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# The State of Utah v. Elizabeth Mullins : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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THE STATE OF UTAH, :

Plaintiff and
Respondent, :

vs. :

Case N[illegible],116

ELIZABETH MULLINS, :

Defendant and
Appellant.

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# APPELLANT'S BRIEF

----oo0oo----

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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| | | |
|---|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff and<br>Respondent, | : | |
| vs. | : | Case No. 14,116 |
| ELIZABETH MULLINS,<br><br>Defendant and<br>Appellant. | : | |

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APPELLANT'S BRIEF

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## STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a non-jury verdict of guilty on the charge of theft by receiving under 76-6-408(1), (2) (a) (b), Utah Code Annotated (Supp. 1973).

## DISPOSITION IN LOWER COURT

The defendant was convicted of theft by receiving of goods having a value of more than $250.00 but less than $1,000.00, a felony of the third degree. Defendant was sentenced to an indeterminate term of zero to five years in the Utah State Prison and fined $500.00. Defendant was placed on probation for two years provided the fine was paid.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the non-jury verdict with directions from this court to dismiss the charges against her based on the point raised on appeal.

## STATEMENT OF FACTS

The State and defendant stipulated (R. 51) to the following facts for purposes of this appeal as follows:

Defendant was charged with the offense of theft by receiving, a second degree felony. She was found guilty of that

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charge, but because of some conflict in the estimates of value of the property involved, the offense was determined to be a third degree felony. The evidence supporting the finding by the trial court, sitting without a jury, was as follows:

1. William Barkley had stolen from his automobile on December 1, 1973, a small electric calculator, Exhibit 11. Larry J. Baker had stolen from him on August 21, 1974, an electrician's hand tool, Exhibit 12.

2. On or about August 25, 1974, Intermountain Glass Company in Salt Lake City was burglarized, and numerous hand tools were stolen. Appellant, with her husband, owns a ranch in Duchesne County, Utah, and residing at the ranch are Appellant with her husband, the appellant's divorced daughter, and the daughter's school aged children.

3. A search warrant issued in October 1974 which was timely served on the premises of the ranch in the absence of Appellant but while her husband was present.

4. During the above search Exhibits 11 and 12 were recovered along with the personalty described in the return to the search warrant and portrayed in the pictures which were received as exhibits in this case, the documentary exhibits being made part of the record on appeal to the Supreme Court. Based on information supplied to the Salt Lake County Sheriff's

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Office by an informant on the search warrant that the Intermountain Glass tools had been sold to Appellant, and that she had been told of their origin, which Appellant denied during the trial, and based upon the finding of Exhibits 11 and 12 during the course of the search of the ranch in Duchesne County, Utah, Appellant was charged with the felony offense of theft by receiving.

## POINT ON APPEAL

### SECTION 76-6-408, UTAH CODE ANNOTATED (SUPP. 1973) IS UNCONSTITUTIONAL

The pertinent provisions of the Utah Code in issue in this case are as follows:

> "76-6-408(1). A person commits theft if he receives, retains, or disposes of the property of another knowing that it 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.
>
> (2) The knowledge or belief required for paragraph (1) is presumed in the case of an actor who:
>
> (a) Is found in possession or control of other property stolen on a separate occasion; or
>
> (b) Has received other stolen property within the year preceeding the receiving offense charged; ... (Emphasis added.)"

Appellant contends the presumption created by this statute is unconstitutional in that it: (1) violates her right to a presumption of innocence and the corollary right that the State prove every element of the offense beyond a reasonable

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doubt as embodied in Section 77-31-4 UCA (1953) and as demanded by the Due Process Clause of the Fourteenth Amendment; (2) violates the Due Process Clause of the Fourteenth Amendment and the similar provision in Article I, Section 7 of the Utah State Constitution, as being overly broad and vaguely drawn, and (3) it violates the Due Process Clause of the Fourteenth Amendment as contrary to Supreme Court decisions in Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), Turner v. United States, 396 U.S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970), Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

In Leary, supra, the court was faced with a narcotics statute that created a presumption of knowledge on the part of the accused. In determining the validity of the presumption, the court said:

> "With regard to the 'knowledge' presumption, we believe that Tot [ Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) ] and Romano [ United States v. Romano, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965) ] require that we take the statute at face value and ask whether it permits conviction upon insufficient proof of 'knowledge'. (395 U.S. 6 at 37) (Citations added.)

Following the Supreme Court's reasoning we must take Section 76-6-408 at face value and examine its language and what it permits the trier of fact to do and on what evidence.

