

1979

State of Utah v. Lynn Dell Noren : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
-v-	:	
	:	
LYNN DELL NOREN,	:	Case No. 16018
	:	
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

An Appeal from the jury verdict and judgement of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

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Plaintiff-Respondent,	:	
-v-	:	
LYNN DELL NOREN,	:	Case No. 16018
	:	
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT
NATURE OF CASE

This is an appeal from the conviction by jury verdict for the charge of Fraudulent Handling of a Recordable Document in violation of §76-6-503, Utah Code Annotated, as amended, 1973, in the Third Judicial District, the Honorable Bryant H. Croft, judge presiding.

DISPOSITION IN LOWER COURT

Appellant was convicted by jury verdict rendered July 17, 1978, and sentenced to the Utah State Prison for the indeterminate term as provided by law of 0-5 years and a fine of \$5,000.00 on August 18, 1978.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this cause reversed and remanded to the trial court for appropriate action and dismissal of the charge set forth in the information.

STATEMENT OF FACTS

Of the seven counts originally charged against the defendant in the complaint (R. 8-10), six were dismissed by the Salt Lake City Court, Judge Robert C. Gibson, for insufficient evidence (R. 3-4), leaving the defendant bound over to be tried on the charge set forth in the information of Fraudulent Handling of a Recordable Document, a felony of the third degree, in violation of §76-6-503, U.C.A., as amended, 1973, to wit:

That on or about the 22nd day of January, 1976, in Salt Lake County, State of Utah, the said Lynn Dell Noren Falsified the Articles of incorporation of Nordell Financial Services, a writing for which the law provides public recording, with the intent to injure or deceive. (R. 11)

Prior to presentation of evidence on behalf of the state and pursuant to the Appellant's written motion filed with the Court prior to commencement of the proceedings (R. 56, T. 118) counsel for Appellant presented oral argument to quash or dismiss the information by reason of its failure to charge the Appellant with an offense. Simply put, counsel argued that articles of incorporation, being documents "filed" with the Secretary of State, are not documents "for which the law provides public recording." (R. 199-130)

The Court held as a matter of law that the phrase ". . . or other writing for which the law provides public recording. . ." includes within its meaning articles of incorporation and therefore the act of falsifying Articles of Incorporation and filing the same with the Secretary of State falls within the ambit of the statute charged, §76-6-503 supra.

In support of the allegation the State first called Raymond Bishop, who testified that the signature of one of the incorporators of Nordell Financial Services on its Articles of Incorporation (Ex. S-1) purporting to be in his hand was in fact not his and that he had given no one authority to sign his name as an incorporator thereof. (T. 149, l. 1-13)

Upon stipulation of counsel the state then introduced a transcript of the sworn testimony of Fawn Noren, (Ex. 7-5), wherein she stated that she had not signed nor did she recall granting authority to anyone to sign her name as an incorporator of Nordell Financial Services (Ex. S-1).

Robert Grube, a handwriting analyst, testified for the State that in his opinion the author of the names "Fawn Noren" and "Ray Bishop," appearing as incorporators of Nordell Financial Services, was the defendant, Lynn Dell Noren.

Ron Ferguson testified, without illuminating effect as to the merits of the allegation, that he notarized the signatures of the three incorporators names: Fawn Noren, I.P. Ozawa, and Ray Bishop. (T. 177)

Attorney Byron Fisher then testified on behalf of the State that he prepared the Articles of Incorporation (Ex. 1-S) as a result of a conference with the Appellant (T. 212-213). Important to the issues presented is the following cross-examination of Mr. Fisher:

Q.: Mr. Fisher, do you know of any limitation, as a matter of law, where a principal in filing a corporation with the State of Utah must disclose in any manner his principalship in that corporation?

A.: I know of no law that requires that.

Q.: In other words, if I were to form a corporation today, I need not disclose in any manner the fact that I am the owner of the corporation because I own all of the stock or I will after it is incorporated and after it is funded; is that correct?

A.: That is a correct statement and my understanding of the law.

Q.: I need not be a director; is that correct?

A.: That is correct.
(T. 217-218)

Based upon this state of the evidence, the State rested its case. (T. 223) Thereupon defense counsel moved for a directed verdict on the grounds that the State had failed to establish a prima facie case, specifically, that there was no evidence of intent to deceive or injure anyone by the act of falsifying the names on the documents. (T 223-224, 223-226)

Subsequent to the Appellants defense case and the State's rebuttal, the matter was submitted to the jury as charged over the defendant's objection that the matter should have gone to the jury not on the felony as charged in §76-6-503 supra, but upon the lesser included offence contained within §76-6-504, U.C.A. as amended, 1973, (T. 391-392).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RULING THAT ARTICLES OF INCORPORATION ARE "...A WRITING FOR WHICH THE LAW PROVIDES PUBLIC RECORDING..." WITHIN THE MEANING OF §76-6-504, U.C.A. 1973, AS AMENDED, AND FURTHER ERRED IN DENYING APPELLANT'S MOTION TO QUASH OR DISMISS THE INFORMATION FOR FAILURE TO STATE A PUBLIC OFFENSE.

There is a crucial distinction between what is "recorded" and what is merely "filed", as those terms are used in the Statutes of the State of Utah. Specifically with regard to Articles of Incorporation the legislature has provided that, among the other general duties of the Secretary of State, there shall be the requirement as set forth in §67-2-2(4), U.C.A., 1975, as amended:

To record in proper books all conveyances made to the state, and to file all articles of incorporation entitled to be filed in his office.
(emphasis supplied)

Throughout the fourteen subsections §67-2-2, i.d., which delineate the various duties of the Secretary of State, there is a studied and consistently maintained distinction between those items which it is provided shall be filed, received, deposited, taken, kept and those which shall be recorded. Interpreting the statute it would seem appropriate and reasonable to conclude that for those matters upon which members of the public might place heavy reliance, the legislature provided for recording: conveyances, official bonds of state officers, trade-marks. For other matters the statute calls for a lesser or different kind of act: filing, receiving, keeping, et cetera.

The law is clear that Articles of Incorporation need only be filed and not recorded:

.....If the Secretary of State finds that the articles of incorporation conform to law, he shall, when all fees have been paid as in this act prescribed:

(1) Endorse on each of such duplicate originals the word "filed" and the month, day and year of the filing thereof.

(2) File one of such duplicate originals in his office. §16-10-50 U.C.A., 1961 as amended.

Although Articles of Incorporation may then be a "public record", it cannot be said that the law has provided that Articles constitute a "writing for which the law provides public recording" as might be said of a deed, mortgage or security instrument. There is no particular emphasis to

be placed on the fact of filing articles of incorporation other than that by virtue of filing corporate existence comes into being. No particular notice of anything, save perhaps the name of the corporation, is imparted and it would be facetious to say that anyone, except the most naive, would rely upon the names of the incorporators as set forth in the filed copy of the articles for any purpose. As the record reflects ownership or directorship of the corporation are not required by Utah law to be disclosed in any manner so that any conflict of interest which might exist would in no way be reflected by the articles.

The only document mentioned in §76-6-503 not like a deed, mortgage, or security instrument is a will. Although provision is made for deposit of a will with the clerk of the court for its confidential safe keeping, §75-2-901, U.C.A., 1975, as amended, it is not a document for which "the law provides public recording". There is an excellent reason for this specific inclusion within §76-6-503, i.d. The interest in preserving the sanctity of a will, as distinguished from almost any other type of document, is great enough to warrant treatment of an offender of that sanctity with punishment as a felony. The same may be said of a deed, a mortgage, a security instrument, or other writing for which the law provides public recording as in the instance of an

Agricultural Cooperative Association for which, in contradistinction to the garden variety corporation involved in the instant matter, it is specifically set forth and provided the method of recording. §3-1-6, U.C.A., 1961 as amended.

Falsifying names of incorporators on an articles of incorporation is not the type of crime intended to be or in fact included within the crime charged in the information and the charge falls short of fulfilling the intendments of §76-6-503, i.d. The information should have been quashed or dismissed at trial.

POINT II

THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY AS A FELONY WHERE A CLEAR AND SPECIFIC STATUTE CONTROLLING THE SAME CONDUCT EXACTING A LESSER PENALTY EXISTS.

Falsifying, destroying, removing or concealing a will or deed are patently more culpable acts than falsifying the names of incorporators on an articles of incorporation. Commensurate with the lesser degree of culpability the legislature provided as follows for punishment as a class B misdemeanor the crime of Tampering with Records:

(1) Any person who, having no privilege to do so, knowingly falsifies, destroys, removes or conceals any writing, other than the writings enumerated in section §76-6-503, or record, public or private, with intent to deceive or injure any person or to conceal any wrong doing is guilty of tampering with records. §76-6-504 U.C.A., 1973, amended.

