1972

State of Utah v. Darrell Eugene Heath : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

DARRELL EUGENE HEATH,
Defendant-Appe

BRIEF OF RESPO

Appeal from the Fourth J
and for Utah County, the Ho
Judge, Presiding.

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STATE OF UTAH,
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vs.

DARRELL EUGENE HEATH,
Defendant-Appellant.

Case No. 12610

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with grand larceny on April 12, 1971, as a result of the theft of one 1965 Comet automobile. He was subsequently bound over to the Fourth Judicial District Court to stand trial.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of grand larceny by a jury on May 27, 1971, and sentenced to an indeterminate term of from one to ten years.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the district court should be affirmed.

STATEMENT OF FACTS

On the evening of April 11, 1971, and the morning of April 12, 1971, a 1965 Comet automobile, owned by Lillian Hales and Larry Hales, was parked in front of their residence at 57 North 6th East in Spanish Fork, Utah (Tr. 19, 28). Between 5:00 a.m. and 5:30 a.m. on April 12, 1971, Lillian Hales and her husband, Duane Hales, heard the motor, to what they said was their 1965 Comet, start (Tr. 12, 22). Lillian and Duane Hales looked out their window and saw what they believed to be their 1965 Comet driving away from their home (Tr. 12, 22). Larry Hales at about 5:30 a.m. was awakened by his father and he promptly called the Spanish Fork Police and the Utah Highway Patrol and reported his car as missing (Tr. 26, 27).

At about 5:40 a.m., Officer Bradford, of the Utah Highway Patrol attempted to pull over a 1965 Comet driven by the defendant but a high speed chase resulted (Tr. 32, 33, 34, 35). The defendant was subsequently apprehended and taken to jail by a Provo City Police Officer (Tr. 35). Officer Bradford never informed the defendant of his legal rights as he did not personally place the defendant under arrest (Tr. 41). The defendant was taken to jail by the Provo City Police (Tr. 35).

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERROR IN REFUSING TO GRANT DEFENDANT'S

FIRST MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE OR IN REFUSING TO GRANT DEFENDANT'S SECOND MOTION TO DISMISS AT THE CONCLUSION OF THE TRIAL.

A. THE STATE DID NOT FAIL TO PROVE, AS A MATTER OF LAW, THAT DEFENDANT TOOK THE 1965 COMET.

Defendant's analysis supporting his contention that the State failed, as a matter of law, to prove that defendant took the 1965 Comet is based on three propositions. First, that mere possession of recently stolen goods is insufficient evidence upon which to base a conviction of larceny. Defendant cites *People* v. *Swazey*, 6 Utah 93, 21 P. 2d 400 (1889), as supporting this contention. Second, that the State failed to show an unsatisfactory explanation for defendant's possession of recently stolen goods. Third, that the State must present rebuttal evidence to defendant's explanation of his possession of the stolen goods.

Defendant correctly states that mere possession of stolen goods is insufficient evidence upon which to base a conviction of larceny, *People* v. *Swazey, supra.* The Court in *Swazey* did state, however:

> "If the property had been found in the defendant's possession immediately after loss, such possession might have been a circumstance to be taken into consideration by a jury, with other circumstances, in arriving at a conclusion as to

> the guilt or innocence of the defendant." *Id.* at 402.

In the *Swazey* case, the ". . . element of recent possession with or without accompanying circumstances, did not exist, and no guilty knowledge could be inferred from the possession." *Id.* at 402. In the case at bar, the defendant did possess stolen goods immediately after loss. According to *Swazey*, that circumstance along with other circumstances are to be considered by the jury and a determination of guilt or innocence is to be made. In the instant case the jury considered the circumstance of possession of the recently stolen car along with other circumstances such as the fact that defendant tried to avoid apprehension by Officer Bradford in a high speed chase through Provo City, when Officer Bradford attempted to stop the defendant (Tr. 33, 34). In considering all of these circumstances the jury concluded that the defendant was guilty of larceny. There was not simply the circumstance of the defendant possessing recently stolen goods but much more. For instance, the defendant had possession of the car almost immediately after Lillian and Duane Hales heard its engine start and saw the car being driven away from the front of their home (Tr. 12, 22). Also, there is the fact that the defendant desperately tried to avoid apprehension by Officer Bradford (Tr. 33, 34).

