

1966

The State of Utah v. Ken Knepper : Defendant and Appellant's Petition For Re-Hearing and Supporting Brief

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

THE STATE OF UTAH,)

**Plaintiff and)
Respondent,)**

vs

**Case No.
10614**

**KEN KNEPPER,)
)
Defendant and)
Appellant.)**

**DEFENDANT AND APPELLANT'S PETITION FOR
RE-HEARING AND SUPPORTING BRIEF**

Upon appeal from a Judgment of Conviction against Defendant entered by the District Court of Weber County, State of Utah, the Honorable Charles G. Cowley, District Judge

**DEFENDANT AND APPELLANT'S PETITION FOR
RE-HEARING**

The petition of the defendant, Ken Knepper, respectfully shows to the Honorable Supreme Court:

1. The above entitled court filed its opinion herein in favor of the State of Utah and against defendant Knepper on October 4, 1966.

2. By orders of the court duly entered herein and upon good cause shown the time in which defendant may petition for a rehearing has been extended to and including the date of the filing hereof.

3. It is respectfully alleged that the court, by its opinion and decision aforesaid, erred in the following particulars, to-wit:

I. This Court erred in analyzing the case as though the Defendant had the burden of raising a reasonable doubt as to his guilt.

II. This Court erred in failing to treat, and apparently to consider, the point urged by Defendant that by going forward with his case he did not waive his right on appeal to rely on his motion to dismiss made at the close of the State's case.

III. This Court erred in failing to treat, and apparently to consider, the point urged by Defendant that the State failed, in

its opening case, to prove beyond a reasonable doubt that Defendant's failure was willful.

IV. This Court erred in failing to treat, and apparently to consider, the point urged by Defendant that, assuming the Defendant waived his right on appeal to rely on his motion to dismiss, nothing further was supplied by the Defendant from which the Trial Court could find that Defendant's failure was willful.

WHEREFORE, Defendant respectfully prays that this matter be reheard by this Honorable Court and that said errors be corrected, that judgment and conviction of the trial court be reversed, and that the Defendant be retried or discharged from custody.

Respectfully submitted by,
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**DEFENDANT AND APPELLANT'S BRIEF
ON PETITION FOR RE-HEARING**

**STATEMENT OF NATURE OF CASE AND
DISPOSITION BY THIS COURT ON
ORIGINAL HEARING**

This is a criminal case wherein defendant was charged and convicted of embezzlement for willfully failing to return a rented typewriter of a value exceeding \$50.00 to its owner within ten days after the rental agreement had expired in violation of Utah Code Annotated Section 76-17-5 (Supp. 1965).

Defendant appealed on the grounds that a typewriter does not come within the statute and that there was not sufficient evidence to justify the Trial Court's finding that defendant's failure was willful. This Court affirmed the lower Court's conviction.

The facts are sufficiently stated in defendant's original brief filed herein.

ARGUMENT

INTRODUCTION

It is not the Defendant's intent to ask this Court to merely reconsider those points which the Court considered in arriving at its original decision herein. While the Defendant does not agree with the Court's holdings on those issues which were fully considered, nonetheless the Defendant recognizes that he was granted a hearing on those issues and does not contest them further herein. However, the Defendant respectfully submits that this Court failed to treat, and apparently failed to consider, certain controlling points urged by the Defendant in his original brief herein, and that had this Court considered those points its decision herein would have been in favor of the Defendant and against the State.

The Defendant asserted the following points in his original brief herein:

A. That this reviewing Court must re-
view the Trial Court's refusal to dismiss the
information pursuant to Defendant's motion
made at the close of the State's case, and
that the Defendant did not waive this right
by going forward with his evidence.
(Defendant's brief pp. 10-11).

B. That the word "willful" as used in
the statute means intentional wrongdoing and
not merely intentional. (Defendant's brief
pp. 11-15).

C. That the State, in its opening case,
failed to prove beyond a reasonable doubt
that Defendant's failure was willful, even if
willful is defined to mean only intentional.
(Defendant's brief pp. 15-19).

D. That even assuming the Defendant
waived his right to rely on his motion to dis-
miss made at the close of the State's case,
nothing further was supplied by the Defendant

from which the Trial Court could find that Defendant's failure was willful, even if willful is defined to mean only intentional. (Defendant doesn't expressly raise this in his original brief but it is necessarily implied from his argument appearing at pp. 19-31.)

E. That even assuming the State presented sufficient evidence to support a finding that Defendant's failure was willful, the Trial Court was bound by the Defendant's testimony to the contrary where his testimony was clear, not extraordinary or incredible, and not contradicted. (Defendant's brief pp. 19-31).

F. That a typewriter does not come within the terms of the statute under which the Defendant was convicted. (Defendant's brief pp. 31-37).

This Court treated and considered those

points listed above as B, E and F, and decided against the Defendant on those issues. However, those holdings were not dispositive of the issues raised by points A, C, and D above and Defendant herein respectfully urges this court to grant a rehearing and consider the issues raised by these points. These points are more fully discussed hereinafter under points II, III and IV respectively.

Before discussing these errors of omission, however, there is one error of commission which must be considered. The error referred to is the error of treating the Defendant as guilty until proven innocent and placing on his shoulders the burden of raising a reasonable doubt as to his guilt. Clearly, this is what the Court did; the Court itself expressly states:

It is true that all the defendant had to do was to raise a reasonable doubt that he was guilty of a willful embezzlement of the typewriter.

Defendant respectfully urges under Point I hereof that this Court erred in adopting this position and thereby deprived Defendant of his liberty without due process of law in violation of his constitutional rights.

POINT I.

THIS COURT ERRED IN ANALYZING THE CASE AS THOUGH THE DEFENDANT HAD THE BURDEN OF RAISING A REASONABLE DOUBT AS TO HIS GUILT.

As was pointed out in the foregoing introduction this Court treated only the issue of defining willful and then skipped to the issue of whether Defendant's testimony was sufficient to raise a reasonable doubt as to his guilt. The Court failed to treat, and apparently to consider, the issue of whether the State met its burden of proving every essential element of the crime charged beyond a reasonable doubt. In so doing this Court erroneously treated the Defendant as having

the burden of raising a reasonable doubt as to his guilt.

It was held in one of the earliest cases decided by the Utah Supreme Court that the State has the burden of proof from the beginning and that the burden never shifts to the Defendant:

In no criminal case is the burden of proof ever shifted from the prosecution to the defense. It rests upon the prosecution throughout the entire trial, and the rule of a reasonable doubt applies in every such case

People vs Tracy, 1 Utah 343, 346 (1876).

As stated by Justice Crockett in a later case:

The presumption of innocence and the requirement of proof of guilt beyond any reasonable doubt, are indeed of the utmost importance as safeguards against the possibility of convicting the innocent. We scrupulously adhere to them notwithstanding the difficulties encountered and the possibility that some guilty may escape punishment. It is an ancient-and honored adage of our law that it is better that ten

guilty go free than that one innocent person be punished. We appreciate the wisdom of that maxim and the importance of according every proper consideration to those accused of crime.

State v. Sullivan, 6 Utah 2d 110,307 P2d 212, (1957).

This doctrine is not unique but is the universal rule.

20 Am. Jur. Evidence Sec. 134 and 149 (1939).

Indeed this is such a fundamental and traditional doctrine that Defendant submits that the Court's holding herein shifting the burden to the Defendant denies to the Defendant due process of law as guaranteed to him by the Constitutions of this State and of these United States.

United States Constitution, Amendment XIV, Sec. 1.

Utah Constitution, Art. I, Sec. 7.

It is clear that "due process" requires a fair hearing in substantial accord with estab

lished procedures relating to the conduct thereof.

American Railway Express Co.
v. Kentucky, 273 U.S. 269,
71 L. Ed. 639 (1927).

Ladner v. Siagsl, 298 Pa. 487,
168 A. 699, (C.C.A.) 1172
(1930).

And the United States Supreme Court has held that proof of all elements of the crime by the prosecution beyond a reasonable doubt is an essential requirement of a fair trial in the following language:

An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt.

Christoffel v. United States, 338
U.S. 84, 93 L. Ed. 1826, 69 S. Ct.
1447 (1960).

Certainly, if the State proves to the satisfaction of the fact finder that Defendant is guilty beyond a reasonable doubt, then the Defendant must either come forward with suffi-

cient evidence to raise a reasonable doubt or be convicted. But in this case this Court failed to treat, and apparently to consider, the issue of whether the State first met its burden. This failure by the Court has the effect of shifting the burden of proof to the Defendant in violation of his constitutional rights. Defendant respectfully submits that this matter should be reheard and the omitted issues considered, and decided in favor of Defendant for the following reasons.

POINT II.

THIS COURT ERRED IN FAILING TO TREAT, AND APPARENTLY TO CONSIDER, THE POINT URGED BY DEFENDANT THAT BY GOING FORWARD WITH HIS CASE HE DID NOT WAIVE HIS RIGHT ON APPEAL TO RELY ON HIS MOTION TO DISMISS MADE AT THE CLOSE OF THE STATE'S CASE.

