

2007

# Utah v. Dembert : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,  Plaintiff/Appellee,  vs.  RORY DEMBERT,  Defendant/Appellant.	CASE NO. 20070068-CA  <b>APPELLANT IS INCARCERATED</b>
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BRIEF OF APPELLANT

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**APPEAL FROM DISTRICT COURT'S DENIAL OF DEFENDANT'S  
MOTION TO SUPPRESS STATEMENTS AND JUDGMENT, SENTENCE,  
AND ORDER FOR COMMITMENT, IN THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF  
UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.**

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**ORAL ARGUMENT REQUESTED**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,  Plaintiff/Appellee,  vs.  RORY DEMBERT,  Defendant/Appellant.	CASE NO. 20070068-CA
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BRIEF OF APPELLANT

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**JURISDICTION**

Appellant, RORY DEMBERT (“Mr. Dembert”), appeals from the denial of his motion to suppress evidence and the consequent Judgment, Sentence, and Order for Commitment. This Court has appellate jurisdiction pursuant to Utah Code Ann. §78-2a-3.

**STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

**ISSUE 1:** Was Mr. Dembert denied his constitutional right to effective assistance of counsel when his trial counsel did not file a motion to suppress incriminating statements at least five days prior to trial?

**STANDARD OF REVIEW:** When a claim of ineffective assistance of counsel is raised for the first time on appeal, this Court resolves the issue as a matter of law. *State v. Mahi*, 125 P.3d 103, 105 (Utah App. 2005).

**ISSUE 2:** Did the trial court abuse its discretion in denying Mr. Dembert's motion to suppress evidence on the ground that it was untimely under Rule 12(c) of the Utah Rules of Criminal Procedure?

**STANDARD OF REVIEW:** The trial court's denial of Mr. Dembert's motion to suppress on procedural grounds is reviewed for abuse of discretion.

*State v. Cornejo*, 138 P.3d 97, 100 (Utah App. 2006).

**ISSUE 3:** Did the trial court err in denying Mr. Dembert's motion to suppress allegedly incriminating statements that were made when law enforcement continued to question him after he invoked his right to remain silent under *Miranda*?

**STANDARD OF REVIEW:** The denial of a motion to suppress evidence is reviewed for correctness, giving no deference to the trial court. *State v. Adams*, 2007 UT App 117, ¶7.

### **STATEMENT OF THE CASE**

On July 18, 2006, Mr. Dembert was charged with one count of Aggravated Assault, a second degree felony. R:1-6. A preliminary hearing was conducted on August 22, 2006, after which the charge was bound over for trial. R:31-32. On November 21, 2006, which was also the first day of Mr. Dembert's jury trial, Mr. Dembert's counsel filed a motion to suppress allegedly incriminating statements (**Addendum A**) that were made during the initial investigation after Mr. Dembert invoked his right to remain silent and requested the assistance of an attorney. R100-101. The trial court denied the motion on the ground that it was untimely

under Rule 12(c) of the Utah Rules of Criminal Procedure and also denied the motion on its merits. R170:13-14. A jury convicted Mr. Dembert of the charge on November 22, 2006. R171:28. On December 15, 2006, Mr. Dembert was sentenced to serve 1-15 years at the Utah State Prison. R147-48. Mr. Dembert timely filed his Notice of Appeal on January 3, 2007. R157-58.

While this case has been pending in this Court, the parties stipulated to supplement the record with a certified transcript of Mr. Dembert's interview with police that was admitted into evidence. After this Court signed the order, the district court apparently did not respond for several weeks. The Clerk of this Court then notified Mr. Dembert's counsel it had been discovered the district court did not have the DVD in the record. Counsel for Mr. Dembert then requested the DVD from the Salt Lake District Attorney's Office pursuant to a specific request for discovery. It was provided and a certified transcript was ordered.

However, it subsequently became apparent to counsel for the State that the transcript included portions of the interview that had not been admitted into evidence during Mr. Dembert's trial. The parties eventually reached a second Stipulation as to what occurred during that interview. A copy of that Stipulation, which has been filed with this Court, is attached hereto as **Addendum B**.

### **STATEMENT OF FACTS**

On July 16, 2006 at about 1:00 a.m., Angelo Pollock (Mr. Pollock) was stabbed several times by Mr. Dembert outside of the Road Home homeless shelter located at 210 South Rio Grande Street in Salt Lake City. R:170:27. Mr. Pollock



testified Mr. Dembert was trying to steal Mr. Pollock's cocaine when Mr. Dembert attacked him with a knife. R170:22-29. Mr. Pollock said he also had a knife that he claimed he was using to open a bottle of wine when Mr. Dembert approached him from behind. R170:25. After being stabbed in the abdomen, shoulder, and buttocks, Mr. Pollock testified he "finally told [Mr. Dembert], 'I'm done.'" Mr. Dembert responded, "I know you are," and left the scene. R170:53, 55.

Gail Cameron was working at the Road Home at the time of the stabbing. R170:61-62. Ms. Cameron has a monitor at her desk linked to an outside camera. R170:63. At the time of the incident, Ms. Cameron was not watching the monitor because she was helping someone at her desk. R170:63, 71-72. Therefore, Ms. Cameron did not see how the fight started. R170:72. When she did look at the monitor she saw a man fall to the ground, so she "focused the camera in on it." R170:63. Ms. Cameron testified she then saw Mr. Pollock "on his back, with his hands and his feet in the air, as though he was trying to defend himself." R170:64. She testified Mr. Pollock was not holding a knife. R170:64, 75. She then observed Mr. Dembert lean over and strike Mr. Pollock, and "when [Mr. Dembert] stood up [she] saw a knife in his hand." R170:66.

Both Mr. Pollock and Mr. Dembert are drug addicts and both had used cocaine around the time of the incident. R170:22, 39, 49. Mr. Pollock had "smoked some earlier" and was "in the midst of smoking it" when the incident occurred. R170:39-40. Mr. Pollock testified while he could recall the events of July 16, 2006, he had no recollection of testifying at the preliminary hearing

conducted on August 22, 2006. R170:37-38, 41, 57-58. Mr. Pollock also testified he had a prior conviction for providing false information to a peace officer, although he lied about that conviction at the preliminary hearing. R170:41-42.

Officer Michael Blackburn of the Salt Lake City Police Department was only a couple of blocks away from the incident when he was contacted by dispatch to respond to the scene. R170:77. Mr. Dembert was almost directly across the street from the shelter where the incident occurred, “sitting next to the east fence, kind of crouched down like in a sitting position with a bag in front of him, wearing a black shirt and white pants.” R 170:79, 85. Mr. Dembert appeared “really nervous, real apprehensive to make eye contact. ... [He was] real timid and shy, more head down, fidgeting with something in a green backpack or a green bag he had in front of him.” R170:79. Mr. Dembert made no attempt to flee the scene and he followed the officers’ instructions. R170:87.

When Officer Blackburn asked Mr. Dembert if he had seen “anything that went on,” Officer Blackburn testified he could not recall whether Mr. Dembert responded to the question. R170:81. Because Mr. Dembert matched the description of the suspect, officers conducted a pat-down search, took his wallet to identify him, then handcuffed him and placed him inside a police vehicle. R170:82. No weapons were found on Mr. Dembert’s person. R170:93.

Officer Kevin Ford of the Salt Lake City Police Department was working with Officer Blackburn when the dispatch call came in. R170:90. He testified knives were found in Mr. Dembert’s green duffle bag. R170:92. When Officers

Blackburn and Ford placed Mr. Dembert under arrest, Officer Ford looked into Mr. Dembert's bag and "could see the blade of a knife poking up with blood running down it." R170:94.

Officer Ford testified he booked into evidence another knife presumably belonging to Mr. Pollock that was located at the crime scene after the scene was secured. R170:99.

It appears Officer Angeline Portel of the Salt Lake City Police Department was the first officer to respond to the scene. R170:101-2. She obtained Mr. Dembert's description from Gail Cameron who was assisting Mr. Pollock and provided that information to Officers Blackburn and Ford. R170:104. Officer Portel also identified a photograph of Mr. Pollock's knife that was found at the crime scene. R170:110. After Mr. Dembert was transported to the police station, Officer Portel interviewed him. R170:105. The jury was shown a portion of that interview. R170:106-7.

Scott Scriven was a crime lab technician for the Salt Lake City Police Department. R170:113. He took several photographs of the crime scene including a knife presumably belonging to Mr. Pollock that was found on the sidewalk at the scene. R170:116.

Mr. Dembert testified in his own defense. R170:117. He had been living in the area of the shelter for three or four days prior to the stabbing, sleeping on the sidewalk. R170:118. He testified he kept all of his worldly possessions, comprised of a couple of knives and some personal items, in his duffle bag.

R170:118. He testified he kept the knives for protection. R170:119. Mr. Dembert further testified that on the night of the stabbing, Mr. Pollock and two or three other men approached him and accused him of stealing their drugs. R170:119-20. Mr. Pollock and the men he was with were also speaking Spanish with each other. *Id.* It was after midnight and it was dark. R170:119. Mr. Dembert denied stealing any drugs. R170:120. Mr. Dembert then moved to another area and sat on a bench located at the front of the shelter where there were more people and surveillance cameras, hoping Mr. Pollock and the men with him “might not mess with me if I was sitting [there.]” R170:121.

