1966

George L. Bell, et al.. v. Bud Favero and Maurice Richards : Brief of Respondents

IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE L. BELL, et al,	)	
	)	
Plaintiffs-Respondents,	)	
	)	Case No.
vs.	)	10709
	)	
BUD FAVERO and MAURICE RICHARDS,	)	
	)	
	)	
Defendants-Appellants.	)	

BRIEF OF RESPONDENTS

Appeal from Judgment of the Second
Judicial District Court
Honorable Lewis Jones, Judge

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BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

Respondents accept Appellants' statement.

DISPOSITION IN LOWER COURT

Respondents accept Appellants' statement except to add that Plaintiffs did also allege that the purchase of football tickets was for private individuals and that said purchase was

described on the public records of Weber County as "Scholarships for Weber Athletic Department".

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the Trial Court.

STATEMENT OF FACTS

Mr. Gary Crompton, Athletic Business Manager of Weber State College, appeared before a regular meeting of the Board of Weber County Commissioners on August 26, 1965, to sell the County a half-page ad in the Weber State College football programs and to seek the support of their athletic program by Weber County employees (Tr. p. 7, lines 1-7 and p. 38, lines 18-24). In response to the solicitation of Mr. Crompton the Appellants requested a special discount rate to Weber State College football games "for the employees

for Weber County". (Tr. p. 8, lines 9-24) This request was rejected by the administration of Weber State College. (Tr. p. 8, lines 21-24)

As alternative proposals to the Appellants request, Mr. Crompton suggested either an athletic scholarship or the outright purchase of football tickets--not at a special discount rate, which had already been rejected by Weber State College, but at the regular season ticket rate. (Tr. 8, lines 21-24) The Appellants rejected the granting of a scholarship and agreed to purchase 50 season football tickets to Weber State College games. (Tr. p. 11, lines 18-30 and p. 12, lines 1-9)

Shortly after the Appellants had agreed to purchase 50 season tickets, Mr. Crompton delivered the tickets to Mr. A. R. Covieo, (Tr. p. 9, lines 10-20) Weber

County Building Inspector, who had been assigned by Appellants to distribute the tickets; (Tr. p. 14, lines 14-22) however, these first tickets were returned as unsatisfactory because the Appellants decided that they did not comprise a solid seating block. Mr. Crompton remedied the problem by redelivering 50 season football tickets situated together in a block. (Tr. p. 96, lines 19-30 and p. 97, lines 1-3)

Approximately three weeks after the tickets had been delivered, Mr. Crompton made a special request to Mr. Covieo for payment of the tickets purchased because he had to close his books with the Weber State College Cashier. (Tr. p. 9, lines 21-30 and p. 10, lines 1-8) In response to this request Appellants caused to be appropriated from the Weber County Treasury the sum of $600.00 by means of Weber

County Purchase Order No. 2622, dated September 20, 1965, accompanied by Requisition For Material No. 1420, dated September 17, 1965, (Plaintiff's Exhibit B), in which the tickets purchased were described as "Scholarships for Weber State Athletic Department".

Although Appellants and Mr. Covieo have disclaimed responsibility for describing the ticket purchase as "Scholarships for Weber State Athletic Department", Appellants did approve the completed purchase order containing the erroneous description (Tr. p. 46, lines 21-26 and p. 91, lines 12-26) and Mr. Covieo did sign the requisition on which the description does appear (Plaintiff's Exhibit B).

