1971

The State of Utah v. Eugene John Murphy : Defendant-Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

EUGENE JOHN MURPHY,
Defendant-Appellant.

Case No. 12277

DEFENDANT-APPELLANT'S BRIEF

Appeal from a conviction for murder in the first degree in violation of Section 76-30-3, Utah Code Annotated (1953), in the Third District Court in Salt Lake County, Honorable Aldon J. Anderson, presiding

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STATEMENT OF THE CASE

This is an appeal from a conviction for violation of Section 76-30-3 U.C.A. (1953), making every murder committed in the perpetration of a robbery a murder in the first degree.

DISPOSITION IN LOWER COURT

Appellant was tried in the District Court of the Third Judicial District in and for the County of Salt

Lake, the Honorable Aldon J. Anderson, presiding, and found guilty of murder in the first degree.

RELIEF ON APPEAL

Appellant prays that the judgment of the lower court be reversed and the case remanded for a new trial.

STATEMENT OF FACTS

On December 4, 1969, a white Chevrolet with a driver and one passenger parked in front of a grocery market. The passenger got out and went into the market. Minutes later the passenger left the store, got in the car, and the car left the store. A white Chevrolet was seen by witnesses at the market at the time of the incident.

Testimony at trial indicated that the driver of the car was appellant, Eugene Murphy, that the passenger was William Jordan, and that Jordan had attempted to rob the store and that he shot and killed the store owner Alfred Weseman in the course of this attempt.

At the approximate time of this incident, two witnesses, Ray Wyllie and Kert Kueffner, saw two men park a white Chevrolet in the neighborhood of the store, run a short distance to a green Rambler, and depart in that car which was driven by a third person. Prior to the time of seeing appellant in custody and seeing pictures of appellant, these witnesses were able to give

only a very general description of the men they saw run from the Chevrolet to the Rambler. Wyllie was unable to identify appellant in a police lineup (R 291). Kueffner was able to identify appellant in a police line-up, but he had seen televised pictures of appellant prior to attending the lineup (R 345).

Both Wyllie and Keuffner were subpoenaed to the preliminary hearing, but they were not used as witnesses at the hearing. While outside the courtroom at which the hearing was held, Wyllie and Keuffner were approached by a Deputy County Attorney and asked if they could identify appellant, who was also in the hall outside of the courtroom (R 285-289).

The driver of the green Rambler was Earl Wilde. His testimony at appellant's trial identified appellant as the driver of the Chevrolet.

Appellant testified at trial that he did not know that Jordan intended to rob the market and that he thought Jordan went into the market to get a package of cigarettes.

POINT I

BECAUSE OF THE SUGGESTIVE IDENTIFICATION PROCEDURE, IT VIOLATED APPELLANT'S CONSTITUTION RIGHTS TO COUNSEL AND DUE PROCESS OF LAW TO ADMIT THE TESTIMONY OF WYLLIE AND KUEFFNER THAT APPELLANT WAS

ONE OF THE MEN THEY SAW RUN FROM THE CHEVROLET TO THE RAMBLER.

The identification of Appellant outside the courtroom at preliminary hearing constituted a lineup at which Appellant had the right to have counsel present. Wade v. U.S., 388 U.S. 218. Failure to have counsel present at this "lineup" was not harmless error because both identifying witnesses had previously been able to give only a very general description of Appellant, and one witness, Wyllie, had been unable to identify Appellant at a prior lineup. This courthouse lineup also violated due process of law by being improperly suggestive. Simmons v. U.S., 390 U.S. 377.

The error in admitting the identification testimony of these two witnesses was highly prejudicial because without this independent identification of Appellant, there would have been insufficient evidence to corroborate the testimony of the accomplice Wilde (driver of Rambler).

POINT II

THE COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY AS TO THE INTENT REQUIREMENT NECESSARY TO CONVICT AN AIDER AND ABETTOR TO A ROBBERY OF MURDER IN THE FIRST DEGREE UNDER THE FELONY MURDER RULE.

