

1977

State of Utah v. David J. Griffiths and Jack I. Deal : 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- :

Case No.
16195

DAVID J. GRIFFITHS
and JACK I. DEAL, :

Defendants-Appellants. :

----- :
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with and convicted of theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953), as amended, in the Sixth Circuit Court, Tooele County, State of Utah. They were also charged by Information and convicted of burglary, a third degree felony in violation of Utah Code Ann. § 76-6-202(1) (1953), as amended, in the Third Judicial District Court, in and for Tooele County, State of Utah. Prior to the burglary trial, appellants entered a plea of once in jeopardy, which was denied. It is from the burglary conviction that appellants appeal.

DISPOSITION IN THE LOWER COURT

Appellants were charged on October 11, 1978, in the Sixth Circuit Court, Tooele County, State of Utah, with theft, a class B misdemeanor in violation of Utah Code Ann. § 76-6-404 (1953), as amended; and burglary, a third degree felony in violation of Utah Code Ann. § 76-6-202 (1953), as amended. They were subsequently convicted on October 20, 1978, of the class B misdemeanors in the Sixth Circuit Court. On that same day, probable cause was found and the appellants were bound over to the Third Judicial District Court for trial on the burglary charges. On October 23, 1978, an Information charging the appellants with the aforesaid burglary was filed by the Tooele County Attorney. Not guilty pleas were entered and a jury trial set for Tuesday, November 21, 1978.

On November 13, 1978, appellants' motion to withdraw their not guilty plea and enter a plea of once in jeopardy was granted. On November 16, 1978, a hearing on the once in jeopardy plea was conducted by the district court and said plea was

denied. A subsequent motion by appellants to vacate the trial setting was denied. A further written motion to vacate the trial setting was filed by appellants the day before trial. This too was denied.

On November 21, 1978, appellants were tried on the burglary charge by a jury and found guilty as charged in the Information.

Appellants were sentenced on the burglary charge to an indeterminate term of zero to five years in the Utah State Prison. A stay of execution was issued pending an appeal to the Utah Supreme Court.

Appellant Griffiths was sentenced on the class B misdemeanor to pay a fine of \$250 and serve 60 days in Tooele County Jail. The jail sentence was stayed and appellant was placed on probation for a period of six months.

Appellant Deal was sentenced on the class B misdemeanor to serve 120 days in the Tooele County Jail. 60 days of the jail sentence was stayed and the appellant placed on probation with the Adult Probation and Parole for a period of six months to serve 60 days in the Tooele County Jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of the district court below convicting appellants of burglary.

STATEMENT OF FACTS

On the night of October 10, 1978, at approximately 10:25 p.m., the dispatcher in the Tooele City Police Department received a call informing her that the burglar alarm at the Cottage Market, a "7-11 type store," was ringing (District Court Record 10). She immediately dispatched Deputy Douglas Broadway of the Tooele County Sheriff's Department to the scene (D.C.R. 11). Upon arriving at the Cottage Market at 10:31 p.m., Deputy Broadway observed a Blue Datsun parked next to the market (D.C.R. 13). The vehicle was occupied by the appellants (D.C.R. 13), Jack Deal sitting behind the driver's wheel in the front seat, David Griffiths sitting on the passenger's side in the front (D.C.R. 15). The motor of the vehicle was running (D.C.R. 18). The appellants were immediately ordered out of the vehicle and placed on the ground in the parking lot (D.C.R. 14, 15). At this time Officer Morgan of the Tooele Police Department arrived with his dog, and along with Deputy Broadway, ascertained that a third person was still inside the Cottage Market (D.C.R. 15, 16). This third

person, Scott Byrd, was ordered out of the Cottage Market by Deputy Broadway (D.C.R. 16). Byrd exited through a window which he later admitted breaking prior to his entry (D.C.R. 17,33). The three men were placed under arrest, handcuffed, and transported to Tooele (D.C.R. 18).

