1966

State of Utah v. Craig Phillip Hamilton : Brief of Respondent

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 RESPONDENT

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

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CRAIG PHILLIP HAMILTON,
Defendant-Appellant.

Case No. 10588

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant appeals from a conviction on jury trial of the crime of robbery in the District Court of Washington County, State of Utah.

DISPOSITION IN LOWER COURT

The appellant was charged in separate informations with the crime of robbery alleged to have occurred on the 5th day of March, 1965, in Washington County, Utah (R. 5) [1] and with being an habitual criminal. Trial was held in the district court on November 4 and 5, 1965. The jury

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[1] Respondent will cite the court document as R., the out of court hearing transcript as OT, and the testimony of Zella Riding as T.

returned a verdict of guilty on the robbery charge and the habitual criminal charge was dismissed. On November 8, 1965, the appellant was ordered committed to the Utah State Prison. A motion for a new trial was subsequently made and thereafter denied on November 24, 1965.

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the district *court should be affirmed, or in* the alternative, the case be remanded to the district court with instructions to that court to hold a hearing without jury to determine whether there was sufficient compliance by the police with the principles laid down in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), to have warranted consideration by the jury of appellant's confession.

STATEMENT OF FACTS

On March 5, 1965, Zella Riding was working in a grocery store in St. George, Utah (T. 7, 8). At about 9:05 p.m. she and a young boy were in the rear of the store to obtain groceries to restock the shelves (T. 9). On looking out of the area into the meat area, she noticed the appellant standing by the meat counter (T. 9). The appellant told her it was a "stick up" (T. 10). Mrs. Riding then said, "You're kidding," and the appellant replied he was serious (T. 10). He told Mrs. Riding to take the paper money from the cash register and give it to him (T. 11). Appellant pulled a pistol from his pocket and said he was serious (T. 10). Mrs. Riding took the money from the cash register, which totaled about $100.00, and gave it to appellant who

then fled the store and rode away in an automobile (T. 12). Subsequently, Mrs. Riding identified appellant as the robber (T. 18).

During the course of trial, certain admissions of the appellant were offered by the prosecution (OT 3). An out of court hearing was held to determine their admissibility. Officer Donald R. Lyman of the Salt Lake City Police Department testified that before interrogating the appellant at the Salt Lake City jail, he advised the appellant of the fact that Officer Lyman was investigating a robbery charge, advised appellant that he could have an attorney and further advised appellant that anything he had to say would have to be voluntary and could be used against him. At no time did the appellant request an attorney, but he indicated he would make arrangements to obtain a local attorney (OT 5, 11, 12). Further, Officer Lyman testified (OT 6):

> "Q. (By Mr. Burns) Did Mr. Hamilton request an attorney?
>
> "A. No, he didn't."

Subsequently, the appellant made some admissions relating to the crime. The trial court overruled an objection to receipt of the admission on a claim that appellant had requested an attorney and been refused one.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING THE ADMISSIONS OF

APPELLANT SINCE (1) THE EVIDENCE WOULD SUPPORT A CONCLUSION APPELLANT DID NOT REQUEST COUNSEL; (2) A REQUEST FOR COUNSEL PRIOR TO JUNE 13, 1966, ONLY REQUIRED THAT APPELLANT BE WARNED OF A RIGHT TO REMAIN SILENT AND (3) APPELLANT WAS ADEQUATELY WARNED.

The facts in the instant case clearly support the conclusion that the appellant did not request an attorney. At no time was there any testimony from Officer Lyman that after the advice he gave to the appellant that he could have an attorney was any request made for an attorney. In fact, he specifically indicated that appellant did not request an attorney. The only thing the appellant indicated was that he was going to attempt to obtain the services of a local attorney. He did not request to see the local attorney at that time, nor was there any evidence in the record that he requested the police to obtain counsel for him or that he wanted counsel present at the time of his interrogation. Consequently, with the instant state of the record, it was well within the prerogative of the trial court to determine from the facts that there was never any request for counsel. This being so, it is submitted that there is no basis for the appellant to claim any denial of his constitutional rights.

