STATE v. SKINNER

210 Kan. 354 (1972) | Cited 20 times | Supreme Court of Kansas | November 4, 1972

The opinion of the court was delivered by

Paul E. Skinner was convicted by a jury of the offense ofaggravated robbery. Sentenced, he now appeals.

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Appellant was charged with committing the offense jointly withConnie M. Suing. The two were separately tried (see State v.Suing, 210 Kan. 363, 502 P.2d 718.)

Evidence for the prosecution revealed the following:

On November 17, 1970, at about 11:30 p.m. a woman (lateridentified as Connie M. Suing) entered the Taco Tico No. 1restaurant on South Seneca street in Wichita. Displaying ahandgun she approached a Taco Tico employee and demanded money.The employee commenced handing her one dollar bills from his cashregister. She ordered him to give her his "big bills". Theemployee then produced some five, ten and twenty dollar billswhich the woman took. She ran out the door and entered anautomobile parked outside the restaurant. This vehicle was awhite, older model Chrysler, very dirty, with rust spots on thepassenger side and a trailer hitch on the rear. The car bore agreen license plate with white numerals and the letters SG. A manseated in the driver's seat drove the vehicle away immediatelyupon the woman's entrance into it.

The parked vehicle was observed by the Taco Tico employee andalso by a married couple whose attention was attracted to theincident by the woman's rapid exit from the restaurant and theemployee's cry that he had been robbed. This couple hadpreviously entered the restaurant, had seen the Suing woman enterit as they were leaving, and were preparing to drive from theparking lot in their own vehicle parked near the Chrysler whenSuing ran from the restaurant. The husband testified he observedthe driver of the white Chrysler and that appellant "looks like"that person. He and his wife followed the Chrysler in their ownautomobile for a short distance south on Seneca street but lostit.

A description of the Chrysler was promptly given to the Wichitapolice department and about an hour after the holdup a carmatching the description was located in a parking lot at theGasser Club in Wichita. A license tag check determined thisvehicle belonged to appellant. It was a white 1962 Chrysler,dirty, had rust spots on the passenger side, a trailer hitch onthe rear bumper and a green

license plate with the letters SG onit. Within a few minutes after police observed the car, appellantand Connie M. Suing came from the Gasser Club, entered thevehicle and drove away. Police officers stopped the car, arrestedthe two and searched appellant's person. He had $134.00 incurrency "stuffed" in his left rear pants

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pocket — four twenty dollar bills, one ten dollar bill, sevenfive dollar bills and nine one dollar bills. Appellant had nowallet on his person The amount of money missing from the TacoTico cash register was $173.74.

Photographs of Connie M. Suing and of the Chrysler automobilewere received in evidence.

Appellant testified in his own behalf. On the day in questionhe had received money from the sale of a business and as a resulthad $200.00 in cash; that evening he and Connie Suing had been atthe Roaring Sixties Club from about 9:00 p.m. to about 11:45p.m., although Connie did leave the tavern for a while butreturned about 11:30; they left to go to appellant's home wherehe changed shirts, then they went to the Gasser Club; he wasarrested in his Chrysler automobile soon after he and Connie leftthat club; he had previously lost his wallet and had not replacedit; he was not in the vicinity of the Taco Tico No. 1 restaurantthat night and did not take Connie Suing there to rob it. Heacknowledged that the photographs offered by the prosecution werepictures of his vehicle.

The proprietor of the Roaring Sixties Club testified inappellant's behalf that he saw appellant at his club on the nightin question, the last time being about 11:25 or 11:30 p.m.

Appellant's specifications of error will be dealt withchronologically.

During the voir dire examination certain questions were askedrespecting ownership in the Taco Tico corporation. This inquiryprompted the trial judge to interrupt and to disclose in aconference outside the jury's hearing that he owned a one-thirdinterest in a Taco Tico franchise in Topeka but had no financialinterest in the Taco Tico operation in Wichita; he further statedhe felt no prejudice as a result of his Topeka ownership interestand did not believe he should disqualify himself as trial judge.Appellant asserts the trial judge indicated he would disqualifyhimself for sentencing if appellant were found guilty. The recorddoes not sustain that assertion and the record must control.

Appellant argues the judge should have disqualified himself andthat prejudice is shown because the maximum sentence possible fora class B felony under K.S.A. 1971 Supp. 21-4501 (b) wasimposed (fifteen years to life) and this must have resulted fromthe judge's lack of impartiality by reason of his financialinterest in Taco Tico. The contention has no merit.

