1966

The State of Utah v. Harold Michael Brown : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

HAROLD MICHAEL BROWN,
Defendant and Appellant.

Case No. 10759

APPELLANT'S BRIEF

Appeal from the Judgment
Of the Fourth District Court for Utah County
Hon. Maurice Harding, Judge

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STATEMENT OF FACTS

The Defendant in this action was charged with Second Degree Burglary of an automobile of one Ronald L. Call. The case was tried before a Jury and a verdict of guilty returned by the Jury. At the trial, the principal witness, Ronald L. Call, testified regarding the facts surrounding the alleged burglary and during direct examination was permitted over counsel for Defendant's objection, to testify regarding the prior location of certain items of personal property. (TR. of Trial p. 14). The Court permitted Ronald L. Call to testify to the conclusions of fact to be proved which were the ultimate issue.

At the conclusion of the evidence the Court instructed the Jury. The counsel for Defendant prepared an instruction on the recent possession of stolen property which was rejected by the Court and an exception duly taken by counsel for the Defendant. (TR. of Trial p. 25).

On the 15th day of July, 1966, the Defendant was sentenced by the Honorable Maurice Harding. The Court denied the Defendant probation on the ground that Defendant had items of personal property in his automobile at the time of the arrest and therefore the Court concluded he had committed burglaries on many other occasions. (TR. of pronouncement of Judgment p. 3)

From the verdict of the Jury and the Judgment entered therein, and from the sentence of the trial court, the Appellant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Judgment and verdict and the granting of a new trial or that failing that the sentence should be declared void.

POINT I

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF RONALD L. CALL TO THE CONCLUSION OF FACT TO BE PROVED.

The State called as its principal witness at the

trial of this case Ronald L. Call. The State on direct examination of said witness asked (TR. of Trial p. 4).

> "Where did he get those to hand them back to you?"

Before the witness answered, counsel for Defendant objected and over his objection the witness Ronald L. Call answered,

> "Out of my car."

The somewhat narrow question on appeal under this assignment of error is whether or not it was proper for the trial judge to permit Ronald L. Call to testify and state his opinion as to the ultimate issue. The location of the items of personal property raised at least inferentially, the unlawful entry upon which the case turns.

A substantial number of courts have gone far enough to rule out a witness's views as to how the Judge and jury should exercise their function and have announced the general doctrine that witnesses will not be permitted to give their opinions or conclusions upon an ultimate fact in issue.[1]

The Supreme Court of North Carolina has examined this problem and in the case of *State vs. Carr, et al* stated the majority position and its reasoning:

> "As a rule the witness is required to state facts he observed and relied on as the basis of his opinion so far as they permit of a detailed enumeration. Such a statement of the facts affords an

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1 **State vs. Carr**, 196 N.C. 129, 144 S.E. 698.

opportunity of testing the reasonableness of his inference, for a witness may not express an opinion which finds no support in the facts he enumerates."

The reason is sometimes stated that such testimony if admitted invades the province of the Jury.[2] The concern is not that the expressions be taken literally by the Jury but that if admitted will encourage the Jury to forego independent analysis of the facts and bow too readily to the remarks made by the witness.

The answer solicited by the prosecutor called for an opinion of a mixed question of law and fact. When a standard has been fixed by law, the entry in a burglary prosecution, no witness should be permitted to express an opinion as to whether or not the person or conduct measures up to that standard. On that question the Court must instruct as to the law and the Jury be permitted to draw its own conclusion from the evidence.[3]

The dangers of permitting such statements are obvious. At the trial of any criminal action the Jury is required to pass upon the credibility of the State's witnesses. If the principal witness, who generally also is the victim is entitled to express the ultimate issue to be proved, the Jury might be far more impressed by that testimony than any of the other evidence offered in the case. Having heard the victim state the ultimate issue, what else need they hear?

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2 **DeGroat vs. Winter**, 261 Mich. 660, 247 N.W. 69.

3 **Federal Underwriters Exchange vs. Cost**, 132 Texas 299, 123 S.W. 2d 332, 334, 335.

The Defendant submits that to permit this principal witness to testify to the ultimate issue, and to admit this improper evidence was reversible error on the part of the trial judge.

POINT II

THE TRIAL JUDGE'S REFUSAL TO GRANT THE DEFENDANT'S INSTRUCTION ON RECENT POSSESSION OF STOLEN PROPERTY IS ERROR.

The defendant requested that the Court give the following instruction and the same was denied by the trial judge.

DEFENDANT'S REQUESTED INSTRUCTION

NO. 1

> In order to presume that the Defendant was guilty of burglary as charged in the information, you may consider the fact that the Defendant was in recent possession of stolen property. However, you must determine that the possession is sufficiently recent as to exclude every other reasonable hypothesis for said possession. In making this determination you must also find, beyond a reasonable doubt, that the possession was personal, exclusive, and knowledgeable in the Defendant.
>
> You are further instructed that you cannot convict the Defendant solely upon his possession of said property, but you must consider the possession with other facts or circumstances tending to connect the Defendant with the unlawful entry into the vehicle of Ronald Leroy Call as the law

in Utah is that the mere bare possession when not coupled with other culpatory or incriminating circumstances does not suffice to justify a conviction.

