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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF OF UTAH,
Plaintiff-Respondent,

vs.

DANNY WETTSTEIN,
Defendant-Appellant.

Case No. 12827

BRIEF OF APPELLANT

Appeal from the Judgment of the First Judicial District Court of Cache County, Utah, before the Honorable VeNoy Christofferson, Judge.

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FILED
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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF OF UTAH,
Plaintiff-Respondent,

vs.

DANNY WETTSTEIN,
Defendant-Appellant.

Case No. 12827

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Appellant was convicted of the crime of robbery in a bench trial held before the Honorable VeNoy Christoffersen, Judge, First Judicial District Court, Cache County, State of Utah, on December 9, 1971.

DISPOSITION OF THE CASE IN LOWER COURT

After conviction for robbery, the Defendant was sentenced to the Utah State Prison for the indeterminate term as provided by law. During the course of the proceedings, the lower Court denied the Defendant's motion to suppress evidence and to suppress line-up identification.

RELIEF SOUGHT ON APPEAL

The Appellant seeks to reverse the trial court's denial of the Appellant's motion to suppress evidence and identification and seeks to have the case remanded for a new trial.

STATEMENT OF FACTS

Primarily, it should be noted that the transcript on appeal consists of three volumes. The three volumes are not progressively numbered; therefore, it will be necessary that references to each volume be made separately. Thus, reference to transcript referring to the Defendant's motion to suppress will be designated as (MS-....) and the trial will be referred and designated as (TR-....). The pleading will be designated as (P-....).

The Defendant was charged with the crime of robbery occurring in Cache County, Utah, on March 26, 1971, in violation of UCA (1953)76-51-1.

The trial proceeded before the Honorable VeNoy Christoffersen, Judge, without a jury. It was stipulated that the Defendant would agree that if the proposed witnesses were called that they would testify, in substance, to the facts as represented by the prosecutor to the Court. (TR-5,6).

Pursuant to the stipulation, the prosecutor represented that if William Bud Mortenson were called, he would testify that he was employed at the Yeates Mobil Service Station in College Ward, Cache County, and that on March 26, as he was closing up the station about 10:00 P.M., he was approached by a masked person, gun in hand, and ordered to lie down. (TR-7). The masked person bound his arms and legs, covered his head and took his wallet and the cash box which was in the station attendant's car parked just outside the station's front door. (TR-7). The attendant heard the sounds of motor vehicles spinning their wheels coming from the rear of the station. The masked person returned and inquired about the operability of the vehicles in the station. (TR-8). The masked person used the truck and chain to liberate the stuck vehicles. (TR-9).

Thereafter, he freed himself and summoned the sheriff. He observed the rear area of the station and saw that his car was stuck in a ditch located east of the station and the truck was parked on a gravel road east of the station. (TR-10).

The attendant could not establish the identity of the masked person. (TR-9).

The testimony of Charles Ames and Aneta J. Ames, his wife, is found in the Defendant's motion to suppress. The Defendant stipulated that their testimony at trial

would substantially be the same as their testimony during the Defendant's motion to suppress. (TR-11).

In the evening hours, approximately 10:00 P.M., the Ames were returning from Wellsville, and turned on the Nibley Road. They observed some cars in a ditch (MS-67). Mrs. Ames, a passenger, observed two cars from her seat. One was a light blue Studebaker Lark with the right tail-light out and the left tail-light broken but functional. (MS-69-70). Further, she observed a "Utah State University" sticker on the back window. (MS-69-70). A person approached her vehicle and asked for assistance. (MS-70). She and her husband went to their residence to get their truck. When they returned to the scene, the parties were gone. (MS-70). She became suspicious and called the Sheriff. (MS-71).

Deputy Merrill responded to her call and the Ames and he returned to the scene. (MS-71). Photographs were shown to them and Mr. Ames selected the photograph of the Defendant. (MS-73). Again, on Sunday, two days following the incident, the photographs were shown. She selected the Defendant's photograph. (MS-74).

She made an in-court identification of the Defendant (MS-75). Other facts regarding the identification will be brought in argument.

Also on Sunday, she was shown photographs of a "Lark" automobile. (MS-75). She identified the car in the photo as being the car she observed at the scene. (MS-75).

