1983

State of Utah v. Edward Houser : Brief of Respondent

Utah Supreme Court

John W. Ebert; Attorney for Appellant;
David Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18128
EDWARD HOUSER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction of Theft by Receiving, a second-degree felony, and of Carrying a Concealed and Dangerous Weapon, a third-degree felony, in the Third Judicial District Court in and for Salt Lake County, the Honorable David B. Dee, Judge, presiding.

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

Attorneys for Respondent

LINDA E. CARTER
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

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236 State Capitol
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LINDA E. CARTER
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333 South 200 East
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Attorney for Appellant

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Carrying a Concealed Dangerous Weapon, a third-degree felony, pursuant to Utah Code Ann., § 76-10-504 (1953), as amended, in Count I; and with Theft by Receiving, a second-degree felony, pursuant to Utah Code Ann., § 76-6-408 (1953), as amended, in Count II of the Information.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury on July 15, 16 and 20, 1981, the Honorable David B. Dee presiding. A Motion to Suppress the evidence gained at the time of appellant's arrest on January 1, 1981 was heard on July 15, 1981 and denied. Appellant was found guilty on both counts by the jury on July 20, 1981. Sentence of concurrent, indeterminate terms of not more than five years on Count I and of not less than one nor more than fifteen years on Count II was imposed on November

5, 1981. Fines of $5,000 and $10,000, respectively, were also imposed.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the court below and denying appellant's requests for a new trial and, in the alternative, acquittal.

STATEMENT OF THE FACTS

The home of Dr. and Mrs. Thomas Broadbent was burglarized on December 14, 1980, sometime between the hours of 1:00 and 4:00 p.m. (R. 152-153). Among the items missing were: an engraved desk set (R. 161, 232), Salt Lake Clinic identification cards (R. 163, 232), a birth certificate for Stephanie Broadbent (R. 164, 232), a check made out to Dr. Broadbent (R. 163, 232), several pieces of jewelry (R. 170-171, 230, 232), a coin purse containing coins (R. 170), a sterling box (R. 233), and a pocket watch on which were the Duke University crest and Dr. Broadbent's initials (R. 229, 237). Two spent bullets were found in the home although no blood was found (R. 156).

According to the testimony of appellant, he obtained the items listed above from the perpetrators of the burglary (R. 305-306). Appellant testified that on December 14, 1980, a man named Ralf Schimerald and a companion, Lynette Gillman, arrived at appellant's residence at 717 South 200 East in

Salt Lake City in a taxi (R. 293). Although appellant no longer actually resided at that address, he testified that he was there investigating a robbery that had been reported to him by his girlfriend (R. 292). Some of appellant's belongings remained at the house (R. 294). When Ralf and Lynette arrived appellant went out to help Ralf inside because Ralf had apparently been shot (R. 294). Ralf and Lynette told appellant that Ralf had shot himself during a burglary (R. 297). Ralf and Lynette had brought with them the stolen goods from the burglary. Appellant saw the name of Dr. Broadbent on some of those items (R. 319), although he also testified that he didn't know to whom the items belonged on December 14 (R. 302). Lynette began sorting the items into piles and asked appellant to help her find out if the goods were "precious metals" and to sell them (R. 296-297). Appellant refused to do that but told Lynette where she might get the information (R. 297). Lynette and appellant left Ralf at the house and went downtown so appellant could point out the places where Lynette might sell the stolen goods (R. 298-299). Lynette did not take the goods with her at that time because it was too late in the day (R. 300). Appellant did not return to the house with Lynette that day (R. 300). Instead, appellant purchased some sandwiches for Lynette and left her at a nearby Miniature-Mart (R. 300). Lynette offered to leave some of the stolen property at appellant's home, but appellant declined that offer (R. 300-301).

Appellant returned to 717 South 200 East two or three days later and found Ralf and Lynette gone (R. 301). Ralf had left behind his bloody clothes, a mink stole and a sawed-off rifle (R. 301, 338). The rifle was located in a crawl space below the floor, inside the bedroom closet (R. 338). None of the Broadbent property was seen by appellant in the house at that time (R. 341). Appellant left the gun and other items just as he found them (R. 301). When appellant again returned to the house two days later, the gun and the mink were gone (R. 387).

On December 31, 1980, appellant went to his sister's house at 100 South and 800 West to borrow her car (R. 302). Appellant arrived at about 5:30 p.m. (R. 303). There were a dozen or so other people there (R. 303). Ralf Schimerald and Lynette Gillman arrived there at about 6:00 p.m. (R. 303). Ralf had the stolen goods from the Broadbent burglary with him (R. 304) and was selling the goods at very low prices (R. 304). At that time, according to appellant, he bought some of the property from Ralf for $50.00 (R. 306). Appellant put the items he had purchased into a backpack and left his sister's home after about an hour, returning to his own residence (R. 307). At one point, appellant said that he told Julie, his girlfriend, that he bought the stolen goods from Ralf (R. 347), but at a later time, appellant said he did not tell Julie because he did not want to get her involved (R. 375).

From his home, appellant, Julie and his daughter, Mercede, went to a party (R. 308). After the party, they had car trouble and were unable to leave immediately (R. 309). When the car was repaired, appellant, Julie, Mercede and Julie's father, who had come to help with the car, drove to 717 South 200 East (R. 310). They found that appellant's parked car had been broken into and that the house had again been burglarized (R. 311). Because it was 4:00 a.m. and appellant was tired, he did not call the police (R. 312). Appellant testified that calling the police just isn't done (R. 312). Appellant saw the sawed-off rifle in the trunk of his car at that time (R. 385). He found another gun on the ground outside the bedroom window where the burglars had apparently dropped it (R. 311). Julie gave appellant a pen which he used to pick up the gun, thus avoiding placing any fingerprints on the gun (R. 312). According to appellant, he intended to use the gun, and any prints found on it, to trace the burglars (R. 312). For that reason, appellant put the pistol inside his backpack. Although he allegedly intended to have the police department run a check on the pistol, appellant did not call the police (R. 313).

The next day, January 1, at approximately 2:00 p.m., appellant, Julie and Mercede left the house to get something to eat (R. 314). Appellant took the backpack with him so that the burglars would not steal it if they returned (R. 383-384).

Everything appellant had placed inside the backpack the night before remained there (R. 314, 383-384). Appellant testified that he did not remember the gun was in the backpack when he left home (R. 314). His testimony was contradictory as to when he remembered the pistol was inside the backpack. At one point, appellant said he remembered the gun while at the Miniature-Mart (R. 314), but later he said he remembered it while on his way to the market (R. 327-328). Appellant decided not to take the gun out of the backpack or to take it back to the house (R. 315, 328).

At approximately 4:00 p.m. on January 1, appellant was observed walking down the street near 717 South 200 East pushing a hand truck (R. 181). Officer DeWitt watched appellant place the hand truck in a white station wagon (R. 183). As he observed appellant, DeWitt felt that appellant's activities warranted further investigation. There were several reasons that DeWitt decided to stop appellant: (1) DeWitt knew appellant and knew that he had a record (R. 189); (2) DeWitt knew appellant had been evicted from the 717 South 200 East home (R. 197); (3) DeWitt felt he had seen all of appellant's possessions at that time and that appellant did not have a hand truck (R. 189); (4) there was not much pedestrian traffic on the street (R. 194); (5) it seemed strange to DeWitt to see appellant pushing a hand truck down the street (R. 195); (6) appellant's former landlord had

asked that appellant be arrested if he returned to the house and appellant was heading in that direction when DeWitt stopped him (R. 197); (7) based on what he knew of appellant's record, DeWitt believed appellant had been involved in crimes previously and might possibly become involved in a crime in the near future (R. 204).

While DeWitt was questioning appellant, his partner went over to the car to look at the hand truck (R. 195). Appellant told DeWitt that the hand truck was not his, but that he had found it and he could use it to move so he took it (R. 183). The partner then radioed back to DeWitt telling him that the hand truck had the name "Stokes Brothers" on it (R. 195). The officers then seized the hand truck and attempted to have someone at Stokes Brothers contacted (R. 194). Unable to do that and believing that appellant had stolen the hand truck, the officers placed appellant under arrest for theft of the hand truck (R. 185, 194). Appellant was walking in a direction headed away from Stokes Brothers when he was stopped (R. 184).

At the time of appellant's arrest, the officers searched appellant's backpack (R. 174). Inside the backpack was found the Broadbent property listed above and a .22 H & R revolver (R. 175, 177, 178, 247). Appellant was charged with theft by receiving and carrying a concealed dangerous weapon as a result of the search (R. 20).

After his arrest, and being advised of his rights, appellant gave a statement to Detective Gillies (R. 240-241). Appellant said then that he had gotten the property from the perpetrators of the Broadbent robbery but did not say he had bought it from them or when he had gotten it (R. 363). Appellant and Detective Gillies went to 717 South 200 East where the engraved pen set was recovered (R. 255-256). Some other jewelry was recovered and turned in to Detective Gillies on January 12, 1981 (R. 268). Detective Gillies told appellant on January 8 that he expected recovery of the property from the Broadbent robbery and testimony against Ralf and Lynette in return for favorable treatment in this case (R. 269-270). Appellant never testified and never brought in any other property after January 12 (R. 273). Appellant did turn in a mink cape to another officer, Bruce Smith (R. 288). He also gave Officer Smith information on the location of Ralf Schimerald, but Ralf was not found as a result of that information (R. 289). The sawed-off rifle used by Ralf Schimerald during the burglary was later found in appellant's car by Smith on appellant's instructions although, according to appellant, he knew the gun was there when he and Detective Gillies had gone to the house on January 5 (R. 383, 385).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED WITHOUT WARRANT.

Appellant claims that the evidence presented at trial was improperly seized by law enforcement officials and, therefore, should not have been admitted at trial. To support this claim, appellant argues first that the officers had no sufficient reason to stop and question appellant when they observed him near 717 South 200 East on January 1, 1981. Second, appellant's car was illegally searched prior to his arrest because the facts of this case do not fit the plain view doctrine. Third, there was no probable cause to arrest appellant; and fourth, the search of appellant's backpack was illegal due to the lack of sufficient reason to question or arrest appellant. For these reasons, appellant contends, the evidence admitted at trial was illegally seized and should have been suppressed.

It is important to note here that it is the responsibility of the trial court to determine the admissibility of evidence and the reasonableness of the search and seizure of that evidence. The ruling of the trial court on this matter is presumed to be correct and should not be disturbed unless it was clearly in error. See State v.

Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968) and cases cited therein; and see State v. Torres, 29 Utah 2d 271, 508 P.2d 534 (1973).

Although none of the evidence in this case was seized nor the arrest made pursuant to warrants, both fit within recognized exceptions to the general rule that a warrant must be obtained prior to all searches, seizures and arrests. The detention of appellant for questioning and the subsequent seizure of evidence and arrest of appellant were reasonable under the circumstances of this case. The evidence was, therefore, properly admitted.

A. THERE WAS SUFFICIENT JUSTIFICATION TO DETAIN APPELLANT BASED ON A REASONABLE BELIEF THAT A CRIME HAD BEEN COMMITTED OR WAS IN PROGRESS.

The threshold question to be considered before analyzing the issue of the seizure of the evidence is whether the stop and questioning of appellant was proper. Utah Code Ann., § 77-7-15 (1953), as amended, provides:

> 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 actions.

Further, under Terry v. Ohio, 392 U.S. 1 (1968), an officer may stop a person and investigate his suspicious actions when the officer has a reasonable, good faith belief, based upon

articulable facts that the officer's actions are warranted. An "informal arrest" or brief detention is permitted where the circumstances do not constitute probable cause for arrest, but there is need for a temporary detention to investigate and obtain more information about a person's suspicious activities. The United States Supreme Court has stated:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143 (1972). See also: State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). The informal arrest or temporary detention is an "intermediate response" so that a police officer "who lacks . . . probable cause to arrest [need not] shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, supra.

This Court has also said that:

> When a police officer sees or hears conduct which gives rise to a suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

State v. Folkes, Utah, 565 P.2d 1125, 1127 (1977); State v. Whittenback, Utah, 621 P.2d 103, 105 (1980).

The articulable facts in this case supporting an "informal arrest" or stop of appellant include: (1) the officer knew of appellant's reputation and that appellant had a record although he did not know the exact contents of that prior record (R. 189, 195); (2) the officer knew that appellant no longer lived in the area because he had been present when appellant was evicted (R. 189, 197); (3) the officer did not believe appellant owned the hand truck he was pushing because the officer felt he had seen all of appellant's possessions (R. 189); (4) there was not much other activity on the street (R. 194); (5) it seemed strange to the officer that appellant would be pushing a hand truck down the street (R. 195); (6) the owner of the residence from which appellant had been evicted a few days earlier had asked that appellant be arrested for trespassing if he returned to the property, and appellant was heading in the direction of the house at the time the officer stopped him (R. 197); (7) based on what the officer knew of appellant's prior record, he believed appellant had been involved in crimes previously and might possibly become involved in a crime in the near future (R. 204). These facts together with rational inferences, reasonably support a temporary detention to investigate appellant's actions.

Appellant attempts to discount the officer's factual basis for stopping him by analyzing each fact separately. It

would be unfair to assume that the officer would have stopped appellant for any one of the reasons articulated where the officer testified that it was all of those facts, taken together, that were the motivation for the stop. These facts should be considered in the light in which they appeared to the officer at the time of the stop when determining whether the officer was justified under the circumstances.

This Court has previously considered the "informal arrest" or stop and detention situation in State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). In that case, the Court said "that the test to be applied on the question as to whether" appellant's constitutional rights have been abridged:

> . . . is one of 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 [footnote omitted].

See also: Terry v. Ohio, supra. Furthermore,

> The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense. State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259 (1972).

State v. Whittenback, Utah, 621 P.2d 103, 106 (1980).

In this case, taking into consideration all of the facts and appellant's constitutional right to be free from unreasonable searches, the stop and questioning of appellant was reasonable. Although an officer cannot base such a stop on "mere curiosity, rumor or hunch," In Re Tony C., 582 P.2d 957, 959 (Cal. 1978), the officer in this case had a more substantial basis for the stop. The officer knew appellant and knew of his record. This, combined with the unusual activity in which appellant was engaged on New Year's Day and the fact that appellant was headed toward a location where the officer knew appellant had no legal right to be, was sufficient to justify a fair-minded person inquiring into the circumstances of that activity, even where that person was not aware of the exact contents of appellant's record. The officer need not know that a crime has occurred and that appellant is guilty; he need only reasonably suspect that one has occurred or is occurring and that appellant is involved in its occurrence under § 77-7-15. Therefore, although the officer did not have probable cause to arrest appellant at the time he stopped appellant for questioning, the officer did have reasonable justification to stop appellant and inquire about the activity in which appellant was engaged.

B. THE OBSERVATION OF THE HAND TRUCK IN OPEN VIEW WITHIN APPELLANT'S VEHICLE WAS NOT A SEARCH AND, THEREFORE, DID NOT VIOLATE THE FOURTH AMENDMENT.

Appellant argues that the observation of the hand truck while it was inside his vehicle did not meet the standards of the "plain view" doctrine and therefore was an illegal search and seizure. The evidence at trial, however, was clearly contrary and met the standards of both the "plain view" and "open view" doctrines.