However, Mr. Pollock then joined Mr. Dembert on the bench and continued to accuse him of taking Mr. Pollock’s drugs, which accusation Mr. Dembert continued to deny. R170:121. Mr. Dembert testified he was trying to go to sleep on his bag. R170:122. Mr. Pollock and the men with him “were standing all around me, you know, and speaking in Spanish. I was kind of nervous; and when I look (sic) up, [Mr. Pollock] had a knife. ... and was coming towards me with a knife.” R170:122-23. Mr. Dembert testified Mr. Pollock was holding the knife by the handle and swinging the blade toward Mr. Dembert. R170:123. Mr. Dembert then reached in his bag and grabbed one of his knives. *Id.* Mr. Dembert testified he and Mr. Pollock then started fighting. *Id.*

Mr. Dembert testified Mr. Pollock was “swinging wild” and Mr. Pollock’s knife came “[r]eal close” to his body. R170:124. Mr. Dembert started swinging at Mr. Pollock while Mr. Pollock was “[t]rying to stick” Mr. Dembert. They “both

kind of stood up ... and [Mr. Pollock] swung and he kind of got off balance and ... he fell on the ground and throwed (sic) his hands up, saying, 'I'm done, I'm done.'" R170:124. Mr. Dembert then testified, "I seen the knife, and I seen he had nothing in his hands, so I quit." R170:124-25. At that point Mr. Dembert walked across the street. R170:126.

Mr. Dembert testified he did not realize he had stabbed Mr. Pollock until the police told him there was blood on Mr. Dembert's knife. R170:125. He testified, "it's kind of blurry because I had been up two days. We both were getting high, you know. We were both high. We were on drugs, and it's kind of hard to say exactly; but once he come at me, he swung his knife, you know, I jumped and twist and just hanging on to each other." R170:125. Mr. Dembert testified, "I was just trying to keep him up off me." *Id.*

When the police arrived almost immediately after the incident Mr. Dembert was cooperative. R170:127. After the police transported Mr. Dembert to the police station, he testified he told them he did not want to talk to them without his lawyer present. *Id.* Mr. Dembert said he told the police the fight started because of a misunderstanding over the drugs. *Id.* What Mr. Dembert meant by that statement was the fight started because Mr. Pollock accused him of stealing his drugs, and Mr. Dembert referred to the nature of that dispute as "stupid."

R170:128. Mr. Dembert testified he felt partly responsible for the misunderstanding because "I told the dude where the drugs was (sic), and he went and got it. That's what started ... the altercation about the drugs, you know.

Basically ... because I did that, I felt like ... I kind of created the situation. You know, it don't justify him coming at me with a knife, though ..." R170:128.

On cross-examination, Mr. Dembert denied stabbing Mr. Pollock after he had fallen to the ground. R170:131. However, he did acknowledge he had been awake for several hours and was using cocaine such that his memory and perception of the events were not as sharp as they would have been otherwise. R170:131. Mr. Dembert testified, " Well, we both was [swinging wildly], you know, and I didn't even know – like I say, I didn't even know if I was hit, I didn't even know if he was hit. I didn't – like when he fell and throwed (sic) his hands up, I just backed off and went across the street." R170:132.

**Stipulation: Police Interview with Mr. Dembert**

A portion of the videotaped police interview was played for the jury and the prosecution summed up that relevant portion during closing argument:

The defendant's arrested; and then he's taken to the police station and interviewed by Officer Portel. You saw that interview that she had with the defendant. She asked him several times, you know, what happened, what was going on. He says a few things. He says that it was a mistake, "I made a mistake. It was something stupid." Then he says it wasn't him – well, she asked him again, you know, "What happened?" He says, "It wasn't him; it was me. It was a drug thing. I got caught up in a drug thing. I use drugs. My mind goes whoosh."

That's what happened. He was using drugs. He wanted some more. Mr. Pollock didn't want to share with him, and so whoosh, he snapped and stabbed ... Mr. Pollock.

R171:6. Thus taken out of context Mr. Dembert's statements were incriminating and the prosecution presented Mr. Dembert's statements as a confession of guilt.

The alleged incriminating statements were elicited after Mr. Dembert invoked his right to not incriminate himself. At the commencement of the interview and immediately after Mr. Dembert was read his *Miranda* rights, he refused to sign the waiver form and unequivocally invoked his right to not incriminate himself silent. The parties have stipulated to the following facts:

1. Following his arrest, Defendant was questioned by Officer Portel and Lt. Smith in an interview room at the Salt Lake City police station.
2. Before interrogating Defendant, Officer Portel placed a *Miranda* waiver form on the table in front of Defendant and advised him of his *Miranda* rights. The following exchange between Officer Portel and Defendant then took place:

Officer Portel: Do you understand these rights?

