

1956

State of Utah v. Gordon S. Little : Reply Brief of Appellant

Utah Supreme Court

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Gordon S. Little;

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Clerk, Supreme Court
Case No.

STATE OF UTAH,

Respondent,

-VS-

GORDON S. LITTLE,

Appellant.

8421

R E P L Y B R I E F O F A P P E L L A N T

GORDON S. LITTLE

In Propria Persona
Box 250, Draper, Utah.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Respondent,

- vs -

GORDON SAYRE LITTLE,

Appellant.

Case No.

8421

REPLY BRIEF OF APPELLANT

Comes now the Appellant in this cause and files this 'REPLY BRIEF' to the Respondent's Brief Heretofore filed by the Respondent. This Reply Brief is filed for the purpose of pointing out not only that the Respondent's contentions are contrary to the established rulings of this Court, but also that he has made a number of False, Deceitful and Reckless statements, which have no basis in fact, and are refuted by the Record in this case.

First, at page 1 of his Brief, Respondent States:

"..merchandise of a value from two to four hundred dollars (was) purloined."

This statement is simply NOT borne out by the Record, in fact not one of the articles in evidence, as the Appellant will show, infra, was ever shown to have been in Mr. Thuerer's Store the night before the alleged burglary, NOT ONE of the articles in evidence was ever positively identified as having been stolen, and NO definite value was ever placed on any one or any group of articles.

At page 3 of his Brief, Respondent states:

"He (Mr. Thuerer) itemized the missing articles and fixed their combined value at between \$200.00 and \$400.00, . . ."

But NO such itemized list of the supposedly missing articles was ever produced, in fact Mr. Thuerer did NOT know what was missing.

Mr. Thuerer stated that he took an inventory of his stock January 1, 1955 (Rep.Tr. p. -172-, L. 27-30.) and made another inventory right after the alleged burglary on January 31, 1955 (Rep.Tr. p. -165-, L. 6-7.); Yet he did NOT compare these inventories to ascertain what articles if any, were missing (Rep.Tr. p. -173-, L. 1-3.). At the Trial Four (4) Months after the alleged burglary Mr. Thuerer said that he had a list (Not introduced as evidence) of some of the items which he claimed were missing, WHICH HE HAD MADE UP THAT MORNING, AT HOME, and claimed that he could remember most of the items (Rep.Tr. p. -12-, L. 5-24.).

Mr. Thuerer did not have the list which he claimed to have made right after the burglary (Rep.Tr. p. -163-, L. 22-24.) and he admitted that he didn't know everything that was taken (Rep.Tr. p. 13-, L. 22-24.) and that he had no records or way of checking when articles might have been sold (Rep.Tr. p. -173-, L. 19-26.).

At the start of the Trial, Mr. Thuerer definitely stated, in regards to the allegedly stolen articles:

"I have never figured the actual value,"

(RepTr. p. -13-, Lines 19-22.).

Appellant submits that in a case of Grand Larceny, the value of the goods MUST be definitely established by competent evidence to be over \$50.00 actual market value, and that such value can NOT be established by guess and conjecture (STATE v. LAWRENCE (Utah 1951) 234 P.2d 600, at 601:), but must be set up and established by an accurate appraisal and fixing of the actual market value of each and every item necessary to bring the total value of the goods to over \$50.00; In this case NOT ONE article in evidence ever had any definite valuation placed on it, and there was not ~~an~~ even any attempt to do so.

At page 5 of his Brief Respondent states:

"He (Mr. Thuerer) identified the articles contained in Exhibits 6, 7, and 8, one by one, thoroughly and painstakingly, and stated they were all taken from his Store in the burglary."

Appellant submits that Mr. Thuerer did NOT, in any way positively identify any of the articles in evidence, and he did NOT in any way ever assert that any of them were taken in the alleged 'Burglary'.

In fact, Mr. Thuerer repeatedly admitted that his Clerks could have sold all of the articles in evidence prior to the 31st day of January, 1955, the date of the alleged burglary (Rep.Tr. p. 21-, L. 14-16; page 22-, L. 2, 5, 13, 22; page 165-, L. 9-17; page 169-, L. 20-24.). And Mr. Thuerer admitted that he could NOT recall ANY specific item as having been in his Store prior to January 31st, 1955, the date of the alleged burglary.

