

1981

State of Utah v. Jahes E. Ballenberger : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 10,000

JAMES E. BALLEMBERGER, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a jury verdict of

Judicial District Court in and for Salt Lake County

Jay E. Banks, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 17619
JAMES E. BALLEMBERGER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty in the Third
Judicial District Court in and for Salt Lake County, the Honorable
Jay E. Banks, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 17619
JAMES E. BALLEMBERGER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from a jury verdict of guilty of the offense of Theft, in violation of § 76-6-404 and § 76-6-412, Utah Code Annotated (1953), as amended. The charge was based on appellant's exercise of unauthorized control over the property of another with intent to deprive him of his property. The property stolen was of a value exceeding \$1,000 and thus a second-degree felony sentence was imposed.

DISPOSITION IN THE LOWER COURT

At the outset of the trial, the court held an evidentiary hearing on the appellant's Motion to Suppress Evidence (T. 81). Appellant claimed that the evidence should have been excluded since his initial detention by the officer constituted an unlawful arrest; thus, evidence subsequently

obtained was inadmissible. The trial court denied the motion (T. 86), holding that appellant was not unlawfully arrested and that subsequent evidence was not unconstitutionally obtained in violation of the Fourth Amendment.

The case was tried on the 28th and 29th of January, 1981, in the Third Judicial District Court in and for Salt Lake County, the Honorable Jay E. Banks presiding. The appellant was convicted by a jury of theft, a second-degree felony, in that the value of the property exceeded \$1,000.

The trial court also denied appellant's motion to dismiss, stating that the issues raised were questions of credibility which were properly left to the jury as triers of fact (T. 157).

Appellant was sentenced to the Utah State Prison on March 5, 1981 to serve an indeterminate term of from one to 15 years as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of: 1) the jury verdict of guilt rendered in the trial court; 2) the trial court's denial of appellant's Motion to Suppress; and 3) the trial court's denial of appellant's motion to dismiss for lack of sufficient evidence.

STATEMENT OF FACTS

On May 15, 1980, Officer Ray LeVitre was engaged in routine patrol when he noticed a vehicle heading eastbound on the Highland Dairy access road (T. 26, 123). Due to the large number of burglaries which had recently occurred in the area, the officer had been requested to increase his patrol and identify anyone stopped in the area (T. 40, 43).

As the car came within viewing distance of Officer LeVitre's car it made a sudden turn into the parking lot of the Oakwood business district and went behind a row of buildings located there (T. 28, 29, 124). Officer LeVitre backed up about 100 yards and waited to see if the car was going to re-emerge from behind the buildings (T. 30, 125, 126). When the car failed to re-emerge, Officer LeVitre called for assistance and went to investigate (T. 31, 127).

He arrived where the vehicle was located and noted that the area was well lit (T. 32), and that the appellant was standing in front of the vehicle with the hood up and the engine off (T. 32, 33, 127). The officer then pulled his car alongside the passenger side of the other vehicle and asked if there was a problem (T. 33, 43, 52, 128), to which the appellant replied that they were checking the oil. The officer then left his vehicle and approached the other car asking the appellant and his companion for identification (T. 34, 130). The appellant had none (T. 145).

As Officer LeVitre approached the other vehicle he noticed in the back seat, in plain view, stereo equipment and other property (T. 35, 128). He asked appellant who the property belonged to just as Officer Hansen was arriving (T. 36, 131). He then asked Officer Hansen to take the appellant to his vehicle and question him about the property and the circumstances of their presence in the area at 3:30 in the morning (T. 37, 131).

Officer Hansen then placed the appellant in his patrol car, gave him Miranda warnings, and questioned him (T. 38). The appellant told Officer Hansen that he had bought the property from a third-party friend of Lynn Fulton (who was the other person in the car) whom he could not identify (T. 45, 141). Officer Hansen told this to Officer LeVitre, who had received a different story from Lynn Fulton (T. 41, 71). Officer LeVitre then confronted Fulton with the inconsistency of his and appellant's stories. Fulton told Officer LeVitre he had lied and the property had really come from a van which was located nearby (T. 45). Officer LeVitre and Lynn Fulton then went to the place where the van was located, found the owner, and returned to the scene where the property was identified as belonging to Robby Ashby (T. 46, 132).