No doubt articles of incorporation are a public record and fall well within the purview of this statute. Certainly to the extent that there exists any confusion, the principles

as well as rulings of this court establish the proposition that when two statutes encompass like criminal conduct, the more specific and clear statute is applicable as well as that containing the lesser penalty. State v. Shondell, 22 Utah 2d 143, 453 P.2d 146 (1965); State v. Fair, 23 Utah 2d 34, 456 P.2d 168 (1969); Rammel v. Smith, 560 P.2d 1108 (Utah 1977) State v. Loveless, 581 P.2d 575 (Utah 1978). These cases stand for the proposition that the clear, specific and lesser penalty prescribed shall be applied when two statutes encompass the same conduct. In Shondell the Court also stated:

Related to the doctrine just stated is the rule that when there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser. 453 P.2d at 148

The conclusion follows that appellant was entitled to have the case submitted to the jury on §76-6-504 i.d., a misdemeanor, rather than §76-6-503, i.d., a felony.

POINT III

SECTION 76-6-503(1), AS CHARGED IN THE INFORMATION VIOLATES THE DUE PROCESS CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 7 OF THE UTAH CONSTITUTION IN THAT IT IS UNCONSTITUTIONALLY VOID FOR VAGUENESS.

Section 76-6-503(1) i.d., at least in its application against the appellant herein, violates due process in that it is unconstitutionally vague. "It is recognized that a reasonable degree of certainty in a criminal statute is an essential requirement of due process of law. State v. Minns, 80 N.M. 269, 454 P.2d 355, 356 (1969)."

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its application violates the first essential of due process. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

In Papachristou v. City of Jacksonville, 450 U.S. 156, 31 L. ed. 2d 110, 92 S. Ct. 839 (1972) the Supreme Court held a municipal ordinance vague on the basis that the ordinance failed to give a person of ordinary intelligence fair notice of what acts were proscribed and also because such vague enactments encourage arbitrary and erratic arrests and convictions. This concept was expanded in Grayned v. City of Rockford, 408 U.S. 408, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (footnote omitted) 408 U.S. at 108-109.

In ruling that articles of incorporation are a writing for which the law provides "public recording", Judge Croft hastened to add, "I may be wrong". (T. 129) Therein lies the problem. There is much question as to what this

"public recording" terminology means.

The case law in Utah applies the same standards and described factors that a court may consider in determining if a statute is unconstitutionally vague. See State v. Packard, 122 Utah 369, 250 P.2d 560 (1952); Graves v. State, 528 P.2d 805 (Utah, 1974).

The statute in question should be held unconstitutionally vague for the reasons set forth herein as well as those previously stated in Points I, II, and III.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANTS MOTION TO DISMISS AT THE END OF THE STATES CASE FOR THE REASON THAT THE STATE FAILED TO MAKE OUT A PRIMA FACIE CASE.

The State in its proof failed to marshal sufficient evidence to warrant submitting the matter to a jury. Reasonable minds could not differ in the opinion that sufficient proof of the statutory requirement, "intent to deceive or injure", §76-6-503, i.d., was not present to put appellant upon his defense or submit the matter to the jury.

Although an inference may be considered with all the other evidence in establishing guilt beyond a reasonable doubt, there nevertheless must be sufficient facts adduced to entitle the state to have the case go to the jury because the evidence is sufficient to counterbalance the general

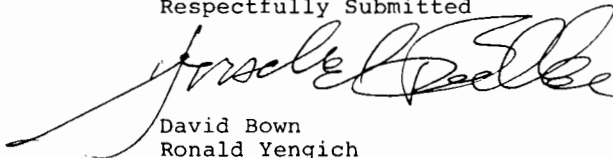
presumption of innocence Mantell v. Jones, Neb. 36 N.W.
2d 115; see also State v. Hall, 145 P.2d 494, (Utah 1944)

There was not sufficient evidence to submit this
case to the jury and the state failed to prove out a
prima facie case.

CONCLUSION

For the reasons above stated Appellant submits
that this action should be remanded with instructions to
the Trial Court to dismiss the action or for such other
relief as may be consistent with Appellant's position as stated
herein.

Respectfully Submitted

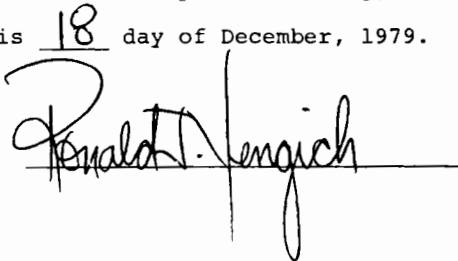
A large, stylized handwritten signature in black ink, likely belonging to David Bown, is written over the typed names.

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Ronald Yengich
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Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Defendant-Appellant to the office of the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 18 day of December, 1979.

A handwritten signature in black ink, appearing to read "Ronald T. Engich", is written over a horizontal line. The signature is stylized with a large initial "R" and a long, sweeping tail.