

1980

## State of Utah v. Lynn Dell Noren : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LYNN DELL NOREN,

Defendant-Appellant.  
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BRIEF OF RESPONDENT  
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AN APPEAL FROM THE JURY VERDICT AND  
JUDGMENT OF THE THIRD JUDICIAL DISTRICT  
COURT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE BRYANT S.  
CROFT, JUDGE, PRESIDING  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LYNN DELL NOREN,

Defendant-Appellant.

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Case No.  
16018

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BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a jury verdict finding him guilty of Fraudulent Handling of a Recordable Writing in violation of Utah Code Ann. § 76-6-503 (1953), as amended. The charge was based on appellant's filing of articles of incorporation for Nordell Financial Service with the Secretary of State after forging two signatures upon said articles of incorporation.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in the Third Judicial District Court, the Honorable Bryant H. Croft, presiding, on July 13, 14 and 17, 1978. Appellant was

convicted of violating Utah Code Ann. § 76-6-503 (1953), as amended, a felony of the third degree. Pursuant to the verdict, Judge Croft sentenced appellant to an indeterminate term of from 0-5 years imprisonment in the Utah State Prison, and imposed a fine of \$5,000.00.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and sentence pronounced by the lower court.

#### STATEMENT OF FACTS

During the years 1974 through 1976, the appellant operated a used car dealership called World of Autos located in Salt Lake County (R.300,341,343,253). Ireva Petty Ozawa also participated in the operation of World of Autos as a bookkeeper, having herself a 50 percent interest in the corporation (R.294,295). In October of 1975, appellant employed one Raymond L. Bishop to buy cars for World of Autos at car auctions in several Western states (R.133-135).

Under the normal procedure followed by World of Autos, when Ray Bishop bought a car he instructed the seller to send a "draft" or envelope containing the title to a bank in Utah (R.136,137). Ireva Petty Ozawa would then pay the price of the car to the bank, receive the title to the car, allowing it to be sold by World

of Autos (R.298-301). The bank charged World of Autos a fee of \$15.00 per draft (T.80).

During 1975, World of Autos began having difficulty paying for cars bought for resale purposes (R.340-341). To ease this problem, appellant determined to set up his own finance company, Nordell Financial Services, to eliminate having to pay a bank for handling drafts (R.140,301-302). Under this arrangement, drafts sent to Nordell would be available to World of Autos such that the latter would have the title to a car and could re-sell the car before paying the dealer from whom World of Autos bought the car (R.142).

Appellant had Byron Fisher, a Salt Lake attorney, draft articles of incorporation for Nordell and approached Ray Bishop and appellant's mother, Fawn S. Noren, about being incorporators of Nordell along with Ireva Petty Ozawa (R.147,212,326,247-248). Appellant did not want to be an incorporator of Nordell (R.260). Ray Bishop refused the request to become an incorporator and appellant's brother apparently cautioned Fawn Noren not to become involved (R.147,248).

On the 22nd of January, 1976, Ireva Petty Ozawa took the unsigned articles of incorporation to appellant at the Salt Lake Auto Auction. Without authority to do so,

appellant forged the signatures of Ray Bishop and Fawn Noren upon the articles (R.149,193,228,311). Ireva Petty Ozawa then took the document to Ron Ferguson, signed her name to it, and Mr. Ferguson notarized it (R.309,177). Ms. Ozawa proceeded to file the articles of incorporation in the Secretary of State's Office (R.312).

Appellant told Ray Bishop to tell the dealers from whom he bought the cars to begin sending drafts to Nordell (R.143). Bishop was also instructed by appellant to tell such dealers that World of Autos had been dealing with Nordell for a year and a half (R.144). In addition, appellant represented to Kenneth Don Nelson, the manager of an auto auction in California, that Nordell was a "group of local businessmen," and when Mr. Nelson contacted the Secretary of State's Office to determine who incorporated Nordell, appellant denied any relation to Ireva Petty Ozawa or Fawn Noren (R.380-382).

#### ARGUMENT

#### POINT I

THE TRIAL COURT DID NOT ERR IN RULING THAT UTAH CODE ANN. § 76-6-503 (1953), AS AMENDED, APPLIES TO FILING ARTICLES OF INCORPORATION UPON WHICH ARE FORGED SIGNATURES.

