1970

# State of Utah v. Jesse Junior Gilpin : Brief of Respondent

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 RESPONDENT

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

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## BRIEF OF RESPONDENT

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## NATURE OF THE CASE

The defendant, Jesse Junior Gilpin, is appealing from a conviction of robbery in violation of Utah Code Ann. § 76-51-1 (1953).

## DISPOSITION IN LOWER COURT

The defendant, Jesse Junior Gilpin, was found guilty by a jury of the crime of robbery on March 4, 1969, and was sentenced to the Utah State Prison for an indeterminate term as prescribed by law.

## RELIEF SOUGHT ON APPEAL

The respondent asks this Court to affirm the decision of the Third District Court, Salt Lake County, State of

Utah, and hold that no errors were committed by the trial court.

## STATEMENT OF FACTS

Respondent agrees with the facts as set out by appellant but wishes to insert the following.

The appellant relied on the defense of alibi. He called his aunt (T. 140), his cousins (T. 142, 148, 157), his close friend (T. 150) and himself (T. 162) to testify that he was at his aunt's home on September 27, 1968, between 7:00 and 10:00 p.m. Three of the witnesses who testified were not present at the home located at 263 West First North and were not in fact alibi witnesses. They added nothing to the alibi defense (T. 146, 149, 152).

Evidence concerning a fight which had occurred on the night of the robbery was introduced and allowed for the purpose of showing only that a fight did in fact take place in Midvale after the robbery (T. 155). In fact, the evidence was to establish merely that the defendant was in Midvale (T. 156). The prosecution did not object to that point (T. 150), but did in fact object to any endless detail about the fight (T. 155). This objection was sustained (T. 156). The defense counsel explained that he did not wish to go into detail about the fight (T. 155).

The defendant testified that he was in Midvale on the night of the robbery (T. 166).

## ARGUMENT

### POINT I.

### THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUP-

PRESS THE IN-COURT IDENTIFICATION OF THE DEFENDANT; THE CONFRONTATIONS BETWEEN THE APPELLANT AND STATE'S WITNESSES DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT NOR THE RIGHT TO COUNSEL OF THE FIFTH AND SIXTH AMENDMENTS.

The appellant states in his argument that his Fifth Amendment rights were violated. He has not, however, developed this argument in his brief. It deserves emphasis that this case presents no question of the admissibility in evidence of anything Gilpin said or did whch implicates his privilege. A Fifth Amendment violation is therefore not in question. *United States* v. *Wade*, 388 U. S. 218 (1967).

There are several approaches available to the Court, and each one supports the position that the trial court did not err in denying appellant's motion to suppress the in-court identification.

POINT IA.

LOOKING AT THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE IN-COURT IDENTIFICATIONS AND THE PRE-TRIAL VIEWINGS, IT IS CLEAR THAT APPELLANT WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION OF THE IN-COURT IDENTIFICATIONS.

Since both confrontations took place before custody and before an information was filed, *Wade, supra,* and

*Gilbert* v. *California*, 388 U. S. 263 (1967), do not apply. This same approach was followed by the Arizona Supreme Court in *State* v. *Fields*, 104 Ariz. 486, 455 P. 2d 964 (1969):

> "*Wade* and *Gilbert* are inapplicable in this case as they relate only to post-information situations. (Citation omitted.) In the instant case no information has been filed and counsel had not yet been appointed." *Id.* at 487, 455 P. 2d at 965.

The situation is the same in this case. Since *Wade* and *Gilbert* do not apply, our determination of the issue is controlled by *Stovall* v. *Denno*, 388 U. S. 293 (1967). The precise issue to be decided is whether, looking at the totality of the circumstances surrounding the in-court identification and pre-trial confrontations, the appellant was denied due process of law by admission of the State's witnesses' identification at the trial. The trial court ruled in a motion to suppress that the pre-trial confrontations did not violate appellant's rights. This determination was correct and the judge did not err in so ruling.

Both Mrs. Mitchell and Miss Hom were afforded ample opportunity for sustained observation of the appellant at the time of the robbery. The appellant did not wear a mask or disguise, or otherwise attempt to conceal his identity from the victims. Mrs. Mitchell served coffee to the appellant (T. 90) and observed him while he sat in a booth (T. 90). She observed him as he came around the cash register and took out the money (T. 91). She watched him back out the door and run towards the Centre Theater (T. 91-92). There is nothing to suggest that the lighting was bad or

that the angle at which Mrs. Mitchell viewed the appellant subjected him to any distortions.

