1978

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

Utah Supreme Court

Randall Gaither; Attorney for Defendant-Appellant;
Robert B. Hansen; Robert R. Wallace; Attorneys for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 15776

MICHAEL JOSEPH JIMINEZ, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT IN A CRIMINAL ACTION ENTERED BY THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, JUDGE DEAN CONDER PRESIDING

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STATEMENT OF THE NATURE OF THE CASE

Appeal by Appellant from his criminal conviction for Theft by Deception, a second degree felony, in violation of Utah Code Ann. § 76-6-405 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was convicted by a jury in the Third Judicial District Court, in and for Salt Lake County, and sentenced by Judge Dean Conder to a term in prison of not less than one nor more than fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent prays this Court to affirm the decision of the lower court.

STATEMENT OF FACTS

The statement of facts is divided into two parts. Subsection A states the facts of the offense. Subsection B outlines the procedural steps before trial.

A.

Mr. Anthony Escabar, a former professional soccer player and owner of Alpha Distributing Co., a Salt Lake City home furnishings distributor, was introduced in June, 1976, to the appellant, Michael Joseph Jiminez (T. 11), and began business dealings with defendant.

The appellant represented to Mr. Escabar: (1) that he was Chairman of the Board of Directors of Tri-Delta Corporation, a large California corporation, (2) that Tri-Delta owned Frontier U.S.A., a multi-million dollar corporation with stock trading at $5.00 per share in the over-the-counter market (T. 18); (3) that he had millions of dollars of Exxon and Phillips Petroleum Company stock available to him through Kimberly-Beers Company; (4) that he owned Zero Cold, a large restaurant equipment supply corporation doing the major

supplying to such large food chains as Kentucky Fried Chicken, Wendy's Restaurants, McDonalds, Winchel's Donuts (Exh. 2, T. 19), (5) that he owned Harbor Rest Memorial Park in Southern California; (6) that he owned White Barns Condominiums in Ogden, Utah, the Capitol Heights Apartment Building project behind the State Capitol Building in Salt Lake City, Utah, and a large shopping center, Continental Bank & Trust, an Idaho Bank, and Dollar A Day Rent A Car, (T. 18-21); (7) that he could get any amount of money from the Ogden branch of First Security Bank of Utah, where he already had a number of loans in excess of several million dollars secured by some of his stock in his various companies (T. 21).

That these representations were made, is corroborated by a brochure from Tri-Delta Corporation given to Mr. Escabar by the appellant (Exh. 2, T. 21) and by testimony of other witnesses including Ogden Attorney Robert V. Phillips (T. 155-160).

Based upon these representations of financial success and the appellant's claimed ability to provide sufficient capital, on July 29, 1976, Mr. Escabar entered into an agreement with the appellant to attempt to acquire a soccer franchise and operate a soccer team in Utah (T. 23, 31, 39).

The essential elements of the agreement between the appellant and Mr. Escabar were that Mr. Escabar would (1) remain President of his own Alpha Distributing Company, which would be taken over by appellant's multi-million dollar Company, Frontier U.S.A; (2) become Vice President of Frontier U.S.A.; (3) receive $20,000.00 cash as a down payment for the purchase of Alpha Distributing by Frontier, and which would be used for soccer expenses; (4) receive Frontier U.S.A. stock worth $200,000.00, at the going rate of $5.00 per share; (5) become President of the to-be-acquired soccer team which would be known as the Utah Pioneers; (6) receive a car and a credit line from Tri-Delta Corporation (T.26-37,44). Defendant was to: (1) Pay the $20,000.00 cash to Escabar and (2) financially support the Utah Pioneers Soccer Team through Tri-Delta Corporation and Frontier U.S.A. (T. 29-32, 74). Appellant stated that he would give all the profits from the operation of the soccer team to the LDS Church. This fact was stated again for the press and public at subsequent news conferences through major Salt Lake City television stations and newspapers (T.40,42). The defendant had a letter prepared for Mr. Escabar's use which stated, in relevant part, that:

"One. Alpha Distributing is now a wholly owned subsidiary of Tri-Delta Corporation. Two. Mr. Anthony Escabar has been duly appointed by the President of Tri-Delta and confirmed by the Board of Directors as a Vice President of Tri-Delta and President of Alpha Distributing. Three. Tri-Delta Corporation will guarantee and support Alpha Distributing . . . ." (T. 38, lines 24-30)

The defendant's primary interest in acquiring the soccer team was publicity (T. 19, 252).

