1965

State of Utah v. Leslie D. Pappacostas : Brief of Appellant

Utah Supreme Court

Jimi Mitsunaga; Attorney for Defendant-Appellant;
Phil L. Hansen; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

- vs. -

LESLIE D. PAPPACOSTAS

Defendant-Appellant.

Case No.
10234

APPELLANT'S BRIEF

This is an appeal from a judgment of conviction for grand larceny in the Third Judicial District Court, Salt Lake County, State of Utah.

Honorable Merrill C. Faux, *Judge*

JIMI MITSUNAGA,
Legal Defender
231 East 4th South
Salt Lake City, Utah
Attorney for Defendant-Appellant

PHIL L. HANSEN
Attorney General, State of Utah
State Capitol Building
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
LESLIE D. PAPPACOSTAS,
Defendant-Appellant.

Case No. 10234

RESPONDENT'S BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Honorable Merrill C. Faux, Judge

RONALD N. BOYCE
Assistant Attorney General
Attorney for Respondent

JIMI MITSUNAGA
Legal Defender
231 East 4th South
Salt Lake City, Utah
Attorney for Appellant

TABLE OF CONTENTS

Cases Cited

Statutes Cited

Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
LESLIE D. PAPPACOSTAS,
Defendant-Appellant.

Case No. 10234

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

The appellant, Leslie D. Pappacostas, appeals from a conviction for the crime of grand larceny upon jury trial in the Third Judicial District Court in and for Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

The appellant was charged with grand larceny and second degree burglary. Prior to trial a motion to

suppress certain evidence was made on the basis of an alleged illegal search and seizure. The trial court denied the motion to suppress. The jury returned a verdict of guilty to the charge of grand larceny, and the appellant was committed to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being a more accurate statement of the evidence received at trial.

On January 6, 1964, Pehrson's Hardware Store in Salt Lake City closed as usual at 6:00 p.m. (T. 29). On January 7, 1964, when an employee opened the store, he noted holes in the wall, that boxes which had contained guns were opened and empty, and that the store was generally "torn up" (T. 31, 32).

Mr. Paul Pehrson, the store owner, noted that $88, a Land camera, $5 in stamps, and 15 to 18 guns were missing. Exhibit 1, a .357 Magnum pistol, was identified as one of the missing guns (T. 39). Although Mr. Pehrson had no personal knowledge of whether the gun had been stolen or sold by an employee, his busi-

ness records showed that the gun was not sold and was not properly taken from the store (T. 46, 49, 77-84).

On January 10, 1964, three days after the larceny, Officer William Litton of the Las Vegas Police Department was alerted to be on the lookout for a 1963 Ford having Utah license plates which had been recently changed (T. 60). Officer Litton observed the vehicle pull into a service station in Las Vegas. He approached the vehicle's driver and asked if he could see his driver's license and registration (T. 60, 61). The owner of the vehicle was a Mr. Bates Anderson, the driver. As Mr. Anderson opened the console between the front seats to get his registration, Officer Litton noticed a .22 caliber pistol (T. 62). He ordered the four occupants in the car to get out (T. 62). The defendant was in the right front seat immediately in back of the glove compartment (T. 61). Officer Litton put all parties under arrest and searched the vehicle (T. 61). He found several other guns in the glove compartment, including a .357 Mangum pistol, the serial number of which matched the serial number of the gun taken from Pehrson's store (T. 54, 63). The license plates on the vehicle were not those for which the vehicle was registered (T. 86, 87). Burglary tools were also found (T. 66).

The appellant, Leslie Pappacostas, was questioned concerning the .357 magnum and told the Las Vegas police that the gun belonged to him (T. 74), that he had purchased the weapon several months previous in

a bar, and had brought it with him to Nevada (T. 86-87). The gun was valued at $115 (T. 39).

Based upon the above evidence, the jury returned a verdict of guilty.

ARGUMENT

POINT I

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

The appellant contends that the evidence is insufficient to sustain the conviction for grand larceny. It is submitted that there is no merit to the appellant's position when the evidence is viewed in a light most favorable to the jury's verdict.

The record discloses that on January 6, 1964, numerous items of property were apparently taken from Pehrson's Hardware in Salt Lake City. The evidence relating to the taking of this property shows that the store was secured for the night and that in the morning $88 cash, $5 in stamps, a Land camera, and fifteen to eighteen guns had been taken. A hole had apparently been opened in the roof or wall. According to the records kept in the regular course of business by the Pehrson Hardware store, a .357 magnum pistol (Exhibit 1) had been taken from the store. No record of any kind disclosed that the pistol had been sold and Mr. Pehrson, who kept reasonable control over

the store, was of the opinion that the item had been illegally removed from his store.

