1982

State of Utah v. Francis Eugene Knill : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

Appeal from a conviction of Theft in the Seventh Judicial District Court in and for Emery County, the Honorable Boyd Bunnell, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114
Attorneys for Respondent

MARLYNN BENNETT LEMA
108 North 400 West
P.O. Box 1026
Price, UT 84501
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

Appeal from a conviction of Theft in the Seventh Judicial District Court in and for Emery County, the Honorable Boyd Bunnell, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114
Attorneys for Respondent

MARLYNN BENNETT LEMA
108 North 400 West
P.O. Box 1026
Price, UT 84501
Attorney for Appellant

TABLE OF CONTENTS

Cases Cited

Table of Contents

Table of Contents

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with committing the crime of Theft in violation of Utah Code Ann., § 76-6-404 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury which found him guilty of Theft on October 15, 1981 in the District Court in and for Emery County, the Honorable Boyd Bunnell presiding. The court pronounced judgment at that time and sentenced appellant to imprisonment for a term of one to fifteen years.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence rendered at the trial.

STATEMENT OF FACTS

On June 25, 1981, a highway patrol sergeant noticed appellant driving down a hill at a high rate of speed (T. 50). The officer followed the car and called in the license plate number, which identified the plates as stolen (T. 52). A second officer appeared and the two officers then stopped appellant. Appellant's driver's license did not match the car's registration (T. 52) because the car was registered to Eric Wichgram (T. 58). An insurance card in the car also bore Wichgram's name (T. 58).

The serial number found on the car door also did not match the registration card (T. 56). Wichgram, the car's owner, had replaced the car doors and the serial number on the door belonged, of course, to the car from which the door was taken (T. 41).

Despite the conflict in serial numbers, Wichgram proved ownership of the car through extensive testimony (T. 37, 38). He had installed a custom stereo system (T. 40), replaced the seats (T. 40), and installed a clock, tachometer and interior console. Also, he reported the car as stolen, using the correct serial number from the body of the vehicle (T. 43).

The license plate on the stolen car did not belong to Wichgram. The plate had been stolen from a third party,

a relative of appellant's (T. 64, 65). The relative did not loan the plate to appellant and had, in fact, reported it as stolen (T. 65-66).

Appellant claimed that he had traded a motorcycle for the car (T. 56); however, he did not produce a bill of sale, was unable to recall the alleged prior owner's last name, and did not attempt to use this story as a defense at trial.

After counsel was appointed for appellant, he waived the preliminary hearing (R. 1). Appellant then hired his present attorney and moved that the case be remanded for a preliminary hearing (R. 4, R. 18). Appellant later requested that the case be transferred from the Justice of the Peace Court to the Circuit Court (R. 20). After these delays, caused by appellant, arraignment was set for October 6, 1981. Trial was nine days later. The jury found appellant guilty of theft.

Appellant, prior to 1975, had been convicted of another felony (T. 86).

ARGUMENT

POINT I

APPELLANT RECEIVED EFFECTIVE ASSISTANCE FROM COUNSEL IN THE EARLY STAGES OF THESE PROCEEDINGS.

Appellant's original counsel, Charles W. Taylor, was appointed to represent both appellant and his son. In Point

II of his brief, appellant now claims that this dual representation caused Mr. Taylor to be an ineffective advocate.

Appellant claims that Mr. Taylor allegedly encouraged appellant to waive the preliminary hearing, plead guilty, and waive his right to confront witnesses and to trial by jury so that the charges against appellant's son would be dropped. However, these contentions are not supported in the record. Appellant did waive the preliminary hearing (R. 8); however, even in appellant's own affidavit (R. 18), he does not claim that he intended to plead guilty. There is no support in the record for appellant's claim that he waived his right to confront witnesses or to be tried by a jury. In fact, appellant received a jury trial. Also, the record does not support appellant's claim that the charges against his son were dropped at all, let alone in exchange for appellant's waiver of the preliminary hearing. Therefore, despite appellant' assertions to the contrary, the only waiver appellant made was of his statutory right to a preliminary hearing, which he later received anyway.

Although appellant retained his present counsel immediately after waiving the preliminary hearing, he first raises the issue of ineffective counsel on appeal. This Court has stated that it generally will not rule on issues raised for the first time on appeal. State v. Lee, Utah, 633 P.2d

48 (1981); State v. Hales, Utah, ____ P.2d ____ (Case No. 18083, decided July 7, 1982). In this case, appellant could have raised this issue long before even the trial stage since he had new counsel for his preliminary hearing.

