

1963

State of Utah v. Hugh F. Rowley and Donald Spencer : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Louis H. Callister; Louis H. Callister, Jr.; Attorneys for Appellants;

A. Pratt Kesler; Attorney for Respondent;

Recommended Citation

Brief of Appellant, *State v. Rowley*, No. 9894 (Utah Supreme Court, 1963).

https://digitalcommons.law.byu.edu/uofu_sc1/4252

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

of the

STATE OF UTAH FILED

001 43 1963
LAW LIBRARY

AUG 23 1963

THE STATE OF UTAH,

Plaintiff and Respondent,

—vs.—

HUGH F. ROWLEY and DONALD
SPENCER,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No. 9894

BRIEF OF APPELLANTS,
HUGH F. ROWLEY and DONALD SPENCER

Appeal from the Judgment and Sentence of the
Third District Court for Tooele County, State of Utah,
Hon. Joseph G. Jeppson, Judge

LOUIS H. CALLISTER and
LOUIS H. CALLISTER, JR.
619 Continental Bank Building
Salt Lake City, Utah
Attorneys for Appellants

A. PRATT KESLER
Attorney General
State of Utah
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2, 3
ARGUMENT	3
POINT I. THE TRANSCRIPT OF PROCEEDINGS HEREIN, WHICH IS CERTIFIED TO CONTAIN A FULL, TRUE AND COMPLETE TRAN- SCRIPT OF SAID PROCEEDINGS, EXCEPT AS THE SAME ARE DISPENSED WITH BY THE COURT, DOES NOT INDICATE OR SHOW ANY EVIDENCE THAT THE PROVISIONS OF SECTION 77-31-1(1), UTAH CODE ANNOTAT- ED 1953, WERE COMPLIED WITH AS RE- QUIRED BY STATUTE.	3
POINT II. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE AN INSTRUC- TION AS TO THE EFFECT OF A STIPULA- TION FOR THE TAKING OF A POLYGRAPH TEST BY HUGH F. ROWLEY AND AS TO THE PURPOSE FOR WHICH THE RESULTS OF SAID TEST ARE ADMISSIBLE AND THE WEIGHT TO BE GIVEN TO SAID RESULTS.....	5
POINT III. THE COURT, IN INSTRUCTING THE JURY (INSTRUCTION NO. 5-B) REGARDING THE ELEMENTS NECESSARY TO CONSTI- TUTE ATTEMPTED SECOND DEGREE BURGLARY, COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY AS TO THE NECESSITY OF FINDING THAT THE CRIME WAS NOT COMMITTED DUE TO SOME AGENCY OR FORCE NOT SET IN MOTION BY THE DEFENDANTS.	9
POINT IV. THE TRIAL COURT COMMITTED RE- VERSIBLE ERROR IN ITS INSTRUCTION NO. 5-C IN CHARGING THE JURY AS TO WHAT CONSTITUTES A PRINCIPAL AS DEFINED	

TABLE OF CONTENTS—Continued

	Page
IN SECTION 76-1-44, UTAH CODE ANNOTATED 1963, THERE NOT BEING SUFFICIENT EVIDENCE TO SUSTAIN THE GIVING OF THIS CHARGE.	11
CONCLUSION	14

CASES CITED

Henderson vs. State, 230 P.2d 495; 23 ALR2d 1292 (1951)	6
State vs. Baum, 47 Utah 7, 9; 151 P. 518, 519 (1915)	11
State vs. Prince, 75 Utah 205, 214; 284 P. 108, 111	9, 10
State vs. Solomon, 93 Utah 70, 77; 71 P.2d 104 (1937)	4
State vs. Spencer, 101 Utah 274, 281; 117 P.2d 455, 458 (1941); 101 Utah 287, 289; 121 P.2d 912, 913 (1942)	4
State vs. Valdez, 91 Ariz. 274; 371 P.2d 895, 900-901 (1962)	7, 8

TEXTS CITED

76-1-30 Utah Code Annotated 1953	9
76-1-44 Utah Code Annotated 1953	11
77-31-1(1) Utah Code Annotated 1953	3, 4, 5
Arizona Rules of Criminal Procedure, Rule 346	7

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent,

—vs.—

HUGH F. ROWLEY and DONALD
SPENCER,

Defendants and Appellants.

