1948

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

Utah Supreme Court

Grover A. Giles; Attorney General of Utah; Andrew John Brennan; Assistant Attorney General; Attorneys for Plaintiff and Respondent;

In the
SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

-vs-

HOWARD S. BYINGTON,
Defendent and appellant.

} Case No. 7176

Brief of Respondent

GROVER A. GILES,
Attorney General of Utah

ANDREW JOHN BRENNAN,
Assistant Attorney General

Attorneys for Plaintiff and Respondent.

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STATEMENT OF THE CASE

The Appellant, Howard S. Byington, having been tried before the District Court of the First Judicial District in and for the County of Cache, State of Utah, was

found guilty by verdict of the jury of Perjury in the Second Degree and sentenced therefor by imprisonment in the Cache County jail, Logan, Utah, for a term of one year. It is from the verdict and sentence that he appeals.

The record discloses, by State's exhibit "C", that a Decree of Divorce was entered on the 9th day of May 1947, dissolving the bonds of matrimony existing between one Howard S. Byington the Appellant and one Lavina Byington; and that by the provisions of the Decree Mrs. Byington was awarded custody of the four children of the parties and $50.00 per month for their support and maintenance, payable on the 20th day of May 1947 and each month thereafter. A further sum of $1.00 per year was awarded to Lavina Byington as alimony, payable June 1, 1947 and annually thereafter.

State's exhibit "C" further reflects that on or about the 26th of November 1947, Lavina Byington filed an Affidavit in which she set forth as a fact the failure of the Appellant to make the payments as ordered and further that "His failure to pay said sums has been willful and intentional." Lavina Byington, in the aforesaid affidavit, prayed that the Court enter an order directing the Appellant to show cause why he should not be punished for contempt for failure to make aforesaid payments. The order was issued by the Court on or about the 26th day of November 1947 and was regularly heard by the Court on the 8th day of December. At the hearing Lavina Byington appeared personally and was represented by her counsel. The Appellant appeared without counsel.

The Court heard the testimony of Lavina Byington as to her information concerning the Appellant's income since the making of the Decree and also the Appellant was questioned at that time by counsel for Mrs. Byington and by the Court in respect to his earnings and failure to pay alimony.

It was during the course of these proceedings on the Order to Show Cause that the Appellant, among other things, was questioned as to whether or not he had remarried and the Appellant answered "yes". He further testified that he was married in the state of Montana but that he did not know of the exact time or place. His recollection concerning the marriage was so hazy that the Court asked:

> "Where is your wife?"
>
> Answer: "Home."
>
> Court: "Hasn't she been able to tell you where you got married?"
>
> Answer: "Well, I guess she could."
>
> 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."
>
> (Page 56, State's Exhibit "B")

The Appellant returned a few minutes later and was again questioned regarding his marriage and he again testified that he was married and that he did not know

the time or place but that the marriage was entered into in the state of Montana. (Pages 56 and 57, Plaintiff's Exhibit "B").

It was upon this testimony concerning marriage following the Decree of his divorce from Lavina Byington that the Appellant was charged and convicted of the crime of Perjury in the Second Degree.

PROPOSITION NO. 1

QUESTIONS CONCERNING MARRIAGE WERE PROPER AND PERTINENT TO THE ISSUES BEFORE THE COURT

Counsel for Appellant, in his brief, argues that the question of whether or not the Appellant was married was collateral and incidental as far as the issues in the proceedings were involved, had nothing whatsoever to do with Byington's default in alimony payments, and no materiality in the determination as to whether or not the Appellant should be punished for contempt.

It may be conceded that this argument is correct, as far as the premises therein are involved; however, it is the position of the Respondent that the information would be pertinent to the Court in the final determination as to the disposition to be made of the matter before him. That is to say the Court, with the decree standing of record and the failure of the Appellant to obey the decree, may have no alternative but to find that the Decree had been violated and, following questions concerning the activities of the Appellant, determine the Appellant to be in contempt. Nevertheless the court had an additional

determination to make and that is to the extent of the punishment to be meted in accordance with the facts and circumstances.

