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Criminal Law - Testimony of Accomplices and Codefendants - Receiver of Stolen Goods or Thief

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CASE COMMENT

CRIMINAL LAW – TESTIMONY OF ACCOMPLICES AND CODEFENDANTS – RECEIVER OF STOLEN GOODS OR THIEF

Two admitted burglars testified they met at the defendant's home and together laid out a plan, mastermined by the defendant, to burglarize the C. F. & R. Steel Fabricating Co. The two witnesses took various tools from the plant on the night of the burglary, which the defendant had indicated he wanted and would purchase, and which he did in fact purchase. Defendant was convicted of receiving stolen goods and sentenced to life imprisonment as a habitual criminal. Among the errors claimed by the defendant on appeal was that the thieves of the stolen property received by him were accomplices to that crime and that it was error to submit the case to the jury on their uncorroborated testimony. *Held,* the receiving of stolen goods, knowing them to have been stolen, is a crime distinct from the original larceny and the party committing larceny is not the accomplice of one who purchases from him, his testimony is therefore not subject to the infirmities normally attached to accomplice testimony. The test to be applied is whether the witness himself could be indicted for the offense with which the defendent is charged; thus, one who admits theft cannot at the same time be charged with knowingly receiving stolen goods. *Burns v. People,* 365 P. 2d 698 (Colo. 1961).

As long ago as 1873 the Colorado Supreme Court recognized by way of dicta what was referred to even then as a well established principle, that courts will generally advise a jury not to convict on the uncorroborated testimony of an accomplice and that when corroboration is lacking, omission of an instruction cautioning the jury on the credibility of an accomplice is reversible error.[1] On more than one occasion, trial court convictions have in fact been reversed for failure to tender such cautionary instructions.[2] Of course, it is also recognized that where accomplice testimony is supported by other witnesses and circumstances, failure to give the cautionary instruction is not a ground for reversal.[3] The Colorado Supreme Court has also held, however, that where the trial court gave a cautionary instruction there may be conviction upon the testimony of the accomplice, uncorroborated, if it is clear and convincing, received with great caution, and shows guilt beyond a reasonable doubt.[4] Rulings similar to these have also obtained

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1 Solander v. People, 2 Colo. 48 (1873). See also Klink v. People, 16 Colo. 467, 27 Pac. 1062 (1891); Roberts v. People, 11 Colo. 213, 17 Pac. 637 (1888).

2 *E.g.,* O'Brien v. People, 42 Colo. 40, 94 Pac. 284 (1908).

3 Solander v. People, *supra* note 1. *Accord,* Wilkins v. People, 72 Colo. 157, 209 Pac. 1047 (1922), where the trial court refused to give a cautionary instruction. See also, Miller v. People, 92 Colo. 481, 21 P.2d 1119 (1933), where there was a vigorous dissent in favor of cautionary instructions regardless of outside corroboration.

4 Hoffman v. People, 72 Colo. 552, 212 Pac. 848 (1923). *Accord,* Mendelsohn v. People, 143 Colo. 397, 353 P.2d 587 (1960); Schechtel v. People, 105 Colo. 513, 99 P.2d 968 (1940); People v. Boutcher, 89 Colo. 497, 4 P.2d 910 (1931); Hamilton v. People, 87 Colo 307, 287 Pac 651 (1930).

uniformly in the Tenth Federal Circuit,[5] and in other federal courts.[6]

With this background in mind, it must be understood that *Burns v. People* is certainly not intended to stand for a departure from these well established principles. The problem, as the case clearly indicates, is whether the rules as to the credibility of accomplice testimony are to be applied where the uncorroborated testimony of the thief is the basis of a conviction for receiving stolen goods; in other words, whether the one who stole the merchandise is an accomplice of the one who knowingly received that same merchandise. Previous to the principal case, there existed only two supreme court decisions in Colorado on this precise point of law. In the first, *Newman v. People*,[7] the facts were similar to the *Burns* case in that the defendant had been convicted of buying and receiving fourteen bars of bullion belonging to a railroad, the evidence against him being the uncorroborated testimony of the boys who had committed the larceny. The defendant Newman appealed his conviction, citing as error the trial court's failure to give a cautionary instruction as to this testimony. The supreme court affirmed the conviction, holding that receiving stolen goods is a distinct crime from the original larceny, and the party committing the larceny is not an accomplice of one who knowingly purchases the stolen goods from him.

Only four years later, in *Moynahan v. People*,[8] the supreme court reversed a conviction for receiving stolen goods on the basis of the trial court's refusal to caution the jury as to the testimony of the thief of the stolen property. The court unequivocally held that a person who knowingly sells stolen goods is an accomplice

5 *E.g.*, Arnold v. United States, 94 F.2d 499 (10th Cir. 1938), where a mail theft conviction was reversed on the ground that the district court had not instructed the jury to receive the testimony of an accomplice with caution, and where it was also recognized that although subject to being received with caution, a conviction could be had on such testimony without corroboration. *Accord*, Hall v. United States, 109 F.2d 976 (10th Cir. 1940). See also, Reger v. United States, 46 F.2d 38 (10th Cir. 1931), where it was held that there is no requirement for the district court to instruct that the testimony of an accomplice must be corroborated before it is sufficient for conviction, and that the cautionary instruction given was sufficient. *Accord*, Johns v. United States, 227 F.2d 374 (10th Cir. 1955).

