

1963

State of Utah v. Jack Donaldson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY OF UTAH

OCT 23 1963

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STATE OF UTAH,

Respondent,

vs.

JACK DONALDSON,

Appellant.

9905
Case No. ~~18252~~

BRIEF OF RESPONDENT

Appeal from the Judgment of Conviction and
Sentence of the Third Judicial District Court
in and for Salt Lake County
Hon. Marcellus K. Snow, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

JACK DONALDSON,

Appellant.

} Case No. 18252

BRIEF OF RESPONDENT

NATURE OF CASE

The appellant has appealed from his conviction for the crime of issuing a check against insufficient funds in violation of 76-20-11, U.C.A. 1953.

DISPOSITION IN LOWER COURT

The appellant was convicted upon a non-jury trial, the Honorable Marcellus K. Snow presiding.

RELIEF SOUGHT ON APPEAL

The respondent submits the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The appellant was tried without jury on 21 March 1963. The evidence disclosed that on 5 March

1962 the appellant entered the Cash Saver Service Station in Salt Lake County to purchase gasoline (R-14, 15). The service station was operated by Mr. John Wilson (R-14, 15). The appellant purchased a tank of gasoline for his automobile (R-15). After the tank was filled, the appellant asked Mr. Wilson if he would take a "check" (R-15), and Mr. Wilson said he would. The appellant then wrote out Exhibit S-1 in the sum of \$25.00. Exhibit S-1 is a blank check drawn upon the First Security Bank, Ogden, Utah, Main Branch. The space provided for the payee was left blank, but both written words and figures show the instrument to be made out for \$25.00. The instrument was signed by the appellant as drawer. Mr. Wilson endorsed the instrument on the back and persented the instrument for collection. The purported check was returned to Mr. Wilson by the bank, which indicated that they were unable to locate any account for appellant (R. 17). Mr. Wilson indicated that the appellant made no request that he hold the instrument, which was dated 3 March 1962 (R. 18).

It was further stipulated that no record of an account for appellant could be found in the main Ogden Branch of the First Security Bank during the time in question, and that the appellant had made admissions to a Salt Lake County Sheriff that he had written Exhibit S-1 and that he knew

when he wrote it that he did not have an account at the bank (R-22).

During the course of the trial, appellant objected to the *admission* of Exhibit S-1 on the grounds that no payee was named on the check. The court admitted the exhibit over appellant's objection. Based on the above evidence, the trial court entered a judgment of guilty.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY ADMITTED EXHIBIT S-1 INTO EVIDENCE SINCE:

- A. EXHIBIT S-1 WAS RELEVANT AND MATERIAL TO THE CASE.
- B. THE EXHIBIT IS IN FACT A CHECK SINCE:
 - 1. IT IS A BEARER INSTRUMENT; OR
 - 2. IT WAS PRESENTED TO SOMEONE WHO HAD AUTHORITY TO TREAT IT AS A CHECK.
- C. APPELLANT ATTEMPTED TO NEGOTIATE A CHECK WHICH IS SUFFICIENT TO CONSTITUTE AN OFFENSE UNDER 76-20-11, U.C.A. 1953, AS AFFECTED BY 76-1-30, U.C.A. 1953.

A. It is argued by the appellant that the trial court improperly admitted Exhibit S-1 into evidence. The essence of appellant's contention is that, since the purported check did not contain a named payee, it was not a "check" within the meaning of that term as used in the statute 76-20-11, U.C.A., 1953 and, therefore, should not have been admitted. It is submitted that the nature of the appellant's

contention is erroneous in that he confuses the question of admissibility of evidence with the question of sufficiency of evidence.

Evidence is generally admissible if it is relevant or material to the issues of the case and not otherwise prejudicial. Abbott, *Criminal Trial Practice*, 4th Ed. § 448. Since Exhibit S-1 was identified as the instrument which the appellant presented in payment for his gasoline, and was an essential item of the corpus of the case, it was directly relevant and material and, therefore, admissible.

Since the appellant has only preserved the issue of the admissibility of Exhibit S-1 on appeal, the case should be affirmed without considering whether Exhibit S-1 as written is legally a check.

B.-1. Appellant contends Exhibit S-1 is not a "check" within the meaning of 76-20-11, U.C.A. 1953, because no payee was designated. He relies upon two cases, *People v. Nickols*, 391 Ill. 565, 63 N.E. 2d 759 (1945) and *State v. Ivey*, 248 N.C. 316, 103 S.E.2d 398 (1958), and apparently concludes that these are the only cases applicable and that they are contrary to the position that an instrument like S-1 could be a check. As will be shown, these two cases are a distinct numerical minority if they, in fact, stand for the proposition urged, and actually not truly supportive of the position urged.

In *People v. Nickols*, *supra*, the defendant was

charged by indictment with having forged a check payable to "Harry E. Crow"; however the check which was set out in the indictment showed no payee. The court held the indictment fatal, noting:

"After alleging in the purport clause of the indictment that the instrument forged purported to be a check payable to Harry E. Crow, the tenor clause shows that it was not a check at all, and that it did not purport to be a check payable to Harry E. Crow. It was not necessary, of course, that the indictment describe the instrument both by its purport and by its tenor, yet where it attempts to do so, the two descriptions must be consistent and it must appear from the face of the indictment that they refer to the same instrument. * * *"

"It is apparent, therefore, that there is a fatal variance between the purport clause and the tenor clause of the indictment, in the description of the instrument alleged to have been forged. * * *"

The court did not purport to hold that a check where the payee has been left blank is not in fact a check, although some unreasoned and unsupported dicta in the case support such an inference. Consequently, the holding of the *Nickols* case does not truly support the appellant's contention.

In *State v. Ivey*, supra, also relied upon by appellant, the defendant was charged with "giving" a worthless check. The court in no part of its decision says that an instrument may not be a check

where the payee is left blank. To the contrary, the court had before it a document already showing a payee. However, defendant contended that he signed a blank instrument and "did not authorize" anyone to fill it in. The court reversed because of an instructional error by the trial court as to the effect of signing a blank check, where the defendant did not authorize its completion or intend it as a check. Consequently, neither case is really precedent on the proposition for which it is urged.

In the instant case, the appellant delivered what he called a "check", and which was complete in all parts except no specific payee was named. It is submitted that this is a bearer instrument. 44-1-10, U.C.A. 1953, provides:

"An instrument is payable to bearer:

"1. When it is expressed to be so payable; or,

* * *"

The appellant apparently feels this requires that the instrument actually contain the word "bearer" before it is so expressed. As will be seen, this is too narrow a construction. Any expression which is sufficient to indicate that the drawer intended an unrestricted payee is sufficient. This can be done in several ways, some of which are common. First, by writing "cash," *State v. Simon*, 269 S.W. 95 (Tex. Cr. 1925); secondly, by writing "blank"

or merely leaving a blank; or, third, by writing "John Doe" or "holder". Numerous possibilities exist. To hold that 44-1-10, U.C.A. 1953, required a specific bearer expression would be contrary to accepted commercial practice, provide an easy means to avoid criminal liability for worthless checks, and finally would render as surplusage the language in subsection 2. of 44-1-10, U.C.A. 1953, which provides that an instrument is payable to bearer:

"* * *

2. When it is payable to a person named therein or *to bearer*."

Finally, the case law and authorities are squarely to the contrary. In 8 Corpus Juris, § 287, p. 170, it is noted:

"The payee's name may be left blank, which makes the instrument payable in effect to bearer, and in such case the blank may be filled in by the holder."

A similar statement is found in 10 C.J.S., *Bills and Notes*, § 120, with additional citations. In *Finley v. Rose*, 189 Ky. 359, 224 S.W. 1059 (1920), the Kentucky Court of Appeals remarked:

"The rule is well settled that the name of the payee may be left blank, which makes the instrument payable to bearer. * * *"

Many other cases, civil in nature, have so held. *Enid Bank and Trust Co. v. Yandell*, 56 P.2d 835 (Okla. 1936); *Schuster v. Bown*, 97 Cal. App.2d

803, 218 P.2d 836; *Li Rocchi v. Keen*, 127 So.2d 44 (La. App.); *Steel v. Rathbun*, 42 Fed. 390 (1890); *Dunham v. Clogg*, 30 Md. 284; *Dinsmore v. Duncan*, 47 N.Y. 573, 15 Am. Rep. 534; *Fretwell v. Carter*, 78 S.C. 531, 59 S.E. 639; *Wookey v. Pole*, (Eng.) Reprint 839. Britton, *Bills and Notes*, 2nd Ed., p. 196, notes:

“* * * Formerly, the holder was required to fill in his name as a condition precedent to his right to sue upon the instrument *but he may now declare upon such an incomplete instrument as one payable to bearer.*”

Since the rule is well settled civilly, the appellant would only be entitled to relief if there were some overriding reasons in the criminal law for not following the civil rule. Since both civil and criminal law are aimed at commercial protection in this area, the criminal rule is the same as the civil rule noted above.

In *People v. Gorham*, 9 Cal. App. 341, 99 Pac. 391 (1908), the defendant gave a check in payment for a piano, but left the payee's name blank. The company filled in the blank, but before further negotiation determined the check to be fraudulent. The defendant appealed her conviction on the ground that the check at the time of delivery did not contain the name of a payee, and hence could not be “a check or other document within the meaning of section 476” of the California Penal Code. The California Court rejected the contention, noting:

“* * * The effect of such paper until the name of the payee is inserted pursuant to the authority conferred upon the receiver by its delivery for value is that it is payable to the bearer and passes from hand to hand by mere delivery. Under our view there is no merit in appellant’s contention.”

In *Harding v. State*, 54 Indiana 359 (1876), the appellant was charged with forgery where the alleged forged note did not contain the name of a payee. The Indiana Court rejected the contention now made by appellant and affirmed the conviction, noting:

“But if there should be a blank space left for the name of the payee, in a written instrument which has all the other requisites of a promissory note, such an instrument may well be termed a promissory note, even in an indictment for forgery of such instrument.”

In *State v. Campbell*, 219 P.2d 956 (Idaho 1950), the Idaho Supreme Court affirmed a conviction where the payee’s name had been left blank. The court ruled:

“The check in question was in blank as to the name of the payee. Appellant therefore contends that it was not a completed check and did not fall within the statute. In *People v. Gorham*, 9 Cal. App. 341, 99 P. 391, the court decided a similar question contrary to appellant’s contention. The gist of the court’s decision as contained in Headnote No. 1, reads as follows: ‘Leaving blank the name of the payee of a check gives to any bona fide holder

for value implied authority to fill the blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with its own name; and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Pen. Code, § 476, when passed by defendant, is without merit.'

"A check made payable in blank is payable to bearer and the blank may be filled in by the holder. *Enid Bank & Trust Co. v. Yandell*, 176 Okl. 550, 56 P.2d 835; *Clark v. Layman*, 144 Kan. 711, 62 P.2d 897. Appellant's contention is without merit."

In *Simon v. State*, 269 S.W. 95 (Tex. Cr. App. 1925), the defendant was charged with forgery of a check. In affirming, the court, by way of dicta, stated:

"A check, although the name of the payee is left blank, may be the subject of forgery, because, if genuine and delivered in such condition, it carries with it authority for the holder to write in the name of the party entitled to receive the money called for by it.
* * * Also an instrument payable only to bearer is the subject of forgery."

In *State v. Grider*, 284 P.2d 400 (Wyo. 1955), the Wyoming Supreme Court reached a similar conclusion, ruling that the delivery of a promissory note

with the payee's name left blank was still the subject of forgery. The court relied upon *People v. Gorham*, supra, and stated:

“* * * The fact that the California case involved a check and the case at bar involves a promissory note does not, in our judgment, make any difference. The principle involved is the same. The objection in this connection therefore must be overruled.”

Consequently, it appears clear that the weight of authority considering similar situations would affirm the instant conviction and rule S-1 to be a bearer instrument.

B.-2. Section 44-1-15, U.C.A. 1953, provides:

“Where an instrument is wanting in any material particular the person in possession thereof has prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as prima facie authority to fill it up as such for any amount. * * *”

This court has recognized the right of one receiving a negotiable instrument to fill in appropriate blanks. *Plescia v. Humphries*, 121 Utah 355, 241 P.2d 1124 (1952). Recently in *Hanson v. Beehive Security Co.*, 14 Utah 2d ..., 380 P.2d 66 (1963), this court recognized the power of a person to whom a deed is given, with the name of the grantee left blank, to fill in the blank. The court

was clear to point out that such an instrument was not void. By the same reasoning, it appears clear that where one makes out a check, leaving the name of the payee blank, the instrument is not void but still a check. Especially is this so where the Legislature has granted the recipient authority to complete the instrument. Consequently, at the time that S-1 was made out it was sufficiently complete to constitute a check within the meaning of 76-20-11, U.C.A. 1953. *People v. Gorham*, 9 Cal. App. 341, 99 Pac. 391 (1908); *State v. Grider*, 284 P.2d 400 (Wyo. 1955).

C. Finally, it is submitted that even were the allegations of the appellant correct, his conduct would amount to an "attempt" to violate 76-20-11, U.C.A. 1953, and that this court could modify the judgment of the trial court to affirm a conviction for attempt and remand for sentence. ⁽¹⁾

76-1-30, U.C.A. 1953, defines an attempt as:

"Any act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit a crime.

* * *"

In the instant case the appellant represented to Mr. John Wilson that he was giving him a check

(1) 77-42-3, U.C.A. 1953, provides:

"The court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all the proceedings subsequent to or dependent upon such judgment or order, and may, if proper, order a new trial."

(R-15). He in effect attempted to pass a check. His failure, if any, would be only the failure to fill in the name of the payee or for Mr. Wilson to complete the payee's name. Neither failure is such a failure as would render the crime impossible of commission, and his conduct would consequently constitute an attempt to commit the crime. 76-1-30, U.C.A. 1953; *State v. Prince*, 75 Utah 205, 284 Pac. 108 (1930); Model Penal Code, § 5.01 (Proposed Official Draft, 1962). Since an attempt to commit a crime is necessarily lesser included in the crime itself, *State v. Blythe*, 20 Utah 378, 58 Pac. 1108 (1899), it would be proper to affirm a conviction for attempt.

CONCLUSION

The appellant has claimed a defense, which when examined against the reasoning of other courts and the general rules of commercial law, affords him no basis for reversal. It is a common commercial practice for checks to be written leaving a blank for the payee. Some companies prefer to name themselves as payee or a specific account; others prefer to give the instrument as wide a construction as possible and, therefore, treat a blank instrument as payable to bearer. Banks obviously operate under the same assumption, as can be seen by the many civil cases so holding. To rule to the contrary would not only be a minority position, but would do manifest injury to

commerce. Consequently, the conviction should be affirmed.

Respectfully submitted,

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