At the end of the State's opening case the Defendant moved to dismiss the information

on the grounds that the State had failed to produce sufficient evidence from which any reasonable man could conclude beyond a reasonable doubt that defendant had willfully failed to return the rented typewriter. (R. 20-21). The Trial Court reserved its ruling until after all the evidence was in and then ruled against the Defendant. (R. 46).

The Defendant urged, in his original brief herein (pp. 10-19), in oral argument to this Court, and by way of additional authorities submitted at the time of oral argument (addition to p. 10), that this Court was now bound to look only at the evidence adduced prior to Defendant's motion to dismiss in determining whether the State met its burden of proving beyond a reasonable doubt that defendant's failure to return the rented typewriter was willful. This Court failed to confine its initial inquiry to evidence produced by the State prior to the Defendant's motion and

failed to even treat, and apparently to consider, the issue of whether it was so bound. It is this omission of which the Defendant now complains and urges a rehearing for its correction.

Defendant admits that there is authority which supports the State's position that a defendant waives his right to rely on a motion to dismiss made at the close of the State's opening case where the defendant proceeds to present evidence in his own behalf. However, the Defendant respectfully urges that these authorities are wrong and that the better reasoned cases have reached the contrary conclusion.

The waiver rule, which was imported from civil into criminal trials without considering the demands of our accusatorial system of criminal justice,

Cephus v. United States, 324
F. 2d 893 (D.C. Cir. 1963)

places the defendant on the horns of a dilemma at the close of the State's case. If his motion to dismiss is wrongfully denied he must either refuse to present any evidence in his behalf and take the risk that he can convince the appellate court of the trial court's error, or he must proceed with his case and risk supplying some bit of evidence missing in the State's case. This result is wholly inconsistent with our accusatorial, as opposed to inquisitorial, system of criminal justice wherein society carries the burden of proving its charge beyond a reasonable doubt by evidence secured through skillful investigation independent of assistance from the accused.

Watts v. Indiana, 338 U.S. 49,
69 S. Ct. 1347, 93 L. Ed. 1801
(1949).

The waiver rule was considered and discredited in a recent case from the United States Court of Appeals for the District of

Columbia Circuit.

Cephus v. United States, supra.

Although the final result reached in that case was also supported by other reasons, it is clear that one of the alternative holdings in the case rejects the waiver rule. The following language from that case at pp. 895-896 states with lucidity the defendant's position:

One of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense.

* * *

The few decisions which elaborate on the waiver rule attempt to justify it on the ground that the defendant's loophole-plugging evidence renders harmless any error in the denial of the original motion or that a defendant who voluntarily introduces evidence is estopped from denial of its efficacy. These arguments do not meet the objection that the defendant's willingness to ask for acquittal on the Government's

evidence is not a willingness to gamble on a prediction that the jury or appellate court will find that evidence insufficient. Moreover, there is danger that under the waiver rule prosecutions may be pursued with inadequate evidence in the hope that defendants will supply missing evidence. The rule seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense.

A New Jersey case, cited by the Court in the Cephus case, rejected the waiver rule as early as 1916 in the following language:

The application of the civil rule to criminal trials is open to the criticism that, by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself. . . .

State vs. Bacheller, 89 N.J.L. 433, 436, 98 A. 829, 830 (N.J. Sup. Ct. 1916).

The Defendant respectfully submits that this Court erred in failing to consider this

issue and respectfully requests a rehearing so that this issue can be considered. Defendant further requests that upon rehearing this Court hold that the Defendant did not waive his right to rely on his motion to dismiss, and that this Court confine its review to the evidence produced by the State in its opening case in determining whether there was sufficient evidence to prove Defendant guilty beyond a reasonable doubt.

POINT III.

THIS COURT ERRED IN FAILING TO TREAT, AND APPARENTLY TO CONSIDER, THE POINT URGED BY DEFENDANT THAT THE STATE FAILED, IN ITS OPENING CASE, TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT'S FAILURE WAS WILLFUL.

As shown under Point I hereof the State has the burden of proving every element of the crime beyond a reasonable doubt. No one can contend that there was any direct evidence

adduced at trial of Defendant's willfulness. The only possible way the Trial Court's finding can be supported is by inference from the other evidence presented. Of course, if such an inference can be fairly drawn, this is sufficient.

