

1980

# State of Utah v. Robert James Salmon And Tommy Lee Benwel : Brief of Respondents

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-

ROBERT JAMES SALMON and  
TOMMY LEE BENWELL,

Defendants-Appellants.  
-----

BRIEF OF DEFENDANTS

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APPEAL FROM THE  
FOURTH JUDICIAL DISTRICT  
COUNTY, HONORABLE  
JUDGE

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SHELDEN R. CARTER  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16591
ROBERT JAMES SALMON and TOMMY	:	
LEE BENWELL,	:	
Defendants-Appellants.	:	

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BRIEF OF RESPONDENTS

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STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with unlawfully entering a building with intent to commit theft therein, in violation of Utah Code Ann. § 76-6-202 (1953, as amended) (R. 12). On May 8, 1979, the Honorable Allen B. Sorensen entertained a motion to dismiss charges on entrapment grounds (R. 16, 17). An entrapment hearing was held on May 10, 1979, after which the defendants' motion was denied (R. 18). Trial before a jury was set for May 30, 1979 (R. 19).

#### DISPOSITION IN THE LOWER COURT

On May 30, 1979, the appellants were convicted as charged before a jury in the Fourth Judicial District Court, the Honorable Allen B. Sorensen, Judge presiding (R. 40, 42). Both appellants were later sentenced to be confined to the Utah State Prison for a term not to exceed five years.

#### RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that the judgment of guilt entered against appellants be affirmed.

#### STATEMENT OF THE FACTS

The appellants resided in the State of California prior to the events in question. The two men traveled to Utah by car following several conversations with John Bucy, a friend of the appellants. Mr. Bucy lived with Jamie Flowers. Before the appellants arrived in Utah, Flowers was told by John Bucy that the appellants were coming to Utah for the purpose of robbing some Utah drugstores (R. 183, 191). Based on this belief, Flowers notified James H. Gillespie of the Department of Public Safety, State Liquor and Narcotics Enforcement, that he (Flowers) had information that two men were on their way from California to Utah for the purpose of committing burglaries in the State of Utah (R. 191, 132). This conversation by phone took place on April 10, 1979. Mr. Gillespie thereafter assigned Floyd Hansen to contact Flowers to ascertain further information (R. 133).

Mr. Flowers had never met the appellants prior to their arrival in Utah the morning of April 11, 1979 (R. 182). Appellants were then without means of supporting themselves and they stayed at Flowers' house during their visit. The appellants were also without transportation as their car had broken down so they asked Flowers if he would drive them around on that evening and point out some of the drugstores in the area (R. 183).

Flowers met with Floyd Hansen on April 11 and a listening device was attached to Flowers' person (R. 195). That evening Flowers, Bucy, and the appellant drove around Salt Lake City, Draper and Riverton (R. 196). The "Fargo" listening device was operating during this time and Hansen, who was maintaining surveillance by vehicle, was able to hear the conversation in the Flowers' car over the device (R. 196-198).

The following day, April 12, appellants again asked Flowers to drive them around. Appellants asked Flowers if he knew of any drugstores outside of Salt Lake City (R.193), and if he knew of any drugstores there. Flowers told them about Orem and three places he knew of there. Flowers thereafter contacted Gillespie and Hansen to advise them that appellants wished to travel to Orem that evening (R. 193). The Orem City Police were informed as to where the burglaries would most likely occur (R. 139).

The night of April 12 and early morning of April 13, Flowers drove Bucy and the appellants to Orem. After appellants checked two pharmacies in the Orem area, appellants had Flowers drive to the Cascade Medical Center (R. 81). The appellants got out of the car and entered the South end of the building carrying what appeared to be an empty sack (R. 82-84, 93, 94). The appellants were seen inside the building passing back and forth in front of a lit window (R. 82-84). Appellants emerged from the building approximately fifteen minutes later dragging a heavy bag behind them (R. 83, 94). The two men got back into the car which drove out of the center's parking lot toward Orem Boulevard (R. 84). The appellants were thereafter arrested after the vehicle was stopped by Parole Sargeant Terry Taylor (R. 104, 105, 107).

