Floyd, James P. vs. State of Missouri 1852 1st C. Cole 189/3

(6) Larceny

Rev/Rend, Cr sentenced to two yrs steady Winston Thomas $10 property of

Theft

Jury Lugi

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THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the first Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Cole County, in the Judicial Circuit aforesaid wherein The State of Missouri was plaintiff and James P. Floyd was defendant

in an action of Indictment for Grand Larceny manifest error hath intervened, to the great damage of the said defendant as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the thirteenth day of December in the year of our Lord one thousand eight hundred and fifty one

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

State of Missouri } S.S.
County of Cole } I G A Parsons Clerk of the Cole Circuit Court in pursuance of the Commands of the Within writ of error, have made out a true and perfect transcript of the record in the cause of the State of Missouri against James P Floyd And herewith return the Same

G A Parsons Clerk
By Robt H Kyle D C

[H]

In the Cole Circuit Court

Be it remembered that on the 17th day of Nov-
-ember in the year of our Lord one thousand eight
hundred and fifty one it being the first day of
the November Term of the Cole Circuit Court the
following proceedings were had in a certain cause
therein pending wherein the State of Missouri
was plaintiff and James P Floyd defendant
on an indictment for Grand Larceny the follow
ing proceedings were had to wit
The defendant filed his petition for a
change of venue in this cause which said
is in words and figures following to wit.

In the Circuit Court
Cole County

The State of Missouri
vs
James P Floyd } Indictment for Larceny

To the Hon the Circuit
Court within and for the County of Cole in the State
of Missouri.

Your petitioner James P Floyd
the defendant in the above entitled cause, res
-pectfully represents that the minds of the in
-habitants of this county are so prejudiced ag
-ainst him that a fair trial of said cause can
not be had herein, and that the facts above men
-tioned have come to his knowledge since the last
preceeding continuance of this cause, He there
fore prays the Court to grant him a change of
venue to some other county

James P Floyd

James P. Floyd the above named defendant
makes oath and says the facts set forth

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in the foregoing petition are true to the best of his knowledge and belief [6]

James P Floyd.

Sworn subscribed to before the undersigned Clerk of the Cole Circuit Court this 17th Nov 1857

G. A Parsons Clk

And on the Eighteenth day of November 1857 the Court overruled and refused the application of the defendant for a change of venue the order of the Court is in the words and figures following to wit

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny

Now at this day comes the Attorney General who prosecutes on behalf of the State as well as the defendant by his attorney and files his application for a change of venue and all and singular the premises being seen and heard and by the Court fully understood the same is overruled

To which opinion of the Court the defendant by his Counsel excepted, and on the same day at the above term the defendant moved for a continuance of said cause,

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny

Now at this day comes the said defendant by his attorney and files his Motion and affidavit for a continuance of said cause. which is in the words and figures following to wit.

In the Circuit Court
Cole County

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny

James P Floyd the defendant in the above entitled cause makes oath and says that he cannot safely go to trial at this term of the Court on account of the absence of a material witness in the case who resides out of this State that he has used due diligence to obtain the testimony of said witness and that he has about three weeks since obtained a letter from said witness stating his residence and that he believes that if a continuance be granted him he will be able to procure the testimony of said witness in time to be used upon the trial of the cause

James P Floyd

Sworn and Suscribed to before me this the 18th day of November 1859

G. A. Parsons Clerk
By Robt S Kyle DC

Which Affidavit for a continuance the defendant by his Counsel asked leave to amend before the disposition of the Motion for a continuance the by the Court, which application to file an amended affidavit was overruled by the Court, which is in words and figures following

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny

Now at this day comes the said defendant by his Attorney's and prays the Court to give him leave to file an amended affidavit in this cause which is overruled and thereupon the Motion for a continuance is overruled.

To which Opinion of the Court in refusing the defendant leave to file an amended affidavit and in refusing the said continuance the

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4 [8]

defendant by his counsel excepted and on the day and year last aforesaid the said defendant was arraigned before the Court to answer to said indictment which said indictment was in words and figures following.

State of Missouri } In the Cole Circuit Court
County of Cole } February Term 1851

The Grand Jurors for the State of Missouri empannelled sworn and charged to inquire in & for the county of Cole upon their oaths pre sent that James P Floyd late of said county of Cole on the tenth day of February in the year of our Lord one thousand eight hundred & fifty one at the said County of Cole two striped vests each worth the sum of five dollars, two black satin vests each worth the sum of two dollars, one black frock coat of the value of the value of two dollars one hair brush of the value of one dollar one plush cap of the value of two dollars one bleached domestic shirt of the value of two dollars two pairs of Boots of the value of two dollars two silk handker=chiefs of the value of one dollar each, two pocket knives of the value of one dollar each twenty pairs of shoes of the value of two dollars each of the goods & chattels of Thomas Winston then & there being found unlawfully & felo=niously did steal take & carry away con=trary to the form of the statute in such case made & provided & against the peace & dig=nity of the State

Robards Atty Gnl

To which the defendant plead not guilty and thereupon a jury was sworn and em=

pannelled which entry is as follows to wit,

State of Missouri vs James P Floyd } Indictment for Grand Larceny

Now at this day comes the Attorney General who prosecutes on behalf of the State and the said defendant in his own proper person and being demanded of and concerning the premises and how he will acquit himself of the same for plea says he is not guilty in manner and form as specified in said indictment, and thereupon come a jury to wit A. L. Robinson Charles M Comer, James Barber, John Barry Granville Francis William C Hines, O H P. Askren Floyd Crandle William Dawson M. A Smith Christ Kolkmeir and Daniel S Abbott twelve good and lawful men tried and sworn, well and truly to try the issue joined and a true deliverance make between the State of Missouri Plaintiff and James P Floyd defendant and a true verdict give according to the law and Evidence, and as the Testimony of witnesses not having gone through with this cause is continued until to Morrow morning at 9 o clock.

And thereupon the following Evidence was introduced in said cause on the part of the State to wit

G M Wray First witness produced in court a lot of clothing 3 Satin Vests, 1 pair pants 1 Black Frock Coat 2 Shirts 2 hair brushes, a lot of Pocket knifes 2 books, 1 striped vest, 1 pair Boots 3 pair Shoes and 5 handkerchiefs and a plush cap which he found at Mrs Trimbles, Part of them were got by H M Smith. Floyd (the witness deposed) was arrested in Town Jefferson City on Saturday

5 Evening charged with Stealing a knife Sunday Witness went out and arrested Ambrose Barker

at Mrs Drimbles on Monday. A M Smith brought in a portion of the goods, At night they went out to Mrs Drimbles who handed them out the balance of the goods, Floyd & Barker came from Kentucky to this county together in the fall of 1880. Crop examined. Floyd's wife is a step daughter of Mrs ~~Floyds~~ Drimble, He came back from Kentucky to this county to get his interest in an Estate of his wifes father.

