1979

State of Utah v. Roger anderson and Thomas E. Brackenbury : Brief of the Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 16,372

ROGER ANDERSON and THOMAS E. BRACKENBURY, :

Defendants-Appellants. :

- - - - - - - - - - - - - - - - - - - -

BRIEF OF THE APPELLANTS

- - - - - - - - - - - - - - - - - - - -

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR WASATCH COUNTY, STATE OF UTAH, HONORABLE J. ROBERT BULLOCK, JUDGE

- - - - - - - - - - - - - - - - - - - -

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
Provo, Utah 84601

Attorneys for Appellants

J. HAROLD CALL
Wasatch County Attorney
30 North Main Street
Suite #3
Heber City, Utah 84032

ROBERT HANSEN
Attorney General
State of Utah
Salt Lake City, Utah

Attorneys for Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 16,372

ROGER ANDERSON and THOMAS E. BRACKENBURY, :

Defendants-Appellants. :

- - - - - - - - - - - - - - - - - - - -

BRIEF OF THE APPELLANTS

- - - - - - - - - - - - - - - - - - - -

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT IN AND FOR WASATCH COUNTY,
STATE OF UTAH, HONORABLE J. ROBERT BULLOCK, JUDGE

- - - - - - - - - - - - - - - - - - - -

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
Provo, Utah 84601

Attorneys for Appellants

J. HAROLD CALL
Wasatch County Attorney
30 North Main Street
Suite #3
Heber City, Utah 84032

ROBERT HANSEN
Attorney General
State of Utah
Salt Lake City, Utah

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: Page

CONSTITUTIONS CITED:

UTAH:

UNITED STATES:

STATUTES CITED:

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 16,372

ROGER ANDERSON and THOMAS E. BRACKENBURY, :

:

Defendants-Appellants.

- - - - - - - - - - - - - - - - - - - -

BRIEF OF THE APPELLANTS

- - - - - - - - - - - - - - - - - - - -

STATEMENT OF THE CASE

This was a criminal action brought by the State of Utah against the defendants-appellants Roger Anderson and Thomas E. Brackenbury. The information charged a violation of U.C.A. §76-8-508, tampering with a witness. The charge arose out of an incident which occurred on May 28, 1978, in Soldier Summit, Utah.

DISPOSITION IN LOWER COURT

This case was tried by a jury in Heber City, Utah, the Honorable Judge J. Robert Bullock, Fourth District, presiding. The jury found the defendants guilty as charged in the information.

RELIEF SOUGHT ON APPEAL

The defendants-appellants seek a reversal of their conviction and a dismissal of the information. In the alternative, the defendants seek a reversal and request this

Court to remand the case for a new trial.

STATEMENT OF THE FACTS

On May 28, 1978, defendant Roger Anderson was Chief of Police of the town of Soldier Summit, Utah. On the same date, defendant Thomas E. Brackenbury was Justice of the Peace of the town of Soldier Summit.

In the early evening of May 28, 1978, the defendants entered the J & M Saloon in Soldier Summit. Defendant Anderson's purpose in visiting the J & M Saloon was to investigate miscellaneous rumors and reports he had receive which concerned, among other things, the illegal sale of liquor. T. 153, 183. The J & M Saloon was operated by one of the witnesses at defendants' trial, James Garner.

After a brief misunderstanding with the bartender, James Garner, and some of his patrons, the defendants seate themselves at the bar. After a few moments, the defendant Anderson requested James Garner, who was at the opposite en of the bar, to join him and defendant Brackenbury for a brief conversation. T. 41. The purpose of the conversatio of course, was to determine the validity of the rumors and reports which Anderson had previously received.

The nature and content of the conversation that ensued between the defendants and Garner was the subject of disputed testimony at trial. Garner testified that the defendant Anderson immediately "got kind of huffy" and the conversation rapidly "ended up in an argument." T. 41,42.

The defendants testified, however, that Garner responded to their request with foul and abusive language and summarily ordered them to leave his premises. T. 155,183.

During this heated argument, Ray Applegate, a transient truck driver, attempted to intervene in the dispute in behalf of James Garner. T. 58. Applegate approached the defendant Anderson and seated himself immediately beside Anderson. At the climax of the confrontation between Garner and Anderson, Garner ordered the defendants to "get the hell out of here" or "I'll have him [Applegate] throw you out." T. 155,86. Garner then told defendant Anderson, with reference to Ray Applegate, "he's my bouncer," and Applegate immediately acknowledged this statement. T. 155-156. Defendant Anderson identified himself as the Chief of Police of Soldier Summit after which Ray Applegate apparently returned to his seat in the bar. T. 58.

The confrontation between Garner and Anderson was brought to an abrupt conclusion when James Garner struck defendant Anderson as he was drinking a soft drink. T. 42,156,184. At this juncture, both Anderson and Brackenbury immediately left the premises and parted company. Defendant Brackenbury returned to his home. Defendant Anderson secured the assistance of Butch Curtis, Soldier Summit's officer on duty at the time, and returned to the J & M Saloon. Anderson then directed Curtis to arrest Garner on the charge of assaulting an officer. Curtis was then

assigned to transport Garner to the Utah County jail. T. 102.