William Young and Jackie Murphy, detectives, Orem City Police Department, searched the car in which appellants had been passengers and removed from the backseat a white pillowcase, a Kidd fire extinguisher, a phone answering system, an AMF radio, an electric typewriter, a calculator, screwdrivers and leather gloves (R. 85, 98). These items were given to Jackie Murphy, the evidence officer at the time for the Orem City Police (R. 95). Murphy locked up the evidence described and took both articles with her to Court on May 30, 1979.



Jamie Flowers testified at trial that he had never suggested or insisted that appellants commit a burglary or any other crimes (R. 187). Floyd Hansen, a police agent, had the opportunity to listen to conversation in the Flowers' car through a "Fargo" listening device, and testified that he never heard Flowers indicate that he wanted anyone to commit a crime (R. 197). Hansen never heard Flowers threaten the appellants and he never heard the appellants state that they "didn't want to do this." (R. 198). Similar testimony was given by James H. Gillespie, Jr., field supervisor for the department of Narcotics and Law Enforcement (R. 133, 134).

#### ARGUMENT

##### POINT I.

APPELLANTS ERRONEOUSLY COMPLAIN OF  
THEIR CONVICTION BY APPLYING A  
LEGAL STANDARD NOT IN EFFECT AT THE  
TIME OF TRIAL.

Up until this Court's decision of State v. Taylor, (Nos. 15631 and 15645, filed August 7, 1979), Utah courts examined the defense of entrapment, Utah Code Ann. § 76-6-303 (1953, as amended), by employing a subjective test. That test requires a showing that the idea of the crime originate in the mind of a police officer, who then induces the defendant to commit the crime. The test also requires a

determination of whether the defendant is a person predisposed to commit this sort of a crime. This is done by focusing on the defendant's character. The appellants, however, contend that under the objective test for entrapment, their entrapment defense should have been upheld and their motion to dismiss should have been granted. The objective test also requires that the plan for crime originate in the police officer's mind, but then the focus shifts to the police conduct. The test then asks if the police conduct involved a substantial risk of inducing persons to engage in criminal conduct who ordinarily would not engage in that sort of conduct.

A.

THE PROPER LEGAL STANDARD WAS APPLIED  
CORRECTLY.

At the time of the appellant's trial, the subjective test, still used by the majority of states, was the proper legal standard in force and was applied correctly.

The jury found that the plan to burglarize the Cascade Medical Center did not originate in any police officer's mind. The appellants argue that Flowers, an informant for the police, planned and induced the crime. However, the testimony at trial was sufficient to allow the jury to weigh the evidence and conclude that, indeed,

there had been no entrapment. Floyd Hansen testified that he never heard (through the "Fargo" listening device) Flowers urged the appellants to commit a crime nor did Flowers tell them how they should do the job. There was also testimony that the appellants had come to Utah intending to burglarize drugstores. Thus, there was evidence as to the origin of the plan for crime and the defendants' propensity to commit crime. In their task of weighing the evidence and the credibility of witnesses, the jury believed this evidence and therefore found that the appellants had not been entrapped.

Moreover, under either the subjective or the objective test, there could be no entrapment since Flowers was not a police agent. In State v. Taylor, (Nos. 15631 and 15645 at p. 6 & 7, filed August 7, 1979), this Court said, "Entrapment, as a defense, is not available to one who is induced by a private person to commit a crime. Since entrapment can be asserted only when one is induced to commit a crime by a government agent, the obvious focus of this defense is directed to the conduct of the government." There was evidence at trial that Flowers was not a "government agent." Mr. Gillespie testified that Flowers did not work for him and was not an agent of the police force (R. 135).

Appellants are asking this Court to apply the objective test in this case, as was done in State v. Taylor, in order to avoid the jury's verdict. The appellants were convicted by a jury on May 30, 1979. State v. Taylor was decided by this Court on August 7, 1979. What appellants actually seek then is retroactive application of State v. Taylor, (Nos. 15631 and 15645, filed August 7, 1979).

B.

THIS COURT'S DECISION IN STATE V. TAYLOR, ANNOUNCING ADOPTION OF THE OBJECTIVE TEST, SHOULD NOT BE APPLIED RETROACTIVELY.

The criteria for retroactive application of a new court-created rule in the area of criminal law was announced by the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966). In that case, the court refused to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966), a decision rendered just one week before Johnson was heard by the Court. In determining whether to give retrospective or prospective effect to decisions adopting such new rules, the Court listed these considerations: (1) the purpose of the rule involved; (2) reliance placed upon the former rule; and (3) the effect which retroactive application of the new rule would have on the administration of justice. 384 U.S. 727.

