1966

State of Utah v. James Coleman : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAMES COLEMAN,
Defendant and Appellant.

Case No.
10349

BRIEF OF APPELLANT

Appeal from Judgment of the Seventh Judicial District Court in and for San Juan County, Utah, Honorable F. W. Keller, District Judge

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is a criminal action instituted in the Seventh Judicial District in and for San Juan County, against the defendant, James Coleman, alleging the commission of the crime of, "issuing a check against insufficient funds" in violation of Section 76-20-11, U.C.A. (1953), (R. 1, 5).

DISPOSITION IN THE LOWER COURT

The jury returned a verdict of guilty (R. 11). The trial court denied a motion by defendant for a new trial (R. 25).

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Judgment on the verdict of the jury and a new trial.

Since both volumes are separately numbered, references to the Reporter's Transcript of testimony will be identified by R. Tr., and all other references to the record will be designated R.

STATEMENT OF FACTS

The State charged that the defendant, on or about the 3rd day of March, 1964, with intent to defraud Richard Perkins, made and delivered a check in the sum of $4,640.00, payable to the order of Richard Perkins and drawn upon the Fruita State Bank, Fruita, Colorado, and at the time the defendant made and delivered the check he knew he did not have suficient funds in, or credit with the said Fruita State Bank, for the payment of the check in full on presentation (R. 1).

A few days prior to the issuance of the check in question, Mr. Coleman contacted Richard Perkins at Blanding, Utah, regarding the purchase of some cattle (R. Tr. 4). Mr. Coleman and Mr. Perkins agreed upon the purchase of 45 head, but did not complete the deal until Mr. Coleman made a phone call and then confirmed their arrangement later in the day (R. Tr. pp. 5-6, 23, 25, 26, 35) (See also charge for a long distance call made by the Fruita Bank March 6, 1964, def's. Exhibit No. 6).

As shown by the Affidavit of Robert Sawyer, Vice-President and cashier of the First National Bank, Durango, Colorado, Mr. Coleman called him long distance on March 2, 1964, to determine if a

...ck for $5,8880.00 drawn by Mr. James Wright ...the order of James Coleman would be available ...payment. Mr. Sawyer informed Mr. Coleman ...the check would be good and it was in fact ...subsequently paid on March 5, 1964 (R. 20). See ...the Affidavit of James Coleman to the same ...(R. 21).

After ascertaining that he would have money ...lable to complete the transaction, Mr. Coleman ...arrangement to take delivery of the animals ...issued the check in question (Pltf's Exhibit ...1, R. Tr. 7). The check was subsequently deposit-...by Mr. Perkins in his bank account in Blanding, ...Utah, (R. Tr. 31). It was presented to the Fruita ...State Bank, Fruita, Colorado, for payment on March ...or 6th, 1964 (R. Tr. pp 54-55), but it was re-...turned by the bank March 6, 1964, to Mr. Perkins ...for endorsement (R. Tr. P. 49). Mr. Coleman had ...deposited a check for collection in the Fruita State Bank on February 28, 1964, (Def's Exhibit No. 5). It was payable to Coleman and issued by one Charles Wright. It was drawn on a Durango bank (R. 20), and was paid by that bank March 5, 1964. Mr. Cole-...man opened an account with the Fruita State Bank, Fruita, Colorado, March 6, 1964, and deposited the Wright check in the Fruita Bank, for $5,878.83 ($5,880.00 less $1.17 for a long distance phone call, Def's Exhibits Nos. 6 & 7, R. Tr. 43-44). Mr. Per-...kins added the endorsement to his check and re-...deposited it. It was received by Fruita State Bank

a second time March 12, 1961 (R. Tr. p. 5[illegible] this date, a balance of approximately $2,5[illegible] mained in Mr. Coleman's account and the [illegible] again returned, this time because there [illegible] adequate funds to pay the full amount [illegible] (Pltf's Exhibit 3).

The jury was instructed on the law, argu[illegible] of counsel were made and the jury retired for [illegible] liberation at 5:35 p.m. At 8 o'clock p.m. the jury [illegible] quested permission to confer with the Court [illegible] cerning Instruction No. 4 (R. Tr. p. 67). The Court made certain explanations concerning the [illegible] struction which were assigned as error by defend[illegible] ant's counsel. Further reference will be made to [illegible] conduct of the Court in this regard in the argument. The jury again retired at 8:10 p.m. (R. Tr. p. 7[illegible] and returned with a verdict of guilty at 8:16 p.m. (R. Tr. p. 72).

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXPLAINING TO THE JURY, FOLLOWING THEIR RETIREMENT, THE MEANING OF INSTRUCTION NO. 4.

Prior to the jury's retirement for deliberation the Court, among others, gave the following Instruction:

> "INSTRUCTION No. 4
>
> Under the law of this State the making and delivering of a check to another, knowing at the time of such making and delivery that

the maker does not have sufficient funds in or credit with the bank upon which such check is drawn for the payment of said check in full upon its presentation is prima facie evidence of an intent on the part of the maker to defraud. If, theerfore, your minds are satisfied beyond a reasonable doubt that the defendant on or about the 3rd day of March, 1961, within this county, made and delivered to Richard Perkins a check of the description set forth in Instruction No. 1, and are further satisfied that at the time of the making and delivery of such check the defendant knew that he did not have funds on deposit with the bank upon which the check was drawn or credit with the said bank sufficient to pay said check upon its presentation, you may then find that in the drawing and delivery of said check he had the intent to defraud, unless from all the evidence in the case you entertain a reasonable doubt as to whether he had the intent to defraud at the time of making and delivering such check."

Following approximately 2½ hours of deliberation, the jury requested permission to confer with the Court (R. Tr. p. 67), whereupon the following colloquy between the Court and the jury occurred:

"JUROR: We wanted you to go over Instruction No. 4 and explain it to us and give us a chance for two questions.

THE COURT: Well, shall I take it sentence by sentence?

JUROR: Right.

THE COURT: Under the law of this State the making and delivery of a check to

another, knowing at the time of such [illegible] and delivery that the maker does not [illegible] sufficient funds in or credit with the [illegible] upon which such check is drawn for the [illegible] ment of said check in full upon its pres[illegible] tion is prima facie evidence of an intent [illegible] the part of the maker to defraud. Now, [illegible] the word prima facie that bothers you?

JUROR: Presentation.

THE COURT: What?

JUROR: Presentation.

THE COURT: Presentation. That means when the check is delivered to the bank if he knows at the time. It is not presentation to the man, it is presentation to the bank. *when he gives the check to the payee he knows that he doesn't have money in the bank credit with the bank to pay it when the check gets there.* If he knows that when he writes the check that he doesn't have, when he writes it that he doesn't have the money there to credit with the bank, that is prima facie evidence of fraud. Is there anything else you want to know about that question? Prima facie. I haven't given you the dictionary definition, but prima facie means that which is, may be assumed in the absence of any proof otherwise. That's what prima facie is. What the representation is without further proof. In other words. All right, now does that, do you want to ask any other question about that?

JUROR: We would like to know if the date of presentation to the bank necessarily has to be the date that it was given to the payee, the date that it was written. I mean

must he have money in the bank the day that he writes the check or must —

THE COURT: *Yes, he must have money in the bank when he writes the check or an arrangement with the bank to pay it. When he writes the check. Otherwise, that is prima facie evidence of intent to defraud.* Any other question? Now that is only on the question of prima facie evidence of intent to defraud. Other things may bear upon the intent. Now, if you want to taken a exception, either one of you, to what the Court has said." (R. Tr. pp. 68-69) (Emphasis added).

Proper exceptions were taken to the "explanation" given by the Court by defense counsel. The jury again retired for further deliberation at 8:10 p.m. (R. Tr. p. 71). The jury returned in six minutes with a verdict of "guilty" (R. Tr. p. 72) (R. p. 11).

From the foregoing, it seems obvious that the jury was uncertain what meaning should be attached to the term "presentation", as used in the Instruction. The explanation is contradictory. The jury was first advised that Coleman must have money or credit with the bank when the check arrives at the bank. The Court then advised them that such must be the case when he writes the check. Further, in response to a juror's question concerning the meaning of prima facie the Court did not properly define that term as it relates to the "short check" statute as set out in *State v. Prettyman*, 113 Utah 96, 191 P.2d 142 (1948), discussed infra. The explanation was the equivalent of instructing the jury

to return a guilty verdict. The Court erroneously failed to advise the jury that even though funds were not on hand in the bank at the time the check was issued to Mr. Perkins, that if Mr. Coleman had a reasonable expectation that funds would be available to pay the check when it was presented at the bank, such would not constitute an offense under the statute.

The Utah Statute is as follows:

> "76-20-11. Checks, drafts or orders against insufficient funds — Evidence. — Any person who for himself or as the agent or representative of another or as an officer of a corporation, wilfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such checks, draft, or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail of not more than one year, or in the state prison for not more than five years.
>
> The making, drawing, uttering, or delivering of such check, draft, or order as aforesaid shall be prima facie evidence of intent to defraud.

Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary, or person, or firm, or corporation, for the payment of such check, draft, or order."

The doctrine of "reasonable expectation" is a recognized defense under statutes similar to Utah, and, as will be noted later, has been impliedly accepted by this Court in *State v. Prettyman*, 113 Utah 36, 50, 191 P.2d 142 (1948). The pertinent language of the Penal Code of California, Section 476 (a) contains substantially the same language as the Utah statute and reads as follows:

"Any person who . . . with intent to defraud makes or draws or utters or delivers any check . . . upon any bank . . . for the payment of money knowing at the time of such making, drawing, uttering or delivering that the maker or drawer . . . has not sufficient funds in, or credit with said bank . . . for the payment of such check . . . in full upon presentation, although no express representation is made with reference thereto is punishable . . ."

In the California case of *People v. Becker*, 30 P.2d 562, it was held a "reasonable expectation of

payment" was a defense to a crime charged under that statute. In that case the defendant purchased a watch on Saturday and in payment therefor issued a check on a bank in which he had neither account nor funds. However, prior to issuing the check he had made arrangement with a third person to obtain money with which he intended to open an account in the bank on which the check was written, the following Monday morning. The defendant attempted to introduce the testimony of the third person to corroborate his testimony to this effect but the prosecutor's objection was sustained as being immaterial. Conviction followed. Upon appeal the conviction was reversed and the matter remanded for a new trial.

In holding that a "reasonable expectation" of payment constituted a defense, the Court observed that the "intent to defraud" is an essential element of the crime, and is the "gist" of the offense. Since the offered testimony of the third party tended to establish the fact that funds would be available for payment of the check when it was presented to the bank in the ordinary course of business, it was error not to receive it. A "reasonable expectation of payment" is a defense to the charge.

In *People v. Griffith*, 262 P.2d 355, 359, the California Court affirmed the earlier decision. In that case it was stipulated that at the time the check in question was made and issued the defendant did

sufficient funds or credits with the bank which it was drawn to make payment in full upon presentation. The defendant testified that he did not know the account was overdrawn when he made it and because he did not keep accurate records concerning his account. The defendant was convicted. On appeal the judgment was reversed because there was insufficient evidence of intent to defraud. The following language is taken from the opinion:

> "In negotiating a check, the maker does not necessarily represent that he then has the bank funds out of which it will be paid; but he only represents it is a good and valid order for its amount and that the existing state of facts is such that in the ordinary course of business it will be paid on presentation. One who negotiates a check with knowledge he has not sufficient funds in the bank to meet it, but who has good reason to believe, and honestly does believe, that it will be paid, cannot be said to have an intent to defraud the payee of the bank."

In a more recent California case, *People v. Hilton*, 327 P.2d 611, the Court again recognized the "reasonable expectation" rule.

The "reasonable expectation of payment" rule is also recognized in the Ninth Circuit Federal Court in the case of *Williams v. United States*, 278 F.2d 5 (C.A. 9th), where the defendant was accused of mail fraud for using the mail to transmit fictitious checks and was convicted. On appeal the Court applied the reasonable expectation rule, but

found no error in the manner in which it was mitted to the jury. In defining the limits of the the Court stated:

> "The expectation of the defendant ever, must be more than mere hope. T cumstances must be such as to justify sonable certain belief that funds will be able."

See also 22 Am. Jur. False Pretenses, Sec. p. 478.

The Utah Court has impliedly recognized exception to what may appear to be mandat language of the short check statute. The statute clares "the making . . . or delivering of a check (under the circumstances there defined) prima fa evidence of intent to defraud." However, this C has given interpretation of the quoted languag previously decided cases, which was not refer to by the trial court. In *State v. Prettyman*, Utah 36, 50, 191 P.2d 142 (1948), the defendant had written a check upon a Vernal Bank in which did not have an account. However, there was tes mony that he had made an arrangement with party in Seattle, Washington, to "honor any draft within reason." The defendant did not attempt notify the third party of his need for money until after issuing the check. This Court in a split de sion sustained a jury's guilty verdict for an offense charged under Section 108-18-11, U.C.A. 1943, the predecessor of the present statute. The following language is taken from the concurring opinion:

> "Under Sec. 103-18-11, U.C.A. 1943, the

delivery of a check knowing that the maker has not sufficient funds or credit with the payee to pay the check in full upon presentation is made prima facie evidence of an intent to defraud. *The statute does not expressly make any exception to that rule, but I believe that the legislature intended it to only apply in the absence of other evidence which would explain those facts in such a manner that it would be unreasonable to hold that there was no reasonable doubt of such intent.* The defendant in a criminal case is presumed to be innocent until his guilt is established beyond a reasonable doubt. Certainly the statute did not intend to remove this safeguard. So if in the light of all the evidence, including the facts on which the prima facie evidence is based and the explanation thereof, it would be unreasonable to find that there is no reasonable doubt of defendant's guilt then notwithstanding this statute the court should direct a verdict in his favor. (Emphasis Added)

The explanation of the trial court in the instant case concerning the meaning of the statute, removed the safeguard referred to in the *Prettyman* decision. While the opinion does not specifically mention the "reasonable expectation of payment" rule, it is impliedly accepted in determining that the prima facie provision of the statute is to apply "only . . . in the absence of other evidence which would explain . . . (the) facts in such a manner that it would be unreasonable to hold that there is no reasonable doubt of such intention (to defraud)."

The Court's statement to the jury that a prima

facie case of intent to defraud had been estab... against Mr. Coleman if they found that at the... he isued the check he did not have money in... bank or an arrangement with the bank to pa... (R. Tr. 69), is prejudicial error, because it ... closed the jury from considering the defen... "reasonable expectation of payment". The jury w... given no explanation whatever concerning it. T... Affidavits of Mr. Sawyer, Vice President & Cas... of the First National Bank of Durango, Colora... and of Mr. Coleman, affirm the fact that at t... time the check was written, March 3, 1964, M... Coleman had a "reasonable expectation" of rec... ing sufficient funds to pay the check. In fact, C... man had placed a check in the sum of $5,880... issued to him by one Charles A. Wright in the Fru... State Bank for collection on February 28, 1964, fo... days before he isued the check to Perkins (Def... Ex. No. 5). A telephone call was made to ascert... if money would be available to him before he issue... the check to Perkins (R. 20-21). The evidence is u... disputed that he did in fact make a deposit o... March 6, 1964, in the Fruita State Bank of $5... 878.13 (Def's Ex. No. 6 & 7), the amount of th... Wright check less $1.17, the cost of a long distan... phone call. This deposit was more than a thousan... dollars in excess of the check issued to Perkins ... previous arrangement had been made for payme... of the check.

It is significant that the jury had failed ...

...ve a verdict in 2½ hours of deliberations, but ... minutes following the Court's "explanation" ...uilty verdict was returned. The Court erroneously ...nstructed the jury on one of the vital issues of ... case concerning which they sought the further ...ssistance of the Court. The Court's explanation ...as erroneous and contradictory. It was also con...using and resulted in misleading the jury.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION ... FAILING TO GRANT THE DEFENRANT'S MO...ON FOR A NEW TRIAL ON THE GROUND OF NEW...DISCOVERED EVIDENCE.

Following trial, the defendant on his own be...alf prepared and filed a Motion for a New Trial (R. Tr. 16). He assigned as error the failure of the Court to properly direct the jury, that the verdict was contrary to the evidence and newly discovered evidence. The Court subsequently denied his Motion.

The Motion as it pertains to newly discovered evidence, is based upon two Affidavits. The Affidavit of the defendant, James Coleman, states that he did not appreciate the significance of Robert Sawyer's testimony regarding his statement to the defendant that funds would be available to him and would not have done so prior to the trial and the evidence introduced by the State. The affiant further states that he could not with due diligence have realized the importance of Sawyer's testimony in order

to have made arrangements to have him available at the trial (R. Tr. 21).

The Affidavit of Robert B. Sawyer, Vice President & Cashier of The First National Bank of Durango, Colorado, indicates that on March 2, 1964 (the day previous to issuance of the check in question), Mr. James Coleman called his bank long distance to determine if a check for $5,880.00 drawn by Mr. Charles A. Wright would be available for payment. Mr. Sawyer advised him that the check would be good and it was subsequently paid on March 5, 1964.

The manner in which the testimony developed at the trial made the testimony of Mr. Sawyer become critical in two particulars. First, Coleman's conversation with Sawyer is evidence of Coleman's lack of intent to defraud Mr. Perkins because Coleman did not confirm the agreed purchase price until he had made a long distance phone call to ascertain whether sufficient funds would be available to him and second, Sawyer's testimony would also demonstrate that Mr. Coleman had a reasonable expectation that funds would be available to him with which to pay in full the check issued to Mr. Perkins. Even a cursory evaluation of the testimony leads one to the logical and reasonable conclusion that on a retrial the result would probably be different.

significance and necessity of Sawyer's did not become apparent to Mr. Coleman following trial, because until the State presented its evidence, Mr. Coleman was unaware that there was any question concerning the arrangement of funds with the Fruita State Bank to pay the check in question when it was presented for payment. He had been given a receipted deposit slip by the Fruita Bank (Def's Ex. No. 6), showing a deposit in the sum of $5,878.33, ($5,880.00 less the cost of a long distance phone call), which was dated March 6, 1964. In addition, the same bank (Fruita State Bank) had given him a receipt dated February 28, 1964, (Def's Ex. No. 5), four days prior to the issuance of the check to Perkins showing that a check issued by one Charles A. Wright in the sum of $5,880.00 had been received from Coleman by that bank for collection. This new evidence is not cumulative because it deals with a new aspect of the defendant's case.

Under the circumstances of this case, the Court abused its discretion in failing to grant a new trial on the grounds of newly discovered evidence as that principle of law has been set out in *State v. Hawkins*, 5 Utah 16, 16 P.2d 713.

CONCLUSION

The Court committed prejudicial error in explaining Instruction No. 4 relating to the effect of prima facie evidence of intent under the shoplifting statute, and in defining "presentation" under the same statute. Additionally, the trial court abused its discretion in failing to grant a new trial to defendant on the grounds of newly discovered evidence.

Respectfully submitted,

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