It is, therefore, respectfully submitted that the marital status of the Appellant would be pertinent and that the Court was justified in going into the domestic situation of Byington as well as his economic condition. This proposition is well supported under the law. See Hillyard vs. District Court of Cache County 68 Utah 220, 249 Pac. 806 and Watson vs. Watson, 72 Utah 218, 269 Pac. 775. In the Watson Case this Court held:

> "(1) The particular question here, however, arises upon the contention of defendant that the finding made by the court does not warrant or support the judgment of imprisonment which was entered against him. It is argued that a finding of present ability to comply with an order is an essential prerequisite to an order that the delinquent be imprisoned until he does comply. In support thereof the following cases are cited: Ex parte Silvia, 123 Cal. 293, 55 P. 988, 69 Am. St., Rep. 58; In re Cowder, 139 Cal. 244, 73 P. 156; Lutz vs. District Court, 29 Nev. 152, 86 P. 445; Ex parte Hamberg, 37 Idaho, 550, 217 P. 264--to which may be added our own decision in Hillyard vs. District Court (Utah) 249 P. 806.
>
> The judgments considered in the cited cases were all coercive in form and purpose and intended to compel the payment of money by the delinquent, by an order of indefinite imprisonment until the payment was made. To support such a judgment in contempt it is clear that it should first appear that the act sought to be

> coerced was yet within the power of the person proceeded against to perform. It would be repugnant to reason and futile to order a person imprisoned until he did some particular thing, unless he had the present ability to do it."

Section 104-45-10 Utah Code Annotated 1943 provides as follows:

> "Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it is adjudged that he is guilty of the contempt, a fine may be imposed upon him not exceeding $200, or he may be imprisoned in the county jail not exceeding thirty days, or he may be both fined and imprisoned."

It is evident that the court must exercise a discretion as to the punishment to be imposed and, therefore, he has a right to inquire into the circumstances of the party. See also 48 C. J. 833, Perjury, paragraph 33:

> "A statement can be neither material nor immaterial in itself, but its materiality must be determined in accordance with its relation to some extraneous matter. False testimony relative to a non-existent issue cannot be material. But any statement which is relevant to the matter under investigation is sufficiently material to form the basis of a charge of perjury. The test of materiality is whether a false statement can influence the tribunal - not whether it does."

48 C. J. 832, paragraph 32:

"At common law and under statutes preserving the common law rule in this respect, a false statement must be material to the issue or question under consideration in order to constitute perjury. Irrelevant testimony although false, cannot be made the basis of a charge or perjury; nor will a false oath as to superfluous and immaterial matter sustain an indictment for this offense.

Under statutes changing the common law rule in this respect materiality is not an element of the crime of perjury. Citing: State vs. Miller 26 R.I. 282, 58A. 882; State vs. Byrd, 28 S.C. 18, 4 SE 793, 13 Am. SR660; Reg vs. Ross, 1 Montr. (Q.B.) Que 227.

(a) In second degree perjury materiality is not necessary. State vs. Wilson 83 wash 419, 145 P. 445."

PROPOSITION NO. 2

THE STATEMENTS INVOLVED WERE VOLUNTARILY MADE

Appellant urges in his brief that the question of marriage was incriminating and in violation of the protection afforded a witness under Article 1, Section 12 of the Constitution of the State of Utah, and Section 105-1-10 Utah Code Annotated 1943.

The proceedings before the Court, in which this charge arose, were civil in nature and in furtherance of civil process. It was proper and within the jurisdiction and power of the Court to summon the Appellant before him and with Byington present in Court, question him concerning his failure to pay support money, attorney's fees, and generally abide by the Court's Decree.

Section 105-1-10, 1943, as cited by Appellant, is a section of the Utah Code of Criminal Procedure. It is of long standing in the common law system of jurisprudence as a protection for those accused of a crime. Byington was not accused. He was a participant in a civil proceedings. The Order to Appear and Show Cause was in the nature of proceedings supplementary to execution in civil matters.

There is a distinction between criminal and civil Contempts. In 17 C.J.S. 7, the following appears:

> "A criminal contempt is conduct that is directed against the dignity and authority of the court, or a judge acting judicially; it is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect.
>
> Criminal contempt may arise in the course of a criminal action, in special proceedings, or in civil or private litigation.
>
> The line of demarcation between acts constituting criminal and those constituting civil contempts is very indistinct. The confusion in attempts to classify civil and criminal contempts is due to the fact that there are contempts in which both elements appear. In general, contempts of court for which punishment is inflicted for the primary purpose of vindicating public authority are denominated criminal, while those in which the enforcement of civil rights and remedies is the ultimate object of the punishment are denominated civil contempts; whether or not

a fine or inprisonment is imposed is not a distinguishing test.

Civil Contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of an opposing party therein, and is therefore, an offense against the party in whose behalf the violated order is made. If, however, the contempt consists in doing a forbidden act, injurious to the opposite party, the contempt may be considered criminal."

This Court has held in the case of Foreman vs. Foreman,—Utah—176 Pac. (2d) 165 at 168 as follows:

"We believe that Mr. Justice Stone, in the case of Lamb vs. Cramer, 285 U.S. 217, at page 220, 52 S. Ct. 315, at page 316, 76 L. Ed. 715, sets out clearly and concisely the rule for determining the nature of such procedings. He said:

'***The fine or the incarceration ordered in conjunction with the relief afforded the litigant is considered secondary to the granting of that relief even though it has the effect of vindicating the authority of the Court. In each of these two cases, the party litigant who is the beneficiary of the Court's Order is interested in the result thereof, and in case of an appeal is interested in upholding the Court's Order in order to establish and/or satisfy his rights.' "

It is therefore respectfully submitted that Byington was neither before the court in the status of an accused, nor compelled to incriminate or give evidence against himself. He did not stand charged with a crime.

Article I, Section 12 of the Constitution of the State of Utah provides in part, "The accused shall not be compelled to give evidence against himself; ***" and it is this provision of our Constitution under which the privilege against self-incrimination arises.

As a matter of fact, the honorable district Court in the proceedings below, and this Court is not and should not be concerned with the nature of the testimony given, that is, whether or not it was privileged or improperly received as the fundamental issue is whether or not Byington perjured himself before the Court.

The authorities, generally speaking, are not in accord as to the practice or procedure which should be followed either by the court, counsel or witnesses when an incriminating question is submitted for answer. Generally speaking experience has shown that the witness, to say the least, is in a rather perilous position. If he answers the question he may subject himself to prosecution. If he refuses to answer he may find himself guilty of direct contempt for his refusal, and if he counsels with the Court he places himself in a degrading position. His dilemma must depend upon the decision of the Court as to whether or not his answer would be incriminating. See Vol. 8, Wigmore on Evidence, 3rd Edition, Pg. 304, Paragraph 2251 et seq.

Wigmore on Evidence, 3rd Edition Vol. 8, Page 851 discusses the rule of law tothe effect it is not for the witness to determine if the question is incriminating and the great weight of authority holds that the court

must decide if a question is material or pertinent to the issue. These are held the prerogative of the inquisitor. Moreover, the privilege is "an option of refusal and not a prohibition of inquiry." See Wigmore on Evidence, Vol. 8, page 389. This last mentioned rule has been discussed and adopted by this Court. In State vs. Thorne 39 Utah 208, 117 Pac. 58, it is stated:

> "The rule obtains in this jurisdiction that a defendant, in a criminal case, becoming a witness, may be cross-examined the same as any other witness. He, like any other witness, may be asked many questions wholly irrelevant and collateral to the issue, for the purpose of testing his memory, affecting his credibility, and the weight of his testimony. When a question is asked which relates to incriminating acts, or calls for evidence of an incriminating character, separate and distinct from those on trial or testified to by him, he, like any other witness, may claim the privilege and decline to answer it. The prevailing opinion in this country is that it is for the court, and not the witness to determine whether the evidence called for by the qustion propounded may or not tend to incriminate the witness."

