

1981

State of Utah v. Joseph Shelton Wilson : 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. 17664
JOSEPH SHELTON WILSON, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a Judgment of Conviction
Fourth Judicial District Court in and for Utah County
Honorable Allen B. Sorensen, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
plaintiff-Respondent,	:	
-v-	:	Case No. 17664
JOSEPH SHELTON WILSON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a Judgment of Conviction Entered in the
Fourth Judicial District Court in and for Utah County, the
Honorable Allen B. Sorensen, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of theft by receiving, a second degree felony in violation of Utah Code Ann., §§ 76-6-408 and 76-6-412 (1953), as amended, in that he did sell a 22-caliber pistol knowing that it was stolen.

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted before a jury on October 12, 1980 in the Fourth Judicial District Court, the Honorable Allen B. Sorensen, presiding. On March 6, 1981 appellant was placed on a three-year probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment and sentence of the trial court.

STATEMENT OF THE FACTS

On June 5, 1981 Officer Ronald Price, an undercover officer for the Provo City Police Department, picked up appellant and his brother, who were hitchhiking (T. 18-22). During a conversation that ensued, Officer Price mentioned he was interested in buying a gun (T. 22). Appellant told Officer Price that he could get any gun the officer wanted for \$50.00 (T. 22). When appellant and Officer Price separated they agreed to meet the next day to acquire a gun.

The following day, after he was picked up, appellant directed Officer Price to the home of Dean Powell in Pleasant Grove, indicating they would obtain the gun there (T. 24, 25). However, when they arrived at the Powell residence there was someone in the house so appellant directed Officer Price to drive past. Approximately two hours later they returned, but the house was still occupied. Appellant told Officer Price they would have to obtain the gun at a later date (T. 25).

On June 10, 1980, after receiving a phone call from appellant, Officer Price picked up appellant and again drove

to Pleasant Grove (T. 26, 27). Officer Price let appellant off in a vacant field where he went behind some storage sheds and returned fifteen minutes later with a .22-caliber gun, a holster, and an additional cylinder (T. 27-29).

Officer Price inspected the gun and negotiated a price of \$40.00 for its purchase (T. 28). During the sale, Officer Price asked appellant if the gun was "hot." Appellant replied that it had been stolen.

At trial Mr. Powell testified that in March of 1980 appellant's brother had been placed by the state in the Powell home (T. 11). Three or four times during the spring of 1980 appellant also stayed in the Powell home (T. 11). In May of 1980 Mr. Powell discovered his .22-caliber pistol, a holster, and an extra cylinder were missing (T. 13). He reported the missing gun and the serial number to the police (T. 14, 17).

At trial Mr. Powell identified the gun, holster, and cylinder sold by appellant to Officer Price as the items taken from his house (T. 12). Mr. Powell testified that he never authorized appellant to take the gun or sell it (T. 13).

In the information charging appellant with theft by receiving, it states that appellant committed the crime on or about June 18, 1981 (R. 2). Prior to the commencement of the trial, the prosecutor made a motion to amend the information to say June 10, 1980, stating that a typographical error had

been made (T. 5, 6). Appellant indicated he would not be prepared to go to trial if the information were amended even though no notice of an alibi defense had been given the prosecutor (T. 6). Appellant's counsel stated the appellant would testify concerning an alibi (T. 7). The court denied the motion to amend (T. 7) concluding that the terms "on or about June 18, 1980" were sufficient to charge a crime committed on June 10, 1980. The court then instructed the jury on the meaning of "on or about" (R. 27).

ARGUMENT

POINT I

THE INFORMATION SUFFICIENTLY APPRISED APPELLANT OF THE CHARGES AGAINST HIM INCLUDING THE ALLEGED DATE OF THE CRIME; AND APPELLANT WAS NOT PREJUDICED BY THE FACT THAT THE EVIDENCE ESTABLISHED THE CRIME OCCURRED ON JUNE 10, 1980 INSTEAD OF JUNE 18, 1980.

The information charging appellant alleges that he committed the crime of theft by receiving on or about June 18, 1980 (R. 2). At the commencement of appellant's trial, immediately after the case was called, the prosecutor made a motion to amend the information to read June 10, 1980, explaining that the other date was a typographical error (T. 5). The motion to amend was denied by the court (T. 7), and the jury was instructed that where the information alleges the

crime was committed "on or about" a certain date, it is sufficient if the proof shows the crime was committed on or about that date (R. 27).

The state is not required to prove a crime occurred on a precise date alleged in an information. State v. Bayes, 47 Utah 474, 155 P. 335 (1916). Proof that the crime was committed, at any time before the information was filed, and before the statute of limitations has barred the prosecution, is sufficient. State v. Woolsey, 19 Utah 486, 57 P. 426 (1899). Utah Code Ann., § 77-35-4(b) (1953), as amended, provides:

Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense.

As a general rule, then, the state is not required to even allege the time of the commission of the offense in the information. However, if it does, the state is not required to prove the precise date alleged in the information.

There are exceptions to this rule. If the defendant is prejudiced because of the variance in the dates, a conviction may not follow even though there is sufficient proof of the commission of the offense. State v. Sisson, 217 Kan. 475, 536 P.2d 1369 (1975).

This comports with Utah Code Ann., § 77-35-4(d) (1953), as amended, which permits the information to be amended at any time prior to the verdict as long as the substantial rights of the defendant are not prejudiced. Prejudice is normally considered to be present if there is danger the accused will be prosecuted a second time for the same offense, or that he is so surprised by the proof that he is unable to prepare his defense adequately. United States v. Francisco, 575 F.2d 815 (10th Cir. 1978). Appellant is not subject to double jeopardy; therefore the issue is whether appellant was prejudiced in preparing his defense by the variance in the date alleged in the information and the date established at trial.

In the instant case appellant was not surprised by the evidence, which showed the crime occurred on a date other than that specified in the information. At the conclusion of the state's case, counsel for the appellant made a motion to dismiss on the grounds that the state had failed to establish Officer Price had purchased the gun on the precise date of June 18, 1980, as alleged in the information (T. 37). Appellant's counsel had apparently researched certain caselaw to support his motion on this particular issue (T. 38, 39) prior to trial, no doubt because he was aware that the state's evidence, with reference to the date the crime was committed, would likely vary from the allegations found in the

information. Therefore, appellant was not surprised by the variance in the proof and the information.

Appellant should have become aware of any inconsistencies in the dates at his preliminary hearing or through police reports and other evidence which were accessible to him. At the preliminary hearing, Officer Price testified concerning the sale of the gun in Pleasant Grove (T. 35). Since the variance in the dates was a result of a typographical error and not of any confusion by Officer Price, it is reasonable to assume that Office Price testified at the preliminary hearing that the crime occurred on June 10, 1980 as he did at trial.

The state's evidence at trial established every element of the offense of receiving stolen property (See Point II). Appellant has not refuted this evidence; he merely argues that the state failed to show the crime occurred on June 18, 1980. Therefore, appellant does not claim, nor did he provide evidence at trial to show, that the crime did not occur; only that it did not occur on the date alleged in the information. Respondent submits that the inconsistencies between the two dates are not prejudicial where the state established that the crime did, in fact, occur.

In the case of State v. Wadman, Utah, 580 P.2d 235 (1978) cited by appellant, this Court noted that the

prosecution should be careful to assure that the evidence presented at trial coincides with information furnished for a bill of particulars. When a bill of particulars is sought by the defense, the state has a greater obligation to assure consistency between the proof and the information. This Court stated in State v. Cox, 106 Utah 253, 147 P.2d 858 (1944) that:

. . . the allegation of time is immaterial, that regardless of the time alleged, except where made certain by a bill of particulars, the state may prove the offense at any time within the statutory period of limitations.

Utah Code Ann., § 77-35-4(b)(e) (1953), as amended, provides that the defendant may file a written bill of particulars to obtain information concerning the details of a crime such as time, place, means, intent, value, and ownership. In the instant case, the information alleged the approximate date of the crime as "on or about" June 18, 1980. Appellant never filed a bill of particulars requesting the state to specify the exact date the crime was committed. Respondent maintains that since appellant failed to take advantage of remedies available to him to obtain such information, the state was not required to prove the precise date alleged in the information, and any error resulting from the variance in the dates was non-prejudicial.

