1969

State of Utah v. Jesse Junior Gilpin : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

JESSE JUNIOR GILPIN,
Defendant-Appellant.

Case No. 11786

BRIEF OF APPELLANT

Appeal from Jury Verdict of Guilty in the Third District Court in and for Salt Lake County, The Honorable Merrill C. Faux, Presiding

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STATEMENT OF NATURE OF CASE

The appellant, Jesse Junior Gilpin, appeals from a conviction of robbery rendered in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

Defendant, Jesse Junior Gilpin, was found guilty by a jury of the crime of robbery on March 4, 1969, and was thereafter sentenced to be committed to the Utah State Prison on March 24, 1969, for the term prescribed by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his robbery conviction and a new trial.

STATEMENT OF FACTS

On September 27, 1968, near 9:00 p.m., two young men entered the International House of Pancakes at 141 East Broadway, Salt Lake City, Utah, sat at a booth and ordered coffee. (R-90) Judy Mitchell, a waitress, served them and some thirty minutes later returned to their table offering more coffee, which they declined. (R-90) Mrs. Mitchell returned to the restaurant pass-bar for an order, when the taller of the two fellows pulled a gun. The shorter fellow went behind the cash register, opened it and removed about $470.00. (R-91) Both fellows then backed out of the restaurant, broke and ran towards the Centre Theater in Salt Lake. (R-92)

At the time of the robbery Miss Barbara Hom, also an employee at the restaurant, was at the cash register, and she related testimony similar to that previously stated. (R-111-114)

Some weeks following the robbery, near October 22, 1968, Mrs. Mitchell was riding home, with a deputy sheriff, in a sheriff's car. As they passed the area of 33rd South and Highland Drive, the officer mentioned

the fact that two boys had been standing on the street by Dee's Drive Inn for some time. (R-75, 76, 92) Mrs. Mitchell looked and thought one of the fellows resembled one of the individuals who held-up the Pancake House on September 27, 1968. (R-75-76, 92) Upon stating her impressions to the officer, he turned the vehicle around and indicated to Mrs. Mitchell he would return and speak with the boys to give her a better look. (R-76, 92) Calling the boy (defendant) by name, the officer spoke to defendant from his car (R-77); whereupon, Mrs. Mitchell concluded defendant was one of the individuals involved in the robbery. (R-78)

About one and a half months later, on December 13, 1968 (R-60), Barbara Hom was at the Salt Lake Police Station to view a line-up in connection with the robbery of September 27, 1968. (R-80-81) Unable to make an identification of the tall robber, she was taken by Detective Floyd Ledford, Salt Lake City Police Department (R-80, 115) to the courtroom of the Honorable Leonard W. Elton, Judge, Third District Court, where defendant was on trial for an offense of assault with a deadly weapon; of such offense he was acquitted. (R-60-62) Officer Ledford instructed her to go into the courtroom and look for anybody familiar. (R-81, 115) At the time she entered the courtroom, she had in mind that one of the robbery suspects would be there. (R-118)

When she entered the courtroom, defendant Gilpin, who was under police custody (R-62), was seated at the witness stand (R-82), and although counsel was present, he was not informed of the reason for her presence. (R-61) After leaving the courtroom, Miss Hom thought the defendant to have a familiar appearance, but she could not state he was the person involved. (R-116)

Three days following her initial courtroom view of defendant, Miss Hom appeared as a witness against defendant at a preliminary hearing involving the robbery charge. (R-84) At this time she learned defendant had been charged with the offense and concluded he was one of the robbers. (R-84, 117) However, she asserted her decision was based upon the way defendant walked (R-84, 117), not upon the facial appearance of defendant. (R-86)

Prior to trial defense counsel filed a motion to surpress the in court identification of the defendant of state witnesses based on the principles of *Wade v. United States*. (R-7-8) Although counsel in his motion raised only the question of a due process violation under the Fifth Amendment to the United States Constitution, counsel, nevertheless, also informed the court he was relying on the Sixth Amendment provision of right to counsel. (R-65) Following a hearing in this case, the court denied defendant's motion to surpress. (R-87)

Defendant, by counsel, also served notice that he would rely on an alibi to the effect that at the time of the offense, defendant was at 263 West 1st North, Salt Lake City and later in Midvale, Utah. (R-9) Various witnesses were called to support defendant's alibi. When counsel for defendant endeavored to introduce evidence involving the defendant's presence in Murray the court refused to allow such testimony.

