

1954

# State of Utah v. James P. Sandman : Brief of Appellant

Utah Supreme Court

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Supreme Court of the State of Utah

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Clerk, Supreme Court, Utah

STATE OF UTAH,

*Plaintiff and Appellant,*

vs.

JAMES P. SANDMAN,

*Defendant and Respondent.*

Case No.

8202

BRIEF OF APPELLANT

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In the  
**Supreme Court of the State of Utah**

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STATE OF UTAH,

*Plaintiff and Appellant,*

vs.

JAMES P. SANDMAN,

*Defendant and Respondent.*

Case No.  
8202

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**BRIEF OF APPELLANT**

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**STATEMENT OF FACTS**

This appeal, taken by the State, is from the District Court's dismissal of a charge against defendant of the crime of resisting an officer attempting to discharge a duty of his office. The statute allegedly violated by defendant is Sec. 76-28-54, U. C. A. 1953, which reads:

“Every person who wilfully resists, delays or obstructs any public officer in discharging, or at-

tempting to discharge, any duty of his office, when no other punishment is prescribed, is punishable  
\* \* \*.”

After complaint was filed in the Heber City Justice Court (R. 7) the defendant by stipulation waived preliminary hearing, reserving however his right to challenge the sufficiency of the pleadings and to move to dismiss in District Court (R. 13). The District Attorney then filed the information (R. 14) and the bill of particulars (R. 16-17).

The relevant portion of the information charges:

“\* \* \* that on the 18th day of July, 1953, in Wasatch County, State of Utah, at Stinking Springs in said Wasatch County, the said defendant wilfully resisted Leo A. Cox, a public officer and Game Warden of the State of Utah, in attempting to discharge a duty of his office, contrary to the provisions of and in violation of the provisions of Section 76-28-54, Utah Code Annotated, 1953.”

The allegations of the bill of particulars are:

“1. That on or about the 18th day of July, 1953, at a place commonly known as Stinking Springs, in Wasatch County, Utah a game warden, one Leo A. Cox, while on duty in the performance of his duties as a game warden of the State of Utah, in the daytime, observed the defendant, James P. Sandman, while said Sandman was fishing at Stinking Springs, and was using what appeared to be hamburger or ground meat for bait. That upon observing the use of the type of bait above described by the defendant, said Leo A. Cox identified himself to the said defendant as a game warden of the State of Utah and asked to see the defendant's bait; and

at such time the said defendant, while the hook and bait with which he was fishing was in the water, moved the hook and bait back and forth in an apparent effort to dislodge such bait and thereupon, the said Leo A. Cox told him not to do that and grabbed hold of the fishing pole held by the defendant in an effort to prevent the dislodging of the bait, and in a scuffle which ensued both Leo A. Cox and the defendant fell into the water and while said Leo A. Cox was attempting to regain his feet while holding on to the pole he was violently struck in the face and about the head by the defendant.

“2. That defendant violated the provisions of 76-28-54, Utah Code Annotated, 1953, in resisting an officer in the discharge of his duties, the penalty being set forth in such statutory provision.

“3. That the said Leo A. Cox was acting within the authority of the law and the scope of his duties, pursuant to the provisions of the statutes of the State of Utah and particularly the provisions of Section 23-3-11, U. C. A., 1953; Section 23-3-7, U. C. A., 1953, as amended by the Session Laws of 1953; Section 23-3-21, U. C. A., 1953 and Section 76-28-39, U. C. A., 1953.”

At the trial, and after the prosecutor had made his opening statement, defendant renewed his motion to dismiss, which was read into the record (R. 24-25). The motion was granted, defendant was released, and his bail exonerated (R. 28). The apparent reason for the court's ruling appears at R. 27. The court's language is:

“THE COURT: The Court has come to the conclusion that the motion should be granted unless the State of Utah is prepared to prove that an ar-

rest was made before any altercation occurred between the parties.”

The prosecutor then made an offer of what the State intended to prove (R. 28-29), which offer included no claim of arrest or attempted arrest.

## STATEMENT OF POINTS

### POINT I.

THE COURT ERRED IN GRANTING THE  
MOTION TO DISMISS.

## ARGUMENT

### POINT I.

THE COURT ERRED IN GRANTING THE  
MOTION TO DISMISS.

