1971

State of Utah v. Gary Winger : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
GARY WINGER,
Defendant-Appellant.

Case No. 12314

BRIEF OF APPELLANT

Appeal from a Conviction of Grand Larceny in the Fourth District Court of Salt Lake County
Honorable Maurice Harding, District Judge

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STATEMENT OF THE CASE

This is a criminal proceeding in which the Defendant Gary Winger was charged with grand larceny in violation at Title 76, Chapter 38, Section 4, Utah Code Annotated (1953), by information filed in the District Court of Utah County, State of Utah on August 25, 1970.

DISPOSITION OF CASE BY LOWER COURT

The Defendant was tried before a jury, commencing September 14, 1970 before the Honorable Maurice Harding. Gary Winger was found guilty by a verdict of the jury, entered September 14, 1970, of the crime of grand larceny and sentenced to confinement in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant Gary Winger seeks a reversal of his conviction.

STATEMENT OF FACTS

On August 5, 1970 a television set was taken from the home of Mr. and Mrs. Clinton Betts in Pleasant Grove, Utah. Sam Robinson, Jr. and his mother, Donna Robinson, neighbors of the Betts, observed a white, or light colored, 1963 Ford with a noisy muffler or pies (Tr. 54) in the vicinity of the Betts home on August 5, 1970, but they were not able to identify the occupants thereof nor definitely establish any connection between this vehicle and the taking of the television set.

On August 6, 1970 Defendant Winger was asked by a person named Steve Villiard to deliver a television set for him. Mr. Winger contacted Paul K. Biggs and asked him to assist with the delivery. The two went to the home of Mr. Villiard where they picked up a television set covered by a bedspread. The television and the bedspread were loaded in Mr. Biggs' car and, as they had been instructed to do, Mr. Biggs and Mr. Winger then drove to a parking lot at 900 East and 5600 South in Salt Lake where they met Thomas W. Bartlett and James C. Roderick, as they had been told they would.

All four people proceeded to Mr. Bartlett's house where the television set was unloaded from Mr. Biggs' car — a white 1963 Ford, but one which, ac-

cording to Mr. Bartlett, did not make a noise that was "loud or rumbling" or "excessive" or a louder noise than any other older Ford automobile (Tr. 26, 27). Mr. Bartlett purchased the television from Mr. Winger for $220. (Mr. Winger had been told by Mr. Villiard that he could keep anything over $200 received for the set — Tr.77).

The television set which Mr. Winger received from Mr. Villiard and sold to Mr. Bartlett was the same one which had been taken from the home of Mr. and Mrs. Betts.

The contact with Mr. Roderick, who arranged the sale to Mr. Bartlett, was made by someone named Steve with a last name that "sounds like" Villiard (Tr. 36).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED BY THE STATE WAS INADEQUATE IN VIEW OF THE REQUIREMENTS OF LARCENY AND THE BURDEN WHICH MUST BE CARRIED BY THE STATE IN CRIMINAL CASES.

Utah Code Annotated 76-38-1 (1953) defines "larceny" as "the felonious stealing, taking, carrying, leading or driving away the personal property of another." Under this definition, it is not enough to prove that the accused had possession of stolen property, even if he knew it to be stolen (*State vs. Merritt*, 67 Utah 325, 247 Pac. 497, 500 (1926)). There is a separate statute covering the receipt of

stolen property (Utah Code Annotated, 76-38-12 (1953)), and if this is all the State is able to prove, the accused should be charged under this statute and not with the offense of larceny.

Appellant submits that the State did not prove that he participated in a "stealing, taking, carrying, leading or driving away." The second part of §76-38-1 does provide that,

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

However, this court has construed this provision as not relieving the State of its fundamental burden of proving the entire case against the accused. In the case of *State vs. Wood*, 2 Utah 2d 34, 268 P. 2d 998, 100 (1954) the court held that,

> "The state must prove not only the larceny and recent possession but also that he failed to make a satisfactory explanation of his possession."

The evidence presented by the State *did not* establish that Appellant took the television set. The most that can be said for it is that it placed Appellant in possession of a recently stolen object.

After the State had rested, Defendant Paul K. Biggs took the witness stand and clearly and fully explained the circumstances under which he and Appellant obtained possession of the television set. His explanation was not inconsistent with any facts con-

tained in the State's case, it was not contradicted by any rebuttal testimony presented by the State (none was offered) and Mr. Biggs was not impeached in any way as a witness.

In fact, his explanation was remarkably consistent with testimony presented by one of the State's witnesses. Mr. Biggs testified that a person by the name of Steve Villiard delivered the television to him (Tr. 74), that it was Mr. Villiard who had initially contacted Appellant regarding delivery of the set (Tr. 74) and that Mr. Villiard was to receive $200 of the price paid for the set (Tr. 77). James C. Roderick, the State's third witness, testified that he was initially approached by someone named Steve (Tr. 31) whose name "sounds like" Villiard (Tr. 36), and that all arrangements concerning the proposed sale were made with this same person (Tr. 31).

We are left with possession on the part of Appellant of recently stolen property and a consistent, uncontradicted explanation for such possession. In view of a number of decisions of this court relating to what must be established in order to have a valid conviction, Appellant submits that the State's proof in the instant case was clearly inadequate. In *State vs. Whitely*, 100 Utah 14, 110 P. 2d 337 (1941) the court said:

> "The State, in all cases where the presence of the accused is necessary to render him responsible, must prove that he was there as part of its case; and if from all the evidence there ex-

> ists a reasonable doubt of his presence, he should be acquitted."

Clearly, larceny is an offense which requires the "presence of the accused" and such presence was not established by the State.

In the case of *State vs. Lamb*, 102 Utah 403, 131 P. 2d 805 (1942) the court quoted language with approval from the earlier decision of *People vs. Scott*, 10 Utah 217, 37 Pac. 335 (1894) requiring the prosecution to

> "not only show by a preponderance of evidence that an offense was committed, and that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt."

In the *Lamb* case the court concluded that,

> ". . . if two reasonable hypothesis are pointed out by the evidence and one of them points to the defendants' innocence, it would then be difficult to see how any jury could be convinced beyond a reasonable doubt of the defendants' guilt."

Under the evidenc presented in the instant case, the account of Paul K. Biggs is surely at least a reasonable hypothesis. In view of its uncontradicted nature it is more; it constitutes the most logical explanation of the possession of the televison set by the de-

fendants. To conclude otherwise would reverse the constitutional presumption of innocence. Inasmuch as this explanation is inconsistent with guilt on the part of the defendants, it is difficult to understand how the jury could have concluded that they were guilty "beyond a reasonable doubt."

Under the authority of the statutes and cases cited above and the clearly inadequate proof presented by the State, it was error for the trial court to have allowed the case to go to the jury and Appellant's convction should be reversed.

POINT II

APPELLANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF UTAH WERE VIOLATED WHEN THE PROSECUTOR COMMENTED ON HIS FAILURE TO TAKE THE WITNESS STAND AND WHEN THE PRESECUTOR INTENTIONALLY BROUGHT OUT AND EMPHASIZED THE FACT THAT THE DEFENDANTS HAD REFUSED TO MAKE ANY STATEMENT TO THE ARRESTING OFFICERS.

The Fifth Amendment to the United States Constitution provides that,

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

Article I, Sec. 12 of the Utah Constitution reads as follows:

> "The accused shall not be compelled to give evidence against hmself."

Appellant has submitted to the court an affidavit wherein he reports his best recollection of certain remarks made by Deputy District Attorney Ray E. Gammon in the course of his closing argument to the jury. As is often the case, the closing arguments of counsel were not reported by the court reporter and, in view of their obvious prejudical impact, Appellant felt that the court should be aware of them and has attempted to bring them to the attention of the court in this manner. The remarks suggested that Appellant's failure to testify was an indication of his guilt.

The right to reman silent is fundamental to our system of criminal justice. We place on the prosecution the burden of proving any criminal charge and allow the accused to decide whether or not to take the witness stand and testify in his own behalf. If he chooses not to do so, the jury may draw certain inferences from the silence — the drawing of such inferences is impossible to control. However, for the prosecutor to argue that a certain inference should be drawn is improper and amounts to constitutional error.

In the first place, there are many possible explanations for a defendant's decision not to take the witness stand, including nervousness, fear that he will not be able to stand up under cross examination and an unwllingness to have a past criminal record exposed through impeachment-oriented cross examination.

In the second place, such comments by the prose-

cution undermine the basic right to remain silent. In effect, the accused becomes a witness against himself by his silence. In the recent case of *Griffin vs. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S. Ct. 1229 (1965), the court had before it the question of whether the prosecutor or the court can properly comment on the accused's failure to testify in his own behalf. A California statute permitted such comment and during the course of the trial in queston, both the court and the prosecutor commented on the accused's silence. The court said that,

> ". . . comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional prvilege. It cuts down on the privilege by making its assertion costly."

The Court went on the hold that,

> ". . . the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

Under the authority of the *Griffin* case, the remarks made by Mr. Gammon were clearly prejudicial error. Appellant urges that certain other testimony that was apparently intentionally brought out by the prosecution also amounted to prejudicial error, for essentially the same reasons. In the course of Mr.

Gammon's examination of Officer Brent Bullock, the officer was asked in detail about the pre-interrogation warning given to the defendants and then he stated that both refused to talk to him (Tr. 69). Mr. Gammon didn't then drop the subject, instead he inquired further and again, in response to his questions, Officer Bullock stated that the defendants had declined to make a statement (Tr. 70). As if this were not enough, Mr. Gammon, in his cross-examination of defendant Paul K. Biggs, asked him why he had not talked to the officers (Tr. 86).

Mr. Gammon, in his preparation of the case for trial, must surely have talked with Officer Bullock and learned that the defendants had chosen not to make a statement. His apparently intentional injection of this irrelevant and prejudicial fact into the trial should also be held to have amounted to reversible error. In the required pre-interrogation warning, suspects are told that they do not need to make a statement of any sort. If they do as they have been told they have a right to do and decline to talk to the officers, this fact should not then be used against them at the time of the trial.

On this very question, the Court of Appeals for New Mexico, in a 1969 decision, held a much less prejudicial comment made by the prosecutor to be reversible error. In *State vs. Ford,* 80 N.M. 649, 459 P.2d 353 (1969), the defendant was convicted of burglary and larceny and an appeal was taken. The prosecutor, in his closing arguments at the trial, stated that the

accused failed to protest his innocence at the time of arrest. The New Mexico court held:

> "The statement employed by the prosecution in summation unquestionably suggested to the jury that [defendant] at the time of his arrest did not proclaim his innocence. By this method the State undertook to invoke a tacit admission by silence.
>
> [Defendant] was under no duty to say anything and silence should not have been employed against him. Having been arrested and charged with a crime he had the right to remain silent. It is fundamental that an inference of guilty may not be drawn from the mere failure to speak when under arrest. *Miranda vs. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
>
> In *Gillison vs. United States*, 130 U.S. App. D.C. 215, 339 F.2d 586 (1968). The court, considering a like situation said: 'In *Griffin vs. State of California* . . . the Supreme Court held that the Fifth Amendment forbids the prosecutor from commenting on an accused's failure to testify on his own behalf. The distance between that issue and the prosecutor's comments here about the accused's failure to make an exculpatory statement upon arrest is infinitesimal. Indeed, in *Miranda vs. State of Arizona*, the Supreme Court recognized the applicability of *Griffin* to this situation, when at Footnote 37, the court noted that 'in accord with our decision today, it is unpermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he*

stood mute or claimed his privilege in the face of accusation.'" [Emphasis the Court's]

The New Mexico Court went on to cite *United States vs. Mullings*, 364 F.2d 173 which stated, in analyzing the same point:

> ". . . It is well settled that an inference of guilt may not be drawn from a failure to speak *or to explain* when a person has been arrested."

There can be no question that, in the instant case, the remarks made by the prosecution and elicited by the prosecution from the police officer with regard to the defendants' refusal to speak were prejudicial to the defendants and appellant urges that even if these remarks were the only error committed they would be sufficient to require reversal as they violate the express mandate of the U.S. Supreme Court in *Griffin* and *Miranda*.

There are many possible explanations of a person's desire to not communicate with the police, including a desire to obtain the assistance of counsel, extreme nervousness and a desire to first communicate with other who might be in a position to help explain awkward circumstances. The obvious reason for injectiong evidence concerning the accused's refusal to speak into a trial was to suggest that the accused must have had something to hide or no adequate explanation to give or he would have fully cooperated and communicated with the police. In fact, as outlined above, there may have been other entirely legitimate reasons for the silence.

Here again, the silence of the accused is used as evidence or as the basis for prejudicial inferences and the accused, by his silence, becomes a witness against himself; contrary to the spirit and literal wording of the constitutional provisions referred to above.

Both the comments by the prosecutor concerning Appellant's silince during the trial and his intentional elicitation of information concerning the defendants' silence at the time of their arrest constituted serious attempts to erode Appellant's fundamental right to remain silent, as guaranteed by the Constitution of the United States and the State of Utah. Both *Griffin* and *Miranda* clearly held that such attempts in either federal or state proceedings should not be ollowed.

Appellant did not receive a fair trial and his conviction should be reversed.

POINT III

UTAH CODE ANNOTATED, 76-38-1 (1953) SHOULD BE HELD TO BE UNCONSTITUTIONAL SINCE IT CASTS UPON THE ACCUSED THE BURDEN OF PRESENTING EVIDENCE IN THE FORM OF AN EXPLANATION WHEN HE IS FOUND IN POSSESSION OF RECENTLY STOLEN PROPERTY.

Instruction 11 which was given by the court was based on the provisions of Utah Code Annotated, 76-38-1 (1953), which makes recent and unexplained possession of recently stolen property "prima facie evidence of guilt."

In the fairly recent case of *State vs. Wood*, supra, the court considered this statute and said:

> "The contention that this portion of the statute forces upon the defendant the burden of proving his innocence has been rejected by this court in many instances. The state must prove not only the larceny and recent possession but also that he failed to make a satisfactory explanation of his possession."

Appellant respectfully suggests that, notwithstanding the fact that this part of the statute has been consistently unheld by this court over the years, it is time to take another look at it in the light of pertinent constitutional provisions and recent decisions regarding the rights of the accused.

The court pointed out in the *Wood* decision that the statute doesn't affect the State's burden of proof and that part of the burden must be to prove that the accused "failed to make a satisfactory explanation." Under this language, if the accused declines to make any explanation at all, as he has a constitutional right to do, this would undoubtedly be construed as an inadequate explanation and the State's burden as to this phase of the suit would be met. Thus, the accused places himself in jeopardy if he relies on his constitutional right to remain silent.

The *Wood* case provides an excellent example of the dilemma in which this places the accused. If he chooses not to make a statement, his silence will enable the State to meet its burden concerning an in-

adequate explanation. If, on the other hand, he decides to take the witness stand and attempt an explanation, he risks having any criminal record that he may have exposed in the form of impeachment-oriented cross examination.

As stated above, both the Utah and United States constitutions give defendants the right to remain silent. The effect of the Utah statute, particularly where the accused has a criminal record, is to damn him if he does take the stand and damn him if he doesn't. The *Griffin* decision strongly condemns such undermining of the Fifth Amendment privilege.

Appellant urges the court to reconsider and declare unconstitutional that portion of 76-38-1 referred to above. Despite the language of the *Wood* decision, it seems clear to Appellant that this statute has the effect of placing a burden of proof on the defendant in a case such as this one, when it is fundamental to our system of criminal justice that the prosecution has the complete burden of proof. The statute also serves to undermine the constitutional right of the accused to remain silent during the trial by placing him in jeopardy if he does not testify.

If upheld on this appeal the statute (Sec. 76-38-1) will stand for the proposition that being possessed of recently stolen property is sufficient evidence for a conviction of larceny. It will reverse the constitutional presumption of innocence and shift the burden of proof from the State in a criminal matter

to the defendant. All of these concepts are violative of all the prior criminal law of the State of Utah as expressed by the Utah Supreme Court. The Utah Supreme Court had occasion to explore these problems in the cases cited below.

In *State vs. Whitely*, supra, the court stated:

> "The burden of proving guilt must always rest upon the prosecutor . . . to charge that the defendant has the burden of establishing an alibi is plainly erroneous, for the burden of proving guilt never shifts from the government. *Glover vs. United States*, 147 F.426 (8th Cir.); *Falgout vs. United States*, 279 F. 513 (5th Cir.); *Cangelosi vs. United States*, 19 F.2d 923 (6th Cir.); *United States vs. Vigorito*, 67 F.2d 329 (2nd Cir.).
>
> In one of the earliest cases in the Utah Reports, this court is reported as having stated: 'In no criminal case is the burden of proof ever shifted from the prosecution to the defense.'" *State vs. Tracy*, 1 Utah 343.

In *State vs. Dickson*, 12 Utah 2d 57, 361 P.2d 412 (1961), the court stated with regard to the presumption of innocence in criminal matters:

> "Everyone, including a convicted felon is presumably innocent and the State *must* present sufficient credible evidence to convince a jury of guilt beyond a reasonable doubt."

And again, in *State vs. Sullivan*, 6 Utah 2d 110, 307 P.2d 212 (1957), the Utah court held:

> "The presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt are of utmost importance as safe-

guards against the possibility of convicting the innocent, and courts scrupulously adhere to them notwithstanding difficulties encountered and the possibility that some guilty may escape punishment."

In the case at hand the prosecution failed to produce any evidence linking the defendant with the crime of larceny other than mere possession. The evidence submitted by the defendants to show how they came into possession was never refuted; it was apparently merely ignored or rejected out of hand.

If this conviction is allowed to stand it will have the effect of relieving the prosecution of the burden of proof, and in addition, since the prosecution failed to establish even the minimum essential elements of the crime, the conviction reverses the presumption of innocence and requires that an accused party in possession of recently stolen property affirmatively come forward and prove that he did not commit the crime of larceny. Both of these concepts are, in addition to being inconsistent with the traditional and well-established criminal law of the State of Utah, cited supra, also totally antithetical to traditional notions of Anglo-American justice and jurisprudence.

POINT IV

THE PREJUDICIAL EFFECT OF THE ERRORS DISCUSSED IN POINTS II AND III IS OBVIOUS SINCE APPELLANT WAS CONVICTED UPON THE BASIS OF INADEQUATE EVIDENCE.

As discussed in Point I, the evidence presented

by the State was simply insufficient to prove that Appellant was guilty of grand larceny, as that crime is defined by the statutes of this state and as it was defined by the trial court's instructions (instruction #7 listed as an element that defendants "took possession of and carried away" the television set).

It is, therefore, obvious that the defendants were convicted on the basis of something other than proof beyond a reasonable doubt of the elements of the crime charged. It is logical to assume that decisive factors included the comments of the Deputy District attorney concerning Appellant's failure to testify, his intentional presentation of evidence concerning the defendant's refusal to talk to the officers and the giving of an instruction based on a statute that improperly places on the accused the responsibility of making an explanation.

By no stretch of the imagination can it be said that the errors made in the course of this trial were "harmless." To the contrary, they were highly prejudicial, in violation of Appellant's basic constitutional rights and they apparently had such an influence on the minds of the jurors that two men were convicted of an offense on the basis of clearly inadequate proof.

CONCLUSION

For the reasons set forth herein, the conviction of appellant should be reversed. If the State then

chooses to file a charge against him based on some other offense, such as receiving stolen property, a proper trial can then be held thereon. It is tragic to have a man convicted of a felony and imprisoned on the basis of the type of evidence which was presented in the lower court.

Respectfully submitted,

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