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# State of Utah v. Paul Koyd Hurlburt : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

vs.

PAUL KOYD HURLBURT,

Defendant-Appellant.

Case No. 14727

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APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is a criminal case wherein the appellant appeals from a conviction of receiving stolen property valued at \$100.00 or less.

DISPOSITION IN THE LOWER COURT

This matter came before the Honorable Edward Sheya, Judge of the Seventh Judicial District Court in and for Grand County for trial, sitting with a jury, on June 3, 1976. At the close of plaintiff's case, defendant by and through his trial counsel moved to have the case dismissed for lack of

sufficient evidence. The court denied the motion to dismiss. After closing arguments, the jury retired to deliberate and returned a verdict finding the defendant guilty of receiving stolen property valued at \$100.00 or less. On June 15, 1976, the court pronounced judgment upon defendant. On July 1, 1976, defendant made a motion for new trial on the ground, inter alia, that the verdict was contrary to and not supported by the evidence presented at trial. The court denied defendant's motion for new trial.

#### RELIEF SOUGHT ON APPEAL

The defendant seeks a reversal of his conviction because the evidence presented at trial fails to prove beyond a reasonable doubt that defendant committed the offense of receiving stolen property, and in particular plaintiff failed to prove beyond a reasonable doubt the most critical element of said offense, namely, that defendant knew or believed that the goods had probably been stolen.

#### STATEMENT OF THE FACTS

The undisputed facts are as follows: Darwin Shields, a retired plumber, owned a tool box containing various tools such as sockets and ratchets (Tr. 4). Shields resided at and managed the Red Rock Lodge in Moab, Utah, and stored the tool

box in a tool shed behind the lodge (Tr. 3, 5). In December 1975, Shields was in need of the tool box for a particular job, so he made a search for them in his tool shed but found them to be missing (Tr. 4-6). Shortly thereafter Shields reported the missing tool box to the Grand County Sheriff's Office (Tr. 8). Two months later, on February 15, 1976, Shields was in the Five C's pawn shop in Moab on other matters and noticed a tool box behind the counter which he identified as the one missing from his tool shed since December 1975 (Tr. 6, 12).

On a certain evening during the first or second week of December 1975, defendant had gone to the apartment of an acquaintance, Cydney Osanna, to help her paint the inside walls of her apartment (Tr. 20; Affidavit of Cydney Osanna in Support of Defendant's Motion for New Trial, hereinafter referred to as Osanna Affidavit, paragraph No. 3.) During the evening a Stephen Bahmamus aka Steve Bathemess visited defendant and Osanna at her apartment (Tr. 20; Osanna Affidavit, Paragraph No. 3). Defendant and Osanna, in need of a screwdriver to remove a light socket wall plate in order to paint behind it, and unable to locate one in the apartment, asked Bahmamus if he had one. Bahmamus said yes, left the apartment, and returned minutes later with a complete box of tools (Tr. 20; Osanna Affidavit, Paragraph No. 3).

Before defendant and Osanna were finished with the screwdriver Bahamamus left the apartment, leaving the tool box behind. (Tr. 20; Osanna Affidavit, Paragraph No. 3). The tool box remained in Osanna's apartment for the two months between December 1975, and February 13, 1976, (Tr. 20; Osanna Affidavit, Paragraph No. 4). Defendant, residing at another apartment in Moab, visited Osanna on occasions between December 1975, and February 13, 1976, and frequently noticed the tool box at her apartment (Tr. 20).

On February 13, 1976, Osanna and her younger brother, Danny Anderson, wanted to pawn the tool box for enough money to buy groceries. Anderson didn't possess a driver's license and therefore couldn't pawn the tool box himself. Osanna and Anderson asked defendant for help and defendant offered to pawn the tool box for them. (Tr. 20; Osanna Affidavit, Paragraph No. 5). On the same day defendant loaded the tool box in his car and proceeded to Five C's Pawn Shop in Moab where he sought to pledge the tool box for a loan. The clerk on duty at the shop that night, Sally Jane Shepherd, told defendant she would first have to clear it with her boss and requested that defendant return later in the evening (Tr. 10, 20-21). Later on that evening Osanna entered the Five C's Pawn Shop, apparently inquiring if the tool box could now be pledged, to which Shepherd responded that defendant himself would have to come in because.

his driver's license was required before the pledge and loan could be made. (Tr. 11). Later the same evening defendant returned to the Five C's Pawn Shop and pledged the tool box as security for a loan in the amount of \$20.00 which he immediately turned over to Danny Anderson (Tr. 21) for the money to use as grocery money.

