1984

The State of Utah v. Paul Brian Tucker : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
PAUL BRIAN TUCKER,	:	Case No. 19281
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Robbery, a First Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

JAMES C. BRADSHAW
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
PAUL BRIAN TUCKER,	:	Case No. 19281
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Robbery, a First Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

JAMES C. BRADSHAW
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

TABLE OF CONTENTS

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
PAUL BRIAN TUCKER,	:	Case No. 19281
Defendant/Appellant	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment and conviction for the offense of Aggravated Robbery, a First Degree Felony, in violation of Utah Code Annotated §76-6-302 (1953 as amended) in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Paul Brian Tucker, was convicted in a trial by jury of Aggravated Robbery on May 10, 1983. Appellant was sentenced to the indeterminate term of not less than five (5) years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction or, in the alternative, a new trial.

STATEMENT OF FACTS

On February 18, 1983, a man was robbed at gunpoint by someone wearing a bandana over his face, near the Little America

Motel located at 500 South and Main Street in Salt Lake City, Utah. Shortly after the robbery, two deputy sheriffs from Salt Lake County were driving down 500 South when they observed a person run out in front of their patrol vehicle (T.98). The deputies observed this person run into some shrubbery near the motel and then exit the shurbbery and run across the street, into an alleyway, out of their view (T.52).

The same person who was observed by the Salt Lake County Sheriff deputies was also observed by a Salt Lake City Police vice officer who happened by at the same time. This vice officer, who was just coming off duty (T.85), pursued the person on foot down the alleyway, but the officer quickly lost all contact with the fleeing person (T.88). At all times the officer were pursuing this individual, they were unaware of the robbery which had taken place.

A short time after the Salt Lake City vice officer had los sight of the person who fled into the alleyway, he came across appellant lying in a vacant field which is adjacent to the 451 Club, a tavern located in the area (T.90).

After learning of the robbery, the police took the victim of the robbery and his companion to the field where they had arrested the appellant. The appellant was handcuffed and surrounded by uniformed police officers, and it was at this point that the victim and his companion identified the appellant as the perpetrator of the robbery (T.12,27).

The appellant was searched pursuant to this arrest and

although discovering a common type bandana on his person, no weapon was found (T.22).

On March 11, 1983, a line-up was conducted at the Salt Lake City Police station at which time the victim of the robbery picked the appellant out of a group of eight men, as the perpetrator of the robbery.

ARGUMENT

POINT I

THE IDENTIFICATION OF APPELLANT BY THE VICTIM OF THE ROBBERY WAS SUGGESTIVE AND INVOLVED A LIKLIHOOD OF MISIDENTIFICATION AND AS A RESULT SHOULD HAVE BEEN SUPPRESSED.

During the commission of the robbery the perpetrator had worn a bandana which covered most of his face (T.22) and the entire incident lasted approximately fifeen to twenty seconds (T.20).

About twenty minutes after the robbery, the victim was transported by the police to the vacant lot where they had discovered the appellant lying in the field (T.27). At the time he was presented to the victim, the appellant was handcuffed and surrounded by uniformed police officers at which time the victim identified appellant as the man who had robbed him (T.27).

The type of showup identification which was used in this case is generally disfavored and has been widely condemned as an inherently suggestive procedure. Stovall v. Denno, 388 U.S. 293 (1967); United States v. O'Connor, 282 F.Supp. 903 [D.C.]; Neil v. Biggers, 409 U.S. 188 (1972).

In the Biggers case, the United States Supreme Court held that where there existed a "likelihood of misidentification," the defendant's due process right might be violated by admission by the court of that identification. Id. at 199.

The inquiry, as outlined by the court in Biggers, is whether the eyewitness identification appears reliable as viewed under the totality of the circumstances applying the following five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and, (5) the length of time between the crime and the confrontation.

Applying the factors to the present action, it becomes apparent that there exists a likelihood of misidentification.

A. OPPORTUNITY OF THE WITNESS TO OBSERVE THE CRIMINAL.

According to the victim's testimony the entire incident lasted only about fifteen to twenty seconds, occurred late at night, and the assailant had a bandana covering his face during the entire incident.

B. DEGREE OF ATTENTION.

Considering the nature of the crime, it would seem apparent that the victim's focus would be on the gun and an escape route. Indeed the victim's testimony reveals the following:

> Q. And I assume you had a gun pointed at you and that you were mostly focusing on the

gun is that fair to say? I mean you saw this gun in front of you.

A. That is the first thing you notice, yes.

(T.[illegible]).

It thus appears that the victim's attention was on the gun during most of the fifteen to twenty seconds of the robbery.

