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State of Utah v. Douglas Charles Peterson : Brief of Appellant

Utah Supreme Court

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EksAyn Anderson and P. N. Anderson; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

DOUGLAS CHARLES PETER-
SON,

Defendant and Appellant.

Case No.
7757

FILED **Brief Of Appellant**

NOV 27 1951

Clerk, Supreme Court, Utah

EKSAYN ANDERSON *and*
P. N. ANDERSON,

*Attorneys for Defendant
and Appellant.*

Received 2 copies of this
Brief this 27th day of November,
A.D. 1951

Brigham E. Roberts
District Attorney by E.L.

Received 2 copies of this Brief.
This 27th day of November, 1951

Dorothy Keane of the
Office of the Attorney General

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an appeal from the judgment of the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, against the above named defendant; the Honorable Joseph G. Jeppson, Judge.

The defendant was informed against by the District Attorney of the Third Judicial District by an information and accused of the crimes of BURGLARY IN THE

SECOND DEGREE and GRAND LARCENCY, TO WIT: that the defendant on or about March 25, 1951, * * * entered the building of Clarence L. Means in the night time with intent to commit larceny therein; and that the defendant on or about March 25, 1951, stole from Clarence L. Means personal property having a value in excess of \$50.00, lawful money of the United States. The case was tried before a jury June 13, 1951, and a verdict was returned as follows:

“We, the Jurors impaneled in the above case, find the defendant guilty of the crime of Grand Larceny as charged in the Information, and not guilty of the crime of Burglary in the Second Degree.”

THE EVIDENCE

CLARENCE L. MEANS, the complainant, was owner of Torch Tavern, at 477 South Main, front entrance on Main, with driveway running back of building from 5th South; at back of building is a door with window south of it. He closed his business at 1 A.M. March 25 and checked doors and windows. Pursuant to visit of a policeman later, he went to the tavern and saw one back door, leading from toilet, partly open, and a back window with a small square broken out; and he observed a television set, electric drill and other property had been taken; next saw articles about 6 A.M. Sunday at police station. (Tr. 3-12) Means had known defendant for 4 or 5 years, but had not seen him for

about 1 year. (Tr. 13-14) The big window in which a pane was broken is barred, but in judgment of witness afforded sufficient protection inasmuch as a person could not crawl between the bars; (Tr. 17-18) bars about 8 or 10 inches apart; the door in back was open in the morning — it had been locked on inside and nailed. (Tr. 19) Means did not know Charles M. Olmsted. (Tr. 24)

DANIEL A. DUN testified that he and Edward Peterson, after being at Dee's Hamburger at about 3:30 A. M., were standing talking on 5th South and east of The Torch, he observed a car drive out of parking lot east of The Torch, turn right and go West; rear door was open but went shut; trunk lid partly up; some object in trunk. They went back to investigate; observed window broken and rear door partly open; called police about 3:55; waited until officers Clayton and Olsen arrived at 4:00. (Tr. 32-36) He did not see anyone in car; watched it to at least West Temple. (Tr. 27)

EDWARD PETERSON, testified that early morning of March 25 he and Dan Dun walked north on Main past The Torch; he heard something fall in The Torch but thought it was the janitor; when they came back and were standing talking he saw a car drive from driveway over sidewalk at too fast a rate of speed; he did not pay much attention to car; only saw license number, which he detected was 484; the trunk lid was up; it appeared to him there was a safe in the back of the car; looked like two in the car; went west on

5th South at a high rate of speed; he and Dun went to The Torch tavern and saw a window broken and a door partly open. Dun called the police between 3:30 and 4:00; officers came later; he did not know if occupants were male or female. (Tr. 54-57)

JACK MERRICK, special officer on duty along 5th West Street early morning of March 25 near corner of 2nd South; saw a car going north; trunk open about a foot, black object sticking out; he fell in behind, gave chase to almost North Temple and 5th West; lead car made left turn into alley at 49 N. 5th West; two men jumped out; witness followed driver through field or alley and overtook him; asked by officer what was in car man told him a television set he obtained from a friend after a fight; man then ran away north; witness phoned the police dispatcher 4:04; between 8 to 10 minutes after witness had first seen the car; witness identified man in court as defendant; witness with other officers went to pursued car and did some checking on articles in car. He testified the pursued car made a turn into a narrow driveway for about half block from sidewalk which led into a place where there are all kinds of shacks and a lot of rubbish. (Tr. 76-76) It was dark back there, no lights; witness fired two shots; man came back; witness did not identify man, but man said his name Chuck or Chick Peterson and the man with him was Kenny Solomon; witness did not see man again for few days in county jail; he reported name man told him

and saw some pictures of him; man pursued had levis and a blue striped shirt on; Easter morning and no coat on or with him. (Tr. 76-83) On redirect: there were are lights and sign light, and witness had flash light at man's face so he could readily observe features. (Tr. 83)

