

1970

State of Utah v. James McMahon : Appellant's Brief

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JAMES McMAHON,

Plaintiff and Appellant.

APPELLANT'S BRIEF

Appeal from a judgment of the
Second District Court of Washington
Honorable Calvin C. ...

FRED ...

Attorney

BERNON B. ROMNEY
UTAH ATTORNEY GENERAL

Attorney for Respondent

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JAMES McMAHON,

Plaintiff and Appellant.

} Case No.
12228

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The Defendant was arrested for receiving stolen property.

DISPOSITION IN LOWER COURT

The case was tried before a jury in the Second District Court for Weber County, Judge Calvin Gould, presiding. The Defendant was convicted by the jury for receiving stolen property and the Defendant was then sentenced to imprisonment in the Utah State Prison for a term not to exceed five years. The Defendant is presently serving his term at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the judgment rendered by the lower court and judgment directing a verdict in favor of the Appellant, as a matter of law.

STATEMENT OF FACTS

Some time between January 1, 1969, and June 1, 1969, two snowmobiles were taken from Petty Ford and/or its successor in interest, Colonial Ford. Eventually these machines were reported to the Salt Lake City Police Department as stolen. During this period of time the Appellant, McMahon, was serving time at the Utah State Prison for a violation of his parole. The Appellant was admitted to the State Prison on the above-mentioned parole violation on August 27, 1968, and was released September 16, 1969.

On the morning of February 2, 1970, as indicated in the testimony of Detective Webster of the Ogden Police Department, he observed two snowmobiles on a trailer in the parking lot of the Mt. Eyrie Racket Club in Ogden. The detective above-mentioned was able to obtain serial numbers from the aforementioned snowmobiles. He then had the obtained serial numbers checked by the National Criminal Identification Center. The report from the Center was that the snowmobiles had been reported as stolen. The detective also observed two cars parked in the parking lot of the Mt.

Eyrie Garden Apartments. The detective withdrew to observe the snowmobiles from a vantage point approximately five hundred feet from the snowmobiles at a nearby service station. At approximately 4:50 a.m. he observed a white-over-blue Buick leaving the parking lot of the Mt. Eyrie Garden Apartments. He was unable to positively identify either the car or the driver at that time. Approximately five minutes later Detective Webster observed two individuals enter into the remaining car, a black 1966 Ford, and watched them hook the snowmobile trailer with the above-mentioned snowmobiles onto the Ford car. He followed these two individuals with the snowmobiles and requested additional help from the Ogden Police Department. After trailing the above-mentioned individuals, their car was stopped and the individuals were taken into custody. The individuals above-mentioned were State's witnesses, Hastie and White. On February 5, 1970, Detective Richard Peterson of the Ogden Police Department filed a complaint and an arrest warrant was issued and served on the Appellant, McMahon. The Appellant was brought before an Ogden City judge for an arraignment on February 6. A preliminary hearing was requested and held in the Ogden City Court on February 13, 1970. At the conclusion of the preliminary hearing the Appellant was bound over for trial in the Second District Court for the County of Weber by Judge E. Fred Ziegler. A trial date was set. It was subsequently changed four times, and eventually the

Appellant was tried on May 7 before Judge Calvin Gould. The Appellant was represented at this trial by Attorney L. G. Bingham and Bill Daines. The trial, however, was declared by Judge Gould as in a state of mistrial and a new date was set for trial. The case was tried before a jury on June 9, 10 and 11. The Appellant acted at this trial as his own attorney. The Appellant was convicted by the jury and sentenced on June 16, 1970, by Judge Calvin Gould to imprisonment in the Utah State Prison for a term not to exceed five years.

ARGUMENT

POINT I

WITH THE PROPER APPLICATION OF THE RULE REQUIRING INDEPENDENT CORROBORATION OF AN ACCOMPLICE'S TESTIMONY, THE STATE HAS NOT MET THE BURDEN OF PROOF REQUIRED BY UCA 76-38-12, 1953, AS AMENDED.

The Appellant, James McMahan, was convicted for receiving stolen property, 76-38-12 UCA 1953, as amended. The aforementioned statute states:

Every person who, for his own gain or to prevent the owner from again possessing his property, buys or receives any personal property exceeding \$50 in value, knowing the same to have been stolen, is punishable by imprison-

ment in the state prison not exceeding five years; if the value of the property so bought or received is \$50 or less in value, he is guilty of a misdemeanor.

