

1953

## State of Utah v. Benito E. Vigil : Brief of Appellant

Utah Supreme Court

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John Moore Williams; Attorney for Appellant;

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CASE NO. 7924

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

-----FEB 27 1953

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Clerk, Supreme Court, Utah

STATE OF UTAH,  
Respondent,

-vs-

BENITO E. VIGIL,  
Appellant.

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APPELLANT'S BRIEF  
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JOHN MOORE WILLIAMS

Attorney for Appellant

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MAILED 10/10/1933

McCormick, Lewis

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :

Respondent, :

Case No.

vs. :

7924

BENITO E. VIGIL, :

Appellant. :

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PRELIMINARY STATEMENT

The Appellant, Benito E. Vigil, was convicted on two counts under the Information charging him with burglary in the second degree and grand larceny arising out of the taking of personal property from an automobile parked on Salt Lake City street.

The defendant set up an alibi, claiming that he was not at the scene of the crime. He denied all accusations and testimony advanced by the State.

The case presented against the defendant was based upon testimony of an accomplice. The accomplice, Lewis Ronald Johnson, connected the defendant to the commission of the crimes involved.

However, there was no corroborative evidence sufficient to fulfill the requirement of Section 105-32-18, R.S.U., 1933. The major burden of this appeal will rest upon that particular situation, although additional grounds will be advanced.

#### ADDITIONAL STATEMENT OF FACTS

According to the evidence presented by the State, the automobile of Mr. T. A. Short of Kettleman City, California, was broken into and rifled while it was parked on North Temple Street, in the City of Salt Lake City, Utah, on the evening of August 1, 1951. The automobile had been parked on North Temple Street by the owner while he and his family were eating dinner in a local restaurant.

State's witness, Lewis Ronald Johnson, testified that he and the defendant rifled the Short vehicle after breaking into it. Johnson claimed that he and the defendant took several pieces of luggage containing clothing and other personal articles from the Short vehicle. (Tr.

66) Johnson testified further that the luggage was taken to the nearby city of Bountiful where the personal articles were taken from the luggage. Johnson testified further that certain traveler's checks were taken from the luggage and cashed by a fellow by the name of Gene Bassett (Tr. 89), and that the money was split three ways.

Thereafter, Johnson and the defendant, according to the accomplice Johnson, went back to the Earl Hotel in Salt Lake City. (Tr. 89) The foregoing testimony was denied by the defendant. (Tr. 114) The defendant explained that he was at the Havannah Club and Dee's restaurant during the time the crimes were committed. (Tr. 114)

Johnson claimed that the defendant "would like to keep the bag for himself". The bag that Mr. Johnson referred to was the bag he claimed was brought back to the Earl Hotel and as admitted in evidence as State's Exhibit B. According to Johnson, the bag referred to as State's Exhibit B was one of those taken from

the Short vehicle. The arresting officers claimed that the defendant referred to the bag as his. (Tr. 101, 102, 103, 105 and 106) The defendant claimed that Johnson brought the bag with him to the defendant's room at the Earl Hotel at about 1:30 or 2:00 o'clock in the morning of August 2, 1951. (Tr. 115) The defendant denied that he had claimed ownership of the bag or that he had told the arresting officers that the bag belonged to him. (Tr. 117) The defendant further explained that Johnson agreed that the defendant could put his "stuff" in the suitcase when they went to prove to look for work. (Tr. 117) The defendant further denied that he had any claim on that suitcase. (Tr. 119)

At the time of defendant's arrest and of the incident involving the delivery of the suitcase to the jail by the arresting officers, the defendant had not been charged with any violation of the law. He claimed that he did not know what he was charged with until "after fifteen days later". (Tr. 119)



The Transcript of the preliminary hearing, so far as it pertained to the testimony of Truman Allen Short and his wife, Lizzie Edna Short, whose automobile was rifled, was admitted in evidence. However, although no notice was given to the defendant that the Shorts would not appear, the Transcript was admitted upon a showing that no attempt was made to determine if the Shorts were in the jurisdiction of the trial Court until the day before and the morning of the trial itself. (Tr. 54 and 55)

