1964

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

— vs —

CLOYD REED ALLRED,
Defendant-Appellant.

Case No. 10068

BRIEF OF RESPONDENT

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS — Continued

STATUTES CITED

TEXTS CITED

IN THE SUPREME COURT
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STATE OF UTAH,
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— vs —

CLOYD REED ALLRED,
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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant Cloyd Reed Allred has appealed from a conviction of the crime of grand larceny, in violation of Title 76, Chapter 38, Sections 1 and 4, Utah Code Annotated 1953, in the Third Judicial District Court.

DISPOSITION IN LOWER COURT

Appellant was brought to trial on October 16, 1963 in the Third Judicial District Court of Salt Lake County, State of Utah, charged with the crimes of burglary in the 2nd degree and grand larceny. The appellant was found guilty by the jury of both crimes charged. On October 17, 1963, subsequent to the time of the appellant's conviction on the above referenced charges, the court on its own motion vacated and set aside the conviction of burglary in the 2nd degree (R. 28).

RELIEF SOUGHT ON APPEAL

Respondent State of Utah submits that the appellant's conviction for the crime of grand larceny should be affirmed.

STATEMENT OF FACTS

The respondent State of Utah submits the following statement of facts as being more in keeping with the rule that the evidence will be reviewed on appeal in a light most favorable to the jury's verdict.

On September 5, 1963, Pete Sayatovich, who resided in Kim's Apartments in Copperton, Utah, heard a disturbance outside of his apartment (R. 51). He observed two individuals, going up the side of a mountain adjacent to the apartments, carrying something (R. 52). Mr. Sayatovich examined the door to the entrance of Kim's Market, which was immediately downstairs from where he lived (R. 51), and noticed that the front door had been pried open and the padlock broken (R. 52). Ruth Goff, the proprietress of Kim's Market, indicated that when she closed the market on the 4th of September at 8:00 p.m., she had locked and padlocked it and had closed and locked the backdoor to the premises (R. 61). At approximately 3 o'clock in the morning on the 5th of September, she examined the store premises and found that the front door had been forced open and the padlock was off the door. The backdoor was in the same condition that she left it (R. 61). An examination of the premises disclosed that 150 cartons of cigarettes, a .38 caliber pistol, a pair of coveralls, a radio, Kennecott safety boots, a check protector and check book had been taken from the premises (R. 63 through 70).

At noon, on the 6th of September, 1963 (R. 95), Deputy Sheriff Paul LaBounty saw the accused in the vicinity of

3rd South and 7th East in Salt Lake City (R. 95). Officer LaBounty had previously been given information from an informant that the appellant had been involved in the burglary and larceny at Kim's Market (R. 46). Officer LaBounty went to locate the appellant and found him in Salt Lake City. The appellant was operating an automobile on 7th East and Officer LaBounty made a U-turn and started to follow him. When he was within a distance of approximately 100 yards, the appellant pulled his automobile in a driveway, got out and ran from the automobile (R. 96, 110). Officer LaBounty approached the automobile and noticed boots and coveralls in the vehicle of the kind which had been taken in the burglary (R. 97, 36). The items were in plain sight on the front seat of the automobile (R. 37). On the 6th of September, Officer LaBounty went to an apartment at 230 South 7th East, where the appellant had been staying. The apartment was occupied by Donald Madsen, who accompanied the officer (R. 44). Mr. Madsen invited the officer to come with him and search the apartment (R. 45). The appellant had moved from the apartment on the 5th of September (R. 48). Subsequent to that search, Officer LaBounty obtained a search warrant to search the same premises and recovered the .38 caliber pistol taken during the burglary.

Subsequently, the appellant turned himself in at the county jail to deputy sheriffs. At that time, the appellant indicated that he had purchased the boots and coveralls from some one and that he did not know where the gun had come from (R. 99). The appellant stated that he could not recall where he had purchased the coveralls and boots but that he had obtained them from some store (R. 100).

At the time of trial, Robert L. Nelson testified that a check (Prosecution Exhibit 4), payable to Frank Cardwell

and issued by Kim's Supermarket for $106.96, was passed at his store by the appellant (R. 107). The check (Exhibit 4) was identified by Mrs. Goff as having been one of the blank checks taken with her check book and check protector during the burglary.

While the appellant was confined in pretrial confinement in the county jail, he sent a letter to a friend in which he stated:

> "Get everybody who was at the house that nite to testify that I was home all nite that I got home about 12 or 1 AM and stayed home until about 11 A.M. that morning because I had the flue and had been sick from Tues. until Friday.
> "Get a bill of sale for the coveralls size 34 with a blue lapel and a pair of 8-D Bond work shoes with high tops with steel toes and steel arch support."

Prior to trial, the appellant made a motion to suppress the evidence relating to the coveralls, boots and gun on the grounds that they were obtained during an illegal search and seizure. The motion was denied (R. 49).

ARGUMENT

POINT I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION OF THE CRIME OF GRAND LARCENY.

The evidence in the instant case overwhelmingly establishes the accused's guilt. The fact that the trial court dismissed the burglary conviction does not render the larceny conviction void, but merely tends to show the trial court was more lenient to the appellant than was warranted.[1]

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[1] The appellant's statement that the trial court by its action somehow influenced the jury's verdict does not follow (Brief, p. 5). The jury had already returned its verdict and could not have in any way been concerned with the court's action. The State submits that the trial court erred in dismissing the burglary charge, since the same rule as to possession of recently stolen property that applies to larceny applies to burglary. *State v. Thomas,* 121 U. 639, 244 P.2d 653 (1952); *State v. Manger,* 7 U.2d 1, 315 P.2d 976 (1957); *State v. Nichols,* 106 U. 104, 145 P.2d 802 (1944).

76-38-1, Utah Code Annotated 1953, provides:

> "Larceny is the felonious stealing, taking, carrying, leading or driving away of the personal property of another. *Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.*"

Several Utah cases have held the evidence to be sufficient to convict an accused of larceny, based upon the presumption arising from the possession of recently stolen property where the evidence was similar to that before the trial court in this case. In *State v. Crowder,* 114 U. 202, 197 P.2d 917 (1948), this court upheld the accused's conviction of grand larceny, based upon evidence of possession of recently stolen property. The accused was seen in the vicinity of a house where $2,000 in cash in twenty dollar bills was stolen. Before the theft, he had very little money. Subsequently, he was seen to have $1,000 in twenty dollar bills. This court, in upholding the conviction, stated:

> "Appellant next contends that there was insufficient evidence to sustain a conviction. His argument to sustain this contention is that others also knew of Rottini's habits and the layout of his home, and that on two prior occasions small sums had been missed, and that on one such occasion his young son had taken it and on the other occasion another boy was suspected. As to that evidence it was a matter to be considered by the jury and not this court what weight they wished to give it in arriving at a conclusion of guilt or no guilt. Appellant also argues that there was no evidence connecting him with the crime since the only evidence introduced was that he was present in the vicinity of Rottini's home on one of the nights on which the money could have been stolen and that he was found in possession of $1000 in bills of the denomination of twenty dollars and such evidence only shows a possibility that the appellant took the money but is insufficient to show an actual theft by him. We cannot agree with such a contention. The jury could very reasonably find as it did from the evidence that appellant's presence in the immediate vicinity of Rottini's home and his subsequent quick return to Wyoming with a sum greatly in excess of any he was known to have had, and consisting of twenty dollar bills which was the denomination of the stolen bills, and

appellant's equivocal statements as to when he acquired these bills, that appellant had stolen those bills as charged."

In *State v. Gillespie,* 117 U. 114, 213 P.2d 353 (1950), this court affirmed a conviction for larceny similar to that in this case although not as much evidence of guilt existed. This court stated:

> "* * * While the evidence may not be as complete as desired, it is sufficient to permit the trial judge to find beyond a reasonable doubt that the appellant is guilty. *Under our statute the essential elements to be established by the state in prosecutions for larceny need be only property recently stolen, possession by the defendant, and an unsatisfactory explanation of the possession.* These are all established in the present instance. The evidence is sufficient both to establish a prima facie case and to permit the court to find the defendant guilty beyond a reasonable doubt."

