

1955

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Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

FILED
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Clerk, Supreme Court, Utah

THE STATE OF UTAH,

Plaintiff and Respondent,

-vs.-

WILLIAM FRANCE GILLEN,

Defendant and Appellant.

Case No.

8392

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the District Court of
Salt Lake County, State of Utah

Honorable A. H. Ellett, Judge

FOWLER & MATHESON
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THE STATE OF UTAH,

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-vs.-

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BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS

The defendant and appellant will be referred to as defendant, and the plaintiff and respondent will be referred to as the State.

A complaint was filed in the City Court of Salt Lake City, County of Salt Lake, State of Utah, on the 27th day of January, 1955, charging the defendant with a first county of forgery and a second count of uttering a forged instrument, both in violation

of Title 76, Chapter 26, Section 1, Utah Code Annotated, 1953 (R.4).

A preliminary hearing on said charges was held on the 23rd day of February, 1955, before the Honorable J. Patton Neeley, City Judge, and the defendant was ordered bound over to the Third Judicial District Court, in and for Salt Lake County, State of Utah, to stand trial for the offenses charged (R.1-2)

The case was tried before the Honorable A. H. Ellett, sitting with a jury, on the 18th day of March, 1955 (R. 8). Counsel for defendant at the trial were Sumner J. Hatch, Esq., and Brant H. Wall, Esq.

The evidence, as produced by the State, tended to show the following sequence of events: Sometime early in the month of January, 1955, the defendant, in the companionship of one Lester J. Samuelson, made two visits to the Good Housekeeping Center, a Business establishment operated by Glen F. Stevensen, the first witness for the State (R. 34-35). Mr. Stevensen testified that he was acquainted with Samuelson, having

employed the latter for a period of five or six months (R. 34). This witness failed to identify the defendant as Samuelson's companion (R. 34A, 36, 38). State Exhibits 1 and 2, business checks of the Good Housekeeping Center, were identified by the witness as having their origin in his business check-book (R. 34A). Stevensen had neither given permission to anyone to remove the checks, nor signed his name to the checks, nor had he granted authority to sign his name to the checks (R. 36, 37). Cross-examination revealed that the signature on the back of State Exhibit 2 appeared to be the "type or style" of Samuelson's writing (R. 44).

Wendell McDermaid, the manager and operator of the O. P. Skaggs store at 744 East Fourth South, Salt Lake City, Utah, testified for the State, as follows: That the defendant and Samuelson entered his store on January 13, 1955; that he was called to the check stand to approve a check (State Exhibit 1) presented by

Samuelson (R. 47); that the defendant identified himself as "Nelson," the payee on the check (R. 48); that the defendant "re-endered" the check (R. 48); that he (witness) approved the check for payment (R. 48).

Lester J. Samuelson, appearing as a witness for the State, admitted stealing the blank checks from the Good Housekeeping Center (R. 57). The blank checks were given to the defendant, according to the witness (R. 57). He further declared that the defendant accompanied him to the O. P. Skaggs store where State Exhibit 1 was presented to Mr. McDermaid for approval and in payment of groceries (R. 57-58).

On cross-examination Samuelson opined that he and defendant had become "pretty plastered" while visiting Ogden, Utah, a short time before returning to Salt Lake City where the check was passed (R. 59). His condition, as regards sobriety, dulled his memory of events in Ogden, and he failed to remember obtaining the services of a waitress to fill in the blank checks (R. 60).

The witness was certain that he didn't forge the checks (R. 60), but he conceded handing State Exhibit 1 to McDermid at the O. P. Skaggs store, although defendant received the change (R. 64). Further examination, both direct and cross, established that Samuelson endorsed the name "George Nelson" and an address thereunder, upon the back of the check (R. 69-70, 72).

