

1951

State of Utah v. August Schrieber : Appellant's Reply to Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

AUGUST SCHRIEBER,
Defendant and Appellant.

Case No.
7737

FILED
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Clerk, Supreme Court, Utah

**APPELLANT'S REPLY TO
RESPONDENT'S BRIEF**

GRANT MACFARLANE
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INTRODUCTORY STATEMENT

Respondent's theory in this case has, as shown by its brief, entirely changed since the District Attorney for the Third Judicial District made and filed his petition to vacate and set aside the order of October 20, 1949, dismissing the action against defendant and discharging him. As shown

by the record, Respondent made and filed on May 29, 1951, a petition to vacate the order of October 20, 1949, and to order the defendant to appear before the Court and show cause why the order of October 20, 1949, should not be vacated.

The only grounds alleged in said petition for vacating the order were (1) that a condition of the order was permanent departure from the State of Utah, which had been violated upon defendant's return to Utah, and (2) that the order was contrary to Article VII, Section 12, Utah Constitution. No notice or suggestion was given in said petition of any other grounds for vacating the order. The citation which subsequently issued on the basis of said petition contained and was accompanied by no notice of any grounds for vacating the order other than stated above. At the hearing on said petition no claim or argument was made by Respondent as grounds for said petition other than those stated. No evidence was offered or introduced by Respondent bearing upon grounds for vacating the 1949 order except those stated. At no time was a claim of fraud or misrepresentation in procuring said order made until the Judge who heard the case vaguely expressed such contentions in his oral opinion after all the evidence was in. Now for the first time in its brief the Respondent seizes upon the vague and ambiguous remarks of the said Judge to fortify an argument that the court acted properly in vacating the order of October 20, 1949. The original grounds alleged by Respondent for vacating said order have now been abandoned and are conceded to be without merit.

At page 4 of its brief Respondent states that a good argument can be made that the order of October 20, 1949,

was contrary to Article VII, Section 12, Utah Constitution, but the brief utterly fails to reveal the nature of that argument. The suggestion ignores the first sentence of the constitutional provision which in unmistakable terms empowered the legislature to enact Section 105-36-17, Utah Code Annotated, 1943, as amended, pursuant to which said order was made.

Respondent apparently no longer contends that the order contained a condition that defendant permanently remain outside the State of Utah. At page 13 of its brief Respondent quite frankly concedes that such a condition would be void. Thus Respondent concedes that the order of October 20, 1949, was a final, unconditional order, and submits as its only contention on this appeal the proposition that the court vacated the October 20, 1949 order, with authority to do so, on a finding of fraud, misrepresentations and deceit made to the trial court. In this Reply, therefore, Appellant will confine his discussion to that point. There are four aspects to that contention which require consideration, and they are as follows:

I.

VACATION OF THE ORDER OF OCTOBER 20, 1949, ON GROUNDS OF FRAUD REQUIRED A FINDING OF EXTRINSIC FRAUD, WHICH DID NOT EXIST.

Appellant does not take issue with the well established principle of law that a court has the power to vacate a judgment or an order where the judgment or order was

procured by fraud. As an abstract proposition, Respondent has correctly stated the law. Within the framework of this principle of law, however, there are definite requirements which must be present to invoke its operation. It isn't every variety of fraud which justifies invocation of the power. The authorities are in complete accord that the fraud must be of an extrinsic and collateral nature.

31 Am. Jur. Judgments, Sections 735, 738;
49 Corpus Juris Secundum, Judgments, Section
269.

This court has had frequent occasion to consider and apply the principle stated, and has consistently limited its application to cases of extrinsic fraud.

Cantwell v. Thatcher Bros. Banking Co., 151
Pac. 986;
Anderson v. State, 238 Pac. 557;
Logan City v. Utah Power & Light Co., 16 P.
(2d) 1097;
Rice v. Rice, 212 P. (2d) 685.

The foregoing decisions, as well as the authorities elsewhere, hold that a judgment cannot be set aside except for the most compelling reasons; they hold that fraud as to a matter or issue actually or potentially before the court does not constitute extrinsic fraud such as to constitute grounds for setting a judgment aside. Examples of extrinsic fraud are the following: Bribery of witnesses or preventing witnesses from testifying, inducing a party by deceit to subject himself to the jurisdiction of the court, preventing a party from testifying, and other examples pertaining to collateral matters too numerous to mention. Misrepresenta-

tion or perjury, even if established, as to a matter in issue or material to issues, does not constitute extrinsic fraud. Thus, in *Cantwell v. Thatcher Bros. Banking Co.*, supra, this court refused to apply the principle where the alleged fraud was perjury as to issues actually or potentially pertinent to the judgment. Again, in *Anderson v. State*, supra, this court held that an alleged conspiracy to mislead the court as to material issues and perjury did not constitute the type of fraud required to set aside a judgment.