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Appellant relies on authority pertinent to judicialdisqualification when a financial interest is present. As to thisthe law is clear. A judge should disqualify himself in anyproceeding in which his impartiality might reasonably bequestioned, including instances where he has a financial interestin the subject matter in controversy (see ABA Code of JudicialConduct, May, 1972, Final Draft, Adopted August, 1972, Canon 3,C. [1] [c]; also, ABA Standards, The Function of the TrialJudge, June, 1972, Tentative Draft, Adopted August, 1972, § 1.7,p. 34).

The foregoing principle, however, is not pertinent to the caseat bar for the simple reason the record affirmatively shows thetrial judge had no financial interest, direct or indirect, in thebusiness which was victimized. This latter fact was expresslyconceded, as it had to be, by appellant's counsel upon oralargument. There was no connection between the Topeka interestowned by the judge and the Wichita operation other than each wasa franchisee of the same franchisor, which obviously isinsufficient to raise any reasonable question of partiality. Tohold otherwise would operate to disqualify every judge whohappened to possess property similar to that which had become thesubject of predatory activity. Manifestly, the trial judgerevealed his interest in the Topeka operation only from extracircumspection in an effort to prevent any misinterpretationpossible from surface appearance and nothing in the recordsuggests impropriety or partiality on his part. The sentenceadjudged was within legal limits and was imposed by the trialjudge with the knowledge that appellant had had a previous felonyconviction.

Appellant asserts the trial court erred in receiving inevidence a photograph of Connie Suing and two photographs of hisautomobile. The basis of complaint is the exhibits were nevershown to be true and accurate portrayals of the subjectsdepicted. Appellant conceded he and Suing were arrested in hisown automobile and that the two photos depicted that automobile.The photos were taken the day after the holdup — the same day asthe arrest. The arresting officer testified he saw no alterationsin or additions to the automobile from the time he first saw itat the Gasser Club to the time the photos were made. The TacoTico employee and the married couple identified the pictures asportrayals of the vehicle which they saw the robber enter uponrunning from the restaurant. Appellant was identified as a manwho "looks like" the person who was the driver of the vehicleportrayed in the pictures.

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Connie Suing was not present in court but the exhibit which isconceded to be her photograph was shown to various prosecutionwitnesses. The Taco Tico employee identified the photograph asdepicting the female robber, the married couple identified it asportraying the woman they saw running from the restaurant and whoentered the white Chrysler, and the arresting officer identifiedit as depicting the woman present in the white Chrysler when hestopped it. It is immaterial that no witness testified as to thecircumstances of the taking of the photos. The photos were notoffered to portray testimonially the particular appearance eitherof Connie Suing or appellant's vehicle on the night in question —that was not an issue. They were offered to link appellant to therobbery at the

time of its commission and ample foundation fortheir admission for that purpose was shown. No furthersponsorship was needed.

Appellant makes the bare assertion the prosecution failed topresent sufficient evidence to support his conviction. Nothingbeyond this simple statement is offered in support and in view ofthe facts already recited the assertion can only be regarded asfrivolous.

Appellant complains the court failed to give an instruction tothe jury respecting his defense of alibi. He did serve a noticeof alibi and, as already indicated, offered evidence which ifbelieved would have placed him elsewhere than at the scene of thecrime at the time of its commission. The record does not revealany request by appellant for an alibi instruction and furtherconsideration might well end at this point by reason of K.S.A.1971 Supp. 22-3414 (3) which, after providing that any party mayfile written requests that the court instruct the jury on the lawas set forth in the requests, states that all requestedinstructions must be filed as a part of the record of the case.

However, appellant asserts he orally requested such aninstruction in chambers and upon argument before this court thestate concedes this was true. Because of the importance of theissue to the bench and bar we consider it on the merits.

Appellant cites and relies on State v. Conway, 55 Kan. 323,40 P. 661, wherein the following appears: "Where there is testimony that the accused was so far removed from the place of the crime at the time of its commission as to make it impossible that he could have committed it, the court should instruct the jury upon the law of alibi." (Syl. ¶ 1.)

In the opinion the cited authority for this rule is State v.Johnson, 40 Kan. 266, 19 P. 749. However, the actual holdingin Johnson, on this issue was limited to the following:

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"Where there is testimony tending to sustain the defense of an alibi, interposed by one of the defendants, it is proper for the court to instruct the jury as to the law of such defense; but where the defendant is prosecuted with others upon the theory that all conspired together to commit the crime, and there is testimony supporting it, a direction to the jury that if they found that one of the defendants was not actually present when the crime was committed they should acquit him, was properly refused." (Syl. ¶ 3.)

