

1977

# State of Utah v. Larry Kyle Stephens and Troy Johnson : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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|-------------------------|---|----------------|
| STATE OF UTAH,          | ) |                |
| Plaintiff and           | ) |                |
| Respondent,             | ) |                |
| vs.                     | ) | Case No. 15384 |
| LARRY KYLE STEPHENS and | ) |                |
| TROY JOHNSON,           | ) |                |
| Defendants and          | ) |                |
| Appellants.             | ) |                |

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BRIEF OF APPELLANTS

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Appeal from the First Judicial First Judicial District  
Court for Cache County, Utah  
HONORABLE VENNY CHRISTOFFERSEN, JUDGE

---

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of theft, Utah Code Annotated §76-6-501(1953) as amended, a second degree felony.

DISPOSITION IN LOWER COURT

This case was tried before the Court sitting without a jury on July 19, 1977, wherein the Defendants were found guilty.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the judgment of the lower court reversed or vacated and the case remanded with directions to enter a judgment of not guilty.

STATEMENT OF THE FACTS

On the 4th day of December, 1976, Grant Mathews, a mink rancher from Providence, Utah, found the hinges of his shed door

at his ranch removed and 75 frozen mink pelts missing from a storage freezer inside. (T.R. 25). These pelts were placed there in plastic bags with each bag containing 25 graded pelts together with approximately 700 pelts to be taken to Orem, Utah for final preparation for market. These pelts and bags were not marked except each contained Mathew's card. (T.R. 31 and 54) Mathews records showed the missing 75 pelts were all male with the coloration graded as 67 pastel and 8 demi-buff. (T.R. 61) Mathews further testified that the Defendants had worked for him for a short time and were terminated about 10 days before the loss was discovered. (T.R. 39). The officers could find no evidence at the scene to identify the person or persons involved (T.R. 76-77)

On a tip, the deputies from the Cache County Sheriff's office went to Shamrock Coins, a pawnshop in Pocatello, the end of April, 1977 and talked with the owner, Dan Williamson. He told them that two boys came into his pawn shop to sell two plastic bags containing 75 mink pelts on the 9th day of December, 1976. (T.R. 81) He bought the pelts which he identified the color as mostly a light color platinum with three black ones. (T.R. 84). He sent the pelts to Wilkinson Pelting Service in Orem, Utah on December 20, 1976 (T.R. 113) who graded the 75 pelts as 61 pastel, 11 demi-buff and three other mutations. (See Exhibit 9). These were in turn delivered to and sold by the Seattle Fur Exchange with the pelt description and sex listed (See Exhibits 10 and 11). The pelts were not available at trial. Williamson and his



wife were shown pictures of the defendants with others but could not identify the defendants. (TR. 99). At trial however, the witness Dan Williamson did identify the defendant Troy Johnson but could not identify the defendant Kyle Stephens.

#### POINT I

THE COURT ERRED IN NOT DISMISSING THE CHARGES AGAINST BOTH DEFENDANTS FOR INSUFFICIENT EVIDENCE TO SUPPORT BEYOND A REASONABLE DOUBT, A GUILTY VERDICT ON CHARGES OF THEFT.

It is well recognized law that the burden of proof in criminal cases is on the State to prove each and every element of the charge beyond a reasonable doubt and the defendant is entitled to any benefit of reasonable doubt. Potter v. U.S., 155 U.S. 438, 39 L Ed. 214, 15 S. Ct. 144 (1894) State v. Taylor, 21 U. 2d 425, 446 P. 2d 954 (1968).

In Utah, the standard for a reasonable doubt is specifically set forth in State v. Williamson, 22 Utah 248 62 Pac. 1022, (1900):

"A reasonable doubt is not a mere imaginary, captious or possible doubt but be fair doubt based upon reason and common sense, and growing out of testimony in the case. It is such a doubt as will leave the juror's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt." p. 1024

This uncertainty of mind is one arising from a defect of knowledge or evidence and is one, if honestly entertained, which is a reasonable doubt. Williamson, supra, at 1024.

In the instant case, the Court sitting as a jury, found beyond a reasonable doubt that Appellants were guilty of the theft of 75 mink pelts. Appellants respectfully submit that there is insufficient evidence to prove their guilt beyond a reasonable doubt as defined in Utah law. The pelts which were sold in Idaho were never identified beyond a reasonable doubt, as those pelts taken from Grant Mathew's shed.

In Utah, the State must identify stolen property as the goods which are charged to have been stolen. The rule is set forth in State v. Hall, 105 U. 151, 139 P. 2d 228 (1943) reversed on other grounds in 105 U. 162, 145 P. 2d 494 (1943), in which the defendant was charged with stealing spark plugs.

Under the authorities, it is clear that the State must definitely identify the goods found in the Defendant's possession as the goods which were charged to have been stolen before the jury may draw an inference of guilt based upon the proof of possession by the defendant of such goods. Hall, supra, at p. 230 (emphasis added).

In that case, there was no evidence that anyone saw the Defendant or anyone else take the spark plugs. The State therefore, as here, relied entirely on circumstantial evidence to prove all elements of the crime. The facts adduced were that two shipments of plugs were missing within six weeks, that not all of the shipments were missing, that the defendant was allegedly selling spark plugs at a discount price, and that the defendant had access to the area of the theft. The State was unable to identify the plugs as those stolen during the theft, particularly on the second date the spark

were missing. This court stated that "proof in the alternative that they were either the ones stolen on May 23rd or part of the shipment which was stolen some six weeks earlier, will not suffice." Hall, supra, at 231. As a matter of law, the State had failed to prove the plugs were taken on May 23rd and the case was remanded for a new trial.

Similarly, the 75 mink pelts in the instant case were not sufficiently identified under the above rule of law. The Court near the end of the trial, in response to objection of defense counsel that as a question of whether the pelts described in Mathew's original records could fit the description in the Wilkinson and Seattle Fur Exchange's invoices was too speculative stated:

"This is too speculative, the whole thing has been in the same category" (T.R. 211)

The lower court itself then in rendering his verdict stated that testimony concerning identification is purely speculative.

The Court: In this case, first of all as to the identity of the stolen property, mink of course are not branded like cattle and have a distinct different brand mark on them, but certainly by the circumstantial evidence you have 75 mink missing and 75 mink turn up at a place where one of the defendants is identified as being present and selling the mink, and of the same general description. I understand there's been a lot of testimony here about descriptions and colorations and gradings of mink pelts and about what I've learned in not only this case but others as far as mink grading is concerned is that this generally fits in about the same category of expertise as far as agreement among themselves as appraisers and surveyors and weather prognosticator. (T.R. 215 and 216.)

Out of pages of testimony, the lower court could credit the experts with only a minimal degree of consistency which in listening to the testimony is understandable. The Court described very clearly the lack of certainty with which the pelts were identified. Grant Mathews readily changed his initial identification of coloration from 67 pastel and 8 demi-buff (T.R. 30) to be the same as the coloration established in Exhibit 9 by Wilkinson Pelting Service and in Exhibit 10 and 11 by Seattle Fur Exchange. Lynn Erickson, an expert witness without any self interest, agreed that some disagreement may be made in grading coloration and size but was clear that a luletia pelt graded by Seattle fur Exchange in Exhibit 10 and 11 and consistent with "other mutations" by Wilkinson in Exhibit 9 would not be mistaken for a demi-buff or pastel. (T.R. 186) Even if one accepts the inconsistency in coloration grades as being merely graders' opinion, there is one pelt sold in Pocatello that is totally inconsistent with the color gradation of the pelts taken from Mathews.

This evidence does not comprise definite identification. In fact, the only evidence that the pelts missing from the Mathews shed were those sold to Williamson in Pocatello was the fact that they were the same number.

In addition to the critical difference in color, other evidence was contradictory to the State's case:

- 1) the mink pelts taken from Mathews were in three

bags but the mink sold in Pocatello were in two bags (T.R. 81) and still more could have been put in each bag (T.R. 99). Grant Mathews testified that 30 of his male pelts in one of his bags is very crowded (T.R. 11).

