

1991

# Utah v. Helm : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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STATE OF

Plaintiff-Respondent, :

v. :

Case No. 14589

ROY M. HELM, :

Defendant-Appellant. :

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APPPELLANT'S BRIEF

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FILED

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE  
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#### STATEMENT OF THE NATURE OF THE CASE

The appellant, Roy M. Helm, appeals from a judgment entered against him in the Second Judicial District of Utah, the Honorable Thornley K. Swan presiding, following a conviction for tampering with evidence.

#### DISPOSITION IN THE LOWER COURT

Appellant was found guilty by a jury on March 26, 1976, of tampering with evidence in violation of Utah Code Anno., Sec. 76-8-510 (1953), and sentenced April 19, 1976.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction for tampering with evidence or in the alternative a determination that the lower court was without jurisdiction to sentence the appellant on the date that sentence was imposed and, therefore, the sentence should be vacated.

#### STATEMENT OF FACTS

Plaintiff and defendant stipulated to certain testimony to be admitted at trial as follows (p. 12-14 TT):

That on the evening of September 4, 1974, Trooper Owen Busch had probable cause to stop a vehicle in Davis County, State of Utah; that he stopped the vehicle and observed that the driver was one Willard Eccles; thereafter, Trooper Busch took some notes



pertaining to what he observed; that Trooper Busch recorded the notes; that Trooper Busch had Mr. Eccles perform some field sobriety tests, or performance tests, and took notes of what he observed; that all these notes and others were recorded on forms similar to plaintiff's Exhibit "A"; that he then took Mr. Eccles in Busch's vehicle, turned on a tape recorder and placed Mr. Eccles under arrest for driving under the influence of alcoholic beverages; that Officer Busch made arrangements to have Mr. Eccles' vehicle impounded for safekeeping and that he radioed for the assistance of one Sergeant Odell Hatch to come to the scene; that Trooper Busch then recorded an interview with Mr. Eccles; that Trooper Busch wrote out a traffic citation to Mr. Eccles for driving under the influence of intoxicants; that Mr. Eccles showed him a badge and stated that he was the Chairman of the Highway Patrol Civil Service Commission; that shortly after this Sergeant Hatch arrived in his car; that both officers then took Mr. Eccles in Officer Busch's vehicle to the Davis County Jail for purposes of booking Mr. Eccles; that on the way to the jail Mr. Eccles stated to the police officers, "Aren't you afraid of losing your jobs?"; that at all times during which Sergeant Hatch participated in the arrest he was aware that Mr. Eccles was, in fact, the Chairman of the Highway Patrol Civil Service Commission; that Mr. Eccles was, in fact, Vice President of First Security Bank and had told Officer Busch that; and finally, that the officers and Mr. Eccles, in fact, arrived at the jail.

After this testimony had been stipulated to, Officer Busch testified that on arrival at the jail Mr. Eccles wished to use the phone (p. 17 TT); that Mr. Eccles attempted to reach Commissioner Raymond Jackson but failed to reach him; that Mr. Eccles then reached Colonel Helm's home by phone and spoke with someone; that 10 minutes later a call came for Mr. Eccles at the jail; that after Mr. Eccles finished speaking, he handed the phone to Officer Busch; that Officer Busch could not remember any part of the conversation Mr. Eccles had on the phone; that when Officer Busch spoke on the phone, he spoke to Colonel Helm, and defendant stipulated to that fact.

Officer Busch further testified that Colonel Helm asked him to go to another room in the jailhouse to speak to him (p.18 TT); Colonel Helm asked him if anyone had seen him bring Mr. Eccles into the jailhouse. When Officer Busch responded in the negative, Colonel Helm told the Officer Busch to get Mr. Eccles out of the jailhouse (p. 19 TT).

Officer Busch then testified that he and Officer Hatch discussed the conversation that Officer Busch had just had with Colonel Helm and then the two officers took Mr. Eccles in Officer Busch's vehicle to the parking lot of Farmers State Bank on Fifth South and about Sixth West in Bountiful, Utah.

Officer Busch's testimony was that appellant arrived at the Farmers State Bank some 10 minutes after the officers and

Mr. Eccles had (p. 20 TT). Officer Busch left his vehicle and entered appellant's automobile and the two conversed for about 10 minutes. During the course of the conversation appellant asked Officer Busch the question, "What do you have on this?" according to Officer Busch's testimony (p. 21 TT). Officer Busch responded by returning to his vehicle and retrieving his field notes and tape recording and bringing them back to Colonel Helm's car. Officer Busch then testified that after Colonel Helm examined the notes he asked Officer Busch to request Sergeant Hatch to speak with Colonel Helm (p. 22 TT). Busch layed the notes and tape on the seat and left.

