

1977

# State of Utah v. David J. Griffiths and Jack I. Deal : Brief of Appellant

Utah Supreme Court

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Morris D. Young; Attorneys for Appellant;

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**IN THE**  
**Supreme Court**  
**of the**  
**State of Utah**

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**State of Utah,**

*Plaintiff and Respondent*

**VS.**

**David J. Griffiths**

**and**

**Jack I. Deal**

*Defendants and Appellant*

**Brief of**

**Defendants and**

**Appellants**

*Case No. 16195*

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**APPELLANT'S BRIEF**

---

**MORRIS D. YOUNG**

*Attorney for Appellant*

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*Attorney for Appellant*

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## APPLICABLE STATUTES

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IN THE SUPREME COURT OF THE STATE OF UTAH

---ooOoo---

STATE OF UTAH,	:	
	:	
Plaintiff and	:	BRIEF OF DEFENDANTS AND
Respondent,	:	
	:	APPELLANTS
vs.	:	
	:	
DAVID J. GRIFFITHS and	:	Case No. 16195
JACK I. DEAL,	:	
Defendants and	:	
Appellants.	:	

---ooOoo---

QUESTIONS FOR THE COURT

1. Does the District Court have jurisdiction of two separate offenses when one is a third degree felony and the other is a Class B misdemeanor and both offenses were:

- a. Committed in a single criminal episode, and
- b. Are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan? (77-21-31 (1) UCA 1953 as amended) and
- c. A new procedural statute 77-21-31 (1) UCA 1953 as amended, provides that two or more of such offenses may be charged in the same indictment or information ... whether felonies or misdemeanors

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2. Were the appellants denied due process of law when, at the hearing on the plea of once in jeopardy, the court argued the prosecution's case and refused to vacate the trial setting thereby preventing the defense the full exercise of their rights and remedies?

#### NATURE OF THE CASE

A Class B misdemeanor offense and a third degree felony offense were allegedly committed in a single criminal episode. The appellants were convicted of the Class B misdemeanor and pled once in jeopardy as to the third degree felony. A question is also raised as to whether or not the appellants' due process rights were violated by the action of the court in arguing the prosecutor's case and refusing to give the appellants time to seek a writ of prohibition.

#### DISPOSITION IN THE LOWER COURT

The appellants were tried and convicted of a Class B misdemeanor theft in the Sixth Circuit Court of the State of Utah. The plea of once in jeopardy was denied in the Third Judicial District Court in and for Tooele County, State of Utah, and a jury in the same court found the appellants guilty of burglary, a third degree felony.

## RELIEF SOUGHT

The appellants seek a ruling that the District Court did have jurisdiction of both offenses, the Class B misdemeanor and the third degree felony, and therefore the conviction and sentencing on the Class B misdemeanor in the circuit court barred the district court from proceeding on the third degree felony; and that the appellants' due process rights were violated by the action and error of the district court in arguing the prosecutor's case in the once in jeopardy hearing and refusing to give the appellants time to seek a writ of prohibition. The conviction and sentencing in the district court should be dismissed.

## STATEMENT OF THE FACTS

Without the knowledge or concurrence of Griffith and Deal, Byrd, the third party, broke into a market intent on stealing merchandise. He set off the burglary alarm which warned him off without his having taken anything. A short time later, he returned with Griffith and Deal to retrieve his loot which he claimed he had left in the building. The alarm was still ringing. It apparently was not hooked up to a surveillance station because of the lack of activity in the area.

Byrd entered the building a second time allegedly to obtain the loot. Neither Griffith nor Deal entered the building until after the alarm. Byrd failed to go ahead and take



October 23, 1978. Not guilty pleas were entered and a jury trial was set for Tuesday, November 21, 1978.

