1983

The State of Utah v. Marvin Arthur Powell : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent, -vs- MARVIN ARTHUR POWELL, Defendant-Appellant.	Case No. 19068

BRIEF OF APPELLANT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE DEAN E. CONDER
District Judge

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NATURE OF THE CASE

This is a criminal case in which defendant was charged by Information with Attempted Theft By Receiving and Carrying a Concealed Dangerous Weapon.

DISPOSITION IN THE LOWER COURT

The Jury found defendant not guilty of the charge of Carrying a Concealed Dangerous Weapon, but returned a verdict of guilty of the charge of Attempted Theft By Receiving. Based thereon, the court entered its Judgment and Sentence on February 7, 1983.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Judgment and an order directing the District Court to dismiss the charge of Attempted Theft By Receiving brought against him in this action.

STATEMENT OF THE FACTS

The appellant and his co-defendant, Earl Cushing, were jointly charged by Information with Attempted Theft By Receiving, a Third Degree Felony, in violation of Utah Code Annotated, Title 76-6-408. The appellant was also charged in a Second Count with the crime of Carrying a Concealed Dangerous Weapon, a Third Degree Felony, in violation of Utah Code Annotated, Title 76-10-504. The court granted defendant Cushing's Motion for Acquittal at the close of the evidence at the trial, and the case was submitted to the Jury on the two charges pending against Mr. Powell. A verdict of not guilty was returned on the weapons charge, but the Jury found him guilty on the charge of Attempted Theft By Receiving.

For purposes of this action, the parties have entered into a Stipulation of Facts which reads as follows:

1. On April 12, 1982, the defendant was charged by Amended Information with the crime of Attempted Theft By Receiving, a Third Degree Felony, in violation of Utah Code Annotated, Title 76-6-408, in that said defendant did attempt to receive, retain or dispose of the property of Jack Hales knowing that it had been stolen, or believing that it probably had been stolen, with a purpose to deprive the owner thereof. (R.56)

2. On or about May 19, 1982, defendant filed his Motion To Quash and Dismiss Count I of the Amended Information (dealing with the charge of attempted theft by receiving) on the ground that the acts of the defendant did not constitute the offense of Attempted Theft By Receiving because one of the essential elements of the crime, that of attempting to receive stolen property, was not present when the alleged offense occurred. That motion was denied by the court. (R.61)

3. At the conclusion of the State's case, and at the conclusion of the evidentiary portion of the trial, the defendant made oral motions for acquittal on grounds that the State had failed to establish one of the essential elements of the crime, that of attempting to receive stolen property. Those motions were denied by the court.

4. The stolen property referred to in the Amended Information consisted of two horses that were sold to the defendant on October 20, 1981, by Charles P. Illsley, an undercover police officer employed by West Valley City.

5. The horses that were sold to the defendant by Officer Illsley were not stolen. They were owned by Jack Hales, who loaned them to the West Valley City Police Department on October 20, 1981, for the purpose of making the transaction with the defendant.

6. At the outset of the trial, the attorney for the State of Utah conceded that the horses were not stolen, and testimony throughout the trial consistently showed that the horses were never stolen.

7. The trial judge refused the defendant's request that the jury be instructed that one of the essential elements of the crime is that the property must be stolen when it is received by the defendant. (R.163) Instead, the trial judge instructed the jury that one of the elements of the crime is that defendant did receive or retain the horses believing that they probably had been stolen. (R.114)

8. The jury found the defendant guilty of the charge of Attempted Theft By Receiving, and Judgment on the verdict was entered by the court on February 7, 1983. (R.184-5)

9. The sole issue to be determined by the Supreme Court on appeal is whether the subject property (horses in this case) must actually be stolen before the defendant can properly be convicted of the crime of Attempted Theft By Receiving, in violation of Utah Code Annotated, Title 76-6-408.

ARGUMENT

POINT NO. I

THE DISTRICT COURT ERRED IN REFUSING TO DISMISS THE CHARGE OF ATTEMPTED THEFT BY RECEIVING AND IN INSTRUCTING THE JURY THAT THE OFFENSE IS COMMITTED EVEN THOUGH THE SUBJECT PROPERTY HAS NOT ACTUALLY BEEN STOLEN.

