

1965

Virgil Redmond and Ed Delyle v. City Court of Salt Lake City, J. Patton Neeley, City Judge, Warren M. Weggeland, Deputy Salt Lake County Attorney :  
Appellant's Brief

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**Recommended Citation**

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

UNIVERSITY OF UTAH

VIRGIL REDMOND and ED DeLYLE,  
*Plaintiffs-Appellants*

vs.

CITY COURT OF SALT LAKE CITY,  
J. PATTON NEELEY, CITY JUDGE,  
WARREN M. WEGGELAND, DEPUTY  
SALT LAKE COUNTY ATTORNEY,  
*Defendants-Respondents*

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Case No.  
10340

**APPELLANTS' BRIEF**

Appeal from the Judgment of the ~~Third~~ District Court of Salt Lake County  
Honorable Stewart M. Hanson presiding

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*Defendants-Respondents*

Case No.  
10340

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## APPELLANTS' BRIEF

### STATEMENT OF THE KIND OF CASE

Suit for writ of Mandamus to compel Salt Lake City Judge to dismiss a criminal complaint against Appellants because of failure of Prosecutor to furnish a Bill of Particulars ordered by the City Court, or in the alternative to order prosecutor to furnish said Bill of Particulars.

### DISPOSITION IN LOWER COURT

District Court refused to grant relief requested and dismissed suit for mandamus with prejudice.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of order dismissing suit for Mandamus and for an order requiring dismissal of the criminal complaint filed against the Plaintiffs in the City Court, or in the alternative for an order requiring the said Bill of Particulars to be furnished.

## STATEMENT OF FACTS

Both Appellants were charged with issuing a fictitious check in a complaint issued by the City Court of Salt Lake City. (R 1)

At their arraignment in the City Court, Appellants filed a written motion for a Bill of Particulars. (R. 3, 18) The City Judge ordered the prosecution to furnish Appellants with documents and other information demanded in the motion. (R. 3, 18, 45). The Bill of Particulars furnished by the Prosecution is merely a restatement of the allegations of the complaint and a refusal to furnish the information and documents which the Court ordered to be furnished, except that a copy of the check mentioned in the complaint was furnished to Appellants.

Although the complaint filed in the City Court against Appellants involves only one check, that check is only one of a series of forty or fifty checks which appear to have been uttered by the same person. (R. 43) All of said checks were drawn on the same bank account, were made payable to the same persons, bore the same approximate dates, were for approximately the same amount, were endorsed by the same person, were countersigned by use of the same drivers license for identification, were part of a numerical sequence, and appear to have come

from the same pre-numbered check book. (R. 51, 52, 53)

The police appear to have gathered up all of the checks issued in this series, together with the bank signature cards, bank records concerning the bank account, returned checks which were deposited to open that bank account, and other documents demanded in the Bill of Particulars. The Prosecutor first agreed to furnish Appellants with copies of the requested documents and then refused to do so or to permit Appellants to inspect or copy said documents. (R. 52) They have admitted that they have them in their possession. (R. 52, 53)

Because the Prosecution has gathered up the evidence needed by Appellants to learn the identity of person who cashed the checks and needed to submit to hand-writing experts to identify the persons who actually uttered and cashed the checks in question. (R. 48, 50), the Appellants are unable to prepare evidence necessary for them to present at the preliminary hearing to show that no probable cause exists upon which they could be bound over to the District Court for trial.

Appellants filed in the City Court, a motion to quash the complaint in accordance with the provision of 77-11-1 and 77-23-3, UCA, 1953, or in the alternative to compel the Prosecution to furnish the Bill of Particulars ordered furnished by the Court. (R. 12, 13) This motion was heard and denied by a different City Judge. Appellants then brought this action for a Writ of Mandamus to compel the Court to quash the complaint or require the Bill of Particulars to be furnished, and the The District Court refused to grant the relief requested. From that order this appeal is prosecuted.



The information sought in the Bill of Particulars is not a preview of the prosecution's evidence pertaining to the alleged fictitious check mentioned in the complaint but is evidence and facts which would ordinarily be available to Appellants but for the act of the prosecution and the police department in gathering up that evidence so that it is not now available to Appellants. (R. 48, 50)

Respondents have admitted in their answer to the complaint filed herein that the order requiring the prosecution to furnish the Bill of Particulars is still in full force and effect and was not overruled by the order of the second Judge which denied Appellants' motion to quash, etc., and Respondents allege that the Bill of Particulars furnished by them complied with the order of the Court, notwithstanding the fact that it was merely a refusal to comply with that order.

## POINT I

### ARGUMENT

**APPELLANTS ARE ENTITLED TO AN ORDER QUASHING THE COMPLAINT BECAUSE OF FAILURE OF PROSECUTION TO FURNISH BILL OF PARTICULARS ORDERED BY THE COURT.**

The City Court ordered the Prosecution to furnish the Bill of Particulars demanded by Appellants. The Bill of Particulars furnished by the Prosecution constitutes a restatement of the wording of the complaint, a photocopy of the check mentioned in that complaint, together with the following statement in (lieu) of furnishing the information demanded in questions 2 and 3 of the de

mand for a Bill of Particulars:

"Plaintiff refuses to answer questions No. 2 (No. 3) in that defendant requests matters which are evidentiary and beyond the scope of a Bill of Particulars."

Appellants are entitled to the information which they demanded in their motion for a Bill of Particulars and which the Court ordered the Prosecution to furnish, as indicated in 77-21-9, UCA, 1953, (which statute is made applicable to complaints by the last paragraph of 77-11-1, UCA, 1953, see also *State v. Gunn* 102 U—422 132 P2d 109 (1942); *State v. Solomon* 93U70, 71 P2d 104 (1937) which statute reads in part as follows:

**"77-21-9, BILL OF PARTICULARS.**-(1) When an information or indictment charges an offense in accordance with the provision of section 77-21-9 but fails to inform the defendant of the particulars of the offense, sufficiently to enable him to prepare his defense, or to give him such information as he is entitled under the Constitution of this state, the court may, of its own motion, and shall at the request of the defendant, order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the prosecuting attorney may of his own motion furnish such bill of particulars.

(2) When the court deems it to be in the interest of justice that facts not set out in the information or indictment or in any previous Bill of particulars should be furnished to the defendant, it may order the prosecuting attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be furnished, the court shall consider the whole record and the entire course of the proceedings against the defend-

ant . . . . ”

(Emphasis added)

It should be noted that the foregoing statute vests in the Judge the discretion of determining what “facts” should be furnished in a Bill of Particulars in each case, and what “particulars” are necessary to enable the accused to prepare his defense. In addition, when the “interest of justice” requires that “facts” available to the Prosecutor be furnished to the Defendant the Court may order the Bill of Particulars. The statute further sets a standard to be used by the Judge in exercising that discretion in ordering or refusing to order a given Bill of Particulars. *State v. Faux*, 9 U. 2d 350, 345 P2 186 (1959). It is in the sound discretion of the Court to determine if the accused should be allowed to obtain evidence in the possession of the prosecution. *State v. Lack*, 118 U. 128, 221 P. 2d 852 (1950). We must assume that in exercising its discretion the City Court Judge, who ordered the Bill of Particulars, complied with the requirements of 77-21-9, UCA, 1953, and, accordingly, that the Prosecution should be required to furnish the Bill of Particulars. In discretionary matters of this type, this Court should not substitute its opinion for that of the trial Judge unless there is a clear abuse of discretion by the lower court.

Appellants assert that they are innocent of the charges contained in the complaint filed in the City Court. It cannot be reasonable or rightfully asserted that the documents and other information ordered furnished to Appellants in the Bill of Particulars is not necessary for the preparation of a defense, or that the interest of justice does not require that said information be furnished to

Appellants. This information is in fact necessary to learn the identity of persons who can identify the persons who actually cashed the checks in question and to furnish an adequate number of handwriting specimens to a handwriting expert for him to form an opinion as to the identity of the person or persons who uttered the checks in question. Whenever a person is charged with an offense which may result in a fine or imprisonment, justice requires that he be given information to show his innocence.

The uncontradicted fact is that the prosecutor wilfully refused to comply with the order which required him to furnish the Bill of Particulars, which order the prosecution admits to still be in full force and effect. (R. 18) The remedy available to a Defendant who has not been furnished with a sufficient Bill of Particulars when one has been ordered is set out in 77-23-3, UCA, 1953 (Which statute is made applicable to complaints by the last paragraph of 77-11-1, UCA, 77-21-1 1953) and which statute was the basis of the motion to quash filed by Appellants, which reads in part as follow:

**"77-23-3, MOTION TO QUASH-GROUNDS-A motion to quash the information or indictment shall be available only on one or more of the following grounds. In the case of:**

**(1) Either an information or indictment:**

**(a) . . .**

**(b) *That the court has ordered a bill of Particulars under the provisions of section 77-21-9 and the prosecuting attorney fails to furnish a sufficient bill. . .***

**(Emphasis added)**

Appellants are not seeking an order compelling a Bill Particulars. Such an order has been issued in the sound discretion of the City Court and is still in full force and effect. Appellants motions seeks an order quashing the complaint, or in the alternative an order compelling the prosecution to comply with the existing order of the Court for a Bill of Particulars. The language quoted above is quite emphatic concerning quashing of a complaint in the event of failure of the prosecution to furnish a "sufficient" Bill of Particulars. It is manditory, and the Appellants are entitled, as a matter of law, to an order quashing the complaint.

The prosecution admits that it has in its possession all of the documents subpoenaed by the Appellants and that the documents subpoenaed are the same as those demanded in the Bill of Particulars. (R. 52, 53). Because they have gathered up all these documents, the Appellants have no other source from which to obtain them. Where information is not otherwise available to an accused, it is a clear case where justice demands that it be furnished so that an adequate defense can be presented.

## POINT II

### REFUSAL TO FURNISH BILL OF PARTICULARS IS A DENIAL OF DUE PROCESS OF LAW.

The purpose of a preliminary hearing is to determine if there is sufficient cause to believe that there has been an offense committed and to believe that the accused is guilty thereof and accordingly should be held to answer thereto in the District Court. 77-15-17 and 77-15-19, UCA,

1953. The accused is entitled to present witnesses and evidence on his own behalf at a preliminary hearing to show that no probable cause exists. 77-15-11, UCA, 1953.

It would be a useless formality and a denial of due process of law to hold a preliminary hearing if the accused were prevented from presenting evidence and testimony on his own behalf to explain the accusations and evidence appearing against him. 16 Am. Jur. 2nd, *Const. Law.*, Sec. 578. It would clearly be a denial of due process to require the Appellants to be present at a preliminary hearing when evidence necessary to prepare their defense has been gathered up by the prosecution and withheld so that they cannot learn the names of witnesses who might testify as to the identity of the real criminals or who might testify as to the appellants innocence. If prejudice to the preparation of a defense is shown resulting from failure to furnish a bill of particulars, the accused who has been denied that bill has been denied due process of law. *Van Dam v. United States*, 23 Fed. 2nd 235; (1928) *Leland v. Oregon*, 343 U.S. 790, 96 L. ed. 1302, (1952)

The term "due process of law" is a fundamental principal of justice rather than a specific rule of law and is not susceptible of more than a general statement of its intent and meaning; accordingly, each case must be determined according to the reasonableness of the action taken by the prosecution, the injury to the accused resulting therefrom, and whether it is necessary for the information in the possession of the prosecution to be disclosed to the accused so that he has an opportunity to show that it is untrue. 16 Am. Jur. 2nd., *Const. Law*, Sec. 340 A 51 C 545, 578.

## POINT III

THE FUNDAMENTAL OBJECTIVE OF THE PROSECUTION IN A CRIMINAL CASE IS TO SEEK THE TRUTH AND TO ADMINISTER JUSTICE AND NOT SOLELY TO CONVICT.

Although the prosecution prepared an instrument entitled "Bill of Particulars," it was completely insufficient. Furnishing of the checks and other documents ordered by the court was completely refused except for the one check mentioned in the complaint. If the prosecution has a sufficiently strong case to justify prosecution, it would not be weakened by disclosure of this evidence. If their case is weak and it is necessary to conceal evidence to present a prima facie case, then the case should not have been filed.

It is well recognized that it is the duty of the prosecutor in a criminal case to seek justice and to see that fairness reigns. It is the duty of the state to seek the truth rather than to achieve a record of indiscriminate conviction by concealment and surprise. A.B.A., *Canons of Professional Ethics*, Canon 5

The attorney General of the state of Utah has by statute been given the power and duty of supervisory control over county attorneys in the state in their official duties 67-5-1 (5) UCA, 1953. In exercising this power the attorney general recently (May 21, 1965) issued a directive to the Salt Lake County Attorney and others concerning disclosure of evidence favorable to the accused. The full text of this directive is as follows:

"To all District Attorneys, County Attorneys

## Sheriffs, and Chiefs of Police:

It was announced this day through the news media that an assistant attorney general from this office reported yesterday before the Utah State Council on Criminal Justice Administration that it would be unethical for a defense counsel to approach a policeman assisting in a prosecution . . . that is was a type of client-counsel relationship.

This directive is to inform your office of the correct position assumed by this office with respect to this general area of the law.

There is absolutely no canon of ethics to prevent such contact between policeman and defense counsel.

There is absolutely no client-counsel relationship between policeman and prosecutor.

The policeman in such a capacity is nothing more than a witness. And no prosecutor owns any witness.

A witness is a person who is to testify as to facts—truthfully—as he has perceived them—no matter who calls him as a witness. No honest witness will testify that the facts are one way for the prosecution, another way for the defense.

Too often it appears that prosecutors regard themselves as partisan attorneys, justified in excluding evidence of matters favorable to the accused, and in introducing all evidence which could, by any possibility, be unfavorable to the accused.

But while a prosecuting attorney is justified in bringing out all the facts which tend to establish the guilt of the accused, he has no right to misrepresent facts or to create false impressions in the mind of the jurors.

Prosecutors represent the people, and should endeavor to see, not only that an accused person is convicted, but also that the facts are fully and fairly placed before the jury.



It must be remembered that a fundamentally American concept of the law is that any person accused of having committed a crime has the constitutional presumption of innocence.

No person is guilty of a crime in this county until he is proved guilty beyond a reasonable doubt.

If the prosecutor has sufficient legal evidence to prove an accused guilty beyond a reasonable doubt, what harm to the prosecution could result by a disclosure of those facts?

And, if the prosecutor does not have sufficient legal evidence to prove an accused guilty beyond a reasonable doubt, he should not prosecute.

Another constitutional right afforded an accused is that he be confronted by his accusers.

For this right to be meaningful, and not an empty play on words, the defense counsel must be able to interrogate those accusers and all witnesses with factual information before the actual courtroom confrontation. Otherwise, the accused might well be deprived of a still further constitutional right, that of being represented by counsel. For, in any reasonable fair and logical approach, an unprepared counsel is tantamount to no counsel.

Besides, it is a law in Utah that the accused be informed of all witnesses against him. What sense would that law make if those witnesses could not be interrogated? Absolutely none. So how could a defense counsel be unethical by confronting those witnesses?

American justice should not be decided by a game of chance, surprise, trickery, gimmick—anything short of full disclosure, complete fairness, and impartial witness—have no place whatsoever in the

procedural machinery that potentially could deprive one of our citizens of his life or liberty.

The prosecution has almost every advantage. It has its own policemen, investigators, lawyers, experts, chemist, photographers, doctors, engineers, and unlimited money for preparation.

An indigent accused has practically none of these to use in his defense. Only recently has Utah had even a taste of public approach to this problem.

A giant step forward has been taken by the formation of the Salt Lake Legal Defenders Association and the appointment of the very capable defense lawyer, Jimi Mitsunaga, as its director.

This trial program, afforded by a grant from the Ford Foundation must be supported and given every reasonable opportunity to prove its value for continuation if the State of Utah is to pride itself with any sense of fair play toward an accused.

*Toward this end, it is hereby suggested to you and the members of your organization by this office, as the Chief Law Enforcement Officer of the State of Utah and as supervisor of all county attorneys and district attorneys, that you adopt the above philosophy by discarding the concept of "cat and Mouse."*

*Please make available to all defense counsel the names and addresses of all witness of a case known to the prosecution, copies of all statements and photographs, exposure to examination of all physical evidence, and any other available factual information concerning the case.*

This Directive and Suggested Procedure might well seem drastic and severe to the dogmatic adversary of the game "Button, Button, Who's Got the Button?"

But to the believer in the cherished words of the United States Constitution, it is no more than what has been long overdue. It is no more than compliance with the law.

Surprisingly, perhaps-but inevitable, indeed-such a procedure will breed respect for the law, avoid crime behind a badge of authority, and aid in the reduction of the alarming increase in the crime rate of our nation.

Let us communicate often and be of assistance to each other."

(Emphasis added)

The trend in the law is definately toward more liberal discovery procedure in criminal cases. Permitting a liberal discovery will "enhance, rather than diminish, the dignity of the administration of law" and is "in accord with enlightened administration of criminal justice. *U.S. v. Peace*, 16 F.R.D. 423 (1954). In a recent Utah case this Court permitted an accused to inspect the transcript of the Grand Jury hearing for purpose of impeachment of witnesses at the trial. In that decision the Court stated that:

"the rights of an accused of a crime are in no wise to be belittled nor ignored. The fundamental purpose of a criminal trial is not solely to convict but to seek the truth and administer justice." *State v. Faux*, 9 U. 2d 350, 345 P. 2d 186 (1959)

The City Court recognized the need of the Appellants to secure the documents in question and ordered the Bill of Particulars. However, the prosecution without a valid reason continues to withhold it. This policy certainly is not in accord with the "enlightened rules of criminal justice."

## CONCLUSION

The court should reverse the District Court and compel the City Court to quash the complaint charging the appellants with the issuing of a fictitious check, or in the alternative to compel the prosecution to furnish the information which they were ordered to furnish in the Bill of Particulars.

By doing this the interests of justice will be carried forth and the Appellants will be able to adequately prepare their defense for the presenting of evidence now withheld from them in order that they may show lack of probable cause at the preliminary hearing. Moreover, they will be accorded their constitutional rights by being able to present evidence in their favor so that truth might be ascertained and justice properly administered.

Respectfully submitted,

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