

1990

Salt Lake City v. Glenn E. Holtman : Brief of Appellant

Utah Court of Appeals

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COURT OF APPEALS
OF

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY,
Plaintiff/Respondent,

v.

GLENN E. HOLTMAN,
Defendant/Appellant.

:

:

:

Case No. 900177-CA
Priority #2

BRIEF OF APPELLANT

Appeal from judgment and conviction for Retail Theft, a class B misdemeanor, in violation of Salt Lake City Ordinances § 11.36.060, in the Third Circuit Court in and for Salt Lake City, State of Utah, the Honorable Paul G. Grant, Judge presiding.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY, :
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v. :
GLENN E. HOLTMAN, : Case No. 900177-CA
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(d) (Supp. 1990) and Rule 26(2)(a), Utah Rules of Criminal Procedure (1990) whereby a defendant may take an appeal to the Court of Appeals from a final judgment and conviction. In this case final judgment and conviction was rendered by the Honorable Paul G. Grant, Judge, Third Circuit Court, Third Circuit Court, in and for Salt Lake City, State of Utah.

TEXTS OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Rule 609(a), Utah Rules of Evidence (1990) provides in part:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE ISSUE

Did the trial court commit prejudicial error in denying Mr. Holtman's motion to suppress his prior conviction?

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY, :
Plaintiff/Respondent, :
v. :
GLENN E. HOLTMAN, : Case No. 900177-CA
Priority #2
Defendant/Appellant.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Honorable Paul G. Grant, Third Circuit Court, in and for Salt Lake City, State of Utah. A jury found Mr. Holtman guilty of Retail Theft, a class B Misdemeanor, in violation of Salt Lake City Ordinances, § 11.36.060 after a trial held on January 24, 1990.

STATEMENT OF FACTS

On October 28, 1989, Mr. Holtman and his brother Jason were browsing in Nordstrom's Department Store (R. 28). Mr. Holtman, the defendant, walked up to the sunglasses counter and asked to try on several pair of sunglasses (R. 29). He tried on the pairs putting his own sunglasses on the counter with the other sunglasses (R. 30). After walking back and forth to a mirror several times he reboxed the sunglasses, waited to return them to the sales person,

and then left with his brother (R. 31). He put what he thought were his sunglasses on his head and walked out of the store at which point he was arrested (R. 31).

At trial, immediately before Mr. Holtman, the defendant, took the stand, counsel for defendant made a motion under Rule 609(a)(1) and (2) to exclude evidence of the defendant's prior conviction for grand larceny in Virginia. The motion was denied primarily because, as the trial court noted, the crimes were so similar in nature that the prior conviction was probative on the issue of intent and would aid the jury in judging the defendant's credibility. (R. 24). Counsel for the City indicated originally that she would only ask if there had been a prior felony conviction should the defendant take the stand (R. 23). After the motion was denied counsel for the defense asked the counsel for the City what she was going to ask on cross-examination concerning the prior conviction (R. 25). Her response was that she would ask if the defendant had ever been convicted of a felony and, if so, what the crime was and when it was committed (R. 25, inaudible response reconstructed by stipulation between counsel). Defense counsel elicited this information on direct examination of Mr. Holtman (R. 32).

SUMMARY OF ARGUMENT

The trial court erred in denying Mr. Holtman's motion to suppress his conviction for grand larceny pursuant to Rule 609, Utah Rules of Evidence. The probative value of the conviction did not

outweigh its prejudicial effect; furthermore, the conviction was not for a crime of dishonesty or false statement within the meaning of subsection 2 of Rule 609(a). Such error was reversible, since it was most likely used by the jury as evidence of Mr. Holtman's intent to steal, the only issue at trial.

