1967

The State of Utah v. Virgil S. Redmond : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

VIRGIL S. REDMOND,

Defendant-Appellant.

Case No. ~~10,401~~ 10610

APPELLANT'S BRIEF

Appeal from verdict of jury and sentence of court of the Third District Court of Salt Lake County Honorable Aldon J. Anderson presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

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Case No. 19,401

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Criminal prosecution for allegedly uttering a factitious check.

DISPOSITION IN LOWER COURT

Defendant was sentenced to a term in the State Prison after guilty verdict.

RELIEF SOUGHT ON APPEAL

Defendant seeks a new trial and an order compelling the prosecution to make available to him the other checks of the same series as the check charged in the information which have been gathered up by the police and are being suppressed by the prosecution and withheld from defendant.

STATEMENT OF FACTS

During April, 1964, Tom Stoker, a witness for the prosecution, opened a bank account (R. 185) under the name of Prudential Federal Adjusters (R 186) in a Salt Lake City Bank (Ex. 2 & 3) by representing himself as "C. Coon" (Ex 1), had checks imprinted with that name (R188), typed a large number of checks on that account each for approximately the same amount, each naming C. J. McCall as payee and each of which he signed Carl J. Coon except the check herein charged which he signed Cal J. Coon. (R 267-268). Approximately 50 checks were negotiated over a week-end from that series. (R 268) One such check was cashed at Makoff's. Defendant is charged herein with uttering that check.

The police and prosecution gathered up and withheld from defendant and his counsel all of the bank records pertaining to the bank account opened by Stoker and upon which said checks were drawn and all of the checks drawn on that account which were a part of the series mentioned above. (R 598). Without access to those records and checks defendant has been unable to learn the names of the persons who accepted checks of that series or to locate and identify persons who cashed those checks for use as witnesses to establish that it was a third person and not the defendant, who cashed those checks and the check with which he is charged herein. (R 598)

Prior to preliminary hearing of this matter Judge Beck ordered the County Attorney to furnish said checks and other requested information pursuant to a demand for a bill of particulars. The checks and records were not furnished and defendant's motion to dismiss the complaint

for failure to furnish that information was heard before Judge Neeley who denied the motion. Judge Hanson of the District Court denied a petition for an extraordinary writ to compel furnishing of said checks and his decision was affirmed by this Court on appeal. *Redmond v. City Court*, 17 U2d 95, 404 P2d 964. In that decision the Court underscored the fact that said proceeding was taken in connection with a preliminary hearing and noted that it was on a petition for an extraordinary writ, apparently to indicate that we were not to be precluded from raising those questions in this appeal.

Defendant asked for substantially the same information in a request for a bill of particulars in the District Court (R596-603). Extensive arguments were heard by the Court (R 597-602; R 606-618) prior to trial concerning defendant's request for access to those checks, etc., however Judge Anderson ruled that evidence concerning checks other than the one charged in the information was not material to the issues in this case (R 615) after hearing argument from the prosecution to the effect that evidence concerning said other checks would be wholly inadmissable at the trial and immaterial to the issues (R 620-621) and denied defendant's motion for access to those checks. Defendant reasserted and reargued his motion for access to the other checks that were a part of said series of checks at the commencement of the trial (R 597-603; R 625), during the course of the trial (R 356-59) and also his motions for a continuance (R 358) and for a mistrial (R 358), all of which were denied by the Court.

At the time defendant was arrained the information

charged him with uttering a check for the payment of money of C. J. McCall (R 1), however the information was amended when a co-defendant was arrained to charge uttering a check for the payment of money of Carl J. Coon (R 1; R 605. Defendant has never been given a preliminary hearing on a charge pertaining to uttering a check for payment of money of Carl J. Coon.

At the time of arrainment defendant requested that the witnesses called at the trial be limited to those listed on the information or that defendant be furnished with the names of additional witnesses which the prosecution intended to call at the time of trial. (R 607). The District Attorney agreed to furnish the names of additional witnesses to be called at the trial as soon as they became known to him (R 607), however no additional names were endorsed on the information or furnished to the defendant. Defendant objected to calling of witnesses for the prosecution whose names had not been supplied (R 355-358), moved for a continuance or mistrial (R 358), however his motions were denied and approximately 14 additional prosecution witnesses who were not named in the information and who had not testified at the preliminary hearing were permitted to testify for the State. Many of these witnesses were persons who had cashed other check which were a part of the series sought by defendant, and were persons whose names were withheld from defendant by suppression of the other checks from defendant by the prosecution. Defendant had no opportunity to prepare to meet the testimony of these additional witnesses, much of which testimony was vague and indefinite.

The Court permitted the prosecution to introduce

other checks of the series which had been withheld by the prosecution from defendant into evidence and permitted persons whose identity had been withheld from defendant and suppressed by the State to testify and to allegedly identify the defendant as the person who cashed other checks of the series sought by defendant. (Ex 4 & 9). Defendant was unable to produce similar evidence from other persons who had cashed similar checks from that series because of suppression of the other checks from that series by the prosecution.

POINT I

IT IS A DENIAL OF DUE PROCESS OF LAW TO PERMIT THE PROSECUTION TO SUPPRESS EVIDENCE FAVORABLE TO THE DEFENDANT

Suppression by prosecution of evidence favorable to defendant is a denial of due process, irrespective of the good or bad faith of the prosecution, 21 AM. Jur 2d, *Criminal Law* Sec. 225; 33 ALR2d 1421, and is a violation of the rights secured by the fifth amendments *Curtis v. Rives*, 75 Ap DC 66, 123 F2d 936 and of the fourteenth amendment to the U. S. constitution. *Mooney v. Holohan*, 294 US 103, 79 L.3d 79 L.ed. 791, 55 S Ct 340, 98 ALR 406, reh den 294 US 732, 79 L. ed 1261 55 S Ct 511; *Pyle v. Kansas*, *Mooney v. Holohan* (1935) 294 US 103, 79 L. ed. 791, 55 S Ct 340, 98 ALR 406, reh den 294 US 732, 79 L. ed. 1261, 55 S Ct 511; *Pyle v. Kansas* (1942) 317 US 213, 87 L. ed. 214, 63 S Ct 177; *White Thunder v. Hunter* (1945 CA 10th Kan) 149 R3d 578, cert den 325 US 889, 89 L. ed. 2002, 65 S Ct 1579, 141 F2d 500; *Pyle v. Amrine* (1945) 195 Kan 458, 156 P2d 509. cert den 328 US 749, 90 L. ed.

