1973

State of Utah v. Eugene Meyers : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
vs.
EUGENE MEYERS,
Defendant-Appellant.

Case No. 13105

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF GUILTY BY THE COURT SITTING WITHOUT A JURY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE D. FRANK WILKINS, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Eugene Meyers, appeals from a conviction of issuing a fictitious check in violation of Utah Code Ann. § 76-26-7 (1953).

DISPOSITION IN THE LOWER COURT

The Honorable D. Frank Wilkins found the defendant guilty of the crime of issuing a fictitious check. The defendant was thereafter sentenced to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of conviction rendered below.

STATEMENT OF THE FACTS

On May 19, 1971, the defendant met Debbie Wilson and gave to her an identification card bearing the name of a third person (T. 34, 41). In doing so, the defendant explained to Wilson that the identification card was to be used in cashing checks when she went into stores (T. 43). He further instructed her to act confidently (T. 46, 66) when she presented a check for negotiation utilizing the fraudulent identification.

On May 20, 1971, Wilson met the defendant and together with two other persons traveled to the parking lot of Shopper's Discount where defendant gave Wilson a check which was made payable to the same name that appeared on the identification previously given by the dsfendant (T. 44, 45). Wilson, with the defendant following right behind, walked into Shopper's Discount and then subsequently went to the checkstand with several items and presented the check for payment (T. 61). The checker, instead of cashing the check, gave it to the store manager, Thayne Eskelson. Thereafter the defendant approached Eskelson and tried to get the check back, offering money for its return (T. 25, 26). Eskelson refused to return the check and appellant left the store, Wilson having departed earlier.

ARGUMENT

POINT I.

THE EVIDENCE IN THE TRIAL BELOW

WAS SUFFICIENT TO FIND THAT APPELLANT AIDED AND ABETTED THE COMMISSION OF THE OFFENSE.

Utah Code Ann.§ 76-1-44 (1953) provides:

> "All persons concerned in the commission of a crime either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission, . . . are principals in any crime so committed."

Thus, if a person is an aider or abettor, he can be convicted as principal even though the aider or abettor did not personally perform or commit all of the legal elements of the crime. He becomes a principal by operation of law. It is respondent's contention that the evidence adduced at trial was sufficient to prove beyond reasonable doubt that appellant did in fact aid and abet another in the commission of the crime charged.

It should be noted that appellant waived his right to jury trial. The judge then became the trier of fact and had the "exclusive prerogative of judging the credibility of the evidence and finding the facts as normally belong to the jury." *State* v. *Mecham*, 23 Utah 2d 18, 458 P. 2d 158 (1969). The Utah Supreme Court has also said concerning the prerogative of the trial court sitting without a jury:

> "It is our duty to survey the entire record in the light most favorable to the judgment and to assume that he (the trial judge) believed the evidence that supports it." *Id.* at 158.

Where the issue is specifically aiding or abetting, the Court has held that broad prerogative extends to the trier of facts.

> ". . . not only (2) believing those aspects of the evidence which support the verdict but also of drawing all reasonable inferences that could fairly be deducted therefrom." *State* v. *Knepper*, 18 Utah 2d 215, 418 P. 2d 780 (1966).

In *State* v. *Murphy*, 25 Utah 2d 330, 489 P. 2d 432 (1971) the defendant, an aider and abettor, was charged with first degree robbery-murder under Utah Code Ann. § 76-1-44 (1953). The Court held that in order for Murphy, the aider and abettor, to be convicted:

> ". . . the evidence must justify the jury believing and finding beyond reasonable doubt . . . that the defendant was aware of Jordan's (the trigger man's) purpose and thus had the intent to participate in the robbery as a principal." *Murphy, supra*, at 431.

Thus, from these Utah cases, the law regarding aiding and abetting might be stated thusly: the defendant must be shown to have been aware of and shared the criminal purpose of the principal as well as having the criminal intent of the principal. Evidence that the defendant is aware and has encouraged the criminal purpose is evidence of this criminal intent and all reasonable inferences may be deducted from the facts and circumstances to show this guilty awareness.