Anderson returned to the J & M Saloon after Garner's arrest to gather information and to arrest Ray Applegate for interfering with an officer. Applegate, by his own admission, had consumed a significant amount of alcohol and was at least partially inebriated. T. 82-83. Applegate was under the influence to the extent that is was necessary for defendant Anderson to assist him in walking from the bar to the Justice of the Peace's trailer. T. 143-144; 159; 184-186.

The events which took place in defendant Brackenbury's trailer were the subject of highly contradictory claims at trial. The witness Applegate testified that he was forceably removed from the J & M Saloon by defendant Anderson to defendant Brackenbury's trailer. Applegate also claimed that he was intimidated in the presence of Anderson and Brackenbury. After certain statements had been prepared by Brackenbury, Applegate testified that he signed the statements because he would do "anything to get out of there." T. 88.

But defendants Anderson and Brackenbury testified differently. They insisted that Applegate was completely drunk, and stumbled about the trailer before finally being placed in a seat by defendant Anderson. They also claimed that defendant Anderson carefully questioned Ray Applegate

concerning suspected illegal sales of liquor by James Garner. Applegate volunteered the information which comprised the substance of the statements later reduced to writing and signed by Applegate. T. 160,185-186. The statements have been made part of the record and in essence charge that James Garner was selling liquor illegally.

Applegate, by his own admission could not read and write well. T. 91,99. The defendant Brackenbury testified that because of Applegate's inability to write the statements himself, he, Brackenbury, personally prepared the statements based upon the questioning of Applegate conducted by Anderson in Brackenbury's presence. Brackenbury also testified that the prepared statement was read by Applegate in final form, and that it was also read to him so that he might fully understand the same. T. 187-189. A copy of these statements is reproduced in Appendix A of this brief.

After signing the statement in the presence of defendants Anderson and Brackenbury as well as George Shade, the Mayor of Soldier Summit, Ray Applegate left Brackenbury's house trailer and returned to the cafe attached to the trailer. While at the cafe, Applegate again encountered the defendant Anderson. He offered to buy Anderson dinner or at least a cup of coffee. T. 90. Applegate then returned to his tractor-trailer rig, and left the town of Soldier Summit sometime around midnight. The defendants never saw Ray Applegate again until trial. The unsworn statements subscribed to by

Ray Applegate were never used in any administrative, legislative, judicial proceeding or in any other manner until they were produced in the course of a discovery deposition of Brackenbury and thereafter used as evidence in the course of the trial of these defendants.

After the discovery deposition of Brackenbury by the County Attorney's office, the defendants Anderson and Brackenbury were charged with a violation of U.C.A. §76-8-508, tampering with a witness. The defendants requested and were granted a preliminary hearing. But the State's key witness, Ray Applegate, was not present at the hearing. The County Attorney was given permission to introduce Applegate's affidavit wherein he made the substantive allegations which formed the foundation of the information. The defendants were denied their right to confront and cross-examine Applegate at the hearing. On this charge, the defendants were convicted on the 31st day of January, 1979.

ARGUMENT

POINT I

DEFENDANTS ROGER ANDERSON AND THOMAS BRACKENBURY WERE, IN EFFECT, DENIED THEIR CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

A preliminary hearing did not exist at common law, and there is generally no federal constitutional right to a preliminary hearing. But cf. Gerstein v. Pugh, 420 U.S. 103, 126, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Thus, a so-called "right to a preliminary hearing," if any right there be, must derive from State statute or constitution. 21

Am.Jur. 2d 445, Criminal Law §442.

The Utah Constitution provides a constitutional right to a preliminary hearing in Article I, §13:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State . . .. (Emphasis added.)

Concerning Article I, §13, this Court has written:

> And before the defendant can be so bound over and held to answer by the magistrate, he is entitled to a preliminary hearing, unless, with the consent of the State, he waives such hearing which under the Constitution, the statutes, and authorities cited supra, he may do. State v. Freeman, 93 Utah 125, 71 P.2d 196, 199 (1937). (Emphasis added.)

Thus, to citizens of this State is preserved a constitutional right to a preliminary hearing before an accused can be properly held to answer for a crime.

That the constitutional right in Utah to a preliminary hearing is a "substantial one," was early recognized by this Court. State v. Pay, 45 Utah 411, 146 P.300, 304-305 (1915). Indeed, if a defendant is denied a preliminary hearing, "the cause must be reversed, regardless of the other claimed errors in the trial. That [a] defendant cannot lawfully be tried and convicted on a charge upon which [he] was not given, or on which [he] did not waive a preliminary hearing is elemental. [Citations.]" State v. Jensen, 103 Utah 478, 136 P.2d 949, 951-952 (1943). (Emphasis added.)

One of the rights, long recognized, which inheres in the right to a preliminary hearing, is the defendant's right to rebutt the evidence presented by the State at such hearing. Freeman, supra, at 200. Moreover, the Legislature has recognized that the viability of the defendant's right to a preliminary hearing depends upon his ability to adequately counter the evidence introduced by the State. In harmony with this recognition, the Legislature has codified the procedures to be followed at the preliminary hearing. See Utah Code Annotated (U.C.A.), §§77-15-1, et seq. Thus, that the defendant's presentation might be meaningful at th preliminary examination, §77-15-2 provides that he be given reasonable time to secure counsel. Section 77-15-8 grants the defendant the right to deploy the State's sovereign power in his behalf to subpoena witnesses for his presentat

But one of the most fundamental procedures to buttress the defendant's right to counter the State's evidence at th hearing, is expressed in §77-15-10:

> The witnesses must be examined in the presence of the defendant, and may be cross examined in his behalf. (Emphasis added.)

