1972

# State of Utah v. Richard Dolan : Brief of Respondent

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

STATE OF UTAH,
*Plaintiff-Respondent*

vs.

RICHARD DOLAN,
*Defendant-Appellant*

## BRIEF OF RESPONDENT

APPEAL FROM A RULING OF THE DISTRICT COURT DENYING DEFENDANT'S MOTION TO ARREST JUDGMENT AND SET ASIDE THE CONVICTION ON THE CHARGE OF FORGERY, A FELONY, ON THE GROUNDS AGAINST INSUFFICIENCY OF THE EVIDENCE, IN AND BEFORE THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH E. WAHLQUIST, JUDGE, PRESIDING

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IN THE

# SUPREME COURT

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STATE OF UTAH,
*Plaintiff-Respondent,*

vs.

RICHARD DOLAN,
*Defendant-Appellant.*

Case No. 12907

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

Richard Dolan appeals from a decision in the Second Judicial District Court denying his motion to dismiss and his conviction for issuing checks against insufficient funds.

### DISPOSITION IN LOWER COURT

The appellant was tried and convicted of issuing checks against insufficient funds. Appellant'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 appellant is now in the Utah State Prison.

## RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the lower court affirmed.

## STATEMENT OF FACTS

Between July 22 and August 16, 1971, appellant wrote seven checks, drawn on his checking account at Walker Bank, Ogden, Utah, and payable to three Ogden businesses. These seven checks were returned to the payee for lack of sufficient funds. Appellant was charged with three counts of violating Utah Code Ann. § 76-20-11 (1953). The date, amount and payee of the checks are as follows:

| | | | |
|---|---|---|---|
| July 22, 1971 | $100.00 | K-Mart | Prosecuted as one felony charge |
| August 3, 1971 | 75.00 | K-Mart | |
| August 11, 1971 | 93.64 | Gibsons | Prosecuted as one felony charge |
| August 14, 1971 | 106.15 | Gibsons | |
| August 15, 1971 | 93.95 | Gibsons | |
| August 15, 1971 | 97.52 | Gibsons | |
| August 16, 1971 | 72.63 | Lafayette Electronics | Appellant pled guilty to misdemeanor charge |

Based upon the checks issued to K-Mart, on August 24, 1971, appellant was charged with a felony pursuant to Utah Code Ann. § 76-20-11(2) (b) (1953). Pursuant to the same section of the Utah Code, on August 25, 1971, appellant was charged with another felony based upon the checks issued to Gibsons. Based upon the check issued to Lafayette Electronics, on September 10, 1971, appellant was charged with a misdemeanor pursuant to

Utah Code Ann. § 76-20-11(2) (a) (1953). The prosecutor approved the misdemeanor complaint before he knew of the felony possibilities (R. 42).

On September 14, 1971, preliminary hearings for the felony charges were held before Judge Charles N. Sneddon in the City Court of Ogden. Appellant was represented by appointed counsel and was ordered held to stand trial upon the offenses charged (R. 4). Later on September 14, 1971, appellant was called before the same court on the misdemeanor charge. This proceeding was continued until September 17, 1971, at which time appellant entered a plea of guilty to the misdemeanor charge and was sentenced to ninety days in jail (R. 219).

The two felony charges were joined into one felony charge with two counts pursuant to a memorandum Decision of the District Court (R. 42). Appellant was subjected to only one trial and was convicted on April 11, 1972, on both counts of the felony charge. Appellant was sentenced to the Utah State Prison for a term not to exceed five years (R. 86).

## ARGUMENT

### POINT I.

### APPELLANT HAS NOT BEEN SUBJECTED TO MULTIPLE PUNISHMENT OR DOUBLE JEOPARDY SINCE UTAH CODE ANN. § 76-20-11(2) (1953) CANNOT BE CONSTRUED AS DEFINING ALL BAD CHECKS

ISSUED BY APPELLANT WITHIN A SIX MONTH PERIOD AS A SINGLE "SERIES OF CHECKS."

Utah Code Ann. § 76-20-11(1) (1953) makes it illegal to issue checks against insufficient funds. Utah Code Ann. § 76-20-11(2) prescribes the punishment for subsection (1) of the statute. This section reads 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 or 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, then a fine of not more than $299 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 but not $2,500, then a fine of not more than $5,000 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, 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 word "series" in the above citation is the major issue of appellant's appeal.

Appellant has been convicted of writing seven bogus checks in violation of Utah Code Ann. § 76-20-11 (1953).

Appellant now argues that this statute must be interpreted to mean that any number of bad checks passed within a six-month period, the total of which is between $100.00 and $2,500.00, constitutes "a series" and a *single offense* for purposes of imposing a penalty. Appellant further argues that the statute requires that all bad checks, issued within a six-month period, be prosecuted as a single offense. Since appellant was charged with and convicted of more than one offense arising out of the seven checks issued during a six-month period he arguest that he has been subjected to double jeopardy. This interpretation of the statute is unreasonable since in the instant case appellant issued bad checks to three different businesses, on different dates, for different amounts, and in exchange for different merchandise. Respondent contends that appellant has committed three separate, distinct offenses and has been properly charged and convicted for all three.