Following the agreement and negotiations with the American Soccer League for future payment of the Soccer Franchise, Escabar was to organize and operate the soccer team. Of the promised $20,000, $10,000 was eventually paid by appellant by check, but the check bounced (T. 45, 46). A later check cleared another bank (T. 47).

Following this initial check from the appellant, no more of the promised financial support was provided by the appellant for the operation of the soccer team and Mr. Escabar was forced to pay soccer expenses with capital of Alpha Distributing, expecting reimbursement so Alpha Distributing would not go bankrupt through loss of operating capital (T. 48). Mr. Escabar contacted appellant numerous times and informed him of his cash needs for the operation of the soccer team (T. 47). The appellant promised Mr. Escabar that monies would be sent, but in the meantime, instructed Mr. Escabar to

continue paying expenses from the Alpha accounts (T.48). Mr. Escabar never received any further money from the appellant for the operation of the soccer team and was forced to pay all expenses from his own personal sources or the accounts of Alpha (T.69,74). In several cases, soccer players were given merchandise from Alpha in order to satisfy amounts owed them as salary for playing (T.168). At trial, the State produced numerous checks made by Alpha to cover the costs and expenses of the Utah Pioneers soccer team (T.50-69).

The State produced evidence that many of appellant's original material representations were false. Emerson Burgess stated at trial that he was the President of Zero Cold Corporation during 1976 (T.216). He testified that the defendant had offered to buy Zero Cold, but that the sale never went through (T.224,225). Fred Jenson testified that in 1976 he was an officer of a California bank that owned Harbor Rest Memorial Park (T.107). He stated that the defendant had negotiated to purchase the cemetary, but never came up with any money (T.112). He testified defendant never owned Harbor Rest.

Keith Downs testified that he was president of White Barns Condominiums and golf course in Ogden, Utah,

in 1976 (T.191). Downs testified that the defendant never had any ownership interest in White Barns (T.192).

Burt Elg testified that he was Vice President and Trust Officer of Continental Bank and Trust (T.197). He stated that bank records showed no bank ownership interests in the name of the defendant, Tri-Delta or Frontier U.S.A. (T.198).

John H. Kelly testified that he was secretary and treasurer of the Capital Heights project in 1976. (T.200). Mr. Kelly further testified that neither the defendant, Tri-Delta or Frontier U.S.A. every possessed any ownership interest in Capital Heights (T.202).

Conrad Scheidell testified that at the time appellant made representations, Frontier U.S.A. stock was not being sold over the counter, but that he had sold two (2) lots at $.62 per share, not $5.00 per share (T.204-207).

In addition to this evidence, Bill Marcroft, a local television sportscaster, testified that he spoke with the appellant in 1976 at a news conference announcing the soccer team's formation (T.210). Mr. Marcroft stated that when he asked the appellant how much money he was going to put into the franchise, the defendant told him he

would put $21 million into the team (T.211). The appellant told Mr. Marcroft that he was a millionaire and wanted the team for publicity (T.212).

In January of 1977, Escabar made a final plea to defendant for money for his dying company (T.70-73). He received in return a letter stating that the original agreement had been rescinded back in August of 1977 (T. 70-73). However, Escabar had never been notified of any rescission until January, and Escabar had had conversations with defendant after August in which the agreement appeared still to be in force (T.70-73).

Also, Lyle Jenkins, a later manager of Alpha Distributing, testified that he was instructed by defendant in October to sell one of the remaining assets of Alpha Distributing and send the proceeds to the defendant in California. A check was produced to show that the proceeds were sent to defendant (R.168-169).

After the presentation of all the evidence, the jury found the defendant guilty of theft by deception. This appeal follows.

B.

The procedural facts of which the Court should be aware are as follows:

1. August 3, 1977, an information, signed by Robert R. Wallace, was filed in Third District Court (R.7).

2. August 5, 1977, appellant was arraigned in District Court. At the arraignment appellant was represented by H. Ralph Klemm and Gerald L. Turner (R.8).

3. August 15, 1977, appellant moved to quash the information on the grounds that the facts did not constitute an offense. The motion was denied and a bill of particulars was ordered (R.11).

4. Trial was set for October 19, 1977 (R.8).

5. October 19, 1977, the trial was continued to December 12, 1977 (R.15).

6. November 15, 1977, Mr. Klemm and Mr. Turner withdrew as counsel (R.16).

7. December 12, 1977, Randall Gaither appeared for appellant and moved for a continuance of the trial based upon the grounds that "defense counsel having just accepted the case and not being ready for trial at this time." Trial was set for March 6, 1978 (R.17).