Deputy Broadway then discovered on the ground between the building and the Datsun several items of jewelry, rings, a small screwdriver set, and a can of beer (D.C.R. 18). Also found in the Datsun were several cartons of cigarettes and a large quantity of beer (D.C.R. 18, 19). The items were identified by Mary Norris, Manager of the Cottage Market, as items carried by the store in inventory. Such items were found to be missing from the Cottage Market immediately subsequent to the night of October 10, 1978 (D.C.R. 24,26,27).

At trial, testimony by Scott Byrd revealed that Jack Deal, one of the appellants, received the cigarettes and beer taken from the store by Byrd and placed them in the Datsun (D.C.R. 37). Appellant Griffiths was present while this transaction was occurring.

Testimony by Byrd also revealed that earlier in the evening of October 10, 1978, prior to the incident when the arrests were made, all three men had driven to the Cottage Market, where Byrd broke into the building through a window (D.C.R. 37). At that time, Deal and Griffiths were allegedly sleeping in the backseat of the Datsun (D.C.R. 37). The burglar alarm apparently went off while Byrd was inside, Deal drove the car around the building and picked Byrd up in the Datsun, and all three sped off towards Salt Lake City (D.C.R. 37).

A few minutes later, Byrd persuaded appellant Deal, who was driving, to turn the vehicle around and return to the Cottage Market (D.C.R. 37), at which time the second entry into the Cottage Market was made. Byrd initially alleged that he told Deal and Griffiths that he wanted to return to the Cottage Market to retrieve a coat he had left behind. Byrd's testimony, however, revealed that he did not have a coat on that occasion, nor did Griffiths or Deal (D.C.R. 38).

Appellants were subsequently convicted of theft, a class B misdemeanor, in the circuit court, and burglary, a third degree felony, in the district court. The trial in the district court was before a jury, with the

Honorable Ernest F. Baldwin, Jr., presiding. Pleas of once in jeopardy were made following the theft conviction in the circuit court prior to preliminary hearing on the felony charge, and again prior to the actual trial in district court. Said pleas were denied each time (Circuit Court Record 67-72; District Court Record, Transcripts of Proceedings of November 16, 1978, 1-17). Following denial of the once in jeopardy pleas, appellants filed a motion to vacate the trial setting for the purpose of filing a writ of prohibition (D.C.R. 29). Such motion was filed the day before trial.

ARGUMENT

POINT I.

NEITHER THE DISTRICT COURT NOR THE CIRCUIT COURT COMMITTED ERROR IN DENYING APPELLANTS' MOTION TO DISMISS THE BURGLARY CHARGE ON THE GROUNDS OF DOUBLE JEOPARDY.

Following their conviction for theft in the circuit court, appellants moved the circuit court to dismiss the preliminary hearing on their burglary charge on the grounds of once in jeopardy. This motion was denied (Circuit Court Transcript, 67-72). Following their arraignment in district court on the same charge and prior to the jury trial, appellant's again moved for dismissal of the third degree felony charge of burglary on the grounds of once in jeopardy pursuant to Utah Code

Ann. § 76-1-402(2) (1953), as amended. This too was denied (District Court Record, Transcript of Proceedings November 16, 1978, 1-17).

Appellants now file this appeal and contend that the district court was barred from trying them on the third degree felony charge on the grounds of once in jeopardy. The basis for their argument is centered around Utah Code Ann. § 77-21-31(1) (1953), as amended, and Utah Code Ann. § 76-1-402(2) (1953), as amended, which according to appellants, give the district court jurisdiction on the facts of this case to initially try both the class B misdemeanor and third degree felony. Since the appellants were tried and convicted on the class B misdemeanor in circuit court, their argument is that the statutory provisions of Section 76-1-402(2) regarding double jeopardy apply (since both offenses should allegedly have been tried in the district court), thereby precluding trial on the third degree felony in the district court.

Respondent submits that appellants' argument has previously been presented to the Utah Supreme Court and rejected, and that Section 77-21-31(1) is a procedural statute, not intended, when read in conjunction with Section 76-1-402(2), to allow the district court to initially try class B misdemeanors.

A.

THE FACTS OF THE CASE
AT BAR COME WITHIN THE BOUNDS
AND LEGAL REASONING SET FORTH
BY THE UTAH SUPREME COURT IN
STATE V. COOLEY, THEREBY
PRECLUDING TRIAL OF A THIRD
DEGREE FELONY AND A CLASS B
MISDEMEANOR INITIALLY IN THE
DISTRICT COURT.

