

1979

## State of Utah v. Keith Wilburt Murphy : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
16412

KEITH WILBURT MURPHY, :

Defendant-Appellant. :

----- 1 -----  
BRIEF OF RESPONDENT  
-----

APPEAL FROM A JUDGMENT OF THE JUDICIAL DISTRICT COURT, IN AND FOR KANE COUNTY, STATE OF UTAH, THE COURT OF ROBERT F. OWENS, JUDGE PRESIDING.

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FILED

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IN THE SUPREME COURT OF THE

STATE OF IOWA

STATE OF IOWA

APPELLANT

Case No.  
10412

STATE OF IOWA

APPELLEE

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE FIFTH  
JUDICIAL DISTRICT COURT, IN AND FOR THE  
COUNTY OF IOWA, THE HONORABLE  
ROBERT E. OWENS, JUDGE PRO TEM, PRESIDING

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

- - - - - : - - - - -

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs-

:

Case No.  
16412

KEITH WILBURT MURPHY, :

Defendant-Appellant. :

- - - - - : - - - - -

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by complaint and information with one count of possession of a stolen vehicle, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury before the Honorable Robert F. Owens in the Fifth Judicial District Court for Iron County and found guilty as charged on February 15, 1979. Following a pre-sentence report, a sentence of one to fifteen years in the Utah State Prison was imposed.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court conviction and sentence.

## STATEMENT OF THE FACTS

On November 11, 1978, while searching for a stolen van, police discovered appellant at 400 North 800 West in Cedar City sleeping in the rear of a brown 1975 Dodge van which matched the description of the vehicle they were looking for (R. at 19: 13-15, 17-18).<sup>1</sup> Appellant was awakened and then arrested (R. at 19: 16, 19). He was immediately advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (R. at 19: 19). Appellant claimed when he was arrested that his friend "Mike" allowed him to sleep in the van but would give no explanation of who "Mike" was or where he could be reached (R. at 19: 21-22). The keys to the van were in the ignition although it was apparent that the lock had been tampered with since the ignition switch came out with the keys (R. at 19: 23-26).

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1 Two transcripts are included within the record on appeal (R). They are numbered separately from the rest of the record and will be referred to by page number as R. at \_\_:\_\_, the first number representing the page of the record at which the particular transcript begins and the second number representing the page of the transcript referred to.

Lori Pledger also testified that she had seen appellant with the van several days before he was arrested (R. at 19: 49). It was stipulated that appellant had been driving the van in which he was arrested (R. at 19: 50).

It was also stipulated that the van in which appellant was found had been missing from the U & S Motor Company parking lot for three days (R. at 19: 32-33). A Utah vehicle registration card and certificate of title were introduced and were stipulated to pertain to the brown van in question (R. at 3, 19: 33). Officer Houchen testified that he had contacted Robert Robertson, shown on the title as owner of the van (R. at 19: 42).

Following the presentation of the state's evidence, appellant moved to dismiss the charges claiming that the state had failed to prove all the elements of the crime. The motion to dismiss was denied and the state was allowed to amend the information to conform to the evidence in that Robert and Raina Robertson were shown as the owners of the van, not the U & S Motor Company as the information had originally stated.



Defendant then testified, although his testimony was not made a part of the record on appeal.

After deliberating, the jury found appellant guilty as charged of receiving stolen property. Following a pre-sentence report, appellant was sentenced to a term of one to fifteen years in the Utah State Prison.

#### ARGUMENT

##### POINT I

APPELLANT'S MOTION TO DISMISS WAS PROPERLY DENIED SINCE THE STATE HAD ESTABLISHED A PRIMA FACIE CASE.

Utah Code Ann. § 76-6-408 (1953), as amended, provides:

A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen. . . .

The elements may thus be stated as:

- (1) the actor must receive, retain, or dispose of the property of another; and
- (2) the actor must know the property has been stolen or believe the property to probably have been stolen.

The evidence in the instant matter indicated that appellant had been driving the van several days before his arrest (R. at 19: 49). Appellant was sleeping in the van with the keys in the ignition the morning he was arrested (R. at 19: 14-15, 23). In spite of his assertion that his friend "Mike" had allowed him to sleep in the van, appellant would give no indication as to who "Mike" was or where he could be reached (R. at 19: 21-22). There was certainly enough evidence to reasonably infer that appellant retained or possessed the van.

It was stipulated that the van had been missing for three days (R. at 19: 32-33). In Barnes v. United States, 412 U.S. 837, 839-840 (1973), the United States Supreme Court approved of the following jury instruction:

. . . possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence of the case, that the person in possession knew the property had been stolen.

The Court also noted:

In the present case we deal with a traditional common-law inference deeply rooted in our law. For centuries courts have instructed juries that an inference may be drawn from the fact of unexplained possession of stolen goods.

Id. at 833.

The Utah Supreme Court has also noted:

. . . it is a fact of life that one in possession of stolen property who makes no explanation as to how he came to be in possession is apt to be under some adverse consideration as to his honesty; and if he has an explanation as to how he innocently came into possession of the stolen property, he would certainly improve his situation by giving his account of how it happened to the jury.

State v. Burr, 579 P.2d 331, 334 (Utah 1978).

Although the holding of the Court in State v. Burr was that a defendant need not put on affirmative evidence to rebut a presumption created by his possession of stolen goods, it does not go so far as to rule out the type of inference allowed in Barnes v. United States supra. Appellant's unexplained possession on several occasions of the van which was stipulated to have been missing for several days plus the fact that the ignition lock had been tampered with all could have reasonably

indicated to the jury that appellant knew the van was or probably was stolen.

In a similar case, the Wyoming Supreme Court noted that the widely accepted rule is that possession of recently stolen goods alone is damning evidence of guilt. Russell v. State, 583 P.2d 690, 695 (Wyo. 1978). That court also held:

When the State introduces evidence on its case-in-chief from which the jury may properly infer the essential elements of the crime, the State has then made out a "prima face case," impregnable against a motion for acquittal.

Id. at 695.

In the instant matter the State had clearly presented evidence from which the jury could have inferred the elements of the crime charged. Consequently, the lower court acted properly in denying appellant's motion to dismiss.

POINT II.

THE LOWER COURT DID NOT ERR IN ALLOWING AN AMENDMENT TO THE INFORMATION AT THE CLOSE OF THE STATE'S CASE AND REFUSING TO ALLOW APPELLANT MORE TIME TO MEET THE AMENDED INFORMATION.

Utah Code Ann. § 77-17-3, (1953, as amended), provides:

An information may be amended, without leave of court, in any matter of form or substance at any time before the defendant pleads thereto. It may also be amended in any matter of form or substance, by leave of court, at any time after the defendant has pleaded to the merits, or during the trial. In case an amendment is allowed after a plea or during the trial, the court shall give the defendant such reasonable time as may be necessary to meet the new matter set up in the amendment . . . (emphasis added).

This Court considered this statute in State v. Rohletter, 100 Utah 452, 160 P.2d 963, 964, (1945):

Section 105-17-3, Utah Code Ann., (1943), governs amendments in criminal cases. It provides that an information may be amended with leave of the court as to matter of substance or form during the trial. However, in State v. Rickenburg, 58 Utah 270, 198 P.2d 767 (1921), we held that under this statute no amendment could be made which would essentially alter the nature of the case, so to prejudice the defendant in making his defense. This was affirmed in State v. Caputo, 69 Utah 266, 254 P. 141 (1927).

See also State v. Sommers, Utah No. 16016, filed July 6, 1979. A recent Illinois case has also indicated that:

Variance between allegations of a charge and evidence which can affect a criminal trial are limited to differences between the pleading of essential elements of a crime and the proof . . . (cites omitted) . . . To vitiate a criminal trial, however, a variance must be material and of such character that it mislead a defendant in the making of his defense or exposes him to double jeopardy . . . . The variance must result in substantial injury to a defendant either by causing a jury to be misled or by hindering the defendant in the intelligent presentation of his case. . . . Where property of another is involved, a variance between allegations of ownership and proof is not fatal if evidence shows that rights of possession and ownership of the property are in some person, legal or natural, other than the defendant. . . .

People v. Bristow, 8 Ill. App. 3d 798, 291 N.E. 2d 189, 192 (1972).

Under Utah Code Ann. § 77-21-8 (1953), as amended, all an information is required to state is the name of the offense, the statutory designation of the offense, or the basic definition of the offense with which the defendant has been charged. Consequently, an information for receiving stolen goods does not need to identify who actually owns the property in question under Utah Code Ann. § 77-21-16 (1953, as amended), which states:

An information or indictment need contain no allegation of the ownership of any property, unless such allegation is necessary to charge the offense under section 77-21-8.

Moreover, Utah Code Ann., § 77-21-20, states: "An information or indictment need not state any matter not necessary to be proved." The elements of receiving stolen property do not include specific ownership of the property, only if that ownership is with someone other than the defendant. Since ownership of the van was not a necessary allegation in the information, any allegation to that effect can be regarded as surplusage. (Utah Code Ann. § 77-21-42 (1953), as amended: "Any allegation unnecessary under the existing law or under the provisions of this chapter, may, if contained in an information, indictment, or bill of particulars, be disregarded as surplusage.")

A change in a portion of the information which was surplusage could hardly be characterized as changing the nature of the case. The same property was still alleged as having been received; the same crime was still charged; the same proof was still relied upon to establish the elements of the crime. It had already been stipulated that the van had been missing from the U & S Motor parking lot for three days (R. at 19, 32-33). It was apparent that the van did not belong to the defendant. The change of the

alleged identity of the owners of the van to conform to the proof did not alter appellant's case.

Additional support for the lower court's action in allowing the prosecution to amend the information following the presentation of its case is found in Utah Code Ann., § 77-21-43 (1953, as amended):

. . . (2) No variance between those allegations of an information, indictment or bill of particulars, which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the defendant. The court may at any time cause the information, indictment or bill of particulars to be amended in respect to any such variance, to conform to the evidence.

(3) If the court is of the opinion that the defendant has been prejudiced in this defense upon the merits by any such defect, imperfection or omission or by any variance the court may because of such defect, imperfection, omission or variance, unless the defendant objects, postpone the trial, to be had before the same or another jury on such terms as the court considers proper. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution.

(4) No appeal, or motion made after verdict, based on any such defect, imperfection, omission or variance shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits.  
(emphasis added).



The lower court considered appellant's motion to dismiss and objection to the variance and found no prejudice. The effect of the change was to make appellant feel compelled to testify (Appellant's Brief at p. 14), and to take away his argument that the state had failed to show ownership in someone other than appellant. Neither of these effects would so substantially prejudice appellant as to require reversal or a new trial.

Appellant also claims the prosecutor acted in bad faith in withholding a bill of sale showing that the van in question had been sold by the Robertsons to U & S Motor Company (R. at 18). A consideration of the bill of sale and the certificates of title (R. at 3), indicates that who had legal title was in doubt. As has been noted above, it made no difference to the state's case who had title to the van. The state needed only to show that the van was missing from someone. The change in the information did not undermine any affirmative defense of appellant.

The bill of sale was not evidence "favorable to appellant." Appellant claims that had he been given more time, he could have obtained the bill of sale and other witnesses and shown that U & S Motor Company owned the van, the Robertsons (Appellant's brief at p. 9). It is difficult to see how this would have helped appellant. It would simply have made the fact that the van had been stolen more explicit.

There was no reason to have delayed the trial or to have disallowed the change. Consequently, the trial court acted properly in allowing the amendment to the information at the close of the state's case and refusing to allow more time for appellant to meet the amended information.

#### CONCLUSION

Appellant's motion to dismiss at the close of the state's case was properly denied since the state had made out a prima facie case of receiving stolen property. There was no error in allowing the information to be amended to conform to the evidence since the portion changed was surplusage and did not change the nature of the offense charged. Moreover, appellant's case was not prejudiced by the change. Appellant was not harmed by the failure of the prosecutor to introduce evidence since the evidence was not clearly favorable to him and was not central to the elements of the crime charged.

Accordingly, the conviction and sentence of the lower court should be affirmed.

Respectfully submitted,

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