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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

HUGH LEONARD WOOD, alias
JOSEPH EARL MARTIN, alias
JOSEPH PAUL MARTIN, alias
JAMES WALTON,
Defendant and Appellant.

Case No.
8020

BRIEF OF RESPONDENT

FILED
OCT 15 1953

Clerk, Supreme Court, Utah

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Case No.
8020

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent adopts the Statement of Facts of Appellant. The issues raised on appeal go not to the facts but to the law.

STATEMENT OF POINTS

POINT I

THE INFORMATION SUFFICIENTLY CHARGED THE COMMISSION OF AN OFFENSE; ALLEGATION OF OWNERSHIP OF PROPERTY ALLEGEDLY STOLEN IS NOT REQUIRED UNDER SHORT STATUTORY FORM PROVIDED BY SECTION 77-21-47, U. C. A. 1953. THE ORDER REQUIRING APPELLANT TO ANSWER IN THE DISTRICT COURT WAS DULY MADE AND SIGNED BY THE COMMITTING MAGISTRATE.

POINT II

THE COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT A MISTRIAL.

POINT III

THE COURT COMMITTED NO ERROR IN DENYING APPELLANT'S MOTIONS FOR DISMISSAL AND FOR A DIRECTED VERDICT SINCE POSSESSION OF PROPERTY RECENTLY STOLEN SHALL BE DEEMED PRIMA FACIE EVIDENCE OF GUILT. THE MATTER OF EXPLANATION OF SUCH POSSESSION WOULD ORDINARILY BE A QUESTION OF FACT FOR THE JURY.

POINT IV

THE HABITUAL CRIMINAL ACT OF UTAH IS CONSTITUTIONAL; IT DOES NOT OFFEND THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, THE CONSTITUTION OF THE STATE OF UTAH, NOR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

POINT V

THE COURT COMMITTED NO ERROR IN SENTENCING;—AFTER JURY FOUND APPELLANT GUILTY OF GRAND LARCENY AND THEREAFTER FOUND HIM GUILTY OF HAVING BEEN TWICE BEFORE CONVICTED OF FELONY, THE IMPOSITION OF SENTENCE AS PROVIDED FOR BY HABITUAL CRIMINAL STATUTE WAS PROPER.

POINT VI

THE COURT DID NOT ERR IN ITS INSTRUCTIONS GIVEN THE JURY.

ARGUMENT

POINT I

THE INFORMATION SUFFICIENTLY CHARGED THE COMMISSION OF AN OFFENSE; AL-

LEGATION OF OWNERSHIP OF PROPERTY ALLEGEDLY STOLEN IS NOT REQUIRED UNDER SHORT STATUTORY FORM PROVIDED BY SECTION 77-21-47, U. C. A. 1953. THE ORDER REQUIRING APPELLANT TO ANSWER IN THE DISTRICT COURT WAS DULY MADE AND SIGNED BY THE COMMITTING MAGISTRATE.

Appellant relies upon the case of *State v. Jensen*, 83 Utah 452, 30 P. 2d 203, for his contention that the information did not charge an offense by reason of a failure to allege ownership of the property taken. At the time that decision was rendered (May 10, 1934), the short statutory form of pleading now provided in our Code of Criminal Procedure was non-existent. Section 77-21-47, U. C. A. 1953, now provides:

“The following forms may be used in the cases in which they are applicable: * * * Larceny—
A. B. stole from C. D. * * *”

Further, as to ownership, as provided by Section 77-21-16, U. C. A. 1953, an information or indictment need contain no allegation of the ownership of any property, unless such allegation is necessary to charge the offense under Section 77-21-8, U. C. A. 1953; the later section permits reference in the information or indictment to any statute creating the offense charged and provides also that in determining the validity or sufficiency of such information, regard shall be had to such reference. The complaint in the instant case refers to the statute creating the offense of

grand larceny and we submit that the accused was indeed fully informed of the nature and cause of the accusation made against him. This court has said, in substance, that by conformance with the statute, i.e., 77-21-8, by citation of, or reference to, the section creating the offense, the court and the defendant will be sufficiently apprised of what was intended to be charged so a plea could be entered, defense prepared and penalty be known. *State v. Spencer*, 101 Utah 274, 117 P. 2d 455; rehearing denied, 101 Utah 287, 121 P. 2d 912. At the expense of substantial justice, Appellant here seeks to interpose an artificial nicety.