In this case the evidence clearly establishes the burglary of Kim's Market on the 5th of September 1963. It further clearly establishes that boots, coveralls and a gun were taken from the store, and these and other items were taken by two men. One day later, as Deputy Sheriff Paul LaBounty was working on the case, he sought to discuss the matter with the appellant. He saw the appellant in his automobile on 7th East in Salt Lake City and proceeded to make a U-turn to approach the appellant concerning the matter. As the appellant observed the officer, he pulled his car into a driveway and ran away. This evidence of flight is certainly inconsistent with innocence. Wigmore, *Evidence,* § 276, 3rd Ed., notes:

> "Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt."

The appellant himself admitted he ran and gave no reasonable explanation. Further, the possession of the property in the appellant's car, which was stolen from Kim's Market, was conscious recent possession. The same may be said of

the gun recovered from the appellant's former apartment. Further, the appellant's explanation of how he came to acquire the property is contradictory and inconsistent. He told Officer LaBounty that he bought the boots and coveralls from someone, and then that he bought them at a store which he didn't recall. Another explanation was that he received them from "a couple of guys I know." This explanation is refuted by Exhibit 5 in which the appellant tried to get his friend, while appellant was in jail, to establish an alibi and get evidence pertaining to his buying the stolen articles. The evidence amply sustains the conviction.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS.

The appellant's position that the coveralls, boots, and gun were obtained pursuant to an illegal search and seizure is untenable. The evidence clearly supports the conclusion that the above items were not obtained in violation of constitutional principles against unreasonable searches and seizures.

Deputy Sheriff LaBounty had received reliable evidence from an informant, that he knew to be dependable, that the appellant was involved in the burglary of Kim's Market.[2] As a consequence, he desired to talk to the appellant concerning his possible involvement. Officer LaBounty drove towards the area where the appellant lived and observed the appellant in a vehicle on 7th East Street in Salt Lake City. Upon observing the appellant, LaBounty made a U-turn and turned on his red light[3] in order to stop the ap-

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[2] Such information in and of itself may be a basis for apprehension and search or a search warrant. *Rugendorf v. United States,* 11 L.Ed.2d 837 (1964).

[3] Appellant testified that he observed LaBounty and ran, and did not observe a light on the officer's car.

pellant and talk to him. He did not desire to apprehend or arrest the appellant. As he started to follow appellant and was some 100 yards away, the appellant drove his car into a driveway, got out and ran. Officer LaBounty approached the car, observed the stolen contraband on the front seat of the car. Officer LaBounty testified that he seized these items because he felt that if he left to get a warrant, the appellant might return and remove the vehicle. Cf. *Carroll v. United States,* 267 U.S. 132 (1925). There is no legal basis to contend that the seizure of these items was improper. First, it is submitted that the officer did not arrest the appellant nor operate to arrest him. There is nothing wrong with an officer stopping a person to talk with him concerning his possible involvement in a crime. Leagre, *The Fourth Amendment and the Law of Arrest,* 54 Journal of Criminal Law, Criminology and Police Science 393, 417 (1963); *United States v. Bufalino,* 285 F.2d 408 (2nd Cir. 1960). This does not constitute apprehension under Utah law and is a permissible use of the police power. In *Gilliam v. United States,* 189 F.2d 321 (6th Cir. 1951), it was stated:

> "The stopping of appellant's car was not an arrest. No intent to apprehend appellant was shown and no move was made to take him into custody at that time. The officers did not open the car door when it was stopped, nor state that appellant was under arrest, nor touch his person."

See also *Vaccaro v. United States,* 296 F.2d 500 (5th Cir. 1961), cert. den. 369 U.S. 890. Davis, *Federal Searches and Seizures* (1964). Remington, *The Law Relating to "On Street" Detention, Questioning and Frisking of Suspected Persons and Police Privileges in General,* 51 Journal of Criminal Law, Criminology and Police Science 388

(1960). In *United States v. Bonanno,* 180 F.Supp. 71 (DC N.Y. 1960), the court noted:

> "It is clear that the mere stopping of a car by a police officer is not such an illegal act that would taint all evidence stemming therefrom."

State v. Beckendorf, 70 U. 360, 10 P.2d 1073 (1932); *Wendelboe v. Jacobson,* 10 U.2d 344, 353 P.2d 118 (1960).

In the instant case, the appellant's vehicle was not stopped, the appellant himself abandoned the vehicle; as a consequence, no act of the officer can be said to affect the search in this instance.

