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State of Utah v. George Pappas : Brief of Appellant

Utah Supreme Court

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

Statement of the Nature of the Case	1
Disposition in the Court Below	1
Relief Sought on Appeal	2
Statement of Facts	2, 3, 4

ARGUMENT

Point I. The Trial Court Erred In Treating the Issue of Entrapment as Soley an Issue of Law for the Court and in not Submitting the Matter of Entrapment to the Jury for Consideration. . . 4, 5, 6, 7

Point II. The Trial Court Committed Prejudicial Error in Admitting Evidence of Other Criminal Acts of the Appellant. . . . 7, 8, 9

Point III. Reversible Error was Committed in the Prosecution's Opening Argument. 9, 10, 11, 12

Point IV. The Trial Court Erred in Admitting into Evidence Taped Conversations Allegedly Between the State's Undercover Agent and the Appellant Because: (1) The Foundation for Admission was Insufficient, (2) The Tape Contained Other Material Not Relevant to the Case, and (3) No Transcript of the Tape Was Made For Appellate Review. 12, 13, 14, 15, 16, 17

Point V. The Trial Court Improperly Instructed the Jury on the Elements Of the Charge Against Appellant. 17, 18, 19

Point VI. Title 76, Chapter 6, Section 408, U.C.A., 1953 as Interpreted and Applied in this Case Violates Article I §7 of the Constitution of the State of Utah and the XIVth Amendment of the Constitution of the United States. 19, 20, 21, 22, 23, 24

Conclusion	24
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Constitutions and Statutes

Constitution of Utah Art. I §7	19, 22
Constitution of United States, XIVth Amendment.	12, 22
Utah Code Annotated, 1953	
76-2-303.	6
76-2-303(5)	6
76-2-303(6)	9
76-4-101(3) (6).	19
76-6-408.	2, 19, 22, 24
76-6-408(1)	17, 23
76-6-408(3) (a).	17

Rules of Evidence

Utah Rules of Evidence

Rule 55	8
Rule 1(12).	14
Rule 67	13, 14

Authorities

Admissibility of Sound Recordings In Evidence

58 ALR2d 1024, 32	16
Burdick, <u>Law of Crime</u> , Vol I §98.	21
Holmes, <u>The Common Law</u> , p. 67	21
Model Penal Code §2.13(2)	5
Whartons Criminal Procedure, (12th Ed. Torcia) Vol 3 §493	10

Cases

Brandenburg v. Ohio, 395 U.S. 444 (1969).	22
Cleveland Bd. of Ed. v. La Fluer, 414 215 632 (1974).	22
Hampton v. United States, 425 U.S. 484 (1976)	2
Lambert v. California, 355 U.S. 225 (1957).	22
Peck v. Dunn, 574 P2d 367 (Utah 1978)	20
People v. Caston, 573 P2d 423 (Cal. 1978)	11

People v. Johnson, 564 P2d 116 (Colo. 1977).	. . . . .21, 23
People v. Turner, 390 Mich 7, 210 N.W. 2d 336 (1973).	. . . . . 2
Republican v. Malin, 1 Dall. (U.S.) 33, 11 L. Ed. 25.	. . . . .21
Rex v. Sutton, 1 East, Pleas of Crown 172, 93 Eng. Rep. 1040 (1736).	. . . . .21
Robinson v. California, 370 U.S. 660 (1972)	. . . . .22
Seales v. United States, 367 U.S. 203 (1960).	. . . . .22
Sherman v. United States, 356 U.S.369 (1958).	. . . . . 2
Sorrells v. United States, 287 U.S. 435 (1932).	. . . . . 2
State v. Ahrnes, 25 Utah 2d 222, 479 P2d 786 (1971)	. . . . . 8
State v. Anselmo, 558 P2d 1325 (Utah 1977).	. . . . .18
State v. Gasham, 223 S.E. 2d 53 (W. Va. 1976)	. . . . . 6
State v. Bridwell, 566 P2d 1232 (Utah 1977)	. . . . . 6
State v. Casias, 567 P2d 1097 (Utah 1977)	. . . . . 6
State v. Curtis, 542 P2d 744 (Utah 1975).	. . . . . 2
State v. Erwin, 101 Utah 365, 120 P2d (1941).	. . . . .11, 12
State ex. re. Cox v. Bd. of Education, 21 Utah 401, 60 Pac. 1013 (1900).	. . . . .20
State v. Hoffman, 558 P2d 602 (Utah 1976)	. . . . . 2
State v. Kasai, 27 Utah 2d 326, 495 P2d1265 (1972).	. . . . . 2
State v. Mullen, 216 N.W. 2d 375 (Iowa 1974).	. . . . . 2
State v. Mullins, 549 P2d 454 (Utah 1976)	. . . . .23
State v. Pacheco, 13 Utah 2d 148, 369 P2d 494 (1962).	. . . . . 2
State v. Perkins, 19 Utah 2d 421, 432 P2d 80 (1967)	. . . . . 8
State v. Plum, 552 P2d 124 (Utah 1976).	. . . . .23
State v. Poe, 21 Utah 2d 113, 441 P2d 412 (1968).	. . . . . 9
State v. Sommers, 569 P2d 110 (Utah 1977)	. . . . . 6, 19