Defendant: Yes. I'm being charged?

Officer Portel: Um, yes, you are under arrest.

Defendant: For what?

Officer Portel: For aggravated assault.

Officer Portel: Now, if you would like to tell me your side of the story, because, like I said, I'm kind of missing some of the information I think, uh, I need you to sign this form saying that you, you do want to talk to me, you, you do want to have this conversation right now.

Defendant: I don't have to?

Officer Portel: No, you don't have to.

Defendant: I won't (shaking head).

Officer Portel: You're not going to sign it?

Defendant: Huh-uh (shaking head).

Officer Portel: So, you don't want to answer any questions right now?

Defendant: Huh-uh (shaking head).

3. Officer Portel then folded the unsigned waiver form and put it away in her notebook. While putting her pen back into her front pocket, Officer Portel told Defendant that she did need to verify his name and she asked Defendant for identification.

4. While Officer Portel was inquiring about Defendant's identification, Lt. Smith opened the door and asked to speak with her. Officer Portel exited, leaving Defendant alone in the room.

5. Less than a minute later, Lt. Smith and Officer Portel re-entered the room. Lt. Smith explained to Defendant that he was "possibly responsible" for a crime that sent a man to the hospital, but that they "don't have ... the whole story." Lt. Smith asked Defendant whether he had been read his *Miranda* rights and whether he understood them. Defendant responded in the affirmative to both questions.

6. Lt. Smith then told Defendant that although he was under arrest and not free to go, it did not mean that he was guilty. He told Defendant that police had "an indication" Defendant "might be responsible" for the crime, but that they "don't know the other side of the story." He told



Defendant that this was his opportunity to tell police his side of the story and “get it out there on public record,” if he wished to do so. He also told Defendant that he was not required to speak with police.

7. Lt. Smith then requested the *Miranda* waiver form from Officer Portel, read Defendant his rights, and obtained Defendant’s waiver of those rights. *See* SE19.

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Based on the foregoing stipulated facts, the parties further stipulate as follows:

8. After Officer Portel read Defendant his *Miranda* rights and confirmed that he was not required to sign the waiver, Defendant unequivocally responded that he did not want to waive his rights and speak with police.

STIPULATION (**Addendum B**) (the original document skips paragraph numbers 4 and 7 but is otherwise identical to the foregoing).

Additional facts will be cited throughout the body of Appellant’s Brief as warranted.

### **SUMMARY OF ARGUMENT**

Mr. Dembert’s trial counsel rendered deficient performance that prejudiced him when counsel filed the motion to suppress on the day of trial. The motion was meritorious as Mr. Dembert “unequivocally” (Stipulation, **Addendum B**) invoked his right to remain silent at the beginning of his interview with police, yet they

continued to question him. Had counsel timely filed the motion to suppress, the alleged incriminating statements Mr. Dembert made would have been suppressed. The failure to suppress those statements prejudiced Mr. Dembert because the State's primary witness was the alleged victim who was less credible than Mr. Dembert was.

The trial court abused its discretion when it denied Mr. Dembert's motion to suppress his alleged involuntary "confession" on procedural grounds. The notice purpose of Rule 12(c) of the Utah Rules of Criminal Procedure was met on these facts because the State was prepared to argue the merits of the motion. So the rule requiring the defense to file a motion to suppress five days prior to trial did not apply. Also, the nature of the constitutional rights that were violated when the incriminating statements were elicited and the prejudice created by their admission far outweighed the procedural requirement. Further, the trial court's subsequent consideration of the motion on its merits constituted a waiver of the rule's requirements. Finally, under the controlling federal law, a procedural rule cannot circumvent the requirement that an involuntary confession be suppressed.

The trial court also erred when it alternatively denied Mr. Dembert's motion to suppress on its merits. It is undisputed Mr. Dembert unequivocally invoked his right to remain silent, yet the officers continued to question him in violation of his right to not incriminate himself.

## ARGUMENT

### **I. TRIAL COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL.**

Mr. Dembert's counsel was ineffective for not timely filing the motion to suppress statements made during his interview with police. Further, Mr. Dembert was prejudiced by that ineffective assistance.

Both federal and State courts recognize a defendant's Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984) is the seminal case adopted by Utah courts which established the two-pronged test for determining whether the right to counsel is violated: (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) whether the defendant was prejudiced by the objectively deficient performance, i.e., there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different. *See also, Williams v. Taylor*, 529 U.S. 362 (2000) (reiterating the reasonable probability standard to establish prejudice).

If this Court affirms the district court's ruling by concluding Mr. Dembert's motion was untimely filed and was properly dismissed on procedural grounds, that holding will establish trial counsel's objectively deficient performance. In that event, the only question for this Court is whether Mr. Dembert was prejudiced by his counsel's objectively deficient performance. Because it is true that but for trial counsel's unprofessional error in untimely filing the motion to suppress the motion

would have been granted such that statements portrayed as incriminating would have been suppressed, prejudice is established.

The Fifth Amendment of the Constitution of the United States provides, “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. A defendant who is both in custody and subject to interrogation is in an “inherently coercive” environment. *New York v. Quarles*, 467 U.S. 649, 654 (1984). To protect a defendant against this inherently coercive environment, law enforcement officers are required to convey the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) in such a manner that they apprise “accused persons of their right of silence and [assure] a continuous opportunity to exercise it.” *Id.* at 467.

When a motion to suppress is filed on the basis of a *Miranda* violation, the prosecution must prove by a preponderance of the evidence that the defendant knowingly, voluntarily, and intelligently waived his rights. *Id.* at 475. The prosecution must show that the waiver was an uncoerced choice and that the defendant understood both the nature of the rights he was waiving and the consequences of the waiver. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The prosecution could not have met this burden in this case because Mr. Dembert “unequivocally” invoked his right to remain silent before any statements were made. Stipulation at ¶10.

Courts apply a totality of circumstances test to determine if a waiver of *Miranda* rights is valid. *Id.* Relevant factors to apply in making that

determination include the defendant's intelligence and education,<sup>1</sup> his experience with the criminal justice system,<sup>2</sup> and his physical and mental condition.<sup>3</sup> More important, once a defendant has invoked his right to remain silent, law enforcement are required to cease all questioning. *Miranda*, 384 U.S. at 473-74; *see also*, *United States v. Tyler*, 164 F.3d 150, 154-55 (3d Cir. 1998) (continued questioning after defendant stated he did not want to talk violated *Miranda* even though officers repeated the warnings); *McGraw v. Holland*, 257 F.3d 513, 515 (6th Cir. 2001) (officers violated *Miranda* when they continued questioning after defendant said he did not want to talk about the crime); *United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004) (same).

The police did not cease questioning Mr. Dembert when he “unequivocally responded that he did not want to waive his rights and speak with police.”

Stipulation at ¶10. Yet once a defendant invokes his right to remain silent, further interrogation is impermissible unless the defendant initiates more discussion. *See*,

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<sup>1</sup> *See, e.g., Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981) (waiver by mentally handicapped defendant was invalid because his inability to understand the waiver and its consequences were demonstrated by the record and police failed to take extra precautions).

<sup>2</sup> *See, e.g., Smith v. Mullin*, 379 F.3d 919, 933 (10th Cir. 2004) (waiver was valid in part because defendant had prior experience with the criminal justice system); *but see, United States v. Longbehn*, 850 F.2d 450, 453 (8th Cir. 1988) (suspect's knowledge of rights does not obviate requirement to give *Miranda* warnings even when suspect is a police officer).

<sup>3</sup> *Mincey v. Arizona*, 437 U.S. 385, 399-400 (1978) (waiver not valid where defendant was in the hospital and repeatedly requested the presence of counsel while complaining to be in terrible pain).

*Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (plurality opinion) (emphasizing that initiation of conversation and waiver of Fifth Amendment rights are two separate inquiries); *see also*, *United States v. Szymaniak*, 934 F.3d 434, 439 (2d Cir. 1991) (it was impermissible for officers to approach defendant and ask if he wanted to talk after he invoked his rights).

Mr. Dembert did not initiate more discussion after he invoked his right to remain silent, yet the police continued to interrogate him. Stipulation at ¶¶2-3, 6, 8. Therefore, the officers' refusal to cease questioning in this case was a clear violation of Mr. Dembert's right to not incriminate himself and his motion to suppress should and would have been granted if it had been filed timely.

Further, the unlawful admission of Mr. Dembert's incriminating statements at trial prejudiced him such that it is likely the jury would have acquitted him if those statements had been suppressed. The portion of the police interview that was admitted into evidence was presented to the jury as a confession. The prosecutor paraphrased Mr. Dembert's statements as, "I made a mistake. It was something stupid. ..." "It wasn't him; it was me. It was a drug thing. I got caught up in a drug thing. I use drugs. My mind goes whoosh." R171:6.

The U.S. Supreme Court has explained that juries usually give confessions great weight so their admission usually cannot be construed as harmless error. *Arizona v. Fulminante*, 499 U.S. 279, 296, 306-12 (1991). In other words, prejudice should be presumed in this case unless the State can establish the error was harmless. The State cannot do so on these facts.

Mr. Dembert's alleged "confession" in this case likely carried even greater weight in light of both Mr. Dembert's and Mr. Pollock's serious credibility issues and their conflicting stories of self-defense. The only other eyewitness to the altercation was Gail Cameron who saw only the last portion of the fight on her desk monitor. R170:63. Ms. Cameron testified she was not watching the monitor when the fight started, so she did not see who initiated the attack. R170:72. She saw Mr. Pollock fall to the ground and assume a defensive position after he had been stabbed, then saw Mr. Dembert lean over and strike Mr. Pollock briefly. R170:64, 75. She testified Mr. Pollock was not holding a knife, but Mr. Dembert did have a knife in his hand. R170:64, 66, 75.

This evidence is consistent with Mr. Dembert's claim that Mr. Pollock attacked him first such that Mr. Dembert was forced to defend himself. Further, Officer Ford testified he booked into evidence another knife that was found at the crime scene and was not the knife Mr. Dembert had used. R170:99 (*see also*, R170:94 where Officer Ford testified he found a knife in Mr. Dembert's bag that had blood on it).

Mr. Pollock, who admitted to smoking cocaine at the time of the incident, testified he was using his knife to open a bottle of wine when Mr. Dembert approached him from behind. R170:22-29, 25, 39, 49. Yet Mr. Pollock had no memory of testifying at the preliminary hearing and had a prior conviction for providing false information to a peace officer, which he lied about at the preliminary hearing. R170:37-8, 41-2, 57-8.

While neither Mr. Pollock nor Mr. Dembert was particularly credible, Mr. Pollock was the lesser of the two because he had no memory of the preliminary hearing, he perjured himself at the preliminary hearing, and had a prior conviction for lying to a peace officer. Without seeing who initiated the attack, it was impossible for Ms. Cameron to know who started it. This poor evidence falls far short of proof beyond a reasonable doubt. In this context, the alleged confession was absolutely critical. Therefore, without Mr. Dembert's incriminating statements, there is a reasonable probability the jury would have acquitted him.

Mr. Dembert was prejudiced by his trial counsel's ineffective assistance and thereby denied his Sixth Amendment right to counsel because there is a reasonable likelihood the outcome of trial would have been in his favor had his motion to suppress been granted. Accordingly, his conviction should be vacated and this matter remanded for a new trial.

## **II. THE TRIAL COURT ERRED IN DENYING MR. DEMBERT'S MOTION TO SUPPRESS ON THE MERITS AND FOR BEING UNTIMELY.**

An involuntary confession is not admissible at trial. *Chavez v. Martinez*, 538 U.S. 760, 770 (2003). Although the admission of a coerced confession may be construed as harmless, this is difficult to establish because confessions are usually given great weight. *See, Arizona v. Fulminante*, 499 U.S. 279, 296, 306-12 (1991) ("[A]n involuntary confession may have a more dramatic effect on the course of trial than do other trial errors ... but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error.").



Before a trial court can rule on a motion to suppress incriminating statements and before the prosecution can introduce that evidence at trial, the court is required to conduct a hearing outside the presence of the jury to determine voluntariness of the defendant's statements. *Sims v. Georgia*, 385 U.S. 538, 534-44 (1967). If a motion to suppress is denied, a finding that the defendant's statements were voluntary must be clearly reflected in the record. *Id.* at 544.

**A. The trial court erred when it denied Mr. Dembert's motion on procedural grounds under Rule 12 (c).**

In this case, the fact that Mr. Dembert was both in custody and subject to interrogation cannot be disputed and is not at issue. He had been placed under arrest and was subject to questioning at the police station. R172:6. At the commencement of the interrogation and immediately after being informed of his *Miranda* rights, Mr. Dembert unequivocally invoked his right to remain silent. When he was presented with the waiver form, he asked if he had to sign it and when informed he did not have to, he refused to sign it and further refused to answer any questions. R170:8; **Addendum B.** Notwithstanding Mr. Dembert's unequivocal response that he did not want to waive his rights or talk to the police, the officers continued questioning him. *Id.*

Mr. Dembert's trial counsel did not file the motion to suppress until the day of trial. R100-101. The State argued the motion should be denied because the Utah Rules of Criminal Procedure require a motion to suppress be brought five days prior to trial. R170:10. The State further argued Mr. Dembert did eventually

sign the *Miranda* waiver and the State presented a photocopy of that document to the court. R170:10. The trial court denied the motion to suppress on the procedural ground that the issue was waived for not bringing it timely under Rule 12(c) of the Utah Rules of Criminal Procedure. R170:13-14.