Section 77-15-10 guarantees the accused the right to confront his accusers and have them cross examined in his presence, from the earliest practical point in the criminal prosecution process--at the preliminary hearing. This statutory procedural protection is consistent with the United States Constitution, Amendments VI and XIV, and the

Utah Constitution, Article I, §12, which preserve the defendant his right to confront his accusers at trial. See also U.C.A. §77-1-8(4). In Utah, the right of confrontation exists not only at trial, but also at the preliminary hearing.

In considering Article I, §12 of the Utah Constitution, this Court has stated:

> Under the constituion and statutes of the state the accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. . . . He had the right, not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. State v. Mannion, 19 Utah 505, 57 P. 542, 544 (1899). (Emphasis added.)

In elaborating upon the guarantees set forth in Mannion, this Court explained in State v. King, 24 Utah 482, 68 P. 418, 419 (1902):

> The chief purpose in requiring that the accused shall be confronted with the witnesses against him is held to be to secure to the defendant an opportunity for cross-examination; so, that if the opportunity for cross-examination has been secured, the test of confrontation is accomplished. See also State v. Kendrick 538 P.2d 313, 315 (Utah, 1975).

The right to a preliminary hearing in this State is fundamental. Part and parcel of that right is the right to present one's rebuttal to the State's evidence. The right to confront one's accusers at trial is also fundamental

constitutional law. But in Utah, the basic right of confrontation and cross examination of witnesses has been secured the accused not only at trial, but also at his preliminary hearing. Section 77-15-10, supra. In light of these principles, defendants Anderson and Brackenbury were effectively denied their constitutional right to a prelimina hearing.

Although the defendants were actually given a prelimina hearing in this case, they were not afforded the constituti and statutory rights enumerated above; in fact, these right were compromised to such an extent that they were effective denied their constitutional right guaranteed in Article I, §13 of the Utah Constitution.

The State's burden at the preliminary hearing has been described before by this Court:

> A preliminary hearing is the procedure by which the State puts on sufficient evidence to convince a committing magistrate that the crime charged has been committed and that there is sufficient cause to believe the defendant committed it. Seibold v. Turner, 20 Utah 2d 165, 435 P.2d 289, 290-291 (1967).

At the preliminary hearing in this case, two witnesses testified for the State and were cross examined by defense counsel. James Garner testified as to an altercation he h had with one of the defendants on May 28, 1978. PHT 34-35 Garner's testimony did not even remotely relate to any of the elements of the crime of witness tampering under U.C.A §76-8-508. Irvine J. Curtis testified as to two conversat

which he had had with the defendants, one on the night of May 28, 1978, and the other some weeks later. PHT 38-40. The testimony, if believed by the magistrate, would tend to establish that defendant Roger Anderson had used some force in securing the arrest of James Garner and a statement from Ray Applegate. But neither Garner nor Curtis testified as to a single element of the crime of witness tampering under the statute. Their testimony was irrelevant to establishing the elements of the crime, and the State did not meet its burden at the preliminary hearing to show "that the crime charged [had] been committed and that there [was] sufficient cause to believe the defendant[s] [had] committed it." Seibold, supra.

But the State supplemented the in-court testimony of Garner and Curtis with certain affidavits sworn to by Ray Applegate, the only witness of the State who could testify as to the elements of the crime with which defendants had been charged. The State sought admission of the documents under U.C.A. §77-15-19, which reads in relevant part:

> (2) The rules of evidence for trial of criminal cases shall apply at the preliminary examination, except that hearsay evidence that would not be admissible at trial shall be admitted if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness or party furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained. When hearsay evidence is admitted, the court, in determining the existence

of sufficient cause, shall consider:

(a) The extent to which the hearsay quality of the evidence affects the weight it should be given, and

(b) The likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary examination.

An extended discussion of the merits and meaning of §77-15-19 was conducted by the court and counsel. See PHT 19-30. During this discussion, counsel for the defendants made numerous objections to the constitutionality of §77-15-19 (PHT 21-22, 24, 29), as well as specific objections to the application of the statute in this particular case. PHT 19-20, 21, 23-24, 28.

Defendants' arguments, announced at the preliminary hearing and reiterated here, are essentially two. First, the documents produced by the State were sworn affidavits made by Ray Applegate, and were therefore not hearsy. The clear wording of the statute makes it applicable to hearsay only, and the introduction of the affidavits of Applegate was not provided for by the statute. The State sought, for the sake of its own convenience, to circumvent the defendants' rights under U.C.A. §77-15-10 to confront and cross examine the State's key witness, the effect of which circumvention was to compromise the defendants' right to a preliminary hearing under the Utah Constitution. Moreover this Court has expressed its disdain with the introduction of hearsay evidence at preliminary hearings. State v. Crank, 105 Utah 332, 142 P.2d 178, 183 (1943). (To satisf

its quest for convenience, the State could have produced Applegate at the preliminary hearing; afforded the defendants their full rights to confront and cross examine him at the hearing; and then not produced him at trial, introducing the transcript of the preliminary hearing instead. Under well-settled constitutional law, the defendants under such an arrangement would not have been denied their rights under Article I, §12 of the Utah Constitution, King, supra, at 419, nor under the Sixth and Fourteenth Amendments to the United States Constitution. California v. Green, 399 U.S. 149, 165-166, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970).)