In Davis, supra, at page 19, it is stated:

> "The courts have ruled that abandoned property, open fields and woods do not fall within the protection of the Fourth Amendment to the Constitution. Under these rulings, officers are not required to have a warrant or other legal justification in order to search or seize such property."

In the instant case, the appellant fled, leaving his property in the presence of the officer. The car was parked in a driveway. The officer had every right to examine the abandoned property and seize the contraband. *Hester v. United States,* 265 U. S. 57 (1924); *Haerr v. United States,* 240 F.2d 533 (5th Cir. 1957). The officer acted properly when he seized the property and appellant may not complain.

Additionally, and most obviously, the contraband was in "plain sight" on the front seat of the appellant's abandoned car. The officer had a right, as well as a duty, to seize the contraband. In Davis, supra, § 9.11, at page 349, it is noted:

> "Assuming there is no unauthorized invasion of private property, the mere observation or visual inspection of what is open and patent does not constitute a search. This is true whether the observations are made with the aid of natural or artificial light."

In *Haerr v. United States,* 240 F.2d 533 (5th Cir. 1957), it is stated:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. 79 C.J.S., Searches and Seizures, Sec. 1. Stopping the automobile in quest of aliens was the duty of the Border Patrol, and it was a part of the performance of this duty to look into the automobile. Mere observation, however, does not constitute a search. United States v. Lee, 1926, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202; Ellison v. United States, D.C. Cir., 1953, 206 F.2d 476; United States v. Strickland, D.C.S.C., 1945, 62 F.Supp. 468."

In *The Federal Law on Search and Seizure,* F. B. I. (1962), it is stated:

> "It is not a search for the officer to merely see what is open and visible to the eye in or on the vehicle either by daylight or by artificial light. *U. S. v. Lee,* 274 U.S. 559 (1927). 'Police officers in dealing with investigation of crime are not required to blindfold themselves.' *U. S. v. O'Brien,* 174 F2d 341 (1949); *Smith v. U. S.,* 2 F2d 715 (1924); *Petteway v. U. S.,* 261 F2d 63 (1958). It is not a search for the officer to shine his flashlight into the vehicle at night. *Smith v. U. S.,* supra; *U. S. v. Strickland,* 62 F.Supp. 468 (1945); *Haerr v. U. S.,* 240 F2d 533 (1957); *U. S. v. O'Brien,* 174 F2d 341 (1949) (open end of a truck). The officer has a right to shine his light into the vehicle at night 'for his own protection, if for no other reason.' *Bell v. U. S.* 254 F2d 82 (1958), cert. den. 358 U.S. 885. In a patrol boat, he may use the searchlight. *U. S. v. Lee,* supra. The information which the officer obtains by looking into the vehicle or any part of it which he may see without any action of opening a door or other part has been lawfully obtained without a search."

It becomes obvious, therefore, that the officer in the instant case acted within the law in obtaining the boots and coveralls from the appellant's vehicle.

With reference to the search of the apartment, where appellant lived, it appears that the search on September 6, 1963 was at the permission and invitation of the then occupant. The accused had moved out on September 5, 1963

and Officer LaBounty examined the premises upon the consent of the then occupant. Consequently, the first search was based on consent. *People v. Torres,* 158 Cal.App.2d 213, 322 P.2d 300 (1958). Even so, nothing appears to have been discovered and obtained during that search. Subsequently, the search was made pursuant to a search warrant and the pistol obtained. Consequently, that item was not illegally obtained. *McGuire v. United States,* 273 U.S. 95 (1927); *United States v. Kaplan,* 286 F. 963 (1923). Davis, supra, § 2.0.

The appellant's contention that he was denied his constitutional rights under the Fourteenth Amendment is without any merit.

POINT III.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY.

The appellant has challenged the court's giving of various instructions to the jury. The appellant challenges Instruction No. 7 given by the court (R. 123), contending that this is an inappropriate instruction. The facts of the instant case clearly show that as Deputy Sheriff LaBounty approached the appellant the day after the commission of the burglary at Kim's Market, the appellant stopped his car and ran from the officer. The instruction given by the court is generally in accordance with Instruction No. 36, *California Jury Instructions, Criminal,* based upon the California Penal Code, Section 1127(c). As previously noted, flight is evidence from which an inference of guilt may be drawn. Wigmore, *Evidence*, § 276, infra page 6. In the instant case the jury was instructed that flight in and of itself was not sufficient to prove guilt but was merely a circumstance which they could consider. The fact that the appellant subsequently turned himself in does not necessarily

diminish the inference that could have been properly drawn from appellant's flight. In *People v. Jordan,* 290 P.2d 484 (Cal. 1955), the California Supreme Court upheld the same instruction as was given in this case. Since the evidence amply justified an inference of guilt from appellant's flight and the instruction was not otherwise improper, no error can be claimed.

The appellant further contends that the trial court erred in giving Instruction No. 8(a) (R. 126, 127). The instruction given was appropriate to the admission into evidence and the circumstances surrounding Exhibit 4, which was a check taken from Kim's Market on the morning of September 5, 1963. The evidence showed that the check had in fact been taken from the market and that subsequently the appellant passed the check to a grocer. The check was returned, indicating that the payee's signature was not an authorized signature. The court clearly instructed the jury that the accused was not charged with any check offense and indicated that Exhibit 4 could only be considered for what evidentiary weight it might have on the burglary and grand larceny charges. The appellant contends that the court erred in indicating in the instruction that Exhibit 4 might show the commission of another offense. Exhibit 4 and the circumstances surrounding accused's possession of it, in fact, did show such actions on the part of the appellant from which it might be inferred that another offense had been committed. 76-26-1, Utah Code Annotated 1953, makes it a criminal offense to forge a negotiable instrument, and 76-26-6 makes it a crime to pass any such instrument. 76-26-7 makes it a crime to issue any fraudulent paper and makes it criminal conduct to pass a fictitious check. These are all offenses which the facts and circumstances surrounding this case might lead a reasonable person to believe the

accused had committed. The court, therefore, properly advised the jury that this evidence could be considered by them to the extent that it related to the burglary and, further, properly advised the jury that the accused was not in fact charged with a check offense. Thus, an appropriate cautionary instruction, preliminary to the substantive instruction, was given and it cannot be said that the instruction was in any way prejudicial. The facts and circumstances concerning other crimes are relevant —

> "To complete the story of the crime on trial by proving its immediate context of happenings near in time and place."

McCormick on Evidence at page 328 (1954).

The appellant objects to the court having given Instruction No. 3, claiming that the instruction failed to state the appellant's theory of the case (R. 121). Instruction No. 3 is merely a statement of the elements of the crime of larceny and burglary. This instruction was exactly what this court in *People v. Flynn,* 7 U. 378, 26 Pac. 1114 (1891), said the trial court should give. The fact that some other instruction would have better suited the appellant's case is immaterial. If appellant had desired an instruction on a particular issue, it was up to the appellant to make a request. Abbott, *Criminal Trial Practice,* 4th Ed., § 661. Obviously, no error exists on this point.

The appellant contends that it was error to give Instruction No. 6 (R. 123). This instruction merely informed the jury that grand larceny requires that they find the value of the property taken to be in excess of fifty dollars and indicated that they could add the value of the various items taken in making a determination. This is an appropriate statement of the law. The jury had before it evidence of a number of items having been taken from Kim's Market.

They also had the value placed upon the items by the proprietress and other evidence upon which value could be established. This, therefore, raised a jury question and the jury was properly advised on the issue. It is, of course, appropriate to join the value of all items taken where the larceny of many items was in fact one larceny.

None of the instructions to which the appellant objects were in any way improper and in no way can be determined to be prejudicial. 77-42-1, Utah Code Annotated 1953, expressly requires that before a case can be reversed, it must appear that the error was of such a grave nature as to affect the substantial rights of a party. Prejudicial error is not presumed. This rule is equally applicable to instructions in criminal cases. *State v. Hall,* 105 U. 162, 145 P.2d 494 (1943).

CONCLUSION

Analysis of the evidence in the instant case makes it manifest that the accused's guilt was proved beyond any reasonable doubt by overwhelming evidence. The legal errors assigned for reversal are without merit. The trial of the accused did not deprive him of any substantial right which would warrant this court in reversing. The court should affirm.

Respectfully submitted,

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