

1981

# The State of Utah v. George William Burton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- :  
GEORGE WILLIAM BURTON, : Case No. 17252  
Defendant-Appellant. :

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BRIEF OF APPELLANT

Appeal from a conviction for two counts of Theft,  
Second Degree Felonies, in the Third Judicial District Court,  
in and for Salt Lake County, State of Utah, the Honorable  
Homer F. Wilkinson, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for two counts of Theft, Second Degree Felonies, in violation of Utah Code Ann. §76-6-404 (1953 as amended), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, GEORGE WILLIAM BURTON, was charged in an Information with two counts of Theft, felonies of the second degree in violation of Utah Code Ann. §76-6-404 (1953 as amended). On the 14th day of July, 1980, the appellant was convicted by a jury of both counts as charged in the Information. On the 1st day of August, 1980, the appellant was sentenced to incarceration in the Utah State Prison to two indeterminate terms of one to fifteen years said terms to run concurrently.

## RELIEF SOUGHT ON APPEAL

The appellant, GEORGE WILLIAM BURTON, seeks reversal of the judgment entered against him and a new trial in the above-entitled matter.

## STATEMENT OF THE FACTS

The appellant was convicted of two counts of Theft. Count I was for Theft of a Vehicle, and Count II was for Theft of Property, such property being valued at over \$1,000.00. Salt Lake City Police Officer Charles Oliver testified that at approximately 9:15 p.m. on April 11, 1980, he spotted a westbound car on 1300 South which matched the description of a car reported as stolen an hour earlier. After a two block "chase," the vehicle pulled over into a parking lot at 1148 South and 300 West, and the appellant was discovered to be the driver. (T. 42-47) Cliff Bowden, the owner of the car, testified that he saw the appellant drive the vehicle away from the home of Elver Langdon, located at 48 South and 600 West, around 8:00 p.m. (T. 6, 35)

Not disputing most of the above facts, the appellant testified that he had been drinking large amounts of alcohol with an acquaintance, one "Crazy Fish," during the day in question. (T. 71) Towards evening the two drove in the appellant's car to the house where he resided with his mother, located at 258 North 800 West, "to get some more cash, money, and something to

eat." (T. 72, 79) While the appellant was in the house, Crazy Fish drove off in the appellant's car and the appellant pursued him on foot, heading south. (T. 72, 73) Upon discovering a car with keys in the ignition, the appellant drove off in that car in pursuit of Crazy Fish. (T. 73)

The appellant testified that he then drove to Perkins, at 900 South State, where he had met Crazy Fish earlier in the day, talked to several people at Perkin's asking if anyone had seen Crazy Fish or the car, and then drove around the area between 900 South and 1300 South, and West Temple and 300 West, where he believed Crazy Fish lived. (T. 74) The appellant stated that he did not at any time intend to steal the car, and was, in fact, driving back to where he had found it, in order to leave it "in the neighborhood" when he was pulled over and arrested. (T. 75)

Kathy Murray, a foster sister to the appellant, corroborated his testimony in the following particulars. That the appellant and Crazy Fish were together on the day in question, and were intoxicated; that she saw Crazy Fish drive off in the appellant's car; that she saw the appellant pursue Crazy Fish on foot; and that the appellant's car was found on the evening of April 11th crashed into a telephone pole. (T. 60-63)

The appellant did not raise the defense of voluntary intoxication, and therefore objected to Instruction 16-B on



voluntary intoxication. The appellant also excepted to the Court's failure to give a reasonable hypothesis instruction, which was properly requested in writing. (T. 98)

## ARGUMENT

### POINT I

#### THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY ON THE DEFENSE OF VOLUNTARY INTOXICATION.

Count I of the Information charged the appellant with Theft of a Vehicle. Jury Instruction No. 15 instructed the jury on the lesser included offense of Unlawful Taking of a Vehicle, which is a misdemeanor. The element of specific intent to deprive the owner of his property is required for Theft of a Vehicle, while an intent merely to temporarily deprive the owner of possession of his property would constitute Unlawful Taking of a Vehicle. This issue was of critical importance in the present case, where the appellant admitted that he unlawfully took Cliff Bowden's vehicle, but denied any intent to steal the car.

