Lawyer (1983 Case)

Statement of facts

Fifth assignment of Error

and

Rebecca Boop's Statement

STATEMENT OF FACTS

On Friday, October 12, 1979, Arthur Smith, the manager of the Rink's store in Bellefontaine, Ohio, did not come home after work. (Tr. 1133). His body was discovered in a field in rural Logan County on October 21, 1979. (Tr. 1118). Smith had been shot several times and the cause of death was a bullet which entered the top of the skull and lodged in the lower part of the jaw bone. (Tr. 1197). No other bullets or bullet fragments were found in the body or at the scene. (Tr. 1202).

A bookkeeper for Rink's at the time of the offense testified that on the day after Smith's disappearance she discovered that approximately $23,000.00 in cash, checks, and charge receipts were missing and had not been deposited in the bank. (Tr. 1186-1187).

Marianne Smith, the victim's widow, testified that her husband's routine when he worked until the 9:30 P.M. closing time was to secure the store, bring the cash and check receipts home with him, eat a late dinner and then deposit the receipts in the bank's night deposit that night or early the next day. (Tr. 1131-1132, 1148, 1153). She testified further that on the night of his disappearance, her husband had called her around 9:20 P.M. to inquire whether her daughter needed to use the Volkswagen that night. He had it at work with him. (Tr. 1130). She testified further that her daughter, Cathy, came home around midnight and they both went to bed. She was awakened at 7:00 A.M. the next day by a phone call from relatives in Germany. (Tr. 1167-1168). After the phone call she drove by the

A25

Rink's store, by the bank, checked the hospital and then went to the police and sheriff's offices. (Tr. 1168-1169).

Marianne Smith also testified that, although her husband often worked late at the store, he would always call her if he was going to do so. (Tr. 1174). She further testified that she had dinner prepared for her husband that night. (Tr. 1132). Finally, there was testimony from the widow that Rink's had a snack bar which served hot dogs and knockwurst and that she served knockwurst to her husband quite often. (Tr. 1133).

The next witness, James R. Rogers, a co-defendant in the case, testified he was presently serving a 37-130 year sentence at the Southern Ohio Correctional Facility for Aggravated Robbery, five counts of Kidnapping, Aggravated Burglary, and Possession of Criminal Tools. (Tr. 1206). He stated he was first in trouble at age thirteen or fourteen and was sent to a boy's school in Wooster from whence he escaped. He then began committing burglaries and auto theft at age fourteen, was caught, and sent to the Boy's Industrial School at Lancaster. Upon his release he was returned twice for parole violations arising from gun possession charges. (Tr. 1211-1212).

Rogers testified that his first adult conviction was for an Armed Robbery at age eighteen. He was sent to the Ohio State Reformatory at Mansfield. (Tr. 1213-1214). Parolled after five years, he was returned as a parole violator. He was eventually parolled again three years later. After this parole he married his wife, Diana. He returned to prison in 1980 following his conviction for the crimes previously listed. It was while he

was in prison that he and the Appellant, George W. Skatzes, were indicted for the murder of Arthur Smith, as well as a myriad of other crimes.

Rogers testified about the consideration he was to receive in return for his testimony against Appellant. He was granted immunity for the murder of Arthur Smith and for approximately fifteen (15) separate Aggravated Robberies known to the prosecutor. He entered a plea of guilty to the Aggravated Robbery of Arthur Smith and the Rink's store. (Tr. 1218). He was also told that a letter would be written to the parole board indicating his cooperation with authorities in the instant case. (Tr. 1219). He testified further that since being granted immunity, he'd been transferred from the Logan County Jail to the Bellefontaine City Jail, that he had much more privileges in the area of visitation, and he was permitted to leave the jail to attend family social events. (Tr. 1348-1349). He further testified that the prosecutor had attempted, and would continue to attempt, to get the 37-130 year sentence from Allen County reduced by the judge there. (Tr. 1361).

Rogers testified further about an unsuccessful escape he had planned from the Allen County Jail following his conviction there. (Tr. 1352). Finally, he admitted that he had taken the witness stand three times in his life, twice in his own behalf and once as an alibi witness for another individual. He admitted committing perjury all three times. (Tr. 1344-1346).

