

1989

Michael Robert Dulin v. Gerald L. Cook : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

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DOCKET NO. 890274 IN THE UTAH COURT OF APPEALS

MICHAEL ROBERT DULIN, :
 :
Plaintiff-Appellant, : Case No. 890274-CA
 :
v. :
 :
GERALD L. COOK, Warden, : Category No. 3
Utah State Prison, et al. :
 :
Defendants-Respondents. :
 :

BRIEF OF RESPONDENTS
- - - - -

AN APPEAL FROM A DISMISSAL OF A PETITION FOR
POST CONVICTION RELIEF, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
THE HONORABLE LEONARD H. RUSSON, JUDGE,
PRESIDING.

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CLERK OF THE COURT
SALT LAKE COUNTY

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BRIEF OF RESPONDENTS

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a dismissal of a petition for post conviction relief, entitled writ of habeas corpus by plaintiff, filed pursuant to Rule 65B(i) of the Utah Rules of Civil Procedure. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989) as the Utah Supreme Court transferred this matter to this Court on May 5, 1989.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the post conviction court erred in dismissing the petition.
2. Whether the post conviction court was correct in deciding this petition on the legal issues without holding an evidentiary hearing.
3. Whether the evidence established by the court below was sufficient to support plaintiff's conviction.

4. Whether plaintiff's felony convictions were barred under the single criminal episode doctrine by his guilty plea to a separate misdemeanor charge.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies are included in the body of this brief.

STATEMENT OF THE CASE

Plaintiff, Michael Robert Dulin, filed a petition for post conviction relief, which he entitled Application for Writ of Habeas Corpus, on September 14, 1988, in the Third Judicial District Court for Salt Lake County, State of Utah (Record [hereinafter R.] at 7-9). The petition was assigned to the Honorable Leonard H. Russon, District Judge.

Defendants filed a motion to dismiss the petition on September 26, 1988 (R. at 56-57) and the court granted the motion in a written ruling on December 7, 1988 (R. at 103-110). The court signed an order to that effect on December 29, 1988 (R. at 114-15). Plaintiff filed a notice of appeal on December 30, 1988 (R. at 123).

STATEMENT OF THE FACTS

The record in this case contains only the pleading file since no hearing was held and transcripts of the criminal matters have not been provided by plaintiff. However, the trial judge in the post-conviction matter is the same judge who heard the trial of plaintiff's felony criminal charges (R. at 104). In his ruling, the judge set forth the pertinent facts from the criminal charges (R. at 104-107); these facts do not differ significantly

from the facts cited by plaintiff in his petition and his brief on appeal with its accompanying exhibit. This statement of the facts will be taken from the trial court's ruling, with differences from plaintiff's petition and brief noted separately.

The trial court's exposition of the facts underlying plaintiff's criminal convictions is as follows:

On May 27, 1982[,] Dulin was charged with the crime of Escape From Official Custody, and subsequently pled guilty to Attempted Escape, a Third Degree Felony, and was sentenced to an indeterminate term of 0 to 5 years in the Utah State Prison, to run consecutively with the sentence he was then presently serving. He apparently was placed on parole because on May 25, 1984, Dulin was charged with the crime of Possession of a Dangerous Weapon by a Restricted Person. On May 29, 1984, he pled guilty to a reduced charge of Possession of a Dangerous Weapon, a Class A Misdemeanor, and was sentenced to one year in the Salt Lake County Jail or the Utah State Prison.

On June 11, 1984, Dulin was charged with the crimes of Burglary, a Third Degree Felony; Theft, a Second Degree Felony; and Habitual Criminal, a First Degree Felony. Dulin pled not guilty to those crimes. A Motion to Dismiss was filed on September 17, 1984[,] and heard. It was then argued that these charges arose out of the same criminal episode for which he earlier pled guilty to the charge of Possession of a Dangerous Weapon, and which he was then currently serving sentence. A Memorandum in support of the Motion to Dismiss was filed at the same time, setting forth the facts upon which the said Motion was based. Dulin stated in his Memorandum that the burglary and theft for which he was being tried had occurred between 11:30 p.m. and 12:30 a.m., and that he was arrested at 2:10 a.m. by the police while he was elsewhere in a City Cab. He had been in the Old City Saloon since 1:48 a.m., had shown a gun, and left at 2:10 a.m. by City Cab. The police were advised on this and they stopped the cab, located the gun and arrested Dulin. To the charge of Possession of a Deadly Weapon by a Restricted Person[,]

