1972

The State of Utah v. Robert M. Sheen : Brief For Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH

Plaintiff-Respondent,

vs.

ROBERT M. SHEEN,

Defendant-Appellant.

On appeal from the District Court of the [illegible] District of the State of Utah, in and for Cache, the Honorable Veloy [illegible] Judge, Presiding.

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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THE STATE OF UTAH
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Defendant-Appellant.

Criminal No. 1630

BRIEF FOR DEFENDANT-APPELLANT

This is a criminal case in which the defendant-appellant appeals from a conviction for robbery. Judgment was entered against appellant-defendant pursuant to a jury verdict; defendant-appellant here seeks reversal of the conviction and dismissal of charges, or, in the alternative, a new trial.

STATEMENT OF FACTS

On the evening of March 26, 1971, a Friday, a robbery occurred at a service station a fews miles southwest of the City of Logan, Utah. During the time the robbery was in progress, the perpetrators were observed by witnesses,

Mr. and Mrs. Charles Ames, who stopped to help the perpetrators extricate their car from a ditch where it was stuck not far from the service station. (Testimony of Annetta Ames and Charles Ames, Transcript of Preliminary Hearing, April 8, 1971 (hereafter cited as "Preliminary hearing"), pp. 65-70; 80-83; Testimony of Annetta Ames and Charles Ames, Reporter's Transcript of Proceedings, July 20, 1971 (hereafter cited as "Trial"), pp. 33-39; 46-49.) The attendant of the service station, who was threatened with a pistol and bound by one of the perpetrators, testified at the pretrial hearing that the individual perpetrator who came into the station with a gun was of average height and stocky build. (Preliminary Hearing, p. 37.) The service station attendant further testified that the gun employed apparently had some kind of enlargement or attachment on the barrel. (Trial, pp. 31-32.)

Shortly after the robbery, investigating officers arrived on the scene and showed certain pictures, introduced into evidence by the State as Exhibits F, G, H, I, J, K, L, and M, to the witnesses Ames. (Testimony of Officer Jay Crockett, Preliminary Hearing, pp. 115-116; Testimony of Officer James R. Merrill, Transcript of Proceedings on Defendant's Motion to Suppress (hereafter cited as "Motion"), pp. 20-22.) The following Sunday the officers again showed the same witnesses the same pictures, at which time defendant-appellant herein was again identified. (Motion, pp. 19-20.)

The following Monday, subsequent to the arrest and detention of defendant-appellant in the county jail, defendant-appellant was taken into a room in which a one-way mirror was installed on one wall. (Motion, pp. 9-10). The only persons in the room with defendant-appellant was a police officer, recognized as such by the witness, and a co-defendant (Preliminary Hearing, pp. 91-92) who has not, at this writing, been tried. On the other side of the

one-way glass the Ames were observing defendant-appellant and again identified him. (Preliminary Hearing p. 91)

At the trial defendant was identified in court by the same witnesses over objection by counsel. One Anne Fonnesbeck testified that while she aided in the misprision of a felony, defendant-appellant herein said that he had been with the perpetrators at the scene of the crime. (Trial, pp. 64-66.)

Another witness testified that he had loaned a gun at approximately the date the robbery occurred to one Gene Turner, (Trial, pp. 87-89.) who was identified as one of the other perpetrators by Anne Fonnesbeck, and who has not at this writing been arrested. The gun identified by the witness Bowers was admitted into evidence over the objection of counsel.

I. DENIAL OF RIGHT TO COUNSEL

On the basis of the above facts, defendant-appellant submits that he was denied his rights under the Sixth Amendment to the United States Constitution to have counsel present at an arranged show-up. For this proposition defendant-appellant relies on the cases of *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). In the *Gilbert* case the United States Supreme Court held that admission of any in-court identification following a line-up at which counsel was not allowed to be present is reversible error unless the prosecuting authority is able to demonstrate that the witness had some means independent of the tainted line-up identification to identify the defendant. In the *Wade* case, the court noted that eye-witness identification under circumstances of a "show-up" nature, (i.e., where defendant is singled out,) are frequently unreliable and that their

credibility depends to a considerable extent on the witnesses' opportunity to observe the accused; any discrepancy between the description the witness gives and the accused; his identification of other individuals on other occasions; any failure on other occasions to identify the accused; lapse of time; and any previous identification from photographs. (388 U.S. at 241.)

In the instant case, only one of the witnesses, Mr. Ames, had anything approaching a clear view of the defendant-appellant herein, and in his statement made in writing to the police immediately following the incident, he described an individual over six feet in height. (Motion, p. 22; Trial, p. 44.) Although he claimed that at one time he was within two feet of the appellant, (Preliminary Hearing, p. 95.) his later recollection was that the individual he observed was constantly in motion (Trial, p. 43.) and was in the shadow and not in the direct glare of the only source of illumination, a street lamp. (Ibid.) The other witness, Mrs. Ames, admitted on cross-examination that her identification was based primarily on the length of hair and its coloring of the person that she observed; (Trial, p. 52.) and that she did not directly observe this person's features. (Ibid.)

