1972

The State of Utah v. Paul Joe Martinez : Brief of Respondent

In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Respondent,
-vs-
PAUL JOE MARTINEZ,
Defendant-Appellant

Case No. 12785

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT IN AND FOR THE COUNTY OF WEBER STATE OF UTAH HONORABLE CALVIN GOULD PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Paul Joe Martinez, appeals from a conviction of the crime of burglary in the second degree entered against him in the District Court of the Second Judicial District, in and for Weber County, State of Utah.

DISPOSITION IN THE LOWER COURT

The Appellant was found guilty of burglary in the second degree by a jury, and sentenced to an indeterminate term of not less than one or more than twenty years.

RELIEF SOUGHT ON APPEAL

The Respondent submits that the judgment of the Second District Court should be affirmed.

STATEMENT OF FACTS

On the evening of May 7, 1971, an individual (described as about 5'8", slender build, long hair, and wearing a fringe jacket) was observed jumping from the cab of, and running behind a late model pickup truck and camper located in a parking area near the corner of Willow and Stephens Streets in Ogden, Utah (TR 4, 5).

The individual was then observed "ducking" in and out of cars parked along Willow before proceeding down an alley off Willow, which parallels Stephens about one-half block east (TR 6). Moments later, someone was seen "crouching" behind a bush in the same alley (TR 7).

It was then discovered that the aforementioned truck and camper had been broken into, and a tape deck and two tapes were missing (TR 54).

Later, Paul Joe Martinez (described as wearing a fringe jacket and having long hair and a beard) was observed slamming the door of and crouching behind a second late model pickup truck parked on Willow by the previously mentioned alley (TR 7, 8, 25, 26, 36).

Paul Joe Martinez was then seen running from the truck on Willow, and was apprehended and taken to the

front of the Hitching Post Lounge, located on the corner of Willow and Wall Avenues (TR 27, 28).

Around midnight, Officer Donald R. Moore arrived at the Hitching Post Lounge to conduct an investigation. He placed Mr. Martinez under arrest, searched him, and discovered a set of Ford ignition keys (TR 44, 45, 46).

Officer Moore summoned Officer Grant J. Price to the Hitching Post Lounge for the sole purpose of booking Mr. Martinez (TR 68, 71, 73). Officer Price arrived at the scene, but the trial record fails to clearly show when he removed Mr. Martinez from the scene to book him in the Weber County Jail (TR 69, 70).

Meanwhile, Officer Moore learned from his investigation that a stereo tape deck and two tapes were missing from the previously described truck and camper (TR 55).

The particular tape deck and tapes were located, 30 to 60 minutes following defendant's arrest, in the rear "boot" area of Mr. Martinez' Ford convertible parked on Stephens south of the Willow intersection (TR 47-49). The rear plexiglass window of the convertible was zipped out and was laying on top of the said tape deck and tapes (TR 48, 49, 63). No search warrant was obtained (TR 63).

The testimony of the investigating officers is in conflict regarding other events surrounding the discovery of the deck and tapes.

Officer Moore, the primary investigating officer, testified that after learning that Mr. Martinez had driven to the area in a Ford automobile, he looked for and found defendant's car. He further testified that he saw in plain view, the tape deck and tapes through the plexiglass window lying in the "boot" of the convertible.

Officer Price, on the other hand, testified that he was with Officer Moore when they examined the defendant's automobile, and that he, Officer Price, lifted the plexiglass flap to observe the tape deck and tapes in the "boot" (TR 69). Officer Price further testified that he did not see the deck and tapes until he lifted the flap (TR 70).

Over defendant's objection, the deck and tapes were admitted on the ground that Officers Moore and Price conducted a seizure without a search since the items were in plain sight (TR 64, 74).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY, BECAUSE THE EVIDENCE WAS SUCH THAT REASONABLE MINDS COULD BELIEVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF BURGLARY IN THE SECOND DEGREE.

Appellant was convicted of burglary in the second degree under Utah Code Ann. § 76-9-3 (1953), which in part provides:

> "Every person who forcibly breaks and enters . . . any . . . automobile, automobile trailer . . . with intent to commit larceny or any felony, is guilty of burglary in the second degree."

Larceny is defined by statute as "the felonious stealing, taking, carrying, leading or driving away the personal property of another." Utah Code Ann. § 76-38-1 (1953).

The fact that the basic elements of the crime of burglary were committed is not disputed by Appellant.