The facts and evidence offered at appellant's trial

clearly indicate the trier of fact could most certainly find without entertaining reasonable doubt that appellant was guilty of aiding and abetting the commission of the crime of issuing a fictitious check.

Uncontradicted testimony was given by Debbie Wilson that the defendant aided and abetted the commission of the crime in that he provided both the identification and the check with the intent that they be used for the unlawful purpose of issuing a fictitious check (T. 41, 43, 45, 57). Providing either the fictitious check or the fraudulent identification would be sufficient evidence to constitute aiding and abetting the commission of the crime and here appellant was shown to facilitate the crime by providing both.

In addition, testimony indicates that the defendant instructed Wilson in the mechanics of carrying out the crime and even advised her to act confidently in attempting to negotiate the instrument (T. 43, 44, 46).

Further evidence of defendant's criminal intent and conduct is the uncontradicted testimony that after their initial meeting on May 19th and before entering Shopper's Discount on May 20th, the defendant provided Wilson with two similar fictitious checks which were cashed at other stores by utilizing the fraudulent identification provided by the defendant. Testimony was also given that the defendant received a portion of the money resulting from the cashing of these checks.

From the fact that the defendant drove to Shopper's

Discount with Wilson, gave her the check in the parking lot, and walked into the store right behind her, the trier of fact could reasonably conclude that the defendant aided and abetted the commission of the crime in that he not only facilitated the crime, and made it physically possible, but also gave Wilson necessary encouragement and backing.

Appellant urges that there was insufficent evidence corroborating Wilson's testimony. However, an examination of the record clearly demonstrates sufficient corroboration of Wilson's testimony in accordance with the test laid down by this Court.

In *State* v. *Sinclair*, 15 Utah 2d 162, 389 P. 2d 465 (1964), this Court stated that the proper test to determine the sufficiency of the corroborative evidence was whether there was evidence independent of the testimony of the accomplice which the jury could reasonably believe tended to implicate and connect the defendant with the commission of the crime. Sufficiency of corroborative evidence as required in Utah Code Ann. § 77-31-18 (1953) was further construed in *State* v. *Vigil*, 123 Utah 495, 260 P. 2d 539 (1953) where this Court stated:

> ". . . The corroboration need not go to all the material facts as testified by the accomplice nor need it be sufficient in itself to support a conviction; it may be slight and entitled to little consideration. However, the corroborating evidence must connect the defendant with the commission of the offense; and be consistent with his guilt and inconsistent with his innocence (citation

> omitted). The corroborating evidence must do more than cast a grave suspicion on the defendant and it must do all of these things without the aid of the testimony of the accomplice."

A review of the instant record reveals sufficient evidence to corroborate the testimony given by Wilson which the trier of fact could have reasonably believed connected the defendant with the crime. Appellant's efforts to secure the return of the instrument, as testified to by Thayne Eskelson (T. 25, 26) could reasonably lead the trier of fact to believe implicated and connected the defendant with the commission of the crime.

Based on the above mentioned facts and circumstances of the case, the inference may reasonably be drawn that the appellant was guilty of aiding and abetting the crime. The trier of fact did accept the inference beyond reasonable doubt and therefore the verdict must be affirmed.

POINT II.

APPELLANT CAN BE CONVICTED AS AN AIDER AND ABETTOR EVEN THOUGH NO ONE BUT APPELLANT HAS BEEN PROSECUTED FOR THE SUBSTANTIVE OFFENSE.

Since an aider and abettor can be convicted as a principal under Utah Code Ann. § 76-1-44 (1953), appellant's proposition that a person cannot be convicted as an aider

and abettor without someone else being prosecuted for the substantive offense, is clearly inconsistent with Utah law. Under Utah law, an aider and abettor is a principal and therefore is himself convicted of the substantive offense. Clearly, it is not required that someone else be actually accused by information of the offense in order for the conviction of a principal to stand.

