

1979

State of Utah v. Sanders Hancock : Brief of Respondent

Utah Supreme Court

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Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;

Shelden R. Carter; Attorney for Appellant;

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 15921
SANDERS HANCOCK, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF UTAH COUNTY
HONORABLE J. ROBERT BULLOCK, JUDGE

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84111

Attorneys for Respondent

SHELDEN R. CARTER
107 East 100 South, #29
Provo, Utah 84601

Attorney for Appellant

FILED

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
)
Plaintiff-Respondent,)
)
v.)
)
MARK ANTHONY COLLINS,)
)
Defendant-Appellant.)
)

CASE NO. ~~15901~~
15921

SUPPLEMENT TO
APPELLANT'S BRIEF

Appeal from the Judgement of the
District Court of Utah County
Honorable George F. Baliff
JUDGE

SHELDEN R CARTER
107 E. 100 S. # 29
Provo, UT 84601

Attorney for Appellant

ROBERT B. HANSEN
236 State Capitol Bldg.
Salt Lake City, UT 84114

Attorney for Respondent

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

SANDERS HANCOCK,

Defendant-Appellant.

:
:
:
Case No.
15921
:
:
:

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

On May 4, 1978, appellant, Sanders Hancock, was charged by way of an Information with exercising "unauthorized control over cash in an amount in excess of \$1,000.00 belonging to Bill Brown Realty with the intent to deprive him of the same" in violation of Utah Code Ann. §§ 76-6-404 and 76-6-412 (1953), as amended (R.35).

DISPOSITION IN THE LOWER COURT

On May 9, 1978, appellant was tried on the above mentioned charge before a jury in the Fourth Judicial District Court, Utah County, State of Utah, the Honorable J. Robert Bullock, presiding (R.14-16). At the conclusion

of the trial, appellant was found guilty of the offense charged (R.16), and sentenced to not less than one nor more than fifteen years in the Utah State Prison (R.12).

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of the lower court affirmed.

STATEMENT OF FACTS

On January 26, 1978, Bill Brown hired the appellant, Sanders Hancock, to manage an apartment building, the Moon River Apartments, owned exclusively by Mr. Brown (T.70). Appellant's duties were those of general management which included the collection of deposit and rent monies and the requirement that the appellant turn over these monies to Mr. Brown or his bookkeeper, Billie Brinkerhoff, within 24 hours of collection (T.71). Within a day or two of the signing of the employment contract, the appellant occupied an apartment within the complex and began his duties.

At trial Mr. Brown testified that the appellant performed satisfactorily during the month of February, but during the early part of April his bookkeeper notified him that the rents were slow in coming in (T.72). Mr. Brown then contacted the appellant and questioned him about the collection of the rent. The appellant promised

Mr. Brown that he would bring the rent and deposit monies to him by 10:00 a.m. the next day (T.72).

The next day the appellant failed to appear, but a friend of appellant's, Sam Ungricht, arrived at Mr. Brown's office and informed him that the appellant had taken substantial rent monies and left for Las Vegas (T.73). Mr. Brown then contacted the Provo City Police Department and filed a complaint initiating these proceedings (T.73). Subsequently, the appellant was arrested in Las Vegas, the police finding substantial amounts of cash and a check to the Moon River Apartments on his person (T.172).

At trial the State put on evidence which established that the appellant had told at least ten apartment renters to make their rent or deposit checks payable to him. Appellant variously told the renters to make checks payable to him because (1) he was a co-owner, with Mr. Brown, of the complex, or (2) Mr. Brown would not accept out-of-state checks; therefore necessitating payment to the appellant who in turn would make out a personal check to Mr. Brown on behalf of the renters.

The following renters testified at trial as to the payments made by them to the appellant:

Ira J. Chaemi gave appellant a check made payable to appellant on April 4, 1978, for \$80.00 for a deposit on one of the apartments (T.10).

Hamid-Reza-Jafari gave the appellant a check for \$149.50 on April 8, 1978, made payable to appellant, for rental of an apartment unit (T.15).

Steven Van Ausdal gave the appellant \$80.00 for a deposit on March 9, 1978, and \$165.00 for rent on March 22, 1978 (T.19).

Mohammad Sabbaghi paid appellant \$80.00 for a deposit on a unit and \$190.00 for rent on April 6, 1978, both by check (T.23).

Sally Jean Casper gave appellant \$80.00 in cash as a deposit on March 25, 1978, and another \$100.00 for rent on April 1, 1978 (T.28).

Elisha Crandall paid appellant \$80.00 by check for a deposit on March 21, 1978 (T.32).

Harriet N. Tibbs paid appellant \$64.38, cash, for rent on April 4, 1978 (T.39).

