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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 14433 R

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RICHARD CAUBLE,

Defendant-Appellant.

Case No. 14433

- - - - - - - - - - - - - - -

BRIEF OF RESPONDENT

- - - - - - - - - - - - - - -

Appeal from the judgment of the District Court of Utah County, Honorable George E. Ballif, Judge

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FILED

FEB 14 1977

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - -

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RICHARD CAUBLE,

Defendant-Appellant.

Case No. 14433

- - - - - - - - - - - - - - - -

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of theft in violation of Utah Code Ann. § 76-6-404 (Supp. 1975), a felony of the second degree.

DISPOSITION IN THE LOWER COURT

The matter was tried to a jury in the Fourth Judicial District Court. The jury returned a verdict of guilty to the charge of theft of property of a value exceeding $1,000, and the Honorable George E. Ballif entered a judgment and sentence on that verdict.

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RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment and sentence entered by the court below.

STATEMENT OF THE FACTS

In November, 1974, defendant was employed by Western Leisure Industries, Inc., a corporation that manufactures and sells house trailers. On November 13, 1974, defendant sold three of the company's trailers to Boyd Wheelwright. He paid for the trailer's with a check in the amount of $9,262 drawn on an office of Zions First National Bank located in Utah County (T. 47, Plaintiff's Exhibit no. 6). At the time Mr. Wheelwright delivered the check to the defendant, the defendant stated that he was going to use some of the money to "reimburse himself." (T. 49,112).

On November 14, 1974, the defendant took the check to an office of Tracy Collins Bank and Trust located in Salt Lake County, opened an account in the name of the Mansford Corporation (a pseudonym for the defendant) and deposited the check. The defendant then withdrew from the account $262.00 cash and approximately $4,917 in the form of a cashier's check made out to the Blazor Corporation, the sole stockholder of Western Leisure. The defendant delivered the check to Mr. Giles, the company's comptroller, in exchange for a promissory

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note in the amount of the check. The defendant told Mr. Giles that the money had come from a lawsuit he had won back East (T.29). About one week later, Norma Peterson, Office Manager for Western Leisure, asked the defendant about the Wheelwright transaction at her office in Payson (T. 51,58). The defendant told Mrs. Peterson that the deal had fallen through and promised to return the Statements of Origin covering the trailers to her (T. 58). Mr. Giles testified that the normal procedure following the sale of a trailer was to deliver the check to Mrs. Peterson in Payson, who would receipt the check before it was deposited into a company account by either Mr. Giles or Mrs. Peterson (T. 15,21). Mr. Giles also testified that if a check was received in Salt Lake City, the check could be directly delivered to Mr. Giles' Salt Lake City office, and that this was the only circumstance where Mrs. Peterson's office would be bypassed (T.21). Mr. Giles testified that the defendant had no authority to endorse or sign checks (T. 22). The defendant testified that on occasions he would not take the checks to Mrs. Peterson's Office if he were in another area (T. 132).

The defendant did not deny depositing the check in question into his account, but claimed that he was entitled to the money because Western Leisure had failed to reimburse him for certain expenses and back pay.

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On November 13, 1976, the defendant claimed that the amount owed him was between $9,500 and $10,000 (T. 130). The defendant at first claimed that he had deposited no other checks belonging to his employer into his own account, but later admitted that he had offset checks of about $3,327 and $1,215 prior to the incident in November, 1974 (T. 148, 161-163, 168).

Boyd Saderup, President of the Blazor Corporation testified that his accounting records showed that the defendant was owed between $300 and $600. David Giles testified that the only unpaid claims due to the defendant amounted to between $200 and $300, and that the defendant had received some $2,017 in advance for expenses which the defendant had not accounted for by the return of vouchers, receipts or cancelled checks, despite requests to do so (T. 189-191).

The jury returned a verdict of guilty and judgment was entered on that verdict.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE GROUND OF IMPROPER VENUE.

A. Defendant waived his objection to improper venue.

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Utah Code Ann. § 76-1-202(2) (Supp. 1975), provides that:

> "All objections of improper place of trial are waived by a defendant unless made before trial."

In the recent case of State v. Christean, 533 P.2d 872 (Utah 1975) this Court held that a defendant in a criminal case can waive his constitutional right to have an action against him tried in the county where the cause of action arose, that the waiver need not be express, and that an objection made for the first time on appeal will not be considered.

In this case, defendant made no objection to the place of his trial until after the State had rested its case (T. 86). Counsel for the State indicated that a timely request for a transfer would have been honored (T.87). Defendant has not alleged any reasons that excuse or explain the delay, nor has any prejudice to the defendant been shown.

