

1963

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

THE STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

JAMES B. DENNIS,
Defendant and Appellant.

OCT 2 1963

Court, Utah
Case No. 9920

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Fourth District Court for Utah County
Honorable 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

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant appeals from a conviction in the Fourth District Court, Utah County, of the crime of forgery in violation of Section 76-26-7, U.C.A. 1953.

DISPOSITION IN LOWER COURT

The appellant pled not guilty to the information charging him with the crime of forgery, and upon jury trial before the Honorable Maurice Harding, Judge, on March 13, 1963, the appellant was found guilty and committed to the State Prison.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

The respondent submits the following statement of facts as being in keeping with the rule that in reviewing a conviction the record will be reviewed in a light most favorable to the conviction and, also, being more in keeping with the actual evidence before the jury.

On or about December 7, 1962, the appellant entered Curley's Market in Provo, Utah (R. 7) where he presented Exhibit 1 to Clayton F. Black, the son of the proprietor. (R. 7, 8). Exhibit 1 is an instrument purporting to be a check drawn upon the Walker Bank and Trust Company, Farmers and Merchants Branch, Provo, Utah, by Mrs. Billie Stubbs, and payable in the sum of \$54.31. The check was dated December 7, 1962, and bore the notation "Labor." Mr. Black initialed the check, and the cashier gave the appellant the money. (R. 8).

Mrs. Billie Stubbs testified that it was not her signature on Exhibit 1, although it bore her name. (R. 11, 12). She also testified that she did not give the appellant permission or authority to sign her name (R. 12), nor did she authorize anyone else to sign her name to a check for the appellant. (R. 13).

LeGrand J. Barker, Lieutenant of Detectives of the Provo Police Department, had conversation with the appellant on February 11, 1963. He testified, (R. 15):

"A. Jimmie came into the Police Department 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, and he gave me a statement regarding this check.

Q. I am speaking of this particular check, Mr. Baker, the check which is Fifty-four Dollars and some odd cents drawn on the Walker Bank.

Did he make any comment regarding that?

A. Yes.

Q. What did he say regarding that?

A. He said that he had made out the check and signed the name of Mrs. Billie Stubbs.

Q. Did he say anything else regarding it?

A. That he didn't have authority from her to sign the check."

The appellant, upon voluntarily taking the stand, testified that on December 8, 1963, he signed Mrs. Billie Stubbs' name on the check, Exhibit 1, which he cashed at Curley's Market. (R. 16, 18). He never made any claim that he had authority to sign checks, or that he expected the check to be allowed by Mrs. Stubbs. Mrs. Stubbs never indicated that she gave the appellant authority to sign her name, in fact, she testified to the exact opposite. (R. 12).

No other evidence of any kind tending to exculpate the accused was offered.

ARGUMENT

POINT I.

THE EVIDENCE WAS SUFFICIENT TO ALLOW A JURY TO CONVICT THE APPELLANT BEYOND ALL REASONABLE DOUBT.

The appellant was convicted of the crime of forgery, and contends the evidence in support of his conviction is insufficient. The appellants raises several inferences to support his contention. First, he contends that no complaint or objection from Mrs. Stubbs to the signing of the check by the appellant was made after the fact until the complaint was signed in February. This is after the fact and immaterial. The time when Mrs. Stubbs received notice of the check having been forged does not appear of record.¹ Additionally, there is no evidence of record that Mrs. Stubbs did "ratify" the defendant's action, or did or intended to do any of the things that appellant sets out in his brief.

The evidence which actually does appear of record is that the appellant made out Exhibit 1, and did so without the authority of Mrs. Billie Stubbs, whose name he affixed to the check as drawer; that he cashed the check, that he offered no excuse or evidence of any past conduct that would allow him to expect that his employer would have sanctioned such conduct. No evidence of record appears that she did sanction the conduct. Finally, the appellant admitted the act, and admitted the absence

1. No evidence of record supports the appellant's assertion that the check was received in January, even so one months' time between return and the filing of the complaint in February is relatively fast action.

of any authority at the time of the act which would allow his actions or tacitly give them approval. A mere hope of subsequent ratification is insufficient to exculpate. There is no evidence that the appellant thought he had authority to sign his employer's name to a check in his behalf, or had in the past been given any reason that would lead him so to believe. The actual evidence of record is amply sufficient to convict.