To correct a discovered technical legal error and so as not to jeopardize the plea of once in jeopardy, defense filed a motion to withdraw the not guilty plea and enter a plea of once in jeopardy. This motion was heard and granted Monday, November 13, 1978. At the same time a hearing by the district court on the plea of once in jeopardy was set for Thursday, November 16, 1978. At that hearing defense counsel was not given a chance to say much of anything. Judge Baldwin argued the case for the prosecution. (See November 16, 1978 transcript beginning on page 5.) When it was obvious that the judge was going to rule against the defense, a motion was made to vacate the trial setting in order that the defense counsel might have time to prepare an adequate defense and to get the matter before the Utah Supreme Court for its review. The motion to vacate the trial setting was denied (page 11). This was on a Thursday. Defense counsel tried immediately to get a writ of prohibition executed but could not get before a supreme court quorum of justices before December 4, 1978. Defense counsel renewed his motion to vacate by preparing and filing a written motion. It was filed Monday, the day before the trial. This was also denied. (See pages 29 and 30 of the November 21, 1978 transcript.) This motion mentioned the need to obtain a writ of prohibition. The judge acknowledged receiving a telephone call about a writ of prohibition but still ruled against it. It is appellants' position that the judge

did not listen on the telephone to the explanation of the motion any more than he did to defense counsel's argument on November 16, 1978.

On November 21, 1979, the jury trial proceeded not withstanding the motions to vacate and objections of once in jeopardy. Essentially the same witnesses testified and the same evidence was presented as in the lower court except this time the prosecution was able to strengthen its case. Byrd was not called as a witness by the State which forced the defense to put him on. The prosecution was then able to discredit Byrd's testimony by having him admit that he did not have a coat that night and therefore had not left a coat in the building. From the facts presented the jury apparently felt it their duty to find both appellants guilty but wanted to recommend leniency as evidenced by their question to the court recorded on page 61 of the transcript.

#### APPELLANTS' EXPLANATION OF THE CASE

Two separate offenses were allegedly committed in a single criminal episode. These offenses come within the statutory criteria in that they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a continuous or unitary act." Utah Code Ann. § 10-1-1(1)(b) (1993) as amended. When the offenses are committed in a single episode, the offenses are considered to be a single criminal episode.

demeanor, by legislative direction, can be tried on information or indictment and therefore can and should be tried in a single trial and in a single court. It is understood that this procedure is contrary to the present practice by prosecuting attorneys in the State of Utah.

Had there been a jury trial on both offenses at the same time and had the prosecution presented the same evidence as presented in the theft trial, the defense is confident the jury would have acquitted the appellants of the burglary charge. As it turned out, even after the prosecution strengthened its case for the second trial, the jury wanted to recommend leniency. (Page 61 of the November 21, 1978, transcript)

Appellants contend that they did not participate in the burglary at all. It is admitted they were with Byrd when he entered the building the second time and that they were aware of his entry for the purpose of retrieving his coat, according to the State's own evidence. Neither Griffith nor Deal entered the building. State v. Evans 74 U 389, 279 P. 950 states in effect, "... intent with which the defendant entered the building was the crux of the case ... if defendant, at the time of entering, believed he had the right to the property he intended to take, he would not be guilty." The appellants contend that according to the evidence produced by the State at the theft trial, no intent could be imputed to the appellants until the merchandise was handed out and by then it was too late for them to be guilty of burglary, and not bur-

Whether or not the appellants would have been acquitted had there been a single trial before a single court is not the point in issue. The probability is mentioned to emphasize the fact that the instant case is exactly in point, is a double jeopardy case and precisely the type of situation against which the legislature and the founding fathers were trying to protect. The trauma, expense, and hazard of being subjected to multiple trials for this kind of single criminal episode is set forth by the legislature as the type of double jeopardy that is not to be allowed.

#### SUMMARY OF ARGUMENT

The new procedural statute, Section 77-21-31 (1) UCA 1953 as amended, brings this case squarely within the operation of the constitutional and statutory law and case authority quoted in the Cooley and Hakki cases and the holdings in those cases strengthen the appellants' position. The district court does have jurisdiction of both the Class B misdemeanor and felony offenses in the instant case. The appellants having been convicted of the Class B misdemeanor, the statutory provisions regarding double jeopardy do apply. The district court is barred from proceeding with the trial of the third degree felony. The finding of guilt by the District Court District Court in and for Salt Lake County, State of Utah and, therefore, be set aside.

