

1954

State of Utah v. Lester Davey Willard : 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 and Respondent,

Clerk, Supreme Court, Utah

vs.

Case No.
8227

LESTER DAVEY WELLARD,

Defendant and Appellant.

BRIEF OF RESPONDENT

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LESTER DAVEY WELLARD,
Defendant and Appellant.

Case No.
8227

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The respondent controverts many of the statements in the appellant's brief regarding the facts of this case, either because they relate to facts not found in the record on appeal or because they are not considered accurate. The record on appeal shows the following material facts:

The appellant was convicted in the Third District Court in Salt Lake County of the crime of issuing a fictitious check, exhibit S-1, in violation of 76-26-7, U. C. A., 1953. Trial was by jury, before the Honorable A. H. Ellett, District Judge.

The defendant passed exhibit S-1 at a filling station, presumably in Salt Lake City; and he passed the check of

exhibit S-4 at a motel in Nephi, Utah. Exhibit S-1 is a check to Cash for \$12.00 on an Ogden bank, bearing the name Frank Adams as that of the maker. Exhibit S-4 is in part a check to Cash for \$10.00 on a Logan bank, bearing the name Vaughn Pugmire as that of the maker.

The defendant's story prior to his arrest, as related by Norman Hayward, was that he received exhibit S-1 from a man representing himself to the defendant as Frank Adams, a resident of Layton, Utah, in payment for some books he sold to said Adams in Layton in December, 1953. The defendant described this Frank Adams as a man 28 to 30 years old (R. 14 line 30 to R. 18 line 5). The defendant also said, prior to his arrest, that he had received the check part of exhibit S-4 from a Mr. Pugmire in Idaho in payment for some books sold to Pugmire (R. 20 line 21 to R. 21 line 26).

The defendant told Deputy Hayward before he was arrested that he thought he could locate Frank Adams, the maker of exhibit S-1, in Layton; however Mr. Hayward thought it inadvisable to send him to Layton, preferring to make an independent search (R. 24 lines 20-26).

Deputy Hayward made a search for persons named Frank Adams in the Salt Lake area and in the Layton area by means of telephone directories only. He found a Frank Adams in Salt Lake City who was fifty-eight years old, and a Frank Adams, with a middle initial, in the Layton area. He made no search in the Ogden area (R. 27 line 27 to R. 29 line 11).

Frank D. Adams testified for the state that he had lived in Layton for sixty years and was very well acquainted

with people named Adams in Davis County because he had written a published genealogical record of the family lineage of Elias Adams, presumably an ancestor of the witness. Mr. Adams testified that there was no other Frank Adams in Davis County in December, 1953, nor was there at the time of the trial. The witness did not know the defendant, and had never seen him until the preliminary hearing was held. Mr. Adams had neither made nor signed exhibit S-1. To his knowledge, no Frank Adams worked or was stationed at Clearfield or Hill Field. His father formerly owned a farm east of Layton, but witness did not remember any tenants of this farm named Wellard. Mr. Adams operates a large super-market in Layton, and is well-known in and around Layton.

The defendant testified in his defense, and admitted having and cashing both exhibit S-1 and exhibit S-4. His story at the trial was that a man calling himself Frank Adams made out exhibit S-1 in Layton in December, 1953, in the defendant's presence (R. 34 lines 28-30), and gave it to defendant in payment for a dozen books. He did not know this Frank Adams, and had never seen him before (R. 41 lines 5-7). Adams purportedly wore a mechanical leg brace; sold used cars in Layton; and lived east and north of Layton, possibly at Sahara Village (R. 35 lines 5-17). The defendant required no identification from Adams before accepting the check. The defendant denied writing exhibit S-1. He said that he had known Frank D. Adams, the witness, when defendant was a boy in Layton, and that he was not the Frank Adams from whom defendant received the check (R. 40 lines 9-18). Defendant had not seen Frank D. Adams since he was a boy, but he knew

there had been a Frank Adams in Layton. The defendant went to Layton prior to the trial, but had been unable to find any other Frank Adams than the Frank D. Adams who testified (R. 41 lines 20-30). Defendant said at the trial that he got the check part of exhibit S-4 from a fellow in Logan who had it, and not from Vaughn Pugmire (R. 44 line 17 to R. 45 line 6). He admitted having been convicted of forgery in Nevada in 1941.

STATEMENT OF POINTS

POINT I

AN ISSUE NOT SUPPORTED BY THE RECORD ON APPEAL IS NOT BEFORE THIS COURT:

A. THE DENIAL BELOW OF A MOTION TO DISMISS IS NOT BEFORE THIS COURT WHEN THE RECORD DOES NOT SHOW THAT SUCH A MOTION WAS MADE, ANY REASONS ADVANCED IN SUPPORT THEREOF, NOR A RULING ON SUCH MOTION.

B. EVIDENCE NOT IN THE RECORD IS NOT BEFORE THE COURT; AND NO ISSUE AS TO THE SUFFICIENCY OF THE EVIDENCE IS BEFORE THIS COURT WHEN THE RECORD ON APPEAL DOES NOT CONTAIN ALL THE EVIDENCE ADMITTED BELOW.

POINT II

IT WAS NOT PREJUDICIAL ERROR FOR THE COURT BELOW TO GIVE INSTRUCTION SIX.

POINT III

NO ERROR PREJUDICIAL TO THE DEFENDANT APPEARS IN INSTRUCTION SEVEN.

POINT IV

THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S REQUESTED INSTRUCTION ONE, REGARDING THE IDEM SONANS RULE.

POINT V

THE TRIAL COURT PROPERLY ADMITTED EXHIBIT S-4 INTO EVIDENCE.

ARGUMENT

POINT I

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ON APPEAL DOES NOT CONTAIN ALL THE EVIDENCE ADMITTED BELOW.

A. The appellant complains in his Point I of the refusal of the trial court to grant his motion to dismiss, made at the close of the State's evidence. The record on appeal, however, does not show that the appellant made such a motion to the court, that he presented any reasons to the court which would justify dismissal, nor that the court ruled on the motion. The only reference to such a motion to be found in the record is in the third paragraph of appellant's "Draft of Bill of Exceptions" (R. 70), which is not properly a part of the record on appeal because it was never settled nor allowed by the trial judge. This document might be considered a statement of points on appeal, but nothing more. It is no more efficacious in supplying the deficiency noted here than is the appellant's brief.

It is a fundamental and well-settled rule of appellate procedure that all questions must be tried and determined by the record as certified to the appellate court. 3 Am. Jur. 284, sec. 692. The appellate court can look only to the record to determine what occurred in the court below. It will not consider an assignment of error unless the alleged error affirmatively appears of record. To predicate error upon the refusal to grant a motion, it must properly appear that the motion was made and ruled on. 3 Am. Jur. 210, sec. 568; 24 C. J. S. 570, sec. 1783.

In the absence of any showing in the record of a motion to dismiss by the defendant, his reasons in support thereof, and the ruling thereon, no issue pertaining to such

motion and the errors assigned in connection therewith is before this court. Consequently, appellant's Point I must be disregarded in this appeal.

B. The appellant makes numerous assertions about the evidence in this case in connection with his assignments of error, as well as in his statement of facts. Some of these assertions refer to evidence not found in the record at all. Other assertions question the sufficiency or the extent of the evidence introduced below. The respondent controverts a number of these assertions by the appellant.

"The brief of an appellant * * * is limited to error appearing of record. Thus, the intimation of counsel in his brief on appeal cannot be taken as evidence of a fact not appearing on the record." 3 Am. Jur. 331, sec. 767. The court cannot consider evidence not in the record, and it is improper to make allegations regarding certain evidence when that evidence is not in the record on appeal. The respondent asks that the court disregard all assertions in the appellant's brief regarding evidence which is not in the record.

It appears from an entered order of the trial court (R. 55) that ten different witnesses testified at the trial, including the defendant. It appears that the transcript, however, contains the testimony of but four of these witnesses (R. 8, R. 54). It thus appears of record that not all the evidence in the case is included in the record on appeal. It is self-evident that all of the evidence introduced below must be included in the record on appeal if the appellate court is to review the weight and sufficiency of the evidence. Therefore no question as to the extent or sufficiency of the

evidence introduced below is before this court, and it must be assumed on review that the evidence was sufficient in extent and probative value to support the verdict and judgment, as well as any intermediate ruling of the trial court involving the sufficiency of the evidence. The defendant's complaints of the insufficiency of the evidence must be disregarded. 3 Am. Jur. 261, sec. 692, and p. 223, sec. 590; 24 C. J. S. 590, sec. 1789.