Rogers proceeded to testify that he had developed a modus operandi for the commission of armed robberies. This involved the use of police scanners to moniter police radio activity, the wearing of ski masks and gloves, the carrying of loaded weapons,

A77

the use of rope or tape to bind the victims to allow more time to escape, and the observation (casing) of prospective targets to determine the routines of those individuals handling the money. (Tr. 1222-1225).

Rogers claimed to have cased the Rink's in Bellefontaine on more than one occasion. He also claimed the Appellant participated in this activity. (Tr. 1227-1230).

Rogers proceeded to explain the steps taken by he and Appellant on the night of Arthur Smith's murder. (Tr. 1230-1247). This testimony will be detailed more in the assignment of error dealing with the admission of so-called "other acts." In a nutshell, Rogers claimed the two of them went to Bellefontaine, parked their car in an apartment complex behind Rink's, hid in a building which was under construction and located across from the side of the Rink's store. This vantage point gave them a side view down the entire front of the Rink's store. They waited until all cars but Smith's had left the parking lot after Rink's closed. When Smith exited the store they came up behind him, forced him into his own car and drove out into the country. Rogers claimed to have trouble operating the four-speed transmission in Smith's Volkswagen. He testified the car had a clutch and a four-speed gear shift on the floor. After taking the proceeds from the store and frisking Smith, they tied his wrists and ankles with electric cord taken from the construction site where they had hidden. It was claimed that Appellant stayed with Smith and the money while Rogers went back to town to switch cars. While driving back to Rogers' house, Appellant allegedly told Rogers that he'd had to shoot Smith.

A78

At this point, the trial was recessed and a hearing was held concerning the introduction of so-called "other acts." Over the objection of Appellant's counsel, seven separate crimes were allowed to be discussed by Rogers in which he claimed he and Appellant were involved in other armed robberies. (Tr.1252-1315). The details of these offenses will be discussed at the appropriate assignment of error.

In proceeding with the events following the robbery, Rogers testified that after arriving at his home in Kenton, he and Appellant split the cash. Rogers was to burn the checks, charge receipts and money bags later. (Tr. 1318). This he did by taking the aforementioned objects and his clothes and ski mask out into the country, placing them in a small hole, dousing them with kerosene, and burning them up. The boots he wore that night were thrown in a swampy area. (Tr. 1319).

Rogers testified that after Appellant left with his share of the money, Rogers told his wife that a man had been killed in a robbery. He didn't tell her any of the details. (Tr. 1320). Identified by Rogers at this time were a pair of boots which he claimed were the ones he had thrown into the swamp more than three years before, a pocket scanner he claimed was used on the night of the Rink's robbery in Bellefontaine, and a pistol which he claimed he carried on the night of this robbery. (Tr. 1322-1324).

On cross examination, Rogers further detailed events of the Rink's robbery. He also testified concerning the involvement in this case of Tom Martin, a private investigator from Marion, Ohio. This testimony will be detailed in the assignment of error dealing

A79

with prosecutorial misconduct. In a nutshell, Rogers revealed that Tom Martin was working in this case for Rogers' attorney, J.C. Ratliff, while at the same time he was under written contract with Logan County Prosecutor Douglas MacGillivray to help solve the case. (Tr. 1385-1387). He further testified that had he been aware of Martin's treachery he wouldn't have said a word to him about anything. (Tr. 1388).

Rogers further testified that on one occasion, while the murder indictment was still pending against him, Prosecutor MacGillivray had Rogers brought to his office for a meeting. This was neither at the request of Rogers nor with the prior consent or knowledge of attorney Ratliff. (Tr. 1389).

After Rogers' testimony, Don LaRoche, the manager of the A&P Store adjacent to the Rink's Store, testified he saw Smith's Volkswagen start to leave the parking lot on the night in question at approximately 10:30 P.M. (Tr. 1400).

Various witnesses described the scene where the body was found and evidence that was gathered there. There was testimony that the wire binding the body was the same type of wire found in the construction site across from the Rink's Store. (Tr. 1448).