State v. Soroushien, 571 P2d 1370 (Utah 1977)	6
State v. Thompson, 110 Utah 113, 170 P2d 153 (1946)	18
United States v. McKeever, 169 F. Supp. 426 (SDNY 1958)	14
United States v. Russell, 411 U.S. 423 (1973)	2
United States v. Sansone, 231 F.2d 887 (2nd Cir. 1956). . .15, 16	
Utah Manufacturer's Assn. v. Stewart, 82 Utah 198, 23 P2d 229 (1933).	20
Yates v. United States, 354 U.S. 298 (1957)	22

Relief Sought on Appeal

Appellant submits the judgment of the Trial Court should be reversed, and the charge dismissed, or in the alternative, a new trial granted.

Statement of Facts

The Appellant was charged by information with the crime of attempted theft by receiving in violation of 76-6-408, U.C.A., 1953, which crime allegedly occurred on September 9, 1976 (R. 6). It was alleged that the Appellant attempted to receive firearms which were the property of the Salt Lake City Police Department (R. 6). The Salt Lake City Police, through Officer Vuyk, contacted a prisoner awaiting prosecution who was detained in the Salt Lake County Jail (TR 11-14). The Police induced the prisoner, Rudy Sandoval, an admitted burglar (TR 42), to work undercover for the police. In exchange, they would speak to the County Attorney about the charges against Sandoval (TR 14). One charge pending against Sandoval was dropped, and for his work for the police, Sandoval was paid \$100.00.

The police arranged for Sandoval's removal from the Salt Lake County Jail.¹ They gave him instructions on how to proceed and furnished him with a rented automobile (TR 16). The Police purchased a clock-radio from J. C. Penny Company which they also furnished to Sandoval. On September 8, 1976,

the police "bugged" Mr. Sandoval's person and sent him to the Appellant's service station. Sandoval was accompanied by police who, with their electronic equipment, could overhear what was said by Sandoval and also hear sounds within his range (TR 16-17). At that time Sandoval allegedly told the Appellant, Pappas, that the property was stolen and that Sandoval was sick and needed money for drugs. A sale of the property was made (TR 19). The taped portion of that conversation was admitted as an exhibit (TR 6).

Subsequently, on the 9th of September, 1976, the same action between the police and Sandoval was repeated. Firearms were obtained from the Salt Lake City Police Department, Training Division. Sandoval was taped and furnished a vehicle. He went to Pappas's service station where Sandoval allegedly sold two guns to Pappas. According to Sandoval, he told Pappas that the guns were stolen, that he, Sandoval, was a drug addict, sick and needed money (TR 38, 39, 42-43).

A search warrant was issued, almost at the same time, by City Judge, Maurice Jones, who was in a police vehicle (TR 25), and the radio and guns were seized from the Appellant's service station. In addition, Sandoval testified about a prior sale of property to Pappas some three weeks before. The testimony intimated that he had sold property that may have been stolen, although Sandoval was unclear whether he said it was stolen (TR 35-36).

