

1978

State of Utah v. Roy J. Tippetts : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

ROY J. TIPPETTS, :

Defendant-Appellant.

BRIEF OF DEFENSE

APPEAL FROM THE VERDICT
JUDGMENT BASED THEREON
JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
HONORABLE J. ROBERT HARRIS

WALTER F. BUGDEN, JR.

Salt Lake Legal
Defender Association
343 South Sixth East
Salt Lake City, Utah 84102

Attorney for Appellant

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
 :
Plaintiff-Respondent, :
 :
-vs- : Case No.
 : 15512
 :
ROY J. TIPPETTS, :
 :
Defendant-Appellant. :
 :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with robbery in violation
of Utah Code Ann. § 76-6-301 (Supp. 1977).

DISPOSITION OF THE LOWER COURT

Appellant was tried before a jury and found guilty
of one count of robbery on October 4, 1977, in the Fourth
Judicial District, in and for Utah County, State of Utah,
the Honorable J. Robert Bullock presiding. On October 21,
1977, appellant was sentenced for the indeterminate term,
not less than one year nor more than fifteen years, in the
Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of the lower court.

STATEMENT OF FACTS

On August 30, 1977, at approximately 12:30 a.m. the Riverbend Lounge, located in Provo Canyon, was robbed by two men. Four eyewitnesses at the scene described the events as follows:

Two men entered the bar, asked where the restroom was, asked for a beer, asked where the cigarette machine was, then exited (T.14,27-28). The two then returned to the bar, one holding "something hard" at the back of a customer, Joseph E. Faux, who was seated at the bar (T.14,29,36,40) and the other went to the bartender, Lori Elliot, and demanded money (T.15,29,35,40). The man who "stuck something hard" into Faux's ribs (T.29) was positively identified by the four eyewitnesses at the lounge as appellant Tippetts (T.13,28,36,39). They all testified that appellant Tippetts wore a red shirt, brown vest, levis and a cowboy hat (T.13,28,36,39). Utah Highway Patrol Trooper John N. Moon, who arrested the defendants, also testified that on the night of August 30, appellant Tippetts was so dressed (T.47). A similar positive identification was made on co-defendant Lopez and the clothes

he wore--football sweat shirt with the numbers "78" on it, cap and levis (T.13-14,28,36,38,47).

Elliot testified--and the three other bar partons corroborated her testimony--that appellant Tippetts told Faux "don't move or I'll put one of these through you into the bar" (T.15,29) and that co-defendant Lopez first demanded \$50, then \$100, then all the money in the cash register (T.15, 29,35,40). A later accounting showed that \$314 was taken from the lounge. Elliot also testified, and was supported by the other three witnesses, that co-defendant Lopez then pulled the phone cord out of the wall, threatened anyone who tried to follow and the two sped away in a white, rusty old Ford (T.16-17,33,36,41). Elliot then called the police on a pay phone and she gave a description of the car and suspects to the Highway Patrol (T.16-17). Trooper Moon, who was in the general vicinity responded to the call and apprehended the suspected vehicle (T.44-46). Four persons were in the car and Trooper Moon testified that he recovered and marked \$250 hidden in the front grill of the car and on the floor of the back seat (T.49, State's Exhibit 1). The four occupants of the car were identified as Roy J. Tippetts, Gilbert Matthew Lopez (aka Henry Lopez because he gave officers the name of "Henry Lopez", belonging to one of his brothers, when he was arrested) and two of defendant Lopez's brothers (T.52-54).

The two defendants were arrested and charged with the robbery. Both were assigned counsel from the Utah County Public Defenders' Office to represent them at trial--Lopez was assigned Sheldon R. Carter and Tippetts was assigned Michael D. Esplin. The day before trial began, Carter became ill and was unable to attend the trial (T.1-2). In a pre-trial conference in Judge Bullock's chambers, Lopez, Esplin, who fully represented appellant's interests, and the judge discussed the possible actions that could be taken: continuance or proceed with the trial using Esplin as joint counsel (T.1-4). When asked about a possible conflict of interest, Esplin replied, ". . .I don't know of any real conflict. . .I don't know now of a conflict between Mr. Tippetts and Mr. Lopez." (T.2). Esplin further stated that he was well versed on Carter's strategy for trial and knew Carter had not planned on calling any witnesses (T.3). Both Carter and Esplin had discussed the case together (T.3). In fact, Esplin had previously represented both defendants at preliminary hearing (T.3). Lopez indicated his desire to proceed quickly with the trial. Upon the basis of these representations of Esplin and with Esplin's and Lopez's full compliance, Judge Bullock ruled that the trial would proceed as scheduled (T.4).

At the close of the trial the only on the record objection the defense made was the judge's refusal to include a jury instruction on a lesser included offense of theft (T.60,64). The jury returned a verdict of guilty for both defendants. Appellant Tippetts now appeals that conviction.

ARGUMENT

POINT I

APPELLANT HAS NOT SHOWN A CONFLICT OF INTEREST EXISTED BETWEEN CO-DEFENDANT AND APPELLANT IN THEIR DUAL REPRESENTATION AND HAS