Mrs Drimble Second Witness examined the goods produced says the goods look like the ones that were at her house, Witness remembers the black vest and three striped ones dont know whether vests were Silk or Satin. Witness called them Silk. She knew that two fine Shirts were at her house also one Black frock coat. thinks it was broad cloth looked new also one pair of Striped pantaloons also two hair brushes looked like these produced here in Court, also some shoes and pair of boots. thinks about ten pair of leather Shoes were brought to her house. Hand Kerchiefs like these here in Court were brought to her house there was one cap also like this in Court. The first I knew of the Goods Floyd & Barker had them Brought them there at night. Barker claimed the Pantaloons Floyd claimed one hair brush 1 hand Kerchief. 2 Striped vests. Floyd gave me two pair of shoes. my daughter 2 pair & Sally 2 pair, and let David Drimbles wife have a pair of shoes Barker claimed the cap and the coat he brought the coat from town with him both came to my house together to Stay. I dont

whether anything was in their Saddle bags
When they went away to go to town I gave up
the goods to Wray & Mercersmith at her house
in Cole County some time last fall or winter
Cross Examined. Did not take notice who
carried the Saddle bags thinks some times
one and some time the other. ~~have Known~~
have Known Floyd a good while say three
years never Knew anything amiss of him
He came out here from Kentucky to get his
portion of the Estate of My deceased husband
She lives 14 miles from Jeff City. Her family
when they came to town Generally got home
in the night.
3rd Witness Thomas M Winston lives in
Jefferson City in Cole County formerly merchant
in Said County Sold clothing &c Witness
then Examined the property produced
and Said the Striped vest once belonged to
him also the black Satin vest believed the
two Shirts belonged to him, The two hair brushes
once belonged to him believes the black Frock
Coat also once belonged to him. Prisoner had
on a ~~[illegible]~~ Striped vest before the committing
Magistrate that once belonged to him. Believes
Some one stole the goods they were taken
without his consent. The Value of the above
property is as follows. Satin vest $6.50
Striped vest $5.50. the vest Floyd had on $3.50
2 hair brushes $1.00 - 50 cents Each 2 Shirts $3.00
Cloth Coat $16.00. Fur Cap $2.50 believes
the Cap was taken without his consent. The
Cap is not here Mr Thomas Taylor told me
he bought a fur cap from Floyd which
I suppose was the same. First time our

7.

Barker was with Floyd last fall, came into witnesses counting room, asked leave to write letters, clothing was all in the counting room, they were there several times afterwards think they wrote letters there the second time saw them frequently after they were generally both together. Barker also came once I think by himself. My Store in which the above goods were, was in Cole County

Crop Examined. Cannot say whether the goods were stolen. Never missed them till they were shown to witness. Bought the goods 12 months before Floyd & Barker were arrested. I suppose he witness had sold divers articles of the same kind as are here to divers persons, never usually took off the marks when selling. I identify the goods by no other means than the mark Clothing of this kind is a common article of traffic among Merchants. does not positively know the coat was stolen. Frequently sold to men that he did not know. I sold either Barker or Floyd a pair of boots. James Elston was clerk in my Store, both attended to sales, sometimes witness was absent from the Store. Cannot tell whether Floyd or Barker or either of them stole the goods Have no means of knowing that the goods were taken from his Store if taken at all before or after Floyd & Barker came to this County. None of the shoes or boots or any of the property here in Court except that which witness has before identified came from his Store. Witness affidavit filed with the Justice charging defendant and Ambrose Barker

with stealing the property that is shown here which he admits he made and was sworn to and was subscribed by him. It is a matter of impossibility for me to state that the goods mn lost by me, I may have sold the same goods to some other person or persons, I did not sell them to Barker or Floyd.

Mary Drimble 4th Witness Examines the goods and says. She has seen a coat and black vest like these in the possession of Barker brought the coat to her Mothers house in Cole County Never saw Floyd have the Coat. Floyd claimed the Striped vest, they divided out the goods both claimed a hair brush a peice. and a Shirt a peice, thinks Floyd had or claimed a black vest & 2 Striped vests. Barker claim=ed the black vest here in Court. Floyd gave away 7 pair of shoes, goods all staid together until they mn given to Mr Wray.

Cross Examined. Floyd was not with Bar=ker when he brought the coat from town. My brother A Drimble was with him. Floyd was out in the Country.

The Attorney General then introduced as a Witness Eppa Drimble who spoke of the goods identified by Thomas M Winston. The Attorney General then proposed to prove by this witness, that the defendant had in his possession the other goods and property not identified by Thomas M Winston and which Winston stated did not come from his Store the defendant by his counsel objected to the introduction of this testimony and the Court overruled the objection to which

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opinion of the court the defendant by his counsel excepted. The following is the testi=mony of said last mentioned witness Eppa Trimble 5th Witness saw the coat two vests, two shirts at her mothers both Bar=ker & Floyd brought goods to my mothers Barker claimed the coat Floyd two striped vests, they had two caps, Barker claimed them Floyd got the boots of Barker the boots were to small for Barker and Floyd took them at Barkers request, saw also at my mothers the silk handkerchiefs, pocket knives, several pairs of shoes, 1 fur cap. 1 plush cap and a pair of striped pantaloons at my mothers some part of them Floyd claimed and some Barker claimed, Barker and Floyd boarded at my mothers, never saw Floyd bring any goods from town. The State here rested her case.

The defendant here introduced the following testimony to wit. The affidavit of Thomas M Winston the prosecutor as sworn to by him before the committing Magistrate was offered and read which said affidavit was as follows.

State of Missouri } SS
County of Cole } Thomas Winston after being duly sworn says that he has reason to believe and does believe that in the months of January and February 1851 at the county of Cole certain goods & chattles were stolen from him to wit One Black cloth coat One black sattin vest coat one merino or cassemer vest coat one fur cap several hair brushes &c and this

affiant has good cause to suspect & believe and does suspect & believe that James P Floyd and A W Barker are guilty of stealing taking and carrying away the said property aforesaid

P M Winston

Subscribed and sworn to before me this 14th day of February AD 1851

Charles R Holler
J.P.

G M Wray being recalled stated that he had known the defendant for three or four years that he never heard anything against his character. The Attorney General admitted that Hiram M Smith would swear that he had known defendant three or four years and that his character during that time was good. The defendants counsel then offered to read in Evidence the warrant of arrest issued by the Justice against the defendant and Ambrose Barker which being objected to by the Attorney General the Court sustained the objection to which opinion of the Court the defendant by his counsel ~~objected~~ excepted. which said warrant of arrest is in the words and figures following.

