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In The Supreme Cou[illegible]
of the State of Uta[illegible]

WAYNE STERLING PEARSON,

Plaintiff-Appellan[illegible]

-vs-

JOHN W. TURNER, WARD[illegible]
UTAH STATE PRISON,

Defendant-Re[illegible]

BRIEF OF AP[illegible]

An appeal from the deci[illegible]
District Court, Salt Lake [illegible]
Marcellus K. Snow presi[illegible]
petition for a writ of habeas c[illegible]

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In The Supreme Court of the State of Utah

WAYNE STERLING PEARSON,
Plaintiff-Appellant,

-vs-

JOHN W. TURNER, WARDEN,
UTAH STATE PRISON,
Defendant-Respondent.

Case No. 12749

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Wayne Sterling Pearson, appeals from a decision of the Third Judicial District Court denying his release from the Utah State Prison upon a petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

On June 18, 1971, a hearing was set and heard on a petition for a writ of habeas corpus before the Honorable Marcellus K. Snow in the Third Judicial District Court, Salt Lake County, alleging that Wayne S.

Pearson's commitment to the Utah State Prison was invalid. After hearing the matter the petition was denied.

RELIEF SOUGHT ON APPEAL

Appellant, Wayne S. Pearson, seeks a reversal of the judgment and order of the court below, or in the alternative that his appeal be reinstated.

STATEMENT OF FACTS

On October 16, 1971, appellant was tried before the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, with the Honorable Joseph G. Jeppson, sitting with a jury, for crimes of Grand Larceny in violation of 76-38-4, Utah Code Annotated, (1953) and Second Degree Burglary in violation of 76-9-3, Utah Code Annotated, (1953) as amended in 1969. The transcript of the trial was admitted as evidence in the habeas corpus hearing (Trial Transcript referred to as 'T', Hearing Transcript referred to as 'H') as plaintiff's exhibit one. The petition for writ of habeas corpus was heard before the Honorable Marcellus K. Snow, a judge of the Third Judicial District, in and for the County of Salt Lake, State of Utah, on the 18th day of June 1971 at 2:00 p.m.

At the habeas corpus hearing, appellant was called in his own behalf and testified that after having been convicted in the present case, the appellant had a discussion with his attorney, Walter Ellett, at which time

Mr. Ellett represented to appellate that he would fi'e a notice of appeal. (H. 4) Mr. Ellett did not file the appeal, however appellant timely filed the appropriate papers personally, and subsequently received conformation. (H. 5) Appellant testified that sometime in December, to the best of his recollection, Mr. Ellett again met with appellant and informed him that three or four more charges were going to be filed against petitioner and that if petitioner would dismiss his appeal all new charges would be dismissed. (H. 7) Mr. Ellett also informed appellant that at a later time he could try to obtain release on a writ of habeas corpus. (H. 7) Mr. Ellett returned in the first part of January and appellant signed papers dismissing his appeal. (H. 8) Appellant testified that he agreed to the dismissal because it was his understanding that the other charges would be dismissed and that he could effect his release upon a writ of habeas corpus. (H. 8) The other charges were in fact dismissed. (H. 8)

At trial Mr. Lewis Miltenberger was called by the State and testified that on April 18, 1970, he was a next door neighbor of the Jensen family (the alleged victims in the present case), and that he left his home between 8:00 and 8:30 p.m. on that date and observed a red Avis panel truck stop in front of the Jensen home. (T. 21) He further testified that he returned home about 15 to 20 minutes later, observed a red panel truck on the Jensen lawn with the back of the truck near the doorway (T. 22) and saw two men loading a large object into the back of the truck. (T. 22) He testified that

when his automobile lights were shown on the area, the truck began moving away and the men ran behind it. (T. 22) He did not obtain the license number, nor could he describe or identify the men. (T. 22)

Richard Ronald Jensen testified that he was residing at 5202 East Moor Road in Salt Lake City, and that upon returning home on April 18, 1970, he discovered his sofa as well as other items were missing from his home, (T. 7) and he identified the sofa that had later been found in Mrs. Bogue's home as his own. (T. 6)