In *State v. Tinnin*, 64 Utah 579, 232 Pac. 543 (1925), the evidence showed a similar course of conduct, but without the direct admissions of the defendant. The court held the evidence to be amply sufficient to sustain a conviction. The evidence is, therefore, amply sufficient in this case.

As to the appellant's claim of ratification, he has no legal basis for his contention. The general rule is found in Clark and Marshall Crimes, 6th Ed., Sec. 12.32:

"To constitute forgery, a fraudulent intent is always essential. There must not only be a false making of an instrument, but it must be with intent to defraud. It follows that a person is not guilty of forgery in signing another's name to a note or other instrument, if he believes that he has authority to do so, though he may in fact have no authority. If there is no such authority, however, and no belief that there is, one who signs another's name to an instrument is none the less guilty of forgery because he believes that the person whose name he signs will ratify his act and pay the obligation. * * *

The appellant did not ever indicate that he thought he had authority to execute the check, in fact he admit-

ted to the contrary. There was not one scintilla of evidence that appellant had a "reasonable and honest" belief that he had authority to execute the instrument. Nor would subsequent hope of ratification obviate the offense, or even subsequent ratification had that occurred. *Thomas v. State*, 33 S.W. 127 (Tex. Crim. App. 1895). In *State v. Tull*, 119 Mo. 421, 24 S.W. 1010 (1893), the court stated the general rule:

"The fact that one whose name had been forged may be willing to condone the offense, and even pay the obligation, does not render it less a crime in the forger."

See also *People v. Weaver*, 177 N.Y. 434, 69 N.E. 1094 (1904), where a claim similar to the instant one was rejected by the New York Court of Appeals on the grounds that mere hope of ratification does not destroy the necessary intent to defraud. Of a similar conclusion is *Foster v. State*, 65 Tex. Cr. 143, 143 S.W. 623 (1912). Wharton's Criminal Law and Procedure, Vol. 2, p. 437, notes:

"It is no defense that the accused believed that the person whose name he had forged to the instrument would pay the amount thereof, or that there was condonation by subsequent ratification and willingness to pay, on the part of the person whose name was forged, or intent to repay, or actual repayment, or ratification of the instrument."

See also 37 C.J.S., Forgery, Sec. 89.

Consequently, there is no merit to appellant's contention as to the sufficiency of the evidence.

POINT II.

THERE WAS NO BASIS FOR THE TRIAL COURT TO ORDER A MISTRIAL AFTER APPELLANT'S OPENING ARGUMENT.

The appellant's second point urges that the actions of the trial defense counsel in making his opening argument to the jury were so prejudicial to the accused that the trial court should have sua sponte granted a mistrial. The opening argument of the defense counsel was a short response to the proof the prosecution outlined in its opening argument. The opening statement of the defense, which appellant now, for the first time on appeal finds objectionable, was as follows in its pertinent parts, (R. 5):

“Now, the defendant will be called to testify, and he will admit that he did. He will say 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 says 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 testimony 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.

Now, this is the substance of our case. 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. That is our case."

The argument in no way discloses any disloyalty or conflicting motives on the part of defense counsel. He insists in the innocence of his client. Although he admits that the evidence will disclose a confession of guilt, he, in good conscience, urges the jury to find his client innocent.

The appellant's argument is, in effect, that the trial defense counsel was guilty of such misconduct as would compel the trial judge to order a new trial. Essentially the argument of appellant is based on two occurrences in the opening argument. First, the fact that he, defense counsel, mentioned the appellant's previous conviction, and, second, that he commented on his client's confession of guilt and feelings of guilt.

The general rule as to when a conviction is improper because of impropriety on the part of the defense counsel is set out in 74 ALR 2d 1403:

"* * * most courts considering * * * the question of incompetency of retained counsel are generally agreed that the judgment of conviction is void when counsel's representation has been so inadequate as to make the trial a farce and mockery of justice, thereby denying the accused a fair trial (due process of law) * * *."

