1971

State of Utah v. Earl Ward Clements : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

EARL WARD CLEMENTS,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, THE HONORABLE GOULD, JUDGE, PRESIDING

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STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
EARL WARD CLEMENTS,
Defendant-Appellant.

Case No. 12400

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Clements appeals from a conviction of second degree burglary in the District Court of the Second Judicial District in and for Weber County, State of Utah, the Honorable Calvin Gould, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The Honorable Calvin Gould, judge, sitting without a jury, found Clements guilty of second degree burglary pursuant to Utah Code Ann. § 76-9-3 (1969 Supp.) and sentenced him to not less than one nor more than twenty years in the Utah State Prison.

Clements appeals from that conviction and sentencing.

RELIEF SOUGHT ON APPEAL

State seeks affirmance of the judgment of the lower court.

STATEMENT OF FACTS

Clements and another were caught inside the Ogden Clinic late at night on April 18, 1970. After first being confronted by a police officer, Clements and his friend ran down a corridor and were both later found hiding in the building (R. 42-43, 62-63). Where Clements was found to be hiding there was also found a loaded .357 Magnum lying under a piece of foam (R. 49). Another gun was also found in Clements' car (R. 70-73).

Testimony in the trial court showed that Clements and his friend had not been authorized to enter the clinic (R. 40, 68). There was also testimony indicating that at about 5:30 p.m. on April 18, 1970 all of the windows and doors were shut and secured (R. 66). Officers testified that two screwdrivers were found on the floor in the front of the building and that a window had been broken inward in the building (R. 64, 69-70). A police officer testified that he saw Clements and his friend trying to unlock or pry open an inside door (R. 43).

Clements was charged with second degree burglary and an habitual criminal violation in two separate cases. These cases were consolidated for the same trial (R. 18). Because Clements and his friend were both charged on second degree burglary dealing with the same factual situation, Judge John F. Wahlquist suggested that the two

defendants might be tried together if the State would file the proper motion for consolidation (R. 18).

On June 29, 1970 a motion for consolidation was filed by the State and on October 5, 1970 before Judge Ronald O. Hyde the cases of the two defendants were consolidated for trial and the habitual criminal charges were dismissed (R. 26).

The trial took place on November 10, 1970 wherein the transcript shows that the Honorable Calvin Gould, Judge reviewed the consolidation matters with the defendants' attorneys (R. 37). Judge Gould also interrogated the defendant regarding his waiver of a jury trial (R. 36-37). The trial proceeded as a consolidated trial before the Honorable Calvin Gould sitting without a jury. The defendants were both found guilty of second degree burglary and sentenced to prison.

ARGUMENT

POINT I.

THE EVIDENCE WAS SUFFICIENT TO SHOW THAT CLEMENTS HAD THE NECESSARY INTENT TO SUSTAIN THE CONVICTION OF SECOND DEGREE BURGLARY.

Clements contends that the evidence presented in the trial court was insufficient to show that the defendant had the requisite specific intent to commit the crime of burglary in the second degree. This offense, as outlined by the Utah Code, has a specified intent:

> "Every person who forcibly breaks and enters, or without force enters an open door, window or other aperture, of any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, or any tent, sheep or cattle camp, vessel, watercraft, railroad car, automobile, automobile trailer, aeroplane or aircraft *with intent to commit larceny or any felony*, is guilty of burglary in the second degree." Utah Code Ann. § 76-9-3 (1969 Supp.) (Emphasis added.)

It should be noted that proof of the commission of a larceny or a felony is not required by the statute but rather that the defendant's intention to commit a larceny or felony be shown. Because the true intent of the individual may only be known by himself, the proof of specific intent in criminal matters can only be shown through circumstantial evidence. The Utah cases dealing with the required standard of proof in second degree burglary cases clearly point this out.

In the case of *State* v. *Tellay*, 7 Utah 2d 308, 324 P. 2d 490 (1958), the defendant contended that as a matter of law there was insufficient evidence to directly prove that he had the requisite intent for the crime of burglary. Defendant has been apprehended coming out of a foundry. The foundry had been locked and the defendant had not been authorized to make entry. Evidence showed that a window in the foundry had been broken and that locks on a door had been tampered with. Nothing was found to have been stolen from the foundry and the defendant had been drinking but was not drunk according to any

visible signs. This court said in relationship to the sufficiency of the evidence and proof of intent:

> "Nor can it be said as a matter of law that from all the facts and circumstances in this case a jury could not reasonably find beyond a reasonable doubt the necessary intent to commit larceny or any other felony. No attempt was made to explain appellant's breaking and entering the foundry in the nighttime, nor does there appear any lawful motive for such entry. *Under such circumstances a reasonable inference from the evidence is that the entry was made for the purpose of committing larceny or some other felony. Intent is usually proved by acts and conduct.* (citation omitted)." *State* v. *Tellay*, 7 Utah 2d 308, 309, 324 P. 2d 490, 491 (1958). (Emphasis added.)

