1984

# The State of Utah v. Steven v. Singleton : Brief of Respondent

IN THE [illegible] OF THE STATE OF UTAH

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[illegible] UTAH,

Plaintiff-Respondent,

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[illegible],

Defendant-Appellant.

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BRIEF OF RESPONDENT

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AN APPEAL FROM THE CONVICTION AND JUDGMENT OF THEFT, A FELONY OF THE THIRD DEGREE, IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PETER F. LEARY, JUDGE PRESIDING.


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IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 19107 |
| STEVEN V. SINGLETON, | : | |
| Defendant-Appellant. | : | |

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| Defendant-Appellant. | : | |

## STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with Theft, a third degree felony, under Utah Code Ann., § 76-6-404 (Supp. 1978).

## DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of Theft, a third degree felony on November 16, 1982, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary presiding. On December 14, 1982, Appellant was ordered committed to the Utah State Prison for the indeterminate term not to exceed five years and fined $500.00. Defendant was granted a stay of execution of the above sentence and placed on probation for a period of three years under the supervision of the Department of Adult Probation and Parole.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment in this case.

## STATEMENT OF FACTS

On November 11, 1981, around 7:00 p.m., Denise Bailey was driving home (T. 29). As she slowed down to turn into her driveway, she noticed a little reflection and some movement near a bush in the field next to her house (T. 30, 40). As she pulled into her driveway, a man stepped out from behind the bush and walked right in front of her car (T. 30). The man walked down the street and Ms. Bailey watched him through her rear view mirror (T. 30). When she was sure he was not around, she went to the bush and discovered a stereo system (T. 41). She immediately called the police (T. 41).

When Officer Maack arrived, he discovered that the home next to Ms. Bailey's had been burglarized (T. 90). The front door glass had been broken in order to gain entry into the home (T. 90). Mr. Goldstein, the owner of the house, observed that a stereo was missing (T. 90). He had not given permission to anyone to enter his residence or to remove the stereo (T. 24).

Following this discovery, Officer Maack called in a description of the man seen by Ms. Bailey to other officers in the vicinity (T. 93). The suspect was described as wearing blue jeans, a light weight blue jacket, a white shirt, a two

tone baseball cap, hiking type shoes, with dark hair, of medium height and a slender build (T. 39, 40). Within fifteen minutes, a suspect, exactly matching the description given by Ms. Bailey, was spotted just five and a half blocks away from Ms. Bailey's home (T. 93).

The appellant, Steve Singleton was brought before Ms. Bailey for a show-up (T. 93). Appellant was standing next to the police car under a street light when Ms. Bailey identified appellant from her porch steps and then from the street, a distance of approximately ten feet (T. 78, 97).

Ms. Bailey identified the appellant as the man she had watched earlier in the evening walk from behind the bush, in front at her car and down the street (T. 44).

It does not specify in the transcript exactly when appellant was placed under arrest, but following the identification, appellant was informed of his Miranda rights (T. 97). When asked if he understood the rights and had anything to say, he said that he understood and didn't have anything to say (T. 99). Then on the way to the police station he volunteered the following, "I guess she saw me with the stereo equipment too?" (T. 117). Neither Officer Maack nor the other officers had provoked the comment, nor had they previously mentioned a missing stereo (T. 100), and when asked how he knew about a stereo, the appellant became restless and upset (T. 118).

The appellant had fresh cuts on his hands at the time he was picked up (T. 101). At trial, appellant presented evidence that he had cut his hands a week earlier when he had to break a window to get into his own home (T. 173). The state presented evidence that appellant had given a different explanation to the two officers who first detained him (T. 192, 193), and yet another explanation to Officer Maack (T. 121). Even though these explanations were given to the officers prior to the time appellant received the Miranda rights, counsel for the appellant did not object at the time such testimony was given at trial (T. 101, 102, 192, 193); the explanations were received as evidence. A subsequent motion for mistrial on the matter was denied (T. 244, 245).

Also during the trial proceedings counsel for the appellant objected to the prosecutor's questions directed to Officer Maack about the events at the time of identification and the reading of the Miranda rights (T. 99). The objection was overruled (T. 99). Counsel then moved for a mistrial on the grounds that the questioning was a comment on appellant's post arrest sentence (T. 1.03). That motion for a mistrial was denied (T. 159). Months later, on an appeal to the same court, counsel for the appellant made a motion for a new trial for the same reasons and that motion was denied (R. 428).

