

1988

Utah v. Johnson : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

UTAH
DOCUMENT

IN THE SUPREME COURT OF THE STATE OF UTAH

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DOCKET NO.

v.

ALFRED WILLIAM J. JOHNSON,

Defendant-Appellant.

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Case No. 880066

Category No. 2

PC 01383

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

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APPEAL FROM A CONVICTION OF BURGLARY, A
SECOND DEGREE DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-6-202 (1978), AND
HABITUAL CRIMINAL, A FIRST DEGREE FELONY,
INVIOLATION OF UTAH CODE ANN. § 76-8-1000
(1978). IN AND FOR THE COUNTY OF SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE RICHARD
H. MOFFAT, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent, : Case No. 880066
v. :
ALFRED WILLIAM J. JOHNSON, : Category No. 2
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STATE OF UTAH, :
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ALFRED WILLIAM J. JOHNSON, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1978), and Habitual Criminal, a first degree felony, in violation of Utah Code Ann. § 76-8-1001 (1978). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2 (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the evidence introduced at trial was sufficient to support the denial of defendant's motion to dismiss and to support the jury's guilty verdict.
2. Whether the trial court's inadvertent mention to the jury of two charges in the charging document prejudiced defendant's right to a fair trial on the burglary charge.
3. Whether the trial court abused its discretion when it sentenced defendant to consecutive terms for Burglary and Habitual Criminal convictions.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The statute relied on in the argument of this case is Utah Code Ann. § 76-8-1001 (1978). The text of this statute is:

Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

STATEMENT OF THE CASE

Defendant was charged with Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1973), and with Habitual Criminal, a first degree felony, in violation of Utah Code Ann. § 76-8-1001 (1978).

Defendant was tried to a jury on the Burglary charge on December 10, 1987 in the Third Judicial District Court, the Honorable Richard H. Moffat, presiding. The jury convicted defendant and then the Court took evidence of defendant's prior convictions and found defendant guilty of the Habitual Criminal charge.

On January 15, 1988 the Court sentenced defendant to serve one to fifteen years in the Utah State Prison for Burglary and five years to life for Habitual Criminal, both sentences to run consecutively to each other.

STATEMENT OF THE FACTS

On September 29, 1987, John and Eleanor Sargent left their apartment on Second Avenue in Salt Lake City to go to lunch (R. 94 at 19). As they left, Mrs. Sargent locked the door by pushing in the button in the middle of the door knob (R. 94 at 20 and 46). Mr. Sargent pulled the locked door shut (R. 94 at 20) and Mrs. Sargent recalls him "rattl[ing] it a bit" (R. 94 at 47). Mr. Sargent testified that they had never had any problem with the door "falling open" (R. 94 at 20).

After having lunch and dropping his wife off at the University of Utah, Mr. Sargent returned to find the door of his apartment open about one inch (R. 94 at 22). As he opened the door he saw defendant standing in the living room just at the entrance to the bedroom (R. 94 at 23). Mr. Sargent challenged defendant who responded that he was looking for someone else, that it was a mistake and that he hadn't taken anything. He then asked Mr. Sargent to check and see that nothing was missing (R. 94 at 23). Defendant said all of that at once then added that he was looking for a friend, Steve Goddard (R. 94 at 23-24). No one by that name lived in the building where the Sargents' apartment was (R. 94 at 24). Mr. Sargent was confused and fearful of a confrontation with defendant and began checking to see if anything was missing (R. 94 at 24-25).

On searching, Mr. Sargent found little out of place but did notice that his wife's jewelry box on the window sill was open with nothing missing; he said that there was nothing of great value in the box (R. 94 at 26). He said he had not seen

the lid open before he left for lunch and that their common practice was to keep the lid shut (R. 94 at 27).

Mrs. Sargent testified that she had not opened the jewelry box for a year and that it had a thick coat of dust "because it hadn't been touched for so long" (R. 94 at 48). She noticed when she returned to the apartment on September 29th that the lid was open and could see the coat of dust on it still (R. 94 at 49). She also noticed "a couple of fingerprints on it" (R. 94 at 49). She said that they looked like fingerprints but admitted she had no training in identifying fingerprints (R. 94 at 49-50). The marks in the dust were "[l]ittle, round spots in the dust that appear as though they might be fingerprints" (R. 94 at 50). Officers were unable to lift any prints because the surface of the box was not conducive to obtaining prints (R. 94 at 55).