Appellant argues that the facts in the case of State v. Cooley, 575 P.2d 693 (Utah 1978), are distinguishable from those in the present case, thereby precluding the Cooley case from being within the ambit of Section 77-21-31(1). Respondent submits that the facts in both the Cooley case and the case at bar are extremely similar and that the law set forth in Cooley is applicable to the facts of the present case. Furthermore, Section 77-21-31(1) is a procedural statute dealing with forms of pleading, not with jurisdiction of offenses, and for this reason has no bearing on the Cooley case or the case at hand.¹

In State v. Cooley, supra, the appellant was arrested and given two citations. One was for failing

1 Appellant seemingly agrees with respondent that the facts of the Cooley case are not governed by Section 77-21-31(1), but for different reasons. Appellant contends that the offenses in Cooley, though constituting a single criminal episode, were ". . . not of the same or similar character, . . . are not based on the same act or transaction or two or more acts or transactions connected together. . . [and] do not constitute parts of a common scheme." Appellants'

to stop his motor vehicle at the command of a police officer, an indictable misdemeanor; the other was for two offenses, viz: (a) driving with an improper license and (b) having no tail light on a boat trailer attached to the motor vehicle, both class B misdemeanors.

The defendant pleaded guilty before a Justice of the Peace to the charges of no driver's license and no tail light and paid the fines. When arraigned on the charge of failing to stop at the command of a police officer, he pleaded once in jeopardy pursuant to Utah Code Ann. § 76-1-402(2) (1953), as amended. That section provides:

(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.

Appellant contended in Cooley that since the citations were issued at the same time (conduct establishing

separate offenses under a single criminal episode), he could not be charged with the indictable misdemeanor of failure to stop his motor vehicle at the command of a police officer, since the prosecuting attorney knew of all the charges when they were made before the Justice of the Peace Court. The district court argued and dismissed the information. The State appealed pursuant to Utah Code Ann. § 77-39-4(1) (1953), and the Utah Supreme Court reversed, remanding the case back to the district court for trial on the merits.

In its opinion, the Court observed that the two charges before the Justice of the Peace were class B misdemeanors, triable before the Justice of the Peace on a complaint,² while the charge of failing to stop his vehicle at the command of a police officer was an indictable misdemeanor triable only on information or indictment in the district court.³

2 The Court cited Spangler v. District Court of Salt Lake County, 104 Utah 584, 140 P.2d 755 (1943).

3 In support of this proposition, the Court cited Article VII, § 7 of the Utah Constitution and Utah Code Ann. § 77-16-1 (1953), as amended, which respectively were cited as follows: "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. . . ."

The Court thus concluded that the two different classifications of misdemeanors (indictable and class B) could not be tried together since statutory law proscribed that class B misdemeanors be tried in the Justice of the Peace courts while indictable offenses be tried in the district courts:

It thus is evident that the provisions of U.C.A., 1953, 76-1-402 (2)(a) relating to a single criminal episode does not apply for the reason that the crime of failing to stop a vehicle at the command of a police officer cannot be tried in the same court where the other two crimes must be tried.

575 P.2d at 694 (emphasis added).

In the case at hand, appellants allege that the facts in the Cooley case are distinguishable from those in the present case because the Cooley facts do not come within the purview of Section 77-21-31(1), whereas the instant facts do. Section 77-21-31(1) reads:

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.

Appellants say in their argument that the offenses involved in Cooley, i.e., failing to stop a motor

vehicle at the command of a police officer, driving with an improper license, and having no tail light on a boat trailer attached to a motor vehicle, though constituting a single criminal episode, are ". . . not of the same or similar character . . . are not based on the same act or transaction or two or more acts or transactions connected together . . . [and] do not constitute parts of a common scheme or plan." See Appellant's Brief, p. 13. Thus, appellants imply that the Utah Supreme Court decided the Cooley case as it did because the offenses involved did not meet the criteria of Section 77-21-31(1).