448, 66 S Ct 45, reh den 326 US 809, 90 L. ed. 493, 66 S Ct 165; U. S. ex rel. *Montgomery v. Ragen* (1949, DC Ill) 86 F. Supp 382; *Woollomes v. Heinze* (1952, CA 9th Cal) 198 F2d 577, cert den 344 US 929, 97 L. ed 715, 73 S Ct 499; *Burns v. Lovett* (1952) 91 App DC 208, 202 F2d 335, affd 346 US 137, 97 L. ed. 1508, 73 S Ct 1045; *White v. Ragen,* 324 US 760, 764, 65 S Ct 978, 89 L. ed. 1348; *Hysler v. Florida,* 315 US 411, 413, 316 US 642, 62 S Ct 688, 86 L. ed. 932; *Jones v. Kentucky,* 6 Cir, 97 F2d 335, 338; *Soulia v. O'Brien,* DC Mass, 94 F Supp 764. State courts considering deliberate suppression of evidence favorable to the accused have generally held that such conduct is a denial of due process. *Morhous v. Supreme Court of New York* (1944) 293 NY 131, 56 NE2d 79; *People v. Whitman* (1945) 185 Misc 459, 56 NYS2d 709, 177 P2d 918.

Suppression by prosecution after request by defense of accomplice's confession violated the due process clause of the Fourteenth Amendment where accomplice's confession admitted that he had actually strangled the victim. *Brady v. Maryland* (1963) 373 US 83, 10 L ed 2d 215; 83 S Ct 1194. Withholding of requested statement given to police which contained admission by a prosecution witness which was favorable and vitually material to defense was held to be a deniel of due process. US ex rel. *Butler v. Maroney* (1963, CA3 Pa) 319 F2d 622. Suppression of evidence, including a bullet, that tended to show that the defendant did not fire the fatal shot where evidence is material as to punishment is a denial of due process. *US ex rel Almeida v. Baldi* (1952, CA3 Pa) 195 F2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L ed 1341, 73 S Ct 639, reh den 345 US 946, 97 L ed 1371, 73 S Ct 828. Refusal after request to produce pair of men's

shorts that did not belong to defendant, found in hotel room in prosecution for killing of a woman in that room held to be denial of due process where the evidence is material either as to guilt or as to punishment. *People v. Hoffman* (1965) 32 Ill 2d 96, 203 NE2d 873. See also *Barbee v. Warden, Maryland Penitentiary* (1964, CA4 Md) 331 F2d 842. Failure to reveal laboratory report favorable to accused held to be denial of the fairness required under the due process clause of the constitution. *People v. Whitmore*, (1965) 45 Misc 2d 506, 257 NYS2d 787. The court observed in *State v. Cook* (1965) 43 NJ 560, 206 A2d 350 in a case involving withholding of a medical report of the state's psychiatrist that a prosecuting attorney must deal fairly and may not constitutionally withhold material evidence which favors the defendant. In *People v. Preston* (1958) 13 Misc 802, 176 NYS2d 542 involving withholding of hospital and autopsy reports the court stated that any action or omission by the district attorney which prevents a defendant from presenting evidence which may establish his innocence may result in a denial of due process of law under the Fourteenth Amendment.

See also annotations at 33 ALR2d 1421 and 7 ALR3d 8, 32 and cases there annotated and discussed for extensive discussion and digest of law. The law is clear that suppression of evidence favorable to the accused in a criminal trial is a denial of due process.

In this case the prosecution through the police department systematically gathered up the bank records, all of the checks that had been cashed as a part of the alleged scheme of which the checg which defendant purportedly uttered was a part and withheld that evidence from de-

fendant notwithstanding demands for a bill of particulars prior to the preliminary hearing (R. 2 & 3). An appeal to this court in an attempting to secure that information prior to preliminary hearing, (*Redmond v. Salt Lake City Court*, et al 17 U2d 95, 404 P2d 964), a demand for a bill of particulars prior to trial (R. 2-3), extensive arguments thereon (R. 597-620; R 606-618) and various motions, objections and requests for continuances (R. 358; R 401-403) and for declaration of a mistrial (R. 358; R 401-403) failed to produce said information required for defendant to prepare his defense.

In a recent Utah case in the Federal District Court for Utah it was held that the prosecution having caused the doctor to testify in such a manner as to leave impression that rape had been committed when he was of the opinion that sodomy but not rape had been committed on the victim constituted a suppression of evidence in violation of due process. The defendant was ordered released from custody, subject to further action by the state. *Turner v. Ward*, CA10 Utah 321 F2d 918.