As previously stated, the state need not prove the precise date alleged in the information. However, when time is an essential element of the offense, a variance between the information and proof cannot be disregarded. Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970). In the case of United States v. Davis, 436 F.2d 679 (10th Cir. 1971) the court stated "the time or date an offense is committed is not an essential element of an offense unless the statute makes it so." In the instant case appellant was prosecuted under Utah Code Ann., § 76-6-408, which provides:

A person commits theft if he receives, retains, or disposes of the property of another knowing 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.

Clearly, time is not an element of the crime of receiving stolen property. Since time was not an essential element of this offense, the state was not required to prove the precise date alleged in the information.

This Court has also held that the time of the offense may be material where an alibi defense is advanced. State v. Cooper, 114 Utah 531, 201 P.2d 764 (1949). In the instant case, appellant alleges he had prepared an alibi

defense concerning his whereabouts on June 18, 1980. However, appellant did not file a notice of an alibi defense with the prosecuting attorney, as is required by Utah Code Ann., § 77-14-2 (1953), as amended, nor did appellant testify concerning an alibi defense. Since appellant did not raise an alibi defense, the time of the commission of the offense was not made material.

Appellant argues in his brief that a variance of eight days is a manifest injustice. Respondent maintains that since appellant was not prejudiced, the variance in the dates was immaterial. In United States v. Davis, supra, the indictment erroneously cited June 2, 1969 instead of December 2, 1969 because of a typographical error. A motion to amend the error was made prior to trial but was denied. The jury was instructed that the date a forged check was caused to be placed in interstate commerce was not an essential element of that offense, and that it was sufficient if the evidence showed the transaction had occurred prior to the indictment and within the applicable statute of limitations. In Davis the court did not find a variance of six months prejudicial and the conviction was affirmed.

POINT II

THE EVIDENCE, THAT APPELLANT SOLD A
STOLEN GUN TO OFFICER RON PRICE, WAS
SUFFICIENT TO ESTABLISH APPELLANT HAD
RECEIVED STOLEN PROPERTY.

Appellant argues that the evidence produced at trial was insufficient to establish he had received stolen property. Utah Code Ann., § 76-6-408 (1953), as amended, provides in pertinent part:

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 elements of receiving stolen property as set forth in Section 76-6-408 are as follows: property belonging to another has been stolen; the defendant received, retained, or disposed of the stolen property; at the time of receiving, retaining, or disposing of the property the defendant knew or believed the property was stolen; and the defendant acted purposely to deprive the owner of the possession of the property. State v. Murphy, Utah, 617 P.2d 399 (1980).

Respondent submits that the evidence in the instant case was sufficient to establish each of these elements beyond a reasonable doubt.

In State v. Gorlick, Utah, 605 P.2d 761 (1979), this Court reiterated the standards of appellate review used in determining whether the evidence is sufficient to sustain a conviction:

The evidence is to be viewed in the light most favorable to the jury's verdict, State v. Jones, Utah, 554 P.2d 1321 (1976). The standard for determining whether there is insufficient evidence is that the evidence must "be so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime." State v. Romero, Utah, 554 P.2d 216, 219 (1976), and cases cited therein. A jury verdict will be upheld unless the evidence compels the conclusion as a matter of law that fair-minded persons must have entertained reasonable doubt as to defendant's guilt, State v. Mills, Utah, 530 P.2d 1272 (1975). The function of this Court "is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendant's testimony," State v. Romero, supra, at 218.

Id. at 762. An evaluation of the evidence in light of these standards establishes that the evidence was sufficient to find appellant guilty of theft by receiving.