## APPLICABLE STATUTES WITH SHORT COMMENTS

Section 77-21-31 (1) UCA 1953 as amended (with emphasis added) reads as follows:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The instant case fits in all respects into this statute so that there can be no valid claim that the legislature has prevented the district court from assuming original jurisdiction in such cases as the case in hand.

Section 76-1-402 UCA 1953 as amended (with emphasis added) reads as follows:

- (1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode.
- (2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:
  - (a) the offenses are within the jurisdiction of a single court, and



- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

There is no question that the prosecuting attorney knew of both offenses in the instant case at all stages of the proceedings. It is the position of the defense that there should be no question that Section 77-21-31 (1) UCA 1953 as amended brings both offenses in the instant case within the jurisdiction of a single court and that they should have been handled as one matter. It is inconceivable to the defense counsel as to how these statutes could be interpreted otherwise than to fully apply to the instant case.

Section 76-1-401 UCA 1953 as amended reads:

"... single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

There is no disputing the fact that a "single criminal episode" was involved in the instant case.

Section 76-1-403 UCA 1953 as amended states:

- (1) If a defendant has been prosecuted for one or more offenses included within a single criminal episode, and a second prosecution for the same or different

offense arising out of the same criminal episode is barred if:

- (a) The subsequent prosecution is for an offense that was or should have been tried under Section 76-1-402 (2) in the former prosecution; and
- (b) The former prosecution
  - (11) Resulted in conviction.

There is no question in the mind of the counsel for the defense that the November 21, 1978 jury trial should have been barred.

Section 77-16-1 UCA 1953 as amended follows (emphasis added):

All public offenses triable in the district courts, except cases appealed from justices' and circuit courts, as well as Class A misdemeanors triable in circuit courts, must be prosecuted by information or indictment, except as provided in Chapter 7 (not pertinent)  
...

This is the same Section 77-16-1 statute quoted in the Hakki case but amended and brought up to date to include the new circuit courts and conform to new jurisdictional matters given to those courts.

Article VIII, Section 7 of the Utah Constitution reads:

The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law, ...

Comments as to how this applies in the instant case just as well as in the Cooley case are given elsewhere and need not be repeated here.

## ARGUMENT

### POINT 1

THE COOLEY CASE AND THE INSTANT CASE ARE DISTINGUISHABLE.

At the hearing on the plea of once in jeopardy held November 16, 1978, the prosecution merely referred to State of Utah v. DeVere Cooley 575 P2d 693 and submitted it without argument. The judge then proceeded to argue the case for the prosecution as set forth in the November 16, 1978, transcript. (beginning at page 4. Counsel for the defense will respond to the judge's comments in setting forth his argument herein. In order to put emphasis on these points, including clarification by the Supreme Court.

A. The COOLEY case is a State of Utah v. DeVere Cooley 575 P2d 693. The criteria set forth in the COOLEY case are as follows: 1. The COOLEY case is a State of Utah v. DeVere Cooley 575 P2d 693.

The position of the defense is that this case and the Cooley case are distinguishable. The Cooley case involved three separate offenses being committed at the same time: first, failure to stop at the command of a police officer; second, driving with improper license; and third, having no tail lights. These offenses, though constituting a single criminal episode, do not come within the criteria set forth in 77-21-31 (1) UCA 1953. They are not of the same or similar character. They are not based on the same act or transaction or two or more acts or transactions connected together. They do not constitute parts of a common scheme or plan.

B. The Instant Case Does Come Within the Criteria of Said Statute.

The offenses in the instant case do come within said statute. They consist of two separate offenses: first, theft, a Class B misdemeanor and second, burglary, a third degree felony. These were allegedly committed at the same time and place. They are of the same or similar character based on the same act or transaction or on two or more acts or transactions connected together. They do constitute parts of a common scheme or plan. On pages eight, nine, and ten of the November 10, 1976 transcript, defense counsel tried to explain this distinction to the court. The lower court's response is interpreted as rejecting that distinction.