The trial court's denial of Mr. Dembert's motion on procedural grounds was an abuse of discretion for four reasons: (1) because the State was prepared to and in fact did argue the merits of the motion, the implicit notice requirement of Rule 12(c) did not apply; (2) the nature of the substantial rights involved and the potential for prejudice required the trial court to consider the issue on its merits; (3) the trial court's subsequent cursory denial of the motion purportedly on its merits constituted a waiver of the requirements of the rule; and (4) the controlling federal law prohibits the denial of a motion to suppress evidence on mere procedural grounds.

While in a perfect world it might be ideal to resolve all evidentiary issues prior to trial, prosecutors and defense counsel frequently make objections to evidence on grounds of inadmissibility on the day of trial. The imposition of a five-day deadline for filing a motion to suppress under Rule 12(c) is intended to provide the State with sufficient notice of the issue being raised so it can be argued and ruled upon at least on the day of trial. Moreover, under its plain language the trial court has considerable discretion to waive the requirements of the rule.

While the prosecutor in this case objected to Mr. Dembert's motion based on timeliness grounds, the prosecutor also indicated to the court that he was

prepared to argue the motion on its merits and he then proceeded to do so.

R170:10-13. The prosecution never claimed any prejudice caused by a lack of notice. Rather, the prosecution merely objected to Mr. Dembert's failure to comply with the procedural requirements of Rule 12(c). The notice purpose of the procedural requirement was not the basis for the State's objection. Therefore, it was an abuse of the trial court's discretion to deny Mr. Dembert's motion on the ground that he had waived the issue.

Also, the potential for prejudice to the accused requires a court to consider a motion to suppress an involuntary confession on its merits. In *State v. Cornejo*, 138 P.3d 97 (Utah App. 2006), the defense moved on the day of trial to suppress the results of the defendant's involuntary blood draw and the trial court ordered an immediate evidentiary hearing on the issue. The State moved for a continuance of the trial and the evidentiary hearing on the ground that the State had not anticipated the defense's objection to the blood draw evidence and thus had not subpoenaed an essential witness because the defense had not filed a motion to suppress at least five days prior to trial. The State argued that under these circumstances the trial court's denial of its motion for a continuance was an abuse of discretion. This Court agreed with the State and reiterated that an abuse of discretion occurs when the moving party is prejudiced, meaning their substantial rights are adversely affected, such that there is a reasonable likelihood of a more favorable result for the moving party had their motion been granted. *Id.* at 101.

In this case, had Mr. Dembert's motion to suppress been granted, there is a reasonable likelihood the outcome of trial would have been in his favor. This case was one of "he said/he said." Only Mr. Dembert and Mr. Pollock witnessed<sup>4</sup> the entire encounter and both were admitted drug addicts who told two completely inconsistent stories about the incident, with both claiming they acted in self-defense.

However, Mr. Pollock was less credible than Mr. Dembert. Mr. Pollock testified he had no recollection of testifying at the preliminary hearing and admitted he had a prior conviction for providing false information to a peace officer, which conviction he lied about when testifying under oath at the preliminary hearing. R170: 37-38, 41-42, 57-58. Therefore, Mr. Dembert's seemingly incriminating statements from the police interrogation were particularly weighty and damaging. Their admission cannot be construed as harmless on these facts. Rather, they adversely affected Mr. Dembert's substantial rights.

As previously noted, the trial court has considerable discretion under Rule 12 (c) to waive its requirements and consider the merits of a motion to suppress and should do so when a contrary ruling will adversely affect the substantial rights of the moving defendant. Further, a trial court's consideration of such a motion on its merits constitutes a waiver of the rule's requirements. *See, State v. Matsamas,*

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<sup>4</sup> Gail Cameron, who worked at the shelter, testified she only saw Mr. Dembert striking Mr. Pollock after Mr. Pollock had fallen to the ground and had assumed a defensive stance. She did not see how the fight started or who instigated it. R170:61-72.

808 P.2d 1048 (Utah 1991) (holding trial court's decision to not treat defendant's failure to raise issue prior to trial as a waiver and its decision to consider merits, waived requirements of rule and preserved issue for appeal). Such discretion simply highlights the fact that the procedural requirement is far less weighty than the constitutional implications involved. The requirements of Rule 12(c) were waived in this case when, "[f]or edification of the Counsel," (R170:14), the trial court did consider the merits of the defense's motion to suppress. *Id.*

Finally, under the controlling federal law, evidence obtained in violation of the Fifth Amendment may not be presented at trial for the purpose of proving the defendant's guilt. *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960). As noted herein, a trial court is required to conduct a hearing to determine whether a confession was voluntary and to then make findings about the voluntariness of the confession on the record. The trial court in this case refused to do so and denied Mr. Dembert's motion on procedural grounds.

Notwithstanding any state procedural rule such as Rule 12(c), the admission of an involuntary confession is an error that requires reversal unless the error was harmless. *See, Chapman v. California*, 386 U.S. 18, 23-24 (1967). Given the great weight juries give to purported confessions, the State's burden to establish harmless error is formidable and unlikely to be met, particularly on these facts when the only two witnesses to the entire incident were Mr. Dembert and Mr. Pollock, who both told widely divergent stories of their own asserted self-defense. There is no authority under the federal law that allows a state, on merely

procedural grounds, to force a defendant to waive his right to have an involuntary confession suppressed. Therefore, to the extent Rule 12(c) allows for an involuntary confession to be admitted at trial on procedural grounds, it is a violation of the Supreme Court precedent cited herein and unconstitutional.

In this case, the trial court did deny Mr. Dembert's motion to suppress on the ground that it was brought untimely under Rule 12 (c). However, if in fact Mr. Dembert's "confession" was obtained in violation of the Fifth Amendment, the exclusionary rule applies and trumps the procedural requirement. The rights at issue far outweigh a mere procedural formality. *See, Miranda v. Arizona, supra*; *see also, United States v. Leon*, 468 U.S. 897, 906 (1984) (explaining the exclusionary rule is not a personal constitutional right but rather a judicially created remedy to deter the government from violating constitutional rights).

The Supreme Court has held that a trial court is required to conduct a hearing on the merits outside the presence of the jury and to make a clear finding on the record that the defendant's statements were voluntary, which the trial court did not do in this case. *Sims v. Georgia*, 385 U.S. 538, 534-44 (1967). Moreover, the importance of the procedural requirement diminishes even further in light of the fact that the prosecutor in this case was prepared to argue the motion on its merits and did so, and the additional fact that the trial court found it would have denied the motion on its merits in any event. R170:14.

Based on the foregoing, the trial court erred when it denied Mr. Dembert's motion to suppress under the procedural grounds set forth in Rule 12(c).

**B. The trial court erred when it denied Mr. Dembert's motion to suppress on its merits.**

As previously indicated, the trial court did address the merits of Mr. Dembert's motion for "the edification of Counsel." R170:14. Based on its review of the transcript, the court determined that the communications that occurred between the police and Mr. Dembert after he invoked his right to remain silent were "in effort to clarify his rights under the Miranda warning. ... and if he was willing to sign the waiver." *Id.* The court further noted that Mr. Dembert did sign the waiver after he initially said he did not want to talk to the police. *Id.* The court reiterated it was not denying the motion on its merits, but stated, "[I]f I were addressing the merits, if it were me, here's how I would have done it, I would rule that the motion ought to be denied." *Id.* This alternative denial of Mr. Dembert's motion on the merits was not supported by the facts or the law.

After Mr. Dembert unequivocally invoked his right to remain silent, Officer Portel (who had been questioning him) left the interrogation room and immediately returned with Officer C.T. Smith who resumed questioning. R170:8-9. Mr. Dembert did not initiate the discussion.

The officers' actions in this case were a clear violation of Mr. Dembert's Fifth Amendment rights under the controlling law. When Mr. Dembert unequivocally invoked his right to remain silent, the officers were required to immediately cease all questioning. *Miranda*, 384 U.S. at 473-74. However, they continued to question him in a way that was carefully designed to elicit

information, notwithstanding the officers' acknowledgements that Mr. Dembert did not have to answer their questions. Their continued questioning after Mr. Dembert clearly invoked his right to remain silent violated *Miranda*. See, *United States v. Tyler*, *McGraw v. Holland*, *United States v. Rambo*, *supra*.

While the informal transcript provided to the trial court is not part of the record, the fact that Mr. Dembert unequivocally invoked his right to remain silent, after which the officers continued to question him, was known to the trial court. R170:8-9. Under the totality of these facts that were known to the trial court, Mr. Dembert's "confession" was not voluntary and the trial court erred in concluding Mr. Dembert's motion should also have been denied on its merits.

### **CONCLUSION**

Mr. Dembert respectfully requests this Court to overturn the trial court's denial of his motion to suppress his statements and to remand this matter back to the trial court for a new trial.

Respectfully submitted this 22<sup>nd</sup> day of December, 2008.

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Jennifer K. Gowans  
Attorney for Appellant, Rory Dembert



**CERTIFICATE OF DELIVERY**

I hereby certify that on this 22<sup>nd</sup> day of December, 2008, I caused to be hand-delivered a true and correct copy of the foregoing **BRIEF OF APPELLANT** to the following:

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