1972

The State of Utah v. Paul Victor Smith : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

PAUL VICTOR SMITH,
Defendant-Appellant.

Case No. 12831

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

The appellant appeals his conviction for the crime of 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 before the Honorable Ronald O. Hyde of the Second District Court and from the judgment of guilty, appellant appeals.

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgment of the lower court be affirmed.

STATEMENT OF THE FACTS

In January, 1970, Wilford R. Evans saw an advertisement in the Western Livestock Journal explaining that cattle farmers could increase their net worth one-quarter million dollars and more without paying profit-depleting interest, and without large loans to repay.

Mr. Evans contacted appellant, Paul Victor Smith, and arranged a meeting at which Mr. Smith explained to Mr. Evans that he could form a corporation and obtain financing. Mr. Smith assured Mr. Evans that he already had the necessary investors and capital available (T. 24, 57). Mr. Smith made the following representation to Mr. Evans: "He said that he had the investors to give me the funds; he had the money available for it" (T. 52).

Mr. Smith said that he did have some investors available then, but because of his many customers he might have a slight delay while finding more investors for all his customers (T. 24). However, Mr. Smith told Mr. Evans that his (Mr. Evans) financing involved such a small amount that he already had the money available and that Mr. Evans wouldn't have to worry about it (T. 46).

The concrete commitment of the investors is shown from the trial testimony as follows:

"Q. You thought the whole time that the money was right there available, the investors had already committed to pay you the money.

A. He advised me that they had.

Q. He told you that the investors had committed —

A. Right" (T. 46).

Mr. Evans signed a Pre-Incorporation Agreement with a stock offering clause. Mr. Smith said he had to have the agreement to protect himself (T. 188). However, Mr. Evans understood that Mr. Smith was not contemplating a public offering (T. 56).

Mr. Evans paid Mr. Smith $3,100.00 on April 13, 1970. The $3,100.00 was not Mr. Smith's fee, but was to be used solely for the necessary legal expenses required to set up a corporation (T. 60, 25).

Mr. Evans testified that he would never have paid the $3,100.00 had he known that financing was not *presently* available (T. 39). Mr. Smith has never formed a corporation for Mr. Evans or drawn up the necessary legal papers for which he was paid $3,100.00 nor was the $3,-100.00 ever returned to Mr. Evans (T. 39). Mr. Smith also told Mr. Evans that P. V. Smith & Associates was a corporation (T. 36); but P. V. Smith & Associates was not incorporated (State Exhibit "E").

Mr. Smith's operation was not the result of innocent mistake or ignorance. The evidence showed that it was a deliberate and well-planned scheme. John Furster, a

salesman for P. V. Smith & Associates was instructed to tell farmers that investors were presently ready (T. 182). Three other farmers, Rulon Whitesides, Floyd Mingo, and Russell Pincock, had unfortunate experiences with Mr. Smith which were similar to those of Mr. Evans'. They all testified substantially like Mr. Evans.

Mr. Smith told Mr. Whitesides that he, appellant, was worth millions of dollars (T. 114). Mr. Smith told Mr. Mingo that the funds were definitely available (T. 148). At one time he told Mr. Mingo that the money was already in (T. 135). Mr. Smith told Mr. Mingo that he had incorporated a taxi cab company, an ambulance company in Salt Lake City, and that his total assets were worth seven million dollars (T. 129).

Eldon Wayne Burnett, an executive vice-president of P. V. Smith & Associates testified that Mr. Smith had said that he had four million dollars available for a beauty salon venture in which he was engaged (T. 80). Mr. Burnett was told that an excess of $50,000.00 for investments was to come from doctors, including a Dr. C. R. Gobbert, yet Dr. Gobbert testified that he had never entered into an agreement with Mr. Smith to finance business ventures (T. 159-60).

Mr. Smith induced his customers to part with their money by making misrepresentations in which he said that investment money was then available. While Mr. Smith specifically told Mr. Pincock, Mr. Mingo, Mr. Whitesides, and Mr. Evans that he had investors and that

he had the money to buy the cattle, the evidence showed that he really only made attempts to find such investors. Investors had not approved any money whatsoever, and the evidence showed that there never were investors with money available (T. 191, 82, 182). Mr. Smith never performed any of the promises he made to Mr. Evans, (T. 39), and the evidence demonstrated that Mr. Evans and others were boldly deceived by a scheme to obtain money by false pretenses.

ARGUMENT

POINT I.

THE COMPLAINING WITNESS RELIED TO HIS DETRIMENT UPON REPRESENTATIONS OF PRESENT MATERIAL FACTS WHICH THE APPELLANT HAD DELIBERATELY MADE.

Mr. Smith told Mr. Evans that he had investors and money *then* available (T. 24, 57, 52, 24, 26, 33-4, 36, 187-8). Mr. Smith told Mr. Evans that his business was incorporated (T. 36). Neither of these representations relative to present material facts was true. "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." *People* v. *Orris*, 52 Colo. 244, 121 P. 163 (1912).

The jury concluded that Mr. Smith misrepresented a PRESENT MATERIAL fact. Instruction No. 8 to the jury read as follows:

> "The crime of obtaining property or money by false pretenses does not lie when based upon a representation that promisor will do something in the future, and it is essential that the representation be relative to a material fact."

In *State* v. *Seymour*, 49 Utah 285, 163 P. 789 (1917), although the plaintiff obtained what he bargained for, (stock), a misrepresentation of the condition of the corporation was enough to sustain conviction. Because the appellant misrepresented the condition of the corporation, the court stated: ". . . no other inference is permissible than that the appellant made the false representations with the intent to defraud . . ." *Id.* at 790. See also *State* v. *Casperson*, 71 Utah 68, 262 P. 294 (1927). The differences between present and future representations are distinguished in A. L. R.:

> ". . . the statement of the defendant that he 'was prepared' to pay indicated an existing intention, as distinguished from one that is prospective only." 168 A. L. R. 844 (1947).

In *State* v. *G. W. Jones*, 73 N. M. 459, 389 P. 2d 398 (1964), the appellant's conviction of obtaining money by false pretenses was affirmed because:

> "Appellant, by stating that he was vice president of the company when in fact, as shown by the prospectus in his possession he was not, is a material misrepresentation of a present fact . . .

> the misrepresentation made by appellant was of an existing fact." *Id.* at 401.

Jones, took notice of other constructions regarding future events:

> "Some courts, however, have formed the 'ability' rule, that future representations may imply a present ability to perform an act and thus amount to an existing fact. *People* v. *Cohn*, 358 Ill. 326, 193 N. E. 150; *Hameyer* v. *State*, 148 Neb. 798, 29 N. W. 2d 458."

A more recent view is that expressed in an opinion by Justice Traynor of the California Supreme Court in *People* v. *Ashley*, 42 Cal. 2d 246, 267 P. 2d 271 (1954), wherein the rule in California was stated to be that:

> ". . . a promise made without intention to perform is a misrepresentation of a state of mind, a misrepresentation of existing fact, and thus a false pretense." *Id.* at 401.

People v. *Weitz*, 255 P. 2d 40 (1953 Cal. App.), stresses the importance of a misrepresented material fact:

> "A promise although false, will generally not serve as a pretense; but, where a promise is combined with a representation of fact, there is sufficient pretense unless the prosecution relied wholly on the promise and not at all on the representation." *Id.*

A misrepresented fact coupled with a future promise will sustain a conviction:

> "A false pretense as to future facts or events will not support a conviction for obtaining property under false pretenses. However, a false rep-

> resentation or statement regarding a past or existing fact, accompanied by a promise or statement as to a future act will support a conviction." *A. L. R., supra,* at 840.
>
> . . .
>
> "While a mere false promise to do something in the future is not within the statute, a false promise of future performance, when coupled with a false statement as to a past or existing fact, will support a charge for swindling." *McCuistion v. State,* 158 S. W. 2d 527 (Crim. App. Tex. 1942) at 529.

Inasmuch as the evidence supports the conclusion that Mr. Smith misrepresented present material facts, the jury's verdict should be upheld.

POINT II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT PRESENT MATERIAL FACTS WHICH APPELLANT REPRESENTED TO THE COMPLAINING WITNESS WERE FALSE.

The State presented the following evidence:

1) Appellant did not have money or investors available at the time of the representation. He had merely made attempts to find investors (T. 82, 159-60, 181-82).

2) P. V. Smith & Associates was never incorporated, contrary to appellant's representations (State Exhibit "E").

3) Mr. Smith's operation was a well-planned scheme to fraudulently obtain Mr. Evans' money. While successfully perpetrating the same fraud on many others, Mr. Smith had never secured investors or capital.

