

1961

# George L. Tillman v. State of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

DEC 15 1961

Clerk, Supreme Court, Utah

STATE OF UTAH,  
*Plaintiff and Respondent,*

— vs. —

GEORGE L. TILLMAN,  
*Defendant and Appellant.*

Case  
No. 9562

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BRIEF OF RESPONDENT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

*Plaintiff and Respondent,*

— vs. —

GEORGE L. TILLMAN,

*Defendant and Appellant.*

Case  
No. 9562

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## BRIEF OF RESPONDENT

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### STATEMENT OF CASE

The appellant, George L. Tillman, also known as Spike Jones, was convicted of grand larceny (78-36-1 through 4, Utah Code Annotated 1953) and second degree burglary (76-9-3, Utah Code Annotated 1953) in Third Judicial District Court and sentenced on each crime with the sentences directed, to run concurrently. Appellant contends that he may not be sentenced on both charges.

## DISPOSITION IN LOWER COURT

The lower court, upon conviction of defendant of grand larceny and second degree burglary, sentenced defendant upon each crime, sentences to run concurrently. No further action was taken subsequent to this action except the instant appeal.

## RELIEF SOUGHT ON APPEAL

The appellant seeks to have so much of the sentence as applies to the crime of grand larceny vacated. The respondent, State of Utah, contends the court should affirm, and deny the relief sought.

## STATEMENT OF FACTS

The respondent adopts the facts as set out in the appellant's brief as being essentially correct. The only issue raised on appeal is whether the crime of grand larceny and second degree burglary may be separately punished by individual sentences where the two crimes arise out of the same total transaction.

## STATEMENT OF POINT

### POINT I.

THE APPELLANT WAS PROPERLY SENTENCED ON BOTH THE GRAND LARCENY AND SECOND DEGREE BURGLARY COUNTS.

## ARGUMENT

### POINT I.

THE APPELLANT WAS PROPERLY SENTENCED ON BOTH THE GRAND LARCENY AND SECOND DEGREE BURGLARY COUNTS.

The appellant contends that the trial court erred in sentencing him for both larceny and burglary where the burglary and larceny arose from the same total transaction.

The information under which the appellant was tried lists two counts: Count One being for the crime of burglary, second degree, and Count Two for grand larceny, both crimes being charged as having occurred at the same time and place (R. 8). The facts show that the burglary preceded the larceny in that appellant, being an accomplice to the actual burglary and larceny, stood by in a truck, while his co-principals first entered the building and then removed property therefrom.

At the outset, it is noted that 77-21-31, Utah Code Annotated 1953, provides:

“The information or indictment must charge but one offense, but the same offense may be set forth in different forms under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count; provided, \* \* \* that an information or indictment for burglary may contain a count for housebreaking and one for larceny, and an information or indictment for housebreaking may contain a count for larceny; \* \* \*”

Section 77-21-32, Utah Code Annotated 1953, is to be read with the above cited provision and states:

“The defendant or defendants, or any of them, may be convicted of any offense charged in any of the counts joined as prescribed in the next preceding section; provided, that no person shall be convicted of more than one crime upon the same facts constituting such crime.”

It appears, therefore, that if a person is tried upon joint counts, he may not be convicted of more than one crime if the same facts constitute the different crimes.

The appellant, in contending the court should not affirm the sentence on the larceny count, relies upon 76-1-23, Utah Code Annotated 1953. The key phrase of this statute which prohibits multiple punishments for the same act, is the wording which states: “An *act* or *omission* which is punishable in different ways \* \* \*.” Sections 77-21-32, and 76-1-23, Utah Code Annotated 1953, should be construed in conjunction with each other, since it would be an absurdity to allow a conviction but provide that an accused could not be sentenced upon the conviction. Since both provisions are related to the same general subject matter, they should be construed consistently or in *pari materia*. Sutherland, Statutory Construction, 3rd Ed., Sec. 5202.

It is submitted that the construction of the above statutes is consistent with the sentencing of an accused on both the count of larceny and burglary arising from the same total transaction. Generally, separate sentences may be imposed on each count of an indictment where

different offenses are charged. Thus, as is noted in 24 C. J. S., Criminal Law, Sec. 1567, p. 37:

“As a general rule, where accused enters a plea of guilty or is convicted by a general verdict or otherwise on several counts of an indictment charging separate and distinct offenses although of the same character, he may be subjected to separate punishments \* \* \*.”

To the same effect is that statement in 15 Am. Jur., Criminal Law, Sec. 451, where it is said:

“Unless otherwise provided by a statute, a defendant who pleads guilty or is convicted under an indictment charging two distinct offenses may be punished for both.”

See also 9 Am. Jur., Burglary, Sec. 83, 31 L. R. A. (N. S.) 727.

In the instant case, there is no question but that larceny and burglary are distinct and separate offenses. The elements of one are not the same as the elements of the other. The same facts nor the same acts or omissions do not give rise to both crimes. Larceny takes over where burglary leaves off. Section 76-1-23, U. C. A. 1953, requires that the same act or omission be punishable in the same way; but the acts constituting burglary will not justify a conviction for larceny, and vice versa.

The appellant has cited several early federal cases to the effect that a sentence cannot be imposed for both burglary and larceny where they arise from the same totality of circumstance. It is noted that these cases pre-

ceded the decision in *Morgan v. Devine*, 237 U. S. 632 (1915), where the United States Supreme Court said:

“But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, *but whether separate acts have been committed* with the requisite criminal intent and are such as made punishable by act of Congress.”  
(Emphasis added)

The court there upheld the sentencing of the accused for both the breaking and entering of a post office and larceny therefrom.

The subsequent federal cases cited by appellant are not concerned with the specific issue now before the court, nor as here where we have two separate statutes. The cases cited by the appellant for the most part involve violations of a single statute, making several things criminal. Even so, the rule set down in *Blockburger v. United States*, 284 U. S. 296 (1932), is still applicable to cases like that of the instant situation.<sup>1</sup> In the *Blockburger* case, the court set the test for multiplicity of sentence as follows:

“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.”

There is, therefore, no inconsistency between the federal position and the position advocated by the State

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<sup>1</sup>See *Gore v. United States*, 357 U. S. 386 (1958) and *Harris v. United States*, 359 U. S. 19 (1959), where the United States Supreme Court adhered to the *Blockburger* rule.

and applied by the trial court, since burglary and larceny require the proof of separate elements.

It is submitted that the trial court acted properly and in direct accord with the previous decisions of this Court. In *Wilkinson v. Harris*, 109 U. 76, 163 P. 2d 1023 (1945), the accused sought release on habeas corpus because he had been charged in one information with both burglary and larceny, and sentenced on both counts. The court denied the writ, holding that since he had not completed the sentence on either count, his application was premature. A little over a year later, the same contention as is raised in the instant case and was sought to be raised in the *Wilkinson* case was before the Utah Supreme Court. In *Rogerson v. Harris*, 111 Utah 330, 178 P. 2d 397 (1947), a writ of habeas corpus was sought by petitioner on the grounds that he was improperly convicted of larceny and third degree burglary, and sentenced to consecutive sentences on both counts; and that he had served his sentence for burglary, he should be freed. The court rejected the contention. It noted that the statute, that is now 77-21-31, U. C. A. 1953, allows joinder of the offenses in the information and that what is now 77-21-32, U. C. A. 1953, prohibits conviction if the crimes are based upon the same facts. The court stated:

“\* \* \* The clear meaning of Section 105-21-32 [77-21-32, U. C. A. 1953] is that a defendant may be found guilty of more than one offense charged in the same information unless the same facts constitute both or all the crimes of which he is charged.

“Do the same facts in this case constitute the crimes of burglary in the third degree and grand larceny?

“Burglary in the third degree is defined as: ‘Every person who, in the daytime, enters any dwelling house \* \* \* or other building, \* \* \* with intent to steal or to commit any felony whatever therein, is guilty of burglary in the third degree.’ Section 103-9-5, U. C. A. 1943.

“Larceny is defined as: ‘Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another.’ Section 103-36-1, U. C. A. 1943.

“The crime of burglary was perpetrated by the plaintiff’s entering the garage with intent to steal. Had he been interrupted and prevented from taking the car, or, after entering, had he changed his mind and decided not to take the automobile he still would have committed the crime of burglary.

“Larceny requires no ‘entering.’ The crime is accomplished merely by taking the personal property of another with intent to steal.

“In this case burglary and larceny arose out of the same total transaction but the proof of the burglary stopped when the proof of the larceny started. Entirely different facts constitute the different crimes of which the plaintiff was found guilty. The same facts therefore do not constitute the two crimes joined but different facts constitute different crimes. Conviction of the two crimes were therefore not prohibited by Section 105-21-32, U. C. A. 1943.” (178 P. 2d at 399.)

