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State of Utah v. Verdean Ilas Carter : Brief of Appellant

Utah Supreme Court

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Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;

Larry R. Keller; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	
	:	
VERDEAN ILAS CARTER,	:	Case No. 15278
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF THEFT BY RECEIVING,
ATTEMPTED THEFT BY EXTORTION AND BEING A HABITUAL
CRIMINAL IN THE THIRD JUDICIAL DISTRICT COURT IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE JAMES S. SAWAYA, PRESIDING.

LARRY R. KELLER
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102
Attorney for Defendant-Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Plaintiff-Respondent

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of theft by receiving, Utah Code Ann. §76-6-408 (1953), attempted theft by extortion, Utah Code Ann. §76-6-406 (1953) and being a habitual criminal, Utah Code Ann. §76-8-1001 (1953), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Verdean Ilas Carter, was convicted by a jury of the crimes of theft by receiving and attempted theft by extortion on May 19, 1977, before the Honorable James S. Sawaya of the Third Judicial District Court. On June 8, 1977, the appellant was convicted of being an habitual criminal by the Honorable James S. Sawaya of the Third Judicial District Court. The appellant was sentenced by the court to serve one to fifteen years in the Utah State Prison, for the indeterminate term of imprisonment provided by law, for the crime of theft by receiving,

not more than five years at the Utah State Prison, the indeterminate term of imprisonment provided by law for the crime of attempted theft by extortion, and five years to life imprisonment in the Utah State Prison, the indeterminate term of imprisonment provided by law for the crime of being an habitual criminal, the sentences to be served concurrently.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him and a new trial, and in the case of his habitual criminal conviction, a dismissal of the charge based on its unconstitutionality.

STATEMENT OF FACTS

Sometime between the closing of the business on Friday, February 18, 1977, and 7:00 a.m. on Saturday, February 19, 1977, Sterling H. Nelson & Sons, a wholesale and retail grain store, was burglarized (TR 21-22). The safe inside the building was broken into and two days worth of receipts were among the items missing (TR 22). The receipts consisted of the customer's checks stapled to invoices (TR 22-23). The value of the checks stolen was estimated by the company at thirty to thirty-five thousand dollars (TR 27).

The procedure followed by the company did not include a separate recording of the name and address of customers paying by check (TR 23); thus, without the checks and receipts, there was no way of determining who paid by check and the burglary resulted in a substantial loss for the company (TR 23, 26-27, 38-39, 41).

At approximately 11:00 a.m. on the morning the burglary was discovered, Lloyd Ward, Co-Manager of Sterling H. Nelson & Sons received a telephone call from an unidentified caller who asked "Do you want your checks back?" (TR 23-24). Upon Mr. Ward's affirmative answer, the caller asked if he would pay for the checks Mr. Ward told the caller he would pay \$500.00 and the caller said "You will be hearing from me." (TR 24-25). The same day, Mr. Ward received a second phone call at approximately 3:00 p.m. from the same caller indicating that he did not want the police involved that he had \$60,000.00 worth of the business' checks and that he wanted at least \$5,000.00 (TR 24-25). The caller also threatened to "torch the place" and destroy the checks if the police were

involved (TR 24, 29). Mr. Ward received a third telephone call on Monday from the caller which relayed information similar to the second call on Saturday.

Ralph Nelson, Senior Manager of the business, received six to eight subsequent telephone calls from an unidentified man in the course of the same week concerning an agreement to receive \$5,000.00 in exchange for the checks (TR 43). On approximately February 25, 1977, Mr. Nelson was instructed by the caller that a substantial amount of checks would be left in a shopping cart on the west side of the Grand Central building at 33rd South and Main Street to prove that the caller had the balance of the checks. (TR 34-35). Mr. Nelson immediately went to the location and retrieved the checks which totalled approximately \$6,000.00 and were made payable to the business (TR 35).

On the following Monday, the caller asked Mr. Nelson if he was willing to pay \$5,000.00 and if he would be willing to go through an attorney in order to receive the merchandise, (TR 35-36). When Mr. Nelson consented to go through an attorney, the caller informed him that it would cost an additional \$500.00 which Mr. Nelson agreed to pay (TR 36). There was some discussion of using the company's attorney but the idea was not pursued and no attorney was actually named in the discussions (TR 45-47). At 11:30 p.m. of the same day, Mr. Nelson received a phone call setting up an agreement as to the means of delivering the \$5,500.00 and receiving the checks (TR 36, 47). Mr. Nelson was called by Mr. Green of the Salt Lake City Police Department on the following day and told that the checks were in the possession of the police department.

ment (TR 36).

On the evening of February 28, 1977, Robert Van Sciver, an attorney in Salt Lake City, received a call from the appellant, Verdean Carter. Van Sciver had represented the appellant in the past and was performing services with respect to a settlement of a civil matter at the time (TR 51, 60). The appellant asked Van Sciver if he could deliver a package to Van Sciver's office and if Van Sciver would give the package to somebody if they came to redeem it from him. Mr. Van Sciver indicated that he would agree (TR 52). The following day, March 1, 1977, the appellant went to Van Sciver's office at approximately 8:15 a.m. with a package where he met Van Sciver, who was on his way out the door. The appellant and Van Sciver went into the office where the appellant placed the package on the floor (TR 53). The appellant told Van Sciver to call the person whose name appeared on the checks and that they would bring in some money and pick up the checks. The amount of money referred to was \$5,500.00, \$500.00 of which was to be retained by Van Sciver (TR 53-54). Mr. Van Sciver told the appellant "It smells. I don't like this." (TR 55). Mr. Van Sciver further stated that he thought the arrangement sounded like an extortion plot, to which the appellant responded, "Well, it is." (TR 88). Van Sciver told the appellant he intended to tell the police "to cover my ass." The appellant told Van Sciver that the person to whom the checks belonged did not want the police involved and that he didn't need to feel like he had to discuss it with the police (TR 55).

Van Sciver then went directly to the coffee shop in the Metropolitan Hall of Justice and saw Captain Patrick of the Salt Lake City Police Department whom he told about the package (TR 56). Van Sciver, on the same day, spoke with Deputy County Attorney John Nielsen and Salt Lake City Police Detectives Young and Stoner about the situation. Without revealing the appellant's name or his conversations with the appellant, Van Sciver told them where the package was and that they could examine it (TR 57)

Later the same afternoon, Van Sciver telephoned appellant at his place of employment at Z.C.M.I. Shoe Repair and told him that the checks were in the hands of the police (TR 66). The appellant said, "Don't worry I can still make it fly" and "I'll just tell them to deliver the money to you: that the checks are in the hands of the police." (TR 69). Van Sciver also assured the appellant that under no circumstances would he disclose the defendant's name (TR 70). Subsequently, Van Sciver was subpoenaed and ordered to reveal the appellant's identity, which he did (TR 58)

The appellant was arrested by Officer Jake Green later in the afternoon of March 1, 1977, at his place of employment and taken to the Salt Lake County Attorney's Office for interrogation (TR 76-77). The appellant voluntarily gave a statement to the police (TR 78-79). He stated that he was approached by an individual two days earlier and asked if there was a way to have a lawyer get some checks back to the company (TR 79).

The appellant was advised by the individual that in return for his assistance, "they would take care of him," meaning there

was more than one person involved (TR 84). The appellant admitted that he believed some type of fraud was involved in the arrangement; that he went to Van Sciver's office with another individual and that he delivered the checks to Van Sciver so that the checks could be returned to their owner while the unidentified individual waited in the car (TR 82, 85-86).

At the trial, the appellant testified that an individual advised him that he had a whole bunch of checks and he didn't know how to get them back to the owners so he was going to destroy them (TR 125). The individual stated that he had talked to the owner who was willing to pay a reward for the return of the checks and to go through a lawyer to get them back (TR 126). The appellant later saw the checks at the individual's home and thought they valued approximately \$50,000.00 (TR 128). The appellant testified as to his concern that the checks be returned to the owners because a loss of \$50,000.00 could bankrupt a business (TR 131). The appellant believed that the parties would give him a part of the \$5,000.00 paid by the owners and he stated he would have accepted the money (TR 130-131). The appellant related his conversations with Van Sciver in which he admitted that the transaction could be extortion. At no time did the appellant tell Van Sciver not to return the checks if the money was not paid or attempt to retrieve the checks when Van Sciver said he intended to call the police (TR 131, 133). The appellant told Van Sciver not to contact the police only because the individual who accompanied him to Van Sciver's office said so (TR 133). The appellant did not believe

he was personally involved in crime and wished to remain anonymous to avoid an embarrassing situation with the police (TR 135). It was always the appellant's understanding with Van Sciver that Van Sciver would not divulge his identity to the police (TR 135).

Floyd Ledford, a police officer for Salt Lake City, assigned to the Detective Division, testified in behalf of the appellant (TR 100-101). Officer Ledford testified concerning his acquaintance with the appellant for six or seven years and his work with the appellant as an informant over the past two years (TR 101-102). The officer stated that the appellant had provided the police with several leads concerning the crimes in the region and in one instance, the appellant's information led to the recovery of approximately \$100,000.00 worth of jewelry stolen (TR 102-105).

At the conclusion of the trial on Counts I and II of the Information and after the jury had returned a verdict of guilty, the jury was dismissed. The appellant waived his right to a jury trial on Count III of the Information, the Habitual Criminal Charge and the matter was tried to the Court on June 8, 1977 (TR 201, 202). The appellant made a motion to dismiss Count III on the grounds that such prosecution in this case constituted a selective enforcement of the statute and presented evidence in support of the Motion (TR 200).

Gerald Kinghorn, Assistant County Attorney, testified that the appellant was the first individual to be prosecuted under the Habitual Criminal Statute since it was reenacted into law in 1969. He also stated there are no written guidelines setting forth when to use the habitual criminal prosecution (TR 208). Further, Mr

Kinghorn could identify only one other person as being prosecuted under that statute in Utah since 1970 (TR 208).

David E. Yocom, Deputy County Attorney for Salt Lake County, testified that he was in charge of the Career Criminal program for Salt Lake County, a federally funded administrative test program (TR 212). He testified that only one other individual had been charged with being a Habitual Criminal under the statute since July, 1975 and that the Complaint against that individual was dismissed at Preliminary Hearing. This was true despite the fact that the Career Criminal program became effective in the Salt Lake County Attorney's Office in July of 1975 and 260 individuals had been prosecuted under the program since its inception (TR 213). According to Mr. Yocom, there were seven criteria for determining persons to be prosecuted under the program, including the criteria of two or more convictions for serious felony offenses (TR 213). Mr. Yocom testified that none of these 260 were individuals against whom the County Attorney could have filed and proven the elements of being a Habitual Criminal pursuant to the statute (TR 214). He noted that some cases involving out-of-state and federal convictions were not filed due to the difficulty of proving that the conviction was a felony of the first or second degree (TR 216-217). However, one of the convictions relied upon in the appellant's case is a conviction from the State of California (TR 217).

The prosecution submitted as Exhibit 1 an authenticated copy of a judgment and conviction from the State of California naming Verdean Ilas Carter as the defendant and showing that the defendant pled guilty to the offense of Robbery (TR 218-219). The Court

took judicial notice of Section 213 of the California Penal Code which provides for a sentence of not less than five years for the crime of First Degree Robbery (TR 221-222). Exhibit 2 reflected a Utah conviction of Verdean Ilas Carter showing that the defendant entered a plea of guilty to the crime of Attempted Robbery and was committed to the Utah State Prison for a term of two and a half to twenty years (TR 219).

Based on the appellant's admission during the trial of Counts I and II that he was the same Verdean Ilas Carter as named in the Utah and California convictions represented by Exhibits 1 and 2, the Court found the appellant guilty of Count III (TR 137, 138, 223, 226).

ARGUMENT

POINT I

THE HABITUAL CRIMINAL STATUTE, UTAH CODE ANNOTATED §76-8-1001 (AS AMENDED 1975), IS UNCONSTITUTIONAL FOR THE FOLLOWING REASONS:

A.

THE STATUTE VIOLATES THE APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS AS PROVIDED IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND HIS RIGHT TO THE UNIFORM OPERATION OF THE LAWS PROVIDED IN ARTICLE I, SECTION 24 OF THE CONSTITUTION OF UTAH.

The appellant first contends that the Habitual Criminal Statute is unconstitutional on its face because the legislature has vested the prosecution with unbridled discretion in its enforcement.

The statute provides as follows:

76-8-1001. Habitual Criminal -- Determination --
Any person who has been twice convicted, sentenced,
and committed for felony offenses at least one of
which offenses having been at least a felony of the
second degree or a crime which, if committed within
this state would have been a capital felony, felony
of the first degree or felony of second degree,
and was committed to any prison may, upon conviction
of at least a felony of the second degree committed
in this state, other than murder in the first or
second degree, be determined as a habitual criminal
and be imprisoned in the state prison for from five
years to life. [Emphasis Added]

The choice of enforcement provided in the statute through interjection
of the word "may" discriminates against the appellant in violation
of his right to equal protection of the laws as guaranteed by the
Fourteenth Amendment to the Constitution of the United States and
the right to uniform operation of laws as provided in Article I,
Section 24 of the Constitution of Utah.

The scope of discrimination permissible under the law has
been examined by the Utah Supreme Court. In Hansen v. Public
Employees Retirement System Board of Administration, 122 Utah 144,
246, P.2d 591 (1952), Justice Crockett stated for the Court:

An act is never unconstitutional because of
discrimination so long as there is some reasonable
basis for differentiation between classes which is
related to the purpose to be accomplished by the
act. And it applies uniformly to all persons with-
in the class. State v. Mason, 94 Utah 501, 78 P.2d
920, 117 A.L.R. 330; Slater v. Salt Lake City, 115
Utah 476, 206 P.2d 153, 9 A.L.R. 2d 712. [Emphasis
Added]

The Court affirmed the approach taken in the Hansen case
in Child v. City of Spanish Fork, 538 P.2d 184 (1975), where again
Justice Crockett wrote:

" . . . different treatment of individuals does not necessarily violate the equal protection of the laws assurances. They may be treated differently by the law or by legal procedures which divide them into classifications, if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally." [Emphasis Added]

Although the statute permissibly defines a class of persons subject to the provisions, it fails to insure the uniform and non-discriminatory treatment of the class of habitual criminals. Through use of the permissive word "may" in §76-8-1001, the prosecution is granted license to abuse discretion and subjectively inflict the provisions of the statute. Appellant is not lacking authority for this position. In State v. Cory, 204 Ore. 235, 282 P.2d 1054 (1955), the Oregon Supreme Court reached the same conclusion with respect to that state habitual offender statute. Similar to §76-8-1001, the Oregon statute provided that upon a finding of the requisite prior convictions not involving crimes of personal violence, the district attorney may file an information accusing the person of the previous convictions. The Court held that the portion of the statute giving the district attorney discretion to determine whether to file an information against a person previously convicted of a felony not involving personal violence was unconstitutional under the equal protection clause of the state and federal constitutions, Writing for the Court, Justice Latourette stated:

" . . . there is no yardstick or semblance of classification which would enable the district attorney to determine under what circumstances an information should be filed. The exercise of absolute discretion is vested in the district attorney in such a circumstance. In other words, the fate of persons, even to the extent of life

imprisonment, who have committed the same acts under the same circumstances and in like situations is determined by the whim and caprice of the district attorney." 282 P.2d at 1056.

The Utah Habitual Criminal Statute is equally deficient in providing appropriate and concise guidelines for the uniform application of the law. Recent years have seen increasing demands for control of the decision to prosecute by establishing guidelines on standards to implement the avowed purposes behind the American Criminal Justice System. The benchmark in this area is embodied in the American Bar Association Standards for Criminal Justice, Standards Relating to the Prosecution Function §3.9. The prosecution of habitual offenders based on no standards runs afoul of the constitution since it can serve none of the utilitarian purposes demanded by the criminal sanction. As is noted in the aforecited A.B.A. Standards:

The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly. (A.B.A. Standards, infra §3.9 Commentary at 93). See also A.B.A. Code of Professional Responsibility DR7-103(A).