Appellant claims that the language of Utah Code Ann. § 76-6-503 (1953), as amended (all statutory references



are to Utah Code Ann. unless otherwise indicated) which covers any ". . . other writing for which the law provides public records" does not encompass articles of incorporation. The crux of appellant's claim is that the law of Utah provides not for the "recording" but for the "filing" of articles of incorporation; see e.g., Section 67-2-2(4).

Appellant argues that articles of incorporation are not heavily relied upon by the public, as are deeds, mortgages, and security instruments which are enumerated in Section 76-6-503, and that the legislature thus did not intend articles of incorporation to be encompassed within "writing(s) for which the law provides public recording."

Respondent submits that the distinction between "recording" and "filing" is merely semantical, and carries no substantial significance. Appellant admits at page 8 of his brief that once articles of incorporation are filed, they become a matter of public record, in the same way as do deeds, mortgages, and security instruments.

In ruling on appellant's motion to quash the information or to dismiss, Judge Croft discredited appellant's contention that articles of incorporation are not relied upon by the public:

. . . I would say that the words "or other writing for which the law requires public recording" does cover the filing of Articles of Incorporation in the Secretary of State's Office because the law requires those documents to be filed in that office and indexed so the public can go up there and examine them and find out what the history of the corporation is. What its makeup is and what its Articles provide, who its incorporators are, before that corporation has any legal existence. . . .

(R.128-129, emphasis added.) The State also produced the testimony of Kenneth Don Nelson, a manager of an auto auction in California which dealt with World of Autos, as to his attempt to obtain information about Nordell from the articles of incorproation (R.376-388). Mr. Nelson came to Salt Lake City to check into over \$70,000 worth of drafts sent to Nordell which had not been paid for (R.379-380). After being told by appellant that World of Autos had paid Nordell for the drafts, Mr. Nelson called the Secretary of State's Office and was told that the articles of incorporation for Nordell showed that Ireva Petty Ozawa and Fawn Noren were incorporators of Nordell (R.380,381,382).

This conduct shows that those who dealt with appellant and World of Autos could and did rely on the articles of incorporation for Nordell Financial Services,

which were a matter of public record, to determine if Nordell and World of Autos were organized by the same person. In addition, Ray Bishop testified that the auto auction in Phoenix, Arizona, refused to send drafts to a private financial company but would deal only through banking institutions (R.172). This would indicate a distrust on the part of the sellers of financial enterprises operated by the same persons who operated the car dealership who bought cars from the seller. In summary, then, articles of incorporation are documents relied upon by the public and for which the law provides public recording, and Judge Croft was correct in so holding.

## POINT II

THE TRIAL COURT WAS NOT BOUND TO SUBMIT THE CASE TO THE JURY UNDER UTAH CODE ANN. § 76-6-504 (1953), AS AMENDED, BECAUSE THE SECTION DOES NOT CONTROL THE SAME CONDUCT AS UTAH CODE ANN. § 76-6-503 (1953), AS AMENDED.

Appellant contends that since Section 76-6-504, prohibiting tampering with records, controls the same conduct as does Section 76-6-503, but prescribes a lesser penalty, the trial court should have submitted the case to the jury under Section 76-6-504. Conceding that where there are two statutes which proscribe the

same conduct, but impose different penalties, the defendant is entitled to the lesser of the two penalties; Rammell v. Smith, 560 P.2d 1108 (Utah 1977), respondent submits that Section 76-6-503 and Section 76-6-504 do not proscribe the same conduct.

It should be noted that the argument presented in Point I of appellant's brief is inconsistent with the contention urged in Point II. In Point I, appellant argues that Section 76-6-503 does not cover articles of incorporation. In Point II, he contends that articles of incorporation are "within the purview" of Section 76-6-504. Yet appellant contends that the two statutes proscribe the same conduct, i.e., falsifying, destroying, removing, or concealing a public record.

Section 76-6-504 expressly excludes from its proscription those writings enumerated in Section 76-6-503, thus indicating that the conduct proscribed by the two statutes is not identical because it refers to different objects which are influenced by the conduct. It is also significant that Section 76-6-503 applies only to documents for which the law provides for public recording, while Section 76-6-504 applies more broadly to any record, public or private. Thus, this case is similar to Rammell v. Smith, supra, in which the Utah Supreme Court after

acknowledging the general rule, held that the two statutes there involved did not proscribe the same conduct. The trial court was correct in refusing to submit the case to the jury under Section 76-6-504 (R.392).