Elmer Carver, the third member of the Weber County Board of County Commissioners, testified that he had not been

informed prior to November, 1965, that Weber County funds had been appropriated for the purchase of football tickets. (Tr. p. 24, lines 15-29) He further testified that prior to the 1965 Weber State College homecoming game he was given two football tickets by Appellant Maurice Richards--not knowing at the time that public funds had been used to purchase said tickets (Tr. p. 25, lines 2-12). Neither the exact appropriation of $600.00 nor the purchase of 50 season football tickets had ever been discussed at a regularly constituted or special meeting of the Weber Board of County Commissioners. (Tr. p. 36-43)

Appellants never supplied a complete list of all recipients of the football tickets. (Tr. p. 88, lines 29-30) The evidence indicates that Mr. Covieo had kept a written record of all persons who

had received tickets and had reported after each game the names of such persons to the Appellants. (Tr. p. 80, lines 28-30) Mr. Covieo testified that when the season was completed, he threw the complete list in a waste basket. (Tr. p. 99, lines 5-18, p. 103, lines 11-14)

In the published answers submitted by Appellants to the written interrogatories propounded by Respondents, Appellants list 38 recipients of football tickets, 24 of whom are salaried officials or employees of Weber County. (Tr. p. 68, lines 5-30 and p. 69, lines 1-23) Only seven persons on the list were serving as non-salaried members of Weber County advisory boards at the time tickets were distributed to them.

Mr. B. M. Richards, father of Appellant Maurice Richards, testified that he received approximately 18

admission tickets. (Tr. p. 60, lines 17-29) Mr. Richards was at the time a salaried deputy sheriff of Weber County (Tr. p. 60, lines 12-15) and an appointed member of the Weber County Welfare Board. (Tr. p. 62, lines 3-11)

Mr. Dee Wilcox, Weber County Auditor, testified that he had received 8 admission tickets, but did not know at the time he received the tickets that said tickets had been purchased with public funds. (Tr. p. 47, lines 1-30; p. 48, lines 1-20; p. 53, lines 17-30; p. 54, lines 1-7) Later in November, 1965, after he discovered that public funds had been used to purchase said tickets, he and David L. Duncan, Weber County Treasurer, reimbursed Weber County in the sum of $45.00 for all tickets which had been distributed to them by Mr. Covieo. (Tr. p. 54, lines 11-30)

Although Appellants aver that Mr. Covieo did not personally use any of the tickets (Appellants' brief, p. 11), the record is quite clear to the contrary. (Tr. p. 79, lines 25-30; p. 80, line 1; p. 100, lines 12-20) At the time of ticket distribution Mr. Covieo was a salaried employee of Weber County as were a majority of the known ticket recipients. (Tr. p. 68, lines 12-30 and p. 69, lines 1-23)

Appellant Maurice Richards testified concerning the general purpose to be served by the distribution of tickets as follows:

> ... We were trying to encourage our county people, the people who are affiliated with us, the 4 or 5 or 600 employees, the 40--something like that--whatever it is, 20, 30, 40 board members, the people at the hospital and these kids. We weren't really trying to encourage these kids to go to the ball games. We were trying to give them a night out or a day out, something like that. We were not making any attempt to buy tickets for the whole public.

We were trying to develop some spirit and some enthusiasm within this block of people known as county employees and affiliates. (Tr. p. 88, lines 7-15)

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THE APPROPRIATION MADE BY APPELLANTS WAS ILLEGAL.

The Respondents submit that the appropriation of public funds for the purchase of football admission tickets for private individuals, most of whom were salaried employees of Weber County, was an illegal appropriation, serving a private, rather than a public purpose.

Appellants have attempted to reconstruct their conduct as constituting a contribution or donation to Weber State College. One of the Appellants went so far in his testimony as to declare that the Weber County Commissioners were "in the donation business." (Tr. p. 117,

lines 16-19). Contradicting this reconstruction by the Appellants is the testimony of the Weber State College representatives who were involved in the purchase and sale of the tickets. (Tr. p. 12, lines 1-9 and p. 21, lines 1-13). The appropriation of $600.00 was an exact quid pro quo consideration for the fifty (50) season football tickets sold by Weber State College to the Appellants. There was no gift to the college.

