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State of Utah v. Michael Joseph Jiminez : Brief of Appellant

Utah Supreme Court

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Robert B. Hansen; Robert R. Wallace; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff - Respondent,)	
)	
vs.)	Case No.
)	
MICHAEL JOSEPH JIMINEZ,)	15776
)	
Defendant - Appellant.)	

BRIEF OF APPELLANT

Appeal from the judgment in a criminal action entered by the Third Judicial District Court in and for Salt Lake County, State of Utah, Judge Dean Conder, presiding.

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AUG 31 1978

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Defendant was charged in a Criminal Information signed by Assistant Attorney General, Robert Wallace with the offense of theft in violation of Utah Code Annotated 76-6-405 (Supp. 1977), for obtaining or exercising control of the property of Alpha Distributing by deception and with a purpose to deprive Alpha Distributing of its property.

DISPOSITION IN THE LOWER COURT

The jury found the defendant guilty of the offense and the defendant was sentenced on April 11, 1978, by Judge Dean Conder to an indeterminate term of one to fifteen years in the Utah State Prison. Both the District Court and the Utah Supreme Court refused to enter a Certificate of Probable Cause staying the execution of the commitment.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the order of the lower Court refusing to quash the Information and an order of this Court declaring that the trial Court was without jurisdiction and the judgment entered is void; or, in the alternative an order awarding the appellant a new trial.

STATEMENT OF FACTS

The Information filed and issued in the Third District Court was signed by Robert Wallace, as Assistant Attorney General on behalf of Robert Hansen. (R.). The Salt Lake County Attorney did not sign or file the Information. The entire proceedings in this case from the original Complaint to and including the trial was prosecuted by the Utah Attorney General's Office.

The first witness at the trial was Anthony Escobar, the President of Alpha Distributing Company and President of Inter American Development. (T.27). He was also the sole owner of Inter American Development, a corporation without a board of directors or any other stockholders (T.27). Mr. Escobar first met the defendant on the first of June 1976 (T.) when Mr. Escobar approached Mr. Jiminez about taking over a bankrupt professional soccer team the "Golden Spikers" (T.84). The defendant at the time was an officer in Tri Delta Corporation and entered into some discussion with Mr. Escobar about the acquisition of the professional soccer

franchise by Frontier, U.S.A., a corporation controlled by Tri Delta Corporation (T.88,37).

According to Mr. Escobar, an oral agreement was entered into between Alpha Distributing and the defendant on behalf of Tri Delta Corporation to transfer all of the assets of Alpha Distributing to Frontier, U.S.A., in exchange for which Anthony Escobar would become President of Alpha Distributing Co., Vice-President of Frontier, U.S.A., and stockholder in Frontier, U.S.A. (T.32,88).

Prior to the oral agreement there was discussion and negotiations between the defendant on behalf of Frontier U.S.A. and Anthony Escobar. (T.86). On direct examination, Mr. Escobar stated that Mr. Jiminez made certain representations to him (T.18). He stated Mr. Jiminez said that he was the chairman of the board of Tri Delta Corporation, a multi-million dollar conglomerate, that Frontier U.S.A.'s stock was trading at \$5.00 per share, that he had millions of dollars of Exxon and Phillips Petroleum oil stocks at his disposal through a company called Kimberly Beers, that he was the owner of Continental Bank and Trust Company, that he was owner of a bank in Idaho, that he owned a company called "Zero Cold" and that he had a project known as "White Barns" (T.19-21). He was also given pro forma financial statements for Tri Delta and Frontier, U.S.A. (T.21, States Exhibit 2).

On cross examination, Mr. Escobar stated that he didn't check on any of these statements or representations prior to making the oral agreement (T.91). He also said that he

understood that the term "pro forma" was used in the financial statements meant the potential of the companies or what could be done given the right circumstances (T.95).

Mr. Escobar stated that the defendant, Mr. Jiminez on behalf of Frontier U.S.A. paid to the soccer team \$10,000.00 in the form of a cashier's check which was deposited in the account of Tri Delta Corporation (T. 120). Out of this account and the account of Alpha Distributing Co., Mr. Escobar paid the expenses incurred by the soccer team. (T.50-62, States Exhibit 5). The soccer team which was known as the "Utah Pioneers" played four games in 1976 and made the league play offs (T.85). Other than the payment of \$10,000.00 Mr. Jiminez incurred additional obligations in the amounts of \$4,400.00 and \$8,000.00 in relation to expenditures for the soccer team (T.244). The evidence also showed that Mr. Escobar received a salary from Alpha Distributing during July and August of approximately \$3,000.00 and the use of a Lincoln Mark IV (T.146).