The appellant and Lynn Fulton were then placed under arrest (T. 46). The car was towed to the Murray police station and then seized (T. 39).

At trial appellant made a motion to suppress the evidence claiming that it was obtained pursuant to an illegal arrest (T. 81). The trial court determined that the arrest did not occur until probable cause existed and therefore denied the motion to suppress (T. 86). At the end of the state's case the appellant made a motion to dismiss (T. 145), claiming that value had not been established and that failure to produce the tools constituted a denial of due process (T. 146). The trial court denied this motion stating that the issues presented were questions of credibility which should properly be decided by the jury (T. 157).

ARGUMENT

POINT I

THE INITIAL INQUIRY OF APPELLANT WAS
PERMISSIBLE AND THE SUBSEQUENT ARREST WAS
NOT ILLEGAL.

Appellant contends that the initial questioning of appellant and Lynn Fulton was a violation of the Fourth Amendment to the United States Constitution in that the officer did not have a reasonable suspicion that they were engaged in criminal conduct. He also contends that the subsequent arrest was unconstitutional since it was not based on probable cause. Both of these contentions are without merit when viewed in light of all the circumstances. Officer

LeVirtre was justified in making the initial inquiry and questioning of the appellant and his arrest was only made after probable cause had been established.

A. NOT ALL DETENTIONS CONSTITUTE AN
UNLAWFUL ARREST OF THE INDIVIDUAL.

The case of Terry v. Ohio, 392 U.S. 1 (1968), upon which appellant relies, established that a police officer may detain and question a person based on information which falls short of establishing probable cause to arrest the person. The facts of Terry are similar in many respects to the case at bar. There, an experienced Cleveland police officer, while patrolling on foot, had his attention attracted to two persons who repeatedly walked up and down a street pausing to look into a particular store window each time they passed. The officer suspected that they might be "casing" the store in contemplation of a possible robbery and thus approached the individuals to question them. When they gave evasive answers the officer also frisked them for weapons.

In upholding both the stop and the frisk, the United States Supreme Court wrote:

. . . there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails. . . . And in justifying

the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

392 U.S. 1, 21. The Court reserved the issue of when a seizure would be justified for purposes of detention and/or interrogation, Terry, supra, n. 16. In that footnote the Court observed:

Obviously not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

392 U.S. at 1, 19, n. 16.

In the present case, Officer LeVitre's initial questioning of the appellant and his companion while they were "checking their oil" did not constitute a sufficient show of authority nor a restraining of their liberty to constitute a "seizure." Thus, the protections of the Fourth Amendment do not apply to this initial encounter.

This Court, in State v. Whittenback, Utah, 621 P.2d 103, 105, adopted the standard of "objective credible reason" which was used in People v. La Pene, 40 N.Y. 2d 210, 352 N.E. 2d 562 (1976) and its companion case, People v. DeBour, 352

N.E. 2d 562 (1976). In People v. DeBour, supra, the Court of Appeals of New York recognized that in some circumstances police officers may approach persons to conduct a preliminary inquiry on facts falling short of the "reasonable suspicion" standard of Terry, supra. In DeBour, two police officers, while walking down a street shortly after midnight, noticed an individual walking toward them on the same side of the street. When the person got within thirty feet of the officers he quickly crossed the street. The officers also crossed and asked the defendant what he was doing in the area and asked for identification. Observing a bulge under the defendant's jacket, the officers asked him to unzip his jacket, which he did, revealing a loaded revolver in his waistband which the officers seized.

In holding that this conduct did not constitute a "seizure," the Court wrote:

This case raises the fundamental issue of whether or not a police officer, in the absence of any concrete indication of criminality, may approach a private citizen on the street for the purpose of requesting information. We hold that he may. The basis for this inquiry need not rest on any indication of criminal activity on the part of the person of whom inquiry is made but there must be some articulable reason sufficient to justify the police action which was taken.

