

1977

the State of Utah v. Brent Jay Sessions and Louis R. Dabbs : 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.
15617

BRENT JAY SESSIONS, :

Defendant-Appellant. :

----- :
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF GUINNEY
BURGLARY IN THE THIRD JUDICIAL DISTRICT
COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE G. H. HARRIS,
JUDGE, PRESIDING

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MAY 11 1967

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-v3-

BRENT JAY SESSIONS,

Defendant-Appellant.

Case No.
15617

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Burglary, a felony of the third degree.

DISPOSITION IN THE LOWER COURT

Appellant waived his right to a jury trial and was found guilty by the Honorable G. Hal Taylor, District Judge. Appellant was sentenced to a term of not more than five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence rendered below.

STATEMENT OF FACTS

Appellant was tried jointly with his roommate, Louis R. Dabbs.

During the night of September 15, 1977, a service station was broken into, and a television, sixty to eighty pounds of frozen meat, and some safety inspection stickers were stolen from the premises (R.67-70). On September 22, 1977, Deputy Sheriff Mike Hanks executed a search warrant at the apartment where the appellants Sessions and Dabbs lived (R.73-74). Deputy Hanks found a television, a quantity of frozen meat, and some safety inspection stickers during his search (R.74). All of these objects were identified as the ones stolen from the service station (R.68-70). The apartment is located approximately two city blocks from the service station (R.74). During the search, Deputy Hanks asked who the television belonged to (R.77). The appellant Sessions replied that it belonged to a friend; the co-defendant Dabbs did not reply. Id. Later in the search, Deputy Hanks asked about the stickers. Id. The appellant Sessions said nothing, but the co-defendant Dabbs answered that he was an investor. Id.

At the time of trial, appellant filed three motions. The first was a motion to sever based on the ground that co-defendant Dabbs' statement ("I am an investor") was

admissible at trial and would prejudicially incriminate Sessions (R.22). This motion was denied (R.49). The second motion asked that all evidence gained by Deputy Hanks' search be suppressed on the grounds that the affidavit upon which the warrant issued was defective (R.21). The appellant did not produce the warrant or the affidavit in support of his motion, nor did he make a motion to discover that evidence (R.56-57). The court below held that the appellant had the burden of going forward on the motion to suppress, and that in the absence of any evidence the motion would be denied (R.50, 56,57). The court below then denied the motion to suppress with neither the warrant nor the affidavit before it (R.56-57). The third motion asked that the identity of a confidential informant be disclosed (R.23). Deputy Hanks represented to the court below that the disclosure of the informant's identity would jeopardize the informant's safety and decrease his usefulness as an informant (R.62). The court below held that disclosure of the informant's identity would not aid the defense and denied the motion (R.62-63). The informant did not testify at trial. The court found both defendants guilty (R.24). The defendant Dabbs was placed on probation (R.41), and defendant Sessions was sentenced to serve a term of not

less than five years in the Utah State Prison, this sentence to run concurrently with the other sentence defendant Sessions was serving (R.34).

It is from this conviction and sentence that the defendant Sessions appeals.

ARGUMENT

POINT I

THE COURT BELOW DID NOT ERR IN DENYING THE MOTION TO SEVER.

Two or more defendants may be charged in the same information if it is alleged that they participated in the same act that constitutes an offense. Utah Code Ann. § 77-21-31(2) (Supp. 1977). Appellant claims, however, that it was error to try him with his roommate Dabbs because Dabbs' statement (i.e., "I am an investor") would incriminate the appellant and deny the appellant his right to cross-examine Dabbs. Respondent insists that this claim of error is without merit for three reasons. First, Dabbs' statement does not incriminate the appellant, and its admission at trial could not have prejudiced the appellant. Second, appellant was tried without a jury, and the court below is presumed to know the law (i.e., that Dabbs' hearsay statement was only admissible against Dabbs) and to have acted in

accordance with the law. Third, the statement was not a confession, and is not within the rule of law established by the authorities cited by the appellant.

