2001

State of Utah v. Elizabeth Mullins : Brief of Respondent

Utah Supreme Court

Vernon B. Romney; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Plaintiff and Respondent.
Robert M. McRae; Hatch, McRae and Richardson; Attorneys for Defendant and Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ELIZABETH MULLINS,

Defendant-Appellant.

Case No. 14116

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ERNEST F. BALDWIN, JR., JUDGE, PRESIDING

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT M. McRAE

HATCH, McRAE & RICHARDSON
370 East Fifth South
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- ELIZABETH MULLINS, Defendant-Appellant.	:	Case No. 14116

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant was charged with the crime of receiving stolen property.

DISPOSITION IN LOWER COURT

On April 23, 1975, the matter was tried by the Honorable Ernest F. Baldwin, Jr., sitting without a jury. Appellant was found guilty of the crime of theft by receiving and was sentenced to pay a fine of $500 and was placed on two

years probation in lieu of imprisonment provided the fine is paid.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the conviction.

STATEMENT OF THE FACTS

During the early morning hours of the 27th day of August, 1974, the Intermountain Glass Company in Salt Lake City was burglarized and numerous tools were taken (T.8,9). The burglary was committed by 19 year old Allen Vanover, 20 year old Charlie Brown, and some other youths (T.55). After the burglary, the two boys took the carload of stolen items to the home of appellant who is Allen's aunt. About ten o'clock a.m. the boys made a deal with appellant wherein she agreed to pay the boys $250 for the carload of tools (T.66, 149-150).

Appellant claims that she was told by the boys that the tools belonged to Charlie's father

(T.149). However, both boys testified that they had made up this story and told appellant to use it if the police asked questions, and that appellant definitely knew the tools were stolen (T.67,100). Both boys had long criminal involvement in burglaries and stealing (T.56,73,106,108) and both testified that they had sold appellant stolen tools and other goods on many previous occasions (T.80,99).

A search warrant issued in October, 1974, was appropriately served at appellant's ranch in Duchesne County, Utah. At this time the stolen tools from Intermountain Glass were recovered along with other stolen property from other burglaries. (Record on Appeal, page 52.)

ARGUMENT

POINT I

THIS CASE CAN BE DECIDED WITHOUT QUESTIONING THE CONSTITUTIONALITY OF A STATUTE.

The Supreme Court of the United States holds that constitutional issues will be avoided if

The Supreme Court of the United States holds that constitutional issues will be avoided if cases can be decided on other grounds. Johnson v. Robinson, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). The Utah Supreme Court also has such a rule. State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970); Clinton City v. Patterson, 20 Utah 2d 70, 433 P.2d 7 (1967). Respondent submits that the present case can, and therefore should, be decided without reference to the constitutionality of a statute which the legislature of the State of Utah has deemed worthy of enactment.

Appellant was convicted of receiving stolen property, a crime under Utah Code Ann. § 76-6-408 (Supp. 1973):

> "A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen . . . with a purpose to deprive the owner thereof."

Appellant admitted that she received the stolen property (T.157). Therefore, the only real issue was whether or not she knew the property she purchased was stolen.

The finder of fact found that appellant did know the tools were stolen. On appeal the evidence should be viewed in the light most favorable to this verdict of conviction. State v. Ward, 10 Utah 2d 34, 341 P.2d 865 (1959); State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183 (1960). The finder-of-fact, in this case the district court judge, was in the best position to observe the facial expressions, mannerisms and tone of voice of witnesses and thus was in the best position to weigh the evidence. Those kinds of judgments are difficult, if not impossible, to make on appeal. By examining the evidence, however, it is obvious that the judge's verdict is heavily supported by the evidence. The verdict will not be overturned on appeal unless it appears that the evidence was so inconclusive

or unsatisfactory that reasonable minds must have entered reasonable doubts that the crime was committed. State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Danks, 19 Utah 2d 162, 350 P.2d 146 (1960). In other words, the strong presumption is that the trial verdict is correct. Appellant, to prevail, has the burden to prove that the verdict was unreasonable, and this she has failed to do.

At trial, a district court justice found that there was not a reasonable doubt of guilt. As the facts are examined it is obvious that the judge's verdict is more than adequately supported by the evidence. On the other hand, the testimony of appellant is highly improbable and amounts to nothing more than self-serving protestations of innocence. This court has pointed out many times:

> "A finder of fact is not necessarily bound to accept as conclusive a testimony of a witness. His credibility may be impeached by self-interest

> or improbability so that it would be entirely within the realm of reason to discount or to entirely discredit it." Nichol v. Wall, 122 Utah 589, 253 P.2d 355, 356 (1953).

