

1941

State of Utah v. Sid K. Spencer : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT

OF THE

State of Utah

THE STATE OF UTAH,

Plaintiff & Respondent

vs.

SID K. SPENCER,

Defendant & Appellant.

No. 6223

RESPONDENT'S BRIEF

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FILED

MAY 6 1941

CLERK, SUPREME COURT, UTAH

INDEX OF ARGUMENTS

	Page
The Complaint and Information, as implied by the Bill of Particulars, state facts sufficient to con- stitute a public offense.....	6
The Evidence is sufficient to support the conviction..	14
Conclusion	16

INDEX OF CASES

Cassidy vs. Hilman (Ky.), 31 S. W. 726.....	10
Holzer vs. Reed, et al. (Cal. 1932), 13 Pac. (2d) 697..	10
People vs. Greenwall, 5 Utah 112, 13 Pac. 89.....	7
Massucco vs. Tomassi (Vt.), 67 Atl. 551.....	11
Mobile Light & R. Company vs. Davis (Ala.), 55 So. 1020	11
Murphy vs. Coptieters (Cal.), 68 Pac. 970.....	11
State vs. Diaz, 76 Utah 463, 290 Pac. 727.....	15
State vs. Gleason, 86 Utah 26, 40 Pac. (2d) 222.....	15
State vs. Roberts, 91 Utah 177, 63 Pac. (2d) 584.....	15
Streeter vs. Sawyer, 28 N. H. 555.....	11

INDEX OF STATUTES AND TEXTBOOKS

C. J. 48, Section 34, "Perjury".....	7, 16
Laws of Utah, 1937, Section 3 of Chapter 134.....	6
Laws of Utah, 1935, Chapter 118, Section 105-21-47..	13
Revised Statutes of Utah, Section 105-21-9, Chap- ter 118, Laws of Utah, 1935.....	4, 12
Revised Statutes of Utah, Section 105-11-1, as amend- ed by Chapter 143, Laws of Utah, 1937, Chap- ter 118, Laws of Utah, 1935.....	11, 13
Wigmore on Evidence, Third Edition, Vol. III, Section 785	9

IN THE SUPREME COURT

OF THE

State of Utah

THE STATE OF UTAH,

Plaintiff & Respondent

vs.

SID K. SPENCER,

Defendant & Appellant.

**Respondent's
Brief
No. 6223**

RESPONDENT'S BRIEF

The appellant, Sid K. Spencer, was convicted of the crime of PERJURY in the first degree. The complaint charging the offense was filed on May 31, 1939, and omitting the heading and title, reads as follows:

“On this 31st day of May, A. D., 1939, before me, A. H. Ellett, City Judge and Ex-Officio Justice of the Peace of the City Court within and for Salt Lake City, Salt Lake County, State of Utah, personally appeared Arthur B. Bringhurst, who, on being sworn by me, on his oath,

did say that Sid K. Spencer on the 31st day of May, A. D., 1939, at the County of Salt Lake, State of Utah, did commit the crime of PERJURY, as follows, to-wit:

“That the said Sid K. Spencer, at the time and place aforesaid, committed perjury by testifying as follows:

“ ‘I have not driven a car at any time since my license was revoked for drunken driving.’
“contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

ARTHUR B. BRINGHURST.

ATTEST:

ETHEL MACDONALD

CLERK OF CITY COURT

BY J. BRYANT MORETON,

Deputy.

Subscribed and sworn to before me, the day and year first above written.

A. H. ELLETT,

City Judge and Ex-Officio

Justice of the Peace.” (Tr. 5).

The proceeding wherein the perjury was allegedly committed was one in which appellant was charged with driving an automobile without a driver's license on the 21st day of April, 1939.

Upon his trial in the court of Justice of Peace Arthur B. Bringham, on May 31, 1939, appellant was sworn on his oath and took the witness stand in his own behalf. He denied that he drove an automobile on the 21st day of April, 1939. The State's evidence in the instant case was that, while upon the witness stand in the case in Judge Bringham's court and upon cross examination, appellant was asked the question as to whether or not he had driven an automobile since his driver's license was revoked for drunken driving, to which appellant replied:

“I have not driven my car at any time since my license was revoked for drunken driving.”
(Tr. 68, 96 and 97.)

It was admitted that on the 14th day of June, 1938, defendant's license was revoked for a period of one year for drunken driving. (Tr. 60.)

The charging portion of the information filed by the district attorney for the Third Judicial District alleges:

“That the said Sid K. Spencer, on the 31st day of May, A. D., 1939, at the County of Salt Lake, State of Utah, committed perjury by testifying as follows:

“ ‘I have not driven a car at any time since my license was revoked for drunken driving.’ ”
(Tr. 6.)