The State's next witness was Rogers' wife, Diana. She admitted helping to destroy evidence of her husband's armed robberies as well as helping to spend the stolen money. (Tr. 1454). She admitted to lying under oath at her husband's trial in Allen County, claiming people held her at gunpoint and made Rogers commit the crimes against his will. (Tr. 1455-1456). She even asked a girlfriend of hers to commit perjury to help she

A80

and Rogers. (Tr. 1480-1481). She also recounted her involvement in shoplifting schemes. For all crimes to which she claimed involvement, she was granted immunity from prosecution. (Tr. 1456).

In her testimony concerning the night of the Rink's incident she basically backed up her husband's story. (Tr. 1457-1458). She further testified that after Rogers was convicted and in prison with his case on appeal, she convinced Appellant to put up the money for an appeal bond. She testified that she, Appellant, his wife and son travelled to Cincinnati to post the bond with a bondsman. Upon asking the bondsman why the bond was so low for such serious charges, Appellant was allegedly told that Rogers must be snitching on someone. She claims that upon hearing this the Appellant blew up, stormed out of the bondsman's office and, on the way back home, kept ranting and raving that Rogers must have snitched on him about the Rink's murder. She testified that Appellant revealed to her that he had shot the man in Bellefontaine. (Tr. 1459-1461).

Rogers' wife testified further that on the night of October 6, 1982, she was arrested for the murder of Arthur Smith. (Tr. 1471). It was after her arrest that she decided to tell the prosecutor about this trip to see the bondsman. (Tr. 1462). She testified further that she had received money from the State of Ohio to help pay her food and rent since she had become a State's witness. (Tr. 1463).

On cross examination, Rogers' wife admitted that she always does what Rogers tells her to do. (Tr. 1465). She also recounted the actions of the double agent from Marion, Tom Martin. (Tr. 1468-1470). Again, his involvement will be discussed in some detail in

A81

another portion of this brief.

Rogers' wife admitted helping Jack Benton commit armed robberies under Rogers' direction from the Southern Ohio Correctional Facility by acting as a messenger between the two. (Tr. 1475). She also admitted helping prepare an escape attempt for her husband. (Tr. 1477). As for her previous perjury, she testified she didn't regret it and that it just came natural. (Tr. 1480).

Following Diana Rogers' testimony was that of Dr. Jolly, a pathologist from Hamilton County, who testified as to the cause of death, he being the person who performed the autopsy. He also testified that Smith's stomach contained some processed meat that appeared to be a frankfurter but was much larger than a normal one (like knockwurst). Given the amount of decomposition, Jolly determined that Smith had eaten within two to four hours of his death. (Tr. 1504). Finally, Jolly testified that in his opinion Smith was lying on the ground when shot and that his assailant was firing from ground level at a distance greater than three feet. (Tr. 1510-1513).

Over continuing defense objection, the State proceeded to introduce independent evidence of the so-called "other acts." (Tr. 1521-1543, 1584-1628). The facts concerning all of these incidents will be dealt with in another section of this brief.

The defense consisted essentially of three witnesses, the victim's daughter, Sheila Lile, her husband, Bruce Lile, and her brother, the victim's son, Michael Smith. Their testimony was similar in several respects. They all recounted that Arthur Smith had revealed to them prior to his death that he was having problems at the Rink's

482

store with guns disappearing and with the pharmacy department in regards to drugs. Arthur Smith told all three of them that he was keeping some kind of ledger or book to document these problems. This book was never found. (Tr. 1664-1665, 1744, 1800-1801).

Michael Smith and Bruce Lile also testified concerning Arthur Smith's habits upon arriving home from work. He would remove his shoes and socks, his glasses and his necktie. This was the same condition in which his body was found; shoes off and no socks, glasses or necktie to be found anywhere. (Tr. 1755-1756, 1778-1779).

Finally, all three relatives of the victim impeached the testimony of Marianne Smith, the widow, concerning her actions on the night of her husband's disappearance. Although she testified that she went to bed at midnight, woke up at 7:00 A.M. to the call from Germany, and then proceeded to check the Rink's store, hospital, and various law enforcement agencies (Tr, 1167-1169), Sheila, Bruce and Michael all testified that she told them within two days of Smith's disappearance that when her daughter, Cathy, arrived home from the football game at midnight, Marianne drove alone to the Rink's store, didn't see her husband's car there, drove by the bank, checked with the hospital and then with law enforcement agencies. She then told them she went home and laid down only to be awakened at approximately 2:30 A.M. by the call from Germany. (Tr. 1668-1669, 1747, 1795).

