

1987

The State of Utah v. Rodney James Ramon; State of Utah v. Minnette M. Riedman : Brief in Opposition to Certiorari

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870279-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	Case No. 860005-CA
)	Supreme Court No.
v.)	870279
)	
RODNEY JAMES RAMON,)	
)	
Defendant-Appellant.)	

STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
vs.)	
)	
MINNETTE M. RIEDMAN,)	No. 8600013-CA
)	Supreme Court No.
Defendant-Appellant.)	

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UTAH COURT OF APPEALS

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FILED

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QUESTION PRESENTED FOR REVIEW

The State claims in its Petition that the Court of Appeals decision to the effect that theft by receiving is substantively different than theft by concealing is in conflict with Utah Code Annotated § 76-6-403, and State v. Taylor, 570 P.2d 697 (Utah 1977).

OPINION BELOW

The opinion of the Court of Appeals is appended to the State's Petition as Appendix A.

JURISDICTION

Jurisdiction of the court is conceded.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Utah Code Annotated § 77-35-4(d)

The Court may permit an indictment of information to be amended at any time before verdict if no additional or different offenses charged and substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent set of facts. (Emphasis added)

2. Utah Code Annotated § 76-6-403.

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. (Emphasis added)

3. Utah Code Annotated § 76-6-408(1).

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.

STATEMENT OF THE CASE

A. Nature of the Proceedings Below.

Respondents, having been charged with theft by receiving were bound over, arraigned and completed jury selection when the trial court permitted amendment of the information, over defendant's objection, to include a charge of theft by concealing. Defendants were convicted and sentenced upon the amended offense.

On consolidated appeals, the Court of Appeals reversed the convictions of defendant on the grounds that the amendment of the information mid-trial over defendant's objection violated Rule 4(b) of the Utah Rules of Criminal Procedure (77-35-4(d) U.C.A. 1953 as amended). A petition for rehearing was denied. (See Appendix B to State's Petition).

B. Relevant Facts.

The information filed on December 20, 1983, charged theft by receiving. On May 16, 1984, the State filed an amended information adding the following language:

". . . or concealed, withheld, or aided in concealing or withholding any such property from the owner, knowing the property to be stolen . . ."

Defendants received notice of the proposed amendment on May 17, and on May 23, defendant's filed a Motion for Bill of Particulars seeking specification of the theory of guilt upon which the State would rely at trial. On June 19 after the jury had been selected, sworn and admonished, the State formally moved

to amend the information and over defendant's objection, the court granted the State's motion. (R. 2-5). After defendants entered pleas of not guilty to the amended information, the trial proceeded onward and the jury found defendant's guilty as charged on June 22, 1984.

The case arose out of a theft of one 18' wide coil of copper sheet weighing approximately 2500 pounds and 8' x 15" fabricated panels from Western Sheet Metal. An employee of the victim advised local salvage yards to be on the look out for three coils of copper sheet totaling 10,000 pounds and 500 pounds of pie-shaped scrap. (R. 41-44; 52-53 and 333-337). No mention was made of the 8 foot panels nor was defendant Riedman, who took the phone call from the employee, advised a single spool of coil weighed some 1,250 pounds. (R. 52-53; 333-337).

The burglars took the stolen copper to Industrial Salvage where they drove directly to a shed in the back of the yard, unloaded the copper and received a yard receipt from an employee of Industrial Salvage. That yard receipt was paid by defendant Riedman. (R. 28-30; 328-330).

An employee of the victim questioned Riedman about the 10,000 pound coil and pie-shaped scraps but Riedman denied knowledge. Later that day to detectives, having obtained an investigative subpoena for the sale records of Industrial Salvage for that day, requested the sales records. Riedman, at Ramon's

request indicated that she had no knowledge of its whereabouts, but a short time later, after conferring with his counsel, defendant Ramon surrendered the receipt book to the detectives.