In the present discretionary statute, §76-8-1001 fails to insure the uniform operation of the law and the equal protection of individuals culpable thereunder and therefore must be found invalid on its face.

Appellant next contends that the Habitual Criminal Statute was selectively and capriciously applied against him in violation of his right to equal protection of the laws.

In Oyler v. Boles, 368 U.S. 448 (1962) the United States Supreme Court considered a similar challenge to the West Virginia recidivist statute. Rejecting the Petitioner's claim, then Justice Tom C. Clark speaking for the majority of a 5-4 divided Court stated:

" . . . the conscious exercise of some selectivity is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. Oregon v. Hicks, [213 Ore. 619, 325 P.2d 794 (1958)]; cf. Snowdon v. Hughes, 321 U.S. 1 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (by implication)." [368 U.S. at 456]

It is nonetheless clear as indicated in Oyler v. Boles that the Fourteenth Amendment's guarantee of Equal Protection of the law applies as well to the enforcement of penal laws as it does in other contexts. Thus, the prosecution of an individual in an arbitrary manner violates the Fourteenth Amendment and such a prosecution must be dismissed.

The seminal case in this area is that of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064; 30 L.Ed. 220 (1886). In this case certain city ordinances, which regulated the business of operating a laundry, although valid facially, were found by the Court to be discriminatorily enforced against the Chinese population. In Yick Wo the Court noted that although a:

" . . . law itself be fair on its face and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their

rights the denial of equal justice is still within the prohibition of the Constitution." (118 U.S. at 373, 374).

It becomes clear from Yick Wo and Oyler v. Boles that raising a challenge of discriminatory enforcement of a penal statute stands on firm constitutional soil. The Courts have apparently gone beyond a limited reading of Oyler v. Boles and have held the Oyler does not preclude the granting of relief against intentional and purposeful discrimination against an individual since such conduct was not alleged in Oyler. See Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963) (opinion by Judge Lambard). The case of United States v. Falk, 479 F.2d 616 (7th Cir. 1973) gives such a reading to the Yick Wo-Oyler line of decisions. In that case the Seventh Circuit reversed the District Court and held that the defendant was entitled to an evidentiary hearing on his claim of discriminatory enforcement for failure to possess a draft card. In so doing the court did not require a discriminatory distinction based on the traditional invidious classifications of race or religion but applied Oyler in such a way so as to indicate that the potential chilling effect on first amendment rights of such a prosecution falls within the category of "other arbitrary classifications."

A similar result was reached in United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), which involved a conviction for refusing to answer questions in a census report in violation of 13 U.S.C. §221 (a). The defendant argued that he had been deliberately selected for prosecution because of his participation in a census resistance movement. The Court of Appeals for the Ninth Circuit agreed that there was evidence that Steele had been

singled out for prosecution on the basis of his exercise of First Amendment rights and concluded that his conviction could not stand under Oyler and Yick Wo.

Convictions were also reversed in United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), on a finding that an unlawful and discriminatory purpose precipitated the indictments. The arrests in that case were for violations of a disorderly conduct regulation which prohibited loud and unusual noise and obstruction of passageways and a regulation forbidding the distribution of handbills without prior permission of the federal agency in whose space the material was to be distributed.

The point that these cases make is that purposeful discrimination in the enforcement of penal laws may be arbitrary and hence unconstitutional under the Oyler rationale even though the discriminatory effect does not manifest itself in traditional categories of race or religion. See also People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S. 2d 128 (1962).

In the instant case, the evidence shows that the appellant was the sole individual prosecuted under the Utah Habitual Criminal Statute in the two years since its reenactment. This statistic is particularly suspect in view of the fact that 260 individuals have been prosecuted under the Career Criminal program alone during the same two years and one of the criteria for Career Criminal treatment is two or more convictions of serious felonies.

Mr. Yocom, the Deputy County Attorney in charge of the Career Criminal program, testified the Habitual Criminal charges may not be filed against some defendants who have out-of-state

convictions due to the difficulty of proof. Yet the appellant had an out-of-state conviction which was used against him. Appellant contends that the difficulty of proof of out-of-state convictions is not a viable excuse since presumably the County Attorney has access to the statutes of other states by which the classification of the conviction can be as readily determined as it was in the instant case.

