

1999

# Utah v. Troy Dale Rothe : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

STATE OF UTAH,

Plaintiff/Appellee,

vs.

TROY DALE ROTHE,

Defendant/Appellee.

Case No. 990863-CA

Priority No. 2

**BRIEF OF APPELLANT**

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY,  
STATE OF UTAH-AMERICAN FORK DEPARTMENT  
FROM THE JUDGEMENT, SENTENCE AND COMMITMENT ENTERED IN THIS  
CASE BY THE HONORABLY HOWARD H. MAETANI  
FROM A CONVICTION OF RETAIL THEFT, A CLASS B MISDEMEANOR

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FILED  
Clerk of the Court

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**IN THE UTAH COURT OF APPEALS**

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**JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has Jurisdiction in this matter pursuant to Utah Code Annotated § 78-2a-3(2)(e).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

Whether the trial court erred in convicting the defendant of theft based solely on the defendant's presence at the scene of the crime, his knowledge that the crime was being committed, and his "looking around" while the items were being stolen. "When reviewing a bench trial (in a criminal case) for sufficiency of evidence, (the appellate court) must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." Spanish Fork City v. Bryan, 975 P.2d 501, 502 (Utah App. 1999).

**CONTROLLING STATUTORY PROVISIONS**

All relevant statutory and constitutional provisions are set forth in the text of the

brief.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

Troy Dale Rothe appeals from the judgment, sentence, and commitment imposed by the Honorable Howard H. Maetani after a bench trial at which Rothe was acquitted of the charge Public Intoxication and convicted of Retail Theft, a class B misdemeanor.

#### **B. Trial Court Proceedings and Disposition**

Rothe was charged by information filed in the Fourth District Court, American Fork Department with Retail Theft, a class B misdemeanor, and with Public Intoxication, a class C misdemeanor. At his arraignment on, Rothe plead not guilty to both counts. A bench trial, the Honorable Howard H. Maetani presiding, was held on June 23, 1999 at which Rothe was acquitted of public intoxication and convicted of retail theft.

Rothe was sentenced on November 16, 1999 to 30 days in the Utah County Jail, a fine and surcharge of \$200.00, and was placed on probation for 12 months.

### **STATEMENT OF RELEVANT FACTS**

On December 21, 1998, Dale Nichols, an employee of Smith's grocery store in American Fork saw Lee Barringer and Troy Rothe in an aisle of the store and observed Barringer putting items in his pockets. While this was happening, Rothe looked up and down the aisle. The two moved to another aisle, and Nichols followed. Again, Barringer put items in his pockets, as Rothe looked up and down the aisle. (R. 5 at 6; 6 at 2).

Nichols contacted two other Smith's employees for help, and they stopped Barringer and Rothe at the front of the store. (R. 8 at 22). Barringer resisted the employees'

attempts to contain him and had to be taken to the ground and handcuffed until the police arrived. (R. 10 at 1). Rothe cooperated and went peaceably. (R. 16 at 17). While being questioned by the police, Rothe admitted that he knew Barringer was taking the items. (R. 13 at 21).

### **SUMMARY OF ARGUMENT**

Rothe was present while Barringer took the items and knew what Barringer was doing; however, there is no evidence that Rothe intended for this crime to happen. His looking up and down the aisles is as consistent with innocent as with guilty behavior. The facts in this case do not support a conviction for Retail Theft.

### **ARGUMENT**

The trial court determined that even though Rothe did not have the merchandise on his person or physically take possession of the merchandise, he was guilty of Retail Theft. The retail theft statute states that “[a] person commits the offense of retail theft when he knowingly . . . [t]akes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise . . . with the intention of retaining such merchandise or . . . depriving the merchant permanently” of the merchandise. Utah Code Ann. § 76-6-602(1) (1999). To convict Rothe, the trial court must find that the city proved each element of the offense beyond a reasonable doubt, including the requisite mental state. State v. Labrum, 959 P.2d 120, 123 (Utah Ct. App. 1998).

In Labrum, the trial court imposed the group crime enhancement to the defendant’s sentence for attempted criminal homicide. At 122. The trial court enhanced the minimum duration of his jail term because the defendant was in the presence of the two other

defendants while they planned the crime and when they boasted of committing the crime. This Court held that even though the defendant boasted of committing the crime and was in the presence of the person who committed the crime and even boasted of the crime, there was nevertheless insufficient evidence to impose the sentencing enhancement statute: “[m]ere presence, or even prior knowledge, does not make one an accomplice when he neither advises, instigates, encourages, or assists in perpetration of the crime.” Id. (quoting State v. Kerekes, 622 P.2d 1161, 1166 (Utah 1980)).