The jury returned a verdict of guilty and the Appellant was sentenced to the Utah State Prison.

Argument

POINT I

The Trial Court Erred in Treating the Issue of Entrapment as Soley an Issue of Law for the Court and in not Submitting the Matter of Entrapment to the Jury for Consideration.

The facts disclose that the Salt Lake City Police took a prisoner from the County Jail to act as an undercover operator, furnished him with guns that the undercover operative allegedly represented to be stolen, sent the operative to the Appellant's service station in a rented vehicle, paid the operative \$100.00 for his work, and had the operative sell the guns to the Appellant. The operative represented to the Appellant as a narcontics addict and sick at the time and in need of money. Charges against the operative were dropped.

The trial court, at the end of the prosecutor's case, denied the Appellant's motion to dismiss the charge on the grounds of entrapment, (TR 52). The trial court did not base the denial on any failure of Appellant to make a written pre-trial motion (TR 53). Subsequent to the denial of the motion, the prosecutor stated, (TR 54):

MR. NIELSON: The state would have a motion in the nature of limiting this time, Your Honor, and it would be our position that inasmuch as the motion for entrapment has been denied, that counsel

for the defense should be instructed that no argument is proper with respect to that particular defense.

THE COURT: Oh, I think that's correct. I don't think you can argue a defense that the court has denied.

and (TR 55):

THE COURT: That's the entrapment as a matter of law, and had I ruled in your favor on entrapment, there would have been no necessary issue to go to the jury. But because I have ruled against you, I don't think I am going to allow you to argue the effect of entrapment.

The trial court and the prosecutor were apparently under the impression that entrapment, under Utah law, was purely an issue of law for the court. This would coincide with the so called "objective" theory of entrapment. This is the position taken by the Model Penal Code, §2.13(2) and in some states: State v. Mullen, 216 N.W. 2d 375 (Iowa 1974); People v. Turner, 390 Mich 7, 210 N.W. 2d 336 (1973). However, the majority of jurisdictions in the United States apply a "subjective" or "origin of intent" standard: Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976). The position of this court has been that the proper test to apply is the origin of intent test, the subjective test, and not the objective standard: State v. Pacheco, 13 Utah 2d 148, 369 P2d 494 (1962); State v. Kasai, 27 Utah 2d 326, 495 P2d 1265 (1972); State v. Curtis, 542 P2d 744 (Utah 1975); State v. Hoffman, 558 P2d 602 (Utah 1976).

Under this standard, entrapment is a proper issue for the jury to consider. Possibly the trial court was of the mistaken opinion that the Utah Penal Code adopted the Model Penal Code position. However, such is not the case.

76-2-303, U.C.A., 1953 provides for the defense of entrapment. The section provides for pre-trial notice of the defense and a hearing before the judge, and thereafter, consideration is for the jury. 76-2-303(5), U.C.A., 1953 provides:

Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial.

The Utah statute specifies that the entrapment issue is for the jury if the court determines that entrapment has not been established as a matter of law: C.F. State v. Casias, 567 P2d 1097 (Utah 1977); State v. Bridwell, 566 P2d 1232 (Utah 1977). The issue is not for the court alone unless the court were to rule entrapment occurred as a matter of law; State v. Soroushien, 571 P2d 1370 (Utah 1977). The statute does not embody the objective standard.

In State v. Sommers, 569 P2d 1110 (Utah 1977), under similar facts to those now before the court, it was stated that the entrapment issue was essentially for the trier of fact. See also, State v. Basham, 223 S.E. 2d 53 (W. Va. 1976).

Since the trial court was under the mistaken belief that the entrapment issue was for the court's consideration alone, the trial court deprived the accused of the right to have his defense considered by the jury. This requires reversal and a new trial.

POINT II

The Trial Court Committed Prejudicial Error in Admitting Evidence of Other Criminal Acts of the Appellant.