Secondly, the statute, as it was applied in the preliminary hearing of these defendants, is so inconsistent with Article I, §§12 and 13 of the Utah Constitution and U.C.A., §77-15-10 that it either must be declared unconstitutional in toto, or be deemed to have been rendered inapplicable by these constitutional and statutory provisions insofar as the case at bar is concerned. The State's introduction of Applegate's affidavits completely foreclosed the defendants from cross examining him at the preliminary hearing as to any of the elements of the alleged crime. A valuable source of pre-trial criminal discovery was foreclosed. Moreover, because the testimony of Garner and Curtis was otherwise insufficient to fulfill the State's burden at the hearing, the defendants were effectively bound over and held to

answer via a pseudo-preliminary hearing that was such a sha as to be an unacceptable compromise of the defendants' constitutional rights to a qualitative hearing. That the dignity of the constitutional right to a preliminary heari in this State might be preserved, and because the prejudic to the defendants of an inadequate preliminary hearing in this case threatened proper trial preparation and presentation, the defendants respectfully request that the conviction be reversed.

POINT II

SECTION 76-8-508 OF THE UTAH CRIMINAL CODE IS UNCONST TIONALLY VAGUE AND OVERBROAD.

The constitutional test against which a purportedly vague statute must be scrutinized was enunciated by the United States Supreme Court in Connally v. General Constru 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), and followed by this Court in State v. Packard, 122 Utah 369, 250 P.2d 561, 563 (1952):

> The terms of a penal statute creating a new offense must explicitly inform those who are subject to it the conduct on their part which will render them liable to its penalties . . . and 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 meaning and differ as to its application violates the first essential of due process of law. Connally, 269 U.S. at 391. (Emphasis added.)

The test of unconstitutional statutory overbreadth wa stated by this Court in State v. Haig, 578 P.2d 837, 839 (Utah, 1978):

> A criminal statute is overbroad when it, in a substantial way, prohibits lawful acts as well as unlawful acts.

In the case at bar, the defendants were charged with the violation of U.C.A. §76-8-508, which reads in pertinent part:

> Tampering with witness--retaliation against witness or informant bribery. A person is guilty of a felony of the third degree if: (1) believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
>
> (a) testify or inform falsely . . .

"Official proceedings" are defined in §76-8-501, but no definition or other explanation is given for the terms "induce," "otherwise cause," "testify," or "inform."

A close reading of the statute divulges that the Legislature has failed to include, as an element of the offense, the requirement of a mens rea or criminal intent. Well-recognized terms such as "intentionally," "willfully," "knowingly," "recklessly," or "wrongfully" delineate the mental element necessary for the commission of a criminal act. State v. Casias, 567 P.2d 1097, 1098 (Utah, 1977). All of these terms are conspicuously absent from the present statute.

But the term "believing" is found within the statute, and it obviously connotes some kind of state of mind necessary to the commission of the offense. The defendants suggest, however, that the term "believing" describes only the state of knowing that an official proceeding is pending or about

to be instituted, and in no way modifies or elucidates the phrases "attempts to induce" or "otherwise cause." If the statute had contemplated a mens rea requirement as a necessary element of the crime of witness tampering, it would have had to have been written accordingly:

> (1) Believing that an official proceeding or investigation is pending or about to be instituted, he [knowingly] attempts to induce or otherwise cause a person to:
>
> (a) Testify or inform falsely . . .

(For the term "knowingly," any of the other terms mentioned above could be substituted, as long as at least one was present.)

It is well-settled law that the State may make certain acts criminal which are unaccompanied by a mens rea. State Twitchell, 8 Utah2d 314, 333 P.2d 1075, 1077 (1959); State v. Cutshaw, 7 Ariz. App. 210, 437 P.2d 962, 972-973 (1968). But, "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 499-500, 71 S. Ct. 857, 95 L.Ed. 1137 (1951). Because of its aberrational and exceptional character as a criminal statute which does not prescribe a mens rea for the commission of the offense which it describes, §76-8-508 compels a man of common intelligence to "guess at its meaning and differ as to its application," and it sweeps within its ambit "lawful acts as well as unlawful acts."

No better example of the above conclusion can be found

than the circumstances of the present case. Ray Applegate was the subject of a police investigation and he was being interrogated at the time of the alleged commission of the crime, by the local chief of police, defendant Anderson. The United States Supreme Court has recognized the tremendous "compulsion inherent in custodial surroundings" and has declared that the atmosphere of such investigations, "carries its own badge of intimidation." Miranda v. Arizona, 384 U.S. 436, 457-458, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thus, the very nature of the investigation being conducted by defendant Anderson may have tended, in a very subtle but real way, to "induce" or "otherwise cause" Ray Applegate to "testify or inform falsely." In fact, all police investigations may have this same tendency, so intimidating are the usual circumstances, to subtlely "induce" or "otherwise cause" a criminal suspect or witness to inform falsely.