Respondent strongly submits otherwise. The Court specifically declared the reason that the case was decided as it was, that being that all the crimes involved could not by statute have been tried in the same court (see 575 P.2d at 694), thus the inapplicability of Section 76-1-402(2)(a). No mention was made by the Court of Section 77-21-31(1), not because, as appellants say, the criteria of Section 77-21-31(1) were not met by the facts, but because Section 77-21-31(1), being a procedural statute, had no bearing whatsoever on the question of jurisdiction of the offenses involved.

Respondent further submits that the facts of the present case fall squarely within the purview of Cooley. In both cases class B misdemeanors were tried in the Justice of the Peace court (circuit court in present case). In both cases indictable offenses were charged (indictable misdemeanor in Cooley; third degree felony in the present case). In both cases the offenses involved were separate offenses arising out of a single criminal episode. Thus, the reasoning and result in Cooley should be applied in the present case, thereby sustaining the position of this Court that class B misdemeanors pursuant to statutory law and case law, cannot be initially tried in the district courts.

Finally, Section 77-21-31(1) has no applicability to the present case since both offenses cannot, pursuant to State v. Cooley, supra, and statutory law (see Point C, infra), be tried in the same court initially.

B.

THE CASE OF HAKKI V.
FAUX PRECLUDES THE TRYING
OF CLASS B MISDEMEANORS IN
THE DISTRICT COURT WITHOUT
INVOKING THE PROPER PROCEDURE.

Appellants' claim that both the class B misdemeanor and the third degree felony should have been tried initially in the district court is expressly

rebuked in the case of Hakki v. Faux, 16 Utah 2d 132, 396 P.2d 867 (1964), which was cited by the Utah Supreme Court in the Cooley case.

In Hakki, the plaintiff had been charged with a nonindictable misdemeanor in a complaint filed in the district court. The district judge thought he could try the case and in order to prevent his doing so, the defendant (plaintiff on appeal) brought a writ of prohibition against any further proceeding in the district court on the complaint filed therein. In granting the writ, the court held that the proper procedure to bring a nonindictable misdemeanor before the district court was not followed:

Concluding, as we must, in the light of statutes and case authority that the proper procedure for invoking the original jurisdiction of the District Court has not been followed, the District Court was powerless to act in this matter. The Writ of Prohibition lies to prevent the judge from proceeding with the trial. It is so ordered.

396 P.2d at 869.

The Court in Hakki seemingly further said that where a nonindictable misdemeanor charge was originally filed in the District Court, and the proper procedure to invoke the jurisdiction was not followed and could not be followed, jurisdiction to initially try the case

was thereby precluded. The Court followed the reasoning set forth in State v. Telford, 93 Utah 228, 72 P.2d 626 (1937), and State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941).

In Telford, there was an improper transfer of a misdemeanor to the District Court. There, the Court said:

The district court should not have proceeded with this case. A tribunal may have jurisdiction of a subject matter but the right to proceed under that jurisdiction may depend on a condition precedent. Put in another way, the court may have jurisdiction of a subject matter but its jurisdiction should be properly invoked.

There are many cases where courts have jurisdiction of a subject matter but that jurisdiction must be invoked according to a certain procedure . . . 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 district court itself should refuse to proceed if the certificate shows it is not an appeal, or that it is not shown that there are no justices of the peace in the county qualified to try the case. . . .

72 P.2d at 627-628 (emphasis added).

In the Johnson case, the defendant was initially charged with a misdemeanor in the district court. A question was presented as to whether the district court had jurisdiction to initially try the case:

This presents the question of the construction of Article VIII, Section 7 of the State Constitution, which as far as involved here reads: "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same"

114 P.2d at 1036.

The Court went on to answer its question as to the meaning of "original jurisdiction" as set forth in Article VIII, Section 7 of the State Constitution:

Does this provision mean that any civil or criminal matter not expressly prohibited by law may be commenced, in the first instance, in the district court regardless of statutory provisions providing another forum where certain cases must be commenced and may then come to the district court by appeal? In other words what is the meaning of the term original jurisdiction? Does it refer to the locus or situs of the initial instigation of a legal controversy or does it refer to the nature of the adjudicative power of the tribunal? Does it refer to the tribunal where the processes invoking juridicial action must emanate or be filed in the first instance; or does it define the form and extent of the juridicial power? We have no hesitancy in saying it is the latter.