Further you are instructed that if only the crime of larceny is inferred by virtue of the possession of stolen property from a burglarious entry, this also does not suffice to warrant a conviction and you must, therefore, find the Defendant not guilty.

The law in Utah regarding recent possession appears to be relatively clear.[4] There may or may not have been corroborating circumstances in the case at bar. However, the Appellant submits that the offense of burglary is ordinarily removed one degree further from the act of larceny and the possession of stolen goods does not have the same tendency to connect the Appellant with burglary as it would with larceny.

Appellant therefore was entitled to have his cautionary instruction on recent possession. Without same the Jury was entitled to conclude that by virtue of the possession the entry was made. Appellant contends that the Court should have instructed that possession was to be considered as any other factual circumstance in arriving at its conclusion as to the guilt or innocence of the Appellant. It seems to be established that recent possession of stolen property by itself will not suffice to sustain a conviction. The possession must be considered along with other facts and/or circumstances which tend

4 **State vs. Crawford**, 59 U. 39, 201 P. 1030.
State vs. Kimsey, 77 U. 348, 295 P. 247.
State vs. Nichols, 106 U. 104, 145 P.2d 802.

to suggest involvement on the part of the Appellant with an unlawful entry.

Appellant contends that the Court's failure to give his instruction was prejudicial as it influenced the Jury's determination in that it was not fair and impartial. Refusal to grant the instruction denied to Appellant the law applicable to his theory of the case.

The Appellant was entitled to have his instruction given as to recent possession of stolen property if supported by any evidence regardless of however weak, insufficient, or doubtful in credibility it may be.[5]

It should be immaterial that the uncontradicted facts would put little weight in the instruction if given. All issues should be fairly and clearly stated to the Jury and the failure to instruct upon this issue was reversible error on the part of the trial judge.

POINT III

THE TRIAL JUDGE'S REFUSAL TO GRANT THE DEFENDANT PROBATION ON THE GROUND THAT HE HAD COMMITED BURGLARIES ON MANY OTHER OCCASIONS AND REQUIRED HIM TO TESTIFY AGAINST HIMSELF CONSTITUTES ERROR.

Title 77-35-17, Utah Code Annotated, 1953, provides that:

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[5] **Gibson vs. State**, 89 Ala. 121, 8 So. 98.

> "Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the Court having jurisdiction may suspend the imposition or the execution of sentence, and may place the Defendant on probation for such period of time as the Court shall determine."

The statute contemplates that if it is compatible with the public interest a Defendant convicted of a crime may be placed on probation, and it vests in the trial judge's discretionary power to determine whether or not it is compatible with the public interest that the Defendant be placed on probation.

The exercise of any such discretion must be upon a sound and proper basis. The court in this case in sentencing the Defendant Brown refused the Defendant probation and based this refusal largely upon the fact that the Defendant had various personal property and tools in his automobile.

The Court said:

> "You have probably been around committing burglaries and prowling on cars for a long time. If you would have told us the truth, you would likely have been doing that for a long time. You had your car loaded with equipment with which to do those things." (TR Pronouncement of Judgment, p. 3.)

This Court speaking in the Siebert case[6] concluded that an arbitrary denial of probation based upon irrel-

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6 **State vs. Siebert,** 6 U.2d 198, 310 P.2d 388.

evant and improper considerations resulting in an abuse of direction by the trial judge would permit review of his actions.

Unfortunately the record below neglects to disclose the circumstances under which the information as to the contents of the car come into possession of the Court or the probation department. However, it is apparent from the comments by the Judge that he relied heavily upon same in making his determination as to the granting or denial of probation for this Defendant.

The various hearings with respect to the Defendant disclose that this information was never given voluntarily but rather was in the possession of the probation and Parole Department at the time of sentencing (TR. of Hearing p. 3.) The contents of the car were fully inventoried at the time of Defendant's arrest without warrant while the Defendant was in custody. Arising out of said search of the Defendant's car, was a charge against this defendant[7] for violation of section 32-7-31 U.C.A. 1953. The only record relative to the search and seizure is by reference to a minute entry in the City Court of Provo City, County of Utah, State of Utah, and what one might ascertain from the Transcript of Hearing held on July 29, 1966.

MINUTE ENTRY

This case came on regularly for trial with a jury this 19th day of May, 1966. Arnold C. Roylance, Utah

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7 **Preston vs. United States**, 376 U.S. 364.

