

1987

Utah v. Rodney James Ramon and Minnette M. Riedman : Petition for Writ of Certiorari

Utah Supreme Court

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Martin Venhoff; Attorney for Appellant.

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7-17

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
DOCKET NO. — 870279 Plaintiff-Respondent, : Case No. 860005-CA
v. : Supreme Court No.
RODNEY JAMES RAMON, :
Defendant-Appellant. : No. 870279

STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 860013-CA
v. : Supreme Court No.
MINNETTE M. RIEDMAN, :
Defendant/Appellant. :

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS
- - - - -

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FILED

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Clerk, Supreme Court, Utah

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STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 860005-CA
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IN THE SUPREME COURT OF THE STATE OF UTAH

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RODNEY JAMES RAMON, :
Defendant/Appellant. :

STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 860013-CA
v. : Supreme Court No.
MINNETTE M. RIEDMAN, :
Defendant/Appellant. :

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

QUESTION PRESENTED FOR REVIEW

The primary question presented for review is whether the decision of the court of appeals that theft by receiving is a separate crime from concealing stolen property, is in conflict with Utah Code Ann. § 76-6-403 (1978), and State v. Taylor, 570 P.2d 694 (Utah 1977), both which provide that the Utah theft statute consolidates the theft offenses under prior law into a single offense of theft.

OPINION BELOW

The opinion of the court of appeals in State v. Ramon, 57 Utah Adv. Rep. 30, ____ P.2d ____ (Ct. App. 1987) and State v. Reidman, 57 Utah Adv. Rep. 30, ____ P.2d ____ (Ct. App. 1987),

appears as Appendix A to this petition. A copy of that court's order denying the State's petition for rehearing appears as Appendix B.

JURISDICTION

The lower court's opinion was filed on May 12, 1987 (Appendix A). On July 10, 1987, an order denying the State's petition for rehearing was issued (Appendix B). The State's petition for rehearing tolled the period in which this petition for certiorari had to be filed, R. Utah S. Ct. 45(c); therefore, the petition is timely filed. This Court has jurisdiction to review the decision of the court of appeals by a writ of certiorari under Utah Code Ann. § 78-2-2(5) (Supp. 1986).

PROVISIONS OF CONSTITUTIONS, STATUTES, AND RULES INVOLVED

1. Utah Code Ann. § 76-6-403 (1978)

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

2. Utah R. Crim. P. 4(d), Utah Code Ann. § 77-35-

4(d) (1982) :

The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict an indictment or information may be amended

so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Respondents, Rodney James Ramon, and Minnette M. Riedman, were charged with theft by receiving, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (Supp. 1987). After a jury trial, they were found guilty of that offense. The court sentenced them to terms of one to fifteen years in the Utah State Prison.

On direct appeal, the court of appeals reversed defendants' convictions on the ground that receiving stolen property is a separate and distinct crime from concealing stolen property. Thus, the amendment to the information which provided additional language of concealment of the property, charged an additional or different offense than that originally charged and the court held that the amendment was improperly permitted. Ramon, 57 Utah Adv. Rep. at 33 (Appendix A). After ordering respondent to reply to the State's petition for rehearing, the court subsequently denied the petition for rehearing without comment (Appendix B).

B. Facts Relevant to Issues Presented for Review

On the morning of December 9, 1983, the employees of Western States Sheet Metal discovered that the business had been burglarized (R. 258). Initially, it was determined that three coils of sheet copper of approximately 10,000 pounds and 500 pounds of pie-shaped scrap copper had been taken (R. 258, 259).

Prior to 9:00 a.m. that day Western called Ms. Riedman at Industrial Salvage, described the missing copper and requested that she be cautious of anyone selling copper (R. 192, 195-96). Later that day Ms. Riedman purchased a 1300 pound coil of copper sheet and some additional pieces of copper, scrap and fabricated (R. 161-62).

Ms. Riedman was later questioned that day by a Western employee as to whether she had purchased any copper (R. 224). She denied any purchase (R. 225). After the Western employees left Industrial Salvage Mr. Ramon asked Ms. Riedman for the sales book, told her to make an "excuse or fairy tale" concerning the location of the book, and he placed the book in a storage compartment (R. 526, 560).

Western employees later found a box of fabricated copper located near the rear fence of Industrial Salvage and notified the police (R. 276-78).

When detectives arrived with an investigative subpoena to seize the sales records of Industrial Salvage, Ramon and Riedman told detectives that they did not know where the book was and suggested "the vigilantes," referring to Western employees, had taken it.