(Rep.Tr. p. -21-, L. 11; p. -22-, L. 22;

(Cont.....

(cont....)

Rep.Tr. p. -168 , Lines 1-14;

Rep.Tr. p. -169-, L. 14-19;

Appellant submits that this is far from any statement that any specific items were taken in a burglary, and cannot, as a matter of Law, support a conviction.

See: STATE v. WHITE (Utah 1944) 152 P.2d 80, at 81; STATE v. HALL (Utah 1943) 139 P.2d 228, at 230, 231; STATE v. HALL (Utah 1944) 145 P. 2d 494, at 496; STATE v. LAWRENCE (Utah 1951) 234 P. 2d. 600, at 601;
STATE v. CRAWFORD (Utah 1921) 201 P. 1030, 1031.

"There must be proof of larceny before the recent possession statute is brought into play. (STATE v. PETERSON, 110 U.413, 174 P.2d 843, 846.)"

At pages 3 & 4 of his Brief Respondent refers to the testimony of Mildred Andrew that on January 29, 1955, she noticed two "Strangers" (Mr. Haskins & Appellant Little.) looking for a parking space for their Car

before going into Thuerer's Store to buy a pair of coveralls, being strangers, they looked "suspicious" to her and she took down their license number. Next Respondent refers to the testimony of Vada Spackman, about a Car she saw about 3:00 o'clock A.M. on January 31st, 1955, but the Record shows that she made no identification of the Car or of the occupants, all that she could say about it was that it had a 'light top' (Rep.Tr. p. -33-, L. 2-5.) of which there are thousands in any populated neighborhood, yet the State was permitted to infer that it was Appellant in his car.

Appellant submits that testimony such as this is prejudicial, gives rise to 'mere suspicion' and wild conjecture, and is not legal evidence of anything.

At pages 4 and 5 of his Brief, Respondent seeks to make much of the fact that Mr. Haskins and Appellant bought Bus Tickets to Boise, Idaho, on the same day, apparently with the

idea of having this Honorable Court believe that the two men were acting together, whereas the Records shows that Mr. Haskins bought a ticket to Boise at 8:00 o'clock in the morning and checked three Bags (Ex's 6, 7 & 8.) See: (Rep.Tr. page -46-, L. 2-19); Whereas the Appellant did not buy a ticket to Boise and check his Bags (Ex's 3, 4 & 5.) until about One o'clock in the afternoon, (Rep.Tr. page -45-, L. 26-27.) it was not until the 2:25 Bus was due for Boise that the two men were seen in the Bus Station talking as they waited for the Bus. And Appellant Little never had anything to do with Mr. Haskin's Bags - Exhibits 6, 7 & 8, (Rep.Tr. page -54-, Lines 7-11.)

At pages 5 and 8 of his Brief, Respondent claims that Chief of Police Gillette of Twin Falls, Idaho, testified that Appellant carried a key on his person that opened Mr. Haskin's Bags; but the Transcript shows NO such thing.

- - -

the ONLY mention by Chief Gillette of a key was at Rep. Trans. page -147-, L. 16-18, as follows:

"Q. I'll ask if you have seen a key
similat to that one before?

A. Yes, I have. "

Just these words and nothing more, do NOT constitute testimony that he found any such key on Appellant Little or anyone else; nor does it even prove that he had ever seen the same key, for there are lots of 'similar' keys, this bit of testimony is only another trick of the State to have the testimony of a witness seem to the jury to be something differant than what the witness actually said.

At page 6 of his Brief, Respondent makes much of the testimony of the Expert Witness, Mr. Gallagher of the F. B. I., regarding the Crowbar (Ex. 13.) and at page 8 states:

cont..)

"(7) that in the luggage checked by the defendant, and for which he held claim checks, was a wrecking bar which was used to break into the burglarized store. "

This is quite a reckless statement for the Respondent to make, for there is NO proof that the wrecking bar introduced in evidence was ever in the luggage of Appellant Little; nor is there any satisfactory evidence that the said bar was the one used, if any, in the alleged burglary.