According to the Transcript admitted, Mr. Short described how his vehicle was broken into and, so far as he remembered, what was taken. In addition to the suitcases that were taken there were several items of personal clothing, a camera, approximately \$12.00 or \$15.00 in cash and traveler's checks to the extent of \$300.00. (Tr. 57, 58, 59, 60, 61, 62, 63, 64 and 65) Mr. Short did not testify to the value of the articles taken, although he did claim to own a large portion of them.

Mrs. Short also described, in more detail, the articles taken from the vehicle. Mrs. Short gave, as her opinion, the market value of the things taken as approximately \$200.00. (Tr. 74) This valuation given by Mrs. Short covered all the articles taken, although she did not testify that anything belonging to her individually bore a market value of \$50.00 or more.

Further and additional facts will be brought out in the argument to follow.

### ARGUMENT

POINT 1: There was insufficient corroborative evidence of the testimony of the accomplice to sustain the verdict of the jury.

Lewis Ronald Johnson, the State's witness to the alleged facts involved in the actual perpetration of the felonies involved in the case at bar, was an accomplice. Since his status in that regard is well established in the case, there is no need here to go into a lengthy argument to sustain the conclusion that Johnson was an accomplice.

Section 105-32-18, R.S.U., 1933., reads  
as follows:

"A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

All evidence in this case linking the Appellant with the perpetration of the offenses with which he was charged and for which he was tried in the District Court below, came from the testimony of the accomplice, Lewis Ronald Johnson. It is assumed that the testimony of the two officers concerning the suitcase taken from the Appellant's room at the Earl Hotel in Salt Lake City, Utah, to the jail was also an attempt to establish a connection linking the Appellant to the perpetration of the offenses. All other evidence in the case refers to other matters and has no connection with the Appellant whatsoever.

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Since the only evidence that connects the Appellant in any way with the perpetration of the offenses with which he was charged came from the testimony of the accomplice, it is necessary, to sustain the jury's verdict in this case, that sufficient corroboration of the testimony of the accomplice be shown to have been introduced at the trial below.

Here, as stated above, the only attempt by the State to corroborate the testimony of the accomplice Johnson was made by the State in the testimony of the two arresting officers, Joseph B. Clayton and Seiger Springer. (Tr. 101, 102, 103, 104, 105, 106 and 107) Mr. Clayton testified:

"He asked about his suitcase. We had questioned him as to where he was staying, and he said 'the Earl Hotel', and said he had a suitcase there, and asked if we would get it for him." (Tr. 101 and 102)

He further testified that there was no further conversation relative to the suitcase. (Tr. 102) Officer Springer testified that he had something to do with the arrest of the Appel-

lant. (Tr. 104 and 105)

"We asked him where he had been staying, and he told us, and told us during this conversation -- I don't recall exactly where, in it -- that he had a bag there in the Earl Hotel. He gave us the room number. I don't recall the number. And would we see that he got it."

And Officer Springer continued:

"We told him that we would, and we went up there and got it." (Tr. 105)

Officer Springer also identified the States Exhibit B as being the bag he went after for the Appellant. (Tr. 105) In addition to the foregoing, Officer Springer testified:

"He said the suitcase was his, but he had several belongings in there that belonged to Johnson." (Tr. 106)

Officer Springer then testified that he had no further conversation with the Appellant regarding the suitcase. (Tr. 106)

The Appellant testified, in addition to denying all the accusations contained in the testimony of the State's witnesses, that Johnson had the suitcase with him when he came to the Appellant's room at the Earl Hotel at 1:30

er 2:00 o'clock on the morning of August 2, 1951. (Tr. 115) On cross-examination, the Appellant testified that Johnson brought the suitcase to the Appellant's room. He also testified that he had not told Officer Springer or Officer Clayton that the suitcase belonged to him, or anybody else. He told them that there was a suitcase in his room. (Tr. 117) Then the Appellant testified:

"Well, he brought the suitcase up. And I wanted him to go to Provo to go to work at the Geneva Steel. I had a small bag, it wasn't a large bag. It was more or less of an Army bag. And I asked Johnson, I said if it would be all right to put my stuff in his suitcase when we went. And he said, 'That will be fine.' But Johnson said he had to go to Morgan, Utah and he borrowed \$5.00 off of me to go there; that he would be back the following day."