POINT II

SUPPRESSION BY THE PROSECUTION OF THE EVIDENCE SOUGHT BY THE DEFENDANT IS CONTRARY TO THE PUBLIC POLICY OF THE STATE OF UTAH AS ANNOUNCED BY THE LEGISLATURE

The legislature of the State of Utah has declared that the fair administration of justice requires that evidence sought by any party in any legal proceeding shall not be concealed by any person with intent to prevent its production at that legal proceeding and has made it a crime

for any person to destroy or conceal any such evidence. The question of admissability of such evidence is properly left to the Court who may accept or reject the pre-offered evidence when it is offered at the legal proceeding. The intentional concealment of such evidence to prevent its "production" at the proceeding is denounced by law. 76-28-39, UCA, 1953 reads as follows:

> "76-28-39. DESTROYING OR CONCEALING EVIDENCE. - Every person who, knowing that any book; paper, instrumentin writing or other matter or thing is about to be produced in evidence, upon any trial, inquiry or investigation whatever authorized by law, willfully destroys or *conceals the same, with intent thereby to prevent it from being produced is guilty of a misdemeanor.*"

If Redmond had in some manner obtained possession of exhibit P-4 or other evidence which the prosecution wanted to produce at the trial of this matter, whether that information were actually admitted by the court when offered or not, we reasonably could have expected that a complaint would have been issued against him charging a violation of 76-28-39, UCA, 1953 (supra). The statute creates no exception in favor of the prosecution which would permit suppression or concealment of evidence by the prosecution of evidence which Redmond tried diligently to obtain for presentation at his trial, but which evidence was gathered up by the prosecution for purposes of concealing it from Redmond. If the true intent of the statute is to be carried out Redmond is entitled to access to any available evidence which he wants to produce in evidence at the trial, whether it is in the possession of a third party or the prosecution. The right to access to such evidence necessarily requires that it be

made available to him in sufficient time to permit him to investigate other evidence and testimony which may become known to him from that evidence. In this case it was necessary for Redmond to have access to the checks so that he could determine the identity of the persons who cashed the checks, interview those persons as possible witnesses and submit the checks to a handwriting expert to establish that the identity of the person who cashed each such check and placed the endorsement thereon was the same as the person who actually cashed the check with which he is charged in this case.

POINT III

SUPPRESSION OF EVIDENCE BY PROSECUTION DEPRIVED DEFENDANT OF A "FAIR TRIAL" GUARANTEED BY THE DUE PROCESS CLAUSES OF THE UTAH AND FEDERAL CONSTITUTIONS

A defendant in a criminal case comes into court clothed with the presumption of innocence (77-31-4, UCA, 1953) and the state is required to prove his guilt beyond a reasonable doubt or he is entitled to an acquittal (77-31-4, UCA, 1953). Reasonable doubt may result from either the failure of the prosecution to produce sufficient proof or from evidence adduced by the defendant which creates a reasonable doubt as to his guilt. In a recent case this court has stated that:

> ". . . the rights of one accused of crime are in no wise to be belittled nor ignored. The fundamental purpose of a criminal trial is not solely to convict the accused. It is to seek the truth and administer justice . . . " *State v. Faux*, 9 U 2d 350, 345 P2d 186.

In this case Redmond was denied the right to obtain the names of witnesses who had cashed other checks of the same series, approximate amount, drawn by the same person to the same payee and cashed at about the same time by the use of the same identification. He was also denied to copies of those checks which had been gathered up and suppressed by the prosecution. This denied him access to that evidence which was vital to the preparation and presentation of his defense by enabling him to identify the persons who cashed the other similar check of the same who could be called as witnesses to establish the fact that Redmond not the person who cashed the checks. By a handwriting expert he could link the checks together to establish that all of the checks of that series, including the check charged in the information were cashed and endorsed by the same person (R601). Certainly such evidence would at least tend to establish a reasonable doubt in the minds of the jury as to his guilt. The Court erroneously ruled that such evidence was relevant but not material and refused to require the prosecution to permit Redmond to inspect those checks, yet permitted that very evidence to be introduced into evidence at the trial by the prosecution.

Didn't this action deny Redmond the rights guaranteed by 77-31-4, UCA, 1953 with respect to the burden of proof beyond a reasonable doubt by refusing to permit him to establish evidence which may well have established a reasonable doubt in the minds of the jury. Wouldn't such evidence have convinced the jury of Redmonds innocence guaranteed by 77-31-4, UCA, 1953 when it denies a defendant the right to evidence favorable to the accused which he has requested from the prosecution and thereby

impliedly substitute a presumption of guilt by infering that since the defendant is guilty anyway he cannot be prejudiced by refusal of discovery since all his counsel needs to do is to ask him what he did to prepare his defense.

POINT IV

THE COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT ACCESS TO CHECKS IN THE POSSESSION OF THE PROSECUTION TO PREPARE HIS DEFENSE

The Utah Statute pertaining to the right of a defendant to a bill of particulars (77-21-9), UCA, 1953) recognizes the right of a defendant to limited discovery in criminal cases by permitting the defendant to obtain additional:

> "facts" which the court deems to be" . . . in the interest of justice . . . "

That statute sets a standard for the Court in applying the statute by stating:

> "In determining whether such facts, and if so, what facts, should be so furnished, the court shall consider the whole record and the entire course of the proceedings against the defendant."

This court recognized that discovery in criminal cases is properly the function of the court in *State v. Faux* pertaining to screening of transcript of grand jury hearing (supra). This procedure recognized that problems may exist in a particular case which might make it unwise to grant certain discovery in unusual criminal cases and leaves the question of whether unusual circumstances

exist in a particular case which would justify denying discovery to the sound discretion of the trial judge who is close to the problems in a particular case. Utah is one of the few states that has a workable procedure in the statutes which will permit a workable realistic criminal discovery by the defendant. This procedure has been conservatively applied and little used in Utah until the *State v. Faux* case (supra).

In England and Canada criminal discovery is virtually unlimited. No evidence is permitted at the trial that was not presented at the preliminary hearing without notice to the defendant. In 1792 pretrial inspection of documents was sought by a high official of the East India Company charged with malfeasance and corruption but was denied with the outraged comment of the then *Lord Chief Justice* that to grant such a request would "subvert the whole system of criminal law," however by 1883 *Sir James Stephen* was able to say that this was barbarianism not to be tolerated in a decent criminal procedure. See *Discovery in Federal Criminal Cases,* 33 F.R.D. 47 at page 59. The fears expressed by opponents of liberal discovery in criminal cases appear unfounded when we examine the results of the Canadian procedure and the similarity between the conditions in Canada and the United States. California has established extremely liberal discovery good results and without the problems forseen by opponents of liberal discovery procedure. Our experience in liberal discovery procedure in civil cases is a good illustration of the benefits derived and the effectiveness of judicial supervision of discovery to prevent abuses. Criminal discovery need not be a one way street as illustrated by the California ruling that neither the

privilege against self-incrimination nor the attorney-client privilege are violated if the defendant is required to disclose in advance only what he himself intends to disclose at the time of the trial. *Jones v. Superior* Court, 58 Cal. 2d56, 22 Cal. Pptr 879, 372 P. 2d 919.

Opponents of liberal criminal discovery argue that his is a one-way street with no benefits to the prosecution. Does not the prosecution benefit from a sharpening of the issues, exposure of untenable arguments, more efficient marshalling of evidence, disposing of more cases without trial and from the important public interest in the acquital of the innocent. Similar benefits have been derived from statutes requiring notice to the prosecution of alibi and insanity defenses, which in itself is a form is discovery for the prosecution. Does not refusal of discovery eliminate the chance to prove the truth as well as the false. The argument that the dishonest accused may abuse rights of discovery by perjury, intimidation, etc. when such an argument prevents also prevents the honest accused from the opportunity to clear himself. In a recent case this Court stated:

> " . . . all fair-minded persons will concede that ultimately the full truth should be revealed to the court and jury. In such instance the truism should be recognized that the truth should have nothing to fear from light." *State v. Faux* (supra)

Soviet prosecutors vigorously objected to adoption of the prevailing American rules of discovery in the Nuemberg war crime trial on grounds that they are just "not fair to defendants." The result was compromise procedure which permitted the accused at those trial more liberal discovery than allowed under American Law, al-

though apparently narrower than Soviet or French practice sanctions. 33 F.R.D. 47 at P. 59.

Discovery under prevailing criminal procedure in the United States is a one-way street, with the state being permitted to build its case against the accused in its leisure without real concern for cost and with the aid of governmental power, experts, science and implied threats of holding a person as a material witness or of charging him with one of the vague conspiracy, accessory, principal or other statutes if he does not cooperate with the state in its discovery procedure. The large number of complaints of police abuses by interrogation, the large number of guilty pleas or convictions resulting from confessions induced by threat, promise, pressure, interrogation, etc. indicate that the state exercises extensive discovery procedure even against the accused. The presumption of innocence and burden of proof beyond a reasonable doubt fall short of counterbalancing the advantages of the prosecution in a criminal case.

In this case the law theoretically gave Redmond the theoretical presumption of innocence and right to acquittal if a reasonable doubt as to proof of his guilt existed, however by withholding from him the evidence necessary to present a defense which would establish his innocence or a reasonable doubt makes this right:

> " . . . ineffectual and but an empty deluision, unworth of our standards of fairness to both sides in such a trial." *State v. Faux,* (supra).

If we deny him the right to discovery we are in essence saying that he has no cause to complain because he knows what he did and does not need discovery anyway.

Again the right becomes an "empty delusion" and "ineffectual," *State v. Faux* (supra). The Court recognized that the evidence sought by Redmond was "Relevant" (R. 616), ruled that this evidence would be inadmissable at the trial and denied his right to obtain that evidence which the prosecution was withholding, although the Court allowed the prosecution to present a part of that very evidence at the trial (Ex 4 & 9) over Redmonds objections. (R 597-603; R 356-359; 401-403).

POINT V

INFORMAL DISCOVERY AT DISCRETION OF PROSECUTOR NOW IN WIDE USE IS A DENIAL OF EQUAL PROTECTION UNDER THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT AND BY ART. 1, SECTIONS 2 AND 24 UTAH CONSTITUTION.

The amount of information available in a criminal case where this matter is left to the discretion of the prosecution will vary according to (1) who the prosecutor is, (2) who the defense counsel is, (3) who the defendant is, (4) whether the prosecution believes that it has a strong or weak case and (5) many other unknown factors which may be present in a particular case. This court has denounced as "dangerous" a procedure whereby the prosecution would "screen" evidence to be made available to the defendant and has held that this function is a judicial function to be performed by the Court. *State v. Faux* (Supra). The right to discovery of evidence in a criminal case should be afforded to everyone or to no one. Our legislature has very wisely placed the discretion in the trial judge to determine what information should

be open to discovery in a criminal case (77-21-9, UCA, 1953). The defendant believes that the Court abused that discretion too narrow of a construction on that statute in this case and that for this reason the defendant should be granted a new trial with instruction to the court to permit him to have access to the other checks issued apparently as a part of the plan or scheme by the persons who perpetrated the fraud as requested by defendant in his demand for a bill of particulars (R. 2-3).

POINT VI

THE COURT ERRED IN PERMITTING THE STATE TO PRESENT IN EVIDENCE A CHECK OF "CAL J. COON"

The information (R. 1) and the instructions of the Court to the jury (R. 121, 129, 130) all refer to the fictitious person involved in the alleged offense as a "*Carl* J. Coon", however the alleged fictitious instrument charged in the information (Exhibit P.6) bears the signature of a "*Cal* J. Coon." The information was amended to strike the name C. J. McCall and substitute therefor the name Carl J. Coon after this defendant had been arrained and before the trial, (R. 605) however the preliminary hearing was limited to consideration of a charge of utter a check for the payment of money of C. J. McCall. The posture of the case and the evidence is insufficient as a matter of law to sustain a conviction of the defendant for the following reasons:

(a) Defendant has not waived and has not been given a preliminary hearing on the charges for which he was convicted in violation of 77-23-3 (2) (a) and Art I, Sec.

13, Constitution of Utah. The preliminary hearing was limited to a charge of uttering a fictitious instrument for the payment of money of C. J. McCall. He was convicted of uttering a fictitious instrument for the payment of money of Carl J. Coon. It may be that each of these alleged offenses would constitute a separate crime in properly charged and proven, however the court lacks jurisdiction to try the defendant and it is error to try the defendant on a charge different from the charge contained in the complaint at the preliminary hearing. *State v. Freeman,* 93 U. 125, 71 P.2d 196; *State v. Jensen,* 103 U. 478, 136 P.2d 949; *State v. Crank,* 105 U. 332, 338, 142 P.2d 178, 180; *State v. Nelson,* 52 U. 617, 176 P. 860. The limitation on the jurisdiction of the Court to try Redmond without holding or waiving a preliminary hearing is further illustrated by Art. VIII, Sec. 6 of the *Utah Constitution* which reads in part as follows:

> "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, . . . "

Art. I, Sec. 13 reads in part as follows:

> "Offenses heretofore required to be prosecuted by indiction, shall be prosecuted by information *after examination and commitment by a magistrate, unless the examination be waived by the accused* with the consent of the State . . . "

The information to which Redmond entered a plea charged him with uttering a check for the payment of money of C. J. McCall. (R. 1, R. 596-597) It was not until a later date when a co-defendant who is not involved in this appeal was arrained that the information was amended to charge the offense with which Redmond

stands convicted. (R. 605) Since the amendment occurred after Redmond had entered his plea the provisions of 77-23-10, UCA, 1953 with respect to waiver of his right to object to the failure to hold or waive a preliminary hearing concerning charges in the information are not applicable to our situation. To the extent that said statute purports to limit the right to preliminary hearing guaranteed to the defendant by Art. I, Sec. 13 quoted above, that statute is unconstitutional and void.

A motion was made by defendant which was in legal effect a motion for arrest of judgment after the verdict of the jury was read and before the defendant was called for imposition of judgment (R. 592 in accordance with the provisions of 77-34-1, UCA, 1953, 77-23-10, UCA, 1953 also purports to effect a waiver of the right to a preliminary hearing if the defendant shall fail to object to the information on that ground prior to entry of his plea to the information, however that statute is also inapplicable since Redmond had no cause to object to the information at the time that he was arraigned and entered his plea to the information, however that statute to the information at the time that he was arraigned and entered his plea since the information charged the same offense as had been charged in the complaint at the preliminary hearing. It appears that the cases which hold that the defendant has waived irregularities with respect to the preliminary hearing or lack thereof by not objecting prior to entry of his plea to the information are not germaine to the issue herein involved because they are based on the waiver provisions of 77-23-3 (2) (a) and 77-16-2, UCA, 1953 where defendant has entered plea to information and those statutes simply do not apply to

this defendant since he has never entered a plea or been arraigned on an information wherein he was charged with uttering a check for the payment of money of Carl J. Coon. He entered a plea to an information charging him with uttering such an instrument of C. J. McCall, a separate and distinct offense. Accordingly the Court lacked jurisdiction to try and pass judgment upon this defendant by reason of those basic defects in procedure.

POINT VII

THE COURT ERRED IN ALLOWING THE STATE TO CALL WITNESSES WHOSE NAMES HAD NOT BEEN INDORSED ON THE INFORMATION AND WHO WERE PREVIOUSLY UNKNOWN TO DEFENDANT

77-21-52. U.C.A., 1953 provides in part as follows:

> "Where an information or indictment is filed, the names of all the witnesses or deponents on whose evidence the information or indictment was based shall be indorsed thereon before it is presented, and the prosecuting attorney shall endorse on the information or indictment at such time as the court may by rule or otherwise prescribe the names of such other witnesses as he proposes to call.*** No continuance shall be allowed because of the failure to indorse any of the said names unless such application (to have the names indorsed) was made at the earliest opportunity and then only if a continuance is necessary in the interest of justice."

Section 77-17-4 requires that the names of those testifying at a preliminary hearing be indorsed on an information. These two statutes clearly evidence an intention that defendant is not to be faced with a host of unknown

witnesses at the time of trial whose character, background, reliability, etc., and testimony are totally or partially unknown to him. It is not the intent of the adversary system under present principles and practice that a trial be conducted in an atmosphere of surprise, chicanery and maneuvering. The code explicitly requires that the names of witnesses be made available to defendant before trial. The purpose of indorsement of names of witnesses is to advise the defendant who the witnesses are. *State v. Faux* (supra). This right has been held to be a substantial one *People v. Lee*, 12 N.W.2d 418, 307 Mich 743; *People v. Smith*, 241 N.W. 186, 257 Mich 319; *People v. Tamosaitis*, 221 N.W. 307, 244 Mich 258, and the requirement should be faithfully observed by the prosecuting attorney. *People v. Tamosaitis*, supra.

The defendant demanded the names of all witnesses for the prosecution and Mr. Jay Banks, District Attorney, expressly agreed to promptly furnish the names of any witness other than the four indorsed on the information which the state intended to call (R 607). No additional names were ever furnished defendant not indorsed on the information prior to the time of trial, yet fourteen additional witnesses were called by the state. These witnesses should not have been allowed to testify, over defendants objections or if it were shown by the state that they were not known prior to the trial, then a continuance should have been allowed in order for defendant to prepare to meet their testimony as requested by defendant (R 358; 401-403) Many of these were the very people defendant had sought to discover prior to trial, and which the state had refused to disclose. Their testimony had previously been ruled immaterial by the trial court. (R-615)

In *Cohn v. State* (Okla. 1913), 135 P. 115, the state had called a witness whose name had not been indorsed on the information and who had not been discovered until after the commencement of the trial. The court said at page 1156:

> "It is clearly shown that the witness Van Tress was not discovered until the noon recess of the court after the case had been put on trial. The assistant county attorney made a clear showing that he was entitled to have the testimony of this witness. The court did not err in permitting his name to be indorsed, and allowing him to testify. If counsel had asked for a continuance for the purpose of securing evidence to meet that of this witness, *it would have been the duty of the court to grant it;* but no such request was made. *If the record disclosed facts which indicated that the county attorney had acted unfair, and was purposely holding back information relative to the witness, then a reversal would be warranted* . . ."

Defendant, in the instant case, has sought to learn the names of witnesses having information bearing upon the identity of the persons who accepted other checks of the same series as the one of which defendant is accused. These checks were gathered up from various merchants by the police and were in the hands of the prosecution, and not available to defendant from any other source. The prosecution, has deliberately concealed these names of witnesses to be called by the Prosecution from defendant, and has purposely failed to abide by their agreement to supply the names of additional witnesses, to indorse their names on the information or to appraise defendant of the state's intention to call them at trial. The record clearly discloses facts which indicate that the

prosecution acted unfair and purposely withheld information relative to the additional 14 witnesses who were called to testify at the trial for the prosecution. Under the holding of the *Cohn case,* supra, a reversal would be warranted.

The advisability of reversal is even more clearly perceived when the purpose of the indorsement or furnishing of the names of prosecution witnesses is considered. It has been stated that the purpose includes, among other things, the following objectives:

(1) That accused may properly prepare for trial by knowing something of history, antecedents, and character of witness who are to be produced. *State v.* King, 182 P.2d. 915, 66 Ariz. 42;

(2) To guard accused against the production of persons who are unknown and whose character he should have an opportunity to canvass. *People v. Quich,* 25 N.W. 302, 58 Mich, 321;

(3) To appraise accused of his accusers and give the defendant an opportunity before trial to interview such witnesses and time to prepare to meet their testimony. *State v. Fedder,* 285 P.2d. 802, 76 Idaho 535.

(4) A witness should not be permitted to testify in chief over objection of defendant, until his name is endorsed upon information, unless such endorsement is waived. *Evans v. State,* 312 P. 2d 908 (Okl. Cr.)

(5) The purpose of the statute requiring the county attorney to endorse upon the information at the time of filing the names of witnesses for the state, if known is to protect the defendant from surprise and unfair ad-

vantage and to afford him a fair opportunity to adequately defend himself. *State v. Cooper,* 406 p.2d 691 (Mont.); State v. Phillips, 264 P.2d 1009, 127 Mont. 381.

(6) The purpose of requiring the endorsement of names upon indictment at time of presentment is to advise the defendant of persons who will give evidence in the trial against him and grand jury witness, whose name is not endorsed on indictment, may not testify over defendant's objection. *State v. McDonald,* 361 P. 2d 1001 (or.)

In the instant case, defendant was never given an opportunity to investigate the background, character history etc., of the 14 witnesses called unexpectedly by the state. He was given no opportunity to prepare to meet their testimony. There was no reason why these names could not have been made available to defendant except the desire to obtain every possible advantage for the prosecution at the time of trial. The state has evidence bad faith which bad faith would warrant a reversal under the doctrine of the Cohn case, supra. The argument presented by the prosecution in opposition to defendant's motion for evidence which would have enabled defendant to learn the names of many of these surprise witnesses, was in essence an argument that since the other checks of the series which these witnesses had cashed were immaterial to the issues in the case the defendant had no need for that information, (R 597-602; R 606-618). This argument persuaded the judge that evidence concerning the other checks and persons who accepted those other checks of the same series was immaterial (R. 620-621) since the prosecution did not intend to present evidence concerning said other checks as

a direct result the defendant was refused access to those other checks. (R. 597-602; R 606-618).

The unfairness to the defendant resulting from the failure of the prosecution to furnish names of additional witness which it had agreed to furnish to defendant, the representations a motions prior to trial to the effect that none of the other checks would be used in evidence at the trial, the resulting denial to the defendant of evidence necessary for him to defend himself against the surprise witnesses and the refusal of the court to give the defendant any relief from this situation (R. 401-403) illustrate the fact that Redmond was in fact denied his right to a "fair trial," was not afforded "due process of law," and was unfairly surprised by the surprise witnesses produced by the prosecution. At the very least defendant was entitled to a continuance of the trial to give him an opportunity to meet the surprise witnesses and evidence, which the Court denied R 401-403; R. 358, notwithstanding the language contained in 77-21-52, UCA, 1953 (supra), and requires that a new trial be ordered.

POINT VIII

THE COURT ERRED IN PERMITTING THE STATE TO INTRODUCE PROOF OF OTHER CRIMES AFTER PRECIOUSLY RULING THAT SUCH EVIDENCE WOULD BE IMMATERIAL AND INADMISSIBLE

The state, over defendant's vigorous objection (R 401-403; R 358) was allowed to introduce evidence concerning several other checks of the same series for the purpose of establishing the defendant's identity as the person who allegedly cashed the check charged in the in-

formation. After previously having ruled that such evidence would be immaterial and hence inadmissible, (R 620-621) and on that ground denying defendant an opportunity to secure such evidence then in the possession of the state (R 597-602; R 606-618; R 401-403) it was clearly error to allow the state at the time of trial, without any notice to defendant, to introduce such evidence. This is just a matter of simple fairness, so obvious that there is a veritable dearth of reported cases on this particular point. Counsel was able to find only three in the whole reporter system.

In a New Jersey case, 1965, the defendant had entered an insanity plea to a murder prosecution and then objected to examination by psychiatrists for the state. The court held (Headnote 13):

> "If a defendant is capable mentally of cooperating to extend deemed necessary by doctors who are examining defendant on behalf of state for purposes of forming an opinion as to defendant's sanity, and defendant fails or refuses to cooperate on motion of state the defense psychiatric testimony shall be limited to same extent. *"State v. Whitlow,* 210 A.2d. 763."

In *Commonwealth v. Hourigan,* 89 Ky. 305, 12 S.W. 550 (1889) where the defendants testimony as to an alleged conversation with a certain person was excluded, it was held proper to refuse to allow the other person to testify thereto.

POINT IX

THE COURT ERRED IN HOLDING OTHER CHECKS OF THE SAME SERIES, DRAWN ON THE SAME BANK ACCOUNT, PAYABLE TO THE SAME PAYEE, AND CASHED AT ABOUT THE SAME TIME WITH THE SAME IDENTIFICATION WERE INADMISSABLE.

In ruling on the admissability of the additional checks, and evidence related thereto, which defendant had sought to have produced for inspection and examination before trial R 597-603; 608-620; 622 the court erroneously concluded that these checks, and the circumstances surrounding their negotiation was "relevant but not material" R 617. Defendant had sought to have these checks produced for inspection before trial in order to establish the true identity of the person cashing them through means of handwriting experts to show that the same person endorsed and cashed all checks of the series and by means of testimony of the individuals who had accepted the said other checks whom defendant proposed to produce as witnesses to testify that he did not cash said checks (R 597-603; 608-620).

The state argued that the identity of persons cashing other similar checks had absolutely no bearing on the prosecution for uttering the particular check for which defendant was charged. The court accepted this reasoning, stating that " . . . it wouldn't matter whether or not he was recognized as having uttered other instruments bearing the same instrument (sic) or other persons had uttered instruments which he had signed." (R 615) on page 616 of the record, the court stated: "Whether or not

in a given case a defendant has evidence to establish that similar instruments, also fictitious were executed by someone other than himself wouldn't make any difference," and later stated "I'd have to conclude that these other checks *would not be admissible under the charge of uttering.* I couldn't visualize how they might produce these other checks so far as execution of them as such evidence bearing upon defendant uttering this particular instrument, and if that's correct, and I think it is, it's maybe relevant but it's not material to the issue." (R 617)

Counsel for defendant then stated: "Your Honor, unless we have these checks or at least the names of the ladies to whom they were issued, we can't even learn the identity of the people who cashed them." The court replied: "That would be of no consequence." (R 617)

The checks, and the testimony of the persons who had accepted them, were clearly material, relevant to the issues, and should have been held admissable. In fact when the state offered testimony concerning additional checks at the time of trial, the court correctly held that they were admissible. (R 131, 188, 191, 211, 238) As a general rule, evidence of other similar crimes committed by the defendant is admissable to prove the commission of the offense charged. There are certain well grounded exceptions, however. Thus is *People v. Harvey,* (N.Y., 1923) 139 N.E. 268, 235 N.Y. 282, the court stated:

> " . . . the people cannot prove the offense charged by showing the commission of earlier or subsequent offenses. To this rule there are the exceptions which have been many times given by the court and which were stated in People v. Moliniux, supra. We said 'The exceptions to the rule cannot be stated with cat-

egorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) Motive; (2) intent; (3) the absence of mistake or accident; (4) *a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others;* (5) *the identity of the person charged with the commission of the crime on trial* 168 *N.Y.* 264, 293, 61 N.E. 286, 294 (62 L.R.A. 193)"

See also *State v. Bock* 39 N.W. 2d. 887 (Minn. 1949); *State v. Stuart,* 203 Minn. 301, 281 N.W. 299; *State v. Lucken* 129 Minn. 402, 152 N.W. 769; *State v. Barrett* 40 Minn. 65, 41 N.W. 459, *State v. Sweeny* 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380, and the annotations in 3 A.L.R. 1540; 22 A.L.R. 1540; 22 A.L.R. 1016; 27 A.L.R. 357; 63 A.L.R. 602.

The state, introduced additional checks in order to attempt to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tended to establish the proof of the other, and to establish the identity of the defendant as the person who cashed the check charged herein. This was the very reason for which *defendant* had sought to obtain the checks except that defendant would have used them to *negative* the identification made by the state's witnesses.

In *State v. Bock,* 39 N.W.2d. 887, twenty seven checks and a check protector had been stolen from General Roofing Company. The next day a man presented one of the stolen checks drawn on General's account in the amount of $62.20 payable to Harold A. Camden. The cashier stated that she would have to call the bank and confirm the

check, the man excused himself left the store and failed to return. The check was never indorsed. At the trial, over the defendant's objection, three other checks were introduced and witnesses identified the defendant as having passed them. The defendant's defense was alibi that he was at home when the checks were passed. He attempted to introduce two checks cashed on the same day as the check for which he was charged, in the identical amount, and payable to the same payee. He sought to show by the clerks who received the checks that the person who presented them was not the defendant. The Minnesota court said:

> "Proof of similar acts constituting separate and distinct crimes is admissible under an exception to the general rule, not for the purpose of showing specifically that defendant committed the crime with which he has been charged, but for the purpose of permitting the trier of facts to draw an inference from the evidence showing a general plan or scheme consisting of a series of acts similar to that with which defendant is charged, that he did commit the crime with which he is charged. 2 Witmore, Evidence, 3dED. Section 304. In determining defendant's guilt, the identity of the person who presented exhibit A is the decisive factor. Inasmuch as an inference that defendant uttered exhibit A is permissible from evidence showing that he passed exhibits B, D, and F, there appears no good reason why an opposite inference that defendant was not the person who offered exhibit A is not permissable from a showing that checks identical with exhibit A were offered or passed on the same day and in a like manner by someone other than defendant. In discussing this question, Wigmore, in his work on evidence 3d. ed., Section 304 has this to say: *'It should be noted*

that this kind of evidence may be also available to negative the accused's guilt. E.g. if A is charged with forgery and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, this plan of B is some evidence that B and not A committed the forgery charged. *This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identification.'* " Again in Id. Section 341, p. 245 we find the following: *'Notice that here, as throughout this series of offenses, the principle of similar acts (ante section* 304) *can be used to exonerate an innocent accused, where the acts evidencing the plan are those of a third person not the defendant.'* "

The court then quoted with approval *Commonwealth v. Murphy,* 282 Mass 593, 185 N.E. 486. In that case the defendant had sought to show that three other checks identical in typing and handwriting with the four of which he was accused were passed by someone other than himself. The trial court had sustained the state's objection to their admissability. The Massachusetts supreme court said:

*"No one, we think, will deny that if the evidence offered is the truth it well might shake confidence in the identifications upon which alone this conviction rests.*** It indicates that two others who met the man who writes and acts as the defendant is accused of doing are ready to testify that he is not the defendant.* It does not establish his innocence. The handwriting on the seven checks may not all be that of one man. Two thieves may have worked together to protect one another by following the same plan and acting and looking in the same way. It does not follow that, because one did not do a thing on October 1, he did not do a similar thing in May and June.

> Acquittals in two courts do not establish freedom from guilt on a different date in a different court. Mistake in identification by one person does not prove another one wrong. These are considerations for a jury. But owing to the ruling (of the trial court) no jury has passed upon them. Unless some positive rule of law prevents, *it would seem that the defendant is entitled to have a jury consider the evidence, pass upon its credibility and wright it with the evidence of identification upon the issue of guilt.*"

In the *State v. Bock* case, supra, after quoting the above from Commonwealth v. Murphey, the court specifically concluded that the defendant:

> " . . . should also have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him. *State v. Harris,* 153 Iowa 592, 133 N.W. 1078."

It seems clear, without possibility of contradiction, that the defendant was entitled to show that other similar crimes, part of a scheme, plan or design, utilizing the same series of checks, payable to the same payee, and cashed at about the same time of the month had been committed by another, and that the trial courts ruling that such checks were inadmissable was clearly wrong.

POINT X

THE STATE'S EVIDENCE THAT IT HAD SEARCHED IN THIS AREA FOR THE ALLEGEDLY FICTITIOUS PERSON WAS INSUFFICIENT TO ESTABLISH THAT NO SUCH PERSON EXSTED

Defendant objected to the insufficiency of evidence adduced and lack of foundation established to permit the officer to testify that no such person could be located in the vicinity of Salt Lake County, (R. 440) and to the sufficiency of the jury instruction with respect to the adequacy of the investigation (R. 589) and pointed out that many persons commute to the Salt Lake County area from Tooele, Summit County, Davis County, Weber County and other areas since area of inquiry did not include those areas and it may well be that such a person does in fact exist in those areas and it may well be that such a person does in fact exist in those areas who commutes to the Salt Lake County area but would not be located by a search limited to the Salt Lake County area. The search made by said officer was limited to calling some utilities companies in Salt Lake Valley, looking in the telephone book and city directory and checking with the office of the secretary of state. (R 440) Such a search would be unlikely to reveal the existence of a person who rented a furnished apartment which included utilities and who had an unlisted telephone number or had no telephone. Certainly it would have been reasonable for such an investigation to have included a check of the

police files, a check with the credit bureau and other credit agencies, a check with the dairies and newspapers and it would be reasonable to include surrounding areas in that investigation.

If we accept such a superficial investigation to establish the existence of one of the basic elements of the crime which must be proven by the prosecution beyond a reasonable doubt are we not setting aside the presumption of innocence guaranteed by the constitution and substituting in lieu thereof a presumption of guilt.

No search was made with respect to a Cal J. Coon, although the check charged in the information (Ex. P. 6) was signed by a Cal J. Coon. The investigation made by the officer was limited to a search for a person named Carl J. Coon. (R. 588) The prosecution must prove beyond a reasonable doubt that the person who purportedly executed said check is a fictitious person before a criminal offense is proven. The record is completely void of any investigation as to the non-existence of a Cal J. Coon in the area and accordingly as a matter of law the prosecution had failed to prove a vital link in their burden of proof as the conviction should be reversed.

CONCLUSION

The actions of the prosecution and the Court in withholding and permitting suppression of evidence favorable to the accused, in calling 14 surprise witnesses when only 4 witnesses' names were endorsed on the information, in agreeing in open court after demand by defendant for names of witnesses to supply names of witnesses and failing to do so, in leading the defendant, his counsel and

the Court at a motion prior to trial to believe that no checks other than the one charged in the information and no witnesses concerning checks other than the one charged in the information would be called to testify at the trial as justification for refusal to make other checks of said series and witnesses concerning those checks, all of whom were unknown to defendant, and at the same time preventing defendant from obtaining access to the names of other similar witnesses who could rebut that testimony, in admitting evidence by the prosecution that the Court has previously ruled to be inadmissable by the defendant as justification for withholding that evidence from the defendant when demand therefor was made in a pre-trial motion, and the inadequacy of the evidence by the prosecution to establish that the maker of the check charged in the information was in fact fictitious clearly illustrate that the defendant was denied a "fair trial." was denied "equal protection under the laws," was denied " due process of law" and was unfairly convicted of a crime which he did not commit. The verdict and judgment should be reversed and set aside and the case remanded for a new trial after a preliminary hearing on the charge contained in the information and the prosecution should be ordered to make available to defendant the other checks of the same series as the check with which he is herein charged.

Respectfully submitted,

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