1972

# The State of of Utah v. Danny Wettstein : Brief of Respondent

SUP

STATE OF

DANNY

APPE
FIRST JU
COUNTY,
HONOR. CH

JIMI MITSUNAGA,
Mitsunaga & Ross
701 East South Temple
Salt Lake City, Utah
*Attorney for Appellant*

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IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

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STATE OF UTAH,
*Plaintiff-Respondent,*

vs.

DANNY WETTSTEIN,
*Defendant-Appellant.*

Case No. 12827

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

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

### DISPOSITION IN THE 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 trial court's denial of the appellant's motion to suppress evidence and the in-court identification, as well as the verdict of guilty, should be affirmed.

## STATEMENT OF FACTS

For the convenience of the court the respondent has used the same designations of the transcript as employed in the appellant's brief.

The respondent agrees generally with the facts as expressed by the appellant in his brief, with the following additions and clarifications.

It is not clear from the transcript what type of vehicle was used to extricate the get-a-way car. After leaving the station with the money, the robber returned and asked the station operator about using either the truck or car located in the bay area of the station to free the stuck automobile (TR-9). After freeing himself, the operator went outside to look at the area where the get-a-way car had become stuck and saw a Ford car parked on the road — the same Ford which had been parked in the bays. No mention is made of a truck (TR-10).

More important, however, is the Trial Court's disposition of the appellant's motion to suppress. The appellant in his brief states that the motion to suppress all items obtained by use of the search warrant was granted. A close examination of the transcript fails to reveal that such a motion was granted. In the District Court Minute

Book 34 Page 242 (P-62), the motion to suppress evidence was commenced on October 20, 1971, at which time the Trial Court denied that motion as to certain photographs and reserved a ruling on the other parts of the motion. On October 22, 1971, the District Court Minute Book 34 Page 244 (P-62), indicates that a further hearing was held on the motion to suppress, and the motion was denied.

## ARGUMENT

### POINT I.

### THE PHOTOGRAPHS TAKEN OF APPELLANT'S AUTOMOBILE DID NOT CONSTITUTE A SEARCH AND SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT AND THEREFORE NO SEARCH WARRANT WAS REQUIRED.

The facts of the case at bar fall within the general "clear view doctrine" which the Supreme Court adopted in *Hester* v. *United States*, 265 U. S. 57 (1924). In *Hester*, revenue officers approached a house and concealed themselves to observe unlawful activities involving "moonshine" whiskey. The defendant was seen handing over a bottle of the illegal substance and was convicted on the testimony of the officers. The defendant appealed, alleging that the testimony should have been excluded as violative of the Fourth Amendment. The Supreme Court upheld the conviction, stating that although the witnesses held no warrants and were trespassers on the land, the

protection of the Fourth Amendment extends to people in their "persons, houses, papers and effects" and not to open fields where the defendant's own acts disclosed the evidence.

The court in *Hester* provides guidelines for the disposition of the case at bar. Officer Crockett was able to observe the suspected robbery vehicle from a driveway which runs along the side of the Fonnesbeck residence (MS-19). The appellant had not attempted to hide the vehicle and even though the police officer walked up the Fonnesbeck driveway to take the pictures (MS-37), the fact that the vehicle was in plain view would bring this case within the *Hester* doctrine and therefore not within the prohibition of the Fourth Amendment.

Recent cases have followed the *Hester* rationale in determining whether evidence was obtained in violation of the Fourth Amendment, even where the officers have trespassed to obtain the information. In *Atwell* v. *United States*, 414 F. 2d 136 (1969), the officers trespassed on private property to observe an unregistered distilling apparatus. The court allowed the testimony and explained:

> "Appellant argues that the government should have proved that there was not an unlawful search or seizure before being allowed to introduce any testimony regarding what the officers saw at the still site. But inasmuch as the protection of the Fourth Amendment against unreasonable searches and seizures does not extend to 'open fields', there was no unreasonable search . . . Moreover, even

> if the officers were trespassing on private property, a trespass does not of itself constitute an illegal search." *Id.* at 138.

