

1980

State of Utah v. Kenneth Sharp, George Christensen, and James N. Tucker : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- :
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

KENNETH SHARP, GEORGE CHRISTENSEN,
and JAMES N. TUCKER, :

Defendants-Appellants. :

Case Nos.

16147

16040

and

16019

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, THE HONORABLE
BRYANT H. CROFT, JUDGE, PRESIDING

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FILED

MAY 22 1980

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IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - - : - - - - -
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 16147, 16040,
KENNETH SHARP, GEORGE : and 16019
CHRISTENSEN, and JAMES :
N. TUCKER, :
Defendants-Appellants. :

- - - - - : - - - - -
BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellants Sharp and Christensen were charged by complaint and information with theft of a motor vehicle, a violation of Utah Code Annotated § 76-6-404 (1953), as amended, and with aiding the escape of a person from official custody, a violation of Utah Code Annotated § 76-8-310 (1953) as amended.

Appellant Tucker was also charged with theft of a motor vehicle and with the crime of escape from official custody, a violation of Utah Code Annotated § 76-8-309 (1953), as amended.

Appellants Sharp and Christensen appeal both of

their convictions. Appellant Tucker appeals his conviction for theft but does not challenge his conviction of escape from official custody.

DISPOSITION IN THE LOWER COURT

Following a trial by jury before the Honorable Bryant H. Croft on August 3 and 4, 1978, appellants were found guilty as charged. Each appellant was given two concurrent sentences of one to fifteen years in the Utah State Prison to be served following completion of the sentences they were currently serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the convictions and sentences of appellants.

STATEMENT OF THE FACTS

On April 18, 1978, appellant Tucker was a prisoner in the minimum security compound of the Utah State Prison. He was serving an indeterminate sentence of one to fifteen years for the crime of rape (R. at 189, State's Exhibit 2-5) and had not been paroled or pardoned (R. at 191, State's Exhibit 3-5). Appellants Sharp and Christensen were also confined in minimum security at the Prison following felony convictions and 90-day presentence evaluation commitments (R. at 193, State's Exhibits 5s and 6s). All three were clothed in denim trousers when they were given shovels and

left with another inmate named Brooks along a ditch on Prison property to carry out a work detail at about 1:00 p.m. Appellant Tucker had on a blue shirt and headband. Appellant Sharp had an orange shirt stuck in his pocket and appellant Christensen had on an orange shirt (R. at 206-209).

At about 3:00 p.m., Prison Instructor Paul Christensen, who was supervising the work detail, noticed inmate Brooks walking alone toward the minimum security area of the Prison (R. at 211). Upon investigation, the shovels which had been issued to appellants were discovered, one lying at the end of the ditch, the other two where the men had begun working (R. at 211). After an unsuccessful attempt to locate appellants, Mr. Christensen notified Prison Control that an escape had occurred (R. at 213). A head count was immediately conducted and it was discovered that appellants were, indeed, missing (R. at 224, 225).

At about the same time, 3:00 p.m. on April 18, 1978, two female employees of Riverton City were sitting in the city offices and noticed three men walking together (R. at 230). The men wore blue shirts and denim pants. One wore a headband. (R. at 231-232). Riverton Police Chief, Leonard Smock, also saw the men and noted that one of them wore a turquoise blue shirt. He identified another as appellant Christensen (R. at 235).

Three men were also seen at about 3:00 p.m. as they walked in front of Sav More T.V., a business two buildings away from the Riverton City offices. (P. at 240). Again, all three were wearing blue shirts and one wore a headband. One man was again observed walking in front of Sav More, and shortly thereafter, people in the building heard a car starting. (P. at 241 and 249). Mrs. Marcia Ruark testified that she ran out in time to see her white 1971 Cadillac being driven away to the north (P. at 249). She had not authorized anyone to take the car (P. at 250). She promptly notified the police (P. at 266). Police Chief Smock and Officer Whipple got into two police cars and began a search for the missing vehicle. The car was quickly located and a chase began during which the vehicles reached speeds of 90 m.p.h. (P. at 266). Chief Smock noted that there were three occupants in the car, one with a headband and another with a turquoise shirt (P. at 267). The chase led to Butterfield Canyon where the Cadillac was found abandoned in the road. Two persons were heading through the oak brush. (P. at 294). Deputy Sheriff Curtis Nielson testified that while he was searching the mountainside he apprehended appellant Sharp hiding under a tree. A turquoise shirt was found with him (P. at 305-307). Officer Whipple noted that he took appellant Christensen into custody as Christensen was trying to hide in the

brush (R. at 313).