The evidence supports the appellant's claim that the County Attorney purposefully and intentionally singled out the appellant for prosecution under the Habitual Criminal Statute while it has declined to prosecute others equally culpable. Such prosecution was arbitrary and resulted in unlawful discrimination against the appellant in violation of his rights to the equal protection of the laws.

B.

THE HABITUAL CRIMINAL STATUTE ALLOWS FOR AN
UNCONSTITUTIONAL DELEGATION OF AUTHORITY BY THE
LEGISLATURE TO THE EXECUTIVE TO FIX AND/OR ENHANCE
PUNISHMENT FOR CRIME.

As noted previously, Utah Code Ann. §76-8-1001, 1002 (as amended 1975) grants discretion to the county attorney or prosecuting authority to charge any criminal defendant who meets the requirements of §1002 with being a habitual criminal, and therefore subjecting such person to an enhancement of punishment for whatever other crime he is convicted of. Such enhancement is "from five years to life." The statute however, does not require the county attorney to ask for such enhancement of punishment in

the case of every individual who meets the criteria, but rather, uses the permissive word "may" in §1001. Appellant contends that this discretion represents exactly the unconstitutional delegation of authority by the legislature of the power to fix punishment which was condemned by this Court in its recent decision in State v. Gallion, _____ Ut.2d _____ P.2d _____ (Ut. Sup. Ct. No. 14966, Nov. 17, 1977).

In Gallion, this Court struck down a section of the Utah Controlled Substances Act which gave the Attorney General, a member of the Executive Department, the power to define and fix punishment for crime. Writing for the majority, Justice Maughn observed:

"In the Controlled Substances Act, the administrator not only determines that a substance should be controlled, he further schedules the substance, which in effect, declares the magnitude of the penalty and fixes the punishment. The administrator is exercising an essential legislative function which cannot be transferred to him." (No. 14966 at P.5)

Under Utah law, the various county attorneys are clearly members of the Executive Branch supervised by the Attorney General. Utah Code Ann. §67-5-1 (1953) provides:

"It is the duty of the attorney general:
... (5) To exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge."

It is clear from a reading of §76-8-1001, 1002 that the court cannot on its own invoke the enhancement of punishment provided for. The determination as to when the section is invoked

rests solely within the discretion of the county attorney or other prosecuting authority as the case may be.

Because Habitual Criminal Statutes are clearly enhancement of punishment provisions rather than substantive crimes (see e.g. Moore v. Mo., 159 U.S. 613, 40 L.Ed. 2301, 16 S.Ct. 179 and Graham v. W. Va., 224 U.S. 616, 56 L.Ed. 917, 32 S.Ct. 583), the legislature has allowed the county attorney or other prosecuting authority to, in effect, fix the punishment of an appropriate offender. This permissive approach makes Utah Code Ann. §76-8-1001 and 1002 (as amended 1975) an unconstitutional delegation of authority which rests exclusively within the legislative prerogative. As Justice Maughn observed in State v. Gallion, supra:

" . . . (T)he authority to define crimes and fix the punishment therefore is vested exclusively in the legislature, and it may not delegate that power . . . A determination of the elements of a crime and the appropriate punishment therefore are, under our Constitutional system, judgments which must be made exclusively by the legislature." (Sup. Ct. Case No. 14966 at P.6) [Emphasis supplied]

Appellant urges a reversal of the trial courts judgment of punishment pursuant to the Habitual Criminal charge and dismissal of that charge.

POINT II

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS ROBERT VAN SCIVER'S TESTIMONY CONCERNING HIS COMMUNICATIONS WITH THE APPELLANT BECAUSE THE COMMUNICATIONS WERE PRIVILEGED THROUGH THEIR ATTORNEY-CLIENT RELATIONSHIP.