The Utah Supreme Court has used this same rationale in the context of constructive possession of illegal substances. Constructive possession may be found when there is a “sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug.” State v. Fox, 709 P.2d 316, 319 (Utah 1985). The Court listed factors that would determine when that sufficient nexus is established; however, the court also stated that the facts “must raise a reasonable inference that the defendant was engaged in a criminal enterprise and not simply a bystander.” Id. at 320.

In Terry v. Zions Co-Op Mercantile Inst., 605 P.2d 314 (Utah 1979), the Court considered whether being in the presence of a shoplifter can be enough to support probable cause for arrest or detention, concluding that mere presence is insufficient to establish probable cause. Terry was a civil case involving false arrest, in which the Court stated,

The presence of a person in the company of one suspected of a crime does not as a matter of law establish probable cause for the arrest of that person. Circumstances and facts sufficient to constitute probable cause to arrest or detain a person must



exist independently from the mere association of individuals. While the association may be a contributing factor in the overall determination, it standing alone cannot be the exclusive basis for probable cause to arrest or detain someone.” Terry, at 321.

In a more recent case, this Court reversed a conviction for contributing to the delinquency of a minor where the conviction was based on the defendant’s presence at a party where minors were drinking, though the defendant knew the minors were consuming alcohol in violation of the law. State v. Terwilliger, 1999 WL 1041183 (Ut. App. 1999). The Court cited several cases that stand for the proposition that presence does not equal intent:

The trial court in this case, however, made no finding indicating defendant had some measure of control over the minors' consumption of alcohol. Instead, the trial court based its ruling on the fact that defendant simply witnessed two minors in his presence consuming alcohol. We believe the plain language of section 78-3a-801 does not sustain the prosecution or conviction of a defendant who, at most, merely sees others violate the law. Cf. State v. Fertig, 120 Utah 224, 228, 233 P.2d 347, 349 (1951) ("Mere presence combined with knowledge that a crime is about to be committed . . . will not of itself constitute one an accomplice."); State v. Krueger, 975 P.2d 489, 495 (Utah Ct.App.1999) (stating section 78-3a-801(1)(a)(ii) requires "the State . . . to prove . . . the defendants intended for the children to chew the tobacco."), cert. granted, 1999 Utah LEXIS 141 (July 26, 1999) (No. 990362); State v. Labrum, 959 P.2d 120, 123 (Utah Ct. App.1998) (" 'Mere presence, or

even prior knowledge, does not make one an accomplice when he neither advises, instigates, encourages, or assists in perpetration of the crime.' " (quoting *State v. Kerekes*, 622 P.2d 1161, 1166 (Utah 1980)); *Commonwealth v. Fields*, 460 Pa. 316, 333 A.2d 745, 747 (Pa.1975) ("[M]ere presence at the scene of a crime is not, in itself, sufficient to establish that one is an active partner in the intent of another to commit the crime.").

Although Rothe was looking around while Barringer took items from the shelves, this cannot be seriously seen as evidence that Rothe had acquired the intent necessary to commit retail theft. He could have been looking around because he was innocently nervous—knowing what Barringer was doing and afraid that he would be implicated in the crime. See *State v. Sierra*, 754 P.2d 972, 976 (Utah App.1988) ("nervous conduct ... when confronted by a Utah Highway Patrol trooper is consistent with innocent as well as with criminal behavior").

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Rothe respectfully requests that this court reverse his conviction for retail theft due to the insufficiency of the evidence presented at trial.

### **CERTIFICATE OF MAILING**

I hereby certify that I delivered two true and correct copies of the foregoing Brief to the Appeals Division to Duval, Hansen, Witt, & Morley, 306 W. Main Street, American

Fork, UT 84003, on this 27<sup>th</sup> day of March, 2000.

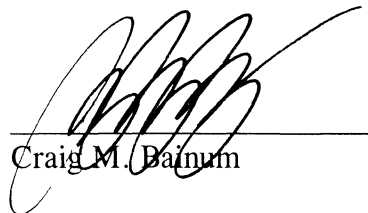
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#### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Rothe respectfully requests that this court reverse his conviction for retail theft due to the insufficiency of the evidence presented at trial.

Dated March 30, 2000.

  
\_\_\_\_\_  
Craig M. Bainum

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A handwritten signature in black ink, appearing to read "Bruce Kim", is written over a horizontal line.

ADDENDUM

No addenda are needed.