During the week following February 13, 1976, defendant was at his place of employment, a mine, located outside of Salt Lake City (Tr. 13). The next week defendant returned to Moshier's fine on a traffic ticket which he had received some time ago for an expired registration. Defendant went to the Salt Lake County Sheriff's Office to talk to them about the ticket (Tr. 21, 13). While defendant was there Sheriff's Deputy Carl Davis arrested him for theft of the tool box (Tr. 13).

During questioning as to how he came into possession of the tool box defendant told Sheriff's Deputies that he woke up one morning in his apartment after a party the night before and found the tool box in his living room, with no explanation as to how it got there (Tr. 14, 21). At trial defendant admitted that he had lied to the Sheriff's deputies during the interrogation (Tr. 23), but did so in order to protect Cydney Osanna from Deputy Sheriff Lynn Izatt, who defendant feared would treat Osanna roughly in obtaining information.

mation (Tr. 22). Defendant then proceeded to testify that he first saw the tool box at Osanna's apartment during the second week in December 1975, and that the tool box remained at the Osanna apartment until she and Anderson asked defendant to pledge it for a loan at Five C's Pawn Shop (Tr. 20). Defendant also testified at trial that he didn't have any idea that the tools were stolen (Tr. 21).

At the close of plaintiff's case, defendant's trial counsel moved the court for a dismissal of the case for lack of evidence (Tr. 15). The court admitted that the evidence wasn't strong, but overruled defendant's motion thereby permitting the case to go to the jury (Tr. 18, 19). After all evidence was presented and closing arguments made, the jury retired for deliberation and returned with a verdict finding defendant guilty of receiving stolen property valued at \$100.00 or less. (Tr. 23). Judgment and sentence was pronounced on June 15, 1976, and on July 1, 1976, defendant made a motion for new trial, supported by the Osanna Affidavit, which likewise was denied by the court.

#### ARGUMENT

DEFENDANT'S MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE AT THE CLOSE OF PLAINTIFF'S CASE SHOULD HAVE BEEN GRANTED ON THE GROUND THAT PLAINTIFF FAILED TO PROVE BEYOND A REASONABLE DOUBT THE MOST CRITICAL ELEMENT OF THE OFFENSE OF RECEIVING

STOLEN PROPERTY, NAMELY, THAT DEFENDANT KNEW OR BELIEVED THAT THE PROPERTY HAD BEEN STOLEN.

The sole issue on appeal is whether sufficient evidence was presented at trial to support defendant's conviction of receiving stolen property valued at \$100.00 or less.

The offense of receiving stolen property is set forth in Utah Code Annotated, Section 76-6-408 (1) (Suppl. 1975), the relevant part of which is underscored:

"A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof."

state

The first essential element of the offense of receiving stolen property is that property has, in fact, been stolen. Sufficient evidence was presented at trial establishing that Mr. Shields' tool box had been stolen (Tr. 6, 12). Also, sufficient evidence was presented at trial to establish the second essential element of the offense, namely, defendant's possession of stolen property. The facts are undisputed that defendant had possession of the stolen tool box, albeit joint possession, with two other people, Osanna and Anderson (Tr. 10, 20-21; Osanna Affidavit, Paragraphs 3-5). However, it is with the third essential element of the offense, namely, that defendant allegedly knew that the tool box had been stolen or believed that it probably had been



stolen, that defendant bases his appeal.

