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In Re Contempt of Neuman C. Petty : Brief of Appellant

IN THE SUPREME COURT

of the

STATE OF UTAH

IN RE CONTEMPT

of

NEUMAN C.

BRIEF OF

Appeal from the

PHIL L. HANEY
Attorney General
State Capitol
Salt Lake City, Utah

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CASES CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

IN RE CONTEMPT

of

NEUMAN C. PETTY,
Appellant.

Case No.
10690

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This case arose through Judge Merrill C. Faux, Third District Court, holding the appellant, Neuman C. Petty, in contempt of court for refusal to testify to certain questions on the advice of his attorney on the grounds that said testimony may tend to incriminate. The judge, after the jury had been temporarily excused, sentenced the appellant to thirty days in the county jail for contempt with the basis of purging himself and the

contempt by agreeing to testify.

RELIEF SOUGHT FROM THIS COURT

The appellant seeks a reversal of the court's ruling that he is in contempt of court, and relief from the contempt sentence of thirty days in the county jail.

STATEMENT OF FACTS

1. Billie Maurine Newsom was being tried on an indictment in Case No. 19534 from the Salt Lake County Grand Jury charging perjury in the first degree, and accusing her among other things of testifying falsely to (a) a query "Have you ever embezzled or taken any funds for your own use from your employer?" (the employer was Motor Lease, Inc.) "or from payments of customers made?" (see page 2 of the indictment, State v. Newsom, Criminal No. 19534, attached as Exhibit "A," and bill of particulars in the same case, paragraph 2, is attached as Exhibit 3), and (b) "Did you ever credit Mr. Brady with cash payments when, in fact, he had not made the payment?" (Exhibit "A," page 2 and paragraph 2 of Exhibit "D").

2. The appellant, Neuman C. Petty, was at all times a material witness to the Newsom case, being the president of Motor Lease, Inc., and as such, Mrs. Newsom's employer.

3. Neuman C. Petty, as an individual, was charged

as a co-defendant with Mrs. Newsom with the crime of conspiracy to commit ten alleged crimes alleging one hundred and forty-three overt acts, *State v. Motor Lease*, et al., Third District Court in and for Salt Lake County, Criminal No. 19558, and Motor Lease, Inc. and Midvale Motors, Inc., corporations of the State of Utah of which Mr. Petty was principal officer, were also charged in said conspiracy complaint.

4. The substantive crimes alleged in the conspiracy indictment include and are built around alleged bribery of a public offical, to wit, C. W. "Buck" Brady (the same Mr. Brady in the Newsom perjury indictment in *State v. Newsom*, supra).

5. The district attorney subpoenaed Mr. Petty in *State v. Newsom*, and was on notice before the testimony in the Newsom case began that Mr. Petty, if called, would claim Fifth Amendment privilege (see page 2 of transcript of proceedings), and at that time the district attorney indicated that Mr. Petty, in his mind, had the right to claim the constitutional immunity.

6. After a day and a half of trial, the district attorney called Mr. Petty out of the presence of the jury, told the court he was going to dismiss the conspiracy charges as to Mr. Petty, asked the court to give him (Mr. Petty) immunity on his testimony and to compel him to testify.

7. The district attorney had himself sworn and testified as to a conversation he had with Mr. Petty relating to Mr. Petty's knowledge of Mrs. Newsom's alleged embezzlement of funds from Motor Lease, Inc. and an arrangement for payment back of said funds (Tr. 6, 7, and 8).

8. The witness Petty was called before the court, without jury. The district attorney moved the court to dismiss the conspiracy charge, Criminal Case No. 19558, Third District Court in and for Salt Lake County, supra, as to Mr. Petty. The court granted the motion and dismissed said charge.

9. The jury was called in and Mr. Petty was called and after testifying as to his name and address, claimed his constitutional privilege when questioned regarding his affiliations with Motor Lease, Inc. and his acquaintance with the defendant Billie Maurine Newsom, in the principal case.

10. The court, on request of the district attorney, ordered Mr. Petty to answer and advised him that "under the circumstances, what the witness may say may not be used against him as the basis of any criminal prosecution" (Tr. 21).