Dulin pled guilty in Circuit Court. Dulin claims that the burglary and theft therein of Omega Drive-In between 11:30 p.m. and 12:30 a.m., as well as his carrying a weapon at 2:10 a.m. at a different location constituted a single criminal episode, and since he had already been convicted of the "weapons" charge, he could not be subsequently charged with the burglary and theft charges.

The Court at that time gave careful consideration to the arguments of counsel, and the Memoranda of Points and Authorities, and denied the Motion to Dismiss, ruling that the earlier crimes of Burglary and Theft were not part of the same criminal episode as the subsequent crime of Possession of a Weapon.

The case was then tried before the Judge, the defendant having waived his right to a jury trial, and at the end of the evidence and argument of counsel, the Court found the defendant guilty as charged . . .

(R. at 105-107).

This recitation is not in basic conflict with plaintiff's version of the facts which he included in his memorandum of law in support of the petition for post conviction relief. Plaintiff cites the facts as follows:

The [plaintiff] was charged with Count I, Burglary, a third degree felony, Count II, Theft, a second degree felony, and Count III, Habitual Criminal, a first degree felony. These charges arose from an episode beginning at approximately 12:30 midnight when a burglary was discovered and ending about 2:10 a.m., with the [plaintiff's] arrest.

An employee returned to the Omega drive in, located at 3490 South State St., Salt Lake City, Utah[. U]pon his return to the drive in[,] the employee found that the drive-in had been burglarized, and that a gun, a .38 Erma Watt automatic, was missing and this was reported to the Salt Lake County Sheriff[']s Office by the employee of the drive in.

At approximately 1:40 a.m., according to bartender, Dick Calder, the [plaintiff] came into the Old Hotel saloon with a gun and he left the bar at 2:10 a.m.[. A]t this time[,] the West Valley Police Department was

dispatched to the bar because they had recieved [sic] a call stating that a convicted person was in possession of a gun and had just entered a City Cab. The [plaintiff] was arrested about 2:15 a.m. by the West Valley Police Department.

The [plaintiff] was charged by the State of Utah through the Salt Lake County Attorney[']s Office, in the Third District, Fifth Circuit Court, West Valley, [w]ith "POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON"[,,] a second degree felony. In an information subscribed and sworn on the 25[th] day of May, 1984. [sic] The charge arose out of the above facts. Preliminary hearing was set for June 5, 1984, at witch [sic] time the [plaintiff] entered a plea pursuant to negotiations with the Salt Lake County Attorney[']s [O]ffice and the [plaintiff's] attorney, Manny Garcia. The [plaintiff] entered a plea of guilty to an amended information of[] "Possession of a dangerous weapon by a restricted person"[,,] a class "A" misdemeanor. The [plaintiff] at this time waived his right to a presentence report and was sentenced to one (1) year in the Utah State Prison forthwith. . . .

On the 11[th] day of June, 1984, the [plaintiff] was again charged by the Salt Lake County Attorney[']s [O]ffice, by and through the State of Utah, in the Third District, Fifth Circuit Court[,] with the three charges listed[above] These charges arose out of the same facts and same information stated above

(R. at 10-11). To this recitation of facts, plaintiff added that he did not appeal his convictions because of advice from his attorney, Frances M. Palacios, of the Salt Lake Legal Defenders Association. Plaintiff said that his attorney "stated to the Petitioner/Defendant that the State of Utah would not let the Petitioner/Defendant win an appeal." (R. at 8).

