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The State of Utah v. Edward S. Byington : Brief of Appellant

Utah Supreme Court

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In The
SUPREME COURT
Of the State of Utah

THE STATE OF UTAH,

Plaintiff and Respondent

vs.

HOWARD S. BYINGTON,

Defendant and Appellant.

APPELLANT'S BRIEF

FILED

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W. Lee Skanchy

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SUPREME COURT, UTAH

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In The
SUPREME COURT
Of the State of Utah

THE STATE OF UTAH,)	
Plaintiff and Respondent)	
vs.)	NO.
HOWARD C. BYINGTON,)	
Defendant and Appellant.)	

APPELLANT'S BRIEF

STATEMENT OF FACTS

This case was the result of an order to show cause proceeding. The appellant having been divorced by his wife was cited in court for failing to pay alimony as decreed by the court. Respondent's Exhibit C. Appellant's former wife took the stand and testified as to the default in alimony

payments. Rec. 44-52. The appellant was asked by the court if he wanted to cross examine his former wife. He declined to cross examine. The court asked him if he wanted to take the stand, and he declined. The court requested him to take the stand as he (the court) wanted to ask him some questions. He was examined as to his earnings since the divorce. The appellant was then asked if he were married and he answered "yes". Rec. 52-55. After some questions as to where he was married, where he has been, etc. appellant was asked by the court to produce his wife. The court then sent the appellant and the sheriff to bring her into court. Ivella Hutchison was placed on the stand by the court and asked by the court whether she was married to the appellant, and she answered in the affirmative. Rec. 56-63. She was asked where she was married and when. Where her

marriage certificate was, etc. The court then found the appellant in contempt of court for failure to pay alimony and in open court said,

"You will be remanded into custody of the Sheriff of Cache County in execution of this judgment, and the District and the County Attorney are here, and I'm submitting this case to them for an investigation with respect to violation of any of the criminal laws of the State of Utah." Rec. 66.

On the 13th day of December, 1947, a charge of first degree perjury upon Sheriff's complaint was filed against the appellant and Ivolla Hutchinson. The complaint and information were based on the testimony of the appellant and Hutchinson in which they stated they were married. The trials resulted in convictions of second degree perjury of both the appellant and Hutchinson on the 13th and 14th day of January respectively. The appellant was sentenced to one year in the county jail.

From this conviction the appellant

appeals.

Said appeal is based on the irregularities in the proceedings which resulted in the filing of charges and the ultimate conviction of the appellant.

The appellant contends that the conviction should be nullified and set aside for the following reasons.

I. That the proceedings from the beginning were irregular and illegal.

A. The charge of perjury was based on immaterial testimony irregularly received.

B. Testimony on which charge was based was on incriminating questions and answers of the appellant.

C. A witness was illegally compelled to testify.

D. Appellant was entitled to change of Judge because of bias and prejudice of the trial judge.

-A-

THE CHARGE OF PERJURY WAS BASED ON IMMATERIAL TESTIMONY IRREGULARLY RECEIVED.

The question as to the marriage of the appellant was wholly immaterial as far as the order to show cause proceedings were concerned. Whether he was married or not was collateral and incidental as far as the issue in the proceedings was involved. He was in default in his alimony payments and was in contempt for such failure. This was true whether he had remarried or not. Appellant made no defense as to the failure to pay alimony. Appellant did not raise the question of remarriage as a defense for defaulting in the payment of alimony.

From the court's instruction at the trial, it is admitted that appellant's testimony as to marriage was immaterial.

Instruction Number Five.

"If you do find beyond a reasonable

doubt that the defendant did commit perjury then the Court instructs you as a matter of law that the matters concerning which the defendant testified were not material matters and your verdict must be guilty of perjury in the second degree.

THE COURT: This instruction is given for the reason that a subsequent marriage is not a defense in an action for contempt when one is cited in to show cause why he should not be held in contempt for failing to comply with the decree. A financial status is the matter of primary concern. The record may show the remarks of the Court, and they may be transcribed if counsel desires them." Rec. 145.