Bruce Lile also testified about Marianne Smith's great strength. (Tr. 1796-1797).

Both Michael Smith and Bruce Lile testified that Arthur Smith's Volkswagen had an automatic stick shift with no clutch, contrary to Rogers' testimony. (Tr. 1753, 1802-1807).

A83

In his closing argument to the jury, prosecutor MacGillivray told the jury he'd had the court reporter type up a transcript of Rogers' testimony concerning the "Rink's thing". (Tr. 1940). He went on to read from a carefully selected portion of that transcript and concluded to the jury that there was "no mention of a clutch" in Rogers' testimony. (Tr. 1942). As specifically mentioned in another part of this statement of facts, Rogers testified that the Volkswagen had a clutch. (Tr. 1376). MacGillivray's statement to the jury was a falsehood.

Subsequent to the conviction in the instant case, Appellant timely filed two motions for new trial. One was based on seven grounds including 1) the weight of the evidence; 2) the admission of "other acts" testimony in the State's case in chief; 3) the Court's refusal to enforce a subpoena duces tecum; 4) prosecutorial misconduct throughout the pendency of the case; 5) the overruling of Appellant's motion for judgment of acquittal after the verdict; 6) the overruling of defense challenges for cause of three (3) prospective jurors; and 7) the Court's holding that Appellant lacked standing to challenge prosecutorial misconduct with respect to the activities of Tom Martin.

The other motion for a new trial was based on newly discovered evidence and was accompanied by an attached affidavit of Danny Stanley. Stanley was cooperating with the State from the outset, had provided information concerning Rogers and Appellant to the prosecutor and had received immunity from prosecution, as well as other consideration, in return for his continued cooperation. Danny Stanley, however, was never called as a witness for the State

of Ohio during the trial. (Tr. Mot. for New Trial 89-93).

At a hearing on this motion held July 8, 1983, Danny Stanley testified that, while he and Rogers were incarcerated together at the Bellefontaine City Jail, just prior to the beginning of the April trial date, Rogers informed him that the Appellant was not involved with Rogers in the killing of Arthur Smith. Rogers told Stanley that Appellant wasn't even there. (Tr. Mot. for New Trial 107-108). Stanley also testified that Becky Boop, his former girlfriend and the mother of his son, had told him that she had accompanied Rogers on the Bellefontaine Rink's job, and that no one else was there. (Tr. Mot. for New Trial 101-102).

Stanley testified further that sometime, either just prior to or during the Appellant's trial, he had revealed both of these statements to his present girlfriend, Jackie Moore. (Tr. Mot. for New Trial 105, 108-109). Jackie Moore, at this same hearing, corroborated the fact that Stanley had revealed these things to her just prior or during Appellant's trial. (Tr. Mot. for New Trial 159).

Both Danny Stanley and Jackie Moore testified that the reasons they contacted no one with this information was they felt it would cause Stanley to lose his deal with the prosecutor and they both felt that Appellant couldn't be convicted since he wasn't even in Bellefontaine on the night of Arthur Smith's murder. (Tr. Mot. for New Trial 102-104, 160).

Stanley's fear of reprisal should he talk to counsel for Appellant was originally established in January, 1983. Stanley testified that, while held in Bellefontaine City Jail, he received a visit from Appellant's counsel, Lewis E. Williams, Jr. Stanley

testified that Sgt. Neil Smith, Bellefontaine Police Department, awoke him with the news that Williams was there to speak to him. Stanley testified that as Sgt. Smith shook his head from side to side (indicating a negative response) he asked, "you don't want to talk to him, do you?" Stanley interpreted this as meaning that Smith (and, therefore, prosecutor MacGillivray) did not want Stanley talking to Appellant's counsel. As a result, Stanley indicated to Appellant's counsel that he didn't wish to speak to him. (Tr. Mot. for New Trial 103-104). Stanley's testimony regarding this incident was corroborated by the testimony of Sgt. Neil Smith, himself, who did not want Stanley to talk to Appellant's counsel. (Tr. Mot. for New Trial 82-85). Stanley testified that this event gave him the impression that he shouldn't be talking to Appellant's counsel during the course of the case for fear of being returned to the penitentiary. (Tr. Mot. for New Trial 104).

