

1969

## State Of Utah v. The Honorable Melvin H. Morris, Jr. : Brief of Appellant

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# In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff,

vs.

THE HONORABLE MELVIN H. MOORE,  
JR., Salt Lake City Court,

Defendant-Respondent.

## BRIEF OF APPEAL

Appeal from the order of the District Court,  
Salt Lake County, State of Utah, Judge  
presiding.

# FILED

MAY 8 - 1969

Clerk, Supreme Court, Utah

SUMNER J. HATCH

707 Boston Building  
Salt Lake City, Utah

Attorney for Respondent

GOVERNOR  
COMMISSIONER  
L. F. ...  
DEPUTY ...  
MEMBER ...  
SALT LAKE ...  
ATTORNEY ...

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# In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Appellant,

vs.

THE HONORABLE MELVIN H. MORRIS,  
JR., Salt Lake City Court,

Defendant-Respondent.

Case No.  
1473

## BRIEF OF APPELLANT

### NATURE OF THE CASE

This is an appeal from an order of the Third District Court in and for Salt Lake County, denying a petition for a writ of mandamus requiring defendant, the Honorable Melvin H. Morris, Jr., one of the Judges of the Salt Lake City Court, to vacate an order granting a motion for bill of particulars prior to preliminary hearing on a public offense charged in a complaint in accordance with Title 77-11-1, Utah Code Annotated, 1953 as amended.

### DISPOSITION IN LOWER COURT

The petition for writ of mandamus was denied after hearing before Stewart M. Hanson, of the Third District Court in and for Salt Lake County, State of Utah, after the court concluded that the defendant, the Honorable Melvin H. Morris, Jr., had power to order a bill of particulars under the provisions of Section 77-11-1, and Chapter 21 of Title 77, Utah Code Annotated, 1953, as amended.

## STATEMENT OF FACTS

During the month of November, 1968, several complaints were issued through the Salt Lake County Attorney's Office, charging one LaMar Edward Kay and Seldon Clarence Darrow with the crimes of grand larceny and forgery, incident to a large misappropriation of funds from the Church of Jesus Christ of Latter-day Saints. The defendants named in the various complaints were arrested and arraigned and a date for preliminary hearing was set by the court. Thereafter, the attorney for defendant, LaMar Edward Kay, filed with the court a motion and order for bill of particulars in five of the six cases then pending against the said LaMar Edward Kay. The attorney for Seldon Clarence Darrow subsequently joining in said motions.

The motions of bill of particulars were heard on the 4th day of December, 1968, before the Honorable Melvin H. Morris, Jr., at the request of Sumner J. Hatch, the attorney for the defendant, LaMar Edward Kay. Following argument on each of the motions, the court entered its order granting a bill of particulars in five of the cases then awaiting preliminary hearing and directed the County Attorney to answer each bill of particulars filed by the defendants, LaMar Edward Kay and Seldon Clarence Darrow, before the close of business on December 6, 1968.

The court based its ruling in granting the motions of said defendants for a bill of particulars on the case of *State vs. Gunn*, 102 U. 422, 132 P. 2d 109, with no apparent consideration having been given to the requirements of Section 77-21-9, of the Utah Code Annotated, 1953, as amended, or to the form and contents of the motions filed with the court.

The State, by and through the Salt Lake County At-

torney's Office, then filed a petition in the Third District Court in and for Salt Lake County, for a writ of mandamus for the purpose of requiring the defendant, the Honorable Melvin H. Morris, Jr., to vacate the order of December 4, 1968. The petition was denied by Judge Stewart M. Hanson, after argument, and his decision denying the State's petition is appealed.

### RELIEF SOUGHT ON APPEAL

Appellant seeks a determination by this court of whether or not the State is required by law to provide a bill of particulars to an accused prior to preliminary hearing and before an information or indictment has been issued within the meaning and under the provisions of Title 77-11-1, 77-21-8, and 77-21-9, of the Utah Code Annotated, 1953, as amended. Should the court find that an accused charged with a public offense triable upon information and indictment is not entitled to a bill of particulars prior to preliminary hearing, appellant seeks reversal of the lower court's decision denying appellant's petition for writ of mandamus; or, in the alternative, an order invalidating the order of the Honorable Melvin H. Morris, Jr., granting the motions for bill of particulars.

### ARGUMENT

#### POINT I

THE LOWER COURT ERRORED IN ITS CONCLUSION THAT THE DEFENDANT, THE HONORABLE MELVIN H. MORRIS, JR., HAD POWER TO ORDER A BILL OF PARTICULARS UNDER THE PROVISIONS OF TITLE 77-11-1, AND CHAPTER 21 OF TITLE 77, UTAH CODE ANNOTATED, 1953, AS AMENDED, PRIOR TO PRELIMINARY HEARING AND BEFORE INFORMATION OR INDICTMENT HAD ISSUED.

Title 77, Chapter 11, Section 1, of the Utah Code Annotated, 1953, sets forth the requirements of "Complaints Before Magistrates". The last paragraph of Section 77-11-1, states:

"In cases of a public offense triable upon information, indictment or accusation, the *complaint, the right to a bill of particulars* and all proceedings and matters in relation thereto *shall conform to and be governed by the provisions of the new chapters 21 and 23 of Title 77, Utah Code Annotated 1953, enacted by Chapter 118, Laws of Utah.*"  
(Emphasis Added)

The section cited above specifically states that the right to a bill of particulars shall be governed by the provisions of Title 77, Chapter 21 and 23, as amended. Article 1, Section 12, of the Utah State Constitution and Section 77-21-9, of the Utah Code Annotated, 1953, as amended, set forth clearly when the right to a bill of particulars shall arise, to wit:

"*When an information or indictment charges an offense in accordance with the provisions of section 77-21-8, but fails to inform the defendant of the particulars of the offense, sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of this state, the court may, of its own motion, and shall at the request of defendant, order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; \* \**  
\* \*"

(Emphasis Added)

It is clear that the right to a bill of particulars arises when an information or indictment has been issued in accordance with Section 77-21-8, but fails to inform the defendant of the par-



iculars of the offense with which he is charged so as to enable him to prepare his defense. However, until the defendant files with the court a proper motion for a bill of particulars alleging therein that the information or indictment charging the offense fails to inform him of the particulars of the crime charged so as to enable him to sufficiently prepare a defense, the requirements of 77-21-9, have not been met and therefor the granting of a bill of particulars would not be proper. (See *State vs. Riddle*, 112 U. 356, 188 P. 2d 449).

In the instant case before the court the defendants, LaMar Edward Kay and Seldon Clarence Darrow, in their motions for bill of particulars did not state that the complaint failed to inform them of the particulars of the offense charged and wherein the complaints were so general that they could not properly prepare a defense so as to warrant the granting of the motions for a bill of particulars. (*State v. Riddle*, *Supra*).

It is equally clear upon reading the provisions of 77-21-9, that the right to a bill of particulars arises only when an information or indictment is issued and fails to sufficiently inform a defendant of the particulars of the offense with which he has been charged so as to enable him to properly prepare his defense. Under our present system of criminal procedure, an information or indictment generally does not issue until such time as a preliminary examination has been held, and the State has met the burden required by Section 77-15-19, of the Utah Code Annotated, and the accused is ordered to stand trial. After the information or indictment has been issued subsequent to his being bound over from the City Court, the defendant for the first time is required to enter a plea to the information or indictment and a right to a bill of particulars attaches at this time, provided that the information or indictment fails to

inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. To so hold that a defendant or an accused is entitled to a bill of particulars as a matter of right prior to preliminary examination upon a complaint before a magistrate, before information or indictment has been issued would be to allow a bill of particulars to become a device to compel the prosecution to give the accused a preview of all evidence on which the State relies to sustain the offense charged and would be directly contrary to the decision rendered by this court in the case of *State vs Lack* U. ... , 221 P.2d 852.

The purposes of a preliminary examination have been stated to be threefold:

(1) To inquire concerning the commission of a crime and the connection of the accused with it, in order that he may be informed of the nature and character of the crime charged against him, and, if there is probable cause of believing him guilty, that the State may take the necessary steps to bring him to trial. (2) To preserve the evidence and keep the witnesses within the control of the State. (3) To determine the amount of bail.

The preliminary examination should not be made available to the accused for the purpose of ascertaining in advance all of the evidence relied upon by the prosecution. (See C.J.S. Criminal Law, Section 331-332) to require a bill of particulars to issue prior to a preliminary examination on a complaint before a magistrate would be to convert the preliminary examination into a complete discovery proceedings in favor of the accused which is not sanctioned by law. To allow a defendant the right to a bill of particulars upon a complaint before the mag-

istrate prior to preliminary examination without qualification or restriction would result in very obvious, far reaching consequences.

It is the contention of the State that the proper meaning of Section 77-11-1, is that the complaint before a magistrate charging a public offense triable upon information, indictment or accusation shall be governed by the new chapters of Title 77, 21 and 23, as to content and form. Sections 77-21-8 and 77-21-47, set forth the requirements as to charging the offense and as to the form to be used upon information, indictment or accusation, and, in this instance, complaints before magistrates. To expand the plain and clear meaning of Sections 77-11-1 and 77-21-9, to include a right to a bill of particulars before preliminary examination would be to place an interpretation upon these sections outside the wording of these sections as they presently exist.

It is true that the Utah Supreme Court, in the case of *State vs. Gunn*, Supra, stated at page 110:

"One charged before a magistrate with a crime triable on information or indictment is entitled upon demand as a matter of right to a bill of particulars *where the complaint charges such a crime by short form.*"  
(Emphasis Added)

However, it is the contention of the State that this decision is not controlling here, in that it was rendered under a former law, Section 105-11-1, R.S.U. 1933, as amended, which has since been repealed. The court, in the Gunn decision, at the time it discussed the question of whether or not the lower court acted properly in granting defendant's motion for a bill of particulars prior to preliminary examination, refused to decide the question and stated:

“Whether the magistrate would have been justified in overruling such demand, need not be determined on this appeal.”

The refusal of the court to decide this question casts considerable doubt as to whether or not the court, in fact, meant that an accused would be entitled to a bill of particulars as a matter of right on a complaint before a magistrate where the complaint is in any form other than a short form. It is important to note that the complaint issued by the State against the defendants, LaMar Edward Kay and Seldon Clarence Darrow, contained particulars of the offenses with which they were charged and could not be considered short form. Further, the motions filed by the defendants for bill of particulars in each of the cases were completely void of any allegation that the complaints failed to inform the defendants of the particulars of the offenses which they were charged with.

The lower court, in failing to take into consideration the requirements of Section 77-21-9, as to when the right of a bill of particulars shall arise, and relying completely upon the decision in *State vs. Gunn, Supra*, in denying the petition of the State was clearly improper and the decision should be reversed.

## CONCLUSION

The case at bar admittedly presents an important question and the appellant is aware of the policies which may be asserted in support of the respondent's position. But equally compelling are the arguments in support of the expressed purposes of a preliminary examination and the role it plays in our criminal procedures today.

To hold that an accused charged on a complaint before

a magistrate triable upon information or indictment is entitled to a bill of particulars as a matter of right upon demand and to issue a bill of particulars prior to preliminary hearing would be to convert the preliminary examination into a complete discovery proceedings in favor of the accused and destroy the original purpose for which preliminary examinations were originally intended, and thereby place a greater burden upon the State than that which is sanctioned by law.

Recognizing this obligation and mindful of the societal interest here in conflict, appellant respectfully submits to this court the difficult question of whether an accused is entitled to a bill of particulars as a matter of right upon a complaint which charges a public offense triable upon information or indictment prior to a preliminary examination and an information or indictment being issued.

Respectfully submitted,

GORDON B. CHRISTENSEN

Salt Lake County Attorney

E. H. FANKHAUSER

Chief Criminal Deputy County  
Attorney

Metropolitan Hall of Justice

Salt Lake City, Utah

Attorneys for Appellant