

SUPREME COURT OF SOUTH DAKOTA

State v. Kihega

Kihega, 2017 S.D. 58 (S.D. 2017) · No. #27673 · Decided September 20, 2017

SUMMARY

The Supreme Court of South Dakota affirmed Roger Lee Kihega’s convictions for first-degree robbery and possession of a firearm by a convicted felon. The court held that accomplice testimony was sufficiently corroborated by physical evidence, testimony, Kihega’s association with the other robbers, and his own statements. The court also upheld the admission of challenged evidence and rejected Kihega’s confrontation-clause claim.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Zinter, Justice (on reassignment); Gilbertson, Chief Justice; Kern, Justice; Zinter, Justice; Severson, Justice; Wilbur, Retired Justice
JURISDICTION	South Dakota
DECIDED	September 20, 2017
DOCKET	#27673
DISPOSITION	affirmed
PROCEDURAL POSTURE	Kihega appealed his jury convictions for first-degree robbery and possession of a firearm by a convicted felon, challenging accomplice-testimony corroboration, evidentiary rulings, his Confrontation Clause rights, and his sentence under the Eighth Amendment.
STANDARD OF REVIEW	The denial of a motion for acquittal was reviewed de novo. Evidentiary rulings were reviewed for abuse of discretion, subject to prejudice. Confrontation Clause questions were reviewed de novo. Sentencing decisions generally were reviewed for abuse of discretion, but whether a sentence was cruel and unusual under the Eighth Amendment was reviewed de novo.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Roger Lee Kihega v. State of South Dakota

TOPICS

criminal procedure

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Washington's accomplice testimony was sufficiently corroborated under SDCL 23A-22-8.
2. Whether the circuit court abused its discretion by admitting jailhouse telephone recordings, rebuttal testimony about an April 16 telephone call, and testimony concerning Kihega's living arrangements.
3. Whether Detective Neal's limited testimony that he had corroborated Washington's account through an interview with unavailable accomplice Gregory Two Hearts violated Kihega's Sixth Amendment right of confrontation.
4. Whether Kihega's sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment or constituted an abuse of sentencing discretion.

HOLDINGS

1. The State presented sufficient corroborating evidence tending to connect Kihega with the robbery, and the circuit court properly denied his motion for judgment of acquittal.
2. The circuit court did not abuse its discretion by admitting the recordings of Kihega's jailhouse conversations with his wife because the statements were relevant circumstantial evidence of consciousness of guilt and were not unfairly prejudicial or protected by spousal privilege.
3. The circuit court properly admitted the exchange because the wife's question was not an assertion offered for its truth and Kihega's answer was relevant circumstantial evidence rebutting his alibi.
4. Any error in admitting Neal's testimony that he had learned from others that Kihega moved from place to place was harmless.
5. Neal's limited testimony that he had corroborated some of Washington's account through an interview with Two Hearts did not violate the Sixth Amendment because it did not repeat Two Hearts's statements or offer them for their truth, and Neal was available for cross-examination.
6. Kihega's fifty-year sentence, with twelve years suspended and parole eligibility, was not grossly disproportionate to his first-degree robbery offense and did not violate the Eighth Amendment.

KEY QUOTATIONS

“Accomplice testimony need not be corroborated by evidence sufficient to sustain a conviction. The mandate of SDCL 23A-22-8 is satisfied where the corroborative evidence in some substantial degree tends to affirm the truth of the testimony of the accomplice and establish the guilt of the accused.” (¶ 11)

“The Sixth Amendment does not bar out-of-court statements when the statement is not offered to prove the truth of the matter asserted; thus, the Sixth Amendment poses no bar to the admission of non-hearsay statements.” (¶ 36)

“Given the gravity of Kihega’s offense, the penalty imposed does not appear to be grossly disproportionate.”
(¶ 42)

FACTUAL BACKGROUND

Three masked, armed men robbed the Casino Korner in Aberdeen, South Dakota, taking approximately \$4,600 after firing handguns and ordering patrons to the floor. Accomplice Michael Washington testified that he and Kihega entered the casino while Gregory Two Hearts drove the getaway vehicle. Physical evidence, casino records, jailhouse telephone recordings, and Kihega's efforts to silence Washington and fabricate an explanation for Washington's confession connected Kihega to the robbery and its aftermath. Kihega was sentenced to fifty years, with twelve years suspended, for robbery and a concurrent five-year sentence for firearm possession.

PROCEDURAL HISTORY

After a robbery at the Casino Korner in Aberdeen, South Dakota, Kihega was charged with first-degree robbery and possession of a firearm by a convicted felon. At trial, accomplice Michael Washington testified against him, and the circuit court denied Kihega's motion for judgment of acquittal, admitted the challenged evidence, and entered guilty verdicts and sentences. Kihega appealed from the Brown County Circuit Court, and the South Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Smithers, 2003 S.D. 128, ¶ 30, 670 N.W.2d 896, 902-03
- State v. Traversie, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330
- State v. Riley, 2013 S.D. 95, ¶ 18, 841 N.W.2d 431, 437
- State v. Nelson, 310 N.W.2d 777, 779 (S.D. 1981)
- State v. Berget, 2014 S.D. 61, ¶ 13, 853 N.W.2d 45, 51-52
- State v. Engresser, 2003 S.D. 47, ¶ 15, 661 N.W.2d 739, 746
- State v. Kvasnicka, 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127-28
- State v. Harris, 2010 S.D. 75, ¶ 8, 789 N.W.2d 303, 307
- State v. Bunger, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609
- Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, ¶ 30, 764 N.W.2d 474, 484
- Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)
- State v. McKercher, 332 N.W.2d 286, 287-88 (S.D. 1983)
- United States v. Love, 706 F.3d 832, 840 (7th Cir. 2013)
- United States v. Williams, 445 F.3d 724, 735-36 (4th Cir. 2006)
- State v. Thompson, 283 A.2d 513, 520 (N.J. 1971)
- United States v. Jinadu, 98 F.3d 239, 244 (6th Cir. 1996)

- United States v. Oguns, 921 F.2d 442, 449 (2d Cir. 1990)
- United States v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006)
- United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006)
- State v. Davi, 504 N.W.2d 844, 855 (S.D. 1993)
- State v. Zakaria, 2007 S.D. 27, ¶ 21, 730 N.W.2d 140, 146
- Crawford v. Washington, 541 U.S. 36, 52, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177 (2004)
- State v. Carothers, 2006 S.D. 100, ¶ 16, 724 N.W.2d 610
- United States v. James, 487 F.3d 518, 525 (7th Cir. 2007)
- United States v. Cruz, 993 F.2d 164, 169 (8th Cir. 1993)
- State v. Johnson, 2009 S.D. 67, ¶ 23, 771 N.W.2d 360, 369
- Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82, 85 L. Ed. 2d 425 (1985)
- State v. Dominiack, 334 N.W.2d 51, 54 (S.D. 1983)
- State v. Spaniol, 2017 S.D. 20, ¶ 23, 895 N.W.2d 329, 338
- State v. Chipps, 2016 S.D. 8, ¶¶ 31, 35-40, 874 N.W.2d 475, 486, 489-90
- State v. Rice, 2016 S.D. 18, ¶¶ 23-24, 28, 877 N.W.2d 75, 83, 85
- Solem v. Helm, 463 U.S. 277, 291, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637 (1983)
- State v. McCahren, 2016 S.D. 34, ¶ 36, 878 N.W.2d 586, 601
- State v. Robertson, 740 A.2d 330, 334 (R.I. 1999)
- State v. Fisher, 321 So. 2d 519, 520 (La. 1975)
- State v. Bonner, 1998 S.D. 30, ¶ 18, 577 N.W.2d 575, 580
- State v. Bruce, 2011 S.D. 14, ¶ 32, 796 N.W.2d 397, 407
- State v. Talarico, 2003 S.D. 41, ¶ 38, 661 N.W.2d 11, 24
- State v. Larson, 1998 S.D. 80, ¶ 9, 582 N.W.2d 15, 17
- State v. Phyle, 444 N.W.2d 380, 382 (S.D. 1989)
- State v. Graham, 2012 S.D. 42, ¶¶ 29, 34, 39, 815 N.W.2d 293, 305-07
- State v. Schafer, 297 N.W.2d 473, 475 (S.D. 1980)
- State v. McDowell, 391 N.W.2d 661, 667 (S.D. 1986)

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