After checking the apartment and finding nothing missing, Mr. Sargent went back into the living room and spoke with defendant (R. 94 at 28). Defendant told Mr. Sargent his name was "Alf" (R. 94 at 30).

After defendant left, Mr. Sargent thought about the occurrence and finally came to the decision that he "probably had entered a burglary in progress " (R. 94 at 29). He then called the police (R. 94 at 29-30).

The police later presented a photo line-up to Mr. Sargent and he identified the defendant's photo as being the person in his apartment (R. 94 at 31 and 56). He also identified defendant at trial as being the person (R. 94 at 32).

SUMMARY OF ARGUMENT

A defendant's intent must be inferred from the facts and evidence elicited at trial because intent is not susceptible to direct proof. If there is some evidence, including reasonable inferences, which supports the jury's finding that the defendant had the requisite intent to commit theft, the appellate court should affirm the jury's verdict. Enough evidence was presented at trial to support the jury's verdict in this case.

The trial court's inadvertent mention of two charges in this case, without more, was harmless error and this Court should not overturn the jury's verdict on such a technicality.

The consecutive terms imposed in this case for Burglary and Habitual Criminal is a proper enhancement for a persistent offender and does not violate double jeopardy standards. Defendant is being punished for committing an additional felony, not for the previous criminal acts. Running the two prison terms consecutively is a proper enhancement for continued criminal activities by this defendant.

ARGUMENT

POINT I

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS AND TO SUPPORT THE JURY'S VERDICT.

On appeal, defendant argues that there was insufficient evidence presented at trial to support his conviction. A review of the evidence, however, reveals that defendant's claim is without merit.

The Utah Supreme Court pointed out in State v. Booker, 709 P.2d 342 (Utah 1985), that where a defendant claims the evidence was insufficient to sustain his conviction, the standard of review is narrow.

"[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, Utah, 659 P.2d 443, 444 (1983); accord State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses. . . ." State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops. . . .

Id. at 345 (emphasis in original).

Defendant maintains that the jury could not have found that the defendant had the requisite intent to commit a theft based on the evidence introduced at trial. As this Court said in State v. Davis, 711 P.2d 232 (Utah 1985):

Defendant's argument is based only on his interpretation of the evidence, which is not the only reasonable interpretation. A contradictory version of the facts, without more, is not a ground for reversal. State v. Buel, Utah, 700 P.2d 701 (1985). . . . We assume that the jury chose to believe the evidence that supports the verdict. State v. Carlson, Utah 635 P.2d 72 (1981).

Id. at 234.

Defendant did not present any evidence and the only version of his encounter with Mr. Sargent in the Sargent apartment came from the victim. Based on the testimony given by Mr. and Mrs. Sargent, a reasonable jury could infer that defendant had the requisite intent for a burglary conviction. This Court has often reiterated the proposition that a person's intent must be inferred from surrounding circumstances.

Specific intent, need not be proved by direct evidence, and, of course, is always subject to denial by an accused. The fact-finder, however, is entitled to draw all reasonable inferences from the facts and from the actions of the defendant. As this Court stated in State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969):

With respect to the intent: It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim; and that he in fact denied any such intent. However, his version does not establish the fact nor does it even necessarily raise sufficient doubt to vitiate the conviction. If it were so, it would lie within the power of a defendant to defeat practically any conviction which depended upon his state of mind. [453 P.2d at 69]

State v. Cooley, 603 P.2d 800, 802 (Utah 1979).

There were sufficient facts given at trial to support the element that defendant entered the apartment with the intent to commit a theft. The door had been locked when the Sargents left at 1:00 p.m. (R. 94 at 20 and 46-47) but was ajar when Mr. Sargent returned. The door was not wide open as when someone enters looking to see if someone they know is there, but open only one inch as if to conceal the fact that someone had entered

(R. 94 at 22). Defendant was not near the outside door as if he had just entered and was calling out to see if anyone was home but was across the living room near the bedroom entrance as if just coming out of the bedroom (R. 94 at 23).