Defendants were charged with the crime of Theft by Receiving in violation of Utah Code Ann. § 76-6-408(1) (Supp. 1987) . The State filed an amended information on May 16, 1984, which added the following emphasized language:

**THEFT BY RECEIVING, a Second Degree Felony,
at 1532 Industrial Road, in Salt Lake County,
State of Utah, on or about December 9, 1983,
in violation of Title 76, Chapter 6, Section**

408, Utah Code Annotated, 1953 as amended, in that the defendants, Rodney James Ramon, Minette M. Riedman and Bobby Dale North, as parties to the offense, received, retained, or disposed of the property of Western Sheet Metal knowing that it had been stolen, or believing that it probably had been stolen, or concealed, withheld, or aided in concealing or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00. (Emphasis added.)

Defendants received notice of the proposed amendment on May 17. On May 23, defendants filed a motion for bill of particulars asking the court to require the State to specify which theory of guilt it would rely upon at trial. The court summarily denied the motion.

ARGUMENT

THE CONCLUSION OF THE COURT OF APPEALS THAT CONCEALING STOLEN PROPERTY AND RECEIVING STOLEN PROPERTY ARE TWO DISTINCT CRIMES AND THUS, MUST BE CHARGED SEPARATELY IS CONTRARY TO ESTABLISHED LAW.

Defendants were charged on December 20, 1983 with the crime of theft by receiving in violation of Utah Code Ann. § 76-6-408(1) (Supp. 1987). The information alleged:

THEFT BY RECEIVING, A Second Degree Felony, at 1532 Industrial Road, in Salt Lake County, State of Utah, on or about December 9, 1983, in violation of Title 76, Chapter 6, Section 408, Utah Code Annotated, 1953 as amended, in that the defendants, RODNEY JAMES RAMON, MINETTE M. RIEDMAN, and BOBBY DALE NORTH, as parties to the offense, received, retained, or disposed of the property of Western Sheet Metal knowing that it had been stolen, or believing that it probably had been stolen, with a purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00.

The State filed an amended information on May 16, 1984 adding the following language:

THEFT BY RECEIVING, A Second Degree Felony, at 1532 Industrial Road, in Salt Lake County, State of Utah, on or about December 9, 1983, in violation of Title 76, Chapter 6, Section 408, Utah Code Annotated, 1953 as amended, in that the defendants, RODNEY JAMES RAMON, MINETTE M. RIEDMAN and BOBBY DALE NORTH, as parties to the offense, received, retained, or disposed of the property of Western Sheet Metal knowing that it had been stolen, or believing that it probably had been stolen, or concealed, withheld, or aided in concealing or withholding any such property from the owner, knowing the property to be stolen with a purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00. (Emphasis added).

In the court of appeals, defendants argued that the amendment added an additional or different offense alleging that the defendants "concealed, withheld or aided in concealing or withholding stolen property."

Utah R. Crim. P. 4(d), Utah Code Ann. § 77-35-4(d) (1982), provides:

The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

Although the lower court acknowledged the ruling in State v. Peterson, 681 P.2d 1210, 1220-21 (Utah 1984), that a proposed amendment to an information is allowable if the amendment merely recites language of the statute originally charged, Ramon, 57 Utah Adv. Rep. at 32, the Court reversed the

convictions because "[t]he generality of Peterson presupposes the charging statute contains a single offense. The rule does not apply in the instant case since the statute under which defendants were charged contains two distinct crimes." Id. at 5. This holding appears to be contrary to Utah statutory law and controlling authority from the Utah Supreme Court.

Utah has a consolidated theft statute. Specifically, Utah Code Ann. § 76-6-403 (1978) provides:

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. (emphasis added).

In State v. Taylor, 570 P.2d 694 (Utah 1977) the Court stated:

"The Utah theft statute consolidates the offenses known under prior law . . . into a single offense entitled theft, and clearly evidences the legislative intent to eliminate the previously existing necessity of pleading and proving those separate and distinct offenses All that is now required is to plead the general offense of theft and the accusation may be supported by evidence that it was committed in any manner specified in sections 404 through 410 of the Code,"

Id. See also State v. Seekford, 638 P.2d 525, 526-27 (Utah 1981).

In State v. Bair, 671 P.2d 203 (Utah 1983) the State charged defendant with retaining stolen property and at trial

presented evidence of receiving and taking stolen property. The Court stated:

"The above-mentioned charges (retaining, receiving and taking) are not themselves separate offenses, although they are separate and distinct substantive definitions of the single offense of "theft". Under the consolidated theft statute, proof establishing any one of these substantive definitions will support a general accusation or charge of "theft". (citations omitted).

671 P.2d at 208.

The purpose behind a consolidated theft statute is to avoid situations wherein a defendant is charged with one form of theft, and then at trial alleges he committed another form of theft.

