

1956

# State of Utah v. Frank DeLano Gay et al : Reply Brief of Appellants

Utah Supreme Court

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Frank DeLano Gay; Oliver Townsend; Willie Olen Scott;

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IN THE SUPREME COURT OF

THE STATE OF UTAH

~~FILED~~

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THE STATE OF UTAH,

Respondent,

-vs-

FRANK DELANO GAY,  
OLIVER TOWNSEND &  
WILLIE OLEN SCOTT,

Appellants.

) -----  
Clerk, Supreme Court, Utah

) Case No.

) 8565

R E P L Y B R I E F O F A P P E L L A N T S

FRANK DELANO GAY,  
OLIVER TOWNSEND &  
WILLIE OLEN SCOTT.

In Propria Persona,  
Box 250, Draper, Utah.

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8565

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R E P L Y   B R I E F   O F   A P P E L L A N T S .

In his 'Brief of Respondent', the Attorney General apparently is trying to lead this Honorable Court away from the real issues of this case, which does not concern itself with whether or not there was sufficient evidence to sustain a conviction, but which concerns only matters of LAW and of CONSTITUTIONAL RIGHT; Therefore Appellants confine their Reply Brief to only several of Respondent's Points as follows:

REPLY TO RESPONDENT'S POINT I.

In his Point I, at page 3 of his Brief, Respondent claims that the trial Judges' brief absence from the bench was not prejudicial, and not reversible error.

This subject was covered at pages 32-33 of Appellant's Brief, under POINT TWO, assignment (i), and the Appellants did not claim that the trial Judges' brief absence alone was reversible error; But that it was one of a number cited in Appellant's Brief at pages 32 to 49, that taken together denied them their Constitutional right to a 'Fair Trial'.

Appellants submit that even minor errors, which standing alone would not be prejudicial, are, when combined as in the instant case, as pointed out in Appellant's Brief, POINT TWO, pages 32 to 49, under assignments (i) to (ix), plainly very prejudicial, and collectively constitute reversible error. See the cases of:

STATE v. MOORE, 111 Utah 458, 183 P. 2d 973;

REPLY TO RESPONDENT'S POINT II.

Under his Point Two, at pp. 4-5, the Respondent claims that Mr. Christensen did not commit Perjury in testifying that he observed a 'Lineup' of Appellants and others in the Salt Lake City Police Station, -" Two or Three days" and " a couple of days after the robbery" on November 28th, 1955; whereas Respondent admits that such a 'Lineup' took place on December 22nd, Three (3) weeks afterwards. Respondent claims that this was only a 'Lapse of memory' by Mr. Christensen and is normal; But Appellants submit that this error of over Three (3) weeks out of the total of 24 days elapsing between the time of the robbery on November 28th and the 'Lineup' on the 22nd of December is too great an error to be called a 'Lapse of memory', and certainly is NOT normal, but on the contrary is just plain PERJURY.

Respondent quotes some of the testimony

of Mr. Christensen at page 4 of his Brief, but he forgot some too, for the Transcript shows that Mr. Christensen, after describing the alleged robbery, said (Tr. p. 97, L. 9-20):

" R.... as soon as they ran out the door

I called the police. . . .

Q Now after the police came did you have occasion to have a talk with Detective Duncomb?

A Yes, uh huh.

Q And what happened at that time?

A He asked for a description.

MR. HATCH: Objection to anything he said or asked. It is hearsay.

THE COURT: Well you may proceed with what you are answering. The objection is overruled as to that.

A Well, he asked the general appearance of the people and he had some pictures, fifteen or twenty.

Q And what were they pictures of?

A All colored people. ( continued)--

(cont.)

" Q Did you examine those pictures?

A Yes.                   ""

Whereas STATE'S WITNESS, Detective DUNCOMB, a reputable Police Officer in Salt Lake City for many years, who was called to the Loan Company to investigate the alleged robbery, and who was in charge of the case throughout, testified as follows (Tr. p. 126, L. 20,--- p. 127, L. 4.):

" Q Whom did you meet on that occasion?

A Where?

Q At the Credit Industrial Loan?

A There was two girls and Mr, Gibbs.

Q And what was the emotional state of Miss Bergner?

MR. HATCH: Objection as calling for a conclusion. I think he can tell what he observed.

THE COURT: Well, with that understanding he may answer.

(cont.)--

(cont.)

" A Both girls were very upset, crying and very frustrated.

Q Were you able to get information from them?

A No sir.

Q Did you get any information from Mr. Gibbs and Mr. Christensen?

A I didn't see Mr. Christensen until several days later "

And at Transcript page 131, it shows that Detective Duncomb testified, lines 3-8 :

" Q But to the best of your knowledge there had been no lineups prior to that time ( Dec.22nd), is that correct, with reference to this crime?

A Not in Salt Lake City there hadn't been.

Q Now you say you didn't talk to Christensen on the 28th, that is you didn't show him pictures? (cont.)-

(cont.)-

"

A No sir. "

And at page 131. Lines 13-19, <sup>D</sup>etective  
Duncomb's testimony continues:

" Q May I see those pictures you have  
in your pocket? These are the pictures  
that you showed Mr. Gibbs then on  
the 28th, is that correct?