In *Miranda* v. *Arizona*, ... U. S. ....., 16 L. E. 2d 964, June 13, 196, the United States Supreme Court laid down a rather revolutionary series of principles to govern state and federal police officials in the handling of interroga-

tions when the suspect is in custody of police officers. The court stated generally that a suspect must be advised of an absolute right to remain silent, must be advised that anything he says can be used in evidence against him, must be informed that he has a right to counsel and that if he cannot afford counsel that counsel will be provided for him. Further, if the suspect indicates that he desires counsel, or that he does not desire to talk to the police, all interrogation must cease. It might well be that if the Miranda case were to govern this situation, the appellant's point on appeal would be well taken. However, this case is not controlled by the decision in Miranda.

Subsequent to the Miranda decision in the case of *Johnson* v. *New Jersey,* ..... U. S. ....., 16 L. E. 2d 882, (1966), the Supreme Court of the United States indicated that the Miranda case was not to be applied retroactively. The court stated that the decision of *Miranda* v. *Arizona* would apply only to trials begun after the 13th day of June, 1966. The court also indicated that the decision of *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), was not to be applied retroactively and that it was applicable only to trials commenced after June 22, 1964, the date of the Escobedo decision. Consequently, this case is governed only by the rule in *Escobedo* v. *Illinois,* supra. The Escobedo rule unlike the Miranda rule does not require termination of an interrogation on the request for counsel.

There has, of course, been a substantial argument raised as to the effect of the Escobedo decision. The overwhelming majority of cases as are noted in the dissenting

opinions in the Miranda case had construed Escobedo to be applicable only where the defendant requested counsel and was denied the opportunity to consult with counsel. Indeed, the appellant in his brief acknowledges the variance of authority. cf. *People* v. *Hartgraves,* 202 N. E. 2d 33 (Ill. 1964); *State* v. *Hall,* 397 P. 2d 261 (1964); *State* v. *Faux,* 131 N. W. 84 (Iowa 1964); *Anderson* v. *State,* 205 A. 2d 281 (Md. 1964); *Bean* v. *Nevada,* 398 P. 2d 251 (Nev. 1965); *Davidson* v. *United States,* 347 F. 2d 530, 534 (10th Cir. 1965); *United States* v. *Childress,* 347 F. 2d 488 (7th Cir. 1965). The cases are collected in the Miranda decision and in the *Brief of Amicus Curiae in Escobedo Cases,* by Ronald Sokol, 1966. The question then is whether Escobedo required a request for counsel before a warning was required?

In *Johnson* v. *New Jersey,* supra, the court stated:

> "As for the stndards laid down one week ago in Miranda, if we were persuaded that they had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of Escobedo, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966. See Tehan v. Shott, 382 U. S., at 409, 15 L. Ed. 2d at 455, note 3, with reference to Malloy v. Hogan, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), and Griffin v. California, supra."

The court in *Johnson* v. *New Jersey,* supra, also said that the courts applying the liberal rule of making advice as to counsel and the right to remain silent of the defendant mandatory before admitting a confession or admission had "perceived the implications of Escobedo and have therefore anticipated our holding in Miranda." Thus, the court acknowledged that it would not read into Escobedo a requirement that an individual be advised as to his right to remain silent, unless there was an actual request for counsel. Thus, it is submitted that the position now urged by the appellant is available only to cases where the Miranda decision is applicable. In *Johnson* v. *New Jersey,* supra, the court said as to the meaning of Escobedo that it was limited to its precise holding apart from its broad implications. Thus, it stated:

> "Apart from its broad implications, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, [where] 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 lends itself to 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 . . .' 378 U. S. at 490-491, 12 L. Ed. 2d at 986."

Thus, it has been interpreted as saying that unless all the elements are present, including the request for counsel and the refusal to supply counsel, there is no requirement that

the defendant in a pre-Miranda case be advised of his right to remain silent. 2 Journal of the National District Attorneys' Association, p. 122 (1966).

Consequently, even if there was no advice clearly spelled out to the appellant in the instant case that he had an absolute right to remain silent, that would not be fatal, if no request for counsel was, in fact, made. Since the record supports the fact that no request was made, the absence of advice would not preclude the appellant's conviction.