It is thus submitted that the opportunity each of these witnesses had to observe the perpetrator at the scene of the crime was not of a type to inspire confidence; on the contrary their opportunity was extremely poor. It is further submitted that this conslusion is not altered by their subsequent identification from photographs. Of eight photographs shown the Ames, only three showed both a front and profile view of the subject, and of those showing both a front and profile, only exhibit I, depicting defendant-appellant herein, showed an individual with light or blond hair coloring. It is thus submitted that the identification from pictures was in itself unfair in that it unduly called

attention to the defendant-appellant and that the witnesses' identification from these pictures cannot, accordingly, be considered as in any way showing an independent basis for their subsequent identification of defendant-appellant herein.

In ruling on defendant-appellant's motion to exclude any in-court identification by the Ames, the learned trial court made the statement that the show-up in the police station was not in itself too suggestive of the guilt of defendant-appellant because no officers were present in the room with the Ames at the time they observed defendant-appellant through the one-way mirror. (Motion, p. 27). Defendant-appellant submits this reasoning is fallacious in that the natural impression to be taken from such circumstances is that there is a suspect in the next room, and that the police have some reason for believing that this individual committed the crime. The very fact that the police want this person observed surreptitiously, it is submitted, is more than sufficiently suggestive to taint the identification as a matter of law, and to make inadmissible any subsequent in-court identification.

In conclusion, on this branch of his argument, defendant-appellant submits that after the initial identification from the photographs, in which defendant-appellant was unfairly prominent in the group shown, it was almost a certain conclusion that the witnesses Ames would identify defendant-appellant subsequently and would be reinforced in that identification by the subsequent showing of the photographs and by the later show-up at the police station. This could, and did, lead to a wholly unwarranted certainty of the identification on the Ames's part, and this in turn had an unwarranted effect on the jury, thus denying defendant-appellant the right to a fair trial for the reason given by the United States Supreme Court in the *Gilbert* and *Wade* cases.

II. ERRONEOUS ADMISSION OF WEAPON

It is axiomatic that any evidence admissible at trial must be relevant to the issues being considered. One authority has said ". . . legal relevancy denotes first of all, *something more than a minimum of probative value.* Each single piece of evidence must have a plus value." (I Wigmore, *Evidence* SS 28 at 409-410 (3d. 1940) (Emphasis in orginal.) In the instant case, the weapon admitted over defendant-appellant's objection had virtually no relevancy to the issues being tried. As the State's request for an instruction concerning what constitutes a principle (Jury Instruction Number Three, File of Documents and Exhibits, p. 53.) implies, there was not a scintilla of evidence that defendant-appellant was the one who actually went into the service station and threatened the attendant with a pistol. Indeed the attendant's testimony shows, that it must have been some individual other than appellant, who is of slender build, who entered and held up the service station. Furthermore, the attendant's testimony shows that it is doubtful, to say the least, that the weapon admitted into evidence actually was the weapon used to commit the robbery. That weapon apparently had a barrel of a configuration different from the weapon admitted into evidence. (Trial, pp. 31-32.) Furthermore, the weapon admitted into evidence was borrowed by someone other than defendant-appellant, and the other individual has not even been charged with the crime.

It is thus submitted that whatever value the gun might have in establishing the commission of a crime, a doubtful proposition in itself, it is certainly outweighed by the possible prejudice it might cause in minds of jurors considering the case. This is especially important in the instant case, since the crime occurred in a semi-rural community where incidents of this nature are quite rare. The magni-

tude of the crime could thus be reinforced in the minds of the jury, and this could lead to a prejudiced assessment of the evidence against defendant.

While defendant-appellant recognizes that this court has, in the case of *State vs. Prince,* (75 Utah 205, 284 Pac. 108 (1930) ruled that the weapon found on a suspect may be admitted into evidence, it is submitted that the instant case is distinguishable from that case, and should be distinguished, since there is no direct connection at all between defendant-appellant herein and the weapon; indeed there is considerable doubt that this even was the weapon used to commit the robbery.

Thus on this branch of this argument, defendant-appellant submits that it was reversable error to admit the weapon under the circumstances here present.

III. ERROR WAS NOT HARMLESS

It may be argued that despite the merits of defendant-appellant's contentions herein, that the outcome of the trial was not altered thereby, since an accessory after-the-fact, Anne Fonnesbeck, testified as to defendant-appellant's presence at the scene. Defendant-appellant takes the position that the errors argued heretofore are not harmless, since without the cumulative effect of the weapon and the Ames's identification, the credibility of an accessory-after-the fact would not have stood so high with jury, especially since the witness concerned received immunity in exchange for her testimony. (Trial, p. 62) Thus defendant-appellant herein prays the court to dismiss the case, for lack of probative and admissible evidence

against him, or in the alternative to grant defendant-appellant herein a new trial with the in-court identification by the Ames and the gun excluded.

Respectfully submitted this 26th day of October, 1971.

A. Robert Thurman

A. Robert Thurman, Esq.
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

I certify that on the 26th day of October, 1971, I mailed copies of the foregoing brief to Plaintiff-Respondent's attorney of Record, Vernon Romney, Esq., postage affixed, addressed to the Utah State Attorney General's Office, Utah State Capitol Building, Salt Lake City, Utah, which is the last address of said attorney known to me.

A. Robert Thurman

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