Nothing had yet been taken which could mean that the burglary had just begun and that there was little of value to take (R. 94 at 25-28). The defendant's first words to Mr. Sargent were that it was a big mistake and that he hadn't taken anything (R. 94 at 23). The jury might have found that that was a curious statement for defendant to make at that point.

While nothing had been taken, a jewelry box had been disturbed as if defendant were looking in it to find something of value (R. 94 at 26). Mr. Sargent noticed this because it was "strange" that the box was open (R. 94 at 26). Mrs. Sargent testified that while she had not specifically checked the box before leaving, she hadn't opened it in about a year and that it had a thick coat of dust on it (R. 94 at 48). She noticed what she thought were fingerprints in the dust (R. 94 at 49) which her husband could not have left that day because the box was already open when he noticed it (R. 94 at 26).

Defendant makes much of the fact that when defendant partially pulled out his pockets, Mr. Sargent didn't see any of the Sargents' property or any burglary tools. Mr. Sargent testified that he didn't check all of defendant's pockets (R. 94 at 36-37 and 44) and so Mr. Sargent was not able to say that the defendant didn't have any burglary tools or credit card with which to pick a lock.

Defendant's conciliatory manner and his statement when confronted by Mr. Sargent are indicative of one who had been caught in the act of burglary but had not yet had a chance to take or conceal anything. He wanted to placate Mr. Sargent and try to talk his way out. He knew that he had not yet taken anything so his best course was to brazen it out and hope that Mr. Sargent would be confused and let him go. This is exactly what happened. He had allayed Mr. Sargent's suspicions long enough to make his get-away but not enough to keep Mr. Sargent from having second thoughts.

From all of these circumstances surrounding the occurrence, a reasonable jury could infer that defendant intended to steal but had been caught in the act. All defendant's story to Mr. Sargent about a Steve Goddard, for whom he was looking, could be seen for what it was--a ruse to confuse Mr. Sargent. Since there is "some evidence, including reasonable inferences, from which findings of all requisite elements of the crime can reasonably be made," Booker, supra at 345, this Court must affirm the jury's verdict.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT MENTIONED TWO COUNTS IN THE INFORMATION BUT ONLY READ ONE TO THE JURY.

During voir dire the trial court made the following statement:

THE COURT: This case is entitled State of Utah, plaintiff vs. Alfred William Johnson, Jr., defendant. Am I correct? That the trial as to both counts, am I not?

(R. 94 at 9). The prosecutor immediately asked to approach the bench and a discussion was held off the record. Then the court proceeded:

THE COURT: There is one count entitled
burglary . . .

(R. 94 at 10). No further mention of another count was made and voir dire continued and a jury was selected. A recess was taken, opening statements given and the noon recess taken. On return from the noon recess and before the jury was brought in, defendant moved for a mistrial based on the trial court's mention of a second count (R. 94 at 14). The prosecutor argued that the court had not revealed the nature of the second charge so there were no grounds for mistrial. The court agreed that no harm had been done but offered to make a curative statement to the jury. Defendant declined, feeling that a corrective statement would "only further complicate the matter" (R. 94 at 15-16). Thus, defendant did not allow the trial court to cure any possible error but seeks to try to correct on appeal. Since defendant did not allow the trial court to correct any alleged error it is specious for him to now appeal that issue. See State v. Hales, 652 P.2d 1250 (Utah 1982).

The court's inadvertent statement mentioning two counts did not prejudice defendant. The matter was not belabored which might have fixed it in the jurors' minds. There is no showing in the record that the jury was influenced by the statement. See State v. Troy, 688 P.2d 483 (Utah 1984). During their deliberations the jury sent out two notes containing questions but neither involved questions about another charge (R. 64).

There is no reason to believe that the brief mention of a second charge swayed the jury in any way.