The question arises then whether appellant had to take the stand as a witness and whether he could rightfully by the Court be asked a question that would be self incriminating if answered. Appellant had been living with Ivella Hutchison as man and wife. A baby was born out of this relationship. Rec. 133. To have answered the question, as to whether he had remarried, in the negative would be admitting that he, the appellant, had committed adultery. The baby was born within

the six months period following the divorce from his former wife. The intimacy with Ivella Hutchison occurred while appellant was married. Rec. 140-141.

Did the appellant have to take the stand? The proceedings at the time appellant took the stand were as follows:

"MR. BULLEN: Well, the record will show that, I guess, I believe that's all.

THE COURT: You have an opportunity to cross examine her, Mr. Byington, if you care to do so, on matters she's testified to.

MR. BYINGTON: Well, I believe there are some things she's got right and some that are not right.

THE COURT: Well, you'll have to come up here and conduct your cross examination in the proper manner.

MR. BYINGTON: I have no attorney on my side so we'll---

THE COURT: Well, you had an opportunity to get one. You don't have to have an attorney to cross examine her if you want to cross examine her.

MR. BYINGTON: Well, we'll let it go as it is.

THE COURT: All right. That's all.

THE COURT: If you want to come up and testify, Mr. Byington, you may be sworn and do so.

MR. BYINGTON: No, that's all right.

THE COURT: Well, come on up here. I want to ask you some questions then. Rec.

(HOWARD S. BYINGTON, defendant, called as a witness to testify for and in his own behalf, being first duly sworn, was examined and testified as follows:

MR. BULLEN: Have you remarried?

DEFENDANT: Yes.

MR. BULLEN: What did you say?

DEFENDANT: Yes, sir.

MR. BULLEN: When?

THE COURT: Do you remember when?

DEFENDANT: No, sir.

MR. BULLEN: A month ago? Two months ago, three months? Approximately.

DEFENDANT: Oh, probably it would be a month or something like that.

THE COURT: Where did you get married?

DEFENDANT: Montana.

THE COURT: Where?

DEFENDANT: I don't know where it was.

THE COURT: Well, now, let's just quit fooling around here.

DEFENDANT: Well, I'm not fooling; I don't remember the place.

THE COURT: Well, how come you got married?

DEFENDANT: Just wanted to." Rec. 55-56.

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TESTIMONY ON WHICH CHARGE WAS BASED

WAS ON INCULCATING LOYALTY AND THE WAYS
OF THE APPELLANT.

Art. 1 Sec. 12 of the State Constitution and Sec. 106-1-10, Utah Code Annotated 1943, provide that "The accused shall not be compelled to give evidence against self."

"The privilege of refusing to answer questions to all proceedings sanctioned by law." 70 Corpus Juris 721.

If the appellant is compelled to testify, are his constitutional rights as to self incrimination violated. Immaterial questions by the court in this case as to remarriage were if answered correctly incriminating. The court knew or should have known that the question would be incriminating. At this instance he, the appellant, should have been advised as to his rights.

This court has said, "If counsel, knowing witness should not be compelled to answer, ask questions implying immorality, supreme court may reverse case with censure on counsel, whether or not witness claimed privilege." State v. Jorgensen 91 Ut. 351-54 P.2d 329.

Where the appellant has no counsel and the court is asking questions, the appellant should have his rights preserved with greater care than ever.

As to waiver of rights, it is difficult to say a person can waive his rights if he doesn't know he has any.

As said in *Callen v. Com.* 11. 24 Cratt,

65 Va. 634- "There can be no waiver of privilege unless the witness has been warned of his right to the privilege."

"However, fair and impartial Judges frequently in proper cases notify witnesses of their rights in this regard. And in some instances it is not too much to say this should be done. Of course, if a witness is also, factually, the accused he must be advised of his privilege." 28 R. U. L. 432.

The policy of the law and courts is to have witnesses testify voluntarily without compulsion and without subjecting themselves to criminal prosecution.

In 70 C. J. 737-28 it quotes the law as

"Unless evidence has been voluntarily given the policy of the law relative to the privilege against self incrimination is to protect all persons from criminal proceedings of any character based on evidence obtained from the persons themselves."

"A witness may claim privilege against self in a cross examination as well as direct unless waived by direct examination." 70 C. J. 737.

