

1956

State of Utah v. Eugene Johnson : Brief of Appellant

Utah Supreme Court

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FILED

JUL 27 1956

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

of the

STATE OF UTAH

UNIVERSITY UTAH

JAN 28 1957

LAW LIBRARY

STATE OF UTAH

vs.

EUGENE JOHNSON

Defendant and Appellant

No. 8548

APPELLANT'S BRIEF

Attorney for Defendant and Appellant

LAVAR E. STARK

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATEMENT OF FACTS

The appellant, Eugene Johnson, together with Charles Brooks was charged with the crime of burglary in the second degree, by the following information:

In the Second Judicial District Court In and For
The County of Weber, State of Utah.

THE STATE OF UTAH

vs.

GENE JOHNSON and
CHARLES BROOKS
Defendants

} Information
No. 5576
Dept. 2

Gene Johnson and Charles Brooks having therefor been duly committed by Charles H. Sneddon a committing magistrate of this county to this court to answer

this charge, is accused by the District Attorney, of this Judicial District, by this information, of the crime of Burglary in the Second Degree committed as follows, to-wit: Gene Johnson and Charles Brooks defendants broke and entered the building occupied by Stanley Robins doing business at Robins' Five and Ten Cent Store, in the night time with intent to commit larceny therein.

In this case pursuant to an order of the trial Judge a Bill of Particulars was filed as follows:

Comes now the State of Utah, and pursuant to the order of the above entitled court furnishes the following bill of Particulars in the above entitled case, to-wit:

Proof to be given by the State in support of the charge of Burglary in the Second Degree filed against the defendants, Gene Johnson and Charles Brooks will show that the defendants, while in Ogden City, Weber County, Utah on or about July 3, 1955, committed Burglary in the Second Degree in the following particulars:

1. That the said defendants did then and there wilfully, unlawfully and feloniously burglarize and forcibly break and enter that certain building occupied by Stanley Robins doing business as Robins' Five and Ten Cent Store, located at 3069 Harrison Boulevard, Ogden, Weber County, Utah, in the night time of said day, to-wit: at approximately 1:22 a.m., through a second story window. That said entry at the aforementioned time and place was made with intention of committing larceny therein:

The defendants were tried jointly before the Honorable Charles G. Cowley, Judge, with a jury on September 23 and 24, 1955, resulting in a verdict of guilty as to each defendant. (Tr. 116.)

At about 1 o'clock on the morning of July 3, 1955, Lew S. Birch and Donald Muller, Ogden City Police officers were on duty in a parked police car in the vicinity of Harrison Blvd., and 30th Streets in Ogden City, Utah (Tr. 6).

The defendant Johnson was seen in the vicinity of Robins Store and was immediately arrested for burglary in the second degree (Tr. 27), handcuffed and placed in the police car.

The officers then saw the defendant Charles Brooks inside Robins' Store. A call was placed for more officers. When they arrived it was discovered Johnson "had got out of the back of the car," (Tr. 11 and 12) and was found in the area laying face down (Tr. 53) His head was cut. He was drunk. (Tr. 29).

The front door of the store was locked, and the owner's son, Glen Robins, had to be called to admit the police through this door. Brooks had obtained entrance into the store through a rear window.

Johnson and Brooks were taken to the police station and interrogated. No confession was obtained.

At the close of the State's case, defendants made a motion to dismiss the information as to each of them. The motion was summarily denied. (Tr. 86).

Both defendants testified as to being together on the day before the alleged offense and denied that Johnson was in any way implicated in the offense.

STATEMENT OF POINTS

The defendant relies on reversal of the judgment against him upon the ground that there was error in the trial court's order denying the motion to dismiss the information.

ARGUMENT

To sustain the order of the trial court on the motion to dismiss, there must be in the record some evidence that Johnson in the nighttime on July 3, 1955, forcibly entered Robins Store with intent to commit larceny therein (76-9-3 Utah Code Annotated 1953) or that he aided and abetted Brooks in this regard (76-1-44, Utah Code Annotated, 1953). The evidence is completely lacking as to direct participation.

Under the aider and abetter theory there must be some evidence that Johnson was in a situation in which he might render his assistance to the commission of the offense, and that he was in such a situation by agreement with Brooks or with his previous knowledge consenting to the crime and for the purpose of rendering aid and encouragement in the commission theory. (14 Am Jur 828, Criminal Law 88).

It is not enough to show Johnson was present outside Robins Store; or that he had been with Brooks during and preceding the day in question; or even that he had knowledge of the offense. Smith et al vs. State, 92 P2d 582; People vs. Hill, et al, 175 P2d 45.

After Brooks was gotten out of the store, the two accused were taken down to the police station. There was some interrogation on the way down (Tr. 13), and later on at the police station some more. (Tr. 16 and 64) During the periods of questioning at the police station Officer L. A. Jacobsen conducted the proceedings. Before the interrogation at the police station, Johnson was taken to the hospital for treatment of a deep wound over his eye (Tr. 41), and afterwards placed in the drunk tank. (Tr. 93).

Does the following indicate that Johnson aided and abetted Brooks in the commission of the crime?

Birch testified at the moment of apprehension of Johnson:

Q. "Did you ask what he was doing?"

A. "I asked him what he was doing there, and he said he was on his way home."

Q. "Did you ask where he lived?"

A. "Yes, and he said Washington Terrace. (Tr. 10.)

And later on from the same witness the following:

Q. "What did you do with them?"

A. "Put both of the men in the police car Officer Muller and myself was driving and took them to the police station and on the way to the police station we had a conversation with them, asked, how come they happened to be there, how they were together or something to that effect, and they said, they had met an hour before,—"

Mr. Stark: " I object on the ground of attempting to get any kind of an admission."

Court: "Objection sustained." (Tr. 13.)

The District Attorney then sought to lay a foundation for the conversation.

Mr. Stark: "I object, I would like to voir dire the witness."

The Court: "Alright, go ahead."

Voir Dire, Officer Birch, By Mr. Stark:

Q. "This time on July 3rd about 1:20 did you say you had a conversation with the defendants?"

A. "Yes sir."

Q. "Did they start the conversation?"

A. "No, we did."

Q. "Did you ask them questions?"

A. "Yes."

O. "And, before you asked them questions did you advise them they didn't have to make statements?"

A. "Not that time."

Q. "Did you advise them that they had the right to consult a lawyer?"

A. "No, not that time."

Q. "Did you advise them that anything they said would be used against them?"

A. "No sir, we did at the police station later."

Mr. Stark: "I object to further conversation on that point."

The Court: "Objection sustained." (Tr. 14.)

Birch then testified as to a conversation between Johnson and Officer Jacobson at the police station as follows:

Mr. Anderson, Further Direct Examination, Officer Birch.

Q. "What was the conversation between Officer Jacobson and the defendant Johnson at that time, other than advising him of his constitutional rights?"

A. "He asked if he was involved in any of it and he told him that time he said, 'I am not in a very good position to say anything,' but later on he said, yes. He asked him about the one the night before.

Mr. Stark: "I object to anything other than that night."

The Court: "Objection sustained." (Tr. 20.)

Cross examination of Birch developed the following:

Q. "Isn't it true the defendant Johnson denied knowing anything about the situation?"

A. "No sir."

Q. "Didn't he say, I don't know anything about it at all?"

A. "Johnson didn't".

Q. "Didn't Officer Jacobson say to him, I know you don't know anything about it?"

A. "No, he didn't."

Q. "Tell the court just exactly what he did say."

A. "He asked the defendant what the situation was he asked about two other different offenses out in that area and he told us that time there was too many people involved."

Q. "This is the first time you mentioned he said there were too many other people involved."

A. "Yes sir."

Q. "Tell us everything said there."

A. "I know that is what he said. I asked him about the stuff there and he said there was too many people involved."

Q. "Did you ask him about the occurrences on the night of July 3rd?"

A. "Yes sir."

Q. "What did he say?"

A. "I don't know whether that time or another time."

Q. "I want to know about that time after he was brought back from the hospital and you interrogated him."

A. "We talked to him two or three different times."

Q. "After you got back from the hospital?"

A. "I can't determine which time, three times, we talked to him and I don't remember which time it was."

Q. "The same night?"

A. "The same night."

Q. "Then you don't know whether he made any remarks about this particular offense in the interrogation of Sergeant Jacobsen, when he was present and you was present at the police station and you were down at the police station and the defendant Johnson had been brought back from the hospital, and according to your testimony you are not sure whether he said anything about it in that conversation or subsequent conversations or in a prior conversation, is that right?"

A. "In the course of our conversation he said it."

Q. "You don't know which conversation it was?"

A. "No sir."

Q. "When he arrived in the police car you didn't tell him anything about his constitutional rights?"

A. "No, we didn't."

Q. "So he interrogated him, took him back again and interrogated him again?"

A. "No, we talked to him once and took him out and talked to Brooks again."

Q. "So you don't know in what conversation or interrogation whether you asked the question whether he was involved and he said no then he said yes?"