This limited application of the principle was again followed by this court in *Logan City v. Utah Power & Light Co.*, supra, where the court held that alleged false and fraudulent representations to the court as to material issues would not constitute extrinsic fraud.

Now what is the alleged fraud or misrepresentation in this case upon which Respondent relies? The alleged fraud can pertain only to Appellant's alleged representations as to his health, the advisability of trying a different climate and Appellant's intention with respect to going to Florida and remaining away from Utah. Appellant is unable to determine precisely which of these factors is the subject of the alleged fraud. In any event, whichever factor it is, it seems clear that the alleged fraud goes to an intrinsic matter, not an extrinsic one. The alleged fraud is similar to the alleged conspiracy to misrepresent in the *Anderson* case, supra, and the alleged perjury in the *Cantwell* case, supra. The verity of the representations was a matter actually or potentially before the court at the hearing of the October 20, 1949, order.

In submitting the foregoing contention, Appellant does not for one moment concede that there was any fraud or

misrepresentation on his part and will demonstrate that position hereinafter. But for purposes of meeting the Respondent's contention squarely, Appellant submits that the alleged fraud or misrepresentation was and is intrinsic, not extrinsic, and was therefore insufficient to have justified the court's action.

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF FRAUD OR MIS- REPRESENTATION.

Assuming the proposition that extrinsic fraud or misrepresentation is grounds for vacating a judgment or order, it seems clear that the order of vacation must be based upon a finding of fraud or misrepresentation. One can search the record in vain to find any competent evidence which is clear and substantial enough to warrant such a finding. The self-evident question arises: What evidence must there be to support a finding of fraud or misrepresentation. Can such a finding be made on the basis of surmise, speculation, suspicion, supposition, conjecture and heresay. Or must the finding be based upon evidence which strongly establishes a conviction as to fraud and misrepresentation. In a criminal proceeding such as this, good reason would appear for applying the orthodox rule that there must be proof beyond a reasonable doubt. This court has by way of dicta applied that orthodox rule to these very circumstances.

In *Anderson v. State, supra*, the court made the following significant statement regarding the quantum of proof of fraud required to vacate a judgment.

"The alleged conspiracy between Cora and her mother is relied on as extrinsic fraud. The only evidence of conspiracy is the fact that they testified to the same effect. That is a circumstance to be considered, especially as the witnesses were separated by order of the court. But is the circumstance conclusive? *Does it produce conviction beyond a reasonable doubt?* (Emphasis added.)

Moreover this court has consistently followed the well established rule that a finding cannot be based upon surmise, speculation, supposition or conjecture.

Dern Inv. Co. v. Carbon County Land Co., 75 P. (2d) 660, 94 Ut. 76;
Spackman v. Benefit Ass'n of Railroad Employees, 89 P. (2d) 490, 97 Ut. 91;
Mehr v. Child, 61 P. (2d) 624, 90 Ut. 348.

It would not seem necessary in this case to determine whether the degree of proof required to show fraud or misrepresentation for vacating a judgment in a criminal proceeding is proof which establishes conviction beyond a reasonable doubt or proof of a lesser degree. It is clear that the evidence herein falls far short of any reasonable requirement. What is the evidence upon which the court made a finding of fraud and upon which Respondent defends that finding. Respondent has set out in its brief the evidence which it apparently deems strongest.

At pages 7, 8 and 9 of its brief, Respondent refers to testimony of Dr. William Henning at the hearing of October 20, 1949, and the hearing of June 9, 1951. This is offered by Respondent to show fraud and misrepresentation. The substance of the evidence at said pages is that Dr. Henning

believed in October, 1949, that Appellant's health was poor and that a change of altitude and climate was advisable; and that the change did not produce the anticipated results. Is that evidence of fraud or misrepresentation. In fact, that testimony supports the representations made by Appellant in October, 1949, that it was advisable from a medical standpoint that Appellant try a different climate. Dr. Henning's statement as to letters received from Appellant in Florida supports the testimony that Appellant's health did not improve. By what distortion of the imagination can that evidence be said to show fraud or misrepresentation in procuring the 1949 order.

