

1983

State of Utah v. Robert Paul Pacheco : Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Petitioner, :
-v- : Case No. 20047
ROBERT PAUL PACHECO, :
Defendant-Respondent. :

PETITION FOR REHEARING

PETITION FOR REHEARING IN AN APPEAL FROM
CONVICTION OF BURGLARY, IN VIOLATION OF UTAH
CODE ANN. § 76-6-202 (1978), IN THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE ERNEST
F. BALDWIN, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
DAVID B. THOMPSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Petitioner

SUMNER J. HATCH
72 East 400 South, Suite 330
Salt Lake City, Utah 84111

Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Petitioner, :
-v- :
ROBERT PAUL PACHECO, : Case No. 20047
Defendant-Respondent. :

STATEMENT OF ISSUES PRESENTED IN PETITION FOR REHEARING

The following issues are presented in this petition for rehearing:

1. Did the Court misapply the holding of Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985), as analyzed and applied in State v. Chambers, Utah, ___ P.2d ___, Nos. 19151 and 19152 (filed October 21, 1985), to the jury instruction concerning possession of recently stolen property that was given in the instant case?

2. Did the Court incorrectly hold that admission of defendant's post-arrest explanation of his possession of a recently stolen ring (i.e., "it may have been there from a previous burglary") was prejudicial error because that evidence was only relevant to show defendant's propensity to commit a crime?

STATEMENT OF THE CASE

Defendant, Robert Paul Pacheco, was charged with burglary of a dwelling, a second degree felony, under UTAH CODE ANN. § 76-6-202 (1978). A jury found him guilty as charged. The court sentenced defendant to the Utah State Prison for a term of

one to fifteen years and fined him \$5,000.

STATEMENT OF FACTS

The State agrees with the fact statement set forth in the Court's opinion in State v. Pacheco, Utah, ___ P.2d ___, No. 20047, slip op. at 1-2 (filed October 21, 1985) (a copy of the full opinion is contained in Appendix A), except for that portion relating to the content of the jury instruction concerning possession of recently stolen property that was given at trial. Id. at 2-3.

SUMMARY OF ARGUMENTS

By failing to consider the entire jury instruction regarding unsatisfactorily explained possession of recently stolen property, as well as other jury instruction given, the Court misapplied Francis v. Franklin in holding that the possession instruction was unconstitutional.

In holding that admission of evidence of defendant's post-arrest statement explaining his possession of a stolen ring was prejudicial error, the Court failed to recognize the relevancy of this evidence to the jury's determination of the guilt question and misapplied the relevant rule of evidence.

INTRODUCTION

In Brown v. Pickard, denying reh'g, 4 Utah 292, 11 P. 512 (1886), this Court set forth the standard for determining whether a petition for rehearing should be granted:

To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

4 Utah at 294, 11 P. at 512 (citation omitted). In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court stated:

To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

42 Utah at 172-73, 129 P. at 624. The argument portion of this brief will demonstrate that, based on these standards, the State's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

POINT I

THE COURT MISAPPLIED THE HOLDING OF FRANCIS V. FRANKLIN, AS ANALYZED AND APPLIED IN STATE V. CHAMBERS, IN DECIDING THAT THE JURY INSTRUCTION CONCERNING POSSESSION OF RECENTLY STOLEN PROPERTY, GIVEN IN THE INSTANT CASE, WAS UNCONSTITUTIONAL.

In State v. Pacheco, Utah, ___ P.2d ___, No. 20047 (filed October 21, 1985) (see Appendix A), this Court held that, based upon its analysis and application of Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985), in a companion case, State v. Chambers, Utah, ___ P.2d ___, Nos. 19151 and 19152 (filed

October 21, 1985), an instruction concerning possession of recently stolen property was unconstitutional. Basic to the Court's decision was its observation that the instruction given was nothing more than a verbatim recitation of UTAH CODE ANN. § 76-6-402(1) (1978),¹ something it found to be unconstitutional under Franklin in Chambers, slip op. at 6-7. However, the Court, for some unexplained reason, failed to consider the instruction in its entirety. Instruction No. 15 in whole read:

The law of the state of Utah provides as follows:

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

Thus, if you find from the evidence and beyond a reasonable doubt, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that the defendant had made no satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property.

(R. 129). In deciding whether that instruction is unconstitutional under Franklin, the Court must necessarily consider both paragraphs of the instruction, as well as other instructions given to the jury.

¹ Section 76-6-402(1) provides:

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.

The general question presented in Pacheco is the same as that presented in Chambers and Franklin: Did the jury instruction "have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Franklin, 105 S. Ct. at 1970 (citations omitted). As stated in Franklin:

The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id., at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 520-524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

. . .

A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of Sandstrom. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. Ulster County Court, supra, 442 U.S., at 157-163, 99 S.Ct., at 2224-2227.

Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the

State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Cupp v. Naughton, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis "requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. Sandstrom, supra, 442 U.S., at 514, 99 S.Ct., at 2545,.

105 S.Ct. at 1971-72 (emphasis added). When this analysis is applied in assessing the validity of Instruction No. 15, it becomes clear that a reasonable juror could only have understood that instruction to contain a valid permissive inference. First, although the first paragraph of the instruction, if considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on the elements of burglary, when considered in the context of the instruction as a whole, a reasonable juror could not have considered that paragraph to have created an unconstitutional presumption. The second paragraph, which clearly is stated in the form of a permissive inference, serves to explain the statement of law in the first paragraph. The words "shall be deemed prima facie evidence" are not readily understandable to the average juror, and, in fact, probably are not particularly well understood by many lawyers, as is evidenced by the confusion this Court has experienced with the phrase. See Chambers, slip op. at 7-9. Therefore, a reasonable juror surely would have rea-

the second paragraph which, significantly, begins with the word "thus," as explaining the statement of law in the first paragraph. No reasonable juror could have read Instruction No. 15 as requiring a finding that defendant was guilty of burglary once he found beyond a reasonable doubt the enumerated predicate facts. Given the wording of the instruction and viewing it as a whole, a reasonable juror would have understood that he may, not must, find defendant guilty of burglary once satisfied that the predicate facts had been proved beyond a reasonable doubt.² This conclusion is further supported by examining other instructions that were given to the jury. Instruction No. 3 read:

You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt.

(R. 118). Instruction No. 12 read in pertinent part:

All presumptions of law, independent of evidence, are in favor of innocence, and a

² That the instruction's first paragraph is a verbatim recitation of UTAH CODE ANN. § 76-6-402(1) (1978) does not automatically render the instruction unconstitutional. And, the use of the term "prima facie" does not in itself require a finding that there is Franklin/Sandstrom error. See Chambers, slip op. at 7-8 (noting cases where this Court held that although the use of the term prima facie in an instruction was improper, it was not prejudicial in light of other instructions given to the jury). Instruction No. 15 does nothing more than instruct the jury on a "traditional common-law inference deeply rooted in our law." Barnes v. United States, 412 U.S. 837, 843 (1973). See also State v. Sessions, 583 P.2d 44, 45-6 (Utah 1978); State v. Kirkham, 20 Utah 2d 44, 432 P.2d 638 (1967) (cases implicitly recognizing the validity of this common-law inference in the context of approving its use in burglary cases).

defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

(R. 126). Instruction No. 16 read:

Before you can convict the defendant of the crime of Burglary of a Dwelling as charged in the Information on file in this case you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 3rd day of June, 1983, at 443 East Vine Street, Murray, Utah the defendant, Robert Paul Pacheco, entered or remained in the dwelling of Masaji and Tsuruko Imai; and

2. That said defendant did so unlawfully; and

3. That said defendant did so with the intent to commit a theft.

If you are not convinced that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to find the defendant not guilty. If, on the other hand, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt then you must find the defendant guilty of Burglary as charged by the Information on file in this case.

(R. 130). And, perhaps of most significance, was Instruction No. 18, which stated:

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

(R. 132) (emphasis added).

Second, Instruction No. 15 contains an acceptable permissive inference given that "the suggested conclusion is . . . one that reason and common sense justify in light of the proven facts before the jury." Franklin, 105 S.Ct. at 191. The Supreme Court made this clear in Barnes v. United States, 412 U.S. 837 (1973), which held that an instruction on the common-law inference of guilty knowledge from the unexplained possession of recently stolen property satisfied the requirements of due process. Id. at 841-46. See also State v. Sessions; State v. Kirkham (*supra*, at fn. 2).

Significantly, the Pacheco instructions do not have the problems identified by the Court in the instructions it found to be unconstitutional in Chambers. There, the verbatim recitation of § 76-6-402(1) appeared alone, without the explanatory paragraph included in Pacheco Instruction No. 15. Chambers, slip op. at 4. Furthermore, in Chambers a separate instruction defined the term prima facie in such a way that it "could well have indicated to a juror that the defendants were required to disprove guilt"--a defect that could not be cured by another instruction that restated the presumption in permissive form. Id. at 6-7.

In sum, Instruction No. 15 survives the Franklin Sandstrom analysis. In applying Franklin, as analyzed and applied in Chambers, to the instant case, the Court failed to

take into account the significant differences in the instruction at issue in Chambers and the instruction addressed here. Consequently, the Court arrived at a conclusion that appears to be contrary to the law expressed in Franklin and Chambers.

POINT II

THE COURT INCORRECTLY HELD THAT THE ADMISSION OF TESTIMONY CONCERNING DEFENDANT'S POST-ARREST EXPLANATION FOR HIS POSSESSION OF THE STOLEN RING WAS PREJUDICIAL ERROR.

Pacheco held that the trial court committed prejudicial error in allowing "Detective Anderson to testify during the State's case in chief that defendant had stated in response to a question regarding the origin of the ring, '[I]t may have been there from a previous burglary.'" Slip op. at 3. In arriving at this conclusion, the Court reasoned that, because the inference set out in § 76-6-402(1) is addressed only to the trial court for determining whether the State has established a prima facie case, the post-arrest statement of defendant, who did not take the stand at trial to offer an explanation for possession of the ring, should not have been presented to the jury. Even without that evidence "the trial judge would have been justified in assuming that a prima facie case of burglary had been made out against defendant." Pacheco, slip op. 4. Therefore, in the Court's view, because the evidence of defendant's statement, which included an admission of a prior crime, was "in no way . . . relevant to prove a specific element of the crime of burglary" and went only to show defendant's propensity to commit crime, its admission was prejudicial error. Ibid. This ruling fails to recognize the relevancy of the challenged evidence to prove

defendant's guilt and reflects a critical misapplication of the rules of evidence.

First, the trial court's determination of whether a prima facie case has been established under § 76-6-402(1) and the jury's determination of the guilt question are two entirely different functions. Although the Court correctly concluded that defendant's statement, in light of his failure to offer any explanation of his possession of the ring at trial, was not necessary for satisfaction of the prima facie evidence standard applied by the trial court, it incorrectly concluded that the evidence was not at all relevant to the issue of guilt presented to the jury. The Court's application of Chambers in this regard strongly suggests that jury consideration of unexplained or unsatisfactorily explained possession of recently stolen property, and the inference of guilt that may be drawn from that circumstance, is improper. Such a conclusion is contrary to established law. See Barnes v. United States, 412 U.S. 837 (1973).³ A jury may lawfully and reasonably draw an inference of guilt from possession of recently stolen property when no satisfactory explanation of that possession is given. "Possession of recently stolen property is nothing more than a circumstantial bit of evidence in a case of burglary" State v. Kirkham, 20 Utah 2d at 44, 432 P.2d at 638. See also

³ The error in this conclusion is fully discussed in the State's petition for rehearing in State v. Chambers. The State's argument there is incorporated by reference here (see Appendix B).

Second, the Court appears to have misapplied Utah R. Evid. 404(b) (Supp. 1985)⁵ in holding that defendant's statement was inadmissible because it was not relevant to prove a specific element of burglary and was relevant only to show defendant's propensity to commit a crime. See Pacheco, slip op. at 4. Rule 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Like former Utah R. Evid. 55 (1977), Rule 404(b) is inclusionary: "evidence of other crimes or civil wrongs that is competent and relevant to prove some material fact, other than to show merely the general disposition of the defendant, is admissible." State v. Tanner, 675 P.2d 539, 546 (Utah 1983) (emphasis in original). See also United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982), cert. denied, 463 U.S. 1210 (1983).

⁴ Under this analysis, presentation by the State of evidence of defendant's pretrial explanation for possession of recently stolen property is not restricted to those cases where the defendant takes the stand and offers a contrary explanation. A defendant's unsatisfactory explanation is most appropriately presented as circumstantial evidence in the State's case-in-chief. See Barnes, 412 U.S. at 839 Sessions, 583 P.2d at 44 (defendants' explanatory statements admitted in government's case-in-chief).

⁵ The current rules of evidence were in effect at the time of defendant's trial.

The State offered defendant's statement only as circumstantial evidence of his guilt of burglary (i.e., as evidence of a lack of legal justification for possession of the ring and an inability to explain satisfactorily that possession), see Sessions, 583 P.2d at 45-6 (approving of an inference of guilt from these circumstances in burglary cases); it was not offered to show defendant's propensity to commit a crime (R. 407-11; Appendix C). Defendant voluntarily gave his explanation about a prior burglary to the police officer after being arrested and after receiving a Miranda warning (R. 40-8; Appendix C).

