1970

State of Utah v. Ila Ahrens : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ILA AHRENS,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Jury Verdict [illegible]
First Judicial District Court, in and [illegible]
State of Utah, the Honorable VeNoy Ch[illegible]
Presiding.

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STATE OF UTAH,
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vs.

ILA AHRENS,
Defendant-Appellant.

Case No. 12153

BRIEF OF RESPONDENT

NATURE OF CASE

This is an appeal from a jury verdict of guilty to a criminal charge of embezzlement.

RELIEF SOUGHT ON APPEAL

The respondent seeks affirmation of the appellant's conviction.

DISPOSITION IN LOWER COURT

The jury returned a verdict of guilty as charged to the crime of embezzlement in the First Judicial District of the State of Utah, in and for Cache County, Honorable Judge VeNoy Christoffersen, presiding. The Court sentenced the appellant to the statutory period of one to ten years with probation granted on the condition that appellant spend thirty days in the county jail and make restitution in an undetermined amount.

STATEMENT OF FACTS

The respondent agrees with the appellant's statement of facts except for the following comment.

Mr. Duane Beck, Logan City Recorder, testified that the appellant's responsibilities included the collection of monies for the cemetery fund as well as parking meter violations as part of her duties in the office (T. 108). In addition, appellant was responsible for the recording and making of deeds in connection with cemetery transactions (T. 185). While working in this capacity, appellant admitted that she received the check of $114.00 and later completed the transaction in regards to that payment (T. 186-9).

ARGUMENT

POINT I.

THE CRIMINAL ACTS SHOWN UNDER THE EVIDENCE ARE SUFFICIENT TO CONSTITUTE EMBEZZLEMENT.

The information charged appellant with a criminal offense under Utah Code Ann. § 76-17-2 (1953):

> "Every officer, director, trustee, clerk, servant or agent of any association, society, or corporation, public or private who fraudulently appropriates to any use or purpose not in due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes the same with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

In response to the charge, the appellant asserts that she is not within the prohibition of this statute, because she had no "control and custody" over the "cemetery trust funds" or the "general funds", and was only a clerk in the office. Consequently, appellant concludes that the charge of embezzlement could not be brought against an individual in her position. However, there are certain considerations which require a contrary position.

First, the record indicates appellant's employment constituted more than the normal employee duties. On February 7, 1968, the appellant took an Oath of Office and posted a bond as Deputy Clerk for the City Recorder, Mr. Duane Beck (Plaintiff's Exhibit II). Mr. Beck further described appellant's duties as including those functions of a clerk's position in the treasurer's office in collecting monies for the cemetery and parking meter violations. This arrangement was a normal business practice as several other people also performed duties in both the treasury and the recorder's office (R. 13; T. 106-9). In this position, appellant had access to and was entrusted with the receipt and transfer of public funds through the use of the general fund cash register.

Although appellant cites Utah Code Ann. § 10-10-64 (1953) for the proposition that the City Treasurer had custody and control of the general funds, it would be inconsistent with the purpose of protecting public interests to hold that only the City Treasurer, who is charged by the statute with the safekeeping and transfer of public funds, could be guilty of embezzling public money. If clerks, office

help, or other employees have access to or are entrusted with public funds, the protection of these funds would require that these individuals would also commit embezzlement if they converted public funds to their own use. Otherwise, the law would provide an inadequate protection of money entrusted to public employees. The statutory language, Utah Code Ann. § 76-17-2 (1953), appears to support this policy of protecting public funds by specifically stating that "every officer, director, trustee, clerk, servant or agent . . ." may be guilty of embezzlement. In view of such authority, there is no statutory language or policy which exempts the appellant from the charge of embezzlement.

In *McMillin* v. *Emery*, 59 Utah 553, 205 P. 898 (1922), the Utah Supreme Court held that the deputy treasurer was charged with precisely the same duties and liabilities as the county treasurer, and if he misappropriated public money entrusted to his office, he could be legally prosecuted for embezzlement. The rationale for prosecuting the deputy treasurer was that he was also responsible for the receipt, safekeeping, and transfer of public money. In order to discourage and prevent such misappropriations from occurring, this same rationale should apply to those clerks who receive, transfer, and deposit public funds. *State* v. *Harris*, 47 Okla. Crim. Rpt. 344, 288 P. 385 (1930); *State* v. *Harrington*, 148 Kan. 602, 83 P. 2d 659 (1938); *People* v. *Lester*, 21 Cal. App. 2d 450, 69 P. 2d 467 (1937).

The appellant was not unaware of her responsibilities and functions in regards to the public funds as evidenced

by her oath of office and posting of bond, and it is clear that the appellant's act is within the scope of Utah Code Ann. § 76-12-2 (1953). Consequently, persons other than a City Treasurer or Deputy City Treasurer could be guilty of embezzlement if they violated their duty and responsibilities in regards to public funds, and appellant is lawfully charged for the crime of embezzlement.

Second, the appellant alleges that the charge was not specific as to the nature of the crime committed, because of inconsistencies between the information filed and bill of particulars submitted at a later date. These inconsistencies allegedly confused appellant whether the charge was larceny or embezzlement.

The information, however, specifically spelled out the date of the alleged act, the amount of misappropriated money, and cited the statutory violation. In the bill of particulars the following two questions were asked which were allegedly inconsistent with the information R. 13:

> "Was the $114.00 alleged to have been misappropriated contrary to 76-17-2, Utah Code Annotated 1953, represented by the check of Vera May Maykin, paid on or about the 1st of May, 1969?
>
> Answer: No.
>
> If that is not the fund she is accused of misappropriating, what fund did she secrete and fraudulently appropriate for her own use and possession?
>
> Answer: Cash, constituting funds from general fund and the cemetery trust fund."

The first question simply asks if Mrs. Vera May

Makin's check for $114.00 was paid on or about the 1st of May, 1969. The answer is correct — no; the check was paid on May 19, 1969 (T. 11). The first part of the second question is vague because neither the prior question nor Section 76-17-2 mentioned any fund; however, the second half of the question can be answered as quoted above. The $114.00 check was misappropriated when it was substituted for cash in the general fund register, which also contained the cemetery trust fund. There is nothing confusing about the answers given which would be inconsistent with any charge of embezzlement. A close reading of the information and the bill of particulars would enable appellant to fully understand that the charge in this instance was embezzlement and not larceny as the appellant alleges.

POINT II.

THE JUROR'S CONDUCT IS NOT SUFFICIENT GROUNDS FOR A REVERSAL OF THE TRIAL COURT DECISION.

The Utah Supreme Court in *State* v. *Anderson*, 65 Utah 415, 237 P. 941 (1925), granted a new trial because the relationship between a juror and a prosecuting witness cast suspicion upon the verdict of the lower court. Almost every day for three weeks the juror had ridden to and from the trial in one of the prosecuting witnesses' car, according to a prearranged plan of transportation. Although the Court was satisfied that the case had never been discussed and neither was there an intent by the witness to influence the juror, it held the relationship sufficient to consciously or unconsciously influence the judgment of the juror, unless

it was affirmatively shown to be of no consequence.

> ". . . [T]he law requires of the juror such conduct during that time that his verdict may be above suspicion as to its having been influenced by any conduct on his part during the trial, or by any courtesy or favor received by him from anyone in any way directly or indirectly interested in the result of the litigation. It cannot be claimed that carrying a juror to and from his home daily, a distance of four and one-half miles, was not a substantial favor during a trial which lasted approximately three weeks." *Id.* at 944.

To further illustrate the type of conduct the Court was repudiating, the opinion cited two cases where the verdict of the juror may have been partial and required a new trial. In *Garvin* v. *Harrell,* 27 Okla. 373, 113 P. 186 (1910), the plaintiff invited the jurors to his home for an evening's entertainment, and in *Springer* v. *State,* 34 Ga. 379 (1865), the counsel for the prosecution kept the horses of the jurors overnight without any charge. The juror in *State* v. *Crank,* 105 Utah 332, 142 P. 2d 178 (1943), renewed an old friendship with a witness in plain view of the court just prior to the submission of the case to the jury. The Court reversed the case on other grounds and did not hold that this conduct alone would be grounds for a new trial, but clearly stated that such conduct was improper, particularly in capital cases, because of the possible suspicious implications of the conversation with an old friend who was also a witness.

