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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

Case No. 12907

RICHARD DOLAN,
Defendant and Appellant.

BRIEF OF APPELLANT

Appeal from a decision denying defendant's motion to dismiss and his conviction on the charge of issuing checks against insufficient funds, entered in the District Court, Second Judicial District, Honorable John F. Wahlquist, presiding.

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FILED

Supreme Court, Utah

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If Section 76-20-11 (2), Utah Code Annotated, 1953, as amended, be construed as defining a series of checks issued against insufficient funds as one crime, then further prosecution or punishment of the defendant, after a conviction based upon one check in the same series, would be barred by the prohibition against multiple punishments embodied in Section 76-1-23, Utah Code Annotated, 1953, by Article I, Section 12 of the Constitution of Utah; and by Amendment V of the Constitution of the United States, made applicable to the several states by Amendment XIV to that Constitution.

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If Section 76-20-11 (2), Utah Code Annotated, 1953, as amended, be construed as requiring that a series of checks, as defined by that statute, be prosecuted as a single offense, then the defendant has twice been placed in jeopardy for the same offense. If that statute be interpreted as permitting but not requiring such a prosecution, then the statute is void under the principles set forth in State v. Shondel, 22 Utah 2d 343, 45 P. 2d 146 (Utah 1969).

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CASES CITED

Ashe v. Swenson, 397 U. S. 436, 25 L.Ed. 2d. 469 (1970)

In re Dick, 411 P. 2d. 561 (Cal. 1966)

Kellett v. Superior Court of Sacramento County, 48 Cal. Rptr. 366, 409 P. 2d. 206 (1966)

Oyler v. Boles, 368 U. S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962)

People v. Gusstella, 44 Cal. Rptr. 678, (Cal. Ct. of Appeals 1965)

State v. Shondel, 22 Utah 2d 343, 453 P. 2d. 146 (1969)

United States v. Haili, 443 F. 2d 1295 (9th Circuit 1971)

Waller v. Florida, 397 U. S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970)

CONSTITUTIONS CITED

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Amendment V

Amendment XIV

Utah

Article I

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STATUTES CITED

Utah Code Annotated (1953) as amended

76-1-23
76-20-11 (2)

California Penal Code

476a

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

Case No.
12907

RICHARD DOLAN,
Defendant and Appellant.

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF CASE

Appeal from a decision denying defendant's motion to dismiss and his conviction on the charge of issuing checks against insufficient funds.

DISPOSITION IN LOWER COURT

Defendant-Appellant was tried and convicted of the crime of issuing checks against insufficient funds. Defendant's trial and motion to dismiss were conducted before the

Honorable John F. Wahlquist in the Second Judicial District Court. Sentence was imposed for a term of not more than five years and the Defendant is now in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant respectfully requests the Court to set aside his conviction on the grounds that he had previously been placed in jeopardy and punished for the same offense.

STATEMENT OF FACTS

It is alleged that between July 22 and August 16, 1971, a period of less than four weeks, defendant wrote seven checks, drawn on his checking account at Walker Bank, Ogden, Utah, and payable to three Ogden businesses. It is further alleged that these seven checks were each returned to the payee for lack of sufficient funds. The date, amount, and payee of each check are as follows:

7-22-71	$100.00	K-Mart
8-3-71	75.00	K-Mart
8-11-71	93.64	Gibson's
8-14-71	106.15	Gibson's
8-15-71	93.95	Gibson's
8-15-71	97.52	Gibson's
8-16-71	73.63	Lafayette Electronics

The total amount of these checks is $638.89.

On the 24th day of August, 1971, defendant was charged with violating Section 76-20-11(2) (b), Utah Code Annotated, 1953, as amended, a felony. This charge was based upon the two checks of July 22 and August 8, 1971, issued to K-Mart, in the amounts listed above. (R.102)

On the 25th day of August, 1971, defendant was charged with violating Section 76-20-11(2) (b), Utah Code Annotated, 1953, as amended, a felony. This charge was based upon the four checks of August 11, 14, 15 and 15, 1971, issued to Gibson's, and in the amounts listed above. (R.1)

On the 10th day of September, 1971, defendant was charged with violating Section 76-20-11(2) (a), Utah Code Annotated, 1953, as amended, a misdemeanor. This charge was based upon the check of August 16, 1971, issued to Lafayette Electronics in the amount of $72.63. (R.217)