The language found in Section 76-6-408(1), supra, which sets forth the essential element of guilty knowledge or belief, has itself had a troubled history since being adopted by the Utah Legislature in 1973. As noted by the court in State vs. Plum, 552 P. 2d 124 (Utah 1976), regarding the statutory language "believing that it probably has been stolen": "We do not commend the drafters of the legislation for their choice of language. . . ." 552 P. 2d at 126. Nonetheless, the statutory language withstood defendant Plum's constitutional void for vagueness attack. Having failed to locate similar state statutes, supported by judicial opinions and secondary authorities, containing the peculiar phrase "believing that it probably has been stolen", defendant in the present appeal is constrained to citing legal authorities construing and deciding sufficiency of evidence issues only under the phrase "guilty knowledge".

It is well established that the crux of the offense of receiving stolen goods is guilty knowledge by the defendant that the goods were stolen. As stated by the Arizona Court of Appeals in State vs. Butler, 9 Ariz. App. 162, 450 P. 2d 128 (1969): "The substance of the offense is the guilty knowledge by the receiver that the goods were stolen. Further, this knowledge must have existed at the time the goods were

received." 450 P. 2d at 132. In 76 C. J. S. RECEIVING STOLEN GOODS, Section 19b at 45, it is stated:

"The evidence must be sufficient to show beyond a reasonable doubt that accused knew when he received the goods that they had been stolen, and accused's guilty knowledge that the property was stolen cannot rest upon mere supposition or suspicion."

Also note 66 Am. Jur. 2d, RECEIVING STOLEN PROPERTY, Section 9 at 301:

"Guilty knowledge (or guilty belief where it may be recognized as the equivalent of knowledge) is said to be the gist of the offense, and must exist at the time the property is received."

Under Section 76-6-408 guilty knowledge or belief is presumed under certain circumstances, as set forth in section (2):

"The knowledge or belief required by Paragraph (1) is presumed in the case of an accused (a) is found in possession or control of stolen property stolen on a separate occasion; or (b) has received other stolen property within the year preceeding the receiving offense; or (c) being a dealer in property of the sort received, retained, or disposed of, acquires it for a consideration which he knows is far below its reasonable value; or (d) being a pawn broker or person who has or operates a business dealing in or collecting used or second hand merchandise or personal property. . . ." (Emphasis added).

However, each of the above presumptions is inapplicable to the instant appeal. It follows as a matter of course that plaintiff must prove beyond a reasonable doubt not only that defendant possessed the stolen tool box but that he also knew or believed

that the tool box had probably been stolen. Proof beyond a reasonable doubt of possession, without the same quantum of proof as to guilty knowledge or belief, is insufficient, as noted by the Arizona Court in State vs. Butler, supra:

"In establishing guilty knowledge circumstantial evidence may be used as well as direct evidence, but the mere possession of stolen goods by a defendant does not in and of itself establish this element." 450 P. 2d at 132.

Also see Shorts vs. State, infra:

"Proof of possession of recently stolen property will not authorize an inference that the possessor received it with knowledge that the property was stolen." 223 S. E. 2d at 505.

Applying the foregoing principles of law, defendant argues that the evidence contained in the transcript and record on appeal is entirely void of any facts or circumstances, other than possession itself, establishing guilty knowledge or belief on his part. Moreover, defendant submits that the transcript and record on appeal contain a wealth of direct and circumstantial evidence proving lack of guilty knowledge or belief and thereby his innocence in the matter:

1. Lengthy time period between the date the tool box was stolen and the date defendant pawned the tool box. During December, 1975, Darwin Shields reported to the Grand County Sheriff's Office of the missing tool box (Tr. 4-6). On February 13, 1976, defendant pawned the tool box at the Five C's Pawn Shop in Moab as security for a \$20.00 loan (Tr. 21). Even

assuming that Shields' tool box was stolen during the month of December and not earlier, at the very least the time span between the theft and the pawning of the tool box is two months. Defendant submits to the court that the lengthier the time period between the date of the theft and the date of the sale or pawn the greater the chances are that the possessor lacked guilty knowledge or belief that the items he possesses are stolen. The reverse situation is found in State vs. Butler, supra, where the facts disclose that a color T. V. was stolen on August 29, 1967, and on either the 30th or 31st of August defendant Butler sold the T. V. set to a third party for a disproportionately low sales price. In holding that the evidence was sufficient from which the court as trier of fact could find the defendant guilty, the Arizona Appellate Court stated particularly the short time span between the theft and sale of the stolen item:

