

1972

## **Terry Adams v. John W. Turner, Warden, Utah State Prison : Brief of Appellant**

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# In The Supreme Court of the State of Utah

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TERRY ADAMS,

*Plaintiff-Appellant,*

-vs-

JOHN W. TURNER, WARDEN,  
UTAH STATE PRISON,

*Defendant-Respondent.*

Case No.

12729

12829

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## BRIEF OF APPELLANT

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Appeal from the dismissal of appellant's Petition for a Writ of Habeas Corpus by the Third District Court for Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson presiding.

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**FILED**

JUN 9 - 1972

*Clerk, Supreme Court, Utah*

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# In The Supreme Court of the State of Utah

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TERRY ADAMS, <i>Plaintiff-Appellant,</i>	}	Case No. 12729
vs.		
JOHN W. TURNER, WARDEN, UTAH STATE PRISON,		
<i>Defendant-Respondent.</i>		

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## **BRIEF OF APPELLANT**

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### STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of the trial court dismissing appellant's Petition for a Writ of Habeas Corpus.

### DISPOSITION IN LOWER COURT

Appellant's petition for a Writ of Habeas Corpus was dismissed on motion of the respondent without an evidentiary hearing.

### RELIEF SOUGHT ON APPEAL

Petitioner seeks a reversal of the judgment of the lower court dismissing his petition for a Writ of Habeas Corpus.

## STATEMENT OF FACTS

Petitioner, Terry Adams was convicted of Assault with a Deadly Weapon in violation of Utah Code Annotated, § 76-7-6 (1953). The trial was held in the Second Judicial District Court in and for Weber County, State of Utah, the Honorable Ronald O. Hyde presiding. Appellant was convicted by a jury and was sentenced to the Utah State Prison on February 16, 1971. Petitioner appealed from his conviction to the Utah Supreme Court, and his conviction was affirmed. *State v. Adams*, ..... Utah 2d, 489 P2d 1191 (1971). In his petition for a Writ of Habeas Corpus, the subject of this appeal, petitioner raised precisely the same issues raised in his original appeal. Because petitioner had raised the same issues on appeal the Honorable Joseph G. Jeppson granted the respondent's motion to dismiss, citing *Scandrett v. Turner*, ..... Utah 2d ....., 489 P2d 1186 (1971).

## ARGUMENT

### POINT I

**PETITIONER CONTENDS THAT THE TRIAL COURT SHOULD HAVE AFFORDED HIM AN EVIDENTIARY HEARING ON THE MERITS OF HIS PETITION.**

Petitioner contends that the trial court should have afforded him an evidentiary hearing on the merits of his petition. In doing so, petitioner realizes he is asking

the court to reverse its position established in *Scandrett v. Turner*, but he feels this approach is necessary to clarify and perfect his position in terms of exhaustion of state remedies before proceeding to federal court. Petition contends that *Scandrett v. Turner*, should be reversed. Appellant contends that all petitions for Writs of Habeas Corpus should be considered with evidentiary hearings to promote an orderly and consistent approach for petitioners seeking to gain relief in federal court.

Respectfully submitted,

DAVID P. RHODE  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH  
*Plaintiff and Respondent,*

Case No.  
12831

vs.

PAUL VICTOR SMITH,  
*Defendant and Appellant.*

---

DEFENDANT-APPELLANT'S BRIEF

---

Appeal from the Judgment of the Second District Court  
for Weber County  
Honorable Ronald O. Hyde, Judge

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**FILED**

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## AUTHORITIES CITED

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

THE STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

Case No.  
12831

PAUL VICTOR SMITH,  
*Defendant and Appellant.*

---

DEFENDANT-APPELLANT'S BRIEF

---

**NATURE OF THE CASE**

Appellant, Paul Victor Smith, appeals from his conviction for Obtaining Money by False Pretenses.

**DISPOSITION IN LOWER COURT**

Appellant was tried and convicted by a jury for the crime of Obtaining Money by False Pretenses by the Honorable Ronald O. Hyde of the Second District Court and from the judgment of guilty, Appellant appeals.