Reference is made by Respondent at pages 9 and 10 of its brief to testimony of Appellant at the two hearings to show fraud and misrepresentation. The evidence referred to contains no misrepresentation by Appellant as to his intentions in October, 1949. All that testimony shows is that Appellant was a sick man and planned to try a different climate and intended to reside in Florida if that climate improved his health. No contrary representation was made to the court. The important question is not what Appellant's health subsequently required him to do but what his intention was at the time he applied to the court in October, 1949, and whether he misrepresented those intentions.

At pages 10, 11 and 12 of Respondent's brief, reference is made to alleged representations made by Appellant's attorney in October, 1949, as to Appellant's having a position in a Florida hospital. Is there any evidence that Appellant's attorney knew the alleged representations were untrue? Is there any evidence that the representations were untrue?

Respondent states at page 11 that Appellant's memory simply failed him on this matter. Can a finding of fraud and misrepresentation be predicated upon a lapse of memory?

It is said by Respondent at page 12 of its brief that Appellant acted in bad faith in going to a judge other than Judge Van Cott, in the Fall of 1950, for advice on the October, 1949 order. Does that show fraud in October, 1949? Does it show anything except the fact that the Appellant was keenly anxious to determine his rights and went to see the presiding judge of the Third Judicial District Court to determine them, a man who had unquestioned authority to advise Appellant.

It is important to re-emphasize the proposition that only extrinsic fraud or misrepresentation as to the procurement of the October 20, 1949, order would constitute grounds for vacating the order. The essential nature of fraud or misrepresentation as applied here would be representing a matter to be otherwise than it was with knowledge of the falsity of the representations. The fraud or misrepresentation claimed against Appellant is, it would appear, representations made by him as to his intentions known at the time to be untrue. The evidence referred to by Respondent in its brief does not prove or tend to prove that Appellant made representations to the court which he knew to be untrue. Only by conjecture, speculation and suspicion can a finding of fraud and misrepresentation be made.

In contrast to the foregoing, the evidence is uncontradicted that Appellant's health was bad in October, 1949;

that he was advised by a doctor to try a different climate; that he so advised the court; that Appellant closed his practice, stored his equipment, packed his furniture and physically moved with his family to a milder climate, where he remained long enough to determine that the climate did not improve his health.

Appellant again emphasizes to the court the clear proposition that the trial judge could not base a finding of fraud or misrepresentation upon extra judicial utterances and statements of unidentified persons. Respondent would apparently concede that such matters would not support the required finding.

It is submitted, therefore, that the evidence herein was insufficient to support a finding of fraud or misrepresentation in procurement of the October 20, 1949 order.

III.

THE ALLEGED FRAUD AND MISREPRESENTATION GOES TO IMMATERIAL MATTERS AND DOES NOT CONSTITUTE GROUNDS FOR VACATING THE ORDER OF OCTOBER 20, 1949.

Respondent has conceded that the alleged condition of banishment from the State of Utah was void. Any representations concerning that matter would appear, therefore, to be immaterial. And as pointed out in Appellant's brief, banishment was not and could not be a mandatory, material basis for issuance of the October 20, 1949 order.

Appellant's position is that the said condition or matter being *immaterial*, any representations made concerning it would not constitute grounds for vacating the order. In order to raise fraud as a grounds for vacating a judgment, it must be shown that the fraud relates to a material issue or question entering into the judgment. The principle that fraud or misrepresentation as to immaterial matters is not actionable has been applied by this court in *Hecht v. Metzler*, 48 Pac. 37, 14 Ut. 408. For a general statement of this principle see 23 *Am. Jur.*, Fraud and Deceit, Section 111. Another analogous principle is the one of general acceptance followed in this jurisdiction that a witness cannot be impeached on the basis of immaterial matters.

IV.

VACATION OF THE ORDER OF OCTOBER 20, 1949, ON GROUNDS OF FRAUD OR MISREPRESENTATION WOULD UNDER THE CIRCUMSTANCES OF THIS PROCEEDING CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW UNDER ARTICLE I, SECTIONS 7 AND 11 OF THE UTAH CONSTITUTION AND UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The essential elements of due process of law under the Constitution of the State of Utah and the Constitution of the United States are notice, and an opportunity to be heard and to defend in an orderly proceeding.