ARGUMENT

POINT I

**THE TRIAL COURT ERRED IN DENYING
MR. HOLTMAN'S MOTION TO EXCLUDE EVIDENCE OF
HIS PRIOR CONVICTION.**

At trial defense counsel moved to suppress Mr. Holtman's prior conviction pursuant to Rule 609, Utah Rules of Evidence (R. 21-25). Mr. Holtman's prior conviction which the state would have used for impeachment purposes consisted of a 1988 conviction in Virginia for Grand Larceny (R. 32, inaudible portion agreed to by stipulation). The trial court denied the motion (R. 23-24). Because of the trial court's ruling, defense counsel elicited from the defendant on direct examination that he had been convicted of grand larceny in Virginia (R. 32, inaudible portion agreed to by stipulation).

A. The prior conviction was not admissible under 609(a)(1).

Rule 609(a)(1) provides:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the

law which he was convicted, and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant [.]

The Utah Supreme Court has summarized the factors to be considered in balancing probative value against prejudicial effect as follows:

[1] the nature of the crime, as bearing on the veracity of the witness

[2] the recentness or remoteness of the prior conviction

[3] the similarity of the prior crime to the charged crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person

[4] the importance of credibility issues in determining the truth in a prosecution tried without decisive nontestimonial evidence

[5] the importance of the accused's testimony, as perhaps warranting the exclusion of convictions, probative of the accused's character for veracity

State v. Banner, 717 P.2d 1325, 1334 (Utah 1986)(citations omitted).

The burden of proving that the probative value of the conviction, in that its admission tells something about defendant's credibility, outweighs the prejudicial effect of its admission is on the prosecution. Banner at 1334. In the present case the City offered no evidence or explanation as to how the prior conviction was probative of Mr. Holtman's character for truth and veracity (R. 22-23). In looking at the factors outlined by the Banner Court, three out of five weigh heavily in favor of suppressing the conviction.

Mr. Holtman was on trial for a retail theft, the prior felony conviction was for grand larceny, a theft crime. This similarity could have caused the jury to do just what the trial court suggested it was proper for the jury to do, that is the jury could have used the fact of a prior theft to decide whether or not Mr. Holtman had intended to steal the glasses or merely walked out thinking he had his own glasses with him. Mr. Holtman's defense was that he made an innocent mistake. By allowing the jury to hear evidence of a prior felony theft, the jury had less incentive to evaluate whether or not Mr. Holtman's actions in this case were innocent. The Banner Court's concern with punishment of the accused because of prior crimes is implicated here.

In addition to factor [3] weighing on the side of suppression, factors [4] and [5] do, too. There was no decisive nontestimonial evidence. Mr. Holtman's actions were not contested, only his intentions. Credibility of the witnesses was critical to the jury's determination. Two security guards testified for the City that Mr. Holtman's actions were suspicious and that he evidenced behavior proving he was trying to steal the sunglasses. Mr. Holtman's brother testified to some collateral matters. Mr. Holtman alone testified to his innocent intentions and confusion in trying on the sunglasses. Therefore, Mr. Holtman's testimony was essential to make out his defense. His own credibility with the jury was the only evidence they could rely on to determine whose perceptions were correct.

Factor number [2] perhaps weighs in favor of admissions, but by itself recentness or remoteness is the least important of the factors. Factor number [1] is the most problematic. If this factor involves the same evaluation as used under 609(a)(2), than, as argued below, a theft crime without more information is not probative of veracity. However, if there is a lower threshold to be applied here, a theft crime might be probative of veracity. However, because this trial is for a theft crime, credibility is at issue, and it is necessary for the defendant to testify, even if a theft crime might be probative, its prejudicial effect outweighs any marginally probative value it might have.

Finally, the trial court's ruling indicates that the conviction is admissible for substantive reasons. The court's analysis is that the prior conviction is probative of the defendant's intent. This is inappropriate, but probably indicates exactly how the jury used the evidence of Mr. Holtman's prior conviction.

The trial court's denial of Mr. Holtman's motion to suppress his prior conviction was error under 609(a)(1).

B. The prior conviction was not admissible under 609(a)(2).

Rule 609(a)(2) provides:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of punishment.

Theft crimes are not necessarily crimes of dishonesty or false statement, unless there is an element of fraud or deceit involved that "bear[s] directly on the likelihood that the defendant will testify truthfully." State v. Bruce, 779 P.2d 646, 656 (Utah 1989) (citations omitted). Under 609(a)(2) Utah courts have found inadmissible prior convictions for robbery and burglary, State v. Lanier, 778 P.2d 9, 11 (Utah 1989); retail theft and attempted burglary, Bruce at 656; misdemeanor theft, State v. Brown, 771 P.2d 1093, 1095 (Utah App. 1989); aggravated robbery, State v. Wight, 765 P.2d 12, 18 (Utah App. 1988).

The City once again had the burden of showing Mr. Holtman's prior conviction for grand larceny involved deceit or dishonesty. Brown at 1094. In addition, the trial court must inquire into the underlying facts before a conviction is admissible under 609(a)(2). Brown at 1094; Wight at 18. Neither did the City provide information or the underlying facts, nor did the trial court investigate further than defense counsel's proffer that Mr. Holtman merely carried keys in a car theft scheme and never made any representations to any victims indicating a tendency to lie. (R. 22).

Mr. Holtman's prior conviction is a theft crime; however, there is no evidence in the record of any fraud or deceit on the defendant's part. The trial court's denial of Mr. Holtman's motion to suppress his prior conviction was error under 609(a)(2).

C. The refusal to suppress admission of the prior conviction was prejudicial error.

[T]he standard for error in cases involving a wrongful failure to exclude prior convictions is whether "there was 'a reasonable likelihood of a more favorable result for the defendant.'"

State v. Gentry, 747 P.2d 1032, 1038 (Utah 1987) (citations omitted). The Utah Supreme Court has found prejudicial error in circumstances where the prior conviction was admitted, and

[t]he evidence of the defendant's guilt . . . was far from overwhelming.

State v. Lanier, 778 P.2d 9, 11 (Utah 1989).

In the present case the only issue was Mr. Holtman's intent to steal the sunglasses. The evidence against him consisted of two witnesses who described his behavior as suspicious (R. 4 & 15). His own testimony was that he had made an honest mistake and picked up the wrong sunglasses before he left (R. 31-32). Mr. Holtman's testimony was completely negated by the trial court's denial of defendant's motion to suppress his prior theft conviction. The jury heard that Mr. Holtman had been convicted of felony theft no more than one year earlier. His credibility was reduced in the jury's eyes by a fact that has very little to do with credibility. The jury should have been allowed to deliberate in this case without the distraction the prior conviction created. Mr. Holtman's actions at the time of the alleged retail theft should have been left to speak for themselves through the testimony of the witnesses for the City and through Mr. Holtman himself. He should have been judged not as

an ex-felon engaged in suspicious behavior and therefore found guilty, but as a young man acting as he did one day in Nordstroms. The denial of the motion to suppress was prejudicial error.

CONCLUSION

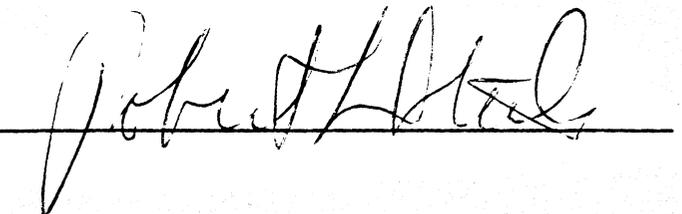
For any and all of the foregoing reasons, Appellant, Glen E. Holtman, respectfully requests that this Court reverse his conviction and remand the case to the Circuit Court for a new trial.

RESPECTFULLY SUBMITTED this 10th day of August, 1990.


ROBERT L. STEELE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert L. Steele, do hereby certify that I mailed four copies of the foregoing brief of appellant to Janice Frost of the Salt Lake City Prosecutor's Office, 451 South 200 East, Salt Lake City, Utah 84111 this 10th day of August, 1990.



MAILED/DELIVERED a copy of the foregoing to the Salt Lake
City Prosecutor's Office, 451 South 200 East, Salt Lake City, Utah
84111 this _____ day of August, 1990.
