1983

State of Utah v. John Joseph Watson : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH	:	
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Plaintiff-Respondent	:	
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-v-	:	
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JOHN JOSEPH WATSON	:	
	:	Supreme Court No. 18422
Defendant-Appellant	:	

BRIEF OF APPELLANT

An appeal from a conviction for Aggravated Robbery, a First Degree Felony; in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, John Joseph Watson, appeals from a conviction of Aggravated Robbery, a felony of the First Degree, and the sentence imposed thereon, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

DISPOSITION IN THE LOWER COURT

The Appellant, John Joseph Watson, was charged with Aggravated Robbery, a felony of the First Degree in violation of Title 76, Chapter 6, Section 302, Utah Code Annotated (1953 as amended). Appellant was convicted as charged in a jury trial and sentenced to an indeterminant sentence as provided by law.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the judgment rendered below and to have the case remanded to the Third Judicial District Court for a new trial, or in the alternative, to have the case dismissed upon a finding of insufficient evidence.

STATEMENT OF THE FACTS

On the morning of April 26, 1981, a man entered the 7-11 store at 6092 South Ninth East (T.3). After a few minutes of browsing, the individual approached the check-out counter where Randy A. Bailey was working, drew a gun, and demanded that Bailey put the money that was in the register in a bag. (T.6-7). The suspect then grabbed the bag and ran out (T.12).

The same morning, Eric Duncan, manager of the Cloud Nine, an Ice Cream Parlor and Arcade located near the 7-11 in question, noticed a car parked in back of his establishment (T.30-31). Shortly thereafter he saw a man running down the other side of 5900 South towards the car in the lot. The individual came witin three or four feet of Duncan before jumping in the car and driving out. (T.34-37).

At trial, Bailey described what the suspect was wearing on the morning of the robbery (T.4-5). He also stated that the suspect was approximately six-feet or six-one (T.7), based on height mark indicators at the door of the 7-11 (T.22), and he then identified appellant as the one who robbed the store. (T.10-11)

witness also identified a vest introduced by the State as the worn by his assailant, and a hat introduced by the State as similar to the one worn.

On cross-examination, Bailey admitted that both on the evening of the robbery (T.14-20), and at the preliminary hearing (T.21) he was unable to positively identify appellant. Further, Bailey testified that he had told police that the robbery was wearing a jacket (T.16) and not a vest.

The other eyewitness, Eric Duncan, testified that the man he saw running in the early morning of April 26 was wearing a jacket and a leather hat. He also stated that the man was six-one or six-two (T.35-36). Though Duncan identified appellant as the man he saw running to the car (T.37), he was unable to identify either the hat or vest introduced by the state (T.41-42, 59).

At the trial, with the help of defendant's witness, it was shown that defendant was about six-six inches in height and with a hat on approximately six-eight. (T.64-67).

POINT I

THE HAT AND VEST SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE AS THE FOUNDATION FOR THEIR ADMISSION WAS INADEQUATE.

Appellant contends that the hat and vest introduced by the State, and forced to be worn by appellant in front of the jury (T.57), were admitted without adequate foundation. No chain

of custody was shown linking the objects to him and to the crime, and further the items were not positively identified by the witnesses.

Professor McCormick in his treatise on evidence stated the general requirements of admissibility of real evidence as follows:

> [W]hen real evidence is offered, an adequate foundation for admission will require testimony first that the object is the object which was involved in the incident, and further that the condition of the object is substantially unchanged. McCormick, Evidence 527 (2d ed. 1972) (Emphasis in original)

The requirements are to make sure that misidentification, tampering, substitution or alteration did not occur. United States v. Howard-Arias, 679 F.2d 363 (4th Cir.), cert. denied 103 S.Ct. 165 (1982); State v. Ricci, 655 P.2d 690 (Utah, 1982); State v. Mayes, 286 N.W. 2d 387 (Iowa, 1979).

The current standard for determining admissibility of real evidence in Utah was stated in State v. Madsen, 498 P.2d 670 (Utah, 1970) as:

> Before a physical object or substance connected with the commission of a crime is admissible in evidence, there must be a showing that the proposed exhibit is in substantially the same condition as at the time of a crime. The circumstances surrounding the preservation and custody of the article and the liklihood of tampering are factors to be considered in determining its admissibility. Id. at 672.

In Madsen, the defendant was convicted of selling a controlled substance and challenged the decision on a chain of custody basis. On appeal, this Court held that the chain had been sufficiently established, as the State had had each individual with custody of

... stance testifying as to their possession and disposition of ...

