1972

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

RONALD G. WILCOX,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, HONORABLE JOHN F. WAHLQUIST, JUDGE

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

TEXTS CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

RONALD G. WILCOX,
Defendant-Appellant.

Case No. 12798

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal action charging the defendant with embezzlement of moneys of the Cardio-Pulmonary Care Clinic, Inc., a corporation. Defendant was President and Manager of the Corporation. Defendant is charged with writing two checks, 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 of embezzlement. Defendant was sentenced to twelve months

in the Weber County Jail, with three days credit being given for each two days served.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the District Court of Weber County affirmed.

STATEMENT OF THE FACTS

Cardio-Pulmonary Care Clinic, Inc. was organized in February 1970. Defendant was President and Manager of the Corporation. Defendant did most of the promotional and organizational work of the Corporation himself. Cardio-Pulmonary Care Clinic, Inc. had no income until July 1, 1970 and only $1,000 of income by September 1970. In the same period the Corporation had over $20,000 in expenses as computed by Keith E. Wiggins, a Certified Public Accountant. The Corporation became defunct. There were no financial records kept other than checks, check stubs and bank statements. The check stubs were often incomplete.

On June 1, 1970 Defendant wrote a check for $2,757.72 against the corporation account. The check was a payment on Defendant's personal car and the check stubs carried only the notation "loan payment". When Defendant was asked about the $2,757.72 he said it was a loan and had been paid back. Defendant made a deposit to the Corporation account on June 1, 1970, of $2,331.00, but there was no record made of what the deposit was for, and Mr. Wiggins testified that Defendant had indicated

it was a loan from Defendant's sole proprietorship to the Corporation.

On August 3, 1970 Defendant wrote a check for $52.90 to Jefferson Standard Insurance Co. to pay for a life insurance policy which listed Defendant's wife as beneficiary. Defendant told the insurance salesman he was writing a Corporation check because he had money coming from the Corporation. The check and check stub carried no indication that the check was for personal expenses or was to be credited against Defendant's wages. No indication was given the Corporation or its other officers that this was not a Corporation expense.

Defendant claimed he had had oral authorization to make personal use of Corporation funds and that he had money coming from the Corporation for back wages, loans he had made to the Corporation, and Corporation charges on his personal credit cards. Kenneth C. Porter, a director of the Corporation testified that to his knowledge, Defendant had no authority to use Corporation funds for personal expenses. None of Defendant's claims of money the Corporation owed him was documented or corroborated except a $200 credit card charge which Mr. Porter had refused to have the Corporation pay. All other credit card charges had been paid by the Corporation. No loans were deposited to the Corporation's account from Defendant before June 1, 1970.

ARGUMENT

POINT I.

THE JURY VERDICT OF GUILTY ON BOTH COUNTS OF EMBEZZLEMENT IS SUPPORTED BY THE EVIDENCE PRESENTED.

Defendant admits that he converted corporate funds to personal use on two occasions as charged. The jury was instructed that if they found Defendant acted in good faith under a claim of right he should be acquitted. The jury found that Defendant acted with a fraudulent intent to deprive the Cardio-Pulmonary Care Clinic, Inc. of its money. There is substantial evidence in the record to support this verdict.

Defendant failed to properly account for the money he took from the Cardio-Pulmonary Care Clinic, Inc. There is evidence to support the jury in a finding that this failure to account was an attempt by Defendant to conceal the fact that he had taken the money from the Corporation. Defendant kept no record of his transactions for the Corporation except a check stub and check register. After writing the check for $2,757.72 to pay off the loan on his personal car, Defendant wrote on the check register that the check was a loan payment with no reference to it being a personal loan (T. 52, L. 18-22, T. 16, L. 12-16). When other officers of the Corporation became concerned about this and other checks, Defendant was asked to explain (T. 46, L. 2-10). Defendant explained

that the check for $2,757.72 was a personal check and had been paid back (T. 47, L. 17-20). Mr. Porter, a director of the Corporation, testified that his investigation yielded no record that the money had ever been paid back (T. 51, L. 18-20). Defendant made a deposit of $2,331.00 to the Corporation account on June 1st but there was no indication on the deposit slip as to what the deposit was for (T. 51, L. 25-30, T. 52, L. 1-6). A Certified Public Accountant called in to set up books for the Corporation testified that Defendant had informed him the $2,331.00 was a loan from Medical Leasing and Distributing Co. to the Cardio-Pulmonary Care Clinic, Inc. (T. 161, L. 24-27). Medical Leasing and Distributing Co. was a sole proprietorship of the Defendant. Defendant himself testified at one point in the trial that the $2,331.00 was a loan to Cardio-Pulmonary Care Clinic, Inc. from Medical Leasing (T. 330, L. 24-30; T. 331, L. 1-7) though he later denied that he had said that (T. 335, L. 22-30; T. 336, L. 1-10) and claimed that the money was the repayment of the $2,757.72 check.

