

1963

# State of Utah v. Edgar Glen Cude : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

STATE OF UTAH,

*Plaintiff and Respondent,*

—vs.—

EDGAR GLEN CUDE,

*Defendant and Appellant,*

Clerk,

Supreme Court,

Case No. 9619

UTAH

17 1963

APPELLANT'S BRIEF

Appeal from the judgment of the District  
Court of the Second Judicial District in  
and for Weber County, State of Utah  
Hon. Parley E. Norseth, Judge

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*Defendant and Appellant.*

} Case No. 9619

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APPELLANT'S BRIEF

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STATEMENT OF THE KIND OF CASE

This is a criminal case wherein the defendant was charged and convicted of the crime of grand larceny for having taken his 1953 Ford Automobile from the possession of Harold's Auto Sales, an auto repair business in Ogden, Utah (R. 7).

The case was tried to a jury, which returned a verdict of guilty on November 9, 1961, and on November 13, 1961, the trial court sentenced the defendant to the Utah State Prison for a term of not less than one nor more than ten years (R. 27).

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and sentence.

## STATEMENT OF FACTS

On August 16, 1961, the defendant and his friend, Garth Walton, towed defendant's Ford automobile to Harold's Auto Sales in order to obtain an estimate of the cost of needed repairs. The estimate given for overhauling the car by L. Eugene Seifert, a mechanic employed by Harold's, was in the neighborhood of \$180.00 (Tr. 96). The defendant left his car at the garage and returned to Montana where he was employed. He did not return to Harold's until noon on September 20, 1961, to inquire whether the repairs on his car had been completed. At that time he was presented with the repair bill (plaintiff's Exhibit "A"), which totaled \$345.97. There is a dispute in the testimony with respect to defendant's reaction when confronted with this bill, but in any event, he asked Mr. Pettigrew, an employee at Harold's, to leave the car by the garage while he went to Salt Lake to get some money owed him by another to pay for the car (Tr. 13). Not being able to get the money in Salt Lake, defendant returned to Ogden and went to the Friendly Tavern where he met his friend, Denny Maxwell, and proceeded to tell him of his predicament. Maxwell indicated an interest in buying the car, and defendant returned to Harold's to see if he could

get permission to bring the car into town to demonstrate and possibly sell it to obtain money with which to pay the bill. Defendant arrived at Harold's at approximately 10:00 p.m., one hour after Harold's had closed for the night. Finding no one there and assuming he had a right to take his own car, defendant drove it from the lot (Tr. 68, 69 and 77). Mr. Pettigrew called the police the next morning to report the missing car.

On September 23, 1961, at approximately 8:00 a.m., officer Judkins of the Ogden City Police Department, received a call to go to Washington Boulevard and Goddard Street to investigate a man who had been stopped while driving the 1953 Ford in question. The driver of the car was Dennis Maxwell (Tr. 33-34). As officer Judkins testified, Maxwell claimed to be the owner of the car and presented a certificate of registration and a Montana title to the automobile; however, the registration and Montana title were not endorsed by the defendant nor signed by the alleged owner (Tr. 39, 40, 81). The officer took Maxwell down to the Police Station and in the presence of the defendant, who later arrived, interrogated Maxwell concerning ownership of the car. The State attempted to show through Officer Judkins and Officer Wold that defendant had in fact sold the car to Maxwell for \$50.00 and that Maxwell told them this in defendant's presence. Defendant being confused and feeling that his friend was in trouble did not deny this claim (Tr. 36, 37, 43, 44 and 72). Maxwell could not be found at time of trial (Tr. 40).