## POINT II

WE HAVE NO ARGUMENT WITH THE RULING OF ROGERSON V. HARRIS, 178 P2d 397, TO THE EFFECT THAT LARCENY AND BURGLARY ARE TWO SEPARATE OFFENSES EVEN THOUGH THEY ARE IN THE SAME CRIMINAL EPISODE.

The Honorable Judge Baldwin cites a Larson case (13 Ut 2d 35) in support of the idea that a burglary and theft are two separate offenses and can be tried in separate trials even though they are involved in the same criminal episode.

The case the judge was referring to is actually State v. Jones, 13 Ut 2nd 35, 368 P2d 262 (1962) which cites and bases its holding on Rogerson v. Harris 178 P2d 397. Rogerson was charged in 1942 with burglary in the second degree, grand larceny, and being an habitual criminal, all in the same information. Rogerson had entered a garage with intent to steal and he did steal an automobile. At the trial he was found guilty of the burglary and larceny. He was sentenced for consecutive terms for the burglary and larceny. He served his term for the burglary and then contended further detention was unlawful because of improper joinder of the two offenses. It was held that the joinder was proper. The question was then raised whether the sentence and conviction on both offenses contravene Section 104-21-32, UCA 1942 which provides (emphasis added):

The defendant ... may be convicted of any offense charged in any of the counts joined as prescribed in the next preceding section provided, that no person shall be convicted of more than one crime upon the same facts constituting such crime.

It was held:

In this case burglary and larceny arose out of the same total transaction but the proof of the burglary stopped when the proof of the larceny started. Entirely different facts constitute the different crimes of which the plaintiff was found guilty. The same facts, therefore, do not constitute the two crimes joined but different facts constitute different crimes. Conviction of the two crimes were therefore not prohibited by Section 105-21-32 UCA 1943.

This case does hold that larceny and burglary are two separate offenses even though they may be in the same criminal episode but it does not hold that thereby they may be tried in separate trials. No comment is being made here as to whether or not such was the result in that day and age by virtue of the then interpretation of the then applied case authority and legislative law. There is no argument with the application of that case to the instant case. The offenses of burglary and theft in the instant case are also two separate offenses in one single criminal episode.

### POINT III

**THE CLASS B MISDEMEANOR IN THE CASE AT HAND  
CAN BE TRIED INITIALLY IN THE DISTRICT COURT.  
THERE IS NO DISPUTE WITH THE HAKKI CASE.**

Another case his Honor relied upon in his argument was Hackey v. Fox, no citation given. (Pages 7, 8, 15, and 16 of the November 16, 1978 transcript) It is presumed he was referring to Hakki v. Faux 16 Utah 2d 132, 396 P2d 867. This and the Utah State Constitution were cited by his Honor as authority for the argument that a Class B Misdemeanor can not be initially tried in a district court.

In the Hakki case, Hakki was charged with a misdemeanor by a complaint. For some unexplained reason it was taken before a district court judge for the initial trial. Hakki resisted the trial and filed a motion for change of venue on the basis of bias and prejudice. The motion was denied and the case was set for trial. Hakki then sought a writ of prohibition to prevent the trial from going forward.

Section 77-16-1 UCA 1953 was cited:

All public offenses triable in the district courts, except cases appealed from justices' and city courts, must be prosecuted by information or indictment, except ... and pertinent .

State v. Telford 93 Ut 228, 72 P2d 626 was quoted as follows:

There are many cases where courts have jurisdiction of a subject matter but that jurisdiction must be invoked according to a certain procedure. ... Likewise, in the case of misdemeanors, the jurisdiction of the district court can be invoked in two ways only: first by appeal; second, if it appears by the certificate that there is no justice of the peace in the county qualified to try the case ...

The holding in the Hakki case was that

... in the light of statutes and case authority that the proper procedure for invoking the original jurisdiction of the district court had not been followed, the district court was powerless to act in the matter. The Writ of Prohibition lies to prevent the judge from proceeding with the trial.