Appellant's first contention is that the evidence was insufficient to positively identify defendant as the person who committed the elements of the crime.

The rules governing the scope of appellate review as to sufficiency of the evidence in a criminal case to sustain the verdict are well settled: It is for the jury to judge the credibility of witnesses and determine the facts; evidence will be reviewed in the light most favorable to the verdict; and if when so viewed it appears the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed. *State v. Ward,* 10 U.2d 34, 341 P.2d 865 (1959).

Reasonable doubt is described as follows:

> "'Reasonable doubt' is not a mere imaginary, captious, or a possible doubt, but a fair doubt, based upon reason and common sense, and growing out of testimony in the case, and it is such doubt as will leave juror's mind, after a careful examination of all evidence, in such condition that he cannot say he has an abiding conviction, to a moral certainty, of defendant's guilt." *State v. Taylor,* 21 U.2d 425, 446 P.2d 954 (1968).

State v. Sullivan, 6 U.2d 110, 307 P.2d 212 (1957) cert. denied 355 U.S. 848, 2 L.Ed.2d 57, 78 S.Ct. 74 (1957), further adds:

> ". . . proof beyond all peradventure of doubt could seldom be had, nor does the law require it."

Respondent contends that the evidence in the trial record, viewed under the above standards, is more than adequate to identify the defendant as committing the alleged crime, thus justifying the jury's verdict of guilty.

Because of the nature of the crime, burglary is rarely proved by the direct and positive evidence of witnesses who view the actual breaking and entry. The inference of guilt in most instances must be drawn from direct and circumstantial evidence surrounding the com-

mission of the crime which tends to incriminate the defendant. *State v. Hopkins*, 11 U.2d 363, 359 P.2d 486 (1961). Therefore, a fact which legitimately tends to connect defendant with the commission of the offense is admissible. The State may introduce evidence relating to the identity, presence, and acts of the accused such as: the fact that he was seen near the scene of the crime, his flight from the scene, clothing worn by the defendant, and defendant's possession of the stolen property. *Henderson v. State*, 1 Ala. App. 154, 55 So. 437 (1911).

This Court has held it is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must prove the required proof. *State v. Erwin*, 101 U. 365, 120 P.2d 285 (1941).

With this in mind, the identification and guilt of the defendant are shown by the "whole chain of circumstances" as follows:

The individual seen by two witnesses jumping from the cab of the burglarized vehicle, running between parked cars, and proceeding down an alley, was described as 5'8", slender build, long hair, and wearing a western fringe jacket (TR 5). Later, the dome light of a second vehicle came on revealing the face of the defendant, Paul Joe Martinez (TR 8, 18, 19). Two witnesses then viewed the defendant slamming the door of and crouching behind said vehicle. He was described as being dressed the same as the individual in and around

the burglarized vehicle, and also had long hair (TR 8, 26, 31). When a flashlight was shined on defendant, he ran and a chase ensued. When the defendant was apprehended, he was wearing gloves, a fringed leather jacket, and had long hair and a beard (TR 26, 27, 36, 41, 42). The gloves were then removed by the defendant, and later found under a bush (TR 42).

The State contends that the above facts are sufficient to identify the defendant as the individual seen in and around the burglarized truck and camper. Appellant called no witnesses to explain his conduct on the night in question, and the defendant failed to provide an adequate explanation for his flight from the scene (TR 17, 18, 28). This, coupled with the defendant's late night activities previously described support the jury's verdict of guilty. *Loper v. United States,* 160 F.2d 293 (1947).

Concerning the matter of defendant's possession of the stolen property, the State recognizes that proof of burglary does not require a showing that the accused be in possession of the stolen property. *State v. Pacheco,* 13 U.2d 148, 369 P.2d 494 (1962). However, possession can be used as tending to show intent and to connect the defendant with the burglary. Utah Code Ann. § 76-38-1 (1953), supra.

Appellant correctly states that no evidence was offered to show that defendant placed the stolen goods in his automobile. The State contends that such a showing is unnecessary. The mere fact that the stolen property

was in defendant's car is admissible to show constructive possession.

The elements of constructive possession exist where there is such a "nexus or relationship between defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession." *United States v. Casalinuovo,* 350 F.2d 201 (1965) at 210. Thus, it is not necessary that the property be actually on defendant's person; it is sufficient if it is in a place or receptacle over which he exercises control, or in a place where it must necessarily have been placed by him. An examination of three cases will show what the courts consider sufficient dominion or control.

