

1963

State of Utah v. Frank Jerry Owens : Brief of Appellant

Utah Supreme Court

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Supreme Court, Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

Case No.

FRANK JERRY OWENS,

9998

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the District Court
of Weber County, Utah, Honorable
John F. Wahlquist, Judge

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.)

Case No.
9998

FRANK JERRY OWENS,)

Defendant-Appellant.)

APPELLANT'S BRIEF

NATURE OF CASE

This appeal has been taken by the defendant-appellant to set aside his conviction of the crime of forgery, and the sentence imposed thereon.

DISPOSITION IN LOWER COURT

Upon information, and after trial by jury, the jury found the defendant guilty of forgery as charged in the information. The court then ordered the defendant-appellant to serve a term in the Utah State Prison for not less than one year nor more than 20 years.

RELIEF SOUGHT ON APPEAL

Appellant seeks vacation of the jury verdict and the sentence of the court, remand for new trial.

STATEMENT OF FACTS

Kenneth Bramwell is the manager of Bramwell's market located at 212 Washington Boulevard, Ogden, Utah (TR-7). On February 5, 1963, a clerk, Eugene Mahnke, was at the cash register

(TR-3) when a man approached the counter and requested that a money order be cashed (TR-8). Mr. Bramwell was standing nearby stocking the shelves and went to the counter, advising the clerk that he would handle the matter. He asked the person presenting the money order for personal identification, and was handed a drivers license issued in the name of Gerald L. Larson (TR-9). Mr. Bramwell asked where the person lived, and was told Salt Lake City, but that he was staying in Ogden with his aunt, a Mrs. Richards, giving her Ogden address at 323 4th Street (TR-10).

The individual appeared to be about 30 years old, dark complected, weighing 170 pounds, wearing slacks and sport coat (TR-16, 25, 27). He was not wearing glasses. The money order (States Exhibit "A") was then endorsed on the back and cashed. It was later returned by the bank.

Exhibit "A" is the money order which it is claimed was forged, and was identified by Sam Harmon, owner and operator of the Third Avenue Pharmacy in Salt Lake City (TR-47). This money order purports to be signed by Mr. Harmon, and is in the amount of \$90.00, payable to Gerald L. Larson, with remitter, R. A. Larson. Mr. Harmon testified that a series of these printed money orders had been stolen on February 3, 1963, from the pharmacy at Salt Lake City, a fact discovered on February 4, 1963 (TR-48). He identified the serial number on Exhibit "A" as one of those stolen (TR-50), and stated that his signature on Exhibit "A" was not his. He produced a series of processed money orders, Exhibits C-1 through C-10, showing his actual signature. No handwriting expert was called, and the signatures of Harmon on Exhibit "A" and of the C series exhibits appear to be identical.

On direct examination, market manager Bramwell testified that he called Lt. Warner Bruestle

of the Ogden Police Department, who brought to the market two or three days later a series of photographs of criminal suspects he called "Mug" shots (TR-11). Bramwell had examined about eight shots at the market, and claimed he identified the defendant, but admitted that he was confused by the shots because there were two that looked like the defendant, and he stated it did not dawn on him that they were the same person (TR-12). He described many of the individuals in these "Mug" shots (TR-23). When he indicated what appeared to be two individuals, he said the officer advised him that they were the same person (TR-24), and that he was doubtful on his identification until the officer so advised him (TR-25).

At the trial Exhibits B-1 through B-3 were introduced by the State, which purport to be the same "Mug" shots as those above. Mr. Bramwell stated that Exhibit B-2 was the photograph of the defendant (TR-31). He stated that

he did not believe that any of the other exhibits had been previously shown to him (TR-32) and particularly Exhibit B-5, which purportedly was the second photograph he had referred to at the market as being similar to the person cashing the money order.

The State then called Warner Bruestle of the Ogden City Police Department (TR-35). He stated that he had checked the address of Mrs. Richards at 323 4th Avenue in Ogden and that there is no such address (TR-36). He testified that at 629 Morlin Drive in Salt Lake City, the purported address of Harold L. Larsen, who endorsed the money order, a Mrs. Ruby Smith had been living for many years (TR-37). The address on the money order is Marlin Drive. He also had checked at the Department of Public Safety Driver's License Division and stated that they could find no license issued to Gerald L. Larson (TR-37).

The witness then testified that in early February, 1963, the Salt Lake City Police De-

partment came to his office, as they were having the same "problem", and they had the "Mug" shots with them (Exhibits B-1 through B-8). These (TR-37) are the pictures, according to Bruestle, which were taken out to Mr. Bramwell (TR-38). Bruestle stated that Bramwell was positive on identification of Exhibit B-2 and thought that Exhibit B-4 looked like the man, although Bruestle had assured Bramwell each set of photographs were of the same individual. His knowledge was based solely on a conversation with the Salt Lake City Police Department (TR-39). On cross examination, the police officer described in fine detail the presentation of the "Mug" shots to Mr. Bramwell (TR-43). He stated that if Mr. Bramwell testified he had not seen the photographs before, he was wrong (TR-47). Again, on redirect examination, the State's attorney elicited in detail the manner in which the "Mug" shots were laid out at the market, and that the Ogden officer was proceeding on information from the Salt Lake Police

Department who were having the "same trouble", and stated "And in the course of their investigation, they suspected Mr. Owens of being one of the men they were involved with" (TR-36).

Upon objection of defendant at this point, the court admonished the jury to disregard the answer as to the Salt Lake City Police Department.

The State rested, and motion of defendant for dismissal on the grounds of insufficient evidence to go to the jury was denied (TR-53).

The defendant called Mr. James A. Grow (TR-55) of the Ogden City Police Department, who checked defendant in at the Ogden jail.

He described the defendant as weighing 140 pounds, and being 5' 11" (TR-56), and introduced a photograph of the defendant at the jail which was identified as Exhibit D. The

witness testified that the defendant was

wearing a white shirt and a pair of slacks

(TR-57). The defense also called Mr. Eugene

Elmer Mahnke (TR-57) who was the 17-year-old

clerk standing at the market cash register when the money order first was presented (TR-58).

This witness could not remember the weight, height, hair color, or any other detail of the individual cashing the money order, and stated he had no reason to believe that the defendant, sitting in the courtroom, was the same individual (TR-60). The defendant did not take the stand.

The complaint was filed in Ogden City Court on March 27, 1963, and the preliminary hearing was held on April 10, 1963. An information was then filed on April 18, 1963, and the case tried by jury on May 2, 1963 (R-7). There was a 'hung jury', and the case retried on July 9, 1963. The jury found the defendant guilty of forgery as charged in the information, and the court sentenced defendant to the Utah State Prison for not less than one nor more than 20 years.

point 1. IT WAS PREJUDICIAL ERROR OF THE DISTRICT COURT TO ALLOW IN EVIDENCE THROUGHOUT THE COURSE OF TRIAL REPEATED REFERENCES TO CLAIMED ASSOCIATION OF DEFENDANT WITH OTHER ALLEGED CRIMINALS, AND THE VIEWS OF POLICE OFFICERS AS TO HIS GUILT.

In his opening statement, the defendant's attorney declared there would be no dispute as to the commission of the crime, as the defendant had no knowledge of the matter since he was not the individual who presented the money order to the market. So far as the defendant was concerned, the sole issue was then the question of identity. This position was emphasized by defense counsel during trial, when he made certain stipulations of fact relating to the forged money orders and other related matters (TR-52). The position was again repeated during closing argument of defense counsel. Here the question of identity assumed more than ordinary significance, because it became the sole disputed issue.

One of the first questions asked of Bramwell by State's counsel was whether he could identify

the defendant who was sitting in the courtroom as the individual who cashed the money order. At that point he did so, and so far as direct testimony was concerned, this should have ended the matter. Notwithstanding, the State's attorney thereafter embarked upon a consideration of the so-called "Mug" shots which can only carry the implication that these are a series of criminals and included among them is the defendant. There is no justification or need for this. As a result, defense counsel had no alternative except to thoroughly explore these matters on cross-examination of the witness. When Officer Bruestle of the Ogden Police Department took the stand, he related in considerable and unnecessary detail the presentation of the "Mug" shots to Bramwell at the market several days after the alleged forgery. He also testified he received the shots from the Salt Lake City Police Department who were, as he said, having the same difficulty. There can be no question that this testimony im-

planted in the minds of the jury the association of the defendant with known criminals, and the fact that in the minds of the Salt Lake City Police officers who were investigating the stolen money orders from the Harmon Pharmacy, this man was a prime suspect. Typical of the testimony is that appearing on page 37 of the transcript:

"Q. Did you know at the time you exhibited these photos to Mr. Bramwell the identity of the suspect?

A. I didn't know the true identity, no. All I was going by was on the information from the Salt Lake Police Department. Like I stated, they were having the same trouble, and in their investigation they suspected Mr. Owens of being one of the men involved."

Upon objection of defense counsel to this statement, the court admonished the jury (TR-46) to disregard the testimony as to the Salt Lake Police Department. The admonishment was limited, and did not reach testimony of this type which had appeared throughout the record, and as to which there was no need nor purpose to be served by the State's attorney in its introduction. As

a practical matter, the attempt in some regards produced confusion, but it could not erase from the minds of the jury the force of repeated reference to these matters. There was little a defense counsel could do in these circumstances, and he was compelled to rely upon the action of the court in limiting such testimony. To indulge in a series of objections would simply emphasize the harmful and serious nature of this testimony.

The District Attorney was not, however, content to leave it at this. In closing argument (TR-66), despite the admonition, he again covers in detail the "Mug" shots and how this defendant was picked out from a number of known or suspected criminals. He points out that the defendant is not on trial for burglary or for anything which Salt Lake City may have against him (TR-63), and in the context of his remarks emphasizes these matters. In rebuttal, the argument continues at TR-74:

"What does Mr. Bramwell have to gain, psychologically, by taking this man and the

eight pictures that were presented to him and pillorying him before you? What does he have to gain? You are the judge of that."

The prosecuting attorney has thus needlessly and with obvious intent to prejudice the jury established the association of the defendant with other criminals, and the suspicions of the Salt Lake City Police Department that defendant is the man here involved. This practice has been condemned by substantial authority. Thus, 22 C.J.S. 417, Section 609 reads as follows:

"Generally, it may be relevant to show that accused at the time of the commission of the crime was associated with criminals banded together for, and engaged in, the commission of similar crimes. On the other hand, it has been held not proper to show that after the offense in question accused and other persons formed a combination to commit similar crimes, that he lived in a locality inhabited by criminals, that he was acquainted with criminals, that he was intimate with suspicious or guilty persons, or that on the night of the crime he was in the company of the criminal." (Underlining supplied)

It is obvious that the association of criminals banded together in commission of similar

crimes is not here involved. It is also clear that the repeated reference to matters implying defendant is a criminal and acquainted or associated or connected with other criminals is the vice of the State's evidence.

There appear no factually related Utah cases. Similar circumstances have, however, arisen in other States. Thus, in State vs. Whitney, 254 Pac 525 (Ida. 1927), the court held that in a prosecution for obtaining money by false pretenses, the admission in evidence of a circular containing defendant's photograph and description, with the request that the peace officers keep a lookout and arrest him if found, was held erroneous, and served no purpose other than to inflame the minds of the jury and prejudice them against the defendant. Again, in People vs. Frank, 236 Pac. 139 (Calif. 1925), the court held that presentation of evidence showing that on three different occasions the defendant had gone under an assumed name was held prejudicial error. These cases

condemn the admission of evidence of the general type here involved. In State vs. Winget 6 Utah 2nd 243, 310 Pac, 2nd 733 (1957), the court reviewed numerous Utah decisions as well as those from other states on the question of the admissibility of other criminal acts to prove the commission of the crime charged. As here pertinent, the court stated, P. 739:

"However, evidence that a person committed a crime on one occasion is inadmissible to prove his disposition, bad character, or propensity to commit crime as the basis for an inference that he committed the crime for which he is on trial."

See State vs. Neal, 262 Pac. 2nd 757, 758 (Ut. 1953).

These cases deal with the commission of prior crimes. There is, however, a direct analogy between the commission of a crime and association with criminals and the belief of the police departments that, as a conclusion, the defendant was a criminal suspect who likely was guilty, based upon his past record and associations. It

must be noted that the defendant in these proceedings did not take the witness stand, and there is no question raised as to an attack on his creditability.

Is this evidence, which is based upon criminal association and the suspicions, if not the beliefs, of the various police departments, prejudicial error, or does it involve matters going only to the weight of the evidence? There is room for doubt as to the identity of the defendant if all of the evidence is considered. This is indicated by the failure to convict on the prior trial upon evidence which would appear to be somewhat similar to that here presented. Bramwell describes the weight of the person who cashed the money order as being 170 pounds, and asserts he is wearing slacks and a sport coat. When the witness was taken to the Ogden city jail (TR-55) he weighed 140 pounds. This is a substantial variance in individuals, particularly where Mr. Bramwell contends that he saw the witness for

several minutes at a distance of a few feet. Other aspects of the evidence on identification have been considered in the above Statement of Facts. Considered as individual matters, here and there throughout the record, it may be said to go to the weight of the evidence, and thus within the province of the jury. The prejudice lies in the collective impact of these matters on the minds of the jury, and the admission of this evidence constitutes prejudicial error.

Point 2. IT WAS PREJUDICIAL ERROR OF THE DISTRICT C COURT TO FAIL TO INSTRUCT THE JURY THAT IT SHOULD DISREGARD TESTIMONY AND EVIDENCE OF CLAIMED ASSOCIATION OF DEFENDANT WITH OTHER ALLEGED CRIMINALS AND THE VIEWS OF POLICE OFFICERS AS TO HIS GUILT.

This point is closely related to Point 1, and the above argument is also applicable here.

The court, during the course of the State's case, on one occasion did admonish the jury (TR-46) to ignore the statement of the Ogden officer that the Salt Lake City Police Department suspected Mr. Owens of being one of the men in-

olved in the theft of the money orders from the
pharmacy. However, nowhere in the instructions
to the jury is there any attempt to deal with the
references to association of defendant with other
criminals and the fact that the defendant is sus-
pected of being the person involved in this crime
by the Salt Lake City police. The court should
have instructed the jury to disregard this evi-
dence as it related to the question of identity,
which was the issue involved so far as this de-
fendant was concerned. It should have so in-
structed irrespective of request, as the instruc-
tions must be upon all of the law of the case.

CONCLUSION

It is submitted that the verdict of guilty
must be set aside, and the case remanded for a
new trial.

Respectfully submitted,

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