

1993

## Utah v. O'Brien : Brief of Appellant

Utah Court of Appeals

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Floyd W. Holm; Attorney for Appellant.

Jan Graham; Attorney General; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 930459-CA
	)	
SEAN MICHAEL O'BRIEN,	)	Classification Priority 2
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from the Judgment, Sentence, and Commitment in the Fifth Judicial District Court for Iron County, State of Utah, the Honorable Judge J. Philip Eves, presiding.

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**FILE**

APR 1994

**COURT OF APPEALS**

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 930459-CA
vs.	)	
	)	
SEAN MICHAEL O'BRIEN,	)	
	)	
Defendant-Appellant.	)	

---

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeals is established by Section 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from the Judgment, Sentence, and Commitment from the Fifth Judicial District Court for Iron County, State of Utah following a conviction of five counts of Burglary, each a third-degree felony; five counts of Criminal mischief, each a class C misdemeanor; and four counts of Theft, each a class B misdemeanor.

ISSUES PRESENTED ON APPEAL

The sole issue on appeal is whether there was sufficient evidence to sustain the convictions. In reviewing the jury verdict, this court must view the evidence in a light most favorable to the jury verdict and reverse if such evidence is so inconclusive or inherently improbable that a reasonable person would reasonably doubt the defendant's guilt. State v. Purcell,

711 P.2d 243, 245 (Utah 1985).

DETERMINATIVE STATUTES OR RULES

The statutes which are believed to be determinative in this matter are Sections 76-6-106, 76-6-202 & 76-6-404, Utah Code Annotated, 1953, as amended. These statutes are reproduced in total in the Addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a criminal conviction under a Judgment, Sentence and Commitment from the Fifth Judicial District Court of Iron County.

B. Course of the Proceedings

The Defendant was charged with five (5) counts of Burglary, each a third-degree felony; five (5) counts of Criminal Mischief, each a class C Misdemeanor; and four (4) counts of Theft, each a class B misdemeanor. Following a jury trial which was held April 28, 1993, at which the Defendant was found guilty of all counts, and following a Presentence Investigation Report, Defendant was sentenced by the Honorable J. Philip Eves on June 7, 1993.

C. Disposition at Trial Court

Judge Eves entered a judgment of conviction and sentenced Defendant to serve zero (0) to five (5) years for each of the five (5) counts of Burglary, each a third-degree felony. The Court further ordered that Defendant serve three (3) consecutive sentences for Burglary. Defendants convictions of Theft and Criminal Mischief were stayed. No fine was ordered; however,

Defendant, as a condition of any parole, was ordered to pay restitution in the amount of one thousand eighty-six dollars and forty-two cent (\$1,086.42). Defendant was committed to the Utah State Prison.

D. Statement of Facts

On January 30 and 31, 1993, Defendant and accomplices allegedly unlawfully entered five businesses in Cedar City, Utah; namely, Steve's Texaco, Zion Sun Floral, Fun and Games, Tyner's Pets and Harding Glass. The charges for criminal mischief and theft arose from damages resulting from the alleged break in and property allegedly taken from the businesses. (R. 26-29).

Two of the alleged accomplices, Todd Davenport and Brian Tsosie, testified of Defendant's involvement in the crimes. Upon cross examination, it became apparent that neither witness could testify accurately regarding the facts and there were several inconsistencies regarding the dates when the burglaries occurred, the identities of other accomplices and the extent of their involvement. Both admitted they were confused. Davenport admitted at one time that he was lying about how the incident occurred. (R. 328, 330-337, 373-379).

A third witness, one Steven Backus, testified that the Defendant told Backus approximately a month before the alleged crimes that he was planning the crimes. Further, Backus testified that at approximately 2:00 a.m. on the early evening of January 31, 1993, he had actually seen Defendant in the parking lot of Harding Glass. He did not see Defendant break into Harding Glass. Backus



further stated that it was approximately 200 yards from where he was standing to where he allegedly observed Defendant. There was not a full moon but there were some street lights illuminated. (R. 350-352).

