1978

State of Utah v. Ricky Joe Archuletta : Brief of Respondent

Utah Supreme Court

Rodney S. Page; Robert B. Hansen; Attorneys for Plaintiff and Respondent;
Lyle J. Barnes; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RICKY JOE ARCHULETTA,

Defendant-Appellant.

Case No. 14636

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE THORNLEY K. SWAN, JUDGE, PRESIDING

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent

LYLE J. BARNES

Villager Professional Building
47 North Main, Suite No. 1
Kaysville, Utah 84037

Attorney for Appellant

FILED

JAN

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS
(Continued)

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 14636
-vs-	:	
RICKY JOE ARCHULETTA,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Ricky Joe Archuletta, was convicted on June 10, 1976, in the Second Judicial District Court, in and for Davis County, of the offense of Burglary, in violation of Utah Code Ann. § 76-6-202 (1953), as amended (R.51).

DISPOSITION IN THE LOWER COURT

On February 18, 1976, appellant was charged by way of complaint with the violation of Utah Code Ann. § 76-6-202 (1953), as amended; burglary (R.4). Following a jury trial, appellant was found guilty of the above named offense in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable

Thornley K. Swan, presiding (R.51). On June 15, 1976, appellant was sentenced to a term in the Utah State Prison of not less than one year and no more than fifteen years (R.55).

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the decision of the lower court.

STATEMENT OF FACTS

On Feburary 8, 1976, Johnny and Judy Delgado's home in Clearfield, Utah, was burglarized (T.4,12). Mrs. Delgado called the police to report the burglary. When the police arrived, it was determined that a television, stereo system and rifle had been stolen (T.4,12,28,33). Upon further inspection, it was discovered that a bedroom window had been broken (T.4,12). A hairbrush was found among the broken glass on the bedroom floor (T.7,48). The hairbrush was identified by Johnny Delgado as belonging to appellant Archuletta (T.17).

At trial, Judy Delgado testified that her husband and the appellant were cousins and shared a close relationship (T.16). She further stated that the appellant had been in their home earlier on the day of the burglary (February 8, 1976), and that her husband had shown the

appellant his new rifle (T.5,6).

Officers Neumeyer and DeRyke testified that Mr. Delgado was very upset by the burglary and that he stated that he suspected that the appellant and Ralph Gomez had committed the burglary (T.29,34). Before the appellant was arrested, Mr. Delgado, through his contacts in the Spanish-American community, provided the police with valuable information as to the location of the stolen property (T.34).

Angelo Caburo and Josie Flores, testifying on behalf of the defense, stated that on the morning of February 17, 1976, in the company of the appellant, they purchased a case of beer and went to the Flores' home to drink (T.58,65). In the early afternoon, after consuming much of the beer, the appellant asked Caburo to take him to the police station, which he and Flores proceeded to do (T.58,65). Both Flores and Caburo testified that, when they arrived at the police station, the appellant was drunk (T.59,65).

Officer Bud DeRyke testified that he contacted appellant's mother and requested that the appellant meet with him on February 17, 1976, at his office in the Clearfield Police Station (T.36). When Archuletta arrived on that day, he met with DeRyke, Officer Chadbourne and Randy

Hunter, secretary (T.37). DeRyke testified that he and Officer Chadbourne first gave appellant a Miranda warning by reading those rights to him several times. After each of the five statements in the Miranda warning, the appellant was asked if he understood the substance of the statement, to which he responded affirmatively (T.71).

The police then read to appellant a waiver of rights form because he informed the officers that he could not read (T.32,71). After each statement was read to appellant, he was asked if he understood the substance of his rights contained in the statement, to which he responded affirmatively (T.71,72). Appellant then signed the form (T.37,71). DeRyke testified that the appellant stated "at least three times that he understood his rights (T.37, lines 15,16).

DeRyke further testified that he informed Archuletta that an interpreter would be made available if he desired, but the appellant responded that "he could understand English good enough (T.38, line 1).