8. January 17, 1977 (sic, 1978) Randall Gaither sent a motion to withdraw as counsel to Robert R. Wallace, Assistant Attorney General, but did not file the motion with the court nor obtain an order for withdrawal (R.46). A copy of this motion was introduced at a hearing on appellant's motion to quash before Honorable Judge Ernest Baldwin, March 1, 1978. A transcript of this hearing was not included in the documents forwarded to this Court, although all documents were designated (R.110).

9. February 24, 1978, Randall Gaither filed a written notice of appearance of counsel with the court and a Motion to Quash (R.28,29).

10. March 1, 1978, a hearing on the Motion to Quash was held before the Honorable Ernest F. Baldwin (R.27).

11. The motion was denied on the grounds that the "said motion was not timely filed." (R.27,27).

12. March 6-8, 1978, trial was held.

ARGUMENT

POINT I

THE ATTORNEY GENERAL OF THE STATE OF UTAH HAS THE AUTHORITY TO FILE AND SUBSCRIBE A CRIMINAL INFORMATION IN A STATE DISTRICT COURT.

The Utah State Constitution, Article VII, Section 1, provides for the duties of the Attorney General as follows:

> "The executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, and Attorney General. . . They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law." (Emphasis added.

Article VII, Section 18, further provides:

> "The Attorney General shall be the legal adviser of the State officers, and shall perform such other duties as may be provided by law." (Emphasis added.)

Utah Code Ann. § 67-5-1 (1953), as amended, states:

> "It is the duty of the Attorney General:
> (1) To attend the Supreme Court of this state, and all courts of the United States, and prosecute or defend all causes to which the state . . . is a party.
> * * *
> (5) To exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices.
> * * *
> (7) When required by the public service or directed by the governor to assist any district or county attorney in the discharge of his duties."

Utah Code Ann. § 67-5-1 (1953), as amended, was specifically interpreted in Meyers v. Second Judicial District Court, 108 Utah 32, 156 P.2d 711 (1945). In that case the appellant argued that the Attorney General did not have the power or right to appear before a grand jury as a prosecutor. The Court specifically quoted Sections (5) and (7) of the above mentioned statute and held that the Attorney General did have the authority to appear as a prosecutor before a grand jury.[1] The Court quoted Sacramento County v. Central Pacific

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1 In Meyers, the Court quotes Utah Code Ann. § 87-6-1 (1943), which has since become Utah Code Ann. § 67-5-1 (1953), as amended; the language of both statutes is identical.

Ry. Co., 61 Cal. 250 (1882), in ruling that:

> "The District Attorney had the power to commence and prosecute the action, subject to the supervision of the Attorney General (Pol. Code, 470.) The last named officer has power, whenever, in his opinion, the public service requires it, to 'assist' the District Attorney. (Ibid.) When he thus assists the District Attorney, he may, by virtue of his 'supervisory power over the District Attorneys in all matters pertaining to the duties of their offices,' assume a paramount control and direction of the business he and the District Attorney are jointly conducting." 156 P.2d at 715. (Emphasis added.)

Thus, the Attorney General has certain enumerated statutory powers, which have been interpreted to include the ability to appear before a grand jury as a prosecutor, Meyers, supra, but all these powers are in addition to those previously existing under the common law.

The State of Utah has statutorily adopted the common law of England by way of Utah Code Ann. § 68-3-1 (1953):

> "The common law of England so far as it is not repugnant of, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

Although it is not generally the duty of the Attorney General to conduct criminal trials in lower courts, he may do so in states where the Attorney General exercises common law powers. 7 C.J.S., Attorney General, § 9, p. 1234. Specifically, this power encompasses all aspects of the prosecution, from filing an information to the ultimate termination of proceedings. People v. Karrella, 35 Mich.App. 541, 142 N.W.2d 676 (1971); State v. Daviess Circuit Court, 236 Ind. 624, 142 N.E.2d 626 (1957).

In Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969), the Utah Supreme Court considered the question of whether the Attorney General has common law powers in a case where the Attorney General sought to initiate a declaratory judgment action to determine the constitutionality of certain legislative amendments. The Court observed that the states are split on the issue; noted that the majority favor upholding such common law power and made a strong argument in favor of upholding the common law powers of the Attorney General in Utah. 456 P.2d at 178.

A recent survey by the National Association of Attorneys General (hereinafter NAAG) reveals that the opinion of the Utah Court in Hansen is consistent with the position that is taken in the vast majority of state jurisdictions which have also held that the Office of the Attorney General

is vested with the common law powers. (Page 39, National Association of Attorneys General, Committee on the Office of Attorney General, February, 1971.) Attached is a tabular summary prepared by the NAAG, together with an index of the state decisions in support thereof (Appendix A and B).

