1970

State of Utah v. Michael Dale Gill : Brief of Appellant

SUPRE

STATE

STATE OF UTAH,

Pl

vs.

MICHAEL DALE GIL,

Defend

BRIEF O

Appeal from a C
Third District C
Honorable Mers

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VERNON B. ROMNEY
Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Respond

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent,* vs. MICHAEL DALE GILL, *Defendant-Appellant.*	Case No. 11783

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is a criminal proceeding in which the Defendant, Michael Dale Gill was charged with the crime of robbery in violation of Title 76, Chapter 51, Section 1, Utah Code Annotated 1953, by information filed in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah on December 15, 1967.

DISPOSITION OF CASE BY LOWER COURT

The Defendant was tried before a jury, commencing June 2, 1969, before the Honorable Merrill C. Faux. The Defendant was found guilty by verdict of the jury, entered June 3, 1969, of the crime of robbery and sentenced to confinement in the Utah State Prison for an indeterminate term.

RELIEF SOUGHT ON APPEAL

Appellant Gill seeks a new trial.

STATEMENT OF FACTS

On November 4, 1967, Harman's Take-Home Cafe, lo-cated in Salt Lake City, Utah, was robbed by two me (Tr. 6-8).

Of three employees on duty, only two were called as witnesses by the State (Tr. 5, 22). The State's first wit-ness, Marilyn Marx identified the Defendant as one of the two men involved in the robbery (Tr. 22), but acknowl-edged that she had difficulty distinguishing the identifying characteristics of Defendant when compared with those of the Defendant's brother, James Gill (Tr. 21). A third wit-ness in behalf of the State, who purported to have accom-panied the Defendant at the time of the robbery (Tr. 31-32), while describing the incident, used the name "Jim" when referring to the Defendant (Tr. 31).

There was considerable variance in the testimony of the State's witnesses as to what the Defendant was pur-ported to have worn at the time of the incident (Tr. 15-16, 38).

For the defense, the Defendant's brother, *James* Gill testified that he and his brother *David* Gill were the par-ticipants in the robbery, and that *Michael* Gill was not present at any time (Tr. 43). This testimony was corrobor-ated by the testimony of David Gill (Tr. 52).

Defense counsel attempted to cross-examine the em-ployee, Marilyn Marx as to her identification of the Defen-

dant as a participant in the robbery and as to her knowledge of the Defendant's name. Upon objection by the prosecution, this line of inquiry was cut short:

"Q. When did you first learn the name of the Defendant, Mike Gill?

"A. When we were, oh, in the line-up.

"Q. And this is the line-up that the police took you to for identification purposes?

"A. Yes.

"Q. Did the police tell you that Mike Gill was in that line-up.

"MR. FREDERICK: I will object to the form of the question — anything the police may have told her, I think, is not material; be hearsay at this point.

"MR. HANSEN: I will submit it.

"THE COURT: The objection is sustained.

"Q. Who was present at the line-up?

"A. The — let's see — the three men that robbed me; the two, the first time; and the two, the second time; and one did it twice.

"Q. And what were their names?

"A. The Gill brothers; I don't really know which one it is, except I know the name is 'Mike Gill,' because I have read about it in the paper.

"Q. You don't know, really, which one it is. what —

"A. I don't know which one is James or — but I know he is Mike Gill.

"Q. And is this because someone told you so?

"A. At the line-up, I think they read off [illegible] names.

"Q. That's right; the police told you so, didn't they?

"A. Yes.

"Q. And do you recall the names of the police that were there?

"A. I know Elton was there; he is the one that come down to investigate that night, that I was robbed.

"Q. You know any others that were at the line-up?

"A. No.

"Q. And, in this line-up there weren't any Mexicans, were there?

"MR. FREDERICK: Your Honor, I am going to object how the line-up — No. 1, has gone beyond the scope of direct examination; it isn't relevant to this matter.

"THE COURT: Objection is sustained; beyond the scope.

"Q. In this line-up, there were no negroes, were there?

"MR. FREDERICK: Make the same objection, your Honor.

"THE COURT: Objection sustained.

"Q. In this line-up, there were no more than —

"THE COURT: Now, listen; objection to this type of question is sustained, and don't ask any more like that.

"MR. HANSEN: Would you identify my limits, your Honor?

"THE COURT: Yes; you understand the limits, very well.

"MR. HANSEN: I am asking for instruction from the Court; I do not — I think I am entitled to go into this.

"THE COURT: The Court instructs you, it is beyond the scope of the direct testimony; and the objection is sustained; and don't go into it, any more.

"MR. HANSEN: Does this mean the entire circumstances surrounding the line-up?

"THE COURT: Entire circumstances surrounding the line-up; you may call the witness as your own witness, if you choose; this is beyond the scope of the direct testimony" (Tr. 12-14).

ARGUMENT

THE COURT ERRED IN REFUSING TO PERMIT DEFENSE COUNSEL TO CROSS-EXAMINE THE STATE'S WITNESS ON THE BASIS FOR HER IDENTIFICATION OF DEFENDANT.

Identification is almost always a matter of opinion. *State* v. *Chambers*, 104 Ariz. 247, 451 P. 2d 27 (1969); *State* v. *Sutton*, 272 Minn. 399, 138 N. W. 2d 46 (1965); *State* v. *Linzia*, 412 S. W. 2d 116 (Mo. 1967).

