1980

State of Utah v. Mary Pierren : Brief of Respondent and Cross-Appellant

Utah Supreme Court

ROBERT B. HANSEN; Attorney for Respondent;MICHAEL E. BULSON; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff, Respondent and Cross-Appellant,

-v-

MARY PIERREN,

Defendant-Appellant.

Case No. 16802

BRIEF OF RESPONDENT AND CROSS-APPELLANT

Appeal from the Memorandum Decision by Judge Calvin Gould of the District Court for Weber County, State of Utah.

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the State of Utah against the defendant to recover public assistance payments fraudulently obtained by the defendant.

DISPOSITION IN LOWER COURT

Plaintiff filed its complaint against defendant on September 14, 1978, alleging that defendant had fraudulently obtained $4,080.00 in public assistance which she was not entitled to receive. The hearing on this matter was before the Honorable Judge Calvin Gould on the 11th, 12th, and 26th of September, 1979. Judge Gould ruled that the public

assistance payments made by plaintiff to defendant were induced by defendant's fraudulent misrepresentations regarding material matters which plaintiff relied on; namely, the defendant failed to report that her ex-husband Pierre Pierren was living in the home. (R.48). From this ruling, Judge Gould granted judgment in favor of the plaintiff for $3,066.00 of the contested $4,080.00. (R.49).

RELIEF SOUGHT ON APPEAL

Respondent asks this court for an affirmance of the lower court's decision regarding defendant's fraud in obtaining public assistance. In addition, respondent urges this court to grant respondent a judgment of $4,080.00 instead of $3,066.00 granted by the lower court.

STATEMENT OF THE FACTS

In this case, the evidence admitted during the trial regarding defendant's public assistance records and her divorce decree was not made part of the appellate record. As a result, defendant placed this evidence in the back of her brief for the Court's reference. To avoid duplication, respondent will also refer to the appendices in the back of defendant's brief.

In April 1976 defendant applied for public assistance and food stamps from the State of Utah. On her assistance application, defendant named only herself and her four children as members of the household. (Appendix A of defendant's brief) Defendant listed her husband, Pierre Pierren, as being absent

from the home for the last 10 months. (Appendix A). Defendant also signed her application with the understanding that she was to notify the Assistance Payments Administration (APA) office regarding any changes in the makeup of her household. (Appendix A, last page).

On September 21, 1976, defendant reapplied for assistance and food stamps, and again listed only herself and her children as members of the household. (Appendix B). The question regarding a man in the home, was deliberately left blank by the defendant. (R. 259,260). On March 7, 1977, a similar reapplication for assistance and food stamps was executed by the defendant, and once again defendant named only herself and children as members of the household. (Appendix C).

On July 16, 1976, Pierre and Mary Pierren entered the office of the Brigadoon Apartments together; and had a rental agreement signed in Pierre's name listing Pierre and Mary Pierren as tenants of the same apartment. (R. 113, 114, 153, 176). From July 16, 1976, to May of 1977, tenants and employees of the Brigadoon Apartments were of the opinion that Mary and Pierre lived together. (R. 118, 119, 135, 144, 157). Their opinions were based on the following facts and observations; (1) Pierre was seen on a daily basis around and about the apartment (R. 114, 124, 132, 141, 154). (2) Pierre was observed in the apartment during all times of the day. (R. 124, 132, 144, 145, 157). (3) Pierre would pay the rent of the apartment with checks made payable to him. (R. 116). (4) Pierre and Mary would often play cards and have parties at their apartment with other

tenants of the Brigadoon Apartments (R. 132, 133, 143).

(5) Mary told two of the tenants of the Brigadoon Apartments, that "if anybody from Welfare comes around, don't tell them that we are living together." (R. 134, 144).

In fact, such a substantial amount of testimony and evidence was presented during the trial showing that Pierre and Mary lived together; Judge Gould was impressed to make the following remark:

> "But it is hard for me to see, Mr. Dazey, how, without having investigators actually walk through the bedroom how the State could put in a case very much stronger than this on that point." (R. 270).

Once it was established Pierre lived with Mary, the unrefuted testimony of Victor Larsen showed that defendant would have been ineligible for financial assistance had the truth been known. (R. 171). Therefore, Judge Gould ruled that the defendant was ineligible for financial assistance payments from August, 1976 to May, 1977. (R. 46).

ARGUMENT

Point I

> THE TRIAL JUDGE DID NOT ERR WHEN HE HELD THE STATE HAD PROVEN ITS BURDEN BY CLEAR AND CONVINCING EVIDENCE THAT PIERRE PIERREN WAS LIVING IN DEFENDANT'S HOUSEHOLD.

In the present case, one matter needs to be made emphasized; the defendant would not have been eligible for Aid to Families with Dependent Children (AFDC) if she would have listed Pierre Pierren a member of her household. (R. 171). Since the information was withheld, she received AFDC assistance to which she was not entitled.

At this point it is important to distinguish between the various types of public assistance programs. There are three distinctive programs: (R. 271-273).

1. Aid to Families with Dependent Children (AFDC)
2. Aid to Families with Dependent Children - Unemployed Parents (AFDC-U).
3. General Assistance (GA)

The eligibility requirements for each type of assistance are different and the "income and resource" classifications are also different. The defendant, Mary Pierren, applied for and received AFDC benefits. It is not the duty of this court to make a determination that she was eligible for any other type of assistance than that for which she applied. For example: to be eligible for AFDC-U or GA, the defendant would have had to report on her application that her ex-husband, Pierre Pierren, was a member of her household. In addition, to maintain eligibility for the AFDC-U or GA programs, the defendant's ex-husband would have had to enroll in various work projects. Since Pierre's presence in defendant's household was unreported, defendant's eligibility for assistance can only be determined under the specific criterion she applied, AFDC.

In determining if defendant's children were eligible for AFDC, it must first be considered whether the children were "dependent" within the meaning of the Social Security Act §406(a), 42 U.S.C.A. §606(a). The Social Security Act defines a dependent child as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued from the home, or physical or mental incapacity of a

parent. . ." 42 U.S.C.A. §606(a).

In the present case defendant contends that her childre were eligible for AFDC because (1) Pierre was continually absen from the home, or (2) even if he wasn't, the children were stil needy because Pierre did not furnish any support. In answer to defendant's second argument the landmark decision of King v. Smith, 392 U.S. 309, (1968) should be controlling.

In King v. Smith, the United States Supreme Court analyzes the history of the AFDC program and states the followi reasons for the program's enactment:

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.' H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,' as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates make perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629, as amended, 42 U.S.C. §606(a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent."

King v. Smith, 392, U.S. at 328. In otherwords, AFDC was not set up to take care of all needy children but only those needy children who are deprived of their parent because he is dead, incapacitated or continually absent. See Graham v. Shaffer, 17 Ariz. App. 497, 498 P.2d 571 (1972). Thus, the issue of whethe or not the parent furnishes support is not a determinative factor. In fact, this point is substantiated by the following statement in King v. Smith, supra,

"The State correctly observes that the fact that the man in question does not actually support the child cannot be determinative, because a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance." 392 U.S. at 329 (Emphasis added).

In King v. Smith, (the controlling U.S. Supreme Court case on AFDC matters) all that is needed to render defendant's household ineligible for AFDC is the presence of Pierre in the home. Since Pierre was in the home, defendant's household was ineligible, regardless of whether or not Pierre furnished the children support.

