1972

The State of Utah v. Ronald G. Wilcox : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,
PLAINTIFF AND RESPONDENT

vs.

RONALD G. WILCOX,
Defendant and Appellant

Case No. 12798

BRIEF OF APPELLANT

Appeal from the Judgment of the Second District Court for Weber County

HONORABLE JOHN F. WAHLQUIST, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF KIND OF CASE

This is a criminal action charging the defendant with embezzlement of moneys of the Cardiopulmonary Care Clinic, Inc., a corporation, Defendant being President and Manager of the Corporation. Two checks were involved, one for $2,757.72 to pay off a personal loan on his car, and one for $52.90 to purchase a life insurance policy with Defendant's wife as beneficiary.

DISPOSITION IN LOWER COURT

The Jury found Defendant guilty on both counts.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the jury verdict of guilty of Embezzlement on both counts as a matter of

law and fact, or, that failing, remanding the case to the District Court for a new trial.

STATEMENT OF FACTS

Defendant and Appellant at all times mentioned herein was married and the father of three children. While in the service of the United States Army, Defendant received training with the use of respirators and finally trained doctors and nurses in the use of same. (TR 252, L 14-30; TR 253, L 1-5.)

For five years Defendant dreamed of setting up a Clinic to assist people who needed medical help, especially as it concerned respirators and respiratory illnesses. During this early period he traveled California and many western states gathering information relative to the establishing of a medical clinic, visiting doctors, hospitals, nurses and clinics all at his own expense. (TR 253, L 9-30; TR 254, L 1-26)

Finally he actually realized his ambition and set up Cardiopulmonary Care Clinic, Inc. as an Idaho Corporation the first part of 1970. Defendant was later elected President, and Mr. Clark Fritton, Secretary-Treasurer. Both signatures were required on Company checks. (TR 255, L 6-10).

Defendant knew nothing of accounting and setting up and keeping records, nor of the niceties of corporate law. (TR 256, L 15-21) and used only a check book with stubs and ledger. (TR 260, L 1-29).

Because Defendant was doing all the work of setting up and managing the business, the Secretary-Treasurer

co-signed many checks in advance and Defendant would use them as needed. (TR 256, L 22-30) State's own witness verified Defendant's testimony. (TR 61, L 21-30; TR 62, L 1-20).

Defendant claims that he was originally authorized to draw $200.00 per week as wages inasmuch as he was doing all of the work and this job was his sole source of income to support himself and family. Defendant also testified that the Directors agreed that he could write checks for personal needs on unpaid wages—this defendant did. (TR 255, L 1-8; TR 273, L 1-30; TR 274, L 6-27; TR 320, L 6-30; TR 321, L 1-30; TR 322, L 1-30).

The business could not support itself so Defendant loaned it money which he obtained from personal loans, some involving his wife who tried to keep the Company records; (TR 265, L 8-30; TR 266, L 1-21) Mrs. Wilcox is still paying on two of them. (TR 391, L 11-30; TR 392, L 1-23).

Defendant also permitted the Company to use his Bank Americard and Master Charge. State's complaining witness admitted that he computed or ran a tape on that use, which showed "around $26,000.00". (TR 261, L 6-20; TR 112, L 21-31). Defendant claims the Company has not yet paid all of this back. Mr. Porter at various times admitted the Defendant claimed approximately $3,000.00 due on credit card charges (TR 99, L 1-13; TR 102, L 17-30) and wages due of approximately $3,000.00 (TR 116, L 1-25; TR 54, L 4-25) State's witness Lester Moody confirmed Defendant's claim for money owed him by the Company. (TR 235, L 8-30). There were no

denials by the State's witnesses that the Company still owed Defendant money for wages or credit card charges.

The two checks that form the basis for the Embezzlement charges were negotiated in June, 1970. The first was written by Defendant, admittedly, for the sum of $2,757.72 to pay on his car. (TR 47, L 17-21; TR 277, L 24-30; TR 278, L 1-30; TR 279, L 1-30). The State's witness on direct did not acknowledge a deposit on the same day by Defendant of the sum of $2,331.00 to the Company account, but finally did so on cross. The testimony, unchallenged, showed that Defendant telephoned Clark Fritton and explained the transaction and got an OK to do so. Defendant wrote the check for the purchase of his car then borrowed $2,331.00 using the new car as collateral and deposited this sum in the Company account. The difference of $426.72 to be charged against unpaid wages. (TR 280, L 21-29). Defendant claimed approximately $3,000.00 wages due and unpaid at this date. The State's witness admitted that the check stub noted "loan payment"; (TR 52, L 10-22). The check was previously co-signed by Clark Fritton.

