

1979

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Joseph C. Fratto, Jr.; Attorney for Appellant

Recommended Citation

Brief of Respondent, *Utah v. Levin*, No. 15930 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1340

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

PETER ANDRE LEVIN,

Defendant-Appellant.

BRIEF OF RESPONSE

APPEAL FROM A GUINET VERDICT IN THE
JUDICIAL DISTRICT COURT OF THE
LAKE COUNTY, STATE OF UTAH,
ERNEST F. BALDWIN, JR.,
AND DENIAL OF A PETITION FOR
HABEAS CORPUS IN THE
COURT, IN AND FOR THE STATE OF
UTAH, THE HONORABLE JUDGE

JOSEPH C. FRATTO, JR.

Salt Lake Legal Defender Association

333 South Second East

Salt Lake City, Utah 84111

Attorney for Appellant

JOSEPH C. FRATTO, JR.

Salt Lake Legal Defender Association

333 South Second East

Salt Lake City, Utah 84111

Attorney for Appellant

JOSEPH C. FRATTO, JR.

Salt Lake Legal Defender Association

333 South Second East

Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

| | Page |
|---|------|
| STATEMENT OF THE NATURE OF THE CASE----- | 1 |
| DISPOSITION IN THE LOWER COURT----- | 1 |
| RELIEF SOUGHT ON APPEAL----- | 2 |
| STATEMENT OF FACTS----- | 2 |
| ARGUMENT | |
| POINT I: UTAH CODE ANN. § 41-1-109 (1953), AS AMENDED, IS SEPARATE AND DISTINGUISHABLE FROM SECTION 112 OF THE SAME TITLE----- | 5 |
| POINT II: EVIDENCE PRESENTED AT THE TRIAL JUSTIFIED THE FINDER OF FACT'S CONCLUSION THAT THE APPELLANT KNEW OR HAD REASON TO KNOW THAT THE CAR IN HIS POSSESSION HAD BEEN STOLEN----- | 9 |
| CONCLUSION----- | 11 |

CASES CITED

| | |
|---|----|
| Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965)----- | 7 |
| Heathman v. Giles, 13 Utah 2d 368, 374 P.2d 839 (1962)----- | 8 |
| Huddleston v. United States, 415 U.S. 814, 94 S.Ct. 1262 (1974)----- | 7 |
| State v. Cornish, 568 P.2d 360 (Utah 1977)----- | 6 |
| State v. Minnish, 560 P.2d 340 (Utah 1977)----- | 10 |
| State v. Romero, 554 P.2d 216 (Utah 1976)----- | 10 |

STATUTES CITED

| | |
|---|--------|
| Utah Code Ann. § 41-1-109 (1953), as amended----- | 5-11 |
| Utah Code Ann. § 41-1-112 (1953), as amended----- | 1,5-11 |
| Utah Code Ann. § 76-6-404 (1953), as amended----- | 7 |

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent, :

-vs-

PETER ANDRE LEVIN,

Defendant-Appellant. :

Case Nos.

15644

and

15930

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with possession of a stolen motor vehicle in violation of Utah Code Ann. § 41-1-112 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before the Honorable Ernest F. Baldwin, Jr., in the Third Judicial District Court, without a jury, and found guilty as charged on January 20, 1978.

Appellant also sought a writ of habeas corpus before the Honorable Peter F. Leary of the Third Judicial District Court, which was denied, with prejudice, on June 22, 1978.

On appeal, appellant seeks to have these matters

consolidated as the issues are claimed to be the same.

RELIEF SOUGHT ON APPEAL

Respondent urges that the actions of the lower courts in convicting and sentencing appellant and in denying him a writ of habeas corpus be affirmed.

STATEMENT OF FACTS

On November 2, 1977, Stephanie Hancock parked her family stationwagon in the parking lot west of West High School in Salt Lake City. When she returned a few hours later, the car was missing (T.10). Both Stephanie and her father identified the vehicle involved in these proceedings as their stationwagon, the only change made having been that the key cylinder had been removed (T.6,11).

Two days later, on November 4, 1977, a security agent at Sears Department Store, John McIntre, was contacted by a Mr. Bates who said that he thought the person he was with had stolen the car they were using (T.13). Mr. McIntre called the police and then walked into the parking lot where he recorded the license plate number of the car in question (T.14). When he was about 40 feet from the car, he saw Mr. Bates get in the passenger side and a man who looked like the appellant walk out of the

store carrying a brown "Sears" bag. The man got into the car and drove away. Mr. McIntre noted that while he could not identify the appellant positively as that man, there was a definite resemblance (T.15).

