2010

The State of Utah v. Brandon Michael Samples : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. BRANDON MICHAEL SAMPLES, Defendant / Appellant.	Case No: 20100322-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT ON ONE COUNT OF THEFT BY RECEIVING STOLEN PROPERTY, A SECOND DEGREE FELONY, BEFORE THE HONORABLE JUDGE CLAUDIA LAYCOCK

KENNETH A. BRONSTON (4470)
Assistant Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114

L. DEAN SAUNDERS
CRAIG JOHNSON

Counsel for Appellee

MARGARET P. LINDSAY (6766)
DOUGLAS J. THOMPSON (12690)
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601
Telephone: (801) 852-1070

Counsel for Appellant

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L. DEAN SAUNDERS
CRAIG JOHNSON

Counsel for Appellee

MARGARET P. LINDSAY (6766)
DOUGLAS J. THOMPSON (12690)
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601
Telephone: (801) 852-1070

Counsel for Appellant

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ARGUMENT

I. THE TRIAL COURT PLAINLY ERRED BY SUBMITTING THE CASE TO THE JURY BECAUSE IT WAS OBVIOUS THAT THE STATE FAILED TO MEET ITS BURDEN

In reply to the State's brief Defendant now addresses the main thrust of the State's argument. "The collective teaching of *Zeman, Gabaldon, Davis,* and *Murphy* is that evidence is sufficient to show that an actor knew or probably believed that property was stolen when the following circumstances are shown: (1) the actor possessed and controlled the stolen property shortly after it was stolen; (2) the actor had received stolen goods in the past; (3) the actor remained in possession of the property for some substantial period of time after it was stolen; (4) the actor attempted to conceal the property; (5) the actor was unable to plausibly account for his possession of the property." Appellee's Brief at 14. Here the State seems to be attempting to distill the

essential factors which enable a jury to find a defendant knew or probably believed property was stolen. The State claims that most of these factors are met in this case and therefore the jury reasonably inferred this element. Samples denies that several of these factors are present in this case and again asserts that the evidence presented does not support the inference that he knew or probably believed the car was stolen.

The actor possessed and controlled the stolen property shortly after it was stolen

The State's first factor is that "the actor possessed and controlled the stolen property shortly after it was stolen[.]" Appellee's Brief at 14. Presumably the State is pointing to the facts in *Gabaldon* where the defendant "personally handled and had the opportunity to observe a substantial amount of" the stolen goods. *State v. Gabaldon*, 735 P.2d 410, 412 (Utah App 1987). However, the more persuasive evidence in *Gabaldon* is the evidence that the defendant and the co-defendant "were seen together by store personnel under conditions that suggested a common shoplifting enterprise... [and] that store personnel say defendant accompanying [co-defendant] when [she] returned stolen property for cash..." *Gabaldon*, 735 P.2d 410, 412.

Perhaps the State draws this factor from the facts in *Murphy* where the defendant was said to driven "the vehicle for one evening and then parked it at the address of the registered owners." *State v. Murphy*, 617 P.2d 399, 403 (Utah 1980). However, as decided in *Murphy*, the fact the defendant had possession of the vehicle soon after it was taken from the owners did not support a reasonable finding that the defendant either knew or believed it was stolen or that he had an intent to deprive the owner of it. *Murphy*, 617 P.2d 399, 403, 403 (J. WILKINS concurring).

While it is true that Samples was shown to be in possession of the stolen vehicle shortly after it was stolen, as in *Gabaldon* and *Murphy*, this evidence alone is not significant enough to prove knowledge of the stolen nature of the property. Because this factor must be combined with other evidence to support a finding of knowledge or belief, and because no such additional evidence exists in this case, the State obviously failed to meet its burden.

Just as in *Murphy*, Samples offered an explanation as to why he had possession of the vehicle shortly after it was stolen. In *Murphy* it was the unknown individual "Mike" who allowed the defendant to sleep in the van. *Murphy*, at 400. There the defendant was not obligated to give an utterly compelling account of who Mike was or why the defendant should believe Mike had authority over the vehicle. It was enough that the State then bore the burden of showing that the reasonable explanation was false. Because they could not the State failed to meet its burden. The same is true here. Despite the State's doubts as to Chris Anderson's identity or existence, the State did not disprove the plausible account for why Samples was in the car on the night after the party. Therefore, this factor does not support the conclusion that Samples knew or probably believed the car was stolen.

