

1971

State of Utah v. Philip Georgopoulos : Brief of Respondent

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

PHILIP GEORGOPOULOS,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE VERDICT AND
JUDGMENT OF THE DISTRICT COURT OF THE
JUDICIAL DISTRICT, IN AND FOR
COUNTY, STATE OF UTAH, BY
JOSEPH G. JEPSON, JUDGE.

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

PHILIP GEORGOPOULOS,

Defendant-Appellant.

Case No.

12574

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the conviction of Philip Georgopoulos for the crime of receiving stolen property in violation of Utah Code Ann. § 76-38-12 (1953).

DISPOSITION IN THE LOWER COURT

Philip Georgopoulos was tried before a jury in the District Court of Salt Lake County, the Honorable Joseph G. Jeppson presiding. Georgopoulos was convicted of receiving stolen property in violation of Utah Code Ann. § 76-38-12 (1953) and was sentenced to an indeterminate term not to exceed 5 years in the Utah State Penitentiary.

RELIEF SOUGHT ON APPEAL

The state submits that this Court should affirm the District Court's verdict.

STATEMENT OF FACTS

The State adopts Georgopoulos' statement of facts, except as hereinafter set forth.

Verl Memmott testified that on or about September 17, 1969, a 1969 Chevrolet pickup with a 1969 model El Dorado eleven-foot cab-over-bed camper mounted on the truck was stolen from Streator Chevrolet Company (R. 58-60). The truck and camper were shown to be worth more than \$50.00.

Ray Richards testified that late in August of 1969 he came in contact with Philip Georgopoulos (R. 73) who said he had access to repossessed campers. In September of 1969 Richards was told that if he had cash he could get the camper (R. 79). Richards gave Georgopoulos \$1000. A few days later Georgopoulos told Richards a better deal was available than Georgopoulos had anticipated and for \$800.00 more Richards could have a truck, too (R. 80). On September 19, 1969 Richards gave Georgopoulos \$450.00 cash and a check for \$350.00; Georgopoulos requested that the payee be left blank (R. 81).

Richards testified in several places (R. 80, 84, 85, 89, 100, 106) he either asked for a title or receipt or for the return of his money and each time Georgopoulos gave an

excuse such as Richards would get the title as soon as the paper work on the repossession was finished. Later, Richards testified the reason he failed to report Georgopoulos to the police after he became suspicious that the camper and truck might have been stolen was because Georgopoulos had a reputation of inflicting physical harm to people who crossed him (R. 105).

Police Officer Nick Paloukos testified that in December of 1969 he was assigned to the burglary squad and detective bureau of the Salt Lake City Police Department. Officer Paloukos testified that they were investigating other cases and received information that Georgopoulos had a warehouse located at 909 West South Temple and since Georgopoulos was suspected of having possession of stolen property they went to that location. No one responded to the knock of the officers; then Paloukos testified "the overhead door leading to the warehouse was slightly ajar." Paloukos then looked underneath and saw a license number of a truck. In checking the license number, it was found the truck was stolen and upon this information a search warrant was issued (R. 128).

Following a full trial Georgopoulos was convicted of receiving stolen property.

ARGUMENT

POINT I.

THE STATE'S WITNESS, RAYMOND RICHARDS, WAS NOT AN ACCOMPLICE AS A MATTER OF LAW AND THE TRIAL COURT CORRECTLY REFUSED TO IN-

STRUCT THE JURY ON THE LAW OF ACCOMPLICITY.

The State has long recognized that the testimony of an accomplice must be corroborated. See Utah Code Ann. § 77-31-18 (1953).

The State admits that *if Richards was an accomplice* to the crime for which Georgopoulos was convicted, the State would have had to corroborate his testimony in order to convict Georgopoulos, and the refusal of the court to instruct the jury on the law of accomplicity would have been reversible error.

The State, however, asserts that Richards was not an accomplice to the crime for which Georgopoulos was convicted. Assuming, (without admitting), that Richards could have been charged with the crime of receiving stolen goods, it is important to note that Richards received the stolen truck and camper at a later time and from a different person than did the defendant Georgopoulos. For Richards to be an accomplice within the meaning of the Utah Statute he would have to be able to be charged with the *identical crime* committed by Georgopoulos. *State v. Bowman*, 92 Utah 540, 70 P. 2d 458 (1937).

The facts show that Richards did not assist Georgopoulos when Georgopoulos received the stolen goods; Richards' alleged crime (if there was one) was completely different and separate from the defendant's, the only thing in common would be receiving the same stolen goods. Richards had nothing to do with Georgopoulos' offense.

