

1963

State of Utah v. Terry D. Louden : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

TERRY D. LOUDEN,
Defendant and Appellant.

Case No.

9851

BRIEF OF RESPONDENT

Appeal from the Judgment of Conviction and Sentence of
the Third Judicial District Court in and for Salt Lake County

Hon. Marcellus K. Snow, Judge

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

TERRY D. LOUDEN,
Defendant and Appellant.

Case No.
9851

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant has appealed from his conviction of second degree burglary in violation of 76-9-3, U. C. A. 1953, upon jury trial in the Third Judicial District, Salt Lake County, State of Utah.

STATEMENT OF FACTS

The respondent submits the following statement of facts, as being the evidence of the case when construed most favorably to the conviction.

During the night of July 22-23, 1962, the Harmon City Shopping Center in Salt Lake County was burglarized (R. 54, 55). Various display cases were rummaged and a Pepsi-Cola machine located in the premises was broken into and \$10.00 removed (R. 65). In addition, one .22 caliber pistol (Exhibit 1), two watches (Exhibits 2 and 3), and a Polaroid camera (Exhibit 4) were taken from the building.

The exhibits (1, 2, 3, and 4) were identified as the items taken from the store as the result of the burglary.

During the course of the investigation into the burglary, the Salt Lake County Sheriff's department received an anonymous tip, and as a result attempted to locate the defendant and his companion (R. 74). Two deputy sheriffs went to the Spiking Motel where appellant was staying. They induced the manager to allow them into the room occupied by the appellant and his companion (R. 75). During this search, all the officers noted was a loaded revolver in the bureau, which serial number matched the revolver taken during the Harmon City burglary (R. 75). Thereafter, the deputies left the room and waited outside for the return of appellant. The appellant returned with his companion and entered the motel room (R. 76). Thereafter, the two deputies approached the room. Although they had drawn their guns as they approached the room, they put them back in their holsters before going in the room. The door to the room was open (R. 83). The deputies asked appellant and his companion if they could come in and look around (R. 76), to which appellant and his companion indicated they could and that they had no objections (R. 76).

According to one officer, the reply was, "Yes, you can come in and look around" (R. 76). Thereafter, the deputies asked if they could search appellant and his companion, and the appellant indicated it was all right (R. 84, 85). During the course of the search, the gun was confiscated, and in addition, the two watches (Exhibits 2 and 3).

Subsequently, the appellant was taken down to the County jail. Some two days later appellant was questioned by the police (R. 78). At the time of questioning, the appellant said he gave the Polaroid camera to the landlady at the Spiking Motel for rent due (R. 79). With reference to the Harmon City burglary, appellant told the police (R. 78, 80) :

"He said that he went there about 2:30 in the morning, pried open the back door and looked around for the safe and couldn't find it; had rummaged through the cashier's desk and couldn't find any money there, and so he took a pistol, Polaroid camera, various watches and some crow bars."

No promises of leniency or anything else were made at that time (R. 79). Thereafter, some promises of leniency were made to induce confessions to other crimes not the subject of the instant prosecution; and further, a written confession was taken but not used. Only the oral statement was used which was given prior to any promises of leniency.

Thereafter, the officers picked up the camera from the motel landlady (R. 80).

Prior to trial, the appellant made a motion to suppress all the evidence found in the appellant's motel room on the

grounds that it was secured by an illegal search and seizure (R. 8). The motion was heard with the trial court receiving the appellant's testimony and a transcript of evidence of the deputy sheriff at the preliminary hearing. (Appendix to record.) The motion was apparently denied (R. 68). Thereafter, during the trial, appellant renewed his motion to suppress, and further requested an out of jury hearing on the issue of the voluntariness of the confession and on search and seizure. The court refused the out of court hearing on the confession, although counsel stated the substance of the expected testimony to the judge, and apparently only wanted the State's witnesses to be subjected to cross-examination before the jury heard them (R. 69). Although the appellant took exception to the procedure, it is not clear whether his exception related only to the confession upon which he had already, through counsel, expressed himself, or to the issue of search and seizure (R. 72).

No evidence on the voluntariness of the confession was put to the jury by the appellant.

Finally, appellant preserved no part of the record on his requested instructions and apparently took no exceptions to the court's failure, if any, to give such instructions.

ARGUMENT

POINT I.

NO REVERSIBLE ERROR WAS COMMITTED
IN REFUSING APPELLANT AN OUT OF

COURT HEARING ON THE ADMISSIBILITY
OF HIS STATEMENT TO THE POLICE SINCE:

- A. THE ORAL STATEMENT ADMITTED
WAS AN ADMISSION, NOT A CONFES-
SION.
- B. APPELLANT PRESENTED THE NATURE
OF HIS TESTIMONY TO THE COURT,
AND THE COURT DETERMINED TO
PLACE IT BEFORE THE JURY, THUS
AFFORDING APPELLANT HIS INITIAL
JUDICIAL CONSIDERATION.
- C. APPELLANT DID NOT MAKE CLEAR HIS
OBJECTION TO THE PROCEDURE FOL-
LOWED WITH REFERENCE TO THE AD-
MISSION OF THE STATEMENT AND
MADE NO OBJECTION TO THE ADMIS-
SION OF THE STATEMENT WHEN PRE-
SENTED TO THE JURY.

A. The appellant contends that the trial court erred in not granting a preliminary hearing, out of the presence of the jury, to rule on the admissibility of the appellant's oral statement to the police. The appellant apparently considered the statement to be a confession. The statement is set out on page 79 of the record, and generally is as follows:

“Q. All right. What was said; what was the conversation in regard to this Harmon City Shopping Center incident?

"A. Well, Mr. Lowden told me that he had given the Polaroid camera to the landlady at the Spiking Motel for rent that was due; or she was going to hold this until he had paid the rent.

"Q. Did he tell you anything as to where he got the Polaroid camera or these other articles?

"A. Yes. And subsequent to him telling me about the camera, he told me all about the job at Harmon City.

"Q. What did he say?

"A. He said that he went there about 2:30 in the morning, pried open the back door and looked around for the safe and couldn't find it; had rummaged through the cashier's desk and couldn't find any money there, and so he took a pistol, Polaroid camera, various watches and some crow bars."

It is admitted that the rule laid down in *State v. Crank*, 105 Utah 332, 142 P. 2d 178 (1943), requires that the trial court, independently of the jury, review all the evidence of the voluntariness of a *confession*, and then if it determines the confession to be voluntary, it may admit both the statement and the circumstances surrounding the taking of the statement for the jury's consideration.¹

However, this rule is not applicable to the case of an admission. Thus, in *State v. Masato Karumai*, 101 Utah 592, 126 P. 2d 1047 (1942), this court noted:

"A confession is the admission of guilt by the defendant of all the necessary elements of the crime

¹The holding of the Crank case and *State v. Braasch*, 119 Utah 450, 229 P. 2d 289 (1951), that the jury should not be instructed to disregard the confession if they determine it involuntary is in doubt. *Rogers v. Richmond*, 365 U. S. 534 (1961).

of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime. *State v. Johnson*, 95 Utah 572, 83 P. 2d 1010; *People v. Fowler*, 178 Cal. 657, 174 P. 892; *State v. Carroll*, 52 Wyo. 29, 69 P. 2d 542; *State v. Stevens*, 60 Mont. 390, 199 P. 256.

“Although there are some cases to the contrary, the great weight of authority and the better-reasoned cases hold that before receiving an admission—as distinguished from a confession—in evidence, it is not necessary that a preliminary showing be made to the effect that the statement was voluntary.”

In that case the court commented with references to the statement taken :

“In the statement testified to there was no express admission of the guilt of any crime of which defendant was charged. Construed against defendant in its strongest possible light, it was, at most, merely an admission that the defendant killed the deceased because deceased was no good. * * *”

Applying that case to the instant facts, it is apparent that the testimony of the police officer as to the statement made by the appellant amounted to no more than a statement of admissions. There was no admission of the intent to commit a criminal offense at the time of the breaking, nor any complete admission of total responsibility. What was said was merely several factual statements as to what was done. This is not sufficient to constitute a confession, and, consequently, the failure to grant an out of court hearing was not error.

B. It is submitted that no reversible error exists even if the appellant's statement to the police is deemed an admission, since a hearing was held out of court where the judge heard the nature of the appellant's evidence, although through counsel, and, thereafter determined to present the matter to the jury (R. 69). Since the judge thereafter determined to present the statement to the jury, he, in effect, determined that there was not sufficient basis to the appellant's objection to rule as a matter of law that the confession was involuntary. This being so, the appellant had all he was entitled to from an out of court hearing. *State v. Braasch*, 119 Utah 450, 229 P. 2d 289 (1951). He could thereafter, if he so decided, raise the same facts before the jury—however, he did not do so. Consequently, it cannot be claimed that any prejudice resulted to the appellant.