The court also noted that the sentences on the crimes, which were consecutive and for both larceny and burglary, were proper. The court said:

“The plaintiff was legally charged with burglary and grand larceny. The convictions *and sentences* for the two crimes were regular. He is being detained in the state prison by virtue of those *sentences*.” (Emphasis added)

Although the court did not refer to 76-1-23, U. C. A. 1953, it did decide that the crimes of burglary and larceny are not patterned on the same facts and, hence, not the same act or omission, and that separate sentences for each are proper. Thus, the Harris case, it is submitted, is dispositive of the instant appeal.

The position of the Utah court appears in accord with the greater majority of cases from other jurisdictions as well. In *Williams v. State*, 109 A. 2d 89 (Md. 1954), the Maryland Court of Appeals said:

“In *Eyer v. Warden*, 197 Md. 690, 80 A. 2d 19, Judge Delaplaine said for the Court: ‘Consecutive sentences, if certain and definite, are valid, where the accused is convicted of separate and distinct crimes charged in different indictments *or in different counts of the same indictment*.’ (Emphasis supplied) We have held that a count of breaking and entering and a count of larceny may be joined in the same indictment. *Debinski v. State*, 194 Md. 355, 71 A. 2d 460; *Bowser v. State*, *supra*. The finding of the jury as to guilt on both the first and second counts was a finding that separate crimes had been committed. This trial court could, therefore, in its discretion impose separate punishments, within statutory limits.”

Other decisions from the same state appear to support the rule. *Johnson v. State*, 164 A. 2d 917 (Md. 1961); *Young v. State*, 151 A. 2d 140 (Md. 1959).

In *State v. Hutton*, 87 Ariz. 176, 349 P. 2d 187 (1960), the Arizona Supreme Court rejected the same argument as is now urged by appellant and did so while considering the effect of A. R. S., Sec. 13-1641, which is the same as 76-1-23, U. C. A. 1953. The court said:

“The above statute covers a situation where the same act is punishable in different ways under different sections of the law. Under such a situation, he can be punished for only one offense. Burglary and theft are two separate and distinct acts. To constitute burglary, it is not necessary that theft be committed.”

To the same effect are *Wyatt v. Alvis*, 136 N. E. 2d 726 (Ohio App. 1957); *State v. Trunzo*, 137 N. E. 2d 511 (Ohio App. 1957); *Kuklich v. Baldi*, 150 Pa. Super. 390, 28 A. 2d 496 (1942); *State v. Byra*, 128 N. J. L. 429, 26 A. 2d 702 (1942); *People v. Morhous*, 63 N. Y. S. 2d 274 (1946); *Robinson v. Commonwealth*, 190 Va. 134, 56 S. E. 2d 367 (1949); *Copeland v. Manning*, 109 S. E. 2d 361 (S. C. 1959); *Sharp v. State*, 61 Neb. 187, 85 N. W. 38; *People v. Guarino*, 132 Cal. App. 2d 554, 282 P. 2d 538 (1955); *People v. Macias*, 161 Cal. App. 2d 594, 326 P. 2d 936 (1958).

Substantial reasons exist for the precedents, since different values are concerned in each crime (see 100 U. of Pa. L. Rev. 411 [1952]); and where both are involved, the result is more serious than if just one crime were

present. In *United States v. Mayo*, 26 C. M. R. 627 (1958), pn. denied, 27 C. M. R. 512, the court rejected the "single transaction" and "continuous impulse" tests as being not applicable to the crimes of housebreaking and larceny. The court said:

"It is our opinion that none of the rules or tests enunciated briefly above are, *or should be*, determinative of the case at hand. It is unthinkable that a housebreaking should be determined to be multiplicitious with a separate and further offense committed after the housebreaking has been effected. So to hold would be an invitation to further criminal offense."

It is submitted that the contention of the appellant is unmeritorious both on the basis of Utah precedent and upon other authority.

## CONCLUSION

It is submitted that appellant's argument, having been laid to rest before by the court, need not now be interred since the social values sought to be protected at the time of *Rogerson v. Harris* are still the social values of the present day. It is recognized that even if the appellant's initial premise were sound, the question of the effect of the sentences upon the collective mind of the Board of Pardons may not be ripe for judicial investigation; but since the initial position of appellant is not based upon a correct rationale, that issue need not be met.

It is submitted that the court should affirm both sentences.

Respectfully submitted,

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