As the Court stated in State v. Biggs, 198 Ore. 413, 255 P.2d 1055, the gist of the constitutional guarantee of a fair and impartial trial in the county where the crime was committed is a fair and impartial trial, and the guarantee of the place of trial is a mere incident of the primary right to a fair trial.

Respondent submits that the defendant was given a fair trial in all respects, and that defendant's belated

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attempt to invoke a technical error should be denied as being contrary to the interest of justice.

B. The crime of theft as defined in Utah Code Ann. § 76-6-404 (Supp. 1975), was completed in Utah County where the trial was held.

Respondent submits that the analysis of the issue of where the crime occurred turns on the resolution of an ambiguity in the statute that defines theft. Utah Code Ann. § 76-6-404 (Supp. 1975), states that "a person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." It is not clear whether the word "obtains" in the statute refers to "unauthorized control" or to "property". In other words, the statute is subject to two constructions:

1. A person commits theft if he obtains the property of another with a purpose to deprive him thereof or if he exercises unauthorized control over the property of another with a purpose to deprive him thereof.

2. A person commits theft if he obtains unauthorized control or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Respondent submits that the first interpretation is more in keeping with the legislative intent. The

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phrases "obtains control" and "exercises control" are interchangeable and the use of both terms would be mere surplusage under the second interpretation of the statute. However, a person may exercise unauthorized control over property without obtaining it, as when a thief directs an innocent agent to deliver property belonging to another to a creditor of the thief, or when a thief deprives an owner of his property by destroying or misusing it. The use of both terms would be logical and necessary under the first interpretation.

Utah Code Ann. § 76-6-401(2) (Supp. 1975) defines "obtain" as meaning "to bring about a transfer of possession or of some other legally recognized interest in property. . . ." without reference to unauthorized control. Utah Code Ann. § 76-6-407 (Supp. 1975) defines the crime of theft of lost property solely in terms of obtaining property without mention of unauthorized control. Respondent submits that the first interpretation of the statute defining theft is the proper construction, and that unauthorized control is not always an element of the crime of theft.

Under this interpretation of the statute, it is clear that the crime of theft was completed in Utah county, because the defendant admitted obtaining the

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check from Mr. Wheelwright in Utah County with an intent to convert it to his own use (T. 112).

Assuming that this Court were to adopt the second interpretation of the statute defining theft, respondent still submits that the crime of theft was completed in Utah County. Defendant's contention that the evidence clearly establishes his authority to receive checks in Utah County and to deliver them to an office in Salt Lake City is not supported by the record (T. 15,21,132). Assuming defendant did have that authority, he would still be without authority to turn the checks over to a creditor of his employer. Such a delivery would be an unauthorized control in the county where it occurred, even if the creditor deposited the checks in another county. In this case, defendant claimed to be a creditor of his employer, and when he took the checks into his personal possession intending to retain them in satisfaction of a supposed debt, he in effect delivered the checks to a creditor in excess of his authority.

Assuming that all of defendant's behavior in Utah County were within the scope of his authority as an agent of the corporation, defendant would still have exercised "unauthorized control" over the property as that phrase is used in the statute. Utah Code Ann. § 76-6-404(4) (Supp. 1975) defines the phrase "obtain

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or exercise unauthorized control" to include, inter alia, conduct heretofore known or defined as common law embezzlement. In other words, if the defendant's acts in Utah County constituted the common law crime of embezzlement, the venue of the action would properly be in Utah County.

In the case of State v. Dykes, 261 Iowa, 1363 158 N.W. 2d 154 (1968) the defendant was charged with embezzlement of a load of grain. The grain was entrusted to the defendant in Story County for delivery in Scott County, but the defendant sold the grain in Appanoose County. The Supreme Court of Iowa held that venue was properly laid in Story County, reasoning that:

> "Where the defendant received property in a county of this State and thereafter fraudulently converts the same to his own use, the jury may be authorized by the evidence to conclude that the intent to convert the same was formed in the county where the property was entrusted to him, and venue under such evidence may properly be laid in that county." 158 N.W.2d at 157.

Again, the defendant by his own admission expressed intent to convert the check to his own use when he received it in Utah County (T. 112).

In the case of People v. Brock, 21 Cal. App. 2d 601, 70 P.2d 210 (1937), the defendant was charged with grand theft of machinery belonging to a mining company of which he was a director. The equipment was

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removed from a mine and taken to a location in San Bernadino County, and later sold in Los Angeles County. The court held that, although the actual misappropriation took place in Los Angeles, the evidence justified an inference that the intent to embezzle was formed in San Bernadino, and that the defendant could properly be tried there. It is interesting to note that in Iowa and California, unlike Utah, the prosecution must prove venue beyond a reasonable doubt. Respondent submits that the evidence unequivocally demonstrates the formation of a criminal intent in Utah County, and under the terms of Utah Code Ann. 76-6-401(4) (Supp. 1975), venue was properly laid there.