Courts in many jurisdictions have considered the relation of the powers of the Attorney General enumerated by statute to those existing under common law. Most courts follow the rationale expressed by the New York Court in People v. Miner, 2 Lans. 396 (1868):

> "As the powers of the Attorney General were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred."

Florida's court in State ex rel. Landis v. S. H. Kress & Co., 155 So. 823 (Fla. 1934), stated:

> ". . . the duties of such an office are so numerous and varied that it has not been the policy of the Legislatures of the states to specifically enumerate them; that a grant to the office of some powers by statute does not deprive the Attorney General of those belonging to the office under the common law." Id. at 827.

In State ex rel. Barrett v. Boeckeler Lumber Co., 257 S.W. 453 (Mo. 1924), the Missouri Court concurred:

> "A grant by statute of the same or other powers does not operate to deprive him [the Attorney General] of those belonging to the officer under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred. (6 C.J. 816). This view has been tacitly accepted, and acted upon, in this state for many years." Id. at 456.

Therefore, in states like Utah which have adopted the common law, it is not necessary to enumerate the powers of the Attorney General, but the additional grant of specific, statutory responsibilities serves simply to supplement the common law powers, unless the statutes specifically divest the Attorney General thereof.

An integral part of the combined common law and statutory powers of the Attorney General is the ability to file an information and prosecute a public offense in District Court. People v. Karrella, supra; State v. Daviess Circuit Court, supra.

POINT II

BECAUSE THE STATE PROVED ALL OF THE ELEMENTS OF THE CRIME OF THEFT BY DECEPTION, THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS.

Appellant argues that his failure to object

to the alleged defect in the information at or before arraignment is rescued by the fact that jurisdictional defects in the information are grounds for a Motion in Arrest of Judgment and such issues can be raised at any time. Appellant contends that an information signed by a person not authorized is jurisdictionally defective. Thus, argues appellant, the supposed jurisdictional defect can be raised at any time and is not waived by failure to object before or at arraignment.

Respondent asserts that appellant should have raised his objection at the proper time in order to allow respondent to correct the supposed defect and that his failure to object at or before arraignment or at least at the earliest practical time, waived any subsequent objection.

As previously outlined, Utah Code Ann. § 67-5-1 (1953), as amended, gives the Attorney General "supervisory powers" over "all matters pertaining to the duties" of the county attorney. Additionally, this statute provides that the Attorney General may "assist any . . . county attorney in the discharge of his duties" when requested by the governor or when, in the judgment of the Attorney General, the "public service" so demands. In Sacramento County v. Central Pacific Ry. Co., supra, it was determined that the Attorney General could assume the "paramount control and

direction" of a case he and a county attorney were jointly prosecuting.

Taken together, all of these statutory and caselaw pronouncements of the Attorney General's duties and authority lead to the reasonable conclusion that, at the very least, at certain times the Attorney General has power to file an information and fully prosecute any subsequent matters following therefrom. The officer who has the power to "supervise," or to assume a primary role in joint business would also have the basic authority and powers of the person supervised. For example, under the rubric of the National Labor Relations Act, although some persons are designated as supervisors and given supervisory duties, they still have the power and authority to perform any of the tasks of the persons supervised. N.L.R.B. v. Ertel Mfg. Corp., 352 F.2d 916 (C.A. Ind., 1965); N.L.R.B. v. Florida Agric. Supply Co., 328 F.2d 989 (C.A. Fla. 1964).

This conclusion finds further support by considering the obvious legislative concern when giving the Attorney General power to supervise, assist and/or assume the primary role in a case jointly prosecuted with a county attorney.

Pursuant to that legislative concern, the Attorney General was given all of the powers of a county

attorney to be exercised at various times, the most obvious of which would include death, disability, resignation or other absence of a county attorney, conflict of interest of the county attorney in a particular case, overwhelming caseload at a particular time, requested assistance, etc.

Likewise, the Governor is empowered by statute to request the Attorney General to "assist any . . . county attorney in the discharge of his duty." If that assistance required the preparing and signing of an information by the Attorney General, it is logical to assume that the Governor's request for aid presupposes sufficient power in the Attorney General to prepare and file an information.

Thus, from the statutory grants of power previously examined it is reasonable to conclude that at least at given times and in given circumstances the Attorney General can prepare and sign an information. A defendant prosecuted under such an information might then legitimately raise the question, "Was this an appropriate case for the exercise of that power?" This question is not jurisdictional and is properly waived unless raised by a timely motion to quash the information.

