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State of Utah v. Virgil Thomas : Brief of Defendant and Appellant

Utah Supreme Court

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7808

NO. 7808

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

-VS-

VIRGIL THOMAS,

Defendant and Appellant,

BRIEF OF DEFENDANT AND APPELLANT

BLAINE V. GLASSMANN, JR.
Attorney for Appellant

FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * *

STATE OF UTAH,)	
Plaintiff and Respondent,)	
-vs-)	Case
)	No. 7808
VIRGIL THOMAS,)	
Defendant and Appellant.)	

* * * *

NATURE OF THE CASE

Defendant prosecutes this appeal from a judgment of the District Court, Weber County, Utah, Honorable Charles G. Cowley presiding upon a jury verdict of guilty to a charge of burglary in the third degree contrary to Section 103-9-5, Utah Code Annotated, 1943.

Trial in the lower court was upon a plea of not guilty to the information which charged that the defendant did then

and there willfully and unlawfully, feloniously and burglariously in the daytime of said day forcibly break and enter a certain automobile, to-wit: a 1936 Plymouth tudor sedan automobile, license number B3719 Utah 1950, owned by Edward Underwood, which was parked on the North side of Lake Street about twenty feet East of Grant Avenue, Ogden, Weber County, Utah, through a door of said automobile with the intent to commit larceny therein. It commenced on October 30, 1951, and was concluded by the verdict of the jury on the same day. Defendant's motion for new trial was regularly set and was heard on November 13, 1951, and the court denied the motion on the same date. Sentence was imposed on November 13, 1951, committing the defendant to not less than six months nor more than three years in the State Prison. A certificate of probable

cause was obtained and this appeal was taken.
The sentence remains unserved.

STATEMENT OF FACTS

On or about August 15, 1950, at approximately twelve o'clock noon, Police Officer L. A. Jacobsen was in the general vicinity of National Tavern, located on 25th street, Ogden, Utah. Officer Jacobsen gave testimony to the effect that he saw the defendant, Virgil Thomas, come out of the National Tavern with a bulge under his coat, and that the defendant dropped a tool to the sidewalk. The Officer then went to a telephone and gave this information to a patrol car detail headed by Officer Wilson A. Allen. Officer Jacobsen then waited for the patrol car to come and pick up the defendant. Officer Jacobsen testified further that he did not see anyone give anything to the defendant, but admits that he

was not observing the defendant continuously until his arrest. (Tr. 50-52, 54).

Officer Wilson A. Allen then came to the National Tavern in a patrol car and arrested the defendant on suspicion (apparently) of having stolen property in his possession. (Tr. 21-22).

At the time of his arrest, the defendant had in his possession mechanic tools which were wrapped in a torn piece of bed spread. (Tr. 22).

Arrested with the defendant at that time was another man by the name of Melvin Bowden, (Tr. 25), also known as "Toughie." (Tr. 44-45, 54).

Other persons in the vicinity who witnessed the arrest were Frances Stoddard (Tr. 39), Roy Allen (Tr. 42-51), (a different person than Police Officer Wilson A. Allen) and Officer L. A. Jacobsen. (Tr. 39).

Officer Allen testified that at the time of the arrest the defendant denied having the tools, but that a tool dropped to the sidewalk from a piece of bedspread the defendant was carrying.

While being placed under arrest at this time, Melvin Bowden (Toughie) took some of the tools and attempted to get away, but was stopped by Officer Allen. (Tr. 25,37).

Also on August 15, 1950, at about seven o'clock a.m. the complaining witness, Edward Underwood, drove his automobile to work and parked it a short way from his place of employment. When he came from work at about 3:30 p.m. he discovered some mechanic tools missing from his automobile, along with a piece of bedspread he had been using for a seat cover. Mr. Underwood waited until the following day, August 16, to report this to the police. (Tr. 9-10).

The evidence showed that the tools and

bedspread found in the defendant's possession at the time of his arrest were the property of the complaining witness, and had been in the complaining witness' automobile prior to being taken. (Tr. 11-12, 23).

The defendant took the stand on his own behalf and explained his possession of the tools and bedspread by testifying that they were given to him, just prior to his arrest, by Melvin Bowden (Toughie); the same Bowden who was arrested at the same time with the defendant. (Tr. 33, 37).

Defense witness Frances Stoddard testified that he saw the defendant in the National Tavern shortly before he was arrested and that at that time the defendant was not carrying anything with him. (Tr. 30). He further testified that just before the arrest he saw Toughie (Melvin Bowden) hand what looked like a canvas sack to the defendant,

and that the Officer then arrested the defendant and an end wrench fell out when the Officer took this sack away from the defendant. (Tr. 28-31).

Witness Roy Allen then testified for the defendant to the effect that he was standing in front of the National Tavern at time the defendant was arrested, and that just prior to the arrest he saw a man by the name of Toughie (Melvin Bowden) hand the defendant a sack, and that a few minutes earlier when he happened to notice the defendant, the defendant did not appear to be carrying any sack or tools. (Tr. 42-43).

