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IN THE SUPREME COURT OF

THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs	:	
FRANCIS EUGENE KNILL,	:	
Defendant-Appellant.	:	No. 18122

BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and for Emery County, State of Utah, the Honorable Boyd Bunnell, District Court Judge, Presiding.

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FILED

MAY 28 1982

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE.................. 1

DISPOSITION IN THE LOWER COURT....................... 1

RELIEF SOUGHT ON APPEAL.............................. 2

STATEMENT OF FACTS................................... 2

DISCUSSION

POINT I THE COURT BELOW ERRED IN REFUSING TO SUPPRESS EVIDENCE RESULTING FROM STOP OF AUTOMOBILE WITHOUT PROBABLE CAUSE........................... 4

POINT II DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE COUNSEL IN THE EARLY STAGES OF HIS PROSECUTION CONTRIBUTING TO A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL.................. 6

POINT III DEFENDANT WAS DENIED A SPEEDY TRIAL...... 8

POINT IV THE TRIAL COURT ABUSED ITS DISCRETION BY RULING THAT HABEAS CORPUS WAS AN INAPPROPRIATE PRETRIAL REMEDY AND WAS UNAVAILABLE TO DEFENDANT............................. 9

POINT V THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DENIAL OF DEFENDANTS PRETRIAL MOTION TO PRODUCE AND MOTION TO DISMISS AT TRIAL......................... 10

CONCLUSION... 12

CASES CITED

Beck v. Ohio, 379 U.S. 89, 13LEd 2d 142, 855 Ct. 223 (1964).. 5

Carmen v. Slavens, 546 P2d 601 (1976)............... 11

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Page

Combs v. Turner, 25 Utah 2d 397, 483 P2d 437 (1971).. 7

Holloway v. Arkansas, 435 U.S. 475 55 LEd 2d 426 98 S.Ct. 1173 (1978)............................. 4

Klopfer v. North Carolina, 386 U.S. 213, 87S.Ct. 988, 18LEd 2d 1, (1967)............................. 9

Mallory v. U. S., 354 U.S. 449, 1 LEd 2d, 1479, 77S.Ct. 1356 (1957).............................. 5

People v. Chacon, 73 Cal. Rptr. 10, 447 P2d 106 (1968)....................................... 7

State in the Interest of Hales, 538 P2d 1034 (1975).. 9

State of Delaware v. Prouse, 440 U.S. 648, 99S.Ct. 1319, 59 LEd 2d 660 (1979)........................... 5

State v. Hall, 105 Utah 163, 145 P2d 494, (1944)..... 11

U. S. v. Ewell, 383 U.S. 116, 15 LEd 2d 627, 86 S. Ct. 773, (1966)................................... 9

UNITED STATES CONSTITUTION CITED

Fourth Amendment.................................... 6

Sixth Amendment..................................... 8

Fourteenth Amendment................................ 6

UTAH CONSTITUTION CITED

Article I, Section 12............................... 8

STATUTES CITED

Utah Code Annotated 1953 as Amended:

76-6-604.. 4

77-1-8.. 8

77-7-15... 5

77-35-7... 6&8

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SECONDARY AUTHORITIES CITED

Page

Utah Rules of Civil Procedure, Rule 65B..........10

Transcript page 5.............................. 4

Transcript page 44............................. 9

Transcript page 50............................. 4

Transcript page 71,72..........................11

Defendant's Proposed Jury Instruction #3.........11

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs	:	
FRANCIS EUGENE KNILL,	:	
Defendant-Appellant.	:	No. 18122

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Francis Eugene Knill was charged in criminal proceedings by the State of Utah with one count of Theft in violation of Section 76-6-604, Utah Code Annotated 1953, as amended.

DISPOSITION IN THE LOWER COURT

On October 15, 1981, Francis Eugene Knill was found guilty of one count of theft by a jury in the Seventh Judicial Court in and for Emery County, State of Utah, the Honorable Judge Boyd Bunnell presiding.

Defendant was sentenced on that same date to not less than one year nor more than fifteen years in the Utah State Prison.

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RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks relief from the sentence imposed as follows:

For an Order of this court reversing judgment and sentence imposed by the trial court.

STATEMENT OF FACTS

Appellant-Defendant and his son were arrested June 25, 1981 and booked in the Emery County Detention facility He appeared before VarLynn Peacock, Justice of the Peace, Emery County, State of Utah on June 26, 1981. Defendant was not represented by counsel but asked that counsel be appointed. Judge Peacock set bail at $15,000.00 and set preliminary hearing for July 22, 1981.

Defendant was first aware that counsel had been appointed on July 7, 1981. Charles Taylor, the then Emery County Public Defender, was appointed to represent both Appellant and his son. Defendant appeared before Judge Peacock on July 17, 1981 and waived preliminary hearing upon assurance that if Appellant were to plead guilty to a felony, his son would not be prosecuted.

On July 28, 1981 Defendant retained private counsel, appeared for arraignment in District Court of Emery County and moved for remand to the Justice Court for preliminary

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hearing. Said Motion was granted.

On August 18, 1981, no date for preliminary had been set. Defendant petitioned District Court of Emery County, Civil No. 4010 for Writ of Habeas Corpus, hearing on Petition was had on September 1, 1981, writ was issued September 9, 1981 and hearing was set for September 14, 1981. At the hearing, Boyd Bunnell, District Court Judge ruled without argument by the State, that a Writ of Habeas Corpus was not the proper procedure for raising the issue of lack of speedy trial and that a Motion to Dismiss was the appropriate means by which to raise such issue.

Preliminary hearing was had in the Eleventh Circuit Court in and for Emery County on September 10, 1981. Appellant was bound over to District Court on two counts. Appellant was arraigned October 6, 1981, Defendant's Motion to Dismiss for lack of a speedy trial was denied with no argument by Prosecution and trial was set for October 15, 1981.

Appellant filed ExParte Motion to Produce and Affidavit on October 12, 1981. The State filed no response nor Affidavit. Motion was denied.

Appellant filed Motion to Suppress on October 12, 1981

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with hearing set for 9:00 A.M. October 15, immediately prior to trial. The State did not file response nor did they argue against said motion. The Motion to Suppress was denied.

Appellant was tried on October 15, 1981, by jury, convicted of theft, in violation of Section 76-6-604 U.C.A. (1953) as amended, a second degree felony. Appellant was sentenced that day to serve one to fifteen years in the Utah State Penitentiary.

POINT I

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS EVIDENCE RESULTING FROM STOP OF AUTOMOBILE WITHOUT PROBABLE CAUSE.

Defendant was stopped by Sgt. Jewkes, Utah Highway Patrol. At Motion to Suppress Hearing, immediately prior to trial Sgt. Jewkes testified at page 5 line 8-9 that the reason he "probably" stopped was a report on a license plate. At Trial page 50 lines 3-13 Sgt. Jewkes testified that he had it in his mind he'd probably stop the car and called in the license plate number "as a precaution." At the time he took the precaution, the only thing Defendant had done was slow down when he saw a highway patrol car.

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.....(2) a policeman's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed, or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, such rule against random stops and detentions, however, not precluding a state from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion, such as, for example, the questioning of all oncoming traffic at roadblock-type stops.[1] at 661.

The "reasonable suspicion" standard is further set forth in Section 77-7-15, Utah Code Annotated 1953, as amended as follows:

> 77-7-15. Authority of peace officer to stop and question suspect - Grounds- a peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his action.

Mere suspicion is not sufficient to establish probable cause for a stop[2] despite the good intentions of an officer[3].

1. State of Delaware v. Prouse, 440 U.S. 648, 99S.Ct. 1319, 59 LEd 2d 660 (1979).
2. Mallory v. U.S., 354 US 449, 1LEd 2d 1479, 77S.Ct. 1356, (1957)
3. [illegible] 379 US 89, 13LEd 2d 142, 85 S.Ct.223,(1964).

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Defendant was stopped on the mere suspicion of a police officer in violation of his rights under the Fourth and Fourteenth Amendment of the Constitution of the United States.

Defendant's Motion to Suppress evidence resulting from said stop was denied.

POINT II

DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE COUNSEL IN THE EARLY STAGES OF HIS PROSECUTION CONTRIBUTING TO A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL.

> ...(T)he assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. [Citations Omitted][4]

Defendant, in the case at bar, was incarcerated and was not represented by counsel when preliminary hearing was set for a date twenty-six days later contrary to the dictates of the Utah Code which requires a preliminary hearing be had within ten (10) days if a person in incarcerated.[5]

Counsel was appointed to represent both Defendant and his son who was similarly charged. Upon advice of counsel Defendant was encouraged to waive preliminary

4. Holloway v. Arkansas, 435 U.S. 475, 55 LEd.2d 426, 98 S.Ct. 1173 (1978).
5. U.C.A. 77-35-7

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hearing and plead guilty in exchange for the dismissal of the charges against Defendant's son. Said charges were dismissed.

The Utah Supreme Court has ruled in the case of Combs v. Turner, 25 Utah 2d 397, 483 P2d 437 (1971) which involved dual representation by one attorney of a husband and wife wherein husband pleaded guilty to a felony as a part of a plea bargain and charges were dismissed against the wife. The Court held that the dual representation did not constitute denial of adequate representation.

However, the Court's attention is called to the decision of Cheif Justice Traynor in the California case of People v. Chacon, 73 Cal. Rptr. 10, 447 P2d 106 (1968) wherein the Court said:

> If counsel must represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel. [Citations Omitted].

Counsel representing co-defendants cannot effectively represent the Defendant whom he encourages to waive his right to confront witnesses and to trial by jury in exchange

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for the release of a co-defendant.