On September 14, 1971, preliminary hearings were held on the two felony charges in the City Court of Ogden, Utah, before Charles H. Sneddon, Judge of said Court. Defendant was represented by appointed counsel and was ordered held to stand trial upon the offenses charged. (R.4) Later on that same date, defendant was called before the same Court on the misdemeanor charge. After defendant's request for appointment of counsel had been denied by the court, the case was continued until September 17, 1971. At that time, the defendant, without advice of counsel, entered a plea of guilty to said charge, and was sentenced by the court to ninety days in jail. (R. 219) Neither of defendant's attorneys, appointed to represent him on the felony charges, had been advised of the existence of the misdemeanor. The prosecutor at both hearings was L. Kent Bachman, Assistant County Attorney for Weber County. The defendant was brought to trial and convicted on April 11, 1972, upon an amended information (R.44) which combined the two felony charges as required by the District Court in its Memorandum Decision (R.42). The defendant was sentenced to imprisonment in the Utah State Prison for a term not to exceed five years. (R.86)

ARGUMENT

POINT I

IF SECTION 76-20-11(2), UTAH CODE ANNOTATED, 1953, AS AMENDED, BE CONSTRUED AS DEFINING

A SERIES OF CHECKS ISSUED AGAINST INSUFFICIENT FUNDS AS ONE CRIME, THEN FURTHER PROSECUTION OR PUNISHMENT OF THE DEFENDANT, AFTER A CONVICTION BASED UPON ONE CHECK IN THE SAME SERIES, WOULD BE BARRED BY THE PROHIBITION AGAINST MULTIPLE PUNISHMENTS EMBODIED IN SECTION 76-1-23, UTAH CODE ANNOTATED, 1953; BY ARTICLE I, SECTION 12, OF THE CONSTITUTION OF UTAH: AND BY AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES, MADE APPLICABLE TO THE SEVERAL STATES BY AMENDMENT XIV OF THAT CONSTITUTION.

The language of Article I §12 of the Constitution of Utah and of Amendment V of the Constitution of the United States is substantially the same in stating that no person shall twice be put in jeopardy for the same offense. The troublesome language in both Constitutions is "same offense." Various courts have at various times defined these words in terms of the evidence required or available to support each charge. U. S. v. Haili; 443 F. 2d 1295 (9th Circuit 1971). This is the construction which the state seems to use in its memorandum to the Second District Court. (R.32) More recently many courts have considered the issue as being whether or not the charges are based upon the same acts or same transaction. In Ashe v. Swenson, 397 U. S. 436, 25 L.Ed. 2d 469 (1970) the United States Supreme Court also considered the problem as being one of whether or not the same factual issues were involved in both charges. In his concurring opinion, Justice Brennan discussed the "same evidence" and "same transaction" tests, pointing out that the popular "same evidence" test had never been held by the Court to be the required construction of the words "same offense" and that the Court had in fact rejected that test in cases involving multiple trials. In support of a preference for a test based upon the same act, occurrance, episode, or transaction, Justice Brennan pointed out that both the American Law Institute and the Courts of the United Kingdom have adopted this approach and expressly rejected the evidentiary standard.

The State has also stated in its memorandum (R.32) that the defendant would have committed only one crime had there been but one victim rather than three. This contention involves questions of statutory interpretation as well as constitutional construction, but any such contention flies squarely in the face of Ashe, supra. In that case the defendant had been tried and acquitted of the robbery of one of six victims in the group. The defendant was then convicted of robbing another person in that same group. This second prosecution was held by the Court to constitute double jeopardy. Mere multiplicity of victims does not avoid the double jeopardy prohibitions of the Utah and United States Constitutions.

In his memorandum decision on the defendant's Motion to Dismiss, Judge John F. Wahlquist of the Second Judicial District Court stated that defendant had not been in jeopardy of a felony as his misdemeanor conviction for this offense had been in the City Court of Ogden City, a court which lacked jurisdiction of the felony. (R.42) The position set out in this opinion is exactly that relied upon by the State of Florida in Waller v. Florida, 397, U.S. 387, 25 L.Ed.2d 435, 90 S.Ct. 1184 (1970) Petition for rehearing denied May 18, 1970, 398 U.S. 914, 26 L.Ed. 79, 90 S.Ct. 1984. The Supreme Court of the United States unanimously rejected that position. In its opinion by Chief Justice Burger, the Court held that municipalities are not separate sovereigns from their states, but are arms of their state. The Court stated, therefore, that a state felony charge based on the same acts as an earlier misdemeanor charge brought in a municipal court is barred by the action in the municipal court despite the municipal court's lack of jurisdiction to entertain felony charges.

Moreover, Section 76-1-23, Utah Code Annotated, 1953, provides:

> "An act or omission which is made punishable by different provisions of this Code may be punished by any one of such provisions, but in no case can it be punished under more than one; an acquittal or conviction under any one bars a prosecution for the same act or omission under any other."

Thus it is clear that any further prosecution or punishment of the defendant based upon checks in the same series as a check for which the defendant has already been punished is barred.

