

1981

State of Utah v. Joseph Shelton Wilson : Brief of Appellant

Utah Supreme Court

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Case No. 17664

Honorable Allen B. Sorensen

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
vs.	:	
	:	Case No. 17664
JOSEPH SHELTON WILSON,	:	
	:	
Defendant and	:	
Appellant.	:	

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

In this case Defendant has been charged with theft by receiving in violation of §§ 76-6-408 and 76-6-412, Utah Criminal Code (as amended), in that he received, retained, or disposed of the property of another, knowing that it had been stolen, or believing that it probably had been stolen, for the purpose to deprive the owner thereof, and that said property was a firearm.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury. Defendant was found guilty of theft by receiving and appeals from that judgment.

RELIEF SOUGHT ON APPEAL

On or about June 6, 1980 an undercover Provo City police

officer driving a van, picked up the Defendant and his brother, who were hitchhiking. They drove around parts of Orem and Provo that day, during which time the undercover police officer mentioned that he was interested in purchasing some firearms. The Defendant said that he could get the officer as many firearms as he wanted for a flat rate of \$50. The officer gave the Defendant his phone number and told him to call, and on the ^{6 day to the} 10th day of June the undercover officer's partner received a phone call. Following the call, the undercover officer went and picked up the Defendant at his Orem residence, and they drove to the Pleasant Grove area. They parked behind some storage sheds, and Defendant left the van and was gone for about 15 minutes, returning with a .22 caliber firearm. The undercover police officer agreed to purchase the gun for \$40 and asked the Defendant whether or not the gun was stolen, to which the Defendant replied that it was. The gun was later identified as belonging to Dean Powell of Orem, who had reported the gun missing sometime in May of 1980. The Defendant was charged in the information with receiving stolen property on June 18, 1980. However, all of the evidence at trial suggested that the events occurred on June 10. The jury found the Defendant guilty of receiving stolen property pursuant to §§ 76-6-401 and 76-6-412, U.C.A. (1953) as amended.

ARGUMENT

POINT I

THE STATE FAILED TO PROVE THE OFFENSE IT CHARGED DEFENDANT WITH HAVING COMMITTED; THE INFORMATION ALLEGES THEFT BY RECEIVING ON OR ABOUT JUNE 18, 1980, BUT ALL OF THE EVIDENCE AT TRIAL TENDED TO SHOW THAT THE CRIME WAS ALLEGEDLY COMMITTED ON JUNE 10, 1980.

The information filed on August 7, 1980 charged the Defendant with theft by receiving on or about June 18, 1980. At the beginning of the trial, held on October 15, 1980, the County Attorney requested that the Court allow an amendment to the information which would change the date from the 18th of June to the 10th of June, due to a supposed typographical error. The Court allowed this amendment over the objections of Defense counsel who stated that he was not prepared to proceed to trial because of this change. The Defense had prepared testimony and alibi evidence regarding his whereabouts on June 18. The Court erred in allowing this amendment to the information and by allowing the matter to proceed immediately to trial, in that Defendant was not allowed to testify as he was prepared to do, nor was the Defense given adequate opportunity to respond to the new date.

The State charged the Defendant with having committed

the offense in question on or about June 18. The evidence produced by the State at trial showed, however, that the Defendant had committed the alleged offense on June 10, 1980. During the course of the trial, Defense counsel argued that the State's evidence was insufficient because of the difference between the date charged in the information and the date the Prosecution tried to establish at trial. The State relied on the words "on or about" to remedy this problem. However, this does not remedy the problem, as illustrated by State v Armstead, 283 S.W.2d 577 (Missouri 1955). In Armstead the Prosecution charged the Defendant with receiving money from earnings of women engaged in prostitution (on or about) December 23. The evidence produced on cross-examination of the complaining witness raised the issue of whether the offense was committed on December 30. The Court said:

We cannot believe that jurors of average intelligence would understand the phrase (on or about the 23rd day of December) as inclusive of a week's variance in time...We have said in Crawford v Arends, 351 Missouri 1100, 176 S.W. 2d No. 1, that the words 'on or about' do not put the time at large, but indicate that it is stated with approximate certainty. We further said the phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means 'approximately', 'about', 'without substantial variance from', and 'near'. Id, at 582.