It is often difficult for the police and prosecuting attorney, who find the defendant in exclusive possession of property recently stolen from the owner, to know whether he actually stole it or whether he received it from another who did the stealing. This gives a defendant, charged with larceny, a chance to urge that he received it; or, if charged with receiving, to claim that he stole it. Once again, in moral quality the two crimes, larceny and receiving, are alike, as the generally similar statutory provisions for punishment recognize. The two crimes may be thought of as simply two ways of misappropriating another's property. Thus the Model Penal Code brackets them together as merely two ways among several ways of committing the single crime of theft.

W. LaFave and A. Scott, Jr. Criminal Law, § 8.8 (2nd Ed. 1986).

Because of the specific language in § 76-6-403 that theft is a single offense and "an accusation of theft may be supported by evidence that it was committed in any manner specified in sections 76-6-404 through 76-6-410 . . .", the present case fits squarely within the holding in Peterson. The

information charged defendants with theft by receiving by title and section which apprised defendants of the offense. The amendment did not add an additional or different offense but merely added a different manner in which the crime of theft was committed. Cf. State v. Russell, 733 P.2d 162, 167 (Utah 1977).

The lower court did not distinguish § 76-6-403 or Utah Supreme Court case law from the present case but instead relied upon three Utah cases¹ listing separate elements for receiving stolen property and concealing stolen property. Ramon, 57 Utah Adv. Rep. at 32-33. While the Court listed separate elements for receiving stolen property and concealing stolen property in Murphy, Lamm, and Pappas these cases should be interpreted as providing different substantive definitions for the general crime of theft. In fact, in State v. Lamm, 606 P.2d 229 (Utah 1980) the Court had the opportunity to separate § 76-6-408 into two separate crimes. There, the defendant was charged with and convicted of theft by receiving under § 76-6-408. The Court found that "the facts of the present case fall within the latter portion of this provision, i.e. concealing or aiding in the concealment of stolen property." Id. at 231. The Court could have divided § 76-6-408 into two different crimes, receiving and concealing, but instead found that defendant was properly charged with § 76-6-408 and that defendant committed the crime of theft through the act of concealing rather than receiving. The fact that defendant committed theft by concealing rather than

¹ State v. Murphy, 617 P.2d 399 (Utah 1980); State v. Lamm, 606 P.2d 229 (Utah 1980); State v. Pappas, 705 P.2d 1160 (Utah 1985).

receiving did not make the different acts listed in § 76-6-408 different offenses. Instead, the acts listed in § 76-6-408 are different methods of committing the single offense of theft. This is the logical interpretation in light of the consolidated theft statute and the fact that both acts are listed under the same title and section.

The lower court also cites three cases from other jurisdictions for the proposition that concealing stolen property is a distinct offense from receiving stolen property.² However, none of the jurisdictions cited by the Court had enacted consolidated theft statutes at the time the opinions were reported. See Model Penal Code § 223.6 comment 1, n.1 (1982); Okla. Stat. tit. 21 § 1713 (1983); Tenn. Code Ann. § 39-3-1112 (1982). Although Oregon presently has a consolidated theft statute, Or. Rev. Stat. § 164.015, §164.025 (1985), the Doster case cited by the lower court involved an Oregon criminal statute enacted prior to that State's present consolidated theft statute. See State v. Doster, 247 Or. 336, 427 P.2d 413, 415 (1967).

In effect, the lower court has created two separate offenses under the theft statute which is contrary to Utah statutory law and controlling authority by the Utah Supreme Court. Although an intermediate court of appeals is certainly free to criticize the rulings of the superior appellate court, see e.g., Selby v. Department of Motor Vehicles, 168 Cal. Rptr.

² Whitwell v. State, 520 S.W.2d 338 (Tenn. 1975); Brewer v. State, 554 P.2d 18 (Okla. Cr. 1976); State v. Doster, 247 Or. 336, 427 P.2d 413 (1967).

36, 37-38 (Cal. App. 1980), in performing the primary "error-correcting" function in a two-tiered appellate system, it is not in a position to overrule superior authority, and it generally should refrain from performing its "law-declaring" function in cases of great moment. See State v. Grawien, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Wis. App. 1985); Utah Code Ann. § 78-2a-3(3) (Supp. 1986) (authorizing certification of issues to Supreme Court).

The issue in the present case is substantial and mandates intervention by this Court for several reasons. First, the lower court has ignored controlling authority relating to the applicable rule of law. Second, its decision, if left unreviewed, would create unnecessary and unwelcome confusion on two important questions: (1) must the State now in light of Ramon charge defendants with specific methods of committing the crime of theft, contrary to Utah Code Ann. § 76-6-403 (1978); and (2) is the Court's ruling in Peterson that an amendment is allowable if it recites the language of the statute originally charged, no longer valid law. Third, the apparent ease with which the court of appeals moved from the "error-correcting" arena into the "law-declaring" arena suggests that this Court needs to provide guidance on the role of an intermediate appellate court in a two-tiered appellate system. Consistency in the appellate courts is particularly important to the criminal justice system, where the rights of victims, society, and defendants -- at stake in daily litigation in the trial courts -- demand clear rules of law.

