

1954

State of Utah v. Lester Davey Willard : Brief of Appellant

Utah Supreme Court

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Sumner J. Hatch; Attorney for Defendant and Appellant;

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,)

Plaintiff and Respondent,)

vs.)

LESTER DAVEY WILLARD,)

Defendant and Appellant.)

Criminal No.

8227

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

HONORABLE ALBERT H. ELLETT, JUDGE

FILED
AUG 5 1954

SUMNER J. HATCH
Attorney for Defendant
and Appellant

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
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HONORABLE ALBERT H. ELLETT, JUDGE

STATEMENT OF FACTS

This appeal is from a verdict of a jury in the Third District Court in and for Salt Lake County, on a trial of a criminal matter charging the defendant and appellant herein, Lester Davey Willard, with the crime of issuing a fictitious instrument under Title 76 Chapter 26, Section 7, Utah Code Annotated, 1953, as differentiated from forgery, Title 76, Chapter 26, Section 1, and Chapter 26, Section 6, Utah Code Annotated.

Trial was had regularly before a jury, Judge Albert H. Kilett presiding, on the 12th day of May, ¹⁹⁵⁴ 1954. The jury was duly selected, opening statement was made by counsel for the plaintiff, the State put on evidence by witnesses John T. Stead, Norval Driggs, S. M. Squires, George Haywood, Norman Hayward, Robert G. Heiner, Frank D. Adams, Sam Arge and C. D. Creel.

The State's evidence showed a check in the sum of \$12.00 to have been cashed by the defendant Willard

at Premium Oil Station in Salt Lake City, the witness Stead receiving the check, to have been sent through banking channels by Norval Driggs, operator of the station for Premium Oil Company, Driggs being alleged by the Information as being the person defrauded. Testimony of Robert G. Heiner showed that there was no account for a person by the name of Frank Adams whose name was on the check at the First Security Bank of Ogden.

The State further identified samples of the defendant's handwriting on both slips of paper and sample checks. The State's testimony showed admission by the defendant to the effect that he received the check in question from one Frank Adams in Layton, Utah for the sale of certain books. The State put on one Frank D. Adams set forth in the Information as Frank Adams, without an initial, to the effect that he lived in Layton, Utah, operated a store and had never seen the defendant and that the signature on the check was not his own. Norman Hayward, Deputy Sheriff and witness for the State

made the only testimony for the State as to reasonable search for a person by the name and identity of Frank Adams in the Layton - Salt Lake and Ogden areas. He stated the only check he made was by telephone books of the areas and that in addition to the Frank Adams testifying for the State that he discovered another Frank Adams in Salt Lake City to whom he talked on the telephone. He testified on cross examination that he did not make a search for a Frank Adams at Hillfield, Clearfield or any other communities in Davis County. C. D. Creel testified as an expert with regard to the samples of handwriting admittedly made by the defendant and to the handwriting on the check in question.

The State identified by Officer Hayward a check alleged to have been cashed by Willard in Nephi, Utah also alleged to be a forgery, as to similarity of handwriting, and said check was submitted in evidence over the defendant's objection with a cautionary instruction to the jury by the Court on such admission.

The State rested.

Counsel for the defendant moved for dismissal on the grounds the State by affirmative evidence disproved an essential element of their case, to-wit: That there was in fact no such bank, corporation, partnership or individual as Frank Adams in existence.

Defendant's counsel made opening statement.

Sam Arge was called and sworn on defendant's behalf as to having a Frank Adams as a policyholder in the Utah Motor Club of which he is president. Defendant was sworn and examined on his own behalf, testifying that he received the check from Layton from a person identifying himself as Frank Adams. The check was for the sale of certain books, it was a check he had carried among numerous other checks in a company automobile belonging to the Utah Motor Club and driven by the defendant, and that he cashed the check at the Premium Oil Station in Salt Lake City, receiving therefore \$2.00 worth of gas and \$10.00 in cash, and at the same time attempting to sell to John T. Stead who cashed the check a membership in the Utah Motor Club.