Appellant also contends that the committing magistrate made and signed no order requiring the Defendant to answer in the District Court to the offenses contained in the information. This contention is erroneous; an examination of the original complaint discloses, on the back thereof, the following indorsement:

"It appearing to me that the offense in the within Complaint mentioned has been committed and that there is sufficient cause to believe the within named Hugh Leonard Wood guilty thereof, I order that he be held to answer to the same and that he be admitted to bail in the sum of Five Thousand Dollars and is committed to the Sheriff of Salt Lake County until he gives such bail or is legally discharged.

/s/ J. PATTON NEELEY,
City Judge and Ex-Officio
Justice of the Peace."

The accused was duly bound over and held to answer in the District Court by a magistrate having jurisdiction to

investigate the charge and to make a determination as to probable cause to believe an offense had been committed and defendant was guilty thereof.

POINT II

THE COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT A MISTRIAL.

The court did not err in refusing to grant Appellant a mistrial as claimed under Appellant's Point II, for the following reasons:

1. That part of the information containing allegations of prior felony convictions under which Appellant was charged with being an habitual criminal was not read to the jury in trying the principal charge of grand larceny. Nor was the jury ever informed at any time during the trial on the principal charge that Appellant was also charged with being an habitual criminal.

While it is true that the jury *learned*, during the course of the trial on the principal charge of grand larceny, that Appellant had been convicted theretofore of other felonies, this knowledge came to the jury during the regular course of cross-examination, the propriety of such cross-examination to be discussed *infra* at "2", hence 76-1-19, U. C. A. 1953, stating: The "Jury shall not be told of the previous convictions of felony," was not violated thereby.

That portion of 76-1-19 above quoted is an injunction against a formal reading to the jury of that part of the information containing the charge of being an habitual criminal during the trial of the principal charge. That it is

also an injunction preventing the prosecution from cross-examining Defendant with regard to his conviction of prior felonies as a test of his credibility as a witness, which would seem to be a contention of Appellant, is not sanctioned by the authorities.

2. It is basic in our law that the defendant in a criminal action may be questioned with regard to his prior convictions of felony, as affecting his credibility as a witness, and if he falsifies with respect to such conviction, he may be impeached as any other witness. 78-24-9, U. C. A. 1953: Duty to Answer Questions—

“* * * But a witness must answer as to the fact of his previous conviction of felony.”

In interpreting the above code citation, the Supreme Court, in *State v. Johnson*, 76 Utah 84, 287 P. 909, said:

“A witness as affecting his credibility, may be asked if he had not previously been convicted of a felony, and the kind or name of the felony, but not as to details or circumstances of it; and if the Witness denies the conviction, according to the weight of authority, he may be contradicted by the record of a Court of competent jurisdiction showing the conviction.”

See also

State v. Hougensen, 64 P. 2d 229;

State v. Murphy, 68 P. 2d 188;

State v. Velsier, 159 P. 2d 371;

State v. Crawford, 201 P. 2d 1030.

Since the Appellant upon cross-examination admitted one prior conviction (Tr. 106), but denied specifically two

other convictions (Tr. 109), it is pertinent to point out that the State's attorney is not limited to questioning Defendant on only one prior conviction, as contended by Appellant at the trial and by implication in his brief on appeal.

The function of the inquiry into prior convictions is not fulfilled if inquiry is confined to one prior conviction. If prior convictions affect the credibility of a witness, it follows that both the number and the recency of said convictions is material to a jury's determination of the witness's present truth-telling.

The statute quoted in the beginning of this paragraph says he must answer to the fact of his "*previous conviction of felony*." The absence of the article "a" in the phrase underlined indicates a plural rather than a singular situation; moreover there is nothing in the statute or the governing cases on the subject specifically limiting the inquiry to one prior conviction. Rather, cases from other jurisdictions indicate the opposite to be true. In *State v. Little*, 154 P. 2d 772, an Oklahoma case decided in 1945, the court held:

"When a defendant takes the witness stand, the prosecution has the right to cross-examine him with the same latitude as any other witness. * * * he may be interrogated concerning other *convictions* for crime." (Emphasis added.)