The Madsen decision was expanded upon in two recent cases, State v. Eagle Book, Inc., 583 P.2d 73 (Utah, 1978) and State v. Ricci, 655 P.2d 690 (Utah, 1982). In Eagle Book, defendants contested the introduction of certain pornographic materials into evidence. On appeal, this Court restated Madsen as a two-tiered analysis. The trial judge must first decide whether or not the exhibits had been changed or altered, and second whether to admit the evidence with any weakness in the chain of custody or identification going to the weight accorded the evidence. It was held that the trial judge had not abused his discretion in admitting the evidence as the objects were identified by the purchasers, and more importantly testimony was presented as to the chain of custody from purchase until trial.

Most recently in State v. Ricci, supra, this Court relied on the factors presented in Madsen and Eagle Book. Ricci had attempted to exclude from evidence items from a burglary that were found by police in a trash can. The Court again held there was sufficient foundation, based on eyewitness identification and testimony establishing a strict chain of custody. Further, this Court added another factor when they determined that any prejudice in admitting the items in the trash can would be negated by their lack of importance in determining guilt.

Synthesizing the holdings in the above cases demonstrates the clear and consistent method by which Utah determines the admissibility of real evidence. First, the trial court must determine whether the object is in substantially the same condition as it was at the time of the crime. This determination is based on eyewitness testimony that the object is the same as at the time of the crime, plus evidence as to the completeness of the chain of custody. Second, the trial court must determine whether to admit the evidence, based on the first determination and whether that evidence is crucial to the case.

Based on the Utah analysis, the trial court which in the instant case allowed in the hat and vest as real evidence (T.9, 53), did so unreasonably. No foundation evidence as to a complete chain of custody of the hat and vest from Watson's possession to the trial was offered by the State. Utah Farm Bureau Insurance Co. v. Chugg, 6 Utah 2d 399, 315 P.2d 277, 279 (Utah, 1957). Thus, one of the required factors in determining admissibility was missing.

To show a lack of chain of custody foundation, it must first be established where the chain begins, as "[o]nly breaks in continuous possession that occur within the period included in the chain affect admissibility."[1] This Court has not specifically

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1. Gianrielli, Chain of Custody and the Handling of Real Evidence, Amer. Crim. L.Rev. 539 (Spr. 83).

as to where the chain begins, however the majority position and probably the position in this state is that the chain starts when evidence comes into possession of law enforcement personnel. See Williams v. State, 379 N.E. 2d 981 (Ind. 1978)(foundation not required for periods before evidence comes into possession of law enforcement personnel); State v. Bright, 623 P.2d 917, 920 (Kan., 1981) (Quoting State v. McGhee); 21 ALR 2d 1216, 1236 (1953). In the instant case, the hat and vest apparently came into possesion of law enforcement officials when Watson was picked up by Natrone County (Wyoming) Sheriffs. Thus the chain should have commenced then.

No testimony was introduced by the State concerning the chain of custody of the items from their alleged possession by Defendant when arrested, until they were turned over to Det. Christensen (T.56). Since the only proof offered was on the chain after the items were received by Christensen, a "yawning chasm" in the complete chain was created, Commonwealth v. Pedano, 405 A.2d 525, 528 (Pa., 1979). It is also the general rule that the burden of proving the chain of custody rests with the party offering the evidence. State v. Bright, 623 P.2d 917 (Kan., 1981); Hays v. State, 617 P.2d 223 (Okla. Crim. App. 1980). Therefore the State was required, and failed, to link the hat and vest introduced at trial to appellant Watson's possession and further failed to show whether any alteration or substitution was prevented. Only those Wyoming law enforcement personnel who found the items with Watson at the time of his arrest could link the items to his possession

and also testify as to their chain of custody after his arrest. This testimony is mandatory in preparing a complete chain of custody foundation. Otherwise, appellant is unduly prejudiced by the admittance of evidence that is not relevant and authenticated, as in the case at bar.

The second factor to be used in establishing foundation for the introduction of real evidence is eyewitness identification. In the instant case, unlike the previously cited Utah cases, the testimony as to identification is weak at best and should be discounted. The only testimony that would allow in the vest and hat was that of Witness Bailey. However he admitted, that he thought the vest had sleeves, and that he originally had described the assailant as wearing a jacket. Further the other eyewitness, Duncan, failed to identify the vest at all (T.42, 59).

In Carter v. State, 446 P.2d 165 (Nev., 1968), it was stated:

> . . . it is not necessary that the object received be positively identified. It is sufficient if it is recognized that it is similar or bears a sufficient resemblance to remove the elements of mere speculation and surmise. Id at 168.

Even this liberal interpretation of when to admit clothing or other items can be distinguished from the case at bar, since in Carter, all the witnesses tentatively identified the broken glass. Such was not the situation in the present case. Therefore, unlike Carter, Eagle Book, and Ricci this part of the foundation requirement should be discounted.

