

1965

State of Utah v. James Coleman : Brief of Respondent

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED

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STATE OF UTAH,

Plaintiff and Respondent,

vs.

JAMES COLEMAN,

Defendant and Appellant.

Supreme Court, Utah

Case No.

10849

BRIEF OF RESPONDENT

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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UNIVERSITY OF UTAH

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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 RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant James Coleman appeals from a conviction for the crime of issuing a check against insufficient funds in violation of Section 76-20-11, Utah Code Annotated, 1953, in the Seventh Judicial District Court for San Juan County.

DISPOSITION IN LOWER COURT

The appellant was tried on the crime charged on information on jury trial at Monticello, Utah, on the day of December, 1964. The jury returned a verdict guilty on that date. On January 19, 1965, the appellant was sentenced to be committed to the Utah State Prison but a stay of execution of the judgment was allowed until February 16. On February 16, 1965, the court denied motion for a new trial and ordered commitment to the Utah State Prison. Subsequently, on March 16, 1965, the court denied appellant's motion for reconsideration of the motion for new trial.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

The appellant called Richard Perkins, a stockman in San Juan County, Utah, and inquired whether or not he had cattle for sale (T. 5). This was on or about the 29th day of February, 1964. Approximately the next day the appellant went to the home of Mr. Perkins in Blanding to examine the cattle (T. 5). After examining the cattle, the appellant called Mr. Perkins again by phone, and an agreed price on the sale of the cattle was reached (T. 6). It was agreed that the appellant would take 45 head of Mr. Per-

the cattle and pay Perkins the sum of \$4,620, which sum included a small amount for hay (T. 6, 7).

The cattle were loaded, branded, and inspected; and the appellant gave Mr. Perkins a check in the amount of \$4,620 (Exhibit 1, T. 7). The appellant took the cattle, and Mr. Perkins deposited the check with his bank in Fruita, Colorado (T. 8). The check was apparently returned for lack of a proper endorsement by the Fruita State Bank of Fruita, Colorado, upon which it was drawn. After redeposit of the check was returned because of insufficient funds (T. 8, 9). Subsequently, Mr. Perkins contacted the appellant, and the appellant said he would send a cashier's check, but never did (T. 10). A letter (Exhibit 2), along with a check dated May 16, 1964, was sent to Perkins. Perkins called the bank concerning that check and was advised there was no account (T. 10).

Donald A. Turner, an employee of the Fruita State Bank of Fruita, Colorado, testified that the appellant opened a bank account at that bank on March 6, 1964, and deposited with the bank the sum of \$5,800 (T. 43, 51). However, on that date, the appellant had approximately \$7,000 worth of checks outstanding (T. 56). When the check given by appellant to Mr. Perkins was returned on March 12 to the Fruita State Bank, the appellant had on deposit only \$2,691.69 (T. 56). At no time did the appellant satisfy the check. The appellant did not take the stand nor call any witnesses in his own behalf.

Based upon the above evidence, the appellant was convicted of the crime charged.

ARGUMENT
POINT I.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN REINSTRUCTING THE JURY SUBSEQUENT TO ITS RETIREMENT.

The appellant contends that the trial court committed prejudicial error in instructing the jury when, after the jury subsequent to starting its deliberations, returned to the court to request additional instructions (T. 67).¹ The foreman of the jury indicated the jury's desire to have Instruction No. 4 explained and to have certain questions concerning the instruction answered.

Instruction No. 4 (R. 10) required the jury to find *beyond a reasonable doubt* that at the time of the making and delivery of the check from the appellant to Perkin, the appellant had an intent to defraud, and passed the check knowing that at the time there was not sufficient funds or credit in the drawee bank for payment upon the check's presentation. The jury was expressly advised that the issuance of a check against insufficient funds was *prima facie* evidence of an intent to defraud "unless from all the evidence in the case [the jury entertained] a reasonable doubt as to whether [the defendant] had the intent to defraud at the time of making and delivering such check."

The court, upon return of the jury, instructed them concerning Instruction No. 4 and asked the jury if the

¹The respondent has no information as to how the pen marks appearing in the record came to be there, and respectfully submits that the court should disregard any inference that might have been intended by such markings.

