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# The State of Utah v. Johnny DeHerrera et al : Brief of Appellant

Utah Supreme Court

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Lewis J. Wallace; M. Blaine Peterson; Wallace, Adams & Peterson; Attorneys for Appellants;

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Case No. 8150

IN THE

**SUPREME COURT**

OF THE STATE OF UTAH

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THE STATE OF UTAH,

Respondent,

vs.

JOHNNY DeHERRERA, JOE VALDEZ  
and RAYMOND O. MARTINEZ,

Appellants.

---

**Appellant's Brief**

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LEWIS J. WALLACE,  
M. BLAINE PETERSON  
of WALLACE, ADAMS & PETERSON  
*Attorneys for Appellants*

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STATEMENT OF THE CASE

The appellants above-named were charged with the offense of robbery. The case was tried before the Court sitting without a jury. At the conclusion of the State's case, defendants made a motion to dismiss the information and to discharge the defendants. The grounds for the motions were as follows (Tr. 37, 38):

1. That the State failed to prove the corpus delicti of the offense charged;
2. That the State failed to prove that the crime of robbery was committed; and
3. That the State failed to prove that the defendants, or any of them, were guilty of the offense charged.

The motion for dismissal was denied by the trial court. Defendants offered no testimony in their own behalf and rested. The court then found the defendants guilty as charged.

## STATEMENT OF FACTS

The facts as appear in the record are as follows: On the evening of June 19, 1953, the complaining witness, a man by the name of Thomas Edwards, attended a baseball game at John Affleck Park in Ogden (Tr. 3). The game was over at 10:30 o'clock P. M. and Edwards went from the park to Kay's Bar on 25th Street in Ogden to buy cigarettes (Tr. 2). While there he met defendants and began talking with them (Tr. 2), sat down with them (Tr. 2), and bought them all a beer (Tr. 6, 35), had a conversation with them about some women (Tr. 10), and left less than half an hour after his arrival (Tr. 9).

He testified that when he was leaving two of the defendants grabbed him and shoved him into a car (Tr. 2). He didn't see anyone on the streets. When he got in the car everything went blank (Tr. 2). He testified that he guessed they hit him (Tr. 3). He gained consciousness when he was down in the wilds by the river and they were beating him up (Tr. 3), and when he became unconscious they would either revive him or wait until he regained consciousness and then beat him some more (Tr. 3, 4, 8, 12, 13). He testified that he had about \$27.00 on his person during the afternoon at about quitting time; that he had made some small expenditures prior to the time when he met the defendants (Tr. 5); that he spent money in the tavern (Tr. 5); and that he never counted his money in Kay's Tavern (Tr. 33). About 2:30 the following morning a member of a train crew in the Ogden railroad yards called the police when he noticed somebody near the right-of-way, without any clothes on, run out toward

the engine he was operating, and noticed somebody else come out of the shadows, hit him and drag him back (Tr. 12). The officers arrived on the scene three or four minutes after receiving the call (Tr. 20) about 2:30 a. m. (Tr. 13) on West Rushton (Tr. 13), saw a black 1946 Ford Coupe standing there, and saw the defendants Martinez and DeHerrera standing behind the car (Tr. 14). They saw them throw something into the weeds. It was a pair of shorts (Tr. 14). There was a watch, a wallet, and a lighter (Tr. 7) found on the ground at the scene and identified as those of the complaining witness. They were offered in evidence along with his shorts and trousers (Tr. 36). Also found at the scene were a ring (Tr. 15, 17) and some nail clips (Tr. 16, 17), and a handkerchief with lipstick on it (Tr. 16) which the complaining witness said did not belong to him (Tr. 36, 37). Four or five empty beer bottles were found in the car (Tr. 19). There was evidence of a fight (Tr. 18); "evidence quite a bit that looked like a struggle had gone on, the ground was messed up" (Tr. 18); and there was a pool of blood on the ground (Tr. 18). The complaining witness was beaten severely (Tr. 3, 4, 6, 8, 12, 13), was knocked out more than once (Tr. 4, 8), says he heard the defendants say they were going to beat and finish him off (Tr. 4, 8), and was heard to scream for help (Tr. 22, 23) and say "Don't let him kill me" (Tr. 23).