> A gift has been judicially defined as a voluntary transfer of property by one to another without any consideration or compensation therefore. It has sometimes been defined by statute as a transfer of personal property made voluntarily and without consideration, and also, generally, as that which is given, anything given or bestowed, or any piece of property voluntarily transferred by one person to another. Hence it is apparently well established at law that to constitute a valid gift, a

transfer must be voluntary, absolute, and without consideration. 24 Am. Jur., Gifts, Section 2, p. 730-731.

The distribution to salaried county employees of football tickets purchased with public funds, must constitute either additional compensation or a donation to such salaried employees. Construed either way, such additional compensation or donation violates basic principles of Utah law. Any emolument, gift, compensation or donation paid or given to a county employee from county funds in addition to his regularly established salary is prohibited by our Utah Constitution.

> The Legislature shall have no power to grant or authorize any county or municipal authority to grant, any extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and

> performed in whole or in part, nor pay or authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without authority of law: provided that this Section shall not apply to claims incurred by public officers in the execution of the laws of the State. Utah Const. art. VI, Sec. 30.

The Legislature has also prohibited additional compensation or donation to county employees and officers.

> The salaries herein provided for shall be full compensation for all services of every kind and description rendered by the officers named herein . . . Utah Code Annotated, 1963, Sec. 17-16-19.

Also, an appropriation of public funds either to or in aid of any person or persons is strictly interdicted by Section 17-1-4, Utah Code Annotated, 1953.

Appellants extensively quote as authority Opinion No. 66-073 of the Utah Attorney

General, issued May 20, 1966, as authority for the proposition that an appropriation of public funds for football tickets may serve a public purpose if certain "precautions" are taken. The Opinion concludes as follows:

> Care must be exercised to insure that the distributions are not limited to particular groups, organizations, or political parties.
>
> If the foregoing precautions are practiced, it must be concluded that the Weber County Commission may authorize an expenditure of public funds for the purchase of Weber State College football tickets. (Appellant's Brief, p. 29)

In the instant case, however, it is impossible to conclude that these necessary precautions cited by the Attorney General were observed. The testimony of one of the Appellants, Maurice Richards, negates completely the existence of any such

precautions.

> . . . We were not making any attempt to buy tickets for the whole public. We were trying to develop some spirit and some enthusiasm within this block of people known as county employees and affiliates. (Tr. p. 88, lines 13-15)

Also, judicial notice should be taken of the fact that until the recent election in Weber County, one political party had dominated political offices and patronage in Weber County for approximately 34 years. Consequently, all Weber County employees and other officials designated by the Appellants as "the people who are affiliated with us" (Tr. p. 88, lines 7-15) were holding their jobs or appointments under the political patronage of the one political party in power in Weber County. The distribution of tickets was primarily

limited to this particular group, violating thereby all precautionary guide lines defined by the Attorney General. (Tr. p. 33, lines 5 to 24; Appellant's Brief, p. 29)

It could be argued that even a degree of nepotism appeared in the distribution of 18 tickets to a relative of one of the Appellants. (Tr. p. 60, lines 17-31)

There is a statutory procedure for the disposal of any property belonging to a county not required for public use. Section 17-5-48, Utah Code Annotated, 1953, provides for the public sale of such property by county commissioners as follows:

> They may sell at public auction at the courthouse door, after 30 days' previous notice given by publication in a newspaper published in the county, or if no paper is published in the county, by posting in five public places in the county, and

> convey to the highest bidder for cash any property belonging to the county not required for public use, paying the proceeds into the county treasury for the use of the county.

Inherent in this proviso is a prohibition against discriminatory distribution of property purchased with public funds to a particular and limted group of persons belonging predominately to one political party.

To establish a legal justification for the appropriation of public funds to purchase football admission tickets for private individuals, Appellants argue that there is a presumption that the expenditure of funds is for a proper public purpose and assert that "Courts may not substitute their discretion as to the wisdom of an expenditure for that of the local

official." (Appellants' Brief, p. 18) The authority cited for this assertion is SLATER V. Salt Lake City, 115 Utah 476, 206 P.2d 153 (1949). It is submitted that the case cited is irrelevant to the case at hand. The Slater case involved the direct exercise of the legislative power of a city commission in the enactment of a prohibitory ordinance. The facts of the case in no wise involved the appropriation of public funds.