Counsel for the defense in the instant case makes no comment on the correctness of this holding but accepts it at face value. The quoted Section 77-16-1 statute: "All public offenses triable in the district courts ... must be prosecuted by information or indictment ..." is a procedural statute invoked in the hakki case back in 1964.

The procedural statute upon which we rely in the instant case was amended in 1975 giving it its present form: Section 77-16-1, UCA 1953 as amended. It reads (with emphasis added):



Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The present Section 77-16-1 reads:

All public offenses triable in the district courts, except cases appealed from justices' and circuit courts, as well as Class A misdemeanors triable in circuit courts, must be prosecuted by information or indictment, except ... (not pertinent).

These two latter statutes are the ones that apply in the instant case. Section 77-16-1 requires all public offenses triable in the district courts (with "not pertinent" exceptions) to be prosecuted by information or indictment. The present Section 77-11-31 (1) permits misdemeanors such as in the instant case to be triable in the district courts by information. The district court in the case at hand, therefore, had jurisdiction of both the felony and the misdemeanor; Section 76-1-40<sup>2</sup> applies, and double jeopardy lies, without doing an injustice to the statute or holding quoted in the hakki case.

#### POINT IV

THERE IS NO CONFLICT WITH ARTICLE VIII,  
SECTION 7 OF THE UTAH STATE CONSTITUTION  
AS QUOTED IN THE COOLEY CASE.

As mentioned, his Honor in the lower court argued also that the Utah State Constitution as set forth in the Cooley case, 575 P2d 693, prevented him from trying Class B Misdemeanor cases. Quoting from the Cooley case:

Article VIII, Section 7 of the Utah Constitution provides: "The district court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; ... " (Emphasis added)

The legislature did provide by law the following:

All public offenses triable in the district courts, except cases appealed from justices' and city courts, must be prosecuted by information or indictment ...

It might be added that the legislature did provide by law also the following: two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transactions connected together or constituting part of a common scheme or plan. (77-21-31 (1))

Because of the foregoing, the instant case and the Cooley case are distinguishable. The Cooley case adopted the Hakki v. Paux holding and made the exact same wording the ruling in the Cooley case. That ruling has been quoted and commented upon in our discussion of the Hakki case and does no harm to the position we espouse but instead strengthens it.

#### POINT V

#### THE DISTRICT COURT JUDGE VIOLATED APPELLANTS' DUE PROCESS RIGHTS

The appellants' due process rights were violated at the district court hearing on the plea of once in jeopardy when:

1. The judge argued the prosecution's case.
2. His honor misapplied the law to the instant case.
3. The defense counsel was not allowed to fully argue his case.

4. his Honor refused to vacate the trial setting in order that the defense counsel might have an opportunity to obtain a writ of prohibition.

Defense counsel definitely received the impression that the district court was "railroading" this case through the preliminaries and the trial. At the hearing, the defense was not given an opportunity to fully argue the case. The law was stated with a bias in favor of the prosecution. The judge told the jury that the defendant was guilty of the crime. This was the real reason why the defense was not allowed to argue the case.

give the defense an opportunity to obtain a writ of prohibition. (See the November 16, 1978 transcript beginning on page 5. See also page 5 of this brief and pages 29 and 30 of the November 21, 1978 transcript.)

#### CONCLUSION

The new procedural statute 77-21-31 (1) UCA 1953 as amended brings this case squarely within the operation of the constitutional and statutory law and case authority quoted in the Cooley and Hakki cases and the holdings in those cases strengthen the appellants' position. The district court does have jurisdiction of both the Class B misdemeanor and felony offenses in the instant case. The appellants having been convicted of the Class B misdemeanor, the statutory provisions regarding double jeopardy do apply. The district court is barred from proceeding with the trial on the third degree felony. The appellants' due process rights were violated by the action and error of the district court in arguing the prosecution's case in the once in jeopardy hearing and refusing to give the appellants time to seek a writ of prohibition. The finding of guilty by the Third Judicial District Court in and For Tooele County, State of Utah, therefore, must be set aside.