Miss Hom also saw the appellant clearly. She was at the cash register when appellant took out the money (T. 113). Both witnesses positively identified the appellant as one of the men which robbed the Pancake House. This identification, when looked at in light of the totality of the circumstances surrounding it, did not violate due process of law.

The appellant challenges two separate confrontations, i.e., the confrontation between Mrs. Mitchell and appellant in front of Dee's Drive-In on 33rd South and Highland Drive, and the confrontation between Miss Hom and appellant in the courtroom of the Honorable Leonard W. Elton, Judge, Third District Court. The respondent will discuss these confrontations separately.

Mrs. Mitchell first saw the appellant on the night of the robbery. She testified that she saw him clearly (T. 90-91). About three weeks later she again saw the appellant in front of Dee's Drive-In on Highland Drive and 33rd South. She was riding with a deputy sheriff whom she had called because she feared that her husband would harm her (T. 92). The evidence is clear that she saw appellant first and indicated to the deputy that he looked like one of the men who had robbed her (T. 92, 107). The officer made no suggestions to her before this time. There is nothing whatsoever which indicates that the deputy and Mrs. Mitchell went by Dee's with the pre-conceived idea of seeing one of the robbers. Mrs. Mitchell made the initial iden-

tification completely on her own. The deputy suggested nothing to her.

After Mrs. Mitchell spotted the appellant, the deputy turned around to let her have a better look (T. 92). He called appellant to the car and talked with him through the front window. Mrs. Mitchell then positively identified the appellant as one of the men who had robbed the Pancake House on September 27, 1968 (T. 92). This confrontation occurred on October 22, 1968. To suggest that before appellant could be identified in these circumstances counsel must be provided, is to stretch *Wade* and *Gilbert* totally out of proportion since they dealt only with post-information lineups, where the police influence was highly suggestive. Neither fact was present in this first confrontation situation. The appellant's argument concerning this first confrontation is without merit and suggests that before a defendant can be identified in court, counsel should have been with him throughout the entire robbery and at any time thereafter, just in case one of the victims happens to see him in the street.

Concerning the confrontation between Miss Hom and the appellant, it is clear that no identification was made at that time (T. 116). Miss Hom had gone to the police station to view a lineup and attempt to identify the taller robber. She was unable to make an identification (T. 115). At the request of Detective Ledford, she went upstairs to a courtroom to see if "anyone looked familiar" (T. 115). She was there for two minutes and was unable to identify the defendant who was in fact present (T. 116). Since no

identification was made, no prejudice resulted to the appellant and this viewing did not violate due process of law. *United States* v. *Scully*, 415 F. 2d 680 (2d Cir. 1969), held that where no positive identification was made of the defendant at the confrontation, then the in-court identification need not be excluded. *Id.* at 684.

Miss Hom testified that she did not make a positive identification of the appellant until he appeared at the preliminary hearing (T. 117). In *United States* v. *Black*, 412 F. 2d 687 (6th Cir. 1969), the court, relying on *Stovall*, held:

> "In order to taint an identification it must appear that the viewing was unnecessarily suggestive and conducive to irreparable mistaken identification." *Id.* at 690.

The identification in *Black* occurred at a preliminary hearing where, like in appellant's situation, counsel was present but had no notice that his client was being identified. The viewing was in a state courtroom in which a judge was presiding. The defendant and his brother were present with their counsel. The witnesses were instructed only to observe the two defendants to determine whether either of them looked like any of the photographs which they had seen. Black was not pointed out by the F. B. I. agents. *Id.* at 690. In the instant case, Miss Hom was only told to see if anyone looked familiar. She was not told that Gilpin was the suspect. This procedure is not unnecessarily suggestive, as the court in *Black* so held. This reasoning is applicable to both the viewing in Judge Elton's Court and the viewing at the preliminary hearing. In either situation,

the appellant's rights were not violated and the procedure was not suggestive.

In *United States* v. *Lipowitz*, 401 F. 2d 591 (3d Cir. 1968), the witnesses of a bank robbery were requested to sit in a courtroom during the arraignment of a suspect, ". . . to determine if they could recognize any of the men in the courtroom." *Id.* at 591. It was held that the procedure was not unnecessarily suggestive.