Lyle Jenkins, an employee of Alpha Distributing, testified that Mr. Jiminez stated in his presence that he was the owner of "Zero Corporation" and Frontier U.S.A. (T.164). He also recalled Mr. Jiminez stating that he was "in hopes of pulling together an exclusive franchise by acquiring the Pioneer Soccer Team..." and substantial sums of money into Alpha Distributing (T.164). After Mr. Escobar had resigned and abandoned his position with Alpha Distributing, Mr. Jenkins called Mr. Jiminez seeking some assistance as to

what to do with the company (T.173). In November, 1976, Lyle Jenkins sent \$1,000.00 to Mr. Jiminez after disposing of certain assets (T.169). At the time of forwarding this money, Mr. Jenkins recalled that he discussed obtaining an attorney with Mr. Jiminez (T.174). Mr. Jiminez stated that this money was given to an attorney (T.250).

The State introduced the testimony of several witnesses in relationship to the representations made to Mr. Escobar; Fred Jensen, Robert Phillips, Keith Downs, Burt Elg, John Kelly, Conrad Scheidell, and Emerson Burgess.

The defendant, Michael Jiminez took the stand in his own behalf (T. 233 to T. 279). He testified that he was Vice-President and Chairman of the Board of Tri Delta Corporation and that Tri Delta Corporation had an interest in Frontier U.S.A. (T.236). He stated that the business of Tri Delta Corporation was to be a representative under a finder's fee arrangement to obtain borrowers in obtaining collateral. He stated that he did not have anything to do with the day to day operation of the team and that he had signed all the checks on the joint account in blank before he returned to California (T.240).

Mr. Jiminez said that Tri Delta Corporation had transferred \$4,400.00 to Kimberly Beers, a New York Corporation to obtain collateral for the purpose of borrowing the \$38,000.00 necessary to pay the soccer team franchise (T.241). Subsequent to this agreement, Mr. Jiminez learned that Kimberly

Beers wasn't going to honor this agreement and Frontier U.S.A. was unable to obtain the franchise (T.243).

He stated that there was never a formal consummated merger between Tri Delta Corporation and Alpha Distributing Co. and that the matter was merely under discussion by the two corporations (T.247). He stated that Tri Delta Corporation made an investigation of Mr. Escobar's Corporation, Alpha Distributing and found that the debts far exceeded their assets (T.249).

Mr. Jiminez or Tri Delta Corporation never personally received any money funds or property from Alpha Distributing Co. (T.252). He also explained that he never indicated to Mr. Escobar that he owned any of the property as Mr. Escobar claimed that he did but was negotiating with several of those businesses (T.251 - T.256).

After the conviction, the appellant filed a complaint for Writ of Habeas Corpus in Third Judicial District Court action No. 31004 claiming that the plaintiff was being held in custody pursuant to a void Information. On May 11, 1978 Judge Peter F. Leary dismissed the complaint for a Writ of Habeas Corpus on the grounds that this present appeal was pending.

I

THE ATTORNEY GENERAL DID NOT HAVE AUTHORITY TO FILE THE INFORMATION AND TO PROSECUTE PUBLIC OFFENSES IN SALT LAKE COUNTY.

The appellant was arraigned on August 5, 1977 in the

Third Judicial District Court and entered a plea of not guilty. The Information was filed and signed by Robert R. Wallace, Assistant Attorney General, on behalf of Robert B. Hansen, Attorney General and was not officially authorized by the Salt Lake County Attorney.

On February 24, 1978, after the attorney representing the appellant at the time of arraignment had withdrawn, the new attorney for the appellant filed a Motion to Quash the Information on the grounds the prosecutor had no authority to file the Information. The Motion was denied on March 1, 1978, by the Honorable Ernest F. Baldwin, on the basis that the Motion was not timely filed with the Court as required by Utah Code Annotated 77-16-2 and 77-23-10 (1953).