Defendant wrote a check for $52.90 to purchase life insurance with his wife as beneficiary. The check stub carried no indication that this was not a corporate expense and the C. P. A. who set up the corporate books testified that he received no indication from Defendant that it was not a corporate expense (T. 171, L. 9-23). Mr. Porter also testified that there was no indication the $52.90 had been used for corporate business or paid back (T. 53, L. 1-15). Defendant told the insurance salesman that he was

using a Corporation check to pay for the insurance because he did not have his check book with him and was due some money from the company (T. 133, L. 17-25). Later, Defendant asked the insurance agent to write a letter stating that the original policy had been made out for the benefit of the company (T. 130, L. 20-25). The jury would certainly be justified in deducing an intent to defraud from such conflicting explanations of the purpose of the check.

There is evidence that Defendant knew of his duty to keep accurate records. Defendant had been president and a director of a previous corporation (T. 313, L. 8-30). Defendant's wife set up the bookkeeping for that corporation and Defendant hired a public accountant to take over the books (T. 397, L. 20-25). Defendant made out a financial statement in the presence of others and even underlined the total twice (T. 367, L. 22-30; T. 368, L. 1-11). Mr. Wiggins testified that he instructed Defendant on how to set up proper financial records for the Cardio-Pulmonary Care Clinic, Inc. and that Defendant disregarded his advice (T. 198, L. 12-30; T. 199, L. 1-30; T. 200, L. 17). This supports the jury's finding that Defendant's poor record keeping was motivated by a fraudulent intent to deprive the Corporaoion of its money rather than by ignorance.

There is also evidence to support a jury finding that Defendant held no good faith claim of right to the money taken. There was no authorization in the articles of incorporation, the by-laws or in the minutes of any meet-

ing for Defendant to use corporate funds for personal use (T. 53, L. 16-29). From March 23, 1970 until June 1, 1970 Defendant withdrew a regular weekly paycheck of $125 (T. 155, L. 28-30; T. 156, L. 1-4; T. 323, L. 23-30). There is no evidence as to what Defendant's salary should have been during this period except Defendant's testimony that it should have been $200 a week. In a board meeting in August, 1970, Defendant was authorized a salary of $200 a week which he drew regularly after that date (T. 117, L. 15-30; T. 157, L. 24-27). In Defendant's representation to the board that he was short on the salary due him no mention was made of personal expenses paid off with corporate funds as representing salary (T. 115, L. 26-30; T. 116, L. 1-23). Defendant testified that he had made personal loans to the Cardio-Pulmonary Care Clinic, Inc. before June 1, 1970 and that these represented some of the money due him when he wrote the checks listed in the charge (T. 324, L. 19-23; T. 326, L. 23-30; T. 327, L. 1-25). There was no record of such loans being deposited to the Corporation and Defendant admitted that he may have "misrepresented" what he said in testifying that he had deposited the loans to the company (T. 330, L. 24-30; T. 331, L. 1-28). The Cardio-Pulmonary Care Clinic, Inc. paid for all the Master-Charge and BankAmericard charges presented to it by Defendant except one for $200 which it refused to pay (T. 103, L. 5-11). From this evidence the jury could conclude that defendant drew the salary he was authorized, and that his other claims against the Corporation were neither honestly computed nor held in good faith.

The intent of the Defendant may be inferred from other evidence concerning the general nature of Defendant's conduct toward the Corporation. Mr. Wiggins testified of his concern as a C. P. A. that the transactions between Defendant's sole proprietorship and Cardio-Pulmonary Care Clinic, Inc. were not arm's length transactions (T. 143, L. 14-28). Defendant admitted making a $250 profit from the sale of a $600 radio to Cardio-Pulmonary, from Medical Leasing (T. 338, L. 22-30; T. 339, L. 1-30; T. 340, L. 1). Defendant was inconsistent in explaining the checks he wrote (T. 118, L. 1-7). Defendant delayed the transmission of the Corporation records to the C. P. A. (T. 139, L. 23-28). Defendant's explanation of the records to the C. P. A. were contradictory and inaccurate (T. 48, L. 20-24). Defendant handled the Corporation as if he did not have to answer to anyone (T. 165, L. 17-20). The C. P. A. had prepared a tax return for the Corporation which was not mailed (T. 181, L. 24-26). A check was given to the accountant as an equipment purchase. When the accountant pressured the Defendant on what type of equipment, the Defendant admitted it was personal and should be charged against him as wages (T. 196, L. 8-24). Defendant inflated value of corporate assets by 70% to get investors to back the Corporation (T. 227, L. 9-12). Defendant told prospective investors that he had invested $10,000 in the Corporation which later proved untrue (T. 225, L. 6-25). Defendant listed leased equipment as corporation capital to secure a loan, without indicating that it was leased (T. 216, L. 24-30; T. 217, L. 8-19). This evidence would support a jury find-

ing that the Defendant had a fraudulent intent, and could be used by the jury as outlined in instruction No. 7 to support a finding that the Defendant had the requisite knowledge and scheme to commit the crime.

