

1972

State of Utah v. Kenneth Neal Allgood : Brief of Respondent

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

KENNETH NEAL ALLGOOD,

Defendant-Appellant.

Case No.

12728

BRIEF OF RESPONDENT

APPEAL FROM JURY VERDICT OF GUILTY
IN THIRD JUDICIAL DISTRICT COURT, IN
FOR SALT LAKE COUNTY, THE HONORABLE
GORDON R. HALL, PRESIDING.

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IN THE
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STATE OF UTAH,
Plaintiff-Respondent,

vs.

KENNETH NEAL ALLGOOD,
Defendant-Appellant.

Case No.
12728

BRIEF OF RESPONDENT

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

Respondent urges this court to affirm the judgment of the District Court.

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 for about twenty minutes, from about 10:50 p.m. until 11:10 p.m. During the robbery, Mrs. Downard said that she could see the face of the man who robbed her "very clearly" (T. 9) and gave a detailed description of his facial characteristics (T. 9-10). She later testified that although she was excited and afraid for her daughter during the robbery (T. 19-20), she was not excited when the robber came into the store (T. 33) or when she talked to him across the counter (T. 34). Being "afraid", Mrs. Downard explained, did not mean that she was in panic or to the point of passing out (T. 35).

The robbery took place on Saturday night, April 17, 1971. The following Monday, Mrs. Downard and her daughter were taken to the police station to look at mug shots (T. 14). After looking at about 200 photographs, Mrs. Downard discovered the picture of the defendant and asked her daughter, who was sitting across the room looking at other photographs, to come over for a minute (T. 15). Julie Ann looked at the same page that her mother had set aside, and without any coaching from her, identified the same picture that her mother had previously identified (T. 16, 42 and 47). The picture was that of Mr. Kenneth Allgood (T. 57).

At the trial, Mrs. Downard positively identified the defendant as the one who committed the robbery. When asked if there was anyone in the courtroom who took part in the robbery, Mrs. Downard pointed to the defendant and answered affirmatively when asked if she was

“absolutely certain” (T. 17). She indicated that “if he’s not the fellow, then he has a twin brother.” Under cross-examination, Mrs. Downard was asked if she would be any less certain as to the defendant’s identity if she knew that Kenneth Allgood had four brothers that looked very much like him. She answered that it would depend on their looks but it was “possible if I seen (sic) them” (T. 27-28). Later, after seeing Mr. Leon Allgood, the brother who most nearly resembled the defendant in age and family characteristics (T. 65), Mrs. Downard responded negatively to the question of whether she had “any doubts as to the identity” of the robber (T. 79). On redirect examination, Mrs. Downard testified again that to the best of her testimony, “this fellow is the fellow who robbed me” (T. 34).

On recross-examination, when asked if her identification of the defendant was only her “best estimate,” Mrs. Downard replied that to the best of her knowledge, Kenneth Allgood was the man who robbed her (T. 36). When asked by defense counsel if she was doubtful, she replied: “Without any doubt in my mind, this is the man” (T. 36).

Julie Ann Downard’s testimony is basically the same as that of her mother. She testified that she got a good look at the “stockier fellow” who confronted her mother at the counter (T. 40). The record indicates that she pointed to the defendant when asked to identify him and responded negatively when asked if she had any doubts (T. 41). On redirect examination, Julie Ann again re-

sponded affirmatively to the question of whether the defendant was the same man who robbed the store (T. 50). She also testified that she remembered the defendant from the store and the robbery, and not because she had seen him at the preliminary hearing (T. 53-54). On recross-examination, Julie Ann responded in the negative when asked if it was difficult for her to remember when she had first seen the defendant: the store, the mug shots, the preliminary hearing, or the trial. She said: "I know that it's him" (T. 54).

Later, on direct examination after Mr. Leon Allgood had testified, Julie Ann testified that there was no doubt in her mind which of the two brothers had committed the robbery. She identified Kenneth Allgood as the robber (T. 81). On recross-examination, when asked if she really meant to say that the defendant only "looks more like the man that robbed the store", she replied "Yes ma'am. He's the man" (T. 82).

Officer Allen Burr testified that no identifiable fingerprints were taken at the robbery scene, though attempts were made (T. 59). He further 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 and denied that he was involved in the robbery (T. 61). He said that he had other brothers who resembled him physically and that one brother, Leon Allgood, had on occasion been

mistaken as his twin. On cross-examination by the prosecution, the defendant said that he didn't recall where he was on the night of the robbery (T. 67-68). When asked if he had contacted any persons with whom he might have been associated on the night of the robbery, he said that he had sent letters out but had received no reply. He hadn't tried to reach them by phone either. He also had not told his attorney who his friends were "so they might be contacted" about his possible whereabouts on the night in question because he didn't think it important at the time (T. 69). When further questioned on why he didn't regard this as important, the defendant testified: "Well I figured if I couldn't remember who I was with, who am I going to contact" (T. 69)?

Leon Sidney Allgood, the brother nearest to Kenneth in age, testified on direct examination that as far as he knew, he had never been mistaken as the twin of his brother (T. 75-76). This was in direct contradiction to his brother's testimony on this subject (T. 65). He testified further that in his opinion, the two older brothers, each between 10 and 12 years the senior of the defendant, did not resemble the defendant (T. 76), although he admitted some definite family resemblances (T. 78) of a general nature (T. 76).

ARGUMENT

POINT I.

THE APPELLANT IS NOT ENTITLED TO
A NEW TRIAL BECAUSE THE VERDICT

IS SUPPORTED BY SUFFICIENT EVIDENCE FROM WHICH A JURY COULD BELIEVE BEYOND REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF ROBBERY.

This court has established a clear test for the granting of a new trial on the basis that there is insufficient evidence for the verdict. In *State v. Sullivan*, 6 Utah 2d 110, 307 P. 2d 212 (1957), the court held that a defendant will prevail on the claim of insufficiency of the evidence only when:

“[V]iewing the evidence and all fair inferences reasonably to be drawn therefrom in the light most favorable to the jury’s verdict, reasonable minds could not believe them guilty beyond a reasonable doubt, but would necessarily entertain some substantial doubt.” *Id.* at 214.

See also *State v. Danks*, 10 Utah 2d 162, 350 P. 2d 146 (1960) and *State v. Shonka*, 3 Utah 2d 124, 279 P. 2d 711 (1955). The only real issue in the case at the bar is whether Kenneth Allgood, the defendant, was in fact the perpetrator of the robbery. He denies guilt, but the evidence is such that, viewed from a light most favorable to the state, reasonable minds could convict the defendant without entertaining substantial doubt.

There were only two witnesses to this robbery, Mrs. Wanda Downard and her daughter Julie Ann. Both consistently and positively identified the defendant as one of the robbers (T. 15, 16, 17, 34, 36, 41, 42, 47, 50, 54, 81,

and 82). The only possible point where reasonable doubt as to the identity of the robber could have arisen occurred when Mrs. Downard indicated that her identification *might* not be so certain if she knew that the defendant had four brothers who, in the words of defense counsel, "look very much like him" (the defendant) (T. 27-28). Any possible doubt as to the reliability of Mrs. Downard's testimony was later erased. After seeing the defendant and Leon Allgood, the supposed "twin," together in the courtroom, Mrs. Downard testified that she still had no doubts (T. 79). Julie Ann also indicated that she was sure that Kenneth Allgood, not his brother, was the robber (T. 81). Viewed in a light most favorable to the verdict, there is no reason why the jury, in the face of such strong and uncontradicted evidence, could not find the defendant guilty beyond reasonable doubt.

The defendant himself presented no suitable alibi or contradicting evidence concerning his whereabouts on the night of the robbery. He testified that he could not remember where he was on the night of the robbery because he usually went a "lot of places" (T. 68). He said that he had mailed some letters to some friends that might possibly know where he might have been on the night of the robbery, but had received no replies (T. 69). A few lines later, he contradicted himself, when pressed to reveal why he had not told his attorney who these persons were, by saying: "Well, I figured if I couldn't remember who I was with, who am I going to contact" (T. 69). Obviously, if the defendant had previously written some

letters, he would have had names of persons for his attorney to investigate. The defendant also stated that he had not even tried to call any of these persons on the phone. In view of such testimony, reasonable jurors could refuse to believe that the defendant had an alibi, and could reasonably believe, without substantial doubt, that the defendant was being untruthful as to the sincerity of his attempts to contact persons who would know where he was on the night of the robbery. The jury might then draw the inference that no such persons existed.

CONCLUSION

The record of this case shows uncontradicted evidence of positive identification of the defendant which is sufficient to support the verdict of guilty of robbery.

Respectfully submitted,

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