In State v. McQueen, 14 Utah 2d 311, 383 P.2d 921, 922 (1963), the defendant for the first time on appeal raised the issue of unlawful search, seizure and arrest. This Court stated:

> We cannot canvas any such issue on appeal here. The state had no opportunity to meet such issues, which were interjected for the first time on appeal. . . . It is obvious that to review such extraneous matter would be offensive to appellate practice and highly prejudicial to the opposition, who had no opportunity to meet it at the trial level (emphasis added).

In the present case, if appellant had properly raised this issue at trial, the state could have examined witnesses to determine whether counsel was in fact ineffective in representing both parties.

In State v. West, 2 Kan. App. 2d 297, 578 P.2d 287 (1978), two brothers were represented at trial by the same attorney. One brother's defense was intoxication, but he could not testify about his condition without implicating the other brother. Since the brothers' defenses conflicted and they made timely motions for separate attorneys, the court held that the defendants were entitled to different attorneys.

In a similar case, the Supreme Court held that the defendants were entitled to separate counsel because their defenses conflicted, the evidence was weak against one defendant, and he had objected to dual representation at trial. Glasser v. United States, 315 U.S. 60 (1942). In both of these cases the defendants objected to dual representation, their defenses conflicted, and the problem occurred at trial. In the present case, the appellant did not object, did not show that his defense would have conflicted, and the representation occurred at the preliminary hearing stage. Also, the evidence against appellant was very strong (he was caught driving a stolen car) (T. 51, 55).

This Court, in State v. Albert, Utah, 584 P.2d 843 (1978), reasoned that when a defendant freely consented to the appointment of counsel and had time to consult with him before pleading guilty, he was not denied adequate counsel. In this case appellant freely consented to Mr. Taylor's appointment and had time to consult with him before waiving his preliminary hearing.

In addition to the fact that appellant failed to timely raise this issue by objecting to the appointment, there is nothing in the record to support the claim of ineffective counsel. Appellant has the burden of showing how his counsel was ineffective and the proof must be a demonstrable reality, not mere speculation. State v. McNicol, Utah, 554 P.2d 203

(1976). Appellant must demonstrate that dual representation caused his attorney to be less effective. State v. Tippetts, Utah, 584 P.2d 892 (1978). Apparently, appellant's counsel is merely speculating that since appellant waived the preliminary hearing and his original counsel represented both appellant and his son, the original counsel must have been ineffective. The record does not reflect any inherent conflict or prejudice to appellant's case. This Court has stated that ". . . we are not inclined to reverse a conviction on matters dehors the record." State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

Even if appellant waived the preliminary hearing so that the charges against his son would be dropped, this does not prove that his attorney was ineffective. In People v. Duran, 498 P.2d 937 (Colo. 1972), the defendant entered a guilty plea so that the charges against his wife would be dropped. He was concerned about the effect on his five children and the possibility of losing custody of them if his wife were convicted. The court accepted the plea because it was not a result of deceit, enhancement or coercion.

In a similar case, Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971), the defendant also pled guilty (as his attorney advised) so that the charges against his wife would be dropped. This Court did not find a conflict in dual representation when the defendant entered his plea. The present case is within the scope of these cases since the

defendants in those cases were pleading guilty while in the present case the appellant merely waived a preliminary hearing. Thus, "the mere fact of multiple representation, standing alone, does not amount to a conflict of interest." People v. Romero, 189 Col. 526, 543 P.2d 56 (1975). Even if appellant did waive his preliminary hearing to help his son, this fact alone does not establish that his counsel was ineffective.

The fact that appellant waived the preliminary hearing is actually irrelevant to his claim of ineffective counsel because no plea can be given at that stage. A preliminary hearing is merely to determine whether there is sufficient evidence to hold the defendant. Crouch v. State, 24 Utah 2d 126, 467 P.2d 43 (1970). In this case, the evidence was certainly sufficient to hold appellant since he was caught "red-handed." Therefore, whether appellant waived the hearing or not, the result would have been the same--he would be bound over to district court for arraignment.

In McGuffey v. Turner, 18 Utah 2d 354, 423 P.2d 166, 167 (1967), this Court stated:

> It is rather difficult to see how a guilty defendant is prejudiced by waiving a preliminary hearing when all that is entailed at the hearing is that sufficient evidence be given to the committing magistrate to cause him to believe that a crime has been committed and that there is probable cause to believe the defendant is guilty thereof (emphasis added).

Similarly, in Seibold v. Turner, 20 Utah 2d 165, 435 P.2d 289, 290 (1967), this Court stated "Under our practice the preliminary hearing is not a critical stage of criminal procedure." See also: State v. Starratt, 153 N.W.2d 311 (N.D. 1967).

This Court, in State v. Gray, Utah, 601 P.2d 918, 920 (1979), held that even if counsel was ineffective, the conviction should not be reversed unless a likelihood exists that different counsel would have caused a different result. This Court thought that the defendant did not "establish anything more than mere speculation as to prejudice becaue of ineffectiveness of his counsel." Appellant's contention is also only speculation, and there is no likelihood that a different attorney would have caused a different result since appellant received a hearing anyway.

This Court confronted the flaw in appellant's contention in State v. Sims, 30 Utah 2d 354, 517 P.2d 1313, 1315 (1974):

> In regard to the defendant's contention that he was denied effective counsel: we are impelled to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of a crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service, when the real difficulty was that he had a guilty client (emphasis added).

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTIONS TO PRODUCE AND DISMISS SINCE THE REQUESTED EVIDENCE WAS UNNECESSARY IN THE DETERMINATION OF APPELLANT'S GUILT.

In Point V of his brief, appellant claims that the trial court abused its discretion by denying appellant's Motion to Produce. Appellant contends that he needed to examine the stolen automobile because, allegedly, a conflict existed in identification of the vehicle. A defendant has no right to examine the state's evidence unless required by statute. Mendelsohn v. People, 353 P.2d 587 (Colo. 1960). Indeed, in this case the car was not to be introduced as evidence at all by the state. The Supreme Court has stated "There is no general right to discovery in a criminal case. . . ." Weatherford v. Bursey, 429 U.S. 545 (1977).

In Utah, the Legislature has set forth discovery rules. Utah Code Ann., § 77-35-16(5) (1981 Supp.) provides that the court shall determine whether defendant is entitled to examine an item of evidence, based on defendant's showing that the evidence is needed to adequately prepare his defense. Thus, the trial court has broad discretion in granting or denying Motions to Produce. State v. Lack, 118 Utah 128, 221 P.2d 852 (1950). Appellant must show that the trial court abused this discretion by denying his motion before its ruling

will be overturned. State v. Oldham, 438 P.2d 275 (Idaho 1968); State v. Tyler, 466 P.2d 120 (Wash. 1970); State v. Lybert, 30 Utah 2d 180, 515 P.2d 441 (1973).

In an apparent attempt to show that the trial court abused its discretion here, appellant quotes a definition of discretion given in Carmens v. Slavens, Utah, 546 P.2d 601, 603 (1976). However, the case is not particularly relevant in this matter, as demonstrated by the final sentence in the paragraph appellant quotes, which appellant failed to include:

> It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy (emphasis added).

This Court was referring to the trial court's failure to allow the defendant to have a trial, a much more serious matter than the denial of a Motion to Produce.

This Court has defined the meaning of "abuse of discretion" in many cases. The judge's actions clearly must be inherently unfair so that no reasonable person could adopt the court's view. State v. Gerrard, Utah, 584 P.2d 885 (1978). It must be clear that the court's decision likely resulted in an injustice to the defendant. State v. Danker, Utah, 599 P.2d 518 (1979). The trial court's determination must clearly appear to be error. State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1972). Respondent contends that appellant has failed to show an abuse of discretion in this case.

There are several ways to analyze whether the trial court abused its discretion in denying appellant's Motion to Produce. First, would the evidence have created a reasonable doubt of appellant's guilt. State v. Wilder, 22 Ariz. App. 541, 529 P.2d 253 (1974). In this case, appellant was apprehended when driving a stolen vehicle. The license plates were stolen from another vehicle belonging to one of appellant's relatives (T. 64, 65). While it is true the serial number from the car door did not match the registration, appellant knew that this alleged conflict existed without examining the car. He was able to introduce a police officer's testimony at trial affirming that the serial number on the door did not match the registration. Thus, he was able to use any identification conflict to his advantage at trial to attempt to create reasonable doubt of his guilt. It was unnecessary for appellant to actually examine the car to bolster his apparent but unstated claim that the car was not stolen. The alleged conflict was easily explainable because the car doors had been replaced; therefore the serial number did not match. In fact, appellant surely realized this since the copy of the title for the serial number from the car door was registered "inactive" (R. 27). An examination of the car would have created no more doubt than the testimony of the conflict given by an uninterested witness did, and thus was unnecessary.

The second test is whether it was prejudicial or unfair to appellant to deny his motion. In State v. Stewart, Utah, 544 P.2d 477 (1975), the police erased a tape made during a drug sale. Since the defendant denied that there was a sale, the fact the tape was erased was immaterial. It was not vital to the issue of guilt. In this case, appellant made no claim at trial that the car was not stolen, or was not owned by Eric Wichgram. In fact, he has made no showing at all that the evidence was vital to the issue of guilt or material to his case. State v. White, 98 Idaho 781, 572 P.2d 884 (1977). The owner of the car identified it extensively at trial through the custom work he performed on it such as mechanical repairs, replacing the seats and doors, and installing a stereo system. There was no real doubt that he was the owner and that appellant had stolen the automobile, thus it was not prejudicial to appellant's case to deny the motion.

The third test requires appellant to establish that the evidence would be favorable to him. State v. Ward, 98 Idaho 571, 569 P.2d 916 (1977); State v. Oliverez, 34 Or. App. 417, 578 P.2d 502 (1978). In State v. Koennecke, 545 P.2d 127 (Or. 1976), defendant was charged with attempted murder for firing a gun at a police officer. His defense was that a second officer at the scene was the person firing at the officer. The court denied his motion for discovery of the

officer's guns because the defendant failed to show that testing of the revolvers would disclose any favorable evidence. In this case, too, appellant has failed to show how an examination of the car would produce evidence favorable to him. Also, any potential probative value in examining the car was far outweighed by the burden of producing the car, then in Maryland.

Appellant further contends that the trial court erred in not granting appellant's Motion to Dismiss. Again, appellant is relying on the fact that the serial number on the car door did not match the registration. Respondent contends that appellant's Motion to Dismiss was properly denied.

Utah Code Ann., § 76-6-404 (1953), as amended, states:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

In this case, the state proved the requisite elements of theft. Appellant cites State v. Hall, 105 Utah 162, 145 P.2d 494 (1944), in which this Court states that the goods found in defendant's possession must be identified as the goods stolen. In that case, which involved the theft of some cases of spark plugs, the state had failed to show that the spark plugs in defendant's possession were the ones which were stolen. In

the present case, the state did prove that the car in defendant's possession was "the property of another" and was stolen. The state proved this through the registration and insurance cards found in the vehicle, the owner's extensive testimony, photographs of the vehicle, and the fact that appellant did not claim to own the car at trial. It was not necessary that the state actually prove who owned the car. In State v. Simmons, Utah, 573 P.2d 341, 343 (1977), this Court remarked that the Utah theft statute:

> does not require the state to conclusively prove who owned the property in question, only that the accused obtained or exercised unauthorized control over the property of another.

Ownership proof is simply not an element that the state must prove. The trial court merely left the alleged weakness in identification evidence to the jury to be a factor in creating any possible reasonable doubt. State v. Buckley, 557 P.2d 283 (Montana 1976).

Further, appellant has not challenged the sufficiency of the evidence to sustain his conviction. He did not present any defense. Thus it is difficult to see how an examination of the car would have aided in his case. State v. Ambrose, Utah, No. 16148, decided February 7, 1980 (unreported).

Finally, appellant claims that his proposed jury instruction number 3 should have been given; however, appellant failed to include it in the record designated on appeal, as required by Rule 76(a)(1), Utah Rules of Civil Procedure. In Watkins v. Simonds, 14 Utah 2d 406, 385 P.2d 154 (1963), this Court held that when the record is devoid of evidence, it is assumed that the court below found a sufficient basis to support and justify its findings. Thus, it can be assumed the trial court correctly refused to give appellant's requested jury instruction.

POINT III

APPELLANT RECEIVED A SPEEDY TRIAL AND PRELIMINARY HEARING WITHIN THE STATUTORY REQUIREMENT.

In Point III of his brief, appellant contends he did not receive a speedy trial, as required by the Sixth and Fourteenth Amendments to the United States Constitution. Klopfer v. North Carolina, 386 U.S. 213 (1967). However, the Supreme Court has not set a specific time limit in determining when a defendant has not had a speedy trial. Barker v. Wingo, 407 U.S. 514 (1972). The Utah Legislature, in Utah Code Ann., § 77-1-6(h), has set a time limit requiring that trials must be held within thirty days after arraignment "if the business of the court permits."

In this particular case, appellant was arrested on June 25, 1981. His trial was held on October 10, 1981. Appellant waived his original preliminary hearing in Justice of the Peace Court on July 17 (R. 1). At his arraignment in District Court on July 28, appellant requested that the case be remanded to Justice of the Peace Court for a preliminary hearing (R. 18). Again, at appellant's request, the case was transferred from the Justice of the Peace Court to the Circuit Court for preliminary hearing, which was held within ten days after transfer thereto (R. 5). Appellant also filed a Motion to Dismiss, in part alleging that he had not received a speedy trial. The motion was denied on October 6, 1981; appellant's arraignment was held the same day. Appellant's trial date was October 15, 1981, nine days after his arraignment and, contrary to appellant's contention, well within the thirty-day limit set by statute.

Any pre-trail delay in this case was clearly caused by appellant and was for his benefit. He initially waived his preliminary hearing and requested that the case be remanded for a preliminary hearing; he also requested the transfer to Circuit Court. The delay occasioned by the transfers was caused in an effort to accommodate appellant and cannot be included in computing the time before trial. State v. Velasquez, Utah, 641 P.2d 115 (1982); State v. Baker, Utah, Case No. 17288, decided March 3, 1982 (unreported); Taggard v.

State, 500 P.2d 238 (Alaska 1972); State v. English, 594 P.2d 1069 (Hawaii 1978); Woods v. State, 588 P.2d 1030 (Nevada 1979); and State v. Cuzze, 225 Kan. 274, 589 P.2d 626 (1979). Therefore, the time period between remanding the case for preliminary hearing and the arraignment was not an unreasonable delay in the proceedings.

Even the balancing test set forth by the Supreme Court in Barker, supra, adopted by this Court in State v. Hafen, Utah, 593 P.2d 538 (1979), yields the same result. That test includes four factors: the length of the delay, the reason therefor, whether defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. In Barker, the length of the delay was 5 years; in Hafen it was almost 8 months. In those cases, as the present one (3-1/2 months' delay), the length of delay was not conclusively too long. The reason for the delay, as mentioned above, was for appellant's benefit and at his request. Appellant did assert his right to a speedy trial--and received one within the statutory thirty days; and appellant was not prejudiced. He was effectively represented by counsel, as discussed in Point I. Also, appellant had no real need to examine the stolen automobile, as discussed in Point II, and thus the delay did not prejudice him in this respect.

A factor this Court considers is whether the delay was intentionally caused by the prosecutor. If the defendant

was not prejudiced and the delay was unintentional, this Court has found that the defendant received a speedy trial. State v. Rasmussen, 18 Utah 2d 201, 418 P.2d 134 (1966); State v. Archuletta, Utah, 577 P.2d 547 (1978). In this case, appellant does not contend, and the record does not reflect any intentional delay caused by the state.

This Court, in Rasmussen, supra, stated that the 30-day extension is not mandatory. Instead, each case should be examined in light of its facts. Since appellant received his trial within thirty days after arraignment, was not prejudiced by any delay, caused the delay himself, and any delay was unintentional, he was not denied a speedy trial.

The same analysis applies to appellant's allegation that he was not given a preliminary hearing until after the 10-day limit of Utah Code Ann., § 77-35-7(c). As shown above, after appellant's requested transfer of the case to the Circuit Court, the preliminary hearing was held within the ten-day limit (R. 5). Since all the delay up to that point was caused by the appellant, he cannot be heard to complain on appeal that he was prejudiced by the delay.

Of course, there is no constitutional right to a "speedy preliminary hearing," but merely a statutory entitlement to such a hearing, if not waived, within ten days of the initial appearance before a committing magistrate if

the defendant is in custody. Where this is the case, the appellant must clearly establish prejudice in order to prevail on his claim. Cf. Crowe v. State, Utah, ____ P.2d ____ (Case No. 18227, decided May 25, 1982). In this case, appellant has not met this burden and thus his conviction should be affirmed.

POINT IV

APPELLANT'S AUTOMOBILE WAS PROPERLY STOPPED SINCE THE LICENSE PLATES WERE STOLEN.

In Point I of his brief, appellant claims that the police officer stopped his car on mere suspicion, which violated his constitutional rights. Appellant cites Mallory v. United States, 354 U.S. 449 (1957) and Beck v. Ohio, 379 U.S. 89 (1964) for the proposition that "mere suspicion is not sufficient to establish probable cause for a stop despite the good intentions of an office." However, appellant's application of those cases is incorrect. Both Mallory, supra, and Beck, supra, refer to good faith and probable cause when arresting someone, not merely stopping someone.

The Supreme Court, in Delaware v. Prouse, 440 U.S. 648 (1979), set guidelines for police officers when stopping automobiles. The officer must have an "articulate and reasonable suspicion" that a violation of law exists. In that

case, the officer did not suspect the driver of violating any law. He stopped the car only because he was not busy at the time. The Court felt that the officer violated the driver's rights when he stopped the automobile without having an articulate and reasonable suspicion that the driver had broken a law.

Utah Code Ann., § 77-7-15 also requires an officer to have a reasonable suspicion that a person has committed or will commit an offense before stopping him. The Utah Supreme Court, in State v. Torres, 29 Utah 2d 269, 508 P.2d 534, 536 (1973), stated a test for reasonableness:

> . . . that is, whether fair-minded persons, knowing the facts, and taking into consideration not only the rights of the individuals involved in the inquiry or search, but also the broader interests of the public to be protected from crime and criminals, would regard the conduct of the officers as being unreasonable.

In that case, police officers received a radio report that a robbery had just occurred. Minutes later, the police stopped two men in a car. The court thought the stop was reasonable since the car was in the area where the robbery occurred, although the report did not contain a description of any automobile.

The courts have held that police stops are reasonable in many situations: when defendants appeared to be casing a shop, Terry v. Ohio, 392 U.S. 1 (1968); when police

received a tip that some member of a family would be making a "marijuana run," State v. Ballesteros, 531 P.2 1149 (Ariz. 1975); when defendant attempted to avoid the officer, State v. Baltier, 498 P.2d 515 (Ariz. App. 1972); and when a driver appeared to be unfamiliar with his car (although the car had not been reported stolen). United States v. Solomon, 528 F.2d 88 (1975).

In a recent Utah decision, State v. Elliott, Utah 626 P.2d 423 (1981), the defendant had attempted to sell tires and automobile accessories at very low prices to a service station to pay for gasoline. The Court thought the police officer was justified in stopping the vehicle although a license plate check had revealed that the truck was not stolen. In all of these cases, a reasonable suspicion of defendant's activity was adequate for the police to make a stop.

In the present case, the officer saw the defendant's automobile "coming down the hill at a high rate of speed" (T. 50). When the officer began to overtake the car, it slowed down (T. 50). On these facts alone, the officer was justified in stopping the defendant for a speeding violation; but as a precaution, the officer checked the license plate to see if the car was stolen (T. 50). When the license plate was reported as stolen, the officer stopped the vehicle (T. 52, 5). In this case the officer had even more grounds for

reasonable suspicion than in Torres, supra, where the defendants were merely in the vicinity of a robbery, and in Elliott, supra, where the license plate was reported as not stolen.

Under these facts, the officer's conduct was clearly reasonable in stopping the car. In fact, he would have been neglecting his duties as a police officer if he had not stopped the automobile bearing stolen license plates. Thus, appellant's Motion to Suppress Evidence resulting from the stop was properly denied.

POINT V

THE TRIAL COURT CORRECTLY RULED THAT HABEAS CORPUS WAS INAPPROPRIATE TO RAISE A SPEEDY TRIAL ISSUE.

In Point IV of his brief, appellant claims that the trial court abused its discretion by denying his petition for habeas corpus. In his statement of facts, appellant further claims that the trial court held that a motion to dismiss, not habeas corpus, was the appropriate method to raise the issue of lack of a speedy trial. However, appellant failed to designate any portion of the habeas corpus proceedings on appeal and therefore it is impossible to ascertain why the writ, if any, was denied.

Assuming appellant did petition for habeas corpus, the trial court did not abuse its discretion in requiring

appellant to file a motion to dismiss, rather than habeas corpus proceedings. A writ of habeas corpus is used in unusual circumstances, as when a court lacks jurisdiction, the prosecutor has fabricated evidence, or there is a substantial failure of due process. Gallegos v. Turner, 17 Utah 2d 273, 409 P.2d 386 (1965).

In Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121, 122 (1967), this Court discussed habeas corpus, stating:

> The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law or where some other such circumstance exists that it would be wholly unconscionable not to re-examine the conviction.

This standard was reiterated with approval in Gentry v. Smith, Utah, 600 P.2d 1007 (1979), overruled on other grounds. The writ of habeas corpus is to be used "only in circumstances which cannot be adequately dealt with by the ordinary rules of procedure." Syddall v. Turner, 20 Utah 2d 263, 437 P.2d 194 (1968).

In this case, habeas corpus was properly denied for two reasons. First, appellant fails to claim that the court lacked jurisdiction, or that the requirements of law were so

distorted that he was substantially and effectively denied due process. Second, appellant's claim of lack of speedy trial could be adequately dealt with using ordinary procedural rules.

Rule 65B, Utah Rules of Civil Procedure, states:

> (a) . . . Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these Rules, on any one of the grounds set forth in subdivisions (b) and (f) of this Rule (emphasis added).

(Rule 65B(f), cited in appellant's brief on page 10 concerns habeas corpus.)

Utah Code Ann., § 77-35-25, headed "Dismissal without trial," states:

> (a) In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.
>
> (b) The Court shall dismiss the information or indictment when:
> (1) There is unreasonable or unconstitutional delay in bringing defendant ot trial;

In this case, a motion to dismiss was the plain, speedy and adequate remedy which made habeas corpus inappropriate.

In other jurisdictions, the courts have also held that a motion to dismiss is the correct method of raising a speedy trial issue. Mann v. United States, 304 F.2d 394

(1962); People v. Murphy, 212 Ill. 584, 72 N.E. 902 (1904); State v. Cuzick, 5 Ariz. App. 498, 428 P.2d 443 (1967); People v. Wilson, 32 Cal. Rptr. 44, 383 P.2d 452 (1963); Application of Morris, 369 P.2d 456 (Nevada 1962).

In Ex Parte Douglas, 95 P.2d 560 (Ariz. 1939), the court stated several reasons for requiring a motion to dismiss before petitioning for habeas corpus. The motion would be made to the court in which the case was pending; that court could best ascertain reasons for delay in the proceedings. That court could also make a proper record to include in the criminal proceedings. Also, a motion to dismiss is more direct, takes less time and is less expensive.

There are other circumstances, somewhat similar to the facts herein, in which habeas corpus is inappropriate. Several courts have held that a defendant should file a motion to suppress to challenge evidence rather than petitioning for habeas corpus when claiming an illegal search. State v. Smith, 391 P.2d 849 (Idaho 1964); Dahl v. Sheriff, 553 P.2d 949 (Nev. 1976); In re Anders, 158 Cal. Rptr. 661, 599 P.2d 1364 (1979). When a defendant wishes to challenge the bail amount set, courts have held it must be done by a motion to reduce bond, not by habeas corpus. Petition of Grady, 530 P.2d 461 (Montana 1974); State v. Dunnan, 223 Kan. 428, 573 P.2d 1068 (1978). Thus, habeas corpus is not a suitable remedy in situations which can be dealt with instead by filing a motion.

Appellant had no real grounds for habeas corpus anyway. He was not denied a speedy trial, as discussed in Point III. By improperly attempting to secure habeas corpus relief instead of utilizing a motion to dismiss, appellant actually caused even more delay before trial. Appellant received a hearing on his motion to dismiss based on the same claims as in his habeas corpus petition, and the motion was denied (R. 20) since appellant caused any delays before trial. Either through habeas corpus or a motion to dismiss, the result would have been the same since there was no merit in appellant's speedy trial claim. Thus, appellant has failed to establish any prejudice and this claim lacks merit.

CONCLUSION

For the reasons stated above, appellant's conviction and sentence should be affirmed. He received effective assistance of counsel, he did not need to examine the stolen vehicle to prepare his defense, he had a speedy trial, he was properly stopped for stolen license plates, and his petition for habeas corpus was not a proper method to raise his speedy trial issue.

Respectfully submitted this 6th day of August, 1982.

DAVID L. WILKINSON
Attorney General

Robert N. Parrish

ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Marlynn Bennett Lema, Attorney for Appellant, 108 North 400 West, P.O. Box 1026, Price, Utah, 84501, this 9 day of August, 1982.

Susan Patton