Larry DeBillo had been driving in the area with his wife and had stopped at a roadblock conducted by prison officers. They gave him a flyer with a picture and description of appellant Tucker (R. at 255). As Mr. DeBillo was driving toward Lark, Utah he saw appellant Tucker hitchhiking and picked him up (R. at 257-258). Mr. DeBillo was armed (R. at 256). After driving for a while, Mr. DeBillo took appellant Tucker into custody and sent his wife for the sheriff (R. at 259-261).

Appellant Tucker testified for the defense and indicated that he had left the Prison work detail (R. at 340) and had met appellants Christensen and Sharp in Riverton. He said he had been drinking (R. at 344). He claimed that later as he and appellant Sharp were walking along the road, appellant Christensen drove up in the white Cadillac. Tucker testified that he and Sharp joined Christensen in the car and together they headed toward the Prison. However, they then decided to go for a ride. When the police began the chase Tucker did not ask the others to stop the car because he did not want the police to catch him (R. at 346 and 347).

After deliberation, the jury found appellant Tucker guilty of Theft and Escape from official custody and appellants Sharp and Christensen guilty of Theft and Aiding Escape (R.

ARGUMENT

POINT I

APPELLANTS SHARP AND CHRISTENSEN WERE
PROPERLY CONVICTED OF AIDING THE ESCAPE
OF APPELLANT TUCKER.

A

THE CONDUCT OF APPELLANTS
WAS WITHIN THE SCOPE OF THE
ESCAPE/AIDING ESCAPE STATUTES.

Appellants Sharp and Christensen contend that their
conduct was not sufficient to constitute a violation of Utah
Code Annotated § 76-8-310 (1953), as amended, which provides:

- (1) A person is guilty of an offense if:
 - a) He aids another person to escape
from official custody: . . .
- (2) An offense under this section is a
felony of the second degree if:
 - b) A person to whom the aid . . . is
given is a prisoner confined in
the state prison.

Escape from Official Custody is proscribed by Utah Code Ann.
§ 76-8-309 (1953), as amended, which provides:

- (1) A person is guilty of escape if he
escapes from official custody.
- (2) The offense is a felony of the second
degree if: . . .
 - b) The actor escapes from confinement
in the state prison.

Appellants urge a very narrow reading of these
statutes which Respondent submits is improper. By urging
that an escape is complete as soon as an actor sets foot
off prison property and that any aid given thereafter cannot

be aiding an escape, appellants argue that there was no proof of the necessary acts or intent to constitute the crime charged. Nevertheless, a careful reading of the cases cited by appellants reveals that appellants' interpretation of the Utah statutes is unduly restrictive and that conviction in this matter is consistent with the law of aiding escape throughout the country.

In Orth v. United States, 252 F. 566 (5th Cir. 1918), the defendant had been convicted on two counts. Each count involved a separate portion of a federal statute. The first count charged that the defendant had aided an escaped prisoner. The facts indicated that the defendant had allowed an escapee to hide in his home and then sent him on his way. The escapee had been free for some days before the defendant rendered any aid. The Court ruled that conviction for aiding the escape was improper but noted:

This conclusion does not effect
(sic) the conviction on the second
count charging that the defendant
harbored and concealed. (Id. at 568).

The defendant's sentence was affirmed.

Unlike the United States Code as applied in Orth, supra, the Utah Code does not contain a statute proscribing the act of harboring or aiding an escaped prisoner. Moreover, the course of conduct undertaken by all appellants in this

matter indicates an on-going act. Within the space of a few hours appellants walked away from the prison, took a car and attempted to elude the police. There was ample evidence from which the jury could and did infer an on-going attempt to elude authorities and complete an escape to freedom. Given the locale of the prison, it is clear that no escapee can get far without some transportation. Unlike Orth, where the escapee had been at large for several days before the defendant gave aid, appellants Sharp and Christensen left the prison at or near the same time as appellant Tucker and all three were actively corroborating in a attempt to avoid police a very short time thereafter. While the narrow reading of "escape" was appropriate in Orth where the conduct of the defendant remained criminal under another more applicable portion of the same statute, in Utah there is no specific alternate provision. The lack of such a provision indicates that the escape and aiding escape statutes should be read broadly enough to include help rendered during the entire attempt by the escapee to place himself beyond the reach of legal authority. Appellants Sharp and Christensen were helping Appellant Tucker avoid re-capture within an hour of when they were all discovered missing from the same work detail

at the prison. It would be unduly restrictive to rule that aid given so soon after a departure from the prison as part of such a clearly continuous course of events was not aiding the escape of appellant Tucker.