In *United States* v. *Quarles*, 387 F. 2d 551 (4th Cir. 1967), the Court said:

> "Martin had no right that he not be viewed. *United States* v. *Wade*, 388 U. S. at 221. A lineup is not the only means of identifying a suspect; an individual not in custody, as Martin, 'may be placed under surveilance — he may be viewed on the streets, entering or leaving his home or place of business, at places of amusement, or at any other place where he is not entitled to privacy.'" *Id.* at 556.

The appellant had no right that he not be viewed. In either confrontation by Mrs. Mitchell or by Miss Hom, the appellant was viewed prior to information and prior to custody for the crime charged. The totality of the circumstances show beyond a doubt that due process was not violated. *Simmons* v. *United States*, 390 U. S. 377 (1968). The viewings were not so unnecessarily suggestive as to lead to an irreparable mistaken identification.

## POINT IB.

## THE APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED

## BECAUSE THE IN-COURT IDENTIFICATION HAD AN INDEPENDENT SOURCE.

Even if *Wade* and *Gilbert* are applicable to this case, the Court can affirm the trial court's decision on the basis that the in-court identification had an independent source. *United States* v. *Wade*, 388 U. S. 218, 242 (1967).

In *State* v. *Vasquez*, 22 Utah 2d 277, 451 P. 2d 786 (1969), the Utah Supreme Court held:

> "The record before this court does permit an independent judgment and discloses that Coxey's in-court identification had an independent source, namely, Coxey's description of the automobile and its occupants and his identification of Vasquez and the other four defendants shortly after the occurrence and during the course of their apprehension." *Id.* at 279, 451 P. 2d at 787-788.

Even though the precise facts are different, the test to be applied is the same, i.e., does the record permit an independent judgment and disclose that Mrs. Mitchell's and Miss Hom's in-court identifications had an independent source? Respondent submits that it does.

Both witnesses made a positive identification of the appellant in court (T. 90; 113). On cross-examination they were questioned thoroughly about the robbery, their statements to the deputy sheriff and Detective Ledord, and their identifications (T. 109, 115). They both gave detailed descriptions of the robber, his appearance, size, and clothing (T. 91, 112-113). Considering their testimony and all the facts and circumstances, it is clear that both witnesses

would have recognized and identified Gilpin in court, even if they had not previously seen him at Dee's Hamburger Drive-In and in Judge Elton's courtroom. This is true, especially in light of the fact that Miss Hom did not even make an identification in Judge Elton's courtroom (T. 116).

Further, the record establishes that both witnesses had excellent opportunities for sustained observation of appellant at the time of the crime. The appellant, as stated before, did not wear a mask or disguise or otherwise attempt to conceal his identity from the victims. He was in the restaurant for at least an half-an-hour before the robbery (T. 94). They both watched him go to the cash register and take the money (T. 102, 114). In *Williams* v. *United States*, 409 F. 2d 471 (D. C. Cir. 1969), the court ruled that even:

> ". . . if we assume a defect (in the police station confrontation), we do not think a remand is necessary here because the record before us provides an independent source for the two in-court identifications of such a nature as to dispel any substantial likelihood of misidentification." *Id.* at 473.

The record in *Williams*, like in this case, showed that the:

> ". . . two witnesses had excellent, not to say unique in the one instance, opportunities for sustained observation at the time of the crime, and each made firm and positive identifications of appellant at trial." *Id.*

This same test was applied in *Wade*, 388 U. S. at 242. Respondent submits that even if a defect is assumed, the in-court identifications did have independent sources and appellant's right to counsel under *Wade* and *Gilbert* was not violated.

## POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE DEFENSE TO PRESENT EVIDENCE RELATING TO APPELLANT'S PRESENCE IN MIDVALE AFTER THE ROBBERY; SUCH REFUSAL DID NOT DENY APPELLANT THE OPPORTUNITY TO PRESENT HIS ALIBI.

The appellant in making this argument is proceeding under a false premise, to wit: that the Midvale incident "would have tied together the testimony of the witnesses for the defendant and corroborated his alibi." (Appellant's Brief, p. 16.) The conclusion drawn from this premise is equally faulty: "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." (Appellant's Brief, p. 18.) This conclusion is drawn without any supporting evidence, and when viewed in light of the fact that the robbery occurred in downtown Salt Lake between 9:00 and 9:30 p.m. (T. 90, 91) and the fight took place at about 11:00 p.m. in Midvale, (T. 160, 168), it could be very probable that the appellant was involved in both.