## ARGUMENT

### POINT I

THE PROSECUTOR'S SOLICITATION OF TESTIMONY FROM A POLICE OFFICER AS TO THE EVENTS AT THE TIME THE APPELLANT RECEIVED THE MIRANDA RIGHTS WAS PROPER AS IT ESTABLISHED THE FOUNDATION FOR A LATER STATEMENT MADE BY APPELLANT.

Appellant contends that the prosecutor's solicitation of testimony from Officer Maack as to the circumstances at the time of his identification and subsequent receipt of the Miranda rights violated his Fifth Amendment privilege and Fourteenth Amendment due process rights as an improper comment on his post-arrest silence.

The testimony solicited by the prosecutor now in question, is as follows: (T. 97-100).

Q. After she made her identification of the individual, what did you do?

A. I placed the individual back in my car and read him his rights.

Q. What rights did you read?

A. Miranda.

Q. Did you read that from a card, or personally, or what?

A. From a card.

Q. Did he indicate that he understood his rights?

A. Yes, sir, he did.

Q. For the record, do you have the card with you?

A. No, sir, I don't.

Q. Can you remember what the card said, what the rights are that you gave?

A. I always read it directly from a card.

Q. Is that a standard practice procedure card?

A. Yes, it is.

Q. After reading that, did you ask him if he understood his rights?

A. Yes, sir, I did.

Q. Did he respond?

A. Yes, sir.

Q. What did he say?

A. I can describe the car a little bit. Miranda is on the one side and you turn it over and on the other side it asks if those are -- if they completely understand the Miranda that they have been given and if they wish to make a statement or talk to an attorney.

Q. Did he respond to that question?

A. He responded to both.

Q. What did he say?

A. He said he understood his rights and he really didn't have anything to say.

MR. EBERT: Your Honor, I object and I reserve a motion.

THE COURT: The objection is overruled.

MR. EBERT: Your Honor, I would ask to argue this

right now.

THE COURT: You may proceed.

MR. EBERT: Your Honor, I would like to argue it outside the presence of the jury.

THE COURT: You will have an opportunity to do that. You may proceed with your questioning.

MR. GUNNARSON: Thank you.

Q. (By Mr. Gunnarson) Did he indicate he didn't want to talk to you?

A. At that time he did, yes.

Q. What exactly did he say?

A. Something to the effect that he didn't have anything to say.

Q. Did he say he had nothing to say or that he didn't want to talk to you?

A. Just that he didn't have anything to say.

Q. What happened next?

A. I left the scene and was transporting him down to the jail.

Q. Okay. Was there any conversation at that time?

A. Yes, sir.

Q. Who intiated the conversation? Who started it?

A. He did. He made a statement to me when I first got back into the vehicle when I was taking him back to the jail.

Q. Was this in response to a question you asked him?

A. No.

Q. What did he say?

A. He said, "I guess she saw me with the stereo equipment, too?"

The above dialogue is the only reference in the record that could even be construed as an improper comment by the prosecutor. There is no indication that the prosecutor in this situation purposefully placed the appellant's silence before the jury in an attempt to discredit the appellant. The prosecutor did not cross examine the appellant as to his reaction at the time he received the Miranda, nor did the prosecutor comment on appellant's silence in his closing argument. The testimony was solicited for the appropriate purpose of establishing a foundation for appellant's voluntary statement, "I guess she saw me with the stereo equipment too." Moreover, it was appellant's counsel who made repeated reference to appellant's silence at the time he received the Miranda rights (T. 116, 178).

While appellant claims that the testimony had no relevance or probative value to the state's case, the prosecutor explained that the state need to properly lay a foundation for appellant's voluntary statement concerning his knowledge of the stereo equipment. When this identical issue was brought before the lower court, in presentation of arguments to the trial judge the prosecutor clearly outlined his motives for soliciting testimony from Officer Maack

concerning the events at the time the Miranda rights were given to the appellant: "Now, anticipating that [the statment concerning the stereo] was going to come out and there had to be a foundation laid for it, then the question of two parts came in under Miranda: custody first, and foundation in court that the Miranda warnings had been given." (R. 428, 429).

It needed to be established that the appellant had received and understood the Miranda rights and had not been coerced by law enforcement personnel to give a confession about his knowledge of the stereo equipment. There was no error in soliciting testimony concerning the events at the time of appellant's arrest when the purpose was to lay a foundation for later testimony.