11. The witness still declined to answer and on motion of the district attorney the court held him to be in contempt, and on the further request of the district attorney, sentenced him to thirty days in the Salt Lake

County jail (Tr. 24, 25, and 26). Mr. Petty obtained a writ of habeas corpus from the Supreme Court, and after discussion with the members of the Attorney General's office filed this appeal, and stipulated to the dismissal of the writ.

Defendant appeals on the basis that the court had no power to grant immunity to witness Petty in the absence of statute.

POINT I

THE COURT HAD NO POWER TO GRANT IMMUNITY TO THE WITNESS PETTY IN THE ABSENCE OF STATUTE.

A witness in this state, as well as a party, is protected by Article 1, Section 12, of the Constitution of Utah, which states: "The accused shall not be compelled to give evidence against himself," as well as by Statute 78-24-9, Utah Code Annotated 1953, formerly 104-49-20, RSU 1933, against all self-incrimination, see *In re Sadleir,* 85 P 2d 810, and *State v. Byington,* 114 Utah 388, 200 P 2d 723.

In the Sadleir case at page 812 of the Pacific citation, the court says:

> "The constitutional language is: 'The accused shall not be compelled to give evidence against himself.' Such language permits of no classification of crimes or otherwise that will require the 'accused' to give evidence against himself, but opens

> the way to the common law privilege against self-incrimination."

Further, on the same page, the court uses the following language with regard to witnesses:

> "And after referring to the position taken by the Supreme Court of the United States on the application of the Federal Constitutional clause, U.S. C.A. Const. Amend. 5, declaring that no person 'shall be compelled in any Criminal Case to be a witness against himself,' wherein one subpoenaed to testify before a grand jury was protected from making disclosures which might subject him to subsequent prosecution, the Missouri court, quoting further, said: '*The manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness.*' " Citing State ex rel. Attorney General v. Simmons Hdw. Co., 109 Mo. 118, 18 S.W. 1125, 1126, 15 L.R.A. 676.

In re Sadleir, the court properly discharged the prisoner who was held in contempt by the district court for his refusal to testify in a carnal knowledge case concerning intercourse with the defendant.

The court has more recently held that the self-incrimination provisions of our Constitution and the Federal Constitution applies to a witness as well, *In re Peterson*, 15 Utah 2d 27, 386 P 2d 726.

In *State v. Hutchison*, 200 P 2d 733, together with

its companion case, *State v. Byington*, supra, the Utah Supreme Court again held that the requirement to give self-incriminating testimony was illegal, and reversed a perjury conviction on that basis. Hutchison was a witness in the divorce case of *Byington v. Byington*, both cases arising from testimony in the same case where illegally compelled by a judge.

Mr. Petty was charged as a co-defendant with Mrs. Newsom and others with the crime of conspiracy arising by indictment by the same grand jury that indicted Mrs. Newsom for perjury.

Part of the substantive crimes alleged in the conspiracy indictment were the subject matter of the perjury charge against Mrs. Newsom, to wit, the bribery of a public official (C. W. "Buck" Brady), and the dismissal of the conspiracy charge alleged by the district attorney to be a bar under 77-51-6, Utah Code Annotated 1953, could in no way be construed to prevent prosecution of the witness for any of the substantive crimes alleged in the conspiracy affecting the witness both personally and as president and manager of the co-defendant corporations, Midvale Motors, Inc. and Motor Lease, Inc.

If the district attorney's testimony under oath was correct as to what Mr. Petty would testify to, it could lead to his prosecution as being an accessory to an embezzlement or grand larceny under 76-1-45, Utah Code Annotated 1953, or to compounding or concealing a crime punishable by imprisonment in the state prison, a felony

under 78-28-58, Utah Code Annotated 1953. The district attorney acknowledged the tendency to connect the witness to the crime by his request to the court to dismiss conspiracy charges as to Mr. Petty, and the court made the same acknowledgement by its attempt to give the witness immunity from criminal prosecution.

POINT II

THE COURT HAD NO POWER TO GRANT THE WITNESS IMMUNITY AND NO RIGHT TO ATTEMPT TO COMPEL HIS TESTIMONY BY ADVISING HIM THAT HE COULD NOT BE PROSECUTED ON THE BASIS OF HIS TESTIMONY.