As to the first point, respondent contends that Dabbs' statement, "I am an investor," does not refer to the appellant Sessions and cannot be reasonably construed to incriminate him. Appellant argues that the statement, ". . . is incriminatory in that it shows a knowledge on the part of Dabbs of where he got the stickers." (Brief of Appellant, p. 3, emphasis added.) Assuming that is true, it still does not incriminate Session, the appellant in this case, because being an "investor" has no relationship to being in possession of a television, sixty pounds of frozen meat, and numerous state safety inspection stickers. Respondent must conclude that appellant has not shown that admission of Dabbs' statement was prejudicial to him.

Further, respondent avers that any possible prejudice was removed because the case was heard by the court without a jury. In State v. McLaughlin, 22 Utah 2d 321, 452 P.2d 875 (1969), a defendant claimed error because a statement made by a co-defendant was admitted in evidence. This Court stated:

"Some of the more recent cases indicate that a jury, even with proper instructions by the court, would likely fail to consider an admission or confession only against the declarant. In the instant case, we conclude that a trial judge of learning and experience would only consider the evidence as it related to the issue of the guilt or innocence of McLaughlin." (Footnotes omitted.) McLaughlin at 323, 452 P.2d at 876.

Respondent submits that the court below knew that Dabbs' statement was not admissible against the appellant, and did not consider it in finding the appellant guilty.

Finally, respondent contends that the constitutional requirement for separate trials of co-defendants only applies in cases of confessions and not in every case of an incriminatory statement. The rationale of Bruton v. United States, 391 U.S. 123 (1968), was that, although a jury can follow many cautionary instructions, ". . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton at 135. Bruton suggests that a confession of a co-defendant can be such inflammatory evidence that cautionary instructions may not relieve the

defendant of prejudice. Respondent doubts, however, that every statement of a co-defendant is this inflammatory. Appellant's attempt to expand the Bruton rule beyond confessions is not persuasive. Justice Stewart's concurring opinion in Bruton at 137 states that it is improper to rely on cautionary instructions when ". . . the highly damaging out-of-court statement of a codefendant" is placed in evidence. Dabbs' statement, even if considered prejudicial to the appellant, cannot be categorized as a highly damaging, inflammatory piece of evidence that cannot be objectively weighed. Respondent submits that the admission of Dabbs' statement was not prejudicial error.

POINT II

THE COURT BELOW DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT.

The State has a privilege to refuse to disclose the identity of an informer unless the trial court finds that his identity has already been disclosed or disclosure is essential to assure a fair determination of the issues. Utah Rules of Evidence, Rule 36. The defendant has the burden of demonstrating that the informant would be a material witness on the issue of guilt. State v. Bankhead, 30 Utah 2d 135, 139, 514 P.2d 800, 803 (1973). Further, a defendant may not compel disclosure of an informant's identity to contest

the probable cause for the issuance of a search warrant. Id. at 138, 514 P.2d at 802. Respondent avers that appellant has not carried his burden of showing that the informant was a material witness. There is no evidence in the record that would link the informant to the commission of the crime. Appellant argues that Dabbs' statement might imply that Dabbs bought the stickers, and that if the informer was the seller of the stickers, his testimony would be material. (Brief of Appellant, pp.5-6.) The error in this argument is that there is no evidence that the informant was the seller, and respondent submits that speculation drawn from an inference cannot replace the evidence appellant must produce to carry his burden of demonstrating materiality.

The cases cited by appellant are factually distinguishable from the present case. In Rovario v. United States, 353 U.S. 53 (1957); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); United States v. Conforti, 200 F.2d 365 (7th Cir. 1952); and Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); each defendant was charged with the sale of a narcotic drug to an unnamed informer, and each defendant sought disclosure of the alleged buyer's identity. In the case of a narcotic sale to an unnamed

buyer, disclosure of the informant's identity would be essential to the defense. In this case, however, there is no evidence that the informant participated in the offense, and his testimony has not been shown to be material to the issue of guilt. Respondent urges the Court to find that the trial court properly denied appellant's disclosure request.

POINT III

THE COURT BELOW PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE APPELLANT FAILED TO CARRY HIS BURDEN OF GOING FORWARD ON THE MOTION.