Furthermore case law totally supports the use of such testimony for legitimate purposes. The situation in this case is virtually identical to that in State v. Urias, Utah, 609 P.2d 1326 (1980), where the Prosecutor questioned a police officer as follows:

Q. And as I recall, you testified concerning this statement as to the defendant's rights?

A. Yes, Sir.

* * * * * * * *

Q. After you read him the statement of his rights, did you ask if he understood them?

A. Yes, Sir.

Q. And what was his answer?

A. He exercised his rights and wanted to contact an attorney before he made any statement.

Q. Did he thereafter discuss this matter with you at that time?

A. No, Sir. I called his attorney.

Q. Alright-

THE COURT: The last part of the answer will be stricken. It is a volunteer statement by the witness. You asked him if he then discussed it with him and the answer is, no. Anything else is to be disregarded. Urias, at 1328.

There the defendant claimed that his right to remain silent had been violated by the testimony. This Court replied as follows:

> We agree with the proposition that when a person invokes his constitutional rights, the prosecution should not comment thereon, nor so use it in any way that will tend to impair or destroy that privilege. But we do not perceive that this was done in this case. Except for what was said above, there was no further reference to the matter, either in testimony or in argument to the jury. It is apparent that the prosecutor was having the officer testify to the circumstances of the arrest and that the information elicited was but a part of the natural sequence of events. It is difficult to see how that could have been done, or how the case could have been presented without the jury becoming aware in some manner that the defendant had, in fact, exercised his right to remain silent. It is significant that there is no indication that the prosecutor made any attempt to use that fact to cast any inference of guilt of the defendant, nor to persuade the jury to do so. Urias, at 1328.

The prosecutor in this case, as in Urias, did not impair or destroy the appellant's constitutional right. He merely elicited information that was a part of the natural sequence of events at the time of arrest. The prosecutor when cross-examining the appellant did not refer to his silence at the time of arrest, nor did the prosecutor comment on appellant's silence in his closing argument. The prosecutor did not attempt to cast any inference of guilt upon the appellant, nor did he attempt to bias the jury. Based on Urias, there was no prejudicial error committed that requires a new trial. Likewise, when other jurisidictions have been presented with this issue they have found no error.

Arizona is one of a number of jurisdicitions which have considered the issue raised here, i.e., whether or not it is reversible error per se to make any reference to a defendant's exercise of his right to remain silent before the jury. In State v. Bowie, 119 Ariz. 336, 580 P.2d 1190 (1978), a prosecutor had asked a police officer, "After you read Mr. Bowie his rights did Mr. Bowie make any statement to you?" The officer answered, "No" The Arizona Supreme Court stated:

> Generally, it is error for the prosecutor to draw a derogatory inference from the fact that the accused declined to speak to police upon his arrest. (Cites to Doyle v. Ohio 426 U.S. 610 (1976)) However, in the present case, the prosecutor never commented upon the accused's silence during custodial interrogation; the prosecutor merely questioned the officer about the events of the arrest and inquired whether the defendant said anything.

> The rationale of Doyle, supra, suggests that the state should not make any reference to the fact that the defendant exercised his right to remain silent after arrest. Consequently, it was improper for the prosecutor to ask the officer if appellant made any statement, but we do not find the question to be reversible error for the following reasons: This one exchange between the prosecutor and officer was the only time appellant's post-arrest silence was mentioned; when appellant took the stand he was not cross-examined about his failure to give a statement to the police; the prosecutor said nothing about appellant's silent in his jury arguments. Under these circumstances, we find that the prosecutor's improper question did not prejudice appellant, and there was no reversible error.

Bowie, at 1195.

In State v. Satterfield, 3 Kan. App. 2d 212, 592 P.2d 135 (1979), the Court noted:

> . . . (T)he trial court erred when it allowed evidence to be introduced that dealt with defendant's election to remain silent in the absence of his attorney . . .
>
> Nevertheless, a new trial is not required if the court finds from the totality of circumstances that such conduct constituted harmless error beyond a reasonable doubt.

592 P.2d at 142.

The Court in State v. LeBrun, 37 Or.App. 411, 587 P.2d 1044 (1978), also stated:

> Assuming arguendo that the officer should not have been permitted to testify as to defendant's unwillingness to discuss the matter further, the important inquiry, of course, is the prejudice likely to flow from the officer's testimony. Given the

> overwhelming evidence of guilt, we are convinced beyond a reasonable doubt that the result of the trial would not have been different wihout the challenged answer.

