

1963

State of Utah v. Larry Myers : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH
COUNTY OF UTAH

STATE OF UTAH, : APR 16 1964
Respondent, : **LAW LIBRARY**
Case No. 9955
-vs-
LARRY MYERS, : **FILED**
Appellant. : NOV 13 1963
Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the SECOND JUDICIAL DISTRICT COURT,
Weber County, Hon CHARLES E. COWLEY, presiding.

A. PRATT KESLER
Attorney General
Attorney for Respondent
State Capitol
Salt Lake City, Utah

Submitted by:

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IN THE SUPREME COURT OF THE STATE OF UTAH

_____ 00000 _____	
STATE OF UTAH,)
Plaintiff & Respondent	(
	(
vs.	(
	(
LARRY MYERS,)
Defendant & Appellant	(
_____ 00000 _____	

CASE NO.

9955

BRIEF OF APPELLANT

STATEMENT OF CASE

This case arises from appeal from a conviction in the District Court of the Second Judicial District for the charge of Issuing a check against insufficient funds, which case was heard in the District Court on the 8th day of March, 1963, with the Honorable Charles G. Cowley presiding.

DISPOSITION OF LOWER COURT

The District Court rendered an order of Commitment to the Utah State Prison, upon a verdict of guilty as rendered by a jury after having the case submitted to such jury. Said sentence was to run concurrent with the sentence of a previous sentence rendered in Case

No. 7193 of the District Court of the Second Judicial District for Weber County, State of Utah. The appellant was committed to the Utah State Prison for an indeterminate term of not to exceed five (5) years, which committment was entered on the 8th day of April, 1963.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks a reversal of the judgment of the Court as a matter of law or failing that the Defendant, Appellant be given a new trial to be held without prejudicial error.

STATEMENT OF FACTS

This case arises out of the following facts: The Defendant, Larry Myers, contacted the Browning Chevrolet Company of Ogden, Utah, for the purpose of purchasing an automobile. A car was agreed upon, which could be purchased by the Defendant. He then went to Morgan, Utah, and contacted the First National Bank of Morgan, Utah, and was given a Contract to present to Browning Chevrolet, for the purchase of the car. The Contract was to be for 2/3 of the purchase price.

The Defendant returned to the Browning Chevrolet Company with the Contract to complete the purchase of the automobile. The Defendant was taken to the Sales Manager's Office by the Salesman and at that time the Contract was examined and request made for a 1/3 down payment. The Defendant contends that he gave to the Browning Chevrolet Company a check in the sum of \$765.29, which check was the down payment, but that at the time of delivery there were instructions given that the check was to be held for a short period until the Defendant raised enough capital to cover the check by the sale of livestock. The complaining witness contended that the check was given for immediate payment and that the check was refused by the bank, when presented for payment, and that by such refusal, the Browning Chevrolet Company was defrauded of one automobile, even though the evidence indicates that the automobile was returned and subsequently sold as a used car.

STATEMENT OF POINTS

POINT I - That the District Court erred in denying Defendant's Motion for Mistrial, based upon

District Attorney's improper conduct during the course of presenting the evidence and examination of witnesses.

POINT II - The evidence was not sufficient as a matter of law to have found Defendant guilty beyond a reasonable doubt.

ARGUMENT

POINT I - That the District Court erred by its failing to grant a Motion for Mistrial upon District Attorney's redirect examination of Earl Pierson (R. 39, L. 23-30) and thereby committed prejudicial error to the case of the Defendant. It appears that Earl Pierson, witness for the State, was asked the following question upon redirect examination: "Mr. Pierson, would you have sold this car if you had known this was a Bum Check?" To which question objection was timely made. The District Attorney then asked no further questions of the witness (R. 40, L. 1). The only apparent purpose for asking such a question was for the purpose of discrediting the Defendant and desiring to leave an impression with the jury, that the District Attorney's Office had already investigated

this matter and had determined that the check was bad, which was the entire purpose of the Court proceedings, that is to determine whether or not the check, as tendered, was for payment at a later date or whether it was an attempt to pass an insufficient fund check for purposes of defrauding Browning Chevrolet. The employer of Mr. Pierson.

It further appears that at this point in the trial the check in question had neither been offered or accepted into evidence. (R-43, L. 21-27)

The bad faith on the part of the District Attorney is further borne out by the questions that were asked previously and to which objection was made. "Tell us what you did when the check bounced." (R. 32, L. 1), which questions were asked immediately after the Court had sustained an objection to the previous answer which contained identical statements. (R-31, L. 23-27)

It is the duty of the prosecuting Attorney to be fair and impartial in presenting evidence for the prosecution and examining or cross-examining witnesses. (Beck v. U.S., C.C.A. Mo. 33 Fed. 2d 107; State v. Barren 70 Pac. 2d 935; 92 Utah 571, State v. Murphy, 68 Pac. 2d 188,

It is improper for the prosecuting Attorney to ask a question which by its very nature would assume as proved the very fact in issue (Pierce v. State 77 So. 2d 507, 38 Ala. App. 97, cert. denied 77 So. 2d 512, 262 Ala. 702; People v. Garbutt 239 Pac. 1080, 197 Calif. 200) it then appearing that in this case the District Attorney was not being impartial in the presentation of the evidence and further that the District Attorney committed prejudicial error by his adverse comment and apparent overriding desire to impress the jury with the inherit bad character of the transaction. It appears that the District Attorney would attempt to convey to the jury his version of the facts prior to any such facts having been borne out or in fact proven. The District Court Judge by refusing the motion for the Mistrial as prayed for by defense counsel and by allowing the prejudicial error to remain by failing to give a cautionary instruction to the jury that the jury was to disregard any evidence or testimony to which an objection had been made and which was sustained by the Court. The Court was under the duty to cure prejudicial error by proper curative

instruction (Nimoc v. U.S. Ct. Wash., 178 Fed 2d 656, cert. denied 70 S. Ct 1006, 339 U.S. 985).

POINT II - That the evidence as presented was such that the jury, as a matter of law, could not say that beyond a reasonable doubt the Defendant had intended to defraud the Browning Chevrolet Company.

While it is clear by the Statutes of the State of Utah (77-42-1) that the appellate Court shall not reverse the lower Courts determination unless the substantial rights of the parties are affected, and while it is true that the same statute presumes that if any error has been committed such error is not prejudicial, the Court, if satisfied that the error had been prejudicial, then the Court is warranted in reversing the judgment as entered; even though the general presumption is in favor of the verdict, (Corpus Juris Secundum, Criminal Law 1858) and the appellate Court will not generally interfere when the evidence is conflicting, if there is material evidence tending to support the verdict. (State v. Roberts, 63 Pac 2d 584, 91 Ut 117);

however, the appellate Court can order a new trial when on the inspection of the evidence the verdict is clearly and palpably against the weight of evidence (People v. Peters 213 Pac. 2d 731, 95 C.A. 2d 790; People v. Kloaski, 141 N.E. 309 Ill. 468; Swanson v. State 18 S.W. 2d 1080, 113 Tex Cr. 104) and also while it is not the province of the Supreme Court to judge the creditability of witnesses, the Court is still concerned with the question of the sufficiency of the evidence, that is, is there sufficient evidence to sustain the conviction by showing that the jury could have found beyond a reasonable doubt that the Defendant was guilty (State v. Laub, 102 Ut 131, Pac 2d 805) and if the Court determines that the jury could not so find by reviewing the facts then the Court is justified in reversing the judgment as entered.

It appearing in this matter that there is substantial conflict in the evidence and that in order for the jury to reach a determination that the Defendant was guilty, the jury must of necessity disregard all of the evidence presented by the Defendant, together with the conflicting evidence presented by the State. The

testimony presented by the State's principal witnesses is that Mr. Ciscowski, who was the Salesman who sold the car to the Defendant, and the Sales Manager, Mr. Pierson, who was supposed to have received the check as a current check payable upon presentment not as a Promissory Note are in conflict and confusion. In the record on page 36, lines 2-21, Mr. Pierson, the Sales Manager, indicates that Mr. Ciscowski, the salesman was present at all times and particularly when a certain telephone call was made to the First National Bank of Morgan to substantiate the transaction about to be entered into. Mr. Ciscowski said that he was not present at any time when a telephone call was made to the bank in Morgan, Utah (R-20, L. 5-20), also, Mr. Pierson indicates that Mr. Ciscowski, salesman, knew the Defendant prior to this transaction (R. 391, L. 10-15) Mr. Ciscowski said he did not know Defendant prior to this transaction (R. 8, L. 11-14). The record further indicates that the Defendant entered upon the premises of the Browning Chevrolet Company twice during the day of the transaction. The second time being the time the

check was to have been passed. (R. 12, L. 1-23)

At this time Mr. Ciscowski indicates that he met the Defendant at the front door of the establishment and escorted him to the Sales Manager's office where the contract was presented and a check written in his presence, and after the check was written he then left the presence of the Defendant and Sales Manager, and that he was not present at any time when a call was made to Morgan, Utah, (R. 18, L. 23-30; R. 19. L. 1-9) however, Mr. Pierson, Sales Manager, indicates that as soon as Mr. Myers came into his office the second time a call was made immediately to Morgan, Utah, and that a discussion was had with Mr. Grant Francis, a bank official for the First National Bank at Morgan, Utah, and further that this conversation was made prior to any check being written, for that reason it was not possible to determine whether or not the check was to be held or immediately sent to the Bank. It being the position of Mr. Myers that the check was to be held by Browning Chevrolet Company and it being the position of Browning Chevrolet Company that the check was to be immediately remitted

through the BANK (R. 42, E. 1-10).

It is further necessary in order for the jury to return a verdict of guilty based upon evidence proved beyond a reasonable doubt that the jury disregard the testimony regarding State Exhibit "A" as to when the check was deposited and to whether or not it reasonably appeared that the check was deposited promptly or whether it was delayed in its presentment.

The check, Exhibit "A", bears the following dates, which dates were presented for the jury's consideration, November 21, 1962, being the date Exhibit "A" bears and the stamps as shown by Exhibit "A" at the record at page 50 indicate that the Bank of Ben Lomond where the check was originally deposited was not deposited until November 26th, which being five (5) days after the issuance of such check and that the check further reached the Federal Reserve Bank of the Clearing house on November the 27th and the check was presented to the First National Bank at Morgan Utah, on the 28th day of November, 1962 (R. 49) and that the last stamp to appear upon the check was the day of November 29th indicating the day

which the First National Bank of Morgan returned the check.

In order for the jury to find that the Defendant gave the check to Browning Chevrolet Company and for them to find that the check was not to be held the jury must disregard the fact that the check apparently was delayed in its negotiation and further there being no evidence presented by the State to show reasonable grounds to why the check was delayed for presentment other than that presented by the Defendant and his witness Mr. Philip W. Carter both of whom indicated that the check according to their understanding was to be held and not cashed.

The record further indicates that jurors were properly instructed by the Court Instruction No. 6 to the effect:

"The Defendant has been sworn and testified as witness in his own behalf. This is his legal right that his testimony should not be rejected or discredited by you simply because he is the Defendant and on trial for a criminal offense but you should consider in a way his testimony the same as the testimony of any other witness and determine the wate accreditability to be given thereto by the

same rules given you herein concerning the wate and accreditability to be given to the testimony of the witnesses generally."

It would of necessity require that the jury fail to give any credence whatsoever and to totally reject the testimony of the Defendant and to totally ignore the conflict in the testimony of the State in order for the jury to return a verdict that the Defendant was guilty beyond a reasonable doubt.

CONCLUSION

In light of the prejudicial error committed by the court together with the fact that the jury could not, upon the facts presented, have found the defendant guilty beyond a reasonable doubt the verdict of the trial court should be reversed and the defendant discharged, or failin this the defendant should be granted a new trial free from prejudicial error.

Respectfully submitted,

DALE E. STRATFORD

Attorney for Appellant