By relying on U.C.A. 76-1-44 (definition of principle), the state might have been able to convict appellant of robbery by showing that he had the intent to aid or abet another person in the commission of a robbery, notwithstanding the fact that the jury did not find that appellant had the specific intent to assist in the taking of the property of another by force or fear. The state might also have been able to establish second degree murder without a finding of specific intent to take by force or fear, since murder in the second degree has no specific intent requirement, and the general intent requirement of malice aforethought can be established by the intent to aid or abet in a dangerous felony.

But regardless of what intent must be shown to convict an aider or abettor of a crime in which he assists or of murder in the second degree, a conviction of first degree murder under the felony murder rule requires that the person convicted had the specific intent requirements of the felony relied on. The logic of the felony murder rule is that the premeditated intent to commit the felony is transferred from the felony to the homicide and thereby substitutes for the specific intent requirement of deliberation necessary for first degree murder. State v. Thorne, 39 Utah 208, 117 P.58.

Before one can be convicted of first degree murder under the felony murder rule, the state must prove that the person sought to be convicted had the specific intent elements of the felony relied on. People v. Wright, 23 N.W. 2d 213 (where the defendant testified that the

killing was accidental and denied intent to rob a service station, that intent was an essential element to a first degree murder prosecution under the felony murder rule, and it was reversible error to give a jury instruction which permitted a conviction without a finding that the defendant had the specific intent to take by force or fear).

Jury instruction number 10 (R56) states that the jury may return a verdict of murder in the first degree if it finds:

> 1. That on December 4, 1969, Alfred Wesemann, the operator of a market at 1311 South 8th West, was robbed or that an attempt was made to rob him by William Jordan, Jr.
>
> 2. That in the course of said robbery or attempted robbery, the said Alfred Wesemann was shot.
>
> 3. That the said Alfred Wesemann died within a year and a day as a result of being shot.
>
> 4. That the said defendant, Eugene John Murphy, was one of those aiding, abetting and/or participating in said robbery or attempted robbery.
>
> 5. That said events took place in Salt Lake County, State of Utah.

Appellant objected to the giving of this instruction, especially Section 4 (R 529-530). Appellant also excepted to the refusal of the Court to give Defendant's proposed instruction numbers 1-9 (R 530). Defendant's proposed instruction number 1 (R 38) is a correct

statement of the felony murder rule as applied to an aider and abettor. The giving of instruction number 10 was reversible error because it allowed the jury to return a verdict of murder in the first degree under the felony murder rule without a finding that appellant had the specific intent that the personal property of another be taken by force or fear.

POINT III

SECTION 4 OF JURY INSTRUCTION 10 ALLOWED THE JURY TO CONVICT APPELLANT OF MURDER IN THE FIRST DEGREE UPON FINDINGS WHICH WOULD MAKE APPELLANT NO MORE THAN AN ACCESSORY AND THEREFORE DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

Section 4 of instruction 10 is erroneous in that it allows a conviction upon a mere finding that appellant participated in the robbery-homicide.

Appellant testified that he thought Jordan had gone into the market to purchase a package of cigarettes. If the jury believed this, Section 4 of instruction 10 would allow a conviction if the jury also believed that Appellant participated by driving Jordan away from the market after Appellant had knowledge of Jordan's alleged act. Thus, the jury was instructed to convict appellant of first degree murder upon findings which would make appellant no more than an accessory (U.C.A. 76-1-46).

Section 4 is therefore such a patent misstatement of law as to have deprived appellant of due process of law.

CONCLUSION

While it may arguably have been proper for Wyllie and Kueffner to testify that they saw a man resembling Appellant, their testimony should have been excluded to the extent that it made positive identification.

The instructions to the jury were erroneous and prejudicial in that they permitted a verdict of guilty of murder in the first degree under the felony murder rule without a finding of specific intent to commit the felony relied on (Point II) and without a finding that Appellant's involvement in the crime extended any further than being an accessory. (Point III).

For the foregoing reasons the case should be reversed and remanded for a new trial.

Respectfully submitted,

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