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State of Utah v. Peter andre Levin : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

-v-

PETER ANDRE LEVIN,
Defendant-Appellant.

Case No. 15644

BRIEF OF APPELLANT

This is an appeal from a guilty verdict, the Honorable Ernest F. Baldwin, Jr., presiding, and a denial for a Petition for a Writ of Habeas Corpus, the Honorable Peter F. Leary, Judge, presiding.

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JUL 27 1978

Clerk, Supreme Court, Utah

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-v-	:	
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OTHER AUTHORITIES CITED

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Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, PETER ANDRE LEVIN, appeals from decisions rendered in two legal proceedings and consolidates his arguments in both matters herein. First, the verdict of guilty rendered in the Third Judicial District Court pursuant to an Information charging the appellant with Unlawful Possession of a Stolen Motor Vehicle, a Third Degree Felony, the Honorable Ernest F. Baldwin, Jr., Judge, presiding. Second, from an order denying his release from the Utah State Prison upon a Writ of Habeas Corpus, the Honorable Peter F. Leary, Judge, presiding.

DISPOSITION IN THE LOWER COURT

On January 4, 1977, the appellant, Peter Andre Levin, was found guilty by the Honorable Ernest F. Baldwin, Jr., a judge of the Third Judicial District Court, of the crime of Unlawful Possession

of a Stolen Motor Vehicle in violation of Utah Code Ann. §41-1-11 (1953 as amended). On January 20, 1978, appellant was sentenced to the indeterminate term as provided by law to the Utah State Prison.

On April 4, 1978, appellant, Peter Andre Levin, filed a complaint and Petition for Writ of Habeas Corpus in the Third Judicial District alleging that his commitment to the Utah State Prison was invalid. The matter was set for hearing before the Honorable Peter Leary and was denied on June 22, 1978.

The appellant has filed a motion to consolidate the appeal from both these proceedings as the issues involved are the same.

RELIEF SOUGHT ON APPEAL

The appellant, Peter Andre Levin, seeks an order from this court remanding the matter to the Third Judicial District for resentencing pursuant to a directive that sentencing in this matter cannot exceed six months in the County Jail and a fine of \$299.00.

STATEMENT OF THE FACTS

On November 2, 1977, Stephanie Hancock drove her family stationwagon and parked at West High School in Salt Lake City. A few hours later, upon returning to where the car was parked, she found it missing. On November 4, 1977, John McIntire, a security agent for Sears was contacted by a "Mr. Bates" who said that he was with a person at that time whom he believed had stolen the car.

they were using. Mr. McIntire called the police. Before they were able to arrive, he walked out of the store to see the automobile. He was about 40 feet from the car when he observed "Mr. Bates" get into the passenger seat and another person enter into the driver's seat and drive away. When asked if this person, who was the driver, was the appellant, he stated that he could not positively make that identification.

Brent Ellcock, a police officer with Salt Lake City, testified that on November 4, 1977, about 6:30 p.m. he was contacted by a Bryan Bates. Mr. Bates directed him to an area in front of the Pal-D-Mar Bowling Alley in downtown Salt Lake City. Upon arriving at that location he observed a stationwagon. The officer returned to the police station where he observed the appellant talking to the desk sergeant. Officer Ellcock directed Officer Ray Dowling to remain with the car and for the desk sergeant to inform him when the appellant left the police station. Officer Ellcock returned to the car after Officer Dowling had arrested the appellant at the scene.

Officer Ray Dowling testified that after he had been instructed by Officer Ellcock to disable the vehicle pictured in State's Exhibit I and II, he maintained a position where he could observe the car. After ten minutes the appellant approached the car and entered the driver's seat. Moments later, Officer Dowling approached the car and opened the driver's door where he observed the appellant drop a screwdriver.

Officer Ellcock then arrived and informed the appellant

that he was under arrest for Possession of a Stolen Vehicle.

Officer Ellcock transported the appellant to jail. In route the appellant made a statement wherein he said he didn't know why they were arresting him and didn't know the vehicle was stolen. In further statements, the appellant said that he didn't know the person's full name that he was with but that it was that person who had stolen the car. Having been found guilty, the court sentenced the appellant to a term in the Utah State Prison not to exceed five years.

ARGUMENT

THE SENTENCE IMPOSED BY THE COURT WAS IMPROPER BECAUSE APPELLANT'S CONDUCT, BEING PROSCRIBED UNDER TWO PROVISIONS OF LAW ENTITLED HIM TO BE SENTENCED UNDER THE PROVISION WITH THE LESSER PENALTY.

The appellant was sentenced pursuant to Title 41, Chapter 1, Section 112, Utah Code Annotated, 1953 (Appendix A) which is a Third Degree Felony punishable by not more than five years in the Utah State Prison and a fine not to exceed Five Thousand Dollars.