Defendant testified that on the Saturday of September 23rd, in the hall at the Police Station, he had a conversation with the complainant's partner (Eugene Seifert) and that (Seifert) agreed that some arrangement could be worked out for defendant to pay the bill. This conversation took place after the Sergeant said the affair was a civil matter and defendant and (Seifert) would have to straighten it out (Tr. 72, 73). Defendant showed the car to another prospective buyer on the 27th of September at the pound (the car was impounded the 23rd of September due to its Montana license which was out of date), but the buyer felt that the offering price of \$345.00 was too much for the car. When this deal fell through complainant's partner (Seifert) who was at the pound at the time told defendant "Well, you had better get that money today. If you don't, I'm going to sign out a complaint against you." (Tr. 74)

At the trial defendant's counsel, Mr. Raat, called defendant to the stand to explain his side of the story and asked defendant if he had ever been convicted of a felony to which the defendant answered "Yes." Defendant testified that the last time he was convicted of a felony was in 1952 (Tr. 61). On cross-examination Mr. Newey, attorney for the State, asked defendant how many times he had been convicted of a felony to which defense counsel objected for the reason that it was incompetent, irrelevant and immaterial to the case. The court allowed the answer and defendant testified that he had been convicted of a felony three times. The State inquired as to the nature of each felony over

defendant's objection and defendant testified that he had been convicted of statutory rape and twice for armed robbery (Tr. 75-76).

After the conclusion of the evidence the court instructed the jury as follows:

"Before you can find the Defendant guilty of the offense of grand larceny, as charged in the information, the State must prove to your satisfaction, beyond a reasonable doubt, the following:

1. That on or about August 16, 1961, in Weber County, Utah, the Defendant left with Harold's Auto Sales for repairs his 1953 automobile.

2. That on or about the 20th day of September, 1961, the Defendant removed said automobile from the possession of Harold's Auto Sales without the permission of said Harold's Auto Sales. That the taking away of said automobile was done with the wilful, unlawful and felonious intent of depriving the said Harold's Auto Sales of its right as a lien-holder to the possession of said automobile.

If you are satisfied from all of the evidence in this case, beyond a reasonable doubt, of the above enumerated facts, then you should return a verdict of guilty of grand larceny as charged against the Defendant. But if there is a reasonable doubt in your minds as to the foregoing facts, then you may not convict the Defendant of the crime of grand larceny and your verdict must be not guilty.



‘Felonious’ means proceeding from an evil heart or purpose, done with a deliberate purpose to commit a crime. A malicious wrongful act.” (Tr. 112).

Defendant objected to this instruction and requested the following one which was denied for the reason that it had already been covered in another instruction.

“In theft by larceny, the felonious intent that I have mentioned must exist when possession of the property is originally obtained by the person not entitled thereto, and it is not larceny to take property of another through mistake or under an honestly entertained claim of ownership or right to possession.” (R. 19).

This appeal is directed at the errors committed by the trial court in allowing the State to make further inquiry into defendant’s previous criminal convictions, giving an instruction to the jury which assumed that certain facts had been established thus taking away from the jury its function as the sole judge of the facts of the case, and for failing to allow defendant’s instruction which related to defendant’s theory of the case and defendant’s lack of criminal intent.

## ARGUMENT

### POINT I

THE COURT ABUSED ITS DISCRETION BY ALLOWING STATE’S COUNSEL TO MAKE FURTHER INQUIRY OF THE EXTENT AND NATURE OF DEFENDANT’S PREVIOUS FELONY CONVICTIONS.

The case of *State v. Parker* (1943), 104 Utah 23, 137 P. 2d 626, established that a person could be guilty of larceny by taking his own property from a bailee, however, that case was noted as one which constituted an abuse of the criminal machinery. Considering this case within that light, the conduct of the trial court in allowing the State's counsel to pursue his inquiry with respect to defendant's previous criminal convictions prior to the year 1952, defendant's last criminal conviction, was an abuse of discretion and prejudiced the jury and diverted its attention from the main issue of the case.

