

1948

State of Utah v. Robert William Dyett and Ernest F. Lloyd : Reply Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT
OF THE STATE OF UTAH**

**THE STATE OF UTAH
Plaintiff and Respondent**

vs.

**ROBERT WILLIAM DYETT AND
ERNEST F. LLOYD
Defendants and Appellants**

REPLY BRIEF OF APPELLANTS,

ROBERT WILLIAM DYETT AND ERNEST F. LLOYD.

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LEHR, SUPREME COURT, UTAH

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IN THE SUPREME COURT
of the State of Utah

THE STATE OF UTAH)
Plaintiff and Respondent,)
vs.) Case No. 717
ROBERT WILLIAM DYETT and)
ERNEST F. LLOYD)
Defendants and Appellants)

REPLY BRIEF OF APPELLANTS,
Robert William Dyett and Ernest F. Lloyd.

STATEMENT OF FACTS

The respondent, in the opening statement of its brief, agrees with the appellants' Statement of Facts as correct insofar as related but charges that it is incomplete and feels that the facts stated in the Brief of Respondent should be called to the attention of this court. The factual matters which the respondent then takes up in its Statement of Facts

require some discussion here and additional consideration and comparison with the record on appeal in the case.

On Page 2 of Respondent's Brief it states that there is no question that the car involved had been stolen and that the defendants make no contention to the contrary. The appellants take issue with both of these statements. Pages 15 to 18 of Argument I of Appellants Brief are devoted to the proposition that there is a serious doubt that there is evidence establishing that the Dodge Coupe involved in the case was stolen by anyone. There certainly is no evidence, circumstantial or otherwise, connecting the appellants with the removal of the said Dodge Coupe from the North Temple Garage. As previously stated, the circumstantial evidence existing in the record is strong in its indication that the removal of the said

Dodge Coupe was made by someone in whose possession it had been placed. In support of this contention reference is made to the uncontradicted testimony in the record to the effect that the defendants had never been employed by either the North Temple Garage or the Lyman Motor Company, were unknown, and had never been seen at either place. The said Dodge Coupe was being stored on the lower level of the North Temple Garage for the Lyman Motor Company and was last seen there by a representative of the Lyman Motor Company, Stephen J. Terry, at 9:00 A.M. on Sunday, October 26, 1947. The North Temple Garage was attended by Francis F. Grompton during the period from 9:00 A.M. Sunday, October 26, 1947, until 3:30 P.M. that day when the said Dodge Coupe was found on the Brown Motor Company Used Car Lot. The keys to the said Dodge Coupe had been

locked in the office located at the rear of the upper level of the North Temple Garage during the afternoon on Saturday, October 25, 1947, which office remained locked until 8:00 A.M. Monday, October 27, 1947, and had not been broken into.

Kenneth E. Gapps and Orlan R. Williams, co-owners of the North Temple Garage had the only keys to the said office. Yet the said Dodge Coupe was found at 3:30 P.M. Sunday, October 26, 1947, on the Brown Motor Company Used Car Lot with its keys in it.

The respondent states on page 2 of its brief that, upon investigation, the officers found that defendant Dyett was tinkering with the front license plate of a Ford automobile located in the front of the auto lot. The nuts and screws holding the plate had been removed and were laying on the ground. There is no evidence to

support this statement. On the contrary, the evidence is clear to the effect that the officers observed nothing regarding the front license plate of the Ford and the defendant Dyett's actions other than that he was touching the wing nut of the front license plate and that the wing nuts were loose.

Pages 2 and 3 of respondent's brief indicates that Mr. Dyett stated that one of the reasons he was on the premises was that he had formerly worked for Mr. Brown, the owner of the lot. It is clear from the record that the defendant Dyett at no time made such a statement but that the statement was made by the defendant, Lloyd. Ray W. Brown, owner of the Brown Motor Company Used Car Lot testified that he had never employed Mr. Lloyd but that he had sold him a car.

ARGUMENT

I.

There Is No Evidence In the Record That
The Appellants Stole a 1947 Dodge Coupe
As Charged in the Information.