State of Missouri

To the Sheriff of Cole County Greeting

Whereas Thomas M Winston hath this day complaint on oath before me one of the justices of the peace within and for the County of Cole that he has good reason to believe & suspect and does suspect & believe

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that James P Floyd and A N Barker are guilty of Stealing taking and carrying away at the County of Cole and State aforesaid certain Goods & chattles during the Months of January & February 1851 to wit one Black Cloth Coat one black Satin vest coat one Merino or cassimere vest coat one fur cap Several hair brushes &c These are therefore commanding you to take the bodies of the said James P Floyd and A N Barker if found in your County and bring him forthwith before me the undersigned a Justice of the Peace in said Township & County to answer said complaint and hereof fail not. Given under my hand and seal this the 14th day of February AD 1851

Charles R Moller
J. P.

The Counsel for the defendant then offered in evidence the indictment against Ambrose Barker charging him with the commission of the same offence, which being objected to by the Attorney General the objection was sustained by the Court; to which opinion of the Court the defendant by his counsel excepted ~~by his~~ which said indictment is in the words and figures following to wit.

State of Missouri } In the Cole Circuit Court
County of Cole } February Term 1851

The Grand Jurors for the State of Missouri empanneled Sworn & charged to Enquire in & for the County of Cole upon their oath present that Ambrose Barker

late of said County of Cole on the Tenth day of February in the Year of our Lord one thousand Eight hundred & fifty one at the said County of Cole, two Black Satin Vests of the Value of twenty dollars one Black cloth Frock coat of the Value of twenty dollars one bleached domestic Shirt of the Value of two dollars one plush cap of the value of two dollars, one pair of Striped pantaloons, one cloth cap of the value of two dollars, five pairs of shoes of the Value of two dollars Each pair, three Striped Vests of the Value of five dollars Each, of the Goods And chattles of one Thomas Winston then and there being found unlawfully & feloniously did Steal take & carry Away contrary to the form of the Statute in such case Made and provided & against the peace & dignity of the State.

Robards Atty Genl

~~Such afterwards to wit~~ The Defendant here rested his case. And afterwards to wit on the day and Year last afore-said, the Court at the request of the at-torney General gave the following instru-ctions to wit

State of Missouri
vs
James P Floyd } Larceny

1st If within three Years next before the find-ing of the indictment in this cause and in Cole County the defendant stole, took and carried away personal property of the Value of ten

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dollars or more described in the indictment and of the goods and chattles of Thomas Winston or Thomas Winston and partner against the will of the owners and with an intention on the part of prisioner to defraud the owners, and apply the things stolen to his own use, the jury will find him guilty and affix his punishment to imprisonment in the Penitentiary not less than two nor more than five years. R. S. 1846. 895. 359. 868 3 Chitty Cr L 926. 2 Starkie Cr 827 Russ & Ry Cr L 307.

2nd. If goods of the value of ten dollars or more, described in the indictment were stolen and afterwards found in the possession of the defendant it is prima facie Evidence of of guilty possession and if unexplained by him is conclusive Evidence of his guilt 1 Greenlf Ev 41.

And the defendants counsel asked the following instructions on part of the defendant to wit

The Counsel for the prisioner move the Court to instruct the jury

1st That before they can find a verdict of guilty on this indictment they must be satisfied from the Evidence beyond a reasonable doubt that prisioner stole took and carried away the property mentioned in the indictment or at least enough of said property to be of the value of ten dollars.

2nd That if the jury believe from the Evidence that the prisioner & Ambrose Barker are jointly charged with the commission of the offence

charged in the indictment the must find the defendant not Guilty

3rd That the jury can only take into consideration the property recognized by Winston as his and such as he has sworn to have lost.

4th. That if the jury believe from the Evidence that Barker took Stole and carried away any part of the goods which Winston says belonged to his Floyd ~~[illegible]~~ cannot be convicted for stealing such Goods although the jury may believe that Floyd received a part of said Goods from Barker after they were Stolen

5th. That the jury can not find the prisoner Guilty unless they believe from the Evidence that Floyd took Stole and carried away the goods recognized by Winston or so many of them as will amount to the sum of ten dollars

6th. That unless Winston swore positively that he lost the Goods mentioned in the indictment and that he has not sold the same goods to some other person than the defendant this is not sufficient proof that the ownership of the property was at the time of taking in Winston the person described as owner in the indictment Roscoe page 618.

7th. That the fact of having the property mentioned in possession is not sufficient for the jury to convict the prisoner unless they further find beyond a reasonable doubt that the prisoner is the person who Stole it, and that it was actually Stolen.

15 8th That unless the jury are satisfied that the goods mentioned in the indictment

me feloniously taken and carried away at so late a period that they could not have been taken by some other person, the possession of the property is not prima facie Evidence of Guilt of the prisoner. 9th that although a portion of the goods alleged to have been stolen may have been found in the prisoners possession and under his control within a short time after the Larceny is alleged to have been committed And a presumption of guilt is raised the prisoner is not bound to show to the reasonable satisfaction of the jury that he became possessed of them otherwise than by stealing, the Evidence may fall far short of establishing that and yet create in the Minds of the jury a reasonable doubt of his guilt Roscoe Pg Note 1

10th If the jury have a reasonable doubt of the Guilt of the prisoner they must find him not guilty

The Court gave the first, fifth and tenth and refused the second third fourth sixth seventh Eight and ninth instructions asked for by defendant. In the opinion of the Court in giving the second instruction asked for by the State and in refusing the instructions asked by the defendant, the defendant by his counsel Excepted.

And afterwards to wit on the 19th day of November 1861 the following proceedings were had to wit

State of Missouri
vs
James P Floyd

Indictment for Grand Larceny.

Now at this day come again the attorney General who prosecutes in behalf of the State and the defendant by his Attorney and Thereupon come again the Jury to wit A L. Robinson Charles W Comer James Barber John Barry Granville Francis William C Hines O H P Ashrens Floyd Crandle William Dawson Moses A Smith Christ Kolkmeir and Daniel S Abbot twelve good and lawful men duly Elected tried and Sworn well and truly to try and a true deliverance make between the State of Missouri Plaintiff and James P Floyd defendant and the Argument of the Counsel not having gone through with and the Court being about to adjourn the prisoner is remanded to jail and the Jury having received their charge this cause is Continued until to morrow morning at 9 oclock.

And afterwards to wit on the 20th day of November AD 1851 the following proceedings were had to wit.

State of Missouri
vs
James P Floyd

Indictment for Grand Larceny.

