

1983

The State of Utah v. Boyd Donald Bagley : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19284
BOYD DONALD BAGLEY, :
Defendant-Appellant, :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM THE JUDGMENT OF 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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IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19284
BOYD DONALD BAGLEY, :
Defendant-Appellant. :

STATEMENT OF THE NATURE OF THE CASE

Appellant, Boyd Donald Bagley, was charged by information with a violation of the following provisions of Utah Code Ann. (1953), as amended: § 76-6-202, burglary; § 41-6-13.5, failure to respond to officer's signal to stop; § 76-6-404, theft; and, § 76-8-506, filing a false report.

DISPOSITION IN THE LOWER COURT

Appellant was tried before the Honorable Homer F. Wilkinson, sitting without a jury, in the Third Judicial District in and for Salt Lake County. Appellant was convicted of burglary, theft, and filing a false report. A stay of the execution of the sentence was granted, under the following conditions:

1. The usual and ordinary conditions required by the Department of Adult Probation and Parole,

2. Payment of a fine in the amount of \$750.00,
3. Payment of restitution to be determined by the Department of Adult Probation and Parole,
4. Complete the Prison Diversion Program, and
5. Complete the Weber County Alcohol Rehabilitation Program.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment of the lower court.

STATEMENT OF THE FACTS

On September 19, 1982, at 11:57 p.m., Officer Dave Smith was patrolling in the area of 3100 East 3300 South when he noticed a small, light-colored pickup parked at a Rainbow Service Station. The station appeared to be closed and Officer Smith went over to see if perhaps the tenant was simply late in leaving. As he drove by the station, Officer Smith observed a shattered window in the station and a male Caucasian grabbing items out of the cooler (T. 3-6).

Officer Smith drove into the station, parking his car at an angle in front of the truck. As he was getting out of his car, the suspect was leaving the building. Officer Smith drew his gun and ordered the suspect to stop several times. The suspect, however, continued toward the truck saying, "Don't shoot me. Don't shoot me"(T. 7). The suspect

got in the driver's side of the truck and started to back out. While the truck was backing up, Officer Smith reached into the open window of the passenger side where a second individual was seated, pointed his gun at the suspect and ordered him to stop but to no avail. The driver of the truck continued backing slowly towards 33rd South while Officer Smith maintained his hold on the passenger. Officer Smith was dragged in this manner for approximately 75 feet at which point he became dislodged and the truck took off headed west on 33rd South (T. 8-10).

Officer Smith immediately returned to the patrol car and radioed dispatch to give a description of the truck. Within minutes there was a dispatch call of an accident involving the suspected getaway truck approximately four blocks away. Officer Smith then went immediately to the scene of the accident where he identified the vehicle involved as the getaway truck (T. 10-11). At the scene of the accident, Officer Smith was shown a driver's license belonging to appellant, Boyd Donald Bagley (T. 32), found in the abandoned truck from which he identified the appellant as the burglary suspect and the driver of the getaway truck. A couple of hours later Officer Smith was again shown the driver's license and he again identified the appellant as the burglary suspect and driver of the truck (T. 20-21).

Later that morning, appellant notified the police that his truck had been stolen. An appointment was arranged that same afternoon with Detective Bringhurst for appellant to file a theft report. During the meeting with Detective Bringhurst, appellant was advised that he was a suspect in a burglary (T. 36-38).

Officer Smith had occasion to be at division headquarters on an unrelated matter while appellant was being interviewed by Detective Bringhurst (T. 16). Detective Bringhurst asked Officer Smith if he could identify the individual in his office. Initially Officer Smith was unable to make a positive identification (T. 18). Officer Smith left and returned to Detective Bringhurst's office about 25 minutes later. During the next few minutes Officer Smith observed appellant and listened while he was being questioned (T. 19-20). Thereafter, he was able to make another positive identification of appellant as both the Rainbo burglar and getaway driver (T. 17).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT
THE VERDICT.

In Points I and III of his brief, appellant claims that his conviction was based upon insufficient evidence. The standard under which a claim of insufficiency of the evidence

must be judged has been articulated many times by this Court.

Most recently the Court has stated:

Reduced to essentials, the issue is simply whether there was evidence adduced at trial from which the jury could have found the defendant guilty beyond a reasonable doubt. . . . Contradictory testimony alone is not sufficient to disturb a jury verdict. To overturn a verdict on appeal for insufficiency of evidence, this Court must find that reasonable minds must necessarily entertain a reasonable doubt as to the defendant's guilt. State v. Watts, No. 18847, p.3, (Utah filed Dec. 28, 1983)

It is well established that this Court will overturn a verdict challenged on insufficiency of the evidence only "when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt." State v. McCardell, Utah, 652 P.2d 942, 945 (1982). Additionally, the Court has held it to be the exclusive function of the jury to determine the credibility of the witnesses and the weight of the evidence. That the Court might view the evidence as less than wholly conclusive is not sufficient to overturn the jury's verdict. State v. Howell, Utah, 649 P.2d 91, 97 (1982).

Appellant argues that because conflicting testimony was offered at trial the state somehow failed to meet its burden of proof and a finding of reasonable doubt is mandated. Appellant cites, State v. Wilson, Utah, 565 P.2d 66, 68 (1977) to support his contention that any evidence offered is

sufficient to raise a reasonable doubt. A closer reading of the quoted portion, however, makes clear that "the evidence [of the defendant] be such as to create a reasonable doubt as to any element of the crime." Merely offering conflicting testimony does not of itself raise a reasonable doubt. The Court goes on in Wilson to state that it is a jury function to weigh the evidence. Id. at 68. The mere presentation of conflicting evidence by the accused does not preclude a finding of guilt beyond a reasonable doubt or no one could ever be convicted. State v. Carlsen, Utah, 638 P.2d 512 (1981), cert. denied 102 S. Ct. 1469 (1982). In the absence of a jury, the trial court is authorized to determine the credibility of the witnesses and to believe or disbelieve any witness. Id. at 515.

The evidence adduced at trial clearly supports the judge's verdict that appellant burglarized the Rainbo Service Station. The truck used as the getaway vehicle was positively identified just minutes after the incident by Officer Smith and was subsequently determined to belong to appellant. Appellant's wallet was in the truck with his driver's license. Officer Smith was shown the license at the accident scene and later at police headquarters. Both times he identified appellant as the burglary suspect. Smith made two subsequent identifications of appellant as the Rainbo burglar: one in Detective Bringhurst's office and the other at trial.

The defense offered three alibi witnesses who testified that appellant was home at the time of the burglary.

Two of these witnesses, appellant's girlfriend Tiffany Sorrells and another friend Rick Hall, were appellant's roommates. The third defense witness, Larinda Prisbrey, was Hall's girlfriend. All three of these witnesses testified that Larinda had telephoned appellant's apartment at midnight on September 19, 1982 to talk to Hall and supposedly appellant answered the phone. Despite remembering this phone call, these defense witnesses had very little recall of appellant's activity on the day of the burglary. Evidence was also offered that appellant had received a late call from his sister or sister-in-law telling him the police were looking for him (T. 44 and 56), but none of the defense witnesses remembered this seemingly significant call.

There was also testimony that appellant always left his wallet and keys in his truck at night and used his spare key to get in the truck in the morning. When Detective Bringhurst informed appellant that he would need another key in order to get the truck from the impound lot (since the set which had been seized by the police following the burglary was now part of the evidence), appellant told Bringhurst that there was not another set of truck keys (T. 80-81).

Appellant has failed to show reason why the court could not find Officer Smith's account of the burglary and his consecutive identification of appellant as the burglar sufficiently persuasive to dispel any doubts raised by the defense witnesses. The trial judge in the instant case was

under no obligation to accept any view of the evidence nor compelled to accept the most incredible inferences. As the trier of fact the judge considered all the facts shown and drew the reasonable inferences therefrom. The rule is that the evidence depends upon what the jury regards as substantial and credible. State v. John, Utah, 586 P.2d 410 (1978). Therefore, the fact that Judge Wilkinson found Officer Smith's testimony more credible than the defense witnesses indicates that he had no reasonable doubt as to appellant's guilt. That Judge Wilkinson was not persuaded by appellant's alibi defense does not mean that his guilty verdict was based upon insufficient evidence.

POINT II

APPELLANT'S OBJECTION IS NEITHER TIMELY NOR SPECIFIC AND IS NOT A PROPER BASIS OF APPEAL BEFORE THE COURT.

Appellant contends that Officer Smith's in-court identification was tainted and should not have been admitted, however, this objection was never raised at trial. Rule 4, Utah Rules of Evidence, provides in pertinent part that,

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection . . ."

The credibility of the identification was questioned but not its admissibility. Even now the basis of appellant's

objection is unclear. He never asks for the evidence to be stricken, apparently contending only that it was given too much credence by the trial judge. As has been previously shown, the question of witness credibility falls squarely in the lap of the trier of fact.

This Court has previously held that the proper procedure to follow concerning an allegedly suspect identification is a motion to suppress the identification testimony before trial. The second alternative is a defense motion to suppress during the trial. State v. McGee, 24 Utah 2d 396, 473 P.2d 388 (1970). Neither of these procedures was followed by defense counsel even though he was aware of the viewing prior to trial.

In State v. McCardell, 652 P.2d 947, the Court endorsed the contemporaneous objection rule requiring a "timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal." The purpose of the rule is to afford the trial court an opportunity to address the defendant's concern and proceed with evidence most relevant to the case. The Court further held in McCardell that a new trial should not be granted as a result of the defendant's failure to provide the trial court with that opportunity.

Appellant has not made a clear objection to the admission of Officer Smith's testimony at any point in this proceeding. Therefore, appellant's contention that Officer

Smith's in-court identification was tainted by seeing appellant in Officer Bringhurst's office is not reviewable by this court.

POINT III

UNDER THE "TOTALITY OF THE CIRCUMSTANCES" TEST, OFFICER SMITH'S OBSERVATION OF THE APPELLANT WAS NOT TAINTED.