Samuelson admitted his conviction, by plea of guilty, to charges growing out of the same incidents here in issue (R. 61-64), and especially in relation to State Exhibit 2 (R. 67). In this connection, the witness denied that he was admonished by the court at the time of sentencing to "cooperate with the State in this matter" (R. 72). For purposes of impeachment the defendant proposed that the transcript of proceedings be read in open court and received as evidence (R. 73). Thereafter, the following discussion took place between counsel and the court, out of the presence of the jury (R. 103-104):

"THE COURT: Let me set this thing up. It is my understanding, Mr. Hatch, that the defendant proposes to ask Miss Parker to read notes pertaining to certain parts of the admonition given to the defendant Samuelson at the time he was placed on probation. Is that true?

"MR. HATCH: That is correct, and the portion of those notes which I propose to have Miss Parker read in open court is that portion of the admonition in which the court discussed the checks, an accomplice thereto, and the defendant's knowledge or lack of knowledge as to who wrote those checks, and indicated that this was one of the bases upon which the probation was being considered.

"THE COURT: And you were particularly offering that part wherein the court expressed an opinion that he thought this defendant was harboring somebody.

"MR. HATCH: That is correct, and further I wish to have this portion read with respect to the credibility of the witness in his denying a conversation with the court and his attempted evasion of that conversation by reference to various dates.

"THE COURT: The--

"MR. ANDERSON: I object to it. It is not proper cross examination and not proper for purposes of testing credibility. Rebuttal would involve the testimony of the court. Further, it would show, since we are arguing in the record, it would show that the defendant--the witness has not made any statements any different on the stand than he made at the time.

"THE COURT: The objection will be sustained.

"MR. HATCH: May I be heard on it before you rule on it?

"THE COURT: No, because I am satisfied that the opinion the court expressed being based solely on hearsay would have bearing here and would greatly tend to prejudice this jury. If the jury thought that the court at one time had an opinion, I think it would be highly prejudicial. I will sustain the objection and will not permit any reference to be made to the notes of the reporter in the presence of the jury.

"MR. HATCH: May I make one comment for the record?

"THE COURT: Certainly.

"MR. HATCH: I would like to have an exception noted thereto, though I realize that exceptions in this matter are automatic and--

"THE COURT: That's right.

"MR. HATCH: --would also like to comment that the matter which I refer to is an official record of this court, this court being a court of record."

A police officer, W. E. Eggleston,

appeared for the State and testified, in substance, that he conducted an examination of the case; that during his inquiry he interviewed the defendant who admitted attending the O. P. Skaggs store with Samuelson, who

cashed the check (R. 78). The witness identified State Exhibit 3, containing exemplars of defendant's handwriting.

The final witness for the State was a handwriting expert who contrasted the exemplar of defendant's handwriting (State Exhibit 3) with the handwriting on the two checks (State Exhibits 1, 2). It was his opinion that the face of each exhibit was written by the same person who executed State Exhibit 3 (R. 90, 92). The first endorsement on the back of State Exhibit 1, however, was not made by the same person (R. 101). The second endorsement on the same instrument was made, according to the witness, by the same person who executed the writing on its face (R. 101).

Testifying in his own behalf, the defendant conceded accompanying Samuelson to the Good Housekeeping Center for the purpose of acquiring some furniture (R. 108-109); that he was unaware that Samuelson had stolen the blank checks (R. 110); that he and Samuelson

journeyed to Ogden where they proceeded to drink (R. 110); that he and Samuelson consumed a large quantity of liquor (R. 109-112, 115); that Samuelson "was having a lady up there writing these checks out" (R. 110-111); that after returning to Salt Lake they went to the O. F. Skaggs store where Samuelson handed State Exhibit 1 to the clerk (R. 113); that the manager would not okeh the check until defendant re-indorsed the check for Samuelson (R. 114); that the change was given to Samuelson (R. 115). The defendant expressly denied forging the check (R. 116), having anything to do with it other than re-indorsing the back for Samuelson, or entertaining any intent to defraud anyone (R. 118).

The court, during its instructions to the jury, charged that Samuelson was an accomplice as a matter of law (R. 142).

The jury found the defendant not guilty of the offense of forgery as charged in the first count, and guilty of the offense of

uttering a forged check, as charged in the second count.

Thereafter, on the 29th day of March, 1955, defendant, by and through present counsel, filed a Motion for New Trial (R. 170). A hearing was held before Judge A. H. Ellett on the 19th day of April, 1955, who, on the same date, entered an order denying defendant's motion (R. 171). On the 6th day of May, 1955, defendant filed his Notice of Appeal from said judgment (R. 173).

STATEMENT OF POINT

THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT IN REFUSING TO ALLOW THE DEFENDANT TO PRODUCE EVIDENCE CALCULATED TO IMPEACH THE CREDIBILITY AND VERACITY OF THE PRINCIPAL PROSECUTION WITNESS, AN ACCOMPLICE OF THE DEFENDANT.

ARGUMENT

THE TRIAL COURT COMMITTED ERROR PRE-

JUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT IN REFUSING TO ALLOW THE DEFENDANT TO PRODUCE EVIDENCE CALCULATED TO IMPEACH THE CREDIBILITY AND VERACITY OF THE PRINCIPAL PROSECUTION WITNESS, AN ACCOMPLICE OF THE DEFENDANT.

The defendant in this action sought by his defense to establish that his implication in the alleged forgery and uttering was completely innocent. Indeed, the jury acquitted the defendant of the offense of forgery. His testimony showed that he had no knowledge pertaining to the acquisition of the blank checks--a fact admitted by the witness Samuelson. The defendant further showed that the sole purpose in visiting the O. P. Skaggs store was to accompany Samuelson, and that he had no knowledge that the check had been forged or that it was otherwise than a lawful instrument. Certain aspects of the proof sustain his contention that the check was presented to McDermaid by Samuelson.

Significantly, Samuelson's recollection concerning the filling in of the checks and the uttering of State Exhibit 1, is deficient in clarity, although he insists that the checks were given to defendant, and that they were filled out when returned to him. His testimony also showed that defendant received the money at the store. The credibility of Samuelson, for these reasons, was a matter of paramount significance. His veracity and credibility as reflected by bias, interest, or other concern for the outcome of the case was a matter into which the defense legitimately could probe.

The court refused to permit the defendant to produce evidence for the purpose of impeaching Samuelson upon cross-examination, and it is this ruling that constitutes the gravamen of defendant's contention herein that error resulted.

It is clear beyond any peradventure of doubt that the weight and credibility of the testimony of any witness is a matter solely for the determination of the jury

(Utah Code Annotated, 1953, Section 78-24-1). In order that the jury could properly evaluate the truth or falsity of the testimony of Samuelson they must study his demeanor on the stand, consider his interest in the case, his motives for falsification, and be fully appraised of conflicts producing hostility or bias, caused by some relationship with the matter. See State v. Cerar, 60 Utah 208, 207 Pac. 597, 602.

Especially when the witness is a confessed accomplice his testimony must be received with the greatest caution and be the subject of grave suspicion (State v. Hardung, 161 Wash. 379, 297 Pac. 167; People v. Payne, 359 Ill. 246, 194 N. E. 539; People v. Kendall, 357 Ill. 448, 192 N. E. 378). In III Wigmore on Evidence (3rd Ed.), Section 967, it is stated:

"It bears against a witness' credibility that he is an accomplice in the crime charged and testifies for the prosecution; and the pendency of any indictment against the witness indicates indirectly a similar possibility of his

currying favor by testifying for the State.

"So, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charged." (Citing, *inter alia*, *State v. Dunkley*, 85 Utah 54, 39 P.2d 1097, and *State v. Barretta*, 47 Utah 479, 155 Pac. 343).

In this regard, see also 2 Wharton's Criminal Evidence (11th Ed.), Section 730.

