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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH

OCT 15 1965

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VIRGIL REDMOND and ED DeLYLE, Plaintiffs-Appellants, vs. CITY COURT OF SALT LAKE CITY; J. PATTON NEELEY, City Judge; and WARREN M. WEGGELAND, Deputy Salt Lake County Attorney, Defendants-Respondents.	Case No. 10340

APPELLANTS' REPLY BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEAL REDMOND and ED DeLYLE,)

Plaintiffs-Appellants,)

vs.) Case No. 10340

CITY COURT OF SALT LAKE CITY,)
J. PATTON NEELEY, CITY JUDGE,)
WARREN M. WEGGELAND, DEPUTY)
SALT LAKE COUNTY ATTORNEY,)

Defendants-Respondents.)

APPELLANTS' REPLY BRIEF

STATEMENT OF THE KIND OF CASE

Appellants incorporate herein the statements of the kind of case contained in Appellants' brief (P. 1) and Respondents' brief (P. 1).

DISPOSITION IN LOWER COURT

Appellants incorporate herein the statements concerning disposition in lower court contained in Appellants' brief (P. 1) and Respondents' brief (P. 2), except that they deny the accuracy of the statement contained in Respondents' brief concerning Judge Neeley's alleged ruling, for the reason that the purported ruling was not made by

Judge Neeley and is not included in the record in this matter. Judge Neeley merely denied Appellants' motions to quash the complaint and to require the bill of particulars ordered by Judge Beck to be furnished.

RELIEF SOUGHT ON APPEAL

Appellants seek an order requiring the complaint against Appellants to be quashed or, in the alternative, for an order requiring the County Attorney to furnish the bill of particulars which Judge Beck ordered.

STATEMENT OF FACTS

Appellants incorporate herein the statement of facts contained in their brief (P. 2-4).

ARGUMENT

POINT I

MANDAMUS IS AN APPROPRIATE REMEDY.

Respondents' brief asserts (a) that mandamus is not an appropriate remedy in this case because the acts sought to be compelled are discretionary acts and that except where that discretion is abused this Court cannot disturb the exercise of the discretion of the inferior Court, and (b) that the information sought by the Appellants is evidentiary in nature and is outside the scope of a bill of particulars. (P. 10-11)

Appellants acknowledge that this Court should not usurp the discretion of an inferior

Court as to matters which are purely discretionary, except when that Court has abused its discretion. Respondents argue that Judge Neeley's refusal to quash the complaint or to compel the County Attorney to furnish information which Judge Beck had ordered was a discretionary act and should not be disturbed by this Court.

Judge Beck exercised the discretion conferred upon him by 77-21-9, UCA, 1953 (P. 5 of Appellants' brief) and ordered the County Attorney to furnish the information sought by Appellants. Respondents admitted in their answer (R. 18, Par. 6) that Judge Beck's order was not overruled by Judge Neeley's order. The discretion mentioned in that statute has been exercised in favor of Appellants. The County Attorney stands in defiance of that court order in refusing to furnish that information to Appellants. Mandamus is a proper remedy to enforce the legal rights conferred upon Appellants by Judge Beck's order. State v. Hart, 19 U.438, 57 P. 415; Ketchum Coal Co. v. Christensen, 48 U. 214, 159 P. 541: Richards v. District Court of Weber County, 71 U. 473, 267 P. 779; Hathaway v. McConkie, 85 U. 21, 38 P2d 300.

Appellants are entitled, as a matter of law, to have the complaint dismissed for failure to furnish a sufficient bill of particulars as provided in 77-23-3, UCA, 1953 (P. 7 of Appellants' brief), which statute provides that "A motion to quash SHALL be available . . ." when the prosecuting attorney fails to furnish a sufficient bill. It is admitted by Respondents that they wholly failed to answer questions 2 and 3 of

the bill of particulars which they were ordered to furnish (Respondents' brief P. 4-5). It cannot reasonably be argued that a "sufficient" bill was supplied as to questions 2 and 3 when the County Attorney was ordered to answer those questions but did not. That statute confers no discretion upon the Court to refuse to quash, in the event of an insufficient bill of particulars, and does confer upon Appellants the right to have the complaint quashed. Accordingly since no discretion is involved mandamus is an appropriate remedy in this matter.

Respondents argue further that the information which they were ordered to furnish but have refused to furnish, is evidentiary and accordingly outside the scope of a bill of particulars. 77-21-9(2), UCA, 1953 (P. 8 of Respondents' brief) expressly authorizes the Court to require the prosecution to furnish "facts" when ". . .the Court deems it to be in the interest of justice . . ." and does not limit those facts to those necessary for the prosecution to prove its case. The "facts" mentioned in that statute do not exclude "facts" which are or may be used as evidence either by the prosecution or the defense. Respondents' contention that the Court cannot order a bill of particulars containing "facts" or which are "evidentiary" is without merit.

Respondents argue extensively that a bill of particulars cannot be used to obtain a preview of the prosecution's case and thereby imply that the information which they are withholding is a part of their case, (Respondents' brief P. 13-18) however they admit

elsewhere in their brief that the information being withheld from Appellants is not a part of the prosecution's case in this matter. (P. 5) Appellants are NOT asking for information pertaining to the prosecution's case. All that Appellants seek is information which is being supressed by the prosecution and which information is necessary to prepare their case. (Appellants' brief P. 4) Where information requested in a bill of particulars is needed by the accused in order to enable him to prepare a proper defense, such information should be furnished even if it results in a disclosure of the prosecution's evidence. 5 ALR2d 458.

POINT II

SUPPRESSION OF EVIDENCE FAVORABLE TO APPELLANTS BY PROSECUTION IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE U. S. CONSTITUTION.

The evidence sought by Appellants in the bill of particulars, ordered by Judge Beck and not supplied by the County Attorney, constitutes (1) documents which Appellants desire to submit to a handwriting expert to determine the identity of the person or persons who actually issued and/or uttered the fictitious check charged in the complaint filed against Appellants and (2) identity of persons who cashed the series of checks, one of which is charged in the complaint filed against Appellants, in order that such persons might be called as witnesses on behalf of Appellants. The information sought is not a part of the prosecution's case but is evidence

which was gathered up by the police and withheld and suppressed by the prosecution. All of the information sought is favorable to the Appellants and is in the possession of and/or available to the prosecution. (R. 48, 50)

The cases are almost unanimous in holding that a person has been denied his right to due process of law, guaranteed to him by the fifth and fourteenth amendments to the U. S. Constitution, if evidence favorable to the accused has been deliberately suppressed by the prosecution or by the use of perjured testimony. 33 ALR2d 1421-1424. A conviction obtained by suppressing evidence favorable to the accused should be set aside because such action is a denial of due process of law guaranteed by the U. S. Constitution. Accordingly it would be a denial of due process to compel Appellants to submit to a preliminary hearing without requiring the prosecution in this case to furnish Appellants with evidence in their possession which is favorable to the Appellants and necessary to prepare their defense.

In a recent prosecution for murder of a policeman, where the state deliberately suppressed evidence tending to show that the fatal shot was not fired by the accused but by another policeman, the Court held that suppression of evidence favorable to the accused was a denial of due process. U.S. ex rel. Almeida v. Baldi (1952, CA3rd Pa) 195 F2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L. ed. 1371, 73 S Ct 828.

The Federal Courts have long held that

suppression or concealment of evidence favorable to the accused is a violation of the due process clause of the fifth amendment to the U. S. Constitution. Curtis v. Rives (1941) 75 App DC 66, 123 F2d 936; and that suppression or concealment of evidence favorable to the accused is a violation of the due process clause of the fourteenth amendment to the U. S. Constitution. Mooney v. Holohan (1935) 294 US 103, 79 L. ed. 791, 55 S Ct 340, 98 ALR 406, reh den 294 US 732, 79 L. ed. 1261, 55 S Ct 511; Pyle v. Kansas (1942) 317 US 213, 87 L. ed. 214, 63 S Ct 177; White Thunder v. Hunter (1945 CA 10th Kan) 149 F2d 578, cert den 325 US 889, 89 L. ed. 2002, 65 S Ct 1579, 141 F2d 500; Pyle v. Amrine (1945) 195 Kan 458, 156 P2d 509. cert den 328 US 749, 90 L. ed. 448, 66 S Ct 45, reh den 326 US 809, 90 L. ed. 493, 66 S Ct 165; U. S. ex rel. Montgomery v. Ragen (1949, DC Ill) 86 F Supp 382; Woollomes v. Heinze (1952, CA 9th Cal) 198 F2d 577, cert den 344 US 929, 97 L. ed. 715, 73 S Ct 499; Burns v. Lovett (1952) 91 App DC 208, 202 F2d 335, affd 346 US 137, 97 L. ed. 1508,73 S Ct 1045; White v. Ragen, 324 US 760, 764, 65 S Ct 978, 89 L. ed. 1348; Hysler v. Florida, 315 US 411, 413, 316 US 642, 62 S Ct 688, 86 L. ed. 932; Jones v. Kentucky, 6 Cir, 97 F2d 335, 338; Soulia v. O'Brien, DC Mass, 94 F Supp 764.

State Courts considering deliberate suppression of evidence favorable to the accused have generally held that such conduct is a denial of due process. Morhous v. Supreme Court of New York (1944) 293 NY 131, 56 NE2d 79; People v. Whitman (1945) 185 Misc 459, 56 NYS2d 89 and ExParte Lindley (1947) 29 Cal2d 709, 177 P2d 918. The one

case located to the contrary seems to have been decided on procedural grounds. Wallace v. Foster (1950) 206 Ga 561, 57 SE2d 920, cert den 340 US 815, 95 L. ed. 599, 71 S Ct 43.

Appellants have no plain, speedy or adequate remedy at law available to them, other than a writ of mandamus. If they are not permitted to obtain the evidence necessary to present an adequate defense, because of suppression of that evidence by the prosecution, they will have to go through the empty formality of a preliminary hearing and trial before the question of error by the Court in refusing that information can be raised on appeal. No right to appeal from a preliminary hearing exists. The right to appeal from a verdict after a trial is not a "plain, speedy or adequate remedy" 65B(a) URCP and accordingly this is a proper case for the issuance of a writ of mandate.

CONCLUSION

Appellants are not asking for this Court to usurp the discretion of Judge Neeley or Judge Hanson. Respondents have admitted that Judge Neeley's denial of Appellants' motions did not overrule Judge Beck's order requiring the County Attorney to supply the Appellants with the information demanded in the motion for a bill of particulars. (R. 18) Judge Beck exercised his discretion and thereby vested Appellants with a right to receive that information. This Court is asked to enforce that right and to compel the County Attorney to furnish that information.

Under the statute 77-23-3(1)(b) Appellants

are entitled as a matter of law to have the complaint against them quashed by reason of the failure of the prosecution to furnish the bill of particulars ordered by Judge Neeley. Appellants are entitled to be furnished with the information demanded in the bill of particulars under the due process clauses of the U. S. Constitution. Accordingly the refusal of Judge Neeley to require said information to be furnished was an abuse of discretion and a denial of Appellants' right to due process of law. Mandamus is a proper remedy for this abuse of discretion.

Appellants have no plain, speedy or adequate remedy at law. The rights herein sought to be enforced are vested rights of the Appellants, and no discretion remains in the inferior courts concerning said matters, accordingly this is a proper case for the issuance of a writ of mandate.

To force the Appellants to submit to a preliminary hearing and/or a trial without being furnished with the evidence, gathered up and suppressed by the prosecution, which is not a part of the prosecution's case but which is vital to Appellants' defense, would be to deprive Appellants of their right to the due process of law guaranteed by the U. S. Constitution. Such suppression would make the Appellants' right to compulsory process to compel attendance of witnesses an empty right since they could not determine their identity to serve them with such process.

Respectfuly submitted,

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Appellants