This is the substance of the material evidence.

### ARGUMENT

It is to be noted at the outset that the specific charge of robbery, as stated in the original complaint, was:

“That the said defendants did then and there wilfully and unlawfully take with force and violence from Thomas Edwards the following property: A wallet and approximately \$30.00 in United States money.”

*Statement of Points:*

- A. The court erred in denying defendants' motion to dismiss at the conclusion of plaintiff's case.
- B. That the judgment of the court was against the facts and evidence.
- C. That the State failed to prove that the crime of robbery was committed.
- D. That the State failed to prove the corpus delicti of the offense charged.
- E. That the State failed to prove that the defendants were, or that any of them was, guilty of the offense charged.

These points are so closely related, and the facts so interwoven, that we shall consolidate them for purposes of this argument.

Section 76-51-1, Utah Code Annotated, 1953, defines the crime of robbery as follows:

“Robbery is the felonious taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.”

Every robbery includes grand larceny and a case of robbery cannot be stated without stating a case of larceny. Section 76-38-1, Utah Code Annotated, 1953, defines larceny as “the felonious stealing, taking, carrying \* \* \* away the personal property of another.”

See *State vs. Donovan*, 77 U. 343, 294 P. 1108.

It is necessary to find that the intent to steal existed at the time of the taking.

See *People vs. Miller*, 4 U. 410, 11 P. 514;

*State v. Allen*, 56 U. 37, 189 P. 84.

The taking must be with the felonious intent to steal, and this element must be established by the circumstances of the taking.

*State vs. Dubois*, 64 U. 433, 231 P. 625.

The rule as to possession of recently stolen property has been upheld as to robbery.

*State v. Donovan*, *supra*.

We have carefully read the transcript of the testimony introduced by the State and have been unable to find any facts to support the charge of a felonious taking of the specified personal property, or any property, from the complaining witness, against his will, or accomplished by means of force and fear, or at all. The lower court grappled with this precise point and resolved it with this highly interesting and significant statement:

“THE COURT: Well, I think the facts and circumstances point to the guilt of the three defendants in taking the purse or wallet, although I am impressed and I do believe from the testimony offered that the greatest offense was something other than robbery, but robbery came into the picture, but there was intent to steal during the processes of that evening and before it was over a robbery was committed. From the testimony it sounds like they wanted to beat him up



for the fun of beating him up and for the immoral conduct, so the record may show the Court finds the defendants guilty as charged in the information.”

An analysis of that statement of the trial court, we believe, will disclose what we contend is the basic error of the trial court: that the complaining witness suffered a severe beating and certain moral indignities, which undoubtedly incensed the trial court to the point where he felt that the defendants should be severely punished, and that the only adequate punishment he could mete out was to find them guilty of robbery. For the beating and the indignities we make no brief. But to have found them guilty of robbery on the record in this case we submit is manifestly unjustified.

First the court said:

“Well, I think the facts and circumstances point to the guilt of the three defendants in taking the purse or wallet \* \* \*.”

As to this, there is no evidence in the record that any one of the defendants ever so much as had the wallet in his hand. The complaining witness himself never said that any one of them took his wallet. Nor did anyone else so testify. The wallet was found deep in the bushes where one of the officers speculated that it had been thrown. And oddly enough the wallet was supposed to have contained the greater part of \$27.00; but none of that money was ever found on any one of the defendants, or at the scene of the fight, or at all. Presumably the wallet contained currency, if, in fact, it contained any money at all. Wallets are usually used for currency. Purses more frequently carry change or silver. But no currency or

other money was found anywhere. That being true, if the complaining witness had had the money he claimed, and had had it taken from him by the defendants, it would have been found on one of them, or at the scene of the trouble. But the record is completely silent as to money.

