1971

State of Utah v. Gary Winger : Brief of Respondent

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

CONSTITUTIONS CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

GARY WINGER,
Defendant-Appellant.

Case No. 12314

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an appeal following the appellant's conviction of the crime of grand larceny in violation of Utah Code Ann., § 76-38-1 (1953).

DISPOSITION OF CASE IN LOWER COURT

The appellant, Gary Winger, was convicted of the crime of grand larceny in violation of Utah Code Ann., § 76-38-1 (1953) on the 25th day of August, 1970, following a jury trial, the Honorable Maurice Harding, Judge, presiding.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

On Wednesday, August 5, 1970, a Motorola color television set worth more than $50 (T. 16) was discovered stolen from the home of Mr. Clinton Betts of Pleasant Grove, Utah, who was the owner of the set (T. 11, 13). Earlier that evening Mrs. Sam Robinson, a neighbor of Mr. Betts, and Mrs. Robinson's son, Sam Robinson, Jr., were aroused by the rumbling of an automobile. They observed a white Ford 1963 model automobile making the noise and they observed men walking from this automobile to the Betts' residence (T. 57, 58).

The following day, August 6, 1970, Detective Dean Carr of the Salt Lake County Sheriff's Office went to 5600 South Ninth East, in Salt Lake City, Utah, and observed a white 1963 Ford model automobile being driven by the co-defendant Paul K. Biggs and it was being followed by a 1956 Chevrolet (T. 42). The two vehicles then stopped, along with a third automobile, and a Motorola color television set was taken from the trunk of the white 1963 Ford and delivered to the home of Thomas Bartlett (T. 28). The driver of the 1956 Chevrolet was the appellant, Gary Winger (T. 42).

Upon delivery of the television set Mr. Bartlett negotiated the terms of sale with the appellant, the driver of the 1956 Chevrolet, and he then paid the appellant $220 in consideration for the Motorola television set (T. 20, 21).

The defendants were then arrested on the morning of August 7, 1970, by Officers Bullock and Blackhurst of the Pleasant Grove Police Department (T. 69).

ARGUMENT

POINT I.

THE EVIDENCE PRESENTED BY THE STATE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT WAS GUILTY AS CHARGED IN THE INFORMATION FOR THE CRIME OF GRAND LARCENY.

It is the contention of the appellant that the State failed in its burden of proof leading to the conviction of the appellant. As can be seen, however, from Utah Code Ann., § 76-38-1 (1953), the State did complete the chain of prima facie evidence of guilt. The section reads:

> "Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. *Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.*" (Emphasis ours.)

The fact that the State did show the stolen property of Mr. Clinton Betts (one Motorola color television set) (T. 11, 13) to be in the possession of the appellant (T. 20, 21) without a satisfactory explanation as to ownership was prima facie evidence of guilt; to-wit: the inference that the appellant did commit the larceny. This inference with other evidence presented by the State (T. 57, 58, 42, 28, 20, 21) was all considered by the jury and the defendant was found, beyond a reasonable doubt, to be guilty of the larceny of the television set (R. 13).

In light of such evidence and findings by the jury, the appellant continues to assert that his conviction was based on insufficient evidence. Appellant contends that testimony given by Mr. Biggs (T. 74) and Mr. Roderick (T. 36) tends to infer that some yet unidentified Mr. Villiard was the person who committed the larceny and that the appellant was a mere "middleman" in the disposal of the television. However, the fact that such unsupported testimony was given does not deter from the State's case since it is the function of the jury to weigh the evidence and base their verdict on all of the circumstances. In *State* v. *Hitesman*, 58 U. 262, 198 P. 769 (1921) this court said:

> "While the law is to the effect that a jury may not arbitrarily ignore or disregard credible evidence, then, nevertheless, need not blindly accept every explanation or statement that the one who is accused of the larceny may make in his own exculpation. *The jury, in considering all the facts and circumstances in evidence, 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.*" (Emphasis ours.)

In is also well established in this state that since the jury is the sole trier of fact, they may give whatever weight to a witness's testimony as they see fit in light of the facts and circumstances presented. In the instant case, the appellant would ask this Court to usurp that highly important function of the jury on the basis that a co-defendant, Paul K. Biggs, testified that he and the appellant obtained the

television set from someone named Villiard (Tr. 74). However, on numerous occasions, this Court has determined that the jurors are the sole judges of fact and the credibility of witnesses, of the weight and effect of such evidence, and what inferences are to be drawn from that evidence. *State* v. *Sullivan,* 6 U. 2d 110, 307 P. 2d 212 (1957); *State* v. *Crank,* 105 U. 332, 142 P. 2d 247 (1943); *State* v. *Estrada,* 119 U. 339, 227 P. 2d 247 (1951); *State* v. *Moore,* 111 U. 458, 183 P. 2d 973 (1947).

Finally, the appellant concludes that in light of Mr. Biggs' testimony and the possession of the television set by the appellant, that "it is difficult to understand how the jury could have concluded that they were guilty 'beyond a reasonable doubt'" (Appellant's Brief 7). The appellant has ignored two essential points.

First, there was sufficient evidence in light of Utah Code Ann., § 76-38-1 (1953) to convict the appellant. Mrs. Sam Robinson and Sam Robinson, Jr. testified that a white 1963 Ford was parked outside the home of Mr. Betts on the night of the larceny (Tr. 57, 58, 49). It was also a white Ford that the television set was removed from on the day of the sale to Mr. Bartlett (Tr. 20, 33) as testified to by Mr. Bartlett and Mr. Roderick. It was also the appellant who did the bargaining for the $220.00 consideration paid by Mr. Bartlett for the television set (Tr. 20, 21). In *State* v. *Kinsey,* 77 U. 348, 295 P. 2d 155 (1931), this Court said:

> "Possession of articles recently stolen, when coupled with circumstances of hiding or concealing the same, *or of disposing or attempting to dispose*

> *of them, or of making false or unreasonable or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the commission of the offense.*" (Emphasis ours.)

Second, appellant ignores that the jury is the trier of fact. Again, the state did establish prima facie evidence of guilt as required by Utah Code Ann., § 76-38-1 (1953). Therefore, there was the inference of the appellant's guilt and it was up to the jury to consider and weigh all of the evidence in light of all of the circumstances and either find the appellant guilty or not guilty. *State* v. *Allred,* 16 U. 2d 41, 395 P. 2d 535 (1964); *State* v. *Wood,* 2 U. 2d 34, 268 P. 2d 998 (1954). The jury did exercise this function and did find the appellant guilty beyond a reasonable doubt in light of all of the circumstances and respondent submits that the verdict should be affirmed.

POINT II.

AT NO TIME WERE THE CONSTITUTIONAL RIGHTS OF THE APPELLANT VIOLATED BY WAY OF THE CONDUCT OF THE PROSECUTOR.

The appellant ardently contends that his constitutional rights were violated. The respondent submits, however, that a close reading of the trial transcript clearly shows that no such violations ever existed.

The respondent cannot agree more with the appellant in his interpretation of the Fifth Amendment to the United States Constitution and Art. I, Sec. 12 of the Utah Constitution. Both, for obvious reasons, do provide immunity

to the defendant in cases such as the instant case. The respondent also submits that the precedent established in *Griffin* v. *California*, 380 U. S. 609 (1965), is fundamental to our system of criminal justice. However, there was at no time a violation of any such right in the instant case. The appellant alleges, and has submitted to this Court an affidavit to support that allegation, that the prosecutor made certain prejudicial remarks in his closing argument regarding the appellant's failure to testify.

The respondent stipulates that the prosecutor in his closing argument did make reference to the appellant's failure to testify and an affidavit to that effect has been submitted to this Court. However, respondent submits that those comments were harmless because of the extensive evidence presented by the State which was sufficient enough to find the appellant guilty of the crime charged (Tr. 11, 13, 16, 20, 21, 28, 42, 57, 58, 69). Therefore, any possible prejudice that may have resulted from the prosecutor's comments in closing cannot be regarded as harmful.

Appellant also contends that the prosecutor impaired his constitutional rights at trial when questioning Officer Brent Bullock about the arrest of the appellant. He infers that the prosecution, through examination tactics, indirectly commented upon the appellant's failure to talk to Officer Bullock. A close reading of the transcript does not bear out such an allegation. When read in context, it is obvious that the prosecution in his first question to Officer Bullock, was showing that the appellant was not deprived of any pretrial constitutional rights. It was the prosecu-

tor's intent to establish that the proper warning was given the appellant at the time of arrest, and any comment by Officer Bullock as to the appellant's refusal to talk was not implied in the prosecutor's question (Tr. 69).

The prosecutor later asked Officer Bullock if he had since talked to the appellant. Officer Bullock discussed at length this second confrontation with the comment that the appellant would not answer. Again, if read in context, at no place in the question by the prosecutor is there an implied answer as the appellant contends (Tr. 70).

Finally, the appellant alleges that the prosecutor asked Mr. Paul Biggs, directly, why he had not talked to officers. Again, if the appellant had carefully examined the record he would have known that it was not the prosecutor who asked this question of Mr. Biggs. Rather, it was a question from the court (Tr. 86).

Respondent therefore submits that appellant's allegations in his Point II are without merit.

POINT III.

UTAH CODE ANN., § 76-38-1 (1953) IS NOT UNCONSTITUTIONAL.

The appellant in the instant case has called upon this Court to once more rule upon a statute which many times before has been declared constitutional. It is appellant's contention that Utah Code Ann., § 76-38-1 (1953) places the burden upon the defendant to disprove his guilt by making a complete and plausible explanation of his posses-

sion of recently stolen property. This Court, on numerous occasions, has held such an interpretation to be incorrect.

In *State* v. *Little,* 5 U. 2d 42, 296 P. 2d 289 (1956), the Court said:

> "[The] appellant attacks the larceny statute, U. C. A. 1953, 76-38-1, as unconstitutionally placing the burden upon the defendant to explain satisfactorily the possession of stolen goods. This contention has been rejected by this court numerous times. State v. Potello, 40 Utah 56, 119 P. 1023, State v. Mellor, 73 Utah 104, 272 P. 635, State v. Wood, 2 Utah 2d 34, 268 P. 2d 998. The burden of proof remains at all times with the state and the state must prove not only the larceny and recent possession, but also that defendant failed to make a satisfactory explanation of his possession. The fact of possession of stolen property, together with the lack of a satisfactory explanation, is a matter which the jury may consider in determining whether or not the state has met the burden of proving the defendant guilty beyond reasonable doubt."

As recently as 1969, this Court found it necessary to comment further upon this issue in *State* v. *Gellatly,* 22 U. 2d 149, 449 P. 2d 993 (1969):

> "Under this provision, the state need not present any direct proof identifying the defendant as the thief or directly connecting him with a felonious taking or asportation, for the legislature deemed possession of recently stolen property without a satisfactory explanation as sufficient to support a con-

> viction. Of course, the state must prove not only the larceny and recent possession, but also that defendant failed to make a satisfactory explanation of his possession. By 'prima facie evidence' it is meant that there arises an inference of guilt that defendant committed the larceny and that this inference may be considered with all other circumstances by the jury in its determination of whether the defendant is guilty beyond a reasonable doubt."

The respondent submits that in the instant action there were sufficient facts upon which the jury could find beyond a reasonable doubt that the appellant had been in possesion of the recently stolen television set (Tr. 13, 11, 42), that he asserted ownership and arranged for the sale therefor (Tr. 20, 21), and that he failed to proffer a satisfactory explanation as to his possession as evidenced by the jury verdict of guilty (R. 13). The respondent also submits that the appellant was found guilty under Utah Code Ann., § 76-38-1 (1953) which for the heretofore mentioned reasons is a constitutional statute under both the Constitution of the United States and the Constitution of the State of Utah.

CONCLUSION

Appellant, in the fourth point of his brief makes a summation of Points I, II, and III and for that reason we submit that we have adequately responded to appellant's brief. For the reasons contained herein, we submit that

there was no error in the proceeding; that the appellant was given a fair trial; that Utah Code Ann., § 76-38-1 (1953) is constitutional and therefore the appellant's conviction should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Chief Assistant Attorney General

Attorneys for Respondent