M. L. HUNSAKER, police officer on duty early hours of March 25; about 4 o'clock received call to look for a car, make not positive; numbers on license 484; 8 or 10 minutes later call from Officer Merrick came; went to Merrick, saw car with numbers 484 on license; they checked some articles in car; witness took Pontiac to Headquarters, keys were in car; witness identified articles taken from car and exhibit "E" as a list. (Tr. 84-90) On cross: the television was dusted for prints; he never saw any; never saw defendant until preliminary hearing. (Tr. 93)

M. W. OLSON, police officer, in early hours of March 25 went to Torch Tavern and made examination of broken window, and bars; said bars were sufficiently far apart so a person could get thru them; purpose was to determine means of entry, but made no measurement of space between bars; opined defendant could go thru bars; he checked windows for way of opening, but did not report anything on that, nor if they went thru the bars. (Tr. 94-98)

DOUGLAS CHARLES PETERSON, the defendant, on evening of March 24 was home with wife and

four children at 69 North 5th West; wife had not been out for long time, and he secured his Grandmother to take over the children and he and his wife left home about 10 o'clock and went to Airport Gardens at North Temple about 30th West; drove out in 1939 Dodge Coupe; they danced and defendant played in band; left about 1:15 A.M. Sunday, had trouble getting car started; went directly home—about 15 minute drive; the 1941 Pontiac was missing from back yard—it was there when they left; he had been dickering with Charles Olmsted on transfer of Dodge to Olmsted, and had let the latter drive the car; defendant and wife went in their house, and defendant walked Grandmother (Clara Turner) home; went back, and he and wife went to bed. It was about 2 o'clock. (Tr. 99-103)

After going to bed they were awakened by phone; it was Olmsted who called. Witness here attempted to relate conversation on phone when State objected on ground of hearsay. MR. LUNT (defense counsel): "Now, if the Court please, I think we have a chance to go into this matter at this time. Mr. Olmsted was charged and has not been apprehended for this crime, and I think we have a right to go into the whole business." (Tr. 103) The State withdrew its objection to permit of testimony as to the whole occurrence. (Tr. 109) And defendant then testified to the effect: (Tr. 110) that Olmsted said he had defendant's Pontiac and asked defendant to hurry over to 5th West between 2nd and

3rd South—that it was important; that defendant hurriedly put on pants, shoes and shirt without buttoning shirt, and ran over to designated place. There was the Pontiac; first time he had seen it after leaving home about 10 previous evening. Olmsted approached car, and defendant having seen trunk open asked what was in it. Being told by Olmsted what, and how he obtained the property, defendant told him to get stuff out right now,—to get rid of it; that defendant would have no part of it. Because of condition of car it had stopped on Olmsted, and after some trouble they started; defendant jumped in car and was going to get off over home. (Tr. 110-112) Defendant intended getting off at front of house, but Olmsted turned down driveway; saw car coming about 1½ blocks away; it pulled in behind; Olmsted turned key off, jumped out and hollered, “Run, Pete.” Defendant, being scared and panicky, and by influence of suggestion, jumped and ran; defendant had been fast asleep when property was stolen; they ran together through the field, defendant behind; defendant then thought, what reason did he have to run, stopped and started back to the officer; defendant’s shirt tail was out and shirt unbuttoned,—had no intention of taking shirt off; he had been 40 to 50 feet in lead of officer and could have run behind some houses, but went back to officer and car. Officer asked what was in back of car, and defendant said a television set, and related,—“This friend of mine got it, went down to some people’s houses, and it is his television.” Then

they walked to Salt Lake Milling door, about 20 to 25 feet from driveway where defendant lived; the officer, about 10 feet behind, stopped to awaken nightwatch and call police, and defendant continued walking right into his house; told his wife what had happened, and sat there about ½ hour. (Tr. 112-114) Defendant about 5 o'clock walked over to Grandmother's, about a block away; his wife and Olmsted came over later; defendant complained to Olmsted about what happened, and at that time Olmsted wrote, in presence of Grandmother, defendant and his wife, on his driver's license and signed his name, which writing was identified as defendant exhibit 1, and gave it to defendant, who in turn gave it to Mr. Blazzard of Police department, when defendant went to police department following Tuesday at 8:00 A.M. and related the events. Defendant denies he was in, near or by the Torch Tavern on the morning of March 25, 1951, and denied the burglary. At a recess defendant measured the bars on the Torch Tavern window which had been broken; the window is 42 inches wide, bars about 1 inch thick and 8 bars between ends. (Tr. 114-120) On cross, defendant denied any mention of Kenny Solomon, or that he gave the address of 553 Jeremy Ave. Asked if he had ever been convicted of a felony and he answered, "yes"; Q. What were they? A. One was in 1947 for grand larceny, and I was convicted again in 1949 or 1950 for unlawful sale of Government property. (Tr. 122-124)