The trial court admitted into evidence testimony relating to other criminal acts of the Appellant, other than that charged in the information. Appellant was charged with theft by receiving guns on September 9, 1976, believing that the guns probably had been stolen. The trial court received testimony as to a separate incident on September 8, 1976 involving the receipt by Appellant of a clock-radio. This incident was not charged in the information. In addition, the testimony of Rudy Sandoval was that about three weeks to a month before the charged event, Sandoval and a friend, named Randy Alisando, took a CB radio and home unit to Pappas which the Appellant bought (TR 35-36). Sandoval's testimony was originally that Pappas was advised the items were stolen (TR 36), but then later retracted from that specific wording, but certainly left the impression that the item was stolen (TR 36). The last incident was in no way related or connected to the incident in the information.

Counsel for the Appellant, at a pre-trial hearing, had advised the trial judge the Appellant's defense would be entrapment (TR 53-54). Consequently, the only basis for admission of the prior criminal acts would be on the issue of entrapment. The Appellant did not claim mistake or lack of intent by knowledge. Appellant did not take the stand. Rule 55, Utah Rules of Evidence, allows the admission into evidence of other crimes in a limited number of instances, when material to prove absence of mistake or accident, intent, knowledge, etc. The nature of this case was such that these matters were not material. They were not in issue. The only issue was one of entrapment (TR 52). The exception under Rule 55, U.R.E., was not applicable. Rule 55, U.R.E., otherwise provides:

. . . evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime. . . as the basis for an inference that he committed another crime . . . on another specified occasion . . .

It is submitted, therefore, that the admission of such evidence was erroneous; State v. Ahrnes, 25 Utah 2d 222, 478 P2d 786 (1971).

Nor can it be validly contended that the evidence of other crimes was admissible on the issue of entrapment. Although prior decisions from this court have admitted evidence of other crimes to rebut claims of entrapment, State v. Perkins, 19 Utah 2d 421, 432 P2d 50 (1967), such cases have been negated as precedent by legislative action. When the Utah Penal Code

was adopted in 1973, 76-2-303(6), U.C.A., 1953, was adopted which provides:

. . . past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past conviction for felonies . . .

Consequently, where entrapment is in issue, evidence of other crimes may not be received to rebut an entrapment claim. Therefore, there was no legitimate basis to admit evidence of other crimes, and such evidence was obviously prejudicial, especially when the trial court took the entrapment issue from the jury.

Although trial defense counsel did not object to the evidence, the admission was plain error; State v. Poe, 21 Utah 2d 113, 441 P2d 512 (1968).

POINT III

Reversible Error was Committed in the Prosecution's Opening Argument.

The prosecutor, during his opening argument made reference to matters outside of the evidence which was to be presented. These remarks could only have set the jurors' minds against the Appellant. The opening argument of the prosecutor had the effect of suggesting to the jury that the Appellant was engaged in a continuing enterprise of dealing in stolen property with thieves and burglars. The prosecutor stated, and counsel objected:

MR. NIELSON: A person who receives stolen or hot property is sometimes referred to as a fence or a criminal receiver. Those terms will be referred to probably with considerable frequency during the trial today. There is no question in law enforcement experience that the activities of thieves and burglars and so on are supported in large measure by the stable and continuing market for stolen property.

MR. BRIDWELL: Your Honor, I again object to this as properly argument and not part of an opening statement.

MR. NIELSON: Your Honor, again I think it's important that this jury understand before we get to the evidence what kind of a crime it is we are talking about today.

THE COURT: You tell them what the evidence will show, and I will tell them what the crime is. (TR 6).

The statement of counsel was beyond the evidence to be presented and in the nature of argument. It characterized the Appellant as a person engaged in general criminal enterprise. It included matters not involved in the case. Later in the same opening statement, the court was required, again, to stop counsel, on objection, from speculating about police procedures in dealing with crimes in theft by receiving (TR 7, 8).

The effect of counsel's statement was to obviously suggest to the jury that Appellant was a professional "fence". Thus, the Appellant's right to be presumed innocent until the evidence established his guilt was undermined. In Wharton's Criminal Procedure (12th Ed. Torcia) Volume 3 §493, it observed as to the prosecutor's opening statement:

Prior to presenting evidence, the prosecutor may make an opening statement. In such a statement, the prosecutor explains the nature of the charge, outlines succinctly the supportive evidence which he expects to prove, and identifies the issues. Basically, the purpose of the opening statement is to program the jurors so that they can follow and understand the evidence as it unfolds during the trial. It is not the office of an opening statement to argue the merits of the case, to discuss the pertinent law, to recite the anticipated testimony, or other evidence at length and in detail, to advert to a confession or other inculpatory statement of the defendant.

In State v. Erwin, 101 Utah 365, 425, 120 P2d 285

(1941) this court stated with reference to opening statements:

The purpose of an opening statement is to advise the jury of the facts relied upon and of the questions and issues involved, which the jury will have to determine, and to give them a general picture of the facts and the situations, so that they will be able to understand the evidence. Counsel should outline generally what he intends to prove, and should be allowed considerable latitude. He should make a fair statement of the evidence, and the extent to which he may go is largely in the discretion of the trial court. He should not make a statement of any facts which he cannot legally prove upon the trial; nor should he argue the merits of his case or relate the testimony at length. See 64 C.J. 235, Sec. 251; State v. Distefano, 70 Utah 586, 262 P. 113; People v. Reed, 333 Ill. 397 164 N.E. 847; Green v. State, 172 Ga. 635 158 S.E. 285. The District Attorney went way beyond what was proper, in reciting verbatim the conversations which he intended to prove, and in giving the details of his evidence. The opening statement should be a brief outline of the evidence, and not a recital at length of what he intends to prove. It was clearly

misconduct on his part, to recite conversations which were hearsay and incompetent as evidence. And it was improper for him to overstate the conversations which were admissible in evidence.

In Erwin, the court held no prejudice resulted because of the court's instructions. In this instant case at the time of presentation of the prosecution's opening argument, the court gave no instructions to the jury limiting the effect of the statement, nor did the court admonish the jury to disregard the improper references. The opening statement, when coupled with the evidence of other criminal activities not charged, clearly prejudiced the Appellant.

POINT IV

The Trial Court Erred in Admitting Into Evidence Taped Conversations Allegedly between the State's Undercover Agent and the Appellant Because: (1) The Foundation for Admission was Insufficient, (2) The Tape Contained Other Material Not Relevant to the Case, and (3) No Transcript of the Tape Was Made for Appellate Review.

The trial judge admitted into evidence, over objection of Appellant's counsel (TR 48), tape recorded conversations between the State's informant and the Appellant. The tape recording was played for the jury, and apparently admitted as an Exhibit, (Exh. 6). The tape recording consisted of the conversation between Appellant, Pappas, and the police operative, Rudy Dale Sandoval, on September 8 and September 9, 1976, involving the sale of a clock-radio on the 8th and guns on the

9th. Only the incident on the 9th of September, 1976 was charged. Counsel for the Appellant objected that there was no foundation for admission of the tape (TR 48). No transcript of the tape was made at the time the tape was played for the jury. In addition to the conversations between Pappas and Sandoval, the tape contained other wholly extraneous information (TR 56). The record is not clear whether the jury had the tape during their deliberation, although they did not have a recorder (TR 56).

The foundation for the admissibility of the tape was established through the testimony of Officer John Stoner (TR 45-48). He testified to placing a body bug on the agent, "for the purpose of sending him to various areas" to sell supposedly stolen property (TR 45). He testified that he accompanied the other officers to several locations (TR 45). Stoner accompanied the other officers and the operative in order to operate the electronic equipment (TR 46). He listened to and taped the conversations. He testified that he subsequently listened to the tapes and that they accurately reflected what he heard at the time (R. 47). No other foundation was laid.

Before a tape recording may be received in evidence, it must be authenticated. Rule 67, Utah Rules of Evidence, provides:

Authentication of a writing is required
before it may be received in evidence.

A writing under the Utah Rules of Evidence is defined in Rule 1(12):

Writing means . . . every other means of recording upon an tangible thing any form of communication or representation, including . . . sounds . . .

Therefore, a tape recording is a writing requiring authentication. Rule 67, U.R.E. also provides:

Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law.

Consequently, the Utah Rules of Evidence provide for no specific and detailed method of authentication. Cases from other jurisdictions have addressed the standard for authentication of tape recordings.

In United States v. McKeever, 169 F. Supp. 426 (SDNY 1958), the trial court refused admission of a tape recording of a conversation offered by the defense. The conversation was supposedly with the prosecution's key witness. The foundation laid for the admissibility of the recording was similar to that before the trial court in the instant case. The authenticating witness recognized the defendant's voice and another person's voice, recalled the conversation, and the place of the conversation. Holding the foundation inadequate for admission, the court laid seven criteria for admission:

A review of the authorities leads to the conclusion that, before a sound recording is admitted into evidence, a foundation must be established by showing the following facts:

1. That the operator of the device was capable of taking the conversation now offered in evidence.

2. That the operator of the device was competent to operate the device.

3. That the recording is authentic and correct.

4. That changes, additions, or deletions have not been made in the recording.

5. That the recording has been preserved in a manner that is shown to the court.

6. That the speakers are identified.

7. That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

An examination of the foundation testimony given in the instant case shows a critical failure to meet the foundation requirements for admission. Especially critical is the failure to identify the speakers as was requested by defense counsel. No foundation on voluntariness was laid. The absence of additions and deletions was not accounted for. Indeed, the tape contains other conversations than those relevant to the instant case. No foundation as to the accuracy of the recording device or its operation was before the court.

Identification of the alleged speakers is critical to the authentication of taped evidence of an undercover police operation. Especially this is so when a criminal operative is being used who has a great deal to gain from getting what the police and the operative may hope for and where others may be present. In United States v. Sansone, 231 F2d 887 (2nd Cr. 1956), the court observed:

When a portable transmitting and receiving set, or other device is used to overhear conversations, the initial qualification for admission of evidence involves two sets of interrelated problems: First, whether the device used is an effective means of communicating sound, and Second, the identification of the alleged speaker. P. 890.

Neither foundational prerequisite was adequately established in this case. In Sansone, the court went on to observe concerning the foundations for bugging devices:

Such evidence, however, should be treated with considerably greater caution than evidence arising from telephone conversations, due to much greater familiarity of the general public with the characteristics and potentialities of the telephone.

In annotation, Admissibility of Sound Recordings in Evidence, 58 ALR2d 1024, 32, it is observed:

. . . and generally it may be said, the cases indicate a strict adherence to the rules for testing the admissibility of recordings.

It is, therefore, submitted that reversible error was committed in receiving the tape recording (Exh. 6) without proper foundation.

Second, it is submitted this court should reverse because no transcript of the recording was made and other matter was on the tape. Recently, in People v. Caston, 573 P2d 423 Cal. (1978), the California Supreme Court had a similar issue before it. The court noted Appellant's counsel had stipulated a stenographic record of the transcription did not have to be made, a situation unlike that in the instant case.

It is also noted that a tape recording during the trial was part of the oral proceedings and should be included as part of the normal record. It is submitted that the failure of the trial court to cause a transcript of the tape to be made is an additional reason for reversal.

POINT V

The Trial Court Improperly Instructed
The Jury on the Elements of the Charge
Against the Appellant.

The information in the instant case charged the Appellant with attempted theft by receiving (R.6). The specific allegation against the Appellant was an attempt to "receive stolen property, to wit: firearms. . ." The sale conduct alleged against the Appellant was the act of receiving. 76-6-408(3) (a), Utah Code Annotated, 1953 defines "receives" as "acquiring possession, control, or title, or lending on the security of property." 76-6-408(1), Utah Code Annotated provides several methods of violation of that section of the code. The offense may be committed by: (a) receiving, (b) retaining, (c) disposing, (d) concealing, (e) selling, or (f) withholding. The Appellant was charged only with receiving. None of the other possible violations of 76-6-408(1) U.C.A. 1953 were alleged.

Instruction number 11 given by the court advised the jury that the Defendant could be convicted if he "received or retained" property believing it to be stolen (TR 40). A

similar instruction was given in instruction 12 (TR 41). Thus, the instructions given by the court allowed the jury to find the Appellant guilty on a definition of the crime not charged in the information. The instructions went beyond the offense charged and encompassed conduct of a different nature than that alleged.

In State v. Thompson, 110 Utah 113, 170 P2d 153 (1946), this court states:

We have repeatedly criticized the giving of abstract statements of the law to the jury, and heed that it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence (citing numerous Utah cases).

. . . We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on facts . . . (110 Utah 101)

In State v. Anselmo, 558 P2d 1325, 1327 (Utah 1977), this court observed:

Ordinarily it is error to instruct on abstract principles of law that are not applicable to the facts before the jury . . .

In the instant case, the instructions exceeded the charge and the evidence. If accepted by the jury, the instructions given could have authorized the jury to find the Appellant guilty on a charge different than that contained in the information. The evidence and the prosecution's theory of the case was based on attempted receipt of property believed

to have been stolen. The question of retaining property was not before the trial court. However, the jury could have believed that the defendant's guilt was made out if he retained rather than received the property, believing it to have been stolen. Thus, the instructions given were confusing, misleading, and erroneous. Prejudicial error was committed.

POINT VI

Title 76, Chapter 6, Section 408,
U.C.A., 1953, as Interpreted and Applied
In this Case Violates Article 1, §7 of
the Constitution of the State of Utah, and
the XIVth Amendment of the Constitution
of the United States.

In State V. Sommers, 539 P2d 1110 (Utah 1977), this court ruled that a conviction for attempted theft by receiving can be sustained by the receipt of property by a defendant believing the property to have been stolen when in fact the property was not stolen. This court sustained the constitutionality of section 76-4-101(3)(6), U.C.A., 1953 eliminating the defense of legal or factual impossibility. Thus, the construction the court left as to 76-6-408, U.C.A., 1953 on theft by receiving was that the mere receipt of property by a person believing the property probably to be stolen would suffice to convict. The Appellant submits that this construction of 76-6-408, U.C.A., 1953 violates the "due process" clause of Article 1 §7 of the Constitution of Utah, especially as applied in this case.

This issue was not passed on in Sommers.

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The Appellant, Pappas, received property that had never been the subject of theft or wrongful appropriation. No person suffered any loss, nor was the public health, safety, and welfare threatened by Pappas act. If any injury occurred to the public fisc, it was from the use of public funds to buy an unneeded clock-radio, rent an automobile for two days, and pay a burglar who was released from jail on two occasions, apparently without approval of the committing judicial official. The property involved, which was allegedly stolen, but not in fact, was tendered to the Appellant by a police agent with full urging and allowance by police officers. To allow Pappas to be convicted and sentenced to prison under such circumstances denies due process of law. The statute as construed and applied allowed Pappas to be committed for an act not itself injurious in any fashion. The evidence, if any, is simply Pappas's thinking the property was stolen because the police deliberately lied to him. Consequently it is submitted that the statute as applied in this case is unconstitutional. The State's legislative power must be exercised to promote health, comfort, safety, good morals, and general welfare. State ex. rel. Cox v. Board of Education, 21 Utah 401, 60 Pac. 1013 (1900). The mere legislative declaration that an act is within its police power does not, in fact, make it so. Utah Manufacturers' Assn. v. Stewart, 82 Utah 198, 23 P2d 229 (1933). Recently in Peck v. Dunn, 574 P2d 367 (Utah 1978), this court observed as to the legislative authority:

It is elementary that the governing authority in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the health, safety, morals, and general welfare of society.

Within this standard, it is well settled that the criminal law may not be used to punish thinking about crime; Burdick. Law of Crime, Vol I §98; Rex v. Sutton, 1 East, Pleas of the Crown 172, 93 Eng. Rep. 1040 (1736): "It is certain that a bare intention is not punishable . . ." Republican v. Malin, 1 Dall. (U.S.) 33, 11th Ed. 25. In Holmes, The Common Law, p. 67, it was stated:

The reason for punishing any act must generally be to prevent some harm which is foreseen as likely to follow that act under the circumstances in which it is done. In most substantive crimes, the ground on which that likelihood stands is the common working of natural causes as shown by experience. But when an act is punished the natural effect of which is not harmful under the circumstances, that ground alone will not suffice.

Therefore, the criminal law may not be used to punish evil thoughts without some act of significance to the health, safety, morals, and welfare.

In People v. Johnson, 564, P2d 116 (Colo. 1977), the Colorado Supreme Court considered the constitutionality of the Colorado receiving statute which was similar to the Utah statute as construed. The court held that the statute was unconstitutional on grounds other than now being discussed, but observed:

We do not have a situation in which the property was not in fact stolen. Therefore, we do not reach the question of constitutionality of a conviction of a defendant who believes unstolen property was stolen.

Here the issue is presented. It is submitted that under facts of this case, no harm to the health, safety, and welfare of the citizenry being shown, the conviction cannot stand in the face of Article I §7 of the Utah Constitution.

Federal cases have also recognized the constitutional limitations on prosecution for mere intent with in innocuous act. The United States Supreme Court has narrowly construed Congressional efforts to regulate conduct that may involve criminal regulation of a state of mind. Yates v. United States, 354 U.S. 298 (1957); Seales v. United States, 367 U.S. 203 (1960); Brandenburg v. Ohio, 395 U.S. 444 (1969). There are limitations imposed by the due process clause of the XIVth Amendment on the exercise of legislative authority. Cleveland Bd. of Education v. La Fluor, 414 U.S. 632 (1974). Thus, a California ordinance that made it criminal for a felon to be in a city without registering was ruled in violation of the XIVth Amendment. Lambert v. California, 355 U.S. 225 (1957); see also Robinson v. California, 370 U.S. 660 (1962), unconstitutional to punish being addicted. Under a similar consideration of the limitations on the legislative authority, 76-6-408, U.C.A., 1953, as construed and applied is unconstitutional.

In addition, Appellant contends 76-6-408, 1953 is unconstitutional because it is overly broad and violates due

process by making criminal a state of mind that merely requires "believing that (property) probably has been stolen". In State v. Mullins, 549 P2d 454 (Utah 1976), this court upheld, in the face of a constitution challenge, the presumption relating to knowledge of stolen property contained in 76-6-408(1) U.C.A., 1953. In State v. Plum, 552 P2d 124 (Utah 1976), this court held the mental state required in the state was not unconstitutional because of vagueness. However, neither of the two cases cited considered whether the statute violated due process by being overly broad in scope.

In People v. Johnson, 564 P2d 116 (Colo. 1977), the Colorado Supreme Court considered a challenge to similar but less specific language in the Colorado Statute dealing with the mental responsibility for theft by receiving--"reasonable cause to believe. . ." The Colorado Supreme Court held the statute unconstitutional. The court stated:

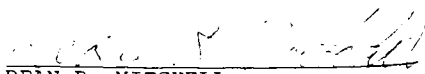
We hold that that portion of the statute defining the mental state as including "having reasonable cause to believe" is unconstitutional by reason of overbreadth. In order for a statute such as this to be constitutional, there must be a knowledge or belief by the defendant that the goods were stolen. There is a constitutional proscription against conviction of a defendant charged with felony by theft if it is predicated upon his negligence or his failure to exercise the intelligence of an ordinary, prudent man. The standard of culpability, in order to be constitutional, must be what the state of mind of the particular defendant was, not what a jury concludes might be that of a fictional reasonably prudent man.

This court should reverse and dismiss because 76-6-408, U.C.A., 1953 violates Article I §7 of the Constitution of Utah and the XIVth Amendment to the United States Constitution.

CONCLUSION

The Appellant respectfully submits this court should reverse. The trial court's failure to submit the issue of entrapment to the jury was based on an erroneous conclusion as to the defense of entrapment under Utah law. The court also erred in receiving evidence of other criminal acts or wrongs of the Appellant, Pappas. Prejudicial error was committed in the prosecutor's opening statement. In addition, the court improperly admitted critical evidence without proper foundation and under circumstances that prevented its fair consideration at trial or on appeal. The instructions given by the court also constituted prejudicial error. Finally, the statute under which the Appellant was convicted as interpreted and applied in this case, is unconstitutional. This case should be reversed and dismissed.

Respectfully submitted


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