**RELIEF SOUGHT ON APPEAL**

The appellant seeks a reversal of the judgment of conviction.

## STATEMENT OF FACTS

In the latter part of January, 1970, Wilford R. Evans saw an advertisement in the Western Livestock Journal directed primarily to cattle farmers, which reads as follows:

“If you are the owner of a small or large operation and wish to expand we can show you how. Whether commercial or purebred you can grow without paying today’s profit-depleting interest, without large loans to repay. The net worth of your operation can increase one quarter million and more. Call, write or wire P. V. Smith & Associates, 309 West 12th Street, Ogden, Utah.” (T. 20)

Mr. Evans contacted Paul Victor Smith by telephone and arranged an appointment for that evening, and together with a friend, Lynn K. Neil, met with Mr. Smith at his office in Ogden, Utah. Mr. Smith explained to Mr. Evans that he could form a corporation and obtain financing either through a stock offering or through investors in order to expand his cattle operation. (T. 23, 24)

Viewing the record in a light most favorable to the State, the following representations were made by Mr. Smith to Mr. Evans:

Q. Okay. Now did he say anything about the financing of your actual business and how the finances would be obtained?

A. Yes. He said he had investors that had this capitol available. There was no problem. It was just a matter of getting the legal papers put together and present it to them. and we was trying to do, and get it passed by his organization and the investors.

Q. Now, at that time did he indicate to you who those investors might be?

A. No, he did not mention no names. He just said that he had numerous investors in various places through the country ... (T. 24)

On April 13, 1970, Mr. Evans paid Mr. Smith \$3,100.00. Mr. Evans testified that the money was in consideration for Mr. Smith's agreement, "to get the investors to put money into it, build a corporation and make it legal, and set up the proper amount of shares for each individual as to what shares would be owned and by who and who our officers would be, and set up a legal structure." (T. 26)

Throughout his testimony Mr. Evans maintained that the financing was to be obtained through investors that Mr. Smith allegedly said were already available. However, at the same time Mr. Evans signed a Pre-Incorporation Agreement which provided the \$3,100.00 was to promote and clear a public stock offering. (Exhibit L) Mr. Evans attempted to explain the contradiction by saying that the public stock offering was contingent upon the investors not coming through with the necessary financing. (T. 187) Moreover, even though Mr. Evans claimed that Mr. Smith assured him that investors were definitely available, he filled out a form which was to be used to solicit investors in the event the money was not forthcoming. (T. 46, Exhibit 1)

Rulon Whitesides, Floyd Mingo, and Russell Pincock testified substantially like Mr. Evans.

Eldon Wayne Burnett was an executive vice-president of P. V. Smith and Associates at the time of the negotiation with Mr. Evans. (T. 67) Prior to the agreement with Mr. Evans, Mr. Burnett and Mr. Smith traveled to St. Louis, Missouri to visit Capitol Consultants for the purpose of obtaining investors although nothing definite was arranged at that time. (T. 70, 81, 82)

There is no evidence that financing was unavailable at the time of Mr. Smith's agreement with Mr. Evans. In fact, the State's case is entirely premised upon Mr. Evan's testimony that he received no money for expansion purposes.

## ARGUMENT

### POINT I

REPRESENTATIONS WHICH WERE ALLEGEDLY MADE BY THE APPELLANT REFERRED TO FUTURE ACTS OR EVENTS, AND DID NOT CONSTITUTE A CRIME AS A MATTER OF LAW.

Mr. Evans testified that he paid the money to Mr. Smith to set up a corporation and obtain financing (T. 43). These alleged representations were promissory in nature and referred to future business transactions. A false pretense is a representation of some fact calculated to mislead, which is not true, and a mere promise to do an act, even though the promisor has no intention at the time of keeping his promise is not a criminal pretense or device. State v. Robington, 75 N.D. 2d 394, (1950); State v. Semray, 199 A. 2d 580 (1963).