And in *People v. Richardson*, California Court of Appeals, First District, decided in 1946, 169 P. 2d 44, the court said, at page 52:

"In this state the testimony of a witness may be impeached by proof that he has suffered the prior

conviction of a felony. * * * This rule applies to a defendant who testifies in his own behalf in a criminal trial notwithstanding the fact that such evidence tends to prejudice him in the eyes of the jury. * * * The nature of the crime *or crimes* of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction."

Finally, upon a denial by the defendant of convictions, the prosecution has the right to introduce the record of the court of the jurisdiction under which the former conviction was had, to contradict the witness, as indicated in the *Johnson* case cited supra. In the case at bar, when the Defendant denied the two prior convictions, the State's attorney put on evidence of the said convictions and it is this conduct to which Appellant now excepts.

We think the argument presented herein answering Appellant's Point II is also determinative of Appellant's Point V and those parts of Point VI dealing with the alleged violation of Appellant's rights as relating to fair trial guaranteed by the Constitution and to alleged misconduct of prosecution on the matter of habitual criminal charge.

POINT III

THE COURT COMMITTED NO ERROR IN DENYING APPELLANT'S MOTIONS FOR DISMISSAL AND FOR A DIRECTED VERDICT SINCE POSSESSION OF PROPERTY RECENTLY STOLEN SHALL BE DEEMED PRIMA FACIE EVIDENCE OF GUILT. THE

MATTER OF EXPLANATION OF SUCH
POSSESSION WOULD ORDINARILY BE A
QUESTION OF FACT FOR THE JURY.

In a recent decision of this Court, *State of Utah v. Benito E. Vigil*, ... Utah ..., ... P. 2d ..., the Court said:

“* * * looking at the evidence * * * we find that one of the bags stolen * * * was found in defendant's hotel room. Two different police officers testified that the defendant stated to them that the bag was his * * *. Section 76-38-1, provided that:

“* * * Possession of property recently stolen, when the person in possession fails to make satisfactory explanation, shall be deemed prima facie evidence of guilt.’

“Here the suitcase was not only found in defendant's possession but he asserted ownership thereto. *The jury could reasonably find from this evidence that he was in possession of this property, that it was recently stolen and that he made no satisfactory explanation of such possession.* Under this statute this constitutes prima facie evidence of guilt. * * *” (Emphasis added.)

In the case at bar, the stolen property, at least a part of it, was found in Appellant's possession. Police Officer Butcher testified that Appellant stated it belonged to him (Tr. 58). Wilson, the cab driver, so testified (Tr. 77). Detective Reeder testified that Appellant said it belonged to him (Tr. 83). Appellant, admittedly, testified otherwise, but, the jury did not find his explanation satisfactory.

POINT IV

THE HABITUAL CRIMINAL ACT OF UTAH IS CONSTITUTIONAL; IT DOES NOT OFFEND THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, THE CONSTITUTION OF THE STATE OF UTAH, NOR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

No useful purpose would be served by a lengthy discussion or citation of numerous authorities to be found holding contrary to the views expressed in the argument of Appellant. The statute, 76-1-18, U. C. A. 1953, has on several occasions stood the test of constitutionality in this Court. Section 76-1-18, reads, in part, as Appellant contends, as follows:

“Whoever has been previously twice convicted of felonies, *sentenced and committed to any prison, * * **” (Emphasis added.)

Section 76-1-19 reads, in part:

“In charging a person with being a habitual criminal the complaint * * * shall allege the felony committed *within the state of Utah and shall allege the two or more convictions of felony relied upon by the state of Utah; * * **” (Emphasis added.)

In view of the wording of these statutes and particularly with regard the phrases “sentenced and committed to any prison” and “the two or more convictions of felony

relied upon by the State of Utah," Respondent is not inclined to accept Appellant's contention that the legislative intent was to restrict the application of this law to those cases wherein the accused had been twice before convicted of felony in this State.

"Felony" is defined by statute, Section 76-1-13, U. C. A. 1953, reads:

"A felony is a crime which is or may be punishable by death, or by imprisonment in the state prison. * * *"

Appellant's argument to the effect that the word "felony" has no legal meaning is, admittedly, a novel one. Possibly it has merit as to the definition of the word itself and it may be conceded here that each and every state may by statute define its local legal meaning. However, the test is not the "act" that constitutes the "felony" but is rather the punishment to be inflicted for the "crime" calling for incarceration in a state prison. To put it another way; in a prosecution under the Habitual Criminal Act, proof of conviction of two or more offenses which are under the law of the jurisdiction where committed, punishable by imprisonment in a state prison, combined with conviction for a felony committed in this State, satisfies the requirement of the statute.