So the trial court, to find robbery, had to do so by pyramiding inferences upon inferences, as we will point out.

The first inference, in the absence of proof, would have to be that one or more of the defendants took the wallet of the complaining witness with its contents of money. The second inference would have to be that he (an unidentified one of the three defendants) threw the wallet away, there being no proof as to how it got in the bushes. And the third inference would have to be that one or more of the defendants kept the money, having had the intent to deprive the owner of it. But there was no money found on any of the defendants, or at the scene of the trouble, or at all, although other articles, much more minute, such as a watch, a lighter, nailclips and a ring, and the wallet itself, were easily observed and found.

There being no money found, it follows logically that the foregoing inferences must be founded on the further (antecedent) inference that the complaining witness actually did have the amount of money in his wallet that he said he did, or some lesser amount. No one ever saw it, or any part of it; and the complaining witness himself had not seen it since he left the office that afternoon when he said he had counted it in case he "needed some

more." (Tr. 5, 6). He was to buy groceries for the week end. And he said: "I didn't count it after that."

Now in view of the fact that no money was ever found anywhere, is it not just as logical to assume that the complaining witness did something else with the money, something he may not have wanted to have to explain to his wife (as he then could not buy the week end groceries) or lost it, or bet it on the ball game and lost it, or spent it for some purposes best known to himself, or spent it foolishly, or otherwise—we say, is it not just as logical to assume one or more of those inferences as to infer that he was robbed by these defendants of money no one ever saw or found, on the defendants, or at the scene of the fight, or at all?

And so long as we are indulging in inferences, might it not be just as logical, too, to infer (as we will hereafter point out) that there was no robbery intended, that the defendants had other things in mind (as the Court suggests), that in the fighting the wallet as well as the other items of personal property fell out of the pocket of the complaining witness, was not found by the officers, but was found by some stranger who had been attracted to the commotion by the arrival of the officers and the arrest, who took the money and tossed the wallet into the bushes. This is certainly not improbable as the scene of the fighting is in that part of the "wilds" by the river generally known to be inhabited by tramps, floaters and transients.

Then the trial court said:

"\* \* \* although I am impressed and I do believe from the testimony offered that the greatest offense was something other than robbery, \* \* \*."

As to this, the record is replete with facts. And with logic. Consider that the complaining witness left the ball game about 10:30 p.m. (Tr. 3), arrived at the tavern on lower 25th Street in "ten or fifteen minutes" (Tr. 9), and remained there not more than half an hour (Tr. 9). According to his own testimony, then, he left the tavern with the defendants about 10:15 or earlier; and that when he got in the car "everything went blank. I guess they hit me." (Tr. 2). Between that time and 2:30 a.m., more than four hours and fifteen minutes later, the beating and the indignities apparently were taking place. It certainly wouldn't have taken the three defendants that long to rob him. He said himself that after they hit him (Tr. 2) he did not regain consciousness until he was "down in the wilds by the river which is Rushton" (Tr. 3) and they were beating him up. He testified that Kay's tavern, where he met the defendants, was on 25th street, "a block up from the Depot" (Tr. 2). From there to Rushton would be: one block west to Wall Avenue, four and one-half blocks north on Wall to Rushton, then west on Rushton to the dead-end lane at least one block, a total of six and a half of Ogden's long City blocks (seven of which, with the intermediate crossings, constitute a mile). Had robbery been their motive they could easily have robbed him during this near-mile ride, and then have dumped him out, as he was unconscious all of that time. And if robbery had been their motive that is just what they would have done; and then fled.

But no, they did not do that. The trial Court well knew from the testimony, as he said, *supra*, that:

"\* \* \* the greatest offense was something other than robbery, \* \* \*"

and also said:

“\* \* \* From the testimony it sounds like they wanted to beat him up for the fun of beating him up and for the immoral conduct, \* \* \*.”