C. At the time of the out of court hearing on how the defendant's statement should be handled, the question of the evidence as to search and seizure and how it should be handled was also considered. The record reflects the following (R. 72) :

“MR. ROSS: That's what I want to do now is clean up the record. Then it's your ruling, is it not, that my—that you will hear the evidence both as to the illegal search—that all evidence of this witness will come in and then you will hear any motions I have as to the illegal search and seizure?

“THE COURT: And as to the alleged confession, if any. And those motions may be argued outside the presence of the jury and before the matter is submitted to the jury.

“MR. ROSS: All right. I’ll take my exception to that at this time.”

The appellant did not make it clear as to what he was objecting to. The discussions immediately before related to search and seizure problems. Since the appellant did not clearly object to the procedure to be followed as to the alleged confession, he cannot be heard at the appellate stage to complain. *State v. Mathews*, 13 Utah 2d 391, 394, 375 P. 2d 392 (1962).

Additionally, it is submitted that the appellant waived any contention as to the voluntariness of the statement he gave the deputy sheriff. No evidence was presented of any kind to rebut the testimony of the sheriff that all promises of immunity came subsequent to the statement received in evidence. Nor was any objection made to the admission of the sheriff’s testimony. Consequently, it is submitted the appellant waived any right to complain. *State v. Fraser*, 107 Utah 454, 154 P. 2d 752 (1944).

It is submitted, therefore, that there is no basis for reversal on the issue of appellant’s statement to the police.

POINT II.

NO BASIS FOR REVERSAL EXISTS ON THE CLAIM OF AN ILLEGAL SEARCH AND SEIZURE.

The appellant contends in Point 2 of his brief that the trial court erred in refusing to grant the defendant’s motion to suppress and in admitting into evidence the prop-

erty seized by deputy sheriffs during the search of the motel room in which the appellant was staying.

Although the United States Supreme Court has ruled that evidence procured by an unlawful search and seizure may not be used in state courts, *Mapp v. Ohio*, 367 U. S. 643 (1961), the determination of what conduct is "unreasonable" is still a matter for state determination. In *Commonwealth v. Bosurgi*, 190 Atl. 304 (Pa. 1963), the Pennsylvania Supreme Court noted :

"In passing upon the 'reasonableness' of a search and seizure, a preliminary and most important, question is whether Mapp requires that state courts determine the 'reasonableness' of such search and seizure in accordance with federal or state standards. To that question Mapp gives no direct answer. However, a study of Mapp would indicate that, at least by implication, state courts are still free to apply their own, rather than the federal, criteria of 'reasonableness'."

See also *Commonwealth v. Richards*, 198 Pa. Super. 42, 182 A. 2d 293 (1962).

Other courts have also followed the Pennsylvania reasoning. *State v. Smith*, 37 N. J. 481, 181 A. 2d 761, 767 (1962); *People v. Mickelson*, 30 Cal. Rptr. 18, 380 P. 2d 658 (1963); *People v. Ruiz*, 196 Cal. App. 2d 695, 16 Cal. Rptr. 855; *People v. Tyler*, 193 Cal. App. 728, 14 Cal. Rptr. 610.

Consequently, in determining whether the action in this instance was reasonable, federal standards are not wholly applicable.

In the instant case, the police officers acting upon an anonymous tip, approached the motel where the appellant was staying and requested the manager to allow them to look around the appellant's room. The manager allowed the officers to search the room. The officers found a pistol taken from the Harmon City burglary (Exhibit 1). Thereafter, they left the room and waited for appellant and his companion to return. Shortly after appellant returned (and again construing the evidence most favorable to the conviction, *State v. Ward*, 10 Utah 2d 34, 347 P. 2d 865 (1959)), the police approached the room with drawn guns, but holstered them before reaching and entering the appellant's room. The door to the room was open and the police first identified themselves and asked if they could enter, to which they received an affirmative reply from the occupants, "Yes, you can come in and look around" (R. 76). Thereafter, the officers entered and asked the appellant if his person could be searched and he agreed. Exhibit 1, which the officers already knew about, was seized. Exhibits 2 and 3, which the officers had not discovered, were also taken. Exhibit 4 was not discovered by virtue of any unlawful search. The room where the appellant was located and staying was rented to a Mr. Carrell who paid the rent (R. 101), although it was apparently due at the time of the search.

In 79 C. J. S., Searches and Seizures, § 98, it is noted:

"One who seeks affirmative relief on the ground that officers violated his constitutional rights in making a search has the burden of estab-

lishing facts from which it will affirmatively appear that his rights were invaded.”

Consequently, the appellant had the duty of demonstrating the illegality of the search. In the first instance as to the right of the police to search with the manager’s consent, Varon, *Searches and Seizures*, Vol. 1, p. 439 (1961) notes:

“In the case of owners, landlords and tenants there have been many decisions in the various courts throughout the nation that define the rights of each and although the greater weight of authority appears to hold that owners of property and landlords under leases and tenancy agreements have the right to consent to a search of their property, there is a question that is meritoriously raised when the rights of the tenants in possession are absolute.”

The appellant offered no evidence to show that the motel manager had no right to allow inspection or search of the premises. Where the room was actually let to someone other than appellant, where the rent was apparently due, and where no evidence was introduced as to the terms of occupancy, it certainly may be concluded that the appellant has not carried his burden of showing the landlady had no authority to permit the room to be searched. In *People v. Dillard*, 168 Cal. App. 2d 158, 335 P. 2d 702 (1959), the court noted as to a similar situation:

“As her first ground for reversal appellant urges that the entry of the officers into her apartment during her absence was in violation of her constitutional rights and that the evidence produced against her was obtained through an illegal search and seizure. In this regard, as heretofore set forth,

when the officers arrived at appellant's apartment they knocked on the door several times and receiving no response they approached the manager who in response to their request opened the door for them. When they entered they discovered the marihuana seeds on the bed. Appellant does not contend that the manager had no authority to enter the apartment, and the manager testified that he voluntarily permitted the officers to enter. On the occasion of the first visit of the officers to appellant's apartment, there was no search. The contraband was plainly visible when the officers entered. The situation here presented is analogous to that existing in *People v. Ambrose*, 155 Cal. App. 2d 513, at page 523, 318 P. 2d 181, at page 188, wherein we said:

“The officers asked the hotel manager for authority to enter the room whereupon he opened the door and let them in. The question of consent is to be determined by the trier of fact (citing cases). Upon the authority of *People v. Gorg*, 45 Cal. 2d 776, 783, 291 P. 2d 469, and *People v. Caritativo*, 46 Cal. 2d 68, 73, 292 P. 2d 513, we are persuaded that appellant's contention must be rejected. In the cited case it is held that where the officers have acted in good faith with the consent of a homeowner or landlord in conducting a search, and the latter believed they had joint control over the premises, and the right to enter them, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner or landlord's authority. See also *People v. Silva*, 140 Cal. App. 2d 791, 794-795, 295 P. 2d 942.’ ”

Consequently, it is submitted appellant has failed to show an illegal search of the premises.

Secondly, it is submitted that even if the original search were invalid, for several reasons appellant may not complain.

First, it is submitted that if the first search was illegal, the subsequent search was made with the consent of the appellant, and having consented to the subsequent search wherein the gun was seized, he thereby ratified what had been done before. In *People v. Allen*, 142 Cal. App. 2d 267, 298 P. 2d 714 (1956), the California court so held. The appellant's reliance upon *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), is not applicable, since in that case, after the illegal search, the internal revenue service sought to subpoena the records discovered by the search. There was no question of a voluntary relinquishment or ratification by subsequent conduct. Certainly, there is nothing unreasonable about holding that consent to search waives any previous illegality occurring by a prior search where the same contraband is on the premises. It is just as probable that consent would have been given before, under the same circumstances, had the appellant been present. Consequently, no logical basis exists not to find a ratification or waiver.

Nor is there any basis to the claim that there was no consent to the second search. The question of consent or no consent is primarily a matter of fact to be determined by the trial court before ruling on the admissibility of the evidence, and hence the legality of the search. *People v. Fischer*, 49 Cal. 2d 442, 317 P. 2d 967. The only real issue is whether the evidence before the court would not as a

matter of law support a conclusion that the appellant consented to the search.

It is recognized that consent must be freely given and not merely acquiesced in by the person whose premises or person is being searched. *Johnson v. United States*, 333 U. S. 10 (1948). However, in the instant case, the police requested permission to search and received it before ever going about the search. Nor did the appellant merely acquiesce in the officers' request. On the contrary, an affirmative invitation was made to the police to look around. Although the police had originally drawn their guns, they were holstered before entering and requesting permission to search. In *People v. Torres*, 158 Cal. App. 2d 213, 322 P. 2d 300 (1958), the court noted the following facts:

"The facts bearing upon this narrow issue may be stated briefly. At approximately 6:00 p.m. on March 19, 1957, Officer King of the Narcotics Division of the Los Angeles Police Department was informed by Sergeant Bitterhoff of the Robbery Division that a man named Tony residing at 136 West 69th Street was selling narcotics. At approximately 9:45 p.m. on March 19, 1957, Officer King was standing in front of the residence at the given address when appellant (whose nickname was Tony) opened the door and came out. The officers identified themselves as police officers and stated to appellant that they had information that he was using and dealing in narcotics. He denied the accusatory statement. The officers then asked him whether 'it would be all right if we'd look in the house.' Appellant answered, 'Yes, go ahead.'"

Based thereon, the court ruled the search voluntary, commenting :

“A search of a house with the express, free and voluntary consent of a householder suspected of possessing narcotics is neither unreasonable nor unlawful. It follows that contraband found and seized in the course of such a search may lawfully and properly be received in evidence against the accused. *People v. Burke*, 47 Cal. 2d 45, 301 P. 2d 241; *People v. Michael*, 45 Cal. 2d 751, 290 P. 2d 852; *People v. Hood*, 149 Cal. App. 2d 836, 309 P. 2d 135. It is true, as pointed out in *People v. Michael*, supra, that one need not forcibly resist an officer’s assertion of authority to search, but if he freely consents to a search, then neither the search nor the seizure of evidence found in the course thereof is unreasonable. As the court there stated (45 Cal. 2d at page 753, 290 P. 2d at page 854), ‘Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.’ To the same effect are *People v. Lujan*, 141 Cal. App. 2d 143, 296 P. 2d 93, and *People v. Gorg*, 45 Cal. 2d 776, 291 P. 2d 469. Since the question is one of fact primarily for the trial court’s determination, the finding of that court, supported by substantial evidence, is binding upon an appellate court. *People v. Hood*, supra, 149 Cal. App. 2d 836, 838, 309 P. 2d 135; *People v. Allen*, 142 Cal. App. 2d 267, 281, 298 P. 2d 714; *People v. Smith*, 141 Cal. App. 2d 399, 402, 296 P. 2d 913.”

See also *People v. Burke*, 47 Cal. 2d 45, 301 P. 2d 241 (1956), where the California Supreme Court found similar facts sufficient to show consent.

Finally, since there was consent to the search, during which Exhibits 2 and 3 were seized, and since Exhibit 4 was not the subject of search and seizure, and since these three exhibits were admitted in evidence as coming from the burglary, and adding to these facts the defendant's admission of theft from Harmon City, it is difficult to see how the admission of Exhibit 1, even if the subject of an illegal search and seizure, could have prejudiced the appellant's position where the other evidence was so conclusive of guilt.

POINT III.

THE COURT DID NOT ERR IN ITS ACTION ON DEFENDANT'S INSTRUCTION RE- QUESTS.

Appellant finally contends that the court erred in failing to give the appellant's instructions 3 through 7. These instructions do not specifically appear to have been requested during the trial, but merely appear to have been filed with the clerk the same day as the trial (R. 15, et seq.). The instructions concern the statement made by the appellant to the police while in custody. The court apparently did not give any instructions on that matter (R. 19-34). However, no exceptions to the failure to give any instructions appear of record. In the absence of exceptions, the appellant cannot complain of any error unless the error was so apparent as to deny the appellant a fair trial. *State v. Cobo*, 90 Utah 89, 60 P. 2d 952 (1936); *State v. Peterson*, 121 Utah 229, 240 P. 2d 504; *State v. Hines*, 6

Utah 2d 126, 307 P. 2d 887 (1957). Since the evidence in the instant case, as it was before the jury, showed no possible claim of coercion or impropriety in taking the statement actually admitted, there was no error in not giving the instructions. On direct examination, the sheriff's deputy testified that no promises of any kind were made prior to the time the statement was given that was placed before the jury. He adhered to that position on cross-examination. All that was admitted was that a promise was made, subsequent to the taking of the statement that was placed before the jury. No evidence appears to rebut that position. Consequently, there was no issue of fact or dispute so as to require an instruction to be given the jury. The appellant is not entitled to abstract instructions of legal principals not raised by the evidence, *State v. Thompson*, 110 Utah 113, 170 P. 2d 153, and has no basis for complaint.

CONCLUSION

The appellant has raised several claims of error, but an analysis of the alleged errors demonstrates that there is no basis for reversal. The conviction should be affirmed.

Respectfully submitted,

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