to ascertaining the true identity and residence of a witness. While explaining

that the threshold question of the witness's name and address is essential to further inquiry, the Supreme Court recognized the trial judge's discretion in limiting cross-examination to relevant issues. Id. at 131-133. The Smith v. Illinois threshold is satisfied in the present case.

In order for appellant's inquiry concerning the witness's awareness of reports on mistaken identification to be within the scope of permissible cross-examination, the inquiry must go to the credibility of the witness. But the cross-examination in question here had nothing to do with the circumstances of the event. Rather, Mr. Bullock was asked whether he had read any newspaper articles or watched any television programs dealing with eyewitness identification (T. 34). Defense counsel claimed that such an inquiry "goes to credibility" of the witness (T. 34), but established absolutely no foundation to indicate that the possible viewing of media reports on misidentification was relevant to the witness's capacity to observe and identify appellant. In response to the prosecutor's objection the judge stated: "I am not sure at this point if it is relevant, counsel. I am not sure of just where you are going." (T. 34-35). Instead of laying the requisite foundation of relevancy as encouraged by the judge, defense counsel attempted to elicit the same information by merely rephrasing the question (T. 35). Pursuant to the State's second objection the judge replied: "I am going to sustain it, counsel, at this point. If you

wish to pursue the matter, discuss it at a later time, we will do so. \* \* \* But I am afraid it is going to go further than the Court feels it should." (T. 35).

The trial judge has broad discretion in restricting the extent of cross-examination. Even when he errs in limiting cross-examination the error is not reversible unless it is also prejudicial. State v. Patterson, Utah, 656 P.2d 438, 439 (1982); State v. Starks, Utah, 581 P.2d 1015, 1017 (1978); State v. Maestas, Utah, 564 P.2d 1386, 1388 (1977). In State v. Curtis, Utah, 542 P.2d 744, 746 (1975), this Court held that no prejudicial error resulted from a limitation on cross-examination where the questions allowed adequately explored the issue of credibility. Appellant in the present case was given ample opportunity to fully explore the witness's credibility.

This Court heard a similar fact situation and legal claim in State v. Gill, 24 Utah 2d 261, 470 P.2d 250 (1970). There the defendant contended the trial court prejudicially limited the scope of the defense counsel's cross-examination of the State's witness in regard to the basis of her identification. The cross-examination dealt with the witness's ability to distinguish between Hispanics and Blacks, when the real credibility issue concerned her ability to distinguish between two Mexican brothers. Finding that the cross-examination extended to matters beyond the vital issues

of the case, this Court held that "the ruling of the trial court did not have the effect of preventing inquiry into an important and material fact." Id. at 252. Any error was harmless error and did not justify reversal of the trial court's decision. Id.

The limitation on cross-examination in the present case must be subject to the same analysis. The viewing of media reports on misidentification does not go to the vital issue of the case, i.e., the credibility of the witness in distinguishing appellant from other Hispanics and Blacks. Appellant failed to establish the requisite foundation of relevancy to extend the scope of cross-examination; therefore, the trial judge properly restricted the questions to relevant issues. No error resulted, and certainly no prejudicial error resulted upon which to justify reversal. The trial court's restriction on cross-examination should be affirmed.

#### POINT II

SINCE THERE HAS BEEN NO SHOWING THAT THE TRIAL COURT ABUSED ITS DISCRETION, APPELLANT'S MOTION FOR A CONTINUANCE WAS PROPERLY DENIED.

Appellant's motion for a continuance to locate an absent witness, Ozzie Ahmed, was properly denied. Mr. Ahmed allegedly saw a suspicious-looking vehicle near the Triangle Service Station at 4200 South Highland Drive--about 1 1/2 miles from the scene of the robbery. Mr. Ahmed told the

triangle attendant who then reported the vehicle to the police. Later that evening, around 10:30 p.m., police stopped a car fitting the description of the vehicle reported earlier. Defendant Ibrian Ortiz was one of three occupants (T. 89-90).

The trial judge is free to exercise sound discretion in ruling on a motion for a continuance and his decision will not be reversed unless he clearly abuses his discretion. State v. Creviston, Utah, 646 P.2d 750 (1982); State v. Moosman, Utah, 542 P.2d 1093 (1975). This Court recently clarified that the trial judge does not abuse his discretion in denying a continuance to procure testimony of an absent witness unless the defendant has shown "that the testimony sought is material and admissible, that the witness could be produced within a reasonable time, and that due diligence has been exercised before the request for a continuance." State v. Creviston, 646 P.2d at 752. See also State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941); State v. Freshwater, 30 Utah 442, 85 P. 447 (1906).

The cases cited by appellant in support of his motion are easily distinguished from the case at bar. State v. Watson, Wash., 419 P.2d 789 (1966), held that where diligent efforts are made to locate a witness the continuance should be granted. State v. Watson, however, involved an attempt to obtain testimony which was clearly material to the key issue of self-defense, and thus within the standard set by this

Court in State v. Creviston. The materiality of Ahmed's testimony to the present case is not as apparent.

Washington v. Texas, 388 U.S. 14 (1967), is cited by appellant to support the proposition that the right to present a defense includes the right to offer witnesses' testimony and to compel their attendance at trial. In Washington v. Texas, however, it was undisputed that the testimony sought was relevant and material and vital to the defense. Washington v. Texas, 388 U.S. at 16. The Supreme Court in United States v. Valenzuela-Bernal, 458 U.S. 858 (1981), explicitly stated that more than the mere absence of testimony is necessary to establish a violation of the defendant's right to compulsory process as guaranteed by the Sixth Amendment. A plausible showing must be made that the absent testimony would have been relevant, material, and favorable to the defense. Id. at 867.

Despite appellant's blanket claim that Mr. Ahmed's testimony would have been material, the contention is unsupported by the content of Mr. Ahmed's proffered testimony. Mr. Ahmed merely told an attendant at a Triangle Oil station near the location of the robbery that he saw a suspicious-looking vehicle. That attendant reported the vehicle to the police approximately ten minutes prior to the Quality Oil Station robbery (T. 14, 69, 81-82). No indication is given that Mr. Ahmed actually saw who was in the vehicle or that he could identify the occupants. A vehicle fitting the description of the report and containing three individuals

was stopped by a police officer 1 1/2 hours after the robbery had occurred (T. 89-90). The co-defendant, Ibrian Ortiz, was among the three, but appellant was not. From this scant information appellant draws the faulty conclusion that he could not possibly have been with the co-defendant at any time during the evening nor could he have participated in the robbery. This conclusion frivolously disposes of any number of events which could easily have occurred during the unaccounted for two hours, including appellant's having teamed up with Mr. Ortiz to commit the robbery. Such a conclusion is at best highly speculative, and is not sufficient to support a reversal of the trial court's decision. "Where the content of the prospective witness' testimony is speculative or likely to be inadmissible, it is not an abuse of discretion to deny a continuance." State v. Creviston, 646 P.2d at 752; see also State v. Derum, 76 Wash. 2d 26, 454 P.2d 424 (1969).

The record also contains evidence that due diligence was not exercised to secure the witness's testimony before the request for a continuance (T. 76-77). Appellant claims knowledge of the witness did not arise until certain police reports had been turned over by the State just one day prior to the original trial date. However, two continuances were granted to appellant after he obtained the reports. This period of several weeks provided ample time in which to study the reports and make the necessary arrangements to ensure Mr. Ahmed's presence at trial. Failure to do so is evidence of

failure to exercise the diligence necessary to obtain a continuance. Appellant has not shown an abuse of discretion by the trial judge according to the Utah standard expressed in State v. Creviston. Therefore, the trial court's ruling on the motion for a continuance should be affirmed.

CONCLUSION

The evidence presented at trial was sufficient to support appellant's conviction, and neither the proper restriction of cross-examination nor the denial to grant a continuance constitutes reversible error. Therefore, appellant's conviction should be affirmed.

RESPECTFULLY submitted this 20<sup>th</sup> day of June, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Brooke C. Wells, attorney for appellant, 333 South 2nd East, Salt Lake City, Utah 84111, this 20<sup>th</sup> day of June, 1984.

*Kathleen R. Kellersberger*