See also Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323, 324 (1969), wherein the Court said that self-interest may justify non-acceptance of testimony.

Appellant would have the Court believe that she bought some tools from two youths (T.125, 86), one of whom she had never seen before (T.146), sight unseen (T.155-156), for two hundred and fifty dollars. Of this testimony the District Court Judge said:

> "The fact that that much property was delivered, placed in a garage, and sold in effect sight-unseen for $250 with no questions who, how, why, when, or where [tends to prove guilt.]" (T.177).

Based on ordinary human experience appellant's testimony is very difficult to believe.

Four persons were present when the sale of the stolen goods took place: Allen Vanover and Charlie Brown were selling stolen property, appellant was buying stolen

property, and appellant's daughter was around the house somewhere. The daugher is a poor witness to the transaction since she admitted that she was paying little, if any, attention to what was going on. She said:

> "A. No, I was busy around the house, really.
> Q. So I take it--
> A. I only grasped part of the conversation there.
> Q. I take it then that your mother just purchased some unknown quantity of tools?
> A. I don't know that, sir, I was in different parts of the house."

So for all practical purposes, only three people witnessed the transaction.

Appellant claims that she had never met Charlie before (T.146), but bought an unknown quantity of tools from him, sight-unseen (T.155). Allen and Charlie both testified that she previously knew Charlie (T.93,94), and both boys testified that she examined the tools

before paying $250 for them (T.65,97). Again, based on human experience, the boys' story is much more reasonable.

Appellant claimed that she did not know the tools were stolen (T.149). Both of the boys, however, testified that she knew they were stolen (T.66,96). Allen testified that he had sold her other stolen items, including tools (T.77), on at least six or seven separate occasions (T.80). Charlie testified that he had been present at least three other times when stolen goods were sold to appellant by Allen or himself (T.99). The testimony of the boys was corroborated by the fact that appellant had in her possession a calculator which was stolen seven months previous to the time appellant purchased stolen goods in this case (T.45). Appellant also had an electrical tool also stolen some months previous (T.51). Since Allen was only 19 years old (T.125) and Charlie was only 20 (T.86), and since both had long histories of burglaries and convictions (T.73,56,109),

it is much more reasonable to believe that appellant knew she was buying stolen goods than it is to assume she was so gullible as to believe that the young men acquired the large amount of tools legally.

Appellant alleged that she was told that the tools belonged to Brown's father (T.149). Both of the boys, however, testified that this was an alibi which they themselves had invented and which they suggested to appellant for use in case the police asked any questions (T.67,100).

Respondent contends that the verdict of the trial judge, sitting without a jury, is fully reasonable and adequately supported by facts, besides being supported by many inferences drawn from ordinary human experience. Respondent submits that the evidence was not so inconclusive or unsatisfactory that reasonable minds would have reasonable doubts that the crime was committed. Danks, supra. Respondent further contends

that appellant has failed to carry her burden of proving the verdict to be unreasonable.

Respondent submits that the conviction should be affirmed and that there is no need to consider the constitutionality of a statute passed by the Utah State Legislature.

POINT II

UTAH CODE ANN. § 76-6-408 (SUPP. 1973), IS CONSTITUTIONAL.

Respondent respectfully submits that this case can, and should, be decided without reference to the constitutionality of a statute. However, even if it were otherwise, the statute is constitutional. The specific provision of the Utah Code which appellant alleges to be unconstitutional is Utah Code Ann. § 76-6-408 (Supp. 1973):

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

This statute creates a statutory presumption. In other words the legislature has decided, for good reasons, to incorporate an ordinary presumption into the law.

The operation of a presumption can be described thus: if one fact is proved because of common experience a second fact may be presumed. Everyone uses presumptions every day, mostly subconciously. Of course the strength of the presumption rests on the strength of the common experience. If it is very general or universal, the presumption may be so strong that the second fact is not only presumed but essentially proved.

Let us examine the statute in question and see how strong its basis is. Common experience dictates that the vast majority of people do not intentionally receive stolen goods. In other words, receiving stolen property unintentionally is unusual. Furthermore, unintentional reception twice is even more unusual. Finally, common experience tells us that unintentionally receiving stolen property twice within twelve months is highly unlikely. Therefore, if it is proved that a

person received stolen goods twice in a year, and if it is highly unlikely that he did so unintentionally, then it may be presumed that he did so with knowledge that the goods are stolen.