WILMA PETERSON, wife of defendant, related going to Airport Gardens about 10 o'clock; Pontiac there when they left, but gone on return; defendant walked home with Grandmother, and in short time came back, and both went to bed; the phone rang and wife handed it to defendant, and she heard him talk on phone; then defendant grabbed his pants and stuff and said he had to run over to 5th West and 2nd South; shortly defendant came back in and then left for Grandmother's, leaving word if Olmsted came to bring him over; later Olmsted came, and she and he went over to Grandmother's; she saw Olmsted write and sign his name, and read what was written. (Tr. 126-128)

CLARA TURNER, the grandmother of defendant, testified she went over to Peterson home; defendant and wife left about 10 o'clock; returned about 1 or later; defendant mentioned about car being gone; he walked her home and went back home; later defendant, his wife and Olmsted were at her place; she saw Olmsted write and sign his name. (Tr. 128-132)

Defendant offered exhibit 1 which was objected to as hearsay and self serving; objection sustained. (Tr. 132) No objections (exceptions) to Court's instructions by defense. (Tr. 133)

The instructions given by the Court appear in the Record on Appeal, pages 16 to 28.

ASSIGNMENT OF ERRORS

1. The Trial Court erred in sustaining objections to defendant's proposed exhibit 1, for the reason that the written confession of Charles Olmsted was a sequence to facts proved which had an inherent tendency to connect said Olmsted with the actual commission of the crime. (Tr. 132)

2. The Court erred in not instructing the jury at the close of the evidence to return a verdict of acquittal on both charges and included offenses; (Instr. Record 16-28) for the reason that the evidence is such that reasonable men cannot differ upon the fact that it includes a reasonable hypothesis of innocence of the defendant; and such was a matter of law for the Court.

3. The verdict of the jury is contrary to law and the evidence.

4. The Court erred in not instructing the jury circumscribing their consideration of the cross examination of the defendant as to conviction of a prior felony to the matter and point of the credibility of the witness.

ARGUMENT

Assignment No. 1

The Trial Court erred in sustaining objection to defendant's proposed exhibit No. 1, for the reason that the written confession of Charles Olmsted was a sequence

to facts proved which had an inherent tendency to connect said Olmsted with the actual commission of the crime.

There is nothing to refute the testimony of defendant and no conflict in the evidence, to the effect that it was Olmsted who had the Pontiac license number 484, and whatever property there was in the car at the time when defendant met him on 5th West and 2nd South after the phone call to defendant's home; and the writing on exhibit 1 came in such sequence as to be a part of the res gestae. We believe the view is tenable and applicable in this case as set out in PEOPLE VS. MENDEZ (Cal.), 223 Pac. 64, (K 21) page 70:

“ . . . Confessions, threats, and circumstances of flight on the part of third persons are all in the nature of declarations or admissions of such third persons, and are therefore hearsay, unless they come within the res gestae exception to the hearsay rule. It does not seem to us that they may be justly regarded as part of the res gestae unless and until evidence is produced which has an inherent tendency to connect such persons with the actual commission of the crime.”

And this theory is further sustained by further observations herein on other assignments.

In GILDER VS. STATE (Tex. 1911), 133 S. W. 883, a conviction of burglary was reversed because of refusal of trial court to grant a continuance to allow defendant an opportunity to have present some absent

witnesses, one to prove confession of a third party. Said the Court:

“By another one of the absent witnesses he alleges he could have established the fact that the witness Smith admitted taking the guns. In other words, he proposed to prove the confession of Smith. His alibi and his statements as to how he came in possession of the guns and the confession of Smith could be entirely in harmony with every other charge, which would afford, if the jury believed it, fully sufficient reasons why they should not return a verdict against him . . . should submit defense matters to the jury.”

UNDERHILL'S CRIMINAL EVIDENCE, 4th Ed.
Sec. 296:

“It frequently happens that the accused resorts to the defense that another committed the crime, especially where the state's evidence is circumstantial. Such evidence is generally held admissible if relating to the *res gestae*, if guilt of the other party is consistent with the innocence of the defendant, and there are facts in evidence pointing to the guilt of someone other than the accused.” Citing, *PEOPLE VS. VATEK*, 71 Cal. App. 453, 263 Pac. 163; *STATE VS. CAVINEES*, 40 Id. 500, 235 Pac. 890; and other cases.”

