

1980

# State of Utah v. Robert W. Bowen : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Appellant,

-vs-

ROBERT W. BOWEN,

Defendant-Respondent.  
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:  
Case No.  
16913  
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:

BRIEF OF APPELLANT  
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APPEAL FROM THE JUDGMENT OF THE SECOND  
JUDICIAL DISTRICT COURT, IN AND FOR WEBER  
COUNTY, STATE OF UTAH, THE HONORABLE  
A. H. ELLETT, JUDGE, PRESIDING  
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FILED

JUL 30 1980

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Appellant, :  
-vs- : Case No.  
ROBERT W. BOWEN, : 16913  
Defendant-Respondent. :

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:  
BRIEF OF APPELLANT  
-----

STATEMENT OF THE NATURE OF THE CASE

Respondent was charged pursuant to Utah Code Ann. § 77-7-1 (1953), as amended, with an accusation seeking to have respondent removed from public office. The accusation was filed by a Weber County Grand Jury on or about December 27, 1979.

DISPOSITION IN LOWER COURT

On January 21, 1980, the Honorable A. H. Ellett, sitting as a District Court Judge in Ogden, Utah, dismissed the accusation of the Weber County Grand Jury based on a written objection filed by respondent. This is an appeal

brought by the State of Utah based on the order of dismissal entered by the District Court.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks to have the ruling of the District Court reversed and the matter remanded for trial on the merits.

#### STATEMENT OF THE FACTS

Respondent, Robert Bowen, was elected as a County Commissioner in Weber County in November of 1978 and took office on or about January 1, 1979. On August 7, 1979, respondent was convicted in the Third Circuit Court of Weber County by the Honorable Larry R. Keller of 32 counts of obtaining unemployment benefits by misrepresentation and fraud in violation of Utah Code Ann. § 35-4-19 (1953), as amended. Each count was a class B misdemeanor. The offenses for which respondent was convicted occurred prior to his election to office, although the trial occurred after the election, and the underlying facts were only discovered after his election to office.

On or about December 27, 1979, a Weber County Grand Jury filed an accusation pursuant to Utah Code Ann. § 77-7-1 and § 77-7-2 (1953), as amended, for the purpose of removing Robert Bowen from office as a County Commissioner. The accusation alleged that the conviction involved an issue

of "moral turpitude" and thus the respondent should be removed from office.

The respondent, pursuant to Utah Code Ann. § 77-7-7 (1953), as amended, filed a written objection to the accusation. The trial court granted respondent's motion to dismiss the accusation. The State of Utah now appeals that ruling.

The issue on appeal is whether a public official may be removed from office because he has been convicted of crimes involving moral turpitude while holding office, although the offenses occurred prior to taking office.

#### ARGUMENT

##### POINT I

PUBLIC OFFICIALS CONVICTED OF  
CRIMES INVOLVING DISHONESTY AND MORAL  
TURPITUDE MAY BE REMOVED FROM OFFICE  
PURSUANT TO § 77-7-1 UTAH CODE ANN.  
(1953), AS AMENDED, EVEN IF THE CRIMES  
WERE COMMITTED PRIOR TO TAKING OFFICE.

The removal of a public official from office in Utah is governed by statutory authority. The statute under which this proceeding was initiated is Utah Code Ann. § 77-7-1 (1953), as amended, and reads as follows:

All officers of any city, county or other political subdivision of this state not liable to impeachment shall be subject to removal as provided in this chapter upon being convicted of a felony, an indictable misdemeanor, a misdemeanor involving moral turpitude or malfeasance in office. (Emphasis added.)

The Utah Supreme Court has held that the "meaning and proper application of the statute is determined by considering its language in light of background and purpose." State v. Jones, 17 U.2d 190, 407 P.2d 571, at 572 (Utah 1965); Andrus v. Allred, 17 Utah 106, 404 P.2d 972 (Utah 1965). This Court held in State v. Jones, supra, that the objective or purpose of Utah Code Ann. § 77-7-1 and § 77-7-2 (1953), as amended, is to provide:

. . . a method of removing from office a public official, even though duly elected, who betrays his trust in office, i.e., is guilty of malfeasance or who commits a crime of such nature as to demonstrate that he is unfit to hold public office. Id. at 572 (emphasis added).

The object of removal from public office of a public official convicted of a crime is not to punish the incumbent, but to protect and preserve the office, and to free the public of an unfit officer.

Several other jurisdictions have held that the primary purpose of the removal statute is to remove public officials from office who are unfit to hold that office. See State ex rel. Longerholm v. Schroeder, 199 Kan. 403, 430 P.2d 304 (Kan. 1967); People ex rel. Taborski v. Illinois Appellate Court, First District, 278 N.E.2d 796

(Ill. 1972); State ex rel. Zempel v. Twitchell, 59 Wash.2d 419, 367 P.2d 985 (Wash. 1962).

The law in Utah is clear that conviction of a misdemeanor would not warrant removal from office, unless the conviction involved matters of "moral turpitude" or "malfeasance" in office. For a misdemeanor to work a forfeiture of office the offense must involve lack of honesty or integrity, that is, unfitness to hold office.

Respondent's conviction definitely involved "moral turpitude" and therefore the removal statute was applicable.

The trial court ruled in this case that respondent was convicted of 32 misdemeanors involving moral turpitude during his term of office (T.3 and Memorandum Decision). The trial court said the offense of obtaining unemployment benefits by misrepresentation was a misdemeanor involving moral turpitude.

In State v. Jones, supra, the Utah Supreme Court was confronted with the same question of whether a misdemeanor conviction involved the issue of moral turpitude. In that case, David P. Jones, a Salt Lake County Auditor, was convicted on April 7, 1965, of a misdemeanor offense for failing to file an income tax return on April 15, 1959. Shortly after the defendant's



conviction, the Salt Lake County Attorney commenced an action pursuant to Utah Code Ann. § 77-7-1 (1953), as amended, to remove the defendant from office. The action was initiated based upon the defendant's misdemeanor conviction. The Supreme Court of Utah was confronted with two issues: (1) did the misdemeanor offense for failing to file an income tax return involve an issue of moral turpitude; and (2) can a public official elected to office be removed because of his conviction for a misdemeanor involving moral turpitude, even though the offense occurred before his election to office.

In addressing the question of whether the conviction involved an issue of moral turpitude, the Utah Supreme Court said in order to forfeit office, the offense must be within a class of crimes which guilt would demonstrate a lack of honesty, integrity or moral character so as to render one unfit for public office. The Supreme Court said the offense of failing to file an income tax return was not necessarily one involving moral turpitude. The record was not clear why Mr. Jones failed to file his tax return. The court said there were several possible reasons why the return was not filed, including lack of funds, a personal vendetta with the federal government, or tax evasion. The Supreme Court concluded that since the

the offense of failing to file a tax return did not necessarily involve a lack of honesty or moral turpitude, the defendant could not be removed from office.

In this case, the trial court ruled that obtaining unemployment benefits by misrepresentation demonstrated a lack of honesty, integrity or moral character and therefore was sufficient to constitute a crime involving moral turpitude. Appellant agrees with the trial court's ruling that respondent's conviction for obtaining unemployment benefits by misrepresentation involves moral turpitude.

The purpose of the Utah Removal Statute is to remove public officials from office when convicted of a crime involving dishonesty or lack of integrity. Certainly, respondent's 32 misdemeanor convictions for illegally obtaining public funds, unemployment benefits, qualifies respondent for removal from office, especially from an office which directs and controls, so intimately, public funds. Although the misdemeanor conviction occurred while the defendant was in office, and although the crimes were not discovered until after the defendant took office, the trial court concluded that removal was justified only if the offense occurred while the respondent was serving office. (T. 6).

Appellant submits that the trial court erred in its interpretation of the Removal Statute which is designed to remove unfit persons from office. The critical factor should be when the crime was discovered and when the conviction was obtained; not when the offense occurred. To allow a public official to remain in office after being convicted of an offense involving moral turpitude is to defeat the purpose of the Removal Statute.

The issue is one of first impression for the Utah Supreme Court. In State v. Jones, supra, the Court was confronted with this same issue but ruled on other grounds. Even the trial court noted in its Memorandum Decision that State v. Jones, supra, was decided on other grounds (p. 2, Memorandum Decision).

Several jurisdictions have held that misconduct occurring prior to election or in a prior term of office may constitute grounds for removing the guilty public officer from his present term of office.

In Application of Baker, 386 N.Y.S.2d 313 (1976), the Supreme Court of New York said the statute providing for removal for misconduct "in office" allowed removal of an officer for misconduct in a prior term where all of the charges were not made public until after election and where the office holder had denied any wrongdoing. See

also In the Matter of Corwin, 218 N.Y.S.2d 718 (1961).

In Attorney General v. Tufts, 239 Mass. 458, 131 N.E. 573, 132 N.E. 322, 17 A.L.R. 274, the court was confronted with a situation where a number of offenses, including acts as a private citizen, had been charged against a district attorney in removal proceeding. The court said that the illegal acts or misconduct which occurred outside the district attorney's official duties could be considered in determining his fitness to hold public office. Bolton v. Tully, 158 A. 805 (Conn. 1932); Hawkins v. Grand Rapids, 158 N.W. 953 (Mich. 1916); State ex rel. Douglas v. Megaarden, 88 N.W. 412 (Minn. 1901).

The reason for removing guilty public officials from office for crimes committed prior to election is based on the theory that the crime or misconduct may have been hidden from the electing body until after the start of the new term of office, thus the voters did not have opportunity to ensure fit public officials. In the present case the discovery of the offense came after the election and the only recourse for insuring a fit and honest official would be through § 77-7-1 Utah Code Ann., et seq.

Legally, respondent was not unfit to hold office until his conviction was entered for obtaining unemployment benefits by misrepresentation. Charging the defendant with

a misdemeanor offense would have been insufficient to warrant a removal proceeding. In State v. Stavar, 578 P.2d 847 (1978), the Supreme Court said a conviction of one of the offenses enumerated in Section 77-7-1, Utah Code Ann. (1953), as amended, is a prerequisite to bringing an action for removal from office. The Stavar decision is consistent with the principle of criminal law that the defendant is presumed innocent until proven guilty. A public official cannot be removed from office until a conviction is obtained.

Since the only logical time centers on the time of conviction rather than the time of offense, the trial court decision should be reversed and the matter remanded for trial. The trial court's decision that the offense must occur while the respondent is in office is inconsistent with Stavar and the presumption of innocence. The conviction of respondent demonstrating his dishonesty and unfitness to hold office should be sufficient to warrant his removal from public office.

#### CONCLUSION

Based on the foregoing arguments and supporting case law, appellant urges this Court to reverse the trial court ruling and remand the case to district court for

trial on the merits.

Respectfully submitted,

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