

1977

the State of Utah v. Brent Jay Sessions and Louis R. Dabbs : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert Hansen; Attorney for Plaintiff-Respondent Carolyn Nichols; Attorney for Defendant-Appellant

Recommended Citation

Brief of Appellant, *Utah v. Sessions*, No. 15617 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/1067

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	
	:	
BRENT JAY SESSIONS and	:	
LOUIS R. DABBS,	:	
	:	
Defendants-Appellant	:	Case No. 15617

BRIEF OF APPELLANT

Defendant, Brent Jay Sessions, appeals from a judgement of guilty of Burglary in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Hal G. Taylor, presiding.

CAROLYN NICHOLS
Attorney for Defendant-Appellant
10 Exchange Place, Suite 210
Salt Lake City, Utah 84111

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84112
Attorney for Plaintiff-Respondent

FILED

MAR 29 1977

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

BRENT JAY SESSIONS and
LOUIS R. DABBS,

Defendants-Appellant

Case No. 15617

BRIEF OF APPELLANT

Defendant, Brent Jay Sessions, appeals from a judgement of guilty of Burglary in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Hal G. Taylor, presiding.

CAROLYN NICHOLS

Attorney for Defendant-Appellant
10 Exchange Place, Suite 210
Salt Lake City, Utah 84111

ROBERT HANSEN

Attorney General
236 State Capitol Building
Salt Lake City, Utah 84112
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

Statement of the Nature of the Case	1
Disposition in the Lower Court.....	1
Relief Sought on Appeal	1
Statement of Facts	1
Statement of Points	2A
Argument	
Point Number One: The Trial Court Erred in Denying Defendant's Motion for Separate Trials	3
Point Number Two: The Trial Court Committed Reversible Error in Denying Defendant's Motion to Compel Discovery and Refusing to Order the State to Disclose the Name and Address of the Confidential Informant	5
Point Number Three: The Trial Court Committed Reversible Error in Denying Defendant's Motion to Suppress the Evidence Obtained Pursuant to a Search Warrant Issued Based on a Constitutionally Invalid Affidavit	7
Point Number Four: The Trial Judge Erred in Applying the Presumption Created in UCA 76-6-402 to a Burglary Charge	8
Point Number Five: The Trial Court Erred in Failing to Rule That the Evidence was Insufficient as a Matter of Law to Find the Defendants Guilty of Burglary.....	11
Conclusion	12

AUTHORITIES

CASES AND OPINIONS CITED

The Federal Rules Advisory Committee 34 FRD 419	P. 4
<u>Aguilar vs. Texas</u> 378 U.S. 108 (1964)	P. 7
<u>Blumenthal vs. U.S.</u> 332 U.S. 539, 92 LED2d 154, 68 S.Ct 248 (1947)	P. 4
<u>Bruton vs. U.S.</u> 391 U.S. 123, 20 LED2d 476, 88 S.Ct 1620 (1967)	P. 4,5
<u>Johnson vs. U.S.</u> 333 U.S. 10 (1948)	P. 8
<u>Pointer vs. Texas</u> 380 U.S. 400, 13 LED2d 923, 85 S.Ct 1065 (1964)	P. 3
<u>Portomene vs. U.S.</u> 221 F2d 582 (5th Cir. 1955)	P. 6
<u>Roviaro vs. U.S.</u> 353 U.S. 53 (1957)	P. 5
<u>Sorrentino vs. U.S.</u> 163 F2d 627 (9th Cir. 1947)	P. 6
<u>Spinelli vs. U.S.</u> 393 U.S. 410, 415, 89 S.Ct 584, 21 LED2d 637 (1969)	P. 7,8
<u>State vs. Gonzales</u> 517 P2d 547, 30 Utah 2d 302 (1973)	P. 10
<u>State vs. Kinsey</u> 295 P2d 247, 77 Utah 348 (1931)	P. 9
<u>State vs. Kirkham</u> 432 P2d 638, 20 Utah 2d 44 (1967)	P. 9
<u>State vs. Nichols</u> 145 P2d 802, 106 Utah 104 (1944)	P. 9
<u>State vs. Thomas</u> 244 P2d 653, 121 Utah 639 (1952)	P. 9
<u>U.S. vs. Conforti</u> 200 F2d 365 (7th Cir. 1953)	P. 6
<u>Wong Sun vs. U.S.</u> 371 U.S. 471, 83 S.Ct 407, 9 LED2d 441 (1963)	P. 13