The appellant can hardly claim prejudice and reversible error when the record clearly shows that the fight in Midvale *did* get before the jury. The defense counsel stated that he wanted the evidence to show "that the event of a fight did take place and would substantiate that Mr. Gilpin was present," (T. 154, 155), and "merely, for the point of

showing to the jury here was an event that was not fabricated by any person and which was a legitimate point of reference" (T. 155). The Judge then said:

> THE COURT: So far as the point referred to is concerned, *that is already in.* What Ledford said [investigation showed that Gilpin was involved in a fight in Midvale] would permit you to argue about it. Now, if it is a matter of prejudice, and I let you go into it, I don't know where it is going to end. I don't know how far the State, then, will want to go on cross-examination to show that he was one of the participants in a brawl, or an incipient riot — I don't know where it was; that he was one of the rioters — one of the brawlers; I don't know how far they are going to go, and I don't know — if you go into it, I can't stop it for cross examination.
>
> MR. BARNEY: [agreeing] I would think, your Honor, that the less said about that, be the less prejudicial to the defendant.
>
> THE COURT: That was one thing I was cautious about. If you don't think it is going to hurt your defendant, I think I will let you go ahead.
>
> MR. BARNEY: Well, the mere — the *one thing* that we desire to do, mainly, was to show that this — that such event in Midvale on this evening did, in fact, take place; and the matter is a matter of record" (T. 155). (Emphasis added.)

Mr. Fredrick, the prosecuting attorney, then responded by saying that no details should be admitted in evidence (T. 156). The Court again agreed (T. 156) and Mr. Barney said:

> MR. BARNEY: No; we don't want to try the merits of the brawl; want to establish, merely, that

there is a problem there, existing; substantial evidence to show that the *defendant in fact did appear in Midvale.*

THE COURT: All right; you have had, at least — you have had, at *least, three persons testify to that* haven't you?

MR. BARNEY: That is *correct.*

THE COURT: Ledford said he was there.

MR. BARNEY: Mr. Ledford said — yes (T. 156). (Emphasis added.)

Martin Joseph Martinez testified that a fight took place (T. 152). Dennis Montoya also testified that a fight took place (T. 147). Mr. Fredrick objected to any *further* testimony on the fight, and the objection was sustained (T. 147). This is the very thing the defense counsel agreed to in Chambers, i.e.; no details about the fight (T. 154, 155).

In *Vaughn* v. *State,* 19 N. E. 2d 239 (Ind. 1939), the court ruled that the sole test in determining whether evidence is admissible to prove or disprove alibi is whether the evidence offered tends to prove facts sought to be established. *Id.* at 242. The evidence in this case, i.e., details about the fight, would not tend to prove the alibi defense. In *Wisdom* v. *People,* 11 Colo. 170, 17 Pac. 519 (1887), the court admitted testimony that on the evening of the crime the defendant was at a pawnbroker's office. They refused, however, to allow testimony that he borrowed money at that time, because such evidence was immaterial. The same rationale controls the present fact situation. Appellant should not be able to testify that he was involved in a

fight even though testimony that he was in Midvale is properly admissible.

The appellant claims that the error occurred when he took the stand to testify. He was asked why he went to Midvale (T. 166). The district attorney objected to the question as being immaterial, and the Court sustained the objection (T. 166). In order to answer the question "And *why* were you going to Midvale?" (T. 166) (Emphasis added), the defendant would have had to go into the details about the fight; the very thing defense counsel said he did not want to do. There was no evidence presented to indicate that defendant went to Midvale for the specific purpose of fighting. He could have gone for other reasons and ended up in a brawl. The objection was properly sustained to the form of the question asked and the resulting details which could not have been avoided by answering the question the way it was asked. Defense counsel made no effort to re-phrase the question.

Further, the district attorney asked the defendant if the boys who had previously testified were with him after 10:30 on the night of the robbery. The defendant answered yes (T. 170). The boys' testimony concerning the fight was already in (T. 147-152). The fact that the appellant went to Midvale was in evidence (T. 166). And the fact that defendant went with the boys was in evidence (T. 170). The jury could make the connections, and appellant cannot claim prejudicial error in light of these facts, especially since defense counsel agreed that no details be admitted. The very points he wanted before the jury were in evidence.

Respondent submits that this examination of the record shows clearly that no error was committed and appellant suffered no prejudice.

## CONCLUSION

Respondent asks this Court to affirm the decision by the trial court and hold that the court committed no error in denying appellant's motion to suppress the in-court identifications and in refusing to allow detailed evidence of an event which occurred at least one and a half hours after the robbery.

Respectfully submitted,

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