The appellant's theory of the case, as outlined in the facts above, is that he just used Cliff Bowden's car for a short while, in order to search for his own car, and that he was in fact returning the car when arrested. The fact of appellant's intoxication was only relevant to explain the circumstances under which he took Cliff Bowden's car, and was never claimed

by the appellant as a defense or an "excuse" for his actions. However, Jury Instruction No. 16-B, given by the court upon request of the State, and over defense counsel's objection, could very easily have confused and misled the jury into thinking that the appellant had raised the defense of voluntary intoxication and was offering his intoxication as the sole excuse for his conduct. That instruction provided:

INSTRUCTION 16-B.

Voluntary intoxication from alcohol or drugs is not a defense to the charge being considered unless the intoxication negates the existence of the mental state which is an element of the offense and which in the case now before the court is that the defendant acted with a purpose to deprive an individual of his property. Being under the influence of alcohol or drugs is no excuse for the commission of a crime where it merely makes a person more excited or reckless, so that one does things one might not otherwise have done. To be a defense to such a crime, one must be so under the influence of alcohol that at the time of the alleged offense he did not know what he was then doing, so that he was then and there incapable of forming the necessary intent.

It is a well settled principle of law that a defendant has a right to have his theory of the case presented to the jury in the form of instructions, at least where such theory is reasonably justified by the evidence, in a "clear and understandable way."<sup>1</sup>

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1. State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931); State v. McCumber, 622 P.2d 353 (Ut. 1980); State v. Potter, 627 P.2d 75 (Ut. 1981); State v. Castillo, 23 Ut.2d 70, 457 P.2d 618 (1969)

It is equally clear that "[t]he purpose of an instruction is to enlighten a jury."<sup>2</sup> An instruction which is confusing, rather than enlightening is properly refused. Specifically, an instruction on the defense of voluntary intoxication is proper in those instances, and only in those instances, where "there has been evidence of alcohol intoxication which bears upon the issue of a required specific intent."<sup>3</sup> (Emphasis supplied)

The intoxication of the appellant in the present case had absolutely no bearing upon the issue of specific intent, since the defense of voluntary intoxication was never asserted by the appellant--that is, the appellant never sought to negate the specific intent element by reason of this intoxication. And while the second sentence of Instruction No. 16-B in light of the facts presented at trial, may have been a proper warning that intoxication is no excuse for the commission of a crime,<sup>4</sup> the first and last sentences of that instruction were definitely improper. Each of these sentences informs the jury under which circumstances voluntary intoxication is a defense to a crime. Sandwiched in between is the sentence disallowing intoxication

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2. State v. Selgado, 76 N.M. 187, 413 P.2d 469, 471 (1966)

3. State v. James, 223 Kan. 107, 574 P.2d 181, 185 (1977); See also State v. Potter, supra.

4. The appellant is not hereby conceding that the second sentence of Instruction No. 16-B was proper, but is merely assuming so, in arguendo. For in fact, intoxication was not even offered as an excuse for the misdeed, but merely one of the circumstances describing the defendant's actions that day.

as an excuse for criminal activity, thus creating a strong overall impression that the appellant was trying to excuse and defend his conduct because of his intoxicated state, and that the jury must not accept the excuses or defenses offered by the appellant.

In a slightly different context, in State v. Potter,<sup>5</sup> this court held that confusing and misleading jury instructions on voluntary intoxication constituted prejudicial error. There, the defendant raised the defense of voluntary intoxication and proposed several jury instructions on that defense, all of which were denied. Instead, the trial court gave general instructions on the intent requirements of the crimes charged and the effect of intoxication upon the defendant's criminal culpability. In reversing the conviction, this court reasoned that "the instructions given in the present case were so general that they could have misled and confused the jury," and

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5. See footnote 1, supra.

