

1970

State of Utah v. Robert Joseph Smelser : Respondent's Brief

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In The Supreme Court of the State of Utah

STATE OF UTAH

ROBERT JOSEPH

DEBENT

APPEAL

FROM THE

COURT OF

COMMON PLEAS

IN AND FOR

THE COUNTY OF

SALT LAKE

UTAH

VS.

THE STATE OF UTAH

BY

SAMUEL KING,

Attorney for Appellant

FILED

1968

CLERK

Supreme Court, Utah

SAMUEL KING,

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Salt Lake City, Utah 84111

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ROBERT JOSEPH SMELSER,

Defendant-Appellant.

} Case No.
11766

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was convicted by a jury of the crime of grand larceny in the District Court of the Fourth Judicial District, in and for Utah County, State of Utah, the Honorable Allen B. Sorensen, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The matter was tried May 12, 1969. The case was submitted to the jury, which returned a verdict of guilty of the crime of grand larceny. The Court denied appellant's motion for a new trial and sentenced the defendant to the Utah State Prison for an indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

The respondent prays that this court will affirm the trial court below.

STATEMENT OF FACTS

The respondent accepts the facts as stated in appellant's brief as being fairly representative of the situation and circumstances surrounding this case.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW CROSS-EXAMINATION OF MAX WEENIG THAT WAS BY ITS NATURE ARGUMENTATIVE.

The appellant contends reversible error, alleging that the trial court denied him the right to cross-examine Mr. Max Weenig, a witness for the prosecution, as to his motives for testifying as he did on direct examination.

The respondent admits that cross-examination of a witness is a matter of right, *Alford v. United States*, 282 U.S. 687, 691 (1931); that such examination may be designed to expose the motives of the witness for testifying as he did on direct examination, Utah Code Ann. § 78-24-1 (1953); and that such exposure properly goes to the credibility of the witness's direct testimony.

However, cross-examination must comport with proper judicial standards. The trial court is vested with

wide discretion in controlling the scope and manner of cross-examination, and in order to find error the reviewing court must find an abuse of that discretion, *State v. Bustamante*, 103 Ariz. 551, 447 P.2d 243 (1968); *State v. Jackson*, 201 Kan. 795, 443 P.2d 279 (1968); *State v. Kinder*, 14 Utah 2d 199, 381 P.2d 82 (1963). Moreover, a trial court that disallows argumentative questions on cross-examination has not abused that discretion, *State v. Eichman*, 69 Wash. 2d 327, 418 P.2d 418 (1966).

The dialogue the appellant is challenging is on page 22 of the Weenig transcript and is quoted as follows:

Q. Now you say you saw the Deputy Sheriff, Mack Holley, and said you thought you could pump information out of Smelser on this burglary, right?

D. Yes, Sir.

Q. Have you been in the habit of reporting to the authorities on what prisoners tell you?

MR. GAMMON: Objection.

THE COURT: Sustained.

Q. (by Mr. King) You had a reason for doing —for talking to Mack Holley, didn't you?

MR. GAMMON: Objection.

THE COURT: Sustained.

Q. (by Mr. King) Did you hope to gain something by telling the authorities.

MR. GAMMON: Objection.

THE COURT: Sustained. You are arguing to the jury now, Mr. King. This isn't the time yet for that. There will be a time for that, but not now, with this witness.

It is clear from the foregoing dialogue that the questions asked the appellant on cross-examination were argumentative in nature. Thus, the trial court properly acted within its discretion in sustaining the State's objections against them.

The transcript shows that the trial court made every effort, within sound judicial discretion, to allow defense counsel the scope of cross-examination he required. On Page 4 of said transcript we read:

THE COURT: I don't mean to cut you off on questioning about promises or threats, but further inquiry into his criminal record, I will cut you off. I think that is the law of this State.

MR. KING: Yes, your Honor, I intend to comply with that. I would like to in-

quire into his mental attitude, if he hopes to gain.

Later on page 16, the following dialogue occurred:

MR. GAMMON: We would object your Honor. This line of questioning has no relevancy to the matter before the Court.

THE COURT: What do you claim for this Mr. King? What bearing does this have on the matter before the Court?

MR. KING: I think, your Honor, that Mr. Weenig has his own personal familiarity with this premises and this isn't information he gained from Mr. Smelser.

THE COURT: Well, I will let that answer remain.

Later on page 18 of the transcript the trial court allowed repetitive questions and answers on cross-examination. Then on page 19, in response to a State's objection, the court said:

THE COURT: I am reluctant to cut anybody off on cross-examination, so I will let him answer the question.