The court held in circumstances very similar to the case presently before the court that the reasonable inference from finding an individual having broken into a building that he has not been authorized to enter is that he has entered the building with the purpose of committing larceny or a felony.

Clements, in the case before us, was found inside a building that he had not been authorized to enter. The building had been locked and secured the previous evening. A window was found broken by which it was assumed Clements and his friend obtained access. The defendants were seen trying to pry open an inner door and when confronted by the police officer, fled to another part of the building. Clements was found hiding in a utility closet and where he was hiding a gun was also found.

It is the State's contention that under these circumstances ". . . [A] reasonable inference from the evidence is that entry was made for the purpose of committing larceny or some other felony." *Id.*

Another case directly in point is *State* v. *Hopkins*, 11 Utah 2d 363, 359 P. 2d 486 (1961). This was another case where the defendant contended that there was no direct proof of his intent to commit larceny and that the proof of intent was made entirely on the basis of circumstantial evidence. The defendant in *Hopkins* fled the scene and was later apprehended. At first he claimed no connection with the offense but later admitted being in the dwelling of another. Hopkins offered an explanation of his presence in the apartment but his testimony was evidently not believed as the jury found him guilty. This court in affirming the conviction stated:

> "It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof. But it can be inferred from conduct and attendant circumstances in the light of human behavior and experience. It is upon that basis that *authorities uniformly affirm that where one breaks and enters into the dwelling of another in the nighttime, without the latter's consent, an inference may be drawn that he did so to commit larceny.* This, coupled with defendant's other inculpatory conduct described above, including his flight from the scene, which itself may be regarded as some evidence of guilt, provide ample proof to support the verdict." *State* v. *Hopkins*, 11 Utah 2d 363, 365, 359 P. 2d 486, 487 (1961).

This court's position in respect to the presumption of intent to commit larceny when found in the building of another without consent was reaffirmed. In the case at bar, as in the *Hopkins* case, the defendant fled the scene which operates as further circumstantial evidence of guilt.

Under these standards for the proof of intent to commit larceny or a felony the judge properly ruled that there was sufficient evidence to establish guilt. Because the judge was sitting without a jury it was his duty to apply the law to the facts of the case and find Clements guilty of second degree burglary. The evidence regarding intent being sufficient, the determination of the trial court judge should not be disturbed.

POINT II.

UTAH CODE ANN. § 76-9-3 (1969 SUPP.) IS NOT VAGUE, AMBIGUOUS OR UNCERTAIN AND SHOULD BE UPHELD AS CONSTITUTIONAL.

There is a "long established presumption in favor of the constitutionality of a statute," *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 354 (1936). This presumption has been relied on by the Supreme Court of the State of Utah in *State* v. *Nielson*, 19 Utah 2d 66, 426 P. 2d 13 (1967) wherein the court stated:

> "The general rule of statutory construction is to hold an enactment of the legislature valid unless it clearly appears to violate some provision of the

> constitution of this State or of the United States." *Id.* at 69. See also *Gord* v. *Salt Lake City*, 20 Utah 2d 138, 434 P. 2d 449 (1967) and *Trade Commission* v. *Skaggs Drug Center, Inc.*, 21 Utah 2d 431, 446 P. 2d 958 (1968).

With this presumption in mind the particular statute in question should be analyzed. Clements contends that the second degree burglary statute became vague and uncertain, in respect to intent, with the amendment of 1969 which eliminated the "nighttime" requirement. The requirement of intent to commit larceny or a felony remained the same in the 1969 amendment of the second degree burglary statute. Without a specific change in the law related to intent the new law must be construed consistent with the prior statute.

> "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and . . . not as a new enactment." Utah Code Ann. § 68-3-6 (1953).

The only portion of the second degree burglary statute that was changed was the requirement that the breaking and entering must be at night. An amendment which eliminates the "nighttime" requirement would help to make the statute more certain and eliminate possible ambiguities as to when it is, or is not, "nighttime."

The second degree burglary statute should not suffer a vagueness attack because a new misdemeanor has been created for entering "with intent to damage property or to injure a person or annoy the peace and quiet of any

occupant therein." Utah Code Ann. § 76-9-9 (1969 Supp.). The plain meaning of the words adequately define a different offense in the case of the misdemeanor than as found in the second degree burglary statute.

The second degree burglary statute, as amended in 1969, should be construed as constitutional in light of the rule that statutes should be construed as constitutional whenever possible. (See *Ashwander, Nielson, Gord* and *Trade Commission* cases, *supra.*) Clements' vagueness attack has been against the intent requirement of the statute which has not changed and should receive a statutory construction consistent with prior law. The second degree burglary statute is valid and constitutional.

POINT III.

CLEMENTS WAS GIVEN A FAIR AND SPEEDY TRIAL WITHIN CONSTITUTIONAL STANDARDS.