Inasmuch as 'suspicion' has played such a dominant role in this case, why not cast a little suspicion on the methods and means used by the State's Witnesses?

Taking this matter of the Crow-bar (Ex. 13.) it seems peculiar that Mr. Royal Hyer, the Police Officer who took Appellant Little's luggage into custody never saw any Crow-bar in it, nor did any others of the Twin Falls Police Department come forth to corroborate Chief Gillette's story that he 'found it' in the

Appellant's belongings.

Then there is Deputy Roskelly, who said that he went out to Mr. Thuerer's Store, ALONE, four days after the alleged burglary, and removed a piece of wood from the back of the Store and took it to Twin Falls, where they 'got hold' of a bar from a suitcase up there and shipped the two of them in a box to the B. B. I. , in Washington, D.C., (Rep.Tr. page -123-, lines 2-24.)

Finally, take the testimony of Mr. Gallagher, the F. B. I. operative brought with fanfare from Washington, D. C., to testify in this case, enthusiastically reffered to by Respondent on page 6 of his Brief; granting that Mr. Gallagher is a top specialist in his line- Spectography, it all the more serves to point out the weakness of his testimony (Rep.Tr. pp. 133-140.) From Mr. Gallagher's description of his work and from other sources, it is known that the Science of Spectography is an Exact Science, on a par with Handwriting Analysis, Chemistry

Ballistics and Fingerprint Identification; that is, just as an Expert can take one sample of Writing, one Chemical compound, one Bullet or one Fingerprint, and by comparing it with millions of suspect ones, unerringly pick out its mate, and say "This is the one", or "It is not one of these". The same is true in Spectography, by which science first discovered the Element Helium in the Sun, when it was 92 million miles away. But Mr. Gallagher did NOT say that the Bar (Ex. 13.) was THE ONE that made the marks on the Wood Chip (Ex. 13.), in fact he sidestepped all reference to any impression marks on the Chip and Bar, a means by which with the Comparison Microscope, it could readily have been told whether or not they matched, just as the minute scratches on a Bullet can be matched to the Gun Barrel it was fired from. Instead of this, after a razzle-dazzle build-up of his qualifications to impress the Jury, all Mr. Gallagher could say in favor of the

State was:

" I concluded the possibility of an interchange of paints such as I have just described taking place by any other manner than by direct contact of this crowbar with these wood fragments is remote."

(Rep. Tr. page -138-, Lines 14-17.)

Why this evasive, indefinite double-talk by Mr. Gallagher? A 'Remote Possibility' is not a definite answer, and 'Direct Contact', could mean anything, inasmuch as these two Exhibits 13 and 14 were shipped in the same container together, as well as having been handled by several persons. Why could he NOT just say - 'This bar made this mark' ?? Appellant submits that it was because it didn't. And that the only reason Mr. Gallagher was called as a witness from Washington, D. C., was to impress and confuse the Jury. Why is it that with all this display of using Science to fight crime, there was not even a Snapshot taken of the back door of Mr. Thurer's Store with its

alleged Bar marks, where Mr. Roskelly went alone to - as he says - remove this 'Wood Chip' from the back door of Mr. Thurer's Store?

Appellant submits that:

It is known that Scientific 'Expert Witnesses' are infallible, and can determine exactly which instrument was used in a given operation, as witness the work of the F. B. I.,, in the Lindbergh kidnapping case of yesteryear, where they traced and identified pieces of string, parts of boards, nails, and even the hammer that drove them, over a period of years.

There is NO guesswork, or 'Remote Possibility' in this field, the answer is either 'Yes' or 'No'; therefore when such an Expert hedges or qualifies and does not give a definite answer, the Court's generally recieve it, if at all, with extreme caution, for it proves nothing, and Appellant would appreciate it very much if this Court would request some such impartial Scientific 'Expert' as Amicus Curia to substantiate these contentions.

At pages 6-7, and again at pp. 8-9 of his Brief, Respondent makes much of the alleged attempt of the Appellant to escape from the Twin Falls, Idaho, jail.