The respondent submits in addition, that the implications in Officer Lyman's testimony were to the effect that he did, in fact, advise the appellant that he could remain silent. At the time Officer Lyman gave his testimony, the prosecution was not compelled as a condition precedent to admission of the evidence to show such advice. *State* v. *Ringo*, 14 Utah 79, 377 P. 2d 646 (1963).

Therefore, respondent requests that if this court determines that the Escobedo and Miranda decisions are applicable to this case, that the case be remanded to the district court and that under the authority in *Jackson* v. *Denno*, 378 U. S. 368 (1964), the judge sitting without jury there determine factually whether the appropriate advice to remain silent was given. If the court decides that the appropriate advice was given, then he may affirm the judgment. If the court determines that the appropriate advice was not given, (assuming this court determines that a request for counsel was, in fact, made), a new trial could be ordered.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF GRAND LARCENY.

The facts in the instant case disclose that the appellant, while in the store where Mrs. Riding was working, told her that it was a stick-up, pulled a gun on her, took money from the cash register, and fled. All the evidence indicates robbery. There is no evidence of any kind to indicate that the sole intention of the appellant was to commit larceny. Indeed, the only evidence offered by the appellant on appeal is the testimony of Mrs. Riding which overwhelmingly supports a conclusion that robbery was, in fact, committed and that that was the only crime properly instructed on. The trial court correctly refused the instruction on the lesser included offense.

In a long line of decisions, this court has indicated that there is no need for a trial court to instruct upon a lesser included offense unless it is raised by the evidence. In *State* v. *Angle*, 61 Utah 432, 215 Pac. 531 (1923), this court stated:

> "It is a well-settled rule that instructions as to lower grades of the offenses charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged where there is no evidence to reduce the offense to a lesser grade. 1 Blashfield, Instructions to Juries (2d Ed.) § 408."

In *State* v. *Ferguson,* 74 Utah 263, 279 Pac. 55 (1929), this court again noted:

> "It is a well settled rule that instructions as to lower grades of the offense charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged, where there is no evidence to reduce the offense to a lesser grade."

Recently, in *State* v. *Gleason,* 17 U. 2d 149, 405 P. 2d (1965), this Court ruled that there was no reason to instruct upon the lesser included offenses to the crime of rape. It was stated:

> "The evidence was so overwhelming that he committed the act that no such instruction was either necessary or appropriate."

Most recently, in *State* v. *Dodge,* 415 P. 2d 212 (1966), counsel for the appellant raised the same contention that is now raised before the court. Appellant's counsel again fails or refuses to acknowledge the overwhelming authority in Utah case law that an instruction on a lesser included offense need not be given unless it is raised by the evidence. In the Dodge case, this court said:

> "The facts indisputably show he was attempting to peel the safe. The jury would have been composed of unreasonable men had it even considered that the defendant had 'unlawfully entered' for the altruistic 'intent to damage property or to injure a person or annoy the peace and quiet of any occupant therein.' The trial court also would have been an unreasonable person had he given such an instruction. The second degree burglary conviction is affirmed."

The decision of *State* v. *Blythe,* 20 Utah 378, 38 Pac. 1108 (1899), cited by the appellant, does not support the proposition for which it is cited, since in that case, the court merely held that the trial court's giving an instruction on a lesser included offense, to wit: attempt, and the jury return of a conviction on the lesser included offense, did not preclude the conviction, even though the evidence overwhelmingly demonstrated the commission of the actual offense. The case is of no precedential value for this appeal.

CONCLUSION

Both issues raised by the appellant in the instant case are without merit. Appellant was only entitled to be advised of his right to remain silent if he made an actual request for counsel. Further, at the time appellant was prosecuted, the failure to cease interrogation, if he made a request for counsel, was not required. The evidence in the instant case clearly shows that a request for counsel was not made and, therefore, no warning was necessary. Consequently, the only question was the voluntariness of the confession, which appellant does not assail. The appellant's contention that an instruction on the lesser included offense should have been given is frivolous and without merit. This court should affirm.

Respectfully submitted,

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