An example of one of the cases following the King v. Smith rationale is Trull v. District of Columbia Dept. of Public Welfare, 268 A.2d 859 (D.C. 1970). In Trull the father forced himself into the home over the objections of his wife. The father remained in the home and did not work on the outside, even though he was able-bodied and employable. In upholding a determination of ineligibility for AFDC, the Court stated that there must be both a need and deprivation, i.e., the child must be deprived of "the support of at least one parent by reason of the parent's death, incapcity or continued absence from the home." Trull 268 A.2d at 860. The fact that Mr. Trull was living in the home (in other words he was not "absent from" the home) was sufficient. It was immaterial that he was unemployed and did not contribute support. The court concluded its decision by stating that the children would remain ineligible until their father left home.

Since Pierre's non-support or support of the children [illegible] concerning defendant's eligibility for AFDC; the

only remaining contention by defendant that her household was eligible is that Pierre was continually absent from the home. In Smith v. Hueker, 531 F.2d 1355 (6 C.C.A. 1976) the Court points out that the federal legislation does not defi the term "continued absence." However, the term "continued absence" is mentioned in the federal regulation, 45 C.F.R. §233.90 (c)(1)(iii), which states,

> "Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may have left only recently or some time previously."

The Utah regulation for deprivation of support (APA Reg. Vol. II §224) basically states this same definition. Thus, the definition of "continued absence" from the above regulations shows that if the parent is not out of the home, then all of the conditions do not exist for the parent to come under the definition of continually absent.

To understand the definition of "continued absence " better, it is beneficial to analyze the parts of the definition. The following example which breaks down the parts of the defini of continued absence is helpful. Example: For a parent to be considered continually absent from the home the parent must meet all of the conditions below:

(1) The parent must be out of the home.

(2) The parent's absence interrupt's or terminates the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and

(3) The known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

In the present case the first element of the definition for continued absence was never met because Pierre was in the home. Thus, the other element of the definition does not need to be considered because the failure to meet the first element rendered defendant's household ineligible for AFDC.

In the cases cited in defendant's first point, she has confused the present case by showing how some courts grappled with the second and third elements of the "continued absence" definition. This court does not need to concern itself with the second and third elements, because Pierre did not meet the condition set forth in the first element. Pierre was not away from the home!

An example of how defendant's first point in her brief is confusing, is illustrated in the case of Freeman v. Lukard, 465 F. Supp. 1269 (D.C.E.D. Va., Richmond Div., 1979). In Freeman the children were found ineligible for AFDC benefits because the father did not meet the second element of the

"continued absent" defintion. The first element (absence from the home) was met by the father and was stated as an undisputed fact. The following comments by the Freeman court substantiat this;

> "The undisputed facts are as follows."
>
> "...although the father was absent from the home he continued to visit the younger children daily, discuss their care with the plaintiff, and provide them with milk and diapers."

Freeman 465 F. Supp. at 1271.

The above statement shows that the Freeman court was not concerned about whether the father was in the home or away from the home, that element was already well established by the undisputed facts. What the court in Freeman used to rend the defendant ineligible for AFDC, was the finding that the fath had not met the second element of the "continued absent" definiti

Since Pierre does not fit in the "continued absent" definition unless he is out of the home, the next question that needs to be answered in this case, is what is meant by being out the home, or in other words being in the home. One can if he wishes cite several cases which define "living together" or "living with", however, this court should keep in mind that those terms are not words of art. For example, the defendant cites the case of Johnson v. Finch, 350 F. Supp. 945 (D. Tex. 1972), and concludes that the same analysis of that decision should apply to the case at bar. The court should compare the wording in the case of Demaray v. Mannerud Const. Co., 128 N.W. 2d 551 (S.D. 1964), wherein construing Workmen's Compensation Regulati the court concluded that "living with" does not impart dwelling together and that the wife could be st

be deemed "living with" her husband. Respondent's argument is that the principle of stare decisis should not be applied to rule that the defendant's ex-husband did or did not "live in" or "was or was not absent from the home" her home. This case must be decided upon its own facts and circumstances.

The defendant cites several cases in Point I of her brief, and states for each case the reasons why the court concluded that the father of the children was in the home. This case should also be examined in the same fashion. When the facts and testimonies of this case were scrutinized closely at the trial it was clear to the court that the State met its burden and showed by clear and convincing evidence that Pierre was in the home. (R. 270).

A case showing that the evidence in the present case is sufficient to prove fraud is Beech v. State, 319 N.E. 2d 678 (Ind. 1974). In Beech, the defendant argued that her alcoholic husband, was absent from the home. However, several neighbors of the defendant testified that they saw Mr. and Mrs. Beech often together, at all times of the day. With the testimonies of the neighbors and a welfare investigator, a lower court in Indiana found that Mr. Beech was not absent from the home under a criminal standard of beyond a reasonable doubt. In addition, it is interesting to note that Mrs. Beech was convicted without the State having to prove that Mr. and Mrs. Beech maintained conjugal relationships or that Mr. Beech ever spent the night with the defendant. On appeal Mrs. Beech's conviction was affirmed.

The facts in this case are very similar to Beech, howev the present case did not require a standard of beyond a reasona doubt for Judge Gould to rule in the State's favor. The presen case only required a standard of clear and convincing evidence. This standard was clearly met by the State when four witnesses who were personal friends of the defendant testified that Pierre was at defendant's home almost every day, at all times of the da (R.114, 124, 132, 141, 144, 154, 157, 203). The witnesses also testified that Mary and Pierre never gave any indication that th were separated or divorced. In fact, Pierre and Mary were so concerned that the neighbors across the hall knew they were livi together that they specifically requested them not to tell the welfare man. (R. 134, 144). The neighbors interpreted this statement to mean that the defendant was getting money she knew s was not entitled to receive. (R. 137, 138, 144). Therefore, in present case Judge Gould did not err when he held defendant's ex husband was not absent from the home. (R. 45,46). Other evidenc substantiating Pierre being in the home is contained in the statement of facts. Other evidence is too numerous to list.

Point II

THE TRIAL JUDGE'S FINDING DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS BECAUSE NO CONCLUSIVE PRESUMPTION WAS MADE WITH RESPECT TO PIERRE PIERREN FURNISHING MAINTENANCE, PHYSICAL CARE OR GUIDANCE TO HIS CHILDREN.

In Point I of the argument, it was pointed out that the issue before the lower court was whether or not Pierre was present in defendant's household. The finding by Judge Gould that Pierre was in defendant's household, was enough in and of

itself to render defendant ineligible for AFDC. Thus, whether or not Pierre provided support to his children did not need to be determined and was irrelevant to this case.

The defendant in this case seems to have the same "fundamental misconception" about AFDC as did the defendant in Shannon v. Department of Human Services, 157 N.J. Sup. 251, 384 A.2d 899 (Super. Ct. N.J., App. Div. 1976). In that case the irrebuttable presumption argument was also raised. The court stated the argument lacked merit giving the following explanation;

> Appellant raises several substantive points of argument, all of which, in our view, lack merit. First, appellant contends that the agency's interpretation of the term "continued absence" as excluding frequent visition by a purportedly "absent" parent raised an irrebuttable and improper presumption that the child is being supported by the visiting parent. In making this argument appellant discloses a fundamental misconception concerning the purpose and scope of the federally-funded AFDC assistance program. Although the financial need of a child is an essential condition to eligibility under the program, need alone is insufficient. The protection afforded by the AFDC program extends to children who are found to be in need of financial assistance and who, while living in New Jersey, have "been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." N.J.S.A. 44:10-1(c). Hence, the program was designed to protect a clearly distinguishable group of children in need of financial assistance, those lacking a parent through death, physical or mental incapacity or continued absence. See King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). This limitation on those eligible for benefits thereunder is emphasized by the deletion in N.J.S.A. 44:10-

> 1(c)(1) of a provision extending protection to a child living with both parents where the father is unemployed or the earnings of both parents are insufficient.* [*Refers to New Jersey's AFDC-U program]
>
> Clearly under the law pertinent to the present controversy, eligibility for benefits was determined not only by financial need but by the absence of a parent whether by reason of death, incapacity or continued absence, this latter condition independent of financial support being needed or provided. (Brackets; Footnote reference, Emphasis Added).

Shannon, 384 A.2d at 900,901.

Since, defendant applied for AFDC assistance and not AFDC-U, the only concern before this court is whether or not the evidence supports the conclusion that Pierre was in defendant household. Thus, the conclusive presumption argument raised by defendant is irrelevant to this case.

Point III

DEFENDANT'S ARGUMENT CONTESTING THE AFDC REGULATIONS AS VAGUE, WAS NOT RAISED IN THE PLEADINGS NOR PUT IN ISSUE AT THE TRIAL AND CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

The third point in defendant's brief is now being presented to this court for the first time on appeal. This issue was never put in issue in any form through pleadings, motion, or at trial. This argument is therefore improperly before this court and is not to be considered. The Utah Supreme Court has stated over the years that: "matters neither raised in the pleadings nor put in issue at trial cannot be considered for the first time on appeal." Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702, 704 (1971). See also, Park City Utah Corp. Ensign Co., 586 P.2d 450 (1978), Edgar v. Wagner, 572 P.2d 405 (1977), and others too numerous to cite. This court refers [illegible] test

raised for the first time on appeal, in a recent welfare fraud case by stating the following; "We have consistently held that matters not raised in the trial court will not be considered on appeal." Department of Social Services v. Lester Romero aka Ralph G. Romero, slip opinion, page 2, no. 16551 (filed March 20, 1980). Thus, this Court should not consider whether or not the AFDC regulations deny due process by being vague.

Even assuming arguendo that this Court considers defendant's third point; this Court should still reject the argument. In Greaves v. State of Utah, 528 P.2d 805, 807 (Utah 1974), the Utah Supreme Court stated the following:

> "the presumption of validity hereinabove stated, gives rise to the rule that a statute will not be declared unconstitutional for that reason if under any sensible interpretation of its language it can be given practical effect."

And in Wagner v. Salt Lake City, 29 Utah 2d 42, 504 P.2d 1007, 1012 (1972), this Court stated as follows:

> "The fact that the legislature may have been more specific in its wording of a statute does not render it unconstitutional."

The above cases show that there is a presumption in favor of constitutionality. The AFDC regulation which defines continued absence is specific enough to give practical effect to its governing statute. It states that one condition for the household to be eligible for AFDC is that the parent is out of the home. 45 C.F.R. §233.90 (c)(1)(iii). Although, courts have at times struggled with what is meant by a parent being out of the home, the courts still have been able to apply the definition quite uniformly by analyzing all the facts and circumstances of each case.

In the present case, four people that were friends of the defendant and who were constantly around the Brigadoon Apartments were able to form an opinion that Mary and Pierre lived together. (R.118, 119, 135, 144, 157). In fact, Mary and Pierre must have been able to understand the meaning of living together, or why else would they have made the statement to their neighbors across the hall not to tell the welfare man that they were living together. (R. 134, 144).

In addition, the application forms for AFDC assistance are very clear. The forms ask specifically for the applicant to list all members of the household. (Appendices B and C) The applications also specifically request that the applicant inform the APA office of any changes in family size or any other circumstances which would affect the grant amount. (Appendix A, last page).

In the present case, the defendant had been on public assistance several times and was well aware of the regulations affecting her grant. (R. 258-260). She did not list her ex-husband on the public assistance forms because she knew that it would render her ineligible for AFDC. Thus, this court should reject her argument that the AFDC regulations are too vague.

Point IV

THE STATE SUFFERED ACTUAL DAMAGES WHEN IT PAID FINANCIAL ASSISTANCE TO THE DEFENDANT WHO HAD FRAUDULENTLY INDUCED PAYMENTS

American Jurisprudence 2d states the following:

"The measure of damages for fraud is, as a general rule, the actual pecuniary loss sustained." 37 Am Jur. 2d §342 Fraud and Deceit (1968). Therefore, the measure of damages which respondent should have against defendant is $4,080.00 dollars; the amount respondent was induced to pay to defendant because of her fraudulent misrepresentations.