114 P.2d at 1036.

A distinction between "original" and "appellate jurisdiction" was made by this Court in the Johnson case. Following this excellent treatise and history on such a distinction, the Court espoused its interpretation and meaning of Article VIII, § 7 of the State Constitution in light of the jurisdictional issue:

We determine then that the constitutional provision [Article VIII, Section 7, Utah State Constitution] does not mean that regardless of statutory rules, practice, and procedure, any civil or criminal matter, not expressly prohibited by law, may be commenced in the District Court. There being no constitutional inhibitions, the legislature may define and prescribe the forum in which actions may or must be commenced, and the procedure necessary to pass from one court to another. Although there are certain constitutional limitations on the exercise of some powers by certain courts, the framers of the Constitution wisely refrain from conferring exclusive original jurisdiction upon any of them, vesting original jurisdiction in all courts inferior to the Supreme Court, to be apportioned and exercised as the legislature may direct. [Emphasis added].

* * *

A power to constitute courts is a power to prescribe its powers and the mode of trial, and consequently if nothing is said in the Constitution to the contrary, the legislature would be at liberty to prescribe what cases should be tried therein. The specification of an obligation that all criminal cases may be tried in the District Court does not abridge the power of the legislature to provide that some must be commenced and

just tried in another tribunal. The legislature may generally prescribe the methods or means by which the jurisdiction of the courts may be invoked in the absence of constitutional limitations. . . .
(Emphasis added).

* * *

By giving the inferior courts jurisdiction of specific classes of cases the legislature did not limit the jurisdiction of the district courts, but conditions precedent are interposed to the exercise of such jurisdiction. They may ultimately have the question tried before them on appeal, and a decision by a district court in a case brought before it from a justice of the peace or city court is final . . . the higher court has the power to hear the matter in controversy but the inferior court is the proper one to just take cognizance of the matter. If, however, there is not a qualified inferior tribunal to hear the cause, upon proper showing of this fact the district court will exercise its inherent power and assume jurisdiction over the cause . . .
(Emphasis added).

* * *

Since the legislature has laid down a certain procedure for invoking the jurisdiction of the district courts this procedure must be followed. . . .
(Emphasis added).

* * *

. . . While the District Court has general jurisdiction in all criminal matters, the proper procedure in misdemeanor cases as prescribed by statute is to commence the action in the city or justice's court . . .

114 P.2d at 1035, 1039, 1040, 1042 (emphasis added).

It is readily apparent that the Hakki courts based its decision to a large extent on the reasoning set forth in State v. Johnson, supra:

" . . . The opinion very clearly develops the thesis that original jurisdiction" as used in the Constitution does not mean that an action must be originally brought in the court having original jurisdiction, nor that there is a right originally to initiate it in that court. The word "original" expresses an adjudicative power of the court to function originally in regard to the litigation, independently of another tribunal, as it could have done if originally brought in that court and not as a court reviewing the action of another tribunal. I think the distinction sound and the only one workable under the various provisions of our constitution.

Hakki, supra, at 396 P.2d 869, quoting from Justice Wolfe's concurring opinion in State v. Johnson, 114 P.2d at 1043.

Respondent thus submits that in the present case the District Court was powerless to try the class B misdemeanor initially because of the reasons set forth in Hakki, Johnson, and Telford cases. The jurisdiction of the District Court to try the class B misdemeanor could have been invoked in only one of two ways, neither way being appropriate under the facts of the instant case. The initial trial was properly held in the Circuit Court.

C.

§ 77-21-31(1), UTAH CODE ANN.,
1953, AS AMENDED, DOES NOT CONFER
JURISDICTION ON THE DISTRICT COURTS
TO INITIALLY TRY A CLASS B MIS-
DEMEANOR.

Article VIII, § 7, of the Utah Constitution confers jurisdiction upon the District Courts to try all matters civil and criminal which are not excepted in the State Constitution and ". . . not prohibited by law; . . ."