The trial court in the instant case refused to acknowledge that county commissioners have unlimited powers (Tr. p. 120, lines 13-25). It relied on the general rule that counties are a creature of statute and have only such powers as are expressly conferred upon them or necessarily

implied from those expressly given. 14 Am. Jur., Counties, Section 28, p. 200. If there is a reasonable doubt as to the existence of a particular power in the county commission, it must be resolved against the commission, and the power denied. Lewis V. Petroleum County, 92 Mont. 563, 17 P.2d 60 (1932).

Appellants take exception to the refusal of the trial court to construe the appropriation of public funds for the purchase of football tickets for county employees and officials as tantamount to the development of the resources of Weber County. Everything in a particular county can be construed as a resource. It does not necessarily follow, however, that appropriations of public funds for the

development of all resources within a county fall within the purview of section 17-5-80, Utah Code Annotated, 1953, which was enacted in 1965. Utah County could not appropriate funds to the Brigham Young University, one of the major resources of Utah County.

Although, Weber State College could be construed to be a Weber County resource, it is a State institution. The taxpayers of Weber County have been legally taxed by the State of Utah for the support of Weber State College. They have never consented directly or indirectly to be taxed by Weber County for the direct or indirect support of Weber State College. The Weber County Commission possesses neither an

express nor implied statutory power to appropriate public funds for the direct or indirect support of any college or university, public or private.

Bailey V. Van Dyke, 66 Utah 184, 240 P. 454 (1925) is cited by Appellants as authority for the donation of funds to a State college and that such a donation serves a public---not private---purpose (Appellants' Brief, p. 22-23). The facts of the case involved an appropriation of Weber County funds in the sum of $1,200 for the service of a county agricultural agent and a home demonstration agent who were to perform field work in Weber County. This Court concluded that extension work was of a public and general character, designed and intended for the public wel-

..." Id. at 457.

In the case at issue, however, there was no exchange of valuable services available to a major segment of the population of Weber County for the public funds appropriated. Quite to the contrary, only a very limited group of Weber County employees and "affiliates" derived any direct benefit from the public funds appropriated. In fact, at least two tickets were given by one of the Appellants to a non-resident of Weber County (Answers to Interrogatories, p.13).

It should be noted that neither the instant case nor the Bailey case involved a donation or gift to a State college. In both instances there was a purchase by Weber County--extension services in the one

and football tickets in the other.

Although Appellants rely on Wood v. Budge, 13 Utah 2d 359, 374 P.2d 516 (1962), to support their theory that a county government "in light of modern day reality" (Appellants' Brief, p. 23-25, 42) should have its legislative acts endowed with a presumption of validity, Wood v. Budge, supra at 519, it should be noted that this Court was dealing with the powers of the legislature and not the limited power of a board of county commissioners. However, this Court did state a general principle of justice that does have application to all levels of government.

> It is an elementary principle of justice that there should be "equal rights to all and special privilege to none." And that thus there should be no discrimination against nor

favoritism toward some persons over others. It is quite unthinkable that the Legislature could properly make gifts of public funds merely to confer favors on certain individuals ....Id. at 519.

If the Legislature doesn't have the power to confer favors on certain individuals, it goes without saying that a county could never be given such a grant of power by the Legislature that would enable county commissioners to distribute preferentially to their subordinates, affiliates and friends football tickets purchased with public funds.

