

1970

State of Utah v. Robert "Buddy" Washington: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	Case No. 12088
vs.)	
)	
ROBERT "BUDDY" WASHINGTON,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

On Appeal from the District Court of Weber
County, State of Utah

Hon. Dallas H. Young, District Judge

NESLEN AND MOCK

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Plaintiff-Respondent,)	
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vs.)	Case No. 12088
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ROBERT "BUDDY" WASHINGTON,)	
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Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

The Defendant-Appellant was charged with two crimes, to-wit; receiving stolen property having a value in excess of Fifty Dollars (\$50.00) in violation of Section 76-38-12 U.C.A. 1953, as amended, and being an habitual criminal in violation of Section 76-1-18, U.C.A. 1953, as amended.

DISPOSITION IN THE LOWER COURT

The Trial Court, by jury verdict, found the Defendant-Appellant guilty on both charges and Defendant-Appellant was sentenced by the Honorable Dallas H. Young to a term in the Utah

State Prison not to exceed five years on the charge of receiving stolen goods, and the further term of not less than fifteen years on the charge of being an habitual criminal said terms to be served concurrently.

RELIEF SOUGHT ON APPEAL

Appellant seeks a directed verdict of not guilty as a matter of law on both charges or alternatively, a new trial.

STATEMENT OF THE FACTS

The facts upon which the State relies to establish the crimes, as alleged, are as follows:

A series of burglaries were perpetrated in or about the City of Ogden, State of Utah during the months of August, September, and October, 1969. (T. 4, 10, 15, 23, 32). Certain articles were taken in the burglaries which were admitted into evidence as state's Exhibits "A", "B", "C", "D", "E", "G", "H" and "I". (T. 96).

Officers Balls and Buzick testified that they recovered the State's Exhibits "A", "B", "C", "D", "E", "G", "H" and "I" from the premises located at 122 Doxey and 118 Doxey, Ogden, Utah. (T. 87, 94). These premises are the residences of Shirley Owens a/k/a Shirley Gallegos, Lester and Faye Hall, and James McClellan. (T. 62, 40, 83). The Appellant resides at 2571 Lincoln, Ogden, Utah. (T. 114).

Howard Wade testified for and on behalf of the state that he is the owner of Exhibit "A" consisting of a Polaroid Camera, (T. 4, 5) and that it was removed from his residence on or about September 25, 1969. (T. 4). Mr. Wade testified that the value of Exhibit "A", when new was \$225.00 (T. 9), while admitting the camera was two and one-half years old. (T. 9)

C. W. Hartman testified that he owned Exhibit "B", a black persian lamb jacket. (T. 11). Mr. Hartman's testimony as to value was \$550.00, but was based solely on replacement value and not current market value of Exhibit "B". (T. 13). Mrs. Faye Hall received this coat from Shirely Owens and the Appellant was never involved with it. (T. 59).

Exhibit "C", a black and white Dumont Television set, was taken from the premises of Dale Iverson. (T. 16). Appellant has never had possession of this television. Shirley Owens moved it to a neighbor's house. (T. 69, 70). It was found at 118 Doxey, the residences of James McClellan (T. 45, 56, 93) by Officer Balls.

Virginia M. Chase, a witness for the state, claimed ownership of Exhibits "D" and "E", consisting of a Westinghouse Radio and a pendant watch (T. 23, 26). The value of the radio was established at \$7.97 (T. 28), however identification was not clearly established inasmuch as an invoice, Exhibit "F", recited a serial number, RD11D28A, but no evidence was

elicited to show whether Exhibit "D" had a corresponding serial number. (T. 24). No value was ever established for Exhibit "E". (T. 26). Exhibit "E", the pendant watch, was given to Mrs. Faye Hall by Shirley Owens. (T. 55).

Muriel Hardy testified that Exhibit "G", an antique gun, belonged to her. (T. 32). Sentimental value of \$50.00 was placed on Exhibit "G" by Mrs. Hardy. (T. 37, 38). Exhibit "G" was positively identified as not being one of the guns the Appellant sold to Lester Hall. (T. 45). Exhibit "H", a hair-dryer, was also identified by Mrs. Hardy as part of some articles taken from the Hardy residence. (T. 33). However, her only means of identification was its standard container. (T. 36, 37). No present market value was ever introduced into evidence of the hair-dryer, but only the recitation of the price tag attached thereto. (T. 35) while an admission was made that the hairdryer was two years old. (T. 33).

Exhibit "I", a Silvertone Color Television was identified by Mrs. Hardy as belonging to her. (T. 34, 35). However, this testimony was in conflict with her testimony at the preliminary Hearing wherein she stated she could not identify the television as being hers. (T. 38). Mr. Lester Hall testified he did not know how this color television got into his home. (T. 49, 50). Mrs. Faye Hall, wife of Lester Hall, testified that she and another

friend brought the color television over to the Hall residence, and that Appellant did not bring the television to the Halls. (T. 56). Once again the only valuation of Exhibit "I" was the purchase price of \$400.00 and not the present market value of this two year old set (T. 34).

Officer Balls made a promise to the Halls, McClellan, and Shirley Owens that if they would cooperate that no complaint would be filed. (T. 99). Officer Balls stated that he knew the amount that was paid for the various items, to-wit; \$12.00 for the Polaroid camera and \$30.00 for the color T.V., but that this was not sufficient, in his opinion, to establish a possible charge of possession of stolen goods. (T. 104).

Appellant took the stand in his own behalf and testified that he was attempting to sell the goods for a friend. (T. 115). Corroboration of this testimony came from Holly Steele. (T. 108). On cross-examination of the Appellant, the state was allowed, over timely objection, to inquire concerning some credit cards. (T. 126, 127).

The credit cards were admitted, over Appellant's objection, for the sole purpose of impeachment. (T. 131). The State attempted to introduce proposed Exhibits "M", "N" and "O", and Appellant again made timely objection which was sustained, even though the

State urged admission for purposes of impeachment only. (T. 136).

The case was then submitted to the jury on the charge of possession of stolen goods in excess of Fifty Dollars (\$50.00) and the jury received their instruction. (T. 138). Counsel for Appellant took exception to the Court's refusal to give proposed instructions relating to testimony of accomplices and the need for corroborating evidence and the failure to instruct on a lesser included charge. (T. 138, 139, 140). The jury found the Appellant guilty of the charge of possession of stolen property having a value in excess of Fifty Dollars (\$50.00).

The trial was then continued on the second charge, to-wit; that Appellant is in the status of an habitual criminal in violation of Section 76-1-18, U.C.A., 1953, as amended. (T. 141). The State produced James W. Johnson, its only witness, who is the records and identification officer at the Utah State Prison. (T. 143). Certain copies of records were brought to the Court by Mr. Johnson. (T. 144). State Exhibits 1 and 2, which were admitted over Appellant's objection, consist of unverified copies of alleged commitments from Salt Lake County District Courts. (T. 151, 152, 153). State's Exhibits 1, 2, 3 and 4 were all admitted over Appellant's objection. The jury was then instructed. (T. 157). The counsel for Appellant excepted to instruction number 7. (T. 157).

The jury entered a verdict of guilty and the Court set time for sentencing. (T. 157, 158). Appellant was sentenced to a term of not more than five years and to a term of not less than fifteen years in the Utah State Prison (R. 27).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN APPELLANT'S CONVICTION AND THE TRIAL JUDGE ERRED IN NOT GRANTING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT.

At the conclusion of the State's evidence, counsel for Appellant made a timely and appropriate motion for dismissal and alternatively for a directed verdict based upon Section 77-31-18 U.C.A., 1953, as amended, which states:

"Conviction on testimony of accomplice. A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission

of the offense or the circumstances thereof."

Examination of the witnesses and the evidence against Appellant is in three categories, to-wit; the victims, the retrievers and the accomplices. The state's witnesses Howard Wade, C. W. Hartman, Dale Iverson, Virginia M. Chase and Muriel Hardy represent the first class called the victims. All of these witnesses, without exception, testified that they were the owners of certain properties consisting of Exhibits "A", "B", "C", "D", "E", "G", "H" and "I", and that these properties were removed from the respective owner by a person or persons unknown. None had ever known the Appellant nor had any of these witnesses ever observed the Appellant in possession of their properties.

The second category of witnesses, the retrievers, consist of officers Murlin Balls, Charles Buzick, and Mr. James McClellan. The substance of the testimony of these three witnesses consist of recovery of the properties identified as Exhibits "A", "B", "C", "D", "E", "G", "H" and "I" from the premises of Lester Hall, Shirley Owens, a/k/a Shirley Gallegos and James McClellan. None of these witnesses observed any of the subject properties in the possession of the Appellant.

The third category of the state's witnesses the accomplices, consist of Lester Hall, Faye Hall and Shirely Owens, a/k/a Shirley Gallegos. All of these witnesses were granted immunity of

prosecution by Officer Balls if they cooperated. (T. 99). The law is very clear in Utah in defining an accomplice. In State v. Fertig, 120 Utah 224, 233 P2d 347, 348 this Court stated, quoting from an earlier case, State v. Bowman, 92 Utah 540, 70 P2d 458, 461:

"In this State we have no statutory definition of an accomplice, but the court has construed the word to refer to one who is or could be charged as a principal with the defendant on trial."

It is true that Officer Balls testified that in his opinion there was not enough reason to suspect that Lester Hall, Faye Hall and Shirley Owens might be guilty of possession of stolen property (T. 102, 103, 104). However Officer Balls did know the property was recently stolen. (T. 104). He knew that the Halls had paid \$12.00 for Exhibit "A", the Polaroid Camera and \$30.00 for Exhibit "I", the color television, and received as gifts Exhibits "B" and "E", the coat and watch respectively. Shirley Owens did not have any explanation as to the possession of Exhibits "C", "G" and "H", the black and white television, the gun and the hairdryer respectively. State v. Bruner, 106 Utah 49, 145 P2d 302, 304 it states:

"Even if they had not told Appellant that these goods had been stolen, the fact that they concealed them on a city dump over two miles away would

indicate to any reasonable person that they did so because they did not want the articles to be found in their possession -- a circumstance which would at least suggest that the articles were "hot".

Section 78-38-1, reads in part:

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

This same section was cited in State v. Vigil, infra, as tending to show corroboration of the crime of possession of stolen goods.

The Halls and Shirley Owens not only had possession of goods known to be recently stolen, but secreted both the black and white television and the color television, Exhibits "B" and "I" respectively, in a neighbor's basement because they thought it might be "hot".

Officer Ball's testimony in this respect must be severely discounted and taken in light of his promise not to file charges against the accomplices, is not only suspicion, but evidence which the Court has held as sufficient to convict for the crime of

possession of stolen goods.

Appellant is charged with violating Section 76-38-12 U.C.A., 1953, as amended, which states:

"Receiving stolen property.
--Every person who for his own gain or to prevent the owner from again possessing his property, buys or receives any personal property exceeding \$50.00 in value, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years, . . ."

Lester Hall purchased from the Appellant what has been identified as state's Exhibits "A" and "I". (T. 44). Mrs. Faye Hall testified she purchased Exhibit "I" from the Appellant. (T. 56). Mrs. Hall further stated that she received the watch, Exhibit "E" and the black fur coat, Exhibit "C" from Shirley Owens, (T. 55, 59) and that the Appellant brought the radio, Exhibit "D" and left it with the Halls. (T. 55, 57). Shirley Owens, a/k/a Shirley Gallegos testified that she kept the hairdryer, Exhibit "H" (T. 69) and that she had Exhibit "G", the rifle in her possession when it was recovered by the police. (T. 67). Shirley Owens further testified that she moved the black and white television, Exhibit "B" next door to Mr. McClellan's residence. (T. 77).

The foregoing acts of purchase and/or possession of the very property in question makes Lester Hall, Faye Hall and Shirley Owens, a/k/a Shirley Gallegos accomplices. They could have been charged with the identical crime as the Appellant.

There is no evidence other than that of these three witnesses, who were accomplices, to show the crime with which Appellant has been charged. The state clearly proved the possession by the three accomplices, but not as to the Appellant. This falls under the purview of State v. Vigil, 123 Utah, 495, 260 P2d, 539, 541 wherein the court stated:

"However, the corroborating evidence must connect the Defendant with the commission of the offense..." (citations omitted)

The offense is having possession. No evidence existed at the time the state rested its case and the motion made of the Appellant's possession other than the accomplices' uncorroborated testimony. Therefore, as a matter of law, Appellant was entitled to a directed verdict inasmuch as Appellant could not, as a matter of law, be convicted on uncorroborated testimony of accomplices.

Appellant's motion for dismissal, based on the State's failure to prove a prima facie case, was appropriate and the trial court

erred in refusing to grant said motion.

Not only did the State fail to show any corroborating evidence of the alleged crime, but the State failed to establish any basis for the valuation of Exhibits "A", "B", "C", "D", "E", "G" and "I". The only valuation on these items came from the owners except Exhibit "C", the black and white television set which was valued by a repairman at less than \$25.00. (T. 21).

Exhibit "A", the Polaroid Camera, was valued by Howard Wade at \$225.00. Mr. Wade received Exhibit "A" as a gift, two and one-half years ago and his valuation is the cost of the camera when he received the gift. (T. 8, 9). No present market valuation exists. Exhibit "B", the black fur coat, was valued by Mr. C. W. Hartman at \$550.00. This valuation was based solely on replacement cost and not present market value. (T. 12, 13).

Mr. Dale Iverson, at page 21 of the transcript admitted that Exhibit "C" in its present condition was valued at less than \$25.00. Exhibits "D" and "E", identified by Virginia M. Chase, were valued at \$7.97 for the radio, Exhibit "D", but no value was even given for the watch, Exhibit "E". (T. 28, 26).

Mrs. Muriel Hardy identified Exhibits "G", "H" and "I", the gun, hairdryer and color T.V. respectively. Sentimental value of \$50.00

was placed on the gun, (T. 37, 38) however, Mrs. Hardy admitted that the gun would not sell for \$50.00. The hairdryer apparently had a price tag on it which reflected a price of \$23.79. Mrs. Hardy testified that this is what she paid for the hairdryer (T. 35), while admitting that the original bonnet had been replaced with a different color and that the hairdryer was at least two years old. (T. 37, 33). Exhibit "I", the color television, was purchased from Sears for \$400.00. (T. 34). No evidence was elicited or made of record which reflects what the present market value of Exhibit "I" is, which was at least two years old (T. 34).

In net effect, no competent evidence exists to show that the item or items had a present market value in excess of \$50.00. The cost of an item, or the sentimental value of an item, or the replacement value of an item, or no value at all on an item is not competent evidence to submit to a jury that Exhibits "A", "B", "C", "D", "E", "G" and "I" had a present value in excess of \$50.00 at the time they were allegedly in the possession of the Appellant. The state failed in establishing a prima facie case of the crime charged, and as a matter of law Appellant's Motion to Dismiss was proper and should have been granted.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LAW APPLICABLE TO THE TESTIMONY OF AN ACCOMPLICE AND THE REFUSAL TO INSTRUCT ON A LESSER OFFENSE.

Counsel for Appellant requested three instructions which relate to the need for corroborating evidence and that the Appellant cannot be convicted upon the testimony of accomplices only. (T. 139, 140). Exception was taken upon the Court's refusal to so instruct the jury. In State v. Hall, 112 Utah 272, 186 P2d 970 the Court recognized the right of an accused to have the jury instructed concerning testimony of accomplices. In Hall, supra, however as well as in State v. Scott, 22 Ut2d 27, 447 P2d 908, the trial counsel failed to request the proper instructions. However, instructions were submitted in this instance and timely exceptions taken to the Trial Court's refusal to so instruct the jury.

Other jurisdictions, notably Arizona and California, have held that it is reversible error not to so instruct the jury even though no instructions were requested. In State v. Owen, 3 Ariz. App. 509, 415 P2d 907, 909 the Arizona Court states:

"No instruction was requested or given to the jury pertaining to the law applicable to the testimony of an accomplice . . . failure to instruct the jury on the applicable principles of law concerning the necessity for corroboration of the testimony of an accomplice, even though not requested, is reversible error ..."

In People v. Wade, 169 C.A.2d 554, 337 P2d 502, 504 the California Court states:

"It does not appear from the record that defendants offered any instructions regarding accomplices. This does not relieve the court of the duty to give such instructions *sue sponte*, even though the question is one of fact for the jury. It is incumbent upon the court to instruct the jury fully upon the law in a criminal case. This rule includes instructions concerning the law pertaining to accomplices and corroboration when applicable." (citations omitted)

The Trial Court's refusal in this instance, when proper instructions are requested, together with timely exceptions, constitute reversible error.

The Trial Court further refused, although initial indication was given that it would be given, to instruct the jury about the lesser offense of a misdemeanor if the jury found the value was less than Fifty Dollars (\$50.00). The jury was in effect instructed that the value was in excess of Fifty Dollars (\$50.00). This is a fact which must be found by the jury and not the Court. In State v. Valdez, 19 Ut2d 426, 432 P2d 53, 54 this Court stated:

"As a general rule the trial court should submit to the jury included offenses where the evidence would justify such a verdict."

Contrary to the Valdez situation, Appellant's trial counsel did request specifically an instruction on the lesser offense. It is prejudicial to the Appellant and reversible error not to so instruct, since the failure to do so constitutes an affirmative instruction to the jury that the value of the property in question which Appellant allegedly had in his possession exceeded Fifty Dollars (\$50.00).

POINT III

THE TRIAL COURT ERRED IN ADMITTING EXHIBITS J, K, AND L, INTO EVIDENCE.

The Trial Court, over Appellant's timely objection allowed into evidence Exhibits "J", "K" and "L", consisting of three credit cards. (T. 131). The basic objection is to an improper foundation as well as materiality. (T. 126, 131, 135). There is no materiality to the credit cards unless Appellant was charged with an offense encompassing said cards. It is true that the credit cards were admitted for the limited purpose of impeachment. (T. 131). However, the possession of them does not impeach Appellant's testimony.

Officer Richard E. Petersen's testimony reflects the lack of foundation. Officer

Petersen at pages 134 through 136 of the record discloses that certain items, among which were Exhibits "J", "K" and "L", were given to him as being the Appellant's personal effects. This is hearsay evidence of the individual or individuals who allegedly obtained these personal effects.

It was prejudicial to Appellant to have before the jury, even for the limited purpose of impeachment (instruction No. 10), where the jury is not instructed on impeachment, and where this so-called impeachment evidence tends to implicate the Appellant to the crime of burglary. The obvious prejudice of this immaterial and hearsay evidence is not overcome by the simple unexplained instruction. It is, therefore, reversible error to admit Exhibits "J", "K" and "L".

POINT IV

THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBITS 1 and 2, AND THE STATE FAILED IN THE BURDEN OF PROOF TO ESTABLISH APPELLANT AS AN HABITUAL CRIMINAL.

The state called James Johnson as its only witness in an attempt to establish the prior conviction, sentencings and commitments pursuant to Section 76-1-18 U.C.A., 1953, as amended. The Trial Court allowed the introduction of, and receipt of Exhibits 1 and 2, over the objection of Appellant's counsel, into evidence. (T. 150, 152, 153). These

exhibits consist of alleged copies of documents purporting to be commitments of the Appellant. (T. 144). Both of these alleged copies of purported commitments are from the Salt Lake County District Court. (T. 150, 152). The sole witness admits on page 152 of the transcript:

"Question: And you don't know whether or not this is a true and accurate record of the sentence and commitment of Buddy Washington from the Salt Lake County Court, do you ?"

"Answer: Well, I don't suppose that I know any of them are true and accurate as far as that goes then."

Appellant's counsel objected and asserted that the state should have some official record from Salt Lake County Court and not copies from the Utah State Prison files to establish any alleged conviction, sentence and commitment. (T. 153). The records offered and admitted by the trial court were hearsay as to any alleged conviction, sentence and/or commitment. Therefore, the State has failed in its burden of proof on the issue of Appellant being in the status of an habitual criminal.

POINT V.

THE TRIAL COURT ERRED IN SENTENCING
APPELLANT TWICE FOR THE SINGLE
OFFENSE.

Appellant was sentenced twice. First for a term of not more than five years and again for a term not less than fifteen years, both to be served in the Utah State Prison, said sentences to run concurrently. (R. 6). It has been held on numerous occasions that being an habitual criminal is not a substantive crime but a status. The language found at page 1000 of the Pacific Reporter in State v. Wood, 2 Ut2d 34, 268 P2d 998 is decisive:

"This court has held that being an habitual criminal is a status, and to be charged with being an habitual criminal is not to be charged with a crime." (citations omitted)

In the fairly recent case of Zeimer v. Turner, 14 Ut2d 232, 381 P2d 721, 723, the court states the significance of being charged as an habitual criminal by the following language:

"Being an habitual criminal is a status, and to be charged with being an habitual criminal is not to be charged with a crime. The habitual criminal statute will apply only upon a conviction of the criminal offense last charged. Its invocation does not inflict additional or further punishment for the prior convictions or impose a new punishment therefor. It only serves to make more severe the punishment for the last or sub-

sequent offense which might be imposed because of the previous convictions."

Only one punishment or sentence can be imposed, if any. If this Court finds that the state carried its burden of proof in showing the prior conviction then a sentence for a term of not less than fifteen years is proper. If the Trial Court erred in allowing into evidence Exhibits 1 and 2, then a term of not more than five years is correct.

CONCLUSION

Appellant as a matter of law is entitled to have his Motion granted directing a verdict in his favor, or in the alternative, the Motion to Dismiss granted at the close of the State's case in chief.

No evidence exists to corroborate the testimony of the three accomplices. The statutory command of Section 77-31-18 is clear and decisive of the motion.

In the alternative, it is submitted that reversible error was committed by refusing to instruct the jury on the law regarding the testimony of accomplices. Further reversible error was committed by the Trial Court's refusal to instruct on a lesser offense and the admission of the immaterial, hearsay, but highly prejudicial evidence of the credit cards under the guise of impeachment.

In the alternative, it is submitted that the state failed to carry its burden of proof to establish the status of Appellant being an habitual criminal inasmuch as the Court erred in admitting into evidence Exhibits 1 and 2. Appellant can be sentenced to a term of no more than five years to be served at the Utah State Prison.

Respectfully submitted,

NESLEN AND MOCK

By

James R. Brown