In a similar situation in Nevada that Supreme Court affirmed a defendant's conviction. That case was more egregious than the present one because a portion of the habitual criminal charge was actually read to the jury.

Finally, appellant contends we must reverse his conviction because a small portion of the habitual criminal charge contained in the information was inadvertently read to the jury by the district court clerk, contrary to the mandate of NRS 207.010(5). Here, the appellant exercised his 5th Amendment right and elected not to be a witness in his own behalf. Any material error with respect to the reading of the criminal charge would militate against a defendant's right to silence. The statute precludes any reference to the habitual charge during the trial of the primary offense. A review of the prior offenses makes it clear why appellant may have determined not to take the stand. The statute speaks in terms of "charge," and although there was reference to "habitual criminal" made by the court clerk, none of the convictions were alluded to. Had they been, prejudicial error may have occurred.

Jones v. States, 564 P.2d 605, 607 (Nev. 1977) (footnote omitted).

This Court has maintained that:

We are firmly committed to the proposition that the rules of law and procedure must be adhered to, particularly in a criminal case. But once a fair trial has been afforded the defendant and a verdict which is supported by the evidence rendered, the proceedings are presumed to be valid; and we are not disposed to reverse for mere technicalities or irregularities unless they put the defendant at some substantial disadvantage or had some material bearing on the fairness of the proceedings or its outcome.

State v. Valdez, 432 P.2d 53, 55 (Utah 1967) (footnote omitted).

Since no mention was made of the substance of the second charge (indeed, the fact of a second count was barely mentioned), the defendant's right to a fair trial was not prejudiced. This Court should not overturn the conviction on a mere technicality.

POINT III

THE TRIAL COURT PROPERLY SENTENCED DEFENDANT TO AN ENHANCED SENTENCE FOLLOWING HIS CONVICTION ON THE HABITUAL CRIMINAL CHARGE.

On January 15, 1988, defendant was sentenced to an indeterminate term of one to fifteen years in the Utah State Prison for the burglary charge and an indeterminate term of five years to life for the habitual criminal charge (R. 94 at 108). The court ordered that the sentences run consecutively saying "with the record that this individual has, I don't think he has earned any kind of consideration in not running the sentence consecutively." (R. 94 at 107.) Defendant raised no objection to the sentence at that time but now challenges it on appeal.

Utah habitual criminal statute, Utah Code Ann. § 76-8-10001 (1978) states:

Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

Defendant claims that sentencing him to a "separate and consecutive sentence" violates the statutory provisions of the habitual criminal statute and the protection against double jeopardy (Br. of App. 14). Defendant, relying on State v. Bailey, 712 P.2d 281 (Utah 1985) and cases from the jurisdictions of Colorado and Idaho, claims that his sentence was not enhanced by the consecutive term of five years to life, but was, rather, a separate consecutive sentence for being an habitual criminal in violation of double jeopardy protections.

The United States Supreme Court has repeatedly upheld habitual criminal statutes when assailed on double jeopardy grounds. In Gryger v. Burke, 334 U.S. 728, 732 (1948), the Supreme Court stated that the adjudication as an habitual offender "is not to be viewed as either new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." See also Spencer v. Texas, 385 U.S. 554, 559 (1967). This Court has also consistently upheld the constitutionality of the habitual criminal statute, both under the previous and current statutory provisions. State v. Carter, 578 P.2d 1275 (Utah 1978); Thompson v. Harris, 107 Utah 99, 152 P.2d 91 (Utah 1944). The Utah statute has been upheld when assailed specifically on double jeopardy grounds. State v. Bailey, 712 P.2d 281, 286 (Utah 1985).

This Court currently has before it two cases in which the same question was raised, State v. Stilling, Case No. 870094

(Utah filed April 7, 1988) and State v. Williams, Case No. 870095, (Utah filed June 6, 1988). In the Stillings case, defendant is asking that his sentence of five years to life for Aggravated Robbery be replaced by a similar term for an Habitual Criminal conviction which was ordered to run concurrently. To do so would be to negate to a certain extent the enhancement provisions of the Habitual Criminal statute. Replacing a five years to life sentence with another five years to life term does not enhance the sentence for the persistent offender.

