

1988

State of Utah v. Thomas R. Humphries : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 880¹04-CA
vs. :
THOMAS R. HUMPHRIES, : Category No. 2
Defendant-Appellant :

REPLY BRIEF OF APPELLANT

Appeal from a jury decision finding the Defendant guilty of Issuing a Bad Check of Draft Sec. 76-6-505 Utah Code Annotated on November 4, 1988.

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FILED

SEP 20 1989

Mary T. Hill
Clerk of the Court
Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 880104-CA
vs. :
THOMAS R. HUMPHRIES, : Category No. 2
Defendant-Appellant :

REPLY BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken pursuant to Sec. 78-29-3 (f) Utah Code Annotated. The Defendant-Appellant was found guilty of Issuing a Bad check of Draft Sec. 76-6-505 Utah Code Annotated, a Felony of the Third Degree in the Second Judicial District Court, in and for Davis County, State of Utah, November 4, 1988. Defendant was sentenced December 6, 1988 and an appeal was filed December 22, 1988.

STATEMENT OF ISSUES

1. Whether or not Defendant preserved four of the five issues raised on Appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Sec. 77-35-27 (Rule 27) Stays pending appeal.

(a) (1) A sentence of death shall be stayed if an appeal or a petition for other relief is pending.

(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause is issued.

(3) When an appeal is taken by the state, a stay of any order or judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(b) A certificate of probable cause shall be issued if the court hearing the application determines that there are meritorious issues that should be decided by the appellate court. A certificate of probable cause may be issued by the trial court or, if denied by the trial court, by the court to whom an appeal is taken. The application for a certificate of probable cause shall be in writing, state the grounds for the issuance of the certificate and shall be served upon the prosecuting attorney. A hearing on the application for a certificate of probable cause shall be held after notice to all parties.

(c) If a certificate of probable cause is denied, the defendant shall commence or continue to undergo sentence. If the certificate of probable cause is granted, the court granting the certificate may continue the defendant in custody at an appropriate place of detention, or admit the defendant to bail or release pending appeal on suitable terms and conditions. The decision on the request of the defendant for release to bail is subject to review by the appellate court for abuse of discretion.

STATEMENT OF FACTS

Defendant filed an appeal from a conviction of guilty of issuing a bad check. Defendant has since filed his appellant brief and Respondent has filed their Brief. Respondent's Brief alleges most issues raised on appeal were not raised in front of the trial Judge.

Defendant thorough newly appointed Counsel had a hearing on a Motion for a Certificate of Probable Cause of March 14, 1989. (t. 3)¹ Several of Defendant's issues raised on appeal were ruled on by the Honorable Douglas L. Cornaby (see addendum marked as exhibit 1), in the Motion for a Certificate of Probable Cause.

¹ "t" refers to the Certificate of Probable Cause transcript dated March 14, 1989.

SUMMARY OF ARGUMENT

The Defendant raised several issues on appeal. The respondent contends that four out of the five issues raised on appeal are moot because Defendant failed to raise those issues at the trial. Appellant submits that the issues were in fact raised at the Motion for a Certificate of Probable Cause. The Judge at the Motion for a Certificate of Probable Cause ruled that none of the issues raised were sufficient to reach the limited burden required for the issuance of a certificate of probable cause. Thus it would be frivolous and without merit to ask the trial Judge to dismiss the charges, grant a new trial, a directed verdict or other post conviction remedies available to Defendant when the burden for each is heavier than the burden to issue a Certificate of Probable Cause.

ARGUMENT

POINT I

WHETHER OR NOT DEFENDANT PRESERVED

FOUR OF THE FIVE ISSUES RAISED ON APPEAL

The trial Court Judge in the above case had the opportunity to review the issues raised on appeal. All four of the issues referred to in Respondent's brief in point I, were raised in Defendant's Motion for a Certificate of Probable Cause. Each and every issue was ruled insufficient even for the limited burden of giving the Defendant a stay pending an appeal.

On March 28, 1989, the Honorable Douglas L. Cornaby had a hearing on Defendant's Motion for a Certificate of Probable Cause. There were several meritorious issues presented to Judge

Cornaby to support the argument that Defendant's sentence should be stayed pending appeal. Among the issues were the following 1) The prosecutor expressed his personal opinion in closing arguments. 2) The prosecutor threatened a witness if she testified. 3) The prosecutor's comments on Defendant's failure to have witnesses testify. 4) The court allowing other bad checks not charged in the information into evidence.

The burden of the Defendant for the court to issue a stay pending appeal is much less than the burden to either dismiss the conviction or order a new trial, or any other post conviction remedy available to the Defendant. In a Motion for a Certificate of Probable Cause Sec. 77-35-27 (Rule 27) states in part:

(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause issued.

(3)

(b) A certificate of probable cause shall be issued if the court hearing the application determines that there are meritorious issues that should be decided by the appellant court....."

The Supreme Court of Utah recently ruled on Rule 27.

We hold that under our Rule 27, in issuing a certificate of probable cause preliminary to consideration of release pending appeal, the court must determine that the issue of fact or law raised on appeal are substantial. There are two prongs to the test for determining whether issues raised are "substantial". First, the Question raised must be either (1) Novel, i. e., there is no Utah precedent that governs or (2) Fairly debateable. A legal issue is fairly debatable is Utah precedent bearing on the issue presents conflicting points of view when applied to the facts of the cause or is other wise unclear. Second, the legal issue raised must also be

integral to the conviction, e. g., if error in the proceedings below would be considered harmless in light of the precedent, the certificate should not issue." State v. Neeley, 707 P. 2d 647 (Utah 1985).

Judge Cornaby, cognizant of the burden, and having a transcript of the trial at his disposal ruled that all four issues raised on appeal in this case, were insufficient to even be fairly debatable. His write decision is more specific. In the written decision he states, in the first issue (the prosecutor expressing his own opinion), that it should not have been done, but interprets what the prosecutor meant to say, (see addendum pg. 2 paragraph 3). In the second issue, (the prosecutor threatening a witness if she testified), he rules there was no threat (see addendum pg. 2 paragraph 8). In the third issue, (the prosecutor's comments on Defendant's failure to have witnesses testify), the court said the prosecutor should not have done it, but the trial attorney should have objected. The last issue respondent claims the trial court never reviewed, (allowing other bad checks into evidence), was in fact brought before Judge Cornaby. The Judge ruled they were admissible to show the Defendant's intent. Then the Judge concludes and rules there were no issues raised to justify the issuance of a certificate of probable cause.

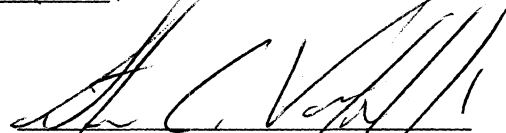
All issues raised by the Defendant in his initial brief have been reviewed by the trial court. All issues have also been determined to lack fairly debatable issues sufficient for the issuance of a Certificate of Probable Cause. It makes no sense and is at best a motion in futility and a burden on the court system to go before the same court and move for mistrial, arrest of Judgment, new trial or other post conviction remedies, when the

Judge has already ruled them insufficient for the limited burden of issuance of a Certificate of Probable Cause.

CONCLUSION

The Defendant respectfully submits the issues raised on appeal have been presented to the trial Judge and ruled upon. The issues are properly before the Utah Court of Appeals.

DATED this 20 day of September, 1989.

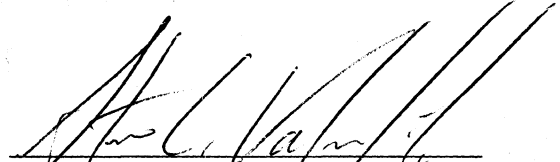


STEVEN C. VANDERLINDEN
Attorney for
Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing Reply Brief of Appellant on this 20 day of September, 1989, by first class, U.S. mail, postage prepaid upon:

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ADDENDUM

EXHIBIT 1

1989 MAR 31 AM 10:28

In the Second Judicial District Court
in and for the
County of Davis, State of Utah

BY ab
CLERK OF COURT

STATE OF UTAH,)	
)	
Plaintiff,)	RULING ON MOTION FOR
)	CERTIFICATE OF
vs.)	PROBABLE CAUSE
)	
THOMAS R. HUMPHRIES,)	Criminal No. 6119
)	
Defendant.)	

The defendant's motion for a certificate of probable cause came before the court for oral argument on March 28, 1989, with Brian J. Namba appearing for the plaintiff and Steven C. Vanderlinden appearing for the defendant. After oral argument, the plaintiff presented a responding brief to the court. Inasmuch as the plaintiff had not been given proper time to prepare the brief it was accepted by the court. The court took the motion under advisement. The court now rules on the motion.

The motion for a certificate of probable cause is denied.

1 The photocopy of Thomas R. Humphries drivers license was proper evidence under U. R. E., Rule 901(a).

2. The bank records, including checks not charged as criminal violations in the Information, were admissible to show knowledge and intent on the part of the defendant.

3. The defendant's knowledge of the issuance of insufficient funds checks was a jury question and the jury resolved the issue in favor of the State.

4. There was no break in the chain of evidence with regards to the checks which was significant to the trial. The defendant admitted he wrote those very checks.

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5. The defendant was appointed competent counsel. No substantial conflict of interest is shown. The only way the defendant can have counsel of his choice is to hire counsel.

6. The State should not have questioned the defendant about his failure to have Steve Brown come to court and testify. On the other hand, the defendant had an obligation to object if he did not want the evidence presented to the jury. The issue is not, therefore, a proper matter for the appellate court.

7. It was not proper for the State to give an opinion in closing argument on the defendant's dishonesty. The argument, however, must be taken in its totality. The State repeats the opinion in several places. What the State was really saying, however, was that the evidence shows the defendant is dishonest. Also, the defendant failed to object to the argument of counsel.

8. The prosecution did not threaten a defense witness. The witness was properly advised of both perjury and fifth amendment rights out of the hearing of the jury. The testimony of the witness thus probably became favorable to the defendant. The jury would tend to believe the witness was paid money by the defendant for deposit since she was taking the fifth amendment. Again the defendant did not raise a proper objection.

9. A "not guilty" verdict form was given to the jury. There is no valid issue on this point.

None of the aforementioned issues meet the standards for issuance of a certificate of probable cause.

The defendant's motion is denied.

Dated March 29, 1989.

BY THE COURT:


JUDGE