Separate crimes are committed when one issues fraudulent checks on different occasions. This is made clear in *People* v. *Martin*, 25 Cal. Rptr. 610, 208 Cal. App. 2d 867 (1962) and *People* v. *Guastella*, 44 Cal. Rptr. 678, 234 Cal. App. 2d 635 (1965). In the later case the defendant had written six checks, each under $45.00. She was charged with two felony counts and was given concurrent sentences upon conviction. Another closely related case is *State* v. *Buckmaster*, 94 Ariz. 314, 383 P. 2d 869 (1963). This case held that separate crimes were committed when the defendant paid for a truck with one bogus check and

presented another check to the same person on the same date, receiving money for the latter. Although the statutes in these other states are not identical to the Utah statute, these cases show that separate crimes are committed when bad checks are issued on different occasions.

In his brief, appellant incorrectly states, "The Utah statute defines a series as any number of checks issued within a period of six months." Appellant contends that all bad checks, over $100 and under $2,500, issued by one individual in a six-month period is a single "series" and constitutes only a single felony offense. This interpretation is unreasonable as it gives no recognition to different victims cheated, different dates, different checks, or different merchandise obtained with the bad checks. Appellant urges this court to ignore the fact that each conviction in the instant case resulted from completely separate acts and each was based on different evidence.

Appellant's interpretation of the statute, which would treat all bad checks between $100 and $2,500 as a single felony would encourage crime. A defendant who had already issued over $100 of bad checks would not be deterred from issuing additional checks up to $2,500 since there would be no additional punishment after the first $100 worth of bad checks had been issued. The California cases cited in appellant's brief illustrate that additional felonies are charged each time a defendant issues bad checks in an amount over the statutory minimum for a felony. *In re Dick*, 49 Cal. Rptr. 673, 411 P. 2d 56 (1966), illustrates the California approach. After a defendant

series of bad checks, enough checks are totaled
statutory dollar minimum is reached in order to
he felony charge. With the remaining checks the
ocess is repeated. This results in additional felony
if the remaining checks again total the amount
y to charge a felony. If the remaining checks do
the felony amount then additional misdemeanors
ged.

California and Utah statutes are not identical.
a Penal Code § 476a punishes a check or series
s under $100 ($50 before a recent amendment)
demeanor and checks or a series of checks over
a felony. This is much like the Utah statute to
t. However, the Utah statute has an additional
and authorizes a more severe punishment for a
series of checks over $2,500. Appellant argues
ause the Utah statute has the additional punish-
ovisions for bad checks over $2,500 that a defen-
not be charged with several felonies falling in the
$2,500 category. This is unreasonable for it pro-
deterrent or punishment for issuing bad checks
,500, after a defendant has initially issued worth-
ks of $100.

ondent submits that the word "series" in the
tute does not require all bad checks between $100
00 to be prosecuted as a single offense. This word
tatute simply allows several bad checks to be
n order to charge a defendant with a felony rather
isdemeanor. The word should not be construed

to preclude prosecution of single checks or other series of checks as either felonies or misdemeanors.

Appellant's interpretation of the statute leaves a legal loophole for those who issue worthless checks. As pointed out in the trial court's memorandum decisions (R. 42), many problems could be encountered where a person is charged with one insufficient funds check and then it is later discovered that it is one of the great series written over a six-month period. Appellant argues that if the defendant quickly pleads guilty to the one check, he would be immune from prosecution of the other checks issued in the same six month period. Respondent urges this Court to reject the reasoning that would create such a loophole in the law.

In his brief, appellant discusses at some length the differences between the "same evidence" and "same transaction" tests as they relate to the constitutional prohibition against double jeopardy. Respondent contends that it is unnecessary in the instant case to deal with these issues. Appellant could have been convicted under either test since each of the appellant's convictions involved different "transactions" as well as different "evidence."

Appellant mistakenly relies on *Ashe* v. *Swenson*, 397 U. S. 436 (1970). In *Ashe*, *supra*, the defendant has been tried and acquitted on the robbery of one of six victims in a group. The defendant was then retried and convicted of robbing another person in that group. The second prosecution was held to constitute double jeopardy.

The narrow issue in *Ashe, supra,* was whether the defendant had been one of the robbers. *Id.* at 445. In *Ashe, supra,* the Court held that the doctrine of collateral estoppel would bar a conviction if that conviction rested entirely upon a question of fact that had previously been resolved in the defendant's favor. Our case is quite different. In the instant case, the issuance of seven checks to three different businesses, on three different occasions constituted separate transactions and offenses. Unlike *Ashe, supra,* appellant has not had a question of fact determined by a jury or court in a previous trial that is dispositive of any issue touching the additional offenses. In *Wilkes* v. *United States,* 428 F. 2d 125 (5th Cir. 1971), the Fifth Circuit Court of Appeals considered the *Ashe* case and stated:

> "That case did not involve the question whether two different charges were so similar that they constituted the same offense. . . . The Court did not conclude that the defendant in that case could not have been separately convicted of robbing each of the victims if he had been the robber." *Id.* at 125.

