

1954

State of Utah v. Dick Smith : Defendant's Brief on Appeal

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Dobbs & Dobbs; Attorneys for Defendant;

Recommended Citation

Brief of Respondent, *State v. Smith*, No. 8158 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2175

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

SEP 14 1954

LAW LIBRARY
U. of U.

IN THE SUPREME COURT

of the

State of Utah

FILED

JUN 8 - 1954

State of Utah

Supreme Court, Utah

Plaintiff

-vs-

#8158

DICK SMITH,

Defendant

DEFENDANT'S BRIEF
ON APPEAL

DOBBS & DOBBS
812 Eccles Building
Ogden, Utah
Attorneys for Defendant

Filed:

By

INDEX

	Page
FACTS, STATEMENT OF	1
POINTS, STATEMENT OF	2 - 3
ARGUMENT:	
Point No. 1	4 - 12
Point No. 2	12
Point No. 3	13 - 30
CONCLUSION	30

CASES

Morris v. State, 9 Okl. Cr. 241	
131 P. 731	23
State v. Collett, 20 U. 290,	
58 P. 684	11
State v. Hall, 112 U. 272,	
186 P. 2d 970	12
State v. Hougesen, 91 U. 351,	
64 P. 2d 229	26
State v. Mills, --U.--, 249 P 2d 211	22
State v. Reese, 43 U. 447,	
135 P. 270	23
State v. Spencer, 15 U. 149	
49 P. 302	11
Williams v. State, 61 Okl. Cr. 396	
68 P. 2d 530	23

STATUTES

UTAH CODE Annotated, 1953:

76-53-10	6
76-53-20	5 - 6
77-31-14	4 - 6
77-31-18	11

Index Cont'd.

TEXTS

58 Am. Jur. 346 - 347	16
58 Am. Jur. 411 - 412	27
58 Am. Jur. 433	28
58 Am. Jur. 433 - 434	28 - 29
58 Am. Jur. 434	29
58 Am. Jur. 435 - 436	29

- -

.IN THE SUPREME COURT

of the

State of Utah

State of Utah,

Plaintiff,

-vs-

DICK SMITH,

Defendant.

)
(
)

8158

DEFENDANT'S BRIEF

ON APPEAL

STATEMENT OF FACTS

A complaint was filed against Dick Smith, the appellant, on October 28th, 1953, charging him with the crime of pandering committed as follows: "That Dick Smith the above named defendant, in Weber County, State of Utah, between November 1, 1951 and March 20, 1952 committed a felony, to-wit: Pandering as follows, Dick Smith, induced, persuaded, encouraged, inveigled and enticed a female person, Norma Lee Stone, to become a prostitute."

Preliminary examination was had October 31st, 1953, a Court Reporter being present and making a transcript of the testimony, defendant was bound over to the District Court where an information was filed November 19th, 1953, to which defendant pleaded "not guilty" November 23rd, 1953, and trial was set for November 30th, 1953. The information charged the defendant with the crime of pandering, committed

as follows: "Dick Smith having heretofore been duly committed by Charles H. Sneddon, a committing magistrate of this County to this Court, to answer this charge, is accused by the District Attorney of this Judicial District, by this information, of the crime of pandering committed as follows, to-wit: Dick Smith induced, persuaded, encouraged, inveigled and enticed a female person, Norma Lee Stone, to become a prostitute."

From the conviction of the appellant to the jury and the imposed sentence this appeal is taken. Discussion of the evidence so far as it relates to the questions which this appeal raises will be made as the various matters upon which defendant relies are discussed.

STATEMENT OF POINTS

The argument in this case will follow the points below given.

Point No. 1.

That the Court committed error in denying the defendant's motion to dismiss the prosecution, made at the close of the State's case, and based upon the ground that the only witness whose testimony connected the defendant with the alleged offense was Norma Lee Stone, whose testimony was not sufficient to convict without corroboration.

Point No. 2.

That the Court committed error in that it refused to give the defendant's requested instruction No. 1 (Tr. 008) relating to necessity of corroboration of an accomplice.

Point No. 3.

Error committed by the Court in rulings sustaining objections made, and orders by the Court made without objection by the prosecution, limiting evidence sought to be adduced by defendant.

ARGUMENT

Point No. 1

"That the Court committed error in denying the defendant's motion to dismiss the prosecution, made at the close of the State's case, and based upon the ground that the only witness whose testimony connected the defendant with the alleged offense was Norma Lee Stone, whose testimony, was not sufficient to convict without corroboration. "

It is the contention of the defendant that Section 77-31-14, Utah Code Ann. 1953, became applicable to this case, upon the prosecution proffering evidence that Norma Lee Stone, the complaining witness, was a previously chaste person.

