

1980

# State of Utah v. Lawrence J. Sorensen : Brief of Appellant

Utah Supreme Court

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BRYAN L. McDOUGAL; Attorney for Appellant; ROBERT B. HANSEN; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, )

Plaintiff/Respondent, )

vs. )

Case No. 16827

LAWRENCE J. SORENSON, )

Defendant/Appellant. )

---

BRIEF OF APPELLANT

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Appeal from the Judgment of the  
Third Judicial District Court of  
Salt Lake County, State of Utah  
Honorable Dean E. Conder, Judge

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Clerk, Supreme Court, Utah

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Plaintiff/Respondent,	)	
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Defendant/Appellant.	)	

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

The Defendant-Appellant, Lawrence J. Sorenson, (hereinafter Defendant) appeals from a verdict and judgment of guilty on four counts of Theft and/or Theft by Deception in violation of Title 76, Chapter 6, § 404 and/or 405, Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

The Defendant was charged and tried by a jury on six counts of Theft and/or Theft by Deception. The Defendant was found guilty of Counts I through IV and a judgment was entered thereon. Verdicts of not guilty were returned on Counts V and VI. Defendant appeals from the verdicts and judgments entered on Counts I through IV.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgments on Counts I through IV and judgments in his favor as a matter of law, or that failing, a new trial.

## STATEMENT OF FACTS

### PREFACE

The Complaint against the Defendant charged theft in that he "did obtain by deception or exercise unauthorized control over the property of another." Difficulty arises in attempting to restate the facts consistent with the alternative charges contained in the Complaint. Additionally, due to the numerous representations made by the Defendant and the general verdict returned it is impossible to determine, assuming theft by deception, which representations the jury deemed made and untrue. Inasmuch as the arguments presented herein are predicated upon questions of law and not the sufficiency of the evidence, no attempt has been made to restate the facts consistent with all possible determinations of the jury. The verdicts of guilty on Counts I through IV are consistent with a finding by the jury that either the Defendant obtained funds from the Complainants by making one or more misrepresentations, or, having obtained the funds lawfully, did exercise unauthorized control over the money, or both.



## BACKGROUND

The facts relating to Counts I through IV show that the Defendant formed Western Heritage, Inc. (hereinafter referred to as "W.H.I.") in late 1977. The Defendant served as Chairman of the Board of W.H.I. and acted as its manager-director. (Tr. at page 290) The stated purpose of W.H.I. was to assist its clients in establishing retail franchise operations. (Tr. at page 290)

On the 4th day of April, 1978, David Candland (hereinafter referred to as "Candland") and Lester Thatcher (hereinafter referred to as "Thatcher") from Portland, Oregon, contacted W.H.I. seeking property, financing, and professional assistance for a restaurant they wished to establish in Utah. The restaurant was to be named Apple Dumplin' and was to be a joint venture between Candland and Thatcher. Candland and/or Thatcher testified that during their first meetings with Defendant, he represented to them, among other things, that: 1) W.H.I. could sell them a piece of property for their restaurant at 941 South State, Salt Lake City, Utah; 2) W.H.I. could procure for them one hundred percent (100%) leaseback financing; 3) W.H.I. was a large, successful, real estate development firm with offices around the United States; 4) W.H.I. had been involved in numerous other successful projects similar to theirs; 5) W.H.I. had a commitment for \$10,000,000.00 from an outside financing source; and 6) W.H.I. was run and staffed by members of the L.D.S. church. (Tr. at pages 97, 98, 99, 195, 199, 200) Candland and Thatcher,

relying on one or more of the representations of Defendant, decided to proceed with the Defendant and W.H.I. in their attempt to establish the Apple Dumplin'.

#### COUNT I

On April 28, 1978, the Defendant requested and obtained \$5,000.00 from Candland. (State's Exhibit "7") On the same date, Candland and Thatcher entered into an Earnest Money Agreement with W.H.I. on a piece of property located on State Street, Salt Lake City. (State's Exhibit "5") Candland testified that payment was induced by the foregoing representations and the additional representations made by the Defendant that: 1) the money was needed to satisfy the requirements for financing (State's Exhibit "13" Item 3) and was not to be applied to the deposit required under the Earnest Money Agreement; 2) the money was a refundable deposit; 3) funding was available subject to their qualifying; 4) upon financing being approved all "up front" monies would be returned; and 5) the money was to be held in a special trust or real estate escrow account. (Tr. at pages 99 to 101) The \$5,000.00 received from Candland was placed in the business account of W.H.I. and spent in the regular course of business. (State's Exhibit "17")

## COUNT II

On the 3rd day of May, 1978, Thatcher paid to W.H.I. an additional \$5,000.00. (State's Exhibit "8") Thatcher testified that he relied on the same representations cited above in making the payment. The payment was deposited in the business account of W.H.I. and was spent in the regular course of business.

## COUNT III

On the 17th day of June, 1978, Thatcher paid to W.H.I. an additional \$10,000.00. (State's Exhibit "9") Thatcher testified that this payment was induced by the representations of the Defendant that: 1) Candland and Thatcher's financial statement was insufficient to obtain the financing (Tr. at page 189); 2) he (Defendant) had substantial capital and was willing to invest with them and become their partner; 3) that the first and last months lease payment of \$20,000.00 had to be immediately paid in order for the financing to be approved; 4) he (Defendant) would invest \$10,000.00 if Candland and Thatcher could come up with another \$10,000.00; 5) financing had been approved; and 6) the money (\$10,000.00) would be returned once the funding was actually obtained. (Tr. at pages 191 to 193) The money paid by Thatcher was deposited in the business account of W.H.I. and spent in the regular course of business.

#### COUNT IV

Thatcher paid an additional \$22,000.00 to W.H.I. by means of two checks (State's Exhibits "6" and "10") in August of 1978. Thatcher testified that both of these payments were induced by the representations of Defendant that: 1) previous funding had fallen through; 2) a new source of funding had been found but that additional up front money was needed to complete the transaction due to the difference in interest rates the bank was willing to pay a trust fund to deposit a compensating sum in their bank, and what the trust fund had demanded; 3) Defendant was going to put up \$50,000.00 of his own money to obtain the funds; 4) the money would only be needed for a couple of days. (Tr. at page 193) Of the \$22,000.00 paid by Thatcher, \$14,000.00 was paid out in an attempt to get financing. A portion of \$14,000.00 was returned, and together with the remaining \$8,000.00, it was placed in the business account of W.H.I. and spent in the regular course of business.

For the sole purpose of clarifying the transcript on file herein and the legal arguments that follow, the defendant's testimony contradicted the foregoing in almost every instance. Defendant testified that all of the payments were received as payments on the State Street property pursuant to the Earnest Money Agreement between himself and Candland and Thatcher.

## ARGUMENT

### POINT I

THE TRIAL COURT INCORRECTLY RULED SECTION 77-31-17\*, ENTITLED "FALSE PRETENSES - EVIDENCE OF", INAPPLICABLE TO PROSECUTIONS ALLEGING THEFT AND/OR THEFT BY DECEPTION

With the enactment of the new Utah Criminal Code<sup>1</sup> in 1973 the legislature abolished the offense of "false pretense" and other similar crimes and incorporated those offenses into a single offense designated "theft". Section 76-6-403 provides:

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in Sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. (emphasis added)

At the time the new Utah Criminal Code was enacted, the legislature left unamended § 77-31-17 of the Utah Code of Criminal Procedure, which provides:

Upon a trial for having obtained, with an intent to cheat or defraud another designedly by any false pretense, the signature of any person to a written instrument, or from any person any money, personal

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\* All statutory references are to Utah Code Annotated, 1953, as amended

1. Utah Code Annotated §§ 76-1-101 to 76-10-1401, 1953 as amended

property or valuable thing, the defendant shall not be convicted, if the false pretense was expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and in such assumed character marrying, or receiving any money or property.