After Colonel Helm and Sergeant Hatch finished speaking, Officer Busch testified that he rejoined the two men outside of Colonel Helm's automobile where the three men decided that Colonel Helm would handle the situation (pp. 23, 39-41 TT). Sergeant Hatch testified that shortly thereafter, Mr. Eccles left Officer Busch's car and the two officers then left the area (p. 41 TT).

Sergeant Hatch testified that he was aware of the notes and tape recordings that Officer Busch had accumulated and that although they were in Officer Busch's car when they were on their way to the Farmers State Bank in Bountiful, they were not in the automobile when they left the Farmers State Bank parking lot (pp. 42, 43 TT).

## ARGUMENT

### POINT I

IT WAS REVERSIBLE ERROR FOR THE COURT NOT TO HAVE GRANTED DEFENDANT'S MOTION FOR DISMISSAL AS A MATTER OF LAW AT THE CLOSE OF THE STATE'S CASE BECAUSE THE STATE DID NOT PROVE ALL THE ELEMENTS OF ITS CASE.

Defendant, Roy M. Helm, was charged with violation of Utah Code Ann., § 76-8-510, which reads in part:

"76-8-510. Tampering with evidence. - A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation;"

It is clear from the face of the statute that some very critical elements must be established before anyone can be convicted of a violation of this section of the penal code. Those elements are:

1. That the person believe that an official proceeding or investigation is pending or about to be instituted;
2. That there be an altercation, destruction, concealment or removal of evidence;
3. That there was a specific purpose for those actions;
4. That the purpose be to impair the evidence;
5. That the impairment either alters, destroys, conceals or removes the verity or availability of the evidence.

As a matter of law the State simply had not met its burden of introducing evidence on these elements.

As to the first element, the State did not even attempt to illicit evidence of any kind that an investigation or official proceeding was pending when the evidence was allegedly treated in the fashion described by the second element of the statute as numbered in this Brief. On the contrary, all of the evidence given by Officer Busch indicates that the investigation was over. Officer Busch had collected all the information that was required to issue a citation and arrest Mr. Eccles. The difference between an investigation and an official proceeding is that an investigation gathers evidence that can be used in an official proceeding or to effect an arrest and further, that an investigation is not a proceeding in which action is taken against anyone. People v. Orr, 103 Cal. Rptr. 266, 26 Cal. App. 3d 849 (1972); People v. Superior Court, 20 Cal. App. 3d 1085, 98 Cal. Rptr. 161 (1971); Meunier v. Bernich, LA. App., 170 So. 567 (1936); Bowles v. Baer, C.C.A. Ill, 142 F.2d 787 (1944); Atchison, T. & S. F. Ry. Co. v. Kansas Commission on Civil Rights, 529 P.2d 666. 215 Kan. 911 (1974); Mason v. Peaslee, 173 Cal. App. 2 587, 343 P.2d 805, p. 808, n.2 (1959). In any type of proceeding, whether criminal, civil, or administrative, the definition of investigation is always the same - a procedure for gathering information or evidence. It is clear, is it not, that the investi-

gation in this case was over. Even if characterized as an official proceeding, it was over. In fact, Sergeant Hatch testified that only one of two things was done in a traffic case - issue a ticket or swear out a complaint (p. 44 TT). Officer Busch testified that he had already issued a ticket, but he did not file a complaint. In other words, no investigation was pending or about to be instituted, nor was any official proceeding pending or about to be instituted, and no evidence was introduced to show either.

Similarly, the second element of the statute was not met. No evidence was introduced to show alteration or destruction or concealment. The only evidence introduced was to show that evidence was moved from one car to another.

Assuming arguendo that the second element is met by movement of the evidence, it must still be tied to the third element or intent. At no point in the trial does the State proffer any evidence as to defendant's intent. Quite rightly, the legislature did not wish to make all movement of evidence a felony, but only those with the requisite and avowed purpose of obstructing justice. Yet with this clear mandate from the legislature, the State does not even bother to submit evidence on the issue.

The fourth and fifth elements of the statute are similarly bereft of substantiation. First of all, no showing has

been made in any manner that defendant attempted to alter the verity of the evidence. To show that the State would almost have to produce the evidence or in some way submit a comparison of two conflicting statements or materials. This was not done. Furthermore, the only evidence dealing with availability was that the evidence ended up in defendant's automobile. On cross-examination Officer Busch testified that he had never even asked the defendant where the evidence was, if he could have it back, or that anyone had even approached defendant on the subject (p. 27 TT). What impairment has taken place? Under the structure of the statute there could be no impairment without a showing of intent and none appears in the record.

Appellant, therefore, contends that the State as a matter of law had not met its burden of proving and, in this case, of even introducing evidence on the elements of the statute under which appellant was charged either by a preponderance of the evidence and much less by proof beyond a reasonable doubt. Although arguable that defendant might have been guilty of other offenses, appellant submits that as a matter of law he was not proven guilty of the offense charged in this indictment.

## POINT II

EVEN IF THE STATE DID PROVE ALL THE ELEMENTS OF ITS CASE, IT WAS STILL REVERSIBLE ERROR FOR THE DISTRICT COURT NOT TO GRANT DEFENDANT'S MOTION FOR DISMISSAL AS A MATTER OF LAW BECAUSE OFFICER BUSCH, SERGEANT HATCH, AND DEFENDANT WERE INVOLVED IN A CONSPIRACY AND THEIR TESTIMONY WAS NOT CORROBORATED.

### A.

The Utah Statute dealing with conspiracy is Section 76-12-1,3, Utah Code Anno. (1953). At face value the act not only requires an agreement, but also an act. Voluntariness is also required as opposed to forced acquiescence. But there is no case law which indicates that a defense to a conspiracy charge exists because one of the conspirators really didn't have "his heart in it" or that "really" in his heart he objected but felt obligated by a superior order of the kind alleged in this case. If the Vietnam War has taught this country anything, it is that Mai Lai stands for the proposition that no superior officer can issue any command which is against the law and a junior officer be forced or feel obligated to follow that command. If he does, the junior is as guilty as his superior. Although at Mai Lai this country was faced with acts of murder, there is no reason to not treat a felony of miscarriage or



interference with justice in any different manner. In essence, the State attempted to excuse the conspiracy on the basis that the junior officers felt obligated to carry out commands which were against the law. The tenor of all the testimony, fairly viewed, indicates that the two officers were, at the very least, conscious stricken about their actions. If this defense is allowed to resist the allegation of conspiracy, appellant submits that the people of Utah are at the mercy of any public official who wishes to be corrupt because their subordinates must follow their commands without objection. The integrity of our system of justice will be seriously impaired and respect by the people of Utah for law enforcement will be seriously affected.

Officer Busch not only conspired in this crime, if in fact one occurred, but delayed filing a complaint for more than 15 months. It was he who carried his own accumulated evidence to Colonel Helm's car. He knew where the evidence was and yet at no time, including December, 1975, when Mr. Eccles was finally charged, did he make any attempt to locate it or have it returned. Similarly, Sergeant Hatch knew that evidence was in the patrol car before they arrived at the Farmers State Bank parking lot, knew what the evidence was, and knew that the evidence was not in the patrol car when they left the scene. Whether he knew that Colonel Helm had the evidence or that Officer Busch disposed

of it is immaterial. Something was amiss if we are to believe his evidence and yet he kept silent and called it to no one's attention.

Furthermore, both officers testified that they spoke together with Colonel Helm and for whatever reason--and in this case the hollow ring of weak integrity--agreed that Colonel Helm would handle the matter; in fact, both testified that they indicated they would not be offended if Colonel Helm proceeded with the case, but defend now with testimonies of tortured conscience and feelings of duty to the Colonel.

15A C.J.S. 756, Conspiracy, § 45, has an appropriate response to this sort of weak and inappropriate defense:

"...an assertion that there has been a failure to prove a corrupt motive on the part of one of the conspirators who participated in an unlawful act does not necessarily warrant the direction of a verdict of acquittal as to him. The fact that the motive of a party was not corrupt when he joined a conspiracy does not exculpate him if he remains a member thereof after learning of its illegality, since it is his duty, after learning of the criminal nature of the scheme, to take some definite and positive step to withdraw from the venture. (emphasis added)

'To be a member of a conspiracy one must have a knowledge of the conspiracy and of its object or purpose during its continuance, since without such knowledge a criminal intent cannot exist. So, to constitute the criminal intent necessary to establish a conspiracy to commit an act prohibited by statute, there must be both knowledge of the existence of the law and knowledge of its actual or intended violation, but, where the act to

be committed is in its very nature wrongful, knowledge of the prohibitory statute is not essential."

Numerous authorities are listed for these statements of the law, and appellant submits that Utah law is not apposite. Certainly ignorance of the purpose of the conspiracy may be a defense, but that has not even been alleged in this case.

One case, State v. Fertig, 120 Utah 224, 233 P.2d 347 (1951), contains language which might be interpreted as indicating that the co-conspirator must have his whole soul in the project.

"However, the cooperation in the crime must be real, not merely apparent, and mere presence combined with knowledge that a crime is about to be committed or a mental approbation while the will contributes nothing to the doing of the act will not of itself constitute one an accomplice." (emphasis added)

Although such language might seem to require actual mental acquiescence in a total complete heartfelt manner; that is not the law. In that case the accused co-conspirator watched an act of sodomy. She did not participate. She was not an accomplice. As the evidence will show, that is not the case here. As a matter of law the Court should have ruled that a conspiracy existed in this case.

B.

The corroborating evidence must do more than cause a grave doubt upon the defendant, State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941); State v. Lay, 38 Utah 143, 110 P. 986;

State v. Butterfield, 70 Utah 529, 261 P. 804; State v. Park, 44 Utah 360, 140 P. 768; State v. Kimball, 45 Utah 443, 146 P. 313; State v. Powell, 45 Utah 193, 143 P. 588; State v. Cox, 74 Utah 149, 277 P. 972; State v. Gardner, 83 Utah 145, 27 P.2d 51.

In State v. Baran, 25 Ut.2d 16, 474 P.2d 728 (1970) the Court said:

"In State v. Sinclair this Court stated that the proper test to determine the sufficiency of the corroborating evidence was whether there was evidence independent of the testimony of the accomplice, which the jury could reasonably believe tended to implicate and connect the defendant with the commission of the crime." 474 P.2d at 729.

In Baran, supra, outside witnesses could corroborate the testimony. State v. Pratt, 25 Ut.2d 76, 475 P.2d 1013 (1970); State v. Christean, Utah, 533 P.2d 872 (1975); State v. Clark, 3 Ut.2d 382, 284 P.2d 700 (1955); State v. Woodall, 6 Ut.2d 8, 305 P.2d 473 (1956); State v. Sinclair, 15 Ut.2d 162, 389 P.2d 465 (1964). In other cases the defendant himself has corroborated the evidence: Christean, supra; State v. Bruner, 106 Utah 49, 145 P.2d 302 (1944); State v. Erwin, supra.

In the case at bar no corroborating evidence exists. Appellant did not testify nor make any statements to police that were introduced into evidence. Furthermore, the only third party in this case was Captain John Rogers who would have verified

the conversation between himself and Sergeant Hatch indicating that Mr. Eccles was making calls and that Captain Rogers told the officer to proceed with his case. Nothing corroborates even the least significant element of tampering with evidence.

Appellant, therefore, submits that the lower court as a matter of law should have dismissed the suit at the end of the State's case because as a matter of law a conspiracy was proven by the testimony adduced and there was no corroborating evidence and no issue of fact on these questions was left for the jury to decide.

### POINT III

#### THE LOWER COURT WAS WITHOUT JURISDICTION TO SENTENCE THE APPELLANT.

The statute with respect to sentencing is 77-35-1, Utah Code Anno., (1953), and reads in pertinent parts:

"After a verdict of guilty, if judgment is not arrested...the Court must appoint a time for pronouncing judgment, which must be at least two days and not more than ten days after the verdict." (emphasis added)

In Herr v. Salt Lake County, Utah, 525 P.2d 728 (1974) the Utah Supreme Court had occasion to discuss the meaning of the word "shall" and following a United States Supreme Court case, Anderson v. Yungkau, 329 U.S. 482, 67 S. Ct. 428, 91 L. Ed. 436 (1946), equated the word "shall" with the meaning of the word "must" which the Court held was a word of command and not

advisory. Although the Herr case is civil, it is difficult if not impossible to determine why a greater power should be given the word in a civil case to preserve a defendant's rights as opposed to a criminal case in which defendant's rights are so much more deeply affected and destroyed if not strictly protected.

It is true that the courts of Utah have held in the past that this statute is merely advisory and not jurisdictional. State v. Fedder, 1 Ut.2d 117, 262 P.2d 753 (1953); State v. Saxton, 30 Ut.2d 456, 519 P.2d 1340 (1974). Appellant submits that the law has changed. In Saxton, defendant absented himself to avoid the penalty of law and in Fedder defendant consented to the delay. Neither situation is true in this case. In fact, in this case defendant was not even aware that the time for sentencing had been postponed.


Appellant submits that the circumstances of this case distinguish it from Saxton and Fedder and that in light of Herr the meaning of the word "must" is a command and, therefore, the Court lost jurisdiction.

#### CONCLUSION

Appellant submits the State did not prove or even submit evidence on all the elements of its case and that the Court should have ruled as a matter of law in defendant's favor.

Furthermore, if the Court felt that sufficient evidence was presented to go to the jury, it should have ruled as a matter of law that there was a conspiracy and absent corroborating evidence , dismissed the charge. Lastly, appellant contends that the Court lost jurisdiction to sentence appellant, and that this Court should so find.

Respectfully submitted,

  
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Mailed two copies of the foregoing Appellant's Brief to Attorney General of Utah, State of Utah, Utah State Capitol Building, Salt Lake City, UT 84104, this 16th day of December, 1976, postage prepaid.



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