The Nevada Supreme Court stated it as follows in *State v. Jukech*, 49 Nev. 217, 242 Pac. 590 (1926):

“We think that the rule deducible from the cases is that a new trial should not be granted by an appellate court in a criminal case on account of the incompetency or neglect of counsel, unless it is so great that the defendant is prejudiced and thereby deprived of a fair trial.”

Thus the trial must be of such a low character as to render the trial a “farce and a mockery.” *People v. Durpee*, 156 Cal. App. 2d 60, 319 P.2d 39.

It is submitted that the defense in this instance, although some may say it could have been done better, was not a “mockery of justice” so as to warrant reversal.

See Annotations 24 ALR 1022; 64 ALR 437.

In *State v. Farnsworth*, 13 U.2d 103, 368 P.2d 914 (1962), this court was faced with similar claim of improper defense. It noted:

“With respect to the first alleged error, defendant argues that his trial counsel was incompetent and did not effectively represent him, thus depriving him of the right to counsel guaranteed by the State and Federal Constitutions. Const. art. 1, § 12; U.S. Const. Amend. 14. To support such a contention, he cites the facts that trial counsel waived preliminary hearing, waived a jury, made no opening statement, failed to make objections to introduction of evidence, did not cross-examine but one of the State’s witnesses, etc. The privilege of an accused to the assistance

of counsel is a fundamental right which means a right to a reputable member of the bar who is willing and in a position to honestly and conscientiously represent his interests.

In the instant case, the defendant selected and retained the trial counsel who is a member of long standing of the bar, experienced in trial work, both civil and criminal, and esteemed by the bar and judiciary alike for his ability and integrity. The serious charges in respect to this attorney's competency should not be lightly treated. Suffice it to say, we have examined the record closely and cannot say, upon retrospect, that trial counsel did not, under the circumstances of the case against the defendant, fairly and competently represent him. The record indicates that no action or inaction by the trial attorney which could not rationally find explanation in a legitimate exercise of strategy—particularly when the case was tried before a judge without a jury."

The factual situation in *Farnsworth* is certainly more aggravated than that in the instant case. Mere errors of judgment on the part of defense counsel are not sufficient to warrant reversal because of trial error. *Mandell v. People*, 76 Colo. 296, 231 Pac. 199 (1924); *Meaders v. State*, 102 Tex. Crim. 437, 278 S.W. 215 (1925); 74 ALR 2d 1399. Indeed, that is all the appellate counsel, in substance, offers, that if he had tried the case below he would have proceeded differently. In his brief, appellant urges a plea of guilty should have been entered. (Brief, p. 19). This would not have effected the ultimate result of conviction. An analysis of the claims of improper action attendant to the opening

argument demonstrates only that trial counsel was employing good strategy and proper ethics.

Appellant's contention that it was improper for defense counsel to mention the previous felony conviction is at best a make-weight argument. The appellant intended to take the stand and defense counsel obviously knew that if he did so he would be subject to cross-examination as to any previous felony convictions, including the type and number. *State v. Dickson*, 12 U.2d S, 361 P.2d 412 (1961); *State v. Kazda*, 14 U.2d, 382 P.2d 407 (1963).² Rather than leave this disclosure to the cross-examination of the prosecutor with its telling effect, it is good trial strategy to bring the matter out on direct examination or opening argument. This acquaints the jury with the fact and allows them to adjust to it before the presentation of defendant's case. Further, it relieves the appearance that something is being held back. Rothblatt, *Successful Techniques in the Trial of Criminal Cases*, p. 84, so recommends:

"If your client has a criminal record including a conviction or a number of convictions, it

2. *State v. Kazda*, supra: "Also assigned as error in the cross-examination of the defendant as to prior convictions. It was elicited upon cross-examination that the defendant had several prior felony convictions, unrelated to the instant charge, and he maintains that this amounted to a general assault upon his character and thus constituted prejudicial error. This is also without merit. When an accused voluntarily takes the witness stand he may be asked whether or not he has ever been convicted of a felony. Such a question is sanctioned by statute. If the accused answers in the affirmative, he may be asked the nature of the felony. Further, the accused may be asked if he has been convicted of more than one felony, and if so, the type or nature thereof."

will sound much better if he tells about it himself in the direct examination. This takes the sting out of it and prevents the prosecutor from bringing it out—it sounds much worse coming from his mouth on cross-examination. Such an open approach also gives you the opportunity to excuse or explain it in the most satisfactory way. * * *

In Levin, Evidence, 1961 Annual Survey of American Law, p. 502, 517 (1962), it is noted:

“A prosecutor who is obliged to offer a witness with an unhappy criminal record may consider it good tactics to anticipate the inevitable attack and himself elicit from the witness the evidence of prior convictions. Superficially this may be characterized as an attempt to impeach one’s own witness. ***”

In *State v. Holley*, 34 N.J. 9, 166 A.2d 758, cert. denied 368 U.S. 854 (1961), the New Jersey Supreme Court recognized this as good trial strategy and upheld it against an argument that it is an attempt to impeach one’s own witness. It was, therefore, good and proper strategy for defense counsel to bring this before the jury,³ and no claim of error or impropriety can be found from such action.

Finally, the appellant urges that it was improper for the trial defense counsel to indicate to the jury that

3. See *State v. Cude*, No. 9619, July 2, 1963, where the same thing was done by trial defense counsel and the prosecutor thereafter cross-examined on the nature and number of the convictions (appellant’s Brief). The court said: “We find no merit to defendant’s assignment of error relating to the cross-examination with respect to his felony record.”

the appellant considered himself guilty, and that he had confessed to the crime, and that the prosecution would present evidence showing that he signed his employer's name to Exhibit 1 without proper authority. In this respect defense counsel was doing no more than putting before the jury the same thing which the prosecution had indicated would be proved, but he did so with the additional qualification and assertion that he did not believe the defendant was guilty or that he had executed Exhibit 1. He professed faith in the defendant's innocence and, therefore, left with the jury a doubt as to whether they were receiving the full picture in the case. Defense counsel cannot be expected to lie to the jury or to raise issues of defense which are not legally and ethically proper. When presented with a case of an accused's guilt which seems to be supported by overwhelming evidence, including a confession, defense counsel has little alternative but to ask the jury to watch the demeanor of the accused and to weigh the circumstances carefully in their minds. There is no duty on the part of defense counsel to plead a man guilty, especially where he has an abiding faith in his innocence or feels that the true facts of the case are being kept from him. Even if the evidence is overwhelming, an accused has a right to test the prosecution in its proof. That right includes the prerogative of sitting back and offering no affirmative defense where none is available and testing the strength of the prosecution's case.

In *Hendrickson v. Overlade*, 131 F. Supp. 561 (1955), the court was faced with the claim of incompetent defense counsel. In rejecting the contention, the court

took note of the overwhelming evidence of guilt. In doing so it said:

“* * * However, when the question of incompetency of counsel is called into question by the petitioner, the question of guilt must be considered by us for the reason that if defendant was conclusively guilty the question as to just what his counsel could do by way of defense is important.”

Certainly defense counsel could not be expected to manufacture evidence, place perjury before the jury, or induce his client to say what his client was unwilling to say. Consequently, defense counsel could do nothing but attempt to take the sting of the prosecution's evidence out of the minds of the jury and the court and see that the evidence was sufficient to prove the crime charged.

In the instant case, the defense counsel cross-examined prosecution witnesses as to the identity of the defendant and endeavored to elicit evidence, although inadmissible, as to the opinion of the appellant's employer as to his guilt or innocence of the crime charged. There is nothing in the record, including the opening statement of defense counsel, that even approximates infidelity to his client, let alone amounting to a sham or mockery of justice. Consequently, there can be no claim that defense counsel's conduct entitles the appellant to a new trial. *People v. Durpee*, 156 Cal. App. 2d 60, 319 P.2d 39.

CONCLUSION

It is submitted that the guilt of the appellant was proved in the trial court by overwhelming evidence. To afford the appellant a new trial in the face of arguments which, though ingenious, are unmeritorious, would waste the time of the courts, the appellant and the prosecutors and add nothing to justice.

This court should affirm.

Respectfully submitted,

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