Defendant testified that he was not involved in any of the incidents and that Backus had a motive to prevaricate because of past "bad blood" between him, Backus and Backus' brother. Indeed, since the trial, Backus has recanted the above testimony, stating that the conversation a month before did not occur with Defendant and that he did not, in fact, observe Defendant in the parking lot. Affidavit of Steven Ashley Backus, Paragraphs 4 and 5.<sup>1</sup>

#### SUMMARY OF ARGUMENT

The testimony of Davenport and Tsosie is so inconsistent as to be improbable. The testimony of Backus is also improbable because of conditions the night of the alleged burglaries and, in any event, such testimony has been recanted. Consequently, there is insufficient evidentiary support for the jury verdict.

#### ARGUMENT

##### POINT I

#### THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION

The sole issue that Defendant has raised on appeal in this case is that there was insufficient evidence to sustain the

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<sup>1</sup>This affidavit was the basis of a Motion for Remand to allow the trial court to consider a Motion for New Trial, which was ultimately denied by this court.

convictions. In State v. Purcell, 711 P.2d 243 (Utah 1985), the Utah Supreme Court reaffirmed the standard for reversing a jury verdict based on insufficient evidence. The Court stated that "a jury's verdict will be reversed for insufficient evidence only when the evidence, viewed in the light most favorable to the jury's verdict, is so inconclusive or so inherently improbable that a reasonable person must have reasonably doubted a Defendant's guilt." Id. at 245 (citing State v. Petree, 659 P.2d 443, 444 (Utah 1983)).

In this case, there is no physical evidence showing that Defendant committed the crimes charged. The sole evidence supporting the conviction, therefore, is the testimony of the alleged accomplices, Davenport and Tsosie, and the eyewitness testimony of Backus. The testimony of all three witnesses is "so inherently improbable that a reasonable person must have reasonably doubted" Defendant's having committed the alleged offenses.

First, both Davenport and Tsosie admit that they were confused about the incidents that occurred allegedly involving Defendant. Davenport even admitted that he was lying at the time of the preliminary hearing. Both witnesses' testimony was clearly inconsistent with the facts as stated by the owners of the stores that were burglarized. Neither was clear as to who was involved in the burglaries and whether they all occurred on the same night or not. Because of the obvious confusion and inconsistencies of the testimony of Davenport and Tsosie, their testimony is so manifestly incredible that the jury could not reasonably have

relied upon it in rendering its verdict.

That leaves the testimony of Mr. Backus. Even assuming the conversation that occurred the month earlier was as Mr. Backus testified, there is no corroborating evidence whatsoever that Defendant carried out his alleged plan. Further, the claimed eyewitness identification of Defendant at Harding Glass is completely unreliable. It defies reason to believe that even with full lighting Mr. Backus could recognize Defendant from a distance of 200 yards. State v. Long, 721 P.2d 483, 493-95 & nn. 7-8 (Utah 1986). Moreover, even assuming that Mr. Backus' identification of Defendant was reliable and accurate, he was unable to provide any evidence whatsoever that Defendant was doing anything other than lawfully standing in a public parking lot near Backus's and Defendant's homes. In other words, Backus was unable to connect his identification of Defendant with any of the alleged crimes.

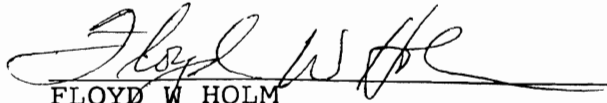
Accordingly, it is "inherently improbable" that a reasonable juror would conclude that Mr. Backus' testimony supports a finding of guilt.

Finally, Mr. Backus has now recanted his testimony, and this Court should therefore reconsider its denial of Defendant's Motion for Remand. In any event, the recantation illustrates the unreliability of Backus' testimony.

#### CONCLUSION


Based upon the above discussion, this Court should reverse the decision of the trial court and remand for dismissal of the case or, alternatively, for a new trial.

DATED this 4<sup>th</sup> day of August, 1994.

  
FLOYD W HOLM

MAILING CERTIFICATE

I hereby certify that I mailed a two (2) true and correct copies of the above and foregoing BRIEF OF APPELLANT to Ms. Jan Graham, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 4<sup>th</sup> day of August, 1994, first class postage fully prepaid.

  
FLOYD W HOLM

## **ADDENDUM**

**76-6-106. Criminal mischief.**

- (1) A person commits criminal mischief if:
- (a) under circumstances not amounting to arson, he damages or destroys property with the intention of defrauding an insurer;
  - (b) he intentionally and unlawfully tampers with the property of another and thereby:
    - (i) recklessly endangers human life; or
    - (ii) recklessly causes or threatens a substantial interruption or impairment of any public utility service;
  - (c) he intentionally damages, defaces, or destroys the property of another, including the use of graffiti as defined in Subsection 78-11-20(2); or
  - (d) he recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car or caboose, whether moving or standing.
- (2) (a) A violation of Subsection (1)(a) is a felony of the third degree.
- (b) A violation of Subsection (1)(b) is a class A misdemeanor.
- (c) Any other violation of this section is a:
- (i) felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$1,000 value;
  - (ii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$500;
  - (iii) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$250; and
  - (iv) class C misdemeanor if the actor's conduct causes or is intended to cause loss of less than \$250.

1992

**76-6-202. Burglary.**

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

1973

**76-6-404. Theft — Elements.**

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

1973

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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,  
STATE OF UTAH

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STATE OF UTAH,	)	<b>JUDGMENT, SENTENCE, AND</b>
Plaintiff,	)	<b>COMMITMENT</b>
vs.	)	
SEAN MICHAEL O'BRIEN,	)	Criminal No. 931500081
Defendant.	)	Judge Robert T. Braithwaite

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The Defendant, SEAN MICHAEL O'BRIEN, having been convicted of fourteen (14) criminal counts by a jury and after a full trial on April 28, 1993, including five (5) counts of Burglary, each a third-degree felony; five (5) counts of Criminal Mischief, each a class C misdemeanor; and four (4) counts of Theft, each a class B misdemeanor, and upon the verdicts of guilty the Court having ordered the preparation of a Presentence Investigation Report, and thereafter the matter having come on for sentencing on June 7, 1993, in Parowan, Utah, and the Defendant having appeared before the Court in person together with his attorney of record, Floyd W Holm, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having reviewed the Presentence Investigation Report, and having further reviewed the file in detail and thereafter having heard statements from the Defendant, his

attorney, and the Iron County Attorney, and the Court being fully advised in the premises, now makes and enters the following Judgment, Sentence, and Commitment, to wit:

#### JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, SEAN MICHAEL O'BRIEN, has been convicted of five (5) counts of BURGLARY, each a Third-Degree Felony; five (5) counts of CRIMINAL MISCHIEF, each a Class C Misdemeanor; and four (4) counts of THEFT, each a Class B Misdemeanor; and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

#### SENTENCE

IT IS HEREBY ORDERED that the Defendant, SEAN MICHAEL O'BRIEN, and pursuant to his convictions of five (5) counts of BURGLARY, each a Third-Degree Felony, is hereby sentenced to a term of incarceration in the Utah State Prison for a period of zero (0) years and not to exceed five (5) years for each of the five (5) Burglary convictions, and the Defendant is hereby placed in the custody of the Utah State Department of Corrections.

IT IS FURTHER ORDERED that the Defendant's conviction of BURGLARY, a Third-Degree Felony, in Count I shall be served consecutively to the Defendant's conviction of BURGLARY, a Third-Degree Felony, contained in Count IV. Moreover, the Defendant's conviction of BURGLARY, a Third-Degree Felony, contained in Count VII shall be served consecutively to the Defendant's convictions of BURGLARY, a Third-Degree Felony, contained in Counts I and IV. Stated another way, the Defendant shall serve three (3) consecutive



sentences for Burglary, each a Third-Degree Felony. The Defendant's convictions for BURGLARY, a Third-Degree Felony, contained in Counts X and XII shall be served concurrently with the other sentences set forth herein.

IT IS FURTHER ORDERED that the Defendant's convictions of THEFT (four counts, each a Class B Misdemeanor) and CRIMINAL MISCHIEF (five counts, each a Class C Misdemeanor) should be, and hereby are, stayed.

IT IS FURTHER ORDERED that the Defendant shall pay no fine.

IT IS FURTHER ORDERED that, as a condition of any parole, the Defendant shall pay one thousand eighty-six dollars and forty-two cents (\$1,086.42) in restitution to the victims in this case (Steve's Texaco, Zion Sun Floral, Tyner's Pets, Harding Glass, and Fun & Games), said restitution to be paid under the direction of the Utah Department of Corrections.


#### COMMITMENT

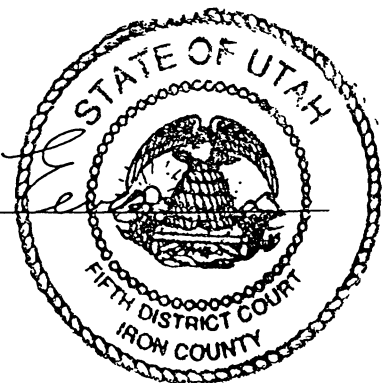
TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, SEAN MICHAEL O'BRIEN, and deliver him to the Utah State Prison, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, and Commitment.

DATED this 28<sup>th</sup> day of June, 1993.

BY THE COURT:

  
J. PHILIP EVES  
District Court Judge

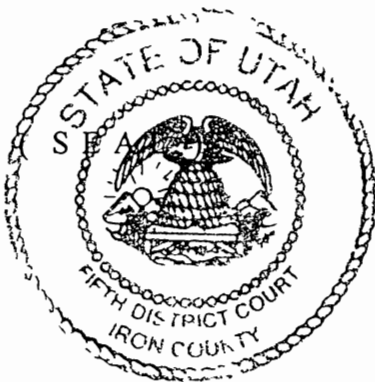


CERTIFICATE

STATE OF UTAH    )  
                                  ss  
COUNTY OF IRON )

I, LINDA WILLIAMSON, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true, and exact copy of the original Judgment, Sentence, and Commitment in the case entitled State of Utah vs Sean Michael O'Brien, Criminal No. 931500081, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this   1   day of July 1993.



LINDA WILLIAMSON

LINDA WILLIAMSON  
District Court Clerk

By Penny Alger  
Deputy District Court Clerk

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Cedar City, Utah 84720  
Telephone (801) 586-6532

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	AFFIDAVIT OF STEVEN
Plaintiff,	)	ASHLEY BACKUS
	)	
vs.	)	
	)	
SEAN MICHAEL O'BRIEN,	)	
	)	Case No. 930459-CA
Defendant.	)	

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STATE OF UTAH            )  
                              :ss.  
COUNTY OF SALT LAKE )

I, Steven Ashley Backus, being first duly sworn upon oath, depose and say as follows:

1. I am over the age of eighteen years and have personal knowledge regarding the facts stated herein.

2. I testified as a witness at the trial of the above-captioned matter.

3. Recognizing the penalties for perjury, I do now recant my testimony at the trial of this matter and state that it was incorrect and untrue as more particularly set forth below.

4. At trial I testified that approximately one month prior to the burglaries that are the subject of this matter, I met the Defendant at a party and that the Defendant stated that he was planning the burglaries that ultimately occurred. Although I did have such a discussion with an individual I believe was ultimately

involved in the burglaries, that person was not the Defendant.

5. At trial I also testified that I observed the Defendant and other individuals in the parking lot of Harding Glass, one of the victims in this case, on the night of the alleged burglary. That statement was entirely untrue, and I never made any such observation.

6. My motive for testifying untruthfully at the trial was that Cedar City Police officers involved in the investigation of the subject crimes threatened to charge me with the crimes if I did not provide them with the information they wanted. Because I feared the consequences or not "cooperating" with the police and to divert attention from me, I agreed to testify as to the above-stated untruths.

7. Based upon my knowledge of the crimes and conversations with witnesses in the case, it is my belief that Defendant did not commit the crimes for which he was charged in this matter.

DATED this 29th day of December, 1993.

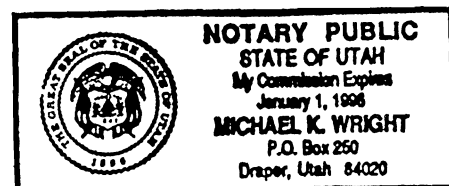
Steven Ashley Backus  
STEVEN ASHLEY BACKUS

SUBSCRIBED AND SWORN to before me this 29 day of December, 1993.

Michael K. Wright  
Notary Public  
Residing at: 5444 Lake County

My Commission Expires:

January 1, 1996



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above AFFIDAVIT OF STEVEN ASHLEY BACKUS to Attorney General Jan Graham, 236 State Capitol Building, 236 State Capitol Building, Salt Lake City, Utah 84114, this \_\_\_\_\_ day of January, 1994, first class postage fully prepaid.

\_\_\_\_\_  
Secretary