The charges against the defendant arose out of a "sting" operation conducted by the West Valley City Police Department. Defendant was arrested when he purchased two horses from the undercover office who negotiated the transaction. The horses had never been stolen, they had just been borrowed by the officer for use during the "sting" operation. Defendant was subsequently charged with Attempted Theft By Receiving, a Third Degree Felony, in violation of Utah Code Annotated, Title 76-6-408. In pre-trial motions and throughout the trial, defendant's attorney repeatedly moved to dismiss the action on grounds that one of the essential elements of the crime, that of attempting to receive stolen property, was not present when the alleged offense occurred. The court consistently held that the subject property need not be of stolen character before defendant could be convicted of the crime of Attempted Theft By Receiving. The trial judge instructed

the Jury that if one receives or retains property of another believing that it probably has been stolen, the offense is committed even though the property has not, in fact, been stolen. Based on previous Utah cases, the defendant asserts on this Appeal that the trial judge erroneously instructed the Jury and improperly refused to dismiss the case.

The issue on this Appeal is the same as that raised by the defendant in the trial court. The court must answer the question of whether the property received by the defendant (horses in this case) must actually be stolen before defendant can properly be convicted of the crime of Attempted Theft By Receiving, in violation of the charging statute.

The relevant portion of Utah Code Annotated, Title 76-6-408, which is the charging statute in this instance, reads as follows:

> RECEIVING STOLEN PROPERTY--DUTIES OF PAWNBROKERS.-- (1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.

The above statute was amended into its present form when the revised Utah Criminal Code was adopted in 1973. This court has previously considered at least three cases which deal with the present language of the statute. The most recent of these is State v. Murphy,

617 P.2d 399. In that case the Supreme Court of Utah reversed defendant's conviction under the statute because the prosecution had failed to prove an unlawful purpose at the time of defendant's possession of the alleged stolen vehicle. In discussing the elements of the crime, the court stated as follows:

> "Implicit in the language of the statute are the basic elements of the crime: (1) property belonging to another has been stolen; (2) the defendant received, retained or disposed of the stolen property; (3) at the time of receiving, retaining or disposing of the property the defendant knew or believed the property was stolen; and (4) the defendant acted purposely to deprive the owner of the possession of the property.
>
> Before the defendant can be convicted of the crime of receiving stolen property the prosecution must present a quantum of evidence sufficient to establish each element of the crime."

In a footnote referring to element number (1), the court stated, "This requirement is fundamental to the offense."

Another case decided by this court which involved the receiving statute is State of Utah v. Lamm, 606 P.2d 229 (1980). In that case the court was dealing with the charge of concealing or aiding in the concealment of stolen property, but the principles laid down by the court apply to all cases arising under the statute. After quoting the language of the statute, as we have done above, the court listed the elements of the crime as follows:

> "(1) property belonging to another has been stolen; (2) the defendant aided in concealing this property; (3) at the time he so aided in concealing it he knew the item had been stolen; and (4) his purpose in acting was to deprive the owner thereof of possession. For a criminal conviction, the prosecution must prove beyond a reasonable doubt each element of the crime."

It appears that this court has twice stated that one of the essential elements of the crime of receiving stolen property is that the property belonging to another has been stolen. The entire basis for the offense, historically and fundamentally, is that the property actually be stolen. The purpose of the statute is to apprehend those having stolen property in their possession where no evidence exists as to the identity of the actual thief. There is no basis in law or in fact for the conviction of persons who purchase property that is not stolen. The language of the statute that states "or believing that it probably has been stolen," refers only to the requirement of knowledge on the part of the accused that the property was stolen. It disposes of the defense of the accused that he did not know that the property was stolen and makes him equally culpable if he believes that the property was stolen. This language does not change the basic requirement that the property be in fact stolen before he can be convicted of the theft charge.

On this issue, the Utah cases are not unlike the holdings of other States. In 66 Am. Jur.2d, Receiving Stolen Property, §7, Page 298, we find the following general language pertaining to this issue. It reads as follows:

> "An essential element of the offense of receiving stolen property is that the property received must be stolen property. A previous theft of the property, with all the elements of that offense, must affirmatively appear, and if it does not, or if the fact appears that the property

> was not stolen, as where the original taking from the owner was without felonious intent or was not against his will or consent, the receiver is not guilty of receiving stolen property. Similarly, if at the time of the alleged offense the property, although previously stolen, has lost its stolen character through a recovery by the owner or otherwise, the receiver cannot be held guilty, even though he receives it believing it to be stolen property. Pursuant to these principles, it is a defense to a charge of receiving stolen property that the property was offered to the accused with the consent of the owner for the purpose of entrapment."

Since the horses that were sold to Mr. Powell were admittedly not stolen, but were the rightful property of Mr. Jack Hales, who loaned them to the police for the purpose of selling them to Mr. Powell, one of the essential elements of the crime is missing, and the trial court should have dismissed the action or should have granted the defendant's Motion for Acquittal.

The third case that has been decided by the Utah court since the Theft By Receiving statute was amended is State of Utah v. Sommers, 569 P.2d 1110. The prosecution and the court erroneously relied upon this case to support the rulings made during the trial.

In Sommers, the defendant claimed that the receiving statute violated the due process clause of the Constitution because the statute, under the law of Attempt, negated the defense of impossibility. He argued that when the statute precludes the defense of impossibility, then the right of fundamental fairness implied in the due process clause has been done away with. The court rejected the Constitutional defense of impossibility, relying upon outside authority. Then, in line with

the rejection of the defense of impossibility, the court stated as follows:

> "Thus to exculpate defendant solely on the ground the television set he purchased was not, in fact, stolen property would shock the common sense of justice. The defense of impossibility is not a fundamental right essential to an Anglo-American regime of ordered liberty. The express abolition of such a defense advances the fundamental principles of liberty and justice which support all of our civil and political institutions.
>
> Defendant's assertion that he was convicted of the crime of conjuring up malevolent thoughts is without merit. His conviction was predicated on proof of his criminal purpose implemented by an overt act strongly corroborative of such prupose."

The above statement by the court refers to the defense of impossibility and not about the elements of the crime of Theft By Receiving. No issue as to the elements of the crime was discussed or resolved in the Sommers case.

The editors of West Publishing Company made a critical error in preparing the headnotes for the Sommers case. They indicated that the court had made a determination on the stolen property question by including the following headnote:

> "Fact that television set purchased by defendant from undercover agent was not stolen property did not preclude defendant from being convicted of attempt to receive stolen property. U.C.A. 1953, 76-4-101(3)(b)."

Unfortunately, the language of the headnote does not correctly reflect the language and holding of the court. The only thing the court decided in that case was that the defense of impossibility was not available to the defendant under the circumstances of the case.

The law of some of our surrounding states is similar to that laid down in the Lamm and Murphy cases. The Supreme Court of our neighboring State of Nevada has also adopted the principle that the first element of a charge involving stolen property is that the property must, in fact, have been stolen. In affirming a conviction for possession of a stolen camera, the court in Dutton v. State, 581 P.2d 856 (Nevada 1978), stated:

> "In order to sustain a conviction for possession of stolen property the State must show: (1) the property was in fact stolen, (2) the property was possessed by the accused with knowledge that it was stolen at the time of possession, and (3) the property was possessed by him with the feloneous intent of depriving the true owner of the property."

A similar conclusion was reached in the case of Billings v. State, 650 P.2d 917 (Okla. Appeals 1982):

> "In a prosection for receiving stolen property, the State must prove beyond a reasonable doubt that: (1) the property was in fact stolen; (2) that the accused was in possession of the stolen property; (3) that the defendant had actual knowledge or reasonable cause to believe that the property was stolen. . .the state adequately showed, through direct evidence, that the truck was stolen and that Billings [the defendant] was found in possession of it."

This same principle was followed in Lohman v. State, 632 P.2d 430 (Okla. Appeals 1981) where the court affirmed a conviction for receiving stolen cattle. In the court's language, ". . . all that need be shown is that the property is in fact stolen, that the accused took possession of the stolen property, and that he knew or should have known that the property was stolen."

It is obvious that one of the basic elements of the crime of Attempted Theft By Receiving was missing in the case now before the court. The horses that were purchased by Mr. Powell during the "sting" operation conducted by the West Valley City Police Department were admittedly not stolen. Therefore, the court should have dismissed the case before it came to trial. In failing to grant Motions to Dismiss and Motions of Acquittal and instructing the Jury that the offense could be committed even though the property was not actually stolen, the court committed serious error which should be corrected by this court on Appeal. The court should reverse the judgment of the District Judge and should remand the case to the District Court for immediate dismissal of the charges.

CONCLUSION

For reasons set forth herein, the court should reverse the Judgment of the District Court and should order the dismissal of the case.

DATED this 12th day of May, 1983.

RESPECTFULLY SUBMITTED,

H. RALPH KLEMM
Attorney for Defendant-Appellant

NOTICE OF SERVICE

On this 12th day of May, 1983, true copies of the foregoing Brief of Appellant were delivered to the following:

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s/ Ralph Petersen
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