<u>The actor had received stolen goods in the past</u>

The State's second factor is that "the actor had received stolen goods in the past[.]" Appellee's Brief at 14. Here the State seems to be pointing to *Zeeman* where the prosecution admitted evidence that the defendant had in his possession "merchandise stolen from four separate merchants..." *State v. Zeeman*, 226 P.2d 465, 467 (Utah 1924).

The point seems to be that "the mere fact of the repeated possession of other stolen goods... lessens the chances of innocence" even where the other stolen goods are different, or received from a different person, whether the possession occurred before or after the charged offenses, rather "it is the multiplication of instances that affects our belief..." *Zeeman*, 226 P.2d 465, 466 (*citing* 1 WIGMORE ON EV. (2d Ed.) § 325).

The State may also be pointing to the facts in *Davis* where the trial court admitted evidence that on several occasions prior to his arrest the defendant traded stolen tools for drugs. *State v. Davis*, 965 P.2d 525, 536 (Utah App. 1998).

Here, unlike *Zeeman* and *Davis*, no evidence was presented that Samples, neither at the time of this offense, nor at any other time, had received stolen goods in the past. As admitted by the State, this factor does not support the finding that Samples knew or should have believed the car was stolen.

The actor remained in possession of the property for a substantial period of time

The State's third factor is that "the actor remained in possession of the property for some substantial period of time after it was stolen[.]" On this factor the State may be referencing the facts in *Zeeman* where the defendant was alleged to have taken possession of the stolen goods in December of 1921 (evidence presented only supported possession from the beginning of February of 1922) and possessed it until March 2, 1922. *Zeeman*, at 466. The could have believed the defendant possessed the stolen property for about a month because he admitted he took possession in early February 1922 and the property was found in his shop in early March of 1922. However, what seemed more crucial to the Court in *Zeeman* was the fact that the defendant possessed multiple stolen

items, as discussed above. The length of possession did not seem to be very significant because if he believed his possession was legitimate he could have possessed it indefinitely. This should not be a factor that suggests an inference that a defendant knows or has reason to believe the property is stolen because keeping stolen property doesn't suggest one knows it's stolen, but rather the opposite is true.

In proposing this factor the State may be pointing to the facts in *Davis* where the defendant asserted "a substantial time intervened between the alleged theft of both tools and their later discovery in his shed." *Davis*, 965 P.2d 525, 536. Strangely enough, that fact in *Davis* was used for the proposition that the defendant did not know or have reason to know the property was stolen. *Davis*, at 536.

Furthermore, the facts presented to the jury in this case do not show that Samples was in possession of the stolen vehicle for a substantial period of time as the facts did in *Zeeman*. The State argues that the fact that the stolen vehicle was discovered in the same county that the defendant lived in should have persuaded the jury he possessed it the entire time. Appellee's Brief at 15. The State argues that "[t]he evidence strongly suggests that Defendant was in control of the Avalon for months after it was reported stolen" because four months after it was stolen it was "found in Carbon County, which is a substantial distance from Mr. Thomas's home in West Valley City, from where it was stolen." Appellee's Brief at 15. But no other evidence shows Samples had possession of the vehicle during that time. No one testified they saw Samples driving the car during those months, no one testified the car was observed in his driveway. No other evidence was presented to demonstrate Samples had any connection to the vehicle at any other

time than during the drive to and from American Fork and the drive taking Samples home. The inference the State calls strong is actually weak at best and more likely is an unfair inference, and not similar to the inferences drawn in other cases.

Possession of the stolen goods in *Zeeman* for the month was attributed to the defendant because he said he took possession of the goods in February and that they were discovered in his store in March. The stolen goods in *Zeeman* were stolen from a store in West Jordan and found in the defendant's store in Salt Lake City. The inference of his continued possession was proper because evidence actually supported possession.

It would be a different story if the goods were found abandoned in a location nearer to the defendant's store than to the victim's. In that case the inference that the defendant had the property in his possession for the month would not be justified, yet that is exactly what the State suggests the jury should have done here. The fact that the car was found in Carbon County does not strongly suggest Samples had possession of it for the four months. It is true that he lived in Carbon County, along with every other Carbon County resident. The evidence does not demonstrate that Samples had possession remained in possession of the stolen vehicle for a substantial period of time, and, even if it did, this factor is does not persuasively support an inference that Samples knew or believed the car was stolen.