"Open view" and "plain view" have been distinguished by this Court. State v. Lee, Utah, 633 P.2d 48 (1981). In the "open view" situation, the object under observation is not subject to a reasonable expectation of privacy because the object is in a position lawfully accessible to the public. State v. Echevarrieta, Utah, 621 P.2d 709 (1980). Thus, stolen property clearly visible through an unobstructed window of a camper and obvious to anyone who happened to be walking nearby is in "open view." State v. Lee, supra. See also: State v. Coffman, Utah, 584 P.2d 837 (1978); State v. Martinez, 28 Utah 2d 80, 498 P.2d 651 (1972). Because in the "open view" situation the observation takes place from a nonintrusive vantage point, no search within the meaning of the constitutional provisions is involved. State v. Lee, State v. Coffman, both supra; State v. Folkes, Utah, 565 P.2d 1125 (1977); State v. Seagull, 632 P.2d 44 (Wash. 1981); State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981).

The hand truck in this case falls within the "open view" doctrine. The officer was standing outside appellant's

car looking at the hand truck which was knowingly exposed to the public by being placed in a position where it could be seen from the outside of the car. There is no evidence that the view of the hand truck or its lettering was obstructed in any way. In fact, the evidence is that the view was not obstructed because the officer testified that his partner was able to view the hand truck and its lettering without entering the car. The officer who testified stated that his partner did not enter appellant's car until after he saw the hand truck, read the lettering and conveyed that information over the walkie-talkie. The partner did not conduct a search, but did what any person nearby could have done; he looked through the car window and saw the evidence. The observation of the interior of a car through a window or open door does not constitute a search. State v. Lee, supra, at 51; see also: State v. Ballenberger, Utah, 652 P.2d 927 (1982). To search is to look into or over carefully and thoroughly in an effort to find or discover. State v. Echevarrieta, Utah, 621 P.2d 709 (1980). Because there was no search, only an observation of evidence in open view, the hand truck was legally seized and could be admitted into evidence.

Alternatively, the "plain view" doctrine can be applied to the facts of this case. "Plain view" is the term uniformly given to the doctrine invoked as justification for seizing evidence which officers see in the course of an

investigation or arrest which they detect without making a physical search. State v. Lee, State v. Folkes, State v. Echevarrieta, all supra; see also: Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968). "Plain view" refers to observations which take place after police lawfully intrude--with a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present--into activities or areas as to which there is a reasonable expectation of privacy. Coolidge, supra; State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981).

The Court in Coolidge, supra, explained:

> What the "plain view" cases have in common is that the police officers in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

403 U.S. at 466. Generally, under the "plain view" doctrine, the police officer must have prior justification to be in the position to view the evidence; discovery of the evidence must be inadvertent; the evidence must not be obstructed from the officer's sight; and the evidentiary value must be immediately apparent to the officer. State v. Shinault, 584 P.2d 1204 (Ariz. Ct. App. 1978).

More recently, this Court listed the justifications for a warrantless seizure as:

> (1) the officer is lawfully present where the search and seizure occur; (2) the evidence is in plain view; and (3) the evidence is clearly incriminating.

State v. Romero, Utah, 660 P.2d 715, 718 (1983). The court stated in footnote 3 of that opinion that the fourth requirement discussed in Coolidge v. New Hampshire, 403 U.S. at 469, of inadvertent discovery was purposely omitted in the Romero opinion. The reasons given for that omission were that inadvertence was listed by only a plurality of the justices in Coolidge and was completely omitted as a requirement in a more recent decision, Washington v. Chrisman, 455 U.S. 1 (1982). Thus, it appears that inadvertent discovery is not a requirement of the "plain view" doctrine.

Appellant's assertion that the observation of the hand truck does not meet the standards of the "plain view" doctrine is twofold. First, appellant claims that the observation of the hand truck was not inadvertent. Second, the officer had no legal right to be where he was at the time the hand truck was observed.

That the officers were legitimately in the area may be easily established. The officers were on a public thoroughfare when they observed appellant pushing the hand truck down the street. The officers did not follow appellant into his home or any other private area. Appellant was stopped on a public sidewalk where any person had a right to

be. There was no evidence that the officer was required to intrude upon private property to observe the hand truck inside of appellant's car. The United States Supreme Court has said that a person has no justified expectation of privacy in an area knowingly exposed to the public; thus, what a person knowingly exposes to the public is not protected by the Fourth Amendment. Katz v. United States, 389 U.S. 347, 351 (1967).

That the observation of the hand truck was not inadvertent is patently absurd. Appellant seems to say that as long as the officers were watching him push the hand truck down the street, the observation was inadvertent; but that once the hand truck was placed inside the car, in open view, the officers no longer could legally view it because if they walked over to the car, the observation was no longer inadvertent. Furthermore, because inadvertent discovery appears no longer to be a requirement of the plain view doctrine, even if the discovery of the hand truck was not inadvertent, it remains within the plain view exception in warrantless searches.

Appellant further claims that even if the observation was inadvertent, the evidentiary value of the hand truck was not immediately apparent when the evidence was first observed. The evidentiary value was not apparent, according to appellant, until the lettering was observed. However, the officers could have rationally concluded that the hand truck

had evidentiary value without knowing that the words "Stokes Brothers" were printed on it. The hand truck, if stolen or used in the commission of a crime, would have evidentiary value even if there had been nothing printed on it. Where appellant was suspected of criminal activity involving the hand truck in any way, the officers could have immediately determined that the hand truck had evidentiary value. The officer, therefore, could not be expected to ignore the hand truck merely because it had been placed inside a vehicle.

Because the officers had a legal right to be in the area where appellant was stopped, they also had a right to let their eyes remain open and to view anything located in plain or open view. The officers were not required to ignore the evidence merely because it was placed inside appellant's vehicle after they had inadvertently observed appellant with the evidence. State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975). For these reasons, the hand truck was legally seized and properly admitted as evidence at trial.

Furthermore, under the circumstances of this case, there was probable cause to believe that appellant's car contained evidence of crime. The United States Supreme Court provides an "automobile exception" to the requirement of a search warrant where it is not practical to secure a warrant because the vehicle can be quickly moved out of the jurisdiction. Carroll v. United States, 267 U.S. 132 (1925).

In Carroll, the Court upheld a warrantless search of an automobile based on probable cause that the car contained evidence of contraband liquor. In Chambers v. Maroney, 399 U.S. 42 (1970), the Court upheld the search of a car at a police station after the car's occupants were arrested for robbery. The Court reasoned that an immediate search is permissible because a car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. The Chambers decision interpreted Carroll as distinguishing between auto searches and searches incident to arrest:

> . . . the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to arrest: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

399 U.S. at 49.

In this case, the officers had sufficient reason to believe that appellant's car contained evidence of crime. The officers observed appellant walking down the street with a hand truck which appellant placed inside the car. The officers believed that the hand truck was evidence of a crime based on the belief that appellant may have stolen the hand truck. Thus, the car was legally searched.

Finally, the record in this case does not indicate that the hand truck was introduced into evidence during the trial. The argument concerning the seizure of the hand truck took place during the suppression hearing before the judge, sitting without a jury. Thus, even if the hand truck were illegally seized, reversal is not required. State v. Romero, 660 P.2d at 718.

C. THERE WAS PROBABLE CAUSE TO ARREST APPELLANT.

The arrest of appellant was proper because it complied with guidelines set by the legislature for situations in which an arrest can be made without a warrant. Utah Code Ann., § 77-7-2 (1953), as amended, provides:

> A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:
> (1) For a public offense committed or attempted in his presence;
> (2) When he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;
> (3) When he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
> (a) Flee or conceal himself to avoid arrest;
> (b) Destroy or conceal evidence of the commission of the offense; or
> (c) Injure another person or damage property belonging to another person.

The officers were justified in arresting appellant because of a reasonable belief that he had committed or was

attempting to commit a public offense under subsection (1). Only after the officers had questioned appellant and determined his explanation of the situation to be unsatisfactory did they place him under arrest. At that time, appellant himself as much as admitted that he was stealing the hand truck the officers had observed. The parties stipulated during the hearing on the motion to suppress the evidence that appellant told the officers that the hand truck was not his, that he had found it and that he figured it would not be there much longer and so he took it becaue he could use it to move (R. 183, 185). The officers also noted that appellant was traveling in a direction away from a business known as "Stokes Brothers" and that the hand truck had the words "Stokes Brothers" printed on it. It was not unreasonable to assume that appellant had stolen the hand truck and was leaving the scene of the crime when the officers observed him. It was not necessary for the officers to wait until the crime had been reported before arresting appellant. It is not reasonable to say that police officers may not arrest someone who they believe is in the process of committing a crime because the victim has not yet reported that crime.

Even if appellant was not still in the process of committing the crime, the officers could arrest him under subsection (3) based on a reasonable belief that he was going to flee or conceal the evidence. The officers watched appellant place the hand truck inside a vehicle. Appellant

could very easily have driven off with the hand truck, taking it and himself to an unknown location had the officers waited until they were able to obtain a warrant or until they obtained a report of the crime by the victim. For these reasons, the officers were justified in placing appellant under arrest.

This Court said of § 77-13-3, the predecessor of § 77-7-2, that:

> In performing his duties as authorized by this statute, a police officer is not required to meet any such standard of perfection as to demand an absolutely certain judgment before he may act. [Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).] The test to be applied is one which is reasonable and practical under the circumstances: whether a reasonable and prudent man in his position would be justified in believing facts which would warrant making the arrest [footnote omitted].

State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276, 278 (1972). Thus, the officers need not have been certain that appellant had stolen the hand truck, they need only have had a reasonable belief that he had stolen it under all of the facts known to them at the time. Among these facts were: (1) Appellant told them he did not own the hand truck and that he had "found" it rather than borrowed or rented it (R. 183); (2) it was late afternoon on New Year's Day (R. 181) and most businesses are closed on that day; (3) the hand truck was

clearly lettered with the business name "Stokes Brothers" (R. 195, 205); (4) appellant was walking in a direction leading away from "Stokes Brothers" (R. 184); (5) no one was at "Stokes Brothers" at the time because it was a holiday and the officers were unable to locate anyone in authority from "Stokes Brothers" at the time of the arrest (R. 184, 194). From these facts and rational inferences the officers could infer that a crime had been committed and, therefore, lawfully arrest appellant without obtaining a warrant.

D. THE SEARCH OF APPELLANT'S BACKPACK WAS INCIDENT TO A LAWFUL ARREST; THEREFORE THE EVIDENCE CONTAINED IN IT WAS PROPERLY ADMITTED AT TRIAL.

Appellant argues that the gun, jewelry and other items admitted into evidence at trial should not have been admitted because the search of the backpack in which they were found was illegal. This claim is based on appellant's position that the police officers had no reasonable suspicion to stop and question him nor probable cause to search his car and arrest him. Therefore, the officers had no legal right to search the backpack and the evidence discovered in that search should have been suppressed.

As argued above, the officers had reasonable justification to stop appellant and question him about his activities. The observation of the hand truck and the lettering on it was not a search, but was an "open view"

observation which the officers could lawfully make. From that observation, the officers had probable cause to arrest appellant. The search of appellant's backpack incident to that arrest was, therefore, legal.

In Chimel v. California, 395 U.S. 752 (1969), the Court held that a search incident to arrest could be conducted to prevent the arrestee from obtaining a weapon or destroying evidence, with the search extending to the arrestee's person and the area within his immediate control. Searches incident to arrest have been approved by this Court. See State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). A search incident to a lawful arrest can be conducted even where the suspect has been handcuffed. The defendant in custody need not be physically able to move about to justify a search within a limited area after an arrest has been made. State v. Austin, Utah, 584 P.2d 853 (1978); State v. Dixon, Utah, 531 P.2d 1301 (1975).

The backpack appellant carried at the time of his arrest was within his immediate control and easily accessible to him. For this reason,a search of the backpack was clearly a reasonable action on the part of the police officers who arrested appellant.

E. APPELLANT FAILED TO OBJECT SPECIFICALLY TO THE EVIDENCE CONTAINED IN THE BACKPACK THUS WAIVING HIS RIGHT TO RAISE THE ISSUE ON APPEAL.

Although the printed motion form submitted to the trial court states that appellant sought suppression of all

the evidence to be introduced by the state, appellant raised no objection to the evidence contained in the backpack in his oral argument of that motion. The written motion appears to be a formality in this case where appellant's name and other references were merely typed into the blanks on a prepared form (R. 23). Because there was no argument at the hearing on the motion to suppress pertaining to the evidence found inside appellant's backpack, appellant waived his right to object to this evidence on appeal.

Recently, this Court cited a Kansas case[1] which states:

> The . . . rule long adhered to in this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. . . . By making use of the rule, counsel gives the trial court the opportunity to conduct the trial without using the tainted evidence, and thus avoid possible reversal and a new trial. Furthermore, the rule is practically one of necessity if litigation is ever to be brought to an end (Emphasis added).

State v. Larocco, Utah, ____ P.2d ____ (Case No. 18267, filed May 23, 1983). See also: State v. McCardell, Utah, 652 P.2d 942 (1982).

Appellant's objection and motion to suppress in this case were neither timely nor specific as to the evidence

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[1]State v. Moore, 218 Kan. 450, 543 P.2d 923 (1975).

contained inside the backpack. This failure to specifically object at trial waives appellant's right to raise the issue of the admissibility of that evidence on appeal.

F. THE EVIDENCE INTRODUCED AT TRIAL FITS WITHIN UTAH'S GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The Exclusionary Rule is a rule of evidence which holds that evidence against a criminal suspect must be suppressed if it was obtained in any manner that violates the Fourth Amendment rights of suspects. Weeks v. United States, 232 U.S. 383 (1914). The United States Supreme Court later held that the Fourteenth Amendment required the application of the rule in state courts. Mapp v. Ohio, 367 U.S. 643 (1961). The United States Supreme Court has decided to consider whether the Exclusionary Rule should be modified to provide a "good faith" exception. See Illinois v. Gates, 32 Crim. L. Rptr. 4405 (December 1, 1982).

The State of Utah has provided an alternative remedy to the exclusion of evidence in criminal cases. The remedy is intended to be:

> . . . in lieu of the exclusion of evidence in criminal cases for violation of the constitutionally protected rights except where those violations are substantial and peace officers were not acting in good faith.

Utah Code Ann., § 78-16-1 (Interim Supp. 1982). Utah Code Ann., § 78-16-5 (Interim Supp. 1982) provides:

> No evidence which is otherwise competent and admissible shall be excluded from any criminal proceeding because of the violation of fourth amendment rights except evidence which, though otherwise admissible, was secured in a method which involved a substantial violation of fourth amendment rights as provided in subsection 77-35-12(g).

Thus, a criminal suspect who claims that evidence was unlawfully seized cannot ordinarily have the evidence excluded but must pursue two remedies: (1) seek the statutory damages provided in § 78-16-1, et seq., or (2) make a motion for suppression of the evidence where there is a substantial violation of Fourth Amendment rights. Unless such a substantial violation is shown, the evidence will be admitted in all cases under the Utah good faith exception, even if unlawfully seized.

Even assuming in the instant case that the evidence was unlawfully seized, it was properly admitted. Appellant has shown no substantial violation of his Fourth Amendment rights as required by Utah Code Ann., § 78-16-8 (Interim Supp. 1982). That section provides as follows:

> In determining whether fourth amendment rights have been violated, the trier of fact shall consider the standards described in subsection 77-35-12(g) for determining whether the violation was substantial, grossly negligent, willful, or malicious or whether the conduct of the peace officer was in good faith.

Utah Code Ann., § 77-35-12(g) (Interim Supp. 1982) provides in pertinent part:

> . . .
> (2) An unlawful search or seizure shall in all cases be deemed substantial if one or more of the following is established by the defendant or applicant by a preponderance of the evidence:
> (i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency;
> (ii) the violation was intended only to harass without legitimate law enforcement purposes.
>
> (3) In determining whether a peace officer was acting in good faith under this section, the court shall consider, in addition to any other relevant factors, some or all of the following:
> (i) The extent of deviation from legal search and seizure standards;
> (ii) The extent to which exclusion will tend to deter future violations of search and seizure standards;
> (iii) Whether or not the officer was proceeding by way of a search warrant, arrest warrant, or relying on previous specific directions of a magistrate or prosecutor; or
> (iv) The extent to which privacy was invaded.

If appellant had established a substantial violation of his rights, the evidence was still properly admitted because the officers were acting in good faith. Bad faith cannot be implied from the facts in this case where the officers were acting on initial observations from a position in which they or any member of the public had a right to be. As discussed

above, the officers had a legal right to be in the area where appellant was initially observed pushing the hand truck. The stop of appellant for further questioning was not unlawful because the officers had a reasonable justification to stop him. The seizure of the hand truck was not the result of a search and, therefore, was not illegal. Appellant's subsequent arrest was based on probable cause as a result of that seizure and the subsequent search of his backpack was incident to arrest. This Court has stated that:

> . . . it is essential that a reasonable degree of tolerance be indulged as to the judgment of police officers, so long as they are acting in good faith and within the standards of decent and decorous behavior.

State v. Torres, 29 Utah 2d 269, 508 P.2d 534, 536 (1973). Because the actions of the police officers in this case were in good faith and within the standards of decent and decorous behavior, the evidence was properly received by the trial court.

POINT II

THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF THEFT BY RECEIVING AND CARRYING A CONCEALED DANGEROUS WEAPON.

Appellant contends that the State failed to establish a prima facie case of theft by receiving and carrying a concealed dangerous weapon because all elements

of each offense were not established beyond a reasonable doubt as required by Utah Code Ann., § 76-6-408 (1953), as amended. Appellant's argument focuses on the mental state of each crime and asserts that no evidence was presented by the State establishing those mental states. Because the requisite mental states were not proved with direct evidence, appellant assumes that the jury was required to believe his testimony negating the required mens rea for each crime, thus establishing appellant's innocence.

In reviewing a claim of insufficient evidence, it is well established that it must appear that reasonable minds necessarily entertain a reasonable doubt that appellant committed the crime. State v. Wilson, Utah, 565 P.2d 66 (1977). Unless evidence compels a conclusion that as a matter of law evidence was inconclusive or so unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that appellant did not commit the crime, the verdict must be sustained. State v. Newbold, Utah, 581 P.2d 991 (1978); State v. Mills, Utah, 530 P.2d 1272 (1975). The evidence need not refute contrary allegations made by appellant if the verdict is supported by substantial evidence. State v. Lamm, Utah, 606 P.2d 229 (1980); State v. Howell, Utah, 649 P.2d 91 (1982). The evidence, and all inferences that may reasonably be drawn therefrom, is to be viewed in the light most favorable to the fact finder's verdict. State v.

Gorlick, Utah, 605 P.2d 761 (1979). It is not the prerogative of this Court to weigh the evidence, but that of the fact finder to assess its weight and sufficiency. State v. Romero, Utah, 554 P.2d 216 (1976).

Appellant in this case does not claim that the State failed to prove any element of the crime of theft by receiving except the intent to permanently deprive the owner of his property. At trial, appellant's only defense was his own testimony that he intended to return the stolen property to its rightful owner. This testimony was self-serving and the jury was only obliged to afford it what credibility it deserved. Clearly, the jury did not believe appellant's explanation, but instead drew the only reasonable inference possible from the evidence presented by the State, that inference being that appellant intended to permanently deprive the rightful owner of possession of the property. The evidence supporting this inference was that: (1) appellant knew the property was stolen as early as December 14 (R. 291, 297), yet by his own testimony refused at that time to take any of the property, although it was offered to him (R. 300-301), choosing instead to purchase the goods with his own funds on December 31 (R. 306). Appellant also testified at one point that he knew who was the rightful owner of the property on December 14 (R. 319), although he originally said that he did not know to whom the goods belonged on December 14