POINT V

THE COURT COMMITTED NO ERROR IN SENTENCING;—AFTER JURY FOUND APPELLANT GUILTY OF GRAND LARCENY

AND THEREAFTER FOUND HIM GUILTY OF HAVING BEEN TWICE BEFORE CONVICTED OF FELONY, THE IMPOSITION OF SENTENCE AS PROVIDED FOR BY HABITUAL CRIMINAL STATUTE WAS PROPER.

In Point VIII of his brief, Appellant complains of being sentenced to a term of fifteen years as an habitual criminal and contends that he should have first been sentenced for the crime of grand larceny, i.e., a sentence of one to ten years, before the court could impose the greater penalty of not less than fifteen years as provided by the habitual criminal statute. For this contention, Appellant cites no authority and Respondent thinks his argument falacious.

The Supreme Court of the State of Idaho said, on this particular question:

“The third conviction of a person of a felony does not constitute a crime. The section merely provides for punishment, on the third conviction of the accused, in excess of that which might have been inflicted on him had he not been twice previously convicted.”

In Re Bates, Idaho, 1943, 125 P. 2d 1017.

See also cases there cited. Again in 1942, the Idaho Court said:

“The purpose of the statute is to increase the penalty for the third conviction of a felony, * * *.”

State v. Prince, 64 Idaho 343, 132 P. 2d 146.

It appears from research that this is a matter of first impression in this jurisdiction; however, Respondent sub-

mits that the very purpose of the statute is to provide for the imposition of the greater penalty based upon conviction of habitual criminality. The imposition of the greater sentence in lieu of the lesser was proper.

POINT VI

THE COURT DID NOT ERR IN ITS INSTRUCTIONS GIVEN THE JURY.

Appellant complains of instructions, numbered two and seven, as being prejudicial to his rights to a fair trial; and especially objects to a portion of Instruction Number Two. Said instruction was given as follows:

“If you find from the evidence and beyond a reasonable doubt that someone committed the larceny as charged in the information, and *that thereafter the defendant was found in possession of the recently stolen goods and if you also find that the defendant failed to give a satisfactory explanation of his possession, there would arise an inference that the defendant committed the larceny himself*, and this inference may be considered along with all of the other facts and circumstances of the case in determining whether or not you are convinced beyond a reasonable doubt of the defendant’s guilt.” (Emphasis added.)

The part given emphasis is that to which Appellant objects. Respondent directs the Court’s attention to the case of *State v. Hall*, 105 Utah 106, 139 P. 2d 228, wherein this Court speaking through Mr. Justice Wolfe said:

“* * * since the term ‘prima facie’ is used in the statute in the sense of presumptive evidence

(*State v. Potello*, 40 Utah 56, 119 P. 1023) it would have been more proper to instruct the jury in substance that if it found from the evidence beyond a reasonable doubt that someone had committed the larceny as charged, that the defendant was found in possession of the recently stolen goods and that it further found that he failed to give a satisfactory explanation, there would arise an inference that the defendant committed the larceny and that this inference might, with all other circumstances, be considered in determining whether or not the jury was convinced beyond a reasonable doubt of the defendant's guilt."

We submit that Instruction Number Two as given in the instant case is, in substance, compatible with that suggested as proper by this Court. However, if it be granted but not admitted, that this instruction complained of was not proper, then Respondent relies also on the case of *State v. Hall*, supra, for the proposition that the giving of the instruction was not prejudicial error, since the jury was further instructed that the State still had the burden of proving guilt beyond a reasonable doubt.

Appellant generally states that Instruction Number Seven was also prejudicial but says not why; not knowing what Appellant holds for this objection, Respondent is reluctant to speculate thereupon. We submit, without argument, that the instruction was proper.

Generally, as to both of the instructions objected to, the record shows merely that:

"The defendant in this action excepts to instruction number two, and the defendant objects to instruction number seven for the record" (Tr. 141).

We suggest that the portions of the instructions objected to were not sufficiently pointed out and that, unless the whole of the instruction was bad, such an exception would be unavailing for the purpose of having any particular part reviewed and passed upon on appeal. *Ryan v. Beaver County*, 82 Utah 27, 21 P. 2d 858, 89 A. L. R. 1253.

Respectfully submitted,

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