

1978

State of Utah v. George Pappas : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
15567

GEORGE PAPPAS, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, THE HONORABLE
G. HAL TAYLOR, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, : Case No.
-vs- : 15567
GEORGE PAPPAS, :
Defendant-Appellant. :
----- : -----

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with attempted theft by receiving, a violation of Utah Code Ann. § 76-6-408 (1953).

DISPOSITION IN LOWER COURT

Appellant was tried before a jury and found guilty of attempted theft by receiving on October 26 and 27, 1977, in the Third District Court, the Honorable G. Hal Taylor, presiding.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of the lower court.

STATEMENT OF FACTS

In September, 1976, the Salt Lake City Police Department initiated an undercover operation targeted at traffic in stolen goods in the City; the operation was designed to utilize a police operative who would attempt to sell "stolen" goods while monitored by the police. On September 8, 1976, Rudy Dale Sandoval, a convicted burglar incarcerated in the county jail, was equipped with an electronic monitoring device, given a new clock radio and sent to appellant's service station (T.16-17). Sandoval was instructed to represent the radio as stolen and to sell it to appellant. A sale was made to appellant at the service station. The electronic equipment was tested before the sale and was found to be working properly (T.17); the entire transaction was carried out under police surveillance, both visual and electronic (T.19). During this first transaction, Sandoval asked appellant if he would be interested in any other goods (T.34). Appellant indicated that certain other goods would be acceptable (T.34); a date for an exchange was arranged for the following day.

The same procedure detailed above was repeated on September 9, 1976, with two changes: firearms replaced the clock radio (T.22), and Judge Maurice Jones accompanied

the police and witnessed the monitoring (T.25). Following the second sale, Judge Jones issued a search warrant; appellant was arrested and the clock radio and the firearms were seized (T.26).

At trial officers Martinus Vuyk and John Stoner testified along with Sandoval as to the transaction and the accuracy and authenticity of the tape recording made during both sales (T.23,40,47). The tape itself was introduced over objection and played to the jury (T.51).

Defense counsel called no witnesses and introduced no evidence; appellant did not testify. The defense of entrapment was introduced for the first time on a motion for directed verdict (T.52); the motion was denied, the judge ruling as a matter of law that entrapment had not occurred (T.55).

Appellant was found guilty by the jury and sentenced to the Utah State Prison.

ARGUMENT

POINT I

A. APPELLANT WAIVED HIS RIGHT TO RAISE ENTRAPMENT AS A DEFENSE AT TRIAL BY FAILING TO FILE TIMELY PRE-TRIAL NOTICE AS REQUIRED BY UTAH CODE ANN. § 76-2-303(4) (1953).

Utah Code Ann. § 76-2-303(4) (1953), requires that written notice of intent to rely on the defense of entrapment be submitted at least ten days before trial:

"(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing."

Appellant failed to submit any written notice and did not offer any reason for not doing so. Even though the trial judge did not specifically base his ruling on a waiver theory, respondent maintains that the reasoning underlying this statute dictates that appellant should not have been allowed to ignore the requirements of the statute.

Requiring written pre-trial notice of a defendant relying on entrapment allows the prosecution to adequately prepare for the trial. This reasoning finds support in the Utah cases interpreting Utah Code Ann. § 77-22-17(1)-(4) (Supp. 1977), the notice of alibi statute, which is very similar to the notice of entrapment in Section 76-2-303(4):

"(1) Upon the written demand of the defendant, the prosecuting attorney shall specify in writing as particularly as is known to him, the place, date, and time of the commission of the offense. A defendant in a criminal case, whether or not such written demand has been

made, who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon the prosecuting attorney a notice in writing of his intention to claim an alibi; the notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, the names and addresses of the witnesses by whom he proposes to establish the alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.

(2) Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this section.

(3) If a defendant fails to file and serve a copy of the notice as required in subsection (1), the court may exclude evidence offered by the defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as provided in subsection (1), the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence.

(4) For good cause shown the court may waive the requirements of this section." Utah Code Ann. § 77-22-17 (Supp. 1977).

In State v. Waid, 92 Utah 297, 67 P.2d 647 (1937), the Utah Supreme Court stated that the purpose of the notice of alibi statute was to prevent wrongful use of the defense and to allow adequate preparation time for the prosecution. This rationale was approved in State v. Whitely, 100 Utah 14, 110 P.2d 337 (1941), and most recently in State v. Anderson, 25 Utah 2d 26, 474 P.2d 735 (1970). See also 45 A.L.R.3d 958. The similarity of the entrapment and alibi defenses and statutes is such that the reasoning of the cases cited above should apply to entrapment and the instant case. In State v. Anderson, supra, failure to give proper notice of an alibi defense was held to bar defendant from raising it at trial. Failure to make a timely request for an entrapment instruction was fatal for a defendant in State v. Cowan, 26 Utah 2d 410, 490 P.2d 890 (1971). If not made aware of the defense of entrapment, the prosecution may fail to present available evidence or be foreclosed from locating rebuttal witnesses. In the instant case, no formal mention of entrapment was made until well into the trial; defense counsel sought to argue the theory

in his closing argument. Respondent contends that appellant lost the right to raise the defense of entrapment by failing to comply with the notice requirement of the entrapment defense statute.

B. APPELLANT DID NOT MEET HIS BURDEN OF PRESENTING EVIDENCE OF AN AFFIRMATIVE DEFENSE.

Utah Code Ann. § 76-2-308 (1953), as amended, makes entrapment an affirmative defense. Both statute, Section 76-1-504 (1953), as amended, and case law, State v. Hoffman, 558 P.2d 602 (Utah 1976), require that evidence of an affirmative defense be presented at trial. In the instant case, appellant did not testify, introduced no witnesses or exhibits, made no opening statement, and cross-examined only one witness for the prosecution. Appellant argued that the tape recording introduced by the prosecution supported the theory of entrapment. Respondent contends that merely referring to a part of the prosecution's case does not constitute presenting evidence of entrapment. Appellant offered virtually no defense at trial; he should not be allowed to ignore statutory requirements for the defense of entrapment, put forth little or no case of his own, and interject an affirmative defense at so late a stage in the trial. Not

only would the prosecution be prejudiced thereby, but the jury, were appellant given his way, would be forced to make a decision on a defense concerning which no evidence had been presented. In light of these factors, the trial judge properly denied appellant the defense of entrapment.

C. IF THE APPELLANT DID NOT WAIVE HIS RIGHT TO RAISE ENTRAPMENT AS A DEFENSE AT TRIAL, THE TRIAL JUDGE PROPERLY RULED AS A MATTER OF LAW BECAUSE THE EVIDENCE WAS NOT IN CONFLICT.

While both the so-called "objective" and "subjective" methods of analysis for entrapment cases historically have each been followed in Utah, appellant correctly states that the current trend is to follow the subjective approach. The subjective method focuses primarily on the predisposition of the defendant to commit the crime and not the actions of the police officers involved, as with the objective method. Each method of analysis is designed to aid the trier of fact in determining guilt where the evidence is in conflict. If neither the predisposition of the defendant nor the methods used by the police is seriously disputed, none of the underlying social and judicial policy considerations behind the objective and subjective theories can be offended. Respondent submits that under the subjective method, if the

defendant's predisposition to commit the crime is never disputed, there is no reason to submit the theory of entrapment to the jury.

Under the subjective theory, a judge may determine as a matter of law that entrapment has occurred. State v. Soroushirn, 571 P.2d 1370 (Utah 1977). In Soroushirn, this Court ruled that because there was no evidence to suggest that the defendant would have committed the crime without police inducement, entrapment had occurred as a matter of law. In State v. Curtis, 542 P.2d 744, 747 (Utah 1977), this Court approved of the notion that entrapment was a question of fact when there was conflicting evidence. The Utah Supreme Court also stated that a question was properly for the jury when the evidence was in conflict in State v. Shupe, 554 P.2d 1322 (Utah 1976).

In Hampton v. United States, 425 U.S. 484 (1976), the United States Supreme Court held that where a defendant conceded that he was predisposed to commit a crime, the defense of entrapment was unavailable to him. Respondent maintains that appellant in effect conceded his predisposition in the instant case by failing to put forth any evidence that he was not so predisposed. The use of the subjective analysis focuses on the defendant's predisposition; when the

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defense fails to counter the prosecution's evidence, there is no conflicting evidence and it is unnecessary to submit the issue to the jury. To do otherwise would be to have the jury decide issues without the aid of having them framed and sharpened at trial. The result would be an exercise in pure speculation.

If a trial judge can rule as a matter of law that entrapment has occurred as in Soroushian, a similar absence of evidence should allow a judge to rule as a matter of law that entrapment has not occurred. In State v. Schultz, 27 Utah 2d 391, 496 P.2d 893 (1972), the defendant contended that he had acted as an agent of the police in procuring drugs and sought an instruction to that effect. In assessing the evidence supporting a defense of entrapment, this Court, citing Sherman v. United States, 356 U.S. 369 (1958), .stated:

"Whether there was such entrapment depends upon what the evidence shows as to the facts; and it is to be determined as are other issues of fact. If it is so clear that all reasonable minds must find one way, then the trial court should rule as a matter of law and take the issue from the jury. Conversely, if there is a basis in the evidence upon which reasonable minds could differ, then the determination should be made by the jury." 496 P.2d at 895.

On rehearing, it was determined that there was sufficient

evidence of an agency relationship to submit the issue to the jury; however, the statement of the basic premise cited above and Sherman, supra, remain good law.

The instant case is unlike virtually all other Utah entrapment cases; in most instances evidence of personal friendships, sexual favors, agency, inducement lasting months or some other evidence is sufficient to create a reasonable doubt concerning entrapment. No such evidence is present in the instant case. Respondent does not argue that the trial judge should usurp the role of the jury as fact finder; however, in the rare case such as this where no evidence of the defendant's predisposition or lack thereof is offered by the defense, a ruling by the judge as a matter of law should be allowed.

POINT II

A. APPELLANT MAY NOT QUESTION THE ADMISSIBILITY OF THE EVIDENCE ON APPEAL BECAUSE NO OBJECTION WAS MADE AT TRIAL.

Rule 4 of the Utah Rules of Evidence requires that any objection concerning the admissibility of evidence be made in a timely manner at trial. The contemporaneous objection rule allows the trial judge to conduct the trial without using what the defendant contends is tainted evidence. Appellant did not make any objection to the

evidence at trial and should not be permitted to raise the issue on appeal.

In State v. Adams, 26 Utah 2d 377, 489 P.2d 1191 (1971), evidence of other misconduct of the defendant was introduced without objection. This Court held that the absence of any objection at trial precluded any review on appeal. See also State v. Keith, 26 Utah 2d 338, 489 P.2d 436 (1971); State v. McMahon, 26 Utah 2d 316, 489 P.2d 112 (1971). Respondent contends that appellant is barred from raising this issue on appeal because of the absence of objection at trial.

The plain error doctrine should not be applied in the instant case because appellant did not suffer any injustice. In State v. Poe, 21 Utah 2d 113, 441 P.2d 512 (1968), cited by appellant, the doctrine was invoked where highly prejudicial pictures of a bloody victim were given to the jury. The admission of other acts of the defendant did not evoke the emotional revulsion in the jury that Poe was concerned with. Because the admission of the evidence did not amount to obvious prejudice and injustice, plain error should not be invoked.

B. IF REVIEW OF THE ADMISSIBILITY OF THE EVIDENCE IS GRANTED, THE EVIDENCE WAS PROPERLY ADMITTED.

While appellant did not give written notice as required by statute of his intention to rely on entrapment, he did orally inform the prosecution of that plan at a pre-trial hearing (T.53-54). The prosecution, thus put on notice, introduced evidence in its case in chief of previous transactions between the police agent and defendant. This evidence was properly admitted as showing the absence of an innocent predisposition that is the basis of an entrapment defense. State v. Perkins, 19 Utah 2d 421, 432 P.2d 50 (1967). In Perkins, this Court allowed in such evidence of other misconduct in the prosecution's case in chief, stating:

"The evidence regarding prior contacts between the agent and the defendant was competent to rebut the claim of entrapment. It was offered to enable the jury to determine whether the defendant was an innocent person whose mind was being influenced by suggestions of the agent or whether he had a disposition to deal in narcotics when the proper situation arose.

While it is true that evidence of prior similar crimes may not be offered until the defendant makes a showing of entrapment, nevertheless the defendant may make such a showing by his cross-examination of the State's witnesses, and the defendant by remaining silent should not prevent the State from showing the true picture if the issue of entrapment is to go to the jury.

The defendant in this case did not affirmatively offer evidence of entrapment and now wants us to announce the rule that until he does, no evidence of prior dealings between the defendant and the agent can be received in evidence.

This we refuse to do. We think and hold that in any case where the issue of entrapment is introduced by the defendant and the prior contacts between the defendant and agent can properly be given in evidence to show the state of mind of the defendant even when such contacts show unlawful acts, unless the defendant makes known to the court that he is not relying upon entrapment as a defense." Id. at 52. (Emphasis added.)

See also 61 A.L.R.3d 293. Contrary to appellant's assertion, Perkins has not been overruled by legislative action; it remains good law as evidenced by its citation in the majority opinion in State v. Curtis, supra, and the subsequent reliance on Curtis by the Court in State v. Bridwell, 566 P.2d 1232 (Utah 1977).

Appellant seeks to rely on the objective approach of Perkins in Point I of his brief and then deny its precedential value in Point II. Another internal inconsistency in appellant's argument is his attempt to avoid the notice provisions of Section 76-2-303(4) and yet to rely on Section 76-2-303(6). Appellant should be required to be consistent in conforming to all statutes and case law, not merely selected favorable portions.

In receiving stolen property cases, the Utah Supreme Court has held that evidence of other acts and possession of other "stolen" property is admissible to show the guilty knowledge of the individual. State v. Zeman, 63 Utah 422, 226 Pac. 465 (1924); State v. Georgopoulos, 27 Utah 2d 53, 492 P.2d 1353 (1972). See also 105 A.L.R. 1288. Respondent asserts that the evidence in this case is admissible under this theory as well.

The trial tactics of defense counsel in this case placed the prosecution in an almost impossible position. After introducing entrapment at the pre-trial hearing, no evidence supporting the defense was introduced at trial as required by State v. Hoffman, supra. The prosecution should not have evidence supporting its case in chief taken away by this type of maneuver. Defense counsel's failure to object to the evidence made the situation even more uncertain and should be held to preclude review. If review is permitted, the evidence was properly admitted under the rule of State v. Perkins, supra, and State v. Georgopoulos, supra.

POINT III

THE PROSECUTOR'S OPENING STATEMENT WAS PROPER AND NOT PREJUDICIAL.

In making his opening statement to the jury, the prosecutor attempted to explain the nature of the crime charge. In doing so he stated,

"MR. NIELSON: . . . Now, again, if the Court will indulge me, I think it's important that you understand the nature of the crime that has been charged here today.

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." (T.6).

This statement followed his warning that the jury was not to consider anything in his statement as evidence:

"MR. NIELSON: . . . The Judge has instructed you previously that what we say as lawyers in the opening statement and the closing arguments are not evidence and should not be considered by you as such." (T.4).

As stated in State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941), the prosecutor has wide latitude in making his opening statement, and the matter is one of discretion for the trial judge. In Erwin, the prosecutor's opening statement:

was some seventy-three pages long and contained much inadmissible hearsay. The Utah Supreme Court found that there was no prejudice to the defendant because of the limiting instructions issued to the jury.

In the instant case, the prosecutor's use of the word "fence" was to explain the charge of attempted theft by receiving stolen property. He did not call appellant a fence, nor did he implicate him in other theft by receiving cases.

In discussing the use of counsel in argument of the word "fence," the Supreme Court of Michigan stated in People v. Fishel, 270 Mich. 82, 258 N.W. 217 (1935):

"In his argument to the jury the prosecuting attorney, it is claimed, characterized defendant as a 'fence.' The appellation was not mere vituperation, but a colloquial characterization of a receiver of stolen property.

As was said in People v. Boneau, 327 Ill. 194, 158 N.E. 431, 436: 'In his closing argument to the jury the state's attorney referred to the defendant as a "fence for thieves," and told the jury that a "fence" was a place where robbers and thieves disposed of their loot. The word "fence" is a colloquial expression used to designate a person who receives stolen goods from the persons who steal them. It was a fair inference from the evidence that defendant was a "fence" or a receiver

of stolen property knowing the same to have been stolen, and the state's attorney did not exceed the limits of proper argument in so denouncing the defendant, and the latter has no just complaint that he was prejudiced thereby.'" Id at 218.

See also Matthews v. State, 42 Ala. App. 406, 166 So.2d 883 (1964); Minton v. State, 468 S.W.2d 426 (Tex. Crim. App. 1971).

In State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), this court stated that counsel are to be afforded wide latitude in their arguments to the jury. The Valdez court also set forth the test to determine whether a given remark is prejudicial:

"The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for a new trial. If there be no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment." Id. at 426.

Respondent contends that the use of the word "fence" in the instant case did not rise to the level of prejudice required

by the court in Valdez. The jury could easily have drawn the inference from the prosecution's case in chief that appellant was a "fence." The opening explanation did not introduce so unwarranted a statement as to require reversal.

POINT IV

THE TAPE RECORDING WAS PROPERLY ADMITTED INTO EVIDENCE.

The case of United States v. McKeever, 169 F. Supp. 426 (SDNY 1958), is often cited as setting out the requirements for the admissibility of a sound recording into evidence; the seven requirements for admissibility are:

"(1) That the recording 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." Id. at 430.

Respondent contends that the foundation laid in the instant case meets the requirements of McKeever:

(1) The tape recorder was shown to be capable of recording the conversation by the testimony of Officer Vuyk. Vuyk stated that the device was tested immediately prior to the transaction and was found to be working properly (T.17). Officer Stoner also verified the capability of the machine (T.50-51).

(2) Officer Stoner was competent to operate the recorder; his specific role in the operation was to operate the electronics equipment (T.46). His competency was also exhibited in court by his operation of the machine in front of the judge and jury.

(3) The authenticity of the recording was confirmed by the testimony of Officers Vuyk and Stoner and Rudy Sandoval, the informant. The Court in United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. den., 421 U.S. 916, found that the testimony of the informant and the operator of the machine was sufficient to establish authenticity.

(4) and (5) Officer Stoner testified that no changes had been made in the tape and that he had personally preserved its original condition by retaining it in his custody (T.47).

(6) The identity of the speakers, appellant Pappas and Rudy Sandoval, was established by the testimony of Officer Stoner (T.48) and Sandoval (T.40).

(7) Sandoval testified that his participation was voluntary (T.40). Appellant did not take the stand; therefore, his voluntariness must be presumed from an absence of a coercive atmosphere and from the substance of the taped conversation itself.

It is significant to note that Judge Maurice Jones was present during the taping of the conversation (T.25). Any possibility of impropriety was eliminated by his overseeing the operation.

The appellant in United States v. Biggins, 551 F.2d 64 (5th Cir. 1977), raised virtually the same objections as appellant in this case. The court approved of a foundation for a tape recording that was established in almost an identical fashion as the instant case. See also People v. Spencer, 31 Cal. Rptr. 782, 383 P.2d 134 (1963), cert. den. 377 U.S. 1007; 58 A.L.R.2d 1024.

In Whetton v. Turner, 28 Utah 2d 47, 497 P.2d 856 (1972), the Utah Supreme Court held that a transcript of the trial proceedings was not essential to the preservation of appellant's rights. In finding that due process was not offended, this Court stated:

"For these reasons, and based upon our own knowledge and experience, we deem it safe and proper to assume that proceedings have been carried on in conformity with the law. Accordingly,

when there is no transcript as to what happened, we indulge that presumption; and in the absence of persuasive proof, the trial court as the finder of the facts is not obliged to find to the contrary." Id. at 858.

Respondent maintains that the tape recording was properly admitted as an exercise of the trial judge's discretion. The prosecution established a proper foundation that comports with the requirements of McKeever, supra. Additionally, appellant has suffered no injustice by not having a transcript of the tape. No indication is made by appellant as to how any prejudice could have occurred from the lack of a transcript. In the absence of prejudice, the verdict below should be allowed to stand.

POINT V

A. APPELLANT WAIVED HIS RIGHT TO HAVE THE SUFFICIENCY OF THE INSTRUCTION CONSIDERED ON APPEAL.

Appellant made no objection to the sufficiency of the theft by receiving instruction at trial; respondent avers that a failure to object constitutes a waiver and precludes appellant from raising the issue on appeal.

In State v. Zeman, 63 Utah 422, 226 P. 465 (1924), and State v. Weaver, 78 Utah 555, 6 P.2d 167 (1931), the Utah Supreme Court held that a failure to object to an instruction

barred raising the issue on appeal. Both cases involved charges of receiving stolen property. Respondent urges this court to apply the rule of Zeman and Weaver to the instant case.

B. IF NO WAIVER IS FOUND, THE INSTRUCTION WAS A PROPER STATEMENT OF THE CHARGE.

Appellant was charged with Attempted Theft by Receiving (R.6); appellant seeks to raise a distinction without a difference between the "shorthand" charge used in the information and the formal felony of Utah Code Ann. § 76-6-408 (1953), Receiving Stolen Property--Duties of Pawnbrokers.

The Information states that appellant was charged with a violation of § 76-6-408(1) of which reads:

"76-6-408. RECEIVING STOLEN PROPERTY--DUTIES OF PAWNBROKERS.--(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof."

Under the statute, an individual is guilty if he receives, retains or disposes of property.

Instructions Eleven and Twelve used the words "received or retained." By eliminating "disposes," the trial judge accurately shaped the instruction to conform to the

evidence presented. Under the facts, appellant could have been found to either have recieved or retained property believing it to have been stolen; either finding would have supported a guilty verdict.

The Information charged appellant with a violation of § 76-6-408; it was the full language of that section that was in issue and not the "shorthand" reference to the title of the section as appellant contends. The instructions were proper and the jury's finding of guilt should be upheld.

POINT VI

UTAH CODE ANN. § 76-6-408 IS CONSTITUTIONAL.

The recent case of State v. Sommers, 569 P.2d 1110 (Utah 1977), makes it clear that property need not be in fact stolen to support a conviction for receiving stolen property. In finding no violation of the due process clause, this Court stated,

"[2,3] Thus to exculpate defendant solely on the ground the television set he purchased was not, in fact, stolen property would shock the common sense of justice. The defense of impossibility is not a fundamental right essential to an Anglo-American regime of ordered liberty. The express abolition of such a defense advances the fundamental principles of liberty and justice which support all of our civil and political instructions." Id. at 1111.

Accord: Darr v. People, 568 P.2d 32 (Colo. 1977); People v. Holloway, 568 P.2d 29 (Colo. 1977). While Sommers dealt specifically with Utah Code Ann. § 76-4-101(3)(b) (1953), respondent contends that the same logic should apply to § 76-6-408. All policy, legal and constitutional considerations are identical. Appellant was not denied due process in the instant case.

CONCLUSION

In view of the foregoing reasoning and authority, respondent urges that this court affirm the ruling of the lower court and find appellant guilty of attempted theft by receiving.

Respectfully submitted,

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