The statute cited provides as follows:

"upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away any female of previously chaste char-

acter for the purpose of prostitution, or aiding or assisting therein, the defendant shall not be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

It will be observed that this enactment is not limited to one class of offenses but is intended as an extension of the general statute respecting conviction upon the uncorroborated testimony of an accomplice, under which such a woman, since not herself subject to prosecution for the same offense as that charged, would not be an accomplice. It would apply to every case where the offense proved is inveigling or enticing such a female for the purpose of prostitution. The word "taking" has relation to the offense defined in Section 76-53-20, which makes such a taking of such a female from her parents or other lawful custodian, she being under the age of 18 years, a

felony. The provisions of Section 77-31-14 do not contain that age limitation.

This enactment was intended to enlarge the definition of an accomplice by including in the class of persons whose testimony required corroboration females of previously chaste character who are enticed or inveigled into a life of prostitution. It is to be observed that the only section of our penal code which makes prior chastity an element of an offense is Section 76-53-20, which has to do with taking for the purpose of prostitution such a chaste female, under 18 years of age, from the custody of a parent or guardian, the latter two elements not being included in the provisions of Section 77-31-14. The latter statute includes "taking" as an alternative element, but does not include "inveigling or enticing", words found in the pandering statute, (Sect. 76-53-10).

If then this statute, so extending the necessity of corroboration to witness not ordinarily falling within the definition of an accomplice is to be read giving meaning to all of its phrases, it must be understood as covering all sexual cases involving prostitution, where the complaining witness has been previously chaste, pandering included. Chastity being no element of such other offenses, it is submitted that the statute is rendered meaningless unless it is intended to apply where it appears in the trial that the witness was chaste prior to the enticement of the defendant, and so must apply whether the charge contains an allegation of such chastity or not.

What are the facts here? The opening statement of the public prosecutor contains a recital of the facts which he intended to prove to establish the State's case. The recital shows a visit by Mrs.

Stone to Smith's living quarters, where they drank together, and where, she said, he first "began making remarks about her becoming a prostitute".

After that, said the prosecutor, the defendant took Mrs. Stone home, and "further enlightened her upon this subject, and asked her her desires in the matter and told her some of the advantages of becoming a prostitute". Then the statement related continuing efforts along the same line, which after some period of time resulted in her engaging in acts of prostitution both in Utah and Wyoming. This statement clearly indicates that the state based its charges upon an enticement whose beginning dated back to that first visit to the defendant's quarters at the Millstream Motel. The statement was followed up by testimony from Mrs. Stone which also began with that motel visit, and followed through her narrative of her relations with the defendant in sub-

stantially similar order as that given in the opening statement. The witness then testified (Tr. 21) that she never had engaged in prostitution prior to meeting Mr. Smith -- not in direct statement perhaps of chastity, but since she had told at length of illicit relations with Smith, we think may be treated as, and was considered by the witness and jury as meaning that, prior to those relations, she had been a chaste woman.

There is nothing in the record which in any wise tends to connect the defendant with the crime involved. The witness Arlyn Garside, the complaining witness in this case, testified (Tr. 24) to seeing Mrs. Stone and Mr. Smith talking in Louigi's Cafe--a fact to which Mrs. Stone had testified; that he saw her in the Grill Cafe working as a waitress at a time when Mr. Smith came to see him about getting a beer license for that cafe; that she disappeared for a time,

and he thereafter saw her about town with other men; and that subsequently (Tr. 25) he had conversations with her at her request. The witness L. J. Jacobson (Tr. 26) testified to seeing Mrs. Stone and the defendant together in the same cafe, and riding together in a car. None of these facts corroborate the testimony of Mrs. Stone as to any act of any kind incidental to the offense charged.

The witness Jean Orlob, a sister of the witness Stone, testified to visits to her home (Tr. 22) by her sister and the defendant, and to some conversation in which "joking" the defendant said something to the effect that her sister could "make more rather than working in a restaurant", that all she recalled was that the defendant had said that her sister could get further than just working in a restaurant. To consider such testimony, characterized by the witness as "joking", evidently so said that her sensibili-

ties were not shocked, and the incident barely remembered, as corroboration of the charge of enticement to prostitution, would result in a rule of evidence exposing any suitor of a woman, subsequently jilted, to conviction upon her evidence of illicit relations, without any showing of opportunity or other facts except presence together in various places where no chance for guilt could arise, plus bad taste in conversation.

Corroboration must go further. This Court has frequently defined such corroboration as being proof of material facts which constitute a necessary element of the crime charged.

State v. Spencer, 15 U. 149, 49 P. 302

Tending to implicate the defendant in and connect him with the offense charged.

State v. Collett, 20 U. 290, 58 P. 684

The many cases cited in the footnote to Section 77-31-48,

Utah Code Ann. 1953, which is the general statute as to testimony of accomplices continue to support the rule laid down in the two early cases above cited.

Point No. 2.

"That the Court committed error in that it refused to give the defendant's requested Instruction No. 1 (Tr. 008) relating to the necessity of corroboration of an accomplice".

The argument given under Point No. 1 covers this point; also, it should be noted that in

State v. Hall, 112 U. 272, 186 P.2d.
970

this Court ruled that where the testimony of an accomplice was in the record, failure of the Court to instruct on the need of corroboration even though no request was made by defendant's counsel for such an instruction, nor any exception taken to its omission.

Point No. 3

"Error committed by the Court in rulings sustaining objections made, and orders by the Court made without objection by the prosecution, limiting evidence sought to be adduced by defendant."

Defendant sought (Tr. 19) to interrogate Mrs. Stone on cross-examination as to some incident which had occurred in connection with her visit to the office of the father of Defendant's counsel. In laying a foundation the following occurred: (Tr. 19)

"Q. Did you go to my father's office about a year and a half ago?

THE COURT: Now, Mr. Dobbs, that is privileged testimony and there is no use asking that.

Q. Your Honor, there is no privileged testimony if there was no client-attorney relationship.

THE COURT: Apparently you asked if she is a client, and she said "no". Now you are asking if she went to

solicit you as a client.

Q. I'm not asking her that. I'm just asking if she went to see my father.

THE COURT: Well, I'm barring the testimony on the ground of Client-attorney relationship."

The conduct of the Court implied without evidence, that the visit of the witness to the offices of the father of defendant's counsel, was a visit to a lawyer--perhaps a matter of judicial notice--but went further by assuming, after the witness had affirmatively testified that she had never been a client of either the father or of counsel, that necessarily a relationship of Client-Attorney arose from the mere evidence of a visit. She was not even permitted to answer a question which was preliminary in character, one laying a foundation for further evidence which counsel was barred by the Court from entering into. The action by the Court was without

ground, not based upon any objection of the prosecution, and prejudicial to the defendant.

Subsequently (Tr. 19 - 20) the following took place:

"Q Mrs. Smith (Stone), who was the officer that contacted you in relation to this action?

A Mr. Garside.

Q. Have you talked to Mr. Garside quite a bit about this matter?

A. Considerable.

Q. What has he told you would happen to you if you didn't testify?

MR. RICHARDS: I object to this, Your Honor, on the grounds it's outside of the direct examination. If counsel wants to make her his witness on his case, that is agreeable, but as to this part it's improper.

THE COURT: The objection is sustained to the form of the question."

The objection was improperly sustained. A

party to litigation of any character may cross-examine an opposing witness as to matters tending to show bias, duress, or other matters tending to prove that the testimony was not freely given, without undertaking the burden of making a witness, presumably hostile, his witness.

"A witness may be cross-examined as to irrelevant matters in order to discredit his testimony by what he himself may state in answer. In fact this line of inquiry is the principal factor in establishing cross-examination as one of the chief agencies for development of the truth in judicial inquiries. By means thereof the relation of the witness to the cause or the parties, his bias or interest, if he has any, his character for truth and veracity, indeed any collateral fact which may bear on his truthfulness and impartiality, may be brought to light. Any question, although irrelevant or remote, may be put if it reasonably tends to explain, contradict, or discredit any testimony given by him, or to test his accuracy, memory, veracity or credibility. It is always permissible on cross-examination to lay a foundation for impeaching the witness by proof of prior contradictory statements."

(58 Am. Jr. 346 - 347)

There simply is no authority which supports any right of the Court to require a defendant to make an adverse witness, particularly the aggrieved herself, his witness for the purpose of such impeachment, yet this is exactly what happened in this case. Obviously the question was foundational, intended to elicit from the witness an answer indicating that her testimony had been induced by some threat or promise of the officer named. He had already testified (Tr. 25) to his talk with her, at a time a month before the trial, and just prior to the filing of the complaint before the committing magistrate, October 28th, 1953 (Tr. 001). To refuse defendant the right even to lay a foundation for impeachment by a showing of duress, threats, promises, or other action inducing the complainant, obviously was error.