The appellant by immaterial questions was placed in an incriminating position. This was a clear case of a violation of his

stitutional rights.

-C-

A WITNESS WAS ILLEGALLY COMPELLED TO TESTIFY.

In the proceedings of the order to show cause hearing, the appellant was not only compelled to testify against himself, but he was forced to get a witness, by order of the court, to testify. And this witness, taken from her home by the appellant and the sheriff, was his alleged wife.

The proceedings so far as material here are set out as follows:

"THE COURT: Where is your wife?
DEFENDANT: Home.

THE COURT: Hasn't she been able to tell you where you got married?

DEFENDANT: Well, I guess she could.

THE COURT: Then I'm going to give you just about five minutes to get down there, Mr. Byington, and bring her back here. We'll take a recess for about ten minutes so far as this case is concerned, and you may go with the sheriff and bring her back.

(Court recessed, as far as this case was concerned, for approximately twenty minutes.)" Rec. 56.

To require a witness to attend court

he must be subpoenaed." 104-49-6. Utah Code Annotated 1943. "He must be allowed reasonable time for preparation and travel. 104-49-6. Utah Code Annotated 1943.

Ivella Hutchison, the witness, then was called to the stand by the court and the proceedings are here set out:

"(IVELLA HUTCHISON, a witness called by the Court to testify for and in behalf of the defendant, having heretofore been duly sworn, testified as follows upon

EXAMINATION BY THE COURT:

Q What's your name?

A Ivella Hutchison.

Q Will you say that again?

A Ivella Hutchison.

Q How do you spell it? I-v-e-l-l-a?

A Yes.

Q Hutchison?

A Yes.

Q Don't you go by the name of Byington?

A Yes.

Q How long have you been going by that name?

A Well, I've been going by it, too, for the last month.

Q You've been what?

A Going by it definitely for the last month.

Q Well, how long---

A But we weren't married until the first of December.

Q How long did you go by it indefinitely?

A Since last October.

Q When were you married?

A First of this month.

Q Where?

A Montana.

Q What?

A Montana.

Q Where at in Montana?

A Can't tell you.

Q Have you got a marriage license?

A Did have, yes.

Q Where is it?

A It's either in my personal belongings at my mother's home or somewhere between Buel, Idaho, and Blackfoot and here.

THE COURT: I think somebody's being taken for a ride.

MR. BULLIEN: These are all new facts to me. I didn't know anything about it." Rec. 63-64.

The court will see that she was not asked if she wanted the advise of counsel. She was not asked if she was the appellant's wife. She was not advised of her rights as to self incrimination.

In fact, the court advised the jury in the perjury trial that there was no reason to ask the witness if she wanted an attorney.

The record 54 shows as follows:

"Ivella Hutchison.

Q Would you state what happened on that date, if you recall.

A Howard was served his papers to come into court, and I started my washing. I was just about halfway through when the sheriff came in with Howard and Howard informed me I had ten minutes to get dressed and get into court.

Q What happened when you got up here?

A I sat down and waited for another case to be ended and then I walked up and took the oath and sat in the jury stand.

Q Were you asked if you wanted an attorney at that time?

A No, sir.

THE COURT: I might state for the purpose of the--or to the jury that there was no reason for asking this witness if she wanted an attorney. She was not a party to the action in that case." Rec. 132-133.

The court having compelled Ivella Hutchison's attendance in court and to testify in violation of all the constitutional rights given a person was still an incompetent witness as appeared at this stage of the proceedings.

If she were the appellant's wife, which appellant had testified that she was, then she was incompetent as a witness. From the evidence adduced there was prima facie evidence of marriage. To overcome this, it was necessary to show no marriage.

And this should have been done in separate examination from the proceedings then being conducted.

"If there is an issue of fact as to the validity of the marriage, the alleged spouse may not testify until the marriage has been proved void, and prima facie proof of marriage renders the witness incompetent." State v. Harris 22 S. W. 420 308 Mo. 99.

"Even in collateral proceedings one spouse cannot give testimony tending to show that the other has committed a crime." 70 C. J. 149.

The question of marriage was not even an issue of fact in this case.