CONCLUSION

Based upon the foregoing discussion, the State's petition for a writ of certiorari should be granted.

DATED this 7 of August, 1987.

DAVID L. WILKINSON
Attorney General

Kimberly K. Hornak
KIMBERLY K. HORNAK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing Petition were mailed, postage prepaid, to Martin Verhoff, Attorney for Appellant, 255 East 400 South, Suite 100, Salt Lake City, Utah, this 7 day of August, 1987.

Kimberly K. Hornak

APPENDICES

APPENDIX A

been requested of this court. See R. Utah Ct. App. 8. The ninety day suspension of plaintiff's license expired, at the latest, ninety days after the order of the trial court, or October 1, 1985. "Because the order of [suspension] has now expired by its own terms, we refrain from adjudicating the merits of the issues raised." Jones, 721 P.2d at 894.

On grounds of mootness, the appeal is dismissed.

Russell W. Beach, Judge

WE CONCUR:

R. W. Garff, Judge

Pamela T. Greenwood, Judge

Chs. 55
57 Utah Adv. Rep. 30

IN THE
UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Respondent, OPINION
v.
Rodney James RAMON,
No. 86006-CA

Defendant and Appellant.
STATE of Utah,
Plaintiff and Respondent,
v.
Minnette M. Riedman,
Defendant and Appellant.
Before Judges Jackson, Orme, and Beach.

No. 860013-CA
FILED: May 12, 1987

THIRD DISTRICT
Hon. Jay E. Banks
ATTORNEYS:
Martin Verhoef for Appellant
David L. Wilkinson, Kimberly Hornak for
Respondent

OPINION

BENCH, Judge:

Defendants Rodney James Ramon and Minnette M. Riedman appeal their separate convictions of theft by receiving stolen property. Utah Code Ann. §76-6-408(1) (1986). Because the cases involve the same facts and the same dispositive issue, we consolidate the cases, sua sponte, and reverse both convictions.

On December 8, 1983, George Linam and Sam Mackie burglarized Western Sheet Metal

and stole one eighteen inch wide coil of copper sheet, which weighed about 2,500 pounds, and twenty-five eight feet by fifteen inch fabricated panels. The next morning, December 9, as Ralph Montrone, the owner of Western Sheet Metal, and his employees arrived at work, they discovered the burglary. After a quick inventory, Montrone estimated the stolen property to be three coils of copper sheet, totaling approximately 10,000 pounds in weight, and 500 pounds of pie-shaped scrap copper. Montrone asked his daughter and employee, Laura, to telephone all the salvage metal dealers in Salt Lake County and notify them about the burglary. Sometime between 8:30 and 9:30 that morning, Laura called co-defendant Riedman, office manager at Industrial Salvage. Laura told Riedman about the burglary and described the property according to her father's instructions. Riedman took notes of the stolen property as described by Laura.

At approximately 9:30 a.m., Linam and Mackie arrived at Industrial Salvage with the stolen copper. They drove through the front gate, past the front office where Riedman worked, and directly to the non-ferrous metal shed in the back of the yard. They unloaded the copper, and Bob North, an employee of Industrial, weighed it and filled out a yard receipt. On the receipt, North described the copper as "1653 pounds of #3 light copper." Linam and Mackie took the receipt to the front office and presented it to Riedman. As the two men entered the office, Roger Valentine, an employee at Western Sheet Metal, also entered the office. Riedman paid Linam and Mackie \$559.02 in cash for the copper. As the two men left, Valentine wrote down the license plate number of their truck. Valentine then identified himself to Riedman. Riedman told him she had received Laura's phone call earlier that morning. Valentine asked Riedman if she had purchased any copper that morning. Riedman replied no. Defendant Ramon, the owner-manager of Industrial Salvage, entered the office at that time and told Valentine they did not see that kind of copper too often. As Valentine left the office, he noticed North in the non-ferrous metal shed carrying a panel Valentine recognized as belonging to Western Sheet Metal. He left the yard, located a public telephone, and contacted Montrone.

Shortly thereafter, Montrone and another employee, Joe Sudbury, joined Valentine at the entrance of Industrial Salvage. They entered the office and again asked Riedman if she had purchased any copper that day. Riedman again replied in the negative. Montrone then asked if they could look around the yard. Riedman explained that they would need to talk to Ramon. The men went out in the yard to ask Ramon. He asked them to wait as he was busy with a customer. Twenty minutes

later, Ramon escorted Montrone and Valentine through the yard. They entered the non-ferrous metal shed and asked North if he had received any copper that morning. North showed them a box of scrap pieces with white paint on them. Montrone and Valentine then left the yard.