Mr. Ames's testimony largely corroborated Mrs. Ames'. (MS-91-95). He also selected the Defendant's photograph. (MS-95-96).

Both Ames testified as to a visual observation of the Defendant through a one-way mirror at the Logan City Police Station. (MS-89).

The testimony of Deputy Merrill and Deputy Crockett during the Defendant's motion to suppress was incorporated in the prosecution's case during the trial by stipulation (TR-12), subject to Defendant's prior objections. (TR-12).

Deputy Crockett visited the residence of one Anne Fonnesbeck on March 28, 1971. He approached the residence from the rear and, looking through a hedge, he observed the suspect vehicle parked in the rear of the residence. (M-17). He and Sheriff Carter returned to the residence and went on to the private property of Fonnesbeck and took pictures of the vehicle. (MS-36). These photographs were later shown to the Ames and used to obtain a search warrant and admitted in evidence. (MS-22, P-4). Other facts relating his testimony will be discussed in arguments.

Deputy Merrill observed the suspect vehicle on March 28, 1971, behind the Fonnesbeck residence. He accompanied Deputy Crockett on to the private property and took photographs of the vehicle. (MS-42). This entry on to the Fonnesbeck residence was without the consent of Anna Fonnesbeck, her husband or the Defendant. (MS-42). The photographs were shown to the Ames and used as a basis to obtain a search warant. (MS-44, P-4). Other facts will be brought during argument.

The prosecutor would call Robert Bowers who would testify that he loaned his gun to one Gene Turner prior to March 26, 1971, and received it back after March 26, 1971. When the gun was returned there was mud on the handgrip. (T-13).

Defendant stipulated to Ann Fonnesbeck's proposed testimony. (T-14).

Ann Fonnesbeck was granted immunity by the prosecution (T-14). She resides at 135 East Third North, Logan, Utah. She is acquainted with the Defendant. On the night of March 26, 1971, the Defendant and two others arrived at her residence approximately at 10:30 to 11:00 P.M. The three appeared nervous and had mud on their clothes. They discussed the robbery and admitted thereto. (T-15). She took their clothing to a laundry mat and washed them. The Defendant owned a Studebaker Lark. (TR-15).

The Defendant stipulated to the testimony of one Gene Barry Turner. (T-18). Mr. Turner was granted immunity. (T-17). He would testify that he, Robert Sheen and Defendant robbed Yeates Mobil Station in College Ward. The gun was obtained from Robert Bowers and Robert Sheen did the actual robbery. (T-18).

The trial Court found the Defendant guilty of the crime of robbery. (MS-18).

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE SEARCH WARRANT WAS OBTAINED THROUGH THE USE OF PHOTOGRAPHS, OBTAINED BY AN ILLEGAL ENTRY IN VIOLATION OF DEFENDANT'S RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE.

The Defendant filed a motion to suppress items of evidence which were obtained through a search warrant. (P-49). The search warrant was issued two days after the incident and pursuant to said arrest, a Studebaker Lark, 4-door sedan, was seized at the apartment house of James Fonnesbeck. Other items seized were a set of mounted snow tires, extra tail light lens, vehicle registration found in or near the vehicle. (See P-6,8).

A hearing on Defendant's motion was held before the Trial Court on October 22, 1971. At the conclusion of the hearing the Trial Court granted the Defendant's motion to suppress as to all items obtained by the use of the search warrant. However, the Trial Court denied the Defendant's request to suppress the photographs of the suspect vehicle which were introduced in trial and shown to two of the state's witnesses. (MS-103, 109). The Trial Court's rationale was that the Defendant had no standing (MS-103); the taking of photographs did not constitute a search (MS-107), and that there was probable cause plus exigent circumstances to warrant the taking of photographs. (MS-108).

The Defendant submits that the Trial Court's rationale was erroneous.