County Attorney, present in Court for plaintiff. Defendant present in Court with his counsel, Robert Van Sciver. On roll call all jurors were present. The Court administered the oath to the jurors. At the request of counsel for Defendant, all jurors were excused, and Mr. Van Sciver moved the Court to dismiss the Complaint because of unlawful Search and Seizure. Motion denied. Jurors returned. Both parties are ready to proceed. The following were empanelled to try this case: 1. Dale Wall; 2. Margaret Orvil; 3. Vilate Olson, and 4. Mary Frost. Arnold C. Roylance made his opening statement. Counsel for Defendant reserved his opening statement until later. Robert Henry Walz, D 1105 John Hall, B.Y.U. (4900 Cherry Street, Vancouver, Washington) sworn and testified for Plaintiff. Richard Michael Lopez, D 1102 John Hall, B.Y.U. (512 East Haltern, Glendora, California) sworn and testified for Plaintiff. Mr. Walz called on rebuttal. James Earl Lindsay, B.Y.U. Security Officer, sworn and testified for Plaintiff. At the request of counsel for Defendant, all jurors were excused from the Courtroom, and he moved for a dismissal because of unlawful Search and Seizure. Motion taken under advisement, and Court in recess until 2:00 p.m. Court in session at 2:30 p.m. All jurors were present and were dismissed by the Court. After deliberation, the Court grants the motion of counsel for the Defendant, and this case is dismissed. By order of the Court, the evidence is released from the custody of the B.Y.U. Security Officers into the Custody of the City Clerk.

Appellant contends that use of the evidence obtained by this search violated Appellant's constitutional rights.[8]

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8 U.S. Const. Amend., 4 Utah Const. Art. 1, Sec. 14.

And the case law construing same as the evidence which is directly seized during an illegal search cannot ever be admissable.[9] The receipt of such inadmissable evidence and its subsequent use was clearly an abuse of the trial judge's discretion in making a determination as to probation. Ample case authority exists that the guarantees of the Fourth Amendment are available at all stages of the trial.[10]

It should also be noted that the Defendant in order to avail himself of the guarantees afforded by the Fourth Amendment was required to waive the guarantees of the Fifth Amendment.[11] The requiring of Appellant to waive one guarantee to invoke the other cannot be sustained as it clearly unvails the guarantees intended in both Amendments.

The search of Defendant's automobile was not material to the prosecution for burglary. What was disclosed by the search of Defendant's automobile was material to sentencing on the burglary. To permit the trial court to use this evidence under the circumstances by which it was obtained against the Defendant is to permit the State to avail itself of knowledge which it otherwise would not have had.

In order to constitute a waiver of either amendment it must be clearly shown that such waiver was voluntary

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9 **Silverthorne Lumber Co. vs. United States,** 251 U.S. 385; **Weeks vs. U.S.,** 232 U.S. 383.

10 **Saferick vs. U.S.,** 62 F.2d 892.

11 U.S. Const. Amend , 5 Utah Const., Art. 1, Sec. 12.

and free from coercion or duress. What could be less voluntary than the circumstances under which waiver was made by this Defendant? Not waiving the rights afforded by either Amendment and still going to prison?

Further in the hearing (TR. of Hearing p. 28) after asking Counsel to admit the Defendant's guilt, the Court required the Defendant to testify against himself or go to prison, the Court commented, (TR. of Hearing p. 28):

> "It makes a difference to the Court whether or not the Defendant recognizes any wrongdoing. When a person asks for leniency we like to be advised as to whether or not he is repentant. If a man does not repent, I am not ready to release him."

If this reasoning of the Court is sound, and is a valid basis for the exercising of the Court's discretion, then a Defendant in a criminal action must decide after he is convicted whether to confess guilt to the Court and probation authorities, or face the denial of probation and be committed to the penitentiary. The Defendant cannot move for a new trial, or appeal his conviction until after he has been sentenced, and under the theory of the trial court in this case, unless he admits this guilt after a verdict of guilty he cannot have probation. If he were to confess guilt in order to retain his right of probation, and he was granted a new trial, the officials of the probation department could appear as witnesses against him. Thus the effect of the Court's reasoning in this case is to force the Defendant to either testify against him-

self, or have probation denied him. Such a requirement would certainly violate the Fifth Amendment of the Constitution of the United States and would be a deprivation of any Defendant's rights. It places on the Defendant a burden which is repugnant to our system of law.

CONCLUSIONS

This Appellant respectfully contends that the trial judge in permitting the testimony of Ronald L. Call as to the ultimate issue, committed reversible and prejudicial error and that the trial judge's refusal to give the Defendant's requested instruction denied the Appellant the law applicable to his theory of the case, and that denying Defendant probation based upon the items in his car and refusal to admit guilt, showed that it based its exercise of discretion on an erroneous legal theory which, if permitted, would require this Defendant to testify against himself, and deny him the protection of the Constitution.

Respectfully submitted,

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