On March 6, 1978 the defendant was tried before a jury in an action prosecuted by Robert R. Wallace, Assistant Attorney General. Prior to the trial, the attorney for the appellant moved the Court to dismiss the action on the ground that the Attorney General had no authority to act as a public prosecutor. This Motion was also denied by the trial Court.

The power and authority of public prosecutor is vested solely in the office of the County Attorney by virtue of Utah Code Annotated 17-18-1 (1953), which was enacted in 197. That section states:

"17-18-1. Powers--Duties--Prohibitions.--
The county attorney is a public prosecutor
and must:
(1) Conduct on behalf of the state all

prosecutions for public offenses committed within his county, except for misdemeanor prosecutions under city or town ordinances and appeals therefrom. . .

(3) The county attorney shall, when it does not conflict with other official duties, attend to all legal business required of him in his county by the attorney general, without charge, when the interests of the state are involved. All the duties and powers of public prosecutor shall be assumed and discharged by the county attorney. The county attorney shall appear and prosecute for the state in the district court of his county in all criminal prosecutions, and may be interested and render such assistance as may be required by the attorney general in all such cases that may be appealed to the Supreme Court; he shall attend the deliberations of the grand jury; he shall draw all indictments and informations for offenses against the laws of this state within his county and shall cause all persons indicted or informed against to be speedily arraigned.

(14) If at any time, after investigation, by and a finding and recommendation from the district judge involved, that the county attorney in any county is unable to satisfactorily and adequately perform his duties in prosecuting a criminal case without additional legal assistance, the attorney general shall provide such additional assistance."

In addition, the Code of Criminal Procedure places upon the County Attorney the authority to file Informations and additional duties and responsibilities concerning the decision to file an Information. Utah Code Annotated 77-17-1 and 77-17-2 (Supp. 1977).

A review of Section 17-18-1 discloses that the legislature took into account the Attorney General's Office is setting up the system of prosecuting public offenses in Utah. Subsection (14) of that statute sets forth conditions precedent to the involvement of the Attorney General's Office; The

district court judge must first make an investigation and a finding and recommendation that the county attorney is unable to satisfactorily and adequately perform his legal duties in prosecuting a criminal case without additional legal assistance. Utah Code Annotated, 17-18-1 (14)(1953).

The authority and power of the Attorney General in relationship to the County Attorney has been faced by the courts of several neighboring states.

In State v. Woodahl, 495 P. 2d 182 (Mont. 1972), attorney in Montana must conduct all prosecutions and file and sign all Informations and the Attorney General did not have any such power. This decision was based upon Section 16-3101 of the Montana Code which is set forth in the opinion and which is substantially similar to Utah Code Annotated 17-18-1.

In Woodahl, the Montana Supreme Court overruled the contention that the Attorney General has any common law power to file Informations. The Court held that the statute vesting authority in the County Attorney to file Informations expressly supercedes and abrogates any common law power of the Attorney General.

In relationship to the power of the Attorney General to supervise the County Attorney the Court stated:

"This opinion is not to be construed as any limitation on the supervisory powers and control of the Attorney General over the County Attorneys of this state as provided by law. This opinion simply holds that under the facts and circumstances here, the Attorney General has no legal power to file an Information signed only by himself or to institute a criminal felony prosecution in the District Court independent of the County Attorney."

In Ryan v. Eighth Judicial District Court, 503 P. 2d 892 (Nev. 1972) the Nevada Supreme Court reached a similar result on this issue in a habeas corpus action. The Court held that the Attorney General's Information was void for lack of jurisdiction and discharged the defendant from custody. The Court stated:

"Indeed our statutory scheme invests control of the Information process in the District Attorney to the exclusion of others. The legislature wisely has forbidden dual control. For example, NRS 173.045(1) provides that all Informations shall be filed by the District Attorney. He may elect not to file an Information after a preliminary examination has occurred and the accused has been held to answer, but must give his reasons in writing for not doing so. NRS 173.055(2)... These provisions declare the legislative purpose to grant the District Attorney of the proper county control over the Information process. The Attorney General is not mentioned, and the conclusion is inevitable that he simply is not empowered to initiate a prosecution by Information independent of the District Attorney."

