

1953

State of Utah v. Benito E. Vigil : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Walter L. Budge; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *State v. Vigil*, No. 7924 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1852

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

BENITO E. VIGIL,

Appellant.

Case No. 7924

BRIEF OF RESPONDENT

F I L E. R. CALLISTER
Attorney General

MAR 17 WALTER L. BUDGE

Assistant Attorney General

Clerk, Supreme Court Attorneys for Respondent

I N D E X

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	2
ARGUMENT	2
Point I. The defendant was not convicted solely upon the uncorroborated testimony of an accomplice and the corroborative evidence was sufficient to sustain the verdict of the jury	2
Point II. It was not error to admit into evidence the transcript of the preliminary hearing.....	6
Point III. The admission of the testimony of Mrs. Short insofar as it concerned the value of the property involved in the larceny was not error; the owner is generally regarded as qualified to testify as to the value of his property and the rule includes the owner's wife or husband who bought goods and is familiar with their cost, time of acquisition and condition	7
Point IV. The value of the American Express Company checks at the time of the larceny was \$300.00, the amount remaining unpaid thereon and the face value thereof	8
CONCLUSION	8

C A S E S C I T E D

Beech v. American Surety Co. of New York (1935), 56 Ida. 159, 51 P 2d 213, 215.....	7
Garrett v. Neitzel (1930), 48 Ida. 727, 285 P 472.....	8
Golding v. R.K.O. Pictures (1950), 35 Cal. 2d 690, 221 P 2d 95	8
Harding v. N. F. Johnson, Inc. (1952), Mont. 244 P 2d 111.....	8
People v. Derenzo (1941), 46 Cal. App. 2d 111, 115 P 2d 858....	4
People v. Negra (1929), 208 Cal. 64, 280 P 354.....	4
Robinson v. State (1939), 67 Okla. Cr. Rep. 8, 92 P 2d 1082....	5
State v. Butterfield (1927), 70 Utah 529, 261 P 804.....	5
State v. Caroles (1929), 74 Utah 94, 277 P 203.....	4
State v. Cox (1929), 74 Utah 149, 277 P 972.....	4
State v. De Pretto (1916), 48 Utah 249, 155 P 336.....	6

I N D E X

	Page
State v. Erwin (1941), 101 Utah 365, 120 P 2d 285.....	3
State v. King (1902), 24 Utah 482, 487, 68 P 418.....	7
State v. Laris (1931), 78 Utah 183, 2 P 2d 243.....	4
State v. Morris (1927), 70 Utah 533, 262 P 107.....	5
State v. Parker (1943), 104 Utah 23, 137 P 2d 626.....	8
State v. Wade (1925), 66 Utah 276, 241 P 838.....	4
Yeargin v. State (1932), 54 Okla. Cr. 34, 14 P 2d 431.....	5

AUTHORITIES CITED

Wharton on Criminal Evidence, 11th Ed. Vol. 2, Sec. 752, 753, 748, 746 and 754, pgs. 1257 to 1273 incl.....	4
25 ALR 886	4
87 ALR 767	4
32 CJS Evidence, Sec. 545 b (2), p 288; Sec. e (3), p 315.....	7

STATUTES CITED

76-38-8 Utah Code Annotated 1953.....	8
76-38-10 Utah Code Annotated 1953.....	8
77-1-8 (4) Utah Code Annotated 1953.....	6
77-15-31 Utah Code Annotated 1953.....	6
77-31-18 Utah Code Annotated 1953.....	2

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

BENITO E. VIGIL,

Appellant.

Case No. 7924

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Brief of appellant states, at page 3 thereof:

* * * 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, went back to the Earl Hotel in Salt Lake City (Tr 89). * * *

The witness Johnson did not so testify. Johnson testified that he and the appellant took back to the Earl

Hotel the suitcase, a clock, camera and the traveler's checks (Tr 90).

Otherwise, respondent adopts, in substance, appellant's statement of facts. Reason for the above exception is developed in the argument to follow.

STATEMENT OF POINTS

I. THE DEFENDANT WAS NOT CONVICTED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE AND THE CORROBORATIVE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY.

II. IT WAS NOT ERROR TO ADMIT INTO EVIDENCE THE TRANSCRIPT OF THE PRELIMINARY HEARING.

III. THE ADMISSION OF THE TESTIMONY OF MRS. SHORT INSOFAR AS IT CONCERNED THE VALUE OF THE PROPERTY INVOLVED IN THE LARCENY WAS NOT ERROR; THE OWNER IS GENERALLY REGARDED AS QUALIFIED TO TESTIFY AS TO THE VALUE OF HIS PROPERTY AND THE RULE INCLUDES THE OWNER'S WIFE OR HUSBAND WHO BOUGHT GOODS AND IS FAMILIAR WITH THEIR COST, TIME OF ACQUISITION AND CONDITION.