The importance and sanctity of the attorney-client privilege is clearly recognized in Utah, as reflected by the provisions in Utah Code Annotated §78-24-8(2) -- Privileged Communications, §78-51-26(5). Duties of attorney and counselors, and Rule 26 of the Utah Rules of Evidence. The general purpose of the privilege is set forth in §78-24-8:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases:

(2) An attorney cannot, without the consent of his client, be examined as to any communications made by the client to him, or his advice given therein, in the course of professional employment,

At the hearing on the Motion to Suppress in the instant case, Mr. Van Sciver testified that he and the appellant had an on-going attorney-client relationship (Suppression Hearing Transcript II). Further, Mr. Van Sciver testified to his belief that the appellant contacted him on this occasion because Van Sciver was an attorney and the appellant sought his services in that capacity (Suppression Hearing Transcript 10). The appellant's position is that his consultation with Mr. Van Sciver concerned a past crime.

The prosecution alleged that the communications between the appellant and Van Sciver were not privileged under Rule 26(2)

of the Utah Rules of Evidence. Rule 26 sets forth the standard required before a communication can be removed from the realm of privilege:

(2) Exceptions. Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort, . . .

Justice Cardoza examined this exception to the attorney-client privilege in Clark v. United States, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993, 1000 (1932):

To drive the privilege away, there must be something to give colour to the charge; there must be prima facie evidence that it has some foundation in fact.

At the hearing, the prosecution presented no independent evidence to support the contention that the communication was not privileged.

The appellant further contends that Mr. Van Sciver's exercise of judgment was faulty and premature. Mr. Van Sciver testified that his conversations with the appellant were quite brief. At no time before going to the police did Mr. Van Sciver pause to examine the potential conflicts with his client, the appellant, nor did he seek to ascertain the exact nature of the appellant's involvement. Rather, Mr. Van Sciver permitted his personal concurs to prevail over those of his client. Such conduct contravenes the role and duty of an attorney as set forth in the statutes:

§78-51-26. Duties of Attorneys and Counselors. --
It is the duty of an attorney and counselor:

(5) To maintain inviolate the confidences, and

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at every peril to himself preserve the secrets of his client.

The fact that the communications related by Mr. Van Sciver were incriminating to the appellant cannot warrant the use of that evidence because it was secured in the breach of Mr. Van Sciver's duty to the appellant.

Appellant does not dispute Mr. Van Sciver's propriety in relinquishing the receipts to the police. A similar result was compelled by the Supreme Court of the State of Washington in State v. Olwell, 64 Wash. 2d 828, 394 P.2d 681, 16 A.L.R. 3d 1021, (1964). In that case, the attorney refused to comply with a subpoena duces tecum requesting the production of knives in his possession and control relating to his client, claiming the attorney-client privilege and the client's privilege against self-incrimination. In holding that the knife was obtained through a confidential communication by the client, the Court stated:

To be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client. [394 P.2d at 683]

The court held the subpoena duces tecum defective on its face and therefore the attorney was not compelled to comply with it. However, the court further ruled the evidence was accessible to the prosecution for use in a subsequent criminal proceeding when certain controls were applied:

"Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the

attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution . . . The prosecution, upon receipt of such evidence from an attorney, where charge against the attorney's client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests." [394 P.2d at 685]

Under the rule propounded in Olwell, the prosecution is entitled to the receipts but it cannot divulge the source of the evidence in a subsequent criminal proceeding.

The essence of the Olwell result is to maintain the client's privilege as to identity. Circumstances warranting the application of the attorney-client privilege to the identity of the client have been recognized by numerous courts. Baird v. Koerner, 279 F.2d 623 (CA9, 1960), Exparte McDonough, 170 Cal. 230, 149 P.566 (1915), See generally 16 A.L.R. 3d 1047. The application of the privilege to the client's identity is most compelling where the client retains the attorney with the specific purpose of keeping his identity confidential. The New York Court of Appeals examined this situation in In Re Kaplan, 8 N.Y. 2d 214, 168 N.E.2d 660 (1960) and held that where an attorney is retained confidentially by a client to pass certain information to a public investigating body, he cannot be jailed for contempt of court because he is willing

to disclose the information but not his client's identity. In the instant case, the appellant did not wish communication to be conveyed to the police. However, his purpose in delivering the receipts to Mr. Van Sciver parallels the client's motivations in Kaplan in that the appellant's concern was that the receipts be returned to the rightful owner.