In the present case, the triggering offense is a second degree felony which mandates a sentence of one to fifteen years. To replace the sentence for the Burglary which triggered the Habitual Criminal charge with the term required by the Habitual Criminal statute would increase the incarceration in this case. On the other hand, it would also trigger a claim of disproportionate sentences. The defendant in a case similar to Stillings, who has the sentence for his triggering offense replaced by the sentence for Habitual Criminal, does not receive a longer indeterminate sentence. But if, as in the present case, the triggering offense is less than a first degree felony, the sentence for the triggering offense is replaced by a longer indeterminate sentence. This defendant's punishment is enhanced by the trial court's order but the sentence of one convicted of an underlying first degree felony is not enhanced in the same fashion.

The sentence imposed on defendant was in compliance with the statutory provision and the purpose underlying the statute. "The habitual criminal statute does not create a new

crime; it merely enhances the punishment for the conviction of a crime committed when the defendant has theretofore committed at least two other felonies and been committed to prison therefor." State v. Carter, 578 P.2d 1275, 1277 (Utah 1978) (emphasis added). The purpose underlying the habitual criminal statute was further defined in State v. Montague, 671 P.2d 187, 190 (Utah 1983) when this Court stated that the purpose is to "make persistent offenders subject to greater sanctions."

The habitual criminal statute does not state that the prescribed period of imprisonment of five years to life replaces the sentence for the present conviction. Nor does it expressly tack on a specific indeterminate term of years to run consecutively as does, for example, the firearms enhancement provision of Utah Code Ann. § 76-3-203 (1978). The statute merely states that once the elements of the charge have been established, the defendant shall "be determined as a habitual criminal and be imprisoned in the state prison for from five years to life." Utah Code Ann. § 76-8-1001 (1978).

The typical double jeopardy argument is similar to the argument raised in State v. Bailey, 712 P.2d 281 (Utah 1985), that is, that the habitual criminal provision violates prohibitions against double jeopardy because the defendant is receiving double punishment for earlier convictions. Courts have universally rejected this argument because, instead of twice punishing a defendant for an offense, the habitual criminal provision enhances the punishment for the current offense. Moore v. Missouri, 159 U.S. 673, 676-77 (1895) (increased severity of

punishment for present offense is not second punishment for previous offense); Gryger v. Burke 334 U.S. 728, 732 (1948) (sentence as habitual criminal is not additional penalty for earlier crimes, but stiffened penalty for latest crime which is considered to be aggravated because it was repetitive); Zeimer v. Turner, 14 Utah 2d 232, 381 P.2d 721, 723 (Utah 1963). In Bailey, a case in which the defendant was convicted on a habitual criminal charge and sentenced to an indeterminate term of five years to life for that conviction, this Court rejected the double jeopardy claim and stated that "the defendant properly received an enhanced sentence for his latest conviction." 712 P.2d at 287.

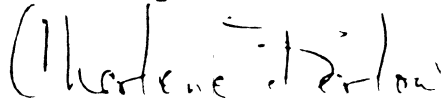
Under this reasoning, it is of no consequence how the enhanced penalty is procedurally imposed, e.g., addition of a specific term of years, a specific minimum mandatory term (as in the 15 year minimum imposed under the previous Utah statute), substitution of a greater sentence for a lower one, or, as done under the current statutory scheme, tacking on an additional indeterminate term of five years to life, regardless of whether it runs concurrently or consecutively. The purpose and effect remains to enhance the punishment for the latest criminal conviction, not to punish for the second time a prior criminal act, and not to separately sentence for the criminal act of being an habitual criminal. In the present case, the added term of five years to life as enhancement for the present convictions does not violate provisions against double jeopardy.

CONCLUSION

Based on the foregoing, and any information which may be brought out on oral argument, the State asks this Court to uphold the jury's verdict and the sentencing imposed in this case.

RESPECTFULLY submitted this 28th day of September, 1988.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Khris Harrold, and Joan Watt, Salt Lake Legal Defender Assoc., 430 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 28th day of September, 1988.