Other authority cited by appellants supports a more broad reading of the Utah statutes. In State v. Jones, 36 P.2d 530 (Idaho 1934), a prisoner was working outside the jail under the supervision of a deputy. Although he was supposed to be delivering coal, he went, instead, to the house of a friend with whom he had left some money he had stolen. His friend, the defendant, gave him some money and sent him on his way. Although the court cited People v. Quijada, 53 Cal.App 39, 199 P. 854 (1921) to state the narrow definition of escape, the court held that the escapee was in the lawful custody of the deputy when he was assisted by the defendant (36 P.2d at 531), even though he had clearly gone where he was not authorized to go. The defendant's conviction for aiding escape was affirmed. Just as in Jones, the actions of appellants Sharp and Christensen in this matter were rendered contemporaneously with Appellant Tucker's escape and made it possible for appellant Tucker to place himself comfortably beyond the immediate reach of authority.

State ex rel. Farrior v. Faulk, 136 So. 601 (Fla.,

1931), cited by appellants, did not involve an aiding escape charge. The escapee had left the jail and had gone into a neighboring county. The sheriff of that county arrested him and sought expenses and transportation costs from the original county. The court held that the escapee was an escaped prisoner and that the sheriff was able to arrest and was entitled to costs. The ruling was clearly made in the interests of orderly and efficient police work. There was absolutely no indication of how the court might have ruled upon the question of when help given to an escapee may properly be termed as aiding the escape.

In People v. Quintero, 67 Mich. App. 481, 241 N.W. 2d 251 (1976), the question of aiding escape was, again, not an issue. It was not clear in that case whether the escapee-defendant had been found off or on the prison ground. The court said that he "escapes if he removes himself from the imposed restraint over his person and volition." (Id. at 252). The evidence in the instant matter indicates that appellants were all trying to do just that—remove themselves from restraint over their persons and volition. They were discovered missing at about 3:00 p.m. and were seen driving away in a car not their own within the half hour. If they were ever separated, it was for a very short time. A perfectly acceptable logical inference for the jury to have made was that all

appellants left the prison together. In any event, in light of the absence of a harboring statute in Utah the narrow view that one may aid an escape only by acting before or as the escapee leaves the narrowest physical confines of his confinement would be unjust. In this case appellants acted in concert during or very shortly after their departure from prison property to make good their getaway. The time interval was so short as to make consecutive events of walking away, stealing the car, and eluding police one continuous transaction.

B

THE NECESSARY INTENT ELEMENT
WAS SHOWN BY THE EVIDENCE.

Appellants contend that the necessary intent element was not shown and that their conviction was therefore defective. Appellants correctly note that where a specific intent is not provided for a crime, a culpable mental state is required, Utah Code Ann. § 76-2-102 (1953), as amended. However, it is well established that criminal intent may be inferred and need not be shown by direct evidence. See State v. Minousis, 64 Utah 206 at 211-212, 228 P. 574 (1924) and State v. Kazda, 15 U.2d 313, 392 P.2d 486 at 488 (1964).

Appellants contend that the intent element for aiding escape must be the same as for escape under Utah Code Ann. § 76-2-202 (1953), as amended. Even if they are correct,

it does not follow from the evidence that the jury could not have concluded that appellants Sharp and Christensen did not intend to effectuate an escape when they acted as they did. In Luke v. State, 49 Ala. 30 (1873) the defendants were charged with arson for burning a hole in the jail floor. The elements of arson required that the fire be set for an illegal purpose. The court found such purpose in that the defendants were aiding each other to escape. All three appellants here were confined in the Utah State Prison. They all did their best, both together and then, later, apart, to evade re-capture. Their tactic of running in different directions after abandoning the car increased the chances that one or more might get away from which the jury could infer an intent to aid each other in their common act. As in Luke, appellants acted in concert to achieve an escape.

