

1972

## State of Utah v. Kenneth Neal Allgood : Brief of Appellant

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# In The Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff-Respondent,*

-vs-

KENNETH NEAL ALLGOOD,

*Defendant-Appellant.*

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## BRIEF OF APPELLANT

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Appeal from jury verdict of  
Judicial District Court, in and for  
the Honorable Gordon R. Hall, presiding.

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BRUCE C. [unclear]

231 East [unclear]  
Salt Lake City, Utah

*Attorney for*

VERNON B. ROMNEY  
Attorney General—State of Utah

State Capitol  
Salt Lake City, Utah

*Attorney for Respondent*

**F I L E**

APR 4

Clerk, Supreme Court

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# In The Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff-Respondent,*

-vs-

KENNETH NEAL ALLGOOD,

*Defendant-Appellant.*

} Case No.  
12728

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## BRIEF OF APPELLANT

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### STATEMENT OF THE NATURE OF THE CASE

The appellant, Kenneth Neal Allgood, appeals from a conviction of robbery in the Third Judicial District Court, Salt Lake County, State of Utah.

### DISPOSITION IN THE LOWER COURT

The appellant, Kenneth Neal Allgood, was found guilty by a jury of the crime of robbery on August 16, 1971, and was thereafter sentenced to be committed to the Utah State Prison for the term prescribed by law.

### RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and a new trial. Counsel on appeal requests permission to

withdraw from the appeal and submits this brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 93 (1967).

## STATEMENT OF FACTS

On April 17, 1971, Wanda Downard was on duty as a checker at a Seven-Eleven Food Store. (T. 4) With her was her 13-year old daughter, Julie Ann. (T. 4) Wanda Downard testified that at about 10:50 p.m., as she and her daughter were cleaning up the store, two men came in and wandered around for a few minutes. (T. 6) She described at trial how the two men were dressed and how they appeared. (T. 7) She testified that one man, the heavier of the two, asked for some shells. (T. 8) As she and the robber were at the counter, she asked for a driver's license so she could record the necessary information for a sale of ammunition. (T. 8) The man stated that he had a license, and that he also had a gun. (T. 8) When the man stated he wasn't kidding, Mrs. Downard put the money from the cash register into a sack. (T. 8)

At this point her daughter, Julie Ann, came to the front of the store. (T. 9) The daughter was then escorted to the rear of the store by the other man, where she turned out the lights. (T. 11) Both men then put Wanda Downard and her daughter into the storage vaults in the back of the store. (T. 12) The two men then left after also taking some cigarettes and Mrs. Downard's purse. (T. 12)

Mrs. Downard testified that the robbers were in the store about twenty minutes, from about 10:50 p.m. until 11:10 p.m. (T. 13) During the robbery, Mrs. Downard said she could see the one man who robbed her clearly. (T. 9) Mrs. Downard testified that she did not see a gun during the robbery. (T. 20) She admitted that she was "very excited" during the robbery, because she was afraid for her daughter, (T. 21) and that she was also afraid. (T. 20)

The robbery took place on Saturday night, April 17, 1971, and the following Monday Mrs. Downard and her daughter were taken to the police station to look at mug shots. (T. 14) Mrs. Downard testified that she looked at about 250 to 300 photos, each of which was about two inches by three inches, and she identified a man that looked like the man that robbed her. (T. 15) Her daughter was called over to look at that page from which Mrs. Downard had identified a man, and she identified the same photo as Mrs. Downard did. (T. 16) The picture was of Kenneth Allgood. (T. 57)

Mrs. Downard identified Kenneth Allgood at the trial as the man who robbed her. (T. 16) She stated that she was absolutely sure, but that if it wasn't Kenneth Allgood, he must have a twin brother. (T. 16) She testified also that if she knew that appellant had four brothers that were about the same height and same build, it is possible that she would not be as certain. (T. 27, 28) Mrs. Downard testified on cross-examination that what she was really saying was that Kenneth Allgood looked an awful lot like the man that robbed her. (T. 33)

On redirect examination, she testified that to the best of her testimony, Kenneth Allgood was the one who robbed her. (T. 34)

Julie Ann Downard testified basically as her mother did as to the robbery of the store. However, her testimony was often confused as to her identification of the robber. She testified that while looking at mug shots, she looked at the unlikely number of between 275 and 700 pictures. (T. 2) As to the story of the robbery, she overheard her mother tell about it to her other sister, (T. 7), she overheard her mother telling her father about it (T. 6), she was with her mother when the latter told the police about it after the robbery (T. 46) and when they were looking at mug shots. (T. 49) She stated she was positive that appellant was the robber, and identified him in court. (T. 41) However, on redirect examination, when asked if the man she identified in court was the same age as the robber she said, "No, he's older." (T. 49, 50) She testified that the man that robbed the store was not the same age as the man she identified in court. (T. 50) She later attempted to clear this up by saying that the age difference she was talking about was the age difference between the two men in the store, (T. 52) one being older than the other.

Later, when one of Kenneth Allgood's brothers was in the court room, Mrs. Downard again identified Kenneth Allgood as the robber. (T. 79) However, Julie Ann again testified in a way that makes her identification less reliable. When asked if she saw anyone in the court room who resembled the robber more than



Kenneth Allgood, she said, "that guy," a man in the back, not Kenneth Allgood. (Apparently referring to Kenneth Allgood's brother, though the record does not indicate). (T. 80, 81) She then said, on the next question, that the man in the back of the court room did not resemble the robber more than Kenneth Allgood, and that the latter was the robber. (T. 81)

Officer Allen Burr testified that no identifiable fingerprints were taken at the robbery scene, though attempts were made. (T. 59) He also testified that he showed Wanda and Julie Ann Downard the mug shots, which were standard size three inch by eight inch pictures. (T. 56)

Kenneth Allgood testified in his own defense. He testified that he was not involved in the robbery (T. 61), but stated that he had been in that store about a year before the robbery. (T. 62) He testified that after his arrest at his place of employment he told the police that he did not know where he was on April 17, 1971, the night of the robbery. (T. 63) At trial he told no fantastic story as to his whereabouts. He frankly admitted that he did not know where he was that night, but that he wasn't at the robbery scene. (T. 63) He testified that he couldn't remember who he was with that night, so his attempts to locate who he was with had been fruitless. (T. 69) He testified that he had four brothers, who were all about the same physical size as him, and all had the same family characteristics, (T. 63-65) and he did not know if one of them was involved in the robbery.

## ARGUMENT

## POINT I

## APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.

This court has on several occasions stated the rules concerning the granting of a new trial on the basis that the verdict was not supported by the evidence. In *State v. Cooper*, 114 Utah 531, 201 P.2d 764, 770 (1949), this court stated:

The question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial court . . . this court cannot substitute its discretion for that of the trial court. . . . We do not ordinarily interfere with the rulings of the trial court in either granting or denying a new trial, and unless abuse of, or failure to exercise, discretion on the part of the trial judge is quite clearly shown, the ruling of the trial court will be sustained.

While in appellant's case there was no motion for a new trial, the above language would seem to indicate under what circumstances this court will grant a new trial, even in the absence of a motion for a new trial.

This court has also stated:

If the State's evidence is so 'inherently improbable' as to be unworthy of belief, so that

upon objective analysis it appears that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, the jury's verdict cannot stand. Conversely, if the State's evidence is such that reasonable minds could believe beyond a reasonable doubt that the defendant was guilty, the verdict must be sustained. *State v. Mills*, 122 Utah 306, 249 P.2d 211 (1952).

See also *State v. Horne*, 12 Utah2d 162, 364 P.2d 109 (1961) for the same rule. This court has later said that before setting aside a jury verdict, "it must appear that the evidence is so inconclusive or unsatisfactory that reasonable minds acting upon it *must* have entertained reasonable doubt that the defendant committed the crime." (Emphasis in original). *State v. Danks*, 10 Utah2d 162, 350 P.2d 146 (1960), citing *State v. Sullivan*, 6 Utah2d 110, 307 P.2d 212 (1957). A jury verdict is reversed only when, taking the evidence in the light most favorable to the verdict, the "findings are unreasonable." *State v. Berchtold*, 11 Utah2d 208, 357 P.2d 183 (1960). If the verdict is "supported by sufficient competent evidence" a new trial is to be denied. *State v. Rivenburgh*, 11 Utah2d 95, 355 P.2d 689 (1960). See also *State v. Schad*, 24 Utah2d 255, 470 P.2d 246 (1970) for the rule that there must be a "reasonable basis" for the verdict.

It is apparent from these various statements of the law that this court *does* have the power to order a new

trial in appropriate cases. This court has said that:

We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of judgment upon whether under the evidence, a jury could, in reason, conclude that the defendant's guilt was proved beyond a reasonable doubt. *State v. Williams*, 111 Utah 379, 180 P.2d 551, 555 (1947).

Clearly each case must turn upon its own facts and circumstances as to whether or not a new trial is warranted because the verdict was not supported by the evidence.

## CONCLUSION

Counsel for appellant respectfully requests permission to withdraw, believing the appeal is without meritorious grounds. The foregoing brief discusses the law applicable to the only point that could arguably be presented on appeal. This court then can, pursuant to *Anders v. California, supra*, dismiss the appeal as unmeritorious or proceed to a decision on the merits.

Respectfully submitted,

Bruce C. Lubeck

*Attorney for Appellant*