1983

State of Utah v. Ervin Brafford : Brief of Appellant

Utah Supreme Court

Lynn R. Brown; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	
v.	:	
ERVIN BRAFFORD, Defendant-Appellant	:	Case No. 18179

BRIEF OF APPELLANT

This is an appeal from judgment and convictions of Aggravated Robbery, a First Degree Felony, and Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, ERVIN BRAFFORD, appeals from a conviction of Aggravated Robbery, a First Degree Felony, and Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, and the sentences imposed thereon, in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Ervin Brafford, was tried before a jury and found guilty of Aggravated Robbery, a First Degree Felony, and Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, and was sentenced to an indeterminate term of 5 years to life and an indeterminate term of 1 to 15 years, the sentences to run concurrently.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of both convictions and a dismissal.

STATEMENT OF THE FACTS

On the morning of May 11, 1981, Robert Hunter, a pharmacist at the Southeast Pharmacy was robbed of prescription drugs and money by two men. Hunter said a man entered, drew a gun, made him lie on the floor behind the prescription counter, and demanded Schedule A drugs. Mr. Hunter then said he saw a second man go through the shelves looking for the drugs, but could not find them. Hunter then got the drugs for them, putting them in a bag that the second man was holding. Hunter next remembered seeing the second man open the cash register, which tripped the alarm and activated the in-store camera.

Ken Jones and Richard Sullivan, parole officers, identified the appellant from looking at the in-store camera pictures as the second man in the robbery. Jones had last supervised the appellant in 1979 and said he had only seen him occasionally since then, although they did not speak. He also could not recall appellant' tatoos. The State rested and then the Court denied a motion to dismiss Count II, the weapons charge on the grounds that the defendant had no weapon.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

Appellant contends that the evidence was insufficient to support the verdict and that the case should be dismissed.

The authority of the reviewing Court to reverse a judgment on sufficiency of evidence is clear. The standard for determining sufficiency of evidence for a conviction is that:

It must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed a crime. State v. Wilson, 565 P.2d 66, 68 (1977).

In State v. Mills, 530 P.2d 1272 (1975), this court also discussed a challenge to the sufficiency of the evidence:

> 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 may reasonably be drawn upon therefrom, in 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

Clearly then, each case must turn upon its own facts as to whether a new trial is merited due to insufficiency of evidence.

In this case, appellant was never identified by the victim as being the second robber. The identification was made by two parole officers from photographs made by a camera installed from within the victim's drug store. These are the same pictures that the prosecution described as not being clear enough to depict the tatoos that were clearly exhibited on the arms of the defendant during the trial. The picture that the State contended was the

defendant showed no signs of markings or tatoos on the arms even though the individual was wearing a short sleeved shirt and the picture seemed to be of good enough quality that the discoloration of a tatoo should have appeared if the person in the picture had, in fact, been the defendant.

The evidence showed that appellant had a tatoo on his left hand and a very large and noticeable one on his right arm. If something so obvious as tatoos on the hands and arms did not appear on the pictures taken on the drug store camera then reasonable minds should not have believed the defendant to be guilty beyond a reasonable doubt. The State did not trust the jury to view the pictures and make the determination themselves. The State was wrongly permitted to use two parole officers both having minimum contact with the appellant to tell the jury that the person in the pictures was the same person seated at defense counsel table. The pictures were the best evidence and the opinion of two parole officers should not have been substituted for something that should have been a jury question. There was no evidence that there was any substantial change in the defendant's appearance. Both parole officers had minimum contact with the defendant.

This Court in State v. Williams, 111 Ut. 379, 180 P.2d 551, 555 (1947) stated that the total picture as presented by the record must be considered in reviewing an insufficiency claim:

> We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of passing judgment upon whether under the evidence a jury could, in reason, conclude that the defendant's guilt was proved beyond a reasonable doubt. This is not to say that merely by reason of the fact that the circumstances surrounding an alleged

assault of this nature created a reasonable doubt in the mind of this court that the offense was in fact committed, we will set aside a verdict. The total picture presented by the record here considered must be kept in mind in evaluating the result here reached.

Appellant urges this Court to review the evidence as presented in the trial of this matter and rule as a matter of law that ~~it~~ there was ~~is~~ not proper or sufficient evidence for a conviction to stand in this case.

POINT II

IT WAS REVERSABLE ERROR FOR THE COURT TO SUBMIT A FLIGHT INSTRUCTION TO THE JURY.