POINT II

IT WAS NOT PREJUDICIAL ERROR FOR THE COURT BELOW TO GIVE INSTRUCTION SIX.

Instruction number six (R. 47 line 29 to R. 48 line 15) was given to guide the jury in its determination of the question whether or not the purported maker of exhibit S-1 existed.

The defendant first contends that this instruction should not have been given because, he asserts, there was no evidence of the non-existence of the purported maker other than that of Deputy Hayward. While it is not clear just what this has to do with the instruction, it seems to draw into question the sufficiency of the evidence as a matter of law to justify the instruction on this point. As established in Point I, *supra*, no such question is before this court since all of the evidence is not in the record. The respondent, moreover, denies this assertion of the defendant, and points to the testimony of Frank D. Adams (R. 29 line 29 to R. 30 line 23) as further evidence of the non-existence of the purported maker of exhibit S-1.

The remainder of defendant's complaints regarding instruction six are answered by *People v. Gordon*, 13 Cal. App. 678, 110 P. 469, 472, a prosecution for forgery on the theory that the purported maker was fictitious, where it was held proper to refuse an instruction that the non-existence of the maker must be proved beyond and to the exclusion of all reasonable doubt and to a moral certainty, and that if the jury had any reasonable doubt as to whether or not there was in existence anywhere in the world such a person as the purported maker, on the date in question, they must resolve the question in favor of the defendant. The court said that the state certainly was not required to prove, nor were the jury required to believe, beyond a reasonable doubt, that there was no such person in the world as the purported maker of the instrument; but it was only necessary to show to a common certainty that there was no such person in existence in the vicinity of and connected with the particular acts charged, in the place and county where jurisdiction accrued. The *Gordon* case was approved and followed in *People v. Reed*, 84 Cal. App. 685, 258 P. 463, 464, which was in turn followed in *People v. Menne*, 4 Cal. App. 2d 91, 41 P. 2d 383, 389. The *Reed* and *Menne* cases were prosecutions under section 476 of the California Penal Code, which is the source of, and almost identical to, section 76-26-7, U. C. A., 1953. *State v. Tinnin*, 64 U. 587, 232 P. 543, 43 A. L. R. 46.

It is perfectly obvious that some sort of limitation must be placed on the necessity of proving non-existence under 76-26-7 or that law would be nullified, as stated in the *Reed* case cited. The defendant contends, however, that

Instruction six erred in limiting the need for proof to Davis County when exhibit S-1 is drawn on an Ogden bank and was passed in Salt Lake County. To this, the respondent answers that the defendant himself is responsible for this limitation and therefore has no cause to complain. The defendant represented that the purported maker of exhibit S-1 lived in or near Layton, both before defendant's arrest and at his trial. This necessarily restricted the question of the alleged maker's existence to the Layton area. The matter was localized and placed in issue by the defendant himself, and he cannot be heard to assume a different or incompatible position on appeal.

Instruction six comported fully with the law and facts of this case.

POINT III

NO ERROR PREJUDICIAL TO THE DEFENDANT APPEARS IN INSTRUCTION SEVEN.

The defendant contends that prejudicial error was committed by the trial court in giving the third paragraph of instruction seven (R. 48 lines 23-25) because the facts proved at the trial did not justify—indeed, precluded—such an instruction. This seems to be a complaint that the verdict should have been directed for the defendant on this point. If so, it is also apparently a complaint that the court failed to act on its own motion in accord with the silent desires of the defendant, for the record shows no motion by the defendant raising the point.

The court, in instruction seven, listed the elements of the crime charged against the defendant, telling the jury,

inter alia, that in order to find the defendant guilty of the crime charged it would have to find that the purported maker of exhibit S-1 did not exist. It cannot be denied that paragraph three (the second element) of this instruction correctly stated a necessary finding to sustain a conviction under the statute, 76-26-7, and that is all it pretended to do. See *State v. Jensen*, 103 U. 478, 136 P. 2d 949, 953, where the elements of this crime are enumerated.

Indeed, it seems clear that any error committed here was in favor of the defendant, as the instruction required the jury to find each of the elements beyond a reasonable doubt; and non-existence need not be shown that conclusively. *People v. Gordon*, 13 Cal. App. 678, 110 P. 469, 472; *People v. Reed*, 84 Cal. App. 685, 258 P. 463, 464; *People v. Menne*, 4 Cal. App. 2d 91, 41 P. 2d 383, 389.