Subsequently, upon demand by counsel for appellant, a bill of particulars was filed by the district attorney, which, omitting the heading, title, and signatures, reads as follows:

“Comes now the State of Utah and pursuant to Section 105-21-9, Chapter 118, Laws of Utah, 1935, and hereby makes the following Bill of Particulars, to-wit:

“That on the 23d day of April, 1939, the Defendant herein was charged with the crime of violating Section 29, Chapter 45, Laws of Utah, 1933, in that he had on the 21st day of April, 1939, in Salt Lake County, driven and operated a motor vehicle, to-wit, an automobile upon a highway within the County of Salt Lake, State of Utah, towit, in the 3500 Block on Highland Drive, and that at said time that said Defendant did not have a driver's license, the same having been revoked on the 14th day of June, 1938. Said charge was made against the Defendant by a complaint sworn to by E. L. Jensen and filed before Arthur B. Bringham, the duly elected, qualified and acting Justice of the Peace within and for the Third Precinct, Salt Lake County, State of Utah.

“That thereafter the said Defendant pleaded NOT GUILTY to said charge, and on the 31st day of May, 1939, said case was being tried before the said Justice of the Peace, and the Defendant was sworn on his oath, and on said day was called as a witness in said case, and at said

time and place testified, while so under oath, as follows:

“ ‘I have not driven a car at any time since my license was revoked for drunken driving.’ “and said testimony was material to the issues of said case and said testimony was then and there untrue and not the fact; and the driver’s license of the said Defendant had been revoked on the 14th day of June, A. D., 1938.” (Tr. 15 & 16.)

Upon the pleadings above mentioned, the case was tried to a jury and the defendant was found guilty of perjury in the first degree.

STATEMENT OF ERRORS RELIED UPON

The appeal was taken before the new rules of this court were put into effect on March 1, 1941, and numerous assignments of error were filed. The arguments in appellant’s brief are, however, limited to two, i.e. (1) That the complaint and information, as amplified by the bill of particulars, does not state facts sufficient to constitute a public offense; and (2) That the evidence does not support the conviction.

In the final paragraph of his brief, counsel for appellant states that there are other assignments of error, and the same are not waived. The errors as-

signed but not argued are, however, by the rules of this court deemed to be waived. Accordingly, we shall proceed upon the assumption that the alleged errors above mentioned are the only ones before this court for consideration.

PARTICULAR QUESTIONS INVOLVED:

1. Whether the complaint and information, as amplified by the bill of particulars, state facts sufficient to constitute a public offense; and
 2. Whether the evidence supports the conviction.
-

ARGUMENT I

THE COMPLAINT AND INFORMATION, AS AMPLIFIED BY THE BILL OF PARTICULARS, STATE FACTS SUFFICIENT TO CONSTITUTE A PUBLIC OFFENSE

The statute under which the defendant was convicted, Section 3 of Chapter 134, Laws of Utah, 1937, reads as follows:

“A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice

or on an occasion in which an oath or affirmation is required or may lawfully be administered.”

One of the matters relied upon by appellant in support of his contention that a public offense is not charged is that the statement allegedly made by appellant in Judge Bringham's court and upon which the perjury charge is predicated was not material to any matter then before the court. We believe that this contention is unsound.

In *People vs. Greenwall*, 5 Utah 112, 13 Pac. 89, it is stated:

“Evidence is deemed material to the issue, and perjury may be assigned upon it, if it tends to establish a material circumstance or link in the chain of evidence or is circumstantially material, or tends in any way to characterize the matter at issue, * * *.”

In 48 C. J., Section 34, “Perjury,” it is stated:

“The degree of materiality is unimportant. False testimony directly pertinent to the main issue is, of course, material. But, it is not necessary that the false statement should bear directly upon the main issue. It is sufficient if the statement is collaterally, remotely, corroborately, or circumstantially material, or has a legitimate tendency to prove or disprove any material fact in the chain of evidence, even though not in itself sufficient to establish the issue. * * *” (Citing numerous cases including *People vs. Greenwall*, *supra*.)

