

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)
 Plaintiff/Respondent,)
 vs.) Case No. 16827
 LAWRENCE J. SORENSON,)
 Defendant/Appellant.)

REPLY BRIEF OF APPELLANT

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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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)

Plaintiff/Respondent,)

vs.)

Case No. 16827

LAWRENCE J. SORENSON,)

Defendant/Appellant.)

REPLY BRIEF OF APPELLANT

REPLY ARGUMENT

POINT I

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE PROVISIONS OF UTAH CODE ANNOTATED § 77-31-17 (1953), AS AMENDED, WAS PREJUDICIAL AND REVERSIBLE ERROR*

A

SECTION 77-31-17 IS CONSISTENT WITH SUBSEQUENT STATUTORY PROVISIONS AND THEREFORE HAS NOT BEEN REPEALED BY IMPLICATION

This Court has repeatedly and consistently held that an

* Appendix "A", attached hereto, sets forth the requested instruction.

implied repeal occurs only where there is a manifest inconsistency or conflict between the earlier and the later statute and such repeals are not favored. Glenn v. Farrell, 304 P.2d 380, 5 Utah 2d 439 (1956); Moss ex rel. State Tax Commission v. Board of Commissioners of Salt Lake City, 261 P.2d 961, 1 Utah 2060 (1953); Salt Lake City v. Town House Athletic Club, 424 P.2d 442, 18 Utah 2d 417 (1967). The clear import of the above cited cases, and numerous others with which this Court has dealt, is that this Court will not find a statute repealed by implication unless the intention to repeal is so clear and manifest that it would be unreasonable not to find such an intent. Bowling Club v. Toronto, 403 P.2d 651, 17 Utah 2d 5 (1965). Furthermore, this Court has held that whenever an earlier statute and a later statute can stand separately both should be given effect. Moss v. Board of Commissioners, supra.

In the instant case, respondent has argued that the enactment of § 76-6-403 repealed by implication the requirements of § 77-31-17. However, upon examining the two statutes it is clear that they can be interpreted and applied so as to complement each other and do not "conflict" so as to require a finding of a repeal by implication.

The two statutes in relevant part provide as follows:

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, ...

77-31-17. False pretenses-Evidence of.---Upon a trial for having obtained, with an intent to cheat or de-

fraud another designedly by any false pretense, the signature of any person to a written instrument, or from any person any money, personal 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.

Initially, it should be pointed out that § 76-6-403 is contained within the Utah Criminal Code, while § 77-31-17 is contained within the Code of Criminal Procedure. Section 77-31-17 imposes a "corroboration" requirement on certain types of admissible evidence. The "corroboration" requirement is similar to the requirements for corroboration of accomplice testimony which was required by § 77-31-18 prior to its repeal in 1979. Section 77-31-17, like that of the prior 77-31-18, does not alter the elements of the crime nor the evidence which may be introduced to support an accusation. What § 77-31-17 does do is require that certain types of evidence be supported before they are sufficient alone to justify a finding of guilt.

There appears to be no manifest inconsistency or conflict between the two statutes which would justify this Court to repeal by implication § 77-31-17, and therefore no valid reason why the concerns of the legislature when they enacted § 77-31-17 should not be given continuing force and effect.

B

THE REFUSAL OF THE TRIAL
COURT TO INSTRUCT ON §
77-31-17 WAS PREJUDICIAL ERROR
REQUIRING A NEW TRIAL

Section 77-31-17 requires that the specific "false pretense" relied upon to convict must be supported by "other" sufficient evidence. The respondent concedes, as it must, that due to the joinder of the charges of "theft" and "theft by deception", and due to the numerous representations which were to be considered by the jury, that there is noway to determine at this time the theory adopted by the jury, the specific representation upon which they relied, nor whether or not the representation relied upon was sufficiently supported so as to satisfy the statutory requirements of § 77-31-17.

In the instant case the jury, due to the trial court's refusal to instruct on § 77-31-17, was denied an opportunity to consider whether the evidence met the statutory requirements. The court's ruling effectively denied to defendant his constitutional right to have the jury consider the evidence in light of the statutory guidelines. As previously noted (Appellant's Brief, p. 12), the issue of sufficient "corroboration" is a jury question. State v. Clawson, 6 Utah 2d 160, 308 P.2d 264 (1957); State v. Foust, 588 P.2d 170 (1978).

This Court has previously held that when there is reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant, espec-

ially where the error involved transgresses against constitutional rights. State of Utah v. Eaton, 569 P.2d 114 (1977).

POINT II

THE TRIAL COURT IMPROPERLY
EXCLUDED APPELLANT'S PRO-
FERRED STATEMENTS AS HEARSAY
SINCE THE STATEMENTS WERE
NOT OFFERED FOR THE TRUTH
OF THE MATTERS ASSERTED
THEREIN

As a defense to the theft by deception charge, appellant attempted to testify concerning representations which were made to him by Mr. King and other financiers. As clearly pointed out to the trial court (Tr. at p. 14), the statements were proffered not to prove the actual existence of financing (proof of the matter asserted), but for the purpose of showing that the defendant did not knowingly and intentionally make false representations concerning financing. As extensively argued in appellants initial brief (p. 16 and 17), recent case law clearly holds that such statements are admissible where intent to defraud is an issue and where motive is material. Robert A. Pierce Co. v. Sherman Gardens Company, (1966, Nevada) 419 P.2d 781, 784; Frank v. U.S. (10th Cir. 1955) 220 F.2d 559, 563, 564.

The denial of defendant's proffered testimony was critical and relevant to one of the primary issues presented to the jury, i.e., the defendant's intent. No more prejudicial error could have been committed than refusing the defendant an

opportunity to present evidence in his own behalf. As previously noted, supra, any reasonable doubt as to the prejudicial nature of the error should be resolved in favor of the defendant. State of Utah v. Eaton, 569 P.2d 114 (1977).

CONCLUSION

The trial court erred in refusing to instruct the jury on Utah Code Annotated § 77-31-17 (1953). Section 77-31-17 is consistent with subsequent legislative enactments and therefore should be held to have continuing effect.

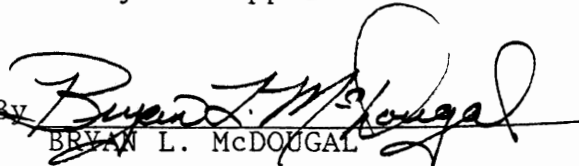
The proffered evidence of the defendant concerning statements of third parties were improperly excluded as hearsay as they were not offered to prove the truth of the matters therein asserted.

Due to the highly prejudicial nature of the errors committed, appellant respectfully prays that appellant's conviction be reversed and this matter remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that two copies of the foregoing Reply Brief of Appellant was delivered to counsel for the Respondent, Robert B. Hansen, Attorney General and Earl F. Dorius, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 on this 6th day of June, 1980.

Kathy T. Nelson

APPENDIX "A"

Instruction # _____

You are instructed that the defendant may not be convicted of theft by deception by reason of making a false representation unless the representation or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the representation is proved by the testimony of two witnesses, or that of one of the witnesses and corroborating circumstances.