1984

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19281
PAUL BRIAN TUCKER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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.

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Paul Brian Tucker, was charged with aggravated robbery, a first degree felony, under Utah Code Ann. § 76-6-302 (1978).

DISPOSITION IN THE LOWER COURT

Appellant was convicted of aggravated robbery after a jury trial on May 10, 1983. He was then sentenced to the indeterminate term of not less than five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

Early on the morning of February 18, 1983, Larry Barleffi and Perry Georges were returning to their rooms at the Little America Motel at 500 South and Main Street in

Salt Lake City (T. 6). As they crossed 500 South, which was well lighted, Mr. Birleffi heard something behind him (T. 6). He turned to see what or who was making the noise and found a handgun pointed at his face (T. 6). Appellant, the person holding the gun, had a bandana over the lower part of his face and demanded that Mr. Birleffi give him all his money (T. 6, 10). Mr. Birleffi reached into his pockets and gave appellant all the money he had -- about $21.00 (T. 7, 8). Before entering Little America to contact the police about the robbery, Mr. Birleffi watched appellant run towards the intersection, where a police car happened to be (T. 8).

The police car at the intersection belonged to two Salt Lake County Sheriff's deputies (T. 47). After appellant ran in front of the patrol car on 500 South and then back to the sidewalk and into the shrubbery on the north side of Little America, the two deputies stopped and pursued appellant on foot. They momentarily lost sight of him in the shrubs, but saw him emerge from the bushes further to the west and run back across 500 South (T. 48-50). One of the officers followed him into an alley, where she lost sight of him (T. 52). However, while the pursuit was in progress, Officer Robert Dortch of the Salt Lake Police Department's vice squad came along and after observing the situation, joined in the pursuit (T. 87). Officer Dortch chased appellant in the alley and briefly lost sight of him, but continued running in the same direction until he arrived at a vacant lot (T. 88).

Officer Dortch scanned the vacant lot with his flashlight and spotted appellant, who ducked when the light fell upon him. The officer drew his revolver, informed appellant that he was a police officer, and then approached him (T. 89). Appellant, who was dressed very much like the man Officer Dortch had been chasing, was perspiring and exhibiting a rapid pulse (T. 89-96). A search of appellant subsequent to his arrest uncovered a bandana with a knot tied in it and $21.00 in cash (T. 72, 73).

Shortly after appellant had been arrested, police arrived with Mr. Birleffi and Mr. Georges, who identified appellant as the person who had robbed Mr. Birleffi. A search of the shrubbery near Little America yielded a handgun that fit the description given by Mr. Birleffi (T. 58).

Approximately three weeks after the incident, Mr. Birleffi picked appellant from an eight man lineup and identified appellant as the man who had robbed him. He also identified appellant in court as the robber (T. 9, 12, 15).

ARGUMENT

POINT I

APPELLANT'S FAILURE TO FOLLOW PROPER PROCEDURES FOR OBJECTING TO LARRY BIRLEFFI'S IDENTIFICATION TESTIMONY PRECLUDES CONSIDERATION ON APPEAL OF APPELLANT'S ARGUMENT THAT THE TESTIMONY SHOULD HAVE BEEN SUPPRESSED; ALTERNATIVELY, ADMISSION OF THAT TESTIMONY DID NOT DENY APPELLANT DUE PROCESS OF LAW.

Relying largely on Neil v. Biggers, 409 U.S. 188 (1972), appellant argues that the showup identification procedure used in his case (i.e., identification of appellant in the vacant lot where he was found shortly after the robbery) was impermissibly suggestive and therefore Larry Birleffi's testimony concerning his showup identification of appellant and his subsequent lineup identification of appellant should have been suppressed.