The legal questions raised at trial and presented herein are 1) whether § 77-31-17 has continued applicability to prosecutions alleging "theft" by deception, and if so; 2) whether the Court erred by refusing to instruct the jury thereon in the case at bar.<sup>2</sup>

A comparison between the prior offense of "false pretense" and the new inclusive crime of "theft" by deception reveals that the two crimes proscribe the same type of conduct and that the new offense of "theft" by deception envelopes the

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2. See "Utah New Criminal Code", 73 Utah Law Review 718 at p. 750, footnote 210, wherein that author notes:

A provision of the Utah Code of Criminal Procedure that the Legislature left unamended requires, for conviction of false pretenses, the testimony of two witnesses or the existence of a writing signed by or in the handwriting of the defendant or the testimony of one witness and corroborating circumstances. Id. § 77-31-17 (1953). To the extent that this provision may be interpreted to apply to the new deception offense, it should be repealed to avoid an adverse procedural effect upon consolidation. See Perkins, *supra* note 3, at 320 (emphasis added)

same or similar elements of the prior offense of "false pretense".<sup>3</sup> Under prior law, the State established the offense of "false pretense" by showing that 1) the defendant made false representations; 2) knowing them to be false; 3) with intent to defraud; 4) received something of value from a victim; and 5) who relied upon the representations. Ballaine v District Court, 107 Utah 247, 255, 153 P.2d 265, 267 (1944).<sup>4</sup> Section 76-6-405, the provision with which defendant herein was charged, requires a showing by the State that 1) the defendant did obtain control over the property of another; 2) by deception; 3) with the purpose to deprive him thereof; and that 4) the value of the property exceeded \$1,000.00. Section 76-6-401(5) defines that "deception" occurs under the new Code as follows:

"Deception" when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

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3. See "Utah New Criminal Code", 73 Utah Law Review 718

4. See also, State v. Vatsis, 10 Utah 2d 244, 351 P.2d 96 (1960); State v. Timmerman, 88 Utah 481, 55 P.2d 1320 (1936); State v. Howd, 55 Utah 527, 188 P.628 (1920).



(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promises would not be performed.

The similarity between the prior offense of "false pretense" and the new offense "theft by deception", together with the express legislative statement that the prior offense is embodied under the offense of "theft" by deception, leaves no doubt that the legislature did not eliminate the offense of "false pretense" but merely consolidated and recodified it under another title. There appears no valid reason why the concerns and intent expressed by the legislatures enactment of § 77-31-17 should not have continuing force and effect under the new Criminal Code.

In addition to the foregoing, under well-established rules of statutory construction, § 77-31-17 should be given continuing application. This Court has long held that, where possible and consistent with other enactments, statutes should be construed so as to give meaning and effect thereto. Totorica



v. Thomas 16 Utah 2d 1975, 397 P.2d 984 (1965) Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965) The legislature itself has directed that statutes should be liberally construed so as to give them effect. Section 68-3-2 provides, in relevant part:

The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. (emphasis added)

In spite of the foregoing, the trial court held Section 77-31-17 inapplicable to "theft by deception" prosecutions which leaves the section without any force of effect whatsoever. While it is not reflected in the record, the trial court relied in part on the title of the section in question in making its decision, the title being "False Pretense - Evidence of". This Court has previously ruled that the titles to statutes are not part of the statutes. Great Salt Lake Authority v. Island Packing Co., 18 Utah 20 276, 421 P.2d 504 (1966) Reliance alone on the title of the statute is improper where the language of the statute is unambiguous and the statute in question has apparent application.

Assuming, arguendo, that the Section 77-31-17 has application to prosecutions for "theft by deception," its specific application to the case at bar requires further analysis.

One of the charges consolidated within each count of the State's case against the defendant herein is that he obtained the property of Thatcher and Candland by means of deception. Obviously, at this stage of the proceeding, there is no way to

determine which allegations or representations made by the defendant the jury found untrue and whether that representation was sufficiently corroborated in compliance with Section 77-31-17. Neither is it possible to determine upon which charge the jury based their verdict. There can be no doubt, however, that the determination of sufficient corroboration is a factual determination to be made by the jury and that it is procedural error to refuse to instruct the jury therein. State v. Clawson, 6 Utah 2d 160, 308 P.2d 264; State v. Foust, 588 P.2d 170 (1978).

Defendant submits that the trial Court committed prejudicial error in refusing to instruct the jury on provisions contained in Section 77-31-17, after having been requested to do so by counsel, and that as a matter of law the Defendant is entitled to a reversal, or in the alternative, a new trial.

## POINT II

### THE TRIAL COURT INCORRECTLY EXCLUDED AS HEARSAY DEFENDANT'S PROFFERED EVIDENCE CONCERNING THE BASIS FOR THE REPRESENTATIONS MADE TO COMPLAINANTS

Complainants (Thatcher and Candland) testified throughout the State's presentation of its case that the primary representation made by the Defendant which induced them to deal with W.H.I., and which eventually induced them to pay to W.H.I. a total of \$42,000.00, was that there was available to them, through W.H.I., 100% leaseback financing for their restaurant.

(Tr. at pages 96, 97, 186, 198, 203 and 205) The charge of "theft by deception" necessarily required the jury to determine whether the Defendant made that representation knowing it to be false.<sup>5</sup>

As illustrated by the verbatim excerpts from the transcript set forth below, numerous attempts were made to elicit testimony evidencing that other third parties had made representations concerning financing to the Defendant and that it was based on these third party conversations that Defendant in turn made representations to the Complainants. The specific interchanges between the Court and counsel with respect to the attempts to elicit that testimony are as follows:

Transcript of testimony of Valoy O. Adams at Tr. page 240, lines 13 to 19.

Q Did they ever make a commitment to you or Western Heritage Inc. concerning that financing?

A The commitment was all verbal from Anthony and Associates. They said yes, they would--

MR. JONES: Object to any statements made on the other end. Clearly hearsay.

THE COURT: It is hearsay. Sustained.

Transcript of testimony of Valoy O. Adams at Tr. page 241, lines 1 to 12

THE WITNESS: All right, sir. At their own expense they flew to Utah to look over some of the packages and some of the concepts that Western Heritage was developing. And at their expense they

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5. Section 76-6-401 (5)(a)

brought in a Mr. King, who, in Mr. Sorensen's office and in the presence of many of these people with whom we were attempting to finance did commit--

MR. JONES: Objection, hearsay, your Honor.

MR. McDUGAL: Your Honor, we're not submitting the statements for the truth of the matter contained therein; simply for the fact the statement was made. (emphasis added)

THE COURT: The objection's sustained.

Q (By Mr. McDougal) Do you want to go to the next? Anything else that they did rather than what they said. Did they supply you with any materials?

A Well, what--I can't tell you what they did. Did not--

MR. JONES: The question was what they did, your Honor and he's not responding.

Transcript of testimony of Lawrence J. Sorensen (Defendant) at Tr. page 302, lines 13 to 22

Q Mr. Sorensen, I want to take you back to 1977. Could you tell us what efforts were made on behalf of Mr. Candland and Mr. Thatcher to obtain the financing that you said was available?

A Yes, originally we submitted when their financial statement came in, we submitted the terms that they had sent us to Mr. King. Mr. King informed us--

MR. JONES: Objection to the statement by Mr. King, your Honor. Hearsay.

THE COURT: Sustained.

Transcript of testimony of Lawrence J. Sorensen (Defendant) at Tr. page 303, lines 7 to 27.

Q Some time down the road, did you meet with Mr. King concerning the financing?

A Yes. We did.

Q And what happened at that meeting?

A He stated that he would--

Q Mr. Sorensen--

MR. JONES: Your Honor--

THE WITNESS: I'm sorry.

THE COURT: Go ahead.

MR. JONES: Object to any comments by Mr. King. I think the witness is aware of that too.

THE COURT: Ask your question.

Q (By Mr. McDougal) Tell us what happened. What was given to Mr. King and what did he give back to you?

A The applications were submitted that had been submitted previously to him. He stated that their financial--

MR. JONES: Objection.

THE WITNESS: All right.

THE COURT: You're trying to tell us what somebody else told you, sir. That's something that can't be done.

As the above excerpts reflect, the Court excluded all testimony concerning statements made to the Defendant and others by third parties. The Court ruled, in spite of counsel's argument that the statements were not being offered to prove the truth of the matters asserted therein, that the statements were hearsay and therefore inadmissible.

Rule 63, Utah Rules of Evidence, defines hearsay as:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the matter asserted... (emphasis added)

There is no doubt that the solicited testimony would be hearsay if it had been offered to prove the matter therein contained, re: that there was actually money available to W.H.I. and the Complainants. The issue therefore turns on whether the evidence was offered for the truth of the matters asserted.