Again after Mrs. Stone had been recalled for

further examination, the following took place at the inception (Tr. 33-34) of her cross-examination:

"Q. Mrs. Smith. At the preliminary hearing, when you were being questioned as to this money, five or six thousand dollars, you stated --Mr. Richards asked you how much of that money has he returned to you.

"ANSWER: Nothing.

QUESTION: Did you ever ask for it?

ANSWER: Just-----."

MR. ANDERSON: I object to this, Your Honor on the grounds it's improper cross examination. Counsel is reading into the record the record of the preliminary hearing. If he is trying to impeach this record, we have no objection him trying to do that.

THE COURT: If you are going to use for impeachment, you've got to ask the impeaching question first, Mr. Dobbs.

Q Your Honor, I am not particularly trying to impeach her. I'm just trying to find out why she is testifying differently.

THE COURT: That is impeachment. If you want to impeach her testimony, you will have to ask her impeaching questions. "

The impeaching questions had already been asked, Mrs. Stone had testified (Tr. 16) that she had testified at the preliminary examination, in front of a reporter. The foundation for her impeachment by the record of her former testimony had been laid. The Court while insisting that impeaching questions must be asked, halted counsel in the very act of asking such questions.

Counsel, to complete the record, called Mrs. Stone as a witness for the defendant. Mrs. Stone again testified (Tr. 38) to having been a witness at the preliminary examination, and the following took place:

"Q. You testified at that time -- will you tell me if these were the words that you used?

MR. ANDERSON: Your Honor, I ob-

ject to this as being leading.

THE COURT: Well, the only purpose you would have would be impeaching questions, so you haven't asked an impeaching question. You were advised to ask your impeaching questions if you want to bring this in.

Q. Your Honor, I think I have already made the impeaching questions on her first testimony and brought part of the record in. I don't know why it should be objectionable now.

THE COURT: You only brought part of the record in before it was objected to. But the only thing you have now is to impeach her. If you will state your impeaching questions which you now wish to impeach her on. I don't recall if you did ask her.

Later, while a witness for the defense, Mrs. Stone did testify to threats that she might lose the custody of her child, made by Officer Garside, (Tr. 41) and the following took place:

"Q. Did he also say had a chance of being prosecuted for prostitution?

MR. ANDERSON: Your Honor, I object to that.

THE COURT: Why are you objecting at this late date?

MR. ANDERSON: The statute protects her on this score.

THE COURT: Well, I know. You didn't object before.

A. Do I answer?

THE COURT: No. I told you, Mr. Dobbs, you had to tell the person and place, and not just anyone -- the time and place in order for her to answer those questions."

So defendant was barred from interrogation, even after he had made Mrs. Stone his own witness, upon a matter whose materiality as showing her bias and prejudice was evident.

The nature of the testimony sought to be elicited by these various attempts of counsel to impeach Mrs. Stone's testimony had been made known to the Court in the opening statement of

defendant's case, (Tr. 6) the statement being that the defendant's case rested upon the question of whether Mrs. Stone had been coerced into prosecuting by members of the City Police Force, and that the jury ultimately must decide whether Mrs. Stone was telling the truth, or lying because she was forced to lie.

This Court has time and again made references to the nature of the burden which a defendant must bear when charged with sexual offenses, and where the sole proof of the offense, and the sole proof of his innocence, must rest upon the belief which the testimony of the woman, and the man, and has approved the rule that under such circumstances, the evidence of the complaint must be received with great caution, and that the widest cross-examination is permissible.

State v. Mills 249 P. 2d. 211, - U -

page 22

State v. Reese, 43 U. 447,
135 P. 270
Morris v. State, 9 Okla. Cr. 241,
131 P. 731
Williams v. State, 61 Okl. Cr. 396,
68 P. 2d 530

Under exactly similar circumstances, where prejudice had been aroused (Tr. 46, 47, 48) by elicitation from defendant that one of his sources of income was playing punchboards, where he had been asked numerous questions as to relations with other women, of a character obviously intended to arouse in the minds of the jury an inference that he had been guilty of pandering in other instances, where the Court had permitted, over defendant's objection, the introduction of testimony of such other offenses, the denial by the Court of the right of impeachment, both on direct and cross-examination could hardly fail to be prejudicial to the defendant.