Three days later the item was recovered from the glove compartment of a motor vehicle in Las Vegas, Nevada, in which the appellant was riding as an occupant. Burglary tools were also recovered. The appellant admitted that the pistol was his and claimed that he had purchased it approximately two months previous and had it in his possession when he went to Nevada. Under thes circumstances, it is submitted that the evidence more than satisfies the requirements to sustain a conviction of grand larceny.

There is no evidence that other persons stole the property and in *State v. Gillespie,* 117 Utah 114, 213 P.2d 353, this court observed that under the provisions of Section 76-38-1, Utah Code Annotated, 1953, the only elements the State need establish for the crime of larceny are recently stolen property in the possession of the defendant and an unsatisfactory explanation of the possession. It is apparent that all the elements of the crime are present in this case. The evidence discloses sufficient circumstances to support a belief that the .357 magnum pistol was taken from Pehrson's on the night of January 6, 1964. The property was admittedly in the possession of the appellant some three days subsequent to the burglary and he admitted taking the pistol to Nevada. By his own admission, the recent possession of stolen property is established. The fact that at the time he was apprehended he did not have the pistol on his person is of no consequence

in view of his admission that he had the pistol and his claim of ownership. Further, the appellant's statement that he had purchased the pistol in a bar two months previous to his arrest is obviously an unsatisfactory explanation of the possession and, therefore, evidence of the appellant's guilt.

The appellant's contention that the evidence is insufficient to show that the pistol had been taken from Pehrson's Hardware does not bear up under analysis. Mr. Pehrson himself testified that the gun was taken from his shop. He indicated that he kept close control over his gun inventory and that in his opinion the gun was not sold. Further, a record check of his inventory records disclosed that the pistol had not been sold. The preceding evidence, when coupled with the obvious evidence of a larcenous taking on January 6 or 7, 1964, and the defendant's unsatisfactory explanation of his possession of the pistol is sufficient to sustain the conviction of larceny. *State v. Allred,* 16 U.2d 41, 395 P.2d 535 (1964); *State v. Cappas,* 100 Utah 274, 114 P.2d 205.

POINT II

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 6, AND THE APPELLANT CANNOT CLAIM ERROR IN THE INSTRUCTIONS SINCE APPROPRIATE EXCEPTIONS WERE NOT TAKEN.

The appellant contends that the trial court erred in giving its Instruction No. 6 and in failing to give appellant's requested instruction on possession of recently stolen property. It is submitted that appellant has not preserved the issue on appeal. At the time for taking exceptions, counsel merely stated (T. 95):

> "At this time, your Honor, the defendant takes exceptions to the judge's instructions to the jury in this matter, on the grounds that it fails to correctly state the law, is contrary to the evidence — more particularly, in that the judge denied the defendant's requested Instructions Numbers 1, 2, and 3. Submitted, your Honor."

It is well settled that a general exception to instructions to the jury is insufficient to raise any question on appeal. *State v. King,* 24 Utah 482, 68 Pac. 418; *State v. Campbell,* 25 Utah 342, 71 Pac. 529; *State v. Judd,* 74 Utah 398, 279 Pac. 953. In *State v. Woods,* 62 Utah 397, 220 Pac. 215 (1923), this court observed, with reference to the general exception or objection similar to that in the instant case:

> " * * * With some slight variations the objection interposed by counsel in each instance was, 'I object to the remarks of the district attorney and assign it as prejudicial error,' or 'I except to the remarks of counsel and assign it as prejudicial error.' This sort of objection or exception, without anything further, without a proper request for instructions to the jury and a ruling by the court, and an exception reserved at the proper time, presents nothing for review on appeal."

At the time of taking exceptions, counsel did nothing which would alert the court as to the defects which are now claimed on appeal. The function of an exception is, in part, to bring to the court's attention specific claims wherein an instruction may be deficient so that it may be corrected and the jury properly apprised. Since counsel did not see fit to indicate to the court with any particularity wherein he felt that Instruction No. 6 given by the court was deficient, that instruction cannot be challenged for the first time on appeal, in the absence of a showing that such an instruction totally deprived the appellant of a fair trial or was palpably erroneous. *State v. Cobo,* 90 Utah 89, 60 P.2d 952 (1936).