The second check was one written to Jefferson Standard Insurance Company for $52.90 for an insurance policy premium with Defendant's wife as beneficiary. (TR 52, L 28-30; TR 53, L 1-5) Defendant did not deny. (TR 281, L 12-17; TR 282, L 1-23).

State's witness, who was Insurance Company agent, Mr. Cooper, stated that Defendant told him that he had a draw on his salary (TR 133, L 17-26; TR 134, L 10-17) at time check was written—Defendant confirmed this. (TR 282, L 27-30; TR 283, L 1-10). It is interesting to

note that no one ever questioned Defendant about these checks or objected to them prior to the issuance of Embezzlement complaints.

All of the State's evidence concerning Defendant's wages was computed by either Mr. Porter or by the C.P.A., Mr. Wiggins, and both admitted they arbitrarily made many charges without evidence to support. Both had different amounts at different stages of the testimony. $3,350.00 (TR 83, L 4-15) $6,788.89 (TR 85, L 1-7) $5,502.50 (TR 154, L 2-30; TR 155, L 1-30). No matter how Defendant could possibly be limited, there were still unpaid wages due Mr. Wilcox.

ARGUMENT

POINT I

THE EVIDENCE DOES NOT SUPPORT THE VERDICT OF GUILTY RENDERED BY THE JURY AGAINST DEFENDANT ON EITHER COUNT.

The State's case consisted of evidence that showed the Defendant to have been the President and sole Manager of Cardiopulmonary Care Clinic, Inc., a corporation set up primarily by Defendant in the State of Idaho in the first part of 1970.

Defendant, admittedly, had the sole responsibility of setting up the business, hiring employees, driving vehicles, purchasing equipment and so forth, and admittedly spent a great number of hours each day in doing so.

The books and records were extremely sparce; Defendant did not have the time or the knowledge to establish and maintain same.

In middle of 1970 the complaining witness was asked by Defendant to become a member and director of the Corporation to set up a complete set of books and records. Mr. Porter had some experience in accounting, and, after going over the records, suggested to Defendant that a C.P.A. be employed to set them up. Defendant readily agreed and Keith Wiggins, C.P.A., was employed.

Mr. Wiggins stated the records were virtually impossible to understand, but with many consultations with Defendant and Mr. Porter, did come up with a set of ledgers and balance sheets. He had only checks, stubs and ledger to work with and it was determined that if no explanation of checks were noted on stubs he would ask what they were for and usually charged them against draws for wages by Defendant, oftentimes arbitrarily and over Defendant's objection. The State's witnesses computed Defendant had drawn wages to be in varying amounts—$3,350.00, $6,788.89, and $5,502.50.

Mr. Porter admitted that Defendant claimed he was authorized to draw $200.00 per week as wages, and did in fact have wages due at the time the two checks were written. He admitted further that Defendant permitted the Corporation to use his personal credit cards and approximately $26,000.00 worth of charges were made for corporate use to try to keep it going. He also admitted that probably not all had been repaid.

Finally in June, 1970 Defendant wrote one of the checks in question in the sum of $2,757.72 with stub notation of a "loan payment" and when Defendant was asked about it, he stated that it was a loan to him and had been repaid. Defendant admitted writing the check to pay on a personal obligation but stated that before doing so had contacted Clark Fritton who was co-signer of check, and explained that he wanted to write the check to pay off his car, but was going to buy a truck and camper and would use the same as collateral and pay money back the next day, and Fritton agreed that this could be done. Actually, the same day the check was written Defendant deposited back the sum of $2,331.00 which he obtained from a loan on the truck and camper. The difference he charged off against unpaid wages which at this time he claimed to be approximately $3,000.00.

At this time, it was clear that Defendant had money coming, over the $426.72 difference, in wages, and he also claimed money coming from unrepaid credit card charges owed by the Corporation.

With regard to the $52.90 check to the Jefferson Standard Insurance Company there could be no question but that, at the time he wrote the checks, he told the Insurance Company agent he did not have his personal checkbook, but had draws coming for unpaid wages against the Corporation and would credit this on the books as such.

It would seem that there is absolutely no evidence of an intention to defraud the Corporation at any stage.