However, on several occasions during the cross-examination the Court sustained the State's objections on the grounds that counsel's questions were argumentative (Weenig T. p. 18, 20, 21, 22).

It is clear from the general tenor of the entire cross-examination that the judge was reluctant to inhibit counsel in his cross-examination. However, where the nature of questions were argumentative, the trial judge acted properly, and within his discretion, when he sustained the State's objections.

POINT II

THE TRIAL COURT DID NOT ERR IN GIVING JURY INSTRUCTION NUMBER SEVEN.

The pertinent part of instruction number seven is quoted in appellant's brief pages 11 & 12. The appellant challenges the instruction on two grounds: (1) that it is an unlawful comment on the evidence by the Court, and (2) that it breaches the appellant's constitutional right against self-incrimination.

A. JURY INSTRUCTION NUMBER SEVEN WAS NOT AN UNLAWFUL COMMENT ON THE EVIDENCE

Utah Code Ann. § 76-38-1 (1953) defines larceny as follows:

"Larceny is the felonious stealing, taking, carrying, leading or driving away 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."

The appellant challenges the instruction on grounds of it being an unlawful comment by alleging that it instructs the jury on the prima facie case of larceny. He further argues that the foregoing statute defining larceny is a standard by which the Court may determine whether or not the case should go to the jury, and therefore, should not be incorporated as part of a jury instruction. He cites *State v. Crowder*, 114 Utah 202, 197 P.2d 917 (1948) as authority for his argument.

The challenged instruction in *Crowder* is as follows:

“ . . . If you find from the evidence, beyond a reasonable doubt (1) that some one had committed larceny; (2) that defendant was found in possession of recently stolen property; (3) that the defendant failed to give a satisfactory explanation, then there is an *inference* that the defendant committed larceny, and that inference beyond that of other evidence be considered in determining whether you are convinced beyond a reasonable doubt of defendant's guilt.” 114 Utah at 209. (Emphasis added.)

This Court found the foregoing instruction faulty on two grounds. FIRST, the instruction tells the jury what constitutes a prima facie case, and SECOND, because the instruction invited the jury to give special attention to the “unexplained possession” evidence. *Id* at 209 and 210.

These frailties are not present in the instant case. The instruction is clear that “unexplained possession” of contraband is merely prima facie evidence of guilt, not a prima facie case of guilt. This distinction has been

sustained by this Court in *State v. Potello*, 40 Utah 56, 119 P. 1023 (1911).

Moreover, the instruction does not set out the "unexplained possession" evidence as having greater probity than other evidence, as was the case in the *Crowder* instruction. Rather, the instruction emphasizes that the "unexplained possession" testimony merely *tends* to show guilt and should thus be considered by the jury along with all other facts and circumstances of the case. This comports with the construction of the Utah Statute, *supra*, by this Court. *State v. Wood*, 2 Utah 2d 34, 268 P.2d 998 (1954).

This Court, in *State v. Little*, 5 Utah 2d 42, 296 P.2d 289 (1956), held an instruction valid which is almost identical to in the instruction now being challenged by the appellant. In so doing, this Court said:

"The first paragraph follows the statute, U.C.A. 1953 § 76-38-1, and the decided cases, *State v. Crowder* (citations omitted); *State v. Hall* (citations omitted)." 5 Utah 2d at 44.

In view of the case law in this State, it is clear that instruction seven was not an unlawful comment on the evidence by the trial court.

B. JURY INSTRUCTION NUMBER SEVEN DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

The appellant urges that the instruction given in

the instant case is the equivalent of an instruction that the jury may draw inferences as to the guilt of the accused from his silence. While it is true that comment directly on the defendant's failure to testify is not permissible, such comment is not the equivalent of the instruction in the present case.

The United States Supreme Court has sustained such a distinction in *United States v. Gainey*, 380 U.S. 63 (1965). In this case the Court rejected defendant's argument that an instruction, similar to the one in the instant case, was deemed to be a comment on the defendant's failure to testify:

"Furthermore, in the content of the instruction as a whole, we do not consider that the single phrase, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury, can be fairly understood as a comment on the petitioner's failure to testify." 380 U.S. at 70 and 71.

United States v. Secondino, 347 F.2d 725 (2nd Cir. 1965), cert. den., 382 U.S. 931 (1965), reh. den., 382 U.S. 1002 (1966), relied on the *Gainey* case and specifically held that an instruction similar to the one in the instant case is not a violation of one's constitutional right against self-incrimination.

In the *Secondino* case the defendant had appealed his conviction on a narcotics charge. The trial court had read the actual provisions of the narcotics statute to the jury, which allowed them (the jury) to draw an inference

of guilt from evidence of "unexplained possession." The instruction challenged was:

"Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless* the defendant explains the possession to the satisfaction of the jury." (Emphasis added.) 347 F.2d at 727.

The appellate Court then pointed out that the trial court:

". . . followed this with the *wholly* adequate instruction that a finding of possession, not explained permits you to draw the inference and find . . . that the defendant had knowledge that the narcotic drug was imported contrary to law." (Emphasis added.) 347 F.2d at 727.

Whereupon the Court rejected appellant's argument that the challenged instruction violated his constitutional right against self-incrimination. 347 F.2d 725, 727. See also *Brown v. United States*, 370 F.2d 874 (1967).

This Court has repeatedly held Utah Code Ann. § 76-38-1 (1953) constitutional, as well as jury instructions pursuant thereto. *State v. Martinez*, 21 Utah 2d 187, 442 P.2d 943 (1968). The Tenth Circuit has concurred with this holding. *State v. Martinez*, No. 110-68, July 1969 Term (10th Cir. July 15, 1969).

It is clear from the foregoing that appellant's contention that instruction seven denies him of his constitutional right against self-incrimination is without merit.

POINT III

THE AFFIDAVIT UPON WHICH THE SEARCH WARRANT WAS ISSUED CLEARLY STATED FACTS SUFFICIENT TO SHOW PROBABLE CAUSE.

Utah Code Ann. § 77-54-3 (1953) establishes the grounds for the issuance of a search warrant:

“A search warrant shall not issue except upon *probable cause* supported by oath or affirmation, particularly *describing* the *place* to be searched and the person or *thing* to be *seized*.” (Emphasis added.)

The appellant challenges the search warrant in the instant case, alleging that the affidavit in support thereof is not of sufficient particularity to establish probable cause.

The United States Supreme Court in *Jones v. United States*, 362 U.S. 257 (1960), held that an affidavit must state facts upon which the belief of the affidavit is based in order to establish probable cause, 362 U.S. 257, 269; that the affiant's information may be based on hearsay information if such information is reasonably corroborated by other matters within the affiant's own knowledge, 262 U.S. 257, 269; and that the name of the informant need not be given, 262 U.S. 257, 271. See also *Rugendorf v. United States*, 376 U.S. 58 (1964) and *United States v.*

Ventresca, 380 U.S. 102 (1965). Utah law is in accord with this standard, *Allen v. Lindbeck*, 97 Utah 471, 93 P.2d 920 (1939).

In the instant case, it is clear that the challenged affidavit states facts sufficient to establish probable cause. Page one (1) of the affidavit (R. 32A) sets forth the affiant's belief that there is probable cause to suspect that the appellant had possession of certain personal property. The place of possession is described with particularity. The personal property, although not described on page one (1), nor identified as stolen, is described with particularity on a list attached to the affidavit (R. 32 A, sheets 4 and 5). Moreover, the attached sheet is identified as "Gene Evans Pharmacy, 266 North University Ave., Provo, Utah, Burglary loss. . . ." (R. 32A, sheet 4).

The appellant challenges the validity of the affidavit by alleging that the personal property believed to be in appellant's possession is not identified as the stolen property. This argument is without merit when the affidavit is read as a whole. As was mentioned above, the attached list identified the property both as to description and as to it being the stolen property. It is not necessary that this identification be on the front page. A clear reference to an attached list of property would seem to be a perfectly acceptable procedure. In the words of the appellant, "It is conceded at the outset that the affidavit need not be finely technical . . ." (Appellant's brief, P. 15). It seems appellant's objection on this point is based more on technicality than on substance.

Page 2 of the affidavit (R. 32A, sheet 2) also identifies the property as being stolen. In addition, page 2 sets

forth facts which support the affiant's belief, thus giving rise to probable cause. FIRST, the affiant is a deputy sheriff of 19 years experience. SECOND, 15 of those 19 years have been spent in the detective division. THIRD, the affiant received his information from Dave Reynolds, Department of Business Regulations, who in turn had received the information from a confidential informant. FOURTH, said Dave Reynolds had made a buy from the appellant, through his informant, and had identified the item purchased as property stolen from the Provo drug store.

There are several facts in the above four points that give rise to probable cause. The affiant was an experienced officer of the law. His source of information, Dave Reynolds, was also involved in law enforcement; i.e., business regulation. Although the item purchased through Reynolds' informant was not specifically described in the affidavit, it was sworn that Reynolds had in fact made such an identification.

The appellant challenges the affidavit because of this specific lack of identification. He asks: ". . . what *proof* is there that it was stolen other than his conclusion (affiant's conclusion)?" (appellant's brief pg. 18). However, the appellant goes too far in supposing that the affidavit must show facts that *prove* the case. The United States Supreme Court in *Jones v. United States, supra*, said:

"We reject the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt . . . such a contention goes much too

far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show *probable cause* for arrest or *search* . . . There is a large difference between the two things to be proved (guilt and probable cause) . . . and therefore a like difference in the quanta and modes of proof required to establish them." 262 U.S. at 270

The United States Supreme Court affirmed this distinction in *United States v. Ventresca*, 380 U.S. 102 (1965), when it said:

" . . . this Court has long held that the term probable cause . . . means *less* than evidence which would justify condemnation. . . ." 380 U.S. at 107

In light of this standard, it seems clear and convincing that the affiant's belief was well established by facts in the affidavit, thus giving rise to probable cause. Therefore, the affidavit clearly comports with constitutional standards as a condition precedent to a search warrant and as a consequence, this Court should sustain the validity of the search warrant in the instant case.

POINT IV

THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT WAS NOT IMPEACHED DURING THE TRIAL AND THUS THE COURT ACTED PROPERLY IN ADMITTING EVIDENCE OBTAINED PURSUANT TO SAID SEARCH WARRANT.

The appellant alleges that Officer Hayward's affidavit was impeached on cross-examination and thus the

evidence obtained pursuant to the search warrant was erroneously admitted by the Court. Appellant argues the impeachment because (1) Officer Hayward did not know whether the informant had made the buy of stolen property pursuant to the request of Officer Reynolds, and (2) because Officer Hayward had not seen the property purchased nor could he identify the same (T. p. 7). The appellant further alleges that such admissions are not consistent with the affidavit, thus showing the affidavit to be untrue and hence insufficient to support the search warrant.

In light of the above allegations, it is necessary to carefully examine the wording of the affidavit. Officer Hayward said in the affidavit that "Dave Reynolds, Dept. of Business Regulations, through a confidential informant did make a buy from Smelser. . . ." (R. 32A, sheet 2). Officer Hayward did not say that the buy was pursuant to Officer Reynolds' request. As a matter of fact, he did not specify. Therefore, for Officer Hayward to testify that he did not know under what arrangements the buy was made was not inconsistent with his statement in the affidavit. In fact, the two statements are clearly consistent. A buy was made, and it was through an informant.

In addition, Officer Hayward's statement on cross-examination that he could not identify the property bought, nor had he seen it, is totally consistent with his affidavit. Quoting further from the affidavit, Officer Hayward said, ". . . Dave Reynolds . . . through the confidential informant did make a buy from Smelser *and has identified the same as coming from a burglary of Gene Evans Pharmacy at Provo, Utah.*" (Emphasis added.) (R. 32A, sheet 2).

The appellant challenges the veracity of the affidavit because Officer Hayward had to rely on the acts and words of Officer Reynolds. However, the United States Supreme Court has allowed such reliance to give rise to probable cause as a condition precedent to a search warrant. In *United States v. Ventresca*, 380 U.S. 102 (1965), an affidavit reading as follows was upheld as establishing probable cause:

“Based upon observations made by me, and based upon information received officially from other investigators attached to the Alcohol and Tobacco Division assigned to this investigation, and reports orally made to me describing the result of their observations and investigations, this request for the issuance of a search warrant is made.” 380 U.S. at 103 and 104.

The Court upheld the affidavit by saying:

“Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, *where reason for crediting the source of the information is given, and when a magistrate has found probable cause*, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner.” (Emphasis added.) 380 U. S. a 109.

See also *Spinelli v. United States*, . . . U.S. . . . , 89 S. Ct. 584 (1969).

In view of the foregoing, we submit that the information in the affidavit is consistent with Officer Hayward's testimony on cross-examination; that his reliance on Officer Reynold's information was justified and credible; that it would be hypertechnical for this Court to overturn the search warrant when in fact a magistrate at the trial level properly found probable cause. Thus, it was proper for the trial court to admit evidence that was obtained pursuant to the search warrant.

CONCLUSION

The respondent submits that the appellant was not denied his right of cross-examination in any way and that sustained objections were proper because of the argumentative nature of appellant's questions on cross-examination.

Further, the respondent contends that jury instruction seven was not prejudicial error; rather, it was consistent with Utah statutory and case law.

And finally, it is the respondent's position that the affidavit supporting the search warrant did give rise to probable cause and thus comports with State and Federal constitutional standards. Moreover, Officer Hayward's answers on cross-examination in no way impeached the validity of the affidavit or the search warrant pursuant thereto.

Therefore, the respondent respectfully prays that this Court will affirm the appellant's conviction.

Respectively submitted,

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