Because §76-8-508 requires no mens rea as an element of the offense of tampering, it sweeps within its ambit otherwise lawful and innocent conduct of the police acting within the proper scope of their social functions. Section 76-8-508 is so vague that the reasonable policeman could never conclusively know which of his acts induced or otherwise caused criminal conduct under the statute. For these reasons, U.C.A. §76-8-508 should be declared unconstitutionally vague and overbroad. (U.C.A. §76-8-508 is, with a minor exception, a carbon copy of Model Penal Code, Art. 241, §241.6 [Proposed Official Draft, 1962]. Utah's sister states which have adopted this

section have changed the Model Penal Code text, and have added the necessary mens rea element. See, e.g. Haw. Rev. Stat., §710-1072; Tex. Penal Code Ann. tit. 8, §36.05 (Vern The Utah provision is also broader than the Model Penal Cod and the Texas and Hawaii statutes in that the Utah provisio substitutes the broad, general term "person" in subsection (1) for the original, and more narrow and specific terms of the Model Penal Code--"witness or informant.")

POINT III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ITS ERRONEOUS AND INADEQUATE INSTRUCTIONS TO THE JURY.

The defendants' requested instructions together with the instructions which the court actually gave are found in the official court file on pp. 77-84, and pp. 88-101. Defense counsel's specific objections to the instructions t the trial court are found in the Transcript on pp. 217-219. As noted above, U.C.A., §76-8-508 is not a paragon of clar important terms are undefined, and the statute's lack of a mens rea element tends to propound vagueness and overbread These statutory deficiencies had a profound effect upon th accuracy and adequacy of the instructions given the jury.

Defense counsel objected to the instructions of the trial court which dealt with the elements of the crime of witness tampering; namely, to the court's Instructions No. and No. 7. In No. 6, the court read the jury the pertinen statute for the violation of which the defendants had bee charged. The critical terms of the statute are left unde

in the Code, and the trial court failed to remedy this deficiency in its instructions. Defense counsel's objection was that No. 6 "was not followed up with specific instructions defining the terms that are used in the statute, which terms are encompassed in the Requested Instructions submitted by the defendants . . ." T. 217.

The error committed in so far as Instruction No. 6 is concerned was compounded by the trial court's erroneous instruction as to the elements of the crime of tampering under the statute. The trial court instructed the jury in Instruction No. 7:

> To constitute the crime of tampering with a witness as it applies to the circumstances of this case, it must be established beyond a reasonable doubt:
>
> 1. That the defendants believed an official proceeding or investigation was either pending or about to be instituted pertaining to suspected illegal sale of liquor by Mr. James Garner, doing business as J & M Saloon, and
>
> 2. That they induced or otherwise caused Ray Applegate to make a false statement. * * *F. 91. (Emphasis added.)

The defendants' counsel strongly objected at trial to this instruction. T. 217.

Instruction No. 7 is an inaccurate statement of the law. The statute plainly requires that before a person can be convicted of the crime of tampering he must have, inter alia, induced or otherwise caused a person to "testify or inform falsely." No matter how morally reprehensive it might be to cause some

one to "make a false statement," in effect to lie, such is not a crime under this statute. If the defendant does not cause the victim to testify or inform falsely, he cannot be convicted under the statute no matter how many false statements or lies he causes another to communicate. Of course, much depends upon the definition this Court gives the words "testify" and "inform".

Counsel also excepted to the trial court's failure to give defendants' Requested Instructions No. 2 and No. 3 which properly define the terms "testify" and "inform." T. 218.

Defendants' Requested Instruction No. 2 states:

> Testify as used in the statute means to give evidence according to law.

"Testify" is a highly specific term and means more than merely "making statements." This specific meaning is amplified in Blacks Law Dictionary (4th Ed., 1968) at 1646

> TESTIFY. To bear witness; to give evidence as a witness to make a solemn declaration, under oath or affirmation, in a judicial inquiry for the purpose of establishing or proving some fact. [Citations.]

That the meaning of the word "testify" is to make statements "under oath or affirmation" is borne out by a legion of citations in 41A Words and Phrases 28, "TESTIFY. Defendants' Requested Instruction No. 2 substantially embodied this concept. The difference between giving evidence according to law, upon oath or affirmation, and merely making statements is fundamental. The trial court

Instruction No. 7 was an inaccurate statement of the law, and the failure to give defendants' Requested Instruction No. 2 allowed the jury to convict these defendants for causing Applegate to make false statements, not for causing him to testify falsely as the statute requires. Moreover, if this Court sustains Instruction No. 7, and causing or inducing someone to make false statements without criminal intent becomes a crime under the statute and the Court's interpretation thereof, then §76-8-508 would be totally unconstitutional on the grounds of overbreadth. Such interpretation would make a mere lie a third degree felony and subject a defendant to criminal strict liability because he could always be charged with "believing" that somewhere in this State, some kind of proceeding or investigation was pending or about to be instituted.

Counsel objected to the trial court's failure to give Requested Instruction No. 3 which defined the term "inform":

> Inform as used in the statute means to make an accusation against another whom he suspects of the violation of some penal statute. T. 218.