587 P.2d at 1046. See also People v. Rooney, 16 Ill.App.3d 901, 307 N.E.2d 216 at 219 (1974); United States v. Dixon, 593 F.2d 626 at 628-629 (5th Cir. 1979); United States v. Sklaroff, 552 F.2d 1156 at 1161-1162 (5th Cir. 1977); Moore v. Cowan, 560 F.2d 1298 at 1302 (6th Cir. 1977); and Taylor v. Dalsheim, 459 F.Supp. 260 at 263-264 (S.D.N.Y 1978).

All of these cases bear remarkable similarity to the matter at hand. In each case the fact of the defendant's post-Miranda warning silence was introduced into testimony. In each case that fact was not used to cross-examine the defendant nor used during the prosecutor's closing arguments.

Appellant cites a few cases that hold that reference to post-arrest silence warrants reversal, but these cases, Doyle v. Ohio, 426 U.S. 610 (1976), and State v. Wiswell, Utah, 639 P.2d 146 (1981) are readily distinguishable. In both cases, the prosecutor, during cross-examination, repeatedly referred to the defandants' post-arrest silence. In addition the prosecutors argued the defendants' post-arrest silence to the juries in their closing arguments. Since Doyle and Wiswell govern in instances where the prosecutor makes continued attempts to put the defendant's silence before the jury, they do not apply to this situation where the prosecutor did not make any attempt to place the appellant's silence before the jury.

Furthermore, the fact that appellant chose to give his voluntary statement in the police car, mintues after receiving the Miranda rights infers that he never chose to remain silent. His first statement that he did not have anything to say at that time could be interpretted to mean, "I don't have anything to say right now but I will tell you something in a few mintues." If such was the case the appellant's right to remain silent was never invoked.

Despite appellant's claim, there was no intent on the part of the prosecutor to interpret appellant's silence as an inference of guilt. Had the prosecutor intended to do so he would likely have used the silence while cross-examining appellant or certainly during his closing remarks. Nevertheless, during both of these crucial periods the state made no mention whatsoever of appellant's exercise of his Fifth Amendment freedoms. As the offending remarks are read in context, it is clear that the prosecutor was merely inquiring into the circumstances of the arrest and attempting to make the officer's testimony clear and coherent. The prosecutor was laying an appropriate foundation for appellant's statement concerning the stereo equipment.

However, should this Court find that the manner of questioning did improperly comment on Appellant's post arrest silence, the error was harmless in the context of this record and is not sufficient to merit a reversal.

The evidence of appellant's guilt apart from any inferences created by the fact of appellant's silence after receipt of the Miranda rights was overwhelming. Ms. Bailey identified the appellant as the man she had watched walk from behind the bush, right in front of her car and the down the street (T. 44). A stereo, missing from the home next door to Mr. Bailey's was discovered in the bush where the appellant was first seen (T. 90). Entry had been made into Mr. Goldstein's home by breaking the glass on the front door, and the Appellant had fresh cuts on his hands with three different explanations as to how he got the cuts (T. 90, 120, 173, 193). Then after receiving the Miranda rights, the appellant asked Officer Maack if Ms. Bailey had seen him with the stereo (T. 100).

What this Court said in State v. Pierre, 572 P.2d 1338 (Utah 1977), most certainly has application in this case:

> This court does not interfere with a jury verdict because of error of irregularity unless upon review of the entire record it is determined that prejudice has occurred in a substantial manner, i.e. the error must be such that there exists a reasonable probability or likelihood that there would have been a result more favorable to the defendant in absence of the error.

572 P.2d at 1352.

In conclusion, while it is well established that although admission of the fact of a criminal defendant's post-arrest silence is error, such error does not require

reversal in every case. The harmless error rule should be applied and reversal is only mandated when there is a possibility that the jury verdict would have been different without the offending testimony. In this matter there was overwhelming evidence of appellant's guilt. Any possible inference created by the mention of appellant's silence could not reasonably have made a difference in the finding of guilt. Consequently, the verdict and sentence of the lower court must be affirmed.

## POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION.

Appellant contends that the evidence presented by the state was insufficient to support a guilty verdict of theft beyond a reasonable doubt.

