1967

State of Utah v. Harold Michael Brown : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,

-vs-

HAROLD MICHAEL BROWN,
Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth District Court of
Utah County,
Honorable Maurice Harding, Judge

PHIL L. HANSEN
Attorney General

GERALD G. DUNCAN
Assistant Attorney General

Attorneys for Respondent

ROBERT VAN SCHIVER
661 East Fourth South
Salt Lake City, Utah

Attorney for Appellant

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-vs-
HAROLD MICHAEL BROWN,
Defendant-Appellant.

Case No. 10759

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Harold Michael Brown, was convicted of the crime of second degree burglary on jury trial in the Fourth Judicial District, Utah County.

DISPOSITION IN LOWER COURT

The appellant, bound over to district court, was charged by information with the crime of burglary in the second degree. A trial was held on June 14, 1966. The jury returned a verdict of guilty as charged in the information. The Honorable Maurice Harding sentenced the appellant to serve in the Utah State Prison the indeterminate sentence provided

by law. From the conviction and judgment the appellant appeals.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

STATEMENT OF FACTS

On March 14, 1966, Mr. Ronald Leroy Call, Jr. left a residence hall at the Brigham Young University shortly after midnight. Mr. Call, in company with his brother, Richard Call, was proceeding to his automobile which was parked on an adjacent parking lot (TR of trial p. 11). The parking area was well lighted (TR of trial p. 12). While at a distance of 150 feet from his automobile, Ronald Call noticed a person seated in his vehicle (TR of trial p. 12-16). This person was identified by Ronald Call as the appellant, Harold Michael Brown (TR of trial p. 15-18). Appellant then ran from the Call automobile to an automobile parked nearby. Ronald Call further testified that the appeallant was carrying certain items as he ran (TR of trial pp. 12, 13). Ronald Call ran to the vehicle in which the appellant was then seated, engaged the appellant briefly in a conversation, whereupon the appellant handed to Ronald Call certain items identified by Mr. Call as his property (TR of trial pp. 13, 14, 15). Mr. Call testified further that when he returned to his automobile, the glove compartment had been forced open and also that certain of the items recovered from the appellant

were in the glove compartment shortly prior to his contact with the appellant (TR of trial pp. 11, 20). The appellant presented no evidence.

Based on the above evidence, it is submitted that the conviction should be affirmed.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF THE COMPLAINING WITNESS.

Appellant contends the complaining witness, Ronald Call, stated an opinion or conclusion which over appellant's objection was allowed to stand. The controversial exchange appears as follows (TR of trial p. 14):

> **Mr. Sorensen** (District Attorney): Where did he get those to hand them back to you? (referring to various items of the witnesses' property).
>
> **Mr. Van Sciver** (Defense Council): I object, your honor.
>
> **The Court:** He may answer.
>
> **The Witness:** Out of my car.
>
> **Mr. Sorensen:** Well, I mean, when you spoke to him, did he go back to your car and get them?
>
> **Witness:** No, sir. He gave them back to me

from his car.

The respondent contends the answer of the witness is not a conclusion, but a statement of his observations. This same witness had previously testified that the items in question were in his automobile prior to his confrontation of the appellant (TR of trial pp. 9, 10); that appellant was seated in the witness's automobile (TR of trial p. 12); that he observed the appellant carry certain objects and tapes from his car (TR of trial p. 13). It would follow therefore that when this witness testified that the appellant these items from the witness's automobile, it was not because the witness assumed, concluded or opined this to have happened, but because this witness, as an eye witness to the commission of a felony, **observed** it to happen.

The respondent further contends the effect of the witness's statement, if error at all, was greatly ameliorated by the subsequent question by Mr. Sorensen. It should be noted, after the disputed question was virtuly withdrawn and another question substituted, (T.14) no effort was made by appellant to strike the answer to the original question. Respondent has no argument with the cases which hold conclusions and opinions are inadmissible under certain circumstances, but feels the matter stated on testimony should be a conclusion or opinion and not an observed fact, in order to apply the cases cited in appellant's brief to the instant case,

Further, even if the evidence were irrelevant, incompetent and immaterial it would not furnish a

ground for reversal where there is abundant competent evidence to establish the fact sought to be proved by such evidence. **Baird v. Denver & R.G.R. R.,** 49 Utah 58, 162 Pac. 79 (1916); Utah R. Civ. P., Rule 61.

Clearly the record discloses an abundance of competent, undisputed evidence as to every element of the crime charged; as a result the trial court's ruling should be affirmed.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO THE LAW OF RECENT POSSESSION.

Appellant urges the necessity of his proposed instruction on recent possession of stolen property in the instant case. He argues that without this instruction the jury was entitled to conclude that by virtue of the possession of certain goods the entry of the automobile was made (brief of appellant p. 6). Appellant overlooks the instructions charged in the instant case. The jury was instructed to dutifully follow the law as stated by the court (R-21); and that the following must be proved beyond a reasonable doubt.

(1) The unlawful, felonious entry of Ronald Call's automobile by the defendant, (2) The specific intent to steal from the victim at the time of entry, (3) That the entry occured during the nighttime, on on or about a specific date (R-25).