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The statute requires at least two elements to be shown without question: (1) that the defendant was in possession of stolen goods, and (2) that defendant knew the goods were stolen. When the presumption is to be used, element # 2 is established by proof that defendant was in possession or control of property stolen on an occasion different from the one for which defendant is charged or that defendant received this other property within the year preceeding the offense charged. The practical effect is this: if the State cannot prove knowledge or its evidence is questionable or insufficient, all it need prove is other possession and the presumption attaches.

It has been consistently held that a showing of mere possession without more cannot substantiate a presumption of guilt as established by similar statutes. See, e.g. Commonwealth of Pennsylvania v. Sheppard, 229 Pa. Super. 42, 324 A. 2d 522 (1974), State of Oregon v. Offord, 14 Or. App. 195, 512 P. 2d 1375 (1973) and cases cited therein. Furthermore, it has been held that in order for the presumption to be constitutional, the fact proved must show beyond a reasonable doubt that the presumed fact is true. United States v. Johnson, 140 U.S. App. D.C. 54, 433 F. 2d 1160 (1970), Wilbur v. Mullaney, 473 F. 2d 943 (1st Cir. 1973), State v. Odom, 83 Wash. 2d 541, 520 P. 2d 152 (1974). Barnes v. United States, supra, is not in opposite. In that case the Supreme Court was not faced with

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a statute creating a presumption of guilt but with a common law rule of evidence creating an inference from all the surrounding circumstances. The court said after examining the cases and the historical basis of the rule:

> "This impressive historical basis, however, is not in itself sufficient to establish the instructions constitutionality. Common-law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience." (412 U.S. 837 at 845)

The instruction given by the trial judge in Barnes, supra, reads in part:

> "However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property." (412 U.S. 837 at 840, n. 3) (Emphasis added.)

In upholding the instruction as given, the court reviewed the evidence and found that both sides agreed defendant was in possession of four recently stolen treasury checks; that payees of those checks had never received them; that a government witness, an expert in handwriting, testified that defendant had endorsed all four checks with his pseudonym and had also endorsed the name of the payee on two of the checks; that defendant testified he received the checks from people who sold furniture for him door to door, but that he could not name or identify any of the sales people; that defendant admitted

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writing his pseudonym on each check; that defendant could not substantiate any furniture orders because the orders had been written on sratch paper which was not kept.

> "Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen." (412 U.S. 837 at 845)

The result in Barnes, supra, is similar to the result reached by the Utah Supreme Court in State v. Martinez, 21 Ut.2d 187, 442 P. 2d 943 (1968), where in interpreting 76-38-1 UCA (1953) and the language "prima facie evidence" the court found the statute created nothing more than a rule of evidence. It still was incumbent on the trier of fact to decide from the evidence whether or not an inference should be drawn. The trier of fact was not forced to make the inference but could if he wished. The "inference" or "prima facie evidence" rule has been upheld in virtually every jurisdiction with statutes of similar wording. This rule differs from the "presumption" rule now before us.

State v. Georgopoulous, 27 Ut. 2d 53, 492 P. 2d 1353 (1972) in determining the admissibility of evidence of other stolen property for purposes of 76-38-12 UCA (1953) fits this pattern. The former 76-38-12 did not create any presumption. But the Utah Supreme Court allowed the evidence of other stolen goods to be admitted at the trial. This court held that this evidence could be used by the jury to help it decide if the

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defendant knew that the goods for which he was arrested were stolen. Again, the court has created a rule of evidence which permits the jury to reach its own judgment as to whether or not defendant had knowledge, i.e. to reach a permissible inference. Barnes, supra, would further require that the evidence be sufficient beyond a reasonable doubt.

These rules are completely evaded by Section 76-6-408, the statute now under consideration. The statute does not provide for any rule of evidence but rather provides for a legal presumption of knowledge and by virtue of the wording of the statute a presumption of guilt.

It is apparent from the abbreviated record in this case that Judge Baldwin at the time of making his finding of guilty (R. 55) considered the "presumption" rule in the literal interpretation of the subject statute without regard to any number of standards considered by other courts in determining the sufficiency of proof. The court stated (P. 55):

> "I have to weigh the evidence. I think that Mr. Van Over and Mr. Brown have told a lot of falsehoods. (Paragraph 4 of stipulated statement of facts that the defendant had been told of the origin of the stolen tools from Intermountain Glass). On the other hand, maybe some of it has some ring of truth. The fact that that much property was delivered (by Van Over and Brown), placed in a garage (the defendant's) and sold (to the defendant), in effect sight-unseen for $250, with no questions, who, how, why, when or where, couples together with whether it's possession or control or of other items stolen on several occasions in the home, I assume one

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> has control of one's own home even though someone else is living there; the bedroom, I have to find those other two items were stolen and end up in the possession of -- I didn't say the ultimate possession of -- of the defendant. The court, based upon the presumptions (statutory), I would have to find the defendant guilty of receipt of property of a value of less than $1,000 and over $250." (Emphasis added.)