"Neither is possession accompanied by a sale at a disproportionately low price necessarily sufficient to sustain a finding of guilty knowledge. When, however, there is other evidence in addition to possession and sale at a disproportionately low price, guilty knowledge may be found. It is highly significant that the defendant sold the stolen television no more than a day and one-half after it was stolen." Op. cit.

2. During the two month period between the theft and the pawn defendant was not in possession of the stolen tool box.

Defendant first saw the tool box during either the first or second week of December, 1975, at Cydney Osanna's apartment when, upon being asked if he had a screwdriver which could be used to remove an electrical socket wall plate, Stephen Bahamamus brought the tool box into Osanna's apartment (Tr. 20, Osanna Affidavit, paragraph no. 3). The tool box remained at the Osanna apartment until February 13, 1976, at which time defendant pawned the tool box at the Five C's pawn shop (Tr. 20-21).

3. Defendant did not attempt to use a fictitious name when he pawned the tool box for a loan. Evidence presented at trial by the plaintiff discloses that defendant presented his driver's license at the Five C's Pawn Shop, as required by law, and signed his true and correct name on the pawn slip (Tr. 10). There is no evidence whatsoever that defendant attempted to forge another's signature or otherwise conceal his identity. Defendant urges the court to consider this a highly significant factor in establishing defendant's lack of guilty knowledge or belief. Certainly the use of a fictitious name to cover one's identity would be considered as evidence tending to show guilty knowledge or belief. In fact, such was the basis for the Supreme Court of Washington affirming a defendant's conviction of receiving stolen goods in State vs. Tollett, 431 P. 2d 168 at 172

(Wash: 1967). Likewise, the lack of any evidence that defendant was attempting to conceal his identity should be considered as helping to establish defendant's innocence in the matter.

4. Defendant did not alter either the tool box or the tools contained therein in order to prevent identification. The record is completely void of any evidence establishing that defendant altered the tool box or tools contained therein in order to prevent their identification at the time of the crime or any time thereafter. Defendant urges the court to consider this as an equally significant factor, for the same reason outlined in Paragraph No. 3 above. Again, this situation arose in State vs. Taylor 422 S.W.2d 884, Mo., where a defendant altered the motor identification tag on a stolen motor block. The fact of alteration was held as a major factor by the Supreme Court of Missouri in its challenge on appeal of the sufficiency of the evidence in his conviction of receiving stolen goods. However, due to the lack of other incriminating facts and circumstances establishing guilty knowledge, the court reversed defendant's conviction. See also State vs. Zeman, infra. If evidence of alteration is to be considered as evidence inferring guilty knowledge, then the lack of any proof showing alteration should be considered as a factor tending to establish defendant's innocence.

5. Defendant's action after pawning the tool box,



Defendant presented evidence at trial to the effect that defendant, approximately one week after the transaction at Five C's Pawn Shop, went to the Grand County Sheriff's Office to take care of a traffic ticket issued to him for an expired registration. While at the Sheriff's office one of the deputy sheriffs arrested defendant for theft of the tool box (Tr. 13, 14). Defendant urges the court to consider this as yet another circumstance evidencing his lack of guilty knowledge or belief that the tool box was stolen. Had defendant known that the tool box was stolen at the time he pawned it at the Five C's Pawn Shop his normal reaction would be to stay clear of any and all law enforcement authorities rather than going to the sheriff's office to talk over payment of a fine for expired registration.