12 Am. Jur., Constitutional Law, § 573;
Snyder v. Massachusetts, 291 U. S. 97, 54 S.
 Ct. 330;
Denver and R. G. W. R. Co. v. Industrial Com-
mission, 279 P. 612, 74 Ut. 316.

Due process of law requires that a defendant in a criminal proceeding be given notice of the grounds for which he is charged and a reasonable opportunity to appear and defend on those grounds. This requirement of notice under due process of law has direct application to the facts of this appeal. As pointed out in appellant's introductory statement, at no time prior to the oral opinion of the trial judge at the hearing on the petition to vacate the October 20, 1949, order was appellant given notice that the grounds charged were fraud and misrepresentation concerning procurement of said order. Appellant's position is that if the order of vacation was based upon fraud and misrepresentation, the order was invalid as a violation of due process of law because no notice was afforded to appellant of that charge and no opportunity was given to defend upon it.

The requirement that notice be given to a defendant of the grounds asserted for setting aside a suspended sentence, a parole, or a dismissal is well established in this jurisdiction and elsewhere.

Annotation, 54 A. L. R. 1471.

One of the principle cases on this question is the Utah case, *State v. Zolantakis*, 70 Ut. 296, 259 Pac. 1044. That case holds that a convict having been granted a suspension of sentence during good behavior is entitled to notice

and hearing on the grounds asserted for setting aside the suspended sentence before revocation of same.

The court stated as follows at page 1047 of the Pacific Reporter:

"In this state the question here involved is one of first impression. The statute involved does not point out a method of procedure. The majority of this court are of the opinion that a person who has a sentence suspended during good behavior, without any limitation, is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed; that such hearing must be according to some well recognized and established rules of judicial procedure; *that defendant is entitled to have filed either an affidavit, motion, or other written pleading setting forth the facts relied upon for a revocation of the suspension of sentence; that the defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issues joined; and that the defendant as well as the state be given the right of cross-examination. If we are correct in our conclusion that the defendant has a vested right to his personal liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error.*" (Emphasis added.)

This court again said as follows under similar circumstances in *State v. Bonza*, 150 P. (2d) 970, at 972:

"A defendant out of prison on probation is accorded due process of law by the following steps, all of which were followed in this case: (1) The filing of a verified statement or an affidavit in the case setting forth facts which show a violation of

the terms of probation. (2) *The issuance of an order to show cause and citation thereon requiring the defendant to appear and show cause why probation should not be revoked, apprising defendant of the ground or grounds on which revocation is sought*, and specifying a proper time for hearing. (3) A hearing before the court on the question of violation of some term or condition of probation, at which the defendant has the opportunity to cross-examine witnesses against him and also to present evidence to refute the claimed violation of the conditions of probation. (4) A determination of the question, followed by entry of an appropriate order. *State v. Zolantakis, supra.*" (Emphasis added.)

It is clear from the foregoing decisions that due process of law under the circumstances of this case required that notice be given to the Appellant apprising defendant of the grounds upon which vacation of the October, 1949, order was based. No such notice was given with respect to the claim of fraud and misrepresentation.

This case presents even stronger features for application of the stated principle than either of the two Utah cases mentioned. This is not a situation where defendant continued after October 20, 1949, to be subject to the jurisdiction and custody of the court. The October 20, 1949 order dismissed the action against defendant and finally discharged him. The petition to vacate said order was in effect a new proceeding. Although the court has in recent decisions [*McCoy v. Harris*, 160 P. (2d) 721, 108 Utah 407, *Ex Parte Follett*, 225 P. (2d) 16, . . . Utah . . .] stated that the Zolantakis principle should be confined to the facts of that case, it is believed that this case presents the facts essential for application of the principle.

CONCLUSION

Appellant submits that the order of October 20, 1949, was a valid, final and unconditional order. The order can be deemed conditional only upon a consideration of parole evidence, which is improper. The alleged condition itself would, as conceded by Respondent, be void as contrary to public policy. Either one or all of the reasons stated by Appellant herein constitute valid and proper grounds for a holding that the trial court erred in vacating the October 20, 1949 order. In view of the foregoing, Appellant urges the court to reverse the decision of the trial court and declare the court's order of June 9, 1951, null and void and order the defendant discharged.

Respectfully submitted,

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