Lisa Snelders paid \$157.61 to appellant for rent and deposit on March 19, 1978 (T.43).

Sherry Cloward testified that on March 18, 1978,

she gave the appellant \$155.04 for rent (T.50).

Finally, Glen Smith stated that he paid \$80.00, cash, for a deposit on March 25, 1978, and \$195.00 for rent on March 31, 1978, to appellant (T.52,53).

In regard to each of the foregoing witnesses, the State produced either a cancelled check made payable to the appellant or a receipt for cash from the appellant. Mrs. Billie Brinkerhoff, Bill Brown's bookkeeper, testified that she never received any of the monies referred to above for deposit or rental of units at the Moon River Apartments (T.58-67).

Following the introduction of this evidence and at the conclusion of the appellant's trial, he was found guilty of the crime charged. This appeal follows.

ARGUMENT

POINT I

APPELLANT'S FAILURE TO TIMELY OBJECT AT TRIAL TO THE CHALLENGED JURY INSTRUCTION NOW PREVENTS HIM FROM CLAIMING ERROR.

By way of this appeal, appellant claims error was committed by the lower court when it instructed the jury as to the essential elements of the crime charged. Appellant claims that the elements of the crime, as outlined by the court in Instruction No. 6 (R.22), were not complete in that they did not include the requirement

that the successive thefts resulted from "one single incriminating impulse or intent."

Respondent asserts that the appellant's failure to timely object to the jury instructions now precludes him from raising the supposed error on appeal.

Regarding jury instructions and objections thereto, Rule 51, Utah Rules of Civil Procedure, provides in pertinent part:

"If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice may review the giving or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made, out of the hearing of the jury."

Thus, the general rule stated in Rule 51 is that a party must object at the time the instructions are offered in order to preserve the error for consideration on appeal. Respondent notes that when asked if he excepted to any part or portion of the jury instructions appellant's counsel responded that he

would not object to any portion thereof (T.185).

Although Rule 51 contains a limitation on the above stated general rule requiring a timely appeal, this Court has consistently construed the rule narrowly so as to require a timely objection to an instruction before it will consider the alleged error on appeal. For example, in State v. Logan, 563 P.2d 811 (Utah 1977), the Court found that the error claimed by the defendant regarding the jury instructions was without merit, but stated that even if it had found otherwise the "appellant still could not prevail in this case for the record shows that he failed to object at the time the instructions were given, and ordinarily the failure to make a timely objection prohibits him from raising the point on appeal." 563 P.2d at 813.

The reasoning behind this strict application of Rule 51 is stated in State v. Kazda, 545 P.2d 190 (Utah 1976). The Kazda Court first notes the case of State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936), as providing an exception to Rule 51, but then states, concerning the general rule and the Cobo exception, the following:

"There is an important purpose to be served by the rule requiring that objections be made to the instructions. It gives an opportunity for the court to correct, or to fill in any inadequacy in the instructions, so that the jury may consider the case on a proper basis. In order to accomplish that purpose, the rule should be adhered to. Accordingly, the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error. The Cobo case involved a homicide in which the appellate court appeared to be convinced that an injustice had resulted. Accordingly, it noted such an exception. But the exception is applied only rarely where there appears to be a substantial likelihood that an injustice has resulted. Then and then only will the failure to comply with the requirements of the rule be excused. No such circumstance appears to exist here." 545 P.2d at 194, 195.

Thus, this Court made it clear in Kazda that a timely objection is a prerequisite to appellate review of a jury instruction unless appellant contends and all the circumstances exist that substantial injustice has resulted from the supposed defective jury instructions.

In this matter appellant does not contend nor does he set forth any facts which tend to show that

injustice resulted from the giving of the challenged jury instruction in the trial court. Because appellant failed to timely object to the challenged jury instruction and because no injustice has resulted therefrom, respondent avers that this Court should give effect to Rule 51 and a substantial body of case law which would preclude appellant from raising this question on appeal. State v. Kitchen, 564 P.2d 760 (Utah 1977); State v. Blea, 20 Utah 2d 133, 434 P.2d 446, 25 ALR3d 1113 (1967); State v. Myers, 15 Utah 2d 130, 388 P.2d 801 (1964); State v. Rowley, 15 Utah 2d 4, 386 P.2d 126 (1963).

POINT II

APPELLANT'S FAILURE TO RAISE THE QUESTION OF THE CONTINUITY OF THE OFFENSE IN THE TRIAL COURT PRECLUDES HIM FROM RAISING THIS QUESTION ON APPEAL.

Appellant argues that the trial court erred when it did not instruct the jury that when a charge results from a series of takings, in order for the separate acts to be aggregated into a single offense, they must all result from "one single incriminating impulse or intent."