First, the purpose of the new rule in determining entrapment (the objective test), is deterrence of police misconduct. Under the Johnson rationale, retroactive application is only justified if the new rule affects "the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent." Id. at 727, 728. The Court in Johnson illustrated this standard by pointing to cases where the Court had given retroactive effect to constitutional rules of criminal procedure such as decisions establishing the right to counsel at trial or a probation revocation hearing, Gideon v. Wainwright, 372 U.S. 335 (1963), and Mempha v. Rhay, 389 U.S. 128 (1967). Another example of retroactive application of new rules involved the right of an indigent to free transcript on appeal. Griffin v. Illinois, 351 U.S. 12 (1956).

A new rule affecting police conduct does not qualify as a constitutional rule of criminal procedure which enhances "the reliability of the fact-finding process." Johnson v. New Jersey, 384 U.S. 728, 729 (1966). Appellants were not denied any procedural rights. They were accorded a hearing on their motion to dismiss. The court determined that there was no valid entrapment defense and properly submitted the issue to the jury. Utah Code Ann. § 76-3-303(4) (5) (1953, as amended). The accused had competent counsel at trial and were afforded a jury trial. The integrity of the fact-finding process which resulted in their convictions was not threatened by use of the subjective test then in effect.

Furthermore, the purpose of the new rule (deterring police misconduct) is similar to those cases in which retroactive application is denied. In Linkletter v. Walker, 381 U.S. 618 (1965), a decision barring use of evidence obtained by illegal search and seizure was not applied retroactively; the purpose of the rule was to deter the police from conducting unlawful searches. Deist v. United States, 394 U.S. 244 (1969), refused to retroactively apply Katz v. United States, 389 U.S. 347 (1967), a decision which precluded the use of evidence obtained by electronic eavesdropping. Finally, Miranda v. Arizona, 384 U.S. 436 (1966), a decision limiting the police's right to interrogate defendants without the presence of counsel, was not applied retroactively in Johnson v. New Jersey, supra. The Court reasoned that deprivation of counsel during the investigative stage does not necessarily impair the integrity of the truth-finding process. In all of these cases, as in the instant case, the purpose of the new rule was to deter police misconduct. In all of the cases retroactive application was denied. Respondent submits that the Utah Supreme Court in Taylor, supra, made clear that the focus of its

decision was to prevent police misconduct and did not go to the integrity of the fact-finding process. For example, at p. 13 of the green sheet opinion, this Court states:

It should be emphasized that defendant engaged in conduct proscribed by statute and was guilty of a crime. However, his conviction cannot stand for the reason the statute condemns the conduct of the state in inducing the crime, as a perversion of the proper standards of administration of criminal law.

Moreover, at p. 11, this Court discusses why the objective test was adopted over the subjective test, to-wit: to curb police misconduct. Respondent therefore contends that, for this reason alone, retroactive application of State v. Taylor (Nos. 15631 and 15645, filed August 7, 1979), should be denied.

Secondly, the United States Supreme Court in Johnson, supra, also stated that the fact that retroactive application of a decision would seriously disrupt the administration of criminal laws was a valid consideration in determining retroactivity. 384 U.S. at 731. Here, retroactive application of Taylor would require the retrial or release of numerous prisoners--an unjustifiable burden on the administration of justice.

More important is the reliance law enforcement officials placed on the subjective test applied in the pre-Taylor decisions. Applying Taylor retrospectively would place a different and possibly a heavier burden upon prosecutors. See Jenkins v. Delaware, 395 U.S. 213 (1969). Before Taylor, when entrapment was asserted as a defense, the focus was not solely on police conduct, but also on the defendant's predisposition to commit a crime. However, now the focus is directed to the conduct of the government, and the prosecutor has a different evidentiary burden because the objective test eliminates presentation of proof by evidence of the accused's criminal character or predisposition by evidence of past offenses. See State v. Taylor, supra.