The following question was asked of the Appellant at the trial:

"Now in connection with the suitcases -- this black suitcase here, you state that that was the one that was left in your room, was Mr. Johnson's personal belongings, and some of yours, in it?"

And the Appellant answered in the affirmative

to that question. No testimony was offered by the State to contradict the testimony of the Appellant that part of the goods left in the suitcase belonged to Johnson. After the suitcase was first taken from the Earl Hotel to the City jail, it was in the custody and control of the State's authorities to the date of the trial. On the day of the trial, the suitcase was brought into Court and contained clothing belonging to Johnson as well as clothing belonging to the Appellant. (Tr. 131)

In *State vs. Butterfield*, 70 U. 529, 261 P. 804, a case where part of the evidence relied upon to corroborate the accomplice was the testimony of the deputy sheriff that he located part of the stolen property in the house of the defendant and his brother, who was the accomplice in the case, and the defendant and his brother lived in the same house. In that case the brother accomplice turned the property over to the deputy sheriff in the presence of the defendant, who said nothing at the time. The Court held that such evidence



was not sufficient to corroborate the testimony of the accomplice. The Court stated:

"There is no evidence that at the time the defendant was accused of the theft, or that anything was said in his presence by any person tending to implicate him in the crime. The independent evidence against the defendant is reduced to the bare fact that his brother in his presence, and in the house, where it may be assumed, although not proved, they both lived, produced a part of the stolen property. The evidence did not show the particular place from which the stolen property was 'produced,' and hence there was nothing upon which to base an inference that it was found in the defendant's possession or even in a place to which he had access."

In the case at bar, the property inside the suitcase belonged both to Johnson and to the appellant. This supported the Appellant's testimony that he was merely using the suitcase, along with Johnson, to keep his clothing in while he went to Geneva Steel to get work. It left the possession of the suitcase just as much in Johnson as anybody else. Actually, these facts bear out the Appellant's testimony. The testimony of the officers concerning the



Appellant's reference to the suitcase as being his, are but indefinite assertions which do not in any manner connect this Appellant with the perpetration of the offenses with which he was charged.

In the case of State vs. Lay, 38 U. 143, 110 P. 987, a case involving an attempt to corroborate the testimony of an accomplice through the testimony of the county sheriff, the Court held as follows:

"The corroborative evidence required by the statute need not be sufficient in itself to support a conviction, but it must implicate the accused in the offense and not be consistent with his innocence. It is insufficient if it merely casts a grave suspicion on the accused."

In that case, a man was charged with adultery. The testimony of the corroborating witness is as follows:

"I asked him what they went up there for, and he said they went up there to talk it over. I asked Lay if she did not tell him she was in the family way, and he said no; that she did not tell him that she was, but that she thought she was. I said, 'Well, you promised to marry her if she was, didn't you?' He said, 'Not; but, I told her that, if

it was me, I would do the right thing."

The witness further testified:

"I remember in the evening another remark he made. We were talking about the affair, and he said the last time he was in Panguitch that his wife said to him: 'Phil, that smooth tongue of yours will get you in trouble.'"