Whether or not "presumption vs. inference" is constitutional at all is discussed in detail in "The Unconstitutionality of Statutory Criminal Presumptions" Vol. 22, Stanford Law Review, page 341. At page 349, the writer notes the basic objections to such legal presumptions when he states (1) they permit verdicts based upon evidence insufficient to support a finding beyond a reasonable doubt; (2) they force the jury to make arbitrary decisions, and (3) they direct verdicts for the prosecution unconstitutionally.

The writer further notes that when presumptions only have to pose the "rationale-connection test", a jury could find a person guilty on a quantum of evidence less than proof beyond a reasonable doubt of each and every element of the offense. As in Leary, supra, Appellant here was found guilty because of a statutory presumption of knowledge, an instance in which the State Legislature attempted to nullify the presumption of innocence which is the highest and greatest presumption in the law. It would appear that State v. Georgopoulous, supra, and the permissible inference allowed by this Court have now been overridden.

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It is obvious from Judge Baldwin's comments (TR. 55) that the sellers of the personalty to Appellant were of questionable reliability. It is further obvious from his comment "Based upon the presumptions..." that we have a presumptive questionable statute and no standard or criterion for overcoming this very questionable practice in the law. Creating a presumption of knowledge of an act which occurs today based upon possession of other stolen property twenty years before or possession of property stolen 364 days beforehand does not necessarily to the exclusion of any other reasonable hypothesis even infer guilty knowledge. To do so is a clear violation of the concepts enunciated by the court in In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) that the State must prove every element of the crime beyond a reasonable doubt. Even accepting completely the State proved possession it does not necessarily follow that such possession proves beyond a reasonable doubt that knowledge was had, in violation of United States v. Johnson, supra, and violates the accepted rule that possession can substantiate a finding of guilt which the statute allows. This statute has taken a rule of evidence in the Utah case of Georgopoulous, supra, and turned it into a presumption of guilt.

Leary, supra, has made it abundantly clear that before a statutory presumption can be constitutionally valid the State

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must prove that the fact presumed must lead at least with "substantial assurance" to the presumed fact.

The court quoted _Tot_, _supra_:

> "...The Court held that because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant." (395 U.S. 6 at 45)

In the _Tot_, _supra_, case the court was faced with a rule of evidence that a jury could infer from possession of a firearm that it came in interstate commerce. It should be remembered that this was only a permissible inference. The jury did not have to infer this knowledge. Only if the surrounding circumstances and evidence warranted the inference in the minds of the jury need they so infer. But in the case at bar the presumption is demanded as the trial judge felt bound to so presume. This statute does not create a permissible inference but a mandatory presumption as evidenced by the trial judge's statement.

Following the rule of _Leary_ and _Turner_, _supra_, it would appear that buyers of personalty must make an indepth investigation into the ownership, identity and source of all purchased goods. Even then an innocent buyer would not be protected because of the statutory presumption because of the unavailable criterion in this attempt to shift the burden of proof.

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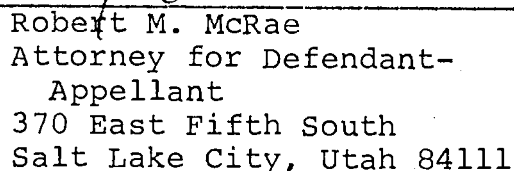
CONCLUSION

There being no evidence that the legislative logic set forth in 76-6-408, UCA as amended, is necessarily true, i.e. that a person who possessed a stolen object on another occasion or possessed an object stolen within a year from the time he received a second stolen object, knew that the second object was stolen. The statute in question sets forth no reasonable standard to create a statutory presumption of knowledge. Likewise, such a presumption is unconstitutional as it violates the basic premise that a person is presumed guilty until each and every element of the offense is established by direct or reasonably inferable conclusionable evidence beyond a reasonable doubt under the facts and circumstances applicable to the cause before this court. Appellant respectfully requests the statutory presumption be struck down by this court as being contrary to the objection of this State and of the United States.

Respectfully submitted,

HATCH, McRAE & RICHARDSON



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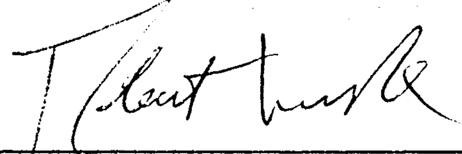
CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Vernon B. Romney, Attorney General, Attorney for Plaintiff-Respondent, 263 State Capitol, Salt Lake City, Utah 84114, this 5th day of September, 1975.



Robert M. McRae

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