The *Atwell* reasoning adds credence to the respondent's argument that the photographs were not prohibited by the Fourth Amendment. A more vivid illustration of the limits of the Fourth Amendment is found in *Ponce* v. *Craven*, 409 F. 2d 621 (1969). In *Ponce*, police officers standing outside the partly opened bathroom window of a motel room were able to overhear a conversation and observe the defendant washing narcotic paraphernalia. After his conviction the defendant filed a petition of habeas corpus, alleging that the officers had violated the Fourth Amendment by their observations, but the court upheld the conviction, saying:

> "If a person knowingly exposes his activities to public view and hearing, he is not entitled to have these activities protected against searches and seizures . . . Further, if a person relies upon privacy in a given situation, that reliance must be reasonable and justified under the particular circumstances . . . Ponce's reliance on privacy in his motel room was not reasonable under the circumstances. If he did not wish to be observed, he could have drawn his blinds. The officers did not infringe upon any reasonable expectation of privacy in this case by observing with their eyes the activities visible through the window . . . Nor was there any unreasonable intrusion upon privacy when the officers overheard conversation from outside the motel window." *Id.* at 625.

Applying *Ponce* to the facts of the instant case, the appellant did not conceal his automobile, and therefore, could not reasonably have expected its location to remain a secret. The vehicle was in plain view, and although the pictures were taken while trespassing on private property, the circumstances would not require this Court to suppress the photographs as a violation of the Fourth Amendment.

The Fourth Amendment cannot be used as a defense to every evidence-gathering activity that the government may initiate. This constitutional guarantee is dependent upon the specific acts of each case, as was apparent in *Katz* v. *United States*, 389 U. S. 347 (1967). In that case the defendant was convicted upon evidence obtained through an electronic listening device that was placed on a telephone booth the defendant was using. The Supreme Court reversed the conviction but explained that: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even at his own home or office, is not a subject of the Fourth Amendment." *Id.* at 351. The court rejected the notion that any particular area can be labelled as constitutionally protected, holding that the crucial factor is the reasonable expectation of the individual. A vehicle parked in a driveway and which is visible from an open alleyway cannot be considered to be in a "constitutionally protected area." The appellant did not locate his automobile in the driveway in an attempt to conceal it. Had this been his intention he surely would have found a garage or secluded area

away from the plain view of the public gaze. There was no reasonable expectation of privacy, and given the *Hester* doctrine, the photographs did not constitute a search and seizure.

## POINT II.

### THE LANGUAGE OF THE FOURTH AMENDMENT PROHIBITING UNREASONABLE SEARCHES AND SEIZURES DOES NOT INCLUDE THE TAKING OF A PHOTOGRAPH.

The general usage of the words "search" and "seizure" does not contemplate the taking of a photograph. In 79 C. J. S. *Searches and Seizures*, Sec. 1, search is defined as:

> "An examination of a man's house, buildings, or premises, or of his person, with a view to the discovery of contraband or elicit or stolen property or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged."

Seizure, on the other hand, "contemplates a forcible dispossession of the owner, and it is not a voluntary surrender."

Not only have the legal encyclopedias narrowly defined the terms of the Fourth Amendment, but numerous cases have also done so. In *People* v. *West*, 300 P. 2d 729 (1956), the court held:

> "A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search.' A seizure contemplates a forcible dispossession of the owner and it is not a voluntary surrender." *Id.* at 733.

From the accepted interpretations of the Fourth Amendment, it is apparent that the taking of a photograph is not constitutionally prohibited. In the instant case there was no examination or prying into that which was concealed, neither was there an attempt to dispossess the appellant of his car. And even if this Court found that there were a constructive seizure, it should not be classified as unreasonable. The Fourth Amendment was not intended to fit the circumstances proposed by the appellant and should not be so extended.

## POINT III.

## EVEN IF THE PHOTOGRAPHING OF THE APPELLANT'S VEHICLE CONSTITUTED A SEIZURE, IT WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION.