Assignments No. 2 and 3

The Court erred in not instructing the jury at the close of the evidence to return a verdict of acquittal on both charges and included offenses for the reason

that the evidence is such that reasonable men cannot differ upon the fact that it includes a reasonable hypothesis of innocence of the defendant, and such was a matter of law for the Court. And, that being so, the verdict of the jury is contrary to law and the evidence.

There is no evidence, finger prints or otherwise, that connects defendant with any taking, receiving, aiding or abetting in the taking of the stolen property. The circumstances established by the evidence are all to the contrary. On the cold Easter morning he was out with only an unbuttoned shirt on—no coat on or with him. His running from the car can easily be perceived as a spontaneous action under the circumstances without the reflection of any guilty scienter; and his return to the officer and car when he could have run and hid refutes the idea of a guilty conscience. As to defendant's whereabouts when the breaking-in took place is established without refutation. Under the evidence any reasonable man can deduce the hypothesis of innocence of the defendant:

In STATE VS. BURCH, 100 Utah 414, 115 Pac. 2nd 911, it is said:

“If circumstantial evidence is submitted to a jury, it is accompanied by an instruction that to convict upon such evidence, that evidence must exclude every reasonable hypothesis of innocence . . . BUT IF THE EVIDENCE IS SUCH THAT REASONABLE MEN WOULD NOT DIFFER UPON THE FACT THAT IT INCLUDES

SUCH AN HYPOTHESIS, THEN IT IS NOT A QUESTION FOR THE JURY, BUT IS ONE FOR THE COURT." (Emphasis ours.

20 AM. JUR. 1060:

"... If the circumstances established are dependent one upon another, each must be consistent only with the theory of guilt in order that a conviction may stand."

STATE VS. WELLS, 35 Utah, 400, 100 P. 691, 136 AM. ST. REP. 1059, 19 ANN CAS. 631:

"... When a fact which is an essential element to constitute a crime is sought to be proven by circumstances alone, it is not enough that the conclusions sought to be proven may be inferred therefrom, but they must also be inconsistent with every other reasonable conclusion." (Straup)

To same effect is 16 C. J. 1011, Sec. 2436.

Assignment No. 4

The Court erred in not instructing the jury circumscribing their consideration of the cross examination of the defendant as to conviction of a prior felony.

The rule is as stated in UNDERHILL'S CRIMINAL EVIDENCE (4th Ed.), Sec. 140:

"The defendant may be questioned when he becomes a witness in his own behalf concerning specific acts *in order to test his credibility of his testimony*. Thus his previous conviction of a felony may be shown."

16 C. J. 586, Par. 1132:

“The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible . . .”

See also 16 C. J. 595, Sec. 1149.

It will be observed that the charge included two offenses—burglary and grand larceny. If defendant were guilty at all, he was guilty of burglary as well as grand larceny, AND the jury brought in a verdict of GRAND LARCENY ALONE. Evidently the verdict was predicated upon the truthful statement of the defendant as to a prior conviction, instead of having been limited by a proper instruction as to the purpose of such cross-examination, which would have added credence to his testimony, and entitled him to an acquittal. Certainly defendant could not have been guilty of grand larceny had he not been guilty of burglary in this instance, but the grand larceny verdict only was predicated upon the cross examination as to a prior conviction of grand larceny.

CONCLUSION

We are not unmindful of the general rule of practice that this Court reviews only those matters that come

before it whereon exceptions and objections have been taken in the Court below according to technical formal procedure. After all, we believe, this Court is not sitting as an umpire rating the scores of legal strategists, but rather the umpire to determine and grant legal rights of the citizens who come before it. And we predicate this belief upon the expressions of this Court in *STATE VS. COBO*, Utah, 60 Pac. 2nd. 952, where the court said at page 958:

“... In these days of widespread advocacy of reformed procedure in criminal cases to heal and cure misgivings and faulty prosecutions, the safeguards of the rights and privileges of the accused should not be overlooked and a loose rein held for the prosecution and a tight, technical, and restricted rein held on the accused.”

This Court in *STATE VS. COBO*, *supra*, cites ample authority for the application of the exception to the general rule in view of the record and transcript submitted on this appeal.

If a person can be convicted on the evidence in this case, being out on parole, on the basis of his prior conviction, without proper instructions relative to cross examination as to prior convictions circumscribing the consideration of the jury as to such examination, then we are going far fetched from the purpose of permitting cross examination as to prior convictions. We will then, as perhaps in this case was done, convict a parolee on no other grounds than that he told the truth. This is a

point of serious concern in this particular case, and we urge consideration on the part of this Court.

Respectfully submitted,

EKSAYN ANDERSON *and*
P. N. ANDERSON,

*Attorneys for Defendant
and Appellant.*