Appellant cites *State* v. *Pacheco*, 27 Utah 2d 45, 492 P. 2d 1347 and 27 Utah 2d 281, 495 P. 2d 808 (1972) in support of his proposition. In *Pacheco*, this Court stated:

> ". . . The state must prove first that some other person . . . committed the offense." *Supra* at 1348.

Proving that another party committed the offense is clearly an element for a conviction of aiding and abetting but that is an entirely different thing from requiring an actual prosecution of that other person.

In the case at hand, the State did prove that the crime of issuing a fictitious check had been committed by Debbie Wilson and further that she was aided and abetted in the commission of that offense by the appelant, Eugene Meyers. Hence, the requirements for conviction of aiding and abetting were clearly met.

Utah Code Ann. § 77-21-40 (1953) provides that even the lesser offense of being an accessory may be prosecuted, tried and punished even though the principal may be neither prosecuted nor tried. It would therefore be highly inconsistent to require, as appellant suggests, that

another person be prosecuted for the substantive offense in order to convict for aiding and abetting.

In *Oaks* v. *People*, 161 Col. 561, 424 P. 2d 115 (1967) the Colorado Supreme Court stated in dealing with similar provisions in their penal code:

> "From the wording of the statute and the interpretation that this court has given it in a number of cases, the acts of the principal are the acts of the accessory and the accessory may be charged and punished accordingly as a principal . . . This Court has held that the conviction of the principal is not a condition precedent to the conviction of an accessory after the fact . . . This same reasoning would apply to an accessory before or during the fact."

Had appellant been an accessory after the fact, as a result of Utah Code Ann. § 77-21-40 (1953) there could be no condition precedent that another party be prosecuted for the substantive offense. Likewise, since appellant is an aider and abetor — an accessory before and during the fact — a prosecution of another person cannot be a condition precedent.

POINT III.

THE EVIDENCE OFFERED IN THE TRIAL BELOW DOES SUPPORT A CONVICTION OF THE OFFENSE OF ISSUING A FICTITIOUS CHECK, A VIOLATION OF UTAH CODE ANN. § 76-26-7 (1953).

Appellant raises the question of whether the offense in this case can properly be tried as a violation of Utah Code Ann. § 76-26-7 (1953). More precisely, appellant is asking whether a check drawn on the account of a corpporation that has not done business for more than nine years is a "fictitious check" within the meaning of the statute. Clearly it is, and the judgment below should be affirmed.

Appellant cites *State* v. *Fox*, 22 Utah 2d 211, 450 P. 2d 987 (1969) and claims that since in that case a preprinted check was used to support a conviction for forgery, it cannot be used in the case at hand to support a conviction for fictitious check. There is a very important distinction, however, that goes to the very heart of the matter. In *Fox*, this Court spoke of the business involved as being an "existing company", *supra* at 989, and hence, that case would not come under the provision of Utah Code Ann. § 76-26-7 (1953). The reason a pre-printed check supported a conviction for forgery in *Fox* and it supports a conviction of issuing a fictitious check in the case at bar is that *Fox* involved an existing company while here there is "no such bank, corporation, partnership or individual in existence" Utah Code Ann. § 76-26-7 (1953).

What proof is required of existence is outlined in *State* v. *Wellard*, 93 Utah 274, 279 P. 2d 914 (1955):

> ". . . It is only necessary to prove to a common certainty that there is no such person as the one who purportedly made such check in the

> vicinity of the counties connected with the act charged." *Id.* at 916.

In the instant case, the state has shown by uncontested evidence offered at trial that the company in question is presently not in existence and has not existed for over nine years (T. 29, 30). Hence, the judgment for conviction rendered below should be affirmed since the instrument involved is clearly within the meaning of the statute.

CONCLUSION

There was sufficient evidence adduced in the trial below to support the judgment of conviction, and appellant can be properly convicted even though no one else has been prosecuted for the substantive offense. Respondent respectfully submits, therefore, that the judgment of the lower court be affirmed.

Respectfully submitted.

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