The word "inform" is apparently a general term, and has no specific meaning to the same extent as the word "testify." See 21 Words and Phrases, 605, "INFORM". Under the familiar doctrine of statutory interpretation, ejusdem generis, the general term "inform" must be given a more specific interpretation in view of the preceding highly specific term, "testify."

Thus, to "inform" under the statute requires an "oath or affirmation." Defendants' additional interpretation of the statutory term, in Requested Instruction No. 3, suggested that an oath or affirmation had to be made in the form of a "accusation against another" suspected "of the violation of some penal statute." The failure to give Requested Instruction No. 3, compounded the error of the trial court in giving Instruction No. 7, and the jury convicted the defendants for having caused Ray Applegate to "make false statements" rather than for having caused him to "inform falsely" as required by §76-8-508. The trial court could have substantially overcome these fatal deficiencies in its instructions had the Court given the defendants' Requested Instruction Nos. 2, 3, and 7.

In Requested Instruction No. 4, defense counsel set forth the substance of one of his theories of the case:

> If you find that the statements signed by Ray Applegate were voluntarily signed by him, you must find the defendants not guilty.

That the defendants were entitled to have the jury instruc on their theories of the case, for which competent evidenc had been adduced, is the rule in this State. State v. New 105 Utah 561, 144 P.2d 290, 292 (1943); State v. Johnson, 112 Utah 130, 185 P.2d 738, 743-744 (1947); and State v. Castillo, 23 Utah 2d 70, 457 P.2d 618, 620 (1979).

The defense theory was that Ray Applegate, although intoxicated, had voluntarily signed the statements prepare by the defendants. The testimony of both the defendants

supported this theory, (T. 159-161, 186-189) and it was prejudicial error for the trial court to refuse Requested Instruction No. 4. If Applegate did voluntarily sign the statements, then, regardless of his inebriated condition, and regardless of the falsity of the statements, defendants could not be guilty of the crime for which they were charged. By having refused this instruction, the trial court denied the jury its prerogative to consider the defendants' theory of the case, and effectively hampered the defendants' constitutional right to present a defense. See In re Oliver, 33 U.S. 257, 273, 275, 68 S.Ct. 499, 92 L.Ed. 682 (1948), and Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed 2d 297 (1973).

Requested Instruction No. 5 posited another of the defendants' theories of the case:

> Should you find the statements signed by Applegate were not voluntarily signed, you must nevertheless find the defendants not guilty if you also find any of the following to be true:
>
> 1. The statements signed were factually correct . . ..

If the statements signed by Applegate were true, and James Garner had been selling liquor illegally and had interfered with the investigation being conducted by the defendants, then Anderson and Brackenbury could not be found guilty as charged. The above analysis on the right of a defendant to have his theory of the case presented to the jury if he has introduced evidence in support thereof, is equally applicable here.

The testimony of Jack Danzy and Michael Branegan supported the defendants' contention that James Garner had been selling liquor illegally. T. 118-124, and 199-201. The defendants both testified as to the altercation between Anderson and Garner. T. 156 and 183-184. Enough competent evidence had been introduced to warrant the submission of this theory of defendants to the jury.

Finally, the trial court erred in refusing to give the defendants' Requested Instruction No. 6 which stated:

> When you are considering the credibility and ability to remember of a witness you may take into consideration, among other things, the state of intoxication of the witness and the extent to which it has affected his ability to remember events and occurrences.

Ray Applegate was the key witness for the prosecution His testimony was the most damning to these defendants. I rebuttal to his testimony, the defendants' testimony substantially contradicted every major part of his story. In considering the defendants' testimony, however, the jury consciously or subconsciously was scrutinizing and weighi the credibility of the same. Everything to which the defendants testified could have been in the eyes of the jury, in the defendants' own self interest. That recogni by the jury probably had a profound effect upon their assessment of the defendants' credibility.

Substantial evidence was introduced at trial concern the intoxicated state of Ray Applegate in the afternoon a

evening of May 28, 1978. T. 143-144; 159-161 and 184-186. Even Applegate, in cross examination, admitted that he had consumed a substantial amount of liquor on the afternoon and evening in question. T. 82-84.

There can be no question that one's perception of events and circumstances is different when one is even partially inebriated. This difference in perception has a substantial effect on one's credibility when recounting experiences gained while inebriated, even in a subsequent, more sober setting. The battles fought, the dragons slain, the women charmed, and the mighty deeds done are somehow far less credible when one knows that the storyteller was inebriated at the time of his retold triumphs.

As a proper counter-balance to the jury's conscious or sub-conscious assessment of the defendants' credibility, the jury should have been instructed to consider Ray Applegate's state of intoxication as it related to his credibility as the State's primary witness. The failure to have given that instruction unmistakenly prejudiced the cause of the defendants.

Because of the failure of the trial court to properly instruct the jury as outlined herein, this Court should reverse and remand the cause for a new trial.

POINT IV

DEFENDANTS ROGER ANDERSON AND THOMAS BRACKENBURY CANNOT BE GUILTY OF VIOLATING 76-8-508 AS A MATTER OF LAW.