Because this question is not jurisdictional, Utah Code Ann. § 77-23-5(2) (1953), specifically provides that one ground for a motion to quash an information is: "(c) That the prosecuting attorney had no authority to file the information." Thus, defendant could and should have filed a motion to quash the information clearly based on the above stated grounds, but Utah Code Ann. § 77-23-1 (1953), requires the defendant to raise his motion to quash the information before or at the time of arraignment on the information or at least in a timely manner. Otherwise, the objection is waived.

> "Upon being arraigned the defendant shall immediately, unless the court grants him further time, either move to quash the information or indictment, or plead thereto, or do both. If he moves to quash, without also pleading, and the motion is withdrawn, or overruled he shall immediately plead."

In the instant case the information charging appellant was filed on August 4, 1977 (R.7), and the appellant pled thereto on August 5, 1977 (R.8), but he did not file his motion to quash the information until March 1, 1978 (R.29), just five days before trial was scheduled to begin (R.18). Defendant's motion was clearly untimely in light of the Section 77-23-1 requirement that such a motion be raised only before or at arraignment or at least in a timely manner (by leave of the court) as was found by the lower court (R.47).

When the defendant failed to raise his objection to the information at the time of his arraignment or as soon as practical thereafter with leave of the court, he waived his right to subsequently contest the validity of the information. Utah Code Ann. § 77-21-5(2) (1953), prohibits any "objection to an information on the ground that it was not subscribed or verified (as provided in Section 77-21-5(1)). . . after moving to quash or pleading to the merits." (Emphasis added.) Therefore, when defendant pleaded to the information and made no motion to quash such before or at the time of his arraignment or as soon thereafter as practical, he waived any right to object to the content, authority or signing of the information. This conclusion was also reached by the lower court (R.47).

Utah Code Ann. § 77-16-2 (1953, as amended) provides:

> "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 such ground. Whenever the consent of the state to any 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 statute contemplates the circumstances of this case. Even though Mr. Gaither did not represent appellant at his arraignment, he actively represented appellant as early as December 12, 1977. He had ample time to challenge any alleged defects in the information long before the March 6, 1978 trial date. Even though appellant failed to challenge the validity of the information, he does not argue that any prejudice or injustice resulted because of the alleged infirmities in the information. The State provided a bill of particulars (R. 12-14, 32-34), it provided and discussed with appellant's attorney all of the state witnesses, (R. 30-31) and it did not oppose appellant's motions to continue the trial date. No confusion or conflict existed about who was

prosecuting the charged offense. Appellant's waiver did not result in hardship or unfairness, nor did it compromise or jeopardize any possible defenses. Utah Code Ann. § 77-23-10 (1953, as amended) also provides that all objections which would be grounds for a motion to quash, except those which are grounds for a motion in arrest of judgment, are waived unless timely raised. Utah Code Ann. §§ 77-34-1 and 77-35-10 define grounds for a motion in arrest of judgment. These statutes include jurisdictional defects, but do not include challenges to the appropriateness of a supervisory prosecutin authority exercising that authority, as in the case here.

Under statutory provisions, appellant is presumed to have conclusively waived any possible defects in the information and his challenge is without merit.

This same result has also been reached in several other jurisdictions with similar statutory requirements as to informations. Gerlaugh v. Florida Parole Commission, 139 So. 2d 888 (Fla., 1962); State v. Amart, 328 S.W. 2d 569 (Mo., 1959); Arnold v. State, 233 Ark. 3, 342 S.W. 2d 291 (1960). Specifically, in Gerlaugh v. Florida Parole Commiss supra, the defendant contended that a constitutional provision required the state's attorney to sign an information and not an assistant state's attorney as had done so in the

information charging defendant. Defendant Gerlaugh did not raise this objection until after he had pleaded to the information. The Supreme Court of Florida, while noting several cases where it had reversed a decision based on this same contention, where such contention had been raised in a timely fashion, refused to entertain defendant's objection because he had not raised it before pleading to the information. The Florida Court stated that granting the desired relief to the defendant:

> ". . .who has waived his right to object, as pointed out in the previous cases, is clearly unjustified. The quoted language must be considered as holding only that upon timely objections to an information on the ground that it was not signed by the State's Attorney such an information is null, void and of no effect." 139 So. 2d at 890

The purpose behind this longstanding rule is clear. When the defendant objects to the information before he pleads thereto or as soon thereafter as practical, it gives the court an opportunity to examine his objection to the information before incurring the costs, in time and money, of going to trial. If the court finds the objection to be without merit, the defendant must then proceed to trial and focus his efforts on those proceedings. At that point, further contentions as to the information cannot be raised in order to allow the court to handle trial proceedings without distraction.

Where the court finds defendant's objections to the information to be meritorious, it must allow the state to correct the errors if possible, or, where the errors cannot be corrected, quash the information. U.C.A. § 77-17-3 (1953) allows an information to "be amended, without leave of court, in any matter of form or substance at any time before the defendant pleads thereto." Specifically where an information has not been properly verified according to section 77-21-5, section 77-23-3(2)(b) allows the prosecuting attorney to correct the verification at the hearing on the motion. If the prosecuting attorney does such, the motion to quash will be overruled. This requirement has special application in the instant matter because an assistant County Attorney was present at each stage of the proceedings (as illustrated by selected minute entries - R. 15, 17), and could have properly verified the information had he been requested. But because defendant failed to timely motion the court to quash the information and challenge the signing of the information by an assistant attorney general, the State was not given the opportunity to amend the allegedly defective information as allowed in sections 77-17-3 and 77-23-5 (2)(b). Thus, defendant's failure to challenge the information in a timely fashion not only waived his right to

challenge it at a subsequent date, but also prejudiced the respondent's ability to amend the information by correcting the supposed deficiency.

Thus, respondent asserts that the lower court properly determined that defendant's motion was not filed in a timely manner. Moreover, because defendant failed to timely object, he waived his right to challenge the alleged error in the information and robbed respondent of his opportunity to amend the information by correcting the alleged defect.

Respondent further notes that if this Court accepts defendant's contentions that the Attorney General cannot sign an information, that his signing of the instant information was a jurisdictional defect and therefore reversed defendant's conviction, jeopardy would not attach and defendant could be prosecuted a second time under a valid information. State v. Roedl, 107 Utah 538, 155 P. 2d 741 (1945). Such a decision would mean not only that all the time defendant has served on his first conviction would be considered dead time, but that the State would be put to the expense, in both time and money, on a new trial. Respondent asserts that it is contrary to public policy to force the state to assume the burden of a new trial in the instant matter on the basis of an alleged defect in the information.

POINT III

BECAUSE THE STATE PROVED ALL OF THE ELEMENTS OF THE CRIME OF THEFT BY DECEPTION, THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS.

Defendant argues that Alpha Distributing did not suffer actual loss and got merely what it bargained for in its association with the defendant. Believing that there was no actual loss by Alpha Distributing, defendant reasons that an element of the crime of theft by deception as described in U.C.A. § 76-6-405 (1973) was not established and that his motion to dismiss should have been granted.

Respondent asserts that every element of the crime of theft by deception was established at defendant's jury trial and, therefore, the trial court properly denied defendant's motion to dismiss.

Defendant was charged with and convicted of theft by deception as described in U.C.A. § 76-6-405 (1973):

> "A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof."

The elements required to be proven by the State in a prosecution for theft by deception are found in Utah Code Annotated, §76-6-401:

"(1) 'Property' means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula, or invention which the owner thereof intends to be available only to persons selected by him.

(2) 'Obtain' means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) 'Purpose to deprive' means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) 'Obtain or exercise unauthorized control' means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) 'Deception' occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed." (Emphasis added.)

In addition to the above elements, the Utah Court has required that the victim sustain a "pecuniary or property loss by reason of the transaction relied upon." State v. Morris, 85 Utah 210, 38 P. 2d 1097, 1100 (1934). But to this requirement the following caveat exists:

> " . . . the actual fraud and prejudice . . . is determined according to the situation of the victim immediately after he parts with his property. If he gets what was pretended and what he bargained for, there is no fraud or prejudice." 38 P. 2d at 1099.

See also State v. Fisher, 70 Utah 115, 8 P. 2d 589 at 590 (1932).

In the instant case, the State established each and every element of the crime of theft by deception. The defendant claimed to be the owner of numerous business enterprises including Continental Bank and Trust Co., Zero Cold Corporation, Harbor Rest Memorial Park, White Barns Golf Course, and the Capitol Heights project. (T. 18-20). Additionally, defendant told Mr. Escabar, as Alpha's representative, that certain stock he would be given was trading at $5.00 per share. (T. 18). Defendant further represented that he would put $21 million dollars into the Utah Pioneers Soccer Team (T. 211) and that he would provide total financial backing and operating capital for the team. (T. 38).

At trial each of these representations was proven to be false and that defendant made these representations knowing them to be such. (T. 112, 192, 198, 202, 216).

Each of these representations was made with the intent to obtain control over the property of Alpha Distribu This element was established by the fact that the defendant required Alpha Distributing to "become a part of Frontier U.S. stating that Frontier "needed assets", (T. 32), that the defendant provided no money for team expenses after the initial funding (T. 69, 74), and that defendant instructed Mr. Escabar to pay team expenses out of Alpha Distributing accounts with the promise that he would reimburse Alpha, but such reimbursement was not forthcoming. (T. 47, 48, 69, 74). At trial, the State clearly established that defendant wanted the soccer team solely for publicity purposes (T. 19, 252), hoping that such exposure would benefit his loan fee operatio

Actual fraud resulted when Alpha Distributing paid substantially all of the expenses of the Utah Pioneers, expenses which the defendant had promised to pay, and the defendant got the benefit of advertising and newspaper and television exposure through his alleged "ownership" of the team. It is clear that obtaining a benefit, such as advertising, through fraud and deceit will sufficiently establi

one of the elements of theft by deception. Stokes v. State, Okl. Cr., 336 P. 2d 425 (1961). See also Beasley v. People, 168 Colo. 286, 450 P. 2d 658 (1969).

Finally, Mr. Escabar repeatedly testified that he entered into the soccer agreement with the defendant on behalf of Alpha because of the defendant's representations of financial success and security (T. 23, 39).

All of these facts, taken together, amount to the theft of Alpha's property by deception as defined by U.C.A. § 76-6-401(5)(e) (1973) quoted above.

Thus, the State having established all the elements of theft by deception, there was no basis for the trial court to grant defendant's motion to dismiss and such was properly denied.

CONCLUSION

The Attorney General had authority to file the information in this case. The lower court correctly ruled that appellant had waived any objection to possible defects in the information because any such defects were not jurisdictional. Appellant's motion to dismiss was not viable and the state sufficiently proved all the elements of the crime charged.

Appellant was prosecuted by a proper authority and his conviction should be affirmed.

Respectfully submitted.

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APPENDIX A

COMMON LAW POWERS OF THE ATTORNEY GENERAL

	Has Such Powers	Not Decided	No Such Powers	Comments
bma	X			Where not limited by statute or constitution
ka	X			Where not limited by statute or constitution
ona			X	Case law denies powers
nsas	X			Where not limited by statute
fornia	X			Most powers now defined by statute
rado	X			Limited case law
ecticut	X			Where not limited by statute, constitution, or court
ware	X			Case law does not specify powers
ida	X			Where not limited by statute
ois		X		Insufficient case law
		X		No statutes or case law
li	X			Statutes give Attorney General common law power
	X			Has power to institute certain actions
ois	X			Has extensive powers, through case law
na			X	Courts limit Attorney General to statutory power
	X			1970 case affirmed power
s	X			Case law
cky	X			Where not limited or modified by statute
iana			X	Common law not recognized in state
	X			By statute and case law
land		X		Not developed by legislature or courts
chusetts	X			Wide range of powers, through case law
gan	X			Wide range of powers, through case law
sota	X			By case law, not statute

	Has Such Powers	Not Decided	No Such Powers	Comments
ssissippi		X		Not fully established by statute or case law
souri	X			By case law, not statute
[illegible]	X			By case law
raska	X			Where not limited by statute
ada	X			By case law, has all common law power.
Hampshire	X			Case law
Jersey	X			Reaffirmed by statute and constitution
Mexico			X	Courts deny Attorney General common law power
York		X		Case law in conflict
h Carolina	X			Implied from statute and case law
h Dakota		X		Insufficient case law
			X	No case law, but a code state
homa	X			By case law
on		X		Case law divided, but powers essentially statutory
sylvania	X			Extensive case law
to Rico			X	No case law
e Island	X			By case law
a		X		No case law
h Carolina	X			Certain powers exercised
h Dakota			X	Courts limit Attorney General to statutory power
ssee		X		No statutes or case law
		X		No statutory basis; case law divided
	X			1969 case affirmed power
nt	X			By statute
n Islands	X			In the absence of laws to the contrary
nia	X			Has powers, by virtue of constitutional status
ngton	X			Where not limited by statute
Virginia	X			Case law

	Has Such Powers	Not Decided	No Such Powers	Comments
nsin			X	Dicta only in recent cases
ng		X		Insufficient case law
d States			X	

