

1963

State of Utah v. James B. Dennis : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

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FILED

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THE STATE OF UTAH,

Plaintiff and Respondent

vs.

JAMES B. DENNIS,

Defendant and Appellant

Clerk, Supreme Court, Utah

Case No.
9920

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FOURTH
DISTRICT COURT FOR UTAH COUNTY, HONOR-
ABLE MAURICE HARDING, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent

vs.

JAMES B. DENNIS,

Defendant and Appellant

Case No.
9920

STATEMENT OF THE KIND OF CASE

This is a criminal case in which the Defendant was charged with the crime of forgery.

DISPOSITION IN LOWER COURT

The case was tried to a Jury. From a verdict of guilty the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

On February 11, 1963, the Defendant went to the police in Provo and said that "Billie

Stubbs was going to sign a complaint unless he could get the money for these checks that he had written before the bank opened that morning". * * He told the witness detective Logrand J. Baker, that he had signed the name of Mrs. Billie Stubbs to the \$54.00 check and that he didn't have authority from her to sign the check. (Tr 15)

The check involved is dated December 7, 1962 and is a blank counter draft with the name of "Walker Bank and Trust Co. - Farmers and Merchants Branch of Provo, Ut." written in ink. It is payable to the order of James B. Dennis and is signed "Mrs. Billie Stubbs" as maker. It bears the word "Labor" in the lower left hand corner. The face amount is \$54.31. On the face of the check in red ink impressed by a large rubber stamp is the word PAID Dec. 11, 1962 with the large numerals 97-18. The check was endorsed on the back "James B. Dennis" and "Curley's Market". There is no evidence in the record to contra-

dict the fact that when the check was presented for payment, it was paid by the Bank on which it was drawn. (State Ex. No. 1)

Prior to December 7, 1962, the Defendant had worked for Mrs. Billie Stubbs. (Tr 19) She paid him by means of a check. She had given him checks "but also my bookkeeper has made a check out for him to sign". (Tr 19) The Defendant had written figures on a pad and "we have talked it over and discussed it." These occasions arose when "we have done a job and he has written a persons name on the pad and the figures" (Tr 19) Mrs. Stubbs testified that based on her familiarity with the writing of Defendant, she did not know whether the writing of the name of Mrs. Billie Stubbs on the face of the check was made by Defendant. (Tr 22)

The Defendant's attorney on page 12 of the Transcript asked Mrs. Stubbs if it was not a fact that she had told him in a conversation prior to trial that she doubted that

Mr. Dennis had signed his name on that check.
(tr 12) The Court sustained an objection to the question. The Defendant cashed the check at Curley's Market on December 7, 1962. (Tr 8) He went into the store quite often. The check was OK'd by the son of the Manager and the Cashier gave the Defendant the money. There is no evidence that anyone saw the Defendant sign the name of Mrs. Billie Stubbs as maker or the name of James B. Dennis as endorser. Mr. Heber Grant Ivins, Assistant District Attorney in his opening statement did not tell the Jury he would prove that the Defendant signed the name of Mrs. Billie Stubbs to the check. He said it was presented and endorsed by the defendant. (Tr 4) These facts become material upon the question of whether the Defendant ever had any intention to defraud Fonzo D. Black or any other person.

ARGUMENT

STATEMENT OF POINT NUMBER ONE

1. The State did not present evidence from which a Jury could find beyond a reasonable doubt that the Defendant had any intention of defrauding anyone.

It is significant that the record shows that no complaint or objection to the cashing of this check was made by Mrs. Billie Stubbs, or anyone else until Feb. 13, 1963. The law requires the Bank upon which this check was drawn to know the signatures of its depositors, and the presumption arises that before this check was cleared through Walker Bank, the signature of the maker was adopted or ratified by Billie Stubbs. This presumption is fortified by the fact that there is no evidence in the record that the signature on the face of the check looks anything like the signature of Billie Stubbs. The real signature is found in the record on the complaint, and shows affirmatively that it does not

resemble the writing on the check.

There are other cogent facts which show the State did not prove beyond a reasonable doubt that the Defendant had any fraudulent intent when he cashed the check at Curley's Market. When Mrs. Stubbs got her checks returned from the Bank shortly after the first of January, 1963, and found the check endorsed by her employee James B. Dennis, what did she do? She did not have the check charged back by the Walker Bank to the State Bank of Provo, where it had been deposited by Curley's Market. She ratified the signature of her name, and approved of the prior action of both banks and Curley's Market in cashing the check bearing her name signed by some person without her prior authority. She did the very thing which James B. Dennis intended she would do when he cashed the check. She ratified the signatures and the cashing and told him to get the money and pay her. She gave him until Feb. 11 when Dennis went to the Police Department and told

them she was going to sign a complaint unless he could get the money. He regarded the transaction as a loan or advance of wages which he would have to pay back either in labor or money. The check was marked "Labor". He had worked for Mrs. Stubbs before Dec. 7, 1962.

An intention on the part of Dennis to defraud or deceive anyone finds no support in the record. No one with enough mental capacity to be able to formulate an intent to defraud would select the means used by Dennis. He knew that the signature on the face of the check Mrs. Billie Stubbs, did not resemble her real signature. He knew that if the Walker Bank paid the check because they failed to observe the fact the signature was not genuine, that Mrs. Stubbs would notice it was not her signature when she looked at her bank balance and returned checks. He did not attempt to conceal in any manner his identity as the person who received the money from Curley's Market. He had been there on previous occasions and was known to the son of the Manager. He gave his address

and telephone number. He did not leave town.

Sometime between Dec. 7 and Feb. 13 the attitude of Mrs. Billie Stubbs toward James B. Dennis changed. When the check was cleared through her bank and paid on Dec. 11, 1962, she presumably was willing to regard him as her employee-debtor. She did not return his check to her bank in January, 1963, but continued to treat the transaction as an advance of wages or a loan to be repaid with labor. But on Feb. 13, 1963, she signed a criminal complaint after threatening to do so if he did not pay her before that date. It did not occur to her that she had been defrauded by a criminal act. Her actions are consistent only with the obvious fact that Dennis either knew or had reason to believe when he cashed the check that she would ratify his act in thus drawing \$54.31 as an advance of wages.

It is respectfully submitted that all the State proved or that a Jury could find beyond a reasonable doubt, was that the Defendant obtained money by an unauthorized signature.

which was later ratified by the person whose name was signed and that at the time the name was signed, the Defendant who endorsed and cashed the check, intended to pay the check in full to his employer.

The fact that the check was paid and the payment by the Bank not objected to by the person whose name was signed without authority, would not require reversal of the case if there was proof beyond a reasonable doubt that Dennis intended at the time he cashed the check, that he would not pay it. But the fact that no objection was made to the unauthorized signature itself and the complaint was signed because the money was not paid to Mrs. Stubbs, raises a strong presumption that Dennis did reasonably believe that Mrs. Stubbs would ratify his signature and become his creditor for \$54.13.

We do not ask this Court to approve the business methods of the Defendant, but we earnestly submit that the record fails to sustain a finding that the Defendant intended to

defraud anyone. It is only incidental proof, of this failure of proof, that he did not in fact defraud anyone. When Mrs. Stubbs ratified the clearing of the check, she became his creditor.

Willetts v. Scudder 144 P. 87 (Ore 1914)

was a case where the plaintiff sued the defendant for libel and recovered a judgment which was affirmed on appeal. The defendant had written a letter accusing the plaintiff of forgery. The plaintiff had a check payable to Scudder Syrup Co. which he received from Allen & Lewis in payment of a debt due the Syrup Company. On Nov. 20, 1911, Willetts wrote to Scudder Co. asking it for permission to use the money covered by the check as an advance on his salary for January and February 1912. Before he received an answer to his request, he endorsed the check in blank by writing on the back "Scudder Syrup Co., A.L. Willetts, and deposited it to his credit in his bank. The Court said:

"It appears from the evidence that the plaintiff indorsed the check before he received letters from the company or the defendant telling him that it was satisfactory for him to have the money as he had requested. The check, after its indorsement, was placed to the plaintiff's credit at Ladd & Tilton's bank, where he did his banking business. He wrote the company's name on the back of the check in his ordinary handwriting, without any disguise, and wrote his own name below it in the same handwriting. In his evidence he says that he indorsed the check as agent of the company, and he appears to have thought that, by writing the company's name and his name immediately below it on the back of the check, he indorsed the check as agent of the company. When the plaintiff was testifying, after he had told of the indorsing of the check and depositing it in the bank, and asking the company for leave to use the money, a juror asked him whether he always did it that way, and he answered: 'I have done that in at least one other instance, and it was satisfactory.' This statement was not denied by any evidence. That statement seems to mean that he had in at least one other instance indorsed and applied a check of the company in the same way that he did in this instance, and that his acts in doing so were satisfactory. This is a circumstance tending, to some extent, to show that the company had previously permitted him to indorse a check.