Bearing in mind the foregoing principles of law, it is difficult to rationalize the position of the Appellant concerning the propriety of the questions in the first instance. All that was asked of the Appellant was whether or not he was married, and he promptly answered, "yes." The Court then went on to ask when he had been married and, as submitted in Proposition 1 of this Brief, it is the position of the Respondent that such evidence would be

pertinent to the disposition of the case because, by knowing when the marriage took place, the Court would have some rule to determine how long he had been married. The Appellant would have a reviewer of this cause jump to the conclusion that when the questions were asked in the first instance the Court then had reason to believe such questions self-incriminating. Certainly such a conclusion cannot be gleaned from the record. To say the least, it does not imply immorality to ask a man if he is married, that he will defame himself by answering, or subject himself to punishment for a crime.

Counsel cites authorities to the effect that the Court should warn the witness and advise him of his privilege. Again there is no indication that the Court was aware of any necessity for so doing should such be the law. Byington perjured himself. Upon making the discovery of this possibility, the court gave him adequate time to reconsider the questions submitted, even to the extent of requesting that he produce his wife. In 41 American Jurisprudence, page 8, it is stated:

> "A false statement made in Court under fear or compulsion constitutes perjury, since the impelling danger is not present, imminent, impending or unavoidable."

The Appellant now submits to this Court that Byington falsified before the Court because he knew he would incriminate himself if he told the truth, and that any answers made to these incriminating questions, as so called, were made in ignorance of constitutional privileges and

as a consequence any privilege which he failed to exercise could not be considered as waived. See 28 R.C.L. 430, paragraph 16.

The foregoing proposition submitted by the Appellant would bear some weight and consideration were Byington being charged with a crime as a result of the information received in the course of the proceedings; that is, a crime concerning his marriage or failure to marry. Then, and in such instances, the question of waiver of privilege would be material. The issue before this Court is not the admissibility of information against the accused, but rather, whether or not having been sworn and placed under oath, he deliberately falsified.

PROPOSITION NO. 3

TRIAL JUDGE WAS NOT DISQUALIFIED

According to the record, as set forth in the Appellant's Brief, prior to the trial of this case, attorney for the Appellant filed application and petition for a change of judge. Upon the affidavit of the Appellant to the effect that the presiding judge, before whom the action was pending, was prejudiced against him and that the defendant believed said judge would not grant him a fair and impartial trial.

It is respectfully submitted that this is the only indication of record that there was any doubt concerning the ability of the Court to hear the matter fairly. The affidavit, which at the most states a conclusion of the

Appellant, is the only evidence that the Judge was either biased or prejudiced.

A review of the record and pages 3 to 15 of the transcript discloses that in the selection of the jury the court absolutely insured that the Defendant would be afforded a fair trial. Nowhere in the proceedings does it appear that this attitude changed during the course of the trial. This court has repeatedly held that the motion seeking to disqualify a trial judge on the ground of bias and prejudice is addressed to the discretion of the judge. He must decide the motion the same as any other matter which comes before him. Musser vs. Third Judicial District Court, 106 Utah 373, 148 Pac. (2d) 802. An affidavit stating that the judge is biased and prejudiced does not show disqualification. Cox vs. Dixie Packing Co., 72 Utah 236, 269 Pac. 1000. See also Haslam vs. Morrison—Utah—190 Pac. (2d) 520 and Willie vs. Local Reality Co.—Utah (April 28, 1948).

CONCLUSION

It is respectfully submitted that the verdict of the jury in this matter was based upon evidence which conclusively shows the guilt of the accused. Byington after disregarding an order of court, committed what may have been found to be a crime in living with another party without the sanction of a marriage ceremony. Then when questioned by the Court concerning apparent disobedience to his order, he perjured himself. Thereafter Byington attempts to gain a privilege by belately arguing that he would innerimiate himself by answering truthfully. The judgment and conviction should be affirmed.

GROVER A. GILES,
Attorney General of Utah

ANDREW JOHN BRENNAN,
Assistant Attorney General

Attorneys for Plaintiff and Respondent.