Utah Law provides that all boards of county commissioners shall consist of three members. Utah Code Annotated, 1953, Section 17-5-1. To insure that the constituents of the county shall have the impor- deliberation and judgment of three

county commissioners, the law provides for replacement of any ineligible, resigned or deceased commissioner by appointment by the surviving commissioners or by the Governor. Utah Code Annotated, 1953, Section 17-5 4. The obvious purpose of these requirements has been stated as follows:

> ...[T]he county is entitled to have each commissioner exercise his own independent judgment on each matter that is presented to the board. Stoddard v. King County, 158 P.2d 78, 86 (Wash. 1945).

In the same decision the Washington Supreme Court stated, "Our statutes contemplate that a board of county commissioners can act authoritatively only by resolutions properly spread upon the minutes and joined in by a majority of the board." Id. at 85.

Utah Law is not dissimilar. It too requires that all commissioners have notice of pending decisions and ample opportunity to deliberate and give to the public the benefit of their judgment. All contracts, agreements and appropriations of public funds made for or on behalf of a county must (1) be approved at a public meeting of the board of county commissioners; (2) be in writing; (3) be entered in the official minutes of the board of county commissioners. Utah Code Annotated, 1953, Sections 17-5-1, 17-5-4, 17-5-5, 17-5-7, 17-5-8, 17-5-12, and 17-5-16.

Section 17-5-9, Utah Code Annotated, 1953, permits a board of county commissioners "to make and enforce such rules and regulations for the government of the

... the preservation of order and the ... tion of business as may be proper." ... has not, however, relieve county ... missioners of their duty to hold regu... meetings and comply with the notice ... requirements for special meetings. Nor ... said section relieve county commis... sioners of their duty to hold their meet... ings in public.

In the instant case the appropri... tion of public funds for the purchase of ... football tickets was neither made at a ... meeting nor a special meeting of ... Board of Weber County Commissioners. ... was farther removed from public ... by being described in the offi... records of Weber County as a schol... contribution, not a football

ticket purchase. No public record reflected the true nature of the transaction or the actual disposition of the tickets in question. The only actual county record pertaining to the tickets and their distribution was an informal list which was destroyed, preventing thereby any possible public scrutiny. (Tr. p. 99 lines 5 to 18) In fact, the entire transaction from purchase through distribution was consummated without any attempt at deliberation by the complete Board of Weber County Commissioners. (Tr. p. 23 lines 14 to 30, p. 24 lines 1 to 29)

In Salt Lake County v. Clinton, 39 Utah 462, 117 P. 1075 (1911), cited by Appellants to indicate the quasi-judicial authority of county commissioners (Appel-

[illegible]' Brief, p. 18), this Court con-
[illegible]ded in regard to a claim for publica-
tion of a delinquent tax list (the publi-
cation of which is a mandatory duty
[illegible]posed by statute) that when money "was
[illegible]propriated and devoted to an object for
[illegible]ch the law authorizes the payment of
[illegible]ney out of the county revenues, and
[illegible] commissioners having acted within
their jurisdiction, and it not being
alleged that they acted in bad faith or
in fraud, they cannot be held personally
liable, however erroneous their judgment
[illegible]specting the validity of the claim may
[illegible] been." Id. at 1079. Requisite to
[illegible] conclusion were the following con-
[illegible]ions: (1) a clear public purpose
[illegible]d by the appropriation of public

...; (2) jurisiction or statutory ...thority for the appropriation; and (3) no allegation of bad faith or fraud on the part of the commissioners.

The present case can be distinguished from Salt Lake County v. Clinton in that the present case initially did involve an allegation of fraud in regard to the erroneous description of the ticket purchase as a scholarship contribution. Another distinction is that the appropriation in the present case evidenced no clear public purpose, if any at all. In Clinton the appropriation served a clear public purpose. Also, at no time has the legislature granted to any public official the right or privilege to buy with public funds entertainment for his subordinates

[illegible]. Consequently, the present [illegible] is clearly distinguished from [illegible], both on its fact and necessary legal conclusion.

There was, therefore, no error committed by the Trial Court in finding that the Appellants' appropriation of public funds for football tickets for use by private individuals was without authority of law.