In the instant case, the visit of the juror to the city offices was not connected in any manner to a type of relationship or contact which would have consciously or uncon-

sciously influenced the juror. Mrs. Bodrero did not recognize him until one of the office girls informed her as to his identity, and apparently the juror was not personally acquainted with anyone at the office. Their conversation was no more than what the juror had heard in court and was not suggestive as to any independent conclusions to be reached in the case (T. 171-4). The respondent submits that the conduct did not contain prejudicial elements, which would have exposed the appellant to a partial jury, because there was no personal relationship, favor, or act which would have consciously or unconsciously influenced the juror.

It should be noted that the entire jury was given the opportunity to view the office after it became known that the juror had been there. The view provided an equal basis upon which the jurors would reach a decision, and there appears to be no prejudicial factor present in this matter (T. 183).

POINT III.

THE TAYLOR AND BEVAN TRANSACTIONS WERE COMPETENT TO SHOW A SCHEME OR PLAN TO MISAPPROPRIATE FUNDS.

As a rule of evidence in a criminal trial, the prosecution must prove the accused guilty of the act charged and is not allowed to make any reference to related or unrelated offenses already committed to show the likelihood of guilt or a predisposition to commit crime. (F. Wharton, *Wharton's Criminal Evidence,* § 232, (R. Anderson, 12th Ed.

1955)). There is, however, an exception to the general rule in embezzlement prosecutions, which allows the state to show related acts and conduct of the accused in order to establish an intent, scheme or motive to misappropriate funds. Use of this exception by the prosecution was upheld by the Utah Supreme Court in *State* v. *Lack,* 118 Utah 128, 135-6, 221 P. 2d 852, 855-6 (1950). The appellant submitted that evidence showing his sale of liquor to various third parties indicated other offenses not pleaded at trial and was incompetent to prove embezzlement from the State Liquor Control Commission. In response, the Court noted that these acts occurred over the period during which a scheme to embezzle was in operation, and the evidence was competent to show an intent to embezzle. *State* v. *Lyman,* 10 Utah 2d 58, 348 P. 2d 340 (1960); *State* v. *Scott,* 111 Utah 9, 175 P. 2d 1016 (1947); *State* v. *Nemier,* 106 Utah 307, 148 P. 2d 327 (1944); *State* v. *Cooper,* 114 Utah 531, 201 P. 2d 764 (1949) The Colorado Supreme Court also upheld this exception to evidence introduced by the people of similar financial difficulties in connection with matter handled by the defendant to prove intent at trial. *Moore* v. *People,* 125 Colo. 306, 243 P. 2d 425 (1952); *Bewley* v. *State,* 404 P. 2d 39 (Okla. Crim. 1965).

In the instant case, the Bevan transaction was relevant to indicate at least an intent to take the money out of the cash register into her own possession. In addition, the transaction is a similar circumstance as that cited in the information; the money was not in the till, and there was no receipt for the check (T. 191-4). The Taylor transaction clearly indicated that a personal receipt for a check was

given only upon request, and the normal procedure was not to give a receipt at all. In effect, these collateral transactions are an inductive process of indicating that a mistake was not being made as to the disposition of money transactions handled by the defendant. Therefore, as to the matter of intent and a plan or scheme to defraud, the Bevan and Taylor transactions are competent evidence.

It should also be noted that appellant personally testified as to these transactions and was given ample opportunity to cross-examine other witnesses' testimony as to these transactions. The respondent submits that there was no prejudicial error committed through the use of this testimony, and appellant had ample opportunity to rebut any implications or inferences which this testimony suggested.

CONCLUSION

The respondent submits that the appellant was legally and lawfully charged and convicted for the crime of embezzlement upon competent legal evidence by an impartial jury.

Therefore, the respondent respectfully submits that the decision of the lower court be affirmed.

Respectfully submitted,

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