Defendant contends that the money she fraudulently obtained should be paid back to the State, by the State collecting her child support payments. Such reasoning leaves a lot to be desired. In other words, defendant wants to benefit from her fraud.

In the first place, defendant would never have been able to assign her child support payments, a chose in action, to the State if she would have been truthful on her public assistance application. The assignment of defendant's support payments only came about as a result of defendant's misrepresentations. Therefore, since the assignment was induced by fraud, it is voided and of no value.

In this action, the State is recovering from the defendant that which the defendant defrauded the State. To require the State to recover the defrauded amount from defendant's debtors would be a grave injustice to the State and would allow the defendant to benefit from her own wrong. Such a ruling should be rejected because it would only encourage more welfare fraud.

Point V

FOR A HOUSEHOLD TO BE ELIGIBLE FOR AFDC, THERE MUST BE A SHOWING OF NEED, AND THERE MUST BE A DEPRIVATION OF PARENTAL SUPPORT.

As was stated in the first point of this brief, King v. Smith, 392 U.S. 309 (1968) is the governing case for AFDC assistance. The holding in King v. Smith is that eligibility for AFDC is two pronged. The first prong is that the dependent children must be needy. The second prong is that not all needy children are eligible, but only those needy children who are deprvied of parental support. (under 42 U.S.C.A. § 606(a)).

Graham v. Shaffer, 17 Ariz. App. 497, 498 P.2d 571 (1972), also states that a household must show more than need fo AFDC. The following passages explain this point:

> "The Senate Committee, in its reports preceding the enactment of the AFDC program, pointed out that the program was not intended to protect all needy children. The report stated that ' many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family." (Citation omitted) Graham, 498 P.2d 573.

And on page 574, the court adds this comment:

> "Congress did not intend for the family with an unemployed 'breadwinner' to be covered by this specific program (AFDC) unless he came under one of the disabilities mentioned in 42 U.S.C. §606(a)."

From the above case law it is clear that Congress passed AFDC so that families with a parent absent could receive financial assistance. If both parents were present in the home and the breadwinner was unemployed then the family would need to apply for assistance under the AFDC-U program.

Defendant applied for her financial assistance under the AFDC program and deliberately withheld information that would ultimately render her ineligible. It is not the duty of this court to make a determination t[illegible] a[illegible]

other type of assistance than that for which she applied. (See Point I of this brief). Therefore, since Pierre was in the home, defendant did not meet the two prong test for AFDC eligibility.

Point VI

THE JUDGMENT OF AWARDING THE STATE ONLY $3,066.00 IS NOT CONSISTENT WITH THE LOWER COURT'S FINDING THAT THE DEFENDANT WAS INELIGIBLE FOR AFDC ASSISTANCE.

The State's basis for its cross-appeal is that Judge Gould's holding which found the defendant ineligible for AFDC assistance from August 1976 to May, 1977 is inconsistent with the judgment of $3,066.00. The State paid the defendant $4,080.00 in AFDC assistance during the contested period and this is the amount the State should be reimbursed. (R.56-58).

The State brought this action against defendant to recover only financial assistance. (AFDC benefits). The State agreed at trial that the defendant was eligible for food stamp assistance during the time in question. (R. 57). In fact, the defendant received food stamp assistance every month during August, 1976 to May, 1977. However, part of the financial assistance given to the defendant was deducted under the optional Public Assistance Withholding program (PAW), to enable the defendant to purchase her food stamps. (R. 57, 58) If the defendant had not elected to have her food stamps purchased through the PAW program, then she would have had to pay in cash, the amount of the PAW deduction to receive her food stamps.

