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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	
JAMES D. CHAMBERS, STANLEY NED JACOBSEN, and J.D. (last name unknown),	:	~~Case No. 19151~~ Case No. 19152
Defendants-Appellants.	:	

BRIEF OF APPELLANTS

Appeal from a judgment and conviction of Burglary, a second degree felony and Theft, a second degree felony, in the Third Judicial District Court in and for Summit County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
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	:	
Defendants-Appellants.	:	

BRIEF OF APPELLANTS

- - - - - - - - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with burglary, in violation of Title 76, Chapter 6, Section 202(1), Utah Code Annotated, 1953, as amended, a second-degree felony, and theft, in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated, 1953, as amended, a second-degree felony.

DISPOSITION IN THE LOWER COURT

Appellants were tried before a jury and found guilty of both charges, in the Third Judicial District Court, the Honorable J. Dennis Frederick presiding. Sentence of an indeterminate term of from one to fifteen years was imposed on both Appellants on March 21, 1983 and Appellants appealed.

RELIEF SOUGHT ON APPEAL

Appellants seek an Order of this Court reversing the judgment of the Court below or a new trial.

STATEMENT OF THE FACTS

Richard Thompson a resident of Park City, Utah and the victim of this crime arrived back from a business trip on January 7, 1983 to find that his house had been burglarized and various items of personal property were discovered missing (T. 13). Of those items discovered missing there was a certain VCR unit, various guns, and a pair of cowboy boots (T. 14-47).

On January 6, 1983 a person called the Park City Police Department, indicating that he had certain information regarding a burglary and theft occurring in Park City, Utah. Later that same day officers from the Park City Police Department met with that person (hereinafter referred to as confidential informant and referred to such throughout the proceedings) (T. 58). The confidential informant arranged a meeting between Appellants and a Park City police officer operating undercover, for January 7, 1983 (T. 65). All of the details of that particular meeting were arranged by the confidential informant (T. 82).

On January 10, 1983 Joseph L. Offert, a Park City police officer sought and obtained a Search Warrant for Appellant Chamber's residence. In connection with obtaining the Search Warrant officer Offert signed an Affidavit for a Search Warrant.

Pursuant to the Search Warrant officers executed on the Search Warrant at the house of Appellant Chambers and seized as evidence one pair of Tony Lama size 8½D lizard tip cowboy boots and one lugar .22 caliber pistol, serial number 39496 (brown leather holster) (return of Search Warrant).

Appellants filed and argued the Motion to Suppress Illegally

Evidence which the District Court denied and those two pieces of evidence were introduced at the Appellant's trial (State's Exhibit 11 and State's Exhibit 12).

Prior to trial Appellants filed a Motion to require the State to disclose the identity of a confidential informant which Motion was denied.

Prior tor trial Appellant Chambers filed a Notice of Alibi and alibi evidence was presented at trial (T. 150-155 and 175-179).

At the conclusion of the trial the State requested and the Court gave an Instruction regarding the presumption flowing from possession of recently stolen property without a satisfactory explanation and applied that both to the theft charge and the burglary charge (Instruction No. 25).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY NOT SUPPRESSING EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT BECAUSE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS INSUFFICIENT AND SEIZURE OF THE EVIDENCE CONSTITUTED A VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS.

Appellants concede that if the Court applies the test established in Illinios v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983) in which the Court established the "totality of the circumstances" test then the Affidavit in Support of the Search Warrant was sufficient.

However Appellants' position is that the appropriate test to be applied is the "two-prong" test established in Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) wherein the United States Supreme Court established what has been called and referred to as the

"two-prong" test. The test was further modified and affirmed by the Supreme Court in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969). The "two-prong" test requires that the informant's information must:

(a) reveal the informant's basis of knowledge and

(b) provide sufficient facts to establish either the informant's veracity or the reliability of the informant's report.

The Affidavit in Support of the Search Warrant indicates the basis for the informant's knowledge as that of personal observation and conversation with Appellants. However the second prong of the Aguilar test is not established upon the four corners of the Affidavit in that there is nothing contained therein to establish either the informant's veracity or the reliability of the informant's report. Appellants do note however that the independent police activity supporting the reliability of the information given by the confidential informant was the purchase of the video recorder by an undercover officer and an identification of that video recorder by the victim. Appellant's contend that this is not sufficient corroboration under the Aguilar test to sustain the search.

Appellants contend that the Aguilar-Spinelli "two-prong" test should be applied in this case, because the Illinois v. Gates, supra "totality of the circumstances" test was prospective only. Appellants' position is primarily taken from the Gates decision wherein at 103 S.Ct. 2332 the Supreme Court said:

> For all of these reasons we conclude that it is wiser to abandon the "two-prong" test established by our decisions in Aguilar and Spinelli. In its place we reaffirm the "totality of the circumstances" analysis that traditionally has formed probable cause

determinations. (emphasis added)

POINT II

APPELLANTS WERE DENIED DUE PROCESS OF LAW BY THE COURT'S FAILURE TO REQUIRE THE STATE TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

The Utah Supreme Court in State v. Forshee, 611 P.2d 1222 involving a charge of distribution of a controlled substance for value held that since the informant was more then a mere informer of a crime about to occur and actually took an active part in arranging meetings and witness the illegal drug sale the defendant's request for disclosure of the informant's identity was warranted. The Court went on to hold that since the defendant knew the identity of the informant that the second exception to the privilege of non-disclosure had been met by the State.

In the case at bar Appellants filed a Motion to require the State to produce the identity of the confidential informant, Appellant Chamber filed a Notice of Alibi and the Affidavit in Support of the Search Warrant contained information regarding the knowledge of the confidential informant and his participation in the crime.

Rule 36 of the Utah Rules of Evidence, (applicable at the time of the trial) provides:

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclosed a violation of a provision of the laws of this State or of the United States to a representative of the State of the United States or governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing

> the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

The Supreme Court in Forshee, supra indicated at page 1223:

> Whether the Court should require disclosure of an informer's identity, not otherwise known to the defendant, in a particular case is a problem which properly requires a determination by the trial court based on a balancing of several factors, i.e., potential hazards to the safety of the parties involved, public interest in protecting the flow of information from informants, and defendant's right to prepare his defense; based on such factors, the trial court must determine how the interests of justice will best be served. (citations omitted)

Appellants by filing with the District Court a Notice of Alibi and entering a plea of not guilty and Appellant Jacobsen's testimony at trial as well as the informant's participation in the sale of the VCR as set forth in the Affidavit in Support of the Search Warrant substantiate Appellants' contention that the informant in this case was more then a mere informer but that he actually took an active part in arranging and meeting and witnessed the illegal sale. The aspect of the Forshee case which vitiate any prejudice flowing to the Defendants in this case was as stated by the Supreme Court at 611 P.2d 1225:

> However, it is defendant's very knowledge of the informer's identity that further served to vitiate any prejudice which may have otherwise resulted from the lower court's failure to require disclosure.

In this case the record is bare regarding Appellants' knowledge of the identity of the confidential informant.

<u>POINT III</u>

THE COURT ERRED BY INSTRUCTING THE JURY THAT AN UNSATISFACTORY EXPLANATION OF POSSESSION COUPLED WITH OTHER CIRCUMSTANCES MAY BE SUFFICIENT TO CONNECT THE POSSESSORS WITH THE OFFENSE OF THEFT AND BURGLARY AND JUSTIFY THEIR CONVICTION OF THESE OFFENSES.

Utah Law as contained 76-6-402 Utah Annotated, 1953, as amended provides:

> The following presumption shall be applicable to this part:
> (1) Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

Appellants contend that this provision of Utah law is unconstitutional on its face since it penalizes a person for exercising his constitutional right to remain silent.