Alternatively, venue could be laid in Utah County on the theory that defendant failed to account there. In Williams v. State, 365 P.2d 569 (Okla. Crim. 1961), defendant was charged with embezzlement of funds he had received as a salesman for an insurance company. The defendant claimed that he could only be tried where the checks had been cashed, but the court held that the prosecution could be brought where the defendant had an obligation to account for the funds. In this case, a demand for the money was made in Utah County (T. 51,58). See also State v. Boulet, 5 Wash. 2d 654, 106 P.2d 311 (1940).

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Finally, venue could be properly laid in Utah County because the check the defendant embezzled was drawn on a bank located there, and consequently the check was paid there. In People v. Keller, 79 Cal. App. 612, 250 P.585 (1926), a corporate vice-president deposited a company check in a bank located in Orange County, and wrote an unauthorized check against the account in Los Angeles County. The court held that the offense of embezzlement was completed in Orange County where the bank honored the check. See also State v. Johnson, 109 Kan. 239, 199 P. 104 (1921).

In sum, respondent submits that the crime of theft was completed in the county where defendant was tried because defendant obtained the property with intent to deprive there, failed to account there, and the check stolen was paid there.

C. Venue was properly laid pursuant to Utah Code Ann. § 76-1-202(1)(g)(iii) (Supp. 1975), a constitutional statute.

Defendant has challenged Utah Code Ann. 76-1-202 (1)(g)(iii) (Supp. 1975) as denying his constitutional right to trial where the crime occurred. As this court stated in White v. Rio Grande Western Railroad Co., 25 U. 346, 71 P. 593 (1903), the constitutional right to a particular place of trial must be interpretated in light

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of the common law existing at the time the constitution was adopted. Although there is a general rule prohibiting the prosecution of a criminal defendant in a county other than that where the crime occurred, there is a widely recognized exception for larceny. 22 C.J.S. Criminal Law § 185(8) states:

> "Both at common law and under statutory provisions in most states one who steals property in one county and brings it into another may be indicted and tried for simple larceny either in the county where the theft was committed, or in any county into or through which the stolen property was brought; the theory being that the possession of the stolen goods by the thief is a larceny in every county through or into which he carries them, because as the legal possession still remains in the owner, every moment's continuance of the trespass and felony amounts to a new taking and asportation. . . ."

Statutes declarative of this common law rule have been upheld against constitutional attacks. 156 ALR 882, 886, states:

> "The conflict of authority on the subject has been alleviated in many jurisdictions by enactment of statutes in effect recognizing the majority view by providing in substance that any person who shall steal in another state or country any goods and shall thereafter bring the same into the state may be prosecuted and convicted of larceny in the county to which such goods are brought or in which he is found, in the same manner as if such larceny had been committed in this state, and that

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> in every such case the larceny may be charged to have been committed in any county into or through which such stolen property may have been brought.
>
> . . .
>
> The constitutionality of such statutes and the power of the legislature to enact them have been for the most part sustained as against various objections, such as . . . that it is violative of the constitutional provision securing in all criminal prosecutions the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed. . . ."

In addition to the authorities collected in the above annotations, respondent respectfully refers this Court to People v. Brickey, 346 Ill. 273, 178 N.E. 483 (1931), State v. Bretz, 534 P.2d 496 (Mont. 1975), and Schultz v. Lainson, 234 Iowa 606, 13 N.W. 2d 326 (1944) upholding state statutes allowing prosecution for theft in any county into which stolen property is brought against constitutional attacks.

Appellant has cited State v. Caroll, 55 Wash. 588, 104 Pac. 814 (1909), as authority that such a statute is unconstitutional. Actually the Washington Court refused to apply such a statute to a burglary prosecution, where the theory of a continuing trespass clearly does not apply. The court did recognize that:

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> "It is generally true that in cases of larceny courts have generally held that the defendant could be tried either in the county where the offense was committed, or in the county to which the goods have been removed." 104 at P. 814.

The Washington Supreme Court has upheld a statute allowing a defendant to be prosecuted for larceny in any county into which stolen property is brought. State v. Moore, 189 Wash. 680, 66 P.2d 836 (1937).

It is important to remember the narrow application and remedial purpose of the Utah statute. Under Utah Code Ann. § 76-1-202 (1)(g)(iii) (Supp. 1975), a prosecution can only be brought in the county where only control of the property is shown when "it cannot be readily determined in which county or district the offense occurred." Utah Code Ann. § 76-1-202(1)(g) (Supp. 1975). Such a common sense attempt to deal with the technical problem of venue in a criminal prosecution is clearly remedial and subject to liberal construction within constitutional limits. Addington v. State, 199 Kan. 554, 431 P.2d 532 (167).

