1964

State of Utah v. Cloyd Reed Allred : Brief of Appellant

Utah Supreme Court

Draper, Sandack & Saperstein; Attorneys for Appellant;
A. Pratt Kesler; Jay Banks; Attorneys for Respondent;

IN THE SUPREME COURT

of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

CLOYD REED ALLRED,
Defendant and Appellant.

Case No. 10068

APPELLANT'S BRIEF

Appeal from jury verdict of the Third District Court for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

DRAPER, SANDACK & SAPERSTEIN
A. Wally Sandack
606 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for Appellant

A. Pratt Kesler
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah

Jay Banks
District Attorney
Third Judicial District
Salt Lake City, Utah

Attorneys for Respondent

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STATUTES

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STATEMENT OF THE CASE

This is a criminal action in which appellant was charged with the commission of burglary in the second degree and grand larceny.

DISPOSITION IN LOWER COURT

The case was tried to a criminal jury from a verdict finding appellant guilty of both burglary in the second degree and grand larceny. The appellant appeals through his court appointed counsel.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction, as a matter of law, or failing that, a new trial.

STATEMENT OF FACTS

At approximately 3:00 o'clock a.m. in the morning of September 5, 1963, Kim's Market, located in Copperton, Utah, was forcibly entered and certain items of property removed by two unidentified individuals who were seen by a tenant, residing in the upstairs apartments, leaving the market (tr. 51). No identification was possible from any witness as they were between fifty and seventy-five feet from the tenant's window (tr. 52). No witness was able to recognize the defendant (tr. 53). Ruth Goff, owner of the business, had secured the market doors at about 8:00 o'clock p.m. prior to the entry (tr. 61). Upon arrival, witness Goff observed that the front door had been forced open (tr. 61). The owner claimed that a quantity of cigarettes, a .38 caliber pistol, a pair of safety boots, a pair of coveralls and a radio, having a value in excess of Fifty Dollars ($50.00), were missing (tr. 60, 61), upon investigation and invntory the following morning. Mrs. Goff also testified that the store's check book was missing, along with the check protector (tr. 69, 70). She identified State's Exhibit No. 4 as one of the checks which had been taken out of the check book (tr. 70), as well as the safety boots, coveralls and gun. (Exhibits 1, 2 and 3).

These exhibits were introduced in evidence over the objection of defendant's counsel who had, prior to the trial, filed a motion to suppress the evidence on the grounds that the items had been obtained through illegal search and seizure of the defendant's car and his apartment (tr. 2). The hearing on that phase of the case took place at 9:15 o'clock a.m., October 16, 1963, before Judge Van Cott who, after hearing defendant's evidence, overruled his motion and ordered the trial to proceed (tr. 32-49).

The testimony supporting defendant's motion to suppress the evidence showed that about noon on September 6, 1963, Deputy Sheriff Paul LaBounty, while making a routine investigation following the alleged burglary, without search warrants or warrant for arrest of the defendant, spotted the defendant driving an automobile near Seventh South and Third East Streets, Salt Lake City, Utah, and attempted to overtake him (tr. 35). The defendant parked the car he was driving at 314 East Seventh South and ran away from the Deputy. Mr. LaBounty searched the car, found the boots and coveralls allegedly t aken from Kim's Market (tr. 36). The Deputy claimed this evidence was in plain sight on the front seat, whereas, the defendant testified it was in the trunk compartment and further explained that he had obtained the items the night before from a friend. The car was not impounded (tr. 37). The Deputy made no effort to obtain a search warrant, but took the boots and coveralls into his possession. Sometime during the 6th or 7th of September, 1963, the

Sheriff made two visits to defendant's apartment without the consent of defendant. A companion, who lived in the apartment with the defendant, allowed the Sheriff to search the apartment without a search warrant. On the second visit, the Sheriff had obtained a search warrant and at this time located a .38 caliber pistol (tr. 41). The search warrant included a description of the boots and coveralls which had previously been impounded. Donald Madsen, a companion of the defendant who resided there along with four or five other individuals, allowed LaBounty to search the apartment (tr. 44).

The defendant, upon learning that a warrant for his arrest was outstanding, voluntarily turned himself in after first arranging for a bail bondsman. Witnesses for the State testified that defendant did not confess or admit participation in the crime of burglary in the second degree or grand larceny, only that defendant claimed he had received this property in good faith, learning later that it had been stolen and that was the reason for his voluntarily turning himself over to the authorities.