The case of *State v. Hougensen* (1936), 91 Utah 351, 64 P. 2d 229 at page 238, sets forth principles with respect to impeachment of a witness's testimony. Although one of the principles set forth states that a witness may be asked on cross-examination whether he had been convicted of a felony, this is not an absolute right and comes within the trial court's discretion after it considers the effect of the questions in their tendency to prejudice the jury against the defendant or divert its attention from the main issue of the case and the purpose sought to be accomplished by the impeachment. The *Hougensen* case, *supra*, sets forth this principle as follows:

“While a defendant in a criminal case who takes the stand may be cross-examined by counsel for the state, as any other witness (section 105-45-5, R.S. 1933), the matter of judicial discretion affecting all witnesses under the varying circumstances under which each may testify is not af-

fectured by such statute, and as elements in the exercise of such discretion, the court should consider the effect of questions in their tendency to prejudice the jury against the defendant or divert its attention from the main issue or issues of the case as weighed against the effect of such questions in affecting the credibility of the witness, keeping in mind that such questions as to a defendant may directly prejudice the jury in the case, whereas in case of a witness not a defendant they do no more than prejudice the jury against such witness and thus less directly affect the case. *State v. Williams*, 36 Utah, 273, 103 P. 250; *State v. Vance*, *supra*; *State v. Shockley*, *supra*. But we think the matter should be left to the sound discretion of the court and do not intend to lay down any rule that under no circumstances can the defendant like any other witness be questioned as to his acts, criminal or otherwise, in accord with rule 7, which may tend to affect his credibility as a witness, subject always to the exercise of his personal privilege in proper cases."

In the present case the defendant had already admitted that he had been convicted of a felony; whatever effect such admission had on defendant's credibility as a witness had already been served. Inquiry into criminal convictions prior to 1952 for purpose of further impeachment was so far removed in time and in light of the admission already made was totally irrelevant and immaterial. The only effect and purpose of such inquiry was to prejudice the jury against the defendant and to divert its attention from the main issue of the case. Such inquiry should not have been allowed and it constituted a serious abuse of discretion by the trial court.

## POINT II

THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY CONCERNING THE ELEMENTS OF GRAND LARCENY REQUIRED TO BE PROVED BY THE STATE.

The instruction to which exception is taken is set forth at page 112 of the transcript and the Statement of Facts of this brief. The particular portions of said instruction which constitute error are as follows:

“\* \* \* That the taking away of said automobile was done with the wilful, unlawful and felonious intent of depriving the said Harold’s Auto Sales of its right as a lien-holder to the possession of said automobile.\* \* \*.”

The court erred by leaving out of its instruction the word “permanently” preceding the word “depriving.” Trial counsel objected to this omission (Tr. 119) and properly so, because it related to defendant’s intent and because the omission of the word “permanently” withheld from the jury the defendant’s theory of the case that defendant was only taking the car for the limited purpose of finding a buyer so that with the proceeds he would be able to pay his debt at Harold’s Auto Sales. A felonious intent is inconsistent with a bona fide intent of returning the property. 32 *Am. Jur.* Section 37, page 928, *Wharton’s Criminal Law*, 12th Ed., Vol. 2, Section 1122, page 1431.

The instruction was further in error because the trial court assumed in the instruction that the facts

which the State had to prove beyond a reasonable doubt had already been established. The Court did this in the following way:

“\* \* \* If you are satisfied from all of the evidence in this case, beyond a reasonable doubt, of the above enumerated facts, then you should return a verdict of guilty of grand larceny as charged against the Defendant. But if there is a reasonable doubt in your minds as to the foregoing facts, then you may not convict the Defendant of the crime of grand larceny and your verdict must be not guilty.\* \* \*” (Tr. 112)

The instruction as given was misleading to the jury. It assumed that the facts had already been established, thus taking away from the jury its function as sole judge of the facts of the case.

32 *Am. Jur.* Section 153 at page 1069 sets forth the following principle.

“Instructions.—\* \* \*. An instruction should not be given which invades the province of the jury to determine the inferences to be drawn from the evidence. Thus, it is reversible error for the court to assume in the instructions that the corpus delicti, or any fact necessary to establish the guilt of the accused, has been proved, and so relieve the jury from its consideration, unless the same is expressly or tacitly admitted by the defendant.”