In the opinion in Ryan, the Nevada Court found that the power to "supervise" the District Attorney which the Nevada statute grant to the Attorney General "means supervision and cannot sensibly be read as a grant of power to usurp the function of the District Attorney." The Court held that the Attorney General's power to commence or defend a suit applies only in the civil area and does not include the prosecution of criminal cases. Thus the Nevada Court rejected the same arguments which are being made in the present case by the Utah Attorney General.

The Colorado Courts have reached a similar result. People Ex Rel Witcher v. District Court, 549 P. 2d 778 (Colo. 1976) and Tooley vs. District Court, 549 P. 2d 774 (Colo 1976).

The appellant respectfully submits that the power and authority over the informational process in the State of Utah has been vested by the legislature with the County Attorney and excludes any involvement by the Attorney General except if the requirements of Section 17-18-1 are met. In the present case, the trial court did not make any finding or recommendation that the County Attorney was unable to satisfactorily or adequately perform his duties. There is no explanation in the record why this public offense was not prosecuted by the County Attorney of Salt Lake County rather than before Attorney General. The Attorney General did not have any authority to file the Information either under Utah Constitution Article VII, Section 18 or Utah Code Annotated 67-5-1 (1953). The power to file Information has been expressly and specifically granted exclusively to the office of County Attorney by virtue of Utah Code Annotated 17-18-1 (1953).

II

THE INFORMATION FILED BY THE ATTORNEY GENERAL HAS NO FORCE AND EFFECT AND THE LOWER COURT ERRED IN RULING THE APPELLANT WAIVED THE JURISDICTIONAL DEFECT.

The lower Court ruled that the Information was valid because any objection to it was waived not because of any

finding that the Attorney General had the power to file the Information. Notwithstanding the fact that the defendant-appellant had retained new counsel after the arraignment, the lower Court found that the objections concerning the Information had been waived because not presented at the arraignment.

The appellant contends that the Information is the only pleading filed in a criminal case which gives the Court jurisdiction over the defendant and the subject matter of the action. The authority for this proposition is found in two early Utah cases, State v. Beddo, 22 Utah 432, 63 P. 96 (1900) and Connors v. Pratt, 28 Utah 258, 112 P. 399 (1910).

In State v. Beddo, 22 Utah 432, 63 P. 96 (1900), the defendant was convicted in a prosecution conducted under our Information filed by the District Attorney under authority of Chapter 56 of the laws of 1899 and not the County Attorney. The Court found that the law enabling the District Attorney to file the Information was unconstitutionally passed by the legislature and that the District Attorney, whose office was created by the act, had no power to sign and file the Information. The Court then held that since the proper official, the County Attorney, had not signed and filed the Information under which the defendant was prosecuted, the Court had no jurisdiction to try the case and the conviction and sentence were void.

Ten years later in the case of Connors v. Pratt, 28 Utah 258, 112 P. 399 (1910), a person convicted in 1902 on the

basis of an Information filed by the District Attorney filed a Writ of Habeas Corpus. Following the authority of State v. Beddo, the Utah Supreme Court held the Information was void and of no force and effect because it was not signed by the County Attorney. The Court then found that the petitioner was released from any legal restraint imposed by such a void commitment.

The remaining question is whether the appellant waived his right to contest the jurisdictional defect of the void Information by not raising the matter at the time of the entry of his plea.

Utah Code Annotated 77-23-10 (1953) which deals with the effect of a failure to make a timely Motion to Quash specifically provides that all objections which are grounds for a Motion in Arrest of Judgment are not waived by raising these objections at the time of arraignment.

In State v. Merritt, 247 P. 497 (1926) the Utah Supreme Court stated that defects in the Information is jurisdictional matter and properly a subject of a Motion in Arrest of Judgment. In this decision, the Supreme Court cited State v. Beddo for the proposition that jurisdictional issues could be raised at any time.

Thus the appellant submits that this matter is not subject to being waived under 77-23-10 because of the jurisdictional nature of the objection.

In addition, Rule 12(h) of the Utah Rules of Civil Procedure, incorporated by Rule 81(e) provides that sub-

ject matter jurisdiction is never waived. Because the Information is the only pleading giving the Court subject matter jurisdiction, the Court acquires no jurisdiction to try a criminal action under a void Information.