Research reveals that the first syllabus in Conway quotedabove has been referred to by this court but once — in State v.McManaman, 120 Kan. 376, 244 P. 225. The holding was merelyrepeated. However, in that case there was no request for an alibiinstruction, the evidence revealed the defendant had twoaccomplices in the commission of the alleged crime, and thecourt's ruling was summarized thus:

"Where there is evidence which tends to show that the defendant was not at the place where the larceny of cattle was committed and there is evidence which tends to prove that two other persons were connected with the defendant in the larceny of the cattle, it is not error to fail to instruct the jury concerning the law of alibi where no such instruction is requested." (Syl. ¶ 3.)

Perhaps the reason we have no further precedent on the subjectis that in the past trial judges have been giving the alibiinstruction upon request. If that be true, and previous recordsbefore this court would so indicate, then the winds of changeappear to be stirring.

In PIK § 52.19, Criminal, prepared by the Committee on PatternInstructions of the Kansas District Judges Association andpublished in 1971 under the sponsorship of the Kansas JudicialCouncil, the following appears: "ALIBI "The Committee recommends that there be no separate instruction on alibi. "Comment "Alibi is not an affirmative defense, as in entrapment or insanity; it consists only of evidence showing that the defendant was not present at the time or place of the crime. This evidence should be considered as all other evidence. If an instruction is given, attention is called to the defendant's alibi, which connotes a burden not found in the law."

Further examination of the opinion in State v. Conway, supra,reveals concern with that which is expressed in PIK, that is,possible connotation in an alibi instruction that the defense hasany burden of proof relative to the defense of alibi. TheConway court carefully pointed out that the attempt of theaccused to prove an alibi does not shift the burden of proof fromthe state; further, that it is not necessary the jury believe theproof of alibi before it can

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acquit the accused and, if the alibi evidence introduced by theaccused is such as to raise a reasonable doubt as to his guilt,he is entitled to an acquittal.

Summing up, the following can be distilled from Conway: Thefunction of evidence relating to alibi is not to establish adefense nor to prove anything, but merely to raise a reasonabledoubt of the presence of the accused at the scene of the crime.

In Witt v. State of Indiana, 205 Ind. 499, 185 N.E. 645, thecourt in considering whether an instruction on alibi which hadbeen given was erroneous made this comment: "Strictly speaking alibi evidence is merely rebuttal evidence directed to that part of the state's evidence which tends to identify the defendant as the person who committed the alleged crime. And in a sense an alibi is adequately covered by a general instruction which declares that the state must prove beyond a reasonable doubt all the essential elements of the offense charged." (p. 503.)

In Whitaker v. Commonwealth, 302 S.W.2d 601 (Ky.), an alibiinstruction was not given although the accused produced evidencehe was elsewhere than at the scene of the crime at the time ofits

commission. The court held that an affirmative instructioncovering the defense of alibi was not necessary, saying:

"The rule applicable to the instant case `is to the effect that where the instruction submitting the Commonwealth's theory of the case is couched in such language the ordinary juror can easily understand, and its negative (raised by the usual reasonable doubt instruction) completely and adequately covers the defense of accused, it is not necessary to give an affirmative instruction embodying his theory.'" (p. 603.)

State v. Garvin, 44 N.J. 268, 208 A.2d 402, contains anexcellent discussion of the problem. The court stated:

"The subject of alibi has commanded an inordinate amount of judicial consideration. Perhaps the reason is that at one time some courts> thought of alibi as a separate defense and charged the jury that the defendant had the burden of proof with respect to it. . . . But it is now perfectly clear in our State that alibi is merely a direct denial of the State's charge; and that being so, it is not apparent why such testimony should be dealt with differently from any other direct denial of the State's allegations. "Indeed the very discussion of alibi as something apart from a direct denial of the truth of the State's case tends to obscure its role and to suggest a defendant has some special responsibility with respect to it. . . . "Moreover, so long as alibi is thought to command special treatment, there will be unrewarding questions as to what constitutes an alibi and the sufficiency of evidence to raise the issue. . . .

"It seems to us that all of this is quite unnecessary. There is no need to speak of alibi in such separate terms, and indeed to do so will more likely obscure the case than clarify it. The important thing is to make it plain to

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jurors that to convict they must be satisfied upon a consideration of all of the evidence that guilt has been established beyond a reasonable doubt. If a defendant's factual claim is laid beside the State's and the jury understands that a reasonable doubt may arise out of the defense testimony as well as the State's, the jury has the issue in plain, unconfusing terms." (pp. 273-274.)

