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State of Utah v. Blaine Gates : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

BLAINE GATES,

Defendant and Appellant.

Case No.

7421

RESPONDENT'S BRIEF

FILED

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment of the Third District Court wherein defendant was pronounced guilty of the crime of carnal knowledge. The appeal is based primarily upon the judgment roll.

The statement of facts contained in appellant's brief is substantially correct. Though we do not regard this discrepancy as controlling the questions involved, respondent points out that the only apparent amendment by interlineation on the face of the complaint is one changing the word "8th" to "16th." From all indica-

tions in the judgment roll, the phrase "or about" was typed into the complaint before it became a part of the record. Where there is an interlineation in an indictment or complaint, it must be presumed, in the absence of a contrary showing, that the change was made before indorsement by the grand jury foreman or verification by the complainant. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Cook v. State*, 119 Ga. 108, 46 S. E. 64. Except for the extent of the amendment of the complaint, respondent agrees with appellant's statement of facts.

STATEMENT OF POINTS

For the affirmance of the judgment below, respondent will rely upon the following propositions:

1. Reverification of a complaint is not necessary because the date of the offense has been amended unless the date is of the essence of the offense.

2. A plea of "not guilty" to an information, without defendant having moved to quash, operates as a waiver of antecedent defects.

ARGUMENT

I.

REVERIFICATION OF A COMPLAINT IS NOT NECESSARY BECAUSE THE DATE OF THE OFFENSE HAS BEEN AMENDED UNLESS THE DATE IS OF THE ESSENCE OF THE OFFENSE.

Defendant's argument, as we understand it, is this: Where a prosecution for a crime is founded upon an information, rather than an indictment, the accusation must be laid in the first instance by a verified complaint. Without a verified complaint the committing magistrate is without jurisdiction to act; and when a material amendment is made to a complaint that document must be reverified. Here there was a material amendment but no reverification, therefore the magistrate lost jurisdiction to proceed. Inasmuch as the magistrate had lost jurisdiction, defendant was never granted a preliminary hearing on the crime of which he stood accused. But defendant is entitled to a preliminary hearing in every instance unless the hearing is waived. There was no waiver, therefore the conviction on the information should be reversed.

The argument has some validity, but under the facts here it is based upon two assumptions that are unwarranted. The first assumption is that a variance in the date of the offense is material to the crime charged.

It is well established that an indictment, information or complaint may be amended by a court as to matters of form only, 22 C.J.S., Criminal Law, § 314. It is also the general rule that an allegation as to the time or date is usually regarded as a matter of form, unless the act must have been committed at a particular time in order to constitute the offense charged. 7 A.L.R. 1516, 68 A.L.R. 928. This court has often held that such an amendment may be made to an information although

the original information was drawn according to the charge in the complaint. *State v. Sheffield*, 45 Utah 426, 146 Pac. 306; *State v. Distefano*, 70 Utah 586, 262 Pac. 113, 116; *State v. Cooper*, (Utah) 201 P. 2d 764.

The rule is statutory in Utah. In 105-21-12 Utah Code Annotated 1943, it is provided:

“(1) An information or indictment need contain no allegation of the time of the commission of the offense unless such allegation is necessary to charge the offense under section 105-21-8.

(2) The allegation in an information or indictment that the defendant committed the offense shall in all cases be considered an allegation that the offense was committed after it became an offense and before finding of the information or indictment, and within the period of limitations prescribed by law for the prosecution of the offense.”

The provisions for amendment of informations and indictments are contained in 105-21-43. In 105-21-42 it is provided that any unnecessary allegation shall be considered surplusage.

This court held in *State v. Cox*, 106 Utah 253, 147 P. 2d 858, that the time need not be alleged in the information and, if alleged, need not be proved as alleged, but may be proved to have been committed at any time during the period of limitations and before the date of the information.

The above cases indicate that the rules governing amendments to informations are very liberal—of such a nature that they guarantee the efficiency of criminal pro-

cedure and at the same time protect the rights of accused persons. That the same liberal rules should apply to complaints is demanded both by logic and by statute.

By amending the charge during the preliminary examination, the defendant is notified very early in the proceedings of the date which the state intends to prove. The possibility of prejudice resulting from surprise at this stage is virtually non-existent. What the state can accomplish later in the proceedings it can, a fortiori, in most instances do earlier.

If there was, prior to 1935, some doubt about the right to amend the complaint it should have been dispelled by the amendment that year to 105-11-1 Utah Code Annotated 1943. That section sets out the necessary contents of a complaint (the date is not mentioned) and then provides:

“However, in cases of public offenses triable on 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, Revised Statutes of Utah, 1933, as enacted by Chapter 118, Laws of Utah, 1935.”

It is argued that by changing the date the state changed the nature of the offense. A similar argument was presented to the court in *State v. Sheffield*, 45 Utah 426, 146 Pac. 306, decided before the amendment to 105-11-1. There the court upheld an amendment of the information as to date even though the new date was for a

different act than the one originally. The decision was based on the ground that the same offense was charged and that inasmuch as the complaint could have been amended, so could the information. Said the court:

“Time being immaterial, the adulterous act of the 16th was as much charged in the complaint and in the information as the one on the 23rd. To hold otherwise is to hold that the State was bound by the date laid in the complaint and in the information. As to this, the case of *State v. Hilberg*, 22 Utah 27; 61 Pac. 215, is in point.