The first element is that property of another was stolen. In March of 1980 appellant's brother was placed by the state in the home of Dean Powell (T. 11). Mr. Powell owned a .22-caliber single-shot pistol, with a holster and

magnum cylinder. In May of 1980 Mr. Powell discovered his gun was missing and he reported the stolen gun and its serial number to the police (T. 14, 17). On June 5, 1980 appellant offered to sell Officer Price any handgun for \$50.00. Pursuant to his offer, appellant met with Officer Price on June 6, 1980 and drove to Dean Powell's home in Pleasant Grove to obtain a gun for Officer Price (T. 25). However, when they arrived at Dean Powell's home someone was there. They returned two hours later to find the house still occupied so they agreed to obtain the gun at a later date (T. 25).

On June 10, 1980 Officer Price and appellant again returned to Pleasant Grove. Once in Pleasant Grove, appellant left Officer Price's van to retrieve the gun (T. 27). Appellant returned fifteen minutes later with a .22-caliber firearm, a holster, and a cylinder (T. 29). When asked whether the gun was "hot," appellant reported it was stolen (T. 29).

At trial Mr. Powell identified the gun sold by appellant to Officer Price as his (T. 12). He testified that he never gave appellant authority to take the gun (T. 13). Since the gun which appellant sold belonged to Mr. Powell and was taken without his authority, the evidence establishes that the gun had been stolen.

Appellant argues that the evidence was insufficient to establish that the gun sold to Officer Price was the same gun which belonged to Dean Powell. At trial Mr. Powell identified the gun as his (T. 12). Pressed on this identification, Mr. Powell responded he could tell by the weight of the gun and how it handled (T. 16). Mr. Powell's identification of the gun, coupled with the circumstantial evidence that appellant had been in Mr. Powell's home, that Mr. Powell's gun also had a spare cylinder and holster, and that appellant had gone to Mr. Powell's home to acquire a gun to sell to Officer Price is sufficient credible evidence upon which the jury could conclude the gun belonged to Mr. Powell and had been stolen from him.

The second element of the crime of receiving stolen property requires that the defendant receive, retain, or dispose of the stolen property. The statute lists receiving, retaining, and disposing as disjunctives. To sustain appellant's conviction, the evidence need only establish that appellant took one of these three actions with reference to the stolen property.

In the instant case appellant sold the stolen gun to Officer Price (T. 27-29). Since selling the gun is disposing of it, the evidence establishes this element of the crime has been met.

The third element of the crime is that the defendant know or believe the property is stolen when he disposes of it. Here appellant told Officer Price the gun was stolen when he sold it to him (T. 29). In addition, the jury could infer from the facts previously stated concerning how the gun was obtained that appellant knew the gun was stolen. Therefore, the evidence establishes appellant knew the gun was stolen.

The final element of the crime is that the defendant acted purposely to deprive the owner of the property. Taking with the purpose to deprive is defined in Utah Code Ann., § 76-6-401 (1953), as amended, which provides:

- (3) Purpose to deprive means to have the conscious object:
 - (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

In this case appellant sold Mr. Powell's gun to Officer Price (T. 27). At the time of the sale appellant did not know Officer Price was a police officer. When a stolen gun is sold to a third party the chances that the original owner will recover the gun are remote. Since appellant sold the gun to a third party, he disposed of the property in such a manner that it was unlikely to be recovered by the original owner.

In summary, the evidence when viewed in the light most favorable to the jury's verdict establishes beyond a reasonable doubt that appellant disposed of stolen property, knowing it to be stolen, with the intent to deprive the owner of possession.

CONCLUSION

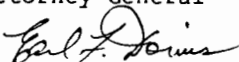
In the instant case the information alleged appellant committed the crime of theft by receiving on or about June 18, 1980. The evidence produced at trial established the crime occurred on June 10, 1980. Appellant could or should have been aware prior to trial of the variance through police reports, at preliminary hearing, or by requesting a bill of particulars. In any event, time was not an essential element of the offense, nor did appellant advance an alibi defense. Therefore, the state was not required to prove the crime occurred on the precise date alleged in the information, and appellant was not prejudiced by its failure to do so.

Finally, the evidence produced at trial was sufficient to establish every element of the offense of receiving stolen property beyond a reasonable doubt.

DATED this 30th 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 W. Andrew McCullough, Attorney for Appellant, 930 South State, Suite 10, Orem, Utah, 84057, this 30th day of December, 1981.