In Green v. Turner, 443 F.2d 832 (10th Cir. 1971), the Tenth Circuit held that the United States Supreme Court decision of Boykin v. Alabama, 395 U.S. 238 (1969), did not apply retroactively even though Boykin was a landmark decision which established the modicum of due process required before a guilty plea could be accepted. If Miranda and Boykin, both of which affected the fundamental constitutional rights of a defendant, did not qualify as the type of case which could be applied retrospectively, surely Taylor does not justify retroactive application to defendants similarly situated.



In State v. Kelbach, 461 P.2d 297 (Utah 1969), this Court refused to apply United States v. Wade, 388 U.S. 218 (1967), retroactively because the police lineup in which the defendants were identified occurred prior to June 12, 1967, the date of the Wade decision. No further explanation of this ruling was made, thus implying, perhaps, a strict rule that there should not be retrospective application of a decision which does not expressly provide for such application.

In another Utah decision, the State advocated a change in the construction of Utah Code Ann. § 77-39-4 (1953, as amended), and also asked that the change be retroactive so as to apply to the proceeding. State v. Kelbach, 569 P.2d 1100 (Utah 1977). This Court declined and appeared to voice a general principle "of honoring the established law. If there is to be such a change in the law whether by legislative act or by judicial decision, it seems that it should have only prospective effect." Id. at 1102.

Therefore, respondent submits that State v. Taylor should have only prospective effect because retrospective application would impose too great a burden on administrators and on law enforcement officials and prosecutors who have relied on prior decisions regarding entrapment.

## POINT II

THE TRIAL COURT PROPERLY EXCLUDED  
A PORTION OF APPELLANT'S TESTIMONY ON  
HEARSAY GROUNDS.

The appellants cite as alternative grounds for reversal their argument that testimony offered by one of the appellants was improperly excluded as hearsay.

At trial a question was asked on direct examination by the defense which referred to Flowers' conduct in inducing appellants to commit crimes. The position of the defense had been that Flowers had made statements which induced the crime, for example, that Flowers wanted the men to burglarize a drugstore and that they should do it in a certain manner, etc. The prosecutor, therefore, objected to the answer given: "Well, for one he drove us around. He was talking about . . .," on the ground that was hearsay since the statement was offered to show the truth of the matter asserted (R.153,154, Utah Rules of Evidence, Rule 63). Counsel stated that the statement was offered for their truth as the statements were at issue in determining whether Flowers had induced the appellants to commit the burglary. Appellants contend that the testimony was not offered to show that the statements were true.

Respondents submit that if the statements were offered for anything but their truth, the evidence would

be irrelevant as lacking any tendency to prove the existence of any material fact. Rule 1, Utah Rules of Evidence. In other words, unless the statements were true, they could not show that the appellants had been entrapped. The statements could only have been crucial evidence going to the issue of entrapment if they had been true--that Flowers uttered words designed to induce or compel the appellants to burglarize the Cascade Medical Center. Thus, the trial court properly excluded the evidence as inadmissible hearsay under Rule 63, Utah Rules of Evidence.

Appellant cites State v. Kasai, 540 P.2d 949 (Utah 1975), as the rule to be applied in determining whether reversal is justified. Respondent suggests that even had there been error below, admission of the appellant's testimony would not have resulted in a different result. The testimony of Hansen and Gillespie was that Flowers had not made statements which would induce the commission of a crime (R.133,134,197,198). Such was also the testimony of Flowers himself. The defense had the opportunity to cross examine and cross examination of Flowers did not reveal any retraction of his testimony on direct examination. It was the jury's task, therefore,

to weigh the evidence and credibility of the witnesses and there is nothing which would indicate the likelihood of a different result had the appellant's testimony not been admitted. Therefore, reversal is not justified in this case because the trial court did not err in excluding hearsay and such exclusion was not prejudicial.

#### CONCLUSION

Respondent, therefore, urges this Court to uphold the guilty verdict entered against the appellants in the court below because the legal standard in determining entrapment was properly applied. Furthermore, retroactive application of State v. Taylor should not be applied for the reason stated in Johnson v. New Jersey, 384 U.S. 719 (1966), and because the evidence at trial shows that even under the objective test, the jury could still find that the appellants were not entrapped.

Finally, the judgment of guilt should not be reversed because the trial court properly excluded testimony of statements offered for the truths of the matter asserted which is prohibited by Rule 63 of the Utah Rules of Evidence.

Respectfully submitted,

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