POINT II

IF SECTION 76-20-11(2), UTAH CODE ANNOTATED, 1953, AS AMENDED, BE CONSTRUED AS REQUIRING THAT A SERIES OF CHECKS AS DEFINED BY THAT STATUTE BE PROSECUTED AS A SINGLE OFFENSE, THEN THE DEFENDANT HAS TWICE BEEN PLACED IN JEOPARDY FOR THE SAME OFFENSE. IF THAT STATUTE BE INTERPRETED AS PERMITTING BUT NOT REQUIRING SUCH A PROSECUTION, THEN THE STATUTE IS VOID UNDER THE PRINCIPLES SET FORTH IN <u>STATE</u> V. <u>SHONDEL</u>, 453 P.2d. 146 (UTAH, 1969).

Section 76-20-11(2), Utah Code Annotated, 1953, as amended, provides a statuatory scheme for punishment depending on the dollar amount of all instruments involved. The three segments of this system are as follows:

(2) Penalties for violating any provision of subsection (1) of this section shall be as follows:

(a) If such check, draft, or order of a series of the same made or drawn in this state within a period not exceeding six months amounts to a sum not more than $100.00, then a fine of not more than $299.00 or imprisonment in the county jail for not more than six months, or both.

(b) If such check, draft, or order or a series of the same made or drawn in this state within a period not exceeding six months amounts to a sum exceeding $100.00, but not $2,500.00, then a fine of not more than $5,000.00 or imprisonment in the state prison for not more than five years, or both.

(c) If such check, draft, or order or a series of the same made or drawn in this state within a period not exceeding

six months amounts to a sum exceeding $2,500.00, then a fine of not more than $10,000.00 or imprisonment in the state prison for not more than ten years, or both.

The difficult language in this statute is the phrase "check, draft, or order, or a series of the same." (Emphasis added) It is clear from the statute that one check, draft, or order is sufficient to invoke punishment within the statuatory framework; it is less clear how a "series of the same" is to be treated.

There are several possible interpretations of this phrase. The words "check or series" may be taken as being mutually exclusive. Such would be the plain meaning of the statute and would require that, at least where the prosecution is aware of the existence of more than one check, all checks in the series be charged and punished as one offense. Under this interpretation, all seven of the defendant's checks should have been charged in one information and the defendant would have been punished under subsection (b) - the "lesser felony" provision - as the total dollar amount of the checks is more than $100.00, but less than $2,500.00. Moreover, under this interpretation, defendant's conviction based on one check in the series would bar further prosecution based on other checks in the same series as the state was fully aware of the existence of the other checks prior to that first conviction.

A second appraoch to the problem presented by this phraseology is that used, most notably, by the California Courts. In their memorandum to the Second Judicial District Court, both the State and the defense discuss several such decisions. It is important, however, to recall that we are dealing here with the construction of a Utah statute, not with a problem in a general area of law common to all jurisdictions. Thus, these decisions from sister states are helpful only to the extent that the statutes construed are analogous. Thus, while the relevant California cases have dealt with a similar statuatory framework for punishment, the statute involved does not pose the "check or series" problem. California Penal Code §476a provides that a check drawn against insufficient funds is a felony unless the total amount of all checks

does not exceed a certain dollar value, in which case it is a misdemeanor. (Note - in some of the cited cases the dollar amount of the statute is $50.00, others arose after the amount had been raised to $100.00.) The Utah statute defines a series as any number of checks issued within a period of six months. Only the extent of punishment depends on the dollar value of the checks. However, as all of the defendant's checks come within the statuatory six-month period, we need pay no further consideration to this part of the definition. The punishment provisions of the California statute would, therefore, seem to bear sufficient resemblence to the Utah statute, so as to make the California decisions as appropriate analogy.

In interpreting the punishment section of the California statute, the California Courts have determined that once the dollar value of a series of checks exceeds the maximum prescribed for a lesser punishment, the greater punishment is invoked. This greater punishment is but one punishment for all of the checks which, when totalled, invoke that greater punishment. Any checks written after that point begin anew to work their way through the statuatory scheme. People v. Gusstella, 44 Cal. Rptr, 678 (Cal.Ct. of Appeals 1965).

An illustrative case is In re Dick, 411 P.2d 561, Cal., 1966. In that case the defendant had issued several checks and had been convicted of seven felonies. At that time, the California statute prescribed that if the amount of the checks did not exceed $50.00, the punishment was as for a misdemeanor. It is important to remember at this point that the California statute sets out a two-stage system for punishment while the Utah system is in three stages. Therefore, all analogies apply to both the misdeameanor and "lesser felony" provisions of the Utah statute. In considering the petitioner's situation, the Dick Court divided the checks chronologically into two series. The first series was compiled until the total dollar limit of the punishment statute was exceeded; at this point the Court determined that the greater punishment had been invoked. The court then began anew with the remaining checks; as their total was less than fifty dollars, the court determined

that the lesser penalty would be applied as to that series. The court pointed out that the statute sets the aggregate amount which "... may be issued without incurring increased criminal responsibility." Dick, supra, 563. Echoing Gusstella, supra, the court stated that once this limit had been reached "... his issuance of further ... checks or a series of checks must be deemed ... as in the case of an original wrongdoer." Dick, supra, 564. The court treated the provisions for escalating punishment as amelioraty so that doubts as to its effect must be resolved in favor of the wrongdoer. Dick, supra, 563.