The issue presented by this appeal is one of substantive law: whether the allegations of the bill, and the offer of proof, would if established beyond a reasonable doubt amount to a violation of Sec. 76-28-54, U. C. A. 1953. The information, from the pleading standpoint, validly charges the crime. Many earlier rules of criminal pleading were changed in 1935 by legislation. By the Act of 1935 (Sec. 1, Ch. 118, Laws '35), which is now Sec. 77-21-8, U. C. A. 1953, the tests for the validity of a criminal pleading were set down by the Legislature. Sec. 77-21-8 reads:

“(1) The information or indictment may charge, and is valid and sufficient if it charges the

offense for which the defendant is being prosecuted in one or more of the following ways:

“(a) By using the name given to the offense by the common law or by a statute.

“(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.

“(2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference.”

This information sufficiently charges the offense. The tests of Subsection (1) (b) and Subsection (2) are both met. Plainly, defendant was sufficiently put upon notice of the statute which he has been charged with having violated. An examination of the bill of particulars indicates with clarity and in detail the acts which defendant allegedly committed that allegedly amount to the crime charged. Defendant's right to know what he must defend against is fully satisfied by the pleadings.

The question here then is whether the facts alleged amount to the crime charged. The only decision of our Supreme Court construing Sec. 76-28-54 is *State v. Beckendorf*, (1932) 79 Utah 360, 10 P. 2d 1073. That case reversed the conviction of a woman charged with wilful obstruction of officers “\* \* \* being then and there engaged in the lawful arrest of the said Martha Beckendorf.”



The proof offered was that the officers, with a search and seizure warrant for liquor, entered defendant's house and found her destroying liquor. Defendant kicked an officer in the groin, threw a jug which cut him, threatened with a knife and escaped through a window. The court held that the evidence failed to support the information, there being no proof of an arrest or an attempt to make an arrest, as the information had alleged. The defendant was not told that she was to be arrested, although there had been ample opportunity for the officers to have done so. The court, in the Beckendorf case, carefully set down the scope of its decision, and in so doing notes a distinction which is important for the instant case. The court stated (10 P. 2d, at 1075) :

\* "The information charges defendant with delaying and obstructing officers then and there engaged in her lawful arrest. *The defendant was not charged with obstructing and delaying officers engaged in searching for intoxicating liquor.*" (Italics added.)

The implication to be drawn from the italicized language is that the result would have been different had the pleadings alleged a lawful search.

The Beckendorf case is not apposite. The case is an application of the settled rule that the proof must support the pleadings. This defendant can take no comfort from the case and in fact it if anything rather supports the theory of the prosecution.

The court below apparently made this basic assumption: a prosecution for resisting an officer in the perform-

ance of official duties does not lie unless the prosecutor pleads and proves an arrest or an attempted arrest. Appellant contends that this is not the true rule. Were that the rule, the difficulty imposed upon officers who enforce our game laws is manifest. Unpleasantness, and worse, would be inevitable. Game laws would be less efficiently enforced, or many civil suits for false arrest would result. It simply would not comport with common sense for the law to require that a warden formally place a fisherman under arrest before asking to inspect a bait which the officer has reason to believe is unlawful. If, in fact, the bait is unlawful, then is the time when an arrest makes sense.

The general purpose of this statute is to prevent obstruction of or resistance to the efforts of a law enforcement officer to perform any duty enjoined upon him by law. The cases are not limited to resisting arrest. A wide variety of official duties, if resisted or obstructed, form a basis for prosecution for this offense. As is said in 67 C. J. S., *Obstructing Justice*, p. 51-2 (with supporting footnotes set out below) :

“Various acts have been held to constitute the offense,<sup>6</sup> such as blocking by defendant, with his body, the entrance of policemen, to a place which he admitted to the policemen he was using for pool

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<sup>6</sup>Obstructing citrus fruit inspector—Unauthorized placing of compound in citrus fruit juice which citrus fruit inspector is preparing to analyze, thereby producing chemical or physical change, is an offense within a statute providing that it shall be unlawful for any person to obstruct or resist any authorized inspector in the performance or discharge of any duty imposed on or required of him by law.—*Johnson v. State*, 128 So. 853, 99 Fla. 1311. Refusal to leave premises or surrender keys—Refusal of employee of state school for deaf to leave premises after notified of his discharge and refusal to deliver keys and school property to superintendent constituted violation of statute relating to obstructing a public officer.—*Bathke v. Myklebust*, 12 N. W. 2d 550, 69 S. D. 534.

selling;<sup>7</sup> destruction of milk by a dealer to prevent inspection as to purity by an officer;<sup>8</sup> exhorting followers to resist officers in execution of an ordinance;<sup>9</sup> refusal of person when arrested for speeding to give his name and attempting to push from his automobile the arresting officer;<sup>10</sup> refusing to obey and surrender when arrested;<sup>11</sup> and use of forcible means in the presence of the officer to interfere with his custody of property.”<sup>12</sup>

In *State v. Pope*, 4 Wash. 2d 421, 103 P. 2d 1089, an officer executing a writ of replevin by entering a house and removing a refrigerator was forcibly abused by the defendant. The case holds the defendant guilty of “resisting a public officer engaged in the performance of a legal duty.”