The evidence at the hearing on the Defendant's motion to suppress established that a Lark Studebaker automobile was at the scene at the time of the robbery. (MS-69-70). This vehicle was a late model, light blue and the right tail light was missing. (MS-69-70). The year of the vehicle was unknown. (MS-19). Deputy Crockett, standing in a field to the rear of the residence and looking through a fence and a hedge, saw the right of a car. (MS-20). He could not see the tires or the rear tail lights (MS-20). After seeing this vehicle parked behind the Fonnesbeck or the Defendant. (MS-42). After the a polaroid camera and returned to the residence and took

the photographs. In taking the photographs, the police officers went upon the private property. (MS-42). This entry was accomplished without the permission of the Fonnesbeck's or the Defendant. (MS-42). After the photographs were taken, they were shown to two state witnesses who identified the car in the photograph as being the car they observed at the scene of the crime. (MS-43). Also, at the time of the taking of the photographs, Deputy Crocket and Deputy Merrill observed the missing tail lights. (MS-45). Prior to the time the photographs were taken, Deputy Merrill was unable to determine the year the vehicle was manufactured. (MS-48).

The Defendant was called as a witness at the hearing on the motion to suppress. Defendant owned a 1960 light blue Studebaker which he parked at 135 East Third North in Logan, Utah. (MS-4). This residence was occupied by Jim and Ann Fonnesbeck. (MS-4). The vehicle was parked directly behind the building with the consent of the Fonnesbecks. (MS-4). Ann Fonnesbeck testified that she and her husband, Jim, were residing at the residence on March 28, 1971. As a tenant she was permitted to use the parking space behind the building. (MS-12). On March 28, 1971, she had given the Defendant permission to park his car. (MS-12). She did not give the police officer permission to come upon her property or to photograph the car. (MS-13).

It must be kept in mind that the Defendant was not arrested for the crime charged until after the photographs were taken and execution of the search warrant. (MS-61). Moreover, the Defendant was not arrested at the location where the vehicle was parked.

There can be no question that the Defendant has standing to raise and object to the seizure of his vehicle by the taking of photographs thereof. It was his vehicle. The vehicle was parked with the permission of the tenants. The instant case is similar to the facts found in *U.S. v. Jeffers,* 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. Moreover, *Jones v. U.S.,* 362 U.S. 257, 46 Ed 2d 697, 80 S. Ct. 735, has eliminated subtle property distinctions and acknowledges that any person legitimately on their premises where the search occurs may challenge its legality.

The more indeterminable issue presented is whether the taking of the photograph of the vehicle constitutes a "search and seizure" within the contemplation of the 4th and 14th amendments. As bearing on this issue, it should be kept in mind that the Trial Court suppressed the items taken pursuant to the search warrant, including the vehicle itself. The three photographs were shown to the state's witnesses and used as a basis for obtaining a search warrant. The affidavit for the search warrant states "photo of the above car has been identified today by three eye witnesses as being at the Yeates Mobil

Station in Nibley on Friday evening at the time of the robbery of said station both before and after the robbery, and a broken tail light lens from this make of car was recovered from robbery scene where it was broken. . ." (P-3).

The issue herein presented is new to the State of Utah. No cases in point have been found.

If this Court accepts the Defendant's position that the taking of photographs of a vehicle constitutes a "seizure" under the constitution, this Court must then determine whether the seizure could be justified on other grounds. The Defendant respectfully submits that no grounds may be found to justify the seizure.

Justification for the seizure, if it exists, must be found in the principles announced in the cases dealing with warrantless searches of automobiles. The Defendant concedes that Courts have long distinguished between an automobile and a home office. (*Carroll v. U.S.,* 267 U.S. 132, 68 L.Ed 543, 45 S. Ct. 280, 39 ALT (1935).

A search incident to an arrest may render the instant search legal, except that *Preston vs. U.S.,* 376 U.S. 364, 84 S. Ct. 881, 11 L Ed 2d 777 (1964), places restrictions on purported searches made incident to arrest. Thus, where the arrest was for vagrancy and the vehicle was removed to the police department and searched after

the man was booked, the U.S. Supreme Court held that the search was too remote in time and place from the arrest. *Preston vs. U.S.*, supra.

In *Chambers vs. Marony,* 399 U.S. 42, 16 L Ed 2d 419, 90 S. Ct. (1970), the U.S. Supreme Court sustained a warrantless search of an automobile where the officers had probable cause to suspect the vehicle was used in a robbery. The Court insisted upon the requirement of probable cause, but only in exigent circumstances. The Court states:

> "Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." 399 U.S. 51

This Court endorsed the principles announced in *Chambers vs. Maroney.* In *State vs. Richards,* 489 P2d 422, 26 Utah 2d, 318 (1971), clearly this Court affirmed the "exigent circumstances" factor when this Court stated:

> "The underlying rationale of Chambers is that exigent circumstances justify a warrantless search of an automobile *stopped on a highway,* where there is probable cause, because the car is movable, the occupants are alerted, and the car's contents may never be found again if the warrant must be obtained. The opportunity to search is fleeting."