The court found no error in the trial court's failure toinstruct on alibi.

In State v. Hess, 9 Ariz. App. 29, 449 P.2d 46, (reviewdenied) the court dealt with a trial court's refusal to give arequested instruction on the subject of alibi, respecting whichthis was stated: "The nature of the `defense' of alibi is not that of confession and avoidance as are coercion, duress, self-defense and insanity; alibi, if successful, is proven under the aegis of a general denial. . . . It is true that our criminal rules require that a defendant who would assert an alibi must give notice of his intention to

do so, listing the witnesses who shall testify to establish the alibi. . . . However, the purpose of this rule is to guard against the wrongful use of alibi evidence and to give the prosecution time and information to investigate the sources of this evidence." (p. 33.)

The court went on to hold that error cannot lie in a refusal tocharge specifically as to alibi where proper instructions aregiven on the elements of the crime charged and on reasonabledoubt.

This court has always been committed to the rule that errorcannot be predicated on the refusal to give specific instructionswhere those which were given cover and include the substance ofthose refused (2 Hatcher's Kansas Digest, rev. ed., Criminal Law,§ 306; 4 West's Kansas Digest, Criminal Law, § 829).

In the case at bar the trial court gave clear and adequateinstructions as to the elements of the crime charged, thepresumption of innocence and the burden of proof. The court madeit plain to the jury that the burden of proof was on theprosecution to establish guilt beyond a reasonable doubt upon theentire case. Under such circumstances, and in order to avoid anypossible misleading of the jury on the all important issue ofburden of proof, we think the better practice is not to singleout the alibi defense for specific treatment in the instructions.As indicated in PIK, the danger in instructing separatelyrelative to the defense of alibi lies in the almostinsurmountable difficulty of avoiding connotation of some burdenon the accused to prove the defense. Accordingly we hold that aseparate instruction on the defense of alibi is not requiredwhere adequate and proper instructions are given on the elementsof the crime charged and on the prosecution's burden to proveguilt beyond a reasonable doubt. That which is stated in syllabus

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¶ 1 and in the corresponding part of the opinion in State v.Conway, supra, is overruled.

Finally, appellant urges error in the trial court's failure togive an instruction on circumstantial evidence. The recordreveals a request for such instruction but here again does notshow the filing of any written requested instruction incompliance with K.S.A. 1971 Supp. 22-3414 (3). A typicalcircumstantial evidence instruction includes a definition ofcircumstantial or indirect evidence, a statement that it is to beconsidered as any other evidence, and lastly, a statement thatthe accused should not be found guilty unless the facts andcircumstances proved exclude every reasonable theory of innocence(see PIK § 52.16, Criminal). However, it has been held that thecautionary last statement should be given only when the proof ofguilt is entirely or substantially indirect (see cases cited 2Hatcher's Kansas Digest, rev. ed., Criminal Law, § 325; 4 West'sKansas Digest, Criminal Law, § 784). Moreover, in State v.Logan, 203 Kan. 864, 457 P.2d 31, we find the following: "Appellant also complains the trial court refused to give an instruction to the effect that circumstantial evidence must be so strong as to exclude every reasonable hypothesis except that of guilt. In one instruction the court did define circumstantial evidence as proof of one fact from which

an inference of the existence of another fact may reasonably be drawn. Having done this, the court could well have supplemented the instruction as requested. However, in view of other instructions given, we cannot say failure to do so constituted prejudicial error. The jury was instructed as to each essential element of the crime charged, burden of proof, reasonable doubt and upon the necessity that each element of the alleged crime be proven beyond a reasonable doubt before appellant could be found guilty. This burden upon the state before a conviction could be had was reiterated throughout the instructions. The evidence was not of an involved or complex nature and, from both a legal and a practical standpoint, presented simple issues. We cannot see how, under the instructions, the jury could have been misled in its consideration of the evidence, to the prejudice of appellant." (p. 866.)

Here there was substantial direct evidence of appellant'sparticipation in the alleged crime, the details of which need notagain be labored, which rendered unnecessary the giving of anyinstruction on circumstantial evidence. Again, it should be bornein mind the trial court in its instructions explained the meaningof reasonable doubt and made it clear the jury must be convincedbeyond reasonable doubt of appellant's guilt before returning averdict of guilty.

We find nothing to warrant disturbing the judgment and it isaffirmed.

APPROVED BY THE COURT.

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