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The State of Utah v. William Campbell aka William Petterson : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

WILLIAM CAMPBELL, also known
WILLIAM PETTERSON,
Defendant and Appellant.

Case No. 7322

RESPONDENT'S BRIEF

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CLERK, SUPREME COURT, UTAH

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STATE OF UTAH,

, Plaintiff and Respondent,

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RESPONDENT'S BRIEF

The appellant was convicted of the crime of Grand Larceny before the Fourth Judicial District Court of the State of Utah, in and for the County of Utah, and it is from this conviction that he appeals.

FACTS

A detailed summary of the proceedings and the facts presented to the court and jury, upon which the conviction was based, are set forth on pages 2 to 7 of appellant's brief.

Although the facts are presented in a manner to best

serve the arguments of appellant in his Assignment of Errors, it is felt that they are clearly and accurately set forth and that a recapitulation at this time would serve no useful purpose to this Honorable Court. Any interpretation of the facts at variance with that of appellant will be called to the attention of the court in the arguments of respondent. The Assignment of Errors and arguments in support thereof will be answered in the order presented by the appellant.

ASSERTION NO. 1

THE COURT DID NOT ERR IN ADMITTING PLAINTIFF'S EXHIBIT "D" IN EVIDENCE.

ASSERTION NO. 2

THE COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S EXHIBIT "D."

In his first and second assignments, appellant claims that the court committed grave error to the prejudice of defendant and denied him his substantial and constitutional rights in the admission into evidence of exhibit "D" and in subsequently denying defendant's motion to strike exhibit "D." This exhibit is an itemized list showing the suitcase and its contents with the value thereof entered opposite each item. The valuations were placed there by Mr. Evan Thomas in his own handwriting at the police station in Provo, Utah on January 12, 1949, and represent his opinion as to the value of the articles (Tr. 22, 25, 28, 30 and 82).

Appellant's objections to the admission of exhibit "D"

were that it was incompetent, irrelevant and immaterial and not the best evidence (Tr. 83), and that defendant had no opportunity for cross-examination and for the further reason that it was hearsay and improper to admit at this time. The subsequent motion to strike exhibit "D" was based on the ground that it was incompetent, not real evidence or evidence of the most reliable character; that it was not shown that the property described in the exhibit was beyond the process or jurisdiction of the court; that the jury was entitled to view and inspect the property and determine its value independently of any witness, and that the exhibit was prejudicial to the defendant and offered him no opportunity to produce any evidence as to the value of the property and offered the jury no opportunity for arriving at its independent judgment as to the value of the property (tr. 110, 111).

In support of the aforesaid arguments, the brief of appellant cites various cases, all of which deal with the best evidence rule. It is the contention of the appellant that the court should have applied the best evidence rule and refused the admission of exhibit "D" and required the state to produce the actual articles. Respondent concedes that the authorities cited accurately state the doctrine universally recognized as the "best evidence rule," but assert that the application of the rule as contended for by appellant cannot be made. Appellant, himself, admits that he has been unable to find any cases dealing with the particular problem involved in this case (br. 16) but suggests that since the State could have produced the articles, it should have been compelled to do so since presumably, in the opinion of appellant, those

articles were the best evidence as to the nature and value thereof.

To substantiate respondent's contention that appellant's application of the "best evidence rule" cannot and does not apply, the attention of this Honorable Court is invited to Section 782, Vol. 32 C.J.S., p. 707, wherein the limitation of the best evidence rule is expressed in the following language:

"Likewise, although the best evidence rule has been applied to evidence of physical objects, the rule does not apply to proof of the nature, appearance, and condition of merely physical objects but these facts may be proved by parol without offering the objects themselves in evidence or accounting for their absence, and even where the objects themselves are present in court."

In discussing this same limitation of the best evidence rule, it is said in *Wigmore on Evidence*, Third Edition, Vol. IV, p. 320:

Sec. 1181. "*Rule not applicable to Ordinary Uninscribed Chattels.*"

"The real reason indicated for the rule shows why it has come to be generally adopted that *only documents*, or things bearing writing, can be within the purview of the rule. * * * For these reasons, it is entirely proper that a rule of such strictness should not be applied so broadly as to require the production of anything but writings; and such is the generally accepted doctrine."

Although appellant admits that he can find no cases which substantiate the application of the best evidence rule

for which he contends (br. 16), the attention of this Honorable Court is invited to the following cases in which the courts refused to adopt the application of the best evidence rule contended for by appellant: *State vs. Davis* (1914), 82 S.E. 525, 74 W. Va. 657, held it was not error to permit a witness who found an empty shell on deceased's premises to describe the shell's condition when found, without actually producing the shell; *Alexandro vs. State* (1930), 31 S.W. (2d) 456, 116 Texas Cr. R. 325, held that in a liquor prosecution, permitting testimony as to what the sheriff found in the house was proper against the objection that the things themselves were the best evidence; *State vs. Malone* (1927), 112 So. 404, 163 La. 525, held that the introduction of liquor in evidence was not required in prosecutions for violation of the liquor laws; *Williams vs. State* (1942), 165 S.W. (2) 377, 179 Tenn. 247, held that the "best evidence rule" applies exclusively to documentary evidence and not to the proof of the nature, appearance and condition of mere physical objects, but these facts may be proved by parol without offering the objects themselves in evidence or accounting for their absence and even where the objects themselves are present in court.

Appellant argues further that exhibit "D" should not have been admitted because defendant was thus deprived of the right of cross-examination. It is submitted that this construction is unsound and of no merit because in referring to the cross-examination which in fact was made with reference to exhibit "D," counsel for appellant argued:

"It is interesting to note that of 34 articles on exhibit "D," there were only 11 of them on which the witness placed the same value on cross-examination." (br. 23, 24).

And further at page 24:

"The record shows that as to the one or two articles, counsel did attempt to examine the witness but the examination only created confusion "

Certainly appellant cannot complain because he was not given the right of cross-examination when he fails to fully avail himself of that right and when, as the record clearly shows (tr. 34-36 and 84-93), in spite of appellant's argument, a cross-examination, however inadequate, was made.

ASSERTION NO. 3

THE COURT DID NOT ERR IN REFUSING TO CHARGE THE JURY IN ACCORDANCE WITH REQUESTED INSTRUCTION NO. 8.

ASSERTION NO. 4

THE COURT DID NOT ERR IN GIVING TO THE JURY ITS INSTRUCTION NO. 14A.

Appellant argues that the court should have charged the jury in accordance with requested instruction No. 8, as follows:

"You are instructed that the highest proof of which any fact is susceptible is that which presents itself to the senses of the court or jury. Neglect, then, to produce such evidence by any party who has it in his

power justifies an unfavorable presumption against him and you are at liberty to draw an unfavorable inference against either party if you think it warranted under all the circumstances and believe that either party has failed to produce any such evidence."

In lieu of the foregoing the court charged the jury in accordance with instruction No. 14a, as follows:

"You are instructed that the highest proof of which any fact is susceptible is that which presents itself to the senses of the Court or jury. The evidence in this case without dispute shows that the contents of the suitcase excepting a belt were by the officers released to the owner. In regard to such evidence you are to consider all of the facts and circumstances surrounding such release and you are at liberty to draw such inferences from a consideration of all of the facts and circumstances thereof as you think such facts and circumstances justify."

Appellant's contention is that the instruction as given was sterile, and completely ignored the presumption to which defendant was entitled in accordance with the rule set forth in Nichol's *Applied Evidence*, Vol. 5, page 4186 and in *Bagley vs. McMickle*, 9 Cal. 430, 446 and *United States vs. Reyburn*, 6 Pet. (U.S.) 352, 367.

It is true that the authorities cited substantiate the proposition that where secondary rather than best evidence is produced, there is a justifiable inference that the best evidence is not produced because it is unfavorable. However, a careful analysis of the authorities cited by Appellant reveals that the

doctrine which allows such an unfavorable inference is an outgrowth of the "best evidence rule" which is applicable only to "writings" and not to "physical objects" or "articles" as appellant suggests. *Bagley vs. McMickle* dealt with the admissibility of affidavits in lieu of promissory notes which had been previously destroyed. *United States vs. Reyburn* dealt with the admissibility of evidence relative to the character or contents of a "commission" when the document itself was not produced nor its destruction proved nor any evidence to procure it shown.

On the other hand the cases referred to by respondent, in support of assertions 1 and 2, hold that other evidence is properly admissible even though the articles themselves may have been available, and in none of those cases did the courts even intimate that the party's failure to produce the articles themselves would justify an unfavorable inference against that party.

Although the rule allowing an unfavorable inference is an outgrowth of the "best evidence rule," which is applicable only to "writings" and not to "physical objects" or "articles," it is submitted that instruction No. 14a was most favorable to the defendant and that no prejudicial error was committed. The instruction, as given, stated merely that the contents of the suitcase, except a belt, were released to the owner without giving any reason therefor and went on:

" . . . you are to consider all the facts and circumstances surrounding such release and you are at liberty of the facts and circumstances thereof as you think such facts and circumstances justify."

It will be noted that the jury was at liberty to draw such inferences as all the facts and circumstances justified which would necessarily include any unfavorable inferences. It is hard to conceive how, when as here, any and all inferences were left entirely to the jury, that the instruction usurped the function of the jury.