In State v. Navarro, 163 A. 103 (Maine, 1932), the court noted that "aiding an escape is any overt act which is intended to assist an attempted or completed departure of a prisoner from lawful custody before he is discharged by due process of law." (Id. at 104). The defendant had given aid after hearing of the prisoner's departure. Even if, for the sake of argument, it is conceded that appellant Tucker's testimony was correct, (that he met appellants Christensen

and Sharp after leaving the Prison), they clearly aided him in his further attempt to evade authority. All three acted together in evading re-capture. The intent to assist each other, as noted above, is clearly inferrable from their actions.

Finally, State v. Cooper, 113 N.J. Super 34, 272 A.2d 557 (1971), supports this conclusion. In that case the defendant started a jail riot during which two prisoners escaped. He was found guilty of aiding their escape. The court stated that it was not necessary to show actual participation in the escape or any intent to aid the escape. The court said the defendant should have known that his acts could create a possibility for escape and affirmed the conviction. The facts here are much stronger. The acts of appellants Sharp and Christensen clearly went to aiding appellant Tucker to make his escape complete. They knew Tucker was, like themselves, incarcerated in the prison and it was clearly inferrable that they knew and intended that their actions would create a possibility for Tucker's escape.

Appellants contend further that there was no evidence of a specific intent to aid appellant Tucker's escape. They say that they, appellants Sharp and Christensen, were simply engaging in a Class B Misdemeanor escape when

appellant Tucker happened along. By so arguing, they concede that escape is an on-going crime since, according to appellant Tucker's testimony, he met his co-defendants outside the prison. But even more important is the fact that from the moment the evidence puts the three together in Riverton there was clearly a common intent and effort to avoid re-capture. They were hardly "clean away" when they were on foot in Riverton in prison clothing. They were in a car, running away from the police within less than an hour of when they were reported missing at the prison. They were all committing the same physical acts--the only difference between the Class B Misdemeanor of appellants Sharp and Christensen and the second degree felony of appellant Tucker was the technical status of the men at the prison. Clearly the jury could have inferred an intent to commit the crime of aiding the escape of appellant Tucker on behalf of appellants Sharp and Christensen. This conclusion is supported by the holding of the court in State v. Stark, 490 P.2 511 (Or.App., 1971) cited by appellants at p.11. In that case the defendant and several of his friends had picked up two hitchhikers. The hitchhikers were robbed and defendant contended "that to find him guilty of the unarmed robbery the jury should have been instructed that he (Stark) had to knowingly aid and abet Ronald Hansen." The court

held that the following instruction was proper:

It is sufficient if the defendant,
William Gerald Stark . . . was present
when the robbery was committed, and
acquiesced therein, with a common
criminal intent or purpose.

All three appellants were escaping from authority.
They were doing it together and were acting in such a way
as to aid each other. This was clearly shown by the evidence
and the verdicts were proper.

C

THE RULE OF STATE V. SHONDEL
IS INAPPLICABLE TO THE FACTS
OF THIS CASE.

Appellants contend that under the case of State v. Shondel, 22 U.2d 343, 453 P.2d 146 (1969) and this Court's more recent affirmations of the rule of that case, they were improperly charged and sentenced. Respondent respectfully submits that appellants have misread Shondel. In Shondel and the cases which followed, State v. Fair, 23 U.2d 34, 456 P.2d 168 (1969); Rammell v. Smith, 560 P.2d 1108 (Utah 1977); and State v. Loveless, 581 P.2d 575 (Utah 1978), the concern was always with two statutes creating the same crime but specifying separate penalties. In Shondel, possession of LSD was prohibited in two statutes. One statute made the crime a misdemeanor and another made it a felony. Similar problems were posed in the subsequent cases cited above.

A fundamental difference between those cases and the matter at hand is that the defendants in those cases could not have been charged with or convicted of violating both statutes. The court had to make a choice as to which statute to proceed under. In this case the supposedly conflicting statutes proscribe escape and aiding escape. In aiding appellant Tucker's escape, appellants Sharp and Christensen committed a second degree felony. In effectuating their own escape, appellants Sharp and Christensen committed a Class B Misdemeanor. It is well-established that within one episode or continuous course of conduct an actor may commit more than one crime, Utah Code Ann. § 76-1-402 (1953), as amended. Moreover, it has been made clear by this Court that when two crimes are committed, neither of which may be tried within the same court, that they may be tried separately. See State v. Cooley, 575 P.2d 693 (Utah 1978) where the defendant had committed three offenses within the same course of conduct. Two of the offenses were Class B misdemeanors and one was an indictable misdemeanor. The Court held that separate prosecutions in the District Court and the Justice Court were proper. Conviction of aiding the escape of appellant Tucker did not preclude the state from further prosecution of appellant's Sharp and Christensen for the crime of escape. They could have properly been charged and convicted of both

crimes. The fact that one act creates two separate criminal results does not prohibit the prosecution of both crimes. Under Shondel when achievement of the same criminal result may result in differing penalties, the lesser penalty must be imposed. No such choice is mandated in this case. Appellants were, therefore, properly charged and convicted. Their verdicts and sentences should be affirmed.