Appellants argued this point in their Brief at pages 8 et seq. The argument therein raised two points:

First, that there is no evidence connecting the appellants with the removal of the Dodge Coupe from the North Temple Garage and all evidence in the record indicated that it was not possible for the appellants to have removed the said Dodge Coupe from the North Temple Garage. This conclusion is based upon the fact that the appellants were not known at, had never been seen around, and had not been employed at either the North Temple Garage or the Lyman Motor Company in order to gain the necessary knowledge of procedures

and locations to make possible the removal of the Dodge Coupe as indicated by the evidence, combined with the physical circumstances of the respective locations of the Dodge Coupe and keys, the removal of the Dodge Coupe while the North Temple Garage was attended, and while its keys were locked in the office of the owners, and the removal of the keys from the locked office without it being broken into.

Second, that without evidence as to whether or not the removal of the Dodge Coupe was effected by a person in legal possession of the said Dodge Coupe it cannot be said that the crime of larceny was committed by its removal.

As indicated in the Brief of Respondent in the second paragraph in Page 4 no issue is taken to the proposition that the person or persons removing the said Dodge Coupe from the North Temple Garage were unknown.

Thus, we are left with the possibility that the removal of the said Dodge Coupe was made by a person or persons in lawful possession of it or by a person or persons without authority and not in legal possession. As discussed in the "First" part, above, the only evidence in the record indicates that the removal was effected by a person or persons in legal possession of the said Dodge Coupe. Thus, under such circumstances, as discussed on pages 17 and 18, Argument I, Appellant's Brief, the crime of embezzlement and not larceny was committed.

We are now left with the consideration of the effect of possession of the said Dodge Coupe following its removal. The presumption raised by possession of recently stolen property is created by Section 103-36-1 Utah Code Annotated,

"Penal Code, Larceny, Defined: Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt."

The statutory provisions pertaining to embezzlement contained in Chapter 103-15, Utah, Code Annotated, 1943, create no such presumption as to guilt in possession cases. Thus without evidence establishing whether or not the crime of larceny or embezzlement was committed the presumption created by the Larceny provision cannot be made effective to function as the sole basis of determining guilt or innocence.

There is no evidence in the record that the said Dodge Coupe was not removed from the North Temple Garage by one of the persons in legal possession of it and, as

circumstantial evidence in the record strongly indicates that the removal was effected by such a party.

At page 72 of the record, Stephen J. Terry, a witness called on behalf of the State, testified as follows:

"Q. What is your occupation?

"A. Sales Manager of Lyman Motor.

"Q. In connection with your duties as Sales Manager, what do you have to do with new cars that come in?

"A. Well, I have to check all of the factory invoices against our original factory I.O. sheet as we call it. That is the make-up sheet that the factory sends us before the car is ever constructed. I receive an I.O. sheet ~~than~~ I receive an invoice giving motor and serial number. Then we have a, Oh, I guess you would call it about a bill of lading; its in lieu of the railroad bill of lading. These cars come in by transport and we also have a check-off sheet that is used by the factory. Now I have to check all new cars and trucks received by Lyman Motor Company, allot them at that time to my ~~associate dealers of Lyman Motor.~~ After that ~~what is left~~ we retail.

"Q. And what particular department has control of these cars so far as Lyman Motor Co. is concerned?

"A. My department only."

Referring to the said Dodge Coupe,

Mr. Terry testified at page 75 of the record as follows:

"Q. Where was the car located?

"A. It was located in the North Temple Garage."

.

"Q. This was about what time?

"A. Right around 9 o'clock in the morning.

"Q. Sunday morning -- That would be October 26th.

"A. Yes, sir.

"Q. Did you again see this automobile?

"A. Monday afternoon.

"Q. When did you again see this automobile?

"A. Monday afternoon after Mr. Brown had called me and told me that my automobile, or wanted to know, he said he had a new Dodge on his lot, giving me the motor and

serial number. I identified the car as mine."

In view of Mr. Terry's position with Lyman Motor Co. and his responsibilities in regard to new automobiles received by the Company and particularly in regard to the said Dodge Coupe, it appears that Mr. Terry had legal possession of the said Dodge Coupe at all times material in this case. There is no evidence in the record whether or not Mr. Terry removed the said Dodge Coupe from the North Temple Garage on Sunday October 26, 1947 between 9 A.M. and 3:30 P.M.

