1963

State of Utah v. Larry Myers : Brief of Respondent

Utah Supreme Court

A. Pratt Kesler; Attorney for Respondent;
Dale E. Stratford; Attorney for Appellant;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LARRY MYERS,
Defendant and Appellant.

Case No.
9955

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Second District Court for Weber County
Honorable Charles E. Cowley, Judge

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LARRY MYERS,
Defendant and Appellant.

Case No. 9955

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The appellant has appealed from a conviction in the Second Judicial District upon jury trial of the charge of issuing a check against insufficient funds, in violation of 76-20-11, U. C. A. 1953.

DISPOSITION IN THE LOWER COURT

The defendant was tried upon jury trial in the Second Judicial District, Weber County, State of Utah, before the Honorable Charles E. Cowley, Judge, presiding. He was convicted of the charge of issuing a check against insufficient funds with intent to defraud, in violation of 76-20-11,

U. C. A. 1953, and sentenced to an indeterminate term of not to exceed five years in the State Prison. The sentence was to run concurrently with another sentence of ten years to life given by the same court theretofore for the crime of rape (*State* v. *Myers,* 385 P. 2d 609 (1963)).

RELIEF SOUGHT ON APPEAL

The respondent contends that the appellant's conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being more in keeping with the requirement that the facts on appeal be reviewed in a light most favorable to the jury's verdict, and also as more accurately reflecting what actually transpired at the trial.

On November 21, 1962, the appellant went to Browning Chevrolet Motors Company in Ogden, Utah, and discussed with a salesman for the company, Mr. Ciscowski, the purchase of a Chevrolet automobile (R. 7). After a motor vehicle had been agreed upon by the appellant, the salesman and the appellant went into the sales manager's office (R. 9). The sales manager was Mr. Earl Pierson (R. 29). The appellant indicated a desire to finance the purchase of the motor vehicle through a bank in Morgan, Utah (R. 10), and after discussing the purchase of the motor vehicle he left to go to Morgan to work out the financing arrangements with the bank (R. 30). Approximately two hours later the appellant returned with papers

from the bank in Morgan, covering the financing of the automobile (R. 30). The arrangements for the financing of the vehicle were that the appellant would pay one-third of the purchase price in cash and the bank in Morgan, Utah would pay the balance, and the appellant would pay the bank for the loan made to purchase the vehicle.

At the time of returning to the Browning Chevrolet Company, the appellant executed a check payable to Browning Chevrolet Company in the sum of $765.29 (State Exhibit A, R. 12 and 31). At the time of executing the check, the appellant told the salesman and sales manager that he had an account at the bank in Morgan (R. 11, 31). The sales manager, Mr. Pierson, called the bank in Morgan concerning the contract with the bank, but never discussed whether or not the appellant had a check account with the bank (R. 35). The check was presented by Browning Motor Company in the due course of business to its correspondent bank (Bank of Ben Lomond in Ogden), and thereafter to the First National Bank of Morgan, Utah. The check was returned marked "No account" (Exhibit A).

At the time of trial the salesman, sales manager and general manager of Browning Chevrolet Company testified that no payment had been made on the check (R. 32, 44), and that no effort had been made by the appellant to make the check good (R. 99). The check was received by Mr. Pierson from the appellant after 5:00 P.M. on the 21st of November, 1962, and was presented to the bank in Morgan on November 28, 1962. November 24th and 25th, intervening days from the time of issue until the time of present-

ment at the drawee bank, were a Saturday and Sunday (R. 50-51). Mr. Ciscowski, the salesman, and Mr. Pierson, the sales manager, testified that there was no agreement of any kind with the appellant not to present the check in the regular course of business to the drawee bank, and that there was no agreement to hold it until the appellant could cover the check. Mr. Grant Francis, the cashier of the First National Bank of Morgan, Utah, testified that the appellant's bank account at that bank had been terminated on June 14, 1962, and that no money was on deposit when the check was received for payment or had there been any tender of a deposit subsequently. He further indicated that on November 21, 1962, the date upon which the appellant purchased the vehicle from Browning Motors, that the appellant came to his bank to obtain financing for the purchase of the vehicle. The appellant asked Mr. Francis what would happen if he wrote a check on the bank for the amount of the down payment. Mr. Francis indicated that since he had no account, that the check would be dishonored (R. 47, 48). Mr. Francis further testified that there was no discussion between the appellant and himself concerning the honoring of the check drawn on the First National Bank of Morgan, Utah, to cover the amount of the down payment. There were no arrangements made to hold the check (R. 62), and the appellant's credit in a livestock account had also been terminated (R. 56).

The evidence at trial disclosed that the appellant had presented checks subsequent to his account being closed which were honored by the bank in Morgan. These, how-

ever, were honored because the appellant had deposited money at the teller's window to cover the checks when presented (R. 54). It was also shown that the appellant had written six other checks subsequent to the termination of his account which were dishonored by the bank (R. 65). The appellant testified that he executed the check knowing that he had no account at the bank in Morgan, but upon an understanding with the payee, Browning Motor Company, that the check would not be presented for payment for from two to three weeks so that the appellant could sell some cattle to cover the amount of the down payment. Such an arrangement did not occur according to the officers and employees of the payee.

Based on the above evidence, the jury found the appellant guilty and in due course the trial court committed the appellant to the State Prison for the indeterminate period provided by law.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

During the course of the trial the District Attorney asked a witness the following question:

> "Q. Mr. Pierson, would you have sold this car if you had known this was a bum check?"

Objection was made and the trial court sustained the objection (R. 39). Thereafter, outside the presence of the

jury, appellant made a motion for a mistrial, which the trial court denied. The appellant contends it was reversible error not to grant the motion for mistrial. In doing so, appellant argues that the question, although no answer was elicited, implies that the District Attorney had investigated the matter and determined the check to be worthless. The whole issue is, at the most, innocuous. The evidence presented at trial showed the check was dishonored on presentment, which even the appellant admitted. It was further shown that the check was never honored; consequently the characterization, although improper, could hardly be deemed prejudicial.

It is well settled that a motion for mistrial is directed to the sound discretion of the trial court, 23A C. J. S., Criminal Law, Sec. 1116, p. 233; *People* v. *Rhoades,* 209 P. 2d 33 (Cal. App.) and, further, it has been stated that the court should not be in a hurry to grant a mistrial in the absence of a clear showing of the likelihood of prejudice. In *Commonwealth* v. *Edgerton,* 200 Mass. 318, 86 N. E. 768, the court said:

> "The court 'ought not to be swift to grant a new trial on account of irregularities not attended with any intentional wrong, and where it is made satisfactorily to appear that the party complaining has not and could not have sustained any injury from them.' "

Thus, clearly in absence of a showing of definite prejudice, the court cannot be said to have abused its discretion. In Abbott, Criminal Trial Practice, 4th Ed., Sec. 303, p. 559, it is noted:

> "* * * and if no improper testimony is in fact given, the allowance of improper questions is immaterial."

In the instant case the court didn't even allow the witness to answer.

The appellant contends that there was a previous objection on an identical statement which the court had sustained. This mis-states the record. The record reflects that previous to the incident the appellant contends should have required a mistrial, the following occurred, (R. 32):

> "Q. Tell us what you did when the check bounced?
>
> "A. When the check came back, then of course they tried to make collection on the check.
>
> "MR. BINGHAM: I will object. He can say what he did but not what the organization did.
>
> "THE COURT: All right."

Thus, the question was not the same, and no objection was made to the form of the question on the basis of improper characterization. Consequently, this argument is equally unmeritorious. This court must weigh for specific prejudice (77-42-1, U. C. A. 1953); the state of the record clearly shows none that would warrant reversal.

Finally, appellant's argument that the court should have instructed the jury to disregard the question is merely make weight. No request for instruction was made which is a prerequisite to a claim of error, *State* v. *Rowley*, 386

P. 2d 126 (Utah 1963). Appellant has no basis for a new trial on this point.

POINT II.

THE EVIDENCE WAS SUFFICIENT TO WARRANT THE JURY IN FINDING THE APPELLANT GUILTY OF THE CRIME CHARGED.

The appellant contends that the evidence was such that the jury could not find him guilty beyond all reasonable doubt. In this regard, the evidence must be weighed in a light most favorable to the jury's verdict. *State* v. *Ward,* 10 U. 2d 34, 347 P. 2d 865 (1959). When the evidence is so viewed, it is clear that there was ample evidence which would warrant the jury in finding the accused guilty beyond all reasonable doubt.

The evidence discloses that on the 21st day of November, 1962, the appellant executed Exhibit A, being a check in the sum of $765.29, payable to the Browning Chevrolet Company and drawn upon First National Bank of Morgan, Utah (R. 12, 31). He told the salesman and sales manager for the payee that he had an account in the bank upon which the check was drawn (R. 31). However, the appellant's account in the bank had been terminated on June 14, 1962 (R. 45). The appellant never made any deposit to cover the check issued with the drawee bank. Further, the record discloses that the appellant was expressly warned by the bank cashier that if he wrote the check on his account that the check would not be honored (R. 48). Although the appellant contended that there was an agree-

ment to the effect that the check would be held and not negotiated by the payee for a period of time sufficient to allow him to make a deposit, both the salesman, Mr. Ciscowski, and the sales manager testified that there was no agreement that the check would be withheld from presentment in the due course of business (R. 26, 94, 98). Further, both of the employees of Browning Chevrolet Company testified that there was no offer to make payment subsequent to default on the check. Although there was some evidence presented that at least two checks had been paid by the First National Bank of Morgan subsequent to the closing of the appellant's account, these checks were paid only when the appellant left the money with the teller to cover the payment of the checks. Further, approximately six checks had been written since the closing of the account which had been dishonored because appellant had not deposited any funds to cover their payment.

The appellant contends that the delay in the presentment of the check for payment lends support to his position that there was an agreement between the parties that the check would not be immediately payable. However, the evidence discloses that the check was given by the appellant to the payee after 5:00 P.M. on the 21st of November, 1962. The first time the check could have been presented for negotiation was on November 22, 1962. The check was presented for collection to the local bank of the payee. It was then sent through to the Salt Lake Clearing House, and arrived for payment at the drawee bank in Morgan on the 28th of November, 1962. In the interim, there

were two days which comprised a weekend during which no banking business would be done. As a consequence, it does not appear that there was any unusual delay such as to overcome the jury's determination that there was no agreement to hold back the check. Further, since it was the appellant's contention that the agreement to hold the check was to be for two to three weeks, any delay of a day or two would hardly be sufficient to corroborate his position on the matter.

Additionally, it appeared that the appellant owed substantial sums of money (R. 78), and knew that he had no money in the bank at the time the check was issued (R. 80).

In this case the jury had an opportunity to view the witnesses, observe their conduct and to weigh the contentions of the witnesses. The evidence in this instance is, consequently, sufficient to warrant the jury in finding the accused guilty beyond a reasonable doubt. *State* v. *Tinnin,* 64 Utah 587, 232 Pac. 543; *State* v. *Prettyman,* 113 Utah 36, 191 P. 2d 142.

There is, therefore, no merit to the appellant's contention that the evidence was insufficient to allow the jury to find the appellant guilty beyond all reasonable doubt.

CONCLUSION

The issues raised on appeal in the instant case are patently unmeritorious. The evidence presented to the jury was overwhelming as to the accused's guilt, and was amply sufficient to sustain the jury's verdict. As a con-

sequence, there is no basis for reversal for insufficiency of the evidence. The appellant's contention that the court should have granted a mistrial can only be characterized as an attempt to make a mountain out of a molehill.

This court should affirm.

Respectfully submitted,

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