In the case at bar, the prosecution failed to carry its burden of proof in showing that the hat and vest were the items worn during the crime, and were in substantially the same shape as at the time of the crime. They ignored linking the evidence to the defendant, and further left unexplained, a gap in time as to the whereabouts of the items. See Graham v. State, 255 N.E. 2d 651 (Ind., 1970); State v. Reese, 382 N.E. 2d 1193 (Ohio App. 1978); Faulkenberry v. State, 551 P.2d 271 (Okla. Crim. App. 1976). Thus, more than adequate opportunity was presented for misidentification, tampering, or substitution of the items. Further the eyewitness identification was less than adequate, even if a chain of custody could have been shown. Thus, based on recent Utah law the foundation was inadequate and the trial court abused its discretion in admitting the evidence.

Finally the admittance of the clothes as real evidence and having appellant wear them was extremely predjudicial. As Wigmore stated:

> [T]here is a general mental tendency, when a corporal object is produced as proving something, to assume, on signt of the object, all else that is implied in the case about it. The sight of it seems to prove all the rest. 7 Wigmore, Evidence §2129 at 704 (Emphasis in original)

The hat and vest should not have been allowed in as real evidence. No testimony was introduced by the State from the individuals who took the clothes from appellant, and who had custody of them until Det. Christensen took possession. This gap is highly predjudicial under Utah law as nothing was brought out to

show that the items had not been altered or misidentified, or that they even belonged to appellant. This lack of a complete chain plus the less than positive identification of the items creates an abuse of discretion in admitting them had as real evidence.

POINT II

THE TRIAL COURT COMMITTED PREDJUDICIAL ERROR BY REFUSING TO GIVE ALL OF APPELLANTS REQUESTED INSTRUCTIONS ON THE NATURE OF AND REQUIREMENTS FOR EYEWITENSS IDENTIFICATION EVIDENCE.

Appellant's conviction was based in large part on eyewitness identifications. He contends though that the nature of the testimony at trial raised a reasonable doubt as to whether he was the perpetrator. Thus specific instructions, as to the nature and dangers inherent in identification evidence, factors to consider in assessing the value of such evidence, and the burden of proof required should have been given. The trial court though gave only part of one of the appellant's requested instructions, not giving several crucial parts.

The difficulties of accurate eyewitness identification are well documented. Justice Brennan made this point in United States v. Wade, 388 U.S. 218, 18 L.Ed. 2d. 1149, 89 S.Ct. 1926 (1967):

> The vagaries of eyewitness identification are well-known. The annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testi-

> mony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazzards of such testimony are established by a formidible number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure." The case of Sacco and Vanzetti, 30 (1927). 18 L.Ed. 2d at 1158.

The Kansas Supreme Court addressed the problem in State v. Warren, 635 P.2d 1236 (Kan. 1981) when they stated:

> We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony. Such an instruction, coupled with vigorous cross-examination and persuasive argument by defense counsel dealing realistically with the shortcomings and trouble spots of the identification process, should protect the rights of the defendant and at the same time enable the courts to avoid the problems involved in the admission of expert testimony on this subject. 635 P.2d at 1243.

The instruction that the Kansas court held should be given was that framed by the United States Court of Appeals in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) as a model instruction.

The factors used in the suggested model instruction were those addressed by the United States Supreme in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972) where it stated:

> As indicated by our cases, the factors to be considered in evaluating the liklihood of misidentification include the opportunity of the witness to view the criminal at the

> time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. 409 U.S. at 199.

In Utah, the Telfaire model instruction (and the one proposed by appellant) was cited with approval by Justice Stewart in his dissenting opinion in State v. Malmrose, 649 P.2d 56 (Utah, 1982). Though this Court failed to require its use in that case, the decision was based on other grounds.

But, this Court in State v. McCumber, 622 P.2d 353 (Utah, 1980) and again in State v. Linden, 657 P.2d 1365, 1367 (Utah, 1983) followed much of the Telfaire and Neil language when it was noted:

> In determining the reliability of the identification under the totality of the circumstances the court must also consider the opportunity of the witness to view the criminal at the time of the crime, the witnesses' degree of attention, the accuracy of any prior descriptions of the criminal, the level of certainty demonstrated during the identification procedure, and the time between the crime and the identification. (Emphasis added)

Therefore, if the above factors are required to determine satisfaction of eyewitness identification, they should also be required in an instruction.

In the instant case, the store clerk, Randy Bailey, identified appellant at the time as his assailant, however, on cross-examination, he admitted to describing the individual as six-feet or six-one. Further Bailey admitted that he was unable

positively identify appellant out of a photo array and was also able to identify him at the preliminary hearing.

The other witness, Eric Duncan, though identifying the defendant through a photo lineup also admitted he thought the individual to be about six-feet or six-one and that the robbers voice appeared to be lower than Watson's. Further the identification was made in the early morning when it was quite dark out.

At trial, the court did give part of the Telfaire and Malmrose instruction. However two very important parts were missing which were crucial in relation to appellant's case. In the final instructions, (3) of the defendant's proposed instructions (R.52, 59) was not given. This section was vitally important since the inconsistent and wrong identification by Bailey and Duncan, (appellant is six-five or six-six) was an obvious part of the appellant's case. By leaving this section of the instruction out, the court seemed to say to the jury that such factors should not be considered, contrary to McCumber and Linden. The present case was the ideal type to give such an instruction in because of its relevance, and because of the focus by defense counsel's questioning.

The final section of the proposed instruction was also [illegible] (R.52, 60). This section dealt with the burden of proof [illegible] witness identifications. Because of the varied descriptions as to defendant's height and voice, such an instruction was important. It was also part of the model instruction from Telfaire and Malmrose.

Finally, Watson proposed several other instructions as to eyewitness identification that were not given (R.48-50), or were "given in substance." The mere fact that the court gave general instructions on the burden of proof and eyewitness factors does not alleviate the predjudice in refusing to instruct the jury with respect to the defendant's defense. This Court has held that a jury need not

> . . . go through such a tortuous process when that result could have been achieved by giving the defendant's requested instruction, or one of that substance. State v. Torres, 619 P.2d 694 696 (Utah, 1980).

Further, in State v. Anselmo, 46 Utah 137, 148 P.2d 1071 (Utah, 1915) it was stated:

> [j]urors are all laymen and possess no knowledge of legal rules or principles. To merely inform them with regard to abstract propositions of law, however correct such a statement may be, nevertheless affords them no guide as to how to arrive at a correct conclusion. . . . Whenever such a course is possible the jury should be told in direct terms that, if they find the facts upon a certain issue or question to be a certain way, the law requires the result to be a certain way, stating what it should be. Id at 1081.

In this case there was no instruction given which would explain to the jury what the defense was, nor any instruction which explained all the circumstances surrounding the vagaries of eyewitness identification. Thus it was error to not give the complete model instruction as found in Telfaire and Malmrose, and it was also error not to give the other instructions which explained the eyewitness factors and defendant's theory on the case.

POINT III

THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE APPELLANT COMMITTED THE CRIME.

It is well settled that a reviewing court has the authority to review a case on the sufficiency of the evidence. This standard of review is stated in State v. Petree, 659 P.2d 443 (Utah, 1983) where it was said:

> [W]e reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. Id. at 444.

In State v. Mills, 630 P.2d 1272 (1975), this Court also addressed when sufficiency of the evidence must be challenged:

> For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that there may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. 530 P.2d at 1272.

See also State v. McCardell, 652 P.2d 942 (Utah 1982).

In the case at bar, viewed in a light most favorable to the jury's verdict and based on the above standards, the identification of appellant by both Bailey and Duncan was "so inconclusive [and] inherently [improbable] that reasonable minds. . . must have entertained a reasonable doubt" as to whether or not the appellant was the perpetrator. See also McNair v. Hayward, 659 P.2d 1061 (Utah, 1983);

State v. Castonguay, Utah No. 13000 (May 9, 1963).

The inherent unreliability of eyewitness testimony must be taken into consideration. The failure of Bailey to positively identify the appellant either from a photo array or at the preliminary hearing, together with his description of the robber as six-feet or six-one, when appellant is actually six-five or six-six, would lead a reasonable juror to entertain doubts as to the identification. Further, the identification by Duncan was also suspect, as he also identified the assailant as six-feet or six-one and felt that the voice was deeper than appellants. Thus this identification is also suspect and should reasonably have been discounted.

Therefore, the two eye witnesses both, independently, identified the assailant as four to six inches shorter than he actually was, with one of the identifications based on actual height mark indicators. This combined with the wavering identificati of appellant by the store clerk, who was in the best light and position to identify the assailant, creates a reasonable doubt as to the identity of the individual.

CONCLUSION

Since the appellant did raise an objection to the introduction of the hat and vest without further foundation, it was incumbent upon the State to provide such foundation. The

... in the chain of the items while in the Wyoming law enforcement possession is unduly predjudicial to its introduction as real evidence.

Further, failing to instruct the jury with the complete model eyewitness identification instruction was predjudicial to the case at bar. The failure seemed to focus the jury away from defendant's theory of the case and was also unduly predjudicial.

Finally, based upon the inherent weakness in the eyewitness identification of appellant as to height and looks by both witnesses, the jury must have entertained a reasonable doubt. For the above reasons, the appellant's conviction on the aggravated robbery should be reversed and the case remanded for a new trial or in the alternative should be dismissed.

DATED this 9 day of August, 1983.

Respectfully submitted,

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DELIVERED two copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 9 day of August, 1983.