The trial court in delivering its decision on the appellant's motion to suppress pointed out the different ways in which one can make a legal search. Included in these was the case where probable cause was shown, coupled with exigent circumstances (MS-107). In the instant

case probable cause was apparent, and in light of recent cases the exigent circumstance requirement was satisfied.

Probable cause has been defined in *Carroll* v. *United States*, 267 U. S. 132 (1924), as when:

> ". . . a peace officer . . . suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony . . ." *Id.* at 161.

Under this definition, the following facts of this case show probable cause to have existed.

On March 26, 1971, the Yeates Mobil Service Station in Nibley, Utah, was robbed by an armed gunman (TR-2). The victim notified the police and reported the details of the crime (TR-10). Shortly after the time of the robbery, two witnesses passed by the Yeates station and saw two cars stuck in a ditch. The witnesses were approached by an individual who asked for their assistance in freeing the cars (MS-68). The witnesses offered to go home and return with their truck, but on returning found that the car had already left (MS-70). Becoming suspicious, the witnesses called the police, and later that same night identified the appellant's picture at the police station from among several mug shots (MS-71, 73). Again on March 28, 1971, the witnesses were shown several photographs and identified the appellant's picture as the man they had seen at the service station (MS-74). The witnesses also identified the vehicle at the service station as a light blue Studebaker Lark (MS-69). The suspect iden-

tified by the witnesses had been observed driving such a light blue Studebaker Lark by Officer Crockett (MS-31). Officer Crockett was informed that the appellant's vehicle, a light blue Studebaker Lark, was located in the rear of the Fonnesbeck residence (MS-14, 15). After finding out where the vehicle was located, Officer Crockett drove up an alleyway near the Fonnesbeck property and observed the car (MS-17). At this point the officer had sufficient knowledge to satisfy the requirement of probable cause. From his own knowledge of the facts, coupled with the information provided by the witnesses, he had reasonable grounds to believe that the car he observed had been involved in the armed robbery.

The "exigent circumstance" requirement has been modified by the Supreme Court in *Chambers* v. *Marony*, 399 U. S. 42 (1970). In that case a vehicle seen leaving the scene of a robbery was stopped, the occupants arrested, and the vehicle removed to the police station. While the automobile was there, the police searched it without a warrant. The defendant objected to the search, but the Supreme Court upheld its validity explaining that although the search could not be justified as incident to an arrest,

> ". . . if an effective search is to be made at any time, either the search must be made immediately without a warrant, or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for search." *Id.* at 51.

Under the unique circumstances of this case, the second above mentioned alternative was used. The car was technically "seized" by a photograph which was necessary in obtaining the search warrant. No search was made prior to the issuance of the warrant, but rather a photo was taken to facilitate that issuance.

In *Chambers, supra,* there were no exigent circumstances at the time the search was accomplished. The vehicle was at the police station and the occupants under arrest. But still the Supreme Court held:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *Id.* at 52.

Officer Crockett chose the first alternative, "seizing" the car through a photograph and then presenting the probable cause issue to a magistrate. Probable cause was evident, and what may have been a technical seizure was, therefore, justified.

The appellant proposes that *State* v. *Richards,* 26 Ut. 2d 318, 489 P. 2d 422 (1971), is applicable to the instant case. In that case a police officer made a warrantless seizure of the defendant's truck under the belief that the truck was involved in another crime different from the one for which the defendant was arrested. An examination of the court's holding reveals, however, that the case was decided on the issue of probable cause. The court stated:

> "In the instant action, the sole justification for the seizure was the expressed belief of Officer Fife, that the truck was involved in another crime. The record is void of any facts or circumstances to support this belief and therefore will not presently support a finding of probable cause to seize the truck." *Id.* at 424.

In the case at bar probable cause was established by the identification of the witnesses and the officer's own knowledge. *Chambers, supra,* upheld a warrantless search that was made without exigent circumstances. If the court finds that photographing the appellant's vehicle constituted a seizure, such a seizure can be justified under the *Chambers'* ruling since probable cause was evident.

