1978

State of Utah v. Gary William Daniels : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -v- GARY WILLIAM DANIELS, Defendant-Appellant.	:	Case No. 15509

BRIEF OF APPELLANT

Appeal from a verdict of guilty in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

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STATE OF UTAH, Plaintiff-Respondent, -v- GARY WILLIAM DANIELS, Defendant-Appellant.	:	Case No. 15509

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STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding in which the appellant, GARY WILLIAM DANIELS, was charged with the crime of Theft in the Second Degree in violation of Utah Code Ann. §76-6-404 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury on October 6, 1977, before the Honorable Jay E. Banks, and found guilty of Theft in the Second Degree. Appellant was sentenced to the Utah State Prison for an indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below and a remand of the case to the Third Judicial District

Court for a new trial, or in the alternative, the appellant seeks reversal of the judgment rendered below and a remand of the case to the Third Judicial District Court with the instructions to enter a a judgment for the lesser included offense of depriving an owner and to impose the appropriate modifications in the sentence.

STATEMENT OF THE FACTS

During the evening of June 14, 1977, a 1968 Corvette was taken from the lot of Midvalley Auto, in Sandy, Utah (T. 5,7). The owner of Midvalley Auto, Lee Bateman, had recently completed rebuil the car, putting in an engine, transmission, drive line and radiato and replacing some wiring (T. 6,10). The Corvette was returned to owner approximately 30 days later (T. 7-8, 11).

At approximately 11:30 a.m. on June 15, California Highwa Patrolman, Bruce Ayers, observed a 1968 Corvette traveling westbou at 75 m.p.h. on Interstate 80 near Floriston, California (T. 27-28) The officer pursued the vehicle, traveling at a speed in excess of 100 m.p.h., until the vehicle engine blew out and the car coasted to a stop (T. 28-29). When the officer approached the Corvette, c appellant was then arrested for reckless driving and driving witho a license (T. 30-31). At the time of the arrest, the vehicle seri numbers were not altered and the patrolman noted no indications of attempt to disguise the identity of the vehicle (T. 35). The Corv had a Utah license plate on the rear portion only which was subsequently determined not to be on file with the Utah Department of Motor Vehicles (T. 38). Patrolman Ayers questioned the appellant

about the car registration while the appellant was in the jail of the Nevada County Sheriff's Office (T. 31-32). At that time, the appellant said that he owned the car (T. 33).

Officer Larry Davis of the Sandy City Police Department went to Truckee, California to pick up the appellant and bring him back to Salt Lake City (T. 13). While driving from Truckee to Reno, Nevada, Officer Davis questioned the appellant about the Corvette and appellant stated to him that:

> . . . he and his friend were in the dealership on State Street in the Sandy area he went to. His buddy popped a door lock out on the passenger side. He had a set of General Motors keys and just opened the door on the driver's side. Someone came along. They walked down the street, came back. He said he did his number on the ignition switch and they left in the vehicle. (T. 26).

Stephen Rex Daniels, appellant's brother, testified that the appellant came to Salt Lake in the beginning of June, 1977, and visited with his grandmother and other relatives in the area and appellant lived in Alameda, California (T. 42). While the appellant was in Salt Lake in June, his car was impounded (T. 40-43). Stephen stated that the appellant sought to borrow money or a car from his brother in order to leave Salt Lake but that he was unable to help in either respect (T. 44).

The appellant, Gary William Daniels, took the stand in his own defense. He testified that his permanent residence was in Alameda, California and that he drove his car to Salt Lake to visit his brother and other relatives (T. 46). While the appellant was in Salt Lake, his car was impounded and he couldn't afford the costs to get it released (T. 47,51). The appellant stated that after his car was

impounded, he wanted to return to his home in California but that his efforts to borrow money from his mother and brother were unsuc ful (T. 47). Appellant admitted that he took the Corvette to get transportation to Alameda, California on the evening before his arrest (T. 47-48). He stated that he removed the console in order shift gears and make the car driveable because the linkage was loo and the gears would not otherwise shift (T. 48-49). After taking car from the Auto agency, appellant picked up his tool box and a s suitcase with clothes, put gas in the car and then headed to Calif (T. 49). Appellant testified that he took the vehicle to get to Alameda, California and when he got there, he intended to park the by the police station. His sole purpose in taking the vehicle was for transportation from Salt Lake to Alameda, California (T. 50).

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE STATE TO QUESTION THE APPELLANT CONCERNING OTHER BAD ACTS COMMITTED BY THE APPELLANT.

During the cross-examination of the appellant, and over objection of defense counsel, the prosecutor elicited from the appellant an admission that he had siphoned gas when he ran out of money. Because appellant's statement had no relevancy to the offe charged, introduction of this evidence could only suggest to the that the appellant had a propensity toward crime. The exchange o of which the prejudicial error arose is as follows:

Q. It only cost you $15.00 to get gas to go from here to Truckee, California?

A. No.

Q. Where did you get the rest of your money for gas?

A. My friend had a couple of dollars, and, then, there's other ways.

Q. Would you like to elucidate?

MR. HILL: I'm going to object.

THE COURT: Overruled.

Q. (By Ms. Marlowe) Tell me how you got gas between here and California.

A. What you call a garden hose.

Q. What do you mean by garden hose?

A. Well, it's a piece of garden hose about six feet long. You insert into a gas tank, which is commonly known as siphoning.

Q. You siphoned gas or you stole gas to get to California?

A. Yes, because I used all my money before I even did that. (T. 51).

Immediately following the cross-examination of the appellant, defense counsel moved for a mistrial which the trial court denied on the basis that the inquiry was probative (T. 53-54). The appellant's character had not been placed at issue and the Court did not instruct the jury to disregard the statement.

The trend is well-settled in Utah that evidence of other crimes or civil wrongs committed by the defendant is inadmissible unless shown that it has a special relevancy to prove an element of the crime charged. State v. Lopez, 22 Utah 2d 257, 451 P.2d 771 (1969); State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961); State v. Torgerson,

4 Utah 2d 52, 286 P.2d 800 (1955). In accord with this policy, Rule 55 of the Utah Rules of Evidence provides:

> Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occassion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

None of the exceptions set forth in the rule which would support admission of other crimes evidence to prove a material fact in issue is applicable to this case. The admission by the appellant that he obtained gas by siphoning was not relevant to the adjudication of the charge of theft of a Corvette.

The problem engendered by the use of evidence of other crimes is that the trier of fact, being aware that a defendant has previously broken the law, may conclude that a person who once manifests anti-social behavior is likely to do so on another occasion. Use of such evidence may result in a conviction based on a thin thread of wrongdoing. The purpose of Rule 55 is to avoid the degradation of the defendant and the implication that the defendant has a propensity to crime. State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963).

In State v. Lopez, supra, the Court set out a balancing test to assess the propriety of admitting of evidence of other crimes:

> Such harm as there may be in receiving evidence concerning another crime is to be weighed against the necessity of full inquiry into the facts relating to the issues.

The test balancing the probative value of evidence against the prejudice to the defendant was recently applied by the Court in State v. Br

577 P.2d 135 (Utah, 1977) (Utah Supreme Court No. 15328, March 27, 1978), and State v. Green, ____ P.2d _____ (Utah, 1977). (Utah Supreme Court No. 14435, April 12, 1978).

Applying the balancing test to the case at bar, the prejudicial effect of the statement must surely tip the scales in favor of the appellant because the fact of siphoning gas was not probative on the issue of the appellant's guilt or innocence of the offense charged.

It is clear from the record that the trial judge erroneously assumed that the prosecutor's inquiry had probative value. The judge believed the vehicle owner had testified that a stereo or amplification component had been removed from the car (T. 53). The fallacy of this assumption was brought to the attention of the judge by the car owner, yet the judge did not correct his ruling or strike the appellant's statement and instruct the jury to disregard it (T. 54).

The case law provides examples of when statements are so prejudicial in and of themselves to require the reversal of a case on appeal. Evidence that the defendant had been charged with a crime in the past, even though never tried on the charge is prejudicial error, State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961). Testimony about a prior arrest for a similar crime than was charged required reversal, State v. Kazda, supra. In the instant case, the statement was an inadvertant admission of committing a crime and therefore even more prejudicial than the remarks in Dickson, supra, and Kazda, supra.

Another factor which substantially contributed to the prejudicial effect is that the judge did not strike the appellant's statement or instruct the jury to disregard it. Without an instruction of that

nature, the evidence is left in for the jury's consideration. State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955). Thus, the jury is left to consider the appellant's admission of another unrelated criminal act in determining his guilt or innocence of auto theft. The only weight they could possibly give to this evidence was that the appellant was a bad person.

Examining the circumstances wherein the statement was elicited the only reasonable conclusion is that the appellant was unjustly prejudiced. The judge permitted the prosecutor to ask the question based on misapprehension of the evidence; the appellant, compelled to answer admitted an unrelated criminal act; and the judge failed to take curative measures to diminish the prejudice. Because the appellant's statement had no probative value to the case at bar, the appellant was denied a fair trial when the jury was permitted to consider the statement that suggested he had a propensity to commit crime.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF THEFT.

Utah Code Ann. §76-6-404 (1953 as amended) provides:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Implicit in the State's burden of proof is the requirement to prove beyond a reasonable doubt that the appellant had the intent to take the owner's property and deprive him of it. State v. Kazda, 545 P.2d 190 (Utah, 1976); State v. Romero, 554 P.2d 216 (Utah, 1976). In Romero, supra, a prosecution for burglary and theft, the Court stated

"The culpable mental state required for [theft] is defined as a conscious objective or desire to engage in the conduct or cause the result," citing Utah Code Ann. §76-2-103 (1975 Pocket Supplement). The Court elaborated on the mental state required for an auto theft conviction in State v. Cornish, 568 P.2d 360 (Utah, 1977), which involved a situation substantially similar to the instant case. In Cornish, an automobile belonging to an auto dealership was removed from the lot. Approximately 24 hours later, the police apprehended the defendant as a traffic violator and the vehicle was identified as the one stolen from the dealership. During the trial to the court, the judge expressed the view that under the evidence, he was uncertain of the intent of the defendant. The Utah Supreme Court found that the defendant was properly convicted of the lesser crime of depriving an owner (joyriding) pursuant to Utah Code Ann. §41-1-109 (1953 as amended). In holding that joyriding is a lesser included offense to the crime of theft, Justice Maughan writing for the Court, stated:

> Both the theft and joyriding statutes require, as elements of the crime, an unauthroized control over the property of another with an intent to deprive him of his property. The only fact the state is not required to establish for joyriding, which is required for theft, is the intent to deprive permanently, or for such an extended period of time that a substantial portion of the economic value is lost.

Reading the Court's opinion in State v. Cornish, supra, with the opinion in State v. Romero, supra, it is evidence that a conviction for auto theft requires proof beyond a reasonable doubt that the defendant had a conscious objective to deprive the owner of the motor vehicle permanently or for such an extended period of time that a

substantial portion of the economic value is lost.

Appellant submits that the State's evidence in the cas bar cannot support the theft conviction because it fails to prove requisite mental state. The test to apply in weighing the suffic of the evidence is set out in State v. Mills, 530 P.2d 1272 (Utah 1975).

> For a defendant to prevail upon a challenge to the sufficiency of the evidence . . . it must appear that viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. [530 P.2d at 1272]

In the case at bar, reasonable minds could not find or infer beyo a reasonable doubt that the appellant had the intent to permanent deprive the owner of his Corvette because no evidence was offered which suggested the appellant's intent.

The evidence showed that the appellant had unauthorized possession of the car for a period of approxmiately 19 hours, tha unregistered Utah license plate was mounted on the rear of the ca that the engine malfunctioned when the appellant was driving the and that the appellant used the car as transportation to Californ The sole shread of evidence even suggesting intent was Patrolman Ayers testimony that the appellant claimed to own the car when initially interrogated after his arrest (T. 33). However, the ap negated this claim when subsequently questioned by the Sandy City Police (T. 26).

Appellant submits that his motion to dismiss the charge theft should have been granted (T. 39-40). The judge, when denyi the appellant's motion, indicated the necessity for affirmative e

to show depriving an owner is clearly erroneous in light of State v. Cornish, supra, and State v. Lloyd, 568 P.2d 357 (Utah, 1977) which held the crime of depriving an owner to be a lesser included offense of auto theft. Further, such a requirement, if correct, violates the appellant's due process rights that the State prove every fact necessary to constitute the crime beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

In the case at bar, the State failed to present substantial direct or circumstantial evidence to show the appellant's conscious objective to permanently deprive. Thus, the evidence is sufficient only to show the lesser included offense of joyriding as proscribed by Utah Code Ann. §41-1-109 (1953 as amended). Because the State failed to present evidence upon which the jury could base the appellant's intent to permanently deprive the owner of his property, the Court must reverse the judgment of theft.

CONCLUSION

The trial court committed prejudicial error when it permitted the prosecution to delve into other bad acts by the appellant, failing to instruct the jury to disregard the appellant's statements. Further, the State failed to present a prima facie case of theft by proof of all of the elements and the conviction must be reversed for insufficent evidence to support the verdict. For the foregoing reasons, the appellant is entitled to a new trial. In the alternative, the Court may remand the case to the District Court with the instruction to

vacate the judgment of theft and enter a judgement for the lesser included offense of depriving an owner and impose a new sentence thereon.

Respectfully submitted,

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Attorney for Appellant