Here the result of joint representation was a delay in the proceedings which constituted a denial of Defendants right to a speedy trial.[6]

POINT III

DEFENDANT WAS DENIED A SPEEDY TRIAL.

The Sixth Amendement of the United States Constitution and the Constitution of the State of Utah[7] guarantees the right to a speedy trial. Defendants trial in the Court below was held more than three and one-half months after his arrest.

Defendants first preliminary hearing was set 16 days beyond the limit allowed by the Utah Code.[8] That date was waived as discussed at Point II supra. The matter was remanded on July 28, 1981 for preliminary hearing and the actual hearing was not had until September 10, 1981 -- two and one-half months after arrest and forty-four (44) days after remand.

Trial was set in District Court for October 15, 1981 more than the thirty day limitation set forth in U.C.A. 77-1-8(6).

Defendant was prejudiced by the delay because the

6. United States Constitution, Amendment Six.
7. Article I, Section 12.
8. U.C.A. 77-35-7

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physical evidence of theft, the automobile, was released to the alleged owner on July 6, 1981[9] and was unavailable for inspection by defense counsel when conflict in identification of said automobile arose. Had there been a timely preliminary and/or a timely appearance of appointed counsel, the automobile would have been available for inspection. The right to a speedy trial is a fundamental right.[10] The purpose of that right is, among other things, to limit the possibility that delay will impair Defendants defense[11] as it did in this case.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY RULING THAT HABEAS CORPUS WAS AN INAPPROPRIATE PRETRIAL REMEDY AND WAS UNAVAILABLE TO DEFENDANT.

"Ordinarily the inquiry in a Habeas corpus matter is as to the legality of the detention."[12]

On August 18, 1981 Defendant petitioned the Court below for a Writ of Habeas Corpus on the grounds that his constitutional right to a speedy trial had been denied. Twenty-eight (28) days later the District Court Judge ruled that Habeas Corpus was not the proper proceeding to raise the issue. His ruling was an abuse of discretion.

9. Transcript - page 44 line 14.
10. Klopfer v. North Carolina, 386 U.S.213,87S.Ct.988, 18LEd. 2d 1, (1967).
11. U.S. v. Ewell, 383 U.S. 116, 15 LEd 2d 627, 86 S.Ct. 773, (1966).
12. State [illegible] Interest of Hales, 538 P2d 1034 (1975).

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Rule 65B, Utah Rules of Civil Procedure provides:

> (f) Habeas Corpus. Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the state of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

Defendant challenged the legality and constitutionality of his incarceration and was told that Habeas Corpus was not the appropriate method of complaint.

Defendant's Motion to dismiss on the same grounds was filed September 30, 1981, was heard October 6, 1981 and denied without argument by the Prosecution forty-nine (49) days after Defendants original petition for relief was filed.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DENIAL OF DEFENDANTS PRETRIAL MOTION TO PRODUCE AND MOTION TO DISMISS AT TRIAL.

Upon discovery that there existed conflicting

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evidence identifying the alleged stolen vehicle, Defendant on October 1981 moved for an Order for Plaintiff to produce the vehicle for inspection. Said motion was denied.

At the conclusion of the State's case Defendant moved to dismiss because of conflicting testimony regarding identification of the allegedly stolen vehicle. Said motion was denied without any argument by the State.[13]

The Utah Court has ruled in the case of State v. Hall, 105 Utah 163, 145 P2d 494, (1944) that:

> Under the authorities, it is clear that the State must definitely identify the goods found in the defendant's possession as the goods which were charged to have been stolen before the jury may draw an inference of guilt based upon the proof of possession by the defendant of such goods at 496. [Citations Omitted].

The Court's refusal to Order production and refusal to dismiss for the states failure to definintely identify the vehicle along with its refusal to give Defendant's proposed jury instruction no. 3 constitutes an abuse of discretion.

The Utah Court defined "discretion" in Carmen v. Slavens, 546 P2d 601 (1976) as follows:

> It is true that where the authority to perform a proposed action rests within the discretion of the court we must allow considerable latitude in which

13. Transcript pages 71-72

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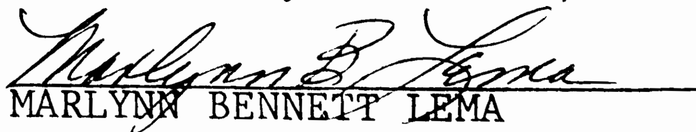
> he may exercise his judgment. But this does not mean that the court has unrestrained power to act in an arbitrary manner. Fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: to courts and judges, as well as to autocrats or bureaucrats. The meaning to the term "discretion" itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice at 603 [Citations Omitted].

CONCLUSION

Appellant respectfully submits, based on the foregoing points and authorities that judgment entered at trial be reversed.

Respectfully submitted,



MARLYNN BENNETT LEMA

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered true and correct documents entitled Brief of Appellant to the Utah Supreme Court and to the Attorney General's Office in and for the State of Utah, Utah State Capitol Building Salt Lake City, Utah this ___day of May, 1982.

____

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