Defendant further testified the man from whom he received the check was a person of approximately the age of 30 years with a brace on one leg purporting to be Frank Adams, a used car salesman in and about the Layton area. What he had indicated to Officer Hayward that he could locate the man who had given him the check and that he was jailed without opportunity to do so.

Defendant rested.

Jurors retired and returned with the verdict of guilty as charged in the Information whereupon defendant appeals.

POINT NO. 1

THE COURT ERRED IN ITS REFUSAL TO DISMISS THE CASE UPON THE MOTION OF THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE IN CHIEF ON THE GROUND THAT THE STATE BY ITS OWN EVIDENCE BY WITNESSES HAYWARD AND FRANK E. ADAMS HAD DISPROVED AN ESSENTIAL ELEMENT OF THEIR CASE.

It is the defendant and appellant's contention that affirmative evidence adduced by the State by the testimony of State's witness Frank Adams Q29 TR21 to

R32 TR24) together with the testimony of State's witness Hayward with reference to the existence of Frank Adams (R25 TR17 Line 25 to R27 TR19 Line 4 and R27 TR19 Line 23 to R29 TR21 Line 11) serves by the State's own testimony to disprove an essential element of the State's case, to-wit:

The burden of showing beyond a reasonable doubt the non-existence of a person by the name of Frank Adams and affirmatively shows the existence of at least one Frank Adams in Davis County, State of Utah, and at least one Frank Adams in Salt Lake County, State of Utah, where the check was cashed, further shows a failure to make a reasonable search in any of the area, the only search having been made being a search of telephone directories wherein two Frank Adams were found with a failure to make any search whatsoever in the Ogden area, the locale of the bank on which the instrument was made. Title 76-26-7 under which the defendant is charged says:

Every person who makes, passes, utters or publishes, with intention to defraud any other person, or who, with like intention, attempts to

pass, utter or publish, or who has in his possession, with like intent to utter, pass or publish, any fictitious bill, note or check, purporting to be the bill, note, check or other instrument in writing for the payment of money or property of some bank, corporation, partnership or individual when in fact there is no such bank, corporation, partnership or individual in existence, knowing the bill, note, check or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than ten years (Underlining by appellant)

That the legislature has therein set forth their intent as set out in *State vs. Navarro*, 26 Pac 2d 955 (Utah)

In construing statutes words must be given their usual and ordinary meaning unless it clearly appears a different meaning was intended and stated.

In *Emerson vs. State Tax Commission*, 72 Pac 2d 467 (Utah)

Unless the contrary appears, the terms of legislative enactments must be taken in their ordinary and usual significance as they are generally understood among mankind.

Further, *Riches vs. Hadlock*, 15 Pac 2d 203 (Utah)

No motive, purpose, or intent other than apparent on face and to be gathered from terms of law itself can be imputed to Legislature in enactment of law.

Further, the cases are legend, also requiring specific construction of criminal statutes and also requiring the State or other prosecuting agency to prove each element of its case beyond a reasonable doubt. This Court has held in *State vs. Jensen*, 136 Pac 2d 949 (Utah) in headnote 4:

The offense of "uttering a fictitious instrument" is a separate and distinct offense from that of "forgery" or of "uttering a forged instrument" will not lie under a charge of forgery or of uttering a forged instrument.

In respect thereto the converse must be true.

The evidence proving or tending to prove a forgery or uttering of a forged instrument is not sufficient to find a conviction of guilty or to make a prima facie case in the absence of the additional element in 78-26-3^{1/2} of the finding of lack of existence of the purported maker of the instrument under which the charge is brought.

There is a plethora of decisions in this and every jurisdiction holding that the prosecution is bound in a criminal matter to prove each element of

the alleged crime beyond a reasonable doubt. In the instant case the State not only failed to put on evidence beyond a reasonable doubt of a thorough and diligent search as to the existence of a "Frank Adams" who was purported to be the maker of the check, but affirmatively put on evidence of two Frank Adams from the area involved in the instant alleged offense. That with the evidence at the point of the State's closing being all that of the State and being as shown by the record as above set forth, the Court erred in failing to dismiss upon motion of defendant's counsel.

POINT NO. 2

THE COURT ERRED IN GIVING COURT'S INSTRUCTION NO. 6.

Court's Instruction No. 6 GR47 TR39 Line 27 to R48 TR40 Line 15) instructed the jury with regard to words of the statute referring to the corporate individual or other purported maker of a check not being in existence. The defendant and appellant contends that the Court erred to the prejudice of the defendant stating therein:

I would instruct that the law does not require proof that nowhere in the world existed a person having the same name as that purportedly signed to the instrument. The adequacy of the proof as to non-existence must be judged in the light of the representation, if any, concerning the maker made by the accused. If at the time of the event in question he identified the purported maker of the instrument as a person living in a certain locality, the proof of non-existence need show only that no person bearing the name of the purported maker then lives in that locality. In the absence of such a pretended identification, the proof need only show that no such person as the purported maker of the instrument was in existence in the vicinity of the County of Davis, State of Utah, who was connected with the particular acts charged in the Information.

The Court erred in the giving of this instruction on the following basis:

That there was no evidence to the non-existence of such person other than the evidence of Officer Rayward to the search of telephone directories. Further the Court erred in limiting the showing of such existence to the County of Davis as the undisputed facts of the case show a check to have been made or purported to have been made in Davis County and the bank of which the check was written being in Ogden

City in the County of Weber, and the alleged utterance of the instrument in the County of Salt Lake.

The Court further erred in making its own interpretation of the language of the statute and such interpretation not being in accord with the rules of legislative construction as heretofore set forth in Point No. 1 of this brief in the cases of State vs. Navarro, 26 Pac 2d 956, Emerson vs. State Tax Commission, 72 Pac 2d 467, and Riches vs. Hadlock, 15 Pac 2d 293.

The Court further erred in the last phrase of Instruction No. 6, "who was connected with the particular acts charged in the Information," ¹⁵ ~~of~~ ³⁸⁴ the statute (76-26-7) makes no provision for any connection of the purported maker of said check.

POINT NO. 3

THE COURT ERRED IN GIVING INSTRUCTION NO. 7.

That in the face of the evidence by the State as to the existence of at least one Frank Adams in Davis County and one Frank Adams in Salt Lake County, the

Court erred in giving Paragraph 3 of Instruction 7

(R48 R240 Line 23 to Line 25)

Second, that the name of Frank Adams signed to the check which is marked Exhibit 1 did not purport to be the signature of any living person.

In conjunction therewith the Court refused to give defendant's requested Instruction No. 1 with reference to the *idem sonans* rule, (R. 56)

You are further instructed that under the law there is an identity of person which is presumed from identity of name and that the burden upon the State to dispute this presumption is rebutted by evidence beyond a reasonable doubt. Likewise you are instructed that names that have the same pronunciation so as to make applicable the rule of *idem sonans* make a *prima facie* designation of the same person.

In conjunction thereto appellant cites *State vs. Gorham*, 72 Pac 2d 656, wherein this Court held at headnote 11:

Generally, identity of person is presumed from identity of name, and burden is on one disputing such presumption to rebut it.

At headnote 12 in the same case:

Names pronounced alike, so as to make *idem sonans* rule applicable, *prima facie* designate same person.

At headnote 13 in the same case:

The name "Sam L. Bringham" on draft, passed by one charged with forgery, and name of witness "Samuel E. Bringham," who testified that signature of former name was not his, were so similar as to render *idem sonans* doctrine applicable.

In the cited case we concede that the rulings therein, together with the discussion of the *idem sonans* rule under headnotes 11, 12, 13 and 17, 73 Pac 2d 962-964 were used to uphold a conviction under the crime of forgery wherein the words of the State was as is the contention of the defendant herein that the similarity in names and the area concerned with the procurement and alleged uttering of the instrument in question herein were so similar as to create an identity of person which was not disproved by the State's witness Samuel L. Bringham in testifying that the signature was not his. Appellant further contends that the wording of the instruction above set forth is prejudicial to the defendant in the absence of the *idem sonans* instruction requested by the appellant and

refused by the Court with the torturing of definitions with regard to the meaning of the word existence as set forth by the Court in ^{THE} ~~its~~ ^{obj} objection to Instruction No. 6 discussed supra, that each such instruction and more concretely the combination of the two instructions assigned as error together with the refusal of the defendant's curative instruction are materially detrimental to the defendant herein.

POINT NO. 4

THE COURT ERRED IN ITS REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1 WITH REGARD TO THE HORNSONS RULE.

As partially set forth by defendant's discussion of Point No. 3, it is appellant's contention that the refusal of defendant and appellant's requested Instruction No. 1 regarding identity of name as set forth above under Point No. 3 is detrimental to the defendant and especially so in view of the alleged error above assigned in court's Instructions No. 6 and 7 duly objected to by the appellant and discussed supra.

POINT NO. 5

THE COURT AGREED IN ADMITTING INTO EVIDENCE
STATE'S EXHIBIT NO. 4 OVER THE DEFENDANT'S OBJECTION.

Appellant further assigns as error and objects
to the admission of testimony regarding a further check
and bank receipt marked and entered herein as plain-
tiff's Exhibit 4 and more expressly to the admission
thereof by the Court as an exhibit over defendant's
express objection thereto. The writer concedes the
fact that the Court withheld ruling thereof until after
a recess and in admitting the check gave a cautionary
instruction (R22 TR14 Line 30 to R23 TR15 Line 16) in-
forming the jury that the only purpose of admission of
said check was as to intent to defraud.

Defendant further contends that such cautionary in-
struction and the language in which it was couched was
confusing and ambiguous to the jury in attempting to
require them to ignore said check, Exhibit 4, and all
testimony referring thereto until such time as the de-
termination had been made as to whether Exhibit 1 was a
fictitious instrument.

Further, that the time said cautionary instruction was given and said exhibit was admitted there was no definition or attempt to define to the jury what a fictitious check consisted of.

Appellant contends further that the error was prejudicial^{JA} to the defendant and combined^{WITH} that the errors assigned in the Court's express instruction to the Jury, No. 6 and No. 7, discussion supra, was instrumental in determining the cause of the finding of the jury herein.

SUMMARY

In conclusion the defendant and appellant contends that there are five instances of error above listed and set forth, any one of which are sufficiently prejudicial to the defendant to cause a reversal of the verdict in the court below and cause the case to be remanded to the Third Judicial District Court for dismissal of the matter at that level or at least for re-trial.

Plaintiff contends as set out in Point No. 1 of the argument herein that the Court erred in failure to

dismiss at the close of the State's case as the State failed to make a prima facie case by its affirmative proof of the existence of at least one Frank Adams in the area concerned contrary to the terms and intent of the statute applicable (76-26-7).

Further that the Court erred in giving Instruction No. 6 and erred in giving Instruction No. 7. That further, the said two instructions regarding the existence of the purported maker of the instrument in issue were ambiguous and conflicting with one another tending to confuse the jury to the prejudice of the defendant.

Further, that the Court failed to attempt to cure the error in these two instructions by giving the requested instruction of the defendant, No. 1, regarding the *idem sonans* rule.

That the Court erred in admitting into evidence State's Exhibit 4, to-wit: a check not in issue, and further erred in its attempted cautionary instruction to the jury upon admission of said Exhibit, said instruction serving to further point out a check not in

issue and the possible fictitious nature thereof when such evidence was immaterial for all purposes.

In conclusion appellant requests that the verdict found in the District Court be reversed and the matter dismissed as to the appellant herein.

Respectfully submitted,

SUMNER J. HATCH
Attorney for Defendant
and Appellant