## POINT IV.

## IDENTIFICATION OF THE APPELLANT WAS NOT VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS AND WAS PROPERLY ADMITTED.

### A. THE IDENTIFICATION OF THE APPELLANT RESULTING FROM THE SHOW-UP IS AN EXCEPTION TO THE *GILBERT-WADE* RULES AND SHOULD NOT HAVE BEEN SUPPRESSED.

The Supreme Court in *United States* v. *Wade,* 388 U. S. 218 (1967), expressed the following rationale for its ruling:

> ". . . we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.* at 227.

Based on the aforementioned language, courts have not applied the *Gilbert-Wade* rules where the circumstances mitigated against application. This Court recognized this exception in *State* v. *McGee*, 24 Ut. 2d 396, 473 P. 2d 388 (1970), where the identification came within minutes after the commission of the crime.

The basis for the exception is that the courts must balance the need for prompt identification against the ability of counsel to avoid erroneous identification. In the instant case the presence of counsel at the show-up was unnecessary. The Ames had already identified the appellant on two separate occasions. The appellant was neither requested to wear any particular article of clothing nor asked to say anything. The confrontation did not prejudice the appellant's rights, the presence of counsel would have added nothing in helping to preserve the appellant's right to a fair trial, and therefore, the *Gilbert-Wade* rules do not apply.

## B. THE IN-COURT IDENTIFICATION WAS BASED ON AN INDEPENDENT SOURCE.

If, in the alternative, it should be determined that the show-up were improper, the in-court identification had an independent source and was not tainted by suggestion from the show-up.

The Supreme Court in *Wade, supra,* reasoned that the in-court identification of Wade would be admitted if ". . . the in-court identifications were based on observations of the suspect other than the line-up identification." *Id.* at 240.

In *Wade*, the court relied on the test applied in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), as the proper one to be applied in these situations:

> "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by *means sufficiently distinguishable to be purged of the primary taint.* McGuire, *Evidence of Guilt*, 221 (1969)." *Id.* at 241. (Emphasis added.)

This court has also accepted an in-court identification when based on an independent source. In *State* v. *Vasquez*, 22 Ut. 2d 277, 451 P. 2d 786 (1969), a man that was beaten and robbed, later identified the defendant at a line-up conducted in the absence of counsel. The defendant filed a motion to suppress, but this court found:

> "It is conceded that Vasquez was not advised that he could have counsel present at the line-up, nor that he knew in advance that a line-up was to take place. . . . 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.

The record before the court in this case establishes that the in-court identification was based on the Ames' personal observations at the scene of the crime rather than the show-up, thus meeting the test of being "sufficiently distinguishable to be purged of any primary taint." At the time the Ames stopped to offer their assistance the scene was well lighted. There was a mercury vapor light on top of a pole that cast a fairly strong light (MS-92, 93). Also there were lights from the service station and the dash lights on the car (MS-84). The Ames were driving a small compact, a Volkswagen, and were therefore very close to the appellant when he put his head down into the open window (MS-68). Mrs. Ames leaned over to the driver's window to hear what the appellant was saying, and was close enough to have been able to touch the appellant's nose (MS-89). Her identification of the appellant's photo on two separate occasions was based on what she had observed at the scene of the crime (MS-90). Mr. Ames was within a foot of the appellant when he approached the Ames' car and asked for assist-

ance (MS-92). In attempting to free the car, Mr. Ames took hold of the left door handle right next to the appellant who was driving the car (MS-92). Mr. Ames was given another look when he talked to the appellant before leaving the scene (MS-92). During this course of events both Mr. and Mrs. Ames were able to observe the appellant for several minutes as the group of men worked to extricate the vehicle from the ditch. Another important corroborating fact was that the light blue Studebaker Lark that Mrs. Ames identified (MS-69) as the vehicle stuck in the ditch was owned by the appellant (MS-5, 75).