Now in that case, the witness actually said that he had gone up the street with the accomplice to "talk it over". He was referring directly to evidence tying him to the perpetration of the offense. This would be strong evidence to corroborate an accomplice. However, in that case, the Court was extremely careful that the protection afforded by the statute was respected. So, the Court required more than even an admission by the defendant himself. In the case at bar, the testimony of the Appellant was clear. The testimony of the officers was vague, unless this honorable Court respects the coaching of the witness by the District Attorney prior to the statement of Officer Springer. (Tr. 106) On page 105 of

sufficient opportunity to testify to all facts involved in connection with the suitcase, the Court upheld the District Attorney and overruled the objection of the Appellant's attorney to the question:

"Did you talk with Vigil anymore about that suitcase?"

It was at this point that the officer finally "woke up" to what the District Attorney was trying to make him say, and answered that the Appellant said the suitcase was his.

In the case of State vs. Coreles, \_\_\_\_ U. \_\_\_\_, 277 P. 203, the Court held insufficient such corroborative evidence as a check which had been given by the defendant to the accomplice in payment for the goods involved in the offense charged against the defendant.

In State vs. Baum, 47 U. 7, 151 P. 518, the defendant was accused of burglary in the second degree. The accomplice testified that he and the defendant took the goods and hid them in some brush near a trail on or near a ranch occupied by the defendant. The corrobor-

rating witness, a young boy of the age of eight, testified that some ten days after the commission of the offense, he saw the accomplice and the defendant drive up to the brush where the stolen beer had been cached. At this time, the accomplice told the young boy to

"Get for home, that he was snoop-  
ing around there to steal some-  
thing, and that he didn't want to  
catch him around there anymore."

In addition to that, the sheriff testified that the defendant said to him, after the defendant had been arrested, as follows:

"This will learn me something. I  
won't be mixed up with kids again."

The Court held that the corroboration by the young boy and the sheriff was insufficient.

In this connection, the Court stated that the empty bottles found in the home of the defendant had not been shown to have been taken from the place where the offense was committed.

The Court also explained:

"The defendant's statement, made  
to the sheriff, no doubt shows  
guilty knowledge of wrong doing of  
some kind, but it no more tends to

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connect the defendant with the commission of burglary than receiving stolen property knowing it to have been stolen, or partaking with the culprits of the tempting fruits of the crime."

In this case, the Appellant claims that he didn't have anything to do with the offense and that he was using the suitcase, together with Johnson himself, to hold his clothes in while he went to Geneva Steel to work.

All cases cited herein require that the corroborative evidence must be considered separate and apart from the testimony of the accomplice. It must be evidence which will, without the aid of the testimony of the accomplice, tie the defendant with the actual perpetration of the offense. In the case at bar, the only evidence that can be considered is that the defendant was without full knowledge of the facts; that he had part of his personal belongings mixed up with those of the accomplice, and that, as a result, the suitcase was tied to him. Surely, the testimony of the arresting officers is not sufficient.

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POINT 2: That the trial Court erred in admitting in evidence the Transcript of the preliminary hearing.

The trial Court overruled the objection of the Appellant's attorney to the introduction of the Transcript of the preliminary hearing into evidence. (Tr. 56 and 57) Without previous notice to the Appellant, or anyone else, whatsoever, the State, through the testimony of Deputy Sheriff Karl Ehlers, (Tr. 54, 55 and 56) and Police Officer Joseph B. Clayton, the State set up an improper foundation for the introduction of the Transcript. Deputy Sheriff Karl Ehlers testified that he made inquiry concerning the whereabouts of the Shorts on the day before and on the morning of the trial. (Tr. 54 and 55) Deputy Ehlers' sources of information in this regard were the city directory and the telephone directory. (Tr. 54 and 55) Officer Clayton, (Tr. 55 and 56), testified that on October 4, 1951, the Shorts advised him as follows:

"Well, the way the conversation came about, they asked me to assist them in setting a place to stay for that

night because they had released their cabin, and they planned to leave that night, and it was necessary that they remain in the city."

Thereafter, the District Attorney asked Mr. Clayton what was said about where the Shorts were going when they left Salt Lake City, and Mr. Clayton replied:

"They said they were returning to Kettleman City, California."