STATUTES CITED

Utah Code Annotated § 76-1-501 (1953 as amended)	P. 8,10,11,12
76-6-202	P. 11
76-6-402	P. 8
77-21-44	P. 3

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

BRENT JAY SESSIONS and
LOUIS R. DABBS,

Defendants-Appellant

Case No. 15617

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Brent Jay Sessions, appeals from a judgement of guilty on one count of Burglary in the Third Judicial District Court, the Honorable Hal G. Taylor, presiding.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of one count of Burglary. Trial was held in the Third Judicial District Court of Utah on December 9, 1977 with the Honorable Hal G. Taylor, presiding.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of his conviction and/or a remand to the District Court for a new trial.

STATEMENT OF FACTS

Cope's Chevron Service Station, located at 480 East South Temple was burglarized and ransacked (p. 22). There were no witnesses to the burglary, which was discovered at 7:00 a.m. on September 16, 1977 by Gene Cope. Missing from the station was 80 pounds of meat (p. 23), a portable T.V., 20 inspection stickers (p. 25), a stamp pad (p. 25) and an electric razor (p. 26). A police investigation turned up no fingerprints or any clues to the identity of the burglar (p. 35).

On September 22, 1977, the Defendant's apartment located at 216 E. Street in Salt Lake City was searched pursuant to a search warrant issued on Mike Hanks (p. 29) affidavit based on information supplied by a confidential informant. The search resulted in the recovery of 20 pounds of meat, a portable T. V. and 5 inspection stickers and the arrest of Brent Jay Sessions and Louis Dabbs for Burglary (p. 34).

During the search, the officers asked a few questions of the Defendants. Brent Sessions, upon being asked who the T. V. belonged to, stated that it belonged to a friend (p. 33). Louis Dabbs, when questioned about the safety stickers, replied that he was an investor (p. 33). No questions were asked concerning the meat.

Of the items recovered all were located in conspicuous and/or obvious locations and there had been no attempt to hide or conceal them. At the trial there was no evidence that the Defendants tried to escape or were anything but polite, calm and respectful to the police officers.

On these facts the case was tried to the Court resulting in the conviction of Brent Jay Sessions and Louis R. Dabbs. It is from this judgment of guilty and the subsequent denial of a motion for new trial that the Defendant Brent Jay Sessions appeals.

STATEMENT OF POINTS

Point Number One: The Trial Court Erred in Denying Defendant's Motion for Separate Trials.

Point Number Two: The Trial Court Committed Reversible Error in Denying Defendant's Motion to Compel Discovery and Refusing to Order the State to Disclose the Name and Address of the Confidential Informant.

Point Number Three: The Trial Court Committed Reversible Error in Denying Defendant's Motion to Suppress the Evidence Obtained Pursuant to a Search Warrant Issued Based on a Constitutionally Invalid Affidavit.

Point Number Four: The Trial Judge Erred in Applying the Presumption Created in UCA 76-6-402 to a Burglary Charge.

Point Number Five: The Trial Court Erred in Failing to Rule that the Evidence was Insufficient as a Matter of Law to Find the Defendants Guilty of Burglary.

ARGUMENT

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR SEPARATE TRIALS.

The Utah Code of Criminal Procedure 77-21-44 provides that the trial Court may sever an information into separate informations and order separate Trials (as may be proper) if there is a misjoinder of parties Defendant.

The information charged both Defendants with the offense of Burglary. At the time of the execution of the search warrant, both Defendants made statements, though not confessions, that could possibly be taken as incriminatory towards the other and used against the other. By not ordering separate trials, the Defendants were denied their 6th Amendment right of confrontation and 14th Amendment right to due process.

The record shows that when Louis Dabbs was asked about the inspection stickers, he made the statement that he was an investor. This statement, while admittedly not a confession, is incriminatory in that it shows a knowledge on the part of Dabbs' of where he got the stickers. But because the Court refused to order separate trials, Brent Sessions was denied his right of confrontation secured by the 6th Amendment and was unable to cross examine Defendant Dabbs.

The United States Supreme Court stated in Pointer vs. Texas 380 U. S. 400, 404, 13 L.Ed2d 923, 926 85 S.CL. 1065, "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the 6th Amendment." A major reason underlying the constitutional confrontation rule is to give a Defendant charged with a crime an opportunity to cross-examine the witness against him. Id. at 406-407, 13 L.Ed2d 927, 928.

In Bruton vs. U.S. 391 U.S. 123, 20 LED2d 476, 88 S. Ct. 1620, where there was a joint trial of two Defendants, and there was a confession by one that was used against. The other the Supreme Court held that because of the substantial risk and despite instructions to the contrary, the jury looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans confession in this joint trial violated petitioner's right of cross-examination secured by the 6th Amendment.

Bruton has two slight differences from our case, but still those differences do not discount its application. Admittedly, Bruton involved a confession and trial by a jury, but the fact that there are only incriminatory statements and a Judge sitting as fact finder cannot diminish the rights of the Defendants. An important element of a fair trial is that a jury [or fact-finder] consider only relevant and competent evidence bearing on the issue of guilt or innocence. Blumenthal vs. U.S. 332 U.S. 539, 559-560, 92 LED 154, 169, 68 S. Ct. 248, The Advisory Committee on Rules (for the composition of Federal Rules) stated that:

"Defendant may be prejudiced by the admission of evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. 34 FRD 419."

And Justice Stewart in his concurrence in Bruton stated:

"I think it clear that the underlying rationale of the 6th Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-

court statement of a co-defendant who is not subject to cross-examination is deliverately placed before a jury at a joint trial, Id At. 391 U.S. 137, 138, 20 LED2 486."

This statement shows that the intention of the Court was not to limit the holding of Bruton to only confessions, but to extend it to any damaging out-of-court statements.

Because of Justice Stewart's statements and the 6th Amendment Confrontation Clause, Bruton should have been applied to this case and separate trials ordered.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO COMPEL DISCOVERY AND REFUSING TO ORDER THE STATE TO DISCLOSE THE NAME AND ADDRESS OF THE CONFIDENTIAL INFORMANT.

The purpose of the State's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law is the furtherance and protection of the public interest in effective law enforcement. Roviaro vs. U.S. 353 U.S. 53, 59, "But the scope of the privilege is limited by the fundamental requirements of fairness. Where the disclosure of an informant's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. Id at 61."

Under our facts, the record shows that Defendant's apartment was searched pursuant to a search warrant issued on the Affidavid of Mike Hanks on information supplied by a confidential informant. The name of the confidential informant was not disclosed and the Defendants were unable to find out his identity. The statement by Mr. Dabbs that he was an investor can be construed to mean that he bought the safety stickers

from someone if it was the confidential informant, it would indeed be helpful, relevant and essential to the defense of the accused. But because the State did not disclose, nor the trial Judge order the disclosure, the Defendants are precluded from cross-examination and confrontation of a highly material witness.

The reasons given by the State for non-disclosure of the identity of the confidential informant was they had several cases pending right now in Court on the same confidential informant, his safety and that we are presenting some facts to the next Federal Grand Jury in regard to heroin trafficking in Salt Lake (p. 17). None of those reasons has anything to do with this case and are totally irrelevant. If it was the confidential informant who sold the stickers to Mr. Dabbs, or set-up the commission of the crime then the State would have to disclose the identity of the informer. Portomene vs. U.S. 221 F2d 582, U. S. vs. Confati 200 F2d 365, Sorrentino vs. U.S. 163 F2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense. Id.

Since separate trials were not ordered the only person that Brent Sessions could call upon other than Louis Dabbs that could corroborate, controvert, explain or amplify Dabbs' statement would be the confidential informant, whose identity was not disclosed. The informer was the only witness in a position to amplify and corroborate or contradict Dabbs' statement that he was an investor. Therefore, the trial court committed prejudicial error in allowing the State to withhold the identity of its informant.

POINT OF ERROR NUMBER THREE: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO A SEARCH WARRANT ISSUED ON A CONSTITUTIONALLY INVALID AFFIDAVIT.

The record will first reflect that the search warrant and the Affidavit are not present. The record shows a Stipulation from the Assistant Attorney General for the State of Utah and Carolyn Nichols, attorney for Brent Sessions requesting that the search warrant and Affidavit be included in the Record on Appeal. However, neither the search warrant or the Affidavit have been located. Without the search warrant, the search warrant was prima facia unconstitutional under Aguilar 378 U.S. 108 (1964), and the 14th Amendment.

The record reflects that a search warrant was issued based upon the statements of a confidential informant. But the Affidavit was sworn to by Sgt. Mike Hanks of the Salt Lake City Sheriff's Department. Sgt. Hanks stated that he was contacted by a confidential informant who stated where the Defendants were living and that they had some safety stickers in their possession, with one of the trial serial numbers listed as 682793, but that he failed to set forth any "underlying circumstances" or any reason or information that the informant was "credible" or his information "reliable" as required by Aguilar vs. Texas 378 U.S. 108 (1964).

The informer's report must first be measured against Aguilar's standards before its probative value can be assessed. Spinelli vs. U.S. 393 U.S. 410, 415 89 SC 584, 21 LED2d 637. Without the "underlying circumstances" set out or any information why the informant was "credible" or his informant was "credible" or his information "reliable" the search cannot be assumed to be constitutional or the Affidavit sufficient. Aguilar vs. Texas 378 U.S. 108, (1964) and Spinelli vs. U.S. 393 U.S. 410, 415, 89 SC 584, 21 LED2d 637. The Aguilar case stands for the proposition that the State has to prove that there were underlying circumstances and that the informant was reliable and these facts must be set out on

the face of the Affidavit. If those facts are not specifically stated on the face of the Affidavit, then the Affidavit is insufficient and cannot provide a basis for a finding of probable cause. Spinelli (at 418). Probable cause must be determined by a neutral and detached magistrate Johnson vs. U.S. 333 U.S. 10, 14 (1948) and is required by the 4th Amendment and the Utah Constitution. A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which is not as reliable as one which passes Aguilar's requirements and has not satisfied both requirements of Aguilar and Spinelli (at 416). Without this affirmative showing through the Affidavit and warrant, there cannot be a finding of probable cause, Aguilar, and any search warrant issued violates the 4th Amendment.

POINT OF ERROR NUMBER FOUR: THE TRIAL JUDGE ERRED IN APPLYING THE PRESUMPTION CREATED IN UCA 76-6-402 TO A BURGLARY CHARGE.

The presumption created in § 76-6-402 is applicable only to theft and states:

"Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be deemed prima facia evidence that the person in possession stole the property."

The trial Judge applied this presumption to the burglary charge which had the effect of depriving the Defendants of their 5th and 14th Amendment rights, switching the burden of proof from the prosecution to the Defendants and depriving the Defendants of the statutory presumption of innocence created in 76-1-501.

This Court has had several occasions to rule on the question of the

76-6-402 presumption as applied to a burglary. State vs. Thomas 121 Utah 639, 244 P2d 653, State vs. Kinsey 77 Utah 348, 295 P2d 247, State vs. Nichols 106 Utah 104, 145 P2d 802, State vs. Kirkham 20 Utah 2d 46. The view of this Court has been that:

"Possession of articles recently stolen, when coupled with circumstances inconsistent with innocence, such as hiding or concealing them, or of making a false or improbable or unsatisfactory explanation of the possession, may be sufficient to connect the possession with the offense of burglary and justify conviction of it. Thomas at 640, and in State vs. Kinsey 77 Utah 345, 295 P2d 247 this Court stated "mere possession of recently stolen property, if not coupled with other inculpatory or incriminating circumstances will not support a burglary conviction."

On the facts of our case it was clear error to apply the 76-6-402 presumption. The facts fail to show any circumstances inconsistent with innocence. The T.V. was located in plain view sitting on the table in the living room. The safety stickers were located in a jar in the living room (p. 31). The meat was located in the freezer. There was no evidence at all that the recently stolen articles were hidden or concealed.

There is no showing that either Defendant made a false, improbable or unsatisfactory explanation of the possession. Mr. Sessions, when asked who the T.V. belonged to said, "It belongs to a friend." (p. 33). This statement is not in any way inconsistent with innocence. It simply answers Mr. Hanks' question. It was not disproved or even disclaimed by the State. If Officer Hanks was unsatisfied with the answer he could

have delved into the matter and continued asking questions. We assume he was satisfied because he then asked about the safety stickers.

Upon being asked about the safety stickers, Mr. Sessions remained quiet which is his constitutional right and Mr. Dabbs made the statement that he was an investor (p. 33). *What he said...*

There is no showing that Mr. Hanks thought this statement to be false, improbable or unsatisfactory. And without some element of proof this statement cannot be assumed to be inconsistent with innocence. UCA 76-1-501.