Now at this day comes the Attorney General who prosecutes on behalf of the State and the defendant by his Attorney and the again come the Jury

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A8 (22)

to wit A L Robinson Charles M Comer James Barber John Barry Granville Francis — William C Stines O H P Askew Floyd Crandle William Dawson Moses A Smith Christ Kockmeir and Daniel S Abbott twelve good and lawful men duly Elected tried and Sworn well and truly to try the issue joined and a true deliverence make between the State of Missouri plaintiff and James P Floyd defendant and a true verdict give according to the law and evidence, who upon their oaths do say that the defendant is guilty in manner and form as set forth in said indictment and do assess his punishment at two years imprisonment in the State Penitentiary.

And afterwards to wit on the 21st day of Nov 1851 the defendant by his counsel filed a motion for a new trial, which motion ~~State of~~ for a new trial in the words and figures following to wit.

In the Circuit Court
Cole County

The State of Missouri
vs
James. P. Floyd } Indictment for Grand Larceny

And the said defendant comes and moves the Court to set aside the verdict of the jury in this cause and grant him a new trial for the following reasons

1st Because the verdict of the jury was against the law

2nd Because the Verdict of the jury was against the Evidence
3rd Because the Court permitted improper and illegal testimony against the defendant to be given to the jury
4th Because the Court Excluded from the jury proper and competent testimony for the defendant
5th Because the Court refused to grant the defendant a change of Venue in this Cause
6th Because the Court refused to grant the defendant a continuance in this cause.
7th Because the ~~defendant~~ Court refused to grant the defendant leave to amend his affidavit for a continuance
8th Because the Court erred in giving the 2nd instruction asked for by the State
9th Because the Court erred in refusing the 2nd 3rd 4th 6th 7th 8th and 9th instructions asked for by the defendant.
10th Because the whole proceedings are illegal erroneous and informal

White & Parsons
Attys for Dfts

And afterwards on the 28th November 1861 said ~~on the same day~~ motion for a new trial was overruled and the following ~~order~~ entry appears of Record which is in the following word and figures to wit.

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State of Missouri
vs
James P Floyd } Indictment for Grand Larceny

Now at this day come the Attorney General who prosecutes on behalf of the State and the defendant by his attorney and said defendant files his

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny
Motion for a new trial

overruled

To which opinion of the Court in overruling said Motion the defendant by his Counsel Excepted. and tenders to the Court here his bill of Exceptions to all the opinions of the Court as above set forth and prays that the same may be signed sealed by the judge of this court and ~~may~~ be made a part of the record in this cause Signed and sealed this 9th day of December 1857

G. W. Miller (Seal)

And afterwards to wit the following entry appears of record in the words and figures following to wit.

Tuesday December 9th 1857

State of Missouri
vs
James P Floyd } Indictment for Grand Larceny.
Bill of Exceptions filed

State of Missouri } ss
County of Cole }

I G A Parsons Clerk of the Circuit Court in and for the County of Cole and State of Missouri do hereby Certify that the Above and foregoing is a true and perfect transcript of the Record had in the cause of the State of Missouri Against James P Floyd

In Testimony Whereof I have hereunto set my hand and Affixed my official Seal this fifteenth day of December AD 1857

G. A Parsons Clk
By Robt S Kyle DC

Clerk Circuit Court of Cole County
Fees for Transcript $6.26

52. 8

State of Missouri - d.e.
vs { Grand Larceny
James P Floyd - p.e.

Transcript

filed December 15 1861

Wm E Dunscomb
Clerk

Cole

1st

(26)

In the Circuit Court
Cole County

The State of Missouri
vs
James P. Floyd

Indictment for
Grand Larceny

To James B. Garden
Sire Attorney General for the
State of Missouri.

Sir

You are hereby
Notified that I have sued out of
the office of the Clerk of the Supreme
Court at Jefferson City in the State
aforesaid, a writ of Error in a
Certain Cause finally adjudged and
adjudicated in the Cole Circuit
Court in the State aforesaid
at the November Term thereof in the year 1851
Wherein the State of Missouri
was plaintiff and I the said
James P. Floyd was defendant
on an indictment for grand Larceny

Dec 23. 1851

James P Floyd by
White & Parsons his
Attorneys

I acknowledge the service of the within notice this 23d day of Dec 1881

James B Gardenhire

Attorney General

The State
vs
James P Floyd

Notice of Writ
of Error

In the Supreme Court of the State of Missouri at Jefferson City.

January Term 1852

James P. Lloyd plaintiff in error

vs

The State of Missouri defendant in error

On an indictment for Grand Larceny.

Error to the Cole Circuit Court.

The Plaintiff in error makes the following assignment of errors in this cause to wit.

1st The court erred in refusing to grant the plaintiff in error a change of venue in this cause.

2nd The court erred in refusing to grant the plaintiff in error a continuance in this cause, and in refusing to grant the plaintiff in error leave to amend his affidavit for a continuance in this cause.

3rd The court erred in permitting the defendant in error to give in evidence by the testimony of Eppa Trumble, the possession of other goods by the plaintiff in error which the prosecutor Thomas M. Winston swore did not come from his store.

4th The court erred in refusing to permit the plaintiff in error to read in evidence the warrant of arrest issued against the plaintiff in error and one Ambrose Barker ~~charging them~~ jointly for stealing the

property mentioned in said indictment.

6" The Court erred in giving the second instruction asked for by the defendant in error.

7" The Court erred in refusing to give the 2nd 3rd 4th 6" 7th 8th & 9th instructions asked for by the plaintiff in error.

8" The Court erred in overruling the motion of the plaintiff in error to set aside the verdict of the jury and for a new trial in this Cause.

White & Parsons.
Attys for Plaintiff in Error

Joinder in error.
Jas B. Ayer Atty Genl
Atty Genl

James P. Floyd
vs
State of Missouri

Assignment of Errors.

filed Jany. 13 1852
Wm E Dunscomb
Clerk

State vs Floyd

(The clerk will have copy the statement made by the Counsel for the ~~[illegible]~~ defendant, down to the marks made by me—)

It will be seen from the above statement that various points have been raised in the Court below; many of which will be passed by without notice—

The point in relation to the change of venue, is not supported by the decision of this Court, in the case of Reid vs the State—11 Mo. Rep. 379— In that case it is obvious, that Reid did give previous notice, and that he gave it as soon as he could after he became satisfied of the existence of the cause for which he sought the change of venue.

It is the safer course for the party who wishes to change the venue, to give the reasonable previous notice to the Attorney General or Circuit Attorney, before the calling of the case—and not depend upon the filing such notice merely in ~~[illegible]~~ open Court, with the Clerk— We do not say, that this last method being done in time would not be sufficient, but the other is the surest and best—

As to the refusal of the Court to continue this case, on the affidavit made by the defendant below, and the refusal to permit an amendment to be

made to the affidavit, ~~therefore~~ no error — in matters which address themselves to the discretion of the Court, we must see very clearly an abuse of this power before we will reverse —

There is no error in the Court refusing to permit the defendant, to give in evidence, the warrant of the Committing Magistrate — or the indictment pending against Barker — This was clearly inadmissible — These minor points have been noticed in order that they may not again be brought here —

The instructions will now be noticed. This Court will not reverse the judgment of the Court below for the refusal to give instructions, provided it appears, from the ~~[illegible]~~ record, that the law of the case has been laid down properly and fairly by the Court in the instructions which it did give to the jury. Instructions are to enable the jury to understand the law of the case: A few, short, pithy and sententious instructions embodying the law of the case will always be better understood, and will have more effect upon the triers of fact, than a long list of instructions loaded with words, generally so involved, that ~~it~~ it tends to confuse rather than conduct the jury to a proper conclusion.

The second instruction given by the Court, on the part of the State, which

is as follows, "If goods to the value of ten dollars or more, described in the indictment, were stolen, and afterwards found in the possession of defendant, it is prima facie evidence of guilty possession, and if unexplained by him is conclusive evidence of his guilt;" does not contain a proper exposition of the principle of law, which no doubt the Court designed to give; This proposition is too large, too unlimited. Had it been qualified by stating that "recently" after the commission of the theft, the goods were found in the possession of the defendant such possession was prima facie evidence of guilt, it would have been proper.

But here there is no limit as to time. This point was decided by this Court in Saint Louis at the last October Term in the Case of the State against Wolff, not yet published — Greenleaf says, "Mere possession of the fruits of crime recently after its commission, is prima facie evidence of guilty possession, and if unexplained either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor or otherwise, it is taken as conclusive. 1 Green. Ev. Sec 34.

A theft having been committed, and the goods being soon after found, either on the prisoner's person or in his house &c he

is prima facie deemed guilty. Here however we must attend to several things, and first of the time. Lord Hale says, if the goods be found with the person, the day of the theft being committed, this is a strong presumption; and yet even in such a case C. a very subtle horse thief, being pursued procured B. to lead the horse under pretence that he C. was hurried to go aside; thus escaping and leaving the presumption to fall on B. who was condemned and executed, though tried before a very learned and wary judge 2 Hale's P.C. 289 —

In the Case of The State vs Adams Haywood's Rep. 1 Vol. 464. The Court said where a horse is stolen and is found in possession of a man, at such a distance from the place where the horse was missing in so short a time after, as shows he must have come directly from that place and without any loss of time, that is such evidence, as a jury may infer the guilt of the prisoner upon, as it raises a violent presumption against him, that he was the taker. This principle is so generally understood that it is needless to cite authorities further — It must be recently, and this depends much on the nature of the things stolen, both as to time and place of the presumption —

For this second instruction therefore, the judgment of the Court below must be reversed — this case is re

manded to be further proceeded in according to the views of this Court - The other Judges concurring

John F. Ryland

8

State vs Floyd

Opinion of the Court
by Ryland Judge

filed Feby. 13 1852
Wm E. Duncomb
Clerk

[9]

In the Supreme Court
January Term 1852

The State, Defendant in error
vs } Grand Larceny
James P. Floyd, Plaintiff in error

At the February Term, 1851, of the Cole Circuit Court, Floyd was indicted for stealing the goods of Thomas Winston, above the value of ten dollars.

At the November Term following, he filed his petition for a change of venue, stating that the minds of the inhabitants of Cole County were so prejudiced against him that a fair trial could not be had therein, and that the facts had come to his knowledge since the last preceding continuance of the cause. No notice of the application having been given to the Attorney General, it was overruled.

Floyd then filed his affidavit for a continuance stating that he could not safely go to trial on account of the absence of a material witness, who resided out of the State; that he had used due diligence to obtain his testimony; that he had, about three weeks before obtained a letter from him, stating his residence; and that he believed, if a continuance was granted, he would be able to procure his testimony in time to be used upon the trial; which was also overruled.

Before the decision of the court upon the application for a continuance, was entered upon its minutes, Floyd asked leave to amend his affidavit, which was, in like manner,

overruled.

The evidence showed that the following articles, of the property of Thomas Winston, were found in Floyd's possession, to wit:

1 satin vest of the value of		$6; 50
2 striped vests	"	7; 00
1 hair brush	"	50
1 bleached domestic shirt	"	1. 50
1 black frock coat	"	13. 00
1 fur cap	"	2. 50
Total exclusive of cap		$30: 50

Winston, in his testimony, stated that he could not swear positively that the goods were stolen; but his belief was, they were taken from his store without his consent. His evidence further shows that no such goods were sold to Floyd; but were sold to divers other persons, and that a purchaser existed, he might have come by them lawfully.

The Attorney General offered to prove that Floyd, when found in possession of Winston's goods, had unusual quantities of other goods in his possession; to which Floyd objected. The ~~evidence was~~ objection was overruled and the evidence admitted.

Floyd's counsel offered to read in evidence the warrant issued by the committing magistrate against Floyd and one Basher for stealing the same goods, to which the Attorney General objected. The objection was sustained, and the evidence excluded.

Floyd's counsel then offered in evidence an indictment against Ambrose

Barber for stealing the same goods, which, on motion of the Attorney General, was included.

The Attorney General, for the state, asked the following instructions, which were given.

"1st If, within three years next before the finding of the indictment in this cause, and in Cole County, the defendant stole took and carried away, personal property of the value of ten dollars or more, described in the indictment, and of the goods and chattels of Thomas Newton, or Thomas Newton and Partner, against the will of the owners, and with an intention on the part of prisoner to defraud the owners, and apply the things stolen to his own use, the jury will find him guilty, and assess his punishment to imprisonment in the penitentiary, not less than two, nor more than five years. R.S. 1845, 895, 359, 868. 3d Chitty's Cr.L. 926. 2 Starkie Evi. 827 Russ & Ry C.C. 307.

"2 If goods to the value of ten dollars or more described in the indictment, were stolen, and afterwards found in the possession of defendant, it is prima facie evidence of guilty possession, and, if unexplained by him, is conclusive evidence of his guilt. 1 Greenl. Evi. 41.

Floyd's counsel then asked the following instructions

"1 That before they can find a verdict of guilty on the indictment they must be satisfied

from the evidence, beyond a reasonable doubt that prisoner stole took and carried away the property mentioned in the indictment, or at least enough of said property to be of the realue of ten dollars

2. "That, if the Jury believe from the evidence that the Prisoner and Ambrose Barker are jointly charged with the commission of the offence, charged in the indictment they must find the defendant not guilty

"3. "That the Jury can only take into consideration the property recognized by Winston as his, and such as he has sworn to have lost."

4th "That if the Jury believe from the evidence that Barker took stole and carried away any part of the goods which Winston says were ours his, Floyd cannot be convicted, for stealing such goods although the Jury may believe that Floyd received a part of said goods from Barker after they were stolen"

5. "That the Jury cannot find the prisoner guilty unless they believe from the evidence that Floyd took stole and carried away the goods recognized by Winston, or so many of them as will amount to the sum of ten dollars"

6. "That unless Winston Denson positively that he lost the goods mentioned in the indictment and that he has not sold the same goods

to some other person than the defendant, this is not sufficient proof that the ownership of the property, was, at the time of taking, in Winston, the person described as owner in the indictment."

"7. "That the fact of having the property mentioned in possession is not sufficient for the Jury to convict the prisoner, unless they further find, beyond a reasonable doubt, that the prisoner is the person who stole it, and that it was actually stolen."

"8. "That unless the Jury are satisfied that the goods mentioned in the indictment were feloniously taken and carried away, at so late a period that they could not have been taken by some other person, the possession of the property is not *prima facie* evidence of guilt of the prisoner."

"9. "That although a portion of the goods alleged to have been stolen, may have been found in the prisoners possession, and under his control, within a short time after the larceny is alledged to have been committed, and a presumption of guilt is raised, the prisoner is not bound to shew to the reasonable satisfaction of the jury that he became possessed of them otherwise than by stealing. The evidence may fall far short of establishing that, and yet create in the minds of the Jury a reasonable doubt of his guilt. Roscoe, 19. note, 1."

"10 If the Jury have a reasonable doubt of

the guilt of the prisoner, they will find him not guilty."

The court gave the first, fifth, and tenth, and refused the balance. The prisoner was convicted, and his punishment assessed to two years imprisonment in the Penitentiary. His counsel afterwards filed a motion for a new trial, assigning for error

1st ~~The discretion of the court including testimony~~

~~2d Refusing a change of venue.~~

~~3d Refusing a continuance~~

1st That the verdict of the Jury was against the law

2. Against the evidence

3d The opinion of the court, in not excluding testimony

4. In excluding testimony

5 In refusing a change of venue

6 In refusing a continuance

7 In refusing leave to amend affidavit

8 In giving 2d instruction asked for the state

9. In refusing 2d, 3d, 4th, 6th, 7th, 8th, and 9th instructions asked for prisoner

10 Error and informality in the whole proceedings.

Copy Statement
Mrs Fra - Ryland

The motion was overruled, and to reverse this judgment of the circuit, bout the cause has been brought, by writ of error, to this court.

Gardenhire, Attorney General, for the State

1. A petition for a change of venue must be supported by reasonable previous notice to the prosecuting attorney. Rev. Stat. 1845, 874. In this case, there was no notice at all. The record shows none, and the court will presume none. On the contrary, when the record is silent, this court will presume every thing necessary to sustain the decision of the court below. 5 Mo. Rep. 522

2. A motion for a continuance is addressed to the sound discretion of the court, and the court will be held to have exercised that discretion soundly, unless it appear from the record that proper diligence has been used to procure the testimony, or good cause be shown why such diligence has not been used. Scagin v. Hudspeth, 3 Mo. Rep. 90 Steel vs. McCutchen, 5 Mo. Rep, 522; and particularly the opinion of the court in Freleigh vs the State, 8 Mo. Rep. 611.

In the case at bar, the prisoner swore roundly to the use of due diligence, without setting out the facts constituting diligence; unless the reception of a letter from the witness three weeks before, constituted it. What the prisoner did to prepare for trial, was a question of fact, to be sworn to

(7)

by him; the legal effect of what he did — whether constituting diligence or not — was a question of law, to be determined by the court. To permit a prisoner to swear to the legal effect of what he has done, would be to strip the circuit court, in which the law has vested it, of all discretionary power in granting continuances, and vest it in the prisoner, who, above all others, may be most interested in its exercise. In such a case, the doctrine adverted to by Blackstone, that a man cannot be Judge in his own case, might well apply.

In the case of Freeleigh vs. The State, the court will observe that the affidavit was much stronger than in the case at bar. The court decided that "a plain and palpable case must be made out to authorize the interference of the Supreme Court," and that it was necessary to show that there was no other person whose attendance could have been procured, to prove the same fact.

3. Amendments are not allowed as a matter of course, by our Statute, but are only permitted at the discretion of the court, in furtherance of justice. The Supreme court will not interfere with the exercise of a discretionary power vested in the circuit court, unless, perhaps, under peculiar circumstances. Higgins vs. Collier & Pettus, 6. Mo. Rep. 572. Caldwell, Admr vs. McKee & Mo. Rep. 333.

According to the practice in the Kings Bench, an affidavit to hold to bail, after it was once made, could not be amended

1 Bac. Ab. 327. B. 1.

By the printed rules of the Cole Circuit Court, and affidavit for a continuance cannot be amended.

If an affidavit for a continuance be amendable, the discretionary power of the Circuit Court, if subject at all to the interference of this court, can scarcely be too cautiously supervised. The delay and inconvenience resulting from it, would be much more serious than in ordinary cases, and, in stead of advancing, would, in most cases, ~~retard~~ obstruct the administration of public justice

4. It was proper for the State to prove that defendant was found in possession of unusual quantities of other goods than those described in the indictment. 1 Phil. Ev. 169-70

5 The warrant and indictment against Barber were properly included.

6 The second instruction given for the State was correct. 1 Greenl. Ev. p. 41. 1 Phil. Ev. 168-9.

7 The second instruction asked for the prisoner was properly refused. There was no evidence upon which to predicate it. The prisoner alone was charged with the larceny, and was alone on trial. Vaulx's Campbell 8 Mo. Rep. 224.

8. The third instruction asked by the prisoner was properly refused. Though the principle it asserts may be correct, it was announced to the jury in other instructions. Williams v. Vanmeter, 8 Mo. Rep. 339. 1 Philips Ev. 169-170. 1 Instruction given for the state.

9 There was as little to predicate the fourth instruction upon, as the second. There was no evidence even tending to prove the prisoner guilty, as receiver of stolen goods. 8 Mo. Rep. 224

10. The 6th instruction was wrong, and properly refused. It certainly was not necessary for Winston to swear positively to the loss of the goods. The loss of goods, in cases of larceny, may be proved, like any other controverted fact, by either direct or indirect testimony. A different doctrine would exempt a large class of thefts from all punishment whatever. To secure a conviction, it certainly cannot be necessary that the owner should actually see the thief take his goods; and yet it would be, to require Winston to swear positively to a theft committed on a large stack of goods, like his.

11 The seventh instruction asked for the prisoner was directly at war with the 2d instruction asked for the state, the doctrine of of which is well established in the law.

12. The doctrine of the 8th instruction would reduce the administration of criminal justice, in cases of larceny, to very narrow limits.

Man could be convicted so long as a possibility of innocence existed.

13. The 9th instruction, though loaded down with many new words, when stripped to the naked principle, embodies no more than the doctrine of the 10th, which was given.