Witness Robert L. Nelson, operator of the Shoppers Market, at 1506 East 4160 South, identified the defendant as the person who presented State's Exhibit No. 4, the stolen check, to him. No criminal charge was filed on the stolen check against this defendant, nor was the defendant charged with the crime of receiving stolen property.

The jury returned guilty verdicts for each charge (tr. 16, tr. 18). Judge Van Cott, on his own motion, ordered the jury verdict of guilty of the crime of burglary in the second degree vacated and set aside and dismissed that count of the information on October 17, 1963 (tr. 28) on the grounds that the State had failed to prove said charge of burglary in the second degree against the defendant. The defendant was sentenced on October 28, 1963, to the Utah State Prison for the indeterminate term as provided by law for the crime of grand larceny, and the commitment issued November 1, 1963.

ARGUMENT

POINT I. THE EVIDENCE DOES NOT SUPPORT THE VERDICT THAT THE DEFENDANT WAS GUILTY OF THE CRIME OF GRAND LARCENY.

In view of the court's own motion setting aside the guilty verdict of the jury on the crime of burglary in the second degree, it would seem to follow that the court should have directed a verdict of not guilty on that charge and not submitted that charge to the jury. The court's failure to do so amounted to prejudicial error and certainly influenced the jury in its guilty verdict on the grand larceny charge. Viewed in this perspective and the presumption (76-38-1 UCA 1953) that possession of property recently stolen, when the person in possession fails to make a satisfactory explanation,

shall be deemed prima facie evidence of guilt and in the absence of such instruction to the jury, following 76-38-1, the State did not establish the necessary elements to constitute larcency. (*State v. Merritt,* 67 Utah 325, 247 Pac. 497, 501). Absent proof of felonious stealing, taking, carrying, leading or driving away of the personal property of another, the jury could not infer that the defendant committed the larceny unless it considered that defendant had an unexplainable possession of property recently stolen. The case, however, was not submitted to the jury on the theory of recent possession of stolen property.

There was absolutely no evidence identifying the defendant with the forcible entry into the market and no proof of the necessary elements to make out the crime of larceny, except possession of the boots and coveralls. Defendant was not charged with receiving stolen property (76-38-12 UCA 1953) which is punishable by imprisonment for a term not exceeding five years, whereas, grand larceny is punishable by a term not exceeding ten years.

The obvious doubt in the mind of the trial court in setting aside the burglary conviction must also favor the same doubt concerning the elements of grand larceny and where, as here, the case was not submitted on the theory of recent possession of stolen property, the conviction should be set aside.

POINT 2. THE COURT ERRED, AS A MATTER OF LAW, IN DENYING DEFENDANT'S

MOTION TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED BY THE STATE AND IN ALLOWING THE STATE TO INTRODUCE SUCH EVIDENCE.

On June 19, 1961, the Supreme Court of the United States in *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, in a landmark decision, overruling its earlier decision in *Wolf v. Colorado,* 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1395, held that, as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court as it is in a federal court. In the instant case, the State, without a proper warrant, obtained possession of the boots and coveralls and, still without a proper warrant, searched the defendant's apartment. The fact that Deputy Sheriff LaBounty later obtained a warrant when he searched the apartment the second time to locate the gun does not cure his action.

It will be recalled that no warrant for defendant's arrest was outstanding at the time, nor had he committed any crime in the presence of the officer when, more than thirty-two hours later, he was chased down by the officer on Third East Street. Defendant's car could have been impounded and a search warrant obtained without jeopardy or prejudice to the State's interest. This was not done. The officer illegally took possession of the coveralls and boots and paved the way for subsequent State search for the gun.

In the past, this court has been reluctant to over-

turn convictions based upon such questionably obtained evidence, but now the Supreme Court of the United States has issued its mandate, and this court should hold that the trial judge erred, as a matter of law, in denying defendant's motion to suppress such evidence and permitting such evidence to be introduced at the trial.

POINT 3. THE COURT ERRED IN INSTRUCTIONS GIVEN TO THE JURY.

The court's instruction No. 7 to the jury:

> "You are instructed that evidence has been offered and received in this case that the defendant on or about the time of the commission of this offense took flight from a sheriff here in Salt Lake County, Utah. This, if you find it to be true, is a circumstance to be weighed by you as tending in some degree to prove consciousness of guilt and is entitled to more or less weight according to the circumstances of the particular case. It is not sufficient of itself to establish the guilt of the defendant, but the weight to which that circumstance is entitled is a matter for you to determine in connection with all of the other facts and circumstances in the case."

was in error in that it indicated to the jury that the defendant *on or about the time of the commission of this offense* took flight from a sheriff here in Salt Lake County, Utah. The offense was committed at about 3:00 o'clock a.m., September 5, 1963. The incident of the defendant's flight from Deputy LaBounty was some twenty-eight hours later, on September 6, 1963. Under

this instruction the jury was told, in effect, that the defendant was in fresh flight from the offense and was not instructed to also consider the fact that after the defendant learned that a warrant for his arrest had been issued, he voluntarily surrendered himself to authorities, after first arranging for a bail bond. The defendant had commited no crime on September 6, 1963, and the officer was merely interested in interrogating him as a part of his investigation. His flight, under such circumstances, should not have been weighed as a circumstance by the jury indicating guilt or a lack of guilt.