In State vs. Gonzales 30 Utah 2d 302, 303 this Court said:

"Bare possession when not coupled with other culpatory or incriminating circumstances would not justify a conviction, but that possession of recently stolen property coupled with flight and the making of false or unreasonable or unsatisfactory explanations of the possession might be sufficient to connect the possession with the commission of the offense." ~~X~~

It should be emphasized that Gonzales says that possession when coupled with flight and false explanations might be sufficient. But in our case, as has been stated there were no false statements and certainly there was no flight. Neither Defendant tried to escape or flee the apartment. To the contrary, both were calm and cooperative. The facts here do not in any way justify application of the presumption and of putting the burden of proof on the defense.

It should also be pointed out that "recently" stolen property in the Gonzales case meant a one day lapse, the Kirkham case was the same day and the Thomas case was the same day. In our case the lapse of time between the burglary and the arrest was seven or eight days, which further

attenuates any justification for application of the 76-6-402 presumption.

POINT OF ERROR NUMBER FIVE: THE TRIAL COURT ERRED IN FAILING TO RULE THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO FIND THE DEFENDANTS GUILTY OF BURGLARY.

The facts brought out at the Preliminary Hearing and Trial showed that Brent Sessions had just moved into Dabbs apartment. That a burglary occurred at Gene Cope's Chevron Station which was four blocks from Defendants' apartment. That there were no fingerprints taken at the scene of the burglary. The articles reported stolen were 80 pounds of meat, a portable T.V., 20 inspection stickers, a stamp pad and an electric razor. When Defendants' apartment was searched a week later, the articles recovered from the apartment were 20 pounds of meat, a T.V. and five inspection stickers. This means only 1/4 of the meat, 1/4 of the safety stickers and a T.V. were recovered. It was on this evidence and the statements of Mr. Sessions that the T.V. belonged to a friend, Mr. Dabbs that he was an investor, that the trial court relied on in finding the Defendants guilty of burglary.

The Utah Statute on Burglary 76-6-202 states that "a person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person." And § 76-1-501 provides:

"A Defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the Defendant shall be acquitted."

The facts presented by the State could possibly make a case for receiving stolen property, but they were not charged with receiving

stolen property. They were charged with the crime of burglary. To convict Brent Sessions of burglary goes against the grain of our entire criminal justice system. The 5th Amendment provides that the accused shall be informed of the nature and the cause of the accusation and 76-1-501 requires each element of that offense to be proved beyond a reasonable doubt. Since he was not charged with receiving stolen property it is a major injustice to allow a burglary conviction to stand that was not proven. The circumstantial and direct evidence brought out at trial was totally insufficient as a matter of law to find the Defendants guilty of burglary.

The evidence totally fails to show that either Defendant was ever in the service station at all. Without that element proved beyond a reasonable doubt, the trial judge committed reversible error in not acquitting the Defendants.

CONCLUSION

Reversal of a trial court conviction is not a matter that should be taken lightly. But, if this conviction, based upon the facts brought out at trial and the errors committed by the trial Judge, were allowed to stand, it would totally obliterate the principle of our criminal justice system which is based on our Constitutions, the Statutes and the common law, as expounded on in actual cases.


The evidence and the cases show that the Defendant was deprived of his 6th Amendment right of Confrontation when the trial Judge erred and did not order separate trials or grant Defendant's Motion to Compel Discovery and Disclose the name of the confidential informant. The evidence also fails to show that the State met its burden under Aguilar

and Spinelli as to the two pronged test for the sufficiency of an Affidavit supporting a search warrant. Without that burden satisfied, there was no probable cause for the search or the arrest and everything thereafter was the "fruit of a poisonous tree." Wong Sun vs. U.S. 371 U.S. 471 83 Supreme Court 407 9 LED2d 441 (1963). By allowing the State's attorney to satisfy any lower standard of sufficiency, the Defendant is further deprived of his 4th Amendment right as applied to "probable cause" and "unreasonable search".

Another gross abuse of Defendant's statutory and constitutional rights came when the trial Judge, in the absence of any circumstances inconsistent with innocence, and in the absence of proof beyond a reasonable doubt, applied the presumption created in 76-6-402 UCA, which was intended to apply to theft only, thereby having the effect of switching the burden of proof to the Defendant. The evidence was insufficient to support a conviction for burglary and the trial Judge further deprived the Defendant of his rights when instead of presuming the Defendant innocent, he applied the theft presumption and presumed him to be guilty.

To allow such errors and abuses to go uncorrected would erode and destroy the inherent safeguards in our penal system and deny to the Defendant the greatest right of all, the right to due process of law.

Respectfully Submitted,


CAROLYN NICHOLS