Mr. Wilcox claimed that the Company owed him money from wages and credit card charges, and used these checks as draws. He had done so in the past and had money coming at the end of the year. He and his wife were paying on two personal loans for money advanced to the Corporation and were at this time paying on credit card charges for the Corporation. He claims the Company owed him over $3,000.00.

He was unfamiliar with bookkeeping procedures and did not know that it might be improper to make draws on wages and moneys owed in this way. He stated that Mr. Fritton lived in another city and it would have been practically impossible to consult with him on each check, so there was an understanding that Fritton would sign many blank checks and Defendant could use them as needed. Defendant did, however, get Fritton's okay to write the $2,757.72 check and Defendant did in fact put back in the Company account $2,331.00 the same day.

There could be no finding of a fraudulent intent at any time, but merely poor judgment in handling the transactions as Defendant did.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF STATE'S CASE.

At the conclusion of the State's case, Defendant made the Motion to dismiss both charges against Defendant, which the Court declined to grant, although from the ruling it appeared the Court found at least some merit in the Motion.

The argument advanced in Point I would apply to this point so Defendant will not be repetitious by repeating same.

Embezzlement under which Defendant was charged is defined by Title 76-17-2, Utah Code Annotated, 1953, as follows:

> 76-17-2 by the officer or agent of corporation.—"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 the 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 secrets the same with a fraudulent intent to appropriate it to use or purpose is guilty of Embezzlement."

In view of the Statute and holding of this Court, no fraudulent intent has been shown by any stretch of the evidence. Full disclosure was made before both checks were written, notation was made on stubs, and Defendant made all records available at all times. There was no showing of secrecy, trickery, or intentional fraud.

Defendant personally requested a thorough accounting and further, asked that a complete set of books be established. He never denied writing checks for personal use and claimed the amounts as unpaid wages, which was true. The Company then and now owes Defendant money for wages and unreimbursed credit card charges.

In one of the leading cases in this State, cited as STATE vs HORNE, 62 Utah 376, 220 P 378, in discus-

sing the intent necessary in the crime of Embezzlement, the Court said as follows:

> "In order to convict one of the crime of Embezzlement the proof must go beyond the mere fact of showing that the accused obtained the property of another in some fiduciary capacity and that he failed to account for it on demand. While there may be cases where the felonious intent may be inferred from the circumstances surrounding the receipt and withholding of the property, nevertheless, that cannot be so where, as in this case, the accused claims withholding of the property to have been in good faith and without felonious intent. True, it is that the reasons the accused may assign for having withheld the property may not be believed, but if he claims as a defense that he withheld the property in good faith and upon some reasonable ground, then the necessary felonious intent cannot be inferred from the mere fact that he failed to account"

The Court also cited MACKLEROY vs PEOPLE, 202 ILL. 473, 66 N.E. 1058. Quoting on the Mackleroy case, the Court held as follows:

> "To the same effect is the case of Mackleroy vs People, Supra. In the latter case it is said 'We are also of the opinion that the evidence failed to prove with that degree of certainty required by the Rules of Evidence in criminal cases that the defendant fraudulently converted to her own use or took and secreted with the intent so to do

without the consent of her employer, the money in question. The only evidence of a criminal intent is the inference to be drawn from the act itself. She at no time denied or attempted to conceal the indebtedness. So it must be said here that defendant at no time concealed or attempted to conceal the withholding of the check, and he as we read the record at all times claimed that he withheld it for the reason stated."

In SINGLETON vs SINGLETON, 157 P2d 896 (Cal.) the Court stated:

"When a person takes goods which he honestly believes are his own under a claim of title, he is not guilty of larceny, nor is such person guilty of embezzlement of property if it is openly and avowedly taken under a claim of title preferred in good faith."

So it is in this case. The accused openly noted the check in the company check register which was available to the officers and agents of the corporation. The same day he also made a deposit in a lesser sum with the allegation that the difference was charged aganist his earned income not paid to him at that time. There is no evidence to conceal any of the transactions at any time. It has been shown to be merely a continuation of practice from the inception of the Corporation and not objected to at any time until the filing of this complaint.

In STATE vs. McCORMICK, 442 P. 2d 134,

an Arizona Case the Court impliedly negated the

criminal intent aspect where it is shown that the transaction was one that had been established as customary practice, stating that the requisite intent in an Embezzlement prosecution may be inferred from the circumstance of the defendant's acts, such as voluntary acts in depriving the entrustor of his property, or taking large sums of money without approval and contrary to established practice.

