

1980

State of Utah v. Lawrence J. Sorensen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 16827
LAWRENCE J. SORENSON, :
Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE DEAN E. CONDER, JUDGE,
PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 16827
LAWRENCE J. SORENSON, :
Defendant-Appellant. :

:
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a jury verdict of guilty on four counts of Theft and/or Theft by Deception in violation of Utah Code Ann. § 76-6-404 and/or § 76-6-405 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury before the Honorable Dean E. Conder and was convicted of four counts of Theft or Theft by Deception. Appellant was sentenced for the indeterminate term of not less than one year nor more than fifteen years. The execution of this sentence was stayed and appellant was placed on probation. The

conditions of probation included a period of incarceration in the Salt Lake County Jail of six months (R. at 153-154).

RELIEF SOUGHT ON APPEAL

The respondent seeks to affirm the conviction in the trial court.

STATEMENT OF THE FACTS

Appellant formed Western Heritage, Inc., in late 1977 for the purpose of assisting clients in establishing retail franchising operations (R. at 290). Appellant served as the corporation's Chairman of the Board and Manager-Director

On April 4, 1978, David Candland and Lester Thatcher (victims) contacted Western Heritage seeking property financing, and professional assistance for a restaurant to be named "Apple Dumplin'" which was to be established in Utah. During the first meeting with the appellant, appellant made the following representations to Candland and Thatcher:

1. Western would sell property located at 941 South State to used for the restaurant;
2. Western could procure one hundred percent (100%) leaseback financing;
3. Western was a large, successful, real estate development firm with offices around the United States;
4. Western had been involved in numerous other successful projects similar to that proposed by Candland and Thatcher;

5. Western had a commitment for \$10,000,000.00 from an outside financing source; and

6. Western was staffed by members of the L.D.S. Church in good standing. (R. 97,98,99,195,199,200).

Relying on these representations, Candland and Thatcher agreed to deal with appellant and Western Heritage in establishing the "Apple Dumplin'" restaurant.

The following is a synopsis, in chronological order, of the events which gave rise to the four counts of Theft. On April 28, 1978, appellant requested and received \$5,000.00 from Candland and Thatcher. That same day, the complainants entered into an Earnest Money Agreement with Western Heritage on the property located at 941 South State, Salt Lake City. The \$5,000.00 payment was induced by these representations from appellant:

1. The money was needed for financing and would not be applied to the deposit required by the Earnest Money Agreement;
2. The payment was a refundable deposit;
3. Funding was available if they could qualify for such;
4. All "up front" monies would be returned when financing was approved; and
5. The money received by Western would be held in a special trust or real estate escrow account. (R. at 99-101).

Contrary to these representations financing was never

obtained, the money was not returned and the \$5,000.00 was not placed in a special trust or escrow account. The money was spent in Western's regular course of business.

On May 3, 1978, Thatcher paid appellant an additional \$5,000.00 which appellant represented as necessary to obtain financing. Thatcher made payment in reliance on the same representations as noted above. This money was also deposited in the business account and spent in the regular course of business. The money never remained in a escrow account as promised by appellant.

On the 17th day of June, 1978, Thatcher paid an additional \$10,000.00 in reliance on the following representations made by appellant:

1. Candland and Thatcher's financial statement was insufficient to obtain financing (R. at 189);
2. Appellant had substantial capital and was willing to invest with Candland and Thatcher and become their partner;
3. The first and last months payment of \$20,000.00 had to be paid immediately to facilitate approval of the financing;
4. Appellant would invest \$10,000.00 if Candland and Thatcher could come up with an additional \$10,000.00;
5. Financing had been approved; and
6. The \$10,000.00 would be returned once the funding was actually obtained (R. at 191-193).

The money paid to Western Heritage was deposited in Western's business account and spent in the regular course of business.

In August of 1978, Thatcher paid \$22,000.00 to Western Heritage. The payment was induced by these representations:

1. The funding previously approved had fallen through;
2. Additional up front money was needed to secure new funding;
3. Appellant would put up \$50,000.00 of his own funds to obtain the financing; and
4. The money would only be needed for a couple of days (R. at 193).

Of the \$22,000.00 mentioned above, \$14,000.00 was paid out to get the financing. Some of the \$14,000.00 was returned and placed in the business account along with the remaining \$8,000.00. This money was spent in the regular course of business by appellant.

At trial the appellant attempted to repeat statements allegedly made by a financier to prove that financing was indeed available to Western Heritage (R. at 240,241,302, 303). These statements were excluded as hearsay by the court. The court ruled that the statements were being offered for the truth of the matter asserted.

At the close of the evidence, appellant requested that the jury receive an instruction on the elements of Utah Code Ann. § 77-31-17 (1953), which reads as follows:

77-31-17. False pretenses-Evidence of.—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 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 Court refused to give an instruction covering that Statute, but did instruct the jury on the elements of Utah Code Ann. § 76-6-404 and § 76-6-405 (1953) as amended.

ARGUMENT

POINT I

THE REFUSAL TO SUBMIT AN INSTRUCTION
ON UTAH CODE ANN. § 77-31-17 (1953),
AS AMENDED, WAS NOT REVERSIBLE ERROR.

A

UTAH CODE ANN. § 77-31-17
(1953), AS AMENDED, HAS BEEN
REPEALED BY IMPLICATION.

In 1973, the Utah Legislature expressly repealed Utah Code Ann. § 76-20-8 (1953), as amended, which defined the crime of "False Pretense" in the Criminal Code. See Ballaine v. District Court, 107 Utah 247, 255, 153 P.2d 265, 267 (1944). The legislature, however, failed to expressly repeal from the Code of Criminal Procedure Utah Code Ann. § 77-31-17 (1953), as amended, concerning the evidence required in a false pretense case.

Respondent submits that the statute, Utah Code Ann. § 77-31-17, was repealed by implication with the repeal of Section 76-20-8 and simultaneous adoption of Utah Code Ann. § 76-6-403 (1973).

Section 76-6-403 (1973), defines "Theft" as those offenses "heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion" (Emphasis added.)

It is clear that the offense of Theft now includes False Pretense. The separate offense of False Pretense no longer exists; that offense is now known as Theft. It logically follows that Utah Code Ann. § 77-31-17 is of no force and effect. Since the offense of false pretense, as a separate, unique cause of action does not exist, application of the evidence requirements of Utah Code Ann. § 77-31-17 never arises.

Appellant does not dispute that False Pretense and the new inclusive crime of Theft proscribe the same conduct (Appellant's Brief at 8 and 9). The statutes, therefore, cover the same subject. Under Utah law subsequently enacted statutes generally supersede prior existing statutes when they relate to the same subject. Pride Club v. Miller, 572 P.2d 385 (Utah 1977).

Later enactments also take precedence over prior enactments where the two are plainly inconsistent. Thiokol Chemical Corp. v. Peterson, 15 Utah 2d 355, 393 P.2d 391 (1964). In this case, Sections 77-31-17 and 76-6-403 do conflict. They differ as to the evidence that can be used to prove Theft. Unlike Section 77-31-17, Section 76-6-403 does not require a writing or two witnesses or one witness with corroborating circumstances. Instead, Section 76-6-403 states, in part:

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,
. . . .

Not one of the sections referred to (Sections 76-6-404 through 76-6-410) require the same evidence as does Section 77-31-17. In this case, theft was shown at trial by the manner specified in Sections 76-6-404 and 76-6-405. Because of the conflict between the more recent enactments and Section 77-31-17, this procedure was proper and Section 76-6-403 (1973) controls.

B

THE STATE SATISFIED THE
REQUIREMENTS OF UTAH CODE
ANN. § 77-31-17 (1953), AS
AMENDED.

Even if the statute was not repealed by implication, the prosecution nonetheless met the evidentiary requirements of Section 77-31-17. Those requirements are that the false pretense be shown by:

1. A writing (note or memorandum) subscribed by or in the handwriting of the defendant, or
2. Testimony of two witnesses, or
3. Testimony of one witness and corroborating circumstances.

It should be noted, contrary to appellant's belief, these requirements are disjunctive and, therefore, corroboration is not essential (Appellant's Brief at 12).

The transcript of this case indicates that documents were admitted as evidence of appellant's false representations. One example is appellant's promise to keep the money received by Western in an escrow account rather than a general business account (State's Exhibit No. 13). The transcript clearly shows that more than two witnesses testified for the State (R.160,161). Under Section 77-31-17 the testimony of Candland and Thatcher was sufficient to satisfy the requirements. The failure to give a requested instruction concerning alternative theories is not error where the instruction was cumulative and amply covered by other instructions given. State v. Martinez, 21 Utah 2d 187, 442 P.2d 943, 944 (1968).

C

FAILURE TO SUBMIT APPELLANT'S
PROPOSED INSTRUCTION WAS HARMLESS
ERROR.

Should this Court find that the refusal to instruction on Section 77-31-17 was error, such refusal did not prejudice the substantive rights of the appellant and, thus, does not justify reversal of the conviction. This Court has on numerous occasions pointed out that it "will not reverse criminal cases for mere error or irregularity." State v. Neal, 1 Utah 2d 122, 262 P.2d 756 (1953). Utah Code Ann. § 77-42-1 (1953), as amended, provides:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

Refusal to give an instruction cannot be the basis for reversal if the jury is sufficiently advised of the issue they are to determine, or it appears that they were not confused or misled to the prejudice of the defendant. State v. Ouzounian, 26 Utah 2d 442, 491 P.2d 1093, 1095 (1971).

As noted above, the requirements of Section 77-31-17 were established by the State at trial. Appellant does not contest that fact. Determination of whether a writing had been submitted or whether the testimony of two witnesses had been heard can be made by examination of the transcript. These determinations, therefore, did not require special consideration by a jury. Therefore, failure to instruct the jury did not prejudice the appellant and cannot be the basis for a reversal.

POINT II

THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S PROFFERED STATEMENTS SINCE THE STATEMENTS WERE HEARSAY AND OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.

Hearsay is defined by Rule 63 of the Utah Rules of Evidence as:

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

As a defense to the theft charges, appellant attempted to prove that he made an honest effort to obtain financing for the restaurant of Candland and Thatcher. The appellant chose to establish this point by referring to statements made to him by Mr. King and other financiers, the alleged source of funding for the project. The statements made by King would have proved the actual existence of financing, but Mr. King was never called by the appellant. Respondent submits that if appellant wished to establish what Mr. King said with regard to financing, then the only alternative was to call Mr. King as a witness.

Appellant made no effort to establish that Mr. King was unavailable for trial nor did appellant establish that any effort had been made to locate Mr. King.

Appellant suggests that the evidence introduced by respondent was based on a theory of deception. The information filed was issued with alternative pleadings involving Theft or Theft by Deception. Respondent's theory was: (1) appellant exercised "unauthorized control" over the property of Candland and Thatcher when he used the money for regular business. Appellant was authorized to hold the money in escrow. He was not authorized to take

the money from escrow or use the funds for Western Heritage; (2) appellant deceived Candland and Thatcher when he advised them that the money was in escrow, that financing had been obtained, and that he would match funds with the investment of Candland and Thatcher.

The jury was instructed on both charges. The verdict does not indicate which theory the jury relied on to convict appellant. Appellant's statement that he was convicted for acts of deception is not totally correct. A conviction for theft would not require evidence of deception. Therefore, the statements by a third party (Mr. King and other financiers) would be immaterial to a conviction.

Appellant and V. O. Adams testified that Western Heritage attempted to obtain financing from several sources. Both witnesses testified that they relied on the representations made by those sources.

Appellant was attempting to prove that an honest effort was made on his behalf to obtain financing for the victims. Appellant was able to do that without introducing the statements of an out-of-court witness. The statements of the financier were not material to the issue and therefore were properly excluded by the trial court.

The statements of Mr. King and other financiers do not fit into the recognized exception regarding "state of mind." In order to satisfy the "state of mind" exception under Rule 63(12), Utah Rules of Evidence, the statements must be offered to show the declarant's (King's) state of mind. Appellant claims that he offered the statements of Mr. King to show appellant's state of mind. The court ruled that such evidence was not admissible because it was not offered to show Mr. King's state of mind.

Appellant cites Frank v. United States, 220 F.2d 559 (10th Cir. 1955), as controlling on the question of whether King's statements were admissible. In Frank, the court said that statements of a third party were admissible to prove that the defendant relied on such statements and representations because the statements were not offered to show the truth (or falsity) of the charges in the complaints. In this case, appellant was not attempting to prove that he relied on the statements of a third party (Mr. King). The appellant was attempting to show that he made an effort to obtain financing from various sources.

In Hoffmann v. United States, 353 F.2d 188, 190 (10th Cir. 1965), the court cited Frank for the proposition that good faith is material to the defense in a fraud case.

However, the court also stated that hearsay could not be used to show good faith; good faith must be shown by "proper evidence." The appellant was able to show that he made a good faith effort to obtain financing without relating the conversations of Mr. King. Appellant testified as to the sources he or Valoy O. Adams contacted and what efforts he made to obtain such financing. Therefore, the statements of Mr. King were not material to the case.

Hearsay has historically been categorized as inadmissible evidence because it is unreliable. The jury is not allowed to judge the credibility of the declarant and there is always the chance that the witness will fabricate or exaggerate the alleged statements of a third person. Exceptions to the hearsay rule were carved out due to the trustworthy character of certain hearsay evidence. But when the evidence, such as the proffered statements in this case, is not shown to have a trustworthy or reliable quality, due to its self-serving nature, then the policy against admitting unreliable evidence is met by excluding those statements. The trial court properly excluded the statements after determining that the statements were hearsay and offered for the truth of the matter asserted.

If this Court finds that it was error to exclude the testimony of Mr. King or other financiers, respondent

submits that it was harmless error. Proof of deception as required by Utah Code Ann. § 76-6-405(2) did not turn on the admission or exclusion of King's statements. Deception was shown at trial by the testimony of witnesses and by the introduction of documents signed by appellant. Failure to allow admission of appellant's proffered evidence did not prejudice his substantive rights and was therefore, harmless error, if error at all.

CONCLUSION

The trial court did not err in refusing to instruct the jury on Utah Code Ann. § 77-31-17 (1953), as it has been repealed and superseded by Utah Code Ann. § 76-6-403 through 76-6-410 (1973). The later enactments, effective in 1973, take precedence over Section 77-31-17.

The evidence proffered by appellant at trial was properly excluded as hearsay since King's statements were offered to show the truth of the matter asserted: that financing was available. If this Court finds, however, that the lower court did err, respondent submits that only harmless error was committed.

Respondent prays for this Court to affirm appellant's conviction.

Respectfully submitted,

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