In the general discussion of what constitutes hearsay evidence contained in 29 Am. Jur. 2d at § 496, the author states:

In the event a statement is introduced for the purpose of establishing that a party relied and acted upon it, such a statement is not objectionable on the ground that it is hearsay. (emphasis added)

The Tenth Circuit applied the above general rule in a case directly on point to the case at bar in Frank v. U.S., (10th Cir. 1955) 220 F.2d 559, 563-64, wherein the defendant was convicted of mail fraud in connection with the solicitations of investments by means of false and fraudulent representations concerning a "magnetic logger", an alleged oil finding device. The court held it reversible error to preclude the defendant from testifying concerning testimonials he had received praising the accuracy of the device. The court explained:

An offer was made to prove by Frank...that he made 60 tests of the device and he was subsequently told by parties familiar with the results obtained in the drilling of such wells that his predictions were accurate in every instance. This evidence was offered

upon the theory that it tended to show that Frank was in good faith in making representations respecting reliability of the device. The trial court rejected the proffered testimony as hearsay.

The statements said to have been made to Frank by third parties were not offered to prove that such statements were true but as tending to show that Frank was led thereby to believe that the magnetic logger could be relied upon. Evidence of this character is not objectionable as hearsay. (emphasis added)

In a similar case, involving fraud, Robert A. Pierce Co. v. Sherman Gardens Company, (1966 Nevada), 419 P.2d 781, 784, the court expressed the rule as follows:

Wherein intent to defraud is an issue, conversations with third persons, or statements made by them, tending to negate an intent to defraud on the part of the party whose motive is material, are admissible.

There can be no doubt that intent was an issue in the case before this Court, specifically the questions of whether Defendant knew the representations he made to be false. Indeed, any prosecution under the theft by deception provisions of the Utah Criminal Code raises the issue. The trial court, by refusing to admit conversations with third parties tending to negate the requisite intent, effectively precluded the Defendant from presenting to the jury evidence tending to show that he was led to believe that the representations concerning financing could be relied upon. As pointed out to the Court (Tr. at page

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6. See, in accord, People v. Marsh, (1962) 58 C.2d 732, 26 CA. R. 300, 376, P.2d 300, 303-305.



241) the statements were not offered to prove that such statements were true but as evidence that such statements were made to the Defendant and believed by him.

The wrongful exclusion of the statements due to the misapplication of the hearsay rule was highly prejudicial in that, as the record reflects, the State relied heavily upon proving that the Defendant knowingly misrepresented to Complainants the availability and terms for 100% leaseback financing. Defendant sincerely submits to this Court, based on this error alone, that he is entitled to a new trial so that the finder of fact can be presented all of the relevant evidence.

### CONCLUSION

The trial Court committed, over the proper objections of the Defendant, two prejudicial errors which deprived the Defendant from having the finders of fact evaluate the evidence by the applicable legal requirements and from having them consider all admissible evidence.

The trial Court's holding that Section 77-31-17 is inapplicable to prosecutions for theft by deception is improper in that it ignores both statutory and judicial rules which require its application.

Secondly, the Court improperly excluded as hearsay critical evidence relevant to the Defendant's state of mind.



Either or both of the errors committed by the trial Court require a reversal of the convictions and that this matter be remanded for a new trial. Only a new trial can afford the Defendant the opportunity to have a finder of fact consider all of the evidence and to have that evidence measured by the proper statutory standards necessary for a conviction.

ORAL ARGUMENT

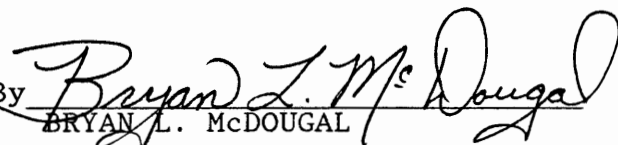
Defendant/appellant's counsel respectfully requests an opportunity to orally argue the merits of the matters contained herein.

DATED this 18th day of March, 1980.

Respectfully submitted,

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Attorney for Appellant

By   
BRYAN L. McDOUGAL

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing Brief of Appellant was delivered to counsel for the Respondent, Ernie Jones, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 on this 19th day of March, 1980.