There is nothing in the record to indicate that appellant objected, by way of either a pretrial motion to suppress or a specific objection at trial, to the showup identification testimony he now challenges on appeal. Under these circumstances, appellant has waived any alleged error concerning the admission of that testimony. See State v. John, Utah, 667 P.2d 32 (1983), citing Rule 12, Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-12 (1982)), and State v. McCardell, Utah, 652 P.2d 942 (1982). Appellant apparently made no pretrial motion to suppress the lineup identification testimony, as required by Rule 12(b)(2), Utah

Rules of Criminal Procedure, and therefore he has waived any objection to the admission of that testimony. State v. John. Furthermore, although at trial appellant objected to the lineup testimony on foundational grounds, he did not object to it on the specific grounds he now argues on appeal. The contemporaneous objection rule requires timely and specific objection at trial to admission of evidence in order for the question of admissibility to be considered on appeal. State v. McCardell, 652 P.2d at 947. For this Court to consider a defendant's objection to the admission of evidence at trial, the defendant must have specifically stated to the trial court the same grounds for objection he presents on appeal. Ibid. See also State v. Davis, Utah, ___P.2d___, No. 18892, slip op. at p. 11 (decided June 25, 1984). In light of this rule, appellant's assignment of error concerning the admission of the lineup identification testimony should not be considered by this Court on appeal.

Even if this Court decides to consider appellant's assignment of error concerning the admission of Larry Birleffi's identification testimony, the testimony was properly admitted. Contrary to appellant's claim, the showup identification procedure employed in his case was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968).

In State v. McCumber, Utah, 622 P.2d 353 (1980), this Court adopted the standards set forth in Neil v. Biggers and other related United States Supreme Court decisions for determining whether an identification procedure gives rise to a substantial likelihood of misidentification:

> Police identification procedures such as photograph displays, lineups, showups, and the like, do not deny the accused due process of law unless, under a totality of the circumstances, they are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused a fair trial. [Stovall v. Denno, 388 U.S. 293 (1967).] Where an identification procedure, even though suggestive, does not give rise to a substantial likelihood of misidentification, no due process violation has occurred. [Neil v. Biggers, 409 U.S. 188 (1972).] In determining the reliability of the identification under the totality of the circumstances, the court must also consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated during the identification procedure, and the time between the crime and the identification. [Neil v. Biggers, supra; Manson v. Brathwaite, 432 U.S. 98 (1977).]

622 P.2d at 357. Acknowledging that the victim of an attempted rape and aggravated sexual assault "had a very limited opportunity to observe her assailant" in that "[h]er view of his face was very brief, and occurred in a darkened room immediatley after she had awakened from sleep," the McCumber Court also said:

> Such factors, however, although they may weaken the probative impact of the evidence offered, do not mandate suppression of the evidence in the name of due process without some showing that the identification procedures were themselves impermissibly suggestive.

622 P.2d at 357.

In applying these tests to the present case, it becomes apparent that, under the totality of the circumstances, there was not a substantial likelihood of irreparable misidentification:

A. Opportunity of the witness to view the criminal at the time of the crime.

Although Mr. Birleffi was face to face with appellant for only 15 to 20 seconds during the robbery, he observed appellant in a well lighted area and was able to note certain of appellant's characteristics as appellant fled, particularly his clothing and his frizzy hair (T. 8, 10).

B. Degree of attention.

Mr. Birleffi admitted that during the robbery, he initially focused on the gun pointed in his face. However, his attention shifted to appellant, with whom he was face-to-face, and he carefully observed appellant during, and moments after, the robbery (T. 8, 10).

C. Accuracy of prior description.

This prong of the McCumber/Biggers test is glossed over by appellant. He virtually ignores the victim's testimony about the description of the robber the victim gave to the police (T. 10). That description, which Mr. Birleffi made prior to viewing appellant in police custody, definitely fit appellant (T. 98).

D. Level of certainty demonstrated by the witness during the identification procedure.

Mr. Birleffi's certainty in identifying appellant as the robber was well established. After seeing appellant at the location where police had apprehended him, Mr. Birleffi told police, "That is the fella" (T. 13). Moreover, Mr. Birleffi easily identified appellant in a lineup of eight men conducted approxiamtely three weeks after the robbery. An in-court identification also was made.