It is clear from the above quote that it is not necessary in the information that the date be specifically stated.

However, it is necessary that the date closely approximate the actual date the offense occurred. See State in the interest of R.G.B., 597 P.2d 1333, 1335 (Utah 1979). In defining the variance from the actual date of offense, Utah courts have been quite consistent in stating that which is acceptable. In State in the interest of R.G.B., the Court held that a variance of one day was acceptable. In State v Middelstadt, 579 P.2d 908 (Utah 1978), this Court found that a variance of two to three days was sufficiently close to the date alleged in the Complaint. Further, in State v Wadman, 580 P.2d 235 (Utah 1978), a variation of approximately three days was found between the date alleged in the Bill of Particulars, and that proved at trial. It is instructive to refer to this Court's statement in Wadman after it said that a variance of three days was close enough:

We do not suggest that a casual or relaxed attitude ought to prevail concerning the State's duty to have its evidence at trial coincide with matters specified in Bills of Particular, but for reasons given ante, we perceive no violation of that duty in this case. Id, at 237.

Of further interest, is the case of State v Neely, 49 P.2d 433, 26 Utah 2d 334 (1971) in which the trial court allowed an amendment of the date of the offense from the 13th to the 9th day of the month. In this case, the Defendant was also accused of receiving stolen property. On appeal, this

Court upheld the lower court's decision. However, it is important to note that this amendment apparently caused no hardship to Defendant's defense and was only four days in duration.

It would appear from the cases cited above that the most recent Utah cases have not allowed for a variance of more than two to four days. In the case at bar we have a variance of eight days, an excessive difference, and a situation where manifest injustice has occurred. We have a situation where an undercover police officer was involved, making it possible for the Prosecution to set an exact date and time, which would give the Defense sufficient notice to adequately prepare. For this Court to allow a variance of eight days is to create a situation where the Defendant is unable to properly defend himself. It is obvious to any trial attorney, that during the short time between the amendment of information and the time the trial began, the Defendant and his attorney would not be able to discuss this change, would not be able to recreate the events of the new date charged and would not be able to obtain witnesses to verify what actually occurred on that date. Thus, since the Defendant was not able to present the testimony which he had prepared for the date charged, he was found guilty and had no opportunity to adequately defend himself. Thus, the State has failed to

prove the offense it charged, and the Defendant should at least be granted a new trial.

POINT II

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO PROVE EACH AND EVERY ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT, AND THEREFORE WAS INSUFFICIENT TO JUSTIFY THE SUBMISSION TO THE JURY OF THE ISSUE OF WHETHER OR NOT THE DEFENDANT WAS GUILTY OF RECEIVING STOLEN PROPERTY.

The Utah Code provides in § 76-1-501, that:

(1) The Defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the Defendant shall be acquitted.

(2) As used in this part the words 'element of the offense' means: (a) the conduct, attendant circumstances, or results of conduct proscribed, prohibited or forbidden in the definition of the offense; (b) the culpable mental state required.

Mr. Schumacher in his Memorandum of Points and Authorities in support of his motion in arrest of judgment, stated:

The State further failed to prove the offense in light of the Court's instruction #5, the elements instruction, which required the jury, before it could convict the Defendant, to find beyond a reasonable doubt that the Defendant had received a firearm, knowing or believing that it was stolen. The evidence produced by the State showed the only receiving of the firearm was that of Officer Price purchasing it from the Defendant on June 10. Officer Price testified the Defendant stated the gun was stolen, but Officer Price also testified that Mr. Wilson made no statement as to how the gun had come into his possession. There was evidence the Defendant had stayed in the Powell home on at least one

previous occasion, and there was evidence the Defendant's brother lived with the Powell family, but it is an impermissible and unsupportable conclusion that Mr. Wilson ever received the firearm on or about June 18. The jury is left to conjecture alone as to whether Mr. Wilson stole the gun himself and hid it for disposal for a later date, whether he received it from his brother or a third party who had originally stolen it and held it for delivery for Mr. Wilson. Although the law allows reasonable inferences to be drawn from circumstantial evidence, there is no such evidence from which these inferences could be drawn. (R.43).

Section 77-35-30, U.C.A. also provides that:

(a) Any error, defect, irregularity, or variance which does not affect the substantial rights of a party shall be disregarded.

In the case at bar we have an error which substantially led to the conviction of the Defendant, and cannot be disregarded.

The elements of the crime of receiving as defined in Utah Code Annotated 76-6-408 are as follows:

(1) A person commits theft if he receives, retains or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.

The Prosecution failed to show beyond a reasonable doubt the Defendant's guilt of the above statute for two additional reasons. First, the Prosecution failed to prove the Defendant guilty of receiving. In instruction #6 given to the jury,

theft was defined in terms of "receives, retains, or disposes". The Prosecution produced direct evidence that the Defendant had disposed of the property of another but did not show that the Defendant had been guilty of receiving. During the course of the trial the State produced only circumstantial evidence as to the Defendant's possession of the firearm prior to giving it to Officer Price. No evidence was produced as to how the Defendant came into possession of the firearm. This proof is not proof beyond a reasonable doubt, when the offense is defined in terms of "receiving only", the conclusion that he is guilty is inconsistent with the evidence produced. Secondly, the Prosecution failed to prove that the firearm belonged to Dean Powell. During the course of the trial, Mr. Powell testified that the firearm admitted in evidence was his. Yet, on cross-examination he admitted that there were no identifying marks, initials, scratches, or serial number that he could point to which would tell him whether or not the gun was actually his. The jury therefore was unable to find beyond a reasonable doubt that the gun was Mr. Powell's firearm. Because the inferences drawn in order to find Mr. Wilson guilty were based only on circumstantial evidence, the State did not prove beyond a reasonable doubt all of the elements of the crime of receiving.

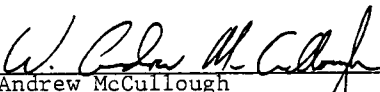
The State also failed to make a connection between the fact that Mr. Powell had a gun which was stolen and that Mr. Wilson had a gun which he said was stolen and sold it to the undercover police officer. The Prosecution attempted to prove this link by circumstantial evidence that the pistol had come from an area in Pleasant Grove, that Mr. Wilson's brother had lived with the Powell family, and that the Defendant and Officer Price had driven past the Powell home a week before the alleged sale. This circumstantial evidence is legally insufficient in light of the fact that Mr. Powell was unable to identify the gun as his, and therefore the jury could not have found beyond a reasonable doubt that the Defendant had received Mr. Powell's firearm. The Court thus erred in not granting Defendant's motion in arrest of judgment pursuant to its authority under § 77-35-23 of Utah Code Annotated (1953 as amended) to do so.

CONCLUSION

The Defendant in this case was charged in the information with the crime of receiving pursuant to Utah Code Annotated 76-6-401, on or about June 18, 1980. During trial all of the evidence presented pertained to events which allegedly occurred on June 10, 1980. This resulted in a discrepancy of eight days between the time charged and that proved at trial. This discrepancy is improper in light of

recent Utah case law, and further was done in a manner which gave Defendant an inadequate opportunity to prepare for his defense. Further, the Prosecution failed to show a connection between the Defendant and the item stolen. Thus, the Prosecution failed to prove all of the elements of the offense charged, and for this reason the conviction of the Defendant under the above-named statute should be dismissed and the Defendant discharged.

Respectfully submitted this 3rd day of September, 1981.


W. Andrew McCullough
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Appellant, postage prepaid, to David L. Wilkinson, Attorney General, Attorney for Plaintiff-Respondent, 236 State Capitol, Salt Lake City, Utah 84114, this 7 day of September, 1981.