Mrs. Ophelia Montoya of 263 West First North, defendant's aunt, testified that defendant was at her home on September 27, 1969, at 7:00 p.m. when she left and at 10:00 p.m. when she returned. (R-140-141) However, when counsel endeavored to show how the witness recalled the date specifically, the court would not allow her to answer. (R-142)

Defense counsel called defendant's cousin, Dennis Montoya, who testified defendant was at the Montoya home when he arrived from work at 9:00 p.m. on September 27, 1968, and that defendant remained there between 9:00 p.m. and 10:00 p.m. (R-144-145) On cross examination prosecution endeavored to show Dennis might have mixed his dates (R-145-146), but when defense counsel sought to show how the witness remembered the particular date, the court refused to allow the witness to discuss the basis of his remembrance and ordered his answer as given to be stricken. (R-146-147)

An acquaintance of defendant's, Martin Joseph Martinez, testified to seeing defendant, Dennis Montoya and others at the Montoya home about 10:00 p.m. on September 27, 1968. (R-151-152) When the witness was asked how he remembered the date in question, he commenced to explain but was not allowed to complete his answer. (R-152)

Following the court's continued refusal to allow defense counsel to show the relation of the events in Midvale to the defendant's alibi, a hearing was held in chambers. (R-153) Counsel explained the reason he desired to show that defendant had gone to Midvale and a fight occurred on the evening of the robbery was threefold:

(1) To demonstrate a chronology of events relating to defendant's alibi;

(2) to show if defendant were involved in a robbery, it is unlikely he would thereafter engage in a fight; and

(3) to show that an event of significance occurred on the evening of the robbery that enabled the alibi witnesses to remember the other events that occurrd on the same evening. (R-153-154)

The court expressed concern over endless detail of the fight, but counsel explained he did not want to go into the merits of the fight, but rather show an event had occurred which tied defendant's alibi and witnesses together. (R-155) The court then indicated a willingness to allow evidence for the purpose stated by counsel (R-155) cautioning counsel about the merits of the fight. (R-156)

Thereafter, defendant was placed on the stand to explain the events of September 27, 1969; however, when counsel endeavored to raise evidence relating to defendant's presence in Midvale, for the purposes previously explained to the court, counsel was prohibited from doing so. (R-166) Defendant denied any involvement in the robbery.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ALLOWING THE IN-COURT IDENTIFICATION OF THE DEFENDANT, IN THAT THE POLICE SUPERVISED CONFRONTATIONS BETWEEN THE DEFENDANT AND THE STATES' WITNESSES WERE CONDUCTED CONTRARY TO CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND RIGHT TO COUNSEL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The recent case of *Wade v. United States*, 388 U.S. 218 (1967) has recognized that a line-up is a critical stage of a criminal proceeding and an accused is entitled to have counsel present to represent his interests at that proceeding under the Sixth Amendment of the United States Constitution. The court has further indicated in *Stovall v. Denno*, 388 U.S. 293 (1967) that the exclusion of eyewitness testimony should be upheld where police procedures in obtaining an identification are suggestive as to deprive a suspect of due process. In *Wade*, the court ruled that admissibility of an in-court identification of an accused, who had been placed in a line-up without counsel present, could be admitted only upon the state's showing by clear and convincing evidence that the witness' identification ability rested on a source independent of the counsel-less line-up or was harmless error. *Wade, supra* at 240, 243 The principles announced in *Wade* were ruled applicable upon the states as a rule of evidence in *Gilbert v. California*, 388 U.S. 263 (1967).

In the instant case defendant Gilpin was confronted by witnesses for the state at police direction without counsel and in a manner which was suggestive as to deprive defendant of due process. Consequently the in-court identification of the defendant should have been disallowed since the ability of the witnesses to identify defendant was not clearly untainted by the police-arranged confrontations. Although *Wade* involved a post-indictment line-up, wherein counsel for defendant had been appointed, such decision has been expanded to

over those situations in which the police arrange for a confrontation between the suspect and witness prior to indictment and appointment of counsel [*Rivers v. United States*, 400 F.2d 935 (5th Cir. 1968)], and without a formal line-up. *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969)

In *Rivers v. United States, supra*, defendant was convicted of attempted robbery, and he appealed. The victim, a rural mail carrier, was shot by a young man, and while at the hospital, the victim informed the sheriff that the assailant was a boy observed at a home where a package had been delivered earlier. The sheriff went to the home mentioned, arrested three boys, and returned with them to the hospital. Upon their return the victim was being placed in an ambulance for transportation to another hospital. At that time a deputy pulled defendant from the police vehicle and showed him to the victim, who identified defendant as the assailant.

On appeal the Fifth Circuit Court of Appeals, on its own, examined the admissibility of such identification evidence under the *Wade* decision, and the conviction was reversed and remanded to have the trial court determine the admissibility of in-court identification under the requirements of *Wade*. Specifically, the court recognized the facts did not disclose any emergency situation which would preclude the victim from later appearing at a formal line-up. Likely the court had in mind the

"emergency" of *Stovall v. Denno, supra*, where the suspect was presented at the hospital room of an assault victim for identification purposes, where the victim was in peril of death. Recognizing that the *Wade* doctrine applied to informal, police-supervised confrontations, as well as formal police line-ups, the court found defendant should have been afforded counsel in the *Rivers'* case, and reversed the conviction for further proceedings.

In the instant case while driving past defendant, Judy Mitchell recognized him as resembling one of the robbers. (R-78) The officer with whom she was riding took her to get a closer look at the defendant. Though defendant was not under arrest at this time, still no emergency necessitating an immediate confrontation existed, for he was known to the officer. (R-77) Rather than placing defendant in such a suggestive-one-to-one confrontation, the officer could have submitted photographs to Judy Mitchell at a later time or requested defendant volunteer to stand in a formal line-up, to avoid the possibility of prejudice to defendant. However, the officer chose to return Mrs. Mitchell where defendant was standing and engage him in a conversation, instructing the witness to closely observe defendant. (R-76,93) Such police-arranged confrontation was not only prejudicial to defendant because of its suggestive nature, but also denied his right to counsel and due process. Where such length of time existed between the robbery and the street confrontation as did here,

the need to avoid suggestive confrontation practices is enhanced, and the admission of Mrs. Mitchell's in-court identification was error. See *Rivers v. United States*, *supra*.

Mason v. United States, *supra* involved a forgery conviction of an individual accused of receiving money from a bank on a forged withdrawal slip. After a photographic identification was made by the state's sole witness, Miss Schulz, the defendant was arrested; however, only a single photo was showed to her. Two weeks following the offense, Miss Schulz, who accepted the forged withdrawal slip, was brought to court by an officer to view the area where the accused person awaited preliminary hearing, and she was instructed to see if she recognized anyone. Miss Schulz was informed the arrested suspect would appear, and influenced by the single photograph she had seen previously, she spotted the defendant seated among several others. Following a conviction based on Schulz's identification, defendant appealed raising the issue of his denial of counsel at such confrontation.

In reversing the conviction of the trial court, the court of appeals recognized, as did *Wade*, the dangers inherent in identification confrontations between witnesses and suspects and found no valid reason not to have afforded the defendant counsel at the questioned courtroom viewing, and held that *Wade*, afforded no

exception to a viewing in a courtroom as was done in the *Mason* case. Further, the court in finding the identification inadmissible, also found such not to be harmless error beyond a reasonable doubt.

To the government's argument that a courtroom viewing could not be "rigged" by police, the court simply answered that the decision of *Wade* was aimed at avoiding unintentional as well as deliberate unfairness. Further, the court suggested that one's desire to cooperate with the police as well as a personal need to identify a suspect were factors which could influence a witness.

As stated in the facts, Miss Hom, like Miss Schulz in *Mason, supra,* was brought to a courtroom by an officer where she knew a suspect would be present. (R-80, 118) Though uncertain of defendant's being the robber following her first view (R-117-118), she was certain at the time he appeared for a preliminary hearing on the robbery charge a few days later (R-84, 117), at which time she knew the purpose of her appearance. (R-85) At the initial courtroom view, defendant had counsel present, but counsel at the time was unaware of any identification proceeding taking place. (R-61) Consequently counsel could not apprize himself of any prejudicial influences at the time of the viewing. *Wade* did not contemplate that type of assistance; rather, notice to both counsel and accused is necessary. *Wade, supra,* at 237. At 1180 in *Mason, supra,* the court stated:

> So long as only the policeman and the witness know that an identification confrontation is in progress, the defendant will be hard put to discover the myriad subtle suggestions which may have passed from policeman to witness.

Likewise an attorney, unaware of such proceedings, could do no better.

Further, no emergency situation existed to have the defendant viewed by the witness, except police convenience. Defendant was in custody on the robbery charge, while being tried for the assault charge (R-62), and in all likelihood the police were desirous of defendant's standing in a line-up that day, but because of his trial, was unavailable. (See R-80, 118, 131, 132) Probably due to defendant's unavailability for the line-up, Miss Hom was taken to the courtroom, where she expected to find a suspect. (R-80, 118) However, mere police convenience is not adequate reason to deny a defendant his right to counsel at a line-up. See *Wade, supra,* at 237; see *Mason, supra,* at 1179.

Certainly, the influences on Miss Hom are equal to, if not greater than, those to which Miss Schulz was subject in *Mason, supra.* Especially must her identification be suspect when she is unable to make a positive identification of the defendant until after she knows the person she saw in the courtroom initially, is the person charged with the offense, which fact she learned

at the preliminary hearing. (R-84, 117) Wherefore, th
reasons requiring presence of counsel in the *Mason* ca
are equally present in the instant case and as in *Mas*
the case should be reversed.

Defendant submits that the identification of both
Judy Mitchell and Barbara Horn were acquired in vio
lation of the *Wade* principle of right to counsel as well
as due process. A witness-defendant confrontation, ar
stigated by the police, except where an emergency is
evident, requires the presence of counsel. Where coun
sel is not present, the state must sustain the burden of
showing clearly and convincingly that the identification
witness' testimony is not influenced by such counsel-less
confrontation, or such introduction was harmless error.
Wade v. United States, supra. Such identification was
admitted in the instant case contrary to the principles
stated, and the judgment and verdict should be reversed
and remanded for further proceedings. Should the court
find that only one of the two confrontations was tainted,
and therefore inadmissible, a reversal would still be
required, then it cannot be said what weight the jury
gave to the testimony of one identification witness, as
opposed to the other, in determining the guilt of the
defendant.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW
THE DEFENDANT AND DEFENSE WITNESSES TO PRE

SENT EVIDENCE RELATING TO THEIR PRESENCE IN MIDVALE ON THE NIGHT OF THE ROBBERY IN THAT SUCH REFUSAL DENIED DEFENDANT AN OPPORTUNITY TO PROPERLY PRESENT HIS ALIBI.

Alibi is recognized as a proper and legitimate defense in this state. *State v. Waid*, 92 Utah 297, ..., 67 P.2d 647, 651 (1937). Although the burden of proving guilt remains with the state and does not shift to the defendant [*State v. Whitley*, 100 Utah 14, 110 P.2d 337 (1941)], still a defendant is entitled to present evidence of innocence; and often an innocent defendant who knows nothing of the facts of the crime charged against him, is hard put to offer a better defense than that of alibi. *State v. Rosenbaum*, 22 Utah 2d 159, 163, 449 P.2d 999, ..., (1969) Therefore, any evidence which tends to prove the facts sought to be established by the alibi is properly admissible. *Vaughn v. State*, 19 N.E.2d 239 (Ind. 1939) In the instant case defendant offered evidence which had a significant bearing on the question of his whereabouts at the time of the robbery, and he was prejudiced by the court's refusal to admit such evidence.

The evidence which defense counsel endeavored to introduce on several occasions (see facts) related to defendant's being in Midvale, Utah after 10:00 p.m. on September 27, 1968. (R-153) Certainly, the Midvale event occurred after the robbery, but yet such event

was significant in establishing defendant's whereabouts at the time the robbery occurred. The Midvale incident, if allowed, would have tied together the testimony of the witnesses for the defendant and corroborated his alibi. Dennis Montoya recalled coming home from work on September 27, 1968, at about 9:00 p.m. and seeing defendant several times between his arrival and 10:00 p.m. that evening. (R-144-145) The state challenged his ability to recall the date in question and Mr. Montoya endeavored to explain that near 10:00 p.m. his brothers and friends returned from a football game and they (including defendant) went to Midvale where a fight occurred. (R-147) Mr. Martinez related going to a football game with Montoya's brothers and coming in at 10:00 p.m. on September 27, 1968, seeing Dennis and the defendant, and then going to Midvale. (R-152) (See also the testimony of Mrs. Montoya at R-140, 142.) Certainly, if Mr. Gilpin went with his friends and relatives at about 10:00 p.m. to Midvale he would have to have been at home at that time. If he were at home at that time and Dennis Montoya saw him at 10:00 p.m., he certainly could have seen him at 9:00 p.m. when he came from work and remembered such an event. However, the court precluded Mr. Martinez from relating the event of Midvale (R-152), and also ordered Dennis Montoya's statement stricken. (R-147)

A case not unsimilar to defendant's frustration was that of *Vaughn v. State*, *supra*. In that case the Indiana Supreme Court reversed an order denying a new trial

inter alia on the grounds that the trial court excluded competent evidence relating to defendant's alibi. At the trial, in which defendant was charged with robbery, the time of the offense was fixed between 6:00 p.m. and 7:00 p.m. In presenting an alibi, defendant endeavored to show that after 7:00 p.m. he went to get a doctor to treat his child and returned at 7:30. Such evidence was excluded, and finding such exclusion to be error, the court stated the test for admissibility to be". . . whether the evidence offered tends to prove the fact sought to be established". *Id.* at 242 Ruling in favor of the defendant the court found that evidence of defendant's going from his home to the doctor's office and back after 7:00 p.m. raised a reasonable basis to infer he was at his home between 6:00 p.m. and 7:00 p.m.; otherwise, he could not have known of the necessity of obtaining medical help for his baby.

In a criminal case the primary issue is the guilt or innocence of the defendant and subsidiary facts are necessary to prove such an issue. Evidence is recognized to be relevant to prove such facts:

> . . . when it is so related that according to the common course of events it either alone or in connection with other evidence renders the existence of the fact more certain or probable. 1 Underhill, Criminal Evidence (5th ed.) §11 P.12

Looking at defendant's evidence as a whole, as he endeavored to present it, his appearance and activities along with his acquaintances in Midvale on the evening

of the robbery rendered his alibi testimony as to his whereabouts at the time of the offense more probable than was possible without such evidence. Then, not only could such evidence aid to establish his whereabouts but would also render his becoming involved in a fight likely improbable if he had just committed a robbery.

Notwithstanding efforts of counsel to present an effective alibi and to explain his reasons to the court for desiring such evidence, defendant was precluded from properly presenting competent and relevant evidence. In view of the "positive" identification of the state's witnesses, defendant should have been afforded a chance to present his defense in as convincing a manner as the law would allow. The court's ruling, which substantially weakened defendant's case, was error and requires a reversal of defendant's case.

CONCLUSION

For the above reasons, counsel respectfully contends the case should be reversed and remanded for the trial court to determine the admissibility of the in-court identification of the defendant consistent with constitutional principles, and further to award defendant a new trial in which he may properly present his defense in this case.

Respectfully submitted,

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