6 United States v. Glassner, 116 F.2d 690 (7th Cir. 1941); Rossi v. United States, 9 F.2d 362 (8th Cir. 1925).

7 55 Colo. 374, 135 Pac. 460 (1913).

8 63 Colo. 433, 167 Pac. 1175 (1917).

of the buyer, because the seller aids and abets in the commission of that crime. Also recognized in the decision were what the court referred to as familar principles of law, that one may be both a principal and an accomplice by doing separate and distinct acts with the same property, and that in any crime where participation of an individual has been criminally corrupt he is an accomplice. No mention whatsoever was made in this decision of the *Newman* case, and so the two diametrically opposed decisions stood.

The clearly opposite results reached in the two early Colorado cases are both typical and representative of the conflict which presently exists on this problem throughout the American jurisdictions.[9] The *Burns* case may be said to have adopted the majority rule,[10] that the testimony of the thief against the receiver is not subject to the infirmities which attach to accomplice testimony. Jurisdictions which have so held reason basically that the existence of accomplice status requires proof that two persons are punishable for the same offense, and that the theft and receipt of stolen property are separate crimes.[11] The minority position, as represented by the holding in the *Moynahan* case in Colorado, is of course diametrically opposed in holding the thief an accomplice of the receiver of stolen goods and his testimony subject to a cautionary instruction. Jurisdictions which follow this point of view base their decisions on what are considered broad or liberal definitions of accomplice, or on a broad definition of principal.[12]

In addition to the majority and minority views, there appears to be a third position taken in a number of jurisdictions which normally hold that the thief and receiver do not bear accomplice status—the majority view. This third approach arises as an exception to the majority rule in cases where there is evidence of a conspiracy or plan between the two parties.[13] In such cases there is deemed a unity of criminal acts in such a manner that the two are held to be accomplices, at least as far as the rules of evidence as to accomplice testimony are concerned; thus, rules as to corrobor-

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9 For a complete discussion, see Annot., 53 A.L.R.2d 812 (1957).

10 *Id.* at 826.

11 *E.g.*, Springer v. State, 102 Ga. 447, 30 S.E. 971 (1897), one of the early definitive decisions on this point of view. In that case it is reasoned that participation in the same criminal act and in the execution of a common criminal intent is necessary to render one criminal an accomplice of another, in the legal sense of that term; and that the actual thief, relative to the receiver of stolen goods, is an independent criminal who does not and cannot participate with the receiver of such goods in the special offense committed by the latter. And, State v. Kuhlman, 152 Mo. 100, 53 S.W. 416 (1899), another of the frequently cited early cases, where it was held that one who bears the relation of an accomplice is a principal in the first degree and is liable to be charged and punished in the same manner as the principal, but that the thief of stolen goods would be chargeable only with a crime distinct from that of receiving stolen goods. The court drew the analogy that the receiver of stolen goods could not be convicted of larceny.

12 An excellent and exhaustive discussion of the minority view is contained in People v. Coffey, 161 Cal. 433, 119 Pac. 901 (1911). Briefly, the California court decided that because one cannot be convicted of the same offense for which the accused is charged does not prevent him from being an accomplice within the rules governing accomplice testimony. It was reasoned that the test of whether one is or is not an accomplice is simply whether his participation in the offense is criminally corrupt; and that by all authority every person of legal responsibility who knowingly and voluntarily co-operates with or aids, or assists, or advises, or encourages another in the commission of a crime is an accomplice. The decision goes on to point out a false premise in the other view, that an accomplice is one who can be charged with the same crime as the person on trial, the fallacy being that one is an accomplice because of the part played in a crime and not because he may be indicted as a principal. The court also pointed out that many states hold that all accomplices may be indicted as principals, but to hold as a result that if a person cannot be indicted as a principal he is not an accomplice, is fallacious reasoning. It was held that wherever the commission of a crime involves the co-operation of two or more people, the guilt of each is to be determined by the nature of his co-operation, and whenever the co-operation of parties is corrupt they are always accomplices.

13 See Annot., 53 A.L.R.2d 838, 839 (1957).

ation and cautionary instructions are applicable.[14] It is interesting to note that California, champion of the minority view in *People v. Coffey*,[15] may recently have switched its approach to this so-called majority exception, or at least recognized it and in fact followed its reasoning.[16] The result, of course, is the same.

Some of the jurisdictions which have found the thief to be an accomplice of the receiver of stolen goods, in support of what has been called the minority view, have called into use various statutes which define principal or accomplice in a somewhat broad sense.[17] Such statutes have been directly used in this connection in Nebraska,[18] Utah[19] and in Wyoming.[20] In fact, Colorado has just such a statute, which defines an accessory as one who aids, abets, assists or advises and encourages the perpetration of a crime and provides that such a person is to be deemed a principal and punished accordingly.[21] The Colorado Supreme Court uniformly construed this statute to mean precisely what it says.[22] Most interesting in this connection is a 1933 decision which states that if one agrees in advance to buy stolen property, knowing that the property is to

14 *E.g.*, Stephenson v. United States, 211 F.2d 702 (9th Cir. 1954), perhaps the leading case on this exception, where it was held that the exception should be invoked when the thief and the receiver enter into an agreement prior to the larceny for one to steal and the other to buy. The decision reasoned that this previous arrangement amounts to a conspiracy for both the theft and receipt so that the usual (majority) test for determining an accomplice is met since the thief and receiver can be prosecuted for both the theft and receipt of stolen property. For a similar result see State v. McNight, 129 Mont. 8, 281 P.2d 816 (1955), where the court admitted that Montana had followed the rule that a thief cannot receive from himself and thus cannot be an accomplice of the receiver of stolen goods, but held that such a rule should be limited to cases where the thief did not participate with the receiver in subsequent acts which pertain to the crime of receiving stolen property. *Accord*, State v. Harmon, 135 Mont. 227, 340 P.2d 128 (1959), where the court defined an accomplice as one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime.

15 See note 12 *supra*.

16 See People v. Lima, 25 Cal.2d 573, 154 P.2d 698 (1944).

17 *E.g.*, Ing v. United States, 278 F.2d 362 (9th Cir. 1960), which employed an Alaska statute defining principals as all persons concerned in the commission of a crime, felony or misdemeanor whether they directly commit an act constituting a crime or aid and abet in its commission, and providing that all such persons are to be tried and punished as principals.

18 Neiden v. State, 120 Neb. 619, 234 N.W. 563 (1931).

19 State v. Coroles, 74 Utah 94, 277 Pac. 203 (1929).

20 State v. Callaway, 72 Wyo. 509, 267 P.2d 970 (1954). The court in this case made an interesting observation when it said the reasoning, that intent is a necessary element of receiving stolen goods and thus there can be no intent to unlawfully receive that which a thief already has, is insufficient because the criminal intent necessary to make one an accessory to receiving lies not in a criminal intent that the accessory knowingly receive, but rather in criminal intent to aid and abet another in his commission of the crime. In addition, for a combination of the broad definition of accomplice approach and the conspiracy exception approach, see Collins v. State, 169 Tenn. 393, 88 S.W.2d 452 (1935), where it was reasoned that a thief who delivers stolen goods to another is an aider and abettor of the receiver and thus also guilty of that offense, *especially* where the thief stole the goods under prearrangement with the defendant for delivery to him.

21 Colo. Rev. Stat. §40-1-12 (1953).

22 See Block v. People, 125 Colo. 36, 240 P.2d 512 (1951); Bacino v. People, 104 Colo. 229, 90 P.2d 5 (1939).

be stolen, he thereby encourages the perpetration of the theft, and if the crime is committed he is deemed and considered a principal.[23] This situation is merely the reverse of that represented in the principal case, and yet it would certainly seem that the results are quite different, in fact, opposite. Perhaps this is still another departure in Colorado law that requires reconsideration and reconciliation with the latest approach of the supreme court.

The decision in the principal case serves a valuable purpose by clearly resolving the pre-existing conflict in Colorado law, as the court expressly adopts the holding and reasoning of the *Newman* case. As indicated, this may be considered the majority view, but there is substantial ground for feeling that it is not necessarily the modern view. In this respect, reference should be made once again to the very sound reasoning of those jurisdictions which have adopted the conspiracy exception to the rule that the thief is *not* an accomplice of the receiver.[24] There can be little doubt that a conspiracy did in fact occur in the principal case. It is submitted that the supreme court either missed or purposely passed up a chance to adopt a better reasoned viewpoint for the case at bar, and yet still reach a decision in favor of the majority rule in general, that is, where no conspiracy exists. The decision seems also to require speculation as to the place of the Colorado statute defining accessory. This is of particular interest in view of the *Miller* case, as previously mentioned.[25] In addition, it is submitted that the arguments tendered by jurisdictions favoring the position that the thief *is* an accomplice of the receiver contain some extremely interesting and compelling reasoning.[26] Notwithstanding these considerations, at least the law in Colorado is now settled after a good many years of quiet but serious conflict.

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23 Miller v. People, 92 Colo. 481, 22 P.2d 626 (1933).
24 See Stephenson v. United States, note 14 *supra*.
25 See note 23 *supra*.
26 See People v. Coffey, note 12 *supra*.