This Court went on to hold that the record was void if any facts or circumstances to support the officer's belief that the truck was involved in another crime.

The Defendant submits that the same circumstances exist in the instant case. The Appellant's vehicle was not on the highway, but parked in a private parking stall and it was unoccupied. The opportunity to search was not fleeting. Quite the contrary, as evidenced by the fact that officers in fact had some five hours to obtain a search warrant and execute the search warrant. (MS-13).

Nor can it be asserted that the record established the existence of the probable cause requirement. The police officers were looking for a light blue Studebaker, late model, with a broken tail light. This vehicle was described as being at the scene.

Officer Crockett was looking for a blue Lark with a broken tail-light. (MS-91).

He observed the suspect vehicle from a vantage point off the property of Fonnesbeck and through hedges which were 4 to 5 feet high with leaves. (MS-14, 20). Officer said he saw no hedges. (MS-20). He could see only the right side of the car. (MS-20) and could not see the tail-light area. (MS-20,21). He did not observe the tires nor the lenses until he returned with Deputy Carter, went on to the property and took the photo-

graphs. (MS-22). Moreover, he testified that he had seen the Defendant driving a blue Studebaker prior to the robbery (MS-31); however, he had seen other people driving a blue Studebaker Lark. (MS-32).

Deputy Crockett did receive information from Ann Fonnesbeck as to the location of the vehicle. (MS-15). However, he testified that he had not received any other information from Ann Fonnesbeck prior to the incident in question. (MS-31).

The Defendant respectfully submits that the record does not establish the existence of probable cause as defined in *Carroll vs. U.S.*, 267 U.S. 132, i.e., probable cause is a reasonable ground for belief of guilt . . . and means more than bare suspicion. The facts and circumstances within their knowledge and of which they had trustworthy information must be sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Crandall vs. U.S.*, supra.

ARGUMENT II

THE TRIAL COURT ERRED IN PERMITTING THE IN-COURT IDENTIFICATION OF THE DEFENDANT WHERE THE LINE-UP WAS ILLEGALLY PERFORMED.

The Appellant filed a motion to suppress the in-court identification on the grounds that the purported line was illegal as unduly suggestive. The Trial Court made a finding that line-up was illegal. (MS-109).

The line-up was conducted in the manner outlined in *State vs. Sheen,* 492 P2d 648, Utah 2d (1972) i.e., the Defendant, with Sheen, was taken into a room which had a one-way mirror without counsel.

Additional facts exist in the instant case which were not reported in the opinion *State vs. Sheen,* supra. Witness Mrs. Ames was shown many shots on the night of the robbery. (MS-51). She selected the Defendant's photo. (MS-59). Again on Sunday, the same photos were shown to her and she selected the Defendant's photo. (MS-53, 56, 73). The description of the suspect was stocky built, about 5'8"-9", quite bushy hair and a mustache. (MS-55). The only photo of a person with a mustache was the Defendant's photo. (MS-60). No effort was made to correlate the mug shots with the type of description received. (MS-57,59). Four out of the six mug shots did not portray a person with bushy hair. (MS-57,58). Strictly an oversight, the officer claims. (MS-60). At the line-up, the Defendant was the only person sporting a mustache. (MS-61).

Mrs. Ames, called by the prosecution, made an in-court identification of the Defendant based upon the prior two occasions of viewing the Defendant's photo-

graphs. (MS-75). Her description at the scene was short, dark complected kid. (MS-77). Perhaps long bushy hair (MS-79); dark hair (MS-80); stocky built, (MS-80). Her identification was based upon the general description of the fellow which included his height, stature or the person's whole body. (MS-84, 85). She, admittedly, was able to better identify a person seeing them in person than just by seeing a photograph. (MS-88). In fact, seeing the Defendant at the line-up assisted her in making the in-court identfication. (MS-89).