It is submitted that the instruction as given by the court properly apprised the jury of the elements of the crime of larceny and was not prejudicial. Instruction No. 6 must be read in conjunction with Instruction No. 5, which enumerated the specific elements of the crime of larceny (R. 5). Instruction No. 5 advised the jury that larceny was the felonious stealing, taking, or carrying away of the personal property of another. This is the specific language of Section 76-38-1, Utah Code Annotated, 1953. Further, the court explained each of the elements for the crime of grand larceny and advised the jury that they must find the appellant guilty beyond a reasonable doubt. Instruction No. 6, as given by the court, covers the last sentence of Section 76-38-1, Utah Code Annotated, 1953, which makes possession of property re-

cently stolen evidence of guilt. The appellant complains that the instruction as given was defective in two facets: first, that the statement preliminary to the instruction, that the definition of larceny includes the concept of possession of recently stolen property, was prejudicially erroneous; and, second, that the instruction somehow does not advise the jury that recent possession was an evidentiary fact to be considered by them in determining the appellant's guilt.

The second contention is obviously without merit, since the instruction itself advises the jury that the possession of recently stolen property is only a presumption which can be rebutted by other evidence. Further, the instruction advises the jury that the possession must be of property "recently stolen" and that there must be a failure to make a "satisfactory explanation" of the possession. The instruction as given was completely in accord with the decision of this court in *State v. Hall,* 105 Utah 151, 139 P.2d 228, and sets forth adequately the rule recognized by this court in *State v. Gillespie,* supra, and *State v. Allred,* supra, that possession of recently stolen property, without a satisfactory explanation of the possession, is sufficient evidence to make out a prima facie case of guilt.

The appellant also seems to argue that the instruction should have encompassed the language in the requested instruction that the possession be conscious, exclusive and unexplained. It is submitted that the

instruction clearly encompasses these elements since the court's instruction refers to the necessity of satisfactory explanation and to the necessity of the property being recently stolen. Further, Instruction No. 5 required the jury to find knowledge on the part of the appellant. It should be noted, however, that no decision of this court has ever required a jury to be instructed that the possession must be conscious and exclusive. *State v. Butterfield,* 70 Utah 529, 261 Pac. 804, and *State v. Kinsey,* 77 Utah 348, 295 Pac. 247, merely recognize that consciousness and exclusivity are factors to be considered in weighing the sufficiency of the evidence. This court has recognized that possession may be joint possession. *State v. Dyett,* 114 Utah 379, 199 P.2d 155. Thus, the term "exclusive" does not refer to individual possession. The statement in appellant's brief, that the jury, had it been so instructed that the possession required was exclusive, could well have found that the possession in the glove compartment nonexclusive, points up the error in appellant's argument. First, it overlooks the admissions of the appellant which reflect exclusive possession and, secondly, it evidences the failure to recognize that the possession could have been joint in an appropriate case. In this case the admissions establish the appellant's possession and the fact that the gun, when recovered, was in a glove compartment of an automobile in which others were riding is immaterial.

The appellant's additional argument, that the reference to recent possession as being part of the

definition of larceny was prejudicial, is equally without merit. Section 76-38-1, Utah Code Annotated, 1953, which contains the definition of the term larceny, also contains the reference to possession of recently stolen property. Appellant argues that referring to this aspect of the law of larceny as part of the definition of the crime of larceny would allow the jury to convict without a finding that there had been a taking. This is obviously absurd. First, the court instructed the jury on the requirement of finding a "taking" in Instruction No. 5 and also on the other elements making up the crime of larceny. Instruction No. 6 uses the word "includes" which simply means that this is an additional aspect of the law of larceny to that already instructed upon. Therefore, in order to convict, the jury was instructed that it would have to find the elements in Instruction No. 5 and the recent possession elements in Instruction No. 6, since they were also included as a necessary part of the crime of larceny in the case. This court has consistently ruled that instructions should be looked at as a whole. *State v. Hendricks,* 123 Utah 267, 258 P.2d 452; *State v. Evans,* 107 Utah 1, 151 P.2d 196; *State v. Siddoway,* 61 Utah 189, 211 Pac. 968. When Instruction No. 6 is viewed with Instruction No. 5 and the other instructions given in the case, along with the posture of the evidence, it is apparent that the jury was not misled. In *State v. Donovan,* 77 Utah 343, 294 Pac. 1108, and *State v. Crowder,* 114 Utah 202, 197 P.2d 917, this court held the substance of instructions similar to that given in the instant

case not to be prejudicial. It is apparent that no prejudice resulted from the instruction as given.

