

1979

# State of Utah v. Frankie Quinn Sommers : Brief of Appellant

Utah Supreme Court

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Shelden R. Carter; Attorney for Appellant;

Robert B. Hansen; Attorney for Respondent;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	CASE NO. 16016
	)	
	)	
FRANKIE QUINN SOMMERS,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

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BRIEF OF APPELLANT

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Appeal from the Judgment of the Fourth  
Judicial District Court, In  
And for Utah County, State of Utah,  
HONORABLE GEORGE E. BALIFF  
JUDGE

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ATTORNEY FOR APPELLANT

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## TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE.....	1
DISPOSITION IN THE LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2-3
ARGUMENT.....	3-7
CONCLUSION.....	7-8

## CASES CITED

### STATUTES

UTAH CODE ANNOTATED, Section 76-6-501.....	1
UTAH CODE ANNOTATED, Section 76-15-9.....	4
UTAH CODE ANNOTATED, Section 76-15-10.....	4
UTAH CODE ANNOTATED, Section 76-15-11.....	4

### CASES CITED

BONHAM v. STATE, 142 Pac. 1092 (Okla. Crim.).....	4
HANDLEY v. ZENOFF, 398 Pac. 2d 241 (Nev. 1965).....	4
MCKAY v. STATE, 132 NW 741 (Neb. 1911).....	4
STATE v. HANSHAW, 112 Pac. 379 (Wash.).....	4
STATE v. HURD, 105 Pac. 2d 59 (Wash 1940).....	4
STATE v. MATTHEWS, 13 UT 2d 391, 375 Pac. 2d 392 (1962).....	6, 7
STATE v. REDMOND, 19 UT 2d 272, 430 Pac 2d 901 (1967).....	6
STATE v. VAN CLEVE, 32 Pac. 461 (Wash.).....	4

### OTHER AUTHORITIES

Article I, Section 12, Utah State Constitution.....	4
21 C.J.S. 2d Sec. 455 Criminal Law.....	4

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FRANKIE QUINN SOMMERS,	)	
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Defendant-Appellant.	)	
	)	
	)	

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Defendant was charged in the Fourth Judicial District Court of Utah County upon an information alleging a violation of the provisions of Utah Code Annotated, Section 76-6-501, a felony of the third degree. Particularly, the accusation against Mr. Sommers read that he:

"with intent to defraud, knowingly and intentionally uttered a forged instrument, to-wit: a bank check with the face value of less than one hundred dollars, purporting to bear the signature of Helvin R. Sommers, Sr., he, the said Frankie Quinn Sommers then and there knowing at the time that said check was forged."

### DISPOSITION IN THE LOWER COURT

The defendant entered a plea of "Not Guilty" and the matter was set for trial. Trial with jury was had on June 27, 1978 with the jury returning a verdict of "Guilty". Prior to entry of plea, the defendant motioned the District Court to Quash the Information upon the basis that the defendant had been denied his right to preliminary hearing upon the crime charged in the Information. The Court denied defendant's Motion to Quash.

### RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of judgment of the lower court, or failing that, a new trial.

### STATEMENT OF FACTS

At the time of Arraignment, the defendant moved the court to Quash the Information. The basis for such motion is that the defendant had not had a proper preliminary hearing upon the crime charged in the Information. In the Affidavit in Support of the Motion to Quash, the defendant, through his attorney, stated:

1. That a preliminary hearing was held May 8, 1978 in Provo City Court upon a complaint alleging that the defendant, Frankie Quinn Sommers, on the 10th day of April, 1978 did commit the crime of a "third degree felony, to-wit: violation of 76-6-501, Utah

Criminal Code, in that he, the said Frankie Quinn Sommers, at the time and place aforesaid, did willfully, and unlawfully make a forged instrument, to-wit: a bank check with a face value of less than one hundred dollars, purporting to bear the signature of Melvin R. Sommers, Sr., he the said Frankie Quinn Sommers, then and there knowing at the time that said check was forged..."

2. Utah County Attorney, Noall T. Wootton, moved to amend the complaint prior to the presentation of evidence, adding the words: "with the purpose to defraud another."
3. Evidence was then presented upon the complaint aforementioned. After the presentation of the State's evidence, County Attorney Noall Wootton again moved to amend the complaint. Mr. Wootton's proposed amendment was to substitute the word "utter" for and in the place of the word "make".
4. Attorney for defendant, Sheldon R Carter, then objected to the proposed amendment as substantially altering a charge or accusation made against the defendant. The amendment was allowed by the Provo City Judge and the complaint was then amended at that time substituting the word "utter" for the word "make".
5. The attorney for defendant was prepared for and did direct his questions of confrontation to the issue of "making a forged document", and that changing the language of the complaint to "utter" substantially and materially changed the complaint to the prejudice of the defendant by denying the defendant his right to a preliminary hearing.

The Court denied defendant's Motion to Quash and set the case for trial.