6. Defendant explained at trial as to how he came into possession of the stolen tool box. Defendant testified at trial that he first saw the tool box at Osanna's apartment during the second week in December 1975, when Stephen Bahamam brought the tool box into the apartment at Osanna's request for a screwdriver, and that the tool box remained at the Osanna apartment until she and her younger brother asked defendant to pawn the tool box as security for a loan at the Five C's Pawn Shop (Tr. 20-21; Osanna Affidavit, Paragraphs 3-5). In short, defendant, under oath, provided a true and reasonable explanation as to how he came into possession of the stolen

tool box. Of course, it is the province of the jury to give a witness's testimony, including defendant's, whatever weight it desires. Defendant argues that the prosecution and trial of fact overstep their bounds when they disregard a defendant's explanation of how he came into possession of the stolen goods and thereby conclude that the prosecution, without putting on substantive proof, has established beyond a reasonable doubt that the defendant knew or believed that the goods had been stolen. This error in proof is well described in State vs. Taylor, supra:

"It is the duty of the State to prove knowledge on the part of defendant. It is the duty of the defendant to prove his knowledge. Defendant did not prove his knowledge of his defense, but this does not prove guilty knowledge on his part or amount to a sort of admission of guilty knowledge. It is to make a submissible case against him in the absence of substantive proof of the elements of the offense. If so, no defendant, no matter how innocent, could take the stand in his own defense for fear that if the jury should fail to believe his explanation or defense and find him guilty of the fact they did not believe him, his case would be treated as a missing link in the State's case and the independent evidence of a fact otherwise established so that his conviction would be upheld. If the State had failed to make a submissible case on some material aspect denied by him in his testimony. If disbelief operates as a presumption then the jury may always find on any issue unfavorable to a defendant who offers evidence favorable to himself, despite lack of evidence on the issue. This is not the law." Id., at 638.

See also State vs. Woods, 434 S. W. 2d 465 (Mo. 1968) for



reaffirmation of the principle above set forth.

7. Last, and probably most important, defendant testified at trial, under oath, that he didn't have any idea that the tools were stolen (Tr. 21).

In comparison to the enumerated facts and circumstances immediately preceeding, plaintiff's substantive proof presented at trial merely establishes that defendant was in possession, arguably joint possession, of a stolen tool box when he pawned it at the Five C's Pawn Shop. As noted in the foregoing authorities, proof of possession, without more, falls short of establishing the offense of receiving stolen property has been committed. In addition, reviewing the evidence presented at trial in a light most favorable to plaintiff, there emerges the fact that defendant told conflicting stories to Sheriff's deputies at the time he was arrested and to the jury at trial. After his arrest and under custodial interrogation defendant told Sheriff's deputies that he woke up one morning and found the tool box in his apartment, and could not explain how it got there (Tr. 14, 21). At trial defendant testified that he first came in contact with the tool box through Stephen Bahamamus and Cydney Osanna and that the tool box remained at Osanna's apartment until February, 1976, when he, at her request, pawned the tool box at the Five C's Pawn Shop (Tr. 20-21). The fact of conflicting stories might be considered

as a circumstance, nowever slight, tending to establish guilty knowledge or belief that the tool box was probably stolen; however, defendant admitted during his testimony at trial that he had lied to the sheriff's deputies in order to protect Cydney Osanna from retaliation by one of the sheriff's deputies, Izatt. (Tr. 22-23).

On all fours with the instant appeal, both legally and factually, is Shorts vs. State, 137 Ga. App. 314, 223 S. 2d 504 (1976), as disclosed by the following:

"The State's evidence was limited to a showing that a shotgun and drill were stolen during a burglary of a home. On the day following the burglary, defendant on two occasions attempted to pawn the shotgun and the drill at a local pawn shop. Defendant testified that he obtained possession of the drill and the shotgun from a friend when the latter requested his assistance in pawning the items on the day that he had no driver's license; and that he did not know that the property was stolen.

... . An essential element of the crime of theft by receiving stolen property is knowledge that the goods are stolen when the defendant receives the property. Knowledge may be inferred from circumstances which would excite the suspicions of an ordinarily prudent man. Applying these principles to the facts, we find the evidence does not authorize a verdict of guilty. Succinctly, all that the State proved was that of recently stolen property which is insufficient standing alone to show guilty knowledge. No inference of guilty knowledge can be drawn from the circumstances of attempting to pawn the property nor from the testimony of defendant as it is completely consistent with innocence. The proof is fatally deficient." 223 S. 2d 504-505.