The record discloses no further foundation for the admission of the Transcript. One officer said he looked in the city directory and the telephone directory and couldn't find the names of the Shorts. The other officer said that about a month and 23 days previously, the Shorts had advised him, on the day of the preliminary hearing, that they would like him to help them find a place to stay for the evening and that they were returning to Kettleman City, California on the following morning. There was no testimony to substantiate the contention of the State that the Shorts were not in Salt Lake City, Utah, at the time of the trial

on November 27, 1951. Since the testimony contained in the Transcript does not reflect a proper value of the property taken, there is, to this Appellant, a very important reason that he should have them at the trial. Their testimony at the preliminary hearing was not all-inclusive. The purpose of the preliminary hearing was to determine whether or not the State considered that it had a proper case against the Appellant. It was not until after the preliminary hearing that the Appellant had any reason to believe that he would require the presence of the Short in Salt Lake City, Utah at the trial. To be confronted at the trial, for the first time, with the knowledge that the Shorts would not be present at the trial prejudiced the rights of the defendant, the Appellant herein, in proving that the grand larceny he was charged with was not actually grand larceny at all.

Section 105-15-31, R.S.U., 1933, is as follows:

**"Upon application by the County**



Attorney or other attorney for the State and upon notice to the defendant the testimony of witnesses may be taken in writing before the magistrate having jurisdiction of the charge, and such testimony, when signed by the witness and certified by the magistrate, or a Transcript thereof, if taken in shorthand, certified by the stenographer who took the testimony, shall be prima facie, a correct statement of such testimony, and shall be used at the preliminary examination of the defendant or at his trial, or both, with the same force and effect as if the witness were present in Court and testifying; provided, however, that it is satisfactorily shown to the Court that the witness is dead or insane, or cannot with due diligence be found within the State."

The foundation testimony of Deputy Sheriff Ehlers and Officer Clayton do not show that "due diligence" was used in determining if the Shorts were within the State. Why, they didn't even contact the Shorts in Kettleman City, California. They could have done so by telephone and definitely ascertained that the Shorts were in that city. Here, however, they merely relied upon a guess that the Shorts were not in Salt Lake City, Utah. There is actually no proof whatsoever that the Shorts

could not "be found within the State." For that reason, no proper foundation was laid for the introduction of the Transcript and the Court erred in admitting it. Since the Transcript contains corroborative testimony so far as the identification of the suitcase is concerned, the failure of the Court to demand further proof that the Shorts were outside the State, is error prejudicial to the rights of the Appellant herein. It is requested that the judgment of the trial Court be reversed upon the grounds given herein in support of the Appellant's attack upon the admission of the Transcript into evidence.

POINT 3: In addition to the error committed by the trial Court in admitting the Transcript in evidence, the trial Court further erred, after the Transcript was admitted in evidence, in admitting the testimony of Mrs. Short concerning the value of the property involved in the larceny.

Mr. Short, (Tr. 57 through page 66), did not testify to the value of the property taken. He testified, throughout his testimony, concerning different articles that had been taken from

his vehicle at the time of the commission of the offense. However, the list of articles he testified concerning were articles owned by himself and other articles owned by his wife. He did mention, however, certain unexecuted traveler's checks representing an amount of \$300.00 upon proper endorsement. (Tr. 64, 65 and 66) However, since the traveler's checks were not signed for collection, they had no value other than the value of the paper they were written on which to base a grand larceny charge.

The testimony of Mrs. Lizzie Edna Short, (Tr. 74), gave her opinion as to the market value of the things stolen from her car as being, "well, about \$200.00." However, the \$200.00 figure covered all of the things taken. Part of the articles taken belonged to Mrs. Short, while the balance of them belonged to Mr. Short. No designation was made as to how much of the value covered the articles belonging to Mrs. Short, or how much of the value covered the articles belonging to Mr. Short.