POINT II

THE TRIAL COURT DID NOT ERR IN IMPOSING THE STATUTORY PENALTY UNDER SECTION 17-5-13, UTAH CODE ANNOTATED, 1953.

To answer Appellants' contention that it was error for the Trial Court to impose the penalties provided by Section 17-5-13, Utah Code Annotated, 1953, a proper analysis of said code provision must be made. Most of the provisions of the section are in the alternative. Of critical importance is the following language:

> ...or who, as commissioner, willfully, fraudulently or corruptly attempts to perform an act unauthorized by law shall, in addition to the penalty provided in the penal code, forfeit to the county $500.00 for every such act, to be recovered on his official bond...

The key words, "Willfully, fraudulently or corruptly," are in the alternative or

junctive--not the conjunctive. In other words for the penalty to be forfeited it is only necessary for a commissioner to violate one of the standards.

The Appellants are correct in stating that The Trial Court did not find that the conduct of the Appellants constituted a "willful and corrupt act." (Appellants' Brief, p. 39) The finding that invoked the penalty of Section 17-5-13 was that they "willfully" appropriated public funds for football tickets for distribution to their subordinates and associates. They simply intended to do what they did. That is all the statute requires.

This Court has defined the word "willful" to mean "an act done intentionally, designedly". Jenson v. Power & R. R. Co., 44 Utah 100, 138 P. 1185, 1189, (1914). Neither the definition of the

word "willful", nor Section 17-5-13, requires any element of fraud or corruption to constitute a willful act. Respondents submit that Appellants' construction of Section 17-5-13 is erroneous.

The penalty provided is a civil penalty. The code provision does, however, make reference to the possibility of criminal penalties being additional to the $500 forfeiture in situations presumably involving fraud or corruption inherent in either of which is criminal intent.

When a governor of Arizona chose to treat some public employees and private citizens to various of his trips involving public duties, the Arizona Supreme Court compelled him to pay back to the public treasury the expenses of his private guests. The governor's defense was that he had exercised good faith in causing the

[illegible]priation of public funds for his [illegible]. In an appeal from a taxpayers' [illegible]t the Supreme Court answered,

> We will state that a reading of Governor Hunt's testimony convinces us that he believed that he had a right to make the purchases enumerated and charge them to the State; also to pay the hotel bills and meals of his guests on business trips made by him, and that he did these things through no dishonest motives. He was simply mistaken as to the law. Valley Bank & Trust Company v. Proctor, 53 P.2d 857, 861 (Ariz. 1936).

In a case involving the misappropriation of public funds by a county board the same court declared that neither good faith nor legal advice is a defense to a taxpayers' action against members of a county board who have appropriated public funds without authority of law. Hartford Accident and Indemnity Company v. Wainscott, 19 P.2d [illegible] (Ariz. 1933).

The question as to whether or not appellants acted willfully is a question of fact which was decided by the

...al Court. This Court has declared ... it will not redetermine facts found ...e fact finder in a lower court in ...ases if, in the light most favorable ... the respondent, the evidence is ...ficient to sustain such findings. ...ons & Reed Co. v. Guthrie, 123 Utah ...2, 256 P.2d 706 (1953).

The proper conclusion must, therefore, ...that the Trial Court committed no error ...levying the penalty imposed for the ...illfull misappropriation of public funds.

CONCLUSION

...he record in the case at issue is ...plete with evidence to support and ...tain the conclusions of the Trial ...t. The appropriation in question ...ved a private rather than a public ...ose. It violated basic constitutional ...statutory prohibitions against

additional compensation or emoluments to public officials or employees. It preferentially benefitted a particular group within a particular political party. It was made contrary to the legally established procedure for the appropriation of public funds by boards of county commissioners. It was made in such a manner as to prevent scrutiny by the public eye. In short, it was a special privilege for a special few. The record presented to this Court requires an affirmation of the judgment.

Respectfully submitted,

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