When appellant was convicted in the Ogden City Court of a misdemeanor charge based on the bad check issued to Lafayette Electronics, he was not in jeopardy of the felony charges based on other checks. Appellant erroneously argues that this point was rejected by the Supreme Court in *Waller* v. *Florida,* 397 U. S. 387 (1970).

*Waller, supra,* concerned a very narrow question of consecutive trials by city and State Governments for an

offense arising out of identical acts. *Waller, supra,* merely decided that, because of the identity of sovereigns, a state cannot prosecute a defendant for the same acts for which he has already been previously tried in a municipal court.

In *Waller, supra,* the defendant removed a mural from the city hall. He was apprehended and convicted for two misdemeanors — the destruction of city property and breach of the peace. Thereafter, based on the same theft, the defendant was convicted in a state court of grand larceny. The Supreme Court held that if both convictions are based on the *same act*, the second trial constitutes double jeopardy.

The instant case is easily distinguished from *Waller, supra.* In *Waller,* both convictions were based on the same act, i.e., stealing a mural from city hall. In the instant case, appellant's convictions were based on completely different acts. The writing of bad checks to different businesses on different dates cannot be considered the same act.

## POINT II.

## THE RECORD AND EVIDENCE DOES NOT SHOW THAT THE TRIAL COURT'S APPLICATION OF UTAH CODE ANN. § 76-20-11(2) (1953) DENIED APPELLANT OF HIS CONSTITUTIONAL RIGHTS OR SUBJECTED APPELLANT TO PREJUDICIAL PROSECUTORIAL DISCRETION.

Appellant argues that Utah Code Ann. § 76-20-11(2) violates the equal protection clause of the Fourteenth Amendment and is void because the penalty imposed for its violation is not clear, specific and understandable.

In the case of *Stephens* v. *Turner*, 421 F. 2d 290 (10th Cir. 1970) the Tenth Circuit Court of Appeals considered the penalty provisions of the Utah statute in question against charges that the provisions violated equal protection of the laws. The court stated:

> "The unambiguous penalty provision of the statute under consideration applies equally to all persons and classes of persons in the State of Utah without discrimination. Every person convicted of violating the statute has an equal chance for lenience and it is not repugnant to the United States Constitution." *Id.* at 292, 293.

In its opinion, the Tenth Circiut Court of Appeals also stated that "equal protection of the laws within the meaning of the Fourteenth Amendment does not require exact equality . . . Identical punishment for like crimes is not required by the Fourteenth Amendment." [Cites omitted.] *Id.* at 292.

Appellant relies on the case of *State* v. *Shondel*, 22 Utah 2d 343, 453 P. 2d 146 (1969), to show that the penalty provisions of the statute in question are void for uncertainty. In *State* v. *Shondel, supra*, this Court considered an uncertainty created by the overlapping of two Utah statutes providing for punishment for the possession of the drug LSD. The Narcotic Drug Act punished the

possession of LSD as a felony and the Drug Abuse Control Law punished the same act as a misdemeanor. In that case, this Court held that the lesser penalty prescribed for the offense was applicable rather than the more severe penalty.

The facts and principles of *State* v. *Shondel, supra,* have little bearing on the facts of the instant case. *State* v. *Shondel, supra,* concerned overlapping and contradicting penalty provisions of two different statutes which purported to punish the same act. The instant case concerns penalty provisions of the same statute which clearly defines the different degrees of punishment in relation to differing dollar amounts of the bad checks involved.

*State* v. *Shondel, supra,* requires the penalty provisions of a statute to be clear, specific and understandable. Respondent submits that the penalty provisions of the statute in question meet these requirements. If a defendant issues a single check or a series of checks with a total dollar amount over $100 then a felony has been committed. If the total dollar amount of the single check or the series of checks is under $100 then only a misdemeanor can be charged. This formula is easily understood.

The record fails to show that appellant was subjected to prejudicial prosecutorial discretion. Appellant pleaded guilty to a misdemeanor charge based on a bad check issued on August 16, 1971 (R. 219). Two additional felony charges were brought against him which were subsequently joined into a single felony charge with two counts. Appellant was convicted of both counts of that felony

charge and was given a single sentence.

Appellant seems to express the belief and hope that this Court will adopt a rule prohibiting all but a single prosecution when criminal conduct is continuous in nature. This belief and hope was rejected by the Tenth Circuit Court of Appeals in *Birch* v. *United States*, 451 F. 2d 165 (10th Cir. 1971) and respondent urges this Court to likewise reject this position. "Logic and fairness . . . do not indicate that a premium benefit should be inherent in a criminal spree." *Id.* at 167.

## CONCLUSION

Respondent submits that appellant has not been subjected to double jeopardy. Appellant has committed three separate, distinct offenses and has been charged and convicted of all three. Respondent respectfully submits that the judgment of the lower court be affirmed.

Respectfully submitted,

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