352 N.E.2d 562, 565.

In the companion case, People v. La Pene, supra, the court indicated how this analysis fits with the "reasonable suspicion" standard:

. . . We bear in mind that any inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions. By this approach various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence. The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality (People v. DeBour, supra). The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, this authorizes a forcible stop and detention of that person.

352 N.E.2d 562, 571-572. Thus, all that is required for an initial confrontation between police and citizens in public places is an articulable, objective reason for the inquiry.

In the present case, Officer LeVitre, aware of the recent incidents of crime in the area, and the sudden swerve of the automobile when the drivers saw the patrol car (T. 31, 40), was justified in initially approaching the appellant

and his companion. His suspicion of the defendants was fueled by the failure to re-emerge from behind buildings which were closed to the public and had recently been the target of several burglaries. He asked for identification pursuant to a police order to identify persons in the area (T. 43). The appellant failed to produce identification (T. 35, 146). At this point the officer had seen the property located in plain view on the back seat of the automobile (T. 19, 20) and asked the parties to whom it belonged. In the circumstances, this question was reasonable and did not constitute a violation of the appellant's rights.

In State v. Larson, Wash. App., 587 P.2d 171 (1978), the court applied the DeBour rationale to a factual situation similar to the instant case. In Larson, officers saw several people in a car parked in a no-parking zone in a closed park late at night in an area in which many burglaries had recently occurred. The officers approached the car and asked each occupant for identification. As the defendant opened her purse to obtain identification, the officers saw and seized a bag of marijuana from the purse. In upholding the trial court's denial of defendant's motion to suppress this evidence, the court stated:

While the presence of individuals wandering abroad late at night or at an unusual hour should not of itself precipitate a police investigation, it is a circumstance justifying suspicion.

. . . Taking it in combination with factors such as the defendant's being seated in a car parked in a no-parking zone near a closed park in an area where numerous burglaries had occurred previously, police suspicion of illegal conduct was justifiable. Under such circumstances, the police may ask for identification . . .

587 P.2d 171, 172-173. See also State v. Warner, Ore., 585 P.2d 681 (1978) at 689.

Here, the initial reasonable suspicion, as in Larson, was followed by a plain view sighting of contraband, which does not amount to a search in the constitutional sense. State v. Echevarrieta, Utah, 621 P.2d 709, 711 (1980).

Although the stereo equipment and tools located in the back seat of the appellant's car were not immediately identified as stolen, they were properly seen through the window and not discovered during the course of an unlawful search. In light of the high rate of crime recently reported in the area, it was proper for the officer to ask the appellant and his companion where the items had come from. There is no indication in the record that either party refused to talk with the officers (Officer Hansen had arrived at the scene and asked appellant, who was outside the vehicle, to answer questions). There is also no indication that any force or threat of authority was used to force appellant to enter Officer Hansen's car for questioning.

B. THE "ARREST" OF THE APPELLANT WAS
BASED ON PROBABLE CAUSE.

Appellant contends that from the point at which he entered Officer Hansen's car he was under arrest. This is contrary to the testimony of Officer Hansen (T. 140, 141, 146) and could only be true if the appellant had indicated a desire to leave and had been unable to do so. Appellant cites the fact that he was given his Miranda warnings to support his contention. This fact, however, is not determinative of the point in time at which an arrest is made. Miranda warnings are routinely given before any questioning is done to insure that information obtained is not subsequently suppressed for failure to give the warnings.

The conduct of Officer Hansen in questioning the appellant was not an arrest since there was no indication that the appellant was not free to leave or that he was in custody. The conduct here merely constituted "threshold questioning" of the appellant. People v. Gurule, Colo., 471 P.2d 413, 416 (1970).

In State v. Marks, Kan., 602 P.2d 1344 (1979), the Supreme Court of Kansas recognized that where an officer does not stop a moving vehicle, but merely approaches the defendant sitting in a parked vehicle, there is no detention and hence no seizure. In the present case there was also no "stopping"

of the appellant and his companion since they were stationary at the time when the officer approached. At the time that Officer Hansen arrived, it was reasonable that he take the appellant away from his companion and Office LeVitre in order to test the consistency of the information obtained by each party.