The point is simple--the State never proved that Ray

Applegate testified or informed falsely. The statements to which Ray Applegate signed his name on May 28, 1978 were no evidence given according to law, under oath or affirmation. Thus, he was not induced or otherwise caused to testify falsely. Moreover, Applegate never made an oath or affirmation in the form of an "accusation against another" suspected "of the violation of some penal statute." Applegate did not inform falsely. The insufficiency of the evidence in this regard leads to the conclusion that the defendants could not be guilty of having violated the statute as a matter of law.

Moreover, even if Applegate was induced or otherwise caused to make false statements, the State failed to show that such were ever used in an official proceeding, or ever intended to be used in such a proceeding. Implicit within 76-8-508 is the requirement that the false testimony or information have been actually used in an official proceeding. At the time the Applegate statements were given, only a police investigation was pending, and the State failed to show that the defendants knew or believed any official proceeding whatsoever was pending or about to be instituted. The statements themselves were never used in any proceeding until their admission into evidence at the trial of these defendants. Any contentions to the contrary were never proven at trial.

Assuming, arguendo, that the statements made by Applegate were completely and totally false, and that the defendants

knew that the statements were false, the defendants are, nevertheless, not guilty, as a matter of law, of the crime charged. There is no question that Applegate was never in any manner or at any time requested to testify in any proceeding concerning the illegal sale of liquor. The evidence demonstrated that Applegate left town the evening of the event and did not return to the State of Utah until the day prior to the trial of this case. Applegate was never requested to "inform" any person other than the defendants, nor were his written statements ever used to "inform" any persons other than the defendants. The defendants themselves could not be "informed" falsely because they would know these statements were false.

Based upon the above analysis, the cause should be reversed because the defendants cannot be guilty, as a matter of law, of violating the statute.

POINT V

DEFENDANT THOMAS BRACKENBURY WAS GRANTED IMMUNITY AND THEREFORE, WAS IMPROPERLY TRIED AND CONVICTED.

Traditionally, two kinds of immunity from criminal prosecution have received constitutional recognition and approbation--"use and derivative use" and "transactional" immunity. Cf. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Transactional immunity precludes prosecution "for any 'transaction, matter or thing' about which the witness is compelled to testify." State v. Ward, 571 P.2d 1343, 1347 (Utah, 1977). (Wilkins,

J., dissenting.) Use and derivative use immunity, however, "prohibits the use of immunized testimony or other immuniz information, but does not prohibit a subsequent prosecutio based on independent evidence." Id.

In outlining the scope of immunity in Utah, the Legislature failed to deploy the traditional nomenclature either "transactional" or "use and derivative use" immunit The statute, which was the subject of vigorous controversy in Ward, supra, reads in pertinent part:

> In any investigation or prosecution of a criminal case, the attorney general and any district attorney or county attorney shall have the power to grant immunity from prosecution to any person who is called or who is intended to be called as a witness in behalf of the State of Utah whenever the attorney general, district attorney or county attorney deems that the testimony of such person is necessary to the investigation and prosecution of such a case. No prosecution shall be instituted against the person for any crime disclosed by his testimony which is privileged under this action, provided that should the person testify falsely, nothing herein contained shall be construed to prevent prosecution for perjury. U.C.A., §77-45-21 (Emphasis added).

Although the statute does not specifically use the terms "use and derivative use" or "transactional," the cl inference is that the immunity authorized under this sect is transactional. The statute states that "no prosecutio shall be instituted against the person for any crime disc by his testimony which is privileged under this action," this language,

> although not the traditional language of transaction, matter or thing," conveys a meaning more similar to that of transactional immunity. Furthermore, it is specifically set out that this statute confers the "power to grant immunity from prosecution." Were the statute intended to be the use type, more precise wording would have been used, not precluding prosecution, but precluding the use of immunized testimony in a prosecution. Ward, supra, at 1347 (Wilkins, J. dissenting, with whom Maughan, J. concurred.)

The majority in Ward did not reach the issue as to the quality of immunity conferred by the statute.

In the present case, the defendant Thomas Brackenbury's deposition was taken on July 11, 1978. During the course of the taking of the deposition, and in response to defense counsel's assertion of defendant's Fifth Amendment rights unless immunity were granted, the County Attorney responded:

> MR. CALL: Well, the County Attorney's office will grant Mr. Brackenbury immunity as to the testimony regarding the incident in the bar and involving James Garner and as to nothing else.
>
> MR. UNGRITCH: Is that going to be the limit of the scope of examination at this time?
>
> MR. CALL: Well, to the extent that we are able to go beyond that we will. We will go into that in some detail, but we have other areas we'd like to go into, but we will grant immunity only to the incident relating to the bar and to James Garner, and to his activities as Justice of the Peace in relation to the arrests and the people brought before him. Deposition of Thomas Brackenbury, at p. 4. (Emphasis added.)

It is defendant Brackenbury's position that the County Attorney actually granted him immunity in two independent areas, either of which was sufficient to preclude his prosecution and conviction in this case. First, Brackenbury was granted

immunity as to "testimony regarding the incident in the ba and involving James Garner." What the County Attorney was actually thinking when he made this statement is irreleven it is what he communicated to counsel and the defendant which should control this inquiry.