E. Length of time between the crime and the identification.

Little more than 20 minutes had passed between the time of the robbery and the time of the identification (T. 12). It is likely that Mr. Birleffi, with the memory of the robbery still fresh, had in his mind a vivid image of the robber when he identified appellant.

As noted by this Court in State v. Clemons, Utah, 580 P.2d 601 (1978), showups are useful in effectively

enforcing the criminal law:

> The idea of taking the victim forthwith to identify a suspect is of value to the detained person if he is innocent; and while the matter is fresh in mind, it assists the victim in determining whether a suspect is or is not the perpetrator of the offense.

580 P.2d at 602. The instant case is similar to Clemons and other cases where one person showups have been held proper. See, e.g., Banks v. State, Nev., 575 P.2d 592 (1978); State v. Arnold, 26 Ariz. App. 542, 549 P.2d 1060 (1976). Nevertheless, appellant suggests that because he was handcuffed and clearly in police custody when the showup identification occurred, the identification procedure was impermissibly suggestive. However, those facts alone are not sufficient to render the procedure impermissibly suggestive. See State v. Allen, 29 Utah 2d 442, 443, 511 P.2d 159, 160 (1973), where this Court held that "[i]t was entirely proper to have the victims see the [suspects] being detained [by the police]." Although probably suggestive, the showup procedure used, when tested against the standards set forth in Biggers and adopted in McCumber, did not give rise to a substantial likelihood of misidentification. See State v. Bingham, Utah, ___P.2d ___, No. 18774, slip op. at pp. 2-3 (June 13, 1984). Given this, appellant's further argument that Mr. Birleffi's testimony concerning the lineup identification should not have been allowed in -- an argument based solely on appellant's

contention that the "tainted" showup identification rendered the subsequent lineup identification unreliable -- is similarly without merit. In sum, the identification procedures used in this case did not deprive appellant of due process of law, and, therefore, Mr. Birleffi's identification testimony was properly admitted.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION ON EYEWITNESS IDENTIFICATION.

Appellant's requested jury instruction on eyewitness identification (R. 29-30) is modeled after that recommended in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). This Court has repeatedly held that a "Telfaire" instruction is not mandatory in all instances where eyewitness identification is crucial to the case. Instead, the decision of whether to give a Telfaire instruction is discretionary with the trial court. See State v. Bingham, Utah, ___P.2d___, No. 18774 (decided June 13, 1984); State v. Reedy, Utah, 681 P.2d 1251 (1984); State v. Malmrose, Utah, 649 P.2d 56 (1982). As noted in Bingham:

> Jury instructions must be considered as a whole. "When taken as a whole if they fairly tender the case to the jury, the fact that one or more of the instructions, standing alone, are not as full or accurate as they might have been is not reversible error." State v. Brooks, Utah, 638 P.2d 537, 542 (1981) (citation omitted).

slip op. at p.3.

The trial court's instructions in appellant's case (see, particularly, Instructions No. 3, 6, and 12 (R. 45, 47, 53)) fully informed the jury that the State had the burden of proving every element of the offense charged beyond a reasonable doubt. Instruction No. 10 (R. 51) instructed the jurors that they were the sole judges of the credibility of the witnesses and set forth specific guidelines for determining a witness's credibility. As in Bingham, the instructions, taken as a whole, "adequately advised the jury on the law pertaining to this case." Bingham, slip op. at p. 4, citing State v. Schaffer, Utah, 638 P.2d 1185, 1187 (1981). Significantly, two eyewitnesses (i.e., Mr. Birleffi and Perry Georges (T. 33-46)) positively identified appellant as the robber; and there was additional physical evidence linking appellant to the crime (i.e., the bandana and the $21 cash found on appellant's person at the time of his arrest). Thus, this does not appear to be the kind of case identified by Justice Durham in her concurring opinion in State v. Newton, Utah, 681 P.2d 833 (1984), where "an instruction on the dangers of eyewitness identification is most appropriate." 681 P.2d at 834.