As an initial matter, the evidence of other misconduct contained in defendant's voluntary statement should not be viewed as "extrinsic" evidence for purposes of Rule 404(b). Because the evidence of the prior burglary was inextricably intertwined with the evidence used to prove the crime charged, it was admissible. United States v. McCrary, 699 F.2d 1308, 1311 (11th Cir. 1983) (in prosecution for aiding and abetting introduction of drugs in federal prison, evidence of other acts of dealing in drugs in prison held "inextricably intertwined" with evidence used to prove crime charged). See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence § 404(10) at 77-9 (1985). Cf. United States v. Blanton, 730 F.2d 1425, 1432 (11th Cir. 1984) (evidence of other wrongdoing at time of arrest of defendant not inadmissible under Rule 404(b) because that evidence was "part of the res gestae of the offense"). Evidence of defendant's explanation was critical to the State's case; and, inclusion of defendant's reference to a prior burglary was essential to the jury's

understanding of the explanation and its assessment of whether the explanation was satisfactory.

Even if Rule 404(b) is applicable, the trial court properly admitted defendant's statement. Essentially, a two-step test must be met for admission under that rule: (1) "the evidence of an extrinsic offense must be relevant to an issue other than the defendant's bad character," and (2) "its probative value must not be substantially outweighed by undue prejudice to the defendant." United States v. Punch, 722 F.2d 146, 153 (5th Cir. 1983) (citation omitted). Defendant's statement obviously was relevant to show that he had no legal justification for possession of the ring and could not give a satisfactory explanation for his possession of it. Moreover, the statement was relevant to identity and intent. In short, the evidence assisted the jury in understanding the circumstances, and its probative value was not outweighed by the possible prejudice to defendant. See Punch, 722 F.2d at 153.

In conclusion, the following comment by Professor Ronald Boyce on this part of the Pacheco opinion is particularly instructive:

[T]he Court's ruling on the admissibility of defendant's admission is wrong in this writer's opinion. The Court confuses the value of the evidence as to the State's burden to make out a prima facie case with the State's burden to prove guilt to the satisfaction of the jury beyond a reasonable doubt. The question is whether the defendant's admission has any relevance to prove his guilt, as distinct from merely showing bad character. The admission could be interpreted by the jury as showing defendant had no legal justification for possession of the ring and could not make a

reasonable explanation as to why the ring was in defendant's possession. This evidence, although unnecessary to the determination of a prima facie case by the trial judge, is relevant to the jury's consideration of guilt. Further, the Court is wrong in saying before the evidence is admissible it must "prove a specific element of the crime." The evidence to be admissible under Rule 55, U.R.E., 1971, or Rule 404(b), U.R.E., 1983, need only have been relevant to any issue in the case other than bad character. If the evidence was more prejudicial than relevant, it should have been excluded under Rule 45, U.R.E., 1971, or Rule 403, U.R.E., 1983. By tying the admissibility of the admission to the issue of "prima facie" case for the trial judge, the Supreme Court has created an erroneous, restrictive, and misconceived standard of admissibility that will come back to haunt it. Any knowledgeable defense counsel will use this case to argue that evidence of other misconduct, unnecessary to establishing the prosecution's prima facie case, is inadmissible. This is not the proper legal standard for admissibility of such evidence.

Intermountain Commercial Record, Nov. 1, 1985, at 24, col. 1.

CONCLUSION

Based upon the foregoing discussion, it appears that the Court in State v. Pacheco, misapprehended significant case law in concluding that the jury instruction regarding unsatisfactorily explained possession of recently stolen property was unconstitutional. Also, the Court applied a wrong principle of law in holding that the trial court committed prejudicial error when it admitted evidence of defendant's post-arrest statement explaining his possession of a stolen ring. Therefore, the State's petition for rehearing should be granted and the instant case should be restored to the calendar for reargument or resubmission. See Utah R. App. P. 35(c) (1985). Alternatively,

the Court should modify its opinion to reflect a proper application of Franklin v. Francis and Utah R. Evid. 404(b).

The State certifies that this petition is presented in good faith and not for purposes of delay.

RESPECTFULLY submitted this 6th day of November, 1985.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Petition for Rehearing were mailed to Sumner J. Hatch, Attorney for Defendant, 72 East 400 South, Suite 330, Salt Lake City, Utah 84111, this 6th day of November, 1985.

David B. Thompson

ADDENDUM C

INSTRUCTION NO. 23

The mere fact that a person was in conscious possession of recently stolen property is not sufficient to justify a conviction of theft. There must be proof of other circumstances tending of themselves to establish guilt. However, such proof need not be established by additional evidence or witnesses if you find that the possession occurred under circumstances which warrants a finding of guilty. In this connection you may consider the defendant's conduct, any false or contradictory statements, and any other statements the defendant may have made with reference to the property. If the defendant gives a false account of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

In the absence of evidence as to why the defendant was in possession of recently stolen property, you may infer that the defendant stole the property.