In *Palmquist v. United States*, 149 F. 2d 352, cert. den, 326 U. S. 727, 90 L. Ed 431, 66 S. Ct. 33, revenue agents on their way to an unlawful still and expecting the transportation of moonshine away from the still, met a truck, which they crowded from the road. They announced they were federal officers. Defendant then drove the officers away with a shotgun. Defendant’s conviction was affirmed, the court stating (149 F. 2d at 353) :

“We do not deem it necessary to discuss the principles of lawful searches and seizures for the reason that there was no arrest and there was no

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<sup>7</sup>N. Y.—*People v. Frank*, 130 N. Y. S. 807, 73 Misc. 1, 26 N. Y. Cr. 308.

<sup>8</sup>Puerto Rico.—*People v. Rivera*, 25 Puerto Rico 700.

<sup>9</sup>Mich.—*People v. King*, 210 N. W. 235, 236 Mich. 405, 48 A. L. R. 742.

<sup>10</sup>Cal.—*People v. Martensen*, 245 P. 1101, 76 Cal. App. 763.

<sup>11</sup>Philippine.—*U. S. v. Resaba*, 1 Philippine 311.

<sup>12</sup>Ohio.—*Campf v. State*, 88 N. E. 887, 80 Ohio St. 321.

search made of either the truck or the person of the defendant for violations of the liquor law. There was no information as to the illegal manufacture or transportation of liquor gained by the officers' contact with the defendant on the night in question, and he is not being tried for any offense that a search of the truck could have revealed. It is debatable, but unnecessary to decide, whether the officers in this case were without right, under the circumstances, to stop defendant's truck, in view of the information possessed by them, after they saw its blinking lights and that it was coming from the direction of a suspected still and on the road in which a liquor truck was expected, at or about the time expected. But we do not see how the constitutional rights of a defendant against unreasonable search can be said to have been violated when there was no search. None of the evidence necessary for a conviction in this case was obtained by virtue of a search, lawful or otherwise, and the motion to suppress the evidence and other kindred defenses were without merit. The issue in the case is whether or not the defendant knowingly resisted Federal officers in the attempted performance of their duty. This was an issue of fact which the jury resolved against the defendant, with substantial evidence to support its verdict. Two officers and the truck driver testified that when the officers first arrived at the scene Officer Carter announced that they were Federal officers. If the defendant knew they were Federal officers, even though he also knew they were planning to search his truck without a warrant, he, nevertheless, had no right to assault them with a shotgun. See *Cook v. United States*, 5 Cir., 117 F. 2d 374. If the jury had believed that the defendant truly thought himself to be resisting a hold-up, there would have been an acquittal, but it found on ample evidence that defendant knew he was resisting Fed-

eral officers in the attempted performance of official duty."

In *State v. Powell*, 99 Cal. App. 2d 178, 221 P. 2d 117, defendant was convicted of this crime because he struck a policeman engaged in suppressing a public brawl between two women in a cafe. Apparently no warrants were involved in that case, but the offense which the officers were seeking to suppress took place in the officer's presence.

The reasonableness of Warden Cox's behaviour is obvious. There was no oppression, no justification for defendant's attack. Cox approached, and identified himself to, a man who was apparently then committing an offense. The man's immediate response was to attempt to rid himself of and destroy the instrumentality of the crime. Warden Cox merely did the obvious and absolutely necessary thing. Cox was in this case simply performing a duty enjoined upon him by the Fish and Game Code, i. e., attempting to enforce the prohibition against fishing with unlawful bait.



## CONCLUSION

Appellant respectfully urges that the pleadings give defendant full notice of the acts which he allegedly committed, and full notice of what criminal offense those acts allegedly amounted to. If the state can prove the alleged acts beyond a reasonable doubt, the defendant has committed a crime. The state should be permitted to present its case to a jury. The ruling should be reversed and the case remanded to the District Court with the instructions to try the case on its merits.

Respectfully submitted,

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