Mr. Charles W. Ames was called by the prosecution. (MS-90). His reaction in seeing the mug shots was:

> "A. Then I says, 'I think that the other man could have been this one, but he had long hair, so may be not.'" (MS-95).

He makes an in-court identification based upon the two prior viewings of the mug shots. (MS-96).

On cross examination, Mr. Ames admitted that he gave no written description of the suspect. (MS-97). His sole description was "stocky built, dark complected." (MS-98). Vaguely, he may have included the height as 5′7″ — nothing said about hair or mustache. (MS-99). While he was contemplating the Defendant's mug shot due to his uncertainty, his wife had, in his presence, selected the Defendant's mug shot. (MS-102). He agreed

that in order to make an identification, it's much better to see the person individually in order to discern the person's general height, weight, general build, stature and complexion — things not discernable from a photograph. (MS-102). The line-up did assist him in making a court room identification. (MS-103). Both Ames were advised by John Merrill, Deputy Sheriff, that the police had arrested two people and requested the Ames to come down and see if they could identify them. (MS-62).

In requesting that this Court reverse the Trial Court's ruling, the Defendant relies upon *U.S. vs. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967) and *Gilbert vs. California,* 388 U.S. 218, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967). In reliance of these cases, the Defendant is aware of this Court's holding in *State v. Sheen,* supra. It is submitted that the instant case presents distinguishable factors which would warrant a reversal of the instant case.

In *Wade,* the United States Supreme Court remanded the case because the record failed to disclose whether the in-court identfication had an independent origin. 388 U.S. 242. Further, the Court stated that to strike the in-court identification would not be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the line-up identification. 338 U.S. 239. In *Gilbert,* the Court stated:

> "The admissions of the in-court identification without first determining that they were not *tainted* by an illegal line but were of independent origin was constitutional error." (Italics mine) 388 U.S. 272.

In the instant case, the Defendant respectfully submits that the line-up did in fact "taint" the in-court identification. Both Ames fully admitted the viewing of the suspect in person assisted them in making the in-court identification. Identification of a particular person involves not only his facial characteristics, but also his height, weight, general stature, and complexion. These are not discernable by the simple viewing of a mug shot. This cannot be disputed. An incident occurring during the time of the hearing affirms the Defendant's position. After having viewed the photos, which were placed in evidence and having observed the Defendant in Court, the Trial Court mistakenly took the Defendant's brother to be the Defendant. (MS-1, 112).

Moreover, the Defendant submits that the Trial Court erred in determining the standard of proof necessary to overcome the admitted illegal line-up. The Trial Court stated:

> ". . . So I don't think that you can say that the burden is upon the state to show by clear and convincing evidence that what may be termed the line-up identification is or does influence the identification. Obviously, it does influence an identification." (MS-110).

This statement by the trial court clearly does not recognize the standard of proof established in the *Wade* case. The Trial Court having failed to place the proper burden of proof upon prosecution committed error and said error warrants a reversal in the instant case. See *State vs. Whitely,* 110 Utah 14, 110 P. 337 (1941) where this Court reversed because the Trial Court erred in his statement that the Defendant had he burden of proof in establishing alibi. The Court concluded:

> "In the instant case, the statements made by the Court were matters of law upon which, if given to a jury, the Court would base its reversal and order a new trial, as such instruction would have been erroneous." p. 340.

Moreover, the Appellant submits that the instant case comes within the prohibition set forth in *Simmon vs. United States,* 390 U.S. 377, 88 S. Ct. 965, 19 L. Ed. 2d 1247 (1968) wherein the United States Court stated:

> "We hold that such case must be considered on its own facts, and that convictions based upon eye witness identificiation at trial following a pre-trial identification by photographs will be set aside on the grounds only if the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In the instant case, the Defendant's photo was the only one where the subject sported a mustache. No attempt was made to correlate the photo with the description of the suspect person. Four out of six photos did not portray a person with bushy hair. Under these circumstances, the instant case illustrates the evil which is proscribed on the *Simmon* case.

CONCLUSION

The Appellant concludes that the search and seizure was illegal and that the illegal line-up and impermissible suggestion of the photographs are justifiable grounds for revival of the instant case.

Respectfully submitted,

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