#### ARGUMENT

At a preliminary examination the magistrate must first read to the defendant the complaint. The Utah Code of Criminal

Procedure provides for a preliminary examination to be conducted by the magistrate first reading to the defendant the complaint and the depositions of the witnesses examined or making the complaint if depositions were taken. Utah Code Annotated, Section 77-15-9.

Further, witnesses are to be examined in the presence of the defendant and may be cross-examined on the defendant's behalf. Utah Code Annotated, Section 77-15-10.

After the examination of witnesses on the part of the State is closed, any witnesses the defendant may produce may be sworn and examined. Utah Code Annotated, Section 77-15-11.

Consequently, it appears that the defendant has the right to demand and know the nature and the cause or accusation against him, to have a copy thereof, to testify in his own behalf, and to confront the witnesses against him. See also Article I, Section 12, Utah State Constitution.

It appears well settled that a substantial amendment of an Information requires the accused be arraigned on the amended Information. State v. Hurd, 105 Pac. 2d 59 (Wash. 1940); State v. Van Cleve, 32 Pac. 461 ( Wash); State v. Hamshaw, 112 Pac. 379 (Wash); Bonhamn v. State, 142 Pac. 1092 (Okla. Crim.); Handley v. Zenoff, 398 Pac. 2d 241 (Nev. 1965); McKay v. State, 132 NW 741 (Neb. 1911); 21 C.J.S. 2d Sec. 455, Criminal Law.

In McKay v. State, (supra), the conviction of the accused



was reversed on appeal where the trial court allowed the prosecution to amend the information and proceed under the original amended information without allowing a new preliminary hearing. The State argued upon appeal that the amendment allowed by the court was immaterial and that no preliminary hearing was required.

The Court placed great emphasis on whether or not defense available to the defendant before the amendment was equally available after the amendment. A second factor mentioned by the Court which was of great importance was whether or not the amendment added any new elements of the crime not included in the original, unamended Information. Finding that the defendant was denied his right to a new preliminary hearing, the Court reversed the conviction.

In the present case before the Court, the defendant was arraigned in the Circuit Court upon a complaint alleging that he did "unlawfully make a forged instrument...". Defendant's attorney was prepared for and did direct his questions of confrontation to the issue of "making a forged document". After the State's presentation of evidence at the preliminary examination, the State moved to amend the complaint substantially altering the charge from "making a forged instrument" to uttering a forged instrument" and thereby prejudiced the defendant by denying the defendant his right to a preliminary examination and the rights thereunder.

The Utah Court has examined the issue in State v. Redmond, 19 UT 2d 272, 430 Pac 2d 901 (1967). There, the original information charged the defendant with "uttering a fictitious check purporting to be an instrument in writing for the payment of money of C. J. McCall". After the defendant had entered a plea of not guilty thereto, the Court permitted the District Attorney to amend by striking the name of C.J. McCall and inserting the name of Carl J. Coomb. On appeal the defendant contended that he had never had a preliminary hearing on the charge as contained in the amended information. In affirming the conviction, the Court held that the amendment was allowed to correct an "obvious" error and that the failure of the defendant to object was fatal. State v. Redmond (supra) is distinguished from the case at bar, in that, the amended information is not an "obvious" error and in addition, counsel for defendant made a timely objection.

In State v. Matthews, 13 UT 2d 391, 375 Pac. 2d 392 (1962) the defendant was charged and convicted with "misusing public monies". The original complaint and information did not allege or designate the defendant to have appropriated the public money while employed as a Deputy Salt Lake County Recorder. This latter phrase was included in an amendment to the Information proffered by the prosecutor just before he was to make his opening statement at trial.

The trial court, over the objection of the defense counsel, allowed the amendment.

On appeal, the defendant contended that the amendment had the effect of alleging new elements to the offense charged upon which he should be afforded another preliminary hearing. The Court found that although the defendant objected to the amendment, he did not advance his argument to the trial court and did not show a reason why the trial should not proceed at that time. Upon defendant's failure to do so, the court affirmed the conviction.

State v. Matthews, (supra) is distinguishable from the present case in that defense counsel advanced his reasons for the court to quash the information in his affidavit.

#### CONCLUSION

It is well settled that a substantial and material amendment to an Information requires that an accused be granted a new preliminary hearing upon that amended information. However, the defendant must preserve his right to a new preliminary hearing by a timely objection and through the advancement of reasons for a new preliminary hearing to the Court.

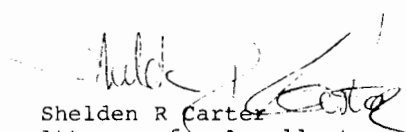
The amendment allowed by the Circuit Court judge, changing the crime from "making" a forged instrument to "uttering" a forged instrument substantially altered the crime charged.

Defense counsel properly objected to the amendment at the preliminary hearing stage and at arraignment in District Court through a Motion to Quash.

Further, defense counsel advanced reasons for a new preliminary examination to the trial court.

A new preliminary hearing should have been granted the defendant, and by the failure to do so, the defendant was prejudiced by the denial of his right to a new preliminary hearing and rights thereunder.

RESPECTFULLY SUBMITTED



Sheldon R. Carter  
Attorney for Appellant