CASES CONCERNING THE COMMON LAW POWERS OF THE ATTORNEY GENERAL

Alabama	State ex rel. Carmichael v. Jones, 252 Ala. 479, 41 So. 2d 280 (1949).
Alaska	None
Arizona	Smith v. Superior Court in and for Cochise County, 101 Ariz. 559, 442 P. 2d 123 (1967).
Arkansas	State ex rel. Williams v. Karstan, 208 Ark. 703, 187 S.W. 2d 327 (1945).
California	California Securities Co. v. State, 111 Cal. App. 258, 295 Pac. 583 (1931).
Colorado	State Board of Pharmacy v. Hallett, 88 Colo. 396, 296 P. 540 (1931).
Connecticut	None
Delaware	Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A.2d 397 (1941).
Florida	State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934).
Georgia	Walker v. Georgia Railway & Power Co., 146 Ga. 655 92 S.E. 57 (1917).
Guam	None
Hawaii	The King v. Robertson, 6 Haw. 718 (1889).
Idaho	Padgett v. Williams, 82 Idaho 28, 348 P.2d 944 (1960)
Illinois	Department of Mental Health v. Coty, 38 Ill. 2d 602, 232 N.E. 2d 686 (1967).
Indiana	State ex rel. Neeriemer v. Daviess Circuit Court of Daviess County, 142 N.E. 2d 626, 236 Ind. 624 (1957).
Iowa	State ex rel. Turner v. State Highway Commission, District Court for Polk County, Equity No. 73960 (12 January, 1970).
Kansas	State v. City of Kansas City, 186 Kan. 190, 350 P. 2d 37 (1960).
Kentucky	Commonwealth ex rel. Attorney General v. The Monroe Co., 378 S.W. 2d 809 (1964).
Louisiana	Saint v. Allen, 177 La. 350, 134 So. 246 (1931).
Maine	Watts Detective Agency v. Kagadahoc, 137 Me. 233 18 A. 2d 316 (1941).
Maryland	None
Michigan	Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921).
Minnesota	Slezak v. Ousdigian, 260 Minn. 303, 110 N.W. 2d (1960).

Mississippi	State ex rel. Patterson for Use and Benefit of Adams County v. Warren, 180 So. 2d 298 (1965).
Missouri	State ex rel. Taylor v. Wade, 360 Mo. 895, 231 S.W. 2d 179 (1950).
Montana	Woodahl v. State Highway Commission, 465 P.2d 818 (1970).
Nebraska	State v. State Board of Equalization, 123 Neb. 259, 242 N.W. 609 (1932).
Nevada	State ex rel. Fowler v. Moore, 46 Nev. 65, 207 P. 75 (1922).
New Hampshire	State v. Knowlton, 102 N.H. 221, 152 A.2d 624 (1959).
New Jersey	Petition of Public Services Coordinated Transportation, 5 N.J. 196, 74 A.2d 80 (1950).
New Mexico	State v. Reese, 78 N.M. 241, 430 Pac. 399 (1967).
New York	People v. Hopkins, 47 N.Y.S. 2d 222 (1944).
North Carolina	Sternberger v. Tannenbaum, 272 N.C. 658, 161 S.E. 2d 116 (1968).
North Dakota	State ex rel. Miller v. District Court, 19 N.D. 818, 124 N.W. 417 (1910).
Ohio	None
Oklahoma	State ex rel. Haskell v. Huston, 21 Okla. 782, 97 Pac. 982 (1908).
Oregon	State ex rel. Thornton v. Williams, 215 Or. 639, 336 P.2d 68 (1959).
Pennsylvania	Commonwealth v. Bardascino, 210 Pa. Super. 202, 232 A.2d 236 (1970).
Puerto Rico	None
Rhode Island	Suitor v. Nugent, 98 R.I. 56, 199 A.2d 722 (1964).
Samoa	None
South Carolina	Cooley v. S.C. Tax Commission, 204 S.C. 10, 28 S.E. 2d 445 (1943).
South Dakota	State ex rel. Maloney v. Wells, 79 S.D. 389, 112 N.W. 2d 601 (1961).
Tennessee	None
Texas	Garcia v. Laughlin, 155 Tex. 261, 285 S.W. 2d 191 (1956).
Utah	Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969).
Vermont	None
Virgin Islands	None
Virginia	James v. Almond, 170 F. Supp. 331 (1959).

Washington	State v. Taylor, 58 Wash. 2d 252, 362 P.2d 247 (1961).
West Virginia	Denham v. Robinson, 72 W.Va. 243, 77 S.E. 970 (1913).
Wisconsin	State ex rel. Reynolds v. Smith, 19 Wis.2d 577, 120 N.W. 2d 664 (1963).
Wyoming	Town of Cody v. Buffalo Bill Memorial Association, 64 Wyo. 468, 196 P.2d 369 (1948).