At this point, it is important to discuss how food stamp assistance is determined and purchased. The amount of food stamps allotted to a household is based on the household's family size and monthly net adjusted income. Based on the adjusted monthly net income the household pays a determined amount for the foodstamps received. (Financial assistance AFDC benefits is included in the household's adjusted monthly net income, See APA Reg., Vol. II §401.15). The difference between the amount of foodstamps received and the amount paid is the bonus, or the foodstamp assistance.

As stated before, this bonus or food stamp assistance the defendant received is not contested. What is contested is t lower court's ruling of including the PAW deduction as part of the food stamp assistance. The PAW is an optional program which is used by welfare recipients who are receiving money from more than one welfare program. For example: if a person with a household of 5 and no outside income was receiving $408.0 in AFDC, and was also eligible for food stamp assistance that person would have the following two options available. The applicant could either receive the $408.00 in financial assista and then pay a portion of that financial assistance to receive her food stamp allotment (applicant pays $110.00 to receive $189.00 in food stamps, result a bonus of $79.00) or she could have a portion of her financial assistance grant deducted under PAW and the deducted amount would be used to purchase her food stamps (Deduct $110.00 to received $189.00 in food stamps result a bonus of $79.00). Under either option the applicant

receives the same in AFDC aid and food stamp assistance. Therefore, the bonus is food stamp assistance but the PAW deduction is not.

The PAW program was instituted so that welfare recipients could avoid the inconvenience of having to bring their welfare money in to purchase food stamps. PAW was not set up to be a supplement, for food stamp assistance. If defendant had been ineligible for AFDC, she would have purchased food stamps out of her own money, or if she would have had no money she would have received a bonus amount of food stamps. Since defendant was not eligible for AFDC, due to her fraudulent misrepresentation, her AFDC benefits of $408.00 was included in her monthly adjusted net income. See APA Reg., Vol II 401.15. Defendant's election to use the PAW program made it easier for her to receive all her welfare benefits. The election did not increase the amount of her food stamp bonus. Thus, the State should be awarded the $4,080.00 in AFDC benefits which defendant fraudulently obtained.

CONCLUSION

The defendant misrepresented on her public assistance application forms essental information used to determine her eligibility for AFDC. As a result of her misrepresentations, defendant obtained $4,080.00 in AFDC which she was not entitled to receive. A great injustice would occur to the State if defendant, who perpetrated her fraud, is allowed to retain any of these funds.

The State at the trial level proved by clear and convincing evidence that defendant's ex-husband was in the home. The unreported presence of defendant's ex-husband in the home,

was sufficient by itself, to render defendant's household ineligible for AFDC. Therefore, any evidence regarding Pierre's support of his children is irrelevant to the case at bar.

Defendant's contention attacking the APA regulations on vagueness grounds should also be rejected. This argument is raised for the first time on appeal, and even if it wasn't defendant understood the regulations in as much as she specifically requested two of her neighbors not to tell the welfare man that she and Pierre lived together.

The State in this case suffered actual damages of $4,080.00 and should not be required to collect this money from defendant's debtors. The State should be allowed to recover the $4,080.00 from the one who committed the fraud. In addition, the defendant should not benefit, from the lower court's misunderstanding of the PAW program. This program is not a supplement for foodstamp assistance, but is just an efficient way of accounting for all of one's welfare needs.

Since defendant was ineligible for AFDC and was not entitled to receive anything from the program, the State should be awarded $4,080.00 the amount obtained by the defendant due to her fraud. Thus, the respondent urges this court to affirm the lower court's finding that defendant committed fraud in obtaining AFDC assistance. The respondent also requests this court to reverse the lower court's judgment of $3,066.00 and

in its place grant the State judgment for $4,080.00.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and exact copies of Respondent's Brief, postage prepaid, to Michael E. Bulson, Utah Legal Services, Inc., Attorneys for Appellant, at 385 - 24th Street, Suite 533, Ogden, Utah, 84401, on this the 6th day of June, 1980.

Sandra Lundquist