1969

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

JOHN RICHARD MARK MILLER,
Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM JURY VERDICT OF
THIRD DISTRICT COURT, IN AND
COUNTY, THE HONORABLE
JUDGE, PRESIDING

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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 RESPONDENT

STATEMENT OF NATURE OF CASE

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

DISPOSITION IN LOWER COURT

Appellant, John Richard Mark Miller, was found guilty of issuing a check against insufficient funds by a jury in the Third District Court, Salt Lake County, Utah. On the 7th day of April, 1969, appellant appeared before the Honorable Merrill C. Faux, District Court Judge, for sentencing

and was sentenced to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgment of the trial court be affirmed.

STATEMENT OF FACTS

Respondent accepts appellant's Statement of Facts but feels that it omits the following pertinent facts which are essential to a full and accurate account.

1. Appellant was informed on January 18th, two days after he uttered the check, that the account he had written the check on was closed (T. 98).

2. Appellant did not go to the Deseret Inn and offer to make the check good (T. 99).

3. Appellant did not deposit funds in the bank or make arrangements with the bank to cover the check when it was presented (T. 86).

4. Appellant left the State knowing he had no funds or credit with the drawee bank to cover the check (T. 86, T. 99).

5. It is common knowledge, which this Court can take judicial notice of, that Walker Bank & Trust Co., University Branch, Salt Lake City, Utah, maintains outside deposit facilities for the convenience of those who wish to make deposits to their accounts after banking hours.

ARGUMENT

POINT I.

NO ERROR RESULTED FROM THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTIONS INVOLVING INTENT TO DEFRAUD.

Instruction number 10 (T. 20) adequately sets forth the governing principle of law in this case. It states that a prima facie case of intent to defraud is made out where one utters a check knowing that at the time of presentation no funds will be in the account to cover it. The instruction goes on to explain that this prima facie case of intent to defraud can be rebutted by other evidence or discredited by circumstances, but if it is not it becomes conclusive of the fact of guilt. Appellant claims that his requested instructions (T. 26 and 27) present a more clear statement of the law than the instructions given by the court (T. 19, 20, 21). The general rule applicable to this situation is:

> "It is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology and may not complain on the ground that his requested instructions were refused if the court, on its own motion, or otherwise, correctly announced the substance of the law applicable to the case, and this is true even though the requested instructions stated the principles involved more clearly and definitely than those given. *People* v. *Barber*, 62 C. A. 2d 206, 213, 144 P. 2d 371, 374 (1943). See also the numerous cases cited in *Pacific Digest*, Vol. 12 § 829 (1)."

The Utah Supreme Court is among those following the above cited general rule. *State* v. *Berchtold,* 11 Utah 2d 208, 357 P. 2d 183 (1960).

The instructions given by the court in the present case stated the law in accordance with Utah Code Ann. § 76-20-11 (1953), as amended, and *State* v. *Coleman,* 17 Utah 2d 166, 406 P. 2d 308 (1965). The instructions the court refused to give emphasized specific parts of defendant's testimony. The instructions given by the court allowed the jury to consider the factors emphasized in the instructions requested by the defense. Instruction number 10 told the jury that the prima facie case of intent to defraud, which was created by uttering a check at a time when the maker knew he did not have funds in the bank to cover it upon its presentment, could be rebutted by other evidence or discredited by the circumstances. Under this instruction, the jury was charged to consider all the evidence and circumstances, including the testimony of the appellant. Under the instruction, the jury could have found, had it believed the evidence appellant offered, that the prima facie case of intent to defraud, created by the uttering of the check, had been rebutted by appellant's purported subsequent efforts to cover it.

Appellant relies heavily on the *Coleman* case. In *Coleman* this Court said:

> "It is not to be doubted that the making and delivering of a check when the maker does not have sufficient funds or credit with the bank to cover it,

> in the absence of any other proof, is sufficient proof to make a prima facie case of intent to defraud as Sec. 76-20-11 provides. However, any other evidence bearing upon the accused's intent must be considered. For example, even if he did not have sufficient money or credit in the bank at the instant the check was made and delivered, if the proof showed that he had arranged to have money or credit in the bank by the time the check is presented for payment, that would negate any intent to defraud; and the evidence need raise only a reasonable doubt as to his having such intent in order to preclude his conviction." *State* v. *Coleman*, 17 Utah 2d 166, 168, 406 P. 2d 308, 310 (1965).

The precise holding of *Coleman* is: where one utters a check at a time when he does not have sufficient funds in his account to cover it, but subsequent to the time of drawing and prior to the time of presentment he deposits sufficient funds to cover it, the fact of his making the deposit negates any intent to defraud. Appellant made no deposit; therefore, the statements of the Court in *Coleman*, *supra*, are dicta and not controlling under the circumstances of the present case. However, instruction number 10 given by the court in the present case is in perfect harmony with the above cited quotation of the Court.

POINT II.

NO REVERSIBLE ERROR RESULTED FROM THE COURT'S REFUSAL TO ALLOW APPELLANT TO TESTIFY AS TO INFORMATION CONCERNING HIS CHECKING ACCOUNT RECEIVED FROM A THIRD PARTY.

Although the principle of law quoted at the bottom of page 6 of appellant's brief may be an accurate statement of law as a general rule, the exclusion of the proffered evidence in the present case does not warrant reversal of appellant's conviction. Utah Code Ann. § 77-42-1 (1953) provides:

> "After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

Appellant testified that he was told two days after uttering the check that the account was closed (T. 98), that he did not deposit funds in the bank or make arrangements with the bank to cover the check when it was presented (T. 86), that he did not go to the Deseret Inn and offer to make the check good (T. 99), and that he left the state knowing he had no funds in or credit with the drawee bank to cover the uttered check (T. 86, T. 99). In the context of this case, it is difficult to imagine any testimony that appellant could have given that would have negated his apparent intent to defraud. Appellant attempted to testify as to what Mr. Glad had told him concerning the money appellant said he sent with Mr. Glad to deposit to appellant's account. Appellant's contention was that the hearsay rule was not

applicable to this testimony because it was not offered to prove the truth of what Mr. Glad said, but rather as circumstantial evidence of appellant's state of mind. Appellant contends that the proffered testimony would have shown he acted in good faith in leaving the state without covering the check he knew was written on insufficient funds. Even were we to assume that the proffered testimony had enough probative value to be relevant in light of the other facts already in evidence, the trial judge did not abuse his sound discretion in excluding it. A common law rule of evidence which has been codified in California provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury." *West's Annotated California Evidence Code*, § 352 (1965).

The comparatively insignificant probative value of the proffered testimony coupled with the difficulty the jury would have had in considering the proffered testimony not for the truth of the facts asserted therein, but only as circumstantial evidence of appellant's state of mind, support the trial judge's ruling excluding the evidence.

The following language of this Court is as apropos to the present case as to the case from which it was taken:

"We are also conscious of the fact that a trial in the courts of this state is a proceeding in the interest of justice to determine the guilt or innocence of the accused and not just a game. We will not reverse criminal causes for mere error or irregularity. It is only when there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted. The defendant was entitled to a full and fair presentation of the case to a jury of unbiased citizens and to have his rights safeguarded by competent counsel. This has been done. *State* v. *Neal,* 1 U. 2d 122, 126-127, 262 P. 2d 756, 759 (1953). See also: *State* v. *Valdez,* 19 U. 2d 426 at page 429, 432 P. 2d 53 at page 55 (1967)."

POINT III.

THE CHANGE EFFECTUATED IN UTAH CODE ANN. § 76-20-11 (1953) BY THE 1969 LEGISLATURE DOES NOT REQUIRE THAT THE PENALTY AND SENTENCE AGAINST THE APPELLANT BE MODIFIED TO CONSTITUTE A MISDEMEANOR.

Appellant discusses the question of law raised by Point III solely from the common law standpoint completely ignoring the fact that Utah has a statute governing this situation, Utah Code Ann § 68-3-5 (1953).

In *Bell* v. *Maryland,* 378 U. S. 226 (1964), the Court avoided the real issue of the case (see the opinion of Justice Douglas and the opinion of Justices Black, Harlan, and

White, especially page 321), and grabbed onto the general rule at common law that repeal of a criminal statute requires dismissal of any pending criminal proceeding. The Court, on page 232 and the following six pages, attempted to show that the general saving clause in Maryland probably would not be applied. The Court had to make this showing in order to support its holding, because it recognized that the saving clause statute, if applicable, would nullify the common law rule.

Appellant also relies on *Pleasant Grove City* v. *Lindsay*, 41 Utah 154, 125 Pac. 389 (1912), without mentioning that the holding of that case probably would have been different had the case involved the repeal of a statute by a statute rather than the repeal of an ordinance by a statute. After setting forth Utah's general saving clause statute, the Court said at page 162:

> "Similar, if not identical, provisions are found in many of the states of the Union, and, so far as we have been able to learn, it has universally been held by the courts that such provisions were not intended to have, and do not have, any application to *municipal ordinances*, or to any proceeding instituted under them."

In short, the reason why the judgment in *Lindsay* was not saved by the saving clause is that the savings clause does not apply to ordinances. The present case involves the repeal of a statute by a subsequent statute, so the holding in *Landsay* is not applicable, but the saving clause is.

The Utah general saving clause provides:

> "The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed." Utah Code Ann. § 68-3-5 (1953).

Acting under a constitutional provision similar in wording to the Utah savings clause above quoted, the Oklahoma Criminal Court of Appeals held:

> "The repeal or the amendment of a statute prescribing the punishment for an offense after final judgment has been pronounced, and while an appeal therefrom is pending, will neither vacate or modify such judgment, nor arrest the execution of the sentence when there is an affirmance of the judgment and sentence." *Alberty* v. *State*, 140 Pac. 1025, 1031 (Okla., 1914).

The sentence in the present case is saved by Utah Code Ann. § 68-3-5 (1953). Any modification of appellant's sentence lies with the Board of Pardons and Paroles, not with this Court.

CONCLUSION

The rulings of the trial court in refusing some of appellant's requested instructions and in excluding some of appellant's proffered evidence do not warrant a reversal of appellant's conviction. Nor does the change in the law

subsequent to appellant's conviction and sentencing entitle appellant to be re-sentenced under the new law. Therefore, appellant's conviction should be affirmed without remand for modification.

Respectfully submitted,

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