The court below, of course, was required to instruct the jury as to the law, not the facts. Should the court, however, have given this instruction “* * * in the face of * * *” evidence of the existence of at least one Frank Adams in the area involved in the case, and in the absence of any motions or requests by the defendant? The trial judge is not obliged to direct a verdict for the defendant on his own motion unless the questions of law and fact are clearly and unequivocally in favor of the defendant, if ever, and unless such action is required to avoid an obvious miscarriage of justice. The court is not obligated to conduct the defense of the accused.

In *People v. Terrill*, 133 Cal. 120, 65 P. 303, the defendant was convicted under the California equivalent of our section 76-26-7; and he urged, on appeal, that the evi-

dence below disclosed the existence of the person claimed to be fictitious. Venue was in Santa Clara county, and the prosecution offered evidence to show that no such man as Leon McAbee, the purported maker of the note in question, existed in that county. It appeared from the evidence that the purported maker was a male person. The defendant showed the existence of a married woman named Leon McAbee in the same county, though she apparently was not present at the trial. The court, nevertheless, said, "There is no evidence tending to show that the signature purported to be hers," in affirming the conviction. See also *People v. Bernard*, 21 Cal. App. 56, 130 P. 1063, and *People v. Lucas*, 67 Cal. App. 452, 227 P. 709.

Under these cases, no prejudicial error occurred in giving instruction seven and in failing to direct this point for defendant on the court's own motion.

POINT IV

THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S REQUESTED INSTRUCTION ONE, REGARDING THE IDEM SONANS RULE.

Defendant complains of the refusal of the trial court to give his requested instruction number one (R. 58).

The request was to instruct the jury that names which are either identical or idem sonans presumably refer to identical persons, and that this presumption is rebutted by evidence beyond a reasonable doubt to the contrary.

If for no other reason, the court below properly refused to give such an instruction because no rule of law

would require the rebuttal beyond a reasonable doubt of such a presumption. Indeed, it has been held that the prima facie presumption of identity of person arising from the identity or similarity of names is liable to be shaken by the slightest proof of facts which produce a doubt as to identity. *King v. Slepka*, 194 Okla. 11, 146 P. 2d 1002, 1005.

If it is assumed, solely for argument and without conceding, that a proper idem sonans instruction should have been given, it nevertheless was not reversible error to fail to give it; for any presumption raised by the similarity of the names involved had been sufficiently rebutted by the defendant's own testimony by the time the trial had ended. Defendant testified (R. 40, lines 9 to 18) that the witness Frank D. Adams was not the person representing himself as Frank Adams who allegedly had made out the check. The jury could not at the same time have believed defendant's testimony and also have believed that the Frank Adams of Exhibit S-1 and Frank D. Adams were the same person. Defendant cannot be heard to assert a presumption on appeal which is contradicted by his own direct testimony at the trial. This would be contrary to reason as well as the rule of law that an appellant will not be heard to take a position on appeal inconsistent with that adopted below.

Rebuttable presumptions are usually nothing more than crutches used by courts as a substitute for the facts, and when the facts appear there is no need to use the crutch. Certainly it would be nonsensical to require or permit a rebuttable presumption to oppose, or be weighed against, facts which clearly and unmistakably rebut that presumption.

The defendant rebutted his own presumption, and there was no error committed by the court in refusing to submit the presumption to the jury.

POINT V

THE TRIAL COURT PROPERLY ADMITTED EXHIBIT S-4 INTO EVIDENCE.

Exhibit S-4 consists of a check and a bank notice stapled together. The defendant admitted cashing the check in Nephi. Exhibit S-4 was admitted in evidence over the objection of appellant that it was immaterial and incompetent (R. 22 line 10). At the time S-4 was admitted, the court specially instructed the jury regarding the limited purpose for which it could be considered (R. 22 line 30 to R. 23 line 24). The record reveals no objection nor exception to this special instruction, nor does it show that defendant requested any additional instruction relative to this exhibit.

Defendant complains of the admission of exhibit S-4 and complains that the special instruction given at the time was ambiguous, confusing, and failed to define a fictitious check.

The complaints regarding the instruction are made for the first time on appeal, and therefore, under the general rule, should be disregarded by this court. 3 Am. Jur. 25, sec. 246; 24 C. J. S. 268, sec. 1669, and p. 299, sec. 1674. *State v. Gorham*, 93 U. 274, 72 P. 2d 656, 664. The alleged errors, if any exist, could easily have been corrected at the time upon application to the trial court.

Moreover, the respondent finds no prejudicial error. It may be noted that defendant's complaint that the instruction was in error in requiring the jury to ignore exhibit S-4 until S-1 was found to be fictitious is really a complaint about the order of proof permitted by the court, as the defendant would be the last to say that S-4 should have been admitted without a limiting instruction. The other alternatives are to exclude exhibit S-4 entirely, or to delay its admission until S-1 has been found fictitious. The order of proof is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse. *State v. Pollock et al.*, 102 U. 587, 129 P. 2d 554, 557; *State v. Olson*, 75 U. 583, 287 P. 181, 185. There is, a fortiori, no requirement that a jury return a special verdict as to one element of a crime before it may consider evidence as to another element of the crime. See also Wigmore on Evidence, 3rd ed., sec. 307. Nor is there any rule of law which would require that the special instruction given contain a definition of a fictitious check. A definition of this term was given in the general instructions, and that is sufficient. Defendant fails to sustain his burden on appeal regarding these complaints.

Because the record does not contain all the evidence admitted below, it must be assumed that exhibit S-4 was properly identified, that sufficient foundation was laid for its reception, that it was shown to be relevant to the issue of intent, and that, in general, S-4 and its supporting evidence were in all respects sufficient to justify its consideration by the jury for the limited purpose for which it was admitted. See Point I-B, *supra*.

The only real question, then, presented to the court by defendant's Point 5 is that of the admissibility of a check on which the charge against him was not based and which tends to show the commission of a distinct offense by the defendant.

Wigmore states the correct general principle to be that all facts affording any reasonable inference as to the act charged are relevant and admissible, including facts showing design, motive, knowledge, intent, and so forth, where these matters are in issue or relevant. To this general rule there is the important exception that conduct tending and offered as evidence to show bad moral character is inadmissible. Wigmore, op. cit., sec. 216, p. 716. The exception is not made because evidence of bad moral character is irrelevant, but rather because its prejudicial effect exceeds too far its probative value. Therefore, to protect the innocent, wise policy excludes evidence offered to show bad character. Wigmore, sec. 193, 194. As long, however, as evidence is not introduced to show the bad moral character of the defendant, but is introduced relevant to a material issue in the case, it comes within the general principle stated and is admissible. If the evidence also tends to show the bad moral character of the defendant, it should be limited by instruction to consideration for its legitimate purpose. Wigmore, sec. 216, p. 712. He points out that this result is sustained also by the fundamental principle that admissibility for one purpose is not affected by inadmissibility for another. Sec. 216, p. 716. *State v. Cooper*, 114 U. 531, 201 P. 2d 764, 768. The criminality of other acts of defendant offered in evidence does not affect their admissi-

bility. The test is whether or not such acts are relevant to an issue in the trial other than the character of the defendant. Wig., sec. 305, p. 205. See also sections 300, 302, and 309 et seq.

A number of the earlier Utah cases espoused the idea that the admissibility of evidence of other offenses is the exception rather than the rule. That concept, however, was expressly abandoned in this state by the Court in *State v. Scott*, 111 U. 9, 175 P. 2d 1016, 1021, in favor of the more general and cogent analysis of Wigmore as adopted by the Model Code of Evidence. See *State v. Green*, 89 U. 437, 57 P. 2d 750, 756; *State v. Nemier et al.*, 106 U. 307, 148 P. 2d 327, 329; *State v. Prettyman*, 113 U. 36, 191 P. 2d 142, 146; and *State v. Cooper*, 114 U. 531, 201 P. 2d 764, 767.

The rule that evidence of other offenses by the defendant, if relevant, is admissible against him to show the intent with which he committed the act charged is too well-established, in this and other jurisdictions, to be controverted. The intent with which the present defendant passed exhibit S-1 was in issue at his trial. Therefore exhibit S-4 was properly admitted and limited to this issue, its relevancy being assumed as stated above.

CONCLUSION

The defendant was lawfully and justly convicted by a jury having full possession of the facts and operating under instructions which erred only in favor of the defendant. He fails to carry his burden of showing that his trial was tainted by prejudicial error.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Respondent.