Officer Chadbourne then proceeded to question the appellant about the Delgado burglary. Miss Hunter recorded the interview in shorthand (T.73). At the conclusion of the interview, Miss Hunter read each

question and answer back to the appellant and he acknowledged that the answer he had given was correct in each case (T.73). The dictation was then typed by Miss Hunter and returned to Officer Chadbourne. With the typed statement in hand, Officer Chadbourne stood alongside the appellant and read each question and answer to him. The questions and answers were read "very slowly, very deliberately", and in each case, the appellant acknowledged that the answer read was correct (T.73, 74). The appellant then signed the document (T.74).

Officer DeRyke testified that the appellant exhibited no "difficulty in understanding the questions or any of the instructions given to him." (T.74, lines 20-22).

In his statement given to Officers Chadbourne and DeRyke, Archuletta admitted breaking into the Delgado residence through the bedroom window, and, in the company of Ralph Gomez, stealing a television, stereo system and rifle (T.75). The rifle was taken to Gomez's home and the television to a girl's home in Ogden. Archuletta then stated that he would assist the officers in recovering the television, which he later did (T.76,77). Finally, the appellant stated that the last time he had seen his hairbrush was directly before the Delgado burglary (T.77).

Officers Chadbourne and DeRyke, who interviewed appellant

shortly after his arrival at the police station, both testified that appellant was not drunk, that he walked steadily and that there was no odor of alcohol about him (T.70,71,105). Additional testimony was received from Officer Glen Parker and Miss Hunter to the effect that the appellant was not drunk, but appeared composed, very calm and without any signs of disorientation (T.84,110).

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WHEN HE WAS INCARCERATED IN EXCESS OF THIRTY DAYS FOLLOWING HIS DEMAND FOR AN EARLIER TRIAL DATE.

Appellant contends that any criminal defendant who is held or incarcerated for more than thirty days following both arraignment and a demand for an earlier trial date, as provided in Utah Code Ann. § 77-1-8(6) (1953), cannot then be tried. Respondent asserts that the delay in the instant case did not deny appellant his constitutional right to a speedy trial.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by

by Article 1, Section 12 of the Constitution of Utah. Article 1, Section 12, provides:

> "In criminal prosecution, the accused shall have the right to . . . a speedy public trial by an impartial jury of the County or District in which the offense is alleged to have been committed. . . ."

The Sixth Amendment and Article 1, Section 12, guarantees of a speedy trial are important safeguards in the prevention of undue and oppressive incarceration prior to trial, in the minimization of anxiety and concern accompanying public accusation and in the limitation of the possibilities that long delay will impair the ability of an accused to defend himself. United States v. Ewell, 383 U.S. 116, 120 (1966).

The Utah Legislature has provided a statutory implementation of the constitutional guarantee to a speedy trial in Utah Code Ann. § 77-1-8 (1953):

> "In criminal prosecutions, the defendant is entitled: (6) to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; and every defendant in a criminal action unable to get bail shall be entitled to a trial within thirty (30) days after arraignment, if the court is then in session in such county, otherwise, the trial of such defendant shall be called on the next day of the next succeeding session of the court."

Appellant argues that the thirty day requirement of Section 77-1-8(6) must be interpreted strictly and that a criminal defendant is entitled to dismissal if it is exceeded. Respondent disagrees and asserts that Section 77-1-8 is directory and not mandatory. State v. Rasmussen, 18 Utah 2d 201, 418 P.2d 134 (1966); State v. Lozano, 23 Utah 2d 312, 462 P.2d 710 (1969). The criminal justice system is designed to proceed at a calculated speed, not only to insure that an accused's ability to defend himself is not damaged by unnecessary incarceration and delay, but also to guarantee sufficient time for defense investigation and trial preparation. In United States v. Ewell, 383 U.S. at 120, the United States Supreme Court stated:

> ". . . in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 198 U.S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950. 'Whether delay in completing a prosecution * * *

> amounts to an unconstitutional deprivation of rights depends upon the circumstances. * * * The delay must not be purposeful or oppressive.' Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L.Ed.2d 393. '[T]he essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041."

The Utah Supreme Court has adopted the perspective of Ewell when applying Section 77-1-8. In State v. Rasmussen, supra, the Court held that Section 77-1-8(6) was directory, not mandatory and that "each case must be examined in light of its own particular facts." In Rasmussen, the defendant was arrested on April 3, 1965, and charged on April 5, 1965, followed by a preliminary hearing on May 14, 1965, being arraigned on June 2, 1965. A trial date was set for June 15, 1965, but later postponed because the trial court had a homicide case in process. On that day, defendant made an oral motion for dismissal for lack of a speedy trial, which was denied. A second date was set for July 2, 1965, and was postponed because of the trial judge's illness and hospitalization. Another trial date was set for July 21, 1965, which also had to be postponed. The trial took place on July 27, 1965, about 45 days after the request for a speedy trail and motion to dismiss for want thereof. The court held that under these circumstances "no one was intentionally prejudiced by the two-week delay," and

therefore, defendant was not denied his right to a speedy trial. State v. Rasmussen, 418 P.2d at 135.

In State v. Lozano, supra, cited by appellant, this Court dismissed a case for lack of a speedy trial where the defendant was held in jail for 135 days after a demand for a speedy trial, the trial date having been continued upon motion of the prosecution over the objections of the defendant.

In the instant case, appellant was arraigned on March 30, 1976, and trial was set for April 30, 1976 (R.10, 11). When it was discovered that April 30 was a legal holiday (Arbor Day), the matter was stricken from the trial calendar. Appellant's attorney filed a demand for a speedy trial on May 3 (R.14). The Court then offered a new trial date to appellant's counsel of June 3 (within the thirty day period of Section 77-1-8), but appellant's counsel was unavailable on that date (R.22), and the matter was then set for trial on June 9 (R.15), 38 days after appellant's demand for a speedy trial.

The delay in trial was not caused by the prosecution. Respondent asserts that there was no prejudicial delay in appellant's trial and, therefore, the trial court properly denied appellant's motion for dismissal based upon lack of a speedy trial.

POINT II

APPELLANT'S CONFESSION WAS VOLUNTARILY AND KNOWINGLY GIVEN AND PROPERLY RECEIVED AT TRIAL.

Appellant contends that his statement to the Clearfield Police concerning his participation in the Delgado burglary should have been suppressed at trial because he does not read or write the English language and was intoxicated at the time the statement was given.

Respondent notes that this Court has consistently held that on appeal from a judgment of conviction, it will view the testimony as a whole in the light most favorable to the state. State v. Jones, Utah, 554 P.2d 1321 (1976); State v. Howard, Utah, 544 P.2d 466 (1975); State v. Wilcox, 28 Utah 2d 71, 498 P.2d 357 (1972).

Testimony received at trial clearly shows that appellant's confession was made knowingly and voluntarily. Both Officers DeRyke and Chadbourne read appellant the Miranda warning and were assured by appellant that he understood his rights (T.37,71). The waiver of rights form was read to appellant several times and he stated that he understood the content of the form before he signed it (T.37,71,72). Finally, appellant's statement as to his participation in the Delgado burglary was transcribed and then repeated back to him to check its accuracy. After the statement was typed, it was read to appellant for a second

time and he again acknowledged that it was correct (T.73, 74). The police officers also testified that Archuletta had no difficulty understanding their questions and responding to them (T.74).

A confession is voluntary when it is the product of rational intellect and free will. Blackburn v. Alabama, 361 U.S. 199 (1960); Davis v. North Carolina, 384 U.S. 737 (1966). The above cited testimony reveals that appellant's confession was made freely and without coercion. Appellant understood his rights, waived them and voluntarily provided the police with information regarding the Delgado burglary. Appellant's statement reveals that he broke into the Delgado home and took from it a television, stereo system and rifle (T.75,76). The confession also states that Archuletta did not believe that he had the Delgado's permission to take the property (T.76).

Appellant's counsel asserts that because appellant Archuletta does not read or write the English language, his statement could not have been made voluntarily and knowingly. Appellant cites no case law supporting this contention. Decisional law indicates that the inability to read or write the English language does not render a confession involuntary and inadmissible. People v. Dacy, 85 Cal.Rptr. 57, 5 C.A.3d 216 (1970); State v. Ortiz, 422

P.2d 355, 77 N.M. 316 (1967); State v. Brady, 469 P.2d 77, 105 Ariz. 592 (1970).

Appellant further contends that he was drunk at the time he made his statement to the police and that, therefore, his statement is inadmissible. Officers DeRyke, Chadbourne and Parker and Miss Hunter all testified that appellant was not drunk, did not smell of alcohol, walked steadily and was not disoriented during his visit to the police station on February 17, 1976 (T.70,71,84,105,110). Several cases have held that the fact an individual has been drinking, even to the extent that he is under the influence of intoxicants, does not necessarily mean that he cannot understand advice and cannot be bound by his subsequent conduct in deciding to waive the right of which he is advised. State v. Smith, 476 P.2d 802, 4 Or. App. 130 (1970); Tucker v. State, Nevada, 553 P.2d 951 (1976); State v. Clark, 110 Ariz. 242, 517 P.2d 1238 (1974); In re Cameron, 439 P.2d 633, 68 C.2d 487, 67 Cal.Rptr. 529 (1968). However, if by reason of extreme intoxication a confession cannot be said to be the product of a rational intellect and free will, it is not admissible. State v. Smith, supra; In re Cameron, supra. In the instant case, appellant has failed

to show that he was intoxicated to an extent sufficient to render his confession inadmissible.

Finally, appellant cites State v. Rivera, 381 P.2d 584, 94 Ariz. 45 (1963), contending that an interpreter should have been provided at the time of his confession. Rivera is distinguishable from the present case. In Rivera, the appellant did not read, speak or understand the English language. In the instant case, appellant spoke and understood English. Appellant felt that an interpreter was not necessary, as he stated to Officer DeRyke (T.38). Furthermore, in the instant case, testimony was received by the trial court indicating that the appellant had no trouble understanding and participating in the interview (T.74).

Viewing the testimony in a light most favorable to the decision of the lower court, it is clear that the appellant understood his rights and knowingly and voluntarily chose to waive them.

POINT II

ON CROSS-EXAMINATION, AN UNSOLICITED AND VOLUNTARY STATEMENT BY A WITNESS THAT THE APPELLANT HAD BEEN IN PRISON, WHERE SUCH STATEMENT WAS NOT HIGHLIGHTED OR EMPHASIZED, WAS NOT PREJUDICIAL AND NOT GROUNDS FOR A NEW TRIAL.

Appellant argues that a statement by his mother, during the course of cross-examination, was prejudicial and should form the basis for a new trial:

> "Q. I see now, Ricky is over 30 years of age. Has he worked at all during this period of time?
> A. Yah. Not too much, because he was, he was in prison." (T.117, lines 22-25).

Appellant claims that this evidence had the effect of tainting his character and securing his conviction.

Respondent concedes that Rule 47, Utah Rules of Evidence (1953), prohibits admission of evidence concerning a trait of an accused's character as tending to prove his guilt or innocence of the offense charged. The Rule also states that evidence of other crimes should not be brought in for the purpose of disgracing a defendant or showing a propensity to commit crimes. State v. Schieving, Utah, 535 P.2d 1232 (1975); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972). Respondent asserts, however, that the above-quoted testimony did not violate the intent and purpose of Rule 47, and was not brought into evidence for the purpose of disgracing appellant or showing a propensity to commit crime. The testimony was proper and should be allowed for any of the following reasons:

1. Appellant failed to object to the introduction of the supposedly prejudicial evidence at the time it was

offered at trial. This Court has consistently ruled that an appellant cannot complain on appeal of the admissibility of testimony to which he failed to object at trial. Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958); Christensen v. Christensen, 119 Utah 361, 227 P.2d 760 (1951).

Appellant argues that no objection was made at trial because it would only have dramatized the testimony in the minds of the jury and that even if he had objected, the only remedy available to the court was an instruction striki the testimony from the record and from the minds of the jury. Appellant contends that such an instruction is of questionable value and utility. Yet this Court has stated that when improper testimony is produced, an instruction by the judge explaining the improriety of the testimony and urging the jury not to "indulge any bias or prejudice" against the defendant because of the testimony is sufficient to prevent prejudice and injustice. State v. Mason, Utah, 530 P.2d 795, 798 (1975).

2. The testimony of appellant's mother was competent, relevant and served a legitimate purpose. In State v. Mason, supra, this Court held:

> ". . . if there is some legitimate purpose to be served by evidence which is otherwise competent and relevant, the fact that it may also show the admission of another crime will not render it inadmissible." Id. at 797.

Appellant's mother had been questioned by the prosecutor about appellant's home life, education and work experience. Such testimony was relevant to help establish those experiential factors which would provide the jury with information as to appellant's language skills; a matter at issue at trial. The fact that the appellant had been in prison would tend to show that he had had experiences which would help develop his English language skills beyond those of his Spanish speaking home and community.

3. The challenged testimony was not directly solicited nor thereafter emphasized by the prosecution. The prosecutor did not ask the witness any direct questions about the appellant's prior criminal involvement or prison experience. The prosecution was pursuing a relevant line of questioning regarding appellant's background as a means of elucidating his language skills.

The challenged testimony was unsolicited and only indirectly responsive to the prosecutor's question. The prosecutor in the instant matter did not question the witness about prior criminal involvement, as did prosecutors in prior cases where this Court has held such testimony to be inadmissible. State v. Peterson, 23 Utah 2d 58, 457 P.2d 532 (1969); State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961). Furthermore, the

challenged testimony was not emphasized nor highlighted in any way. The transcript of the trial proceedings reveals that the prosecutor personally made no mention of the appellant's previous prison term and did not seek to encourage or request the witness to elaborate further. Instead, the prosecutor questioned the witness more specifically about the appellant's past work experience (T.117, lines 22-30). Thus, it is evident that the questioned testimony was not highlighted nor reiterated and that the prosecution made no attempt to misuse the testimony of appellant's mother.

In this context, respondent submits that Pricilla Flores' testimony was harmless and not prejudicial to appellant. State v. Kazda, Utah, 545 P.2d 190 (1976).

4. Prior testimony had already revealed that appellant had served a prison term. On re-direct examination, appellant's own witness announced that appellant had previously been in prison:

> "BY MR. BARNES:
> Q. Do you have any knowledge concerning your brother's ability to read and write.
> A. He don't know how to read or write.
> Q. How do you know?
> A. Because I have wrote him some letters for his friends up when he got out of prison." (T.68, lines 4-10).

Where appellant's own witness previously announced that appellant has been in prison, testimony received on subsequent cross-examination about appellant's prison term cannot be deemed prejudicial to an extent sufficient to establish grounds for a new trial.

POINT IV

APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS, INCLUDED WITHIN AND MADE A PART OF HIS APPELLATE BRIEF, IS UNTIMELY AND IMPROPERLY BROUGHT AND THE ARGUMENTS RAISED THEREIN SHOULD BE CONSIDERED BY THIS COURT AS PART OF APPELLANT'S APPELLATE BRIEF.

In Point IV of appellant's brief to this Court, he petitions the Court for habeas corpus relief (page 13). Said relief is requested for two reasons: (1) the trial court did not have jurisdiction because it failed to bring appellant to trial within 30 days of his request for an earlier trial date, and (2) because appellant's impecuniosity prevented him from obtaining a transcript for 15 months, he was denied equal protection of the law.

Respondent asserts that appellant's petition for habeas corpus relief is untimely and improper for either of the following two reasons and that the points raised therein should be reviewed as part of this Court's consideration of appellant's appeal.

1. The judgment in this case was signed by the trial judge June 16, 1976 (R.61), and the motion for a new trial was filed timely, Utah Code Ann. § 77-38-4 (1953), on June 18, 1976 (R.59), but was never called up for disposition. Thereafter, some 17 months later, appellant petitions this Court for a writ of habeas corpus.

Utah Code Ann. § 77-39-5 (1953), provides that an appeal may be taken within one month after notice of the denial of a motion for a new trial. Since no ruling has ever been made on the motion for a new trial, said motion is still pending; the time for appeal has not expired and an application for a writ of habeas corpus is "moot." Jones v. Smith, Utah, 550 P.2d 194 (1976).

In Jones v. Smith, supra, the Utah Supreme Court held:

> "It appears to us that the time for appeal had not expired, since no ruling had been made on the motion for a new trial. Either party could have called the motion to the attention of the court and had a ruling made thereon." Id. at 195.

2. After an accused has been convicted of a crime, any claimed error or defect is required to be corrected by appeal within the time provided by law. Andreason v. Turner, 27 Utah 2d 182, 493 P.2d 1278 (1972). This Court has consistently held that matters properly heard on appeal cannot be used as a basis for granting a writ of habeas

corpus. Jones v. Smith, supra; Ainslie v. Smith, Utah, 531 P.2d 864 (1975); Schad v. Turner, 27 Utah 2d 345, 496 P.2d 263 (1972); Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967). The matters presented in the application for a writ of habeas corpus are all proper for consideration on appeal, and should be presented and resolved with this appeal.

A. APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WHEN HE WAS INCARCERATED IN EXCESS OF THIRTY DAYS FOLLOWING HIS DEMAND FOR AN EARLIER TRIAL DATE.

In subpart 1 of Point IV of appellant's brief (page 14), appellant raises the identical issue argued in Point I of his brief (page 6), alleging additionally only that such argument is proper in an application for a writ of habeas corpus. Respondent has previously shown that habeas corpus relief is not proper at this stage of these proceedings. Respondent submits, therefore, that appellant was properly tried and convicted and was not prejudiced because trial was not had within thirty days of his motion for an earlier trial date, as argued in Point I of this brief (see Point I, page 6).

B. APPELLANT WAS NOT DENIED A TRANSCRIPT OF TRIAL IN PREPARATION FOR APPEAL, BECAUSE OF HIS IMPECUNIOSITY, IN VIOLATION OF HIS RIGHTS TO EQUAL PROTECTION OF THE LAW.

Appellant contends that he suffered as a result of his inability to pay for a transcript of trial. Respondent asserts that appellant was provided with a transcript of trial in preparation for appeal and that the delay in obtaining a transcript was not prejudicial.

On June 16, 1976, appellant was sentenced to not less than one year and not more than fifteen years in the Utah State Prison (R.61). On June 17, 1976, counsel for appellant filed a notice of appeal (R.57), and notice of withdrawal (R.58), with accompanying motion (R.57).

On July 7, 1976, Archuletta filed a notice of appeal, pro se (R.63).

On March 3, 1977, designation of record on appeal and appellant's affidavit of impecuniosity were filed (R.67,71). However, because of the failure to prosecute this appeal, the time prescribed by Rule 75, Utah Rules of Civil Procedure (1953), for filing designation of record on appeal had expired necessitating appellant's motion for

extension of time for filing designation of record on appeal, dated March 3, 1977 (R.77). The Second Judicial District Court granted appellant's motion for extension of time on March 15, 1977, and filed its order July 21, 1977 (R.73).

It is obvious that a transcript of trial could not be prepared until the court granted appellant's motion for an extension because of the time requirements of Rule 75. Once the court granted appellant's motion he was free to request a transcript, which he did on August 5, 1977 (R.75). The transcript was provided on September 27, 1977 (R.77).

Respondent asserts that the delay in obtaining a transcript was the result of the delay in proceeding with the appeal both by appellant and his attorney and not the result of appellant's impecuniosity. Respondent further asserts that a transcript was provided appellant and was done in a timely manner following the belated designation of transcript (R.75).

Appellant cites Roberts v. LaVallee, 389 U.S. 40 (1967), in support of his contention of sufficiency and prejudice. Respondent notes that Roberts is readily distinguished from the case at bar. Roberts was denied a free transcript of a preliminary hearing. In the present matter, Archuletta was never denied a transcript,

but was provided one upon a final, proper request. The prejudice suffered by Roberts in preparation for trial due to the lack of the transcript of the preliminary hearing, does not exist in the instant case because appellant has had access to the trial transcript in preparation of this appeal.

CONCLUSION

Respondent avers that appellant was not denied his constitutional right to a speedy trial when he was incarcerated in excess of thirty days following his demand for an ealier trial date. Furthermore, appellant's confession was voluntarily and knowingly given and properly received at trial. During trial, an unsolicited and voluntary statement, made by a witness on cross-examination, that the appellant had been in prison, where such statement was not highlighted nor emphasized, was not prejudicial and not grounds for a new trial.

Finally, appellant's petition for a writ of habeas corpus, included within and made a part of his appellate brief, is untimely and improperly brought and the arguments raised therein should be considered by this Court as part of appellant's appellate brief.

Based upon the above cited authority and argument, respondent prays that this Court affirm the decision of the lower court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent