

1982

# State of Utah v. Shannon W. Richmond : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Stephen R. McCaughey; Attorney for Appellant;  
Attorney General; Attorney for Respondent;

---

## Recommended Citation

Brief of Appellant, *State v. Richmond*, No. 18325 (Utah Supreme Court, 1982).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3012](https://digitalcommons.law.byu.edu/uofu_sc2/3012)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 18325  
SHANNON W. RICHMOND, :  
Defendant-Appellant. :

---

BRIEF OF RESPONDENT  
-----

Appeal from a judgment of guilty of Theft, a Class A misdemeanor, in the First District Court in and for Box Elder County, State of Utah.

---

DAVID L. WILKINSON  
Attorney General  
EARL F. DORIUS  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84111

Attorneys for Respondent

STEPHEN R. McCAUGHEY  
72 East 400 South, #330  
Salt Lake City, UT 84111

Attorney for Appellant

FILE

SEP 2 1982

Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 18325  
SHANNON W. RICHMOND, :  
Defendant-Appellant. :

---

BRIEF OF RESPONDENT

-----

Appeal from a judgment of guilty of Theft, a Class A misdemeanor, in the First District Court in and for Box Elder County, State of Utah.

---

DAVID L. WILKINSON  
Attorney General  
EARL F. DORIUS  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84111

Attorneys for Respondent

STEPHEN R. McCAUGHEY  
72 East 400 South, #330  
Salt Lake City, UT 84111

Attorney for Appellant

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT. . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS. . . . .	2
 ARGUMENT	
POINT I. BECAUSE THE CRIME OF THEFT WAS NEITHER CHARGED AGAINST THE APPELLANT NOR IS A LESSER INCLUDED OFFENSE OF BURGLARY, OF WHICH THE APPELLANT WAS CHARGED AND FOUND NOT GUILTY, THE TRIAL COURT'S DETERMINATION OF GUILT OF THEFT WAS ERROR . . . . .	2
CONCLUSION. . . . .	4

Cases Cited

Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947) . . . . .	3
State v. Baldwin, 29 Utah 2d 318, 509 P.2d 350 (1973) . . . . .	4
State v. Elliott and Clayton, Utah, Nos. 17350, 17351, and 17358 (decided January 21, 1982). . . . .	3
State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962). . . . .	3
State v. Romero, Utah, 554 P.2d 216 (1976). . . . .	4
State v. Williams, Utah, 636 P.2d 1092 (1981) . . . . .	3

Statutes Cited

Utah Code Ann., § 76-1-402(3) (1953), as amended. . . . .	2-4
" " " § 76-6-202 " " " . . . . .	1,3,4
" " " § 76-6-404 " " " . . . . .	3
" " " § 77-35-23 " " " . . . . .	2

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 18325  
SHANNON W. RICHMOND, :  
Defendant-Appellant. :

---

BRIEF OF RESPONDENT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from the judgment of the District Court in and for Box Elder County, State of Utah, which judgment was that the appellant was guilty of Theft, a Class A misdemeanor.

DISPOSITION IN THE LOWER COURT

On October 30, 1981, the appellant was tried without a jury by the District Court in and for Box Elder County, State of Utah, the Honorable Omer J. Call, Judge, presiding, on a charge of Burglary in violation of Utah Code Ann., § 76-6-202 (1953), as amended, a felony of the third degree. In a memorandum decision dated December 12, 1981 (R. 40), the appellant was found not guilty of the crime charged, but was found guilty of theft of property having a value of more than \$100.00 and less than \$250.00. Counsel for the appellant filed a motion to arrest judgment, pursuant to Utah Code Ann.,

§ 77-35-23 (1953), as amended, on the basis that the defendant had not been charged with the offense of Theft (R. 50). At a hearing held January 25, 1982, the motion was denied and the appellant was sentenced to a term of six months in the Box Elder County Jail.

#### RELIEF SOUGHT ON APPEAL

The respondent confesses error in the trial court below and seeks a reversal of the conviction for the reasons stated below.

#### STATEMENT OF FACTS

The respondent agrees with the statement of facts as set forth by the appellant.

#### ARGUMENT

##### POINT I

BECAUSE THE CRIME OF THEFT WAS NEITHER CHARGED AGAINST THE APPELLANT NOR IS A LESSER INCLUDED OFFENSE OF BURGLARY, OF WHICH THE APPELLANT WAS CHARGED AND FOUND NOT GUILTY, THE TRIAL COURT'S DETERMINATION OF GUILT OF THEFT WAS ERROR.

The respondent confesses error in the trial court's finding the appellant guilty of Theft for the reasons set forth below:

1. The offense of Theft is not a lesser included offense of Burglary. Under Utah Code Ann., § 76-1-402(3)

(1953), as amended, a defendant may be convicted of a "lesser included" offense if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." See also: State v. Elliott and Clayton, Utah, Nos. 17350, 17351, and 17358 (decided January 21, 1982), and State v. Williams, Utah, 636 P.2d 1092 (1981).

Under Utah Code Ann., § 76-6-202 (1953), as amended, the elements of Burglary are:

1. Entering or remaining unlawfully in a building or any portion of a building,
2. With intent to commit a felony or theft or commit an assault on any person.

Under Utah Code Ann., § 76-6-404 (1953), as amended, the elements of Theft are:

1. Obtaining or exercising control over the property of another,
2. With a purpose to deprive him thereof.

It has long been the law of this State that because Burglary requires no "taking" or "control," it is a separate crime from Larceny, of which "theft" is an element. State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962); Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947). This Court has also held that failure to steal after entering a building with intent to steal is no defense to the crime of Burglary, State v.

Baldwin, 29 Utah 2d 318, 509 P.2d 350 (1973), although, presumably, it would be a defense to the crime of Theft. Thus, under the current statutes, convictions under charges of both counts have been upheld, State v. Romero, Utah, 554 P.2d 216 (1976), a result which could not occur under Utah Code Ann., § 76-1-402(3) (1953), as amended, if Theft were a lesser included offense of Burglary. Because Theft is not a lesser included offense of Burglary, of which the appellant was found not guilty, the trial court's finding of guilt of Theft was improper, and could have only been justified had that crime been charged and the separate elements proved.

2. The appellant was not charged with the separate offense of theft. The Criminal Complaint filed against the appellant charged him only with Burglary, in violation of Utah Code Ann., § 76-6-202 (1953), as amended (R. 3). No separate charge of Theft was ever filed against the appellant. The trial court was without authority to find the appellant guilty of a separate offense, violation of which by the appellant was not charged.

#### CONCLUSION

For the foregoing reasons, the respondent confesses error in the court below and requests that the appellant's conviction of Theft be reversed.



Respectfully submitted this 22 day of September,  
1982.

DAVID L. WILKINSON  
Attorney General



EARL F. DORIUS  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact  
copies of the foregoing Brief, postage prepaid, to Stephen R.  
McCaughey, Attorney for Appellant, 72 East 400 South, #330,  
Salt Lake City, Utah, 84111, this 22 day of September,  
1982.

Susan Patton