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We have a situation, then, in which a person is testifying, without proper foundation being laid, to the value of property belonging to somebody else. Since the \$200.00 covered the aggregate of the articles taken, part of which belonged to Mrs. Short and part of which belonged to Mr. Short, with no designation as to how much value was placed on the two groups of articles, then, no proper value was established. Although it is recognized that an individual may testify to the value of his own property, there are certain limits within which that type of testimony may be admitted.

While it is conceded that Mrs. Short could testify to the value of the articles that belonged to her, it cannot be admitted that she can testify to the value of articles belonging to her husband, especially since no proper foundation was established upon which her testimony could be admitted relative to the value of property belonging to Mr. Short. In fact, no foundation at all was established in that regard. If she were to be properly per-

mitted to testify concerning the value of property which belonged to her, then it would be necessary that she testify to certain articles which were established as having belonged to her and give the value of those articles. Here, however, the articles were not segregated, and there was no distinction between the articles belonging to her and those belonging to her husband. And, too, no value was given by her concerning the articles that belonged to her. Two-hundred dollars covered all of the articles taken. In order that the \$200.00 be properly considered, it would be necessary that Mrs. Short show how much of the \$200.00 covered property belonging to her, and how much of it covered property belonging to her husband, and, at the same time, it would be necessary to also show, so far as the property belonging to her husband was concerned, that she had the proper qualifications for making an estimate of value of her husband's property.

It is submitted that no proper value was

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Now, so far as the traveler's checks are concerned. There was no testimony in the Transcript whatsoever establishing, either properly or improperly, the value of the traveler's checks. At the time of the taking of the articles from the Shorts' vehicle, the traveler's checks were not complete. <sup>at</sup> The signatures in the upper left-hand corner of each traveler's check were made at the time of the purchase; however, all of the checks were unsigned in the space provided for the validating signatures in the lower left-hand corner. (Tr. 65) Therefore, the traveler's checks, at the time of the taking, were incomplete; and, in order that they be cashed it was necessary that they be forged by Gene Bassett, the person who cashed them.

Actually, at the time of the larceny, there was no value attached to the traveler's checks other than the value of the paper upon which they were written. In 7 Am. Jur., Banks, Sec. 96, the matter is covered as follows:

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"Forgery of Purchaser's Counter-  
signature on Travelers' Checks.  
The use of traveler's checks as

now common; the purpose of such checks is to furnish an easy way to secure money while traveling here or abroad, and at the same time to obviate both the danger of loss or theft which would attach to the carrying of a like amount of money and the necessity of identifying one's self other than by signature. The instrument usually provides and is in such form that the checks must be signed by the purchaser when obtained and countersigned again by him when he receives payment. It is this second signature which gives the instrument final currency. That being so, the countersigned signature is to be treated as the ordinary indorsement of a payee upon an ordinary check, with the result that the bank is responsible if it pays upon a forgery."

Therefore, the checks did not become valuable, and would not in any case represent their "face value" until they had been given final currency with the second signature. Since we are dealing with the value of the property at the time it was taken, the traveler's checks had no bearing on this lawsuit other than to show that they had been taken. They surely cannot be considered to establish that grand larceny was committed. Then, too, the Shorts



did not suffer any loss in this matter since they were reimbursed in the full amount of the face value of the traveler's checks. (Tr. 66) Actually, the very basis for traveler's checks is to protect the individual from theft or loss. They are guaranteed to the purchasers that they will not suffer loss financially if the traveler's checks are lost or stolen.

Since the State did not prove, according to the requirements of law, the offense of grand larceny, it is requested that the judgment of the trial Court be reversed and remanded with directions to the trial Court to dismiss the charge of grand larceny against this Appellant.

### CONCLUSION

In conclusion, the Appellant respectfully submits that upon the basis of arguments and authorities set forth herein the judgment of conviction of the trial Court should be reversed.

Respectfully submitted,



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**John Moore Williams**  
**Attorney for Appellant**

Received this \_\_\_\_\_ day of \_\_\_\_\_,  
1953, a copy of the foregoing Appellant's  
Brief.

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