The following cases illustrate the principal that a false representation of a future act is not criminal. In New v. State, 83 S.W. 2d 668 (1935), the defendant was accused of obtaining an assignment of a bank account of his false promise to obtain and deliver bonds. Among other things, the Court said that the offense of obtaining money by false pretenses is not shown notwithstanding the fact that the defendant obtained property without a present intention of performance. See Windham v. State 160 S.W. 72 (1913), where the accused obtained vendor's lien notes on his fraudulent promise to convey title to land; Ranney v. People, 22 N.Y. 413 (1860), where the accused falsely promised to give the complaining witness employment upon his depositing \$100.00 as security for faithful performance and Johnson v. State, 123 S.W. 143 (1909), where money was loaned to the accused on his apparently false promise to invest the money in a house. See also Ballaine v. District Court, 153 P. 2d 265 (1944).

In Chaplin v. United States, 157 F. 2d 697 (1950), the Court reversed appellant's conviction. The question was whether the defendant's present intention not to do what he had promised to do is sufficient to support his criminal conviction.

The Court referred to the danger of charging a person with false pretenses on the sole basis of a fraudulent intention manifest by false and misleading promises. The rationale of the Court's opinion was that the intention to commit certain crimes is ascertained by looking backward from the act and finding that the accused intended to do what he did do. However, in the case of false pretenses where the act complained of is the failure to use money as specified, this is as consonant with ordinary commercial default as with criminal conduct. Business affairs would be materially encumbered by the ever present threat that a debtor might be subject to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat. Promissory fraud is indistinguishable from innocent breach of contract except in the mental element. The mental element is generally determined by reasoning backward from the act, i.e., in this instance, the non-performance. A rule which makes promissory fraud criminal would therefore permit juries to punish innocent breaches of contract.

## POINT II

IF IN FACT PAST OR PRESENT REPRESENTATIONS WERE MADE BY APPELLANT THEY WERE NOT PROVEN TO BE FALSE AND DID NOT CONSTITUTE A CRIME AS A MATTER OF LAW.

All representations to Mr. Evans were promises of future business transactions. By stretching the State's evidence it could be said Mr. Smith's alleged statement that financing was available is a statement of existing fact. However, the State failed to produce evidence showing the alleged statement to be false.

In Ballaine v. District Court, supra, the Utah Supreme Court set out the elements which must be proved to obtain a conviction for obtaining money by false pretenses.

- a. A false or fraudulent representation;
- b. Representations made knowingly and designedly.
- c. Concurring intent to cheat or defraud the person to whom the false pretenses were made;
- d. Something of value must be obtained;
- e. The party must have parted with things of value in reliance on the false pretenses.

In this case the State failed to prove the first element of Ballaine, supra. As the Court said in State v. Casperson, 262 P. 294 (1927) the pretense must be proved false. The failure of Mr. Smith to obtain financing for Mr. Evans does not prove that financing was unavailable or that Mr. Smith did not attempt to secure investors. In fact, Mr. Burnett testified to the contrary. (T. 70, 81, 82)

In Commonwealth v. Wright, 275 A. 2d 873 (1971) appellant was convicted of cheating by fraudulent pretense. He picked up six truckloads of tires from complainant valued at \$4,400.00, agreeing to pay for the same, while representing himself to be the owner of E & W Warehouse Company Sharpsburg, Pennsylvania. The State attempted to show misrepresentation by testimony that the company did not exist at the Sharpsburg address six months later. The Court held that this was not competent evidence to prove appellant was not the owner of E & W Warehouse Co., and that the address given did not exist at the time of the representation.

## CONCLUSION

All of the representation allegedly made by Mr. Smith to Mr. Evans were of a promissory nature relating to future business dealings. As a matter of law these type of promises do not constitute criminal conduct, even though false. Moreover, the State produced no evidence showing that Mr. Smith's alleged representations were false when stated.

Respectfully submitted,

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