At page 81 of the record Orlan R. Williams, a witness called on behalf of the state, testified as follows:

"Q. Your occupation?

"A. Part owner of the North Temple Garage under lease."

In reference to the said Dodge Coupe,

Mr. Williams testified at page 82 of the

record as follows:

"Q. Now were you present on the 25th of October when this shipment of automobiles came in for Lyman Motor Co.

"A. Yes.

"Q. Do you remember seeing a maroon Coupe?

"A. I did."

On page 84 of the record, Mr. Williams testified as follows:

"Q. Were you at work on Sunday, October 26th?

"A. I was down for awhile in the morning.

"Q. During what hours please?

"A. Oh, I went down around 8:30.

"Q. Will you state how long?

"A. Oh, I left, I believe I was around until about 11:00.

"Q. Who was on shift?

"A. Francis Crompton.

"Q. Did you know whether this was there at that time?

"A. I don't know, I didn't go down into the basement to check. No."

In view of Mr. Williams' position in the North Temple Garage and the nature of the authority he had in regard to automobiles stored for Lyman Motor Company in view of further testimony in the record it appears that he had legal possession of the said Dodge Coupe at times material in this case. There is no evidence of record whether or not Mr. Williams removed the said Dodge Coupe from the North Temple Garage on Sunday, October 26, 1947, between 9:00 A.M. and 3:30 P.M.

The Appellants contend that there is no evidence establishing that the crime of larceny and not embezzlement or some other crime was committed and that inasmuch as the presumption arising from unexplained possession of recently stolen property is created by the larceny statute and cannot become effective as the sole basis of determining guilt or innocence until the

fact that the crime of larceny was committed has been established.

II.

There Is No Evidence In the Record That the Appellants Had Possession of Recently Stolen Property Within the Meaning of Section 103-36-1 U.C.A. 1943.

Respondent contends in its brief at page 5 that the defendants were located on the premises where the stolen automobile was located and gave absolutely no satisfactory explanation as to why they were on the said premises. There is no obligation upon the appellants to explain their presence upon the premises. Such a contention certainly is not within the scope of the explanation requirement of the portion of Section 103-36-1 Utah Code Annotated, 1943, referring to the presumption created by possession of recently stolen property.

open to the public in order that persons could come upon the premises to examine the used cars displayed thereupon for sale.

Ray W. Brown, owner of the Brown Motor Company Used Car Lot, a witness called on behalf of the State, testified upon cross examination at page 122 of the record as follows:

"Q. Now your property adjoins the public sidewalks?

"A. Un Huh.

"Q. Do you park your cars with signs on them facing the sidewalks?

"A. Well, I don't put signs on them, I just drive them up about a foot or foot and a half from the sidewalk.

"Q. And you make no effort to keep the public off the property?

"A. No.

"Q. As a matter of fact you are pleased to have people come on the property and look at your cars?

"A. They do it all the time, Un Huh.

"Q. And you have no restrictions as to what day they may look at your cars?

"A. No sir.

"Q. You are just as pleased to have them in the lot looking at the cars on Sunday as any other day?

"A. Yes sir."

Also, on page 5 of its Brief, Respondent asserts that it is apparent that they (the defendants) had removed one license plate and were in the process of removing the other license plate belonging to the Ford automobile. Also, which fact is without explanation, that one of these plates belonging to the Ford automobile was found near the stolen automobile and that one of said defendants was undoubtedly caught in the act of putting that plate on the stolen car at the time the officers arrived. Respondents contend that these statements

in the record.

The front license plate of the Ford automobile had not been removed. At page 105 of the record Don G. Ferguson, a police officer for Salt Lake City, called as a witness on behalf of the State, testified on cross examination in regard to the said front license plate as follows:

"Q. Did you see the defendant Dyett at any time touching the wing nut on the front license plate?

"A. I did, yes sir.

"Q. Did you see him turn it?

"A. I couldn't say for sure whether he was turning it. To me at the time it looked as though he was. I wouldn't swear to it."

Thus, the strongest evidence in the record is to the effect that the defendant, Dyett, was touching the wing nut of the front license plate of the said Ford automobile.