### POINT III

UTAH CODE ANN. § 76-6-503 (1953),  
AS AMENDED, IS NOT UNCONSTITUTIONALLY  
VAGUE.

Appellant contends that the statute under which he was charged and convicted is unconstitutionally vague because it is not clear to what extent the language "other writing for which the law provides public recording" is applicable to documents not enumerated in the statute. The fact that the statute does not enumerate all possible writings for which the law provides public recording is not a constitutional infirmity. Under constitutional standards, a law is not unconstitutionally vague unless it fails to give a person of ordinary intelligence reasonable opportunity to know what is prohibited by the statute. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Grayned v. City of Rockford, 408 U.S. 408 (1972); Smith v. Goguen, 415 U.S. 566 (1974).

Where, as here, the benefit of commonsense understanding reveals the general nature of the conduct prohibited,

the due process clause of the Fourteenth Amendment does not require complete certainty as to the meaning of statutory terms. In the case of People v. Perez, 561 P.2d 7 (Colo. 1977), the appellant challenged a statute under authority of which his illicit massage parlor was closed down as being unconstitutionally vague. In denying his appeal, the Supreme Court of Colorado stated:

. . . a statute need not be drafted with the greatest possible facility or lucidity of expression if it meets the minimal requirements of due process. Given the benefit of commonsense understanding of the statutory terms [citation omitted] the statute challenged here makes reasonably clear to those intended to be affected what conduct is within its scope.

561 P.2d 7, 10. The Court reasoned that although the challenged phrase "public or private place of prostitution" was not defined with mathematical precision, it was not unfair to appellant who "deliberately chose to approach the area of proscribed conduct and assumed the risk of crossing the line." Perez, supra at p. 10.

Several other courts, including this Court, have recognized that due process does not demand that statutes be drafted with the greatest possible exactitude. In United States v. Maude, 481 F.2d 1062 (D.C. Cir. 1973), the Court wrote:

The void-for-vagueness doctrine is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibitive.

481 F.2d 1062, 1068. See also Colten v. Kentucky, 407 U.S. 104 (1972).

In State v. Packard, 122 Utah 369, 250 P.2d 561 (1952), cited by appellant, this Court also recognized that:

The limitations of language are such that neither absolute exactitude nor complete precision of meaning are to be expected, and such standard cannot be required.

250 P.2d 561, 564. Respondent submits that Section 76-6-503 meets the minimal requirements of due process in that it does not force men of reasonable intelligence to guess what conduct is prohibited.

Although the statute does not enumerate all the writings for which the law provides public recording, it does give examples. As was shown in Point I, infra, articles of incorporation, although they are "filed" with the Secretary of State's Office, become a matter of public record after they are filed. It is a matter of common knowledge that forging signatures upon a document which becomes a public record is a culpable act. Further,

even if appellant had actually relied on the distinction between "filing" and "recording" delineated in Point I of his appellate brief, to conclude that his actions did not fall within the statute, such reliance would have been unreasonable and as in Perez, supra, would have constituted a deliberate choice to approach the area of prohibited conduct and an assumption of the risk of crossing the line. Thus, as it applies to appellant in the case at bar, Section 76-6-503 is not unconstitutionally vague.

#### POINT IV

#### THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

At the close of the respondent's case-in-chief at trial, appellant moved for a directed verdict of acquittal on the ground that respondent failed to make a prima facie case in failing to prove an intent to deceive or injure others on the part of appellant (R.223). Judge Croft ruled that the respondent had proved that appellant forged signatures on the articles of incorporation before filing them and that the inference from this conduct is that appellant intended to deceive people (R.226).

The standard to be applied in determining when the trial court has a duty to direct a verdict of acquittal is stated in 75 Am.Jur.2d 543, Trial § 553:



In a criminal case it is the duty of the trial court to direct an acquittal where there is no substantial evidence of the guilt of the accused. It has been held that the court cannot refuse to direct a verdict of acquittal where there is no evidence reasonably tending to prove that the offense was committed, where the defendant is clearly not guilty, where the only evidence against the defendant is incompetent, where there is no competent evidence to sustain a conviction, or where the evidence wholly fails to connect the defendant with the commission of the crime, or creates a mere suspicion of guilt, or is not sufficient to warrant a reasonable conclusion of guilt.