Later, in a response to defendants' motion to dismiss the petition for post conviction relief, plaintiff said that he was advised of his right to appeal by counsel, but counsel discouraged plaintiff

from pursuing a direct appeal by failing to promptly communicate with the plaintiff and by repeatedly advising the plaintiff that even though his appeal "might" be successful[,] there was a danger that plaintiff's appeal would be unsuccessful and establish "bad law".

(R. at 69).

Finally, in his brief on appeal, defendant includes an uncertified transcript of a preliminary hearing held on the three later felony charges (Exhibit "A", Brief of Appellant [hereinafter Br. of App.]) and states other allegations which he does not support by any cite to the record. The transcript supports the trial judge's recitation of facts in his ruling on the petition for post conviction relief. The only other matters found in the transcript but not in the judge's ruling involve the prosecutor's proffer, and an officer's testimony, that the burglary and theft charges were not filed before June 11, 1984, because further documents and investigation were needed to determine whether the habitual criminal charge could be filed (Br. of App., Exhibit "A" at 29-33). Plaintiff also asserts, without any supporting documentation or transcripts, that the prosecutor at the time of his guilty plea to the possession of a dangerous weapon charge said that that was the end of the prosecution for the weapon (Br. of App. at iii-iiii).

SUMMARY OF ARGUMENT

The post conviction court properly dismissed plaintiff's petition for post conviction relief. Plaintiff failed to take a direct appeal of his criminal conviction, and no unusual circumstances were found justifying collateral relief.

Plaintiff does not allege that his trial counsel failed or refused to pursue an appeal at plaintiff's request. He only alleges that his counsel advised him that an appeal would be futile. This is not grounds for a finding that there was an unusual circumstance which would justify granting the petition. Plaintiff has not demonstrated that there was a substantial violation of his rights at trial such that he was not given an fair trial.

The court below did not err in not conducting an evidentiary hearing because it was the same court which heard the original criminal trial. There is no dispute or question of fact which needed to be heard; the issue about which plaintiff wanted to appeal is an issue of law. The court below, and this Court, can properly address plaintiff's legal issue without any further evidentiary hearing.

The evidence before this Court supports the criminal convictions of plaintiff.

Plaintiff's argument that his felony convictions were part of a single criminal episode and were barred by an earlier misdemeanor guilty plea is without merit. The misdemeanor was correctly heard by the circuit court which had jurisdiction and venue, while the felony counts could not be tried in the circuit court. The felony charges correctly were bound over to and tried in the district court. Thus, the charges could not all have been heard by a single court.

In addition, the crimes of burglary and theft were completed at a certain time and location and with a certain

criminal objective which were different than the time, location and criminal objective of the misdemeanor firearm possession charge.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S PETITION BECAUSE IT WAS AN ATTEMPT TO SUBSTITUTE POST CONVICTION RELIEF FOR DIRECT APPEAL.

Plaintiff's first claim on appeal is that the trial court erred when it dismissed his petition on the grounds that plaintiff did not take a direct appeal of his criminal convictions.

It is well-established that the post conviction relief provided for in Rule 65B(i), Utah Rules of Civil Procedure, "is not a substitute for and cannot be used to perform the function of regular appellate review." Codianna v. Morris, 660 P.2d 1101 (Utah 1983). See also Andrews v. Morris, 607 P.2d 816 (Utah 1980), cert. denied, 449 U.S. 891 (1980). Consequently, petitioner cannot raise issues in a post conviction proceeding that could or should have been raised on direct appeal, except in unusual circumstances. Codianna v. Morris. See also Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968).

The types of unusual errors which are properly cognizable by post conviction proceedings are narrowly limited to the following situations: (1) When the trial court had no jurisdiction over the person or the offense; (2) where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law; or (3)

where some such fact is shown that it would be wholly unconscionable not to reexamine the conviction. Brown v. Turner, 21 Utah 2d at 96, 440 P.2d at 969. The Court further stated in

Brown:

If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some unusual circumstance. . . . Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Brown, 440 P.2d at 969.

The trial court in this post conviction proceeding applied the analysis of Codianna and Brown when it ruled:

Habeas corpus cannot be used as a substitute for a direct appeal, except where there is a jurisdictional question, or where the requirements of law have been disregarded, or that it would be wholly unconscionable not to re-examine the conviction. The Court finds that none of those exceptions apply here. The same exact issues were argued prior to the trial and were ruled upon. [Plaintiff's] remedy was by appeal.

