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Beehive Security Thrift and Loan v. John T. Hyde et al : Brief of Respondents

Utah Supreme Court

William G. Fowler; Attorney for Appellant;
John G. Marshall; J. Reed Tuft; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

BEEHIVE SECURITY THRIFT & LOAN, a Utah corporation,

Plaintiff and Appellant,

vs.

JOHN T. HYDE and MARY C. HYDE, his wife, KERMIT R. ESKELSEN, LARSON PAINTING COMPANY, and UNITED STATES OF AMERICA,

Defendants and Respondents.

NO. 10232

BRIEF OF RESPONDENTS JOHN T. HYDE, MARY C. HYDE and KERMIT R. ESKELSEN

J. REED TUFT
53 East Fourth South
Salt Lake City, Utah
Attorney for Respondents John T. Hyde and Mary C. Hyde

JOHN G. MARSHALL
53 East Fourth South
Salt Lake City, Utah
Attorney for Respondent Kermit R. Eskelsen

WILLIAM G. FOWLER
340 East Fourth South
Salt Lake City, Utah
Attorney for Appellant

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IN THE SUPREME COURT
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STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

- vs. -

LESLIE D. PAPPACOSTAS

Defendant-Appellant.

Case No. 10234

APPELLANT'S BRIEF

STATEMENT OF THE FACTS

The State produced evidence that the Pehrson Hardware Store located in Salt Lake County, State of Utah, was burglarized between 6 p.m. on January 6, 1964 and 8:30 a.m. the next morning (R-30). Entry was apparently through a hole in the roof (R-36). The store was found in general disorder and disarray with empty boxes and boxes containing various firearms strewn about (R-31).

Mr. Pehrson, speaking from his records, stated that one of the items missing was a 357 Magnum pistol, valued at $115 (R-39) with the Serial No. 375-66 (R-54). He could not testify that the particular gun was stolen (R-85).

Five days thereafter the gun was taken from an automobile owned and driven by Bates Anderson (R-11) and in which the appellant together with two other occupants was riding in Las Vegas, Nevada (R-64).

At the hearing on the appellant's motion to supress, the Las Vegas officer stated that he received information from an anonymous source, that unknown persons were changing license plates on a vehicle of the description of the automobile in which the appellant was riding (R-12). He observed the vehicle pulling into gas station and approached the vehicle while it was on private property (R-10). The officer asked the driver for his license and registration and in this process observed a 22 calibre revolver in the console of the auto (R-13). Thereupon, the officer placed the driver and occupants under arrest and searched the auto (R-13). There was no warrant for arrest or search warrant and the search was conducted as part of a standard procedure by the Nevada police when an auto is about to be towed (R-13). The appellant testified the arresting officer saw only some cartridges in the console and while seeking the automobile registration ordered the driver (R-23) to open the glove compartment. When a revolver fell out, the officer drew his pistol

and ordered everyone out of the car. The appellant was arrested for investigation of certain felonies but he was not tried for any offense in Nevada (R-26).

STATEMENT OF NATURE OF THE CASE

This is a criminal appeal from a conviction of grand larceny rendered in the Third Judicial District Court, Salt Lake County, State of Utah, Honorable Merrill C. Faux, presiding.

DISPOSITION IN LOWER COURT

The appellant was charged with Second Degree Burglary and Grand Larceny. Upon a plea of not guilty a jury trial was had and a verdict rendered finding the appellant guilty of Grand Larceny. Prior to trial Appellant made a motion to supress and after hearing the court denied the same.

RELIEF SOUGHT ON APPEAL

The Appellant seeks to reverse the lower court's ruling denying Appellant's motion to suppress, to reverse the conviction and to obtain a new trial.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF GRAND LARCENY.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION 6 AND IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1.

POINT III.

COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE IN THAT THE EVIDENCE WAS ILLEGALLY OBTAINED WITHOUT SEARCH WARRANT, WARRANT FOR ARREST OR SEARCH INCIDENT TO AN ARREST.

ARGUMENT

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF GRAND LARCENY.

The conviction in the lower court was based solely on alleged possession of a weapon, to wit, 357 mangum

pistol, which apparently was from the Pehrson Hardware store (R-35). However, the owner indicated that the gun could have been sold (R-44) and could not testify that the gun was stolen (R-85). Officer Reed of Las Vegas testified that the appellant indicated that the gun belonged to him and that he had purchased it from the man in Salt Lake two months prior (R-88). Another salient fact is that the pistol was not found on the person of the appellant, but rather in a glove compartment of an automobile owned by the driver Bates Anderson, in which two other occupants were present.

Under this state of facts, the law in this jurisdiction is clear. No conviction can stand merely on bare possession when not coupled with other culpatory or incriminating circumstances. *State v. Kinsey,* 77 U. 348, 295 P. 247 (1931). Also, see cases cited therein. A later interpretation of the Kinsey case is found in *State v. Dyett,* 114 U. 379, 199 P.2d 155 (1948) wherein this court cited the Kinsey case, together with *State v. Barretta,* 47 U. 479, 155 P. 343, for the proposition that mere association of an accused with property recently stolen in insufficient. The Dyett court further enunciated the proposition that merely proving constructive possession of recently stolen property will not sustain the burden inasmuch as it would be pushing the role too far to require of one accused of a crime an explanation of his possession of stolen property, when possession could, also, with equal right, be attributable to another. The instant case clearly falls within the framework of the court's language.

The appellants further submits that in order that the prima facie evidence role of recent stolen property may become operative in a given fact situation, such possession must be recent, personal, exclusive, and conscious. *State v. Butterfield,* 70 U. 529, 261 P. 804 (1927). *State v. Morris,* 70 U. 570, 262 P. 107 (1927). Also, see 32 Am Jur., sec 141. There is no doubt that this rule prevails in our jurisdiction.

An illustrative case, setting forth the above rule is found in *Davis v. State* (Alaska), 369 P2d 87 (1962) wherein the court reversed on the grounds that the stolen items found in a garage adjoining the accused house did not show exclusive possession. The Court stated: The Court further stated:

> "Possession to be exclusive must be to the exclusion of all not party to the crime."
>
> "Mere constructive possession, as would be the case where possession is not actual on person is not enough."

The Alaska Court concluded that if other persons have equal rights and facility of access with the accused to the place where stolen goods are discovered, the possession not being exclusive or personal is of no weight.

The appellant urges that the evidence is insufficient to establish personal, exclusive and conscious possession

of recently stolen property and consequently the conviction must fall.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION 6 AND IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1.

The trial court instructed as follows:

> You are instructed that the law of this State includes, as part of the definition of "larceny" the following:
>
> Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.
>
> The term "prima facie," as used in this instruction, means at first sight or as the face of things.
>
> Accordingly, such evidence is presumptive evidence, but does not mean that, unless it is rebutted by other evidence or discredited by circumstances, it becomes conclusive of the fact of guilt.

The appellant contends that the above instruction is insufficient as a matter of law in that said instruction

does not state that possession must be personal, exclusive, and conscious. *See State v. Morris, Supra; State v. Kensey, Supra; State v. Brooks,* 101 U. 584, 126 P.2d 1044 (1942). The appellant further contends that instruction was prejudicial to substantial rights of the appellant.

The prosecution based its entire case upon the theory of recent possession. No evidence was introduced to connect the defendant at the scene of crime other than the possession of the pistol. Possession therefore was the crux of the state's case. Not to have submitted a proper instruction in such circumstances deprived the defendant of his full measure of justice to have his guilt or innocence submitted to the jury under proper legal instructions The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a proper verdict. 53 *Am. Jur., Sec.* 590. An erroneous and incomplete instruction in a material and significant aspect of the case wholly falls short of this purpose.

The term "possession" is a term of art and has special meaning depending on the context in which it is spoken. In various areas of the law, this elusive term has a different and varied meaning. In larceny cases, "possession" has been defined as exclusive, personal, and conscious. See cases cited above. A jury of laymen cannot be capable of affixing the technical meaning of possession without the guidance of the court.

The instant case can be analogized with *State v. Horne* 62 U. 376, 220 P. 378 (1923), wherein this court held prejudicial error was committed when the lower court improperly defined the words "feloniously." The rationale of the court was to the effect that the trial court's definition was too narrow and whereas such terms are well understood to the judges and lawyers, when used instructions to a jury, the terms should be carefully defined. The trial court in this instance failed to give the proper instruction, leaving the jury to surmise, according to their own imagination, what facts would amount to possession in larceny cases. Had the court given the proper instruction, the jury could well have found that the pistol, having been found in a glove compartment of the automobile owned by another and in which the defendant was only one of four occupants, was not in the "possession" of the defendant.

The lower court's error is further aggrevated by the fact that the defendant requested an instruction which clearly and properly defined the term "possession". (T-17). A simple reading of the requested instruction as compared with the court's instruction clearly shows that no part of the request was given, except that portion which comes from the *Utah Statute* 76-38-1, (as amended 1953). The trial court is obligated to properly instruct the jury on the law even though the requested instruction is erroneous. *State v. Scott,* Utah 37 P. 335 (1894). However, the appellant does admit that the requested

instruction was erroneous. The Court in the Scott case set forth the proper role of the trial court when it stated:

> "In a criminal case, the Court should see that the case goes to the jury in a clear and intelligent manner, so that they may have a correct understanding of what it is that they are to decide and it should state to them fully the law applicable to the case. It is to the Court that the accused has a right to look to see that he has a fair trial . . ."
>
> "A jury of inexperienced laymen could hardly be expected to apply the rules applicable to this class of testimony without some assistance from the court." (This case involved an erroneuos instruction with regard to circumstantial evidence.)

Another factor which should be considered is the terminology of the trial court's language wherein the court indicated that larceny is *defined* as recent possession of stolen property. Although much confusion exists, the true rule is that recent possession of stolen property is merely an evidentiary fact tending to establish that ultimate issue of guilt or innocence, 22 *Am. Jur.*, 140. Also, see 101 *Am.* 51, *Rep.* 501. No where can there be found any authority that recent possession is part of the definition of the crime of larceny. To define larceny in the terms set forth by the trial court expands the meaning far beyond the statute and case law. The trial court completely ignored the precedent in our state with regard to this matter. See *State v. Hall,* 105 Utah 151, 139 P.2d 228, (1943), reversed 145 Utah 162, 145 P. 2d 494 (1944)

wherein the court sets forth a proper instruction as applied to the issue raised by the appellant, to wit:

> "If it is found from the evidence beyond a reasonable doubt that someone had committed larceny as charged, that defendant was found in possession of recently stolen goods and that defendant failed to give a satisfactory explanation, there would arise an inference that the defendant committed larceny and that such inference might be considered in determining whether the jury was convinced beyond reasonable doubt of defendant's guilt."

The lower court's instruction would directly mislead the minds of the jury, in that, the jury could find that the appellant was in possession of recently stolen property without satisfactory explanation and thus find him guilty of larceny without finding that the defendant feloniously took or carried away the personal property of another. Compare court's instruction No. 5 and No. 6. This conclusion is inescapable when one considers the fact that the defendant was also charged with burglary in the third degree and the jury failed to return the verdict of guilty in that count, consequently it is apparent that the jury did not find facts sufficient to belief that the defendant entered the hardware store. Having not so found, the jury could not have believed the defendant was involved in the theft. The only fact of which the jury was appraised was possession and if possession is deemed as part of definition of larceny the jury obviously felt that

possession, of itself, was sufficient. This is totally prejudicial to the defendant in that it permits a finding of guilt of larceny on facts which are only legally deemed prima facie evidence of guilt and flys in the face of *State v. Hall, supra.* Also, see *State v. Allen,* 56 U. 37, 189 P. 84 (1920) wherein the definition of larceny did not include possession of recent stolen property. The balance of the court's instruction in no way corrects or alleviates the trial court's error and the appellant submits that instruction no. 6 constitutes prejudicial error and merits reversal.

POINT III.

COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE IN THAT THE EVIDENCE WAS ILLEGALLY OBTAINED WITHOUT SEARCH WARRANT, WARRANT FOR ARREST OR SEARCH INCIDENT TO AN ARREST.

The appellant submits that the evidence produced at the hearing in appellant's motion to suppress indicates that the search of the vehicle in which the appellant was an occupant was without search warrant, arrest warrant and without probable cause to search. The evidence shows that arrest was incident to the search which is in violation of the appellant's constitutional rights. *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed. 1081, 81 S.C. 1684 (1961).

At the time the occupants of the vehicle were approached by the Las Vegas police officer, they were driving into a gas station (R-10) and from all appearances were not violating any laws. The officers observed the registered owner of the vehicle driving. A dispute arose as to what point the occupants were placed under arrest. The officer testified that they were arrested after he observed a 22 pistol in the console (R-12) and the appellant testified that there was no pistol in the console, only cartridges and they were ordered out of the car and held at bay while the driver-owner opened the glove compartment at the order of the officer whereupon the 3 pistols fell out (R-17). It is undisputed that the search was made purely as a matter of procedure for vehicles which are to be towed away (R-13) and not in an effort to secure fruits of the crime, instrumentalities of the crime or for self-protection. *Abel v. U.S.*, 362 U.S. 217, 4 L.Ed. 2d 668, 80 S. Ct. 683.

The search should be condemned as purely exploratory. *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344, 75 L. Ed. 374 (1930), and *U.S. v. Lefkowitz*, 285 U.S. 452, S. Ct. 420, 76 L. Ed. 877, 82 ALR 775 (1932).

Looking at the evidence most favorable to the state, one must conclude that there was no valid arrest. The arresting officer's information that persons in an automobile of the description in which the defendant was an occupant were exchanging license plates was not suffi-

cient to justify an arrest since no misdemeanor was committed in his presence. UCA 77-13-3 (1) (as amended, 1953). Nor was there any facts upon which the arresting officer could reasonably believe that the occupants had committed a felony. UCA 77-13-3 (5) (as amended, 1953).

The sole reason for the search was the fact that it was regular procedure to search an automobile which was going to be towed away (R-13). No "inherent necessity of the situation at the time of the arrest" existed. *Trupiano v. U.S.*, 339 U.S. 669, 92 L.Ed. 1663, 68 S. Ct. 1229, overruled on another point in *U.S. v. Rabinowitz,* 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430. A search, whether incident to an arrest or not, cannot be justified by what turns up. *People v. Brown*, 45 Cal. 2d 640, 290 P.2d 528.

CONCLUSION

The appellant respectfully submits that the lower court erred in giving improper instruction, and in failing to give defendant's requested instructions which was prejudicial to the substantial rights of the defendant; further that the evidence was not sufficient to justify the verdict of larceny and the court erred in denying defendant s motion to suppress. For these reasons, the appellant urges that this court reverse and remand the cause.

Respectfully submitted,

JIMI MITSUNAGA
Legal Defender