POINT III

THE COURT DID NOT ERR IN RULING ON THE APPELLANT'S CLAIM THAT EVIDENCE WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

The appellant's contention that the .357 magnum pistol was obtained as a result of an illegal search and seizure is plainly erroneous. Taking the facts apparently found by the trial court, it appears that Officer Litton of the Las Vegas Police Department was alerted by reliable information communicated through police channels, to be on the lookout for a 1963 black Ford having Utah license plates that had been recently changed (T. 60). Officer Litton observed the motor vehicle pull into a service station in Las Vegas. He walked up to the driver's side of the car and asked Bates Anderson, the operator and owner, for his registration. When Mr. Anderson opened the console of the vehicle, the officer observed a .22 caliber pistol, which was loaded. The registration for the vehicle did not match the license plates on the vehicle. After observing the pistol in the glove compartment, Officer Litton instructed the occupants to get out of the car and he placed them under arrest. Bates Anderson,

the owner of the vehicle, was placed under arrest. Thereafter, a search of the vehicle was made. During the search of the vehicle, the .357 magnum pistol was discovered. It is apparent that the search was made incident to a valid arrest, the valid arrest being of the person of Bates Anderson, the driver and owner of the vehicle.

Las Vegas City Ordinances, 1960, Title 6, Chapter 3, Section 7, prohibits an owner or operator of a motor vehicle from carrying any concealed weapons in the vehicle. When Officer Litton approached the car, he immediately requested the registration. He did not place any of the occupants under arrest. Upon observing the pistol in the console, a crime was committed in his presence, and the arrest proper.

Section 482.275, Nevada Revised Statutes, requires that the license plates issued for a motor vehicle be attached to the automobile. In the instant case, the license plates issued for the instant vehicle were not those on the vehicle. Thus, another misdemeanor was being committed in the presence of the officer. The officer could validly arrest the driver of the vehicle and search for any weapon or other contraband.

In *State v. Dodge*, 12 U.2d 293, 364 P.2d 798 (1961), this court ruled that a search incident to an arrest was valid where the motor vehicle was being operated with plates other than those for which it was registered, in violation of Section 41-1-142(c), Utah Code Annotated, 1953. This court ruled the search

incident to an arrest by the officer was proper.[1] Therefore the *Dodge* case was precedent for the finding in the instant case that the search was incident to a valid arrest.

It is apparent that the arrest of Bates Anderson, for carrying a concealed weapon, was a valid arrest. The officer did not arrest Anderson prior to asking for his registration, nor did he search the vehicle. When Anderson opened the console, the officer saw the weapon which was plain to view and observed an offense being committed in his presence.

In *Campbell v. United States,* 289 F.2d 775 (D.C. Cir. 1961), Mr. Justice Burton of the United States Supreme Court, sitting with the District of Columbia Circuit Court, considered a case where officers noted an automobile standing with its lights out and motor running in Washington, D.C. The officer approached the vehicle and asked the driver if he knew his lights were out. The driver turned on his lights and the officer asked the driver to show them his license and registration. As the driver opened the door to show the officers his registration, the light disclosed clothing and other property apparently the subject of a larceny. The court in an opinion by Justice Burton ruled that the officers at that moment had probable cause and the subsequent arrest and search were valid. See also *Robinson v. United States,* 283 F.2d 508 (D.C. Cir. 1960).

---

[1]In the **Dodge** case, the officer made an arrest for a crime other than that committed in his presence; but, since a crime was being committed in his presence, the arrest was proper irrespective of the offense for which the officer thought he was arresting the individual.

In *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1948), officers observed the appellant and another man pull away from the curb of a food store with their car lights out. The officers stopped the vehicle and asked to see the license and registration card. The officer shined his flashlight into the car and noticed cartons of cigarette contraband. The court held that the officers, upon observing the contraband, had reasonable grounds to believe a crime had been committed and that the search was proper.

In *State v. Griffin,* 84 N.J. Super. 508, 202 A.2d 856 (1964), the police approached a motor vehicle to warn a motorist of the danger of a certain left turn that was not illegal. They asked the motorist for his license and, in the course of doing so, observed contraband on the back seat of the car. The court stated:

> "The observations of the two police officers justified the conclusion that the clothing they observed was apparently stolen. The possession of stolen property is illegal; it is the equivalent of *contraband,* and is subject to seizure. See 17 C.J.S. Contraband, p. 510; Williams v. State, 216 Miss. 158, 61 So.2d 793 (Sup. Ct. 1953); State v. McKindel, 148 Wash. 237, 268 P. 593 (Sup. Ct. 1928); State v. Hoffman, 245 Wis. 367, 14 N.W.2d 146 (Sup. Ct. 1944); State v. Hawkins, 362 Mo. 152, 240 S.W.2d 688 (Sup. Ct. 1951). Having observed the stolen property, which was fully disclosed and in plain view, Investigator Walker was justified in opening the door of the motor vehicle and physically examining the same. The constitutional guarantees of the Fourth Amendment are to protect

persons against *unreasonable searches* and seizures. We hold that the search of defendants' vehicle and the seizure of the stolen property were reasonable under the circumstances of the case."

In *State v. Brooks*, 357 P.2d 735 (Wash. 1961), police approached a vehicle in a no-parking zone and, during the course of interrogating the driver and while asking for the registration for the vehicle, observed items on the back seat of the car which appeared to be contraband. They then arrested the occupants and made a search. The Washington Supreme Court upheld the conviction, stating:

> "In the instant case, one of the officers opened the automobile door in order to question the appellant regarding the ownership of the automobile. This was not a part of an illegal search. On the contrary, it was a reasonable course for a police officer to take in handling a case of an illegally parked car when someone was sitting in it. Once lawfully in that position, the officer could observe what was there to be seen. As we stated in State v. Llewellyn, supra [119 Wash. 306, 206 P. 396]:
>
> > " ' * * * Once in the place, the officers were justified in taking cognizance of the fact that a crime was being committed by the defendant. The evidence thereof was before their very eyes; it took no search to find it. * * * '
>
> "The officer saw paper bags with clothing consisting of uncuffed pants protruding from them while he was in the process of questioning the appellant concerning ownership of the automobile. As we have above decided, upon this

observation, a lawful arrest could have been made. Therefore, the search into the paper bags and seizure of the contents prior to the arrest of the appellant was lawful, and the trial court properly denied the motion to suppress this evidence."

A case reaching a similar result is, *State v. Sullivan,* 395 P.2d 745 (Wash. 1964).

In *Haerr v. United States,* 240 F.2d 533 (5th Cir. 1957), Border Patrol officers stopped a vehicle to inquire of the occupants and observed contraband in the vehicle. They subsequently arrested the individuals and seized the contraband. In upholding the search, the court observed:

> " * * * Stopping the automobile in quest of aliens was the duty of the Border Patrol, and it was a part of the performance of this duty to look into the automobile. Mere observation, however, does not constittue a search. United States, v. Lee, 1926, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202; Ellison v. United States, D.C. Cir. 1953, 206 F.2d 476; United States v. Strickland, D.C.S.C. 1945, 62 F.Supp. 468."

In *United States v. Lee,* 274 U.S. 559 (1926), the United States Supreme Court ruled that it was perfectly permissible for officers to base an arrest upon what they viewed even if the viewing was by artificial means.

In *State v. Allred,* 16 U.2d 41, 395 P.2d 535 (1964), this court ruled that where an officer stopped a vehicle and observed items taken from a burglary

in plain sight, the subsequent arrest and seizure were legal.

In *The Federal Law on Search and Seizure,* F.B.I., February 1962, it is stated:

> "In the law on search of vehicles, equally with that covering search of places, it is extremely important for the law enforcement officer to know what is not a search and what is not a seizure. Knowledge of the first of these will allow the officer to judge how far he may go in the inspection of a vehicle without having made an illegal search which will void all subsequent action in the case. For example, if an officer making a lawful check of vehicle equipment at a road block set up to verify motorists' compliance with safety regulations looks into the back seat through any closed or open window and sees therein clear evidence of a crime such as possession of non-tax paid liquor, he then has probable cause to immediately search the vehicle for that crime. The officer originally saw the evidence of a crime without making a search, and once having obtained his probable cause lawfully in that manner he may then proceed to make a search and take any other action called for under the law."

It is apparent, therefore, that the officer, after approaching the vehicle, observed what was a violation of a Las Vegas City ordinance and, therefore, the subsequent arrest, and search, were proper. The appellant's argument to the contrary is, at best, a feeble gesture, Davis, *Federal Searches and Seizures,* 349, 350 (1964).

CONCLUSION

The State's case was proved by strong and direct evidence. It is apparent that the jury was clearly convinced from the testimony and exhibits of the appellant's guilt beyond a reasonable doubt. The argument that the evidence is insufficient is without merit.

The jury was properly instructed and only by hypercritical challenge could the instructions given be said to have been prejudicial.

The claim of an illegal search and seizure is, at best, not addressed to the applicable law and facts.

Under these circumstances, this Court should affirm.

Respectfully submitted,

RONALD N. BOYCE

Assistant Attorney General
Attorney for Respondent