An accomplice should be required to disclose whether leniency was afforded him in exchange for anticipated cooperation in securing the conviction of another (see *State v. Rose*, 339 Mo. 317, 96 S. W.2d 498; *State v. Roberson*, 215 N.C. 784, 3 S.E.2d 277; see also 70 C. J., Witnesses, Section 921, citing *Vaughan v. State*, 57 Ark. 1, 20 S.W. 588). As a general rule, the cases have held that a witness for the prosecution, who is charged with a crime, may be interrogated upon cross-examination as to whether he has received consideration for his testimony, and a refusal to permit cross-examination in this regard may constitute error (*State v. Barretta*, *supra*; *King v. United States* (5th Cir., 1902) 112 F. 988; *People*

v. Pantagea, 212 Cal. 237, 297 Pac. 890;
People v. Langtree, 64 Cal. 256, 30 Pac. 813;
People v. Andrae, 295 Ill. 445, 129 N. E. 178;
State v. Brown, 146 Iowa 143, 124 N.W. 899;
People v. Becker, 210 N.Y. 274, 104 N.E. 396).
Accordingly, it is error to refuse to permit
the defendant to cross-examine an accomplice
as to his expectations regarding punishment
(State v. Kent, 4 N.D. 577, 62 N.W. 631),
and as to the facts and promises on which he
bases his belief that he will be favored or
dealt with leniently (People v. Moshiek, 323
Ill. 11, 153 N.E. 720).

In the case of Perry v. State, 106 Miss.
693, 64 So. 466, the sustaining of objections
to questions propounded to the prosecuting
witness erroneously precluded the impeachment
of the witness by proof he was charged with
the offense and was liberated only on cond-
ition that he testify against accused. The
rule has been applied in the case of an in-
quiry as to the expectations of a witness
who was indicted for the same offense as
that for which the accused was tried

(People v. Langtree, supra).

In an analogous situation, where immunity has been granted an accomplice by the state cross-examination of the fact should always be permitted. As stated by the Supreme Court of Arizona, in Gibbs v. State, 37 Ariz. 273, 293 Pac. 976, at 978 (74 A.L.R. 1105):

" . . . We think it is always competent to show the interest of a witness for the purpose of ascertaining his leanings or disposition or wishes, and that it is especially competent when the witness is an accomplice and has been promised immunity in case he testified against his co-accomplice."

See also Ammerman v. United States (8th Cir., 1911) 185 F. 1; Spain v. State, 24 Ala. App. 599, 139 So. 575.

And in State v. Potts, 239 Mo. 403, 144 S.W. 495, it was held that a witness against whom a prosecution was pending for the same offense as that with which the defendant was charged may be impeached by cross-examination showing he has an arrangement with the prosecuting attorney under which the witness was to gain his liberty for turning state's

evidence.

The long and the short of the matter is that the court should permit a most searching scrutiny to discover whether any promise, reward, immunity, or leniency has been held out, offered, or indicated to an accomplice who testifies for the prosecution. And the rule is no less applicable in a case such as this where the promise and admonition comes from the very mouth of the court. The tendency to prevaricate or taint the truth would seem to be all the stronger, and especially where the reins of probation could be drawn so tightly.

It is true enough that the scope of cross-examination and its concomitant foundation for impeachment resides in the sound discretion of the court. Yet, the court may not deny the right of legitimate cross-examination itself (State v. Barretta, supra, citing 5 Jones, Commentaries on Evidence, Section 828). So, here, the proof should not be restricted so narrowly as not to embrace evidence affording the defendant a

reasonable opportunity to test the accuracy of the accomplice's testimony, and show, where possible, a decided and substantial interest affecting his credibility. As stated in the Barretta case, supra, by this Honorable Court (at 344):

"The defendant, to affect the credibility of the witness, had the undoubted right, on cross-examination, to show the motive or interest of the witness. To deny that is to deny one of the fundamentals of cross-examination itself. The state claimed the witness was an accomplice. . . . Appellants contended that he alone was the thief. The inquiry of whether he did not understand that 'your case is to be dismissed if you will testify against these defendants' undoubtedly tended to show motive and interest." (Citing *State v. Kent*, 4 N.D. 577, 62 N. W. 631, 27 L.R.A. 686).

