2005

State of Utah v. George Wallace : Reply Brief

Utah Court of Appeals

Margaret P. Lindsay; Attorney for Appellee.
Kenneth A. Bronston; Assistant Attorney General; Mark L. Shurtleff; Attorney General; David H.T. Wayment; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	**Case No. 20050192-CA**
v.	:	
GEORGE WALLACE,	:	
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

KENNETH A. BRONSTON (4470)
Assistant Utah Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

DAVID H.T. WAYMENT
Deputy Utah County Attorney

Attorneys for Appellant

MARGARET P. LINDSAY
99 East Center St.
P.O. Box 1895
Provo, Utah 84059-1895

Attorney for Appellee

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	**Case No. 20050192-CA**
v.	:	
GEORGE WALLACE,	:	
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

KENNETH A. BRONSTON (4470)
Assistant Utah Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

DAVID H.T. WAYMENT
Deputy Utah County Attorney

Attorneys for Appellant

MARGARET P. LINDSAY
99 East Center St.
P.O. Box 1895
Provo, Utah 84059-1895

Attorney for Appellee

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	**Case No. 20050192-CA**
v.	:	
GEORGE WALLACE,	:	
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

- - - - - -

ARGUMENT

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in respondent's brief.

REPLY TO POINT I.B

Defendant's reliance on *State v. Lakey*, highlights the magistrate's error in refusing to bind defendant over on the theft by deception charge.

Defendant generally responds that evidence of his "history of bad debt," failed "expectations [of] any payments to his victims," and "involuntary closures" of his bank accounts" . . . "should [not] be a basis to provide a reasonable belief that he knew he would not have sufficient funds to cover the check written to Morris Murdock Travel," particularly in light of the "fact that [he] believed he would be receiving sufficient money to cover the 'check.'" Aple. Br. at 9-10. In support, defendant relies on *State v. Lakey*, 659 P.2d 1061 (Utah 1983). Aple. Br. at 11-13. Defendant's reliance is misplaced.

Defendant's reliance on *Lakey* highlights his misunderstanding of the bindover standard. In fact, *Lakey* supports binding defendant over. Lakey issued a check and asked his creditor not to cash it because there were not then funds to cover it, but that he was expecting additional deposits to cover the check. *Lakey*, 659 P.2d at 1062. The creditor accepted the check with this understanding, but Lakey's bank subsequently dishonored the check because of insufficient funds. *Id.* A jury convicted Lakey of theft by deception. *Id.*

The Utah Supreme Court reversed the conviction. *Id.* at 1064. The court recognized that there was evidence to support that "[Lakey] was aware that his promised deposit of the necessary funds was 'reasonably certain' not to be performed." *Id.* Lakey had issued bad checks before, and the three investors he was counting on to contribute cash had previously failed to do so despite repeated requests. *Id.* Counterpoised with that evidence, however, was uncontradicted testimony from defendant and his wife that (1) each of four investors had promised $2,000 in cash investments; (2) three of these had recently assured defendant that their contributions were imminent; (3) two had promised payment on or shortly before the weekend Lakey issued the check, which would have allowed deposit of sufficient funds before the creditor's check cleared; and (4) those same two investors actually contributed $12,000 in merchandise to the business at about this time. *Id.* Although the court acknowledged that it must view the evidence and its inferences most favorably to the jury's verdict, it was "still unable to conclude that reasonable minds could believe that defendant committed deception." *Id.* The court explained that *Lakey* was "not a case where the jury could find beyond a reasonable doubt that the party who promised the deposit had no

reasonable prospect of being able to make it—*i.e.*, was 'reasonably certain' that his promise would not be performed." *Id. Compare State v. Hogrefe*, 557 N.W.2d 871, 880 (Iowa 1996) (concluding that "jury could easily find that Hogrefe obtained [property] on the strength of the four postdated checks he wrote, checks that Hogrefe knew he could not cover," based on circumstantial evidence consisting of his prexisting $425,000 debt that he had no ostensible means of repaying and his unsuccessful insurance scam and subsequent bankruptcy).

Here, by contrast, there is no counterpoise equivalent to that in *Lakey*. Rather, there was substantial circumstantial evidence that defendant knew the check to Morris Murdock would not be paid at the time he plainly participated in his wife's delivery and tender of the check: the issuance of hundreds of bad checks in the preceding two and one-half years, eleven contemporaneous bank account closures, an admitted debt of approximately $450,000, endless unfulfilled promises to pay victims, and undisputed testimony that there never had been enough money in the account on which the check was drawn to cover the check "[b]y a large margin—[t]housands of dollars." R138:15. *See* Aplt. Br. at 17-22. Additionally, defendant's repeated assertion, that "[he] believed he would be receiving money to cover the 'check,'" *see* Aple. Br. at 10, has no genuine basis in the evidence. The only support for this claim is a Morris Murdock's agent's testimony that defendant and his wife told her that they were expecting money. Nothing more.

Moreover, as defendant acknowledges, *Lakey* concerned the reversal of a jury verdict, not a refusal to bindover. Aple. Br. at 13. The supreme court has explained that the quantum

of evidence necessary to bind a defendant over for trial is significantly smaller than that required to prove guilt beyond a reasonable doubt:

> We have held that the quantum of evidence necessary to establish probable cause at the preliminary hearing is more than [is] required to establish probable cause for arrest. To issue an arrest warrant, the facts presented must be sufficient to establish that an offense has been committed and a reasonable belief the defendant committed it. The facts presented, however, do not have to establish a prima facie case against the defendant. We have further held that the probable cause standard is also less than would prove the defendant guilty beyond a reasonable doubt. Indeed, we recently stated, "[The probable cause] standard is lower, even, than a preponderance of the evidence standard applicable to civil cases."

State v. Clark, 2001 UT 9, ¶ 11, 20 P.3d 300 (citations and quotations omitted; brackets in original).

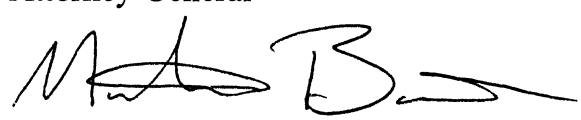
The evidence in the instant case is at least as great as the evidence in *Lakey*. But the evidentiary standard—bind over rather than a jury verdict—is lower. Moreover, *Lakey* was a close case. Two justices dissented in *Lakey*, concluding that a reasonable mind could find that Lakey was "reasonably certain" that the promised deposit would not be made and his check would not clear. *Lakey*, 569 P.2d at 1065 (Howe, J., dissenting, joined by Hall, C.J.). Given that *Lakey* was a close enough case to cause two justices to dissent and that it concerned the higher jury verdict standard, *Lakey* supports binding defendant over in the instant case. This Court should thus hold that the magistrate erred when he refused to bind defendant over on theft by deception.

CONCLUSION

The magistrate's order refusing to bind defendant over and dismissing the felony information against on charges of theft by deception (count 7) and issuing a bad check (count 9) should be reversed and the case remanded for entry of an order binding defendant over for trial on those charges.

RESPECTFULLY SUBMITTED this 24th day of April, 2006.

MARK L. SHURTLEFF
Attorney General



for KENNETH BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, to Margaret P. Lindsay, attorney for defendant, 99 East Center St., P.O. Box 1895, Provo, Utah 84059-1895, this 24 day of April, 2006