2) Grant Mathews indicated that the pelts would have to be kept frozen to preserve their quality. (T.R. 35) and affirmed by Lynn Erickson (T.R. 206) The pelts were sold fully seven days after the alleged theft in a cooled but not frozen condition to Dan Williamson without any spoilage.

3) Grant Mathews reported the theft to the local co-op with a reward which would have been reported to Wilkinson (T.R. 33, 34 and 39), but Wilkinson did not report anything when 75 pelts were received from a non co-op member, namely, a pawnshop, just over two weeks later. If Mathews identification is so clear from invoices why did Wilkinson not note the connection unless the coloration from Mathews' report and that observed by Wilkinson were clearly different.

4) The mink pelts of Mathews are only a small number of over 25,000 pelts prepared in Cache Valley the same time (T.R. 66) with saw dust and in bags available to any co-op member (T.R.31). There is no evidence of where defendant's were working after termination with Grant Mathews or whether other mink pelts were missing or not missing in the area during the same time.

5) The State could not prove Appellants' employment provided them with any special information regarding the mink storage. In

fact, Mr. Mathews testified that most of the mink pelts were accumulated a few days before the break-in and he had planned to take the pelts to Orem the night in question but did not do so because he was tired (T.R. 43-44). It is submitted that Appellants not being current employees would not know the pelt count on the premises. In fact, they would only know where pelts were kept and that they were removed often.

Further, in consideration of the above points and the entire record, where the alleged offense and the accused's alleged connection therewith "rest wholly upon circumstantial evidence which evidence, as a matter of law, is reasonably consistent with the innocence of the accused, then this Court must hold that there is not substantial evidence to support the guilt of the accused." State v. Burch, 100 Utah 414, 115 P. 2d 911, (1941).

The lower court could not base its decision on one shred of direct evidence. By admission, the Court had to rely on circumstantial evidence alone. (T.R. 216 217). Such evidence must be viewed with caution and it must exclude every reasonable hypothesis except the guilty of the defendant. State v. Romero, 554 P. 2d 216 (Utah, 1976). The State did not overcome this burden of proof.

In addition, the State presented evidence which is not substantial. Based on the testimony concerning Appellant Stephens' alleged declaration against his interest, the lower court erred in relying on said testimony to reach its verdict. On page 149 of the trial transcript, the Court sustained a motion of defense counsel to strike the testimony of arresting officer Stauffer with regard to Appellant Johnson's testimony.

The Court: I don't know, unless there can be some relationship to that, you can't tell from the warrant what's being referred to, and the only testimony I got here is that it could be the warrant, it could be - if its the warrant, you can't relate it to any specific event, or certainly not the event they're charges with. I would, therefore, sustain the motion. (T.R. 149 l. 7-13)

Appellants submit that for this same reasoning, the testimony of Officer Alan Nelson is not admissible. On cross examination by defense counsel, Nelson responded to questions concerning the arrest:

A. Approached the subject on the sidewalk, told him that they had a warrant for his arrest charging him with four felony counts.

Q. Okay. Now was Officer Williamson present all during this time?

A. Yes, sir. Or yes, Ma'am.

Q. Okay.

A. And he said, "What for?" and I says, "I don't know what they're all for," I says, "something to do

with a burglary and some thefts of some furs." ...  
...We placed him in the car, drove him to the station,  
and deputies served the warrant on him and booked him  
into the jail.

Q. Okay. At the time that you were arresting him  
did he at any time request the warrant to be shown  
to him?

A. No, Ma'am. (T.R. 178, l. 5-24)

Appellant Stephens at the time of arrest had no knowledge of  
the events with which he is charged. Officer Nelson admitted  
he had no written warrant of arrest and did not know one of  
the four charges included forgery (T.R. 177). The Officers had  
notes but relied completely on memory which was not clear.  
(T.R. 164) In fact, it was not until Stephens arrived at  
the station to be booked that he was actually informed of  
the specific charges against him. This testimony is clearly  
not substantial evidence upon which a guilty verdict may be  
predicated, especially in light of the lack of direct evidence  
against Appellants.