Speaking with regard to the scope of cross-examination, the Court added further (at 345):

". . . It is also familiar doctrine that great latitude is allowed in cross-examining an accomplice including 'questions tending to injure his credit or to disprove his accuracy or veracity.' 2 Elliot on Evidence, Sections 9, 10. All the texts say, and all the cases hold, that. We think the court erred in the ruling and thereby denied appellants a substantial right."

Where, as here, the testimony of an

accomplice would constitute a substantial

foundation for a verdict of guilty the courts are unanimous in allowing great latitude in the scope of cross-examination of such an accomplice (1 Ruling Case Law 166, Section 12; State v. Aldrich, 75 Ariz. 53, 251 P. 2d 653; People v. Evans, 113 C.A.2d 124, 247 P.2d 915; State v. Linden, 171 Wash. 92, 17 P.2d 635, State v. Temby, 172 Wash. 131, 19 P.2d 661; State v. Radon, 45 Wyo. 383, 19 P.2d 177; State v. Ritz, 65 Mont. 180, 211 Pac. 298; 74 A.L.R. 1157; People v. Durand, 321 Ill. 526, 152 N.E. 569).

In the instant case, counsel for defendant proposed to the court that the record of the proceedings wherein the witness Samuelson was sentenced should be received in evidence. This proposal was made for the obvious purpose of testing the credibility of the witness Samuelson, whose memory was faulty by the most egregious standards, and for the further reason of conveying to the jury proof of bias, suggesting a motive to falsify his testimony. Had the evidence been received the witness would have been impeached.

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When a witness denies bias, or a motive to falsify, or, where, as here, a deliberate attempt to conceal the truth is so apparent, the manner in which to demonstrate such motive, bias, or concealment is to ask the witness directly whether any event transpired to produce such a result, and if he denies this the defense should be free to prove facts showing its existence (Sullivan v. State, 25 Ala. App. 140, 142 So. 110). As a general rule, any evidence may be used to show the existence of this fact (Galvan V. State, 129 Tex. C.R. 349, 86 S.W.2d 228; State v. Banks, 204 N.C. 233, 167 S.E. 351). The best evidence of the existence of a motive upon the part of the witness Samuelson to falsify his testimony or taint his story in favor of the prosecution was the actual transcript of the proceedings wherein the alleged admonition was given to Samuelson (see Davey v. Ivey, 93 Flo. 387, 112 So. 264). It makes no difference that the proof constituted hearsay evidence (State v. Jones, 169 La. 291, 125 So. 127). Nor, indeed, could the proof be excluded upon

the ground that it was extrinsic evidence (III Wigmore on Evidence, (3rd Ed.), Section 948, et seq.).

Prejudice to the defendant's substantial rights flowing from the refusal of the court to permit the proffered evidence is patent. The testimony of Samuelson was crucial to the establishment of the prosecution case. And, it follows, that defendant should have been permitted to pursue whatever course he may have taken to diminish or to otherwise tarnish the credibility and trustworthiness of his testimony. With this evidence before the jury the outcome of the case may have been entirely different. At the very least, this Honorable Court should not sanction the trial court's conduct by characterizing the error as harmless.

CONCLUSION

We respectfully submit that the refusal of the court to permit the defendant to produce evidence calculated to impeach the

credibility and veracity of the accomplice Samuelson, whose testimony supplied essential elements of proof for the State's case, constituted error so grave as to produce material prejudice to the substantial rights of the defendant.

For the foregoing reason we submit that the conviction of the defendant should be reversed and a new trial ordered.

Respectfully submitted,

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