One of the material facts necessary to constitute the crime of forgery is an intent to defraud. If the plaintiff, when he indorsed the check, acted in good faith and believed that he had a right, as agent of the company, to indorse it, and did not intend to defraud any one, he did not commit the crime of forgery. The signing of another's name to a note or a check without authority is not necessarily forgery. It constitutes that offense only when it is done with intent to defraud."

In McCay v. State (Tex. Cr. App.) 22 S.W. 975,
the Court says in part:

"It is not every signing of another's name without authority which constitutes forgery. There must inhere in the act an intent to injure or defraud. If there is a reasonable and honest belief that the signature will be approved, there can be no forgery."

The burden of proving forgery beyond a reasonable doubt rests on the State and requires proof to establish the falsity of the signature and that the purported signers name was signed without his authority. State v. Jones 20 P. 2d 614 - 81 U. 503; State v. Gorham 48 P. 2d 447 - 87 U. 86.

While the record in the Dennis case does show testimony that the signature of the maker was not authorized, the evidence that the signature was ratified by Mrs. Stubbs is so convincing and contradicted that the verdict of the Jury holding defendant guilty, is not sustained by the record. The fact that the check was paid by the Bank and no complaint made by Mrs. Stubbs until February 13, 1963, imposed on the State the burden of proving beyond a reasonable doubt that the signature was not ratified by Mrs. Stubbs. The fact of ratification destroys the conclusion of intention to defraud.

Upon this point, it is important to note that it is not necessary to prove that Dennis had a prior agreement that Mrs. Stubbs would ratify his act in cashing the check. It is sufficient to require reversal if the record does not sustain the verdict of the Jury that Dennis intended to defraud Curley's Market (Fonzo Black).

352, this Court held and said:

"In a criminal proceeding it is not sufficient to show merely that the accused has been dishonest, or that he is a cheater, or otherwise of bad character. He is entitled to be charged with a specific crime so that he may know the 'nature and cause of the accusation against him.' And the State must prove substantially as charged the offense it relies upon for conviction."

In the Taylor case, the defendant had cheated various business houses from whom he had bought meat scraps. He was charged with embezzling \$50.00 from Utah By-Products Co. The conviction was reversed.

POINT TWO

The Trial Court committed prejudicial error in not declaring a mistrial on its own Motion upon the opening statement of counsel for the defendant.

In his opening statement, the defendant's attorney told the Jury that Mrs. Stubbs, whose name appears on the check as the drawer, would be called to testify that it was not her signa-

ture and that she didn't authorize the person who put it on the check to do so, and that she will testify that she did not believe the defendant did it either. The defendant will be called to testify and he will admit that he did. He signed a confession that he did, but he didn't. He didn't put that name on that check; he didn't forge it, and I want you to watch him very carefully when he testifies and said that he did.

Now the prosecution will ask the defendant if he has ever been convicted of a felony, and this is a felony and he will answer "Yes that he had". The prosecution will ask him that question to show that his testimony is unworthy of belief; that you can't believe him as to whether or not he is testifying to the truth because he has already committed a serious crime, and under our law the Court will instruct you that you can disregard his

testify if you don't believe he is telling the truth, because he has been convicted of a felony once, and this casts a cloud upon his ability to tell the truth. * *

The defendant didn't hire me to represent him to plead not guilty. The defendant doesn't want this trial; he wanted to plead guilty to this charge. He has already admitted to the police that he is guilty to this charge, and he is going to tell you that he is guilty. But he is not guilty. And I want you to watch him when he testifies, because he didn't do it. He didn't forge that check.

It is unnecessary and it is unfair to counsel for defendant in the Trial Court for this Court to speculate upon what motives and reasons impelled counsel to make such an opening statement. The damage resulting from the opening statement is further compounded by the fact that the Assistant District Attorney, after Dennis had testified that he signed the name Mrs. Billie Stubbs to the check without

authority, and when there was no basis or reason whatever for the admission of any testimony relating to other crimes, asked the defendant

"Q. Have you ever been convicted of a felony Mr. Dennis?

A. Yes

Q. What was that felony?

A. Carnal knowledge.

Q. When was that conviction?

Mr. Nixon: We object to that question. He has asked him the question.

The Court: The objection is sustained.

It is difficult to understand what purpose the Assistant District Attorney had in mind which could serve the ends of justice in asking such a question. Not only had Dennis testified that he wrote the name of Mrs. Stubbs on the face of the check without authority, but the attorney for Mr. Dennis in the opening statement had told the Jury that Dennis was being required to stand trial against his own wishes because he wanted to plead guilty to the charge of forgery.

The District Attorney had no occasion to impeach Dennis or prove that he was not telling the truth, because he had been convicted of a prior felony. His only purpose could have been to have prejudiced and blackened the character of Dennis in the minds of the Jurors.

It is difficult to understand why the learned Trial Judge did not recognize that after the opening statement of the attorney for defendant, and the introduction of the testimony regarding carnal knowledge, it was impossible for the defendant to have received a fair trial. It is a mockery of the administration of justice for a Court to permit a defendant to proceed to trial before a Jury upon a felony charge of forgery, after his attorney in his opening statement had said that the defendant wanted to plead guilty and the defendant has testified without any reason whatever, so far as an orderly trial is concerned, that he had been convicted of

arnal knowledge. Such information might have been useful to the Trial Court upon sentence of the defendant. The Trial Court should have accepted a plea of guilty, or taken the trouble at that stage of the proceeding, to find out the reasons which impelled counsel for defendant to be placed in the strange position demonstrated by this record. He tells the Jury that the defendant wants to plead guilty to forgery, but he is not guilty and his testimony that he is guilty cannot be believed because he has been convicted of carnal knowledge.

We are told that it is the function of the Courts and the District Attorneys not merely to obtain convictions but to see that all persons before the Court receive justice. The proceedings should have been stopped when the opening statements were completed and the defendant either allowed to change his plea to guilty and rely upon the discretion and mercy of the Court, or other appropriate proceedings taken which would have resulted in a fair trial. The effect

of the opening statement was a Plea of Guilty before the Jury. The prejudicial and improper testimony relating to the conviction of carnal knowledge made conviction certain regardless of what the testimony showed regarding the merits of the case.

In State vs. Sanchez 361 P. 2d 174 this Court held:

"* * * in serious criminal cases, under special circumstances, where the interests of justice so require, this Court may notice palpable and significant error even though proper objections were not taken at the trial."

In State vs. Cobo 60 P. 2d 952 90 U. 39, this Court reversed a conviction of voluntary manslaughter and held:

"That such error was manifest and of necessity resulted to the prejudice of the accused and deprived him of a fair trial cannot well be doubted. Because of such manifest error and further because, as already indicated, that the judgment of the court below must be reversed and a new trial granted upon other grounds, we deem it our duty to notice the error and to correct it, though no exception was taken there-to, in order that on a retrial of the case the same error may not again be committed."

531 the Court held:

"In this case the defendant admitted that if the act were proved, the intent would be sufficiently shown. The defendant was not admitting the signing of the name and then offering some excuse, authority, mistake, or defense therefor; but was denying and did deny the writing entirely.

We find no basis within the rule or any of the exceptions making the admission of the other checks alleged to be forged admissible. Each of the other two checks offered and received in evidence was payable to a different payee, cashed at a different time and at a different place, and by different persons than the check, the forgery of which the defendant was charged with.

We think it was prejudicial error to admit in evidence the checks. They tended to prove other separate and distinct offenses. For the reasons stated the judgment of the trial court is reversed and the cause remanded with directions to grant a new trial."

In State vs. Stewart 171 Pac. 2d 383, 110 Utah 203, the defendant was convicted of driving a vehicle while under the influence of liquor and of having previously been convicted of the same crime as alleged in the information. The Court held that the allega-

tions bearing on material criminality were not sufficient to raise that issue. The only charge properly before the Jury being that relating to the substantive offense. The prior convictions were incompetent evidence on that charge:

"Since, in the instant case the prior convictions could not properly be considered by the jury in determining the guilt or innocence of the defendant of the substantive offense, we conclude that it was reversible error to permit evidence thereof to be presented to the jury in the trial of that issue."

In State vs. Hougensen, 91 Utah 351, 64 Pac. 2d 229, this Court said:

"Certainly, if counsel knowing that a witness should not be compelled to answer, regardless of the exercise of her personal privilege, should by asking a number of questions which implied immorality, for the purpose of carrying to the jury such impression and which it was fairly evident did carry to the jury such an impression, this court might reverse the case with censure on counsel whether or not the witness claimed her privilege."

Since there was no reason whatever for the Assistant District Attorney to affect the

redability of the defendant, it was improper and prejudicial to bring to the attention of the Jury the prior conviction for carnal knowledge.

Examination of the record in this case by anyone not familiar with any of the facts outside the record, compels the conclusion that the defendant was denied a fair trial by an unprejudiced Jury upon the crime of forgery with which he was charged. There may have been extenuating circumstances and facts outside the record which explain, but could not justify or condone the proceeding as it appears from the record. If counsel for a defendant feels impelled, by reason of his candor and integrity to make the opening statement before the Jury, which was made by counsel in this case, the Jury should be discharged and counsel should be relieved of his obligation to his client. While the effect of the opening statement was to make it completely impossible for the defendant to get a fair and impartial trial, it did not mention to the Jury

the fact that the check involved was actually paid by the Bank on December 11, 1962, and that the transaction was treated as a loan by Mrs. Billie Stubbs to her employee Dennis until February 13, 1963, and that the Jury could well have found that Dennis had no intention of defrauding his employer. The question of whether the name of the maker was signed by the defendant or someone else becomes immaterial in this case, because there is no dispute from the record that the defendant cashed the check at Curley's Market.

Casual comparison of the name James B. Dennis which appears on the face of the check as payee, indicates that it is not the same handwriting as the endorsement of James B. Dennis on the back of the check. The case was tried below on the theory that it was a valid defense if the Jury could be convinced that because the defendant was a convicted felon, he could not be believed when he testified he signed the check without authority.

It is not surprising that the Jury was not convinced by this theory, because it must have been apparent to the Jury that it made little difference who signed the names in question of Mrs. Stubbs and Mr. Dennis on the back of the check if the defendant cashed the check at Curley's Market when he obviously knew the name of Mrs. Stubbs had been signed not by her and without authority. There was still a cogent valid theory which found such strong support in the testimony that we submit this Court must hold, as a matter of law that the case should not have been submitted to the Jury; that Dennis did not intend to defraud his employer or anybody else. He was charged with defrauding Fonzo Black, but it is undisputed that Black received his money from the Bank. As the record stands, there is no proof that the defendant at the time of trial had not paid Mrs. Billie Stubbs the \$54.31 which he owed to her.

In a recent Utah case, State vs. Kazda, 382 P. 2d 407, involving an erroneous admission of evidence of prior felony convictions the Court said, "The apparent purpose and reason for permitting the prosecution to question the accused regarding prior felony convictions is to affect his credibility as a witness."

The defendant Dennis in the instant case had testified that he signed the check without authority. There was no reason for the prosecution to affect his credibility as a witness.

The Kazda case follows State vs. Dickson, 12 Ut. 2d 8, 361 P. 2d 412. The Court reversed a conviction of robbery because evidence of other crimes was improperly admitted. The Court said:

"The universally accepted general rule is that such evidence is not admissible if its effect is merely to disgrace the defendant or show his propensity to commit crime."

No reasonable Jury could possibly find, beyond a reasonable doubt, that the defendant could have intended to defraud his employer, in view of the complete absence of any deception used by him. He intended to become her debtor for \$54.31 and she concurred in his intention by her action from December 11, 1962 when the check was paid presumably with her knowledge and approval and sometime in Feb. 1963 when she told Mr. Dennis that if he didn't make the check good she would have to swear out a complaint.

In conclusion, it is respectfully submitted that the judgment and conviction of the Trial Court should be reversed.

.. Respectfully submitted,

A. H. Nebeker
Attorney for Defendant
and Appellant