C. ACCURACY OF PRIOR DESCRIPTION.

This is perhaps the most telling of the factors in that the record is devoid of any such prior description. In fact, of the three officers that testified at trial, none had talked to the victim prior to the time of the tainted and suggestive showup.

D. LEVEL OF CERTAINTY DEMONSTRATED BY THE WITNESS AT THE CONFRONTATION.

During his examination the victim stated: "They took us I would say a block or so from the area where we were robbed to where there were a number of police cars and alot of lights and they had the fellow that robbed us standing there." (T.12).

The above statement by the victim is susceptible of two readings: first as demonstrating a high level of certainty but, secondly, as showing the inherently suggestive nature of the showup and the conclusion which is based thereon. The conclusion of the victim seems to be based, not on any articulated specific features of height, weight or coloring, but rather the conclusion and its certainty seem based on light, police cars and the fact that the appellant stands handcuffed alone in a sea of uniformed police.

E. THE LENGTH OF TIME BETWEEN THE CRIME AND THE CONFRONTATION.

The testimony of the victim indicated approximately twenty minutes.

It becomes apparent in applying the factors outlined in Biggers, supra, that the eyewitness identification in this case involves "a likelihood of misidentification." In the case of People v. Thomas, 422 N.Y.S. 2d 188 72 A.D.2d 910 (1979), the New York Supreme Court Appellate Division, in a case with very similar facts to the one before the court, stated that the defendant in that case had been denied due process under the law as a result of a suggestive showup, despite the fact that the showup was made in the field and done shortly after the crime as a part of the investigation. Much like the present action, that case involved a victim who had a very limited opportunity to see the perpetrator's face. That court, in reversing the defendant's conviction stated:

> The opportunity to view his assailants during the crime was very limited. Hence it was very important that his pretrial identification of his assailants not be the product of unnecessary suggestion, such as one on one viewing at the insistence of the police.

Id. at 190. See also People v. Dolphin, 77 A.D. 2d 571, 429 N.Y.S. 2d 732 (1980).

Should this court agree that appellant's due process rights were violated by this suggestive lineup, it should be noted that the subsequent lineup under finer conditions cannot remedy the defects. Prior to the lineup held one month after

the showup the only time the victim had seen the appellant's face, prior to the lineup was the suggestive showup. If the initial showup was indeed tainted, it seems inconsistent to hold that can be remedied by a lineup.

> Where a flawed pre-trial identification occurs, the state is not entitled to use an in court identification with showing it is not tainted by the prior identification. Only a per se exclusionary rule can be an effective sanction to ensure that law enforcement authorities will respect the defendant's due process rights during pre-trial identification procedures.

Wong Sun v. U.S., 371 U.S. 471 (1963). See also Gilbert v. California, 388 U.S. 263 (1967).

In the case at bar, appellant's counsel moved to suppress the lineup as a result of the state's failure to lay proper foundation as to its fairness and reliability (T.16) which objection was overruled. Since the state has the burden of proving its reliability and the evidence shows that in fact it was made under circumstances which were unnecessarily suggestive and conducive to mistaken identification, appellant's due process rights as guaranteed by the Utah and United States Constitutions were violated and a new trial should be granted.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE THE APPELLANT'S REQUESTED INSTRUCTION ON THE NATURE OF, AND REQUIREMENTS FOR, EYEWITNESS IDENTIFICATION EVIDENCE.

The defense raised at trial was that the appellant was not the person who committed the aggravated robbery. As a part of his

defense appellant requested an instruction which described the dangers inherent in eyewitness identification evidence, the factors to be considered in assessing the value of identification evidence and the burden of proof with respect to that defense. The trial court refused to give the instruction[1] and exception was taken (T.110).

The dangers involved with eyewitness identification evidence has been well documented in the literature, and numerous

---

[1] The instruction requested provided:

INSTRUCTION NO. _____

Identification testimony is an expression or belief or impression by the witness. In this case its value depends on the opportunity the witness had to observe whether or not the defendant was the person who robbed him.

In appraising the identification testimony of a witness, you should consider the following:

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

2. Are you satisfied that the identification made by the witness subsequent to the event was the product of his or her own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

3. Has the witness ever failed to identify the defendant?

4. Is the witness credible? Consider whether he is truthful, whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specificailly includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime, with which he stands charged. If after examining the tesimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

law review articles have been written on the subject.[2]

The instruction which was offered by appellant in this case was that framed by the United States Court of Appeal for the District of Columbia in United States v. Telfaire,[3] 409 F.2d 552 (D C. Cir., 1972). This instruction was cited with approval by

---

[2] Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification. 29 Stan.L. Rev. 969 (1977); Due Process Standards for the Admissibility of Eyewitness Identification Evidence, 26 Kan. L. Rev. 461 (1978); Eyewitness Identification Evidence: Flaws and Defenses, 7 No. Ky. L. Rev. 407 (1980); Ellis, Davies, Shepherd, Experimental Studies of Face Identification, 3 Nat. J. Crim. Def. 219 (1977); Use of Eyewitness Identification Evidence in Criminal Trials, 21 Crim. L.Q. 361 (1979); Loftus, Eyewitness Testimony (1979); Public Defender Sourcebook, pp. 251-57 (S. Singer, ed. 1976); Yarmey, The Psychology of Eyewitness Testimony (1979); Buckhout, Determinants of Eyewitness Performance on a Lineup, 1974 Bull. Psychonomic Soc'y 191; Buckhout, Eyewitness Identification and Psychology in the Courtroom, Crim. Def., Sept.-Oct. 1977, at 5-9; Buckhout, Eyewitness Testimony, Scientific Am., Dec. 1974 at 23; Ellis, Davies & Shepherd, Experimental Studies of Face Identification, Nat'l J. Crim. Def. 219 (1977); Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. Pa. L. Rev. 1079 (1973); Luce, The Neglected Dimension in Eyewitness Identification, Crim. Def., May-June 1977 at 5-8; Tyrrell & Cunningham, Eyewitness Credibility Adjusting the Sights of the Judiciary, 37 Ala. Law. 563, 575-85 (1976).

[3] The Telfaire instruction specifically has either been recommended or approved for use in numerous jurisdictions as relfected by the following cases: United States v. Holly, 402 F.2d 273 (4th Cir. 1974); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975); State v. Benjamin, 363 A. 2d 762 (Conn., 1976); State v. Calia, 514 P.2d 1354 (Or. App. 1973); cert. den. 417 U.S. 917 (1974); Commonwealth v. Rodriquez, 391 N.E. 2d 889 (Mass. 1979); United States v. Kavanaugh, 572 F.2d 9 (1st Cir. 1978); State v. Dodge, 538 F.2d 770 (8th Cir. 1976) cert. den., 429 U.S. 1099 (1977); United States v. Masterson, 529 F.2d 30 (9th Cir.) cert. den., 426 U.S. 908 (1976); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974); United States v. Fernandez, 269, 421 N.E. 2d 157 (1981); State v. Payne, 280 S.E. 2d 72 (W.Va. 1981); United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980); People v. Guzman, 121 Cal. Rptr. 69, 47 Cal. App. 3d 380 (Cal. App. 1975); State v. Motes, 215 S.E. 2d 190 (S.C. 1975); State v. Payne, 280 S.E. 2d 72 (W Va. 1981); State v. Malmrose, 649 P.2d 56 (Ut. 1982) (Stewart, J. dissenting); State v. Warren, 635 P.2d 1263 (Kan. 1981).

Justice Stewart of this court in his dissent in State v. Malmrose 649 P.2d 56 (Utah 1982) and has been examined by this court on numerous other occasions. State v. Reedy, Utah, No. 18082, filed April 26, 1984; State v. Newton, Utah, No. 19065, filed April 23, 1984; State v. Melmrose, 649 P.2d 56 (Utah 1982); State v. Shaffer 638 P.2d 1185 (Utah 1981); State v. McCumber, 622 P.2d 353 (Utah 1980).

The general conclusions that can be reached concerning this courts stand on the necessity of a Telfaire-type instruction seems to be that under certain circumstances the identity instruction would be proper, but that in the cases which have come before the court there was no reversible error which could be found in the trial courts refusal to give the instruction.

Appellant submits that the facts of this case dictate that some cautionary instruction should have been given. In this court's latest pronouncement on the need for such an instruction State v. Reedy, supra, an analysis was outlined for determining the need for such an instruction:

> The central question remains whether "under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive," Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). Factors evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 5.

As was seen in Point I of appellant's brief, the factors outlined in Biggers, supra, as applied to the present facts strongly indicate that there exists a substantial chance of an unreliable identification.

Under the facts of Reedy, supra, as this court correctly observed that there was "independant testimony by a police officer of the defendants likeness to the photograph at the time of his initial arrest . . . [and] that the description given matched that of the defendant when initially identified and arrested." Id. at 5,6.

In the case at bar, there exists no independent testimony as to the identification, there was less than ample opportunity to observe by the victim, and perhaps most importantly the record is absent any description given by the victims prior to the appellant's arrest. It is hard to imagine a case where there could be a greater need for an instruction describing what eye-witness testimony is, how it is to be evaluated and the burden of proof it must meet.