"prima facie" bothered them (T. 68). The foreman of the jury indicated that they did not, but that the present issue was the question. The court then carefully instructed the jury that presentation meant presentation to the bank, not to the payee, and that when the defendant presented the check to the payee, he must know that he doesn't have the money in the bank sufficient to pay the check upon its presentation to the bank (T. 68). Further, the court explained to the jury what prima facie means, indicating that it means only that the evidence creates a reasonable inference in the absence of proof to the contrary (T. 69). Finally, the court instructed the jury that evidence of lack of funds at the time the check is written raises a prima facie inference of an intent to defraud (T. 69).

Instruction No. 15, originally given by the court, admonished the jury to weigh the evidence fully in light of all the facts presented. Instruction No. 13 advised the jury that they had a right to consider "all the circumstances surrounding the occurrences referred to" in the case. Instruction No. 11 carefully advised the jury as to the meaning of reasonable doubt and the necessity of finding the accused's guilt beyond all reasonable doubt. The court also instructed on the presumption of innocence (Instruction No. 10) and specifically on the requirement of an intent to defraud (Instruction No. 3). The jury was also instructed that the State bore the burden of proving all the elements of the offense (Instruction No. 2).

At the time of the reinstruction to the jury, the only objection taken was that the court's reference to prima

facie, in the absence of an explanation that the same could be considered, was error (T. 71). Finally, it may be noted that the court read the statute governing the offense to the jury, apparently without objection (T. 70).

At the time of the appellant's motion for a new trial Judge Keller entered a Memorandum Decision in which he explained the basis of his instructions and why a new trial should be denied on a claim of instructional error (R. 25-3). Judge Keller wrote:

"Without detailing the evidence respecting the account of the defendant with the Fruita State Bank upon which the check resulting in the charge in this case was drawn, it was disclosed in the evidence that at the time the check was first presented for payment the defendant had drawn other checks upon the same account which, together with the check upon which the charge is based, would have overdrawn the account by some two thousand dollars. It would seem to me that one may safely assume that this evidence was taken into account by the jury on the question of his intent at the time he drew the check. * * *

It is submitted that, taking the instructions as a whole the jury could not have been misled and no error was committed. It is well settled in this State that in considering whether the trial court has committed error in instructions to the jury the instructions given should be considered as a whole. See *State v. McCoy*, 15 Utah 136, 49 Pac. 42 (1897); *State v. Hendricks*, 123 Utah 267, 258 P. 2d 412; *State v. Evans*, 107 Utah 1, 151 P. 2d 196. In *State v. Snowdown*, 61 Utah 189, 211 Pac. 968 (1922), this court noted

“ * * * When instructions as a whole fairly present the law, clearly present the issues involved, and contain no harmful or prejudicial errors, the verdict in a criminal case must stand. The statute that provides that technical errors in criminal cases shall be disregarded is mandatory, and, unless upon a review of all the evidence we are satisfied that a miscarriage of justice has resulted, we have no right to interfere with the jury’s verdict. * * *”

It is submitted that when the instructions in the instant case are so viewed it cannot be claimed that the jury was misled.

It is well settled that references to burden of proof or the effect of prima facie evidence are not rendered prejudicial where other instructions make it clear that the jury is to consider all the facts and circumstances in the case. See 23A, C. J. S., *Criminal Law*, Sec. 1323, pp. 819-22. In *State v. Sawyer*, 54 U. 276, 182 P. 206 (1919), the appellant complained that an instruction on larceny phrased in the language of the statute on recent possession being prima facie evidence of guilt was error. This court rejected that contention, but noted that when the instructions given by the court were viewed as a whole, it was clear that the jury was given sufficient latitude to consider all the facts and circumstances in determining the appellant’s guilt. In *State v. Donovan*, 77 U. 343, 294 P. 1108 (1931), an instruction similar to that given in the *Sawyer* case, relating to prima facie evidence of guilt, was claimed as error on appeal. The court stated:

“ * * * While the instruction in question stated that the unexplained possession of recently

stolen property was prima facie evidence of the statement was materially qualified. It is computed, by the further charge that such prima facie evidence did not relieve the state from proving defendant's guilt beyond a reasonable doubt, that such possession, even though unexplained, is alone sufficient to warrant a conviction, and such possession might be taken into consideration with other circumstances, etc."

A similar result was reached by this court in *State v. ...* 105 U. 162, 145 P. 2d 494 (1944). The court in that case made it clear that where the jury is otherwise instructed as to the necessity of considering all the elements of the crime as against all the evidence presented, a reference to the term "prima facie" is not prejudicial.