(R. at 107-108). This finding of the post conviction court must be reviewed under the standard given in Bundy v. DeLand, 763 P.2d 803 (Utah 1988). In that case, the Utah Supreme Court stated:

On appeal from denial of habeas corpus relief, "we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." Velasquez v. Pratt, 21 Utah 2d 229, 232, 443 P.2d 1020, 1022 (1967)[.]

Bundy, 763 P.2d at 805. A review of the record in the present matter demonstrates that there is a reasonable basis to support the post conviction court's dismissal of plaintiff's petition.

The record shows that plaintiff does not claim that he told his trial counsel that he wanted to appeal his conviction and that counsel refused, or that counsel agreed to, but then did not take the appeal. Thus, this case is distinguishable from Boggess v. Morris, 635 P.2d 39 (Utah 1981). In Boggess, trial counsel had been informed that Boggess wanted to take an appeal but had not acted on that request because he felt that his appointment as counsel had ceased after Boggess' sentencing. The Utah Supreme Court stated:

Unless relieved by the court, appointed counsel is responsible to continue his or her representation through appeal if the defendant requests an appeal before the statutory time has expired, unless counsel, after a conscientious examination, finds the appeal to be "wholly frivolous." In that event, counsel must nevertheless pursue the procedure outlined in Anders v. California, 386 U.S. 738, 744 . . . (1966), and followed by this Court in numerous cases.

Boggess, 635 P.2d at 40 (footnote omitted). In the present case, plaintiff claims that he discussed an appeal with his counsel and his counsel discouraged him from pursuing it. Plaintiff does not claim that he asked his counsel to take an appeal.

It is interesting to note how plaintiff's statement in this regard changes during the pendency of his post conviction proceeding. Initially, plaintiff asserted that he did not appeal his convictions on the advice of counsel who, he said, told him "that the State of Utah would not let [him] win an appeal." (R.

at 8). After defendants filed a motion to dismiss, plaintiff responded that

Plaintiff was advised of his right to appeal by counsel, but counsel discouraged plaintiff from pursuing a direct appeal by failing to promptly communicate with the plaintiff and by repeatedly advising the plaintiff that even though his appeal "might" be successful there was a danger that plaintiff's appeal would be unsuccessful and establish "bad law".

(R. at 69). Finally, in his brief, plaintiff says that he "was advised by his trial court counsel not to appeal his conviction because of the fact that he could set bad case law." (Br. of App. at iii).

Given the assertions of plaintiff as to why he did not take a direct appeal, the record supports the post conviction court's determination that plaintiff had not been denied due process of law. Even if counsel advised plaintiff that he could not win on appeal and that an attempt to appeal would set bad case law, plaintiff has not alleged that his counsel refused to take an appeal. From plaintiff's allegations, it appears that his counsel spoke with him about his right to appeal and advised him that it would be futile or unwise to pursue an appeal. Evidently, with that advice, plaintiff chose not to pursue the appeal. If he has now changed his mind and decided that he wanted counsel to at least file an Anders brief, that is not one of the unusual circumstances under Brown which allows for a substitute for direct appeal. In addition, as will be addressed below, plaintiff's claim that his felony convictions were barred as a single criminal episode is without merit. The advice from

his counsel, upon which he based his decision not to pursue an appeal, was correct, and plaintiff was not prejudiced by his informed decision not to take an appeal.

POINT II

SINCE THE TRIAL COURT AND THIS COURT CAN DETERMINE AS A MATTER OF LAW THAT DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THAT HIS "SINGLE CRIMINAL EPISODE" CLAIM IS WITHOUT MERIT, IT WAS NOT ERROR TO DENY PLAINTIFF AN EVIDENTIARY HEARING.

Plaintiff next claims that the post conviction trial court committed reversible error when it dismissed his petition without conducting an evidentiary hearing. This Court's decision in Summers v. Cook, 759 P.2d 341 (Utah Ct. App. 1988), demonstrates that the court below did not err when it declined to conduct an evidentiary hearing in this matter. Quoting the Utah Supreme Court from Chess v. Smith, 617 P.2d 341, 343-44 (Utah 1980), this Court wrote:

[o]ne instance of an obvious injustice would be the failure of an attorney to take an appeal when there is a substantial claim of a deprivation of a constitutional right which goes to the basic fairness of the trial.

Summers, 759 P.2d at 344 (emphasis added). This Court went on to state that "an evidentiary hearing must ordinarily be held unless the record of a prior hearing shows petitioner is clearly not entitled to relief." Summers, 759 P.2d at 345 (emphasis added). Obviously then, if the record demonstrates that petitioner was not entitled to relief if an appeal had been taken, an evidentiary hearing on the petition for post conviction relief is not required. The only ground upon which plaintiff claims he

would have prefaced his direct appeal is solely an issue of law which the post conviction court addressed, and which has been preserved for this Court to address in the present appeal. An evidentiary hearing would not provide any additional facts which could assist this Court in deciding whether plaintiff's claim regarding single criminal episode (which claim was rejected by the post conviction court) has merit. The merits of this claim will be addressed in Point IV of this brief.

In the present case, the post conviction court properly determined from the record that plaintiff was not entitled to relief and that no hearing was necessary. In this regard, plaintiff was allowed to fully brief the single criminal episode issue below and did, in fact, submit memoranda and exhibits for the post conviction court's consideration. Plaintiff's basic complaint is one of law, not of fact. The issue, as impacted by Summers, is not whether trial counsel in the present case refused to take an appeal, but instead, whether the failure occurred "when there is a substantial claim of a deprivation of a constitutional right which goes to the basic fairness of the trial[and upon which an appeal should be allowed]." Summers, 759 P.2d at 344. By reaching the merits of plaintiff's single criminal episode claim, even though plaintiff had failed to appeal that claim, the post conviction court determined that plaintiff had not shown a substantial claim of a deprivation of a right which made the original criminal trial unfair. The post conviction court also heard the original criminal case. The post conviction court reviewed the earlier criminal cases upon which

this post conviction claim is based and determined that plaintiff's claim that his convictions were barred under the single criminal episode was without merit.

That this Court can address the merits of plaintiff's claim regarding single criminal episode without a remand for an evidentiary hearing is supported by the decision in Boggess v. Morris, 635 P.2d 39 (Utah 1981). In this case, as in Boggess, the facts upon which defendant bases his single criminal episode claim have already been established by the court below. Thus, "it would be needlessly circular to require that [plaintiff] return to the district court to re-establish the facts by a postconviction hearing[.]" Boggess, 635 P.2d at 42. Plaintiff clearly states in his petition for post conviction relief that his ground for a direct appeal, had he decided to take one, was that his felony convictions were barred by his guilty plea to a misdemeanor charge under the single criminal episode doctrine. This Court can address the merits of that claim because the claim has been preserved for appeal in this post conviction proceeding.

POINT III

PLAINTIFF HAS NOT PRESERVED HIS CLAIM OF INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION BECAUSE HE DID NOT RAISE THAT IN HIS PETITION FOR POST CONVICTION RELIEF. IF THE ISSUE WERE PROPERLY BEFORE THIS COURT, IT FAILS BECAUSE THE EVIDENCE PRESENTED TO THIS COURT IS SUFFICIENT TO SUPPORT PLAINTIFF'S FELONY CONVICTIONS.

In his brief, plaintiff argues that the evidence was insufficient to support his conviction of the felony charges. The law is clear that appellate courts will not address an issue raised for the first time on appeal. As the Utah Supreme Court stated in State v. Tillman, 750 P.2d 546 (Utah 1987):

A general rule of appellate review in criminal cases in Utah is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim of appeal.

Tillman, 750 P.2d at 551. In the present case, plaintiff has not preserved this issue for appeal. No mention of a sufficiency argument is found in either plaintiff's original petition or in his response to defendants' motion to dismiss below. The first time the issue is raised is in plaintiff's brief. The post conviction court was not afforded the opportunity to address this issue and plaintiff is now precluded from raising it on appeal. See State v. Marcum, 750 P.2d 599, 602 (Utah 1988).

If this Court determines to reach this issue even though plaintiff has not preserved it, the claim is without merit. Plaintiff has not included in the record on appeal any transcript of the original criminal trial. Thus, this Court is at a disadvantage when deciding plaintiff's sufficiency argument. However, the facts given by the trial court in its ruling, and agreed to by plaintiff in his petition and in his brief on appeal, with the addition of the preliminary hearing transcript by plaintiff as Exhibit "A", allow this Court to determine that the evidence was sufficient to support defendant's felony convictions.

The standard of review in bench trials has recently been clarified in accordance with Utah Rules of Civil Procedure 52(a), as applied to criminal cases by virtue of Utah Code Ann. § 77-35-26(g) (1982). The Utah Supreme Court held in State v.

Walker, 743 P.2d 191 (Utah 1987), that, in reviewing an insufficiency of evidence claim, the appellate court must not set aside the lower court's verdict unless it is clearly erroneous. Walker, 743 P.2d at 193. See also State v. Featherson, No. 880091 Slip Op. (Utah, Sept. 29, 1989); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). The clearly erroneous standard requires that "if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside." Walker, 743 P.2d at 193. However, as this Court has noted, the application of this standard to bench trials "does not eliminate the traditional deference afforded the fact finder to determine the credibility of witnesses." State v. Wright, 744 P.2d 315, 317 (Utah Ct. App. 1987) (citing Utah Rules of Civil Procedure 52(a); State v. Bagley, 681 P.2d 1242, 1244 (Utah 1984) ("it is not our function to determine the credibility of conflicting evidence or the reasonable inference to be drawn therefrom")); see also State v. Watts, 675 P.2d 566 (Utah 1983).

The evidence before this Court is that the Omega Drive-In at 3490 South State Street, Salt Lake City, Utah, was broken into and a gun stolen from it sometime between 11:30 p.m. and 12:30 a.m. on May 21-22, 1984 (R. at 106 and Br. of App. at iii). Plaintiff had been a cook at that drive-in and was aware of where the gun was kept (Preliminary hearing transcript [hereinafter PHT] at 1-3). Plaintiff had worked at the drive-in that day until 3:00 p.m. (PHT at 2). The burglary and theft were

discovered and reported to the Salt Lake County Sheriff's Office at 12:30 a.m. on May 22, 1984 (PHT at 7-8).

At approximately 1:40 to 1:45 a.m. on May 22, 1984, plaintiff displayed and attempted to sell at the Old Hotel Saloon at 380 South State Street, Salt Lake City, the same gun which had been taken during the burglary of the drive-in (R. at 106 and PHT at 12-13). After the saloon closed, plaintiff got in a taxi and was eventually arrested when the taxi was stopped by a West Valley City police officer (Br. of App. at iii and PHT at 19 and 21-22). When the police stopped the taxi, plaintiff tried to dispose of the gun by laying it on the floor of the taxi and telling the taxi driver that it was the driver's gun now (PHT at 21-22).

This evidence, which is all that plaintiff has supplied to the Court on appeal, is sufficient to support the trial court's verdict convicting plaintiff. Plaintiff was in possession of the stolen gun within an hour and a half of the discovery of the burglary. He was attempting to sell the gun and then tried to dispose of it when the police officers arrived. From these facts, the trial court could properly infer that plaintiff had stolen the gun and broken into the drive-in for the purpose of stealing the gun. The evidence was sufficient to support plaintiff's convictions for burglary and theft. He has not specifically challenged the conviction for habitual criminal; no analysis will be made of that charge.

POINT IV

PLAINTIFF'S FELONY CONVICTIONS WERE PROPER
WITHIN THE CONTEXT OF SINGLE CRIMINAL EPISODE
AND THE ORIGINAL TRIAL COURT'S DENIAL OF
PLAINTIFF'S MOTION TO DISMISS WAS CORRECT.

Finally, plaintiff maintains that his felony convictions for burglary and theft were barred by his guilty plea to the misdemeanor charge of possession of the firearm. Based on that claim, he alleges that the original trial court committed reversible error when it denied his motion to dismiss the felony charges. The pertinent law in addressing this issue is found in Utah Code Ann. §§ 76-1-401 through 76-1-403 (1978). Section 76-1-401 reads:

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Section 76-1-402 reads, in pertinent part:

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the

defendant is arraigned on the first information or indictment.

Section 76-1-403 reads, in pertinent part:

(1) If a defendant has been prosecuted for one or more offenses arising out a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under section 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

. . .

(ii) Resulted in conviction[.]

These statutes were addressed by the Utah Supreme Court in State v. Sosa, 598 P.2d 342 (Utah 1979). In that case, the Court affirmed a conviction for felony possession of a firearm by a restricted person. Sosa was first charged in Ogden City Court with two misdemeanors, carrying a loaded firearm in a vehicle and possession of marijuana. A day later, again in the Ogden City Court, he was charged with felony possession of a firearm by a convicted person. He was tried and convicted in the city court on the misdemeanor charges and proceeded through a preliminary hearing in the city court on the felony charge. The felony was bound over to the district court and Sosa was convicted of the felony in the Second District Court. Sosa, 598 P.2d at 343. Sosa appealed, claiming that the district court prosecution was barred by the single criminal episode provisions of the Utah Code. This argument was based on Utah Code Ann. § 76-1-402(2), with Sosa claiming that the misdemeanor offenses and the felony offense were within the jurisdiction of a single court. The Utah Supreme Court rejected that argument, saying:

District courts therefore have general jurisdiction over all criminal matters [under Article VIII, Sec. 7 of the Utah Constitution] including non-indictable misdemeanors. However, venue has historically been held to lie in justice's and city courts [now circuit courts]. In State v. Johnson the Court held as follows:

The statute having laid the initial venue of misdemeanor cases in the city or justice's court, the parties have a legal right to insist that the action proceed in the proper venue. . . . It is a right personal to the defendant to have his cause tried in the court of proper venue, but if he willingly submits the matter to a court having jurisdiction of the subject matter of the action he is bound by the verdict or the judgment.

Sosa, 598 P.2d at 344 (footnote omitted). In that case, the misdemeanor charges were properly in the city court (comparable to the present circuit court) for trial and verdict. The felony charge was also properly in the city (circuit) court initially for preliminary hearing, but was then properly bound over to and tried in the district court. The Court rejected Sosa's claim that the felony charge was barred because it was not filed along with the misdemeanor charges.

This holding is applicable in the present case where plaintiff was charged with one count of possession of a firearm by a restricted person in the West Valley Department of the Fifth Circuit Court (R. at 91). While it is true that the original charge in that case was a felony, plaintiff was not bound over to the district court because he pled guilty to a lesser offense, a misdemeanor (R. at 91). The firearm possession charge was properly handled in the circuit court which could not have conducted the trial of the felony burglary, theft, and habitual

criminal charges. The trial of the felony charges was properly conducted by the district court after plaintiff's guilty plea to the misdemeanor charge and a preliminary hearing and bind over on the felony charges.

But, plaintiff's argument fails for another, more basic, reason; the charges did not arise out of a single criminal episode. The Utah Supreme Court cases of State v. Cornish, 571 P.2d 577 (Utah 1977), and State v. Ireland, 570 P.2d 1206 (Utah 1977), addressed this issue. In Cornish, the defendant was charged with and convicted of unlawful taking of a motor vehicle. Subsequent to the conviction, he was charged with failure to stop at the command of a police officer for his attempt to evade the officer while defendant was driving the stolen car. Cornish, 571 P.2d at 577. The Court affirmed the conviction, finding that the two offenses (taking the car and evading the officer) were separated in time by nearly a day, and that the objectives in the two crimes were different. The Court said:

The objective of the unlawful taking was to obtain possession, be it permanent or temporary, of another's automobile. It was a completed offense at the time the car was taken. The objective of the failure to stop was to avoid arrest for the traffic violations he had just committed and/or to avoid being found in a stolen motor vehicle.