Thus, when a witness testifies that an incident occurred, and that a given person was involved in the incident, the witness is in reality saying that the *fact* of the

incident occurred and that, based upon what the witness was able to and did observe, it is the *opinion* of the witness that the person identified is the same person involved in the incident. Such opinions, as all testimonial opinions, are open to the test of cross-examination not only as to the competency of the witness to form the opinion — as to what the witness saw and was able to see, but also as to the validity and credibility of the facts forming the basis of the opinion — as to whether the purported facts upon which the opinion is based in reality occurred. *State* v. *Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953); *State* v. *Ward*, 10 U. 2d 34, 347 P. 2d 865 (1959).

When the question of identity is directly in issue, as it was here, the widest breadth of cross-examination should be permitted to test not only the weight and credibility of the identification but, as importantly, to test the competency of the witness to arrive at that identification. This is particularly so, as a matter of basic and fundamental justice, when the question directly in issue is one of identity of the accused. The cornerstone nature of the right to so cross-examine is reflected in the constitutionally secured prerogative to appear and defend and be confronted by the witness testifying against an accused (Constitution of Utah Article I section 12), for as this Court, itself, has said, the right of cross-examination is inherent in the right of confrontation of and by witnesses. *State* v. *Mannion*, 19 Utah 505, 57 Pac. 542 (1899). See also *People* v. *Hume*, 56 C. A. 2d 262, 132 P. 2d 52 (1943); *Archina* v. *People*, 135 Colo. 8, 307 P. 2d 1083 (1957); *State* v. *Merritt*, 66 Nev. 380, 212 P. 2d 706 (1949).

At the trial below, there can be no doubt but that the identity of this Defendant as one of the participants in the robbery was squarely at issue. The Defendant's brothers had testified that they and not the Defendant were the parties to the crime. The State's own witness acknowledged the difficulty in distinguishing between the Defendant and his brother James, and the purported accomplice, Linda Fehmal, with a significant slip of the tongue, indicated that it was James Gill and not the Defendant who was the co-perpetrator. A major portion of Marilyn Marx's testimony on direct examination was devoted to identifying the Defendant (Tr. 8-11).

The gist of the subject line of questioning then goes to the fundamental inquiry to be made of every identification witness:

Whether the witness was able to identify the suspect of her own knowledge and based upon her own observation; or whether, in fact, the witness's identification of the defendant was predicated upon what the police or others had told her, the nature of the line-up and the manner in which it was conducted, or other information which the identifying witness obtained second-hand which tainted her identification by suggestive implication and innuendo and which forced her to a testimonial conclusion at which she would not otherwise have been able to arrive.

With the trial in this posture, the Court should have permitted defense counsel the greatest leeway in cross-examining Marilyn Marx on her identification of the Defendant.

Information gained at the line-up may well have been the sole predicate upon which the witness based her identification.

But instead, the Court cut short this highly germane and relevant inquiry *on the ground that such examination was beyond the scope of direct examination* (Tr. 14).

We submit that such circumscription of defense counsel's right to cross-examine on a matter directly in issue was irreparably prejudicial to this Defendant, and effectively suspended his right to meaningfully confront the primary and chief witness against him and to test the competency and credibility of her opinion.

The principles enunciated in *State* v. *Peek, supra*, a case dealing with cross-examination of expert witnesses to test their opinions, are equally applicable to the present case. This Court stated:

> "There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth it should never be curtailed or limited. Any inquiry should be allowed which an individual about to buy would feel it in his interest to make."

The Court went on to hold that:

> "Cross-examination of an opinion witness may embrace an investigation of the qualifications of the witness [his competency to arrive at an opinion], the extent of his knowledge, reasons for his opinion, and the factors upon which his opinion is based."

See also *State* v. *Ward, supra*. In addressing itself to the scope of cross-examination, the Court, in *Peek*, held that:

> "A witness may be asked on cross-examination *any facts* which *would be* admissible on direct examination * * *." (Emphasis added.)

Even if it were assumed that the matter of identification was beyond the scope of direct examination, in which event the State would not have made its case, it is indisputable that the right of cross-examination extends beyond the limits of direct examination when testing the credibility of a witness as to his opinion or when attempting to impeach the testimony of the witness. And defense counsel's attack here was predicated upon both testing witness's competency to make such an identification and impeachment of her credibility.

Inasmuch as the testimony of a witness is not stronger than where it is left on cross-examination, *Oberg* v. *Sanders*, 111 Utah 507, 184 P. 2d 229 (1947); and since the jury could never know what the witness would have testified if defense counsel *had* been permitted to pursue his cross-examination; and when the effect of the absence of such testimony on the jury verdict cannot be measured or weighed, this Court, as it has done in the past should find prejudicial error and grant Defendant a new trial. *State* v. *Poe*, 21 U. 2d 113, 441 P. 2d 512 (1968).

CONCLUSION

It is respectfully submitted that the trial Court erred prejudicially in refusing to permit defense counsel to fully

cross-examine the State's witness to test her identification of the Defendant.

Accordingly, it is urged that this Court grant a new trial.

Respectfully submitted,

JOHN D. O'CONNELL

STEWART M. HANSON, JR.

Attorneys for Appellant