Defense counsel then moved the court for a directed verdict of not guilty on the grounds of insufficiency of the evidence. (Tr. 55).

During the trial the court recessed from twelve noon until two p.m. Roy Allen,

a duly subpoenaed witness for the defense (R.008) while waiting for court to convene, and just prior to two p.m. was taken by Prosecuting Attorney L. Roland Anderson, Assistant District Attorney, and Police Officers Allen and Jacobsen to a room in the Court House. There, behind a closed door, said officers threatened said defense witness Roy Allen with a perjury prosecution unless he changed his story, (which favored the defendant). At this point defense counsel found the witness and took him into court, where he took the stand as the defense's next witness. (Tr. 49, R.036 Motion for New Trial at Tr. 8, R.027).

Defense witness Roy Allen's testimony favored the defendant (Tr. 41-43), but his testimony on cross-examination was hesitant, doubtful and inconclusive. (Tr. 43-49).

Defendant's Motion for new trial was regularly set and heard on November 13, 1951, and the court denied the motion the same day. (R.035).

The motion for new trial was based on the following grounds:

1. Insufficiency of the evidence to justify the case going to the jury.

2. Insufficiency of the evidence to justify the jury verdict of guilty.

3. Misconduct and irregularity of an officer of the court, an adverse party in the trial of this cause. (R.036).

ASSIGNMENT OF ERROR

1. The lower court erred in failing to direct a verdict of not guilty.

2. The lower court erred in denying defendant's motion for new trial.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN FAIL-
ING TO DIRECT A VERDICT OF NOT
GUILTY.

To make out a case of burglary in the third degree, Section 103-9-5 Utah Code Annotated, 1943, against a given defendant, the state has the burden of showing not only that a burglary had, in fact, been committed but also sufficient evidence necessary to connect the defendant with that burglary.

At the trial of this defendant, the State did prove that a burglary had been committed and property thereby stolen. However, the only evidence introduced by the State to connect the defendant with the burglary was that he had the stolen property in his possession. The defendant submits that possession alone in a larceny or burglary case is insufficient to base a conviction on.

The court said in the Oklahoma case
Gransbury vs. State, 81 P 2d 874:

"The mere possession of recently
stolen property is not sufficient
to convict possessor of larceny
or burglary."

and this court in People vs. Swazey, 21 P
400:

"It seems now to be an established
doctrine, especially in the western
country, that in larceny the recent
possession of stolen property is not
of itself sufficient to warrant a
conviction."

The prevailing opinion in both larceny
and burglary cases, which are analogous to
each other as to the weight given evidence
of possession of stolen property is that in
cases where this is the only evidence against
the defendant, it is insufficient for con-
viction, providing such possession is ex-
plained by the defendant.

This court states in State vs. Kinsey,
et al. 295 P 247 and in State vs. Barretta
155 P 343:

"If only the larceny is shown and recent possession in the accused that is not sufficient to justify a submission of the case and does not warrant a conviction."

The court in State vs. Kinsey, et al above cited further states:

"The authorities also are to the effect that the possession must not only be personal, exclusive and unexplained, but must also be conscious or unconscious assertion of possession by the accused."

In this case here before the court, the defendant explained his possession of this property (Tr. 33, 37) and, in addition, supported his explanation with the testimony of two witnesses. (Tr. 28-31, 42-43).

The rule of law as to what weight is given evidence of possession of stolen property is the same in larceny as it is in burglary. This court in State vs. Brooks, 126 P 2d 1044, states the law as follows:

"Under statute, Section 103-36-1, Utah Code Annotated, 1943, providing that possession of stolen property when the person in possession fails to make a satisfactory explanation shall be deemed prima facie evidence of guilt. The failure to make a satisfactory explanation may be supplied by a false or unreasonable or improbable explanation or an explanation not consistent with innocence. If a prima facie case has not been made the court should not submit the matter to the jury. If a prima facie case has been made the court submits to the jury the question of defendant's guilt. State vs. Barretta, 155 P 343, supra; State vs. Potello, 119 P 1023, supra. As developed so well in the Potello case proof of larceny and of recent possession does not justify submission of the case to the jury. There must be one more element, failure of defendant to make a satisfactory explanation of that possession. As shown they may even be supplied by defendant having made a false or unreasonable or improbable explanation or an explanation not consistent with innocence. Where this element is necessary to make a case that can go to the jury it necessarily follows that the question as to whether the defendant failed to make a satisfactory explanation is one for the court to determine. *

* Underlining inserted by counsel.

If defendant has not made an explanation satisfactory to the court, then the case should go to the jury. If he has made a satisfactory explanation the State has not established a prima facie case and the cause should not go to the jury. The jury does not determine when the explanation is satisfactory."

Again in State vs. Bruno, 87 P 2d 795, this court gave a statement of the law as follows:

"The contention is as to the reasonableness or unreasonableness of appellant's explanation of possession of the alleged stolen property. Where an explanation is given the State has the burden of proving that the explanation is unreasonable.

The State failed to show an unsatisfactory explanation. On the contrary, the defendant presented a satisfactory explanation that is not refuted or otherwise questioned. Such being the case of State vs. Barretta, supra. The court in the Barretta case held, as we said, in the Potello case, in the absence of other evidences to make a prima facie case required proof of three things: the larceny, recent possession in the accused, and an ~~unsatisfactory explanation of his possession~~.^{*} When these are shown the court is not justified in withholding the case from the jury. But if only the larceny is shown and recent possession in the accused, that is not

^{*} Underlining inserted by counsel.

sufficient to justify a submission of the case, and does not warrant a conviction.

Possession of recently stolen property alone is not sufficient. The State must supply proof of an unsatisfactory explanation of possession of recently stolen property and proof of an alleged larceny as well. The explanation was reasonable, in harmony with the circumstances, and unimpeached must be taken as satisfactory. There is no evidence connecting the defendant with the larceny when the possession of recently stolen property is alienated as it must be. Where possession alone has been shown this court has said in *State vs. Kinsey*, supra, 'But mere or bare possession when not coupled with other culpatory or incriminating circumstances, does not alone suffice to justify conviction.'

Various tests are applied as to what is the test of a "reasonable explanation."

In *American Free Hold Land Mtg. vs. Pace*, 56 S. W. 377, the test was held to be:

"It does not mean beyond a reasonable doubt, but it should not be ambiguous, equivocal or contradictory; it should be perspicuous and cause the mind to repose confidence in it."

In *Secklir vs. Penny*, 266 N.Y.S. 327,

the test was held to be:

"Sufficient for a reasonable person acting in good faith."

We submit that the lower court erred in submitting this case to the jury, that the question of whether defendant's explanation of possession of the stolen property was reasonable was one for the court to decide, and not the jury. Further that the evidence submitted at the trial did, by a great preponderance, support the defendant's explanation of possession and the State failed to refute this explanation. Therefore, the reasonable mind of the court should have found the defendant's explanation satisfactory and the court should have directed a verdict of not guilty.

POINT TWO

THE LOWER COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR NEW TRIAL.

The defendant maintains that a new trial should have been granted on his motion because of the misconduct of the prosecuting attorney L. Roland Anderson, assistant district attorney, in conducting the trial.

The misconduct complained of was the taking of a key defense witness by said prosecuting attorney and police officers, a few minutes before he was to take the stand, into a closed room. There said prosecuting attorney threatened the defense witness with prosecution for perjury unless he changed his story (which favored the defendant); (R.027, Tr. 49), and see admissions to this effect by the prosecuting attorney. (R.036 Motion for New Trial Tr. 8, ^{Tr.}/49).

The defendant's cause was greatly prejudiced and impaired by the prosecuting attorney's misconduct in that this key witness was greatly shaken by the threat of prosecution if he did not change his story. As a

result he made a very poor impression upon the jury because of his inconclusive testimony and doubtful demeanor, which in all probability caused the jury to doubt his testimony; thereby causing disbelief of defendant's explanation of how he came into possession of the stolen property. (Tr. 43-49).

This witness' appearance before the jury and what impression he made on them as to credulity and honesty was of grave importance. This was true because this man was able to testify as to how the defendant came into possession of the stolen property, and the State's only evidence against the defendant was possession of stolen property. The crux of this case was his explanation or reasonableness of his explanation of how he acquired the property.

The prosecuting attorney's conduct was reprehensible and highly improper and without question prejudiced the defendant's

cause materially.

The courts are quite unanimous in pressing a duty on the prosecutor of being fair, and the further duty of refraining from improper conduct in his trial of a defendant. This court's decision in State vs. Murphy, 68 P 2d 188:

"While D.A. is obligated to prosecute persons brought to trial with vigor and earnestness, he owes defendant duty to be fair in conduct of trial and in all evidence."

Also see State vs. Jameson, 134 P 2d 173:

"Both the court and prosecutor should be zealous in protecting the rights of an accused, and should carefully refrain from doing or saying anything from which it might be inferred that an unfair advantage was taken of the defendant."

Also see State vs. Gorman, 17 N.W. 2d 42:

"A prosecutor is in a peculiar and very definite sense the servant of the law. The two-fold aim of which is that the guilty shall not escape or innocent suffer, and it is as much his duty to refrain from improper methods calculated to bring a wrongful conviction as it is to use every legitimate means to bring about a just one."

{

The authorities state that where a defendant's cause is materially prejudiced by misconduct of the prosecuting attorney, a new trial should be granted. Authorities for this: Taylor vs. State, 212 P 2d 164; State vs. Holm, 224 P 2d 500:

"A prosecuting attorney must see that defendant has a fair trial and if prosecutor fails to do so, a new trial may be ordered by the Supreme Court."

CONCLUSION

We submit that the lower court erred as a matter of law in failing to direct a verdict of not guilty and in failing to grant defendant's motion for new trial.

Respectfully submitted,

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