Based on the foregoing analysis, the defendant was compelled to testify about the "incident in the bar" becau of the grant of transactional immunity. During the course of that testimony, the defendant revealed other "transacti matters, and things" relating to the charge on which he wa actually convicted. The statute clearly states that "no prosecution shall be instituted against the person for any crime disclosed by his testimony which is privileged under this action," and in order to preserve the defendant's Fifth Amendment right against self incrimination--which right immunity statutes are designed to protect--any ambiquities in a grant of immunity must be resolved agains the governmental officer making the grant.

Secondly, Brackenbury was granted immunity as "to his activities as Justice of the Peace in relation to the arre and the people brought before him." This statement of immunity is so broad that, on its face and with little analysis, defendant submits that it easily encompasses the charge on which he was ultimately convicted.

It was the theory of the State at trial that Brackenb was acting in his office as Justice of the Peace at the ti

the alleged crime took place. It was the uncontradicted testimony of the State's key witness, Ray Applegate, that Brackenbury had announced at the time of the alleged incident that "the Justice Court of Soldier Summit, Utah is in session--it is in session" and proceeded to inform Applegate that he was "charged with interferring with an officer." T. 63. Whether this confrontation between the defendant and Applegate is deemed an arrest, arraignment, or preliminary hearing is irrelevent in so far as the determination of the question of immunity is concerned. The confrontation was obviously within the scope of defendant's "activities as Justice of the Peace" and related to "the arrests and the people brought before him," and was thus within the grant of immunity referred to above. Again, the County Attorney's subjective state of mind is irrelevent to this consideration.

Defense counsel made a timely motion to dismiss as to Thomas Brackenbury, based upon the grant of immunity, well in advance of the preliminary hearing. Again at the preliminary hearing, counsel objected to the further prosecution of the defendant on the grounds of the immunity granted. PHT 31. The same objection was also raised at trial. T. 70. Perhaps because of the confusion and controversy which surrounds §77-45-21, defendants motions were denied. It should be remembered, however, that:

> a state cannot substitute for the privilege against self-incrimination an intricate [or confusingly inadequate] scheme for conferring immunity and thereafter hold in contempt those who have failed to fully

perceive its subtleties. 81 Am.Jur.2d 94, Witnesses §58. Cf. Stevens v. Marks, 383 U.S. 234, 242-244, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966).

Defendant Thomas Brackenbury respectfully prays that his conviction be reversed on the ground that he was grant complete immunity from prosecution for this charge.

CONCLUSION

Because the defendants were denied their constitution right to a fair preliminary hearing; because the statute under which they were charged and convicted is unconstitut vague and overbroad; because the ambiguities of the Statut itself were propounded to the jury by inadequate jury instructions; and because the defendants, based upon the evidentiary presentation at trial, could not as a matter o law have been guilty of violating the statute, the defenda respectfully request this Court to reverse their convictio and dismiss the information. In the alternative, the defendants request the Court to reverse the cause and rema the same for a new trial.

Because defendant Brackenbury was granted immunity by the County Attorney, pursuant to statutory authority, his conviction should be vacated and his name should be expung from the public records of these proceedings.

RESPECTFULLY submitted this 19th day of July, 1979.

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
Provo, Utah
Attorney for Appellants

MAILED a copy of the foregoing Brief of Appellants to Mr. J. Harold Call, Wasatch County Attorney, 30 North Main Street, Suite #3, Heber City, Utah 84032, and Mr. Robert Hansen, Attorney General, State of Utah, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 19th day of July, 1979.

Diane Perry
SECRETARY

DEPOSITION EXHIBIT One 1-11-78

STATEMENT

5-28-78
AT-7:46 PM

Ray Apple Gate said he was the boundhra of the The Business of Mr. J+M Solarro after He was told To Bouncth of Duty Chief of Police Roger Anderson & Tom Custom Brackenburn, to leave His Joint Across from Summit Inn Cafe. I, Ray AbbleGate do Hereby Swear That one James Garner was in The wrong by Striking Roger Anderson Chief of Police in The mouth with A Drink cup in His mouth. Also 3 witness At The Bar known As J+M Salon Driver of Truck Name United Agricutiler of Ennis Texax do Hereby Swear To This Commenment

1301 5 West Manning
FRESNO, CALIF.

Officer didi not eleven ~~officer~~ dan own

Ray Applegat
owner

Exhibit #2 1-20

STATEMENT

5-28
AT 7:46

I Ray Applegate Did Purc[hase]
WHisKey over THe BAR
At J&M Saloon in Sold[ier]
Summit Soldier Summit U[tah]
from Bar Owner (Jim Garn[er]
Owner) THe WHisKey WAS S[old]
At 50¢ Per SHot glASS. 1 ...
Dated 5/28/78 - Approx. Betwee[n]
THe Hour of 7:00 & 8:00 PM.
5/28-/78

Signed -
witness
" George R Schade
" Ray Applegate
" [illegible]

DEPOSITION EXHIBIT
Two
7-11-78

I Ray Applegate did Pay
Operator of BAR - James GA[rner]
wife for All Drinks WHi[ch]
I Purchased.
Signed -

Pl'tf's Exhibit #1
Case No. 650
DM. Clerk

witness
X " Ray Applegate
@ Chief Rogers [illegible]