A All that was concerned saw them.

Q On the 28th?

A Not on the 28th. Mr. Christensen I  
didn't contact until the 2nd day of  
December. (underlining appellant's)

" "

State's Witness, Mr. GIBBS, the manager  
of the Loan company testified that when he  
left to get his noon sandwich, he left the  
Office in charge of Mr. Christensen (Tr. P.75,  
L. 23-25.) that Miss Bergner and Mr. Chris-  
tensen were in the Office (Tr. p. 79, L.22-24.)  
that when he returned 15 or 20 minutes later  
he found the Office in a state of confusion,

with Mr. Creer, a customer, consoling the Cashier who said : "We have been robbed", but there is NO mention of why Mr. Christensen disappeared so suddenly, so that it took Detective Duncomb several days to locate him, just when he was needed most, as the ONLY person with information regarding the robbery alleged.

The fact remains that Mr. Christensen lied on the stand about being at the Loan Office and looking at pictures, etc. when Detective Duncomb and the other Officers came to the Loan Office in response to the call that it had been robbed. Perhaps there was some excuse for Mr. Christensen skipping out before the Police came, and staying away for several days to make up his story, but Appellants submit that there is NO excuse for Mr. Christensen lying by testifying that he was still at the Loan Office when the Police came, and looked at pictures at that time with Detective Duncomb,

The testimony of STATE'S WITNESS Detective DUNCOMB shows that Mr. Christensen was NOT there, and did NOT then look at any pictures

with Detective Duncomb as he testified he did. For Detective Duncomb couldn't even get in contact with Mr. Christensen until 2 days after the alleged robbery, which proves that Mr. Christensen committed Perjury.

Appellants submit that a person who knowingly testifies, declares, . . or states . . any matter to be true which he knows to be false; Is Guilty of PERJURY. See: Utah Code Anno. 1953, Sec. 76-45-1.

The Respondent glosses over the fact that State's Witness Mr. Hunter also committed Perjury, by repeatedly testifying that he saw the Appellants and their Car on an Impossible date, the non-existent 31st of November; See: Appellant's Brief, pp. 20-22, 29; And see Tr. page 259, L. 26-30, ---p. 262, L. 6-15.

Perhaps Respondent will say that Mr. Hunter also had a 'Lapse of memory', in so testifying, when it is common knowledge that nearly all little children know the old

nursery rhyme :

" Thirty days hath September,  
April, June and November . . "

The Perjury of State's Witness Christensen having been proven by STATE'S WITNESS Detective Duncomb; And State's witness Hunter having perjured himself by testifying repeatedly to an impossible date, the 31st of November, the Appellants repeat, as in their Appellant's Brief, pages 26, 29-31 and cases cited, that a conviction, such as the instant one, tainted with PERJURY, CANNOT stand. See:

COMMUNIST PARTY v. SUBVERSIVE ACTIVITIES  
CONTROL BOARD (1956) 76 S. Ct. Rep. 663, at 668.

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REPLY TO RESPONDENT'S CONCLUSION .

In his CONCLUSION, at page 9, Respondent makes the statement:

" Appellants have raised many points which we feel are patently without merit and which consequently are not discussed here. The questions they raise were questions for the jury... ""

Appellants point out that they only raised Two major POINTS, at pages 26 and 32 of their Appellant's Brief, although each has a number of assignments of error; And submit that they, being Constitutional POINTS obviously have merit, all the more obviously because the Respondent, despite the several extensions of time in which to File his Brief, has NOT been able to answer Appellant's contentions born out by the Records.

And as for these questions they raised being for the jury, Appellants submit that their POINTS are matters of LAW, and therefore NOT for the Jury; For example/<sup>the</sup> contention under POINT TWO-assignment (v), Appellant's Brief pages 36 to 40, that the Trial Court errred in admitting and not cautioning the Jury to disregard the large amount of 'HEARSAY' evidence and comments of State's Counsel is surely not a question to be decided by a jury; Nor are POINT TWO assignments (vi), (vii) and (viii), at pages 40 to 44 of Appellant's Brief,

contending that the trial Court erred in Instructions No's 4, 5 and 6 a question for the jury. And POINT TWO -assignment (ix) at Appellant's Brief, pages 44-49, contending that the trial Court erred in refusing to give Defendant's requested Instruction No. 1, and thereby deprived them of their Defense of Alibi and their Constitutional Right to Defend themselves in a 'Fair Trial' is also strictly a matter of LAW, and not for a jury to decide, or even have placed before them.

C O N C L U S I O N .

Appellants submit that they have shown that they have been Denied their fundamental Legal and Constitutional Rights, and that they are entitled to a reversal of the instant case.

Very Respectfully submitted,

By: FRANK Delano Gay,  
Frank Delano Gay,

By: Oliver Townsend,  
Oliver Townsend, &

By: Willie Olen Scott.  
Willie Olen Scott.