

1957

# State of Utah v. Max Floyd Stockton : Brief of Respondent

Utah Supreme Court

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In the

# Supreme Court of the State of Utah

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STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

MAX FLOYD STOCKTON,  
*Defendant and Appellant.*

Case No.  
8569

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## BRIEF OF RESPONDENT

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In the  
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*Plaintiff and Respondent,*

vs.

MAX FLOYD STOCKTON,

*Defendant and Appellant.*

Case No.  
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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

In the afternoon of February 4, 1956, at approximately 6:00 P. M., Max Stockton, Lee Goddard and Dean Carter were identified as being in the city of Huntsville, Utah. Late in the evening of the same day, at approximately 11:30 P. M. the three drove in a stolen car from Ogden to Huntsville, and parked in the vicinity of Jespersen's Mercantile. In the early morning of February 5, 1956, at approximately 1:30 A. M., an attempt was made to break into said mercantile, but after breaking off the outside padlock, they were unable to cut the lock off the door. Because of this

fact, they were forced to abandon their original plan to commit larcency therein. They had been observed in their attempt and the police and the owner of the mercantile had been informed. The owner and his wife observed a car in the vicinity of the mercantile traveling with its lights off, and the wife took the license number, which was BY 782. This number was radioed to the Weber County Sheriff's office and the three were apprehended by Deputy Sheriff A. R. Coveio coming down Ogden Canyon. At this time, Lee Goddard made a statement to Deputy Coveio out of the presence of Appellant Stockton that the three had agreed that Goddard and Carter would take the blame because of the serious trouble Stockton was already in.

The Deputy found in the car a suitcase containing various burglary tools, a padlock and hasp broken off the lock. These were later identified as being the tools used in the commission of the crime and the padlock broken off the door at Jespersen's Mercantile.

In the case at hand there appears to be no question as to whether there was an attempted burglary committed, for Goddard testified as to his guilt and evidence produced by the state and the defendant conclusively proves that Goddard and Carter attempted to burglarize Jespersen's Mercantile. The question this court must resolve is whether Max Stockton was just an innocent bystander who went along for the ride and had no knowledge of the attempt of Goddard and Carter to commit a felonious act. The State maintains that the evidence proves that the appellant Stockton did in the night time, aid and abet Goddard and Carter in the willful, unlawful, felonious and burglarious act of

attempting to break and enter Jespersen's Mercantile, located in Huntsville, Weber County, Utah, with the intent to commit larceny therein. Only the appellant Stockton is being tried and charged with this crime, but for the purpose of this brief, the state will refer to Lee Goddard and Dean Carter as co-defendants and co-conspirators.

## STATEMENT OF POINTS

### POINT I

THE STATE PRODUCED ABUNDANT AND CONVINCING EVIDENCE AT THE TRIAL WHICH SUPPORTS THE VERDICT OF GUILTY OF ATTEMPT TO COMMIT BURGLARY IN THE SECOND DEGREE.

### POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING DEPUTY SHERIFF COVEIO TO TESTIFY AS TO A CONVERSATION BETWEEN THE DEPUTY SHERIFF AND ONE OF THE CO-DEFENDANTS.

### POINT III

THE COURT'S INSTRUCTIONS TO THE JURY CORRECTLY STATED THE LAW AND IT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS.

## ARGUMENT

## POINT I

THE STATE PRODUCED ABUNDANT AND CONVINCING EVIDENCE AT THE TRIAL WHICH SUPPORTS THE VERDICT OF GUILTY OF ATTEMPT TO COMMIT BURGLARY IN THE SECOND DEGREE.

The appellant was charged with the violation of Sections 76-9-3 and 76-1-30, Utah Code Annotated 1953, which together set forth the crime of attempt to commit burglary in the second degree. The Supreme Court of Utah, in the case of *State v. Prince*, 65 Utah 205, 284 P. 8 said:

“The three elements which constitute an attempt are: (1) The intent to commit the crime; (2) the performance of some overt act towards the commission of the crime; (3) the failure to consummate its commission.”

The authorities generally agree that mere preparation is not sufficient to constitute an attempt. There must be some act executed towards the consummation of the crime, however, this act need not be the last proximate act to the completion of the offense attempted. The intent must be manifested and it is dependent upon the facts and circumstances of the particular case. See 22 C. J. S. Criminal Law. Section 75, and cases cited therein.

Here, the appellant conspired with the co-defendants for the perpetration of this crime, so according to well-known criminal and agency law, he would be liable for the



acts of the co-conspirators. The California case of *People v. Frankfort*, 251 P. 2d 401 lays down the general rule and is supported by an abundance of authority where it states:

“Members of a conspiracy are bound by all acts of other members done in the furtherance of the conspiracy.”

The evidence produced by the state implicates the appellant in every phase of this crime and makes him guilty of aiding and abetting in the perpetration thereof.

The state produced a witness who testified, and whose testimony was not contradicted, that he saw defendant Stockton in the presence of two other people in the city of Huntsville on the afternoon of February 4, 1956 (T. 29, 30). Evidence was set forth by the state that the co-defendant Goddard testified at the preliminary trial that defendant Stockton helped and advised them as to what car they should steal to use when they committed the crime (T. 80, 81). The state also brought forth testimony that in the early morning of February 5th a car was seen parked in the intersection next to the Jespersen Mercantile with the motor running and the lights off, (T. 6, 7) and from such car a person could keep a look-out in all four directions (T. 7). A person was observed going from the car to the mercantile and returning to the car (T. 7). Other testimony was that at the preliminary trial co-defendant Goddard testified that he went from the mercantile to the car to report that they had the lock off the door (T. 81). The state's witness also testified that at a later time he noticed the car gone from the intersection, but then saw a car with its motor running

and the lights off parked one-half block from the mercantile in the same location that defendant stated it was (T. 9). Other witnesses seeing the car in this location noticed the brake light flash on such car and then traveled around the block to observe the car, but it had moved (T. 9). However, they followed a car traveling with its lights off and took down the license number which was BY 782 (T. 19, 27). This number was then radioed ahead to the Weber County Sheriff's office and the appellant Stockton, with Goddard and Carter, was apprehended in Ogden Canyon in the car bearing the said license number which was seen in the vicinity of Jespersen's mercantile (T. 34, 35). The Sheriff found a suitcase of burglary tools and a padlock on the front seat of the car and a hasp lying on the floor of the back seat (T. 35, 36). These items were introduced as Exhibits A, B, C, and D, and were uncontradicted as being the lock taken off the door of Jespersen Mercantile and the set of burglary tools used in the commission of the crime (T. 42, 43, 61, 65, 66).

The appellant's evidence was that during the afternoon of February 4th the co-defendants Goddard and Carter, while preparing to drive to Huntsville for the purpose of locating a road out of the valley, (T. 56) just happened to see the appellant coming out of a pool hall (T. 51). They asked the appellant to go for a ride, yet they claim there was no conversation concerning their purpose of locating another road out of the area (T. 56). That evening, at approximately 11:30 P. M. after the co-defendants had stolen a car, (T. 52) just by coincidence they saw appellant standing on the street corner, and again they asked him to go

for a ride and they proceeded to Huntsville, the same city they had been to in the afternoon (T. 53). There, according to their testimony, they parked the car one-half block from Jespersen's Mercantile, (T. 53) and when the appellant asked "where are you going", they said "we'll be back in a little while" (T. 54). Co-defendants then left the car, taking the suitcase with them and appellant waited for them in the car (T. 67, 79). Approximately 15 minutes later they returned to the car and after driving around Huntsville, started down Ogden Canyon where they were taken into custody (T. 34, 54, 55).

Even if appellant remained in the get-away car as a look-out, according to the law of conspiracy he would still be liable, the same as the co-defendants. This is supported by the Utah Code Annotated 1953, Section 76-1-44 which reads in part as follows:

"All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or not being present,  
\* \* \* are principals in any crime so committed."

The appellant asks us to believe that during this series of events he was no naive that he had no knowledge of the co-defendants' intent to commit burglary. The California court, in the case of *People v. Kross*, 112 Cal. App. 2d 602, 247 P. 2d 44, where there was a conviction of theft on circumstantial evidence, said:

"Whether the evidence is as compatible with innocence as with guilt was a question for the jury and not for this court (Citations). An appellate

court will not review the evidence beyond the point of scrutinizing the record to determine whether there is substantial evidence that supports the inference of guilt. The judgment will not be reversed unless it can be said that it is not supported on any reasonable hypothesis (Citations). \* \* \* Direct proof of burglary and theft is not necessary; they may be proved by circumstantial evidence. \* \* \* It is not the law, \* \* \* that each fact in a chain of circumstances that will establish a defendant's guilt must be proved beyond a reasonable doubt (Citations). The doctrine of reasonable doubt applies to proof of guilt and not to the establishment of each incident or event inculcating the defendant (Citation). A reasonable doubt that would warrant acquittal is one that results or arises from a 'consideration of all the evidence' in the case" (Citations).

The state set forth evidence beyond a reasonable doubt that appellant manifested the necessary intent and executed an overt act which led towards the consummation of the crime. The repeated coincidences indicate the absurdity of the position of the appellant and the jury at the trial court was able to see through it and returned a verdict of guilty.

In the case of *People v. Chapin*, 303 P. 2d 365, the California court in regards to cases being reviewed, stated:

"When his appeal is on the ground that the evidence is not sufficient to sustain the finding of the jury, the burden is on appellant to demonstrate that there is no evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever. It is not enough that the established facts and circumstances may be reconciled with the innocence of the accused. Before a reversal

may be had, the facts must disclose no reasonable basis for any inference other than appellant's innocence." *People v. Hatton*, 114 Cal. App. 2d 195, 196, 249 P. 2d 901, 902.

The appellant has failed to meet this burden of proof, therefore, since the evidence is sufficient to sustain the conviction, it should be upheld.

## POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING DEPUTY SHERIFF COVEIO TO TESTIFY AS TO A CONVERSATION BETWEEN THE DEPUTY SHERIFF AND ONE OF THE CO-DEFENDANTS.

The conversation in question is located on page 83 of the transcript beginning with Line 19 and reads as follows:

"Q. Do you have any recollection with regard—did you have a conversation with Lee Goddard relative to his stating that they were willing to take the blame.

"A. Yes sir.

"Q. Will you tell us what the conversation was?

"A. I talked with Lee Goddard about this burglary in Huntsville.

"Mr. Handy: Just a moment may I voir dire the witness your honor.

"The Court: Yes."

Voir dire examination by Mr. Handy:

"Q. Was this conversation, Officer Covieo in the presence of Mr. Stockton.

"A. No sir

"Mr. Handy: I object to it your honor as being hearsay."

### Argument

"The Court: I'll overrule the objection as an exception to the rule. You may testify.

"(To witness) Now do you remember the last question?

"A. Yes, I had a conversation with Lee Goddard pertaining to Max Stockton. Goddard told me just before—well just after I had stopped the car at the time he was getting out of the car he stated the conversation between Lee Goddard and Dean Carter and Max Stockton was, should Lee Goddard take the blame along with Dean Carter and leave Max Stockton out of it because of the seriousness of it and Max Stockton said yes, that he did want them to take the blame because of the seriousness of the trouble he was already in."

The above statement of the record wherein it states:

\* \* \* "Goddard told me just before—well, just after he had stopped the car at the time he was getting out of the car, he stated the conversation between Lee Goddard and Dean Carter and Max Stockton was", \* \* \* would indicate that the conversation between Goddard and Deputy Covieo took place in Ogden Canyon just after the Deputy had stopped the car and before the conspirators were put under arrest or the conspiracy brought to an end. The dis-



cussion which Deputy Coveio is testifying to between Stockton, Goddard, and Carter took place at a time when the three were alone in the car coming from the scene of the crime while they were co-conspirators and before they were taken into custody, for the recorded testimony of Officer Coveio on pages 85 and 86, is as follows:

“Q. Did they have that discussion in the presence of Max? Is that what you are saying?

“A. The three were together in the car, yes sir.

“\* \* \*

“Q. And at that time Lee Goddard told you that they had this discussion about taking the blame, Max Stockton was not present was he?

“A. No sir.

“Q. And any discussion had was prior to your stopping the car; is that right?

“A. Yes.”

In the case of *State v. Simpson*, 236 P. 2d 1077, 1079, the Utah Supreme Court sets forth a general rule as to conversations and declarations of a co-conspirator wherein it states:

“It is true that ordinarily the conversations and declarations of a co-defendant out of the presence of the accused, after the commission of the crime would not be competent \* \* \* there can be as there was here a conspiracy between persons to engage jointly in other criminal offenses and if this fact is shown by independent evidence the statement of any of the conspirators made in furtherance of a common criminal purpose is unquestionably admissible against all. Such conduct in furtherance of the common design does not raise the same question as ordinary admissions or conversations.”

The *Simpson* case continues and quotes from the case of *People v. Suter*, 43 Cal. App. 444, 111 P. 2d 2331, where the court said:

“It has been held that the common design of a criminal enterprise may extend in point of time beyond the actual commission of the act constituting the crime for which the accused is being tried, such as for the purpose of concealing the crime, securing the proceeds thereof, sharing in or dividing the proceeds of the crime, or bribing or influencing witnesses, and that consequently, evidence is admissible to prove acts committed after \* \* \* the perpetration of the crime for which the accused is on trial. Of course, it must reasonably appear that such acts were committed in furtherance of the common design of the conspiracy.”

The *State v. Simpson* case concludes by quoting from *State v. Irwin*, 101 Utah 365, 120 P. 2d 285, where the Utah court said:

“Acts done by the conspirators in order to escape the consequences thereof, even though they at that time know that the conspiracy cannot continue, are nevertheless acts done in the furtherance of the conspiracy.”

This of course indicates that even though the conspiracy is at an end and the conspirators are taken into custody, any testimony of the conspirators, in order to escape the consequences thereof would be admissible. This Court, in the case of *State v. Irwin*, supra, wherein there was some question as to the admissibility of testimony by officer Record who was Chief of the Anti-Vice Squad, that Pierce told him that Mayor Irwin had instructed him to make



collections from racketeers for allowing them to operate in the city. The court held:

“Thus the testimony by Record of his conversation with Pierce was admissible in evidence against all of the defendants, not for the purpose of proving agency, this was proved by other evidence, but as a circumstance proving the conspiracy. This conversation was in furtherance of the conspiracy. \* \* \* This testimony was therefore clearly admissible.”

In the Oklahoma case of *Parnell v. State*, 250 P. 2nd 474, the co-conspirator Lee was transporting intoxicating liquors from without the state into the state of Oklahoma without a permit from the tax commission. At the time of his arrest he made certain admissions to the arresting sheriff implicating the other conspirator, Parnell. It is contended that when the court allowed the sheriff to testify to the statement made by Lee at the time of his arrest, it committed reversible error because such testimony was hearsay. The court reiterated the general rule that the arrest of the co-conspirator precludes any further concerted action and ordinarily puts an end to conspiracy. Therefore, any statement by the co-conspirator out of the presence of the other conspirator would be hearsay and inadmissible. However, the court held that the facts and evidence show that the conspiracy had not been abandoned with the arrest of Lee; that the conspiracy was still in effect and therefore the statement by Lee to the sheriff was admissible against both the conspirators even though not made in the presence of Parnell. The court said:

“And until this conspiracy was accomplished or abandoned, the declarations of either Parnell or Lee

in connection with the conspiracy would be admissible against the other man, even though made in the absence of the other conspirator.”

The *Parnell* case, in quoting from *Barnes v. State*, 8 Okla. C. R. 554, 129 P. 657, states:

“The responsibility of co-conspirators for the language or conduct of those acting with them is not confined to the accomplishment of the common purpose for which the conspiracy was entered into, but extends to and includes all declarations made and collateral acts done incident to and growing out of the common design and spoken or done by a co-conspirator as against all of his co-conspirators.”

From the above discussion of cases it appears that in order to introduce testimony of a co-conspirator, you must first show other evidence tending to prove a conspiracy and, second, that the conspiracy was not ended at the time the statement was made. Mr. Justice Wade, speaking for this court in the case of *State v. Irwin*, supra, quoted the following Utah statute found in the Utah Code Annotated 1953, Section 77-31-18:

“A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.”

The court continues and states:

“This court has held this corroboration need not go to all the material facts testified to by the

accomplice (*State v. Stewart*, 57 Utah 224, 193 P. 855); that the corroborative evidence need not be sufficient in itself to support a conviction; it may be slight and entitled to little consideration. *People v. Lee*, 2 Utah 441; *State v. Spencer*, 15 Utah 149, 49 P. 302. \* \* \*

“On the other hand, the corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all of this must be without the aid of the testimony of the accomplice. \* \* \* *State v. Cox*, 74 Utah 149, 277 P. 972; and *State v. Gardner*, 83 Utah 145, 27 P. 2d 51.”

The above was upheld by Mr. Justice Crockett in the case of *State v. Simpson*, supra.

The appellant in his brief on pages 12 and 13, states the following:

“The Utah case of *State v. Simpson*, 236 Pac. 2d 1077, 1078, in regard to a conversation of a co-defendant out of the presence of the defendant had this to say:

“‘There can be as there was here, a conspiracy between persons to engage jointly in *other* criminal offenses and if this fact is shown by *independent evidence*, the statements of any of the conspirators, made in furtherance of the common criminal purpose is unquestionably admissible against all.’

“According to the above Utah case there must be *independent evidence* of *other* criminal offenses, and only if the statements were made in furtherance of the common criminal purpose are the statements admissible.” (Emphasis by Appellant.)

Here, the appellant, by his own admission, admits that the conversation would be admissible if it complied with the requirements of producing independent evidence of the criminal offense and if the statement was in furtherance of the conspiracy. The state according to the evidence as set forth in Point I of this brief, has certainly complied with the requirements set down in *State v. Irwin*, supra, and *State v. Simpson*, supra, in regards to proving evidence tending to show a conspiracy or the corpus delicti. The conspiracy was not at an end when the statement was made, for the defendants had not yet been placed under arrest and even if they had been, according to *State v. Simpson*, supra, an act to escape the consequences of a conspiracy is still part of the conspiracy. The purpose of the conversation between the three conspirators was to avoid the consequences of the conspiracy for Stockton. Therefore, this would meet the requirement that the conspiracy must still be in force. The state has met this burden of proof and thus the trial court did not err in allowing the testimony of Deputy Coveio.

### POINT III

THE COURT'S INSTRUCTIONS TO THE JURY  
CORRECTLY STATED THE LAW AND IT  
DID NOT ERR IN DENYING APPELLANT'S  
REQUESTED INSTRUCTIONS.

The state maintains that the Court's instructions numbered 1 to 22 covered the law as it applies to the facts of this case. The appellant's requested instructions numbered 1 to 6 were adequately and thoroughly covered within the

Court's instructions. The appellant, on pages 14 to 17 of his brief, states his requested instructions, so for the purpose of this argument, they will be referred to by number and will not be restated.

In the requested instructions 1, 5 and 6, the appellant tends to invade the jury's domain of being sole judge of determining the credibility of the witnesses, of the weight of evidence, and of all questions of fact. The Supreme Court of Utah, in the case of *State v. Fertig*, 233 P. 347, 349, states:

“\* \* \* If the facts themselves are in dispute as to whether the witness would or did not do the things which if he did do them, would make him an accomplice, then it is for the jury to determine whether he is in fact an accomplice or not. *State v. Coroles*, 74 Utah 94, 277 P. 205.”

According to the case of *State v. Bowman*, 92 Utah 540, 70 P. 2d 458, an accomplice is as guilty as the principal, for it states:

“In this state we have no statutory definition of an accomplice, but the court has construed the word to refer to one who is or could be charged as a principal with the defendant on trial.”

Therefore, even if the jury found appellant Stockton was an accomplice, in accordance with appellant's requested instruction, he would still be guilty of the crime charged.

The court's instructions numbered 10, 12, 13, 16, 17 and 20 generally cover the law as requested by the appellant in his above three requested instructions.

Requested instructions numbered 2 and 3 are specifically covered by the court's instruction No. 11.

Appellant, in his requested instruction No. 4 infers that there was a voluntary abandonment of the criminal intent, therefore there was no crime of attempt to commit burglary. The facts prove that no such issue was raised, for the padlock was broken off and an attempt was made to cut the lock off the door, as well as to pry the back door open. The final act to the consummation of the crime was put into execution, but due to their inability to complete their purpose, they were forced to abandon it from necessity rather than voluntarily.

## CONCLUSION

The appellant was convicted of the offense charged in a fair and impartial trial by a jury who saw and heard the witnesses and were able to determine the accuracy and credibility of the evidence that was produced. The evidence, even without the testimony of Deputy Coveio was sufficient to convince a reasonable man beyond a reasonable doubt of the guilt of this man. Deputy Coveio's testimony as to the furtherance of the conspiracy by attempting to avoid the consequences of their act substantiated and corroborated the evidence and the guilt of Max Stockton. The court properly instructed the jury as to the law that applies to this case, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

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