Later that afternoon, Montrone's wife and other employees at Western noticed a box near the west gate of Industrial Salvage. The box was covered with a burlap cloth, but sticking out of the box were fabricated pieces of copper resembling the stolen panels. They contacted the Salt Lake City Police Department.

Two detectives obtained an investigative subpoena to seize the sales records of Industrial Salvage for that day. At about 2:30 p.m., the detectives and an officer arrived at the site. As Ramon observed the policemen arrive, he asked Riedman for the sales book and put it away in a storage compartment in his office. He told Riedman to contact his attorney and to make up a story for the missing sales book. Ramon then went out into the yard. The detectives entered the office, showed Riedman the subpoena, and asked for the sales book for that day. Riedman told them she did not know where the book was, and suggested "the vigilantes," referring to Western Sheet Metal employees, had taken it. She called Ramon into the office, and he gave the detectives the same response. The detectives explained to Ramon the subpoena did not give them the right to search the yard and asked for his permission to do so. Ramon consented. The detectives walked through the non-ferrous metal shed and to the back west gate where the box Western employees had identified was located. Montrone, standing outside the gate, identified the contents of the box as his. The detectives read Ramon his Miranda rights and asked him about the box. He said he knew nothing about it. The detectives told him they were going to seize the box.

By the time the men returned to the front office, Riedman had contacted Ramon's attorney. After conversing with his attorney, Ramon turned the sales book over to the detectives and Riedman told them she remembered purchasing about 1,000 pounds of copper that morning.

Ramon, Riedman, and North were charged, in an information filed on December 20, 1983, with the crime of Theft by Receiving in violation of Utah Code Ann. §76-6-408(1) (1966). The information alleged:

THEFT BY RECEIVING, a Second Degree Felony, at 1532 Industrial Road, in Salt Lake County, State of Utah, on or about December 9, 1983, in violation of Title 76, Chapter 6, Section 408, Utah Code Annotated, 1953 as amended, in

that the defendants, RODNEY JAMES RAMON, MINETTE M. RIEDMAN and BOBBY DALE NORTH, as parties to the offense, received, retained, or disposed of the property of Western Sheet Metal knowing that it had been stolen, or believing that it probably had been stolen, with a purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00.

The State filed an amended information on May 16, 1984, which added the following emphasized language:

THEFT BY RECEIVING, a Second Degree Felony, at 1532 Industrial Road, in Salt Lake County, State of Utah, on or about December 9, 1983, in violation of Title 76, Chapter 6, Section 408, Utah Code Annotated, 1953 as amended, in that the defendants, RODNEY JAMES RAMON, MINETTE M. RIEDMAN and BOBBY DALE NORTH, as parties to the offense, received, retained, or disposed of the property of Western Sheet Metal knowing that it had been stolen, or believing that it probably had been stolen, or concealed, withheld, or aided in concealing or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00. (Emphasis added.)

Defendants received notice of the proposed amendment on May 17. On May 23, defendants filed a motion for bill of particulars asking the court to require the State to specify which theory of guilt it would rely upon at trial. The court summarily denied the motion.

Defendants Ramon and Riedman were jointly tried by a jury and before the Honorable Jay E. Banks, Third Judicial District Court, on June 19-22, 1984. On the first day of trial, after the jury had been selected, sworn, and admonished, the State formally moved to amend the information. Over defendants' objection, the court granted the State's motion. Defendants entered pleas of not guilty to the new information and the trial proceeded that afternoon. The jury found defendants guilty as charged on June 22, 1984. On August 22, the court denied defendant Riedman's motion in arrest of judgment and sentenced both defendants to indeterminate terms of not less than one year or more than fifteen years at the Utah State Prison. The court stayed the sentences and placed defendants on probation under certain terms and conditions. Defendants filed their notices of

appeal that same day.

On appeal, defendants contend the trial court erred in allowing the State to amend the information on the day of trial as the amendment charged an additional or different offense and prejudiced their substantial rights.

Utah R. Crim. P. 4(d), Utah Code Ann. §77-35-4(d) (1982), provides:

The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

Under the Rule, the trial court may allow an information to be amended if two conditions are met: (1) no additional or different offense is charged, and (2) the substantial rights of the defendants are not prejudiced.

In general, these two conditions are met where the proposed amendment to an information merely recites language of the statute originally charged. *State v. Peterson*, 681 P.2d 1210, 1220-21 (Utah 1984), (citing *State v. Ricci*, 655 P.2d 690, 691 (Utah 1982)). In *Peterson*, the defendant was charged with aggravated assault under Utah Code Ann. §76-5-103(1)(a) (1978). The proposed amendment, granted on the second day of trial, substituted subsection (b), " ... uses a deadly weapon or such means or force likely to produce death or serious bodily injury," for subsection (a), " ... intentionally causes serious bodily injury to another," as the basis of the charges. The offense, aggravated assault, remained the same. The Court found since "the amendment to the information did not change the basic charge," no substantial rights were prejudiced and affirmed the trial court's ruling. *Id.* at 1221.