It is clear that defendant had control of the property in Utah County, and under Utah Code Ann. § 76-1-202 (1)(g)(iii) (Supp. 1975) venue was properly laid in Utah County.

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Respondent submits that it was not error to deny defendant's motion for a directed verdict on the grounds of improper venue.

POINT II

THE STATE PROVED ALL ELEMENTS OF THE OFFENSE

Utah Code Ann. § 76-1-501(3)(Supp. 1975) states that:

> "The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence."

In the case of State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955), this court held that venue need only be established by a preponderance of the evidence, that venue was not an element of an offense and that venue could be established inferentially from circumstantial evidence.

As argued more extensively in Point I above, defendant has waived any objection he may have had to the place of trial and the evidence supports the finding that venue was in Utah County. Respondent submits that the trial court did not err in denying defendant's motion for a directed verdict.

POINT III

EVIDENCE OF DEFENDANT'S TAKING OF OTHER CHECKS BELONGING TO HIS EMPLOYER WAS RELEVANT AND PROPERLY ADMITTED.

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Utah Rules of Evidence, Rule 55 provides that evidence of other crimes is admissible to establish absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity.

In this case, the major issue at trial was the defendant's motive and intent in appropriating his employer's check. Identity was not at issue because defendant admitted cashing the check (T. 112-113). Although the evidence of defendant's taking of other checks revealed an inconsistency in the defendant's testimony, it was not admitted for the purpose of attacking his credibility as evidence of prior felony convictions would be. The evidence was admitted to shed light on defendant's claim that the check was taken pursuant to a bona fide claim of right, and demonstrated that the taking was pursuant to a common plan or scheme.

When this purpose for the admission of the evidence is kept in mind, the authority cited by the defendant is clearly distinguishable. In the case of State v. Dickson, 12 U.2d 8, 361 P.2d 412 (1961), this Court held that evidence of prior dissimiliar robberies was inadmissible to establish a defendant's identity as a robber. In State v. Kazda, 14 U. 2d 266, 382 P.2d 407 (1963), a defendant's prior criminal record was brought out for the purpose of impeaching his testimony.

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The admission of details about the prior crimes was held prejudicial error because:

> ". . . the details or circumstances surrounding the felony or felonies for which the accused was convicted may not be inquired into except under unusual circumstances where the inquiry would tend to show a scheme, plan, modus operandi or the like." 14 U.2d at 269. (Emphasis added.)

In State v. Peterson, 23 U.2d 58, 457 P.2d 532 (1969), a defendant charged with selling LSD entered into evidence a theme he had written showing his opposition to drugs. The prosecutor's attempt to smear the defendant's character by inquiring into incidences of drug use was held prejudical. None of these authorities stand for the proposition that when a defendant embezzles a check with criminal intent, pursuant to a scheme or plan, that evidence of other thefts showing this intent and part of the same plan cannot be admitted.

In State v. Lack, 118 U.128, 221 P.2d 852 (1950), a defendant was charged with embezzlement of whiskey, and evidence that the defendant had sold this whiskey to clubs and split payments was held to be admissible even though it showed commission of other crimes not charged. The evidence was found to be relevant to a scheme or plan. In State v. Schieving, 535 P.2d 1233 (Utah 1975), a defendant was charged with mishandling public money, and evidence of other shortages in the defendant's

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department was held admissible as tending to show motive, intent, and absence of mistake or accident.

In State v. Georgopoulos, 27 U.2d 53, 492 P2d 1353 (1972) a defendant was charged with receiving stolen goods, and evidence of the possession of other stolen items was held admissible as bearing on the guilty knowledge of the defendant.

In this case, defendant claimed an innocent intent in taking $9,262 belonging to his employer because he believed he was entitled to between $9,500 and $10,000. Evidence that the defendant had already stolen some $4,500 was clearly relevant in assessing the honesty of that claim, and evidence that the prior takings had occurred in precisely the same manner showed that the taking was according to a common scheme. In factual settings indistinguishable from the present case, evidence of this type was held properly admitted. State v. Hess, 86 Wash. 2d 51, 541 P.2d 1222 (1975), People v. Kendall, 151 P.2d 39, 65 Cal.App.2d 569 (1944) and Thorp v. People, 110 Colo. 7, 129 P.2d 296 (1942). Respondent submits that evidence of other checks taken by the defendant was properly admitted as relevent to the issues of motive,

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intent, absence of mistake or accident, and the presence of a common scheme.

CONCLUSION

Respondent submits that the defendant was tried in the proper county, that the State provided all elements of the offense and that the evidence admitted at trial was relevant and not unduly prejudicial. The judgment and sentence of the lower court should be, therefore, affirmed.

Respectfully submitted,

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