(R. 302). These facts support the inference that appellant never intended to return the property to the rightful owner because it is only reasonable to assume that appellant would not want to use his own money to pay for goods he had no intention of keeping. The jury might also have assumed that if appellant had wanted to restore the property to its rightful owner, he would have acted as soon as he discovered who that owner was. (2) Appellant knew who had stolen the property and where that person could be found on December 14 (R. 297), the date of the burglary (R. 153), but did not notify the police until after he was arrested for possession of the stolen goods (R. 248-249). Had appellant desired to help the rightful owner regain his property, appellant could reasonably be expected to notify the police with any information he had rather than waiting until he was arrested. At least appellant might have notified the rightful owner so that he might inform the police. Appellant, of course, answers these possible avenues of action with the assertion that he did not desire to be labeled a "snitch". It is possible, however, to notify law enforcement authorities of criminal activity without subjecting oneself to such labeling. A person could make use of facilities for anonymous "tips" or demand protection in return for information and/or testimony. The jury, therefore could reasonably determine that this was not believable testimony. (3) Appellant admitted that he helped the persons who had stolen the property to attempt to

dispose of it by giving them the names of businesses that might purchase the goods and by accompanying one of them to the location of these businesses (R. 297-299). An attempt to dispose of the goods or to aid in their disposal by sale to third parties leads to the logical conclusion that appellant intended to permanently deprive the owner of the property rather than the conclusion that appellant intended to return the property. (4) Appellant claimed, on separate occasions, that he told Julie what he intended to do with the Broadbent property and that he did not tell Julie what he planned to do (R. 347, 375). Because Julie did not testify at trial, there is no evidence as to appellant's intentions other than his own contradictory self-serving testimony. (5) Appellant told conflicting stories to the police at the time of his arrest and at trial (R. 365, 368, 370-372, 387, 395). From this the jury could infer that appellant was not a credible witness and, therefore, might not have believed his testimony on the issue of intent.

Taking all of this evidence together and viewing it in the light most favorable to the verdict, the jury could reasonably have concluded that appellant intended to permanently deprive the rightful owner of his property. Even though appellant denied that was his intent, the jury was not obligated to believe appellant's testimony. For this reason, there was clearly sufficient evidence to establish the requisite intent.

Applying the same principles to the offense of carrying a concealed dangerous weapon, it is equally clear that appellant had the appropriate mental state required by that statute. Appellant correctly states that Utah Code Ann., § 76-10-504 (1953), as amended, does not state the mental culpability required and that, therefore, § 76-2-102 provides the appropriate mental state. Section 76-2-102 provides that:

> When the definition of the offense does not specify a culpable mental state, intent, knowledge or recklessness shall suffice to establish criminal responsibility.

Thus, the Stae was required to show that appellant was at least reckless in carrying the pistol in his backpack when he was arrested. Recklessly is defined as follows:

> A person engages in conduct:
> . . .
> (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Utah Code Ann., § 76-2-103 (1953), as amended. The evidence presented in this case was sufficient to prove that appellant was reckless in carrying the gun in his backpack. That

evidence was: (1) Appellant admitted that he put the gun in the backpack around 4:00 a.m. (R. 310, 312); (2) Appellant remembered that the gun was there while he was in a neighborhood market at approximately 2:00 p.m. (R. 313-314), although he also testified that he remembered it while on his way to the market (R. 327-328); (3) Appellant was arrested at approximately 4:00 p.m. (R. 181). From these facts, the jury could reasonably conclude that appellant was reckless in placing the gun in his backpack from the start. Because appellant was the person who had originally placed the gun inside the backpack, it was also reckless to disregard the fact that he had placed a gun in a position where it might easily be carried out onto the street as a concealed weapon. It was further recklessness to continue to carry the gun concealed inside the backpack when he realized it was there.

Furthermore, the jury was not obligated to believe appellant had forgotten that the gun was inside the backpack. Because appellant's testimony was contradictory, the jury might very well have discounted the testimony to that effect and concluded that appellant knew the gun was there. Appellant admitted that he placed the gun inside the backpack less than 12 hours before he left the house. A reasonable jury could determine that a person does not easily forget that he has placed a dangerous weapon inside of a backpack that he plans to carry with him when he leaves, especially when that

gun was found outside a person's home after an apparent burglary. The jury could reasonably infer from the circumstances surrounding the discovery of the gun and its placement inside the backpack that appellant knew the gun was there and, consequently, acted knowingly in carrying it inside the backpack. There was, therefore, sufficient evidence to convict appellant of carrying a concealed dangerous weapon.

CONCLUSION

There was sufficient justification for the police officers to detain appellant when he was observed pushing a hand truck on January 1, 1981. The observation of the hand truck was not a search and, therefore, its seizure and introduction into evidence were proper.

Based on their observations and the lettering on the hand truck, the officers had probable cause to arrest appellant. The search of appellant's backpack occurred after his arrest and was, therefore, justifiable as a search incident to arrest. For that reason, the evidence obtained during that search was admissible at trial.

Finally, the evidence at trial was sufficient to convict appellant of theft by receiving and carrying a concealed dangerous weapon. The judgment of the court below should, therefore, be affirmed and appellant's requests for reversal or a new trial should be denied.

Respectfully submitted this 14th day of June, 1983.

DAVID L. WILKINSON
Attorney General

Robert N. Parrish

ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Linda E. Carter, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 14 day of June, 1983.

Susan Patton