In regard to the purported removal,

of the rear license plate and the respondent's assertion that one of the defendants was undoubtedly caught in the act of putting that plate on the stolen car, the evidence is even more remote.

In reference to the conduct of the defendants at the Brown Motor Company Used Car Lot, at page 101 of the record Officer Ferguson testified as follows:

"Q. Did anything attract your attention?

"A. Yes sir, it did.

"Q. Tell us what did.

"A. The two defendants we found later were in the Brown Used Car Lot. I noticed the defendant Dyett in the front of a 1937 Ford. He was stooping over the front bumper and from that distance I couldn't determine just what he was doing. The defendant Lloyd was to the rear of the '37 Ford.

"Q. And what was he doing?

"A. When I saw him he was just raising up from behind, he was almost in an upright position."

In reference to the rear license plate of the said 1937 Ford and the conduct of the defendants upon the said Brown Motor Company Used Car Lot, at page 112 of the record, Dallas J. Adams, a police officer for Salt Lake City, called as a witness on behalf of the State, testified as follows:

"Q. Never mind the statement you made. You made a statement to him and what else did you observe?

"A. As we drove on past I turned my head and looked to the left and noticed the defendant Lloyd in a crouched position in the rear of the '37 Ford. Traveling on approximately one hundred feet beyond we decided to turn around and investigate. Upon turning around and stopping in front of the Brown Motor Lot, Officer Ferguson and myself got out of the car and walked up to defendant Dyett and asked him what he was doing here, and he made the statement that he was inspecting the license plate. I stepped a little more to the rear of the car and I asked him where his partner was and he said he was alone. Officer Ferguson stayed to the front of the lot with Dyett and I proceeded toward the rear

of the lot. And as I was approaching the rear of this new '47 Dodge Coupe the Defendant Lloyd popped up from in front of it. He stood up there in front of the new Dodge. There was approximately three to four feet between that and the garage that was in back of the lot. I noticed the rear license plate was missing from this Ford as I left it in the front of the lot, and asked him where the license plate he took off the Ford was. He said he didn't know nothing about it. He then left the front of the car and came out toward me and I walked on past him and there in front of the car laid the license and securing bolts.

"Q. About how far in front of the car were they?

"A. I would say about six inches, measuring from the bumper and the ground to the license plate.

.

"Q. I call your attention to these securing bolts that are on there now Officer and ask you if they are in the same condition as they are now. Were they screwed on or off?

"A. No sir, they were laying on top of the plate. I put these in."

Adams testified on cross examination as follows:

"Q. Did you see either of the defendants take the license plate that is marked Exhibit E.

"A. No sir.

"Q. Did you see either of the defendants put it on the ground where it was found?

"A. No sir.

"Q. Did you see either of the defendants with that license plate in their possession at any time?

"A. No sir."

Thus, even assuming that the state had established that the crime of larceny was committed so that a presumption would arise from unexplained possession of recently stolen property, there is no evidence in the record that the appellants had possession of recently stolen property, there is no evidence in the record that the appellants had possession of the said

103-36-1 U.C.A. 1943 as more fully appears in Argument II at page 18 of Appellants Brief.

The respondent at page 7 of its brief contends that State vs. Morris, 70 U. 570, cited by appellants in their brief, is not in point because the court pointed out that the Morris case merely contained evidence of mere possession without proof of knowledge of the presence of the stolen sheep or any evidence whatsoever that the defendant in that case had exercised any dominion or asserted any claims of a personal nature over these stolen animals.

In the present case, there is no evidence that the appellants had possession of the said Dodge Coupe, that they had knowledge of the presence of the said Dodge Coupe upon the Brown Motor Company Used Car Lot in nature any different from the knowledge of the defendant in the Morris

case of the presence of the sheep in the herd under his care, and no evidence that the appellants exercised any dominion or asserted any claims of a personal nature over the said Dodge Coupe. As more fully appears in Argument II at page 18 of Appellants Brief, State vs. Morris defines what is meant by possession in such cases and deals with the various considerations involved in the present case. Therefore appellants contend that the case of State vs. Morris is directly in point.

Respectfully submitted,

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