These two instructions, when considered together, preclude any such fanciful notion as advanced by appellant regarding the entitlement of the jury to conclude entry from recent possession of certain property. The jury was charged to find specific entry and nothing else would suffice under the instructions.

It was totally unnecessary for the trial court to inject, on appellant's urging, any theory regarding the consideration of recent possession of stolen property in order to "presume" the appellant's guilt: The entire prosecution in the instant matter was predicated upon the testimony of an eye witness who apprehended the appellant at the scene of the crime (R-13). What necessity compels the trial court to instruct the jury that they must find that the possession was sufficiently recent to exclude every other reasonable hypothesis than burglary, as submitted by appellant in his proposed instruction (R-18)?

In 23A C. J. S. **Criminal Law** § 1310 it is stated:

> **The instructions should be predicated on, and applicable to, the issues presented by the pleadings and the evidence, and should be concrete as to each issuable, and should be concrete as to each issuable fact, not abstract; an instruction which although it states a correct legal proposition, is not based on, or applicable to, the issues raised by the pleadings and the evidence, or which is abstract is erroneous and properly refused.**

Accord: **State v. Bebee,** 110 Utah 484, 174 P.2d 478

(1946); **State v. Thompson,** 110 Utah 113, 170 P.2d 153 (1946); **State v. Anderson,** 100 Utah 468, 116 P.2d 398 (1941); **State v. Chealey,** 100 Utah 423, 116 P.2d 377 (1941); **State v. Dubois,** 98 Utah 234, 98 P.2d 354 (1940); **State v. Marasco,** 81 Utah 325, 17 P.2d 919 (1933).

Further, respondent contends the refusal of trial court to grant appellant's proposed instruction was not non-prejudicial but favorable to the appellant. Under the instructions given by the court it was necessary to establish all the elements of burglary without the benefit or use of inference or presumption; whereas if the court had granted the proposed instruction the burden on the state was appreciably less, in that an unlawful entry could be inferred by possession of stolen property when coupled with other facts and circumstances. The error, if such it was, in refusing the instruction was clearly not prejudicial. The appellant received the instructions he was entitled to on the law applicable to the evidence.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PROBATION OF THE APPELLANT.

This court in **State v. Sibert,** 6 Utah 2d 198, 310 P.2d 388 (1957) observed:

> Probation is not a matter of right, and this is so no matter how unsullied a reputation one convicted of

> crime may be able to demonstrate to the trial judge the granting or withholding of probation involves considerable intangibles of character, personality and attitude, of which the cold record gives little inkling. These matters, which are to be considered in connection with the prior record of the accused, are of such nature that the problem of probation must of necessity rest within the discretion of the Judge who hears the case.

An extensive hearing was held before the trial court on July 29, 1966, concerning a further stay of execution on the judgment of committment pronounced against appellant on July 15, 1966. At the hearing it was determined the appellant had a prior criminal record (TR of hearing p. 12); that appellant was awaiting action on a criminal charge originating in Salt Lake County (TR of hearing p. 13); and further, that appellant had given inconsistent explanations to police authorities and probation officials regarding the origin of certain items in the possession of appellant at the time of his apprehension (TR of hearing pp. 14, 15). Respondent therefore submits that the record clearly discloses a sufficient and substantial basis to sustain the action of the trial court in refusing probation.

It is urged that the trial court improperly considered appellant's possession of certain items which were seized in violation of appellant's constitutionally protected rights. In support of this position appellant incorporates in his brief an unidentified minute entry (brief of appellant p. 9) which is not part of the

record and therefore not entitled to consideration on appeal [**Brandley v. Lewis,** 97 Utah 217, 92 P.2d 338 (1939)].

The question of the constitutionally prohibited search and seizure was not before the trial court during the hearing, and the absence of evidence on the matter was even brought to appellant's attention (TR of hearing p. 17). It appears, therefore, the question is being presented initially on appeal and should not be considered by this court [**State v. Starlight Club,** 17 Utah 2d 174, 406 P.2d 912 (1965); **State v. Hammond,** 64 Wash. 2d 591, 392 P.2d 1010 (1964)].

A further contention is urged by appellant in that the trial court required appellant to testify against himself, by admitting guilt, or face a denial of probation. The precise issue was raised and argued in the **Sibert** case (supra) where the court stated:

> **It is contended that the effect of such reasoning is to force defendant to either testify against himself or have probation denied, which would violate the constitutional protections against self incrimination. (United States Constitution Amend V; Utah Constitution art I, § 12). He has no refuge in such provisions after he has been convicted of the crime in question.**

Respondent submits, therefore, the position of appellant lacks support in both law and logic.

CONCLUSION

An examination of the record refutes appellant's

assertions that error arose from admission of testimony stating a conclusion. The trial court properly refused to instruct the jury on the law of recent possession as the issue was not raised in the evidence. Further, the trial court, soundly and fairly exercised its discretion in denying probation of the appellant. The appeal is without merit and the conviction should be affirmed.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

GERALD G. GUNDRY
Assistant Attorney General

Attorneys for Respondent