The actor attempted to conceal the property

The fourth factor is that "the actor attempted to conceal the property[.]" Appellee's Brief at 14. This factor seems to be drawn from the facts in *Zeeman* where the some of the stolen merchandise was "mixed with other goods... stuck away in

underwear boxes and mixed with cotton shirts and men's underwear... [with] the labels and marks on part of the goods [having] been removed and destroyed." *Zeeman*, at 467. Presumably this factor tends to show guilty knowledge because he defendant, aware that the items he possesses are stolen, it trying to prevent anyone from discovering that he possesses them or that they are stolen items.

In *Zeeman* the conduct clearly demonstrates an effort to conceal the items. Here however, the evidence demonstrates no similar conduct. The State suggests that when Samples gave the name Jennifer Thomas to the police in American Fork he was trying to conceal the fact that it was stolen. This assertion is senseless. If Samples knew the car was stolen at the time he would hardly have wanted to direct the police to that fact by giving the name of the owner. Further, when the car was discovered none of the identifying marks, like the license plates or vehicle identification numbers, had been removed. There was no evidence demonstrating that Samples tried to conceal the items and therefore no reason to infer from this factor that Samples knew the vehicle was stolen.

The actor was unable to plausibly account for his possession of the property

The fifth and final factor to support the inference someone knows or probably believes the property was stolen, is that he was unable to plausibly account for his possession of the property. This factor is likely drawn from the facts in *Zeeman* where the defendant asserted he got the items "through a transaction whereby he loaned a negro $80 on a trunk and other property; that 18 months later, the trunk not having been redeemed, he opened it and for the first time discovered that it contained the silk shirts."

Zeeman, at 467. The Court found this account to be an "improbable explanation of his possession" but does not describe why. *Zeeman*, at 467. Presumably it is because his account required the jury to ignore that the goods had only been missing for 5 months and could not have been in his possession for the last 18 months. *Id.*

The State claims that Samples' story, his explanation for possessing the car, " is implausible and unsupported by the evidence." Appellee's Brief at 16. The State claims that Samples' explanation is unbelievable and the "evidence strongly suggests Defendant discovered [Jennifer Thomas' Valley Fitness] card upon taking possession of the car and conveniently provided Jennifer's name when queried by Officer Robinson." Appellee's Brief at 16. While the end result may have allowed the stolen nature of the vehicle to go unnoticed by Officer Robinson at the time, it hardly seems convenient for someone who knowingly possesses a stolen vehicle to provide the police with any information that may lead the police to discover the car was stolen. More likely is that Samples, not knowing the car was stolen and having been told by Anderson it belonged to Jennifer Thomas, simply told the officer what he believed. In fact, if his account is true and he was in fact lied to by Anderson, Samples did exactly what we would expect. However, if his account was a lie and he knew the car was stolen his conduct was unreasonable.

Unlike the facts in *Zeeman* it is not impossible for Samples to have been told by Anderson that the car belonged to his aunt, Jennifer Thomas, that he had permission to use it and for Samples to have believed it. While the State doubts this account, there is nothing inherently improbable about it.

Going back to the facts in *Murphy* where the defendant's assertion that Mike let him use the car, even though Mike was not presented, because the defendant's conduct supported the account (he was found asleep in the car in the parking lot next to the owners' residence) the lack of other support does not rebut its plausibility. Much like the facts in *Murphy*, here where Samples' conduct supports his account (he told the police it belonged to Chris' aunt and gave the name of a person who could lead the police to discover it was stolen), even though Chris Anderson was not present to testify in support the account is not implausible, at least in so far that it alleges that he believed the car belonged to Anderson and that Jennifer Thomas was Anderson's aunt.

The State's brief incorrectly applies these five factors in all but one case (the prior instances of possessing stolen property). None of these factors support the inference that Samples knew or believed the car was stolen, and was the case in *Murphy*, "[t] he evidence presented at trial was insufficient to support a conviction of the crime as charged and the defendant should be declared not guilty as a matter of law." *Murphy*, at 403.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Defendant, Brandon Samples, asks the Court to reverse his conviction for theft by receiving stolen property and remand this case to be discharged by the District Court on the grounds that the State failed to prove each element of the charge.

Respectfully submitted this 27th day of July, 2011.

Douglas J. Thompson
Counsel for Appellant

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Appellant's Reply Brief postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the ~~21st~~ 27TH day of July, 2011.