1972

State of Utah v. David Kaae, Keith Wayne Ewer, & Michael Horne : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF UTA

STATE OF UTAH,
Plaintiff-Respondent

vs.

DAVID KAAE, KEITH WA
EWER & MICHAEL HORM
Defendants-Appellants

BRIEF OF RESPONDENT

Appeal from a judgment
Court of Cache County, Hon
Judge.

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

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STATE OF UTAH, *Plaintiff-Respondent,* vs. DAVID KAAE, KEITH WAYNE EWER & MICHAEL HORNE, *Defendants-Appellants.*	Case No. 12904

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an appeal from a conviction of second degree burglary, Utah Code Ann. § 76-9-3, and grand larceny, Utah Code Ann. §§ 76-38-1 and 76-38-3.

DISPOSITION IN THE LOWER COURT

The appellants were tried and convicted of second degree burglary and grand larceny in the District Court in and for Cache County, before the Honorable VeNoy Christoffersen.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the decision of the lower court.

STATEMENT OF FACTS

On August 31st, 1971, Keith Plowman, owner of Keith's Market (R. 13), found that his store had been broken into and merchandise had been stolen. The merchandise was of a value in excess of $50. On September 3, 1971, two officers from the Logan City Police Department went to an apartment located at 970 North Seventh East (R. 4, 32) pursuant to an informant's tip concerning the burglary (R. 8, 38). During the investigation a quantity of the stolen merchandise was found in the apartment and resulted in the arrest of the appellants. Each appellant upon proper constitutional warning wrote and signed a statement implicating himself and others (R. 53, 92, 93, 112, 113).

After the hearing on the motion to suppress the evidence taken from the apartment and to suppress the written statements, the Honorable VeNoy Christoffersen discussed his findings and conclusions. First he discussed the possibility of the appellant's consent to search their apartment and the relevant facts involved (R. 173, 174, 175), and concluded as follows:

> ". . . I think it even went further than that and that after this point that there was a consent and in fact an assistance in accomplishing the turning up of other evidence in the house, and on

> that basis, I would deny the motion to suppress the evidence taken . . ." (R. 175).

Secondly, he discussed the possibility of the confessions being invalid and concluded that the conduct of the officers in securing the statements was not of a "compelling nature," but voluntary (R. 175, 176, 177). He subsequently dismissed the motions.

The testimony of Officers Leon Wursten and Richard Wright carry significant weight in this appeal. Their testimony in substance is as follows:

Officer Leon Wursten testified that he and Officer Richard Wright went to an apartment located at 970 North Seventh East based on an informant's tip that David Kaae was involved in the burglary of Keith's Market (R. 4, 8). Upon arriving the officers knocked on the door and Keith Ewer answered (R. 4). The officers identified themselves and stated that they wanted to talk to David Kaae (R. 5, 12). Officer Wursten testified that Mr. Ewer's reply was, "Come in, he's in the kitchen" (R. 5). The officer further testified that ". . . when we got into the kitchen, we found pencils and the type of glue and the type of razor blades that were taken from the market in bulk on the kitchen counter" (R. 9). The basis for this knowledge was a list that the owner of Keith's Market had given them (R. 2, 12, 13). With reference to the items identified above, Officer Wursten testified more specifically:

> "Well, the LePages airplane type glue there was a couple of tubes . . . There were some pencils,

> lead pencils. They were quite unique in themselves. They had part leads in these pencils. They'd only been on the market just a very short time. It was a type of pencil when the point gets dull you pull the point out, push it in the back, and push a new point out so this is quite an unusual pencil, and there were some razor blades, there were three or four packages of razor blades on the counter" (R. 12, 13).

The officer then testified that he told David Kaae that they were aware of what was going on, and asked him if he wanted to show them where the rest of the "contraband" was hidden. "And he said, 'You bet;' and he showed us right in. He took us around and showed us where the different things were. He was pulling things out of the cabinets and taking the contraband out of the cabinets and starting to stack it on the kitchen counter" (R. 9, 10, 14). Subsequently, David Kaae was arrested and given the *Miranda* warning, and then he gave a written statement as to his part in the burglary (R. 15).

Officer Richard Wright testified that he and Leon Wursten went to the apartment at the above address to talk to David Kaae (R. 32, 52). They knocked on the door and Keith Ewer answered, and they identified themselves as police officers (R. 33, 34, 53). He testified that Mr. Ewer stated that David Kaae was in the kitchen, and then invited them in (R. 35). Officer Wright further testified that their search was by permission (R. 40).

David Kaae and Wayne Ewer rented the apartment (R. 28, 52). Wayne Ewer gave the officer permission to

go back to the apartment to make a more thorough search (R. 54).

ARGUMENT

POINT I.

THE COURT BELOW DID NOT ERR IN ADMITTING THE EVIDENCE WHICH WAS FOUND IN THE APARTMENT LOCATED AT 970 NORTH SEVENTH EAST, LOGAN, UTAH.

This court in discussing a judge's duties when determining the admissibility of evidence held in *State* v. *Tuttle*, 16 Utah 2d 288, 399 P. 2d 580, 582, *cert. denied*, 382 U. S. 872, 86 S. Ct. 129, 15 L. Ed. 2d 110 (1965):

> "The practical exigencies of a trial render it imperative that the trial judge have the prerogative of ruling upon questions of admissibility of evidence. And upon issues of fact incident to that purpose. For this reason, and because of his position of advantage to observe the demeanor of witnesses and other factors bearing on credibility, his ruling thereon should not be disturbed unless it clearly appears that he was in error. If they were not indulged the prerogative and were bound by any story which a self-interested witness may tell which would make a search unlawful, it requires but brief reflection to reveal what mischief could result in thwarting efforts of officers proceeding reasonably and in good faith to solve crimes and enforce the law."

To the same effect see *State* v. *Criscola*, 21 Utah 2d 272, 444 P. 2d 517, 519 (1968); *United States* v. *Page*, 302 F. 2d 81 (9th Cir. 1962). In the case at bar the trial judge considered the credibility of the witnesses, and the facts derived therefrom, and concluded that the search was by "consent" and with the assistance of David Kaae (R. 173, 174, 175). However, appellants allege that the search and seizure was illegal. Respondent submits that the officer's conduct in this case was less than that of the officers in the case of *State* v. *Louden*, 15 Utah 2d 64, 387 P. 2d 240 (1963), and the court held that the search and seizure was legal. The court was determining whether a search of the defendant's motel room was unreasonable. The officers were investigating a series of felonies and had gone to the defendant's motel room pursuant to an informants "tip." The exact nature of the information was not disclosed, but it was apparently sufficiently reliable that the officers acted upon it. First, they went to the owner and asked to enter the room whereupon they found a stolen pistol in a drawer. The officers replaced the pistol and waited outside for the occupants. Upon defendant's arrival the police frisked them for weapons. This court at 242 wrote:

> "The officers aver that they then asked if they 'could take a look around' to which the defendant replied, 'Yes, you can come in, and look around.' The position of the defendant is that he said, 'Would it make any difference if I objected?' They made the search and in addition to the pistol, found two wrist watches and some crowbars

> which also had come from Harmon's Shopping Center."

This court, based on the facts set forth above stated that it could not find anything ruthless or high-handed about the officer's conduct and, therefore, the evidence was properly admitted. Respondent urges that this court consider the facts as set forth in this case in relation to *State* v. *Louden, supra,* and render a like holding as to the admissibility of the evidence.

To supplement the "consent" argument respondent submits that the plain view doctrine can be applied in this case. In *Harris* v. *United States,* 390 U. S. 234, 88 S. Ct. 992, 993, 19 L. Ed. 2d 1067 (1968), the United States Supreme Court wrote:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

This court has treated the plain view doctrine in a number of cases, and has accepted the use of evidence secured thereby. See *State* v. *Eastmond,* 28 Utah 2d 129, 499 P. 2d 276 (1972); *State* v. *Martinez,* 28 Utah 2d 80, 498 P. 2d 651 (1972); *State* v. *Allred,* 16 Utah 2d 41, 395 P. 2d 535 (1964).

The officer's testimony in this case proves that the Supreme Court's test has been met. They were invited into the apartment, and taken into the kitchen where they saw the stolen merchandise sitting on the kitchen

counter (R. 2, 9, 12, 13). This merchandise was described in an inventory list given to the officers by the owner of the store (R. 2, 12, 13). Furthermore, Officer Wursten described some of the items with significant particularity (R. 12, 13) which indicates he was well informed as to the type of merchandise stolen. Consequently, respondent submits that these items are admissible as evidence under the plain view doctrine.

POINT II.

APPELLANTS' CONFESSIONS WERE ADMISSIBLE AS EVIDENCE.

It was determined by the Honorable VeNoy Christoffersen that each appellant's confession was voluntary (R. 176, 177). Furthermore, testimony given by each appellant clearly prove that they were apprised of their constitutional rights and understood them (R. 63, 92, 93, 112, 113). Therefore, the rule set forth in *State* v. *Mares*, 113 Utah 425, 192 P. 2d 861 (1948), is applicable in this case. This court at 870 wrote:

> ". . . a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence . . ."

Respondent submits that all the facts and circumstances in this case prove the legality of admitting the appellant's confessions in evidence.

CONCLUSION

Respondent submits that the search and seizure of the merchandise located in appellant's apartment was with the consent and aid of appellants and, therefore, legal and admissible as evidence. Since the search and seizure was legal the confessions were not secured improperly. On the contrary, they were given voluntarily and were properly admitted in evidence. Therefore, resondent respectfully submits that the decision of the lower court should be affirmed.

Respectfully submitted,

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