A. "Speak it again."

Q. "You don't know in what conversation it was when you were asking the question, are you involved in this thing, your testimony was he said no at first and then he finally said yes?"

A. "My testimony didn't state that fact."

Q. "If I mistake the testimony, I apologize."

A. "That isn't the way."

Q. "You don't remember all the testimony that occurred that night?"

A. "Not at this time."

Q. "Alright."

Mr. Stark: Your Honor, we make a motion to strike all of the answers of this witness in regard to that particular conversation. He seems to be completely uncertain as to when this thing occurred and whether or not the accused told of his rights or not."

The Court: The motion to strike is denied."

Mr. Stark: "That is all." (Tr. 42 to 44.)

Officer Donald Muller testified that he talked with Johnson in the drunk tank and asked Johnson to give a correct story and clean the thing up and Johnson went red. (Tr. 57.)

Then came the testimony of L. A. Jacobson, who had conducted the interrogation at the police station. Notice the lack of corroboration of Birch's testimony as to Johnson saying he was involved: (Referring to conversation at scene of crime).

A. ***"During this time I looked over to Johnson and I asked what he was doing there? And he stated, 'He didn't know what was going on' He stated he was just on his way home when he was arrested. I asked where he lived and he said he was staying with his sister in Washington Terrace. I asked if he usually went by the

way of Harrison Boulevard to go to Washington Terrace? He said he did not understand, and that is about all I said to him about that, but I asked him how he got cut above his eye. I asked how he got it, and he said, when I fell down in the field.” (Tr. 60.)

(Referring to conversation at police station)

A. “I waited to see and shortly Johnson was brought back. I talked to him and I told him the same thing that he was arrested and booked for burglary of the five and ten cent store and that he had the right to consult counsel and that he had the right to call whoever he wished to, that whatever he said could be used against him or for him in the court room. At this time he said he didn’t have much to say. He said, ‘There is nothing I could say’, I asked him, I said ‘What were you doing up there?’ He said, ‘Well, truthfully, I don’t know. When I was arrested I was around on the side of the building with my pants down taking a crap when two officers picked me up.’ I told him, ‘It doesn’t seem likely for you to go clear up there.’ He says: ‘Well, I was up there. I had been drinking that night and I was just wandering around.’ and we got talking again and I asked ‘If he would like to make a statement?’ and he says ‘No, it involves too many people’, so he was placed in the tank.” (Tr. 62, 63.)

Later on at about six o’clock in the morning Jacobson interrogated Johnson again:

Q. “Was that the same day?”

A. “Yes sir, approximately six o’clock in the morning.”

Q. “And what was said?”

A. “I wanted to ask before going off how he felt. I said, ‘Are you feeling any better?’ and he said ‘He had an awful headache,’ Again I advised him of his rights and asked, ‘If he would like to make a statement’ and he said, Well, he couldn’t, he says: ‘I’m not in a position to.’ and I asked him, ‘What part he took in this burglary

of the Five and Ten Cent Store?' and he said, 'I didn't go inside of the place, Jake, I will swear to that.'

Q. "Did he say anything else?"

A. "I asked him if he took part in the burglary the previous night, and he said,——"

Mr. Stark: "I object to that."

The Court: "Objection sustained."

Q. "Any other conversation of the five and ten cent store?"

A. "No sir, that is all, but I asked him if he would like to make a written statement of the fact of the part he took in it, and he said, 'No, Jake, I won't sign anything. I will tell you what I know and remember, but I will not sign anything.' I told him 'O.K.', and he was placed in jail and that was the end of it." (Tr. 64.)

The foregoing do not amount to a confession of an aider and abetter. On the contrary the statements of Johnson are denials of complicity. The only possible admission came through the inconsistent testimony of Birch to the effect that at one of the conversations, Johnson said yes to the question of whether he was involved. And Johnson didn't know whether this was the conversation previously excluded by the court. Was there only evidence of guilty knowledge on the part of Johnson? If so this does not aid the State. State vs. Baum, 151 P 518, 47 Ut 7.

There is no evidence of a conspiracy. The acts and statements of Brooks are not binding on Johnson.

It is respectfully submitted, that the judgement of conviction in this case ought to be reversed.

LaVar E. Stark
Attorney for defendant
and appellant