In a criminal prosecution, the State is required to  
establish beyond a reasonable doubt and by substantial  
evidence that the accused are guilty of a crime, and where  
proof is made by circumstantial evidence, it must be so made  
as to exclude all uncertainty or doubt of Defendant's guilt.  
State v. Sullivan, 34 Idaho 68, 199, Pac. 647, 17 ALR 902 (1941)  
The State here failed to produce evidence to sustain its burden  
of proof.



The police officers knew that they must prove each element beyond a reasonable doubt but the evidence identifying the stolen goods is very weak and certainly not enough to convince a trier of fact beyond a reasonable doubt. Difficulty for the State in proving elements of its case should only require them to work harder and not serve as a license to waive basic constitution rights.

## POINT II

THE COURT ERRED IN NOT FINDING THAT THERE WAS INSUFFICIENT IDENTIFICATION OF THE APPELLANTS IN CONNECTION WITH THE ALLEGED THEFT AS A MATTER OF LAW.

The only evidence against the Appellant, Larry Kyle Stephens, was: 1) he was employed by Grant Mathews for a short time of approximately ten days before the break-in; 2) a handwriting expert testified but he endorsed the check given to the boys by Dan Williamson; 3) he may have been one of the boys in the pawnshop; and 4) admissions made at the time of his arrest.

The employment did not terminate with any hard feelings (T.R. 39) and as set forth in Point I that employment gave him no special knowledge of when pelts would be there or shipped to Orem for fleshing. This factor should be given very little weight by the Court.

Even assuming that a handwriting expert's testimony can be sufficient evidence alone, the State produced no evidence as to when, where, or under what circumstances the Appellant, Larry Kyle

Stephens, may have endorsed the check in question. The check presented for payment in Utah without evidence of who presented.

The identity of Appellant, Larry Kyle Stephens, by Dan Williamson was extremely weak (T.R. 81). This was after he had been presented with a picture of Appellant Larry Kyle Stephens by Officer Crockett, which he could not identify (T.R. 165). It is indeed strange that Williamson could not identify Appellant Stephens by picture in April but could remember and identify him in Court in July, three months later. Mr. Williamson's testimony can best be summarized by his own statement, "It's so hard to remember, it's been so long ago." (T.R. 86). Mrs. Williamson, also present in the shop on December 9, 1976, could not identify the Appellants from the pictures in late April or at Court (T.R. 108).

The so-called admissions were excluded properly and cannot be part of the record as set forth in Point I. Each Appellant was initially charged with four felonies and Defendant Larry Stephens was arrested without a written warrant. Not even the arresting officer knew the exact charges. The trial court was faced with the objection by counsel to exclude testimony of a similar nature by Appellant Johnson properly held it not relevant because the Appellant did not have enough information or definite enough statement for the admission to have any meaning.

Admittedly the testimony identifying the Appellant Trooper Johnson is slightly stronger because he was identified by Dan Williamson and his handwriting identification would place him in the shop with the mink pelts, but based on the points raised regarding Dan Williamson's identification in April was

pictures, this evidence is not sufficient to prove beyond a reasonable doubt Appellant Troy Johnson's involvement in theft.

### CONCLUSION

A case determined solely on circumstantial evidence must be approached with highest scrutiny as afforded by law. If there is a reasonable hypothesis resulting from the evidence which is consistent with Appellants' innocence, there naturally follows a reasonable doubt as to their guilt.


The state has not proven the essential element of the crime with which Appellants are charged: (1) that Appellants exercised unauthorized control over the stolen property, and (2) that the property they allegedly had was, in fact, stolen from Grant Mathews. Based on all the testimony at trial, there exists a reasonable doubt as to Appellants' guilt.

For the reasons stated above, Appellants' pray that the verdict of the lower court be reversed and the case be dismissed for lack of sufficient evidence, or that it be remanded with directions to enter a judgment of not guilty.

Respectfully submitted,

HILLYARD, GUNNELL & LOW

By

  
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CERTIFICATE OF MAILING

I hereby certify that I mailed eleven (11) copies of the foregoing Brief of Appellants to the Utah Supreme Court of Utah, and two copies to the Plaintiff-Respondent's Attorney, *Robert B. Hansen, Attorney General, State Capitol, S.C., Utah* this 5<sup>th</sup> day of December, 1977.

*Gerard J. Poppleton*