It seems to be settled law in this State that where a trial court, as in the instant case, instructs the jury on the necessity of considering all the evidence, and where the instructions when taken as a whole make it clear that the court has not deprived the jury of considering relevant evidence in determining the accused's guilt, prejudicial error would not be found.

The appellant argues that the instructions as given by the court, in effect, deprived him of the defense of reasonable expectation of payment. It should be noted that the appellant made no request for such an instruction neither at the time of the original instructions to the jury nor at the time of reinstruction to the jury. It is apparent that the appellant's defense at the time of trial was based upon a claimed lack of intent to defraud. The reasonable expectation theory is only one means of challenging the

to defraud. See 22 Am. Jur., *False Pretenses*, Sec. 66. Since the appellant did not request an instruction on the issue of reasonable expectation of payment, but relied upon the facts to vitiate the State's contention of an intent to defraud, the argument now raised on appeal is extraneous to the posture of the case at the time of trial. The basis for the appellant's claim of prejudice would be that the trial court's instruction had somehow advised the jury that the element of intent to defraud was no longer a matter upon which reasonable men could differ. It is evident that the jury was not confused on that issue, since the questions were directed only to the issue of present-

It is apparent that the presentation issue was foremost in the jury's mind in determining whether the appellant had the requisite intent to defraud. It is well settled that an appellant cannot seek to avoid his conviction by claiming that at the time the check was written, he had sufficient money in the bank to cover it, if at the same time there were outstanding additional checks in excess of his bank balance. 22 Am. Jur., *False Pretenses*, Sec. 66, states:

"* * * According to some authority, a statute making it criminal for a person, with intent to defraud, to draw or deliver to another a check on a bank, knowing at the time that he has not sufficient funds in, or credit with, the bank to meet the check, is violated by the giving of a check with money in the bank in excess of its amount, where the drawer has previously directed the bank to stop payment on all checks of a class including the check in question.

* * *

See also *Prince v. State*, 93 Texas Criminal 296, 297 S. W. 863 (1923); *Huffman v. State*, 185 N. E. 131 (Indiana, 1933), where the courts sustained convictions in fact situations similar to that in the instant case.

When the instructions are examined as a whole, it is apparent that appellant has no basis on which to claim error before this court. Further, it appears that the appellant is arguing a different theory of defense on appeal than that presented at the time of trial.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL, SINCE:

- A. THE MOTION WAS NOT TIMELY PRESENTED.
- B. THE NEWLY DISCOVERED EVIDENCE WAS READILY AVAILABLE AND COULD HAVE BEEN PRESENTED AT TRIAL HAD DUE DILIGENCE BEEN EXERCISED.

Appellant contends that the trial court committed error in refusing to grant a motion for a new trial. There is no merit to this contention.

A. The record reflects that the jury's guilty verdict to the information as charged was returned on December 10, 1964. The appellant filed his own motion for a new trial on December 15, 1964 (R. 16). The motion requested a new trial on two grounds, one of which was newly discovered

and evidence. On January 19, 1965, the court entered its judgment sentencing the appellant to the Utah State Prison, but stayed execution of the judgment until February 16, 1965. On February 16, 1965, the court heard the matter upon a motion for a new trial. The court denied the motion for a new trial (R. 23). On March 16, 1965, the court denied the same motion for a new trial having taken the matter up for reconsideration at the request of new counsel (R. 24). Affidavits in support of the motion for a new trial were not filed until March 16, 1965 (R. 20, 21).

Section 77-38-3(7), Utah Code Annotated, 1953, allows the court to grant a motion for a new trial on the basis of newly discovered evidence material to the defendant's case which could not have been discovered and produced at trial with reasonable diligence. In the instant case, the motion was timely filed by the appellant within five days after the verdict, as required by Section 77-38-4, Utah Code Annotated, 1953. However, affidavits were not presented until March 16, 1965. Section 77-38-3, Utah Code Annotated, 1953, requires that affidavits be produced at the hearing in support of a motion for a new trial. Section 77-38-4, Utah Code Annotated, 1953, requires that the affidavits be served and filed within 30 days after the filing of the notice of motion. This was not done in the instant case. The court denied the motion for a new trial on February 16, 1965. The court was well within legitimate bounds in denying the motion because of the failure of the appellant to serve affidavits within the statutory period.

Having denied the motion on the 16th day of February, 1965, the court was thereafter without jurisdiction

to reconsider the matter or to grant appellant a second motion for new trial. In *State v. Cano*, 64 U. 388, 291 P. 2d 111, this court ruled that a second motion for a new trial, filed months after the time for filing the motion for a new trial has expired was properly denied. The motion in the instant case, having been denied on February 16, 1965, could not be renewed by petition for reconsideration to be heard at a substantial time thereafter. The court's Memorandum Decision (R. 25) reflects that counsel for the appellant had ample notice of the hearing on the motion for new trial on February 16, 1965. The trial court in that Memorandum Decision doubted its power to reconsider the motion after having denied it and, thus, recognized the rule in the *Cano* case and the statement in *State v. White*, 107 U. 84, 132 P. 2d 80, where this court observed that a "second motion for a new trial was not timely made and the trial court was without jurisdiction to entertain it."

Based upon the above procedural irregularities, the court submitted the trial court properly rejected the motion for a new trial.

B. Appellant claims that the evidence alleged to have been newly discovered required the granting of a new trial. It is well settled that a motion for a new trial rests primarily in the sound discretion of the trial court. See *State v. Montgomery*, 37 U. 515, 109 P. 815 (1910). The trial court has had the opportunity to view the witnesses and appraise the evidence at first hand and, therefore, is in a much better position to determine whether the newly discovered

evidence is, in fact, newly discovered, and whether it would have had a substantial effect on the jury's verdict.

In the instant case, it is submitted that the trial court did not abuse its discretion. The evidence which was said to be newly discovered was a phone call made by the appellant to Mr. Robert Sawyer of the First National Bank of Durango, Colorado, to determine whether or not the check for \$5,880, which was received by the appellant and deposited in the Bank of Fruita, Colorado, would be good (R. 20). There is no question but that this evidence was readily available at the time of trial. It is acknowledged in the affidavit of the appellant that he related the evidence of the conversation to his counsel prior to trial (R. 21). Certainly the appellant, who made the phone call, was well aware of having made the same and the contents thereof. Under these circumstances, it is apparent that this evidence is not newly discovered so as to warrant the granting of a new trial. In *State v. Weaver*, 78 U. 555, 6 P. 2d 167 (1931), this court noted:

"Newly discovered evidence, to be ground for a new trial, must satisfy several elementary requirements. The courts are not in accord respecting all these requirements, but fairly agree that the newly discovered evidence be such as could not with reasonable diligence have been discovered and produced at the trial, that it be not merely cumulative, and that it be such as to render a different result probable on the retrial of the case."

In *State v. Moore*, 41 U. 247 (1912), this court denied the appellant's claim that a new trial should have been granted based upon newly discovered evidence where it

was clear that the evidence could have been ascertained at the time of trial with reasonable diligence.

In *State v. Martinez*, 15 U. 2d 303, 392 P. 2d 39 (1964), this court, in denying that the trial court erred in failing to grant a new trial, observed:

“There was no showing of newly discovered evidence on the question of insanity, which requires a new trial. The evidence shows that the alienist now relied on for such evidence as to his sanity was the same one who was investigating defendant's sanity for the defendant's previous attorney, and there is no showing that the alienist made any new discoveries after the trial. * * *

Finally, it is submitted that the claimed newly discovered evidence could have no effect upon the jury's verdict. The jury was well aware of the fact that there was a deposit the sum of \$5,800 in the Fruita State Bank to the credit of the appellant at the time the check was first presented. The theory of the prosecution was that the defendant's intent to defraud was shown by the many outstanding checks in excess of the amount on deposit, and that the deposit, when viewed in the light of the claims against it, was merely a ruse to cull subsequent persons inquiring into the matter into the belief that the appellant's motives were negligent, though honest. The evidence which the appellant claims to have been newly discovered would have added nothing to the posture of the case as it was submitted to the jury.

The trial court itself in its Memorandum Decision (R. 25) noted the fact that the evidence was hardly newly dis-

and nor could have affected the jury's verdict. It is submitted that this conclusion is correct and that there is no basis for a claim of error in denying the appellant a new trial.

CONCLUSION

The appellant seeks reversal of his conviction because of alleged instructional errors and failure of the trial court to grant him a new trial. An analysis of these claims makes it clear that they have no legal merit. The appellant's forum for battle was the trial court. That was the place for a case of this nature to be won or lost. The jury appeared convinced that the appellant acted in violation of the applicable law, and the appellant himself does not challenge the sufficiency of the evidence upon which the jury's verdict was based. The errors claimed for reversal on appeal appear to have little relationship as to whether essential justice was done.

This court should affirm.

Respectfully submitted,

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Attorney for Respondent.