In this case I believe it has been clearly shown that it was an established practice accepted by the officers and directors of the Corporation and reported to the bookkeeper that payment of wages to the accused was made by the accused paying personal indebtedness and personal accounts with corporate funds, with disclosures being made periodically. All of these checks made payable to the accused on the Company accounts were openly made on Company checks with the notations made on the stubs with a few exceptions when the stubs were not available and at no time is there a claim that these checks and ledgers were not made available and in fact it is clearly shown that they were made available all during the course of time involved up through 1970.

American Jurisprudence defines intent as follows:

26 Am Jur 2d EMBEZZLEMENT (Section) 21 p572, "The retention of property in good faith, without secrecy or concealment under a bonafide claim of right based upon reasonable grounds, generally is inconsistent with a fraudulent intent to embezzle. This is so, even though the accused is

mistaken in his claim of right the retention of money or property belonging to an employer may not constitute embezzlement if the accused retaines it in the belief that he had a right to keep it for his compensation."

Defendant feels that as a matter of law, the Court should have granted Defendant's Motion to Dismiss and erred in denying such Motion.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S INSTRUCTION NUMBER FOUR TO THE JURY, DEFINING THE MEANING OF THE WORD "FRAUDULENTLY" AS IT APPLIES TO EMBEZZLEMENT STATUTE.

At the time the case was submitted to the Jury, the Defendant requested the Court to give to the Jury the following instruction:

"As used in Embezzlement statute providing for punishment of a fiduciary of money who fraudulently converts it to his own use, quoted word "fraudulently" has some other than its usual meaning. It implies deceit, deception, artifice and trickery and means conversions made with intent to deprive beneficiary of the money permanently. It is not sufficient to show that the accused may have used poor judgment in his method of accounting."

The Court erred in refusing to give this instruction. Under the Statute, Title 76-17-2, Utah Code Annotated,

1953, reciting that fraudulent intent was a necessary element of the charge of Embezzlement, and under the rulings of this Supreme Court, the Jury is entitled to an explanation as to what constitutes fraudulent intent and this was the import of the requested instruction.

The evidence set forth in the State's case certainly justified this requested instruction, and in all probability the Jury rendered its verdict because Defendant in fact wrote the checks. They did not properly determine question of intent at the time.

We feel that all the State showed was poor judgment on Defendant's part.

There was a great deal of evidence admitted into the record, which probably confused the Jury on just what elements they were to consider and what elements they were to find. The evidence and arguments concerning the proper way to keep the records and impropriety of an officer dealing with the Corporation in the manner Defendant did, apparently swayed the Jury.

They undoubtedly would have been properly advised as to the meaning of fraud as it applies to Embezzlement if this instruction had been given and we contend that the Court erred in its refusal to give this instruction.

CONCLUSION

It is our conclusion that we have the classic case of a person, skilled in the field of a branch of medicine, but totally unskilled in the fields of business, trying to run

the Corporation. He acted logically but not in accordance with the rules of Corporate dealings.

Defendant had sole responsibility of establishing the Corporation, setting up and managing the business of the Corporation and did so in the way it seemed logical to him. If the Corporation needed money, Defendant would obtain a personal loan and put it in the Corporation account. If he had wages coming, he would draw some checks on wages specifically and on some occasions pay a personal bill on Company check and charge against wages, or money loaned. He permitted Company charges to be placed upon his credit cards when necessary.

When the two checks, subject of the charge of Embezzlement, were written, he had money coming from the Corporation. When he wrote the large check after obtaining permission to do so from the Corporation cosigner, he entered notation "loan payment" and the same day deposited an amount approximatety $400.00 less back in the Company account, which he obtained from a personal loan, and debited the difference against wages.

On the smaller check he told the payee that he had a draw on the Company account, and this amount was charged to Defendant as wages.

The State did not show any evidence of a fraudulent intent. Actually good faith on the part of Defendant was clearly shown.

It is submitted that the Court erred in refusing to dismiss the charges against the Defendant at the conclusion of the State's case.

It is further submitted that the Jury erred in its verdict on both counts in that no fraudulent intent was shown.

The trial court erred in refusing to give Defendant's Instruction Number four defining the meaning of the fraudulent intent necessary for a conviction.

Respectfully submitted,

HUGGINS and HUGGINS

By