Husten v. United States, 95 F.2d 168 (1938), involved a circumstance where the stolen property was found in an alley outside defendant's window after the police had gained resisted entrance to defendant's hotel room. The court held in favor of constructive possession.

Perhaps the leading case in this area is *People v. Sears,* 119 Cal. 267, 51 P. 325 (1897). This was a burglary case where the stolen goods were located in a trunk in a stable where defendant kept his horse. The stable was located "near" defendant's house. The court held defendant had constructive possession of the stolen goods.

Finally, in *State v. Potts,* 1 Wash.App. 614, 464 P.2d 742 (1969), the defendant was arrested for reck-

less driving and taken to jail. The officer then searched the car and found a tin box containing marijuana in the glove compartment, and also located a marijuana plant in the trunk. The court held that defendant had dominion and control over the "premises" even though he was in jail when the search was conducted, and thus, he had constructive possession of the evidence.

In none of the above cases did the court require a showing that the defendant placed the stolen property where it was found.

In the present case, the facts show defendant's automobile was located approximately one block from the scene of the crime, and 1½ blocks from the place of arrest (TR 47); the car was registered in the name of Paul Joe Martinez (TR 47); a Ford ignition key matching the automobile was found on defendant at the time of his arrest (TR 45); the stolen property was located in the "boot" area of the convertible (TR 48); and there was a sufficient span of time between the first observation of the defendant, and the second for him to deposit the goods in his car (TR 7).

Respondent contends the above facts sufficiently show that defendant was in constructive possession of the stolen goods, a factor which further tends to implicate defendant with the commission of the crime, and further substantiates the validity of the jury's verdict of guilty.

POINT II

THE EVIDENCE OBTAINED FROM DEFENDANT'S AUTOMOBILE WAS PROPERLY ADMITTED BY THE TRIAL COURT.

The Fourth Amendment of the United States Constitution prohibits only those searches and seizures which are unreasonable, and this guarantee is applicable to the states by reason of the Fourteenth Amendment due process clause. *Stanford v. Texas,* 379 U.S. 476, 13 L.Ed.2d 431, 85 S.Ct., rep. den. 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 879 (1965). Also see *State v. Kent,* 20 U.2d 1, 432 P.2d 64 (1967). Article 1 § 14 of the Utah Constitution provides the same protection.

Since automobiles are "personal effects", they are entitled to Fourth Amendment protection. Automobile searches, however, are governed by more liberal constitutional standards of reasonableness than those used to test searches of houses, buildings, etc., due to the mobility of the automobile. *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

A. THE EVIDENCE WAS IN PLAIN SIGHT AND OBTAINED WITHOUT NEED FOR A SEARCH.

The trial court held the stolen items obtained from defendant's automobile were in plain sight, thus not requiring a search for their discovery (TR 64).

In *Harris v. United States,* 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968), the Supreme Court held that objects falling in the plain view of a police officer who has a right to be in that position to have that view are not the product of a search, are subject to seizure, and may be introduced in evidence.

This doctrine was previously expressed by this Court in *State v. Allred,* 16 U.2d 41, 395 P.2d 535 (1964), where the facts revealed that defendant abandoned his car in a driveway, and the investigating officer observed in plain view on the front seat, stolen property. The Court held that no search was necessary for the officer to find the articles, they being fully disclosed to his view as he approached the car, and that under such circumstances the constitutional guarantee is not applicable.

In the instant case, Officer Moore testified that he approached defendant's vehicle from the left rear side, and saw "in plain sight" a stereo and two tapes in the "boot" area underneath the zipped-out plexiglass rear window (TR 48). He later testified that he could see the evidence from the outside, through the plexiglass without actually entering the car (TR 49). This testimony clearly places this case within the "plain sight" doctrine.

Officer Price was called by the defense and questioned in part as follows:

> Q. Could you see anything through that flap before you picked it up?

A. I don't recall if I could or not. It was a plastic and you could see through it.

Q. What condition was the plexiglass in?

A. I don't know. I just don't remember. (TR 69, 70).

Officer Price also could not remember whether Officer Moore had previously discovered defendant's convertible while Officer Price was at the jail booking defendant (TR 71, 73). He further testified that this wasn't his case, and that he was merely called to book the defendant (TR 71).

The State contends, and the trial court determined, that Officer Price's recollection was obviously poor, and it would be unreasonable to accept his testimony over and above that of Officer Moore, the primary investigating officer.

To refute the State's proposition that there was no search, Appellant contends there was a search which commenced when the officer(s) sought to locate defendant's automobile; that the stolen items were viewed during the course of this "ongoing" search. Appellant then makes a general legal statement that evidence in a plain view case must not be the objective of an ongoing search, a statement that is both unfounded and unsupported by the cases he cites as authority (*State v. Criscola,* 21 U.2d 272, 444 P.2d 517 (1968); *State v. Richards,* 26 U.2d 318, 489 P.2d 422 (1971); and *Harris v. United States,* supra.)

The Respondent submits that Appellant's statement is valid only if the plain sight observation is made during the course of an ongoing ILLEGAL search. In the present case, however, the search for defendant's automobile was legal and may not be considered part of a search covered by the Fourth Amendment. Police officers are only required to obtain warrants to search places where they have no right to be. Certainly, they have a right to be on a public street to look for an automobile of one they have arrested. Case law further gives them the right and duty to locate, inventory, and impound an arrested person's automobile left on a street following the arrest for the protection of the car owner and the police. *State v. Criscola,* supra.

Appellant also questions the items actually being in plain sight because the officer's observation was at night, with the aid of a flashlight, in an area of little lighting, through unclear plexiglass.

There are many nightime plain view cases when a flashlight was used. In *People v. Cacioppo,* 264 Cal.App.2d 392, 70 Cal.Rptr. 356 (1968), the officer stopped a vehicle for defective equipment, shined his flashlight into the car, and discovered five benzedrine pills on the car floor. The court held this did not constitute an unreasonable search and seizure because the pills were in plain sight. In another California case, the officer with the aid of a flashlight, viewed from the outside of the car a gun protruding from beneath two pillows in the car. The court held the observation fell

under the plain sight rule, and no search occurred. *People v. Linden*, 185 Cal.App.2d 752, 8 Cal.Rptr. 640 (1960).

The issue of the unclear plexiglass has already been considered. Officer Moore testified he could clearly see through the plexiglass, and Officer Price said, "It was a plastic and you could see through it."

B. THE EVIDENCE WAS LEGALLY OBTAINED DURING THE COURSE OF IMPOUNDING DEFENDANT'S VEHICLE.

The leading case in Utah on this subject is *State v. Criscola,* supra, where this Court held that incriminating evidence of a burglary obtained from an automobile driven by defendant on the day following the burglary, and after defendant's arrest for driving without a valid driver's license, and certain evidence taken more than a month later from the automobile defendant was driving when arrested for another traffic violation was not obtained by an unreasonable search in view of an officer's duty to take inventory of the contents of an automobile at the time of its impounding. The Court further said:

> "Inasmuch as he (defendant) . . . was placed under arrest, it was necessary that the car be taken into possession and impounded. When the officers thus became responsible for the car and its contents, it was in conformity

> with ordinary prudence and customary practice, for the protection of the car owner as well as the police, for the officers to take an inventory of its contents. This of course necessarily involves discovery of what the contents were. To suggest that under those circumstances where the police had thus come into the possession of personal property which they had reason to believe was connected with a felony, they would have to go and obtain a warrant to conduct a "search" and "find" that which they already had lawful possession of seems completely discordant with reason. Accordingly, there is no reason apparent to us why the trial court should have rejected the evidence in question as having been obtained by an "unreasonable" search. It is our opinion that the officers were not only acting within their rights, but would have been remiss in their duty if they had not done what they did in taking the evidence and making use of it . . . in building the case against the defendant." *State v. Criscola,* supra, at 519-520.

State v. Potts, supra, also involved an inventory search. The defendant was arrested and taken to jail. The officer then remained with the car, called a wrecker to impound it, then searched the interior and trunk of the car, and found the incriminating evidence. The Washington Supreme Court sustained the officer's

activities as a lawful inventory search. (Note that an inventory may be made either before or after the car is taken to a garage or other place of safety. *People v. Marchese,* 275 Cal.App.2d 1007, 80 Cal.Rptr. 525 (1969).)

In the present case, Officer Moore obtained the Ford car key from the defendant, located defendant's automobile, then called for a State impound wrecker to impound the vehicle before he approached the car to make a closer examination (TR 47). At this time the tape deck and tapes were viewed in the "boot" of the car (TR 48).

The State contends that it was not the intent of Officer Moore to conduct an exploratory search of defendant's automobile, but to inventory the automobile as part of the customary procedure of impounding it. This intent is shown by his willingness to call for an impound wrecker before approaching the car. And, as stated above, Officer Moore had the right to inventory the car before the car was towed away.