Mr. Clyde Thomas Beard testified that he was employed by the Great Salt Lake Transportation Company and that on the 18th day of April, 1970 before 5:30 p.m. he had rented a small Avis panel van to Loretta K. Bogue (T. 27) identified appellant's co-defendant (T. 28), and further testified that the business records indicated that the truck was returned at nine minutes to 11:00 p.m. on the same date. (T. 29) He said that Mrs. Bogue was accompanied by a small child. (T. 32)

Mrs. Joan S. Huston was sworn and testified that she rented the home at 1248 North 1400 West to Mr. and Mrs. Wayne Bogue on February 28, 1970, and identified those persons as appellant and Mrs. Bogue. (T. 40) She recalled that appellant paid the first month's rent in cash (T. 40), that the home was occupied until the middle of June (T. 43), and that the other payments were made by postal money orders and

that she did not know who paid them. (T. 43) She also testified that she observed appellant on the premises only twice, once two days after the home was rented (T. 40), once about one month later (2. 42), and that she had been to the home at least six times later without ever seeing appellant. (T. 44)

Denise Merrell was called on behalf of the State and testified that she lived next door to Mrs. Bogue, and that she had been a baby-sitter for Mrs. Bogue about ten times, that it was always at her request, and that Mrs. Bogue usually paid her. (T. 35) Appellant was present on five or six of those occasions, that usually he was dressed in a coat and wearing a tie and that they apparently went out on a date, returning later in the evening. (T. 37) Miss Merrell also related that she was at home most of the time after school playing in the yard (T. 38), and that she did not observe appellant around the house at any time. (T. 36) She further testified that she recognized his car, but seldom saw the car at Mrs. Bogue's home.

Detective Neil C. Boswell was sworn and testified that after obtaining information from neighbors and officials of Avis Rental (T. 46), he obtained a search warrant, and proceeded to Mrs. Bogue's residence. (T. 47) Detective Boswell found Mrs. Bogue at home with her children, found a sofa matching the description in the warrant, arrested her, and arranged for the evidence to be transported to the police department. (T. 47) Mrs. Bogue was permitted to make telephone calls at her

neighbor's home (T. 55), and Mrs. Bogue testified that one of those calls was to the residence of Mr. Winger and that she left a message for Mr. Pearson to come immediately to her home. (T. 67) Mr. Pearson arrived shortly thereafter, and Detective Boswell informed Mr. Pearson that he did not have a warrant but would seek one. (T. 51) Appellant was arrested the following day. (T. 52)

ARGUMENT

POINT I

APPELLANT CONTENDS THAT HE WAS DENIED DUE PROCESS OF LAW IN THAT THERE WAS NOT SUFFICIENT EVIDENCE TO JUSTIFY SUBMITTING HIS CASE TO THE JURY AND THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT A VERDICT OF GUILTY.

Appellant urges that the Federal and Utah State Case law support his contention that habeas corpus can be used as an appropriate remedy in his particular case. In *Mathis v. People of State of Colorado,* 425 F. 2d 1165 (1970), at page 1166, the United States Court of Appeals for the Tenth Circuit recognized that habeas corpus may be used as a remedy in certain instances:

> The sufficiency of evidence to sustain a conviction is not subject to federal habeas review,

> citation, unless the conviction is "so totally devoid of evidentiary support as to raise a due process issue," *Edmondson v. Warden,* 335 F. 2d 608, 4 Cir. 335.

Edmondson, supra, is an example of an instance of the court reviewing the evidence presented at trial, however in that particular case the court determined there was sufficient evidence to support the conviction. The Utah Supreme Court has also recognized in many cases, *Brown v. Turner*, 21 Utah 2d 96, 440 P.2d 968 (1968); *Bryant v. Turner,* 19 Utah 2d 284, 431 P.2d 121 (1967); *Johnson v. Turner,* 24 Utah 2d 439, 473 P.2d 901 (1970); *Klotz v. Turner,* 23 Utah 2d 303, 462 P.2d 705 (1969); *Rees v. Turner,* 24 Utah 2d 349, 471 P.2d 168 (1970); *Sinclair v. Turner,* 20 Utah 2d 126, 434 P.2d 305 (1967); *Sullivan v. Turner,* 22 Utah 2d 85, 448 P.2d 907 (1968); *Syddall v. Turner,* 20 Utah 2d 263, 437 P.2d 194 (1968); that habeas corpus may be used to review a conviction in certain instances. The *Bryant* case, *supra,* is representative of the language of those cases where the court said:

> The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other such

> circumstances exist that it would be wholly unconscionable not to re-examine the conviction.

Appellant contends that he was effectively and substantially denied due process of law and further that it would be wholly unconscionable for this court not to re-examine his conviction since the trial was totally devoid of evidence to support that conviction.

Inasmuch as the State in this case offered no testimony directly connecting the petition with a felonious taking or aspiration, the only basis upon which the conviction may be upheld in upon the theory that appellant was in possession of recently stolen property and failed to make a satisfactory explanation. That particular theory is provided for statutorily at 76-38-1, Utah Code Annotated, (1953), under the definition of the Offense of Larceny as follows:

> Larceny is the felonious stealing, taknig, 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 facia evidence of guilt.

However, it seems to be a well established doctrine that possession under this section must be personal, conscious and exclusive, and mere association with or constructive possession of recently stolen, or mere presence of accused at the place where stolen proprty is found is not

sufficient. *State v. Kinsey,* 77 Utah 348, 295 P. 247; *State v. Butterfield,* 70 U. 529, 261 P. 804; *State v. Dyett,* 114 U. 379, 199 P.2d 155; *State v. Brooks,* 101 U. 584, 126 P.2d 1044; *State v. Morris,* 70 U. 570, 262 P. 107.

In *State v. Morris, supra,* the court reversed appellant's conviction for the reason that the evidence was insufficient to take the case to the jury, where the defendant was the camp tender for the owner of the herd in which stolen sheep were found, and there was no direct evidence connecting the defendant with the larceny. The court in holding that possession was not exclusive and personal cited Underhill on Criminal Evidence (2dEd) at page 527 as follows:

> . . . The possession of the stolen property is personal and exclusive if it is exclusive as to all persons not particips criminis. As to accomplices, the possession of one is the possession of all. A mere constructive possession is not enough. The accused will not be presumed to have stolen articles which he does not know he possesses. If other persons have equal right and facility of access with him to a room, truck, or closet where stolen goods are discovered, possession, not being exclusive or personal, is of no value as evidence.

The court in *State v. Butterfield, supra,* at page 533, held that the possessor must not only have possession

but also must recognize some interest in the property when it said:

> . . . But the term "possession" as here used means a conscious personal possession, amounting to an express or implied assertion of ownership, *citation*, and, unless this character of possession is proved by direct evidence or in inferrable from other proven facts and circumstances, the evidence relating to possession is of little or no value.

Further this court has held in *State v. Kinsey, supra*, that possession alone is not sufficient to sustain a conviction when it said at page 351:

> Possession of articles recently stolen, when couples with circumstances of hiding or concealing them, or of disposing or attempting to dispose of them, or of making false or unreasonable or unsatisfactory explanations, may be sufficient to connect the possession with the commission of the offense. But mere or base possession when not coupled with other culpatory or incriminating circumstances, does not alone suffice to justify a conviction.

Appellant asserts that the State has failed to sustain their burden of placing him in possession of the stolen property, that possession being "personal, exclusive and with a distinct, implicit or express assertion of

ownership" as required by the cited cases. The States has presented evidence that Mr. Pearson and Loretta Bogue entered into a rental agreement with Mrs. Joan Houston on the 28th day of February, 1970, (T. 40) and the appellant was observed at the home on only one occasion, approximately one month later, although Mrs. Houston had made several visits to the house. (T. 41) It must be recalled that Mr. Jensen's property was not taken until the 18th day of April, 1970 and that Detective Boswell arrived at the home and arrested Mrs. Bogue on the 25th day of April, 1970. Miss Merrell's testimony is the only evidence that places appellant at the home between the 18th and the 25th day of April and that visit was apparently for the purpose of taking Mrs. Bogue out for a date. The trial transcript is totally devoid of evidence that appellant had received mail at that address, paid any of the bills for the maintenance of the household, kept any personal effects or even spent one night at that address. Miss Merrell's testimony at best established that appellant was an occasional social visitor, whose car was known to Miss Merrell but which was seldom observed there. Viewing the State's evidence most favorable to its position, the most that may fairly be said is that, due to appellant's name appearing upon the rental agreement, he was in constructive possession of the Jensen property. The case law of the State of Utah is clear that this type of possession is not sufficient to sustain a conviction.

The appellant further asserts that even if the court were to find that he was in possession, the State has

failed to establish that appellant attempted to hide or dispose of the Jensen property or that he made false or unreasonable explanation as to how he obtained the property as required by *Kinsey, surpa.* There is no evidence that appellant attempted to hide or dispose of the property or even that he was aware it was stolen. Absent some culpatory or incriminating circumstances, a conviction based upon mere possession cannot stand.

The appellant also contends that due to the insufficiency of the evidence relative to Burglary in the Second Degree, the submitting of the case to the jury and the subsequent verdict of guilty was a denial of petitioner's constitutional right of due process of the law under the Fourteenth Amendment of the United States Constitution.

In addition to the argument above, appellant asserts that, opposed to larceny, there exists no statutory presumption dealing with the being in possession of recently stolen property. In *State v. Kirkman,* 20 Utah 2d at page 46, this court, after citing § 76-38-1, Utah Code Annotated, (1953), said:

> This statute has nothing to do with burglary and applies only to charges of stealing . . . .

In *State v. Nichols,* 106 Utah 104, the court after pointing out that the defendant was charged with the offense of burglary and not larceny, reversed defendant's reconviction upon the basis that there was not direct evidence connecting appellant with the burglary and that possession alone was not sufficient. The court

in that case cited *People v. Hart,* 10 Utah 204, 37 P. 330 at page 113 as follows:

> We do not think there was sufficient evidence before the jury to justify a conviction of larceny, had that offense been charged in the indictment; and we are also of the opinion that the naked possession of stolen property from 6 to 24 hours after the larceny or housebreaking, when unaccompanied with any other incriminating fact or circumstances tending in some degree to connect the accused with the commission of the offense charged, is not sufficient evidence, in itself, upon which to convict of housebreaking. The offense of housebreaking is ordinarily removed one degree further from the act of larceny, and the mere possession of stolen goods does not have the same tendency to connect the accused with the burglary or housebreaking as it would with larceny. [Citing cases.]

Appellant contends that since the State's evidence alleges nothing more than possession the lower court's judgment as to burglary must be reversed.

POINT II

APPELLANT CONTENDS THAT APPELLANT'S WITHDRAWAL AND SUBSEQUENT DISMISSAL OF HIS APPEAL WAS INVOLUNTARY AND ACCOMPLISHED

THROUGH FEAR, PRESSURE AND COERCION.

It is appellant's contention that had it not been for the threats on the part of the State to file and prosecute him on additional offenses if he did not dismiss his appeal, he would not have taken that action. Appellant had every intention of proceeding with the appeal until that time as evidenced by the fact that when his attorney delayed in filing the appropriate papers, he undertook the responsibility himself. In the alternative to granting relief under Point I of appellant's brief, appellant submits that because of the coercion exerted against him by the State the dismissal of his appeal was involuntary and appellant further submits that said appeal should be reinstated.

CONCLUSION

In conclusion, the appellant's conviction was in violation of due process requirements in that there was not sufficient evidence to justify submitting either the larceny or the burglary court to the jury since the evidence was insufficient under the law. In addition appellant's appeal should be reinstated since the withdrawal of said appeal was accomplished through coercion and thus was involuntary.

Respectfully submitted,

F. JOHN HILL

Attorney for Appellant