Appellant contends that the trial judge erred in submitted the State's flight instruction[1] to the jury. The law is well settled with regard to the prejudicial error that occurs when such an instruction is improperly given. In State v. Reed, 604 P.2d 1330, 1333 (Wash. 1979), the defendant complained that it was error to give a flight instruction and the court agreed. The Court said that flight evidence was admissible if, after the

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1. INSTRUCTION NO. 19

The flight or attempted flight of a person immediately after the commission of a crime or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of his guilt or innocence. The weight to which such circumstances is entitled is a matter for the jury to determine.

You are further instructed that flight affords a basis for an inference of consciousness of guilt and constitutes an implied admission.

commission of a crime the accused fled and concealed himself as if to elude justice or endeavor to avoid arrest, or after arrest, attempted to effect his re-escape. In Reed there was evidence to support an inference of flight but the Court was persuaded that "evidence of flight should not have been the subject of an instruction." The Court said:

> Instructions of this kind, though time-honored, should be discarded. At best, they merely sanction the use of circumstantial evidence. At worst, they place undue emphasis upon that evidence. Instructions on circumstantial evidence should be expressed in the abstract. We also agree with the District of Columbia Circuit Court of Appeals that evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence. The interest of justice is perhaps best served if this matter is reserved for counsel's argument, with little if any comment by the bench.
>
> United States v. Robinson, 154 U.S. App. D.C. 265, 273, 475 F.2d 376 (D.C. Cir. 1973).

In State v. Smith, 552 P.2d 1192, 1194 (Ag. 1976) the court reversed a conviction where an improper flight instruction was given. Appellant contended that the instruction, given over his objection, was not supported by competent evidence and was prejudicial evidence; the court said:

> This Court has held that it is improper to give an instruction which is not clearly supported by the evidence. State v. Caruthers, 110 Ariz. 345, 519 P.2d 44 (1974). However, in order for error to be reversible it must be shown to be prejudicial.
>
> The test that the court must use in order to determine if it should be given an instruction on flight was delineated in State v. Rodgers, 103 Ariz. 393, 442 P.2d 840 (1968).

> [4-7] The test is two-fold. First, the evidence is viewed to ascertain whether it supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit. If this is not the case then the evidence must support the inference that the accused utilized the element of concealment or attempted concealment. State v. Rodgers, supra. The absence of any evidence supporting either of these findings would mean that the giving of an instruction on flight would be prejudicial error. State v. Castro, 106 Ariz. 78, 471 P.2d 274 (1970). Exceptions to this rule of law are when the defense fails to make timely objection, State v. Steed, 109 Ariz. 137, 506 P.2d 1031 (1973) or when the appellant testifies to his escape from jail. State v. White, 16 Ariz. App. 514, 494 P.2d 714 (1972). The evidence in the present case only shows that the appellant left the scene of the crime. This evidence does not warrant an instruction on flight. Since a timely objection was made it was prejudicial error to give the instruction.

The Arizona Court upheld the reasoning in State v. Clark, 616 P.2d 888 (Arizona 1980) where defendant was neither pursued after he left the scene of the crime nor did he conceal himself. "Merely leaving the scene of a crime is not evidence of flight." 616 P.2d at 894. It was error to instruct as to flight. See also State v. Wrenn, 584 P.2d 1231 (Idaho 1978); State v. Olson, 592 P.2d 273 (Ore. 1979) where the court said the flight instruction as improper absent evidence of flight.

Here, there was no evidence of fleeing the scene or that the flight was open and that they concealed or attempted to conceal themselves. Assuming arguendo that appellant was the second individual, there is absolutely no evidence that he fled from the pharmacy to evade pursuit or that he concealed himself to avoid detection, all that is shown is that the individuals walked out the door. There was evidence that the police arrived in response to the alarm a few minutes after the robbery occurred and there was no evidence of pursuit, concealment, or flight. There is no

significant evidence to support the inference of flight. Absent such evidence, it is clear that the giving of a flight instruction is prejudicial, reversible error.

CONCLUSION

Based on the totality of the circumstances and lack of sufficient evidence in this case, appellant urges this Court to set aside his conviction.

DATED this 21 day of January, 1983.

Lynn R. Brown

LYNN R. BROWN
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 21 day of January, 1983.

Lynn R. Brown