The charge upon which the appellant was being tried before Judge Bringhurst was that he drove an automobile on April 21, 1939, without a driver's license. It was admitted that his driver's license had been revoked prior to that date, and that it had not been restored at the time of his trial in Judge Bringhurst's court. (Tr. 60). Any statement made by appellant which bore upon the question as to whether or not he drove a car on April 21, 1939, would obviously be material and relevant within the rules above mentioned, and would, in fact, go to the very nub of the offense with which he was charged. Any statement made by appellant to the effect that he had not driven an automobile since his driver's license was revoked would, in effect, be an assertion that he had not driven his car on April 21, 1939, and since he had no license on that date, it was tantamount to his saying that he had not driven his car on that date without a driver's license. This, of course, was the very gravamen of the charge in the trial at which appellant was testifying. It appears, therefore, too clear to admit of argument that the statement attributable to appellant was material and relevant to the proceeding in the trial at which such statement was made, and that such statement, if false, was therefor such that a charge of perjury could properly be predicated upon it.

Counsel for appellant emphasizes the fact that

neither the complaint nor the information contains any allegation as to what the question was to which the defendant made the answer which is the basis of the Perjury charge. It is our belief and contention that no such allegation was necessary. If the answer given by appellant was material to the issues of the case before the court, and such answer was untrue, the giving of such an answer would constitute perjury regardless of what question was propounded to which the answer was a response.

In Volume III, Wigmore on Evidence, Third Edition, Section 785, we find the following statement:

“Where the witness, either in a deposition or on the stand, goes beyond the scope of the question, and makes an answer *not responsive*, there is here nothing ‘per se’ wrong. If the answer includes irrelevant facts, they may be struck out, and the jury directed to ignore them; if it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for: * * *

“The only ground of complaint for non-responsive answers is that, in the case of a deposition (for the reason above noted), such an answer may entitle the opponent to additional cross-examination on the new matter,—a rule dealt with elsewhere. Courts ought to cease repeating the novel and unwholesome assertion that ‘where an answer is not responsive to the question put, it

is the duty of the Court to strike it out, on motion.'

"This topic of responsiveness has somehow become in modern times beset with crude misunderstandings, that tend to suppress truth and turn the inquiry into a logomachy:

"(1) Sometimes it is said that the *party questioning* may object on this ground, but not the opposing party. But there should be no such distinction; if the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by Justice."

In *Holzer vs. Reed, et al.* (Cal. 1932), 13 Pac. (2d), 697, it is stated:

"If the answer is in itself proper evidence, the party who is examining the witness has the right to take and retain it, if he chooses to do so."

In *Cassidy vs. Hilman*, (Ky.) 31 S. W. 726, wherein appellant's own witness had given testimony damaging to appellant's case, the court stated:

"It is said by appellant that his own witness, in response to a question propounded to him, disclosed the fact of the alteration; that this disclosure was not responsive to the question asked the witness, and, therefore, should have been excluded. We think not. The facts developed

show the alteration, and while it comes from appellant's own witness, and not in response to the question propounded, still the testimony was competent. * * *"

Other cases holding that the mere fact that testimony is not responsive to questions asked a witness does not make such testimony inadmissible are, *Masuccio vs. Tomassi*, (Vt.) 67 Atl. 551; *Murphy vs. Cop-tieters*, (Cal.), 68 Pac. 970; *Mobile Light & R. Com-pany vs. Davis*, (Ala.), 55 So. 1020; and *Streeter vs. Sawyer*, 28 N. H. 555.

Even though the answer given by appellant were not responsive to a particular question asked, or even though it were volunteered without any interrogatory, if relevant and material to the issue then before the court, it was admissible and binding upon the appellant and, if untrue, would constitute a proper basis for a charge of perjury. Hence, it is our contention and belief that there was no necessity for alleging what question was propounded and the failure to make such an allegation in no way affected the validity of the complaint or information, particularly since both the complaint and the information follow strictly the form prescribed by Section 105-11-1, Revised Statutes of Utah, 1933, as amended by Chapter 143, Laws of Utah, 1937, and Chapter 118, Laws of Utah, 1935, as hereinafter indicated and set forth.

Counsel for appellant contends that the bill of particulars was not complete and responsive to the demand therefor, in that it failed to furnish certain information called for by the demand. Attention is directed to the fact that at the trial of the case, while a discussion of the bill of particulars was being carried on between the court and counsel for the respective parties, the district attorney offered to furnish further information to supplement the bill of particulars, (Tr. 137.) Appellant's counsel at the trial, however, declined any such offer with the statement:

“We are perfectly satisfied with the bill of particulars because it is definite and certain;
* * * .”

“This is as definite and certain as it can be, and we have relied upon it.” (Tr. 138.)