One other variable is important in the equation. The common experience element may be available to some people more than others. Because of a doctor's special experience he could, given certain facts, presume other facts which ordinary people would be incompetent to presume. Likewise, state congressmen have access to facts, figures and experiences which give them greatly enhanced competency to make presumptions. Because of this, and also because of the way the legislative process works (exhaustive review), a presumption created by the legislature is given great weight by the courts of this State. Norton v. Department of Employment, 22 Utah 2d 24, 447 P.2d 907 (1968). In fact, the Utah Supreme Court has held that such business is a matter strictly for the congress and not for the courts:

> "Whether the wearing of the helmet is likely to reduce accidents . . . is a matter for the legislative body to determine and not for the courts." State v. Acker, 26 Utah 2d 104, 485 P.2d 1038 (1971).

Because a presumption is based on probabilities, it is, of course, not a fact. Therefore, a presumption is always rebuttable by evidence to the contrary. After all, there is the possibility that any given case contains the exception to the rule. Statutory presumptions are the same way, an initial presumption may prove to be invalid when exceptional circumstances are shown to exist. This idea is embodied in Utah Code Ann. § 76-1-503 (Supp. 1973):

> "Presumption of fact. - An evidentiary presumption established by this code or other penal statute has the following consequences:
>
> (1) When evidence of facts which support the presumption exist, the issue of the existence of the presumed fact must be submitted to the jury unless the court is satisfied that the evidence as a whole clearly negates the presumpted fact.

> (2) In submitting the issue of the existence of a presumed fact to the jury, the court shall charge that while the presumed fact must on all evidence be proved beyond a reasonable doubt, the law regards the facts giving rise to the presumption as evidence of the presumed fact."

Therefore, under the Utah Code, a statutory presumption is rebuttable and harmless to the innocent defendant.

The Supreme Court of the United States has discussed statutory presumptions in a line of cases ending with Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1968); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1969), and Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). From this line of cases, two tests have emerged to help determine the validity of a statutory presumption. Prior to Leary, supra, a statutory presumption was considered constitutional if in accordance with common experience there was a rational connection between the fact proved and the fact presumed. United States v. Gainey, 380

U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed. 2d 310 (1965). The Court in Leary substituted a new test in place of this "rational connection" test by holding that the fact proved must "more likely than not" lead to the fact presumed. In Turner, supra, the Supreme Court affirmed the use of this "more likely than not" test.

Another test has been proposed which would hold that the proven fact must lead to the presumed fact "without a reasonable doubt." This test has not been adopted by the Supreme Court although they have indicated that they may consider it as the standard in the future. In Barnes, supra, the Court said that if a presumption passed the "more likely than not" test and the "reasonable doubt" test it would certainly be okay but the court did not indicate whether one or the other alone would suffice.

The statutory presumption in this case clearly passes the present test. It can easily be said that if a person is proved to have received stolen goods twice in a year, then more likely than not he knew they were stolen. Even if a court were, in the future, to use the "reasonable doubt" standard, this presumption would probably pass that test also, especially in light of the fact that the Utah Code has provided that the presumption is rebuttable and that guilt must still be proven beyond a reasonable doubt. In Barnes, supra, the most recent case on this subject, a man was convicted of possessing recently stolen property. The trial judge instructed the jury that:

> " . . . possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." 412 U.S. at 839, 840.

This presumption was held to be valid by the Supreme Court.

The above instruction is much the same as the statute in the present case. However, there is one difference, the above instruction says that from possession of recently stolen property one may infer knowledge. In the present case, there must be possession of property from at least two different thefts. So the present presumption is even stronger than the one held by the Supreme Court to be sufficient.

Respondent respectfully submits that the Utah statutory presumption in question is constitutional; it is adequately supported by common experience; it is supported by holdings of the United States Supreme Court; it is harmless to an innocent man since the Utah Code provides that it is rebuttable by other evidence; it was made law by the Legislature of the State of Utah; and finally, the presumption is supported by other evidence in the present case. Respondent respectfully requests this Court to affirm appellant's conviction.

CONCLUSION

The present case can be decided without reference to the constitutionality of the statute. However, even if it were otherwise, the constitutionality of the statute in question is supported by decisions of the Supreme Court of the United States. Appellant's conviction should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent