

1977

State of Utah v. Don C. Coffey : Supplemental Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

DON C. COFFEY, :

Defendant-Appellant. :

Case No.
14710

----- :
SUPPLEMENTAL BRIEF OF RESPONDENT

----- :
STATEMENT OF THE NATURE OF THE CASE

Defendant appeals from a conviction of issuing a
bad check in violation of Utah Code Ann. § 76-6-505 (Supp.
1975).

DISPOSITION IN LOWER COURT

Defendant was tried before a jury which returned
a verdict of guilty. The Honorable Allen B. Sorensen
entered judgment on that verdict, and sentenced defendant
to an indeterminate term of not less than one nor more
than fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment rendered below.

STATEMENT OF FACTS

Deputy County Attorney Gary Stott presented a stipulation that if Dorothy Gardner, an officer of the Dixie State Bank, were called to testify, her testimony would be that on July 29, 1975, and continuing to the date of trial, May 24, 1976, there were not sufficient funds in the defendant's checking account to clear a check of \$3,560.00. Mr. Mulliner, the public defender, asked that the stipulation be modified so as to state that the insufficiency of funds would only be established for July 29, 1975, the date on the check in question (Tr,6). The State called Morris Ercanbrack to testify. He stated he was a fruit dealer who had sold a load of cherries to the defendant, and that the defendant had paid for the cherries with a check in the amount of \$3,560.00. Morris Ercanbrack further testified that the defendant represented the check as good when it was written (Tr.9,12), that the check was put on collection for nearly one month, and that the only payment he had received on the check was \$1,800.00 from a third party approximately ten months after the transaction and after criminal proceedings had begun

(Tr.10). The public defender cross-examined the witness, asking if the defendant had not asked that the check be held for awhile in order to clear (Tr.12). The witness answered that the defendant represented that the check was good when presented.

Randall Ercanbrack testified next for the State. Randall's testimony corroborated the fact that the defendant had represented the check was good when it was presented (Tr.15). At the close of the State's case, the public defender moved to dismiss the case for insufficiency of the evidence as to the defendant's criminal intent (Tr.17). The court denied the motion pro forma (Tr.18). The public defender then asked for a recess to confer with the defendant, and after the recess declined to present any evidence (Tr.19). The public defender took exceptions to jury instruction Nos. 5 and 6 (Tr.20,R.25,26).

ARGUMENT

POINT I

THE DEFENDANT WAS NOT DEPRIVED OF HIS
CONSTITUTIONAL RIGHT TO COUNSEL.

Respondent agrees with the statement of the

law contained in appellant's brief that a claim of incompetence of counsel does not entitle a convicted felon to a reversal on appeal unless an extreme case is shown, where the trial was reduced to a farce or sham. Appellant's claim for relief appears to be principally based on People v. Ibarra, 60 Cal.2d 460, 34 Cal.Rptr. 863, 386 P.2d 487 (1963), which he cites as authority for the proposition that an attorney's lack of preparation, which results in the denial to the defendant of a crucial defense, is a reversible flaw. In the Ibarra case, the defendant was charged with possession of heroin. The trial court asked the defense counsel if he wished to make a motion to suppress a capsule of heroin offered as evidence by the state. Defense counsel declined because his client denied possession of the capsule and could not therefore object to the manner in which the police obtained it. The reason articulated by counsel for refusing to object to the evidence demonstrated an inexcusable ignorance of the law in California that a criminal defendant could object to the admission of narcotic evidence even if he claimed no proprietary

interest therein. The California Supreme Court held that the counsel's ignorance of the law, shown on the face of the record, which denied the defendant a crucial defense, entitled defendant to a new trial.

The Ibarra case is distinguishable in several important respects. As the California Court later explained in In Re Saunders, 2 Cal.3d 1033, 1042, 88 Cal.Rptr. 633, 639, 472 P.2d 921, 927, fn. 7 (1970):

"Cases involving a failure to make those careful factual and legal inquiries and investigations necessary to a constitutionally adequate defense are to be distinguished, of course, from cases wherein counsel, having made such inquiries and investigations, makes tactical or strategic decisions-- whether wise or unwise when viewed with the benefit of hindsight--which cause him not to utilize the fruits of his labors." (Emphasis in original.)

The principle defense urged by the public defender was that the State had produced insufficient evidence of criminal intent as required under the present Utah statute. Appellant's new counsel urges that the defense should have been made by allowing appellant to "tell his story" which would establish his lack of criminal intent. Appellant's new counsel is not urging that the wrong defense was asserted, or that a crucial defense was withdrawn, but that the

defense was not presented in the proper way. The public defender was clearly aware of the defense urged by present counsel (Tr.12,ln.14,Tr.16,ln.3), and nothing in the record demonstrates that he was unprepared to present it.

The central point of the defense urged by present counsel is that the appellant had told Mr. Ercanbrack to hold the check for a certain time until appellant could arrange his affairs so that the check, when deposited, would clear. The evidence produced by the State directly contradicted this point, and the public defender might well have thought, as a matter of tactics, that any testimony he could produce to the contrary would not help appellant as much as a cross-examination by the State would hurt him. The thrust of the defense asserted by the public defender required that as little evidence as possible as to the appellant's intent be produced in order to raise a reasonable doubt in the minds of the jurors.

Present counsel's complaint that the stipulation as to the Bank officer's testimony is ambiguous and not probative of appellant's intent is remarkably parallel to the complaint of the public defender on appeal (see

original Brief of Appellant, Points I and II). No credible claim of incompetence can be assigned on this point.

Present counsel's claim that the check was not paid because of a stop-payment rather than an insufficiency of funds is not supported by the record (Tr.10), and irrelevant. Utah Code Ann. § 76-6-505 (Supp. 1975), simply requires that payment be refused by the drawee, and a stop-payment is as effective in preventing payment as an insufficiency of funds. Appellant has not demonstrated incompetence of counsel in this regard.

Present counsel's complaint that the public defender did not discuss the consequences of a guilty verdict with the appellant is simply irrelevant to the issue of whether a constitutionally adequate defense had been made by the public defender.

CONCLUSION

Respondent submits that appellant has not met his burden of demonstrating that the record affirmatively shows that appellant was denied effective assistance of counsel. Respondent submits that appellant's effort, with the benefit of hindsight, to speculate as to what may have been a more effective defense is not a ground for

reversal. Appellant received the assistance of a capable member of the bar who presented a good faith legal defense and the judgment and sentence of the court below should therefore be affirmed.

Respectfully submitted,

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Attorneys for Respondent