Appellant was charged with Theft a Third Degree Felony, under Utah Code Ann. § 76-6-404, 412 (Supp. 1978). It was established during the trial that a theft occured when someone obtained unauthorized control over Mr. Goldstein's stereo by breaking into his home and removing the stereo without his permission, and that the person intended to deprive Mr. Goldstein of the stereo's use when he hid the stereo in the bush. The issue at trial was deciding whether the appellant was the person who had committed the act of theft.

The state presented sufficient evidence linking the appellant with the crime. First, the state presented a witness who acutally saw the appellant come from the location where the stereo was found. Second, the state showed that entry had been made into Mr. Goldstein's home by breaking the door glass and that at the time the appellant was picked up he had fresh cuts on his hands. Finally, the appellant's own statement, "I suppose she saw me with the stereo equipment, too" further incriminated him.

Ms. Bailey, the eye witness, a young woman, age 26 testified that she saw the appellant step from around a bush and walk in front of her car, forcing her to stop (T. 37, 73) At that close range, with the car headlights shining on appellant, she was able to watch him for fifteen to twenty seconds (T. 38). After finding a stereo in the bush where Ms. Bailey first noticed the appellant, she called the police (T. 41). Police officers found the appellant just blocks away from Ms. Bailey's home and took him to her home for a show-up (T. 93). Ms. Bailey identified appellant as the man she had seen a few hours earlier (T. 44). The short time period between Ms. Bailey's initial sighting of appellant when he walked in front of her car and the subsequent identification at the show up greatly enhanced the likelihood of a correct identification. Moreover, Ms. Bailey was consistent in her identification of appellant at the show up, preliminary hearing and the trial (T. 44, 69, 51). Ms. Bailey's

eyewitness account provides substantial evidence that appellant was the perpetrator of the theft. It can be inferred that when Ms. Bailey first saw the appellant he was hiding the stereo in the bush after carrying it away from Mr. Goldstein's home.

Next, it was established that entry had been made into Mr. Goldstein's home by breaking the front door glass and that appellant had fresh cuts on his hands at the time he was picked up (T. 90, 101). Then contradictory stories were given by the appellant explaining the fresh cuts on his hands (T. 120, 173, 192). This evidence established appellant's guilt by showing that the appellant did not have the authority to enter Mr. Goldstein's home and remove his stereo since he had to break into the home.

Finally, appellant's voluntary admission of knowledge concerning the stereo equipment further established appellant's guilt beyond a reasonable doubt.

Appellant next argues that the state did not present evidence that appellant was the individual who actually stole the property. However, the circumstantial evidence as presented by the state was certainly sufficient to establish a conviction. "In Utah, as elsewhere, circumstanial evidence alone may be competent to establish the guilt of the accused." State v. Clayton, Utah, 646 P.2d 723, 725 (1982). Moreover the state is aided by the statutory presumtion, Utah Code Ann. § 76-6-402(1) (1978) that: "Possession of property recently

stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property."

Finally, appellant argues that the jury's acquittal of appellant on the burglary charge indicated that the jury was not satisfied beyond a reasonable doubt of appellant's guilt. Such a contention is sheer speculation by appellant. The jury did find appellant guilty of theft. What the jury chose to do with the burglary charge is of no consequence to this appeal that deals with the theft conviction.

When reviewing insufficiency of the evidence charges this Court follows the standard set out in State v. McCardell, Utah, 652 P.2d 942 (1982).

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt.

McCardell, at 945, see also State v. Petree, Utah, 659 P.2d 443, 444 (1983).

In summary, the evidence presented at trial was sufficient to sustain the verdict of guilt beyond a reasonable doubt, and when viewed in the light most favorable to the jury's verdict, appellant's conviction should be affirmed.

## CONCLUSION

The State was merely laying a foundation for appellant's statement concerning the stereo equipment when it solicited testimony concerning the circumstances at the time of arrest. The error, if any, was harmless. Further, the evidence presented by the State was sufficient to support appellant's guilt of Theft beyond a reasonable doubt.

For these reasons, the State respectfully submits that appellant's conviction be affirmed.

RESPECTFULLY submitted this 12th day of June, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Lisa Maxfield, attorney for appellant, 333 South 2nd East, Salt Lake City, Utah 84111, this 6th day of June, 1984.

Kathleen Dugan Kellersberger