Therefore, the evidence obtained was the result of a valid police inventory rather than an "unreasonable" search.

C. IF THERE WAS A SEARCH, IT WAS VALID ON THE BASIS OF PROBABLE CAUSE.

The United States Supreme Court has frequently recognized that if law enforcement officers have prob-

able cause for searching an automobile, such probable cause furnished sufficient constitutional justification for their searching the automobile without obtaining a search warrant. *Carroll v. United States,* supra:

> "The measure of legality of such a seizure is . . . that the seizing officer shall have reasonable or probable cause for believing that the auto which he stops and seizes has contraband liquor therein which is illegally transported."

The latest Supreme Court case supporting this view is *Chambers v. Moroney,* 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970), which held that a warrantless search was proper based on probable cause. The occupants of the vehicle were arrested, and, contrary to Appellant's inference that major risks were involved when the search was made, the search was conducted at the police station without a warrant after the suspected armed occupants of the car were jailed. In the decision, the Court laid down an important guideline for lower courts to follow:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

When Officer Moore arrived, he noticed the defendant being held by three citizens; he learned from Bruce R. Peterson that a tape deck and two tapes were missing from his burglarized truck and camper; he arrested and searched the defendant, and found a key to a Ford automobile; he located that automobile thirty minutes to an hour after the arrest, and approximately 100 yards from the place of arrest. When Officer Moore was questioned by counsel, he was asked whether he felt a need or cause to further investigate which he answered in the affirmative (TR 53).

The above facts are sufficient to show that Officer Moore had probable cause to search defendant's vehicle for the stolen tape deck and tapes.

D. IF THERE WAS A SEARCH, IT WAS VALID AS INCIDENT TO ARREST.

An excellent review of the law on this subject is given in *Preston v. United States,* 376 U.S. 364, 11 L.Ed. 777, 84 S.Ct. 881 (1964):

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks v. United States,* 232 U.S. 383, 392 (1914). This right to search and seize without a warrant has been

> extended to things under the accused's immediate control, *Carroll v. United States,* supra 267 U.S. at 158, *and to an extent, depending on the circumstances of the case, to the place where he is arrested, Agnello v. United States,* supra 269 U.S. at 30; *Marron v. United States,* 275 U.S. 192, 199 (1927); *United States v. Rabinowitz,* 339 U.S. 56, 61-62 (1950). The rule allowing contemporaneous searches is *justified for example, by the need . . . to prevent the destruction of evidence of the crime . . . .*" (Emphasis added.)

Preston also expressed a test for determining the scope of a search incident to arrest. It cannot be remote in time or place from the arrest.

Case law defines what is reasonably contemporaneous in time and place with an arrest. In *State v. McClung,* 66 Wash.2d 654, 404 P.2d 460 (1965), a search of defendant's automobile, across the street and less than 150 feet from the tavern in which defendant was arrested was held valid as incidental to an arrest, and not too remote in time and place. In *Scott v. People,* 166 Colo. 432, 444 P.2d 388 (1967), the inspection of an unoccupied automobile parked about one-half block from the scene of the crime was held to be a reasonable search incident to arrest. *People v. Felli,* 156 C.A.2d 123, 318 P.2d 840 (1957), held that where officers arrested defendant while he was driving his automobile, locked the vehicle and took defendant to police head-

quarters for booking, and had the vehicle towed to the place of storage before commencing their search (within an hour after arrest), was legal as incident to arrest.

In the present case the time of discovery was thirty to sixty minutes after the arrest, and the car was located within one block of the scene of the crime and 1½ blocks from the place of arrest. Respondent submits the above facts coupled with the possibility that the evidence might have been removed or destroyed by friends or compatriots alerted to police suspicion, show that the search was reasonably incident to arrest.

CONCLUSION

The State contends that the evidence was sufficient to support the verdict of guilty because the evidence was such that reasonable minds could believe beyond a reasonable doubt that defendant committed the crime of burglary in the second degree.

The State further contends that there are four theories under which the evidence obtained from defendant's automobile can be deemed admissible.

First, the evidence was in plain sight and obtained without a search.

Second, the evidence was legally obtained during the course of impouding defendant's vehicle.

Third, if there was a search, it was valid on the basis of probable cause.

Fourth, if there was a search, it was valid as incident to arrest.

For the above reasons, the Respondent respectfully requests that the conviction of the defendant for burglary in the second degree be affirmed.

Respectfully submitted,

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