Regardless of the court's determination of the legality of the show-up, there is ample evidence to support a finding that the in-court identification was based on independent sources. Both Mr. and Mrs. Ames observed the appellant at close range for several minutes. The vehicle that was described by Mrs. Ames was owned by the appellant. Given the extent of the Ames' observations, the taint of the show-up has been sufficiently dissipated to allow the in-court identification.

### C. THE TRIAL COURT CORRECTLY INTERPRETED THE STANDARD OF PROOF NECESSARY TO REMOVE THE TAINT OF AN ILLEGAL LINE-UP.

The appellant in charging the trial court with error confuses the clear and convincing standard of proof proposed in *Wade, supra. Wade* did not require the state to show by clear and convincing evidence that the line-up

did not influence the identification. What *Wade* did require was explained in *McGee, supra,* wherein this court said:

> "The court [in *Wade*] held that a courtroom identification, in fact, the fruit of a suspect pretrial identification, was inadmissible, unless the prosecution can establish by clear and convincing evidence that the in-court identification was based on observations of the suspect other than the line-up identification." *Id.* at 391.

The trial court stated that in *Wade* the conviction was vacated to allow the prosecution to show that the in-court identification was based on an independent source (MS-110). The requirement is not to show that the line-up did not influence the identification, for as the trial court said, "To hold that you would throw out any in-court identification where there is a line-up and no counsel present" (MS-110). The prosecution must show by clear and convincing evidence that the identification has an independent source and since the facts of the instant case provide such evidence, the in-court identification must be allowed.

## POINT V.

ASSUMING ARGUENDO THAT THE APPELLANT'S ALLEGATIONS HAVE MERIT, THE CONVICTION MUST NEVERTHELESS STAND UNDER THE DOCTRINE OF HARMLESS ERROR.

Rules 61 of the Utah Rules of Civil Procedure, states:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing the judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

As Rule 61 explains, a judgment should not be disturbed unless refusal to do so would result in substantial injustice. This Court has gone further in interpreting Rule 61, and in *Startin* v. *Madsen*, 120 Ut. 631, 237 P. 2d 834 (1951), held that:

> "Before the appellant is entitled to prevail, he must show both error and prejudice; that is, that his substantial rights are affected and that there is at least a fair likelihood that the results would have been different." *Id.* at 836.

Along these same lines this court held in *In Re Baxter's Estate*, 16 Ut. 2d 284, 399 P. 2d 442 (1965), that:

> "When the trial is to the court, his rulings on evidence need not be subjected to quite such critical scrutiny, as when it is to the jury, because in arriving at his conclusions upon the issues, he will include in his considerations of them his knowledge and his judgment as to the competency, materiality and effect of evidence." *Id.* at 445.

In the case at bar, which was heard without a jury, none of the appellant's allegations would justify a remand for a new trial. Even if the Ames' testimony and identification were suppressed, the record is replete with ample grounds for conviction. The appellant stipulated that the testimony would be as outlined by Mr. Sorensen, the District Attorney (TR-6). The testimony of Gene Turner was introduced. Turner was with the appellant when the robbery occurred, and would have testified that the appellant, Robert Sheen, and himself, were the men who robbed the Yeates Service Station (TR-17, 18). Testimony of Ann Fonnesbeck was also introduced. She would have testified that the appellant came to her home the night of the robbery, March 26, 1971, in the company of Turner and Sheen. She would have further stated that the three participants talked about the robbery and in her presence admitted that they had robbed the service station (TR-14, 15). Given these two witnesses and their testimony, the results of the trial would not have been changed even if the trial court had granted the appellant's motion to suppress, and should therefore not be remanded on appeal.

## CONCLUSION

The appellant has not been denied any constitutional guarantee under the Fourth Amendment, neither was the in-court identification so tainted, as to necessitate suppression, and therefore the lower court's ruling and judgment should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

DAVID R. IRVINE
Assistant Attorney General
*Attorneys for*
*Plaintiff-Respondent*