Mr. Bates contacted Brent Ellcock, a Salt Lake City Police Officer, later that evening in the Salt Lake City Police Station (T.18). Officer Ellcock was directed by Mr. Bates to the Pal-D-Mar Bowling Alley several blocks away (T.18). Officer Ellcock and Mr. Bates went to that area together, where they found the Hancock stationwagon which was listed on the police "want sheet" as stolen (T.18, 19). An officer Dowling was assigned to observe the vehicle while Officer Ellcock returned to the police station with Mr. Bates in an attempt to locate the person he had described as the driver of the vehicle (T.19). Upon his return, Officer Ellcock observed appellant talking to the desk sergeant (T.20). Since appellant fit the description given by Mr. Bates, Officer Ellcock asked the desk sergeant to contact the dispatcher and let him and Officer Dowling know when appellant left the station (T.20).

Officer Dowling testified that he had disabled the stolen vehicle by disconnecting the main distributor wire and then waited across the street where he could observe the

vehicle and not be seen (T.34). Ten minutes later, appellant got into the driver's seat of the car. When Officer Dowling approached and opened the car door, appellant dropped a screwdriver which he had held pointed towards the ignition switch (T.34-35). The key cylinder was broken out and in Officer Dowling's opinion, appellant was attempting to start the car (T.35-36).

Officer Ellcock arrived at about that time and arrested appellant after reading him his rights from a card and asking if he understood them. Appellant responded that he did understand his rights (T.22,36). En route to the jail, appellant kept saying that he did not understand why he was being arrested or that the car was stolen (T.25), although he also stated that "Bryan" had stolen the car (T.26). Upon a search of appellant, Officer Ellcock found a six inch straight head screwdriver, a twelve inch wire with alligator clips on the ends, a notebook and a key ring with a blank Ford key (T.31). Officer Dowling searched the car and found a large "Sears" shopping bag which contained a new bolt cutter and straight slot type screwdriver which appellant had dropped on the floor (T.36,37).

Appellant was convicted of possession of a stolen motor vehicle and sentenced to a term of zero to

five years in the Utah State Prison. Appellant challenged the sentence by seeking a writ of habeas corpus before the Honorable Peter F. Leary, but it was denied on June 22, 1978.

ARGUMENT

POINT I

UTAH CODE ANN. § 41-1-109 (1953), AS AMENDED, IS SEPARATE AND DISTINGUISHABLE FROM SECTION 112 OF THE SAME TITLE.

The two statutes at issue in this case are Utah Code Ann. §§ 41-1-109 and 41-1-112 (1953), as amended. Section 41-1-109 provides:

"Any person who drives a vehicle, not his own, without the consent of the owner thereof and with intent temporarily to deprive said owner of his possession of such vehicle, without intent to steal the same is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving is guilty of a misdemeanor."

Section 112, on the other hand, provides:

"Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe

has been stolen or unlawfully taken, receives, or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony."

The Supreme Court of Utah has declared that Utah Code Ann. § 41-1-109 (1953), as amended, herein referred to as the "joy riding statute" is a lesser included offense of theft of a motor vehicle (Utah Code Ann. § 76-6-404 (Supp. 1977); all other statutory references will be to Utah Code Ann., 1953, as amended). The Court noted, State v. Cornish, 568 P.2d 360 (Utah 1977):

"Both the theft and joy riding statutes require, as elements of the crime, an unauthorized control over the property of another with an intent to deprive him of his property. The only fact the state is not required to establish for joy riding, which is required for theft, is the intent to deprive permanently, or for such an extended period of time that a substantial portion of the economic value is lost." Id. at 361.

In fact, the joy riding statute specifically describes ^{one} who has "intent temporarily to deprive said owner of his possession of such vehicle, without intent to steal the same. . . ." (Emphasis added.)

On the other hand, Section 41-1-112, clearly deals with automobiles which have been stolen, i.e., vehicles taken in violation of Section 76-6-404 and then possessed or transferred. Admittedly, "unlawfully taken," if construed in its broadest sense, could include a vehicle taken temporarily without the owner's permission. However, to so interpret this statute would violate the clear intent of the legislature.

The United States Supreme Court, in Huddleston v. United States, 415 U.S. 814, 94 S.Ct. 1262 (1974), noted that "although penal laws are to be construed strictly, they ought not to be construed so strictly as to defeat the obvious intention of the legislature." Id. at 1272. Utah's highest court has additionally declared:

"Allowance should be made for the fact that statutes are necessarily stated in general terms, and that often there is neither the prescience to foresee, nor sufficient flexibility of language to cover with exactitude, all of the exigencies of life which may arise. For this reason one of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in the light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness." Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 at 974 (1965).

The two sections in question, Sections 41-1-109 and 41-1-112, were enacted together as part of the Motor Vehicle Act in 1935. If the literal interpretation of Section 112 urged by appellant is adopted and we assume that the acts described in the joy riding statute and the latter half of Section 112 are the same, we must also assume that the legislature intended to enact contradictory portions of the same act. A more rational approach is that the legislature did not intend to contradict itself, but rather, intended to proscribe a temporary taking via the joy riding statute and possession or transfer of a vehicle feloniously taken from the owner via Section 112.

This conclusion is strengthened when considered in light of the ejusdem generis rule as stated by this Court in Heathman v. Giles, 13 Utah 2d 368, 374 P.2d 839, 840 (1962):

"Another closely related rule which is universally accepted as valid is that of ejusdem generis, meaning 'of the same kind,' which rule is that: when general words or terms follow specific ones, the general must be understood as applying to things of the same kind as the specific."

The first half of Section 112 clearly deals with vehicles taken with an intent to permanently deprive since title to a vehicle taken only temporarily could not

procured or passed. That portion makes it illegal to receive or transfer possession of a vehicle stolen or unlawfully taken. The latter portion, questioned here, talks about possession of a vehicle. The same language used in the former portion, "stolen or unlawfully taken," is also used in the latter. In fact, "unlawfully taken," as defined by appellant, would include "stolen." The use of both terms by the legislature indicates a clear intent to deal with a different category of vehicles from those described in the joy riding statute.

It is respondent's contention that the two statutes in question, Sections 41-1-109 and 41-1-112, are distinguishable in that the joy riding statute proscribes a temporary taking of a vehicle short of stealing while Section 41-1-112 proscribes the handling or possession of a permanently taken stolen vehicle.

POINT II

EVIDENCE PRESENTED AT THE TRIAL JUSTIFIED THE FINDER OF FACT'S CONCLUSION THAT THE APPELLANT KNEW OR HAD REASON TO KNOW THAT THE CAR IN HIS POSSESSION HAD BEEN STOLEN.

It is clear, in Utah, that unless evidence in support of a court's finding is so inconclusive or

improbable that no reasonable mind could believe the defendant guilty, the verdict of the lower court will be upheld. State v. Romero, 554 P.2d 216 (Utah 1976). The Court also stated in State v. Minnish, 560 P.2d 340 (Utah 1977):

"In regard to the matter of the sufficiency of the evidence, this court follows long established precedent and will not upset a conviction unless there is a clear showing that the evidence does not support the verdict." Id. at 341.

The evidence presented in the court below indicates that the appellant knew or had reason to believe the car in his possession was stolen. After having been given the "Miranda warning" and acknowledging an understanding of his rights, the appellant accused his passenger, Bryan Bates, of having stolen the vehicle (T.26). Although the key cylinder had been removed, appellant drove the car (T.15), and was positively identified while attempting to start the vehicle with a screwdriver (T.25).

These facts plus the additional testimony contained in the transcript form an adequate basis for the judge's finding that appellant was guilty of a felony in having possession of a vehicle which he knew or had reason to know had been stolen.

CONCLUSION

Utah Code Ann. §§ 41-1-109 and 41-1-112 (1953), as amended, do not proscribe the same activity as claimed by appellant. They are distinguishable in that Section 41-1-112 prohibits the receipt, transfer, or possession of a vehicle stolen from the owner with an intent to permanently deprive the owner thereof and Section 41-1-109, the joy riding statute, seeks to punish those who temporarily take a vehicle without the owner's permission and without any intent to steal. Appropriately, Section 41-1-112 carries a greater penalty than does Section 41-1-109.

The evidence in this case clearly supports the court's finding that the appellant was in possession of a vehicle which he knew or had reason to believe had been stolen. Respondent therefore urges this Court to uphold the conviction and sentence of the trial court and the denial of the writ of habeas corpus by the Honorable Peter F. Leary.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent