

1980

# The State of Utah v. Marvin Whittenback And John Joseph Parrett : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARVIN WHITTENBACK and  
JOHN JOSEPH PARRETT,

Defendants-Appellants.

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BRIEF OF DEFENDANTS-APPELLANTS  
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APPEAL FROM THE  
JUDICIAL DISTRICT  
HONORABLE GEORGE  
PRESIDING

ROBERT J. SCHUMACHER  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARVIN WHITTENBACK and  
JOHN JOSEPH PARRETT,

Defendants-Appellants.

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Case No. 16575  
and 16738

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BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

The appellants appeal from a jury verdict finding them guilty of the offense of Theft, in violation of § 76-6-404 and § 76-6-412, Utah Code Annotated (1953) as amended. The charge was based on appellants' exercise of unauthorized control over the property of another with the intent to deprive him of his property. The property stolen was cash in an amount exceeding \$250.00 but less than \$1,000.00.

DISPOSITION IN THE LOWER COURT

Appellants were tried before a jury on March 29, 1979, in the Fourth Judicial District Court for Utah County, the

Honorable George E. Ballif, presiding. Pursuant to the jury verdict, Judge Ballif sentenced both appellants to an indeterminate term not to exceed five years imprisonment in the Utah State Prison. Appellant Whittenback was sentenced on June 19, 1979 and appellant Parrett was sentenced on October 12, 1979.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions and sentences of each appellant, as well as affirmance of the District Court orders denying appellants' Motion to Suppress evidence and denying their motions for directed verdict and for judgment notwithstanding the verdict.

#### STATEMENT OF THE FACTS

On July 28, 1978, Officer Craig Geslison of the Provo City Police Department responded to a request that he investigate suspicious persons at the Pine View Apartments Provo (R. 146).<sup>1</sup> Officer Geslison encountered the appellants as the suspects of the suspicious person report and after a two-hour investigation found marijuana and a bag of coins in appellants' vehicle (R. 155, 160). No arrest was made at that time (R. 155).

At about 1:00 a.m. on March 26, 1979, Officer Geslison

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1 Citations to the transcript of the Hearing on appellants' Motion to Suppress and the Transcript of Trial are hereinafter referred to by the page of the Record (e.g. R.1).

was patrolling an area of Provo in which there had been several thefts from businesses (R. 147, 53). He was alerted to the prior criminal activity by reading a Police Department "speed letter" which stated that more patrolling was needed in the area because of the recent thefts (R. 158). Officer Geslison noticed the appellants, whom he recognized from the previous encounter, within an all-night laundromat called "The Wash Hut". (R. 55, 56). His attention was drawn to them by his previous encounter with them, the fact that they were the only individuals in the laundromat, and his knowledge that they resided in Salt Lake City ( R. 147, 56).

After calling for assistance, Officer Geslison entered the Wash Hut and asked appellants what they were doing and for identification (R. 56, 147). Appellant Parrett responded that they were in Provo visiting his ex-wife, but claimed he did not know where his ex-wife lived (R. 147).

Officer Geslison then asked who owned the vehicle parked in front of the Wash Hut. Appellant Parrett responded that it was his car (R. 57, 148). When asked if the officer could search the car, appellant Parrett responded "Yes," or "Yes, you can go ahead and search it." (R. 58, 148). Officers Michael Mock and Bradley Leatham arrived and were instructed by Officer Geslison to search the vehicle (R. 147-148, 57-58, 166, 182).

While the other officers searched the car, and pursuant to his observation of "bulges" in the appellants' pockets and of two "ace" lock picks on the floor under appellant Whittenback's seat, Officer Geslison asked the appellants to empty their pockets (R. 58, 149-150). Appellant Parrett emptied his pockets immediately, but appellant Whittenback asked what authority the officer had for this request (R. 58, 149). Officer Mock then re-entered the Wash Hut, having completed the search of the vehicle, and placed both appellants under arrest for possession of burglary tools (R. 80, 149, 184). Appellant Whittenback emptied his pockets after being placed under arrest (R. 149).

The officers found a large amount of quarters and dimes (the denominations required to operate the machines at the Wash Hut) in appellant Whittenback's pockets. (R. 58, 153). They also found that appellant Parrett's pockets contained a key ring with a key on it which Officer Geslison recognized as being the type used to open washing machines (R. 60-61, 64, 152-153). Pursuant to their search of the vehicle, Officers Leatham and Mock found two "Valley Bank" bags containing a large amount of quarters and dimes, several machine keys, an "ace" lock pick with instructions, and a pair of needle-nose pliers. They also found several other machine keys, a white sock full of dimes, and a screwdriver with a



altered head (R. 76-79, 86, 153-154). Approximately \$596.00 in coins was found either on appellants' persons or in the vehicle (R. 78, 66, 153).

William Victor Oldroyd, the owner of the Wash Hut, was notified by the police officers of the theft on March 26, 1979 and went to the Wash Hut at that time (R. 27-28). Mr. Oldroyd determined that the coin boxes on fourteen washers and two dryers had been opened (R. 30-31). He then counted the money remaining in the machines that had not been tampered with and estimated that roughly \$600.00 to \$800.00 was missing (R. 31-32, 39, 48). Mr. Oldroyd also successfully opened several of the washing machines and dryers with one of the "ace" lock picks found in appellants' possession (R. 32-33).

#### ARGUMENT

##### POINT I

THE INITIAL INQUIRY OF APPELLANTS WAS  
SUPPORTED BY REASONABLE SUSPICION OF  
CRIMINAL CONDUCT AND WAS THUS PERMISSIBLE.

Appellants contend that the initial entry into the Wash Hut and questioning of appellants by Officer Geslison was a violation of the Fourth Amendment to the United States Constitution in that the officer did not have a reasonable suspicion that appellants were engaged in criminal conduct. Respondent rejects this contention and submits that when the

facts and circumstances are viewed in light of Officer Geslison's knowledge, the officer was justified in making the initial inquiry and questioning of appellants.

The case of Terry v. Ohio, 392 U.S. 1 (1968), upon which appellants rely, established that a police officer may detain and question a person based on information which falls short of establishing probable cause to arrest the person. The facts of Terry are similar in many respects to the case at bar. There, an experienced Cleveland Police Officer, while patrolling on foot, had his attention attracted to two persons who repeatedly walked up and down a street pausing to look into a particular store window each time they passed. The officer suspected that they might be "casing" the store in contemplation of a possible robbery and thus approached the individuals to question them. When they gave evasive answers the officer also frisked them for weapons.

In upholding both the stop and the frisk, the United States Supreme Court wrote:

. . . there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails. . . And in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

The Court reserved the issue of when a seizure would be justified for purposes of detention and/or interrogation, Terry, supra, n. 16. In that footnote the Court observed:

Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

392 U.S. 1, 19, n.16.

Respondent submits that in the case at bar, Officer Geslison's initial entry into the Wash Hut and preliminary questioning of appellants did not constitute a sufficient show of authority nor a restraining of appellants' liberty to constitute a "seizure." Thus, the protections of the Fourth Amendment do not apply to this initial encounter.

In the case of People v. DeBour, 352 N.E.2d 562 (N.Y. 1976), the Court of Appeals of New York recognized that in some circumstances police officers may approach persons to conduct a preliminary inquiry on facts falling short of the "reasonable suspicion" standard of Terry, supra. In Debour, two police officers, while walking down a street soon after midnight, noticed an individual walking towards them on the same side of the street. When the person got within

thirty feet of the officers he quickly crossed the street. The officers also crossed and asked the defendant what he was doing in the area and for identification. Observing a bulge under defendant's jacket, the officers asked him to unzip his jacket, which he did, revealing a loaded revolver in his waistband which the officers seized.

In holding that this conduct did not constitute a "seizure" the Court wrote:

This case raises the fundamental issue of whether or not a police officer, in the absence of any concrete indication of criminality, may approach a private citizen on the street for the purpose of requesting information. We hold that he may. The basis for this inquiry need not rest on any indication of criminal activity on the part of the person of whom inquiry is made but there must be some articulable reason sufficient to justify the police action which was taken.

352 N.E.2d 562, 565.

In deciding a companion case, People v. LaPene, the court indicated how this analysis fits with the "reasonable suspicion" standard:

. . . We bear in mind that any inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions. By this approach various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence. The minimal intrusion of approaching to request information is permissible when there

is some objective credible reason for that interference not necessarily indicative of criminality (People v. De Bour, supra). The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, this authorizes a forcible stop and detention of that person.

352 N.E.2d 562, 571-572.

Thus, all that is required for an initial confrontation between police and citizens in public places is an articulable, objective reason for the inquiry.

In the case at bar, Officer Geslison had at least sufficient knowledge to justify his entry into the Wash Hut, his preliminary questioning of appellants, and his asking them for identification, under the De Bour standard. In State v. Larson, Wash. App., 587 P.2d 171 (1978), the court applied the De Bour rationale to a factual situation similar to the instant case. In Larson, officers saw several people in a car parked in a no-parking zone in a closed park late at night in an area in which many burglaries had recently occurred. The officers approached the car and asked each occupant

for identification. As the defendant opened her purse to obtain identification, the officers saw and seized a bag of marijuana from the purse. In upholding the trial court's denial of defendant's motion to suppress this evidence, the court stated:

While the presence of individuals wandering abroad late at night or at an unusual hour should not of itself precipitate a police investigation, it is a circumstance justifying suspicion . . . Taking it in combination with factors such as the defendant's being seated in a car parked in a no-parking zone near a closed park in an area, where numerous burglaries had occurred previously, police suspicion of illegal conduct was justifiable. Under such circumstances, the police may ask for identification . . .

587 P.2d 171, 172-173. See also State v. Warner, Ore., 588 P.2d 681 (1978) at 689.

Here, Officer Geslison knew that there had been several thefts committed in the area of the Wash Hut (R. 15) he knew that the appellants were alone inside the laundromat he knew from a previous encounter with appellants that they were from Salt Lake City and that they had on the prior occasion been in possession of contraband and a bag full of coins (R. 66, 147, 155, 160). This gave him at least an "objective credible reason" to enter the laundromat, a public place where he had a right to be and to ask appellants what

they were doing and for identification. There was no seizure or detention of appellants to this point, since the officer did not restrain their freedom to leave. Rather, Officer Geslison's conduct constituted mere "threshold questioning" of the appellants. People v. Gurule, Colo., 471 P.2d 413, 416 (1970).

In the recent case of State v. Marks, Kan., 602 P.2d 1344 (1979), the Supreme Court of Kansas recognized that where an officer does not stop a moving vehicle, but merely approaches the defendant sitting in a parked vehicle there is no detention of the defendant and hence no seizure. In the case at bar, there was also no "stopping" of the appellants since they were stationary in a place of public business at the time when the officer approached. Since appellants did not even have the immediate capability of moving when first approached, as did the defendant in Marks, supra, if there was no "seizure" there, there certainly was no seizure in this case.

Even if this Court finds that Officer Geslison's conduct constituted a "detention" or "seizure" of the appellants, such conduct was justified under the "reasonable suspicion" standard of Terry. Since Terry, most courts have recognized that:

. . . the governmental interest in effective crime prevention underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for investigating possible criminal behavior, even though there is no probable cause to make an arrest.

People v. Mangum, Colo., 539 P.2d 120, 123 (1975) (emphasis added). See also State v. Post, 573 P.2d 153 (Idaho 1978); State v. Folkes, 565 P.2d 1125 (Utah 1977); United States v. Beck, 598 F.2d 497 (9th Cir. 1979). Thus, the Terry standard of "reasonable suspicion" applies to detentions to investigate possible criminal activity.

In State v. Folkes, supra, this Court recognized that:

When a police officer sees or hears conduct which gives rise to suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

565 P.2d 1125, 1127. The Court also reiterated the test applied in Utah as to the propriety of searches and seizures:

It is to be borne in mind that it is not all searches and seizures without a warrant which are proscribed by the constitutional provisions referred to. It is only of a search which is "unreasonable." It is commonly and properly stated that the question as to whether a search is unreasonable depends



upon the particular circumstances; and the question to be answered is whether reasonable and fair minded persons would judge the alleged search or seizure to be unreasonable or oppressive.

565 P.2d 1125, 1127. When viewed in the light of this test, Officer Geslison's conduct in approaching and questioning the appellants was not only "reasonable," but was based on articulable facts giving him reasonable suspicion to believe appellants were engaged in a crime. In such a situation, the officer has a duty to make an investigation into the circumstances. The facts within Officer Geslison's knowledge, detailed above, clearly distinguish this case from cases cited by the appellants where officers were found to have no reasonable suspicion for an initial stop or detention (e.g. In re Tony C., 582 P.2d 957 (Cal. 1978) cited at p.9 of Appellants' Brief). It is simply not true, as appellants assert, that all Officer Geslison knew was ". . . that the appellants were from out-of-town, that they were in an all-night establishment late at night, and that they were doing laundry." Appellant's Brief at p.17. He also had within his mind the information gained from the previous encounter with appellants and the information that several businesses in the area had recently been burglarized. The initial encounter between Officer Geslison was lawful and did not violate appellants' Fourth Amendment rights.

## POINT II

THE REQUEST TO APPELLANTS TO EMPTY THEIR POCKETS, ASSUMING IT WAS A "SEARCH," WAS JUSTIFIED AS INCIDENT TO A LAWFUL ARREST.

Appellants assert that Officer Geslison's request that they empty their pockets was an unlawful search. Although the case law is sparse on this subject, it seems that a request from an officer to a suspect that the latter empty his pockets does constitute a "search." United States v. DiGiacomo, 571 F.2d 1211 (10th Cir. 1978); State v. Garcia, 493 P.2d 975 (N.M. App. 1972). Assuming that the request in this case does constitute a "search," respondent submits that as to both appellants the search was proper as incident to a lawful arrest based on probable cause.

Respondent agrees with appellant that the basic standard for arrest without a warrant was set forth by the United States Supreme Court in Beck v. Ohio, 379 U.S. 89 (1964). This Court has adopted that standard in State v. Hatcher, 1972 Utah 2d 318, 495 P.2d 1259 (1972), wherein the test is stated as follows:

The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

495 P.2d 1259, 1260. See also State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1972). In addition, this Court has stated often that the determination as to whether the arrest is based on probable cause is primarily for the trial court and will not be reversed on appeal unless clearly in error. State v. Eastmond, supra; State v. Lopes, 552 P.2d 120 (Utah 1976).

The propriety of a warrantless search incident to a lawful arrest was recognized by the United States Supreme Court in Preston v. United States, 376 U.S. 364 (1964). This Court has also recognized this exception to the general requirement of a warrant for conducting a search. State v. Eastmond, supra; State v. White, 577 P.2d 552 (Utah 1978). It has also been widely recognized that even though the search itself precedes the formality of an arrest, the search is still incident to arrest if at the time of the search the officer had sufficient probable cause to make the arrest. State v. Means, 581 P.2d 406 (Mont. 1978); People v. Terry, 454 P.2d 36 (Cal. 1969); State v. Carroll, 526 P.2d 1238 (Ariz. 1974), in which the Arizona Court held there is no constitutional right to be arrested before a search. In State v. White, supra, this Court wrote:

. . . if such probable cause for arrest exists independent of any evidence obtained as a result of the search, the

fact that the search was conducted before the arrest does not invalidate the search nor preclude its characterization as being incident to arrest.

577 P.2d 552, 553.

Applying these rules to the facts of the case at bar, first, Officer Geslison had probable cause to arrest appellants before he requested them to empty their pockets. As shown in POINT I, supra, he had reasonable suspicion to believe they were committing a crime as he entered the laundromat and questioned appellants. Subsequent to the questioning, Officer Geslison noticed bulges in all four of appellant Whittenback's pockets as well as two lock picks of the type used to open the coin boxes on washing machines resting on the floor below where Whittenback was sitting. (R. 58, 145) This observation verified his earlier suspicion that appellants were stealing money and gave him objectively verifiable probable cause to arrest appellants before he asked them to empty their pockets, cf. Post v. State, 563 P.2d 1193 (Okla. Cr. 1977).

Second, as to appellant Parrett, the search was complete before Officer Mock returned from searching the vehicle and placed appellants formally under arrest. However, since a search preceding arrest may be incident thereto as long as the searching officer had probable cause to arrest,

in this case that search was incident to the arrest. The search of appellant Whittenback was not completed until after the formal arrest and thus does not present the preceding-search problem (R. 149).

Finally, it is well-established that the scope of a search incident to arrest extends to anything unlawfully within the suspect's possession. State v. Jackson, 539 P.2d 906 (Ariz. 1975); Agnello v. United States, 296 U.S. 20 (1925) [fruits of crime]; United States v. Robinson, 414 U.S. 218 (1973). Thus, since the search here produced coins from the washing machines and a machine key with which the crime was committed, the search was not unduly broad (R. 58, 60-61, 64, 152-153).

### POINT III

THE SEARCH OF THE VEHICLE WAS PURSUANT  
TO CONSENT AND WAS THUS LAWFUL.

Appellants argue that the search of their car was unlawful because it was undertaken without a warrant and not pursuant to any exception to the requirement of a warrant. Respondent submits that the threshold question to be answered regarding this issue is whether or not appellants have standing in this Court to challenge the legality of the search.

It has been generally recognized that a defendant has no standing to challenge the legality of a search on appeal where he has no possessory or proprietary interest in the

premises searched. Jones v. United States, 362 U.S. 257 (1960); State v. Purcell, 586 P.2d 441 (Utah 1978). In the recent case of Rakas v. Illinois, 439 U.S. 128 (1978), the United States Supreme Court rejected the argument that a defendant has standing whenever a search is "directed" at him. The Court stated that the issue was not really whether a defendant has standing, but rather is a question of "substantive Fourth Amendment doctrine" which must be answered in light of traditional principles of defendant's reasonable privacy interest in the premises searched. 439 U.S. 128, 131. The relevant inquiry, then, is whether or not appellants had a legitimate expectation of privacy in the invaded area. If they did not, their Fourth Amendment rights were not violated. Katz v. United States, 389 U.S. 347 (1967).

In Rakas, supra, the Court dealt with this issue in the factual context of a search of a car. In holding that petitioners had no property or possessory interest in the portions of the car searched, the Court recognized that the expectation of privacy as to an automobile is less extensive than that pertaining to a house or apartment. (See e.g. Carroll v. United States, 267 U.S. 132 (1925)).

In the case at bar, appellants may not challenge the legality of the search both because they had no legitimate expectation of privacy in the automobile and because they

had no possessory or proprietary interest in the car. In Rakas, supra, the Court recognized that use of a vehicle with the consent of the owner does not establish an expectation of privacy in that vehicle. 439 U.S. 128, 148. It is clear from the record in this case that the vehicle searched was not registered to either of the appellants (R. 187). Nothing in the record shows that appellants had a legitimate interest of privacy in the car.

As to appellants' contention that the search was not lawful, respondent submits that the search of the car was justified under both the automobile exception and the consent exception to the warrant requirement. The automobile exception to the warrant requirement was recognized by the United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925):

[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a store, dwelling house, or other structure in respect of which a proper official warrant may readily be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

. . . The measure of legality of

such a seizure is, therefore, that the seizing officer have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein . . .

267 U.S. 132, 153-156. The Court later recognized in Chambers v. Maroney, 399 U.S. 42 (1970) that for constitutional purposes, there is no difference between seizing the car at the scene and waiting for a search warrant and immediately searching the car at the scene.

This Court has adopted the position that where a vehicle retains a reasonable degree of mobility and officers have probable cause to believe the vehicle contains contraband or evidence of a crime, the search may be made immediately without a warrant. State v. Limb, 581 P.2d 142 (1978), State v. Shields, 28 Utah 2d 405 , 503 P.2d 848 (1972).

Applying this rule to the facts of the instant case it is clear that Officers Geslison, Leatham, and Mock had probable cause to believe the appellants' vehicle contained both the fruits and instrumentalities of the crime. Officer Geslison's knowledge establishing probable cause for arrest of the appellants is detailed, supra, in POINT I. When to that knowledge is added his recollection that in his previous encounter with appellants, the investigating officers found marijuana and a bag of coins in appellants' vehicle, probable



cause to believe appellants' vehicle contained contraband and evidence of crime is established (R. 160). Although Officer Geslison did not personally conduct the search, but rather directed Officer Mock and Leatham to do so, this does not destroy the probable cause. In State v. Groda, Ore., 591 P.2d 1354 (1979), the Oregon Supreme Court held:

. . . [T]he searching officer personally must have information which constitutes probable cause, or the searching officer must be directed to make the search by an officer who personally has that knowledge.

591 P.2d 1354 (emphasis added).

In addition, the exigency of mobility of the car was present in this case. If the car was not searched or seized at the scene it could have been freely moved out of the jurisdiction of the officers either by appellants or others. In Chambers, supra, it was recognized that if the officers could seize the car and search it later, they can also search it immediately at the scene of the crime. Appellants' argument that the automobile exception is not available in this case is based solely on the case of Coolidge v. New Hampshire, 403 U.S. 443 (1971). Coolidge is inapposite here because on the facts there the searching officers had no reason to believe the car might contain contraband or evidence of crime.

Finally, the search of appellants' car was conducted pursuant to freely given consent of appellant Parre. It has long been recognized that officers may conduct a warrantless search where the defendant consents to such a search. See e.g. Katz v. United States, 389 U.S. 347 (1968); Vale v. Louisiana, 399 U.S. 30 (1970). In the case of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the United States Supreme Court, reaffirming that a warrantless consent search is valid, held that the prosecution has the burden of establishing from the totality of the circumstances that the consent was voluntarily given. However, the prosecution is not required to prove that the defendant knew of his right to refuse to consent in order to show voluntariness. 412 U.S. 218, 233-234; 248-249.

It has also been held that:

. . . the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.

United States v. Watson, 423 U.S. 411, 425 (1976). This Court has held in accordance in State v. Lopez, 22 Utah 2d 57, 465 P.2d 772 (1969) and State v. White, 577 P.2d 552 (Utah 1978). See also United States v. Shields, 573 F.2d 18 (10th Cir. 1977).

In People v. Hayhurst, Colo., 571 P.2d 721 (1977), the Colorado Supreme Court, in upholding a search as being

consensual, delineated several factors which taken together may show lack of duress or coercion. Those factors include: 1) the absence of a claim of authority to search by the officers, 2) the absence of an exhibition of force by the officers, 3) a mere request to search, 4) cooperation by the owner of the vehicle, and, 5) the absence of deception or trick on the part of the officers.

Respondent submits that each of the factors in Hayhurst, supra, are also present on the facts of the case at bar. At the time when Officer Geslison asked appellants for permission to search the car, all he had done was ask them for their identification and ask preliminary questions. (R.178). Appellants were not in custody at the time and although Officers Mock and Leatham arrived before consent was given, Mock did not enter the Wash Hut (R. 182) and Leatham entered just as consent was being given (R. 166), thus, the presence of additional officers did not create an undue show of authority. When Officer Geslison requested permission to search, he did not claim any authority to search or deceive appellants into thinking he had a search warrant (R. 57-58, 148). He simply asked if the appellant Parrett would consent to the search, to which Parrett responded "Yes," or "Yes, you can go ahead and search it." (R. 58, 148). Finally, none of the officers used force or threats of force

to obtain the consent.

Under the totality of circumstances test, these facts establish that the respondent met its burden of proof that the consent given by appellant Parrett to search the car was voluntary.

#### POINT IV

THE STATE PROVED BEYOND A REASONABLE  
DOUBT THAT THE AMOUNT OF MONEY TAKEN  
BY APPELLANTS EXCEEDED \$250.00

Appellants aver that there was no substantial competent evidence adduced at trial to establish that the value of the property stolen was more than \$250.00 but less than \$1,000.00. However, appellants attempt in their Brief to confuse the issue by comparing proof of the amount of cash stolen with proof of the value of other types of property which have independent market value. Respondent rejects this analogy and respectfully submits that this element of the crime was proved beyond a reasonable doubt by substantial competent evidence.

The cases appellants cite which discuss the type of evidence necessary to prove value of property which has an independent market value are inapposite here. This is because cash does not have independent market value, but rather the value of cash is its face value. See United States

Constitution, Article I, Section 8, and Knox v. Lee, 79 U.S. 457 (1870) The Legal Tender Cases. The only issue which must be proved in a case in which cash was stolen is the amount thereof, since the value is fixed by Congress.

Respondent agrees with appellants that:

[T]he weight of evidence and the credibility of witnesses are reserved exclusively for the jury, and this Court will not interfere unless the evidence is found to be so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

State v. Logan, 563 P.2d 811 (Utah 1977). See also State in the Interest of M. S., 584 P.2d 914 (Utah 1978); State v. Romero, 554 P.2d 216 (Utah 1976). The State here introduced the testimony of William Victor Oldroyd, the owner of the Wash Hut, as to how much money was stolen by the appellants from his establishment. Mr. Oldroyd established that he went to the Wash Hut at the request of the police on March 26, 1979 at about 1:00 a.m. (R. 28). He found that 14 of his 50 washing machines had been broken into as well as 2 of his 25 dryers (R. 28-31). Those machines that had been broken into had no coins in them at all (R. 32). Mr. Oldroyd, after counting the money remaining in the other machines, determined that to the best of his knowledge \$600.00 to \$800.00 was missing from the machines (R. 32, 38, 47-48). He also established that

most of the machines generate approximately the same amount of money (R. 32).

When this testimony is tested in light of the fact that Mr. Oldroyd had owned and operated the Wash Hut for twelve years, it is clear that this was substantial competent evidence of the amount of money taken (R. 27). Further, the total amount of money found in appellants' possession was almost \$600.00, corroborating Mr. Oldroyd's "guess" and establishing beyond a reasonable doubt that more than \$250.00 was taken by appellants (R. 66, 78, 153).

In a similar case, State v. Swanson, 440 P.2d 481 (Wash. 1968), the defendant was charged with grand larceny which required proof that he stole property of more than \$100 in value. The owner of the service station testified that the amount missing was \$104.00, based on his counting of the money left in the cash register. The Washington Supreme Court held that this evidence was sufficient to make out the "value" element of the crime.

#### CONCLUSION

In conclusion, respondent respectfully submits that the initial contact between the officers and the appellants, the "search" of appellants' pockets, and the search of the vehicle, were all reasonable under all the circumstances, as set forth above. Thus, appellants' Fourth Amendment rights

were not violated in this case. In addition, the State of Utah proved beyond a reasonable doubt that appellants stole property having a value of over \$250.00 but less than \$1,000.00. For these reasons, and based on the argument herein, respondent requests that appellants' convictions and sentences be affirmed as well as the orders of the lower court denying appellants' motions to suppress evidence, for a directed verdict, and for judgment notwithstanding the verdict.

Respectfully submitted,

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