The state may contend that Ivelia Hutchison was the one whose rights were violated. That she alone could object. This contention would be untenable, because here the court took over the proceedings in which the appellant was a party and on his own direction made Hutchison testify, not as a witness for appellant, but a witness of the court and a witness that was literally dragged into court to testify not

for but against the appellant and herself.

This procedure is called to the attention of the court to show the flagrant irregularity of the whole proceedings.

As stated, "A Judge may cross examine the witness or ask him leading questions, but it is not proper that he conduct an extended examination of any witness or usurp the place of counsel." 28 R. C. L. 588.

It must be remembered that opposing counsel did not request the witness to testify.

How far does the right of a court go if he can call on his own witnesses who are not properly brought under the courts jurisdiction?

The issue of marriage was wholly immaterial by the court's own admission.

(supra)

"A witness is not bound to answer a question collateral, irrelevant or immaterial if the matter is to degrade the witness, under guise of effecting credibility." 70 C. J. 741.

That the question of marriage was not only incrimination but was degrading cannot be denied. The witness and the appellant were living in unlawful cohabitation. A child was born out of wedlock. The child was conceived when the appellant was married. Rec. 133-154.

-D-

APPELLANT WAS ENTITLED TO CHANGE OF JUDGE WHO WAS OF BIAS AND PREJUDICE OF THE TRIAL JUDGE.

A petition was filed Jan. 7, 1948 for a change of Judge. Rec. 15.

The petition was based on bias and prejudice of the Judge. In this case the Judge had not only heard the alleged perjured testimony, but he initiated the investigation. He requested the County Attorney and District Attorney to investigate. Petition for change of Judge was denied. Rec. 68.

In his sentencing of the appellant for contempt, the Judge in open court said,

"You will be remanded into custody of the sheriff of Cache County in execution of this judgment, and the District and the County Attorney are here, and I'm submitting this case to them for an investigation with respect to violation of any of the criminal laws of the State of Utah." Rec. 65.

This court has repeatedly held that where bias and prejudice are shown to exist against the appellant by the court, he is disqualified to try the case. In the case of Haslam vs. Morrison this court held bias and prejudice would disqualify a Judge.

Where a Judge is the complainant. Where he was presiding when the alleged crime was committed, he certainly cannot be free from bias and prejudice.

"But he (the court) is disqualified when he makes a statement in advance of trial amounting to a prejudgment of the case in favor of one of the parties, and when under circumstances he unreasonably denies a change of venue or change of Judge, judgment will be reversed on appeal although no showing of prejudice at the trial." 30 Am. Juris. 786.

"Where prejudice is ground for disqualification, prejudice which is suffic-

ient to disqualify a person to sit as a juror by disqualifying him as Judge." 10 Am. Juris 745.

That the Judge was not qualified to sit as a juror in this case there can be little question.

That the Judge had formed an opinion as to the guilt of appellant is evidenced by his remarks at the conclusion of the trial to allow cause proceedings. (supra)

"A person who might be called as a witness is not necessarily incompetent as a juror, but if he knows about the controverted facts in the particular case, he is deemed to know material, controverted facts that of necessity must bias and influence his judgment as a juror. 16 R. C. L. 282.

That the court knew the facts is quite plain. The refusal to sign the certificate of probable cause might indicate his frame of mind.

In his order denying the petition for probable cause the court states.

"Defendant was called as a witness and admitted that he testified as charged in the information and also in substance.

admitted that his testimony was false." Rec. 39.

As to this order it may be called to the attention of the court that the appellant never took the stand nor did he testify at the trial.

The fact that there are so few authorities in such cases as this can be explained by the fact that there are few cases where a person's constitutional rights have been so grossly ignored.

It is the appellant's contention that the proceedings from the beginning were irregular and illegal for the following reasons:

1. The charge of perjury was based on immaterial testimony irregularly received.
2. The testimony on which charge was based was on incriminating questions and answers of the appellant.
3. A witness was illegally compelled

to testify.

6. Appellant was entitled to a change of Judge because of bias and prejudice of the trial Judge.

For these reasons the appellant respectfully submits that the conviction should be set aside and the complaint and information should be dismissed.

Respectfully submitted,

E. Lee Skanechy

Attorney for Appellant.