And this occurrence was still continuing at 2:30 a.m. the following morning when the witness Nichols noticed someone without any clothes on run toward his train, and noticed someone else come out of the shadows and hit him and drag him back (Tr. 12). Additional time elapsed for Nichols to get to a telephone and call the police and for the police to arrive and break up the activities, a total elapsed time of approximately four and one-half hours. Certainly this is not the conduct or the mentality of robbers who usually strike and flee. Escape is their object, once they have robbed their victim. But not so here. These so-called robbers took their victim to a dead-end lane, from which there was no escape for themselves and proceeded for more than four hours with other activities, and noisily too.

The trial court said, among other things, *supra*:

“\* \* \* but robbery came into the picture, but there was intent to steal during the processes of that evening and before it was over a robbery was committed. \* \* \*”

But these conclusions are not supported by the evidence or by the known characteristics of robbers. They are conclusions based solely upon inferences. The trial court did not state, nor does the record show, how, when or where robbery came into the picture, or how, where or when the intent to steal was formed, or how, when or where the robbery was committed, or of what the complaining witness was robbed. The court did find:

“\* \* \* the defendants guilty as charged in the information.”

but does not say of what he was robbed. Certainly it was not the \$30.00 originally charged in the complaint, upon which the information was based, or any part of that \$30.00. And as to these points we challenge the record. The only item of personal property seen in the hands of the defendants or any of them was a pair of shorts which officer Torman said he saw one of them throw into the weeds (Tr. 14). And the third man was found at that time in the bushes with the complaining witness. His clothes had been taken off of him, or torn off, and as the officers arrived one of the defendants was holding some shorts. And not one of the defendants tried to run or flee.

The finding of the defendants guilty of robbery, then, must have been upon the inferences mentioned above, plus the inference that a robbery was intended, when all the facts point to other intentions, plus the inference that something was taken from the complaining witness “against his will,” and was appropriated by the defendants with the intent to deprive the complaining witness of it.

Now the record is silent on what caused the fight or why the defendants wanted to beat up the complaining witness or what, if anything, they had against him. Whether they spent more than four hours beating him up “for the fun of beating him up,” as the trial court observed, or for the “immoral conduct” alluded to by the trial court, or for both, or for some other purpose, we do not know, nor does the record say. But the inescapable fact remains that they were not spending four and

one-half hours robbing him, when he was unconscious much of the time, and was largely unclothed part of the time, and during most, if not all of which time, he was helpless to prevent being robbed of everything he had including his clothing.

We submit that the State did not prove any motive to rob, or any intent to rob, or any robbery whatever. But on the contrary did prove other motives and other intents.

We further submit that in the face of such motives and intents "other than robbery", as the trial court observed, it is not legally or otherwise sufficient to build a series of inferences into a finding of robbery, even though the conduct of the defendants appeared to be reprehensible and even though a court might feel impelled to "throw the book," so to speak, at the defendants for their misconduct. Nor, we submit, is it justifiable to charge or convict the defendants of robbery, which is not proved, simply because (as appears evident here) the prosecutors and the court may have felt that the maximum punishment allowed by law for an aggravated assault was wholly insufficient.

## CONCLUSION

In conclusion, we further submit (1) that the trial court erred, at the conclusion of the State's case, in refusing to grant defendants' motion to dismiss the information and to discharge the defendants; (2) that the judgment of the trial court was against the facts and the evidence; (3) that the State failed to prove that the crime of robbery was committed (whatever else might



have been done); (4) that the State failed to prove the corpus delicti of the offense charged; and (5) that the State failed to prove that the defendants were, or that any of them was, guilty of the offense charged.

Respectfully submitted,

LEWIS J. WALLACE and  
M. BLAINE PETERSON

*Attorneys for Appellants*