In summary, the appellant's communication to Mr. Van Sciver was privileged with respect to his identity. The fact that Mr. Van Sciver did not honor the privilege and vigorously protect it when subpoenaed by the Court cannot operate to the benefit of the prosecution. The Court, therefore, erred in admitting this evidence at appellant's trial and therefore appellant is entitled to reversal.

POINT III

THE APPELLANT'S CONFESSION MUST BE SUPPRESSED
BECAUSE HIS ARREST WAS THE RESULT OF A PRIVILEGED
COMMUNICATION UNLAWFULLY ACQUIRED BY THE
PROSECUTION.

The appellant's statement to the police must be suppressed as evidence because it was secured through the unlawful breach of the attorney-client privilege. The use of appellant's statement following Mr. Van Sciver's unlawful disclosure of his identity is similar to certain Fourth Amendment cases examined by the United States Supreme Court. Wong Sun v. United States, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963) held that verbal evidence derived immediately from an unauthorized arrest must be suppressed as the fruit of official illegality. The United States Supreme Court further held in Wong Sun the confession of another defendant admissible because the "connection between the arrest and the statement had become so attenuated as to dissipate the taint."

The Wong Sun doctrine was re-examined by the United States Supreme Court in Brown v. Illinois, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975). The facts in Brown were: following an illegal arrest, the defendant was taken to a police station where, after being given the Miranda warnings, he made incriminating statements concerning a murder of which he was subsequently convicted. The state supreme court held the statements admissible on the grounds as the United States Supreme Court described it,

that the Miranda warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense,

it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments. (422 U.S. at 597)

The United States Supreme Court reversed the state court ruling, distinguishing the purposes of the exclusionary rule to effectuate the Fourth Amendment from the interests and policies served under the Fifth Amendment. Justice Blackmun, writing for the Court, stated:

. . . even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be sufficiently an act of free will to purge the primary taint. Wong Sun thus mandates consideration of a statement's admissibility in light of the district policies and interests of the Fourth Amendment. (422 U.S. at 602)

The Supreme Court set out several facts in addition to the Miranda warnings to be considered in assessing the voluntariness of a statement secured after an illegal arrest, including the temporal proximity of the arrest and confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct.

In the instant case, the appellant departed from his attorney at 8:30 a.m. At approximately 1:00 p.m., he was telephoned by Mr. Van Sciver and advised that the receipts had been turned over to the police but that his identity would not be revealed. Later the same afternoon, the appellant was arrested at his place of employment and taken to the Salt Lake County Attorney's Office for interrogation. Following a discussion with the police, the appellant gave his statement as to his involvement. (TR 154) The

appellant's arrest and confession parallel Brown v. Illinois in that the confession was secured in close proximity to the unlawful arrest and without any intervening circumstances indicating a break in the causal chain. Additionally, the misconduct exhibited by Mr. Van Sciver and the prosecution in breaching the appellant's attorney-client privilege warrants the same rule of exclusion applied to illegal arrests in Fourth Amendment cases. Historically, the attorney-client privilege has been preserved to insure the right of every person to freely and fully confer with a skilled legal counselor to secure adequate advice without apprehension of subsequent disclosure by the lawyer. Baird v. Koerner, supra. The failure to exclude evidence obtained in breach of the privilege would undermine the sanctity of the privilege and encourage prosecutorial harassment of attorneys who might succumb to pressure. The policy of insuring the legality of criminal investigations and arrests mandates the exclusion of the appellant's confession and reversal of the conviction.

CONCLUSION

This is a situation where the appellant sought the advice of an attorney whom he had known and trusted for a number of years in order to assist in the return of stolen property. Because the property was stolen, the appellant sought to maintain the utmost confidentiality as to his identity to avoid an embarrassing situation with the police. As a result of his attorney's breach of the attorney-client privilege, the appellant now faces imprisonment.

Compounding the dilemma, is the patently unconstitutional enforcement of the Habitual Criminal Statute. This conviction must be reversed lest it set a dangerous precedent of vesting tyrannical discretion in the hands of the prosecution.

For the reasons set forth herein, the appellant seeks reversal and a new trial.

Respectfully Submitted,



LARRY R. KELLER

Attorney for Defendant