In recent years both the United States Supreme Court and the Utah Supreme Court have ruled upon the admissibility of in-court identifications where the witness has participated in an identification procedure prior to trial. In Stovall v. Denno, 388 U.S. 293 (1967), the Court established a "totality of the circumstances" test to be used in determining whether a previous contact had tainted the identification. It was later held that each case was to be determined on its own facts and a pretrial identification should be set aside only if the procedure was so suggestive as to give rise to a "substantial likelihood of irreparable misidentification." Neil v. Biggers, 409 U.S. 188, 196 (1972). This standard shifted the focus to the reliability of the identification rather than the circumstances under which it was made. Therefore, the central issue is whether under the totality of the circumstances the identification was reliable even if the confrontation was suggestive. Manson v. Brathwaite, 432 U.S. 98 (1977).

Utah has adopted the "totality of the circumstances" test citing the following as factors to be considered in determining reliability :

- (1) the witness's opportunity to view the criminal at the time of the crime,
- (2) the witness's degree of attention,
- (3) the accuracy of any prior description of the suspect,
- (4) the level of certainty during the identification procedure, and
- (5) the time between the crime and the identification. State v. McCumber, Utah, 622 P.2d 353 (1980).

In addition, the identification process is not impermissible unless it can be shown that some external, suggestive influence so tainted the identification procedure that the witness would almost inevitably identify the defendant. State v. Wilson, Utah, 608 P.2d 1237 (1980).

It is unclear precisely what appellant is arguing. He argues that Officer Smith's identification was tainted by viewing appellant in Detective Bringhurst's office but makes no showing that the identification was unreliable or that an identification of appellant was the inevitable result of the Bringhurst interview. Nor is there anything in the record to suggest that Officer Smith's identification was so tainted as to create a "substantial likelihood of misidentification." Officer Smith certainly observed the commission of the crime. Smith testified that the area around the Rainbo Station seemed fairly well-lighted. He observed appellant from the time he exited the Rainbo Station until he entered his truck. After

appellant entered his truck, Officer Smith testified that he grabbed hold of the other passenger and paid particular attention to appellant while he was backing out his truck for approximately 75 feet. Apparently Officer Smith did not give a description of the burglar although it was likely considered unnecessary based upon his identification of the appellant from his driver's license.

Later that afternoon, Officer Smith saw appellant in Detective Bringham's office. When asked if he could identify appellant, Smith was initially uncertain. Officer Smith left to conduct his other business, then returned. Smith observed appellant and listened to him speak at which point he made an identification. There is nothing in the record which suggests that this identification was not the product of Smith's independent and reliable recollection of the previous events of that day concerning the gas station burglary.

This Court has held it to be a function of the jury to determine whether the witness actually recognizes the defendant in court. It is to be determined as a matter of fact. State v. Spencer, 24 Utah 2d 361, 471 P.2d 873 (1970). When a question concerning an identification is raised, it should be decided in the trial court whether there was anything so suggestive that there is a reasonable likelihood the recollection of the witness was tainted or distorted. This finding should only be disturbed if there has clearly been an error. State v. Perry, 27 Utah 2d 48, 492 P.2d 1349 (1972). In State v.

Wulffenstein, Utah, 657 P.2d 289 (1982), this court held that any discrepancy involving an in-court identification was a matter of credibility of the evidence, not admissibility. Credibility and the weight to be given the evidence is a matter for the jury to decide. Thus, it follows that it is the prerogative of the lower court to determine if Officer Smith's testimony was reliable and based on independent recollections of the event. Any difficulty he may have experienced in identifying appellant in Detective Bringhurst's Office goes merely to the weight and credibility of the evidence.

CONCLUSION

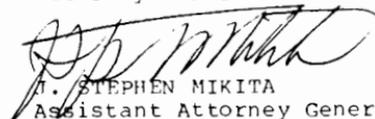
The issue from the appellant's view seems to be that of necessity a reasonable doubt must exist because of the admission of conflicting testimony. This Court has held on several occasions, however, that it is the prerogative of the trier of fact to decide the weight and credibility to be given the evidence. It would be impossible to ever have a conviction if the presence of conflicting testimony automatically mandated a finding of reasonable doubt.

In addition, appellant questions the validity of Officer Smith's testimony but his objection is neither timely nor specific. He fails to state a clear objection to this testimony and contends only that it was given too much weight, therefore, the appeal is not properly before the court.

Regarding the issue of Officer Smith's testimony, both this court and the United States Supreme Court have established the "totality of the circumstances" test where the reliability of the identification is the point of focus regardless of any suspect viewing. There was no showing that Officer Smith's in-court identification was not reliable nor that there was a "substantial, likelihood of irreparable misidentification." For these reasons, appellant's conviction should be upheld.

Respectfully submitted this 10 day of January, 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 Kenneth L. Rothey, attorney for appellant, 942 East 7145 South, #108, Midvale, Utah 84047, this 10th day of January, 1984.

Kathleen Kellersberger