1966

# State of Utah v. Craig Phillip Hamilton : Brief of Appellant

Utah Supreme Court


Phil L. Hansen; Attorney for RespondentJimi Mitsunaga; Attorney for Appellant

# IN THE SUPREME COURT
## of the
## STATE OF UTAH



STATE OF UTAH,
*Plaintiff-Respondent,*

- vs. -

CRAIG PHILLIP HAMILTON,
*Defendant-Appellant.*

Case No.
10588

## BRIEF OF APPELLANT

Appeal from the judgment of the Fifth Judicial District Court in and for Washington County, the Honorable C. Nelson Day, Judge.

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## *STATUTES CITED*

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STATE OF UTAH,
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CRAIG PHILLIP HAMILTON,
*Defendant-Appellant.*

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## BRIEF OF APPELLANT

### STATEMENT OF THE CASE

This is a criminal appeal from a judgment and conviction rendered by a jury against the appellant on the 5th day of November, 1965, before the Honorable C. Nelson Day, Judge, in the Fifth District Court in and for Washington County, State of Utah.

### DEPOSITION IN LOWER COURT

This case was tried by jury before the Honorable C. Nelson Day, Judge of the Fifth District Court in and for Washington County, State of Utah on the 4-5 of November, 1965. During the course of the trial, the appellant excluded the jury and submitted evidence dis-

puting the admissibility of the confession made by the appellant. The trial court, after hearing the evidence, admitted the confession of the appellant over appellant's objection. A jury returned a verdict of guilty of robbery as charged in the information on November 5, 1965. The appellant filed a motion for new trial on November 10, 1965, which was submitted without oral argument. The trial court denied the same on November 24, 1965. The appellant was sentenced and committed to the Utah State Prison on November 8, 1965 for robbery.

## STATEMENT OF THE FACTS

Since the issues on this appeal are limited to the admissibility of the confession and the lower court's error in not granting the defendant's requested instruction on the charge of grand larceny, the entire transcript of the trial was not included in the record on appeal.

During the course of the trial, the appellant excluded the jury from the court room in order to contest the admissibility of the confession. (T-4) During the course of the testimony of Donald R. Lyman, Salt Lake City, Police, the following was illicited: (T-4-5)

(By Prosecutor)

Q. . . . Would you state who spoke and what was said.

A. I done the talking. The first thing that I said was, I advised the defendant that he had been charged with an armed robbery that happened in St. George.

Q. Washington County, Utah.

A. In Washington County. I advised him that I was a police officer. I advised him that he had a right to counsel and also anything he might say would be on a voluntary basis and could be used against him.

Q. Did the defendant make any reply to this?

A. As I recall, he said he was going to make arrangements to get an attorney, rather, he didn't have an attorney at that time.

Whereupon, the trial court overruled the appellant's request to exclude the statement on the grounds that the statements were taken in violation of the defendant's right to counsel. (T-5) Trial court found that the fact situation did not show a request for an attorney. (T-5) Further testimony of the police officer indicated that the appellant did not request counsel. (T-6) However, on cross-examination, the same officer stated: (T-10)

Q. Now, officer, you indicated that the defendant Hamilton, said to you that he was going to make arrangements to get me, isn't that right, to get an attorney?

A. I think that was his plan at the time.

Q. And that was his plan?

A. Yes.

Q. So that as far as in his conversation. Officer Lyman, isn't it true that he did want an attorney?

A. He did want one, you say?

Q. Yes.

A. I think he realized he was going to have to have one and did need an attorney.

Q. And that he did want one, that is why he said he was going to make arrangements to get one?

A. Yes, I think he wanted an attorney.

On further questioning by the court, the same witness state: (T-12)

The witness: He said he was going to make arrangements to get Bud Hatch. In fact, I think he had already called him when I talked to him.

The Court: My question was, what did he say at that time, though, as near as you recall?

> The witness: Well, when I asked him about an attorney, I advised him he had a right to get an attorney. Well, he said he was going to get ahold of one and he was going to get ahold of Bud Hatch. He said he was going to make arrangements.

Later in the trial, before the jury, Edward H. Barton, Salt Lake City Police, was called by the appellant and the witness stated that he ceased his interrogation on the early morning hour of March 14, 1966 because the appellant stated that he wanted to talk to an attorney. (T-14)

The admissions made by the defendant were submitted to the jury.

The defendant requested that the included charge of grand larceny be submitted to the jury and this request was denied by the trial court (T-14). The jury found the defendant guilty of robbery and the defendant was committed to the Utah State Prison on November 8, 1965.

## ARGUMENT

POINT I. THE TRIAL COURT ERRED IN ADMITTING THE CONFESSIONS OF THE DEFENDANT WHERE THE EVIDENCE SHOWS THAT THE CONFESSION WAS TAKEN AFTER THE DEFENDANT EXPRESSED A DESIRE TO OBTAIN COUNSEL.

The instance case points up the legal issues which have been heretofore decided by the United States Supreme Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964) wherein the court stated:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lend itself of eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372, U.S., at 342. and no statement elicited by the police during the interrogation may be used by him at a criminal trial." (491)

It is the appellant's contention on an appeal that the undisputed testimony of the Salt Lake City Police officer, Donald R. Lyman, clearly indicated that the defendant desired the opportunity to obtain counsel, (T-5) and further, that any incriminating statements made by the defendant after this request were improperly admitted by the trial court. The defendant was in custody at the Salt Lake City Jail where interrogation took place, (T-3) and the defendant was advised that he was

charged with armed robbery in St. George. (T-4) The interrogation had passed the "investigatory" stage and was, without doubt, in the "accusatorial" stage. When advised of his right to counsel, the defendant stated he wanted to get one (T-5) further, the officer stated that the defendant wanted one (T-10).

Moreover, the officer failed to inform the defendant of his absolute right to remain silent. This failure alone would be fatal and would require this court to reverse the instance case. *People v. Dorado,* 394 P. 2d 952 (Col. 1964); *People v. Neely,* 395 P. 2d 557 (Ore. 1964); *State v. Dufour,* 206 A. 2d 82 (R.I. 1965); *Campbell v. State,* 384 S. W2d 4 (Tenn. 1964); contra: *People v. Hartreves,* 202 N.E. 2d 33 (Del. 1964); *Commonwealth v. Patrick,* 206 A. 2d 295, (Penn. 1965).

The appellant respectfully submits that the trial court erred in admitting the statement of the accused and the undisputed testimony shows that the instance matter should be reversed.

POINT II. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S REQUESTED INSTRUCTION ON GRAND LARCENY WHERE THE INFORMATION ALLEGES THE CRIME OF ROBBERY.

The defendant was charged with the crime of robbery whereby it was alleged in the information that the

defendant did rob one Zella Riding by taking personal property from her person or in her immediate presence against her will, and accomplished by means of force and/or fear. (R-5) The defendant requested that the included offense of grand larceny be submitted to the jury as an included offense. Trial court refused said instruction. (R-14).

This refusal by the court is reversible error. This court in *State v. Donovan,* 77 Utah 343, 294 P 1108 (1931) held that grand larceny is a necessarily included offense in robbery. This principle was reiterated in *State v. Montayne,* No. 19481, filed on June 3, 1966. The trial court must, of course, submit instructions and verdicts for all necessarily included offenses especially where such instructions and verdicts are requested by the defendant. Section 77-33-6 Utah Code Ann. (1953). This is so regardless of how the evidence appears to the court or how illogical or unreasonable an included offense verdict may be. *State v. Blythe,* 20 Utah 378, 58 Pac. 1108 (1899). The appellant submits the second point on the above cases and requests that the instant matter be reversed and remanded to the trial court.

## CONCLUSION

The entire transcript at trial was not prepared for the appeal of the issues presented. The appellant strongly urges that both points merit a summary reversal of

the instance case as shown by the record on appeal. The facts are submitted without dispute and the matter is presented in crystalized form so as to eliminate the confusion which accompanys most appeals. The facts are clear and the law is equally clear. The instance case should be reversed and remanded.

Respectfully submitted,

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