Cornish, 571 P.2d at 578 (emphasis added).

In Ireland, the defendant was convicted of aggravated robbery and aggravated kidnapping for taking a gun from a highway patrolman in Beaver County and for detaining two hitchhikers in Sevier County. Ireland argued that the robbery charge was barred because he took the gun from the officer, drove approximately 65

miles, then picked up the hitchhikers and held them hostage. Ireland, 570 P.2d at 1206. In that case, the Court found that "there was a distinct difference in time, . . . location, . . . and the criminal objective of robbery was entirely different than that of kidnapping which was totally disconnected in time, place or purpose." Ireland, 570 P.2d at 1207.

In the present case, plaintiff was convicted of misdemeanor possession of a firearm in West Valley City based on being in possession of the firearm at the Old Hotel Saloon at 380 South State Street at approximately 2:00 a.m. on May 22, 1984. This charge was a violation of Utah Code Ann. § 76-10-503 (Supp. 1989) which reads:

(1)(a) Any person who . . . has been convicted of any crime of violence under the laws of the United States, the state, or any other state, government, or country, . . . may not own or have in his possession or under his custody or control any dangerous weapon

(b) Any person who violates this section is guilty of a class A misdemeanor[.]

That crime started and ended when plaintiff was found to be in possession of the weapon at the Old Hotel Saloon and in the taxi at his arrest. The criminal objective was to be in possession of the weapon at a time when plaintiff was legally restricted from being in possession of a weapon. It was separate in time, location, and criminal objective from the subsequent felony charges.

The felony charges of which plaintiff was convicted were completed at a time and location and with a different criminal objective from the misdemeanor charge. Burglary is statutorily defined as:

A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a . . . theft[.]

Utah Code Ann. § 76-6-202 (1978). This crime was completed the moment plaintiff entered the Omega drive-in with the intent to commit a theft. Being in possession of a gun two- to two-and-a-half hours later was not part of the same criminal episode. The criminal objective when entering the building to commit the theft was not the same as the objective for being in possession of the gun at a later time and location.

Theft is defined as:

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 76-6-404 (1978). Plaintiff completed the theft when he picked up the gun at the drive-in with the intent to deprive the owner of the gun thereof. It was not a continuing theft when plaintiff was later found to be in possession of the gun. The theft was accomplished when plaintiff originally obtained the gun.

Other cases cited by plaintiff do not assist this Court in this matter. The Supreme Court in State v. Bair, 671 P.2d 203 (Utah 1983), held that Bair could be convicted of only one count of theft by receiving for being in possession of several weapons which were stolen from different victims at different times. Even though the actual thefts of the guns were different criminal acts, Bair had not been charged with stealing the guns. Bair was charged with being in possession of stolen property on the date

that a search warrant was served on his house. Thus, he was found to be in possession of the weapons only at that one moment and could be convicted only of being in possession at that one moment. The Sosa case has been analyzed above and does not support plaintiff's contention.

United States v. Broce, 781 F.2d 792 (10th Cir. 1986), cited by plaintiff, does not involve a single criminal episode. That case contained two charges of antitrust conspiracy involving allegations that defendants rigged bids on two highway construction projects. The two indictments were identical except for the names of two different highway projects upon which the conspiracy charges were based. That case is not applicable to the present situation in which different charges, involving different crimes, arose out of separate criminal episodes. Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986), dealt with whether a defendant had been fully advised of the consequences of his guilty plea such that his plea was voluntary. The footnote cited by plaintiff is not applicable to the present case because the merits of plaintiff's claim have been addressed collaterally and his due process rights have not been violated.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the post conviction court's dismissal of plaintiff's petition.

RESPECTFULLY submitted this 13th day of November, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondents were mailed, postage prepaid, to Michael Robert Dulin (Evans), Petitioner pro se, N.D.O.P. #26022, P.O. Box 1058, Ely, Nevada 89301, this 13th day of November, 1989.