Upon conviction a motion was made to sentence under the provisions of Title 41, Chapter 1, Section 109, Utah Code Annotated, 1953 (Appendix A) the penalty for which is a Class B Misdemeanor. Both statutes, given the facts of the case, proscribed the same conduct and because the appellant is entitled to be sentenced under the provision which imposes the lesser penalty, he should have been sentenced to a Class B Misdemeanor.

There have been three decisions by the Utah Supreme Court which address this issue. State v. Shondel, 453 P.2d 146 (1969), State v. Fair, 456 P.2d 168 (1969), Rammell v. Smith, 560 P.2d 1108 (1977). The rule of law arising from these decisions is that where there are two statutes which proscribe the same conduct but impose different penalties, the violator is entitled to the lesser.

In this case the violator was accused of being in possession of an automobile which he knew had either been stolen or unlawfully taken. Such conduct is proscribed by the concluding provisions of Title 41, Chapter 1, Section 112, Utah Code Annotated, 1953. This statute has further language which proscribes other more specific acts but would not apply to this case. Therefore it is only the concluding clause that has application. That clause requires that the violator be in possession of the automobile with knowledge that the car was stolen or improperly taken.

The evidence of possession in this case was the Sears security agent who testified that he saw a person driving the automobile away from the store, but could not positively identify him as the appellant and Officer Dowling also saw the appellant in the driver's seat while the car was at rest, with a screwdriver in his hand. The implication being that he was attempting to start that automobile.

The second element is that the violator must know that the car was improperly taken. The importance here is that there

need not be a showing that the car was "stolen". A joy riding episode is an improper taking, though short of a theft, and would qualify as an element under this statute.

The evidence presented to this element of knowledge besides the inference of possession was testimony of Officer Ellcock, who remembers two statements by the appellant after he was arrested. One was to the effect that appellant did not know why he was arrested and did not know the car had been stolen. Later he stated that another person had stolen the car, but disavowed any connection with that taking.

Title 41, Chapter 1, Section 109 is the misdemeanor commonly known as the joy riding statute. The elements of this offense are that the violator drive an automobile which has been improperly taken. His intention, however, would only be to temporarily deprive the owner and not to steal the car.

Putting the two statutes in this case side by side it becomes obvious that there are differences, but given the facts of this case, they do not apply.

The elements of "possession" or "drives" is not qualitatively different and the appellant was not seen performing any greater action in relation to the automobile than driving or sitting in the driver's seat.

Title 41, Chapter 1, Section 112 requires that he have knowledge of the car being "stolen or improperly taken". The statute makes no distinction between the two and does not require that

violator be the person who took the automobile. There is no requirement to show that the car was stolen, only that it was "unlawfully taken" and the State's evidence in this case neither attempted nor achieved any distinction.

Title 41, Chapter 1, Section 109 also requires that the violator have knowledge that the automobile was taken unlawfully. Such knowledge is implied when it is shown that the car was taken without the owner's consent.

In Rammell v. Smith, 560 P.2d 1108 (1977), this Court compared, pursuant to the same issue as is raised in this case, two statutes which prohibited obtaining drugs. Title 58, Chapter 37, Section 8(4)(a)(ii), Utah Code Annotated, 1953, a felony, prohibited a person from acquiring possession of a controlled substance by forgery. Title 58, Chapter 17, Section 14.13, Utah Code Annotated, 1953, a misdemeanor, prohibited obtaining a substance which was designated as unsafe by fraud.

The distinction between these two statutes was recognized as two fold. First, one statute dealt with controlled substances and was specific and the other statute dealt with all unsafe drugs and was general. The defendant had obtained a controlled substance, Preludin, which is a controlled substance specifically prohibited. Secondly, the legislature expressly drew a distinction by specifying that conflicts were to be controlled by the provisions of the felony statute. Such a directive was geared to conflicts in the drug and pharmacy laws.

No such distinctions can be applied to the laws involved and facts presented in evidence in this case. As written and as

applied, both statutes prohibit the same conduct. Neither is more general or specific and there is no legislative preference which has been expressed.

CONCLUSION

The appellant is entitled to the lesser penalty if it can be shown that his conduct is prohibited under two statutes one of which has a lesser penalty.

The appellant was prosecuted under the provisions of Title 41, Chapter 1, Section 112, Utah Code Annotated, 1953, which is a Third Degree Felony. Title 41, Chapter 1, Section 109, Utah Code Annotated, 1953, by its terms and in light of the appellant's conduct proved at trial makes it a statute identical to the felony provision. However, because Title 41, Chapter 1, Section 109 is a Class B Misdemeanor the appellant was entitled to that lesser penalty and the Court erred by not sentencing in that manner.

Respectfully submitted,

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Attorney for Appellant