Following the court's instruction and the arguments of counsel on behalf of the State and the defendant to the jury, the court gave an additional instruction, No. 8 (a), which provided:

> "Counsel and Members of the Jury: I have one more instruction that I am going to give you. It is in reference to this matter of the exhibit, that is, the check in question.
>
> "You are instructed that the defendant is not charged with the issuance of a bad check in this matter, but if the evidence in reference to the check is found by you of value in the solution of the burglary charged and the grand larceny charged herein, you may consider that evidence in the solution of these charges for which the defendant has been charged, even though you may find or believe that it might show evidence of another crime not charged here.
>
> "The fact that it might show another charge, if you thought it did, does not render it incom-

petent for your consideration in reference to the charges for which the defendant is here standing trial."

Why the court gave such an instruction is not clear from the record. It was, however, excepted to by counsel for defendant (tr. 127). The prejudice in such exception is clear and obvious. In effect, the court has said that while the defendant is not charged with the issuance of the bad check (Exhibit No. 4), the jury may consider that evidence in determining defendant's guilt on the burglary and grand larceny charges. There the court should have ended its instruction, but it went on to add, "even though you may find or believe that it might show evidence of another crime not charged here." In effect the court was indicating to the jury by this additional comment that the court felt that the defendant was guilty of a bad check charge. The court should not have given such instruction. Witness Nelson only identified the defendant as the person who presented the check to his establishment. There was no other evidence that defendant received any money or had uttered the instrument. While his possession of that check may have been possession of recently stolen property, the jury was not instructed to consider this theory of the State's case. Total effect of such instruction is prejudicial to the defendant in that it led the jury to believe that the defendant may also have been guilty of a bad check charge, even though that crime was not being tried.

The court's lengthy instruction No. 3 is also objected to for the reason that the jury was not instructed to

consider defendant's explanation of the recently stolen property in his possession from which the prima facie presumption of grand larceny arises as a matter of law.

Instruction No. 6 was also faulty in that it allowed the jury to speculate on the value of various items to make the determination that the goods exceeded the value of Fifty Dollars ($50.00), and in this regard the jury considered a portable radio and an unknown quantity of cigarettes as part of the corpus delicti, where the proof on the taking of these items was insufficient to go to the jury. The boots have a value of Fifteen Dollars ($15.00) and the coveralls, about Six Dollars ($6.00). No competent evidence as to the value of the gun was shown. It is submitted that the court should have specified the particular items, making up the corpus delicti, in order to arrive at the statutory value.

CONCLUSION

As a court appointed counsel, I believe there is merit to this appeal, and I believe the appeal should be sustained and the conviction set aside as a matter of law on the basis of the specifications of error above stated.

Respectfully submitted this 22 day of May, 1964.

DRAPER, SANDACK & SAPERSTEIN
A. Wally Sandack
Attorneys for Defendant-Appellant
606 El Paso Natural Gas Building
Salt Lake City, Utah

ADDENDUM

Since the above brief was filed, counsel's attention has been called to two recent cases decided by the Supreme Court of the United States appearing in United States Supreme Court Reports, Lawyers' Edition, Volume 11, April 13, 1964, which further support appellant's Point 2, Motion to Suppress Evidence.

See Preston v. United States, 11 L. ed. 2d 777, and Stoner v. California, 11 L. ed. 2d 856, which extend the doctrine of illegal search and seizure to the automobile and hotel rooms of the defendant.

This Addendum dated this 10th day of June, 1964.

DRAPER, SANDACK & SAPERSTEIN
A. Wally Sandack

Attorneys for Defendant-Appellant

606 El Paso Natural Gas Building
Salt Lake City, Utah

Mailed a copy of the foregoing to A. Pratt Kesler, Attorney General of Utah, State Capitol Bldg., Salt Lake City, Utah, and to Jay Banks, District Attorney, Third Judicial District, Salt Lake City, Utah, attorneys for respondent, this 10th day of June, 1964.