In the case of *Zediker v. State* (1921, Neb.) 184 N. W. 80, the court held that it was error for the trial court

where the corpus delicti was in dispute, to assume in its instruction that the corpus delicti was established or to refer to it as an established fact even though in another instruction the court instructed the jury that they were the sole judges of the facts.

In *State v. Green* (1931), 78 Utah 580, 6 P. 2d 177 at page 181 the court held:

“\* \* \* the trial judge is not permitted to comment on the evidence, much less may he indicate to the jury that some material facts, not admitted at the trial, are established beyond controversy. It is the sole and exclusive province of the jury to determine the facts in all criminal cases \* \* \*. The provision of our State Constitution which grants accused persons the right to a trial by jury extends to each and all of the facts \* \* \* and such right may not be invaded by the presiding judge indicating to the jury that any of such facts are established by the evidence.”

It is submitted for the foregoing reasons that the instruction as given was misleading and erroneous.

### POINT III

#### THE TRIAL COURT ERRED IN NOT ALLOWING DEFENDANT'S PROPOSED INSTRUCTION.

53 *Am. Jur.* Section 581, page 458 sets forth the following principle of law:

“Ignoring Issues, Theories, or Defenses.—While the instructions should not go beyond matters put in issue by the pleadings and supported

by the proof, they should cover all the material issues thus raised in a case. A court instructing the jury may not ignore or withdraw from the jury issues of fact which are in the case and supported by evidence, a ground of liability, or a proper defense. Nor should it give instructions which tend to or do eliminate an issue properly before the jury and supported by evidence, or exclude from their consideration points which are fairly raised by the evidence on either side."

*Bird v. United States* (1901), 180 U. S. 356, 45 L. Ed. 570, dealt with an erroneous instruction which omitted the defendant's theory of the case of self-defense. The pertinent portion of the instruction which was given is as follows:

"The court instructs the jury, if they believe from the evidence beyond a reasonable doubt \* \* \* that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty \* \* \*."

The defendant objected to this instruction because it was not qualified by the further charge that

"\* \* \* If the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty'."

The court stated in finding this to be an erroneous instruction:

“The question involved \* \* \* was a fundamental one in the case; indeed, it may be said that the defendant’s sole defense rested upon it. The defendant, as shown in the bill of exceptions, had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant’s evidence.”

In the instant case defendant testified that he had taken the car for the limited purpose of demonstrating it for sale so that he could pay his debt to Harold’s Auto Sales; that he did not have any intention to permanently deprive Harold’s of the value of its lien claim, and that defendant thought he had a right to take his automobile from the lot (Tr. 69, 81).

Defendant’s refused instruction was the only instruction which pertained to defendant’s theory of the case with respect to taking property under an honestly entertained claim of ownership or right to its possession. The failure of the trial court to grant this instruction deprived the jury of an important statement of the law which was consistent with defendant’s theory of the case. Such a failure was highly prejudicial to defendant and constituted error by the trial court.

## CONCLUSION

Like the *Parker* case, *supra*, this case represents an abuse of the criminal process. It is apparent from the facts that the officers of the Police Department did not



believe that a crime had been committed or they would have arrested defendant on Saturday, the 23rd day of September, when defendant was at the police station with his friend Maxwell. It was not until the 27th day of September, after defendant had failed to raise the money, that he was arrested pursuant to the criminal complaint signed by Mr. Pettigrew of Harold's Auto Sales (R. 1). Failure to pay a debt resulted in defendant's prosecution and conviction. He was also convicted because of past felony convictions, because the trial court took away from the jury its determination of all the facts in the case, and because the trial court refused to allow defendant's instruction concerning defendant's good faith intent with respect to his own property. In the interest of justice the conviction should be reversed.

Respectfully submitted,  
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