

1952

## State of Utah v. Virgil Thomas : Brief of Respondent

Utah Supreme Court

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### Recommended Citation

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# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Respondent,*

— vs. —

VIRGIL THOMAS,

*Appellant.*

Case No. 7808

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## BRIEF OF RESPONDENT

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# In the Supreme Court of the State of Utah

STATE OF UTAH,

*Respondent,*

— vs. —

VIRGIL THOMAS,

*Appellant.*

Case No. 7808

## BRIEF OF RESPONDENT

### STATEMENT OF FACTS

Virgil Thomas, defendant and appellant herein, was convicted of the crime of burglary in the third degree arising out of the burglary of a car belonging to one Edward Underwood, whereby certain tools contained in the glove compartment of the car were stolen. The burglary occurred on August 15, 1950, sometime between the hours of 7:00 o'clock A.M., and 12:00 o'clock noon. The

crime was not reported until August 16, 1950. At approximately 12:00 o'clock noon on the 15th of August, 1950, Officer Wilson A. Allen, of the Ogden City Police, received a call to proceed to the National Tavern, 25th Street, Ogden City, to check "Slick" Thomas, "he was trying to sell some tools." (Tr. 21) Defendant was arrested with the tools in his possession, later identified as those stolen. The evidence shows defendant made explanations of his possession of the stolen tools at the time of his arrest and again at the trial, and that they were not consistent. (Tr. 22, 33, 34) A trial was had before a jury, defendant was convicted and he appeals.

## STATEMENT OF POINTS

### I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT OF NOT GUILTY.

### II.

THE TRIAL COURT PROPERLY REFUSED TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL.

## ARGUMENT

### POINT I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT OF NOT GUILTY.

It is proper for the trial court to refuse to direct a verdict when the determination of guilt depends upon

the credibility of witnesses or the evidence is sufficient to overcome the presumption of innocence. The trial court is not justified in directing a verdict when disputed facts would support more than one conclusion, or where, admitting all the facts for the purposes of the motion and giving them a reasonable construction in favor of the party against whom the motion is directed, it appears that the evidence is not such that reasonable men would not differ. Where the case is a close one on the evidence a directed verdict should be refused. A directed verdict should not be given upon a mere preponderance of the evidence. 53 Am. Jur., Trial, § 362, 363, 365; 17 ALR 917, 918, 930.

At page 10 of Appellant's brief it is admitted the State did prove a burglary had been committed and that property was thereby stolen. The corpus delicti was therefore established. State v. Kinghorn, 109 Mont. 22, 93 P. 2d 964, 968. The stolen property was identified by uncontroverted testimony (Tr. 11, 12, 19), as the same found in possession of defendant at the time of his arrest. (Tr. 22, 23)

Defendant attempted to explain his possession of the burglarized property on two occasions. (Tr. 22, 33, 34) These explanations were contradictory. If defendant's explanation is to serve him to advantage it is necessary that it be *satisfactory*. This court, in the case of State v. Brooks, 101 Utah 584, 126 P2d 1044, 1046, sets forth the tests an explanation of stolen property has to meet before it will be considered satisfactory.

“\* \* \* Webster defines satisfactory as: Releaving the mind from doubt or uncertainty; yielding content; adequate for the purpose; serving to allay the demands of a challenger or questioner. See, also, Shriver v. Union Stock Yards National Bank, 117 Kan. 638, 232 P. 1062, 1066. It is a statement which enables the mind to rest thereon with confidence. Pittman v. Pittman, 72 Ill. App. 500; State v. Trosper, supra. *It is satisfactory when of such a nature that a court or jury, as men of ordinary intelligence, discretion, and caution, may repose confidence in it.* Jackman v. Lawrence Drilling & Development Co., 106 Kan. 59, 187 P. 258. 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. American Freehold Land Mtg. v. Pace, 23 Tex. Civ. App. 222, 56 S.W. 377; sufficient for a reasonable person acting in good faith, Secklir v. Penny, 148 Misc. 807, 266 N.Y.S. 327. Adequate and sufficient to convince a reasonable person; sufficient to produce a belief that the thing is true or to justify the court in adopting the conclusion in support of which it is adduced. Walker v. Collins, 8 Cir. 59 F. 70, 8 C.C.A. 1; and to cause a reasonable person under all the circumstances to believe in its sufficiency; it is such an explanation that the court is persuaded in its own mind thereby, that the possession is lawfully accounted for.” (Italics added)

In commenting on the effect of an explanation of stolen property found in the possession of a defendant the court further states:

“Where defendant’s explanation is not such as to meet these requirements, is not such as to



persuade the mind of the court to repose sufficient confidence therein, to relieve the mind from doubt or uncertainty and allay the question or doubt in the mind of the court, it is proper to submit the cause to the jury, to determine, not the satisfactoriness of defendant's explanation but the question of his guilt in the light of all the evidence *including his explanation if he made any.*" (Italics added)

It is respectfully submitted that defendant's explanation of his possession of the stolen property is not one in which the mind of the court could repose confidence. Indeed, the circumstances under which defendant was arrested and his conflicting explanations tend to prove his guilt. Officer Allen testified he received a call to go to the National Tavern and check "Slick" Thomas, "he was trying to sell some tools." (Tr. 21) At the time of his arrest defendant's testimony was evasive, and contradictory of his later story. (Tr. 22)

"OFFICER ALLEN: \* \* \* when I pulled up with the police car, the defendant was standing in front of the National Tavern, right in front, I think, with three other fellows, by a meter post, and as I got out of the car I seen he had something in his hand, in his arm, and he shoved it under his coat as I got out of the car. I walked over and asked what he had, and he stated he had a jug. I said, 'Let's see what you got, Virg?' He said, 'I got a jug.' I opened his coat and these tools fell out. They were in a torn blue bedspread, a piece, that had the tools in this. I said, 'Virg, this don't look look much like a jug to me.' He didn't have much to say. I asked where he got them, and he said, 'I got them down to his place.'

I asked where his place was and he said, 'You know where my place is.' He finally told me, 'His mother's place.' I went and checked the story he got them at his home and found he hadn't got them there. \* \* \*."

This is a piece of the same blue bedspread proved to be at the scene of the crime. (Tr. 10, 11, 12)

In court defendant came forward with a story that the tools were given him by a friend. On direct examination defendant testified as follows: (Tr. 33)

"Q. In your own words I would like you to tell the jury how you came into possession of the tools?

A. Well, a friend of mine came over and handed them to me and as soon as he handed them to me I was arrested by Officer Allen. I didn't know what they were but he wanted sixty-five cents for the tools."

The eye-witness testimony of Officer Jacobsen places the tools in defendant's exclusive possession before the time defendant says they were handed to him by his friend. The Officer's testimony on direct examination reveals: (Tr. 50-51)

"Q. Alright, tell the court and jury the circumstances under which you saw the defendant.

A. I just came out of the Eagle Clothing from purchasing a 'T' shirt.

Q. Where is that in relation to the National Tavern?

A. I would say three or four doors west, approximately. I was just going to get in my car, and I was advised by a person that Mr. Thomas,—

“Mr. GLASMAN: I object to that as hearsay.

“THE COURT: Objection sustained.

“A. After I got in my car I noticed Mr. Thomas come out of the National Tavern, at this time he had a bulge under his coat, and as he reached the sidewalk, he was right about to the middle of the sidewalk he dropped a wrench, and the falling of this wrench, I noticed it, and he looked at me and made some remark, I don't just recall what it was, and due to the information told to me before that, I immediately went down to George's Cafe, where I called and asked if we had any tools missing, and I was informed by the desk sergeant that information could be received from Officers Allen and Mitchell the patrol car detail and I was advised to give them the information that I had.

Q. What did you do?

A. I waited in front of the Cafe a short time and Mr. Allen came down and picked up Mr. Thomas.

Q. Did you have occasion to observe Roy Allen, the man who just testified?

A. Yes sir, he was coming from the direction of the west, as I went to my car I noticed him coming. A person called to me and that is how I noticed him, he was a short distance between this fellow, Mr. Allen came up and

joined approximately four fellows, I wouldn't say the number, but Allen came up and talked to those men.

Q. Did you observe the group conversing prior to the time Officer Allen arrived?

A. Yes sir.

Q. Did you observe any package given to the defendant?

A. No sir, not while he was on the sidewalk or any other time."

Officer Jacobson established the time elapsing between the first time he saw defendant and defendant's arrest to be seven to ten minutes "not over ten minutes." (Tr. 54) At another point in the record defendant testified he was arrested within "two minutes" after he handed them (the tools) to me." (Tr. 34)

Certainly, these inconsistencies in defendant's story and the contradictory circumstances do not supply a *satisfactory explanation*, nor are they consistent with *innocence*.

This court, in *State v. Kinsey*, 77 Utah 348, 295 P. 247, 249, said:

"\* \* \* Possession of articles recently stolen, when coupled with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unreasonable or unsatisfactory explanations of the possession may be sufficient to connect the possessor with the commission of the offense."

The instant case presents culpatory circumstances which were not present in the Kinsey case. Gransbury v. State, 64 Okla. Crim. Rep. 408, 81 P2d 874, 876, 877, supplies an interesting detail. There defendant was arrested four miles from the scene of the burglary within a few hours after the crime had been committed. Not only possession of the burglarized wheat was proved, but a board which was shown to have been at the scene of the burglary was found on defendant's truck. The conviction of burglary in the second degree was sustained.

The record in this case shows the stolen property in the possession of defendant, within a short distance from the scene of the burglary, within five hours from the time complaining witness parked his car, and before the burglary came to his attention; further, defendant had in his possession, wrapped about the stolen tools, a piece of blue bedspread torn from that which complaining witness used as a seatcover. (Tr. 9, 10, 11, 12)

That recent possession of burglarized property creates an inference of fact to be considered by the jury with all other circumstances, in determining the guilt or innocence of accused is supported by State v. Tucker, 36 Ore. 291, 61 P. 894, 51 LRA 247. Payne v. State, 21 Tex. App. 184, 17 S.W. 463, holds that recent possession of stolen property should be considered by the jury whether defendant gave any explanation or not. See further State v. Royce, 38 Wash. 111, 80 P. 268. In People v. Taylor, 40 P. 2d 870, 4 Cal. App. 2d 214, it was held that the truth of defendant's explanation as to how he

came into possession of the stolen property is a question for the jury. In addition, the court said, at page 871:

“\* \* \* Flight, false statements showing consciousness of guilt, or as to how the property came into defendant's possession, assuming a false name, inability to find the person from whom defendant claimed to have received the property, have each in turn been held to be sufficient to connect the accused with the crime when proven in connection with possession of the stolen property. (Citing cases.)”

This court has repeatedly adopted the position that unless there is no evidence to support the verdict the determination of the jury will not be disturbed on appeal. *State v. Halford*, 17 Utah 475, 54 P. 819; *State v. Webb*, 18 Utah 441, 56 P. 159; *State v. Endsley*, 19 Utah 478, 57 P. 430. See also *People v. Willard*, 150 Calif. 543, 89 P. 124, 128, where the Court said:

“\* \* \* This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury.”

The evidence adduced by the State connecting the defendant with the crime was direct, substantial, and clearly sufficient to warrant submission to the jury, and to authorize the jury to find as they did.

Respondent respectfully submits that in view of the circumstances connecting defendant with the burglary,

the failure of defendant to satisfactorily explain his possession of the stolen property, and the necessary reliance on the credibility of witnesses to determine defendant's guilt, the trial court properly refused to grant appellant's motion for a directed verdict. Indeed, a view of all the facts makes mandatory a conclusion they are not consistent with the idea that defendant's possession was innocent; therefore defendant's guilt or innocence became a fact for the jury.

It is further submitted that the evidence, both circumstantial and direct, to be found in the record, unquestionably supplies sufficient evidence upon which the verdict of guilty may rightfully rest.

## POINT II.

### THE TRIAL COURT PROPERLY REFUSED TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant states three grounds to support his motion for a new trial. They are: (1) insufficiency of the evidence to warrant submission of the case to the jury; (2) insufficiency of the evidence to support the verdict of guilty; (3) misconduct of the Assistant District Attorney. Appellant has chosen to argue the third ground only. We think alleged grounds one and two raise no issues not dealt with under Point I of respondent's brief, and respondent respectfully submits there is substantial evidence in the record to establish the negative of these two propositions; therefore our argument here will be directed to the third ground only.

The particular act of the prosecuting attorney alleged as a grounds for a new trial in his purported threat to prosecute defendant's witness, Roy Allen, if he did not tell the truth. This, it is claimed intimidated the witness to the point of adversely influencing the manner in which the witness gave his testimony before the jury.

This meeting between the prosecutor and Witness Allen took place outside the court room, away from the jury, and before the afternoon session of the court was called to order. (Tr. 036-5, 6) There is no allegation that the testimony of this witness was any different after the meeting with the prosecutor than it would have been before, and the testimony he did give was substantially the same as that given by another of defendant's witnesses, Francis W. Stoddard. (Tr. 26-30, 41-43)

A like problem is dealt with in the case of *Henwood v. People*, 57 Colo. 544, 143 P. 373, 380, Ann. Cas. 1916A 1111. There the District Attorney, in a published interview said he was "going to see to it" there was no perjured testimony. Appellant in a motion for a new trial alleged intimidation of the defense witnesses. The court, in passing on the issue, had this to say:

"\* \* \* we think it must affirmatively appear that defendant was prejudiced thereby, before such matters can be said to constitute error, and in the absence of such showing the claim made that he was is purely speculative. Moreover, it is apparent, that from the statement published, that it only referred to witnesses testifying falsely. Such a statement could not have frightened an honest witness \* \* \*."



To the same effect is the case of *State v. Williams*, 124 La. 779, 50 So. 711, where the District Attorney, before trial asserted he would have witnesses arrested for perjury if they did not tell the truth. The court refused to regard this as misconduct substantially affecting the rights of the accused.

We respectfully submit that unless it is made to appear that defendant has been prejudiced and deprived of a substantial right a new trial should not be granted where an examination of the entire record reveals that defendant had a fair and impartial trial, and his conviction is supported in law and in fact.

## CONCLUSION

Respondent respectfully submits that a review of the transcript and proceedings in this case discloses ample and sufficient evidence to sustain the conviction of appellant of the crime of third degree burglary. That the alleged misconduct of the prosecuting attorney was not such as to prejudice defendant's right to a fair and impartial trial. The conviction should be sustained.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.