Appellant submits that even if he had of attempted to escape, that such act is NOT proof of the alleged burglary of Mr. Thuerer's Store in Richmond, Utah. For he was also held for the State of Oregon, where he was out on Appeal of a Life Sentence, which since has been Affirmed (STATE OF OREGON v. GORDON S. LITTLE, Sept., 15, 1955, 288 P.2d 446.). And this Supreme Court of the State of Utah, has Held that where a defendant is held in custody upon two or more crimes, an attempt to escape can NOT be considered as evidence of guilt upon any of them (STATE v. CRAWFORD (UTAH 1921) 201 Pac. 1030, at 1033, Op. (7) & (8).), and cases therein cited.

Appellant contends that this evidence of his alleged attempt to escape was simply to prejudice the Jury.

At page 8 of his Brief, Respondent states:

"(10) that the defendant's credibility was seriously impeached and the explanations offered by him were wholly improbable and unworthy of belief."

Just how was Appellants credibility seriously impeached, aside from the fact that he had been previously convicted of a felony? Respondent does not point this out, only inference is made. And just how or why are the explanations of the Appellant, which were not refuted, wholly improbable or unworthy of Belief?

Can it be that the Attorney-General's Office, which NEVER confesses error, labels anything that does not agree with their one-sided views as improbable or unworthy of belief?

Why doesn't Respondent point out some reasons for his all-inclusive statements?

Appellant submits that he did make a reasonable and 'Satisfactory Explanation' of his activities, which would have prevailed with any Jury not prejudiced against him, as was

the Jury in the instant case, by the numerous articles admitted in evidence relating solely to Mr. Haskins, and a number of tools which it was alleged could have been used as 'Burglar Tools' but which the State admitted had NOT been used in the instant case, as well as the hearsay evidence of Chief Gillette in regards to 'Nitroglycerine' which he said he had disposed of, and although not produced, the very mention of it was very prejudicial.

Appellant has fully raised these POINTS in his 'APPELLANT'S BRIEF', and refers this Court to it anew, rather than repeat his main contentions in this Reply Brief, for there are many contentions and Authorities cited therein which the Respondent has utterly failed to answer, despite the facilities at his command.

At page 7 of his Brief, Respondent states:

"(1) that A. R. Haskins pleaded guilty to burglarizing Thuerer's Store on January 31, 1955."

Whatever inference Respondent would have this Court make from that fact is not clear, but evidently he wishes it to consider it as proof of guilt against the Appellant.

But Appellant Submits that the Record of the conviction of one person for Burglary or Larceny can NOT be Constitutionally used to show that goods were stolen, or in any other way, against another person. SEE the case of KIRBY v UNITED STATES, 174 U.S. 47, at 54-62, 19 S.Ct. 574, at 576-579, and Authorities cited. And even if a persons roommate may have in the room stolen goods, it can not be held against such person if he had no hand in stealing it - See: STATE v. CRAWFORD, 59 Utah 39, 201 Pac. 1030, at 1032-1033, Op.(5) - (6).

* If on prosecution of several for grand larceny there is no evidence that one of the defendants in any way aided in or planned the commission of the crime, judgment of the conviction as to him will be reversed. (STATE v. LAUB, 102 U. 402, 131 P.2d 805.) " "

In STATE v. KINSEY (Utah 1931) 295 Pac. 247, at 249, this Supreme Court unanimously HELD:

"(3) Further, the authorities also are to the effect that the possession must not only be personal, exclusive, and unexplained, but must also be conscious, or a conscious assertion of possession by the accused. (citing many cases.)"

Appellant submits that under the rule of cases such as the foregoing, that the instant case, wherein the Appellant never had any of the allegedly stolen goods in his possession or in any way under his control, and didn't even know that Mr. Haskins had any such goods, must be reversed as being contrary to the established Law of the State of Utah.

Again, at page 8 of his Brief, Respondent at (2), (3), (4), urges upon this Court the fact that Mr. Haskins and Appellant Little had been seen together in Ogden, Utah, and that they purchased Bus Tickets to the same City;

but, Appellant contends, this does NOT in any way tend to prove that they were together at the time of the Burglary of Thuerer's Store in Richmond, Utah, nor does it in any way tend to prove that they conspired to commit the crime or acted in concert regarding it. Appellant submits that the mere fact that he had associated with Mr. Haskins, is NOT per se proof that he conspired to commit or that he committed crimes with Mr. Haskins. This is not Russia, where all associates of a person convicted or suspected of a crime, are summarily held to be guilty also. This is America, part of the English speaking World, which has never recognized the monstrous doctrine of 'Guilt by Association'. Mere association, no matter how close, with another, does not show a conspiracy or action in concert. (STATE v CRAWFORD, 201 Pac. 1030, 1032.)

The Authority quoted by the Respondent at page 9 of his Brief, is not in point, for it

shows in itself that before evidence of the activities of another person can be introduced against a defendant, it MUST first be proved that they acted together in the commission of a crime.

In the instant case, there is NO such foundation for the introduction of the activities of Mr. Haskin's in evidence against Appellant Little, and it cannot be its own foundation.

FIRST: There was no evidence that Mr. Haskin's and Appellant acted in concert in the commission of any crime.

SECOND: There was NO evidence that they conspired or combined for any unlawful purpose;

THIRD: There was NO evidence that Appellant knew anything of any unlawful activities, or possession of stolen property, by Mr. Haskin's.

At page 9 of his Brief, Respondent claims that there was substantial evidence that Mr. Haskin's and Appellant acted jointly in the commission of the alleged burglary, that the

possession of allegedly stolen articles by Mr. Haskin's was therefore possession by Appellant. But Appellant submits that there is NO such evidence whatever independant of the mere fact of 'possession' by Mr. Haskin's to connect him, the Appellant with the alleged crime, that the mere fact that Mr. Haskin's has possession of allegedly stolen goods can NOT by itself prove a conspiracy or joint action between Appellant and Mr. Haskin's in committing the crime and thus pave the way for its own admission in evidence as being in the 'possession' of Appellant; that is, it is purely guess, speculation and assumption that they conspired to and committed the crime together, and this cannot support a presumption that Appellant therefore had 'possession' of such goods, to in turn support a third presumption of guilt by having had such possession.

See: STATE v. CRAWFORD, supra. 201 Pac. 1030;
STATE v. NICHOLS, 145 P.2d 802, 805 - 806;

Appellant submits that it is sound and necessary principle of Law, that before any presumption can arise, the facts to support it first must be in evidence.

The Supreme Court of the United States, in the case of *TOT v. U. S.*, 319 U.S. 463, at 473, 63 S. Ct. 1241, at 1248, declared::

"

. where guilt is in issue a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.."

On page 11 of his Brief, Respondent under POINT / ^{THREE}, makes the statement::

"It is too late to assail a statute... so firmly established in our criminal law. . ."

Appellant submits that it is NEVER too late, to assail an unconstitutional Statute, as witness the recent action of the Supreme Court of the United States, in declaring to be unconstitutional various 'Segregation' Statutes which had withstood attack for over eighty (80) years.

As outlined in his POINT THREE of APPELLANT'S BRIEF, pages 41 to 54, Appellant believes he has shown ample reasons why Utah's Larceny Statute is unconstitutional, and if upheld as applied in the instant case, must fall. But, Appellant hopes that it will not be necessary to continue his attack on the Statute, for under his POINT ONE and POINT TWO of APPELLANT'S BRIEF, he believes he has amply shown both that there is NO legal evidence to connect him with the crime charged, and that he was denied a 'Fair Trial' and due Process of Law, under both the State and Federal Constitutions.

IN CONCLUSION, Appellant submits that in accord with the reasons and Authorities shown in his Appellant's Brief, to which no effective answer has been made by Respondent, and to the fact that most of the contentions made by the Respondent in his 'Respondent's Brief' have been shown, Appellant believes, to be False and Untenable, that the Judgment of Conviction against him should be Reversed and Appellant Ordered Discharged from Custody in accordance with Law and Justice.

Very Respectfully Submitted by -


Gordon S. Little,

Appellant in Propria Persona,
Box 250, Draper, Utah.