IV. THE VALUE OF THE AMERICAN EXPRESS COMPANY CHECKS AT THE TIME OF THE LARCENY WAS \$300.00, THE AMOUNT REMAINING UNPAID THEREON AND THE FACE VALUE THEREOF.

ARGUMENT

POINT I

THE DEFENDANT WAS NOT CONVICTED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE AND THE CORROBORATIVE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY.

Section 77-31-18, Utah Code Annotated 1953, is cited by appellant as constituting the main basis for appeal; said section reads:

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.

It is respondent's contention that the evidence at the trial sufficiently corroborates the testimony of the accomplice. The question has been many times before this Court. In the case of *State v. Erwin*, 101 Utah 365, 120 P 2d 285, this court held:

This Court has held this corroboration need not go to all the material facts testified to by the accomplice (*State v. Stewart*, 57 Ut. 224, 193 P 855); that the corroborative evidence need not be sufficient in itself to support a conviction; it may be slight and entitled to little consideration. *People v. Lee*, 2 Utah 441; *State v. Spender*, 15 Utah 149, 49 P 302. * * *

On the other hand, the corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all of this must be without the aid of the testimony of the accomplice. *State v. Lay*, 38 Utah 143, 110 P 986; *State v. Butterfield*, 70 Utah 529, 261 P 804; *State v. Park*, 44 Utah 360, 140 P 768; *State v. Kimball*, 45 Utah 443, 146 P 313, *State v. Powell*, 45 Utah 193, 143 P 588; *State v. Bridwell*, 48 Utah 97, 158 P 710; *State v. Baum*, 47 Utah 7, 151 P 518; *State v. Frisby*, 49 Utah 227, 162 P 616; *State v. Elmer*, 49 Utah 6, 161 P 167; *State v. Gardner*, 83 Utah 145, 27 P 2d 51.

The corroborative evidence of an accomplice, unlike proof of *corpus delicti*, may consist in the admissions of the accused. * * *

See Wharton on Criminal Evidence, 11th Edition, Volume 2, Section 752, 753, 748, 746 and 754, pages 1257 to 1273 inclusive.

See also 25 ALR 886; 87 ALR 767; *State v. Wade*, 66 Utah 276, 241 P 838; *State v. Laris*, 78 Utah 183, 2 P 2d 243; *State v. Caroles*, 74 Utah 94, 277 P 203; *State v. Cox*, 74 Utah 149, 277 P 972; *People v. Derenzo*, 46 Cal. App. 2d 411, 115 P 2d 858; and *People v. Negra*, 208 Cal. 64, 280 P 354.

The record, entirely aside from the testimony of the accomplice, amply connects defendant with the crime and corroborates that testimony. Officer Clayton testified that in his presence and in the presence of Officer Springer, the appellant asked about "his suitcase" (Tr 101); that appellant stated where he was staying, gave the room number at the hotel, and asked that the suitcase be gotten for him; that he did get the suitcase for appellant and delivered it to the jailer at the city jail and later to the jailer at the county jail (Tr 101, 102, 103). Further, he identified the suitcase (Tr 102). Officer Springer testified that he and Officer Clayton asked appellant where he had been staying, that appellant told where, gave them the room number, said he had a bag there and asked them to see that he got it. That they did get the suitcase and delivered it to the Police Station. That appellant said the suitcase was his but that several belongings in it belonged to Johnson (Tr

104, 105, 106). Officer Springer identified the suitcase (Tr 105). Appellant identified the suitcase placed in evidence (Tr 115); admitted that he told the officers where the suitcase was (Tr 117); admitted he intended to use the suitcase (Tr 117, 127); and, appellant at no time denied that he had the physical possession of said suitcase. The possession of the stolen suitcase and defendant's assertion of ownership to the officers is sufficient to establish the defendant's participation and connection with the offense charged. In *Yeargin v. State*, 54 Okla, Cr. 34, 14 P 2d 431, that court held:

Where an accused person is found in possession of property taken from a place recently burglarized, that fact may be considered by the jury, along with all other circumstances, as tending to show that the one in possession committed the burglary.

See also *Robinson v. State*, 67 Okla., Cr. Rep. 8, 92 P2d 1082, and *State v. Butterfield*, 70 Utah 529, 261 P 804; and *State v. Morris*, 70 Utah 533, 262 P 107.