The Court instruction at Instruction No. 18 as follows:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof.
> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

Appellant Chambers did not testify at the trial and under Utah and Federal Constitutional law it would be improper to comment on Appellant Chambers failure to testify. The above Instruction does exactly that. By telling the jury that his failure to explain his possession may constitute and be deemed prima facie evidence that the person in possession of that property stole the property. The Utah Supreme Court in <u>State v. Wiswell</u>,

629 P.2d 146 (1981) in relying upon Doyle v. Ohio, 426 U.S. 610 (1976) held that reference to post arrest silence is prejudicial.

The Court's Instruction No. 18 is a direct reference to Appellant Chambers post arrest silence.

POINT IV

THE COURT'S INSTRUCTION THAT POSSESSION OF PROPERTY RECENTLY STOLEN, WHEN NO SATISFACTORY EXPLANATION OF SUCH POSSESSION IS MADE, SHALL BE DEEMED PRIMA FACIE EVIDENCE THAT THE PERSON IN POSSESSION STOLE THE PROPERTY IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANTS AND WAS INCONSISTENT WITH DEFENDANTS' RIGHTS TO BE PRESUMED INNOCENT.

In Instruction No. 18 of the Court's instructions the following appears:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof.
> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

The Utah Suprme Court in State v. Walton, 646 P.2d 689 (1982) ruled that it was error to instruct the jury that the law presumes a person intends the reasonable and ordinary consequences of his own acts. In ruling on that case the Court relied upon Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), in holding that it was a violation of defendant's due process rights to give the above referred to Instruction.

The Utah Supreme Court in the Walton case relied extensively upon Sandstrom, supra and quoted extensively from Sandstrom as follows:

> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a pre-

> sumption at all, but rather as in irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence-thus effectively shifting the burden of persuasion on the element of intent.

The Utah Supreme Court then went on to apply the Sandstrom ruling to the Walton facts by holding:

> It is true that in the instant case, the jury was told that it may employ the presumption. It was not compelled to do so. That fact, however, does not eliminate the error. Since it was given the option of employing the presumption, we have no way of being assured that the defendant was not convicted on the basis of that presumption. The presumption was not permissive in the sense that the jury was told that it could be considered along with other evidence in resolving the issue of intent. Rather, the jury was told that it could employ the presumption. If it did, it may have fallen victim to the mischief pointed out in Sandstrom v. Montana, supra.

In the present case the Court's Instruction that possession of property recently stolen when no satisfactory explanation of such possession is made shall be deemed prima facie evidence that the person in possession stole the property created in the case at bar a presumption regarding an element of the State's case. This presumption flies in the face of Appellants' "presumption of innocence" and improperly shifts the burden of going forward with some evidence regarding recent possession.

POINT V

THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY CONVICTION IN THIS CASE.

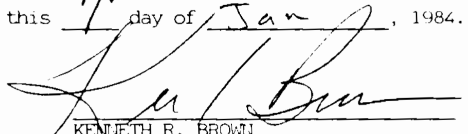
Appellants contend that because there was no direct evidence placing Appellants in Summit County at the time of the commission of this

offense, coupled with the unrebutted alibi evidence presented at trial, that there was insufficient evidence upon which a jury could convict. Appellants concede that this argument is more forceful as it relates to Appellants' conviction for burglary than Appellants' conviction for theft but even as it relates to theft there was insufficient evidence to justify conviction for the crime charged.

CONCLUSION

For the foregoing reasons Appellants seek reversal of their convictions, or in the alternative for a new trial.

RESPECTFULLY SUBMITTED this 7th day of Jan, 1984.



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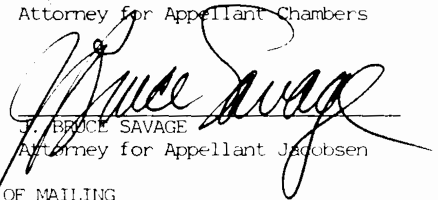

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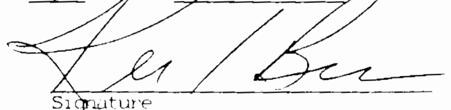
CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed David L. Wilkinson, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 9th day of Jan, 1984.



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