Since the facts and circumstances in which Richards received the goods are different from the facts and circumstances in which Georgopoulos received the truck and camper, Richards could not be an accomplice to the crime for which Georgopoulos was convicted.

A recent Utah case, *State v. Washington*, 25 Utah 2d 111, 113, 476 P. 2d 1019 (1970) had this same issue presented and there the Court said:

“It is the defendant’s contention here that the witnesses Lester Hall, Shirley Owens Gallegos, and Fay Hall, who testified as to their possession of the stolen property and the defendant’s connection with the same, were accomplices and that their testimony was insufficient to establish his guilt without other independent evidence tending to connect him with the offense. While these witnesses may have been guilty of similar offenses, the record fails to reveal that they in any way participated with the defendant in the crime here charged against him. (Footnotes omitted.)

Thus, it is clear the trial court correctly ruled that Richards was not an accomplice as a matter of law. And since Richards was not an accomplice there was no requirement to submit the issue of accomplicity to the jury. The trial court’s refusal to submit instructions on the law of accomplicity was correct.

POINT II.

THE CREDIBILITY OF RICHARDS’ TESTIMONY IS EXCLUSIVELY A JURY DETERMINATION AND GEORGOPOULOS’

CLAIM THAT RICHARDS' TESTIMONY
IS INHERENTLY UNBELIEVABLE IS
SPURIOUS.

Utah law is clear that once the trial court has determined that a witness is competent to testify the jury becomes the "exclusive judges (sic) of his credibility." See Utah Code Ann. § 78-24-1 (1953).

Richards was found to be a competent witness by the trial court and his testimony read as whole is neither unbelievable or questionable. The jury heard his testimony on direct examination and on cross-examination, by one of the state's fine defense attorneys, Richards' testimony was not shaken or proven to the jury to be unbelievable. There is nothing in the record which shows that the jury's decision to favor Richards' testimony should be usurped. The Court properly instructed the jury that should they "believe any witness wilfully testified falsely as to any material matter," the jury could disregard the entire testimony. See instruction No. 7 (unnumbered page between R. 20 and R. 21). In view of this instruction and instruction No. 11 (R. 22) and the jury verdict, Georgopoulos' claim is unfounded. Richards' testimony was convincing to the jury and there is nothing to indicate that the Court should disturb the jury conclusion.

POINT III.

THE COURT PROPERLY ADMITTED EVIDENCE OF GEORGOPOULOS' POSSESSION OF OTHER STOLEN PROPERTY, I.E., THE

1967 FORD TRUCK, AND THERE IS NO SHOWING THAT THIS EVIDENCE WAS OBTAINED PURSUANT TO AN ILLEGAL SEARCH. THE COURT'S STRIKING OF TESTIMONY CONCERNING GEORGOPOULOS' POSSESSION OF THE CAVALIER CAMPER WAS SUFFICIENT TO CURE ANY PREJUDICIAL EFFECT ARISING FROM ITS ADMISSION.

Utah decisions have long recognized that in a prosecution for receiving stolen goods the State may introduce evidence that the defendant has had possession of other stolen goods; such evidence tends to lessen the chances that the defendant innocently received the stolen goods, for which he is being prosecuted. The leading Utah case so holding is *State v. Zeman*, 63 Utah 422, 226 Pac. 465 (1924).

In order to show that Georgopoulos knew that the goods for which he was prosecuted were stolen when he received them, the state introduced evidence of the defendant's possession of other stolen goods. The state produced testimony concerning a Cavalier camper and testimony concerning a 1967 Ford truck. The testimony concerning the Cavalier camper was stricken, and the jury was properly instructed on their use of the evidence of the 1967 Ford truck. See Instruction No. 5D (R. 19).

In deciding on the admissibility of the 1967 Ford truck evidence and in deciding on the alleged prejudicial effect of the testimony of the Cavalier camper, it is im-

portant to note evidence as to each was presented only as tending to show that Georgopoulos had knowledge that the truck and camper were stolen when he received them. Instruction No. 5D (R. 19).

A. THE 1967 FORD TRUCK.

Georgopoulos asserts that the evidence of his possession of the 1967 Ford truck, stolen from Lindell Perry, was obtained illegally due to a police "trespass" upon private property.

The record is silent as to how the police came inside the 50 by 130 foot lot, leased to Georgopoulos. There is no statement in the record to show whether the gates at the north and south ends were shut or whether they were open; the defendant fails to show in what regard a trespass had been effected. At trial the state's witness, Nick Paloukos was testifying as to how the evidence concerning the 1967 Ford truck was obtained, when defendant's counsel objected that the search warrant was obtained without a reasonable basis for the search (R. 129). The trial court overruled the objection and allowed testimony to continue; this ruling and the facts justifying the ruling are not spelled out in the record on appeal, but the trial court's decision to allow this evidence infers that the trial court found that the police were lawfully present and no trespass took place.

On appeal the presumption is that the trial court's rulings are correct, unless the appellant shows prejudicial error. See Utah Code Ann. § 77-42-1 (1953). Georgopou-

los has failed to show facts which demonstrate the trial court's ruling was incorrect. Further, the rule is recognized that the defendant who seeks to suppress evidence obtained with a search warrant on the basis of some violation of Fourth Amendment rights, has the burden to carry on all material issues. *Jones v. U. S.*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), *Anderson v. U. S.*, 344 F. 2d 792 (10th Cir. 1965), *State v. Montayne*, 18 Utah 2d 38, 414 P. 2d 958 (1966), cert. denied 385 U. S. 929, 87 S. Ct. 305, 17 L. Ed. 2d 218. At trial Georgopoulos failed to show that the police were illegally upon the premises he had leased; thus the trial court could not exclude or suppress the evidence as being based on an unreasonable or illegal trespass.

It is clear that when the police are lawfully present they are not required to shut their eyes to evidence in plain sight. *Harris v. U. S.*, 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968). And the fact that the police officers had to bend or squat to see in the warehouse does not render the plain sight doctrine inapplicable. In *James v. U. S.*, 418 F. 2d 1150 (1969), the Circuit Court of Appeals of the District of Columbia has this identical issue presented and there the court said:

“That the policeman may have to crane his neck, or bend over, or squat, does not render the doctrine [plain sight] inapplicable.” *James v. U. S.*, *supra*, at 1151 footnote 1.

Thus the police had a plain sight view of stolen goods and the police were legally upon the premises; this plain

sight view formed the basis of the "reasonable cause" upon which the search warrant was based; and since there is no showing of unlawful trespass the evidence was properly admitted and no error was made.

Further, the State asserts that Georgopoulos failed to make a timely objection to the evidence in question. The State had Nick Paloukos testify at the preliminary hearing held June 12, 1970; at this stage the defendant could have objected to the admission of the evidence. The interests of justice require that objections to the admissibility of evidence be made at the earliest possible time so as to give the trial court adequate time to rule on motions to suppress. While a motion to suppress was made at trial, there is no allegation that a motion was made at preliminary hearing or at any time in the eight months preceding trial. This failure to raise the question of the admissibility of the evidence before trial should be deemed to be a waiver of his right to object to its admission. See *State v. Tuttle*, 16 . 2d 288, 399 P. 2d 580 (1965), *cert. denied*, 382 U. S. 872, 86 S. Ct. 129, 15 L. Ed. 2d 110.

Thus, the State asserts that since Georgopoulos failed to show grounds for reversal the trial court's decision to overrule the motion to suppress evidence should be affirmed and Georgopoulos' conviction should be sustained. See *State v. Tuttle, supra*.

In the alternative, if the court finds that the record does not show facts to justify the trial court's decision to admit evidence of the defendant's possession of the 1967

Ford Truck, then the court should not reverse the conviction but should remand to the district court to hold a hearing to determine whether the police were legally present when the plain sight view, which formed the "reasonable cause" upon which the search warrant was issued, took place. See Utah Rules of Civil Procedure, Rule 76(a). If the district court finds the police were lawfully present, the jury verdict should be affirmed, but if the district court finds the police were not legally upon the lot, and should the Supreme Court determine the admission of evidence was not harmless error, (see point IV) then the court should reverse and remand for a new trial.

B. THE CAVALIER CAMPER.

The state introduced evidence that a 9-foot Cavalier camper had been stolen from Paul Putnam; Mr. Putnam testified that the camper was stolen immediately before deer season in October, 1969 (R. 142). Raymond Richards testified that towards the end of October 1969, Georgopoulos offered to trade him a 9-foot Cavalier camper for a boat, and the trade was completed in November of 1969 (R. 87-90); Richards testified that he sold the 9-foot Cavalier camper to a Mr. Labor about the second week of November, 1969 (R. 90); Richards further testified that he was subsequently contacted by the police who informed him that the 9-foot Cavalier camper he had sold Mr. Labor had been previously stolen. Paul Putnam testified that the camper returned to him was the one which had been stolen, but the state failed to present evi-

dence that the 9-foot camper returned to Mr. Putnam was the same camper the police had taken in custody from Mr. Labor. Thus a link in the chain of evidence was missing, so on the motion of Georgopoulos' defense counsel, the court ordered the evidence stricken:

“Members of the jury, it is the theory of the state in this case that a Cavalier camper owned by Paul K. Putnam, who is a witness here this morning, had been lost and was found in the possession of the defendant. There isn't sufficient evidence to show that they were one and the same trailer. Therefore, the court has granted a motion to strike the evidence relative to that Cavalier camper” (R. 156).

It is recognized that except in the most extraordinary situations the erroneous admission of evidence is not prejudicial where the court strikes the evidence, *State v. Johnson*, 79 Utah 263, 9 P. 2d 186 (1932), *State v. Inlow*, 44 Utah 485, 141 P. 530 (1914). See also Utah Code Ann. § 77-42-1 (1953). The extraordinary situations generally arise when the stricken testimony is the only evidence linking the defendant to the crime for which he was charged. See *State v. Nichols*, 106 Utah 104, 145 P. 2d 802 (1944). Since there was extensive evidence in addition to that of the 9-foot Cavalier camper, (see Point IV), to show that Georgopoulos had “guilty knowledge,” it is clear that the motion to strike was sufficient to cure any prejudice arising from the admission of evidence of the Cavalier camper.

Further, Georgopoulos made no motion at the trial

level alleging that the court's order to strike the testimony concerning the 9-foot Cavalier camper was insufficient to cure the alleged prejudice. The state asserts that Georgopoulos' failure to present this issue of incurable prejudice requiring a new trial to the trial court waives his right to raise it on appeal. *State v. Kinder*, 14 Utah 2d 199, 381 P. 2d 82 (1963).

POINT IV.

EVEN IF THE COURT DECIDES THAT THE EVIDENCE OF THE 1967 FORD TRUCK WAS THE PRODUCT OF AN ILLEGAL SEARCH THE STATE ASSERTS THAT ITS ADMISSION WAS HARMLESS ERROR.

The United States Supreme Court has recognized that even if admitted evidence is the product of an illegal search, its admission may be harmless error, if it is harmless beyond a reasonable doubt. *Harrington v. California*, 395 U. S. 250, 89 S. Ct. 1726, 23 L. Ed. 284 (1969), *Chambers v. Maroney*, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970).

In view of all the evidence presented, the jury would have found that Georgopoulos had "guilty knowledge" without the additional evidence of Georgopoulos' possession of other stolen property.

Utah law makes clear that the test of whether goods were received with guilty knowledge may be proved by

the circumstances and inferences of the case. See *State v. Zeman, supra*. In looking at these circumstances Georgopoulos' guilty knowledge is demonstrated beyond a reasonable doubt: Georgopoulos sold the truck and camper and received full payment within two days from the date it was stolen (R. 81 and exhibit 5); Georgopoulos sold the truck and camper for \$1800 when their retail price would exceed \$4000 (see Exhibit 7 and 8 and R. 61); Georgopoulos insisted upon cash payments and had the check left blank so as not to involve himself in any written receipts (R. 81); Georgopoulos was evasive when asked about a title or receipt for the goods and he was unable to produce keys for the truck after accepting payment of \$1800 for the truck and camper (R. 84); Georgopoulos refused to furnish receipts for the money despite frequent requests for title or receipt (R. 80, 84, 85, 89, 100, 106); Georgopoulos told Richards to get the stolen truck out of his rented warehouse or "you're going to be in a lot of trouble," and this conversation took place two days from the date the truck and camper were stolen (R. 84); and Georgopoulos was unable to tell Richards the person from whom he obtained the allegedly repossessed truck and camper.

In view of all this incriminating evidence showing Georgopoulos' guilty knowledge, even if it was error to not suppress the evidence of the stolen 1967 Ford truck it was harmless error beyond a reasonable doubt.

CONCLUSION

The jury, as exclusive judges of the credibility of witnesses, heard the state's evidence and found Georgopoulos guilty. The trial court correctly held that Richards was not an accomplice and correctly refused to instruct on the law of accomplicity.

The appellant, Georgopoulos, fails to show any illegality which would require a reversal of the trial court's ruling to admit evidence of Georgopoulos' possession of the stolen 1967 Ford truck.

The state respectfully submits that the lower court's decision should be affirmed. Georgopoulos was given a fair and impartial trial; the record discloses no error of law requiring a reversal of the verdict; therefore, respondent respectfully submits that the jury verdict and conviction in the district court should be affirmed.

Respectfully submitted,

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