It is respectfully submitted that the court committed no prejudicial error in refusing to charge the jury in accordance with requested instruction No. 8 and that instruction No. 14a was not a sterile instruction, but correctly stated the law and in fact was most favorable to the defendant.

ASSERTION NO. 5

THE COURT DID NOT ERR IN REFUSING TO CHARGE THE JURY IN ACCORDANCE WITH REQUESTED INSTRUCTION NO. 1.

The requested instruction was to the effect that the court return a verdict of not guilty in favor of the accused. Appellant's contention is that this instruction should have been given because of the failure of the prosecution to prove that the crime was committed in Utah County (br. 30).

It is submitted that in view of the generally accepted rule that all doubtful questions of issuable fact must be resolved by the jury rather than the court, that the determination of this matter was properly left to the jury. Furthermore, the court specifically charged the jury, with respect to the crimes of Grand Larceny and Petit Larceny, that the State must prove beyond reasonable doubt that "such stealing, taking

and carrying away occurred at Utah County, State of Utah." See instruction No. 2 (6) with respect to Grand Larceny (tr. 122), and instruction No. 6 (6) with respect to Petit Larceny (tr. 124).

Appellant admits, in his argument, that there is evidence in the record from which the jury reasonably could have determined that the crime was committed in Utah County even though he claims that the evidence was irreconcilable (br. 34). Even admitting, for the purpose of argument, that the evidence was irreconcilable, which of course respondent denies, it is submitted that a reconsideration of this issue is foreclosed by the jury's verdict rendered in accordance with the aforesaid instructions.

ASSERTION NO. 6

THE COURT DID NOT ERR IN REFUSING TO CHARGE THE JURY IN ACCORDANCE WITH REQUESTED INSTRUCTIONS NOS. 2 AND 7.

Appellant contends that the court should have charged the jury that it could not find the defendant guilty of Grand Larceny. To support this contention the appellant states that the only evidence as to the value of the articles taken was the testimony of State's witness, Thomas, which appellant claims was conflicting with respect to more than two-thirds of the items, and that it was therefore the duty of the court to determine the issue of whether the offense was Grand Larceny or Petit Larceny (br. 38, 39). It is submitted that the very fact that the evidence was conflicting makes this issue a jury

question. The following cases decided by this court reaffirm the universally accepted doctrine that the weight of the State's evidence, whether conflicting or uncontraverted, and the credibility of witnesses, is a matter within the exclusive province of the jury: State vs. Brewer, 48 Utah 252, 158 Pac. 1094; State vs. Green, 78 Utah 580, 6 Pac. (2) 177; State vs. Thatcher, 157 Pac. (2) 258, 108 Utah 63; State vs. Moore, 183 Pac. (2) 973 Utah

Appellant argues further that the court should have charged the jury to the effect that when there is a reasonable ground of doubt in which of the two degrees defendant is guilty, he must be convicted of the lowest of such degrees, or Petit Larceny. (Requested instruction No. 7, (br. 37)). Respondent submits that there is no merit to appellant's contention that prejudicial error was committed in refusing to give that instruction. This is particularly true when the substance of the requested instruction, as in this case, was, very clearly and completely covered by the court in instructions Nos. 2 and 6, which set forth all the material allegations of the crimes of Grand Larceny and Petit Larceny and went on to state:

"If the State has failed to prove to your satisfaction beyond reasonable doubt, any one or more of the foregoing material allegations numbered 1, 2, 3, 4, 5 and 6, then it is your duty to find the defendant *not guilty of Grand Larceny* (tr. 122) or *not guilty of Petit Larceny* (tr. 124)."

Furthermore, this court, in the case of State vs. Cox, 160 Utah 263, 147 Pac. (2) 858, reiterated the accepted rule that

when a requested instruction is covered in one or more other instructions given by the court, it is not error to refuse the requested instruction. In the course of its opinion, the court said:

“Defendant’s contention that it was error for the court to refuse to give his proposed instruction No. 3, on insanity, is not well taken. The proposed instruction while probably correct as far as it goes does not cover the whole field of insanity. The court refused to give it because the thought therein contained was fully covered by instruction No. 12, as given by the court. That instruction not only covered the ground contained in the proposed instruction but adds other grounds not contained therein, on which the jury might acquit the defendant and was thus more favorable to him than the instruction which the court rejected.”

CONCLUSION

It is submitted that no prejudicial errors were committed during the course of the trial and that the evidence in the record, considered in connection with the instructions which were given, conclusively establishes justification for the verdict of the jury, and that it should therefore be affirmed by this Honorable Court.

Respectfully submitted,

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