Stanley testified that he contacted Appellant's counsel and spoke with him on May 20, 1983. Stanley also acknowledged that there was no way Appellant's counsel could obtain Stanley's information until it was volunteered to him. (Tr. Mot. for New Trial 146).

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR NEW TRIAL WHERE THE EVIDENCE ADDUCED AT THE HEARING THEREON CLEARLY MET THE TEST REQUIRED BY RULE 33, OHIO RULES OF CRIMINAL PROCEDURE AND THE HOLDING IN STATE v. PETRO.

To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly-discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. State v. Petro, 148 Ohio State 505 (1947).

Appellant submits that all six criteria have been met by both items discovered after the trial, Rogers' admission that Appellant was not involved and Becky Boop's admission that she was.

A. ROGERS' ADMISSION

Obviously, if a jury were to believe that Rogers told Stanley that Appellant was not involved in the Smith homicide there would be a strong probability that the verdict would have been quite different. Appellant's counsel was not aware of this statement until May 20, 1983, after the trial. Appellant's counsel exercised due diligence in attempting to communicate

with Stanley, but the actions of an agent for the State of Ohio obstructed any possible communication. Rogers' admission is not merely cumulative to former evidence, nor does it merely impeach or contradict former evidence, rather it reveals a totally different motive for Rogers' perjurious testimony: revenge. Revenge for Appellant not bonding him out of prison and revenge for Appellant having terrorized his wife. It reveals a scheme, developed by Rogers, to actively injure the Appellant, not just to help himself.

It must not be forgotten for a moment that the credibility of the testimony of Rogers and his wife (who admits she always does what he tells her to do) is the sole foundation for the case against Appellant. There was no other evidence introduced which directly or indirectly connected the Appellant to the killing of Arthur Smith.

B. BOOP'S ADMISSION

If the jury were to believe that Becky Boop admitted that she and Rogers committed the Bellefontaine Rinks robbery alone then there would be a strong probability that the verdict would have been different. This fact has been discovered since the trial. Despite the exercise of due diligence, Appellant could not have learned of this until, first, the statement was made by Boop to Stanley and, second, Stanley decided to volunteer the statement to Appellant's counsel. This admission is, obviously, material. It is, also as obviously, not cumulative nor does it merely impeach or contradict the former evidence.

This admission creates a new theory of the offense which

A 119

is supported by what the trial court herein would surely have considered a "similar act" under the statute and/or rule of evidence. This is a reference to the robbery of a farm couple, the Caspers, in August, 1979. (Tr. Motion for New Trial 94-95).

C. TRIAL COURT'S FINDING OF FACTS

The trial Court held that since Danny Stanley and Becky Boop were listed on the State's discovery, the diligence of calling them as witnesses was never exercised. With all due respect, it is obvious the trial Court either doesn't know, or is overlooking, the basic rule of the trial lawyer: don't ask questions of you don't know the answers. No lawyer with the slightest intelligence or experience would put Danny Stanley on the witness stand knowing he's been granted immunity for all the alleged crimes committed with his client. If the Court's holding in this regard is adopted by the Appellate Court then defense attorneys must subpoena every prosecution witness and play "go fish" with them to discover anything the witness might know that had been withheld, no matter what potentially damaging statements might be elicited. No lawyer can be expected to do this and to require it be done to meet the test of due diligence violates Appellant's rights to due process of law and the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Appellant also takes issue with the trial Court challenging the credibility of Danny Stanley. Appellant submits that the issue here is whether the newly discovered evidence, if believed by the jury, would, with strong probability, result

in a different verdict than that originally reached, if a new trial be granted. The test is whether there is a reasonable basis upon which the jury could believe such testimony, not whether the trial Court does.

Appellant submits that none of the witnesses we are concerned with are candidates for sainthood. A jury should be allowed to judge Stanley's credibility, just, as the trial Court points out, as they judged Rogers' credibility. Perhaps then the jury would not choose to believe Rogers. Certainly there is a strong probability that such is the case.