Appellant admits of close association with the witness Johnson and that they were roommates for about four days prior to August 2nd and for one, or two, it could have been three days, subsequent thereto (Tr 115). It should be noted that the stolen American Express Company checks were negotiated during the latter period as indicated by the clearinghouse stampings on the backs thereof, all of said checks having reached the clearinghouse between the dates August 4th to 7th, 1951 (States Exhibit A). Appellant admits of further

association with the witness Johnson at the Sparks Hotel (Tr 118).

Appellant was not convicted upon the uncorroborated testimony of an accomplice. His own testimony, the testimony of the police officers together with the exhibits put in evidence by the State amply connect him with the crime and fully corroborate Johnson's testimony.

POINT II

IT WAS NOT ERROR TO ADMIT INTO EVIDENCE THE TRANSCRIPT OF THE PRELIMINARY HEARING.

Where proof is sufficient to show that a witness whose testimony was taken at the preliminary hearing is, in fact, out of the state, then it is not necessary to further prove that special effort was made to find the witness within the state in order to authorize his testimony taken as aforesaid to be read in evidence at the trial. The law does not require needless things to be done. *State v. De Pretto*, 48 Utah 249, 155 P 336.

Appellant herein cites Section 77-15-31, Utah Code Annotated 1953, (Brief of Appellant, pp 20-21) to sustain the contention that "due diligence" was not used to determine if the witnesses Short were within the state. The counterpart of this section is subdivision (4), Section 77-1-8, Utah Code Annotated 1953, which reads in part as follows:

* * * the deposition of such witness may be read, upon it being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found within the state.

Respondent offered evidence satisfactory to the trial court to show the Shorts were not within the state. A subpoena for the appearance of these witnesses was duly issued (Tr 42); the last and best known address of those commanded to appear was therein given (Tr 42, 55); Deputy Sheriff Karl Ehlers testified that he searched the city directory and the telephone directory (Tr 54); Officer Roberts testified as to his acquaintance with the Shorts and as to his personal knowledge of their having left the state (Tr 56). In the case of *State v. King*, 24 Utah 482, 487, 68 P 418, this court said:

The sufficiency of the search is usually and properly left to the trial court's discretion.

This, to respondent's knowledge, remains the rule in this jurisdiction.

POINT III

THE ADMISSION OF THE TESTIMONY OF MRS. SHORT INSOFAR AS IT CONCERNED THE VALUE OF THE PROPERTY INVOLVED IN THE LARCENY WAS NOT ERROR; THE OWNER IS GENERALLY REGARDED AS QUALIFIED TO TESTIFY AS TO THE VALUE OF HIS PROPERTY AND THE RULE INCLUDES THE OWNER'S WIFE OR HUSBAND WHO BOUGHT GOODS AND IS FAMILIAR WITH THEIR COST, TIME OF ACQUISITION AND CONDITION.

Appellant cites no authority for the contention made that no proper value was established for the articles taken (Brief of Appellant pp 22, 23, 24, 25). The law does not sustain his position. See 32 CJS, Evidence, Sec. 545 b (2), page 288, and cases there cited; see also Sec. e (3), page 315, et seq. 32 CJS, supra.

In the case of *Beech v. American Surety Company of New York, Ida.* 135, 51 P 2d 213, 215, that court said:

The owner of property is presumed in a way, to be familiar with its value by reason of inquiries, comparisons, purchases, and sales. The weight of such testimony is another question, and may be affected by disclosures made upon cross examination as to the basis for such knowledge, but this will not disqualify the owner as a witness.

See also *Garrett v. Neitzel*, 48 Ida. 727, 285 P 472; *Harding v. N. F. Johnson, Inc.*, Mont. 1952, 244 P 2d 111; *Golding v. R. K. O. Pictures*, 35 Cal. 2d 690, 221 P 2d 95.

POINT IV

THE VALUE OF THE AMERICAN EXPRESS COMPANY CHECKS AT THE TIME OF THE LARCENY WAS \$300.00, THE AMOUNT REMAINING UNPAID THEREON AND THE FACE VALUE THEREOF.

Section 76-38-8, Utah Code Annotated 1953.

Section 76-38-10, Utah Code Annotated 1953.

State v. Parker, 104 Utah 23, 137 P 2d 626.

CONCLUSION

In conclusion, it is submitted that the evidence in this case fully supports the verdict. The judgment of conviction should be sustained.

Respectfully submitted,

E. R. CALLISTER

Attorney General

WALTER L. BUDGE

Assistant Attorney General

Attorneys for Respondent