14. The instructions given contain the law applicable to the case, and the evidence warranted the verdict of the Jury. This court ought not to interfere. Temple vs Streetman 12 Mo. Rep. 457.

15. There is no bill of exceptions in this case, and this court cannot do otherwise, ~~than~~ under its repeated decisions, than affirm the judgment.

16. If it be thought that the record shows a bill of exceptions, still it does not show that the evidence preserved was all the evidence in the cause. In the absence of such a statement in the record, this court will presume the existence of all evidence necessary to sustain the action of the court below.

The State

vs } Gardenhire

} Bridge

James P Floyd

2310

In the Supreme Court
At Jefferson City
January Term 1852

James P. Floyd plaintiff in error
vs
The State of Missouri defendant in error.

Statement of the Case.

James P. Floyd the plaintiff in error was at the February term 1851 of the Cole Circuit Court indicted for Grand Larceny. The indictment contains but one count, and charges that the defendant on the day &c at &c, feloniously Stole took and carried away &c two striped vests each worth the sum of five dollars two black satin vests worth the sum of ten dollars 1 black pock coat of the value of ten dollars, one hair brush worth one dollar. 1 plush cap of the value of one dollar, one bleached domestic shirt worth two dollars, two pair of boots value of ten dollars, Ten silk handkerchiefs of the value of one dollar each. Ten pocket knives of the value of one dollar each twenty pairs of shoes of the value of two dollars each of the goods & chattles of Thomas M. Winston, &c.

On the first day of the November Term 1851 the plaintiff in error filed his petition verified by his affidavit for a change of venue, the grounds of the petition were, that the minds of the inhabitants of Cole County were so prejudiced against him that he could not have a fair trial therein. And on the day following the

Court overruled the application for a change of venue. To which opinion of the Court the plaintiff in error excepted, and thereupon filed his affidavit and application for a continuance of the cause, and before the same was determined by the Court asked leave to file an amended affidavit which the Court refused and then overruled the application for a continuance, To which the plaintiff in error excepted. And thereupon he was arraigned in due form of law and plead Not guilty to said indictment. A jury were sworn and the State introduced the following witnesses, G M Wray, Mrs Trimble, Thomas M Winston, the prosecutor Mary Trimble and Eppa Trimble. For the testimony see Transcript of record from page 5 to 10.

Omit this

The plaintiff in error objected to all that part of the testimony of Eppa Trimble which relates to the other goods Assowned by Thomas M. Winston the prosecutor but the objection being overruled by the Court this evidence was permitted to go to the jury to which the plaintiff in error excepted. The State here closed her case.

And the ~~plaintiff~~ in error introduced ~~then introduced~~ the following testimony, The affidavit of Thomas M. Winston before the Committing Magistrate. [For which see Transcript page 10.] G M Wray being recalled testified to the good Character of the plain

tiff in error. The Attorney General admitted that Abram Mercer Smith would do the same. The plaintiff in error then offered in evidence the warrant of arrest issued against the plaintiff in error and one Ann Marie Barker jointly. which was objected to by the Attorney General and the objection sustained. To which plaintiff in error excepted. The Counsel for the plaintiff in error then offered to read in evidence the indictment against Ann Marie Barker charging him with the commission of the same offence for which see Transcript page 12 which being objected to and the objection sustained the plaintiff in error excepted and here rested his case.

The Court then at the instance of the Attorney General gave the following instructions on the part of the defendant in error, [here copy there for instructions] for which see Trans Cript pages 14 & 15. The plaintiff in error then asked the following instructions, [for which see Transcript pages 15 & 16.] The Court gave the first fifth and tenth [here copy there given — (need not copy those refused)] and refused the second third fourth sixth seventh, eighth and ninth instructions asked for by the the plaintiff in error. To the giving of the second instruction asked for by the defendant in error, and the refusing of those asked for by plaintiff in error, he excepted. The jury returned a verdict of guilty and afixed the pun

ishment to two years imprisonment in the penitentiary. A motion for a new trial was filed and overruled by the Court, and the plaintiff in Error brings his case into this Court by writ of Error. ✻ The above Statement is adopted by me & is to be copied - except the words in brackets - Ryland

✻ Statement adopted to be prefixed to my opinion (words in brackets left out) Ryland

Parsons for plaintiff in Error will insist upon the following points

1st The Circuit Court should have granted a change of venue in this Cause. The record shows the fact to be that the application for a change was made on the first day of the term, and that it was refused on the second day of the term, before the arraignment of the prisoner. That according to the doctrine of this Court in Reid vs State the filing of the application on the first day of the term was a notice both reasonable and sufficient to the Attorney General. The statute requires no written notice, and evidently is intended to mean if the application be made in open court, the filing of the application gives sufficient notice of the fact. Had the Legislature intended a notice in writing to be served on the prosecuting attorney they would have so declared. See Statutes of Mo 874 875 sec 17.20. & 24 Reid vs State XI. Mo Reps p. 379. It seems to have been the intention of the Legislature that a change of venue should be a matter of right and that Courts should have no power to refuse the same or

in other words It was intended that this Act should be liberally construed for the benefit of those seeking to avail themselves of it See Sepiem acts of 1847 p. 111

2nd The circuit court should have granted the plaintiff in error a continuance upon his affidavit. which though perhaps informal contains the substance of the grounds for a continuance. and should have by all means permitted an amended affidavit to have been filed before the motion for the continuance was disposed of.

3rd The circuit court should have excluded all that part of Eppa Hunnicles testimony, which relates to the other goods not claimed or identified by Thos M Winston. The effect of such testimony was to create the impression upon the minds of the jury that those goods were stolen, and in that manner raise a presumption that the goods identified by Winston were also stolen. Such evidence was calculated to mislead, and did mislead the jury ~~from~~ in regard to the issue. 1 Greenleaf Ev p 64.
The presumption of law is in favor of innocence, and the presumption is that the prisoner came by his property honestly. That presumption is strengthened in part by the testimony of Winston when he denies that a portion of the goods charged in the indictment ever belonged to him or that he ever lost any such goods

It was incompetent therefore for the State to introduce any testimony in regard to such goods after Winston denied ownership in them. Admitting that those goods were stolen they were not stolen from Winston and consequently could form no part of the subject of inquiry under this indictment 1 Green Leaf Ev p 120. 121. Even admitting further that those goods were Winstons, and it had been proven that they were taken at a different time from those identified by Winston, (admitting that those identified by Winston) were stolen, still evidence of the stealing of the goods disclaimed by Winston was inadmissable under this indictment. The presumption of law is in favor of innocence. And the evidence tending to prove one larceny cannot be introduced to prove a seperate and distinct charge. Roscoe Criminal Ev. 81. The admission of this evidence is sufficient to warrant this Court in reversing the judgment of the Court below. 2 Russell on Crimes p. 725. 726. Walker vs Commonwealth 1 Leighs Reps 574

4th The second instruction asked for by the defendant in error should not have been given. There is no proof that the goods were found in the possession of the defendant in error recently after the alledged offence was committed. There was evidence

going to show that another individual Barker might have committed the alleged offence. There was evidence of the good character of the prisoner. All of which should have precluded the Court from giving the instruction. It assumes the broad ~~ground~~ ground that possession of stolen goods is prima facie evidence of guilty possession and if unexplained is ~~absolute~~ conclusive proof of the same. There is a time after the loss when this presumption of law ceases, and also there is a time after the loss when it is weakened. ~~and~~ These questions should have been left for the consideration of the jury. Good character often rebuts the ~~possession~~ presumption of guilt arising from possession. ~~it often rebutted by evidence of good character.~~ Yet this latter evidence in no wise accounts for or explains the possession. The possession must be recent. The language of the instruction is indefinite. The fact that some other person probably stole the goods if they were stolen is a sufficient ~~ground~~ reason or against the prima facie case of possession but does not explain ~~explanation~~ the possession. In support of the above positions the Court is cited to 1st Greenleaf Ev p 99. 71. Roscoe Crim. Ev. p 643, 2nd Phil. Ev. Cowen & Hill's notes p. 425-426 State vs Merrick 19 Maine Rep. 400 2nd Russell on Crimes 122. 123. 124.

5th The Circuit Court should have permitted the plaintiff in Error to give in evidence the warrant issued against Floyd & Barker

jointly; Also the indictment against said Barker charging him with the same offence. It was competent for the plaintiff in error to show that another was suspected and charged of the offence and thus rebut the presumption of guilt arising from possession if any such presumption did arise. Further more by our Statute where two or more are charged with having committed an offence jointly they shall all be included in one indictment. Revised Code of Mo. p 869 Sec 15. Now if it be contended that both Floyd and Barker were jointly engaged in the commission of the offence and both are guilty then this Evidence was competent to show that they had not been charged as the Statute requires. And sustains the position contained in the second instruction asked for by the plaintiff in error, But if it be contended that they committed the offence severally or in other words that one or the other are guilty then evidence conclusive to show that the other may have committed the offence is competent. See also 1 Russell 903

6th The circuit Court should have given the 3rd instruction asked for by the plaintiff in error. The State was permitted commence in the middle of the case by producing in Court before the jury all the goods found in the possession of the

plaintiff in error as well as those found in the possession of Barker. Mary & Mrs Hemble were both permitted to give evidence in reference to the whole of the goods, but when Winston comes upon the stand he examines the property and says that the striped vest black satin vest the two shirts, two hair brushes, believes the black frock coat was once his, and the vest prisoner had on before the committing magistrate once belonged to him Thomas Layton told him of a fur cap that he expects once belonged to him. The value of the property Winston stated to be as follows. Satin vest $6.50 Striped vest 3.50 vest on Floyd 3.50 2 hair brushes $1.00 or 50 cents each 2 shirts $1.50 each Cloth coat $15. Fur cap $2.50 ~~nothing~~ None of the other property came from his store. What is stated above is all that he has sworn that he lost. If he lost that Mary and Eppa Hemble go on to state that Floyd had given away several pairs of shoes that they had hand kerchiefs pocket knives & 1 fur cap (which is not charged in the indictment) striped pantaloons &c. It will be seen by reference to the testimony that the amount of property identified by Winston as being once his and found in the possession of Floyd amounts to the sum of $9.00 & no more. Thus

2 striped vests @ 350 —	700	
1 Hair brush. 50 —	50	
1 Shirt 150	150	$ 9.00

Now there were two good and sufficient reasons why the Court should have given the 3rd instruction.

1st It would have stripped the case of all irrelevant testimony

2nd In making up the amount or value of the stolen property if such it be, in the possession of Floyd the jury would have been confined to the legitimate question of enquiry touch How much property and of what value did Thomas M. Winston lose, and what amount or value of that property was found in the possession of Floyd. And it might well have happened with this instruction before them that they would have failed to find Floyd guilty of Grand Larceny. The authorities cited to sustain my 3rd point will sustain this my 6th.

7th The Circuit Court should have given the 4th Instruction asked for by the plaintiff in error. The law contained in this instruction is so well settled that we deem it unnecessary to cite authorities.

8th The Circuit Court should have given the 6th instruction asked for by the plaintiff in error. For it is contended that unless Winston could swear with certainty to the loss of the goods no prima facie case can under any circumstances be made out. And the prisoner must be ac

guilty. To contend otherwise would be to require the jury to be satisfied beyond a reasonable doubt of a fact which the prosecutor is not satisfied about sufficiently to state it with any degree of certainty. From the fact that the plaintiff in error was charged with stealing a knife (a charge of which it turns out to be he was innocent) and from the fact that the goods were found in possession of Floyd it is to be inferred is the only manner in which Winston came to the conclusion that the goods were stolen. It would be a dangerous rule to establish, to convict a man for stealing goods of another, when the other is unwilling to swear with certainty that the goods are his. Winston's Clerk Mr Elston is not brought before the Court there is evidence that he was engaged as a salesman; that at times Winston was absent; and the goods left in the keeping of Elston. It may have well happened that the prisoner bought the goods of Elston. In support of the 8th proposition the following authorities are cited State vs Fuslong 19th Maine Reps 225. Roscoe Crim Ev. p 643 2nd Russell 122. 2 Phil Ev. Cowen & Hills notes 423, 424

9th The Circuit Court should have given the 9th instruction asked for by the plaintiff in error. It is in conflict with

the second instruction given on the part of the defendant in error but is nevertheless conceived to be the law. That although a presumption of guilt may be raised the prisoner is not bound to show to the reasonable satisfaction of the jury that he became possessed of the property other wise than by stealing - That the evidence may fall far short of establishing that fact and yet create in the minds of the jury a reasonable doubt of his guilt. Good character alone may create the reasonable doubt. The fact that another may have stolen the goods, may create the doubt, yet still the prisoner after having shown these facts may yet be totally unable to satisfy the jury that he became possessed of the property other wise than by stealing. Besides the authorities already cited in support of the 4th proposition I cite also The People vs Mary A Jersue 1 Wheeler Criminal Cases 34. 35 - Same, People vs Peter Meade 36. 37 2 Phillips Ev. Cowen & Hills notes 426. 427

10 The Court should have given the 7th instruction. For it is based upon two questions of fact to be inquired into by the jury: 1st From the testimony of witnesses they find that the goods were stolen?

2nd If they were stolen who was the perpetrator of the crime?

Parsons for
Plaintiff in error

The State
vs
James P Floyd

Brief of
Plaintiff in
Error