Defendant asks the court to adopt the same position as the Georgia court and reverse his conviction for the same reasons.

Finally, defendant urges the court to review the Utah case law and gauge the facts outlined in each of the opinions, comparing them with the facts and circumstances found in the instant appeal. In State vs. Plum, supra, the primary issue was whether the phrase "Believing that it probably has been stolen" set forth in Section 76-6-408(1), supra, renders the statute unconstitutional for vagueness. Our State Supreme Court held no. However, the court also affirmed the trial court's conviction of defendant on the basis that the verdict was supported by the evidence, which consisted of proof that defendant Plum had in his possession stolen coins, which he sold at a coin shop four days after the theft occurred, and defendant was unable to explain adequately how he came into possession of the stolen coins. In the only other case construing Section 76-6-408, State vs. Mullins, 549 P. 2d 454 (Utah 1976), this court was called upon to decide whether evidence presented at trial was sufficient to justify a finding beyond a reasonable doubt that defendant knew the property was stolen. In holding that the verdict was amply supported by the evidence, the court considered the following facts and circumstances: (1) That at the time defendant purchased the stolen tools and machinery she was told that they were stolen

goods, (2) That defendant had purchased other stolen goods on other occasions from the same sellers, (3) That on each occasion the sellers and defendant had contrived stories as to how they came into possession of the stolen goods, (4) and that at the time defendant was arrested for possessing the stolen tools and machinery she was also found in possession of other stolen goods involved in other and unrelated thefts, thereby giving rise to the presumption set forth in Utah Code Annotated, Section 76-6-408(2a) (Suppl. 1975), namely, ". . . found in possession of other property stolen on a separate occasion. . . .". The only other opinion involving sufficiency of the evidence leading to a conviction of receiving stolen property was that of State vs. Zeman, 63 U. 422, 226 P. 2d 100 (1924) which construed an earlier statutory version of the offense. Defendant Zeman appealed his conviction of receiving stolen property on the grounds that the evidence was insufficient proof that he had knowledge that the property received by him had been stolen. The facts revealed that defendant owned and operated a new and second hand clothing store in Salt Lake City. At the time of his arrest he was found in possession of various clothing items that had been stolen from another store approximately three and one-half months earlier. At the same time defendant was found in possession of goods that had been stolen from three other stores on three different

occasions. All of the stolen goods were found to be mixed with other goods in such manner as to conceal their identity. Also, various identification marks on many of the goods had either been removed or destroyed, thereby concealing their identity. In affirming the conviction, the court stated:

"The proof must amount to more than the creation of a suspicion of guilt, but in this case the possession at one time of merchandise stolen from four separate merchants, the circumstances tending to show an effort to conceal the identity of the goods, together with questionable improbable explanation of his possession given by defendant, was sufficient evidence to be submitted to the jury on the question of guilty knowledge, and the verdict of guilty cannot be set aside for lack of evidence to support it." 226 P. at 467.

Defendant submits to the court that, in comparison to the amount of evidence present at the trials in Plum, Mullins, and Zeman, all supra, the evidence presented at his trial is minimal and falls way short of the mark of proving that he possessed the requisite guilty knowledge or belief.

#### CONCLUSION

The evidence presented at trial was insufficient to prove beyond a reasonable doubt that defendant knew or believed that the tool box had probably been stolen. In end effect, the evidence presented at trial merely establishes that defendant was in possession of the stolen tool box and all other evidence sets forth facts and circumstances establishing defendant's

innocence and lack of knowledge or belief that the tool box was stolen. Therefore, the appellant's conviction and sentence by the lower court should be reversed.

DATED this 21<sup>st</sup> day of September, 1976.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the respondent, Vernon B. Romney, Utah State Attorney General, by delivering three (3) copies thereof to his office at 236 State Capitol Building, Salt Lake City, Utah 84114, on the 22<sup>nd</sup> day of September, 1976.

Michael R. Jensen

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