POINT III

THE PROSECUTOR'S COMMENTS IN HIS CLOSING ARGUMENT DID NOT CONSTITUTE REVERSIBLE ERROR.

Appellant argues that certain statements made by the prosecutor in his closing argument to the jury (see T. 108) amounted to improper comment on appellant's decision not to testify and thus constituted reversible error. However, even if those statements can be construed as a direct reference to appellant's not taking the stand, any error was harmless.

Eliciting evidence of a defendant's decision to exercise his or her constitutional right to remain silent, or prosecutorial comment thereon, may violate a defendant's right against self-incrimination. Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965); State v. Hales, Utah, 652 P.2d 1290 (1982); State v. Wiswell, Utah, 639 P.2d 146 (1981). In Wiswell, this Court stressed that it was the prosecutor's repeated efforts to elicit testimony about the defendant's post-arrest silence and his comment thereon in final argument that resulted in prejudice to the defendant. See Wiswell, 639 P.2d at 147. However, it was implied in Wiswell and expressed more clearly in State v. Hales, 652 P.2d at 1292, that evidence of or comment on a defendant's silence does not automatically result in prejudicial error. Curative instructions, for instance, are an important consideration for reviewing courts. See Hales, 652 P.2d at 1292. Also, Wiswell

implied that if the improper evidence or prosecutorial comment is not extensive, reversible error may not result. See Wiswell, 639 P.2d at 147-148, including the dissenting opinion of C.J. Hall. Finally, prompt, ameliorative reaction by the trial judge to the allegedly improper prosecutorial comment generally will prevent prejudice to the defendant. See State v. Kazda, Utah, 540 P.2d 949 (1975), including the concurring opinion of J. Maughan.

It is not at all clear that the brief comments made by the prosecutor, to which appellant objects, were a direct reference to appellant's silence. But even assuming they were, the comments were not extensive, and immediately after the comments were made, the trial judge twice admonished the jury and the prosecutor that the burden was on the State to prove appellant's guilt (T. 108). Moreover, the trial court's instructions made clear that appellant had the right not to take the stand, that no adverse inferences should be drawn from appellant's decision not to testify, and that the State had the burden to prove beyond a reasonable doubt that appellant was guilty of the crime charged (see Instructions No. 3, 6, 11 (R. 45, 47, 52)). Under these circumstances, if the prosecutor's comments were error, such was harmless, in that even without the error there was not "a reasonable likelihood of a more favorable result for the defendant." State v. Fontana, Utah, 680 P.2d 1042, 1048 (1984), quoting State v. Hutchison, Utah, 655 P.2d 635, 637 (1982). See also

Rule 30, Utah Rules of Criminal Procedure (Utah Code Ann. § 77-35-30 (1982)); State v. Smith, Utah, 675 P.2d 521 (1983) (holding that although the prosecutor's remarks in closing argument were improper, they were harmless).

CONCLUSION

Because appellant failed to follow proper procedures for suppression of the identification testimony he now challenges on appeal, the issue of whether that testimony should have been suppressed has not been preserved for appeal. Even if this Court were to consider that issue, admission of the testimony did not deny appellant due process of law.

Further, the trial court's refusal to give appellant's requested eyewitness identification instruction to the jury was in conformity with this Court's recent decisions concerning "Telfaire" instructions. And finally, the prosecutor's remarks in closing argument were, at most, harmless error.

RESPECTFULLY submitted this 16th day of August, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to James C. Bradshaw, Attorney for Appellant, Salt Lake Legal Defender Assn., 333 South 200 East, Salt Lake City, Utah 84111, this 16th of August, 1984.

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