The issue whether there was capital available, was a question for the jury to determine. Although this is a true statement it was made by the prosecutor and not the court; however, the silence and actions of the court may be said to adopt this statement. The court considered the evidence worthy of the jury's consideration. Jury Instruction No. 6 reads: "That there must have been false or fraudulent representations or pretenses." See also Jury Instruction No. 8.

In *Ballaine* v. *District Court*, 107 Utah 247, 153 P. 2d 265 (1944), the Supreme Court of Utah *affirmed* the petitioners' conviction of obtaining money under false pretenses. In *Ballaine*, the defendants promised the plaintiff title to a 1941 Plymouth free and clear of any liens. The defendants obtained a $888.66 lien upon the car prior to plaintiff's payment of the balance. Although defendants made a promise for the future, when they accepted full payment there was an implied warranty to sell free of encumbrances. The court held that the circumstances required honest disclosure, and the defendants committed "Fraud by silence". The seller of a car must give title immediately, but the court recognized that this may take from several minutes to a day or more. As to the charge that the purchaser was not to have title until a *future* time, the court responded:

> "This is *untenable.* The purchaser was to be given title immediately after payment. This means he was to be given title just as soon as this could possibly be done in the usual performance of business. Immediately is defined as 'without intervention; without delay; instantly; at once.'" *Id.* at 269. (Emphasis added.)

The appellant made false representations as to existing material facts, and the verdict below ought to be affirmed.

POINT III.

APPELLANT HAS FAILED TO SHOW FACTS OR CIRCUMSTANCES WHICH WOULD REQUIRE THE COURT TO INTERPOSE ITS JUDGMENT IN PLACE OF THAT OF THE TRIER OF THE FACT.

The Utah Supreme Court must review evidence in the light most favorable to sustaining the verdict of the District Court and should not overturn the opinion unless the evidence was so clear, credible, and undisputed that all reasonable minds would agree that the lower court's holding was erroneous. *Memmott* v. *U. S. Fuel Co.*, 22 Utah 2d 356, 453 P. 2d 155 (1969). In *Taylor* v. *Johnson*, 18 Utah 2d 16, 414 P. 2d 575 (1964), the Supreme Court of Utah said that it was required to view evidence in the light most favorable to the verdict, and then it added: "The determination made by the trial court should not be overturned unless it is made *clearly* to appear that it was in error. *Id.* at 21. (Emphasis added.)

In *Brigham* v. *Moon Lake Elec. Ass'n*, 24 Utah 2d 292, 470 P. 2d 393 (1970), this court held that it would not review issues on appeal which were not raised below except to affirm the trial court. The court placed the burden of proof upon the appellant, by requiring him to convince this Court that the trial court committed error, and not that the appellant, in his own opinion, should have won the case.

In *Mayne* v. *Turner*, 24 Utah 2d 195, 468 P. 2d 369 (1970), this Court held that where a trial court has a statutory alternative based on *discretion*, there is a presumption that the trial court's conclusion is clothed with propriety and bona fides, which presumption is rebutted only by clear evidence adduced by him who attacks it. *Citizens Gas Co. of New York* v. *Hackett*, 17 Utah 2d 304, 410 P. 2d 767 (1966), held that the Supreme Court has the following duty: " . . . to indulge the presumption that the findings and judgment of trial court are correct; and to affirm unless appellant sustains the burden, which is his, of demonstrating to the contrary." *Id.* at 307. *State* v. *Criscola*, 21 Utah 2d 272, 444 P. 2d 517 (1968), elaborates:

> "Due to the responsibility of the trial court in controlling the admissibility of evidence, and his advantaged position to pass on such matters, it is his prerogative to make this determination. For those reasons his ruling should be indulged with a presumption of correctness, and should not be disturbed unless it clearly appears that he was in error." *Id.* at 518-19.

See also *Owyhee, Inc.* v. *Robbins Marco Polo,* 17 Utah 2d 181, 407 P. 2d 346 (1965).

The appellant has not met the burden of proof which is required of him, and this Court must affirm the verdict of the trial court.

CONCLUSION

The State presented evidence upon which was based the jury's finding that appellant made false representations relative to present material facts, and upon which the complaining witness relied to his detriment. The appellant has failed to meet the burden necessary to require a reversal of the verdict of the District Court.

Appellant's conviction should be affirmed.

Respectfully submitted,

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