POINT II

APPELLANTS WERE PROPERLY CONVICTED
OF THEFT OF AN OPERABLE MOTOR VEHICLE
AND THE TRIAL COURT PROPERLY REFUSED
AN INSTRUCTION ON THE LESSER INCLUDED
OFFENSE OF TEMPORARILY DEPRIVING AN
OWNER OF A VEHICLE.

Appellants concede the establishment of all the elements of the crime of theft of an operable motor vehicle except for intent to permanently deprive (Appellants' Brief at p. 18). They contend that the evidence was ambiguous on that element and that the trial court committed error in not instructing the jury on the lesser included offense of joyriding, as they requested. Respondent submits that the evidence clearly indicated that the offense of appellants was not joyriding and that they were guilty of the offense of which they were convicted.

Utah Code Annotated § 76-6-404 (1953), as amended, provides:

A person commits theft if he

obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Annotated § 76-6-401(3) (1953), as amended provides further:

Purpose to deprive means to have the conscious object: To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; . . .

In State v. Romero, 554 P.2d 216 at 218 (Utah 1976) this Court held that:

The intent to steal or unlawfully deprive the rightful owners of their property can be inferred by defendant's conduct and the attendant circumstances testified to by the witnesses.

In State v. Gillian, 23 U.2d 372, 463 P.2d 811 at 812 (1970) this Court quoted State v. Johnson, 112 U. 130, 185 P.2d 738 (1947) to say:

That the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction. (Emphasis in original).

In State v. Dougherty, 550 P.2d 175 at 176-177 (Utah 1976) this Court further noted that an instruction on a lesser included offense may be refused "if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense."

The evidence in this matter clearly demonstrated that appellants intent was to permanently deprive the owner of her automobile. Appellants contend that because there was no significant damage done to the vehicle and that the vehicle was recovered only a short distance from the point of taking within a relatively short time that the court must necessarily have concluded that appellants only intended to make temporary use of the vehicle. While the facts noted by appellants are in the record, they do not present a complete picture of what transpired and should not be viewed out of context. The only reason the car was recovered quickly with minimal damage was because police reacted almost immediately to the theft. The automobile was abandoned after a high-speed chase (R. at 294). The fact of temporary possession does not and should not be taken to indicate an intent to possess temporarily. On the contrary, the fact that appellants were escaped prisoners trying to elude recapture indicated clearly that they had no intention of returning the car to its owner after a short drive in the neighborhood. Appellant Tucker's testimony that they were only trying to return to prison with the car is totally inconsistent with all the other evidence. If they were returning to custody, why did they flee from the police both in the car and then, later, on foot? Moreover, even if

Tucker's testimony were believable, there was no indication that appellants would have done anything to see that the owner of the automobile would have recovered the vehicle within a short period of time, if ever.

Several cases from other jurisdictions are instructive on this point. In People v. Hutchins, 20 Cal Rptr. 497 (Cal. App., 1962) the defendant was charged with grand theft of an automobile. He had rented a car from a Hertz outlet in Long Beach but had not returned the car on the agreed date. The car was, in fact, left abandoned on or near another Hertz lot at the Los Angeles airport. The court held that the evidence was sufficient to prove that the defendant took the car with the intent to deprive the owner of title to and possession of the vehicle.

In Robinson v. Commonwealth, 190 Va. 134, 56 S.E.2d 367 (1949) the defendant and others broke into a car dealership and took a new Ford automobile. The car was found several towns away. The defendant was convicted of theft and contended on appeal that he was guilty of unauthorized use, not theft. The court held:

In the case at bar the conduct of the defendant negatives any idea that he intended to deprive the owner of the car temporarily. He did no act prior to his arrest to indicate that he intended to return the car to the owner. On the other hand, his conduct

and testimony disclose that he intended to deprive the owner of the car permanently. This is the only conclusion that can be reached from the evidence. The circumstances under which the car was taken, and his actions regarding it afterwards, including his abandoning it in a public highway, show clearly that he was guilty of the offense of larceny and not of unauthorized use. We do not think that the instruction offered was proper, and the court did not commit error in refusing it.

Id. at 372.

So also the facts in this case would not have justified an instruction on the lesser included offense of joyriding. Appellants did nothing to indicate that they had any intent other than to permanently deprive the owner of possession. They ran away from the police. They abandoned the automobile. They drove the car in a dangerously reckless manner. (R. at 290,294, 308,312). They were escaped prisoners. Appellants should not benefit from the quick and efficient action of the Riverton Police in that an offense otherwise a felony is reduced to a misdemeanor because they were quickly apprehended.

Appellant relies upon State v. Cornish, 568 P.2d 360 (Utah 1977). However, that case is distinguishable in that there the Court held that the jury was properly instructed on both the greater and lesser offenses because the evidence of intent was clearly in doubt. The defendant had presented

evidence which tended to negate an intent to permantly deprive. In this case the only possible evidence of such a nature was the un-supported, incredible assertions of appellant Tucker that the car had been taken to return to prison. Even that testimony does not indicate any intent to return the automobile to the owner, at best, it simply indicated that the appellants may not have intended to travel a long distance. The car was recovered and returned quickly but not through the actions of appellants.

In summary, an instruction on the lesser-included offense of joyriding was not justified in this case since no reasonable view of the evidence would have supported a conviction of such an offense. Moreover, the intent of appellants to permantly deprive the owner of the stolen automobile was clearly and properly inferrable from the evidence. The convictions were proper and should be affirmed.

POINT III

SINCE EACH APPELLANT RECEIVED TWO
EQUAL CONCURRENT SENTENCES, AN IM-
PROPER CONVICTION ON ONE SENTENCE
IS HARMLESS ERROR.

Utah Code Ann. §76-3-401(7) (1953) as amended provides that whenever two equal, concurrent sentences are imposed, "they shall merge into one sentence." In the instant matter, all appellants received two equal, concurrent sentences. The

practical effect is that each appellant has received one sentence on two alternate theories of conviction.

Appellant Tucker does not challenge his conviction of escape in this appeal. Hence, even if the Court finds that the conviction for theft of an automobile was defective, appellant Tucker's sentence should stand unchanged.

Appellants Sharp and Christensen were convicted of both aiding the escape of Tucker and of theft of an automobile. In order for their sentences to be altered, this Court must find that both of their convictions were defective. If the court finds that only one conviction is defective, their sentences should also remain unchanged. This is the same circumstance which faced the court in Orth v. United States, supra, wherein the defendant had been convicted upon two counts, one of which was held improper. The defendant's sentence was left unaltered since conviction on the proper count alone produced the penalty.

To capsulize, a finding by this Court that the theft convictions were improper, by itself, would indicate harmless error since the convictions of escape and aiding escape would remain unchanged and the sentences of appellants would remain the same. Moreover, a finding that the aiding escape convictions alone were defective would produce the same result. Unless this Court finds for appellants on all

issues raised in this appeal, any error noted is harmless error since the sentences of appellants would not be altered. In any event, any finding of this Court on the issues raised on behalf of appellant Tucker can have no bearing upon his conviction and sentence since he does not challenge his conviction of escape. Any error with respect to appellant Tucker is, therefore, harmless.

CONCLUSION

Appellants Sharp and Christensen were properly charged with and convicted of aiding the escape of appellant Tucker. A proper interpretation of the relevant statutes indicates that the actions of appellants Sharp and Christensen went to aiding appellant Tucker to further his crime of escape. The fact that, in the same criminal episode, appellants Sharp and Christensen also committed the crime of escape does not bar their conviction and/or punishment for the crime of aiding the escape of Tucker.

All appellants were clearly guilty of theft of a motor vehicle and not joyriding. No reasonable view of the evidence would have supported a conviction of joyriding and the court properly refused an instruction on the lesser crime. Appellants' intent to steal the car was inferrable from their acts and the circumstances of the taking.

Finally, even if this Court should find for appellant

on some but not all of the issues raised in this appeal, the error must be considered harmless since the convictions and sentences of appellants Sharp and Christensen remain essentially unchanged unless they prevail on all issues raised. In any event, appellant Tucker has not challenged his escape conviction and a finding that his conviction for automobile theft was defective would not alter his sentence and should be regarded as harmless.

The convictions and sentences of appellants should be sustained as proper.

Respectfully submitted,

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