Clements raises several allegations of prejudice or unfairness at the trial court. His basic contentions are: Clements was tried concurrently with a co-defendant; he was tried without a jury; the intoxication defense was not raised; counsel had a pecuniary interest in the case; and, there was a delay in transmitting the record on appeal. These contentions basically question whether or not Clements received a fair and speedy trial within constitutional standards.

The question of whether or not the two defendants

in this burglary offense could be tried together was raised in the lower court proceedings. After Judge John F. Wahlquist suggested that the two defendants might be tried together, the State filed a proper motion for consolidation (R. 18). On October 5, 1970, before Judge Ronald O. Hyde, the cases of the two defendants were consolidated (R. 26). At the actual trial on November 10, 1970, Judge Calvin Gould reviewed the consolidation matter with the attorneys of both defendants (R. 36). At no time was the consolidation objected to and Clements points to no specific prejudice resulting from the consolidation.

Clements also raises a question regarding his right to a jury trial. A look at the record shows that Judge Gould separately interrogated both defendants regarding their waiver of jury trial. In respect to Clements, the transcript reveals:

> THE COURT: And you are Earl Ward Clemons (sic)?
>
> MR. CLEMONS (sic): Yes, your Honor.
>
> THE COURT: And you understand you have a right to a jury trial, Mr. Clemons (sic)?
>
> MR. CLEMONS (sic): Yes, your Honor.
>
> THE COURT: There would be eight persons empaneled and the District Attorney would have to convince all eight of them as to your guilt beyond a reasonable doubt?
>
> MR. CLEMONS (sic): Yes.

THE COURT: Their verdict would have to be unanimous. You have talked to Mr. Adams, who is your attorney, about this?

MR. CLEMONS (sic): Yes your Honor. And I felt my own self I would leave it up to the descretion of your Honor.

THE COURT: You would like to waive the right and have the Court try the factual issues?

MR. CLEMONS (sic): Right, your Honor (R. 36-37).

It is clear from the Record that Clements knowingly and intelligently waived his right to jury trial. Justice would not be served by allowing Clements to now complain of possible trial errors which he participated in creating.

Clements' counsel in the trial court did not raise the intoxication defense nor did he move for a possible mistrial when the judge's decision was announced. A hindsight look at the trial outcome and a criticism of trial tactics does not provide grounds for reversal.

Cases hold that the constitutional right to counsel is not violated unless an attorney's performance reduces the trial to a farce or a sham through lack of competence, diligence or knowledge of the law. *In re Beaty*, 51 Cal. Rptr. 521, 64 C. 2d 760, 414 P. 2d 817 (1966). See also *Baron* v. *State*, 7 Ariz. App. 223, 437 P. 2d 975 (1968) and *Gresham* v. *Page*, Okla. Cr., 441 P. 2d 478 (1968), *cert. denied*, 393 U. S. 916 (1968). The defendant was granted a right to counsel through court appointment and the

Record shows that Mr. Adams performed his duties in a competent manner.

The delay in having the Record transmitted to the Supreme Court for appeal does not constitute a breach of a constitutional right. The Utah Supreme Court has said regarding a two-week delay in a trial court proceeding:

> "Under the circumstances here, where no one was intentionally prejudiced by the two-week delay. The ends of justice were not aborted. . . . Unreasonable release of felons on technicality, resulting in their freedom to continue plying in their trade, by superficial resort to strained, technical construction of a statute or constitution becomes the shield for the miscreant, and the cross of decent citizenry which some time could lead to a tea party and volley of fire across a bridge." *State* v. *Rasmussen*, 18 Utah 2d 201, 203, 418 P. 2d 134, 135 (1966). See also *United States* v. *Ewell*, 383 U. S. 116 (1966).

It should be noted that Clements raises the question of speedy trial not in connection with the constitutionally safeguarded trial court proceedings but with the state granted appellate proceedings.

In a recent Tenth Circuit case the question of appellate delay as a violation of due process of law was considered. The court held:

> "Ash's appeal was docketed in the appellate court on November 6, 1968 and ultimately decided on July 22, 1969, despite the unexplained loss of the record on appeal which necessitated its duplication.

> "We hold that under the circumstances, there was no inordinate, excessive or inexcusable delay rendering the conviction void, as urged by Ash." *Ash* v. *Turner*, No. 692-69 (April 6, 1970).

A similar fact situation has been presented by Clements. There has been no prejudice shown by the delay in transmitting the transcript and there has been no violation of constitutional rights.

Clements has alleged that he did not receive a fair trial by reciting conclusory statements about how the trial might have been improved. The Record shows no facts wherein the defendant was specifically prejudiced at the trial court level. Mere hindsight as to how a trial might have been cannot be the basis for overturning the decision of the trial court.

CONCLUSION

It is submitted that the evidence brought before the trial court clearly showed that Clements had the requisite intent to sustain the conviction of second degree burglary. Utah Code Ann. § 76-9-3 (1969 Supp.) is not vague and should be construed in a manner consistent with its predecessor and should be upheld as constitutional. Clements was granted a fair and speedy trial and the conviction of the lower court should therefore be affirmed.

Respectfully submitted,

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