The Court's attention is directed to the bringing in of inadmissible matter both by cross-examin-

ation of the defendant and reception of evidence from Norma Lee Stone (Tr. 55-56), and Arlene Berrett (Tr. 57) as to payments of the proceeds of prostitution, over the objection of the defendant. On cross-examination the prosecution had asked defendant as to his ever having received the proceeds of prostitution from fallen women, particularly including (Tr. 48 et. seq.) Arlene Berrett and "the lady who formerly was your wife", Helen Smith. Objections by defense counsel to these questions were overruled, and the questions were answered negatively by the defendant. On rebuttal, (Tr. 55) Mrs. Stone was again recalled, allowed to testify (Tr. 56) to seeing Helen Smith pay money to the defendant which she had earned in prostitution with no effort made to ascertain any possibility of the witness being able to give any answer not based upon guess work; and Arlene

Berrett was called upon to testify (Tr. 58 - 59) that she had paid moneys to Dick Smith that she had earned in prostitution. The witness thereafter (Tr. 60) refused to answer upon the constitutional ground to which Senator McCarthy takes much exception, as to her having been a prostitute. She was also permitted to answer (Tr. 59) that she had seen Helen Smith pay moneys to Dick Smith which she had earned in prostitution, and when the defense counsel objected to the question upon grounds of want of proof that Helen Smith was a prostitute, the Court erroneously ruled that the answer might be made, because that identical question had been asked the defendant, and such receipt by him denied, in spite of total want of proof that Mrs. Smith was a prostitute. In fact on the basis of the testimony of Norma Lee Stone and Arlene Berrett the witness Helen

Smith was prosecuted in the District Court in and for Weber County for the crime of Perjury and was acquitted. In fact the whole reason for the production of the testimony, that so prejudiced the cause of the defendant so badly, was for the sole and only purpose of laying a basis for such charge of perjury.

This Court has commenced in "State v. Hougeseu, 91 Utah 351, 64 P. 2d 229, upon the wide variances of viewpoint among appellate courts as to how far proof of independent crimes may be adduced by cross-examination of a defendant, and in the opinion in which all Justices of the Court concur, there are laid down rules under which such questions are admissible, and under which answer to this type of question addressed to Mr. Smith would be enforced or excused in the sound discretion of the Court

(pg. 238) as answers going to the credibility of the witness, even though not relevant nor material to the offense then on trial before the Court.

A different question presents itself when the attempt is made to impeach the defendant by testimony as to such matters irrelevant to the pending prosecution.

"Regardless of whether, for the purpose of impeachment of a witness, a scope of an inquiry is confined to general reputation for veracity or extended to general moral character, the authorities are quite uniform in holding that the character of a witness may not be impeached by independent proof of particular acts of immorality or of wrong doing; that is a witness may not be discredited by testimony of other witnesses or by independent evidence as to particular incidences of misconduct. Such evidence is rejected because of the confusion of issues and waste of time that would be involved and because the witnesses cannot know what charges may be made and cannot be prepared to expose their falsity."

(58 Am. Jr. 411-12)

"The answers of a witness on cross-examination with reference to matters relevant to an issue are not conclusive and may be contradicted by independent proof for the purpose of impeachment. But it is firmly established that the answer of a witness on cross-examination as to a merely collateral matter is binding on the cross-examinee, and may not be contradicted. The principal reasons of the rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable."

(58 Am. Jr. 433)

"As to whether matter is collateral within the rule precluding proof of the falsity of testimony concerning facts collateral to the issue, the test is whether the fact shown by the answer could be shown in evidence for any independent purpose, or whether the cross-examiner would be allowed on his part to prove the matter. If so, then the matter may be contradicted."

page 28

This test is not infallible, and does not apply to the impeachment of a witness by showing that he has been convicted of a crime or is biased. "

(58 Am. Jr. 433 - 434)

"-----It may be regarded as settled, however, that the answer of a witness to questions regarding specific acts which would show his past conduct, antecedents, and character, or to questions which tend to disgrace him, are final and cannot be contradicted. . . ."

(58 Am. Jr. 434)

"The rule precluding a cross examiner from contradicting by other evidence answers to questions relating to collateral matters has been frequently applied in criminal cases. Indeed, a violation of the rule in such a prosecution may constitute prejudicial error. - - - - -"

(58 Am. Jur. 435 - 436)

None of the offenses, as to which such cross examination was had or such rebuttal made, were matters in any wise connected with the crime charged in the information. They tended in each case to be as to matters as to which the

defendant could not be prepared to expose the falsity of the statements, they were offered and admissible solely for the purpose of discrediting the character of the defendant, and we urge that admission of this testimony over the objections of defendant was highly prejudicial to his cause before the jury.

CONCLUSION

Upon the matters herein discussed, the defendant by his counsel submits that the defendant's conviction should be reversed and the defendant granted the new trial for which he moved. (Tr. 012).

Respectfully submitted,

DOBBS & DOBBS
Counsel for Defendant
812 Eccles Building, Ogden, Utah

By

HUGH E. DOBBS
of Counsel