Appellant further contends that the State failed to show an unsatisfactory explanation on the part of defendant as to the reasons for his possession of the 1965

Comet, Utah Code Annotated § 76-38-1 (1953) states:

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

Appellant cites *State* v. *Potello*, 40 Utah 56, 119 P. 1023 (1911) as supporting his proposition that the State is required to prove the facts of the larceny, recent possession in the defendant, and that he failed to satisfactorily explain his possession. It is only fair to go beyond defendant's discussion of the *Potello* case and fully analyze its meaning and significance. The Court does state that a prima facie case cannot arise unless the state proves the three elements stated above. But, the Court goes on to say the following:

> "We are not holding that a presumption or an inference may not arise against the accused on the mere proof of the larceny and his possession of the recently stolen property. We are holding that under the express wording of the statute the mere proof of such facts alone is not sufficient to make a prima facie case of guilt, and that to make such a case the state, *in the absence of other evidence*, must also prove that the accused failed to satisfactorily account for or explain his possession." *Id.* at 1027. (Emphasis added.)

Appellant argues that the State must prove the three elements in order to get to the jury but this is correct only in the absence of other evidence according to *Potello.* In the case at bar there is other convincing evidence of defendant's guilt which the jury correctly considered in

arriving at its verdict. Further, appellant's attempt to avoid apprehension can indirectly serve as an explanation, or lack of it, of his possession of the stolen automobile.

Defendant in the case at bar voluntarily explained his possession of the 1965 Comet as part of the presentation of his case. The defendant's feeling that his explanation cannot be used by the state in proving larceny is not as expressly condemned by the *Potello* case as it seems. The Court in *Potello* further explained as follows:

> "We now look to the defendant's evidence, of course, he cannot complain of insufficiency of the evidence to sustain the verdict, though the State failed to make a case, if he himself proved one for it. Does, therefore, the evidence on the part of the State, together with that of the defendant, prove the larceny and that the defendant committed it." *Id.* at 1029.

In the instant case all of the evidence taken in sum and as viewed by the jury proves the larceny beyond a reasonable doubt and that the defendant committed it. The judge correctly allowed the case, considering all the evidence, to go to the jury for a determination. In *State* v. *Peterson*, 110 Utah 43, 174 P. 2d 843 (1946), the Court in a larceny case stated a general proposition:

> "A prima facie case is one based upon evidence sufficient to raise a question for determination by the jury. As is often put, if the evidence favorable to the State, with all reasonable inferences and intendments that can be drawn therefrom, could sustain a verdict of guilty the cause

should be submitted to the jury." *Id.* at 845.

The trial judge in this case determined from the evidence that the case was sufficient to submit to the jury and sustain a verdict of guilty. The sufficiency of this evidence is clear from the record and has been stated herein.

The dicta in *State* v. *Potello, supra,* that if the State fails to make a case, the defendant has no complaint if he proves part of the State's case for it has received further support by the Utah Court. In *State* v. *Stockton,* 6 Utah 2d 212, 310 P. 2d 398 (1957), the Court confronted this problem in a case arising out of a conviction for attempt to commit burglary. The defense in *Stockton* presented its evidence after it moved for a directed verdict after the State rested. The Court advanced the following principle:

> "We are of the opinion that defendant, having elected to put on his defense, made all testimony offered available for the jury's consideration." *Id.* at 400.

The Court in *Stockton* cites two authorities for this principle. The first is *State* v. *Denison,* 352 Mo. 572, 178 S. W. 2d 449 (1944). In this case the Missouri court basically stated that if the defense chooses to present evidence rather than stand, the trial court is bound to take the defendant's evidence into consideration insofar as it helped the state's case. See *State* v. *Denison, supra,* at 452. Secondly, the Court in *Stockton* relied on the dicta in *Potello,* and the opinion specifically cites this case as follows:

> "This court in a dicta statement in *State* v. *Potello*, 40 Utah 56, at page 70, 119 P. 1023, at Page 1029, said:
>
> > '. . . of course, he cannot complain of the insufficiency of the evidence to sustain the verdict, though the State failed to make a case, if he himself proves one for it.' " *Id.* at 1029.

The Court in *Stockton* has essentially followed the dicta in *Potello* and held that once the defendant elects to put on his case, all of the testimony offered is available for the jury's consideration.

Defendant also contends that the State had the burden of presenting rebuttal evidence to defendant's explanation of his possession of the 1965 Comet, and if the State could not do so the case must be withheld from the jury. Respondent does not believe the law of Utah requires rebuttal evidence to defendant's explanation. In confronting the problem of whether a situation similar to the one at bar could be given to the jury the court in *State* v. *Hitesman*, 58 Utah 262, 198 P. 769 (1921) stated:

> ". . . when, as here, a defendant has it entirely within his own power to make certain statements or explanations concerning his possession of recently stolen property, and the state is powerless to meet the statements categorically, no one who would be willing to disregard the truth could be convicted of the theft where there were no eyewitnesses to the taking. . . . The jury, in considering all the facts and circumstances in evidency may refuse to give credence to defendant's statements or explanations, or to those of his witnesses, if such statements or explanations, in view

> of all the facts and circumstances, seem unreasonable or not well founded in fact. Where, as here, property recently stolen is found in the possession of the accused, it is for the jury to say whether his explanations and statements respecting that possession are satisfactory or otherwise." *Id.* at 770.

This is what occurred in the instant case. The state presented its evidence and the defendant explained his possession of the recently stolen goods. The State was powerless to categorically meet and contradict the defendant's explanation, so, as the *Hitesman* case points out, it was for the jury to accept or reject the defendant's explanation in view of the facts and circumstances presented by the state. This the jury rightfully did and a verdict of guilty was rendered. *State* v. *Shonka*, 3 Utah 2d 124, 279 A. 2d 711 (1955), also supports the view that a jury can reject an uncontradicted explanation made by a witness. *Shonka* concerned an appeal from a larceny conviction and the court stated therein:

> "Self interest or improbability can always be used to discredit or discount the value of the testimony of a witness and substantive direct evidence, *though uncontradicted* may be disbelieved by a jury when the witness is a party or otherwise interested." *Id.* at 714. (Emphasis supplied.)

In case at bar the Court correctly submitted the question to the jury and the jury could and did refuse to accept defendant's explanation, even though categorically uncontradicted. Moreover, all of the facts and circumstances present in this case, including defendant's ex-

planation, were sufficient for the jury to return a verdict of guilty. Also, it is contended that the defendant's futile attempt to avoid apprehension is at least indirect rebuttal to the defendant's explanation.

B. THE STATE DID PROVE THAT DEFENDANT TOOK THE AUTOMOBILE WITHOUT THE CONSENT OF THE OWNER.

Defendant argues that the state failed to show that both owners of the 1965 Comet, Lillian Hales and Larry Hales, did not consent to the taking of the automobile. Specifically, defendant contends that lack of consent was not shown for Larry Hales and also that the record is devoid of any evidence upon which a jury could find that there was lack of consent on the part of Larry Hales. A review of the record shows that appellant's contention is not supported in fact. Moreover, there are statements in the transcript made by Larry Hales that provide more than sufficient evidence for a jury to make a rational finding. For instance, the following testimony occurred in the trial during direct examination of Larry Hales:

> THE WITNESS: Okay. I looked out the window and my car was missing. So I called the Highway Patrol and I called the Spanish Fork Police.
>
> Q. (By Mr. Gammon) And what did you say?
>
> A. I told them that my car was missing (Tr. 27).

Is this the testimony of someone who may have consented to the taking of his automobile? Would someone

call the police and report that his car was missing if he had consented to its use? This testimony provides sufficient evidence upon which the jury could find lack of consent on the part of Larry Hales. It is difficult to imagine the jury arriving at a different conclusion.

With the State showing the lack of consent on the part of Lillian Hales (Tr. 14, 15) and Larry Hales (Tr. 27) they sufficiently proved this necessary element of larceny.

In *State* v. *Reese*, 44 Utah 256, 140 P. 126 (1914), the court was confronted with a similar issue in a larceny action. The defendant in the *Reese* case argued that necessary want of consent from the railroad company, from which he was convicted of stealing certain cargo, was not sufficiently shown. The court analyzed the problem in this manner:

> "Moreover, where property is taken secretly and without the owner's knowledge, the proof of nonconsent may be inferred from other facts, since it cannot be assumed under such circumstances that the owner consented." *Id.* at 128.

Although the owner in the *Reese* case was a corporation, the same reasoning applies to the case at bar. As in the *Reese* case the nonconsent can easily be inferred from other facts and it cannot be assumed that the owner consented. This is clearly shown, as stated earlier, by the transcript of proceedings at the trial court.

C. THE STATE PROVED AND THE JURY CORRECTLY DETERMINED THAT

DEFENDANT TOOK THE AUTOMOBILE WITH INTENT TO STEAL.

Defendant argues a number of points on this basis for reversal. First, that defendant's intent to steal was shown only circumstantially. Second, that this determination is one for the court and not the jury. Third, that defendant's actions in trying to avoid apprehension was equally consistent with innocence as guilt due to the alleged existence of "flashback" arising from defendant's drug problem.

Defendant cites *State* v. *Dubois*, 64 Utah 433, 231 P. 625 (1924) as supporting his position. In *Dubois* the State proved intent to steal by circumstantial evidence, which defendant contends is not proper. The circumstances in the *Dubois* case, which arose from the theft of livestock, were that the animal was taken by a route which avoided observation, transporting the calf in an automobile, and apparent effort to avoid meeting one of the animal's owners. The court held that these circumstances, among others, justified the jury in finding felonious intent. The circumstances in the *Dubois* case are not any more convincing than the circumstances in the case at bar where defendant desperately tried to avoid apprehension by the police officer. Respondent feels that they are not more convincing.

Defendant's contention that the determination of taking with felonious intent is for the court and not the jury is equally weak. Again, the case of *State* v. *Dubois*, *supra*, provides a convincing answer. After the quotation

from *Dubois* on page 27 of defendant's brief the court continued:

> "As a general rule, the question of whether or not the taking is felonious, is a question of fact to be decided by the jury . . . If the evidence is such that all reasonable minds should arrive at the same conclusion that the taking was without felonious intent, then the question becomes one of law, and the verdict of guilty should be set aside. But if, after a consideration of all the evidence, reasonable minds may differ and arrive at opposite conclusions, the findings of the jury must control." *Id.* at 626, 627.

In reviewing all the evidence in the case at bar it is possible that reasonable minds could arrive at different conclusions and therefore, according to *Dubois*, the findings of the jury must control and that finding is one of intent to steal.

Defendant argues further that his explanation of his attempt to avoid apprehension by the police is equally consistent with innocence as with guilt. He bases this on the alleged existence of drug "flashback" due to his drug use problem and that when he was pulled over by the officer he suffered a "flashback" which caused his reaction, i.e., the high speed chase. Respondent agrees with appellant that in Dr. Washburn's letter to Judge Sorenson of April 14, 1971 (R. 8), it was stated that the defendant has a serious drug problem. But, this letter does not make defendant's explanation of his actions as perfectly plausible as defendant suggests. There was no mention in Dr. Washburn's letter of the existence of a

drug "flashback" problem with the defendant. Seemingly if this phenomenon existed with defendant and it was in fact a serious problem it would have been mentioned by Dr. Washburn. The only mention of the existence of "flashback" was by the defendant. This explanation the jury determined not to give credence, but accepted the state's evidence in its stead.

POINT II.

THE DEFENDANT WAS REPRESENTED BY EFFECTIVE COUNSEL WHICH MET THE DEFENDANT'S CONSTITUTIONAL GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

There is certainly no question that the criminal defendant has the constitutional right to the assistance of counsel and that the counsel provide reasonably effective assistance as opposed to errorless assistance. See *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *MacKenna* v. *Ellis*, 280 F. 2d 592 (5th Cir. 1960), modified 289 F. 2d 928.

The defendant contends that the totality of events and the representation as a whole indicates the defendant was inadequately and ineffectively represented. Respondent feels that a review of the entire record and specifically the transcript reveals effective action and a vigorous defense on the part of the defendant's attorney. This claim by defendant should be carefully looked at before a determination of the adequacy of counsel is made. The

Utah Supreme Court has stated that:

> ". . . this claim, now the last refuge of the guilty, that 'my lawyer was incompetent' should be carefully looked at." *Jaramillo* v. *Turner*, 24 Utah 2d 19, 465 P. 2d 343 at 344 (1970).

A review of the record in the case at bar does not show lack of real concern by the defendant's attorney but rather a genuine and active defense.

In *State* v. *Farnsworth*, 13 Utah 2d 103, 368 P. 2d 914 (1962), the court would not lend credence to the defendant's argument that he was denied a fair trial because of the incompetency of counsel. This was because everything done by the attorney could rationally find explanation in a legitimate exercise of strategy. See 269 P. 2d 914 at 915. In the *Farnsworth* case the defendant's lawyer waived the preliminary hearing, waived a jury, made no opening statement, failed to make objections to introduction of evidence, and only cross-examined one of the State's witnesses. The court stated that upon reviewing the record it could not be shown that the defendant was not fairly and competently represented. In the case at bar, where the defendant's counsel more than adequately performed the procedures not performed in the *Farnsworth* case, there is not a single action or inaction by counsel which could not be demonstrated as being an exercise of strategy. This is clearly demonstrated by the record.

A review of the transcript shows a vigorous defense on the part of the defendant's counsel. To cite just a few

examples from the transcript it can be seen that the defendant's attorney objected to and defended his objection to the admission of evidence (Tr. 42, 43), that counsel vigorously objected to the State's motion to amend the information (Tr. 46, 47, 48), that both witnesses for the defendant stated that they had discussed that case with the defendant's attorney prior to their testimony in court (Tr. 61, 66). These examples are just a few of many examples showing that the defendant had strong representation.

The Utah Supreme Court has set up certain standards to determine whether counsel for a defendant in a criminal action has adequately represented his client. In *Alires* v. *Turner*, 22 Utah 2d 118, 449 P. 2d 241 (1969), a habeas corpus action, the court stated that the constitutional right to counsel is ". . . not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused." *Id.* at 243.

The defendant alleges that his attorney made only short visits with him before the trial and was afforded only a short discussion with his attorney prior to the preliminary hearing. This allegation is not raised by the record on appeal and is therefore not properly before this Court. Suffice it to say, however, that a short conference does not mean the lawyer is not preparing or making a good defense. This court in *Strong* v. *Turner*, 22 Utah 2d 294, 452 P. 2d 323 (1969), in considering a similar issue, stated:

> ". . . no deficiency in that regard follows solely from the fact that the conferences were relatively brief. A conference is not inherently wrong simply because it does not take a long time." *Id.* at 324 and 325.

The defendant, on appeal, specifically cites as an example of his counsel's alleged unconstitutionally inadequate representation the alleged failure of counsel to investigate and assert a particular defense. This defense is the alleged existence of a drug "flashback" with the defendant. Defendant's brief asserts that the attorney failed to investigate and assert this defense at trial. A review of the record shows that this alleged "flashback" phenomenon was presented by the defense for the jury's consideration. In direct examination of the defendant by defendant's counsel this "flashback" phenomenon was presented. The following dialogue took place.

> "Q. Now, would you tell us what happened when the officer — did you ever see a signal from the officer?
>
> A. Well, no, not really. I just kind of blacked out.
>
> Q. Was there any reason for this?
>
> A. Well, they call it a flashback. . . .
>
> Q. What is this 'flashback' that you speak of?
>
> A. It's a flash drugs. You don't know what is happening. You just kind of flashout. . . ." (Tr. 70).

It can be seen from this dialogue that the defendant's

counsel helped, through his questioning, to have the "flashback" phenomenon presented to the jury. The fact that the jury chose not to accept this explanation does not mean that his counsel did an inadequate job.

The defendant's drug problem was mentioned in the record but once aside from the transcript. This is in a letter from Dr. Washburn, at the Community Mental Health Center, to Judge Sorensen (R. 8). In this letter Dr. Washburn discussed the defendant's drug problem. In his discussion Dr. Washburn never mentioned the defendant's alleged drug "flashback" problem. It seems that if the defendant had such a problem it would have been mentioned by Dr. Washburn.

It can clearly be seen by reviewing the record that the defendant was enthusiastically represented by counsel and that the defense presented the defendant's alleged "flashback" explanation to the jury.

As was stated in the *Farnsworth* case:

> "The privilege of an accused to the assistance of counsel is a fundamental right which means a right to a reputable member of the bar who is willing and in a position to honestly and conscientiously represent his interests." 368 P. 2d 914 at 915.

This is what the defendant had in the instant case; a reputable member of the bar who honestly and conscientiously represented his interests. The record compels this conclusion and thus the conclusion that the defendant had constitutionally adequate counsel.

Respondent does not address itself any further to the allegations of incompetency of counsel raised by the affidavit of Appellant. It is well settled that on appeal the Supreme Court may only consider items properly before it as part of the record on appeal. *People* v. *Callaghan*, 4 Utah 49, 63, 6 P. 49 (1885); *Atkinson* v. *Pellegrino*, 110 Utah 363, 173 P. 2d 543 (1946); *Adamson* v. *Brockbank*, 112 Utah 52, 185 P. 2d 264 (1947). The mere physical presence of a document in the file is irrelevant if it is not properly part of the record on appeal. *Adamson* v. *Brockbank, supra.*

The present record on appeal was certified and transmitted to the Supreme Court by the County Clerk on August 4, 1971. Appellant's affidavit is not part of that record. The affidavit was prepared on September 22, 1971 and filed with the Supreme Court on September 23, 1971 with no indication that any proper procedures were complied with to make it part of the record. Clearly any allegations made in the affidavit may not be considered on this appeal.

CONCLUSION

The Respondent contends that the sum of evidence presented to the jury in this action was sufficient for a verdict of guilty to be rendered. The State proved that the automobile was taken without consent of the owners and the defendant failed to satisfactorily explain his possession of the recently stolen automobile.

Also, it is contended that the record as a whole shows

that the defendant's lawyer performed his duties in preparing and presenting a defense in an exemplary manner. The defense was such as to completely dispel any contention that the defendant was denied his constitutional right to adequate counsel.

For the above-stated reasons, the Respondent respectfully requests that the conviction of the defendant for grand larceny be affirmed.

Respectfully submitted,

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