The generality of *Peterson* presupposes the charging statute contains a single offense. The rule does not apply in the instant case since the statute under which defendants were charged contains two distinct crimes.

In *Whitwell v. State*, 520 S.W.2d 338, 344 (Tenn. 1975), the Tennessee Supreme Court held, "[c]oncealing stolen property is an offense distinct from and independent of receiving stolen property." See also *Brewer v. State*, 554 P.2d 18, 21 (Okla. Cr. 1976); *State v. Doster*, 247 Or. 336, 427 P.2d 413, 416 (1967). From our analysis of Utah case law, we conclude that to also be the law in this jurisdiction.

In *State v. Murphy*, 817 P.2d 999, 401 (Utah 1980), the defendant was charged with theft by receiving in violation of section 76-5-

408(1). The Utah Supreme Court outlined the basic elements of theft by receiving stolen property. Those elements are:

- (1) property belonging to another has been stolen;
- (2) the defendant received, retained or disposed of the stolen property;
- (3) at the time of receiving, retaining or disposing of the property the defendant knew or believed the property was stolen; and
- (4) the defendant acted purposely to deprive the owner of the possession of the property.

In *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980), the defendant was also charged under section 76-6-408(1). However, after a review of the facts, the Supreme Court held "[t]he facts of the present case fall within the latter portion of this provision, i.e., concealing or aiding in the concealment of stolen property." The Court then outlined the basic elements of theft by concealing or aiding in the concealment of stolen property. Those elements are:

- (1) property belonging to another has been stolen;
- (2) the defendant aided in concealing this property;
- (3) at the time he so aided in concealing it he knew the item had been stolen; and
- (4) his purpose in acting was to deprive the owner thereof of possession.

The Court clearly lists separate elements for separate crimes. Of particular note are the second elements listed in each case. In *Murphy*, the prosecution had to prove defendant received, retained, or disposed of stolen property. In *Lamm*, the prosecution had to prove defendant aided in concealing the stolen property. The third elements are also different. In *Murphy*, the prosecution was only required to prove defendant believed the property was stolen while in *Lamm*, the prosecution had to prove defendant knew the property was stolen.

Although not apparent in *Murphy* and *Lamm*, there is a difference even in the first element listed for the two crimes. In *State v. Pappas*, 705 P.2d 1169 (Utah 1985), the Court specified yet another distinction between receiving stolen property and concealing stolen property. The Court stated that for the latter part of the statute (concealing), the property must in fact be stolen. The Court held, however, that for the first part of the statute (receiving), the subject property need not be stolen since the defendant might only believe the property has been stolen. In so holding, the Court criticized *Murphy* but only insofar

as the earlier case suggested that even for theft by receiving, the property must actually be stolen.

In *Murphy*, *Lamm*, and later *Pappas*, the Utah Supreme Court has clearly held that receiving stolen property is a crime separate and distinct from concealing stolen property.

The dissent suggests the rationale behind finding two separate offenses under section 76-6-408(1) can also be used to find six separate offenses in the same statute. Such is not the case. The statute, as drafted by the legislature, is divided into two separate portions or offenses: "A person commits theft if he receives, retains, or disposes of the property of another ... or who conceals, sells, [or] withholds ... any such property...." (Emphasis added.) Both offenses contain a triplet of culpable conducts, but each type of conduct is not a separate offense, as evidenced by the second element listed above in *Murphy*.

Because the amendment charged an additional or different offense than that originally charged, defendants' convictions are reversed. In light of this decision, we do not address defendant Riedman's claim of insufficiency of the evidence to support her conviction.

Russell W. Bench, Judge

JACKSON, Judge: (Concurring)

The opinions in this case demonstrate that Utah Code Ann. §76-6-408(1) (1986), modeled after section 223.6(1) of the Model Penal Code, is not artfully drafted. The Utah Supreme Court has indentified two separate offenses in the statute. *State v. Pappas*, 705 P.2d 1169 (Utah 1985); *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980); *State v. Murphy*, 617 P.2d 399, 401 (Utah 1980). It is our function to follow those decisions until the Court rules otherwise, or until the legislature revises the statute.

Norman H. Jackson, Judge

ORME, Judge: (Dissenting)

I agree with the basic approach employed by the majority. I dissent only because I do not believe that in the posture of this case "receiving" stolen property is a crime distinct from "concealing" stolen property, and because I believe that *State v. Peterson*, 681 P.2d 1210 (Utah 1984), is controlling.