As this Court found in Hakki v. Faux, 16 Utah 2d 132, 396 P. 2d 867 (1964), if the proper procedure is not followed for invoking the jurisdiction of the Court, the Court is powerless to act in the matter.

The appellant submits that because the Attorney General did not have the power to file the Information, the lower Court erred in not dismissing and quashing the Information improperly filed in this matter.

III

THE LOWER COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION TO DISMISS THE INFORMATION BECAUSE THE STATE FAILED TO PROVE ALL OF THE ELEMENTS OF THE OFFENSE.

The appellant made a motion at the close of the case in chief by the State to dismiss the Information (T.229). The trial Court denied this motion (T.230).

In State v. Nuttal, 16 Utah 2d 171, 397 P. 2d 797 (1964), this Court reversed a conviction of obtaining property by false pretenses charged under Utah Code Annotated 76-20-8 (repealed 1973). The Court in carefully reviewing the facts in that decision found that the alleged victim did not suffer actual loss and reversed the conviction in the lower Court. As in the present case, the facts involved concerned a business transaction entered into by two people and one

the frustrated parties became the complaining witnesses.

This Court has under the former statute, Utah Code Annotated 76-20-8 (repealed, 1973), that if the purported victim gets what he has bargained for there in no actionable fraud or deception and the determination of this issue is to be made immediately after the person parts with his property. State v. Casperson, 71 U. 68, 262 P. 294 (1927), and State v. Howd, 55 Utah 927, 188 P. 628 (1920).

Utah Code Annotated 76-6-401 (1953) defines "obtain" as used in the statute deficiency theft by deception to mean an act "to bring about a transfer of possession or of some other legally recognized interest in property..."

In the present case, the appellant was originally charged with obtaining the property of Anthony Escobar and Alpha Distributing Co at the close of the State's case the trial Court granted the defendant's motion that the State did not introduce a prima facie case as to Anthony Escobar (T.232).

The appellant respectfully contends that the State did not prove all of the elements of the offense and that Mr. Jiminez acted in any way to obtain money from Alpha Distributing. On the contrary, the appellant submits that the evidence did not show anything more than a risky joint venture which failed causing a loss to both parties.

Mr. Escobar, as president and stockholder of Alpha Distributing Co. stated that he approached Mr. Jiminez with the idea of taking over a franchise of a bankrupt soccer

team, an admittedly risky venture (T.84). Mr. Escobar was to manage the team and stated that according to the oral agreement, he was to receive an ownership interest in the franchise (T. 31 and 126). He further stated that during the time of July and August 1976, Alpha Distributing Co. was having trouble paying its bills (T.102).

On the other hand, the Tri Delta Corporation and Mr. Jiminez contributed about \$22,000.00 to the expense of the ill fated soccer team (T.120 and 244). Neither he or any of the corporations ever received any income from the soccer team or money from Alpha Distributing Co., the alleged victim (T.252).

Frontier U.S.A. was negotiating to obtain a franchise which was conditionally granted but never obtained (T.259 and 185). The entire soccer league eventually went out of business (T.274).

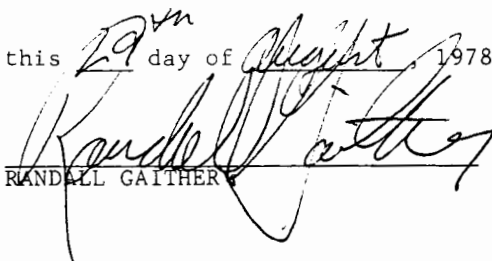
A review of evidence by this Court will show that the evidence did not warrant the trial Court in allowing the case to be submitted to the jury. The State did not prove that the appellant ever obtained any property of the alleged victim and that this was anything more than a failed joint business venture. The Court should therefore reverse the lower Court.

CONCLUSION

The appellant was committed in this case on the basis of a void Information and therefore this Court should reverse the decision of the lower Court in not quashing the Information.

and order that the lower Court dismiss the Information and commitment entered against the appellant. Secondly, the State did not introduce sufficient evidence to allow the case to be presented to the jury; and, therefore, this Court should reverse the lower Court's denial of the appellant's Motion to Dismiss or, in the alternative award the appellant a new trial.

RESPECTFULLY SUBMITTED this 29th day of August, 1978.


RANDALL GAITHER