[Emphasis added]. The Utah Legislature has "prohibited by law" the trying of certain cases initially in the District Court through the enactment of various statutes. The Legislature has also proscribed the method by which a case is to be initially presented and brought before the District Court. Section 77-16-1, Utah Code Ann., 1953, as amended, provides:

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, . . .

Thus, if an offense is triable in the district court, it must be brought by information or indictment, unless appealed from a circuit or justice court. In the instant case, the class B misdemeanor was not appealed from the circuit court, nor was it presented by information or indictment, since

Section 78-5-4, Utah Code Ann., 1953, as amended, gives the justice's courts jurisdiction to initially try all class B misdemeanors punishable by certain fines and imprisonment time:

(1) Justice's courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(a) All class B and class C misdemeanors punishable by a fine less than \$300 or by imprisonment. . . not exceeding six months, or by both . . .

Section 77-57-2, Utah Code Ann., 1953, as amended, makes it mandatory that all proceedings and actions before a justice's court for a misdemeanor be commenced by a complaint under oath.⁴ Thus, statutory laws herein cited specifically give the circuit court judge in the present case the jurisdiction and authority to try the class B misdemeanor of theft.⁵

Respondent submits that § 77-21-31 was enacted as a procedural statute (it is located in the Rules of Pleading - Forms of Information and Indictment Charter of Title 77 -

4 Section 78-4-16, Utah Code Ann., 1953, as amended, gives the city courts the same powers and jurisdiction in all criminal actions as are or may be prescribed for justices of the peace. Section 78-4-16.5, Utah Code Ann., 1953, as amended, gives authority for a complaint to be commenced before a city court judge if such a complaint may be commenced before a Magistrate pursuant to § 77-57-2.

5 Section 76-6-412(1)(d) makes theft under § 76-6-404 a class B misdemeanor under the facts of the present case.

Code of Civil Procedure), and was intended to be used after jurisdiction or venue of offenses had already been established. For example, § 77-21-31(1) in conjunction with § 76-1-402(2), would be used to prevent the prosecution from putting a defendant through separate trials for several offenses (e.g., a second degree felony), if the separate offenses were part of the same act or transaction, etc.; part of the same criminal episode; and of course, very important, under the jurisdiction of a single court.

Finally, respondent submits that § 76-1-402(2) is not applicable because of the aforestated reasons that the third degree felony and class B misdemeanor are not initially triable in the courts of the same jurisdiction.

POINT II.

BURGLARY AND LARCENY ARE TWO SEPARATE OFFENSES, AND AS SUCH, ARE SEPARATELY TRIABLE, EVEN THOUGH THEY ARE IN THE SAME CRIMINAL EPISODE.

Appellant, in Point II of his brief at pp. 14-15, concedes that burglary and theft in the instant case are two separate offenses. Respondent further adds that because of their jurisdictional problems which have heretofore been discussed in Point I., such offenses are also separately triable, though part of the same criminal episode.

As authority for the proposition that the offense of larceny and burglary are separate offenses, though part of the same criminal episode, respondent refers the Court to

the case of State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962); Rogerson v. Harris, 178 P.2d 397 (1947). See also, State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945), which holds that a prosecution for an "act or omission" made punishable by more than one statute did not bar a second prosecution unless the acts or omissions charged were, as a whole, the same; also, the fact that some of the acts or omissions charged in the first prosecution were also elements of the second offense was irrelevant.

In Rogerson, the Court stated:

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 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. . . .

178 P.2d at 399.

In the instant case, the acts of Scott Byrd were imputed to the appellants under § 76-2-202, Utah Code Ann., 1953, as amended, making them liable as principals, though they were accomplices. The appellants were present with

Byrd when he entered the Cottage Market the second time, they knew he was going to enter, and one of the appellants, Deal, drove Byrd to the situs. The purpose with which Byrd entered the store was a matter for jury determination. Apparently the jury was convinced that the requisite criminal intent for burglary was present. It shall be noted that the act of appellant Deal in "loading up" the stolen goods in the car is reflective of his intent, as is appellant Griffiths' acquiescence in being present and lending support, never trying to escape the situation before it was too late. Respondent thus submits that the evidence was sufficient to support the conviction, and no procedural errors affecting appellant's due process occurred.