The statute in question, Utah Code Ann. §76-6-408(1) (1986), defines as constituting the crime of theft a number of closely related post-theft activities sometimes collectively referred to as "receiving" stolen property. These activities are manifestations of a single wrong condemned in law, namely that of dealing with stolen property, knowing or believing it was stolen, with the purpose of depriving the owner of the property. I believe the statute defines a single crime—theft in vio-

lation of the statute. That §76-6-408(1) defines a single crime is a conclusion supported by Utah Code Ann. §76-1-601(6)(1978), which equates the term "offense" with "a violation of any penal statute of this state."

If the majority is correct that this single statute defines more than one crime, I see no reason why it defines only two, "receiving" and "concealing," since several other methods of dealing with stolen property are mentioned. Indeed, under the majority's logic the run-of-the-mill "fence" might be guilty of a multitude of "crimes" every time he effected a sale of a single item of stolen property. He would be guilty of one crime when he received the stolen item. He would be guilty of a second if he retained it, guilty of a third if that retention took the form of concealment, and necessarily guilty of a fourth since that retention, whether in the form of concealment or not, would constitute the withholding of property. He would be guilty of a fifth crime when he disposed of the property and of a sixth if the disposal was in the form of a sale. We would rightfully have little patience with a prosecutor who brought a six-count information against such a perpetrator in the routine case. Our rationale would be that the fence had really committed only one crime, namely theft or "receiving" in violation of §76-6-408(1).

The majority's conclusion that the statute describes more than one crime is mainly premised on the cases of *State v. Murphy*, 617 P.2d 399 (Utah 1980) and *State v. Lamm*, 606 P.2d 229 (Utah 1980). I concede those cases, by providing slightly different hemizations of "elements," are not altogether inconsistent with the majority's conclusion. However, I believe those cases are fully consistent with my conclusion that the statute defines a single crime, one which admittedly can be established by alternative avenues of proof. When both cases are read and considered, there is no escaping the conclusion that *Murphy's* crime would have been "theft" in violation of §76-6-408(1), as was *Lamm's*.¹ Nor does the embellishment made by *State v. Pappas*, 705 P.2d 1169 (Utah 1985), in which the majority takes further comfort, require a different conclusion. In practical terms, *Pappas* is irrelevant to this case since the property in question here was clearly stolen. Insofar as *Pappas* bears indirectly on our analysis, it is quite neutral. *Pappas* recognizes that several of the avenues of proof available to the prosecution under §76-6-408(1) are appropriate where property has not actually been stolen but where the perpetrator believes it has been, as in the case of the now familiar "sting" operation. Nothing in *Pappas* elevates these alternative avenues of proof to distinct offenses. When the dust settles, it is clear that *Pappas's* crime was also "theft" in violation of §76-6-408(1).

While this aspect of my disagreement with the majority may seem largely semantical, I believe that in all events the case is controlled by *State v. Peterson*, 681 P.2d 1210 (Utah 1984). In *Peterson*, the amended information included an additional phrase from the aggravated assault statute, the statute under which defendant was originally charged. In the instant case, the amendment did no more than add additional language from the "receiving" statute under which defendants were originally charged. In *Peterson*, as here, "the amendment to the information did not change the basic charge." *Id.* at 1221. In *Peterson*, as here, defendants were charged by title and section, "which certainly apprised [them] of the statutory offense." *Id.* It is clear to me, semantics aside, that if the amendment in *Peterson* was appropriate, so was the amendment in this case.

As no actual prejudice resulted from permitting the amendment, I would affirm defendant Ramon's conviction. I also believe there is sufficient evidence in the record to support Riedman's conviction, and would therefore also affirm her conviction.

Gregory K. Orme, Judge

1. It is true that Lamm's wrongful dealing with stolen property was in the form of aiding in its concealment while Murphy's allegedly wrongful dealing with stolen property was in the form of retaining it, although the prosecution failed to prove the charge against Murphy. Unlike the majority, I do not see a world of difference between the first phrase in the statute, what the majority refers to as an offense containing "a triplet of culpable conduct," and the second phrase/triplet. On the contrary, I see considerable overlap between them. "Retaining," for example, is in the first triplet, while "concealing" and "withholding," which I regard as mere varieties of retaining, are in the second. Meanwhile, "disposing" of stolen property is in the first triplet while "selling," simply a disposal in exchange for valuable consideration, is grouped with concealing and withholding in the second.

Indeed, if the various "culpable conducts" in §76-6-408(1) were to be logically grouped into separate crimes, receiving stolen property would be one; concealing, retaining, or otherwise withholding it from its owner would be a second; and selling or otherwise disposing of it would be the third. While such a scheme even makes some sense, our Legislature has chosen to lump all of these culpable conducts into the single statutory offense set forth in §76-6-408(1).