Case No. 9894

BRIEF OF APPELLANTS,
HUGH F. ROWLEY and DONALD SPENCER

STATEMENT OF KIND OF CASE

Hugh F. Rowley and Donald Spencer each appeal from a conviction of assault with a deadly weapon and attempted second degree burglary.

DISPOSITION IN LOWER COURT

The District Court of the Third Judicial District in and for Tooele County, State of Utah, sitting with a jury, found Hugh F. Rowley and Donald Spencer both guilty of the offenses of assault with a deadly weapon and attempted second degree burglary, and sentenced each of the defendants to the Utah State Prison for an indeterminate term as provided by law, said sentences to run consecutively.

RELIEF SOUGHT ON APPEAL

Hugh F. Rowley and Donald Spencer each seek a reversal of the Judgment and Sentence of the District Court in and for Tooele County, State of Utah.

STATEMENT OF FACTS

On October 22, 1962, a complaint was filed in the City Court of Tooele City, Tooele County, State of Utah, charging both Hugh F. Rowley and Donald Spencer with committing the crimes of assault with a deadly weapon and attempted second degree burglary on the 21st day of October, 1962.

On November 30, 1962, a preliminary hearing was held before the Honorable M. Earl Marshall, City Judge of Tooele City, at which time both offenses, upon stipulation of the parties, were heard together, and upon order of the Court both defendants were bound over for trial in the Third District Court in and for Tooele County, State of Utah.

Informations were thereupon filed against the defendants by the District Attorney of the Third Judicial District charging both the defendants with the crimes of assault with a deadly weapon and attempted second degree burglary.

A notice of alibi and a request for a polygraph examination was filed with the District Court by Robert B. Hansen, attorney for the defendants, and thereafter a stipulation was entered into by and between the defendants, their attorney Robert B. Hansen and the District Attorney respecting the admission into evidence of the

results of a polygraph test to be administered to Hugh F. Rowley, the results thereof to be used by the defendants or the State of Utah, regardless of the results of said test.

A trial was thereupon held at Tooele, Utah, before the Honorable Joseph G. Jeppson, one of the Judges of the Third Judicial District Court in and for Tooele County, State of Utah, sitting with a jury, on January 18, 1963, both offenses being joined for trial. Proceedings were then had which resulted in the conviction of both defendants on charges of assault with a deadly weapon and attempted second degree burglary, and it is submitted that certain errors were committed by the Court during the trial of the case, said assignments of error being set out and discussed fully in the points hereunder, said errors constituting and being reversible error.

ARGUMENT

POINT I.

THE TRANSCRIPT OF PROCEEDINGS HEREIN, WHICH IS CERTIFIED TO CONTAIN A FULL, TRUE AND COMPLETE TRANSCRIPT OF SAID PROCEEDINGS, EXCEPT AS THE SAME ARE DISPENSED WITH BY THE COURT, DOES NOT INDICATE OR SHOW ANY EVIDENCE THAT THE PROVISIONS OF SECTION 77-31-1(1), UTAH CODE ANNOTATED, 1953, WERE COMPLIED WITH AS REQUIRED BY THE STATUTE.

The applicable provisions of Section 77-31-1(1) provide as follows:

77-31-1. Order of trial. — The jury having been impanelled and sworn, the trial must proceed in the following order:

(1) If the information or indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.

The Court, after the jury was impanelled and sworn, mentioned to the jury (R. p. 3, lines 7-9) that each of the defendants had entered a plea of not guilty to the charges, but there is no mention or evidence in the record on appeal that the clerk read the informations to the jury as provided for under Section 77-31-1(1) for the offenses of assault with a deadly weapon and attempted second degree burglary as required under said section and which is the first order of trial with which the Court must proceed after the jury is impanelled.

The purpose of reading the information and stating the plea of the defendant thereto to the jury has been defined and clarified by two decisions of the Utah Supreme Court. The Utah Supreme Court in the case of *State v. Solomon*, 93 U. 70, 77; 71 P.2d 104, (1937), stated in substance that under the statute requiring the clerk to read the information and state the plea to the jury, the purpose of reading the information being to inform the jury of the nature of the charge and issue before it for trial.

This position was again reiterated and reaffirmed by the Utah Supreme Court in the case of *State v. Spencer*, 101 U. 274, 281; 117 P.2d 455, 458, (1941) rehearing denied 101 U. 287, 289; 121 P.2d 912, 913, (1942), wherein the Court stated:

The provision for reading the information to

the jury, and stating the plea of the defendant (Section 105-32-1, R.S.U. 1933), is in order that the jury may be informed of the charge and the issues before it for trial. Thus even the jury must understand from the information, not aided by the bill of particulars, what and which offense as defined by the statute it is charged defendant committed.

The Court on rehearing further stated :

The issues established by an information or a complaint and the plea of not guilty thereto constitute the foundation of each criminal trial. Upon those issues the relevancy of the proffered evidence is determined.

It is therefore imperative to protect the rights of the defendants that the provisions of Section 77-31-1(1) be fully and completely complied with so that the jury, before the evidence pro and con is presented, is fully appraised of the charges against the defendant contained in the information so that it can weigh the evidence as received as it relates to the charges.

POINT II.

THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE AN INSTRUCTION AS TO THE EFFECT OF A STIPULATION FOR THE TAKING OF A POLYGRAPH TEST BY HUGH F. ROWLEY AND AS TO THE PURPOSE FOR WHICH THE RESULTS OF SAID TEST ARE ADMISSIBLE AND THE WEIGHT TO BE GIVEN TO SAID RESULTS.

In the case at bar, the following stipulation in regard to the results of the lie-detector test on Hugh F. Rowley was made between the defense and the prosecution (R. 86, lines 10-24) :

MR. HANSEN: We would like to make a stipulation in regard to a polygraph test with the defendant, Hugh Rowley.

May it be stipulated, Robert McManama, an officer in the Salt Lake City Police Department gave a polygraph test to Hugh Rowley, that Mr. McManama is a qualified person to give such examination; that Mr. Rowley denied he had anything to do with these particular offenses, and that Officer McManama was of the opinion he was not telling the truth when he made these statements;

It is also requested that the District Attorney stipulate at the present time, the degree of accuracy of the polygraph tests is approximately 99 degrees accurate.

May it be so stipulated?

MR. BLACK: We are certainly agreeable to that stipulationn, your Honor.

It should be noted that the examiner was never called to testify as to the results; it being stipulated that he was qualified, that the accuracy of the tests was approximately 99 degrees accurate, and that he was of the opinion that Mr. Rowley was lying when he denied anything to do with the particular offenses. The court failed to give any instruction relative to the effect of this stipulation.

There has been a great deal of judicial reluctance to recognize the worth of lie-detector evidence in the court room. The Oklahoma Criminal Court of Appeals in the case of *Henderson v. State*, 230 P. 2d 495, 23 ALR 2d 1292 (1951) in affirming a first degree rape conviction quoted

from leading authorities on the subject of lie-detector tests which pointed out some of the chief difficulties in the diagnosis of deception by the lie-detector technique, which are fully set forth in the body of the opinion.

The Supreme Court of Arizona in a recent decision explained at great length the effect of a lie-detector stipulationn. *State v. Valdez*, 91 Ariz. 274, 371 P2d 895, 900-901 (1962). In that case the defendant was tried and convicted of possessing narcotics, who, together with the county attorney and his counsel, stipulated to a poly-graph examination, said stipulation providing that the test would be admissible at the trial. The operator was permitted, over the objections of the defendant, to testify as to the results of the examination. The court then, pursuant to Rule 346 of the Arizona Rules of Criminal Procedure, after the jury returned a verdict of guilty and before sentence was entered, certified the issue of the admissibility of the test to the Supreme Court of Arizona.

The court held, this being a case of first impression in Arizona, that the the results of a lie-detector test upon stipulation are admissible to corroborate other evidence of defendant's participation in the crime charged, but with the following qualifications and limitations expressed by the court:

That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that

at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given. *State v. Valdez*, supra.

In the case at bar there is not only an absence of an instruction to guide the jury in determining the weight, relevance and effect of this stipulation, which is essential, but the jury never had the opportunity to hear directly from the examiner as to his findings or to learn of the condition and circumstances surrounding the test. Furthermore, the stipulation is so ambiguous, uncertain and indefinite as to the exact results of the test as to mislead and confuse the jury, the inference being, in the absence of an instruction by the court, that the stipulation on behalf of the defendant Hugh F. Rowley, was tantamount to a confession on his part.

It is, therefore, submitted that the trial court committed reversible and prejudicial error in not instructing the jury as to the effect of this stipulation regarding the lie detector test. The said instruction should have contained the charge that the results of a lie-detector test do not tend to prove or disprove any element of the crime with which the defendant is charged, *but at most tends only to indicate that at the time of the examination the defendant was not telling the truth*. It should again be reiterated and emphasized that the stipulation in question did not reveal the exact results of the test, but only indicated in the opinion of the examiner, who was not even present at the trial, that the defendant, Hugh F. Rowley, was lying when he stated that he had nothing to

do with the particular offenses.

POINT III.

THE COURT, IN INSTRUCTING THE JURY (INSTRUCTION NO. 5-B) REGARDING THE ELEMENTS NECESSARY TO CONSTITUTE ATTEMPTED SECOND DEGREE BURGLARY, COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY AS TO THE NECESSITY OF FINDING THAT THE CRIME WAS NOT COMMITTED DUE TO SOME AGENCY OR FORCE NOT SET IN MOTION BY THE DEFENDANTS.

Section 76-1-30, Utah Code Annotated 1953, defines an attempt as:

Any act done with intent to commit a crime,
and tending but failing to effect its commission,

In the case of *State v. Prince*, 75 Utah 205, 214; 284 P. 108, 111, the Utah Supreme Court in commenting what constitutes an attempt under Section 76-1-30, Utah Code Annotated 1953, held that the failure to consummate the crime is an essential element where the charge is an attempt to commit a crime. The court, in instructing the jury as to the necessary elements constituting the crime of attempt to commit extortion, stated:

If you believe therefore from the evidence beyond a reasonable doubt that the defendant intended to commit the crime of extortion as charged in the information and coupled with that intent did some act or acts charged in the information but failed to effect the commission of the completed crime through the intervention of some agency not set in motion by the defendant himself then you should find the defendant guilty of

an attempt to commit the crime of extortion. *State v. Prince*, supra.

In the case at bar the court in its Instruction No. 5-B did not define and make clear this element in its charge to the jury and therefore committed reversible error. The instruction is as follows:

Before you can convict a defendant of attempted burglary in the Second Degree, you must believe from the evidence, and be convinced beyond a reasonable doubt that each of the following elements are true:

1. That the defendant being considered, on or about the 21st of October, 1962, in the county of Tooele, State of Utah, did an act with intent to unlawfully enter the building of the J. C. Penney Company.

(2) That the intent of the said defendant was to enter the said building by forcibly breaking into the said building.

(3) That the said defendant at the said time of the act, if any, was intending to commit larceny in the said building.

(4) That the said act, if any, was done in the night time with an intent at said time and place to enter the said building.

It should be noted that the court, while mentioning the elements of intent to commit the crime and the performance of some act toward the commission of the crime, did not make mention or instruct the jury as to the necessary element of a failure to consummate the crime through the intervention of a force or agency independent of the defendants.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS INSTRUCTION NO. 5-C IN CHARGING THE JURY AS TO WHAT CONSTITUTES A PRINCIPAL AS DEFINED IN SECTION 76-1-44, UTAH CODE ANNOTATED 1953, THERE NOT BEING SUFFICIENT EVIDENCE TO SUSTAIN THE GIVING OF THIS CHARGE.

The court in its Instruction No. 5-C to the jury embodied in the charge the language of Section 76-1-44, Utah Code Annotated 1953, which defines principals to a crime as:

All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission ***

The case of *State v. Baum*, 47 Utah 7, 9; 151 P. 518, 519 (1915) held that before the language of the Utah statute on "Principals," now Section 76-1-44, Utah Code Annotated 1953, may be contained in a charge, the pleadings and the evidence must sustain it. In the *Baum* case the defendant was convicted of burglary in the second degree. On appeal the Supreme Court of Utah held that the jury erred in using the language of the section on "Principals" and instructing the jury concerning defendant's part in the crime charged, there not being sufficient evidence to sustain such a charge. The court stated:

There was no evidence to show, and no one claimed, that the defendant but aided or abetted in the commission of the offense, or, not being present, advised or encouraged its commission. There, hence, was no occasion to give that kind of a charge. Under the circumstances, we think it was misleading and harmful. *State v. Baum*, supra.

In the case at bar, even assuming that the state has established, that the defendants were both at the scene of the crime, there is a lack of evidence to justify the giving of Instruction No. 5-C by the court to the jury. If the defendants are guilty, one of them committing the crimes charged and the other being a principal, which one of the defendants for instance attempted burglary and which of the defendants aided or abetted?

In regard to the defendant, Hugh F. Rowley, and his alleged participation in the crimes, the only evidence possibly connecting him to the offenses charged is that there might have been a similarity between his shoes and the heel prints taken from the roof of a building near the scene of the crime (R. 66, lines 19 through 30), together with the evidence of James Portwood, a witness for the prosecution, who testified that there were two people in the car that drove away after the shooting. Portwood, however, testified that he could not tell whether the occupants of the car were men or women (R. 36, lines 5 through 6), the only other evidence being that the defendants, Rowley and Spencer, were picked up in a car that Portwood testified was the same one that drove away from the scene of the crime (R. 37, lines 7 through 17). It is, therefore, submitted that the evidence in this case is not sufficient to justify the giving of Instruction No. 5-C and that the court committed reversible error in so doing.

It should also be noted that Sheriff Fay Gillette on cross-examination as to whether any attempt had been made to identify Spencer and Rowley by anyone who

was present at the scene of the crime responded as follows:

Q. Was there any attempt made to identify Mr. Spencer and Mr. Rowley by anyone who was at the scene of this crime that night? (R. 72, lines 29 through 30; R. 73, line 1).

A. Yes.

Q. Can you tell us when that attempted identification was made? And who was present, and what the results were?

A. I think it was the 23rd.

I think Mr. Jensen, and Sidney Smith were present.

But I do not know what the result was, because I was with the prisoners in the line-up, and I was not over on the other side, so I do not know what the result was.

Q. Who was conducting the line-up?

A. I think Deputy Sheriff Pitt was conducting the line-up.

MR. HANSEN: I think that is all. (R. 73, lines 2 through 12).

Deputy Sheriff Pitt, nor anyone for that matter, was called by the State to identify the defendants, Hugh F. Rowley and Donald Spencer, as being the individuals who committed the crimes.

CONCLUSION

It is respectfully submitted that in view of the assignments of error as brought out in the points of this brief that the sentence and judgment of the Trial Court should be reversed.

Respectfully submitted,

LOUIS H. CALLISTER and
LOUIS H. CALLISTER, JR.

Attorneys for Appellants

619 Continental Bank Building
Salt Lake City, Utah