The power to grant immunity is a legislative power and there is no inherent power in either the court or the prosecuting attorney to give immunity and thereby compel testimony. The cases are collected at 113 ALR 2d at 1439, et seq., holding that there is no inherent power in the district attorney, even with the approval of the court, to grant immunity without statutory provision.

Even in Texas where the prosecuting attorney may, with the approval of the court, give immunity, that power is based strictly on statutory provision.

Utah has no general statutory provision for immunity, either on the motion of the prosecutor or on the court's own motion.

Even in those cases where there is a statutory basis

for immunity, which is non-existent in Utah, the courts hold almost without exception that the immunity must be broad enough to meet the constitutional guarantee both under the statutes and any Constitution such as our Article 1, Section 12, and under the Fifth Amendment of the United States Constitution.

Cases are collected at 118 ALR 591 uniformly holding that immunity from prosecution need not go to only the instant case but must be broad enough to afford complete immunity as granted by the constitutional provisions. That annotation further sets forth that the witness is judge of the incriminating nature of the testimony, see 118 ALR 599 citing from *State v. Edwards,* 2 Nott. and McC 13 (10 Am. Dec. 557):

> "If the answer may form one link in a chain of testimony against him, he is not bound to answer."

The United States Supreme Court in *Counselman v. Hitchcock,* 142 U.S. 547, 35 L. Ed. 1110, 12 S. Ct. 195:

> "In order to be valid a statutory enactment for compulsory testimony must be as broad as the constitutional provision."

the court stating:

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

> ". . . . In view of the constitutional provision, the statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

The courts further uniformly hold that even in states where there are immunity statutes, the fact that the instant crime may be barred by statute is not sufficient. Citing *Overman v. State,* 194 Ind. 483, 143 NE 604:

> "It was held that one who had been discharged by the court as to a certain criminal charge could properly refuse to testify with reference to his acquaintance with reference to the remaining defendants and the victim of the crime, although a statute provided that the order of discharge should be a bar from another prosecution for the same offense."

The court said:

> "A statute which only relieves the witness from prosecution for the crime on trial is not as full a protection against self-incrimination as the Constitution grants him." Also see annotation at 87 ALR 418.

In the instant case, Utah is wholly without a general statute as to immunity for the purpose of compelling testimony. Judge Faux attempted to compel testimony by coercing the witness to testify with regard to his acquaintanceship with the defendant in this case who was also the defendant with him in the conspiracy case which, though dismissed, charged various substantive crimes amounting to felonies in the State of Utah for

which a dismissal could not be a bar, in which both he and the defendant in the case in which the contempt arose were principal parties.

Further, the United States Supreme Court very recently in *Stevens v. Mark*, 15 L. Ed. 2d 724, in Judge Harlan's concurring opinion at page 735:

> "In addition, this court has recently extended the Fifth Amendment to the States, Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 Sup. Ct. 1489, and abolished the 'two sovereignties rule,' Murphy v. Waterfront Comm., 378 U.S. 52, 12 L. Ed 2d 678, 84 Sup. Ct. 1594."

giving the appellant herein the protection not only of the Utah Constitution but the Constitution of the United States. It is submitted that the District Court was without authority to grant Mr. Petty immunity from answering questions which may tend to incriminate. The law seems to be without exception that acquaintance with or linking with another person with whom a crime is charged or may be charged (and in this case we have the various substantive crimes set forth in the conspiracy indictment), there can be no doubt that the answers sought to be illicited from the appellant herein by the district attorney were a step or a link in the chain which may have incriminated the defendant. He properly refused to answer, and the court improperly ordered him to answer, and attempted to coerce the answers by imposing the contempt sentence.

CONCLUSION

It is our contention that under the law of this state and the laws of the United States and the applicability of both Constitution of Utah, Article 1, Section 12, and the non-incrimination provisions of the United States Constitution, the appellant could not have properly been required to answer the questions and our court had no authority, statutory or judicial, to grant him immunity. As a result the finding of contempt and the sentence by Third Judicial District Judge Faux should be reversed and the defendant discharged.

Respectfully submitted,

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