1969

The State of Utah v. John Richard Mark Miller : Brief of Appellant

In The Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff-Respondent,

-vs.-

JOHN RICHARD MARK MILLER,

Defendant-Appellant.

BRIEF OF APPELL

Appeal from Jury Verdict of C
Third District Court in and for
The Honorable Merrill C. Fa

JAY W.
22
Salt Lake C
Attorney

VERNON ROMNEY
Attorney General
State Capitol
Salt Lake City, Utah
Attorney for Respondent

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Respondent,
-vs.-
JOHN RICHARD MARK MILLER,
Defendant-Appellant.

Case No. 11723

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

Appellant, John Richard Mark Miller, appeals from a conviction of issuing a check against insufficient funds in Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

On the 17th day of March, 1969, appellant, John Richard Mark Miller, was found guilty of issuing a check against insufficient funds by a jury in Third District Court, Salt Lake County, Utah; whereupon, appellant, on the 7th day of April, 1969, appeared

before the Honorable Merrill C. Faux, District Court for sentencing, and appellant was sentenced to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction, a setting aside of the sentence and an order awarding a new trial.

STATEMENT OF FACTS

On January 16, 1968, defendant, John Richard Mark Miller, wrote a check (State's Ex. 1) for $95.00 against Walker Bank & Trust Co., University Branch, Salt Lake City, to the Deseret Inn, Salt Lake City, Utah, in settlement of a bill for the motel's services and some cash. (T. 52) The check was written in the presence of the motel's employee, Erma Gelruth, (T-52) and it was later returned. (T-52) Further, it was established that no account existed at the Walker Bank, Sugarhouse Branch in January, 1968, in the name of John R. Miller or J. R. Miller. (T-61) Also, according to Harry Croyle, Operations Officer at the involved bank, and based on the account number of State's Ex. 1, an account had existed for J. R. Miller but was closed by the bank in May, 1966. However, the last account in that bank held by the name of J. R. Miller was in May of 1967.

According to the defendant's version of the facts he was at the Deseret Inn Motel and wrote the check in question for the payment of his bill. (T-79) He had

opened the account involved in the summer of 1965, but was unaware of its being closed until January, 1968, when a Mr. Glad informed him the account was closed. (T-80) However, the defendant had received a check for $347 previous to January 16, 1968, and having endorsed the same asked Mr. Glad to deposit $200 in the account and bring the balance of cash to him.

Mr. Miller endeavored to inform the court and jury what he believed had happened to the money and why it was not deposited but was denied an opportunity to do so. See proceedings (T-83-85).

Defendant submitted two instructions bearing on the question of intent to defraud, (T-26, 27) which the court refused to give, to which counsel duly excepted. (T-102)

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S REQUESTED JURY INSTRUCTIONS INVOLVING INTENT TO DEFRAUD AS RELATED TO THIS CASE.

By the terms of § 76-20-11 Utah Code Ann. 1953 (as amended) it is unlawful for any person, with intent to defraud, to utter a check when at the drawing of such check he knows he has not sufficient funds to pay the draft in full upon its presentation for payment. It is recognized in the State of Utah that the mere fact funds are not in an account at the writing of a check, though prima facie evidence of intent, is not conclusive evidence of an intent to de-

fraud, and efforts by a defendant to place funds to cover the draft at the time of presentment may be considered to negate the presumption of intent to defraud. *State v. Coleman*, 17 Utah 2d 166, 406 P.2d 308 (1965) The instructions given by the court imply that the writing of a check at a time one realizes his account has not the amount of funds written in the draft is all that is necessary in the crime of insufficient funds. Defendant's instructions would have properly clarified the law as stated in *Coleman, supra* and informed the jury of its duty to consider defendant's attempt to meet his obligation on the draft; a failure to give the same was error.

In *Coleman, supra* the Supreme Court dismissed a conviction against defendant for an insufficient funds check where the evidence showed defendant placed funds in his acocunt to cover a check after it was written, though the funds were inadequate at the time of presentment. However, the court did recognize that the trial court's instruction to the jury, that one who had no funds and knowledge of no funds at the writing of the check was guilty of the crime, was an improper statement of the law. In the instant case, the defendant offered evidence of efforts to place funds in the bank to cover the check written. However, the courts instructions involving this offense as set forth in numbers 9, 10, and 11, (T-19, 20, 21 respectively) when read together leave the impression that a lack of funds and a knowledge of such lack of funds at the time of the writing of the draft is all that is required for the offense. Paragraphs 3 and 4 of instruction 11 make reference to ". . . the

payment of said check upon its presentation at said bank . . ."; however, each paragraph is referenced to paragraph 1, which sets forth the time of the writing, and consequently, it is not clear whether the jury should or may consider all the factors involved, including those occurring after the writing of the draft.

Had the court granted defendant's requested instructions T-26 and 27, it would have been clear to the jury that defendant's story, if believed, could have been considered to negate the presumption of intent to defraud. However because of the court's failure to so do, the jury was left with an erroneous impression of the law i.e. that mere lack of funds and knowledge thereof at the time of writing constitutes the crime. Certainly this is not the law in Utah. *State v. Coleman, supra.*

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO TESTIFY AS TO INFORMATION HE RECEIVED REGARDING HIS CHECKING ACCOUNT IN THAT SUCH TESTIMONY WAS OFFERED FOR THE PURPOSE OF EXPLAINING DEFENDANT'S CONDUCT AND NOT TO ASSERT THE TRUTH OF THE STATEMENTS MADE.

As a general rule of evidence, involving hearsay, one may not testify as to non-judicial statements of others where such assert the truth of the statement made. 29 Am. Jur. 2d 555, § 497. However, where one seeks to give evidence of another's statement to explain his conduct and good faith in relation to

that statement, such is regarded as original and material evidence, and the same is not hearsay, and is admissable. *Allstate Insurance Co. v. Godwin*, 426 S.W.2d 652 (Tex. App. 1968); *Thruway Service City Inc. v. Townsend*. 116 Ga. App. 379, 157 S.E.2d 564 (1967); 31A C.J.S. 676, 677 § 257; Jones on Evidence, Civil Cases, 3rd Ed. § 330. During the course of trial defendant Miller attempted to explain what information he received about his checking account to explain not only his state of mind at the time of the writing but also to explain his conduct following the receipt of such information. (T-83-85) The court's refusal to allow such testimony was error and prejudicial to the defendant's case.

In *Allstate Insurance Co. supra*, plaintiff at trial was allowed to testify, over defendant's objection, that her supervisor had explained plaintiff's medical expenses, resulting from an on-the-job injury, would be covered. Such was entered by plaintiff to explain her reason for waiting several months before commencing an action for damages against defendant insurance company. On appeal, the court of appeals upheld the admissibility of the plaintiff's testimony as to another's statement and adopted the rule of Jones on Evidence, Civil Cases, 3rd Ed. § 330:

> **Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay.**

Plaintiff's testimony as to phone conversations held with defendant's agents following damage to plaintiff's truck, caused by negligence of defendant's agents, was held admissable in *Thruway Service City Inc., supra,* to explain plaintiff's conduct, and was ruled not to be hearsay. Defendant"s agents had filled plaintiff's diesel truck with gasoline, and plaintiff was allowed to show he had his engine torn down for an estimation of damage at the suggestion of defendant's agents. In 31A C.J.S. Evidence § 257 pp. 676-677, the following is found:

> **Where a person's knowledge of a particular fact is relevant, it may be shown that an unsworn statement of another person as to its existence was brought to his attention in the same way that any other relevant statement may be shown to have been made to him. . . . A witness may testify as to statements made to him by another, to establish lack of knowledge of the witness as to certain matters.**

Defendant was deprived of an opportunity to explain his good faith at the time of writing the check in question, or in other words to explain how he first learned his account was closed. Further, he was denied the chance to explain the information he received regarding his account which in turn would clarify his subsequent conduct. Based upon the authorities cited, such evidence was material and admissable, and to deny its admissibility was error.

CONCLUSION

For the foregoing reasons defendant's conviction should be reversed, the sentence set aside, and a new trial awarded.

Respectfully submitted,

JAY V. BARNEY

231 East 4th South
Salt Lake City, Utah

Attorney for Appellant