Respondent again notes, as stated in Point I of this brief, that appellant failed to request the court to instruct the jury as to this issue. Respondent further notes that the appellant at no time during the course of his trial raised the issue of one continuous offense or transaction with the charge of grand larceny. The record in this matter does not reveal any objection, exception or mention by appellant of the issue he now presses on appeal. Thus, appellant raises this issue for the first time on appeal. For this Court to consider appellant's argument on appeal, where he has failed to raise and preserve it at trial, would contravene the intent of several previous decisions prohibiting examination of an issue raised for the first time on appeal. Jaramillo v. Turner, 24 Utah 2d 19, 465 P.2d 343 (1970); State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

A case in point is State v. Allen, 59 N.M. 139, 280 P.2d 298 (1955), where the defendant had been convicted of one count of theft from the person for stealing both vodka and cash. The vodka was taken from the victim early in the evening, but the defendant returned later that night to steal the cash. The Supreme Court of New Mexico concluded that the evidence was not

clear as to whether the acts resulted from a single, sustained, criminal impulse. It stated that this was a question for the jury's determination, but held the defendant's failure to raise the question at the trial level would preclude the Court from examining the issue on appeal. The court, therefore, felt constrained to affirm the decision of the lower court. 280 P.2d at 299.

In State v. Gibson, 37 Utah 330, 108 Pac. 349 (1910), a defendant was convicted of grand larceny for embezzling some \$235.60 from the Theater Publishing Company over the course of 38 days. The statute in force at the time made an offense grand larceny if the amount taken exceeded \$50. The largest single sum embezzled by defendant Gibson was \$48.60. The defendant requested an instruction to the effect that because the defendant was not found with more than \$50 in his possession at any one time, only a lesser charge of petit larceny could be found. This Court affirmed the trial court's refusal to give such an instruction, stating:

"We think no error was committed in the ruling. The case is not like that argued to us by appellant where the successive larcenies, each complete and distinct, did not constitute one

continuous transaction; or where properties belonging to different persons located at different places were purloined, and where each asportation constituted a separate and distinct offense...But it is one of embezzlement 'committed by a series of connected transactions from day to day'...and shown to be a 'continuous offense committed by a trusted servant by means of a series of connected transactions; and in such case a charge of embezzlement on a certain date will cover and admit evidence of the whole'...and is one constituting 'in fact and in law a single embezzlement'...and where 'the one substantive charge of embezzlement was supported by proof of the receipt at different times of the amount' the appellant 'was charged to have embezzled and one conversion of the whole.' (Citation omitted.)" 37 Utah at 332-333.

The Gibson Court found no requirement that a series of acts must result from "one single incriminating impulse or intent." Moreover, in State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971), this Court again found no affirmative duty on the part of the trial court to instruct the jury on the "one continuous offense theory." In McCarthy, two individuals were apprehended stealing hams, one being in possession of nineteen hams, defendant McCarthy having only four. McCarthy was convicted of attempted grand larceny despite the fact that the four hams would not exceed the statutory \$50 requirement.

In addition to finding that a lesser included offense instruction was waived by a failure to request it, the Court stated:

"In the circumstances shown, despite the defendant's hopeful conjecture and urgency, we see no basis upon which it could reasonably be believed that this was a segmented transaction in which there was an attempt to steal the four hams separately and thus make the offense petty larceny." Id. at 891.

Other states have also refused to find an affirmative duty of the trial court to submit instructions under similar fact situations. See, e.g., Brown v. State, 30 Ala.App. 27, 200 So. 630, cert. den. 200 So. 634 (1941); McKnight v. State, 134 Tex.Crim.Rep. 373, 115 S.W.2d 636 (1938); State v. Martin, 82 N.C. 672 (1880). See, generally, 136 ALR 949, 53 ALR3d 398.

Respondent submits that the finding of this Court in McCarthy, supra, should be controlling in the instant case. There is no reasonable basis suggesting appellant's actions were segmented. All monies were embezzled from the same employer, all were generated from the same apartment complex, and the entire embezzlement occurred within a short period of time. Therefore,

there was no reasonable basis for an instruction under the facts presented.

CONCLUSION

Appellant failed to raise his theory of a "single, sustained, criminal impulse" at trial. Respondent had no opportunity to address the issue or put on evidence establishing such an impulse. Furthermore, the trial court had no opportunity to rule on the merits of such a defense.

Appellant also failed to object to the court's instructions to the jury regarding the elements of the crime. Appellant clearly stated that he had no objections to the instructions given by the trial court.

Respondent asserts that to allow the appellant to raise this issue for full review by this Court on appeal would be contrary to all notions of fairness, judicial economy and appellate procedure. Additionally, such consideration would be contrary to substantial authorities.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARTLOW
Assistant Attorney General

Attorneys for Respondent