Had the prosecution in the instant case applied the California analogy to the defendant's situation, the seven checks would have been totalled and, reaching less than $2,500.00, the defendant would have been charged with one felony and punished under Section 76-20-11(2) (b), the so-called "lesser felony" provision. Had the total dollar amount exceeded $2,500.00, then the checks would have been totalled until they reached that amount, the greater punishment would have been imposed, and all remaining checks would have been treated as a separate series.

This interpretation of the Utah statute, however, requires us to add another factor to our definition of "series;" that of dollar amount. Where the dollar amount exceeds $2,500.00, the Utah statute would seem to consider that only one punishment may be imposed regardless of the dollar amount. Thus, if we adopt the California approach, we avoid one objection the state raises to requiring a series to be treated as one act for the purpose of punishment.

The state's contention that a series be defined as having a common victim is untenable and seems to result from a confusion with cases involving double jeopardy and the same evidence test. Obviously, the same evidence test or any other test of double jeopardy is not relevant in determining statuatory construction. Many states have no such punishment scheme requiring or permitting the totalling of checks but punish each check as a separate offense even where more than one check is given the same victim. Such a statute raises no problem of double jeopardy and the defendant would not be

here on appeal were that the Utah statute. It is not. Moreover, such an interpretation would emasculate the statute in that the accelerating punishment provisions would then not apply to the "professional paper-hanger." It must be doubted that the state would seriously contend that one who had issued ten checks to ten different persons, the total of such checks being more than $2,500.00, could not be given the maximum punishment under the statute. Moreover, this view seems to have been rejected by the District Court in its memorandum decision.

Yet another approach to the punishment statue is one which would permit the state to prosecute a series of checks either as a series or as individual crimes, at the election of the State. This interpretation is the only one which would allow the defendant's subsequent conviction to stand. The defense contends, however, that this interpretation would render the statute void for vagueness. Were the state to be able to choose between series and individual prosecution or, as here, between part series and part individual, then each case involving more than one check could be punished in a horrifying number of ways. For example, two checks totalling less than $100.00 could be punished either as one misdemeanor or two; two checks each in excess of $100.00, as one "lesser" felony or as two. When one considers a situation such as that here, with seven checks, the potential for prosecutorial abuse truly becomes frightening. If all checks are treated individually, the defendant could be punished for six misdemeanors and one "lesser" felony. By combining the checks into a single series, the defendant may be punished for only one such felony. Partial combination resulted here in one "lesser" felony and one misdemeanor; if this action of the state is upheld, then any combination or lack thereof, with any number and kind of punishment, would also be acceptable.

This interpretation would allow such uncertainty of punishment as to invoke the prohibition against unequal application of the laws contained in Amendment XIV, §1, of the United States Constitution and Article I, §24 of the Constitution of Utah.

State v. Shondel, 22 Utah 2d. 343, 453 P.2d. 146 (1969) is directly addressed to this issue. In that case, this court pointed out that equal protection of the laws requires that the law affect alike all persons in the same situation. Clearly, the interpretation discussed here would permit a completely different prosecution of a person in a situation identical to that of the defendant. From that same opinion, and precisely on point, is the statement summing up a clear and ancient legal principle: "... a penal statute should be similarly clear, specific, and understandable as to the penalty imposed for its violation." Where a statute fails to meet this standard, it must be considered as either too vague to be capable of application or violative of the guarantee of equal protection. Oyler v. Boles, 368, U. S. 488, 7 L.Ed. 2d, 446 82 S.Ct. 501 (1962).

It is the contention of the defense, therefore, that only the first two interpretations of this statute are acceptable. Either a series of checks is punishable as one offense regardless of dollar amount, but to an extent determined by the dollar amount or that a series is defined not only in terms of time, but also in terms of dollar amount - the California approach. Under either of these interpretations, the State must prosecute a series as a single entity at least where it has or should have knowledge of the existence of the other checks. Kellett v. Superior Court of Sacramento County, 409 P. 2d 206, 48 Cal. Rptr. 366 (1966). Also, under either of these interpretations, the defendant has already been placed in jeopardy and punished by his conviction based upon one check in the series.

CONCLUSION

The defendant-appellant has twice been placed in jeopardy and is being twice punished by his prosecution based upon checks in the same series as the check upon which his prior conviction had been based. The statute under which the defendant is being punished either restricts the State to one prosecution for one series of checks or else is unconstitutionally vague as to the punishment to be imposed. His conviction must be set aside.

Respectfully submitted,

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