Using the factors outlined by this court in Reedy, supra, there exists in this case a substantial likelihood that a mistaken identification was made. Appellant submits that the great need for a cautionary instruction combined with the trial court's refusal to give any such instruction, constitutes prejudicial error requiring a new trial.

POINT III

COMMENTS BY THE PROSECUTOR ABOUT DEFENDANT'S CHOICE NOT TO TESTIFY VIOLATED DEFENDANT'S CONSTITUTIONALLY GUARANTEED PRIVILEGES AND CONSTITUTED REVERSIBLE ERROR.

In the landmark case of Griffin v. California, 350 U.S. 609 (1965), the U.S. Supreme Court held that comments by a prosecutor about the failure of a criminal defendant to testify can effectively abridge the defendant's Fifth Amendment right to refuse to testify and, therefore, constitute reversible error. That court reasoned that a rule which would allow a prosecutor to comment "is in substance a rule of evidence that allows the state the privilege of tendering to the jury for its consideratio the failure of the accused to testify." Id. at 613.

This court has expressly recognized the holding in Griffin supra, and stated:

> That a prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or lack thereof, including reference to the paucity or absence of evidence adduced by the defense. But prosecutorial comment on a defendant's refusal to testify may violate a defendant's privilege against self incrimination. Thus a prosecutor commits constitutional error when his statement is manifestly intended or is of such character that a jury would naturally and necessarily contrue it to amount to a comment on the failure of the accused to testify.

State v. Hales, 652 P.2d 1290 (Utah 1982); State v. Nomeland, 581 P.2d 1010 (Utah 1978); State v. Eaton, 569 P.2d 1114 (Utah 1977 Utah); State v. Kazda, 540 P.2d 949 (Utah 1975).

During his closing argument in the trial, the prosecutor, Robert Stott of the Salt Lake County Attorney's Office, made the following argument:

> MR. STOTT: She tells you that the reason the defendant was sweating, because a gun was pointed at him. She doesn't tell us why he was in the field hiding, does she?
>
> MS. CARTER (attorney for appellant): Your Honor, I am going to object to that.
>
> MR. STOTT: Also --
>
> MS. CARTER: The defense has no burden to put on any evidence of anything.
>
> MR. STOTT: I didn't say what the defense was. I said she didn't say.
>
> THE COURT: Counsel, let's complete this case. Let me make the statement, of course, that the burden is on the State to prove the case. The defendant does not have a burden of proving his innocence.
>
> MR. STOTT: Thank you. She didn't tell you, did she, why he was on that --
>
> MS. CARTER: Your Honor, I am going to object.
>
> The COURT: Counsel. I would again admonish the jury and admonish you also that the State, the defendant does not have the responsibility of proving his innocence. The burden is on the State to prove the guilt.

At which point, argument by Mr. Stott continued (T.108).

Attorney for appellant following closing argument and out of the presence of the jury made a motion for a mistrial based on the prosecutor's comments. The motion was denied by the trial judge (T.109).

In light of this courts pronouncements on permissible

argument by a prosector in such a situation, the inquiry before the court should focus on whether the prosecutor's comments were "manifestly intended or of such a character that a jury would naturally and nessarily construe it as a comment on the failure of the accused to testify." State v. Hales, 652 P.2d 1290 (Utah 1982).

It takes no legal reasoning but mere commonsense to determine that the one and only thing the proseuctor was hoping to achieve by his persistant questions as to the defendant's counsel's failure to provide explanations was to plant in the jury's mind the question: Why didn't the defendant take the stand? If he is really innocent, why didn't he take the stand and tell us what he was doing in that field.

A logical reading of the argument presented by Mr. Stott would indicate that it was both given by the prosecutor, and taken by the jury, as a comment on the failure of the accused to testify. As such, it is an impermissible comment on the appellant's absolute right not to testify or present any evidence.

In light of the limited amount of evidence offered against the appellant in this case, it seems likely the jury might have relied on these impermissible comments in reaching its verdict. It is the possibility that these comments "could have affected" the outcome which require a reversal of the trial court's verdict. State v. Wiswell, 1639 P.2d 146 (Utah 1981).

CONCLUSION

Independently, each of Points I, II and III constitute reversible error. However, it is important to note that the cumulative impact of such error clearly denied appellant a fair trial. The combination of the highly suggestive showup proceeding which was presented to the jury without any instruction or guidance and the improper comment by the prosecutor or the appellant's constitutional right to remain silent has effectively eviscerated appellant's right to a fundamentally fair trial. He therefore respectfully requests this court to reverse his conviction and grant him a new trial.

DATED this 18th day of June, 1984.

JAMES A. BRADSHAW
Salt Lake Legal Defender Assn.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

DELIVERED two copies of the foregoing Appellant's Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 13 day of June, 1984.