* * * *

What here is the charged offense? Adultery, committed by the defendant with W. within the venue and jurisdiction of the court. What are the essentials of that offense? That the defendant, a married man, within that venue and jurisdiction carnally knew W., a woman not his wife. It is of little moment when that sexual intimacy, that criminal act, was committed so long as it is alleged and proved to have been committed prior to the filing of the information and within the period of limitation. * * *

There can be no doubt that, under the complaint charging the criminal act or offense on the 23rd, the magistrate could have investigated one claimed to have been committed on the 16th. The one being charged as well as the other, evidence before the magistrate to establish the charged offense was as permissible to show the one as the other. Since the information may be as broad as the complaint and for any criminal act or offense charged or embraced within it and which under it properly could have been investigated by the magistrate, it necessarily followed that what was

alleged in the complaint and which could have been proved under it as the act or offense charged may also be alleged in the information and proved under it * * *."

While *State v. Sheffield* was questioned by the majority opinion in *State v. Nelson*, 52 Utah 617, 176 Pac. 860, it was questioned only to the extent of its application to a situation where different dates charged are for different acts. And Justice Frick's concurring opinion in the Nelson case is enlightening.

In the present case there is nothing in the record to indicate that the act committed on the 16th was a different act from the one originally charged on the 8th. And even if we conclude that an amendment may not be made so as to charge a different *act* constituting the same offense, still the defendant must show, *by the record*, that two different acts are charged. The defendant has failed in this regard. A reversal may not be had on conjecture alone; the defendant must show that he has been prejudiced. In the bill of exceptions there is some testimony of other offenses committed by the defendant against the prosecutrix, but there is no evidence of any other specific act.

There can be no serious contention that there was a possibility of placing the defendant in double jeopardy. The crime of which he was convicted is sufficiently defined to identify the offense without dispute. The holding of a preliminary examination does not place a defendant in jeopardy. *State v. Dean*, 69 Utah 268, 276, 254 Pac. 142.

II.

A PLEA OF "NOT GUILTY" TO AN INFORMATION, WITHOUT DEFENDANT HAVING MOVED TO QUASH, OPERATES AS A WAIVER OF ANTECEDENT DEFECTS.

At common law convictions were often set aside for some technical defect in the proceedings prior to trial. As the penalties for conviction became less severe there was no longer a need for the technical requirements in procedure that had theretofore existed. The courts themselves saw this and to a certain extent ameliorated the rules that had prevailed. The legislatures, too, saw a need for a type of procedure which would protect accused persons and yet at the same time enable the state to procure convictions where the facts demanded it. To this end rules of pleading and trial were liberalized so as to prevent the guilty from relying upon technical objections to overcome what otherwise would be substantial justice. The preliminary examination, often conducted by magistrates without legal training, and hence often open to technical objections, was one of the objectives of the curative effects of 105-16-2 Utah Code Annotated 1943:

"No defect or irregularity in or want or absence of any proceeding or statutory requirement, prior to the filing of an information or indictment, including the preliminary hearing, shall constitute prejudicial error and the defendant shall be conclusively presumed to have waived any such defect, irregularity, want or absence of proceeding or statutory requirement, unless he shall before pleading to the information or indictment specifically and expressly

object to the information or indictment on that ground. Whenever the consent of the state to such waiver by the defendant is required, such consent shall be conclusively presumed unless the state before or at the time the defendant pleads to the information or indictment expressly objects to such waiver.”

This should be read with 105-23-10:

“If the defendant does not move to quash the information or indictment before or at the time he pleads thereto he shall be taken to have waived all objections which are grounds for motion to quash except those which are also grounds for a motion in arrest of judgment.”

Under the provisions of 105-23-3 (2) (a) one of the grounds for a motion to quash an information is that it was filed “without the defendant first having had or waived preliminary examination.” Thus we see that defendant would be barred by the provisions of two separate sections of the code from objecting, at this stage of the proceedings, to the amendment of the complaint by the magistrate. See *State v. Freeman*, 93 Utah 125, 135, 71 P. 2d 196; *State v. Crank*, 105 Utah 332, 142 P. 2d 178; *Rogerson v. Harris*, 111 Utah 330, 178 P. 2d 397; *State v. Leek*, 85 Utah 531, 535, 39 P. 2d 1091.

In the instant case the defendant proceeded through the preliminary examination, pleaded to the information, made no objections to the introduction of evidence of the offense of the 16th, made no motion for a new trial or in arrest of judgment—and then appealed

claiming he had not been granted a preliminary hearing on the offense charged. To reverse a conviction in such a case would be to abrogate well-defined principles of procedure.

CONCLUSION

The date not being material to the charging of an offense under our Code of Criminal Procedure, an information may be amended as to the date at any time, so long as the defendant is not prejudiced by the amendment. The rules applicable to amendment of informations are to be applied also to complaints.

Furthermore, even if we were to regard the amendment as one of substance rather than form, the failure of the magistrate to require the complainant to reverify the complaint was subject to attack by way of a motion to quash the information, and, defendant having failed to make any such motion, the objection to the defect was waived.

For the foregoing reasons the judgment and sentence of the court below should be affirmed.

Respectfully submitted,

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