The elements of the above-mentioned crime as defined in 45 Am. Jur., Receiving Stolen Property, Section 2, are: 1) The actual receiving of, 2) Property actually stolen from an owner, 3) The receiver knowing at the time that the property was stolen, and 4) Receiving the property with knowledge and felonious intent. The State is required to prove beyond a reasonable doubt that the defendant did commit the above-mentioned elements of the crime. In *State v. Thomas*, 121 U. 639, 244 P2d. 653, this court held that the defendant does not have the burden of proving his innocence and that the State must prove that the property was stolen and that the defendant had possession.

It is the contention of the Appellant that the State has not met its burden of proof requirement in respect to the actual receiving of stolen property by the Appellant McMahan. The State has attempted to prove possession of the stolen property by the testimony of Hastie and White, the record is full of their testimony; however, 77-31-18 UCA, 1953, as amended, defines Utah's position as to the testimony of accomplices:

A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by

other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

A conviction cannot stand if it is based on the uncorroborated testimony of an accomplice. An accomplice was defined by this court in *State v. Coroles*, 74 U. 94, 277 P. 203, as a "person who knowingly, voluntarily and with common intent with the principal offender, united in the commission of the crime. The cooperation in the crime must be real, not merely apparent." In *State v. Davie*, 121 U 184, 240 P2d 263, the Court defined an accomplice as one who could be charged as a principal. Since the record indicates that it was Hastie and White who were arrested with the stolen property in their possession, it is obvious that they are accomplices and as such, in order to convict the Appellant, the accomplices' testimony must be sufficiently corroborated.

The above-mentioned statute requires that the testimony of an accomplice be corroborated by evidence which "tends to connect the defendant with the commission of the offense." The corroboration must show more than the commission of the offense or the circumstances thereof. In *State v. Lay*, 38 U. 143, 110 P. 986, the Court formulated a rule stating that corroborating evi-

dence is insufficient where it merely casts a grave suspicion on the accused. The *Lay* rule has been accepted as the general rule in subsequent cases, *State v. Vigil*, 123 U. 495, 260 P2d 539, 541 and *State v. Simpson*, 120 U. 596, 236 P2d 1097, where the court added: "Corroborative evidence need not be sufficient to support a conviction, but evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence and must do more than cast a grave suspicion."

Possession of stolen property has been ruled by Utah Courts as being corroborative evidence, *State v. Vigil*, 123 U. 495, 260 P2d 539; however, that possession must be accurate, conscious and personal, *State v. Dyett*, 114 U. 379, 199 P2d 155. The corroborating evidence is not sufficient when it relates only to prior or subsequent criminal or similar type acts, *State v. Kimball*, 45 U. 443, 146 P 313. It should be noted also that the confession of the defendant cannot be treated as corroborative; the court held in *State v. Ferry*, 2 U2d 271, 275 P2d 173, that an accused cannot be convicted on his confession alone: "We believe and hold that in addition there must be independent, clear and convincing evidence of the corpus delicti, although we and the authorities generally do not require it to be convincing beyond a reasonable doubt. . . . Our traditional goal in safeguarding the rights of an accused would preclude conviction on such an unsubstantial basis."

In *State v. Somers*, 97 U. 132, 90 P2d 273, 274, the court summarized the rule of accomplice testimony corroboration by saying:

While it is a question for the jury to determine whether corroborative evidence is sufficient, in connection with the testimony of any accomplice, to justify a conviction, yet unless there is corroborative evidence of a material fact tending to connect the defendant with the commission of the crime, a *court should direct a verdict* for the defendant." (emphasis added)

A review of the State's case shows that there has not been sufficient evidence to corroborate the testimony of the accomplices Hastie and White that McMahan has possession of the stolen property. Webster, an officer in the Ogden Police Dept., testified that he was one of the arresting officers of White and Hastie. He had seen them come from McMahan's apartment, that the snowmobiles were on a trailer pulled by a car driven by White. This testimony certainly does not show accurate, conscious and personal possession of stolen property on the part of the Appellant. Bean, an employee of Colonial Ford identified the snowmobiles that were found in the possession of White and Hastie as the property of Colonial Ford. Petersen, a Detective of the Ogden Police Dept., testified as to the statements of the accomplices; i.e., that he believed their statements to be true. This is certainly not independent

evidence, but an inadmissible conclusion concerning the accomplices' testimony. The two prospective buyers, Hubble and Bishop, could not identify McMahan or his voice as the person attempting to make the arrangements. The testimony of Stratford as to the confession of McMahan will be treated in the next point of argument; however, in *Ferry*, a confession was ruled to be insufficient corroboration to uphold a conviction.

In all of the above testimony, it is submitted that there is not sufficient independent corroboration of the accomplices' testimony to show that McMahan had possession of the stolen snowmobiles. This is the most essential element that the State must prove to obtain a conviction for violation of 76-38-12 UCA, 1953, as amended. The lower court was in error by not requiring stricter instructions as to the effect of 77-31-18, UCA, 1953, as amended, and for failing to direct a verdict for the defendant as the court did in the *Somers* case.

POINT II

THE LOWER COURT WAS IN ERROR TO ALLOW CERTAIN EVIDENCE TO BE SUBMITTED WHICH ADMISSION WAS A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANT.

A basic premise in criminal proceedings is that the State must prove the defendant's guilt. The State is

required to prove the defendant's guilt without self-incrimination by the Defendant, USCA Const. Amend. 5. In order to be sure that the Defendant has a fair trial, the Constitution provides that the defendant has a right to have the counsel of an attorney, USCA Const. Amend. 6. Our State has enacted a special section that also guarantees to the defendant that he is entitled to a fair trial, 77-1-8 UCA 1953, as amended. Our courts have formulated a general rule that there must be a substantial observance of the rights and privileges of the defendant so that his treatment conforms with commonly accepted standards of decency and fairness, *State v. Hamilton*, 18 U. 2d 234, 419 P2d 770.

In this case, the Appellant acted as attorney pro se. We do not state that it was error for the court to allow him to proceed in this manner; however, it does create the possibility that evidence which should not be entered will be improperly considered by the jury. Generally our courts have shown such concern for the fair treatment of the defendant that they have required the defendant to have an attorney. In the case of *State v. Hillstrom*, ..U.., 150 P 935, the defendant tried to fire his counsel and then the court appointed them as amici curiae to conduct examinations of the witnesses and to protect the rights of the defendant.

The most often used form of self-incrimination is an admission or a confession. In the case of *State v.*

Louden, 15 U2d 64, 387 P2d 240, Vacated 85 S.Ct. 87, 379 U.S. 1, 13 L.Ed 2d 23, it was stated that the trial court has a duty to adopt and follow procedure which will guard against admission of spurious confessions or admissions. The landmark case about the admission of a confession is *Miranda v. Arizona*, 384 US 426, 86 S. Ct 1602, 16 L. Ed 2d 694, 10 ALR 3d 974. *Miranda* clearly holds that the defendant has a constitutional right to the assistance of counsel and the protection against self-incrimination, USCA Const Amends 5 & 6. To protect the individual's rights, the *Miranda* warning has been required to be given to each individual taken into custody by the authorities. This warning states that the individual has the right to remain silent, that anything he may say may be used against him in a court of law, that he has the right to the presence of an attorney, and that an attorney will be provided if necessary. The Supreme Court summarized its position by saying:

We hold that when an individual is taken into custody or otherwise deprived of his freedom by authorities in any significant way and is subject to questioning, the privilege against self-incrimination is jeopardized and procedural safeguards must be employed to protect that privilege.—page 1630

According to *Miranda*, the awareness of the right to remain silent is the threshold requirement for an intelligent decision as to the exercise of this right. High

standards of proof are also required to show that the defendant or individual has waived his right to remain silent. The defendant's failure to object to the introduction of a confession at trial was not a waiver of the claim of constitutional inadmissibility and did not preclude the Supreme Court's consideration of the issue in *Escobedo v. Illinois*, 378 US 478, 84 S.Ct. 758, 12 L.Ed2d 977. In a recent Utah case this court has held that where there is questioning in custody by police officers, the prosecution has the burden of showing that the accused knowingly waived his privilege against self-incrimination and the right of counsel, *State v. Lopez*, 22 U2d 257, 451 P2d 772.

In the present case, while the Defendant was in custody, the testimony of District Attorney Stratford, R209, was that the Defendant confessed that he was guilty. There is no indication in the record that the Defendant was advised of his constitutional rights. The testimony of Stratford was not offered in the first trial in May when the Defendant was defended by counsel. There was no attempt by the court in the present case to determine if the Defendant was aware of his right to remain silent in reference to the admission of the confession and we submit that the trial court committed reversible error by allowing the confession to be admitted without requiring the state to prove that the Defendant had knowingly waived his constitutional right against self-incrimination.

CONCLUSION

The State has failed to prove that the Appellant had possession of the stolen snowmobiles. The State tried to prove this by the testimony of Hastie and White, both of whom are accomplices. Their testimony was not independently corroborated as required by 77-31-18 UCA 1953, as amended; therefore, it is submitted that the court committed reversible error by not directing the verdict for the Defendant.

The court further committed reversible error when it did not require safeguarding procedures to be used by the State to protect the Defendant's constitutional right against self-incrimination. The failure of the State to show that the Defendant had consciously and knowingly waived his right to remain silent was a serious breach of the procedures required to protect the right against self-incrimination; therefore, this court is urged to reverse the judgment of the trial court.

Respectfully submitted,

FRED W. FINLINSON

Attorney for Appellant