Cite as
57 Utah Adv. Rep. 34

IN THE UTAH COURT OF APPEALS

Erting A. ROYLANCE,
Plaintiff and Appellant,

v.

Lynn B. ROWE, Dean L. Bristow, J. R.
Monahan, and Mountain View Hospital,
Defendants and Respondents.

Before Judges Billings, Garff and Jackson

No. 860023-CA
FILED: May 12, 1987 :

FOURTH DISTRICT
Hon. J. Robert Bullock

ATTORNEYS:

S. Rex Lewis for Appellant
David W. Slagle for Respondents

OPINION

BILLINGS, Judge:

Plaintiff Roylance brought an action against Doctors Rowe and Bristow, and Mountain View Hospital for medical malpractice arising from surgery performed in June, 1981. At the conclusion of Roylance's case-in-chief, defendant Mountain View Hospital was dismissed. Subsequently, the jury found the remaining two doctor defendants not negligent and judgment was entered in favor of defendants, no cause of action. Roylance seeks reversal claiming the trial court erred (a) in not granting a directed verdict in favor of plaintiff and in failing to allow a new trial based upon the weight of the evidence; (b) in denying plaintiff's requested jury instruction on *res ipsa loquitur*; and (c) in failing to dismiss defendant hospital at the commencement of trial. We affirm.

Roylance entered Mountain View Hospital for removal of an acute gangrenous perforated gallbladder. The emergency surgery was performed by Drs. Rowe and Bristow. Following the surgery, the scrub nurse counted the sponges; the figures totaled and matched the initial count. After the doctors closed Roylance's incision, an x-ray was taken which revealed the presence of a 4" x 4" piece of gauze. The doctors checked Roylance's external bandages and bed clothes and finding nothing, determined a sponge had been left internally. The doctors thereafter performed another operation to locate the sponge or gauze; no sponge or gauze was located. This action was brought against Drs. Rowe and Bristow and Mountain View Hospital on grounds that Roylance was subjected to unnecessary surgery.

APPENDIX B

IN THE UTAH COURT OF APPEALS

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RECEIVED

The State of Utah,)
Plaintiff and Respondent,)
v.)
Rodney James Ramon,)
Defendant and Appellant.)

ORDER DENYING PETITION
FOR REHEARING
No. 860005-CA
ATTORNEY GENERAL

The State of Utah,)
Plaintiff and Respondent,)
v.)
Minette Riedman,)
Defendant and Appellant.)

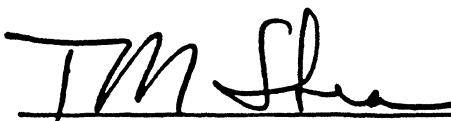
No. 860013-CA

THIS MATTER having come before the Court upon Plaintiff/
Respondent's Petition for Rehearing in the above captioned matter,
and the Court having duly considered said petition.

IT IS HEREBY ORDERED that the Plaintiff/Respondent's
Petition for Rehearing be denied.

Dated this 10th day of July, 1987.

FOR THE COURT:



Timothy M. Shea
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of July, 1987, a true and correct copy of the foregoing Order Denying Petition for Rehearing was mailed to each of the following:

**Martin Verhoef, Esq.
Barber, Verhoef & Yocom
255 East 400 South, Suite 100
Salt Lake City, Utah 84111**

**David L. Wilkinson
State Attorney General
Kimberly K. Nornak
Assistant Attorney General
B U I L D I N G M A I L**

**Third District Court
Salt Lake City, Utah**

**Julia Whitfield
Case Management Clerk**

UTAH COURT OF APPEALS

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RECEIVED

87 JUL 13 P4:38

ATTORNEY GENERAL

July 9, 1987

The State of Utah,
Plaintiff and Respondent,
v.
Rodney James Ramon,
Defendant and Appellant.

REMITTITUR

No. 860005-CA

The State of Utah,
Plaintiff and Respondent,
v.
Minette Riedman,
Defendant and Appellant.

No. 860013-CA

Defendants convictions are reversed.

Issued: May 12, 1987

Record: 4 vol

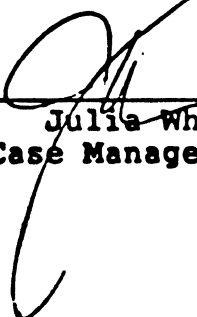
CERTIFICATE OF MAILING

I hereby certify that on the ⁷10th day of ~~June~~^{July}, 1987, a true and correct copy of the foregoing Remittitur was mailed to each of the following:

Martin Verhoef, Esq.
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255 East 400 South, Suite 100
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David L. Wilkinson
State Attorney General
Kimberly K. Nornak
Assistant Attorney General
B U I L D I N G M A I L

Third District Court
Salt Lake City, Utah



Julia Whitfield
Case Management Clerk