Appellant is, of course, bound by such statements of his counsel. If he was not satisfied with bill of particulars as rendered, the time to have made objection thereto was before or at the trial so that the court could have ordered a supplemental or new bill of particulars as contemplated by Section 105-21-9 of Chapter 118, Laws of Utah, 1935. Having failed to make any such objection, but on the contrary having indicated his satisfaction with the bill of particulars, it is too late now for appellant to first raise the objection that the

bill of particulars was not complete and responsive to the demand.

The information was in the exact form prescribed by Chapter 118, Laws of Utah, 1935, and particularly Section 105-21-47, as set forth in that Chapter, which designates, among other things, the form of information to be used for charging the crime of perjury. Section 105-11-1, Revised Statutes of Utah, 1933, as amended by Chapter 143, Laws of Utah, 1937, provides that:

“* * * in cases of public offenses triable upon information, indictment or accusation, the complaint, the right to a bill of particulars, and all proceedings and matters in relation thereto, shall conform to and be governed by the provisions of the new Chapters 21 and 23 of Title 105, Revised Statutes of Utah, 1933, as enacted by Chapter 118, Laws of Utah, 1935.”

This being the case, and it being apparent as heretofore set forth that the answer of appellant was material to the proceedings before the court at the time the answer was given, and that an allegation in the complaint or information as to the question propounded was unnecessary, the only theory left upon which it might be contended that the complaint and information, coupled with the bill of particulars, do not state a public offense is that the statutes enacted by Chapter 118, Laws of Utah, 1935, and Chapter 143, Laws of Utah,

1937, are unconstitutional. This question has not, however, been raised or argued in appellant's brief. Hence, the matter has been waived and is not now before this court.

ARGUMENT II

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION

For the State, Justice of the Peace Arthur B. Bringhurst testified that at the trial in his court on May 31, 1939, when appellant was being tried for driving an automobile without a driver's license, appellant was asked the question as to whether or not he had driven an automobile since his driver's license was revoked for drunken driving, to which he gave the response indicated in the information, (Tr. 68.) Deputy County Attorney J. Patton Neeley, who represented the State in the trial in Judge Bringhurst's court, testified to substantially the same facts as did Judge Bringhurst, (Tr. 96 and 97.) Robert Barnes, an employee of the Motor Vehicle Department of the Utah State Tax Commission, testified that appellant's driver's license was revoked on June 14, 1938, for a period of one year, and such facts were admitted by appellant's counsel. (Tr. 60.) State Highway Patrolman Elden L. Jensen,

testified that on the 21st day of April, 1939, the appellant was driving an automobile in the vicinity of Maple Avenue and Highland Drive in Salt Lake County, State of Utah, and that on that date, he, Jensen, saw appellant driving an automobile and that he followed the automobile driven by appellant for a short distance on Maple Avenue, at which time appellant got out of the automobile. Appellant was then arrested by Jensen. (Tr. 112 and 113.) There is nothing in the record which would discredit the testimony of any of these witnesses. Insofar as the record shows, all are reliable persons of good reputation and there is nothing which would cast any suspicion upon their reputations for truth and veracity or their credibility as witnesses. It is, of course, well settled that the credibility of witnesses and the weight and value to be given their testimony are questions exclusively for the jury. State vs. Diaz, 76 Utah 463, 290 Pac. 727; State vs. Gleason, 86 Utah 26, 40 Pac. (2d), 222; State vs. Roberts, 91 Utah 177, 63 Pac. (2d), 584.

The jury apparently chose to believe the testimony of the State's witnesses and gave such testimony sufficient weight as to conclude that appellant was guilty of the crime charged. The evidence, if believed, was surely sufficient to warrant such a conclusion on the part of the jury, and hence the verdict should not be disturbed by this court.

In appellant's brief, the observation is made that the record does not indicate what ultimate disposition was made of the case of the State of Utah against Sid Spencer on the charge of driving an automobile without a driver's license. It is our belief that this has no bearing upon the validity of the conviction in the case now before this court, and in support of such assertion, attention is directed to 48 C. J., Section 36, "Perjury," wherein it is stated:

"The actual effect of a false statement has no bearing on its materiality, and the guilt of one who has falsely sworn does not depend upon the result of the proceedings in which it occurred."
(Citing cases.)

CONCLUSION

The defendant was fairly tried under a complaint and information meeting in every way the requirements as set forth by our statutes. It is our belief as hereinbefore indicated that all of the proceedings were regular, that the complaint, information, and bill of particulars properly charged the offense of perjury, and that the evidence presented at the trial was sufficient and ample to convict the defendant. It is accordingly

urged that the verdict of the jury and the sentence of the court below should be sustained.

Respectfully submitted,

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