As pointed out in Defendant's original brief (pp. 10-19) the State's only evidence was that the Defendant rented a typewriter from Kammeier's Sports Store, the Defendant was notified of the expiration of the rental period and promised to return the typewriter or pay another month's rent, the typewriter was never returned, and Mr. Kammeier made five further unsuccessful efforts to contact the Defendant. There was no evidence showing that the Defendant had left the area or was not still operating his sign painting business; as to Mr. Kammeier's failure to contact the Defendant it appeared only that the Defendant was

not present at the times and places when and where the contacts were attempted, but was apparently still in the area.

The issue is whether the foregoing evidence is sufficient to prove beyond a reasonable doubt that Defendant's failure was willful, as "willful" is defined by this Court in its original opinion herein. Rather than repeat his argument made in his original brief herein, Defendant urges the Court at this point to re-read pages fifteen through nineteen of his original brief wherein this issue is treated. The thrust of Defendant's argument is that proof of an omission to act does not raise an inference of sufficient strength to meet the State's burden of proof beyond a reasonable doubt that the omission was willful.

Defendant respectfully requests the Court to grant a rehearing so that this issue can be considered, and, upon considering this issue, reverse its original opinion herein.

POINT IV

THIS COURT ERRED IN FAILING TO TREAT, AND APPARENTLY TO CONSIDER, THE POINT URGED BY DEFENDANT THAT, ASSUMING THE DEFENDANT WAIVED HIS RIGHT ON APPEAL TO RELY ON HIS MOTION TO DISMISS, NOTHING FURTHER WAS SUPPLIED BY THE DEFENDANT FROM WHICH THE TRIAL COURT COULD FIND THAT DEFENDANT'S FAILURE WAS WILLFUL.

Assuming for the sake of argument that the Defendant waives his right to rely on his motion to dismiss made at the close of the State's case by going forward with his evidence nonetheless there was not any additional evidence presented sufficient to support the Trial Court's verdict of conviction. The only additional evidence presented by the Defendant is directly contrary to a finding of willfulness.

The fact that Defendant's business venture was not successful and closed within a

short period after it began does not in any way infer that Defendant's failure to return the typewriter was willful.

Nor does the fact that Defendant moved to California infer that his failure was willful. If it had been shown that Defendant fled as a result of hot pursuit then perhaps something could be inferred from his change of residence. But this was not the case. The typewriter was rented on October 30, 1964 (R. 4-5); Mr. Kammerer made his attempts to contact Defendant the first part of December, 1964 (R. 9); and the Defendant didn't leave the area until about two months after he signed the rental agreement, which would be the last part of December, 1964, or first part of January, 1965. (R. 32). Neither the Defendant nor the State's witness recalled the exact relevant dates and it is possible that the Defendant left immediately after the first

contact. But such possibilities certainly are not sufficient to raise an inference proving Defendant's willfulness beyond a reasonable doubt.

There was no other evidence adduced by the Defendant that could possibly support a finding that Defendant's failure was willful. This Court refers in its opinion to evidence which it says the Trial Court could regard as rendering Defendant's testimony of dubious character. Assuming this is true, nonetheless such disbelief can't support a finding that the opposite of what Defendant testifies to is true.

Moore v. Chesapeake & Ohio Ry.,
340 U.S. 573, 95 L. Ed. 547 (1951).

Janigan v. Taylor, 344 F 2d 781
(1st. Cir. 1965).

As stated in the last above cited case:

The reason must be obvious.
Were the rule otherwise a case
could be made for any proposition
in the world by the simple

process of calling one's adversary and arguing to the jury that he was not to be believed.

Id. at 784.

The Defendant respectfully submits that this Court failed to consider the issue raised under this Point IV and should grant the Defendant a rehearing to consider said issue. The Defendant further submits that upon rehearing the Court should hold that the State failed to meet its burden of proving beyond a reasonable doubt that Defendant's failure was willful and reverse its original opinion herein and that of the Trial Court.

CONCLUSION

The Defendant is not asking this Court to reconsider those issues it considered on the original hearing herein. The Defendant is asking the Court to consider for the first time certain controlling issues overlooked by the Court in its original hearing.

The Defendant respectfully submits that this Court, in failing to consider those certain key issues, erroneously shifted the burden of proof to the Defendant and thereby deprived him of his liberty without due process of law in violation of his Constitutional rights.

The Defendant therefore prays for a rehearing so that those issues may be considered, and requests that upon rehearing the decisions of this Court and the Trial Court be reversed and the Defendant retried or released from custody.

Respectfully submitted,

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