If this Court finds that the conduct of the officers constituted a "detention" or a "seizure" of the appellant, it was justified under the "reasonable suspicion" standard of Terry, supra. Since Terry, most courts have recognized that:

. . . the governmental interest in effective crime prevention underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for investigating possible criminal behavior, even though there is no probable cause to make an arrest.

People v. Mangum, Colo., 539 P.2d 120, 123 (1975) (emphasis added). See also State v. Post, Idaho, 573 P.2d 153 (1978); State v. Folkes, Utah, 565 P.2d 1125 (1977); United States v. Beck, 598 F.2d 497 (9th Cir. 1979). Thus, the Terry standard of "reasonable suspicion" applies to detentions to investigate possible criminal activity.

Furthermore, the cases cited by the appellant to support his claim that his arrest was not based on probable cause and therefore amounted to an unconstitutional seizure

under the Fourth Amendment to the United States Constitution¹ do not apply to the circumstances of this case. In People v. Miller, 496 P.2d 1228 (Cal. 1972), the California court was correct to determine that the mere presence of an individual sleeping in his vehicle in a private parking lot did not give rise to any reasonable suspicion of criminal activity. However, in the present case the observations of Officer LeVitre which led him to make initial inquiries of the defendant, coupled with the report of thefts in the vicinity, were the bases of a reasonable suspicion of some criminal activity. This suspicion was further developed as he questioned the appellant and his companion about the items which were located in the back seat (T. 34, 130). Lawful questioning led to the information that the items were stolen and at that time probable cause to arrest the appellant was established. Thus, unlike the Miller case, the arrest was not made without probable cause.

People v. Bower, 597 P.2d 115 (Cal. 1979), is also distinguishable from the present case. There it was sufficient to establish probable cause that the appellant was seen in a community with a high crime rate. A general high crime community is not analogous to an area in which several

¹ The Fourth Amendment is virtually identical to Article I, Section 12 of the Utah Constitution.

recent thefts have preceeded the issuance of directives to increase police patrol and identify persons seen in the area (T. 40, 43). In State v. Folkes, Utah, 565 P.2d 1125, 1127 (1977), this Court recognized that:

When a police officer sees or hears conduct which gives rise to suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

Applying this standard, Officer LeVitre had a duty to pursue his initial observation of the appellant and Mr. Fulton to insure that activity of a criminal nature was not occurring. The fact that subsequent questioning provided information of a recent theft indicates the legitimacy of the suspicion which gave rise to a preliminary investigation.

In State v. Folkes, supra, this Court also reiterated the test applied in Utah as to the propriety of searches and seizures:

It is to be borne in mind that it is not all searches and seizures without a warrant which are proscribed by the constitutional provisions referred to. It is only of a search which is "unreasonable." It is commonly and properly stated that the question as to whether a search is unreasonable depends upon the particular circumstances; and the question to be answered is whether reasonable and fair-minded persons would judge the alleged search and seizure to be unreasonable or oppressive.

565 P.2d 1125, 1127. When viewed in light of this test, Officer LeVitre's conduct in approaching and questioning the appellant and his companion was not only "reasonable," but was based on cumulative articulable facts giving him reasonable suspicion to believe that they were attempting to cover a crime which had recently been committed. The total circumstances, the sudden turn of the car upon seeing the patrol car (T. 29, 124), the lateness of the hour (T. 8), the knowledge of recent reports of crime in the area with requests to identify persons in the area (T. 40, 43), and the failure of the car to re-emerge from behind businesses which were closed (T. 31, 127) distinguish this case from In re Tony C., 582 P.2d 957 (Cal. 1978) where no reasonable suspicion existed to justify stopping the defendant.

The officer had a duty to make initial investigations, and during questioning of the appellant and his companion he discovered that the items located in the back seat of the automobile were stolen. At that point, there was probable cause to arrest the appellant; thus his rights were not violated by detaining him while Officer LeVitre and his companion went to the location where the items had been stolen and returned with the owner, who identified the property as his.

Respondent agrees with appellant that the basic standard for arrest without a warrant was set forth by the United States Supreme Court in Beck v. Ohio, 379 U.S. 89 (1964). This Court has adopted that standard in State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259 (1972), wherein the test is stated as follows:

The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

495 P.2d 1259, 1260. See also State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1972). In addition, this Court has stated often that the determination as to whether the arrest is based on probable cause is primarily for the trial court and will not be reversed on appeal unless clearly in error. State v. Eastmond, supra; State v. Lopes, 552 P.2d 120 (Utah 1976).

The trial court's determination that probable cause existed prior to the time of the arrest and its denial of appellant's motion to suppress should be affirmed (T. 86).

POINT II

THE SEIZURE OF THE ITEMS LOCATED IN THE BACK OF THE AUTOMOBILE WAS LAWFUL AND THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS SUCH SEIZED EVIDENCE.

At trial appellant made a motion to suppress evidence seized, claiming that the search of the automobile was not incident to a valid arrest and that the subsequent search and seizure was not based on exigent circumstances. The trial court correctly denied this motion, finding that there was a valid arrest and thus probable cause existed to justify the search and seizure of the items located in the automobile (See Appendix A) (T. 83).

Appellant now contends that seizure of the evidence at the police station without a warrant was in violation of his Fourth Amendment rights. Respondent submits that the seizure of the evidence occurred at the point that the automobile was immobilized and that it was justified under both the incident to a lawful arrest and automobile exceptions to the warrant requirement.

In the present case, the initial "search" of the automobile occurred when Officer LeVitre saw the items (later identified as stolen) in the back seat of the automobile. This discovery was not a search within the constitutional meaning of the term since it was within the plain view exception to the search and seizure requirement. State v. Echevarrieta, supra.

The subsequent search and seizure of the evidence after it had been identified by the owner was based on probable cause and was effective from the time that the car

was placed in custody. Here, the seizure of the automobile and its contents occurred after both parties were placed under arrest. Thus the seizure was incident to a lawful arrest.

The analysis justifying a search incident to lawful arrest is equally applicable to seizures which are incident to a lawful arrest. The propriety of a warrantless search incident to a lawful arrest was recognized by the United States Supreme Court in Preston v. United States, 376 U.S. 364 (1964). This Court has also recognized this exception to the general requirement of a warrant for conducting a search. Eastmond, supra; State v. White, Utah, 577 P.2d 552 (1978).

The rationale of Chambers v. Maroney, 399 U.S. 42 (1972) is that there is no difference between seizing the car at the scene and waiting for a search warrant and immediately searching the car at the scene. This applies equally to a case like this one where the actual removal of the evidence is done at the station but the legitimacy of the action is based on the probable cause which existed incident to the arrest.

This Court has adopted the position that where a vehicle retains a reasonable degree of mobility and officers have probable cause to believe the vehicle contains contraband or evidence of a crime, the search may be made immediately without a warrant. State v. Limb, Utah, 581 P.2d 142 (1978); State v. Shields, 28 Utah 2d 405, 503 P.2d 848 (1972).

In the present case, the officers knew that the evidence was the fruit of crime as soon as it was identified by the owner, and from that point they were justified in seizing it to assure that it would be preserved.

The seizure of evidence was also justified under the automobile exception to the warrant requirement. The automobile exception was first recognized by the United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925), where the Court stated:

[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a store, dwelling house, or other structure in respect of which a proper official warrant may readily be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

. . . The measure of legality of such a seizure is, therefore, that the seizing officer have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein . . .

267 U.S. 132, 153-156. At the point in time at which the seizure of the evidence was made in this case, the seizing officer knew that the evidence was stolen.

Appellant's reliance on Coolidge v. New Hampshire, 403 U.S. 443 (1971) is inappropriate here because on the facts there the searching officers had no reason to believe the car might contain contraband or evidence of crime when the search and seizure occurred, whereas in this case the evidence had been positively identified as fruits of crime and the seizure was thus justified either as incident to the lawful arrest or within the automobile exception to the warrant requirement. Therefore, the denial of the motion to suppress was proper.

POINT III

THE TRIAL COURT CORRECTLY REFUSED TO GRANT APPELLANT'S MOTION TO DISMISS FOR FAILURE TO ESTABLISH VALUE.

A. APPELLANT'S RIGHT TO CONFRONTATION
WAS NOT VIOLATED BY FAILURE TO
PRODUCE THE STOLEN TOOLS AT TRIAL.

Respondent does not contest appellant's basic premise that the primary purpose of the Sixth Amendment right to confrontation is to allow the appellant the opportunity to confront and cross-examine the witnesses against him. State v. Manion, Utah, 57 P. 542 (1889).

In the present case this right was not abridged. The appellant was allowed to, and did in fact, confront the state's witness who testified as to value (T. 104-114). The appellant claims that without the actual presence of the tools

he was unable to effectively test the credibility of the owner's estimate of value. This contention is not supported by application of the Sixth Amendment right to confrontation.

The Sixth Amendment right carries with it the right to have evidence presented only where that evidence is essential to prove an element of the crime, as in State v. Havas, Nevada, 601 P.2d 1197 (1979). Where the destruction of the tools would not have precluded the state from presenting a prima facie case, the analysis of the Havas case does not apply.

The failure to produce the evidence in this case was not prejudicial. The appellant produced his own expert witness, who testified as to the value of some of the items (T. 216). The trial court was, therefore, correct in determining that there was sufficient evidence upon which the jury could weigh the credibility of the owner's testimony as contrasted to that of the appellant's expert witness (T. 157).

The appellant also concedes (Appellant's brief at 17) that the failure to produce the evidence does not fall within the line of cases where the prosecution has deliberately failed to produce material evidence (e.g. State v. Stewart, Utah, 544 P.2d 477 (1975)). In this case there was no violation of any right essential to a fair trial. Furthermore, the appellant could easily have remedied any

perceived inadequacy by issuing his own subpoena duces tecum (T. 154) to the owner of the stolen property, Robby Ashby.

The failure to produce the tools may have been less than expedient, but their absence did not prejudice the appellant nor deny him his right to confront the witness against him (Robby Ashby). Therefore, the trial court was correct in denying appellant's motion to dismiss.

B. THE STATE PROVED BEYOND A REASONABLE
DOUBT THAT THE VALUE OF PROPERTY
TAKEN BY APPELLANT EXCEEDED \$1,000.

This Court has consistently held that the test to determine the value of property stolen is the market value and that the acceptance of the values testified to is a question of fact which should be left to the jury. State v. Logan, Utah, 563 P.2d 811 (1977). In State v. Harris, Utah, 519 P.2d 247 (1974), this Court found that:

Value is something at which the jury may take a look. The owner of an article is competent to testify as to its value, and such testimony is admissible, but neither inviolate nor impervious to disbelief.

519 P.2d at 248.

In the present case the trial court correctly denied appellant's motion to dismiss, rejecting his contention that the evidence was insufficient as a matter of law to

sustain the motion. The court determined that the owner of the stolen property may testify as to its value (Harris, supra) and that the jury was free to accept or reject his testimony (T. 89-120).

In order to find for the appellant on this point, this Court would have to determine that all of the testimony as to value on the tools was improper. Since an owner may testify as to value, this contention is without merit. Furthermore, the testimony of appellant's expert witness (T. 193-220) substantiated to a degree the testimony of the state's witness. However, the expert's testimony was not as complete as the owner's in that he did not testify as to the value of all items which were stolen (T. 216). The value of tools estimated by the owner at \$1,300 (T. 94-100) was a question of fact which was properly left to the jury.

From the decision of conviction of second-degree theft, it is apparent that the jury chose to believe the testimony of the owner that the value of the stolen property exceeded \$1,000.

In State v. Whittenbeck, supra, this Court sustained the conviction where the jury had relied on the testimony of the owner of the laundromat which had been robbed to determine that the value was in excess of \$250.00. Similarly, the jury's reliance on the owner's testimony of value should be upheld in this case.

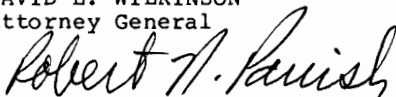
CONCLUSION

For the reasons stated above, it is apparent that the conviction of the appellant for second-degree theft was proper and that appellant's Fourth and Sixth Amendment rights were not violated. The conviction and sentence should therefore be affirmed.

DATED this 29th day of December, 1981.

Respectfully submitted,

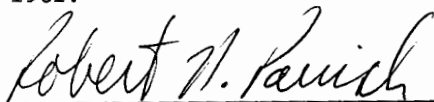
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Peter Stirba, Attorney for Appellant, MCKAY, BURTON, THURMAN & CONDIE, 500 Kennecott Building, Salt Lake City, Utah, 84133, this 29th day of December, 1981.



APPENDIX A

18 THE COURT: In this case based on the testimony
19 and the reasonable inferences from it, it involves many
20 facets of the law. I don't know whether I'll cover them all
21 or not. But in the first place you have a subjective test
22 as to probable cause for both arrest and seizure, search and
23 seizure. In this case the hour is of some import. Here you
24 have a parking area in a store complex with no thoroughfare
25 there through.

240

1 So, you have the hour. I think the testimony
2 was that the stores during the weekdays closed at 6:00
3 o'clock, and service stations and other things in that area,
4 or whatever it was, closed at 10:00. So, it is a private
5 parking area. And any one of the public is an invitee for
6 the purposes of going there to the stores and the businesses
7 there in that area. That's one factor.

8 Another factor is that the stores did not have
9 any security at that time, and due to the number of break-ins
10 two days before a request had gone out for additional obser-
11 vations of the area by the police department, and that was
12 reiterated on each shift. You have that factor. There's no
13 evidence of any other vehicles in that area either on the
14 roadway or in the parking area or in the store area.

15 You've got a police car that's clearly
16 marked coming down the street, and a car abruptly turning in.
17 So, at that point you've got police officer that knows of
18 lots of break-ins in that area at the time you've got an
19 abrupt turning. You've got the public have no right in that
20 area as per se at that time. So, it's reasonable for a
21 police officer to determine why a vehicle would be in that
22 area at that particular time.

23 You've got him after he sees the vehicle go
24 in, back up so he can observe. He sees it turn there
25 between the buildings, backs up so he can see whether it

1 exits. Gives sufficient time for it to come through. It
2 doesn't come through. So, there is an assumption there that
3 the vehicle is still there. So, he goes in to make inquiry.
4 The car is there with the hood up. And to make inquiry as
5 to why they were there.

6 According to one police officer I think this
7 defendant did not have any identification as such. The
8 other party did have that. They were taken to respective
9 vehicles for further inquiry. To separate them. Then after
10 that because of the discrepancies in the explanations the
11 other person was--the other defendant was confronted. And
12 an arrest still wasn't made at that time.

13 But when this defendant testifies he was
14 immediately placed under arrest for receiving or being in
15 possession of stolen property, it is not a logical inference.
16 I can't believe him. Because they did go down and observe
17 the vehicle that was described by the other defendant, which
18 indicated a break-in. The owner of that property was taken
19 back to the scene, and the property, the stolen property,
20 the alleged stolen property in the back was in clear view.
21 Even at the time that the officers first went up there it
22 was in clear view. But it wasn't until they were informed
23 by the owner that that was stolen property that an arrest was
24 made.

25 So, the Court would find probable cause both

1 in--they did not make arrest. They further investigated,
2 which would be logical under the circumstances. And then
3 after it was determined that the property had been stolen,
4 and identified as stolen property, without any search. It
5 was in plain view. It was at that time that they made the
6 arrest. And it would be at that time that the defendants
7 are not entitled to the possession of that property.

8 So, at that point the Court would find that it
9 was a valid arrest, that there was reasonable and probable
10 cause to further investigate the case, to make a determina-
11 tion as to the suspicious circumstances that the defendant
12 was found in, and that upon verification the arrests were
13 validly made. And at that time there would be a probable
14 cause for search and seizure.

15 Now, most of the cases on automobile--it's
16 true that based on probable cause and absent exigent circum-
17 stances that a search warrant should be obtained beforehand.
18 But, you see, most of those cases, if you follow them
19 through, you see, the property, which is subject matter of
20 the crime, is discovered by reason of the search. And a
21 great number of cases justify search without warrant on the
22 basis that products can be easily removed from a vehicle,
23 disposed of, or moved to another locale. But most of those
24 cases, that is where you make the search and then discover
25 the fruits of the crime.

1 In this case the fruits of the crime are
2 apparent from the first observation. But at that time they
3 were not aware that they were fruits of a crime.

4 So, it's not something that they discover
5 incident to the arrest or incident to the seizure. So, in
6 this case it is preliminary investigation determination that
7 the crime had actually been committed, the fruits of the
8 crime in clear view had never been seized prior to the
9 arrest. And after the arrest there was nothing gained,
10 no knowledge, anything else gained by incident of the seizure
11 of the goods.

12 So, the only question is here that remains,
13 as I view it, is after they take possession of the vehicle,
14 and take it to the police station, and remove--at the time
15 they got to the police station remove the fruits of the
16 crime from the car itself. And I'm willing to go with the
17 United States Supreme Court on that.

18 The facts are not too important, but in Frank
19 Chambers vs. James F. Maroney, 26 Law Edition 2d 419, and
20 27 Law Edition 2d 94, if I remember right, that was a--
21 there's only one point in this that's of material import to
22 this case. It involves three points that went up to the
23 United States Supreme Court on certiorari, and the majority
24 opinion, which was Justice White, was supported by seven
25 members of the court. The pertinent point here is the search

1 of the car did not violate the petitioner's Constitutional
2 rights. They had probable cause for stopping and then
3 search. And they addressed themselves specifically to when
4 the car was seized and the contents thereof. However, it
5 was taken to the police station before the fruits of the
6 crime were removed from the car. That's the pertinent point
7 in this case that the Court relies on. And in that they
8 held it's not unreasonable for police officers to take an
9 automobile to a police station before making a warrantless
10 search of the automobile. But this isn't a search. That's
11 another distinguishing factor in this. It is not a search
12 in that sense. As I've indicated before. It's a seizure.
13 And it's a seizure of contraband goods. Your motion to
14 suppress is denied.

15 Here's your cases back, both of you. The
16 distinguishing part, I believe it's our California case.
17 Where's that? Yeah. This is your case here. The distin-
18 guishing parts, your fact situation are not the same in your
19 California case. You see, it wasn't a question of your
20 first observation of criminal behavior. I would agree with
21 you if the Court found that the arrest was made on that
22 basis. I would certainly agree with you. Under your
23 California case. But in this case certainly inquiry as to
24 why they were in that area would be appropriate, which was
25 not the case in your California case. He was found asleep

in the parking area. An arrest was made and they searched the car and got electronic equipment from the car.

In this case certainly inquiry was a necessity in order to determine why they would be in that area. And based on that inquiry they further made inquiry as to the crime itself. Nothing was discovered by reason of that search.

But the fact situation this Court feels is different than the one in your California case. We'll start trial at 2:00 o'clock.

(Thereupon, Court was held in recess at 12:45 p.m. and reconvened at 2:00 o'clock p.m. in the afternoon of the same day.)

THE COURT: Is there still one juror who's not here? Who is it?

THE CLERK: Douros.

THE COURT: Pull his card, then. I'll want to speak to him as to why he isn't here.

Ordinarily we start a jury trial at 10:00 o'clock and go until 12:00, and then recess until 2:00 and go until 5:00. You were called for 11:00 o'clock this morning because of some matters of law that had to be taken up prior to the start of this trial. And it took a little bit longer than we anticipated. But we had you stay around because, hopefully, we could have selected the jury, and