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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 16412
-vs-	:	
KEITH WILBURT MURPHY,	:	
Defendant-Appellant.	:	

APPELLANT'S BRIEF

Appeal from a Judgment of the Fifth District Court of Iron County, State of Utah, the Honorable Robert F. Owens, Judge pro tem, presiding.

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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. KEITH WILBERT MURPHY, Defendant and Appellant.	Case No. 16412

****

APPELLANTS' BRIEF ON APPEAL

****

STATEMENT OF NATURE OF CASE

Appellant, Keith Wilbert Murphy, was accused of having committed the crime of Receiving Stolen Property when he was found sleeping in a motor vehicle on Nov. 22, 1978.

The case was tried in the District Court of Iron County, State of Utah before the Honorable Robert F. Owens, Judge pro tem, sitting with a jury.

A verdict was returned by the jury, finding appellant, Keith Wilbert Murphy, guilty of having committed the crime of Receiving Stolen Property.

DISPOSITION IN THE LOWER COURT

Keith Wilbert Murphy, appellant, was sentenced an committed to the Utah State Prison to serve a term of not less than one (1) year nor more than fifteen (15) years

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by the Honorable Robert F. Owens, Judge pro tem, and appellant has undertaken this appeal to the Supreme Court of the State of Utah.

RELIEF SOUGHT ON APPEAL

Appellant, Keith Wilbert Murphy, seeks a revesal of the judgment entered by the court and have the District Court ordered to enter a judgment of not guilty notwithstanding the jury verdict or a new trial.

STATEMENT OF THE FACTS

NOTE: The court record, herein R- , includes the trial transcripts. Page 19, of the record, R-19, consists of 69 sub-pages. Page 20 of the record, R-20, consists of 22 sub-pages.
All sub-pages will be referred to as R-19- and R-20-

Detective Houchen, a Cedar City Police officer, (R-19-13) while looking for a van supposedly to have been stolen (R-19-17) saw appellant on Nov. 22, 1978, near the southeast corner of 400 North and 800 West in Cedar City (R-19-14). At that time the appellant was in the back of a brown dodge van (R-19-14) at the rear of some apartments on 400 North 800 West (R-19-15). The appellant appeared to the officer to be asleep on his back in the van (R-19-15). The van was mostly empty except for the appellant, a small matress, some beer and a couple of cassette tapes (R-19-15).

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Detective Houchen arrested the appellant and advised him of his miranda right. (R-19-19).

The appellant, when questioned stated that a friend by the name of Mike let him sleep in the van (R-19-21).

During trial it was stipulated: that if Rick Rose, an employee of U & S Motor Company, Cedar City, Utah, were called he would testify the van was missing from U & S Motor Company parking lot just north of the JB's Big Boy Restrauant in Cedar City on or about November 19, 1978 (R-19-32).

Before trial, defense counsel stipulated that a foundation would not have to be laid for certain documents which relating to the van in order to show exactly which vehicle the appellant had been found in (R-20-3). Said documents included Plaintiff's Exhibits 1 and 2 (R-19-33).

Lori Pledger, appellants girlfriend, testified that she knew the appellant (R-19-17), that she said he was driving "his van" (R-19-51), two days before the appellant was arrested (R-19-49), and that the appellant drove her home (R-19-51, R-19-54).

The state then rested (R-19-56) with no testimony at all regarding any right of ownership or possession of the van (R-19-56).

A motion to dismiss was made by defense counsel claim-

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ing that the State had failed to sustain the elements in the information.(R-19-56).

Counsel pointed out that there was no evidence or testimony at all showing that the van belonged to U & S Motor Company. (R-19-56)

The court itself asked the State to comment on the fact that the information stated that the van belonged to U & S Motor Company and that the proof showed it belonged to Robertsons (R-19-59).

The court, without any request from the prosecution, asked the prosecutor if he was going to amend the information to conform with the evidence (R-19-59).

Mr. Shumate moved to amend the information to "strike U & S Motor Company and amend to Robert and Raina Robertson" (R-19-59).

Defense counsel objected and pointed out to the court that "all the evidence shows is that the appellant was driving this van around on the case in chief"(R-19-59,60).

The court asked if the appellant would be prejudiced by the amendment and defense counsel answered yes (R-19-60) and pointed out the fact that when the appellant was arrested, the van was parked next to the registered owners address at 400 West 800 North (R-19-60), see Plaintiffs Exhibit No. 1, and that counsel was in a good position to

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not put on any evidence and argue the matter to the jury without putting on the appellant (R-19-61).

The state argued that it didn't have to show who owned the van, just that it was stolen (R-19-58) no testimony was given by the States witness that the van was stolen.

The court allowed the state to reopen to amend the information to "strike U & S Motor Company and amend to Robert and Raina Robertson (R-19-61).

At time of trial, the state had in its possession a bill of sale showing that U & S Motor Company owned said van (R-20-4,5). See Defendant's Exhibit No.1 (R-18).

Said bill of sale shows that the Robertsons had sold all interest in said van July 29, 1978, several months before the complaint was filed (R-1).

The appellant had been bond over in a preliminary hearing in which ownership by U & S Motor Company was claimed (R-2).

The State went to trial with the intention of proving ownership of the van by U & S Motor Company (R-20-6).

The State did not inform the court that U & S Motor Company actually owned the van and that Robertsons had no interest in it when the State made its motion to amend the information to show that the Robertsons owned said van.

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Following the amendment to the information, the defendant testified on his behalf and was convicted of the charge as set forth in the information.

ARGUMENT

POINT I.

THE COURT'S ACTIONS BY DENYING APPELLANT'S MOTION TO DISMISS AND SUGGESTING TO THE PROSECUTION TO AMEND THE INFORMATION BASED UPON THE ARGUMENT OF DEFENSE COUNSEL PLACED THE APPELLANT IN THE POSITION OF HAVING THREE PROSECUTORS: THE STATE, THE COURT, AND HIS OWN DEFENSE COUNSEL, AND THEREFORE DENIED APPELLANT THE RIGHT TO EFFECTIVE COUNSEL.

The record clearly shows that the state had failed to establish a prima facie cause of action in its case in chief in that there was no testimony at all to show that anyone had possessory right of the van except the appellant himself, or that the van was stolen or believed to be stolen by the appellant.

When appellant's counsel moved to dismiss against the appellant for failure to establish a prima facie case, the court should have granted said motion. Instead, the court recognized the "variance between the proof and information" (R-19-58,59) when it stated:

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"The information states the vehicle
belonged to U & S Motor Company.
The proof shows it belongs to Robertson" (R-19-59)

and then the court without ruling on appellant's motion asked the prosecutor, Mr. Shumate, "Are you going to move to amend the information to conform with the evidence, Mr. Shumate" (R-19-59).

Thus appellant's counsel by making his motion for judicial expediency, in fact, became a prosecutor helping the State by exposing the failure of the State to put on a prima facie case. Had appellant's counsel also rested he could then have argued to the jury the ridiculous variance between the information and the proof and wasted valuable court time.

Appellant had a right to be represented by effective counsel during trial. Parker vs. North Carolina, 397 U.S. 790 (1970) How can counsel be effective when information in an appropriate motion to dismiss is used as an incentive by the prosecution to move to amend and the court allows such motion before acting on said motion to dismiss.

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POINT II.

APPELLANT WAS NOT ALLOWED REASONABLE TIME TO MEET THE NEW MATTER SET UP IN THE AMENDED INFORMATION AND THE APPELLANT WAS NOT FAIRLY TREATED BY THE PROSECUTION.

When an amendment of an information is allowed during trial the court is required under Section 77-17-3, Utah Code Annotated, 1953 as amended to give a defendant reasonable time to meet the new matter.

When the court, on its own initiative asked the state prosecutor if he wanted to amend the information after the state had rested, the appellant objected and explained how he would be prejudiced if the amendment were made (R-19-60,61).

The record shows that from the beginning, by the complaint and by the preliminary hearing, the State alleged ownership of the van by U & S Motor Company (R-1, R-2). Not until the state rested and it was pointed out in appellant's motion that the state never put on any proof of ownership by U & S Motor Company did the state try something very strange, to wit: ask the court to amend the information to show new owners of the alleged stolen van when the state prosecutor had every reason to believe that U & S Motor Company still owned said van (R-20-4,5,6).

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Appellant received for the first time on March 15, 1979, a copy of an automobile bill of sale purporting to show that U & S Motor Company had purchased said van from the Robertsons months before the complaint was filed. Said copy of bill of sale was provided by the state and represented to be a true and correct copy of the original (R-20-5) to which the state agreed.

The above information and copy of bill of sale, appellant Exhibit No. 1 was presented to the court before sentencing (R-20) when the appellant objected to sentencing being held (R-20-2), and renewed his motion to dismiss notwithstanding the jury verdict.

The prosecutor for the State admitted that he had come to trial with the intention of showing ownership of the van by U & S Motor Company (R-20-6).

Had more time been allowed to meet the amended information, appellant could have been able to obtain the orginal bill of sale and witnesses to show that the Robertsons did not have any interest in the van as shown by said bill of sale.

Had the prosecutor informed the court, at the time of his motion to amend, that he had a bill of sale showing showing that the Robertsons had no interest in the van, surely, the court would not have allowed the amendment.

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A prosecutor is under an obligation to treat the defendant fairly and he cannot wilfully surpress evidence favorable to the appellant for purposes of obtaining a conviction State v. Adams, 583 P.2d 89 (Utah 1978). The prosecutor breached his obligation to tell the court that the Robertsons had no interest in the van when he made his motion to amend.

POINT III

APPELLANT WAS ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL AT CLOSE OF STATES CASE BEFORE THE INFORMATION WAS AMENDED

The state has a burden of proving each and every element of the offense and if it fails to do so the defendant is entitled to an acquittel. State v. Housekeeper, 588 P.2d 139 (Utah 1978).

No evidence during the States case in chief was ever introduced to show that the alleged stolen van was ever in fact stolen. No one testified, that the van was stolen or that the appellant believed the van to be stolen.

A critical element of the crime of theft by receiving stolen property is that the accused knows or believes that property probably has been stolen. Section 76-6-408, Receiving Stolen Property, Utah Code Annotated, 1953 as amended.

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The general rule is that on the trial of a criminal prosecution the court may take the case from the jury for want of sufficient proof to establish the guilt of the accused. 75 Am Jur 2d, TRIAL, Section 436, p.467.

Therefore, when the state rested the first time, evidence of the elements of the alleged crime were missing so that no question for the jury was involved and the court had a duty to withdraw the case from the jury.

> It is the duty of the court to take the case from the jury where no question for the jury is involved. To continue such a contest before a jury is subversive of the public interests, is promotive of no right of either party and may be pernicious as to deny to a citizen his right to trial by jury. 75 Am Jur 2d, TRIAL, Section 431, page 465.

The court should have granted appellant's motion to dismiss and a directed verdict of not guilty.

POINT IV

THE APPELLANT WAS ENTITLED TO HAVE HIS MOTION FOR NEW TRIAL GRANTED AND THE COURTS DENIAL WAS PREJUDICAL ERROR.

Appellant made a motion for a new trial (R-20-11) before sentencing based upon the fact that the State's prosecutor, Mr. Shumate, did not inform the court that the Robertsons had not owned the van for months prior to the

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time the appellant was found sleeping in it.

The court denied the motion (R-19-12) and appellants counsel made an offer of proof for the record as follows:

THE COURT: You may state an offer of proof for the record, at this time.

MR. BOUTWELL: Okay. I would expect that if Mr. Shumate was called to the stand and sworn that he would testify that he is the County Attorney of Iron County, duly elected. That in the case of the State of Utah versus Keith Wilburt Murphy, Criminal No. what is the number, your Honor?

THE COURT: Number 681.

MR BOUTWELL: -- number 681, that when this case came to trial, after being duly noticed on February 15th, that the State had every intention to proceed to show that this vehicle had been stolen or taken from the possession of the US Motor Company and to show that US Motor Company was the legal owner. That, in fact, the State had in its possession during the trial an original bill of sale from US Motor Company -- excuse me, strike that -- from the Robertsons to US Motor Company. That the State was unable to prove that evidence and therefore did not prove that the US Motor Company was the valid

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owner because the State had not and had failed to bring forward the witnesses to show this transaction had occurred. And that the State had every reason to believe that it had occurred and that the US Motor Company was the only person who had any interest in that vehicle. That following the end of the trial and the defendant's motion to dismiss because the State had failed to show that anyone but the defendant had possession of that vehicle, that the State moved to reopen and amend the complaint to show that the Robertsons were the legal owners when in fact the State believed that it was the US Motor Company who owned this car. And that the State failed to inform the Court of its belief and of its possession of this bill of sale. And that is what I would expect to prove if we called Mr. Shumate to the stand.

THE COURT: The record may show your proffer.

The record also shows that the court refused to let appellant make a proffer by calling the prosecutor, Mr. Shumate, to the stand, and instead instructed the appellant to make a verbal proffer (R-20-13).

If there is reasonable likelihood that in absence of error, there would have been a different result, error

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should be regarded as prejudicial. State v. Howard, 544 P. 2d 466 (Utah 1978).

If the court had not allowed the information to be amended, there certainly would have been a reasonable likelihood that the trial would have ended with a different result. First, there had been no evidence presented at trial that U & S Motor Company had any interest in the van, Second, the defendant would not of had to testify, Third, the address on the title documents in evidence and the location where the appellant was found sleeping was the same 400 West 800 North, Cedar City, Utah. Fourth, no evidence had been presented that the appellant did not have a possessory right to the van, Fifth, the appellant argument to the jury would have shown the above with a predictably favorable result.

The court was fully appraised that in all likelihood that the information stated an impossibility and it was prejudicial error not to allow a new trial.

CONCLUSION

Because the appellant was not fairly treated by the State prosecutor at trial and the court failed to correct the injustice the District Court should be ordered to enter a judgment of not guilty notwithstanding the jury

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verdict or in the alternative order that the appellant be given a new trial.

Respectfully submitted,

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