POINT III.

THE DISTRICT COURT JUDGE DID NOT
VIOLATE APPELLANTS' DUE PROCESS RIGHTS.

Appellants argue that their due process rights were violated by the actions of Judge Baldwin at the district court hearing on the plea of once in jeopardy when he:

- (1) allegedly argued the prosecution's case;
- (2) allegedly misapplied the law to the facts of the instant case;
- (3) allegedly did not allow defense counsel to fully argue his case;
- (4) refused to vacate the trial setting in order that defense counsel might attempt to obtain a writ of prohibition.

Respondent submits that reason 2 above has been heretofore argued in this brief, and is submitted as such. As to reasons 1 and 3, respondent submits the transcript as support of the argument that Judge Baldwin did not argue the case for the prosecution and did allow defense counsel time and opportunity to argue his case.

Respondent calls the attention of the Court to the colloquy on page 2 of the November 16, 1978, transcript, whereby the County Attorney submitted its argument in opposition to appellant's once in jeopardy plea in the Cooley case:

The Court: State of Utah vs. David Griffith and Jack I. Deal. County Attorney submitted it on a case he said he gave to you, their position.

Mr. Young: Yes, your Honor. If he is referring to the Cooley case, I have a copy of that.

A thorough reading of the transcript reveals that Judge Baldwin was well versed on the applicable case and statutory law, and was merely pointing out to defense counsel such law and the reasons he felt he was obliged to follow such law, though he personally might have agreed with defense counsel's position. See November 16, 1978 transcript, pp. 10, 14, 16. Appellants have made no argument as to how their due process rights were affected and cite no case or statutory authority.

Respondent thus submits that the allegations made against Judge Baldwin are frivolous and merit no consideration from this Court.

Respondent submits that Judge Baldwin correctly applied the law in the State of Utah to the facts at the hearing on appellant's motion to dismiss on the grounds of once in jeopardy, on November 16, 1978. As such, respondent claims that there was no reason shown as to why a writ of prohibition pursuant to Rule 65B(b) (4) should issue, thus no reason to vacate the trial setting as requested by appellants. Aside and apart from that fact, however, respondent submits that any error found by this Court to have been committed by the District Court in refusing to vacate the trial setting was harmless, since appellants have an adequate remedy on appeal to the Utah Supreme Court. Charrigan v. Bowman, 40 Utah 91, 119 P. 1037 (1911); Oldroyd v. McCrea, 65 Utah 142, 235 P. 580 (1925). Should this Court find that the District Court should not have tried the third degree felony, the case will be dismissed and no harm done, since the appellants have already suffered embarrassment through their convictions of theft in the circuit court.

Finally, respondent submits that a writ of prohibition will issue to prevent an inferior court or tribunal from exercising jurisdiction with which it had not

been vested by law, or to arrest it from exercising want or excess of legal jurisdiction, but not to prevent or correct an erroneous exercise of jurisdiction, which, if this Court finds for appellants, would be the case. Campbell v. Durand, 39 Utah 118, 115 P. 986 (1911). The District Court having jurisdiction pursuant to Article VIII, § 7 of the State Constitution to try felonies, a writ of prohibition would not have been proper, and any error in exercising jurisdiction on a jeopardy matter could be argued on appeal.

CONCLUSION

The District Courts do not have jurisdiction to initially try class B misdemeanors. Such is by statute the jurisdictional duty of the city courts and justices of the peace courts. Felony cases must be tried in the District Courts, thus there is no possible way that § 77-21-31(1) could have been applicable in the present case because both cases could not have been initially tried in the same court. The Cooley and Hakki cases substantiate this point. Furthermore, § 76-1-402(2) is not applicable for the same reason, viz: lack of jurisdiction to try both offenses initially in the same court.

Appellants were charged with separate offenses arising out of the same episode, which were separately triable.

Finally, no due process violations can be substantiated in the record at the District Court hearing on the jeopardy motion or at the trial itself. For these reasons, respondent requests that the District Court judgment be affirmed.

Respectfully submitted,

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