ARGUMENT

THE COURT OF APPEALS PROPERLY CONCLUDED THAT FOR THE LIMITED PURPOSE OF CRIMINAL RULE 4(d), THEFT BY RECEIVING AND THEFT BY CONCEALING ARE SUFFICIENTLY DISSIMILAR TO PROHIBIT AMENDING AN INFORMATION DURING TRIAL OVER OBJECTION

After jury selection had been completed, the State moved to amend the original information on file to add the disjunctive concealment language contained in Utah's Theft Statue, § 76-6-408(1). The trial court granted the motion over objection of defendants and arraigned defendants anew on the amended charge, thereafter proceeding with the trial which resulted in a jury verdict of guilty.

Rule 4(d) of the Utah Rules of Criminal Procedure, § 77-35-4(d), U.C.A. 1953 as amended, provides, in pertinent part, as follows:

"The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced."

The Court of Appeals, in partial reliance upon State v. Peterson, 681 P.2d 1210 (Utah 1984), reversed the convictions of both defendants on the grounds that Rule 4(d) as quoted above, did not permit the amendments when theft by receiving had

substantially different elements that theft by concealment. State v. Ramon, 57 Utah Advance Reporter at 33.

In State v. Peterson, supra, it was held that a mere semantic modification, without altering the basic charge, was within the provisions of Rule 4(d). The court had held that a change from assault with "serious bodily injury" to an assault with "force likely to produce death" was a change which did not prejudice defendant's substantial rights. (Id. at 1220-1221). The defense in that case was one of "alibi" and which defense was totally unaffected by the corpus delicti of the crime or unaffected by the specific factual details of the offense other than the identify of the perpetrator. (Id. at 1214). Furthermore, in Peterson, the defendant had the full benefit of a preliminary hearing on two separate occasions upon joined counts.

Justice Stewart in his separate opinion, in which Justice Durham joined, argued that even the slightly semantically distinguishable basis for the aggravated assault could change the nature of the defense, for now medical testimony suddenly became more important than anticipated. Such focus on the second part of Rule 4(d), which requires inquiry into whether the substantial rights of the defendant are prejudiced by the amendment, was deemed pivotal by two justices even though the defense theory was predicated upon an alibi theory. In the case at bar, the Court of Appeals properly perceived that the theory of defense would not be

unaffected but in fact required a shift of the defense because of the differing substantive elements of the crimes and thusly was prohibited by Rule 4(d).

The State's reliance on State v. Taylor, 570 P.2d 697 (Utah 1977) may be inappropriate since that case addressed the trial court's refusal to dismiss and/or instruct with respect to differing theft theories. The decision certainly did not intend to interpret Rule 4(d) or encompass a situation in which the theory of the case changed after preliminary hearing and during trial.

As noted in State v. Bair, 671 P.2d 203 (Utah 1983) the crimes of theft within § 76-6-408 of the Utah Code as amended, ". . . are separate and distinct substantive definitions . . ." (Id. at 208). The court was careful to guard against erroneous interpretation of the general theft statute by stating specifically as follows:

"The statute does not, however, go a step further and say that proof establishing one substantive definition, such as "receiving" stolen property, will support an accusation of another substantive definition, such as "retaining" stolen property or "taking" the property of another. Whether, under principals of consolidation, the statute may be thus extended is a question that has not been addressed by the court, nor do we find it necessary to address the question now." (Emphasis added, footnote omitted) (Ibid)

It is without question that the corpus delicti of theft by receiving is different than the crime of theft by concealing or


aiding in the concealment. When the elements of both offenses are compared side-by-side, as did the Court of Appeals at 57 Utah Advanced Reports 32, there appeared to be differences in and among three out of the four elements of the two substantive crimes.

The fact remains that defendants came prepared to try one theory of a case but were forced, over objection, to change to a different substantive theory of defense after the jury had been duly empaneled.

CONCLUSION

The Court of Appeals properly rules that a mid-trial amendment of the information was prohibited by Rule 4(d) of the Utah Rules of Criminal Procedure. The State's Petition for Writ of Certiorari should be denied.

DATED this 8 day of September, 1987.


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Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Brief in Opposition to Plaintiff's Petition for Writ of Certiorari to the Utah Court of Appeals postage prepaid, to the following this 8 day of September, 1987.

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