[b]ecause the instructions given in the present case failed to explain adequately the distinction between the general and specific intent requirements or relate those requirements to the facts of the case and the different crimes charged, they were misleading and confusing.<sup>6</sup>

Elaborating further, the court explained that because the instructions on intent and voluntary intoxication were so general and not related to the facts of the case, they:

could have left the jury in a state of confusion or even with the impression that as a matter of law the defendant's voluntary intoxication could have no effect on the criminality of his conduct.<sup>7</sup>

In that case the court concluded that, for the reasons given above

The instructions failed to present to the jury in a clear and understandable manner the substance of the defense advocated by the defendant. The instructions thus constitute error which was prejudicial to the defendant and deprived him of a fair trial.<sup>8</sup>

In the present case, the instruction on voluntary intoxication presented a theory of the case advanced by neither the appellant nor the state (the defense of voluntary intoxication) and then negated that theory. This may well have confused and misled the jury into thinking that the defense of voluntary

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6. Id. at 78

7. Id. at 80

8. Id., citing State v. Day, 90 N.M. 154, 560 P.2d 945 (1977); People v. Cesare, 68 A.D.2d 938, 414 N.Y.S. 2d 585 (1979); People v. Maliskey, 77 Mich.App. 444, 258 N.W. 2d 514 (1977).

intoxication was the primary issue for it to decide. This is particularly true since Instruction No. 16-B was couched in terms of voluntary intoxication being no "defense."

The instruction on voluntary intoxication was improper. It was prejudicial because it may have confused and misled the jury, and failed to allow the appellant to present his theory of the case to the jury. Consequently, the trial court's giving of that instruction constituted reversible error.

## POINT II

### THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY ON THE REASONABLE ALTERNATIVE HYPOTHESIS REQUIREMENT.

Although the State's case on Count I of the Information, Theft of a Vehicle, was based on some direct evidence (the appellant testified himself that he took the car without permission), the State's case on Count II, involving theft of property claimed by Cliff Bowden to have been inside the car before it was taken, was based entirely on circumstantial evidence. None of the alleged stolen property was ever discovered, and there was no evidence that the appellant had handled, moved or sold any such property. The entire case against the appellant on Count II was Cliff Bowden's testimony that such property existed, was in the car before the appellant drove off, and was missing when the car was recovered. Even the valuation of the property was determined solely by Cliff Bowden's testimony. And by Mr. Bowden's testimony, the car sat, unlocked and unattended, for some 10 or

15 minutes in front of the Langdon home before the appellant took it. The appellant's testimony was that the car sat for a similar period in front of Perkin's while he was inside questioning people as to the whereabouts of his own car. The evidence presented relevant to Count II, therefore, was entirely circumstantial.

The appellant excepted to the trial court's failure to give the last paragraph of appellant's proposed Instruction No. 2, on the reasonable alternative hypothesis. This paragraph stated:

To warrant you in convicting the defendant, the evidence must to your minds exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.

This instruction is entirely consistent with the law as stated originally in State v. Crawford,<sup>9</sup> that:

[T]he rule applied in cases dependent solely upon circumstantial evidence, as in the case at bar, [is] that the circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged.

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9. 59 Utah 39, 201 P.1030, 1033 (1921). See also State v. Erwin, 120 P.2d 285, 302 (1941); State v. Marasco, 81 Utah 325, 17 P.2d 919 (1933).

It further appears that this rule of law, in circumstantial evidence cases, must be explained to the jury:

It has long been the law in this jurisdiction that the giving of such an instruction [the reasonable alternative hypothesis] is neither appropriate nor required unless the proof of a material issue is based solely upon circumstantial evidence.<sup>10</sup>

In discussing the same issue, this court in State v. Schad, 470 P.2d 246, 247 (Ut. 1970), used the following reasoning:

It is true, as the defendant contends, that where a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, and that it must exclude every reasonable hypothesis except the guilt of the defendant. This is entirely logical, because if the jury believes that there is a reasonable hypothesis in the evidence consistent with the defendant's innocence, there would naturally be a reasonable doubt as to his guilt. Nevertheless, that proposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis.

However, this is only true if the jury specifically understands that a reasonable hypothesis consistent with innocence constitutes a reasonable doubt.

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10. State v. Bender, 581 P.2d 1019, 1021 (Ut. 1978);  
State v. Fort, 572 P.2d 1387 (Ut. 1977); State v. Garcia,  
11 Ut.2d 67, 355 P.2d 57 (1960).



In State v. Eagle,<sup>11</sup> this court, while seemingly ignoring the case law cited in footnotes 9 and 10, supra, highly criticized the request of the defendant in that case for an instruction on the reasonable alternative hypothesis, describing any controversy over such an instruction as "nothing more than a tempest in a teapot."<sup>12</sup> In so doing, the court stated:

The use of the reasonable alternative hypothesis instruction is merely one way of expressing that necessary burden of proof and there is no apparent reason to mandate that one, and only one, particular instruction being used by trial judges in conveying to the jury the meaning of that elusive phrase, "proof beyond a reasonable doubt."<sup>13</sup>

And in State v. King,<sup>14</sup> after quoting the same paragraph from Schad as appears above, the court stated:

Of course, the requested instructions may make more understandable and explicit the usual instruction on burden of proof.

Thus, with all due respect, it appears that the principle reason that trial courts deny the reasonable alternative hypothesis instruction is because it too clearly informs the jury of what the real burden of proof in a criminal case is. It is undisputed that the reasonable alternative hypothesis instruction is a correct statement of the law; and it is

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11. 611 P.2d 1211 (Ut. 1980)

12. Id. at 1213.

13. Id.

14. 604 P.2d 923, 926 (Ut. 1979).

admitted by this court that such an instruction helps clarify the burden of proof to the jury. In fact, the only reason this court has ever given for supporting a trial court's denial of the instruction is the "tempest in a teapot" argument used in Eagle--that the clarity the proposed instruction gives to other burden of proof instructions would not make a significant difference in the jury's deliberations.

If this instruction really does have an insignificant impact on juries, why do prosecutors so vehemently oppose it, and why, pray tell, are the trial judges constantly denying it, when it correctly states the law and makes more clear to the jury what its duty is? And ultimately, why should this court deny to a defendant his chance to inform the jury more clearly as to the meaning of the "elusive phrase," "proof beyond a reasonable doubt"?

In determining whether a failure to give a requested instruction is prejudicial, the question is whether "if the requested instruction had been given and the jury had so considered the evidence, there is a reasonable likelihood that it may have had some effect on the verdict rendered."<sup>15</sup>

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15. State v. Mitcheson, 560 P.2d 1120, 1122 (Ut. 1977)

In the present case, where the appellant was only in possession of the car which contained the missing property for one hour, and where that car sat unlocked and unattended for 10-15 minutes on two separate occasions, and where no evidence whatsoever was found connecting the appellant with the missing property other than his possession of the vehicle, the jury might well have thought it reasonably possible that someone else stole the property from the car. And, not having been instructed that this would constitute a reasonable doubt under the law, the jury may have convicted the appellant in spite of entertaining this possibility. Therefore, under the Mitcheson test, a reasonable likelihood exists that the failure to give the requested instruction had an effect on the verdict rendered, and such would constitute reversible error.

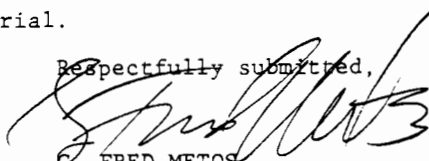
#### CONCLUSION

Since the appellant did not raise the defense of voluntary intoxication, Instruction No. 16-B may have confused and misled the jury in its deliberations. This is particularly true since the defense of lack of specific intent had been raised on other grounds. This error was prejudicial and requires a reversal of the judgment.

The refusal of the trial court to instruct the jury on the reasonable alternative hypothesis very likely resulted in

confusing the jury as to the burden of proof. And since the evidence on Count II was entirely circumstantial and the case against the appellant was weak, the denial of the requested instruction may very well have affected the jury's decision. For these reasons, the appellant's conviction on both counts should be reversed, and the case remanded to the Third Judicial District Court for a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. Fred Metos", written over the typed name.

G. FRED METOS  
Attorney for Appellant

I hereby certify that a copy of the foregoing  
Brief of Appellant was delivered to the Office of the  
Attorney General, 236 State Capitol Building, Salt Lake City,  
Utah 84114 this \_\_\_\_\_ day of August, 1981.

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