It is further stated in 75 Am.Jur.2d 544, Trial § 553, that:

There is no duty on the part of the court to direct an acquittal where there is sufficient evidence to warrant the jury's believing beyond a reasonable doubt that the defendant is guilty, or where there is substantial evidence from which guilt may legitimately be found.

This Court has adopted the later test in its decisions specifically addressing the issue of when it is proper for the trial court to direct a verdict of acquittal. In State v. Penderville, 2 Utah 2d 281, 272 P.2d 195 (1954), the Court upheld a conviction of second degree murder in spite of a challenge to the trial court's failure to direct acquittal. The Court there wrote:

It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of the guilt of the accused, and all reasonable inferences are to be taken in favor of the state. . . [I]f there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion.

272 P.2d 195, 198. See also State v. Rivenburgh, 11 Utah 2d 95, 355 P.2d 689 (1960); State v. Woodall, 6 Utah 2d 8, 305 P.2d 473 (1956); and State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960). Further, in State v. Peterson, 121 Utah 229, 240 P.2d 504 (1952), this Court held that there can be no error in failing to direct a verdict of acquittal where there is competent evidence from which the jury could find beyond a reasonable doubt that the defendant committed the crime charged.

Respondent submits that in the case at bar, there was sufficient competent evidence adduced at trial from which the jury could find appellant's guilt beyond a reasonable doubt.

In the case of State v. Romero, 554 P.2d 216 (Utah 1976), this Court established the burden which the prosecution must bear to establish a prima facie case:

In order to submit a question to the jury it is necessary that the prosecution establish a prima facie case. That is, it is necessary to present some evidence of every element needed to make out a cause of action, and it has long been established that such may be proven by direct and by circumstantial evidence. But the evidence required need be only that which is sufficient to conform to the statutory definition of the crime charged, and the "element of each offense" is defined as (a) conduct, attendant circumstances, or results of conduct; and (b) the requisite mental state.

554 P.2d 216 (Utah 1976). The elements of Section 76-6-503 are: (a) the actus reus of falsifying, destroying, removing or concealing a writing for which the law provides public recording; and (b) the mens rea is an intent to deceive or injury anyone.

Appellant did not challenge at trial the fact that he did forge or "falsify" the signatures on the articles of incorporation (R.228). Indeed, this fact was established by a defense witness, Ireva Petty Ozawa, on direct examination (R.311). Thus, the "conduct" element of the crime was made out beyond a reasonable doubt.

In addition to the inference to be drawn from appellant's conduct of filing articles of incorporation with forged signatures that appellant intended to deceive people, the state also produced evidence of a specific

attempt to deceive a person with whom appellant dealt. Kenneth Don Nelson, the manager of the Bay City Auto Auction in California was told by appellant that Nordell Financial Services was a "group of local businessmen" with whom appellant had no connection (R.380-382). Appellant even denied knowing who Fawn Noren, his mother, was (R.382).

When this conduct is viewed against the backdrop of Nordell being unable to pay for drafts, owing Mr. Nelson at the time over \$70,000, the intent of appellant to conceal the fact that Nordell was incorporated and operated by the same persons that operated World of Autos is apparent. Further, Ireva Petty Ozawa testified that World of Autos was having financial difficulty even before the articles of incorporation for Nordell were filed (R.342). Finally, appellant told Ray Bishop to misrepresent to car dealers from whom he bought cars that World of Autos had been dealing with Nordell Financial Services for one and one half years soon after Nordell was formed (R.144). The evidence viewed collectively shows beyond a reasonable doubt that by forging the signatures of others on the articles of incorporation but not signing the articles himself, appellant intended to deceive others with whom

he dealt into thinking that Nordell Financial Services and World of Autos were functionally separate businesses.

#### CONCLUSION

Based upon the foregoing argument and authority, respondent respectfully submits that the conviction and sentence of the appellant were proper and should be affirmed by this Court.

Respectfully submitted,

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