Appellant attempted to suppress evidence obtained during a search under a warrant. Searches conducted pursuant to a warrant are presumptively valid, and the movant has the burden of showing that the search was illegal. State v. Ames, 222 Kan. 88, 563 P.2d 1034 (1977); State v. Willcutt, 19 Or.App. 93, 526 P.2d 607 (1974); United States v. Various Gambling Devices, 478 F.2d 1194 (5th Cir. 1973). Specifically, the defendant has the burden of demonstrating that an affidavit on which a search warrant issues is invalid under Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas,

378 U.S. 103 (1964). Ames, supra at 92, 563 P.2d at 1039-40; Gaffney Devices, supra, at 1199. This Court has held that a defendant bears the burden of persuasion in moving to suppress evidence where the defendant's standing is in issue. State v. Montanye, 18 Utah 2d 38, 414 P.2d 958, cert. denied 385 U.S. 939 (1966). In this case, appellant produced no evidence as to the content of the affidavit in support of his motion to suppress. The presumption of constitutionality was not overcome, and respondent submits that the trial court properly denied the motion to suppress.

POINT IV

THE COURT BELOW PROPERLY APPLIED THE PRESUMPTION OF UTAH CODE ANN. § 76-6-402 (SUPP. 1977), IN THIS CASE.

The Utah criminal code provides that possession of recently stolen property is prima facie evidence that the possessor stole the property, unless a satisfactory explanation is made. Utah Code Ann. § 76-6-402(1) (Supp. 1977). In State v. Gonzales, 30 Utah 2d 302, 517 P.2d 547 (1973), this Court held that the same inferences can be drawn from the possession of recently stolen property in a burglary case as in a larceny case. Respondent does not understand appellant's fourth point on appeal to dispute the Gonzales holding. The sufficiency of the evidence, including the

evidence of possession of the stolen goods, will be discussed in Point V, infra. This point will be limited to a discussion of the applicability of the presumption to this case.

First, appellant was found in possession of goods that were positively identified as stolen (R.68-70,74). Second, appellant offered no explanation of his possession of any of the stolen goods except the television. His explanation of possession of the television was that it belonged to a friend. The owner of the television did not know the appellant, nor did he give appellant permission to use it (R.67-68). The appellant's explanation is, therefore, not satisfactory. Finally, the goods in appellant's possession were stolen recently. The burglary occurred between late September 15, 1977, and 7:00 a.m. September 16, 1977, and the search was conducted in the afternoon of September 22, 1977. The question of what is such a recent possession as to raise the presumption is a question of fact, and a possession as long as four months from the date of the theft can present a jury question. State v. Bowen, 45 Utah 130, 143 Pac. 134 (1914). A 39 day period between a burglary and the discovery of stolen goods is not too great a period for evidence of possession of the goods to support a burglary conviction. State v. Iedbetter, 17 Utah 2d 353, 412 P.2d 312,

cert. denied 385 U.S. 922 (1966). Respondent submits that the six to seven day period between the burglary and the search raised a question of fact, properly resolved below, of whether appellant was in possession of "recently" stolen goods.

Respondent submits that the presumption that the possessor of recently stolen goods stole the goods was properly applied in this burglary case.

POINT V

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE COURT BELOW.

Appellant's brief alludes to facts brought out at preliminary hearing, such as the allegation that the appellant had just moved into Dabbs' apartment (Brief of Appellant, p. 11). The record does not contain the transcript of the preliminary hearing, nor does it contain any other evidence to support appellant's contention that he recently moved into Dabbs' apartment. Respondent submits that appellant's factual allegation is improperly before the Court.

The evidence in the record and the inferences fairly drawn therefrom, viewed in the light most favorable to the verdict are as follows:

A burglary was committed at Cope's service station. The appellant was found, seven days later and two city blocks away, in possession of goods taken during the burglary. Appellant offered no explanation as to his possession of the stolen meat or stickers, and stated that the television belonged to an unnamed friend. In fact, the owner of the television did not know the appellant or give him permission to use it. The appellant's explanation of his possession of the television was either false or unsatisfactory.

As the Court stated in State v. Thomas, 121 Utah 639, 641, 244 P.2d 653, 654 (1952):

"... possession of articles recently stolen, when coupled with circumstances inconsistent with innocence, such as ... making a false or improbable or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the offense of burglary and justify his conviction of it."

Respondent submits the evidence was sufficient to support the verdict.

CONCLUSION

Based on the foregoing points and authorities, respondent asks that the judgment of the court below be affirmed.

Respectfully submitted,

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