In an appeal from a conviction for embezzlement the evidence is sufficient to support the verdict if there is any substantial evidence upon which a jury could reasonably base a guilty verdict. In *State* v. *Aures*, 102 Utah 113, 118, 127 P. 2d 872 (1942), the Utah Supreme Court said: "It is not the province of this court to judge the sufficiency of the evidence. If there was substantial evidence from which the jury could reasonably conclude that Defendant embezzled money of Mrs. Armstrong, we should not disturb the verdict."

In *State* v. *Berchtold*, 11 Utah 2d 208, 214, 357 P. 2d 183 (1960), this Supreme Court refused to overturn a homicide conviction for lack of sufficient evidence to sustain the verdict. The Court said, "We reverse a jury verdict only where we conclude from a consideration of all the evidence and the inferences therefrom viewed in the light most favorable to such verdict that the findings are unreasonable." See *State* v. *Erwin*, 101 Utah 365, 120 P. 2d 285 (1942), for a similar holding. There is substantial evidence in the record to sustain the jury in its finding that Defendant acted with a fraudulent intent to deprive the Cardio-Pulmonary Care Clinic, Inc. of its money.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO DISMISS.

At the conclusion of the State's case Defendant moves to dismiss. The State had presented evidence on each element of embezzlement. The trial judge properly ruled that the case should go to the jury.

The standard to be applied to the evidence by the trial court in ruling on a motion to dismiss has been stated by this Supreme Court in *State* v. *Thatcher*, 71 Utah 63, 68, 157 P. 2d 258 (1945). The Court said, "where different reasonable inferences can be drawn from the evidence, the question is one exclusively within the province of the jury." Again in *State* v. *Pendervill*, 2 Utah 2d 281, 286, 272 P. 2d 195 (1954), the Court stated:

> "It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that a trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of guilt of the accused, and all reasonable inferences are to be taken in favor of the state."

This holding has been followed by this Court in *State* v. *Rivenburgh*, 11 Utah 2d 95, 355 P. 2d 183 (1960), and in *State* v. *Woodall*, 6 Utah 2d 8, 305 P. 2d 473 (1956).

The basis for Defendant's motion is summarized in Utah Code Ann. § 76-17-10 (1953), which says:

> "Upon indictment for embezzlement it is sufficient defense that property was appropriated openly and avowedly and under a claim of title made in good faith, even though such claim is untenable."

It would not have been proper for the judge to rule as a matter of law that Defendant's appropriation was open and avowed. There is substantial evidence in the record to support a jury determination that Defendant attempted to conceal his appropriation of Corporation money. As outlined under Point I the Defendant made no record of either check to indicate the money had been taken for personal use under a claim of title. When pressed about the $2,757.72 check, Defendant claimed he had paid it back. Defendant also tried to get a letter showing that the $52.90 had been meant for Corporation purposes. The credibility of Defendant's claim that he had no knowledge of accounting and of the inference that he was ignorant of a duty to keep a record of the Corporation's finances was a question for the jury. A determination that Defendant's failure to account was prompted by a fraudulent intent to deprive the Corporation of its money would have been justified evidence presented in the record.

Defendant's claim that he had money coming from the Corporation at the time he wrote the checks is supported only by Defendant's own testimony and statements to other persons. Defendant's credibility is a proper issue for jury determination. Evidence that Defendant drew a regular salary from March to June, 1970 and that

he drew a full $200 salary when it was authorized by the board of directors, along with evidence that Defendant had deposited no loans to the Corporation account before June 1st and had no unpaid credit card charges, support a jury finding that Defendant had no good faith claim to the money he appropriated. It would have been improper for the judge to rule as a matter of law that Defendant's taking was open and avowed under a claim of title.

In *State* v. *Horne*, 62 Utah 376, 382, 220 P. 378 (1923), the Supreme Court held that mere failure to account was not sufficient evidence of the necessary felonious intent *where the defendant has a good faith claim to the property*. In that case the court said the issue was for the jury under proper instruction. The court said, ". . . the jury must be instructed that the necessary felonious intent must be deduced from all the facts and circumstances when considered in connection with the claims of the accused respecting the failure to account for the property." Applying the holding in *State* v. *Horne* to this case, the judge could not rule as a matter of law that Defendant had a good faith claim of title, and the jury was not instructed that it could find the Defendant's intent merely from the fact that he converted the money. The jury was instructed under instructions 6a and 6b (Record 18-20) that if they found Defendant was acting in good faith and intended to charge the money to wages it should find him not guilty.

In *People* v. *Proctor*, 169 C. A. 2d 269, 337 P. 2d 93, (1959), the California Court applied a California statute similar to Utah Code Ann. § 76-17-10 (1953), (Deering California Penal Code § 511), as follows:

> "Whether Appellant took the check openly, in good faith and under a claim of title, is a question of fact for determination by the duly constituted arbiter of the facts, and such a claim does not depend solely upon whether the claimant believes he was acting lawfully, but the surrounding circumstances must reasonably indicate good faith."

The trial court did not err in allowing the jury to decide whether Defendant was acting in good faith or with intent to deprive the Cardio-Pulmonary Care Clinic, Inc. of its money.

POINT III.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S INSTRUCTION TO THE JURY DEFINING THE MEANING OF THE WORD "FRAUDULENTLY" AS IT APPLIED TO EMBEZZLEMENT STATUTE.

Defendant requested the following instruction be submitted to the jury:

> "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 trick-

> ery 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 trial court did not err in refusing to give this instruction since the essential part of the instruction is already stated in instruction 6a and 6b, and the part of this instruction which differs from instruction 6a and 6b is a misstatement of the law. In *State* v. *Berchtold, supra,* the Supreme Court held that the trial court need not give an instruction that is not substantially different from an instruction given. The section of the requested instruction that indicates Defendant may not be convicted for the use of poor judgment in his accounting methods is already covered in instruction 6a and 6b. Besides the instruction in both 6a and 6b that if the jury believes Defendant acted in good faith he should be acquitted, instruction 6a states, "You are instructed that the statute here involved is intended to punish those who fraudulently misuse corporation funds to their own advantage and is not intended to punish those who are mistaken regardless of the reasonableness of their mistake" (Record 18-19). The section of Defendant's requested instruction which defines the word "fraudulently" is a misstatement of the law. In *State* v. *Erwin, supra,* this Supreme Court has ruled that instructions which are a misstatement of the law are properly refused. The word "fraudulently" as used in the embezzlement statute denotes the element of criminal intent necessary to constitute em-

bezzlement and is not meant to imply that embezzlement requires an added element of trickery or deception. In *Mansur* v. *Lentz*, 201 Mo. App. 256, 211 S. W. 97, 99 (Kan. Cty. Ct. of Appeals 1919), a Missouri *Appeals* court held, "the words 'feloniously' and 'fraudulently' used in connection with an unlawful and forbidden act only mean that the act was done knowingly and purposely . . ." The Iowa Supreme Court said in *State* v. *Jamison*, 74 Iowa 602, 38 N. W. 508, 509 (188), that "fraudulently" as used in an indictment charging that the defendant did fraudulently embezzle and convert to his own use a certain sum of money, qualifies the words "embezzled" and "converted" and is descriptive of the motive with which the act is done. Other cases with similar holdings are *State* v. *McCormick*, 7 Ariz. App. 576, 442 P. 2d 134 (1968), and *State* v. *Yell*, 104 N. H. 87, 178 A. 2d 289 (1962).

The criminal intent that the word "fraudulently" denotes is not an intent to deprive the beneficiary of the money permanently. The crime of embezzlement may be complete even though the defendant intended to restore the money. In *State* v. *Pratt*, 114 Kan. 660, 220 P. 505, 507 (1923), the defendant requested an instruction requiring the state to prove defendant intended to permanently deprive the beneficiary of the money. The court instructed that defendant may be guilty of embezzlement, ". . . even though at the time he (converts the money) he intends to restore it or does actually restore it or its equivalent . . ." The Kansas Supreme Court sustained this instruction by the trial court. In *State* v. *McCormick*,

supra, the Arizona Court said, ". . . the intent necessary to constitute the crime of embezzlement is not the same as that required for larceny, i.e., an intent to permanently deprive the owner of his property." Other cases with the same holding are *Henry* v. *United States*, 273 F. 339 (D. C. Cir. 1921), *Commonwealth* v. *Tuckerman*, 76 Mass. (10 Gray) 173 (1857), *People* v. *Shears*, 158 App. Div. 577, 143 N. Y. S. 861 (Sup. Ct. 1913), affd. 209 N. Y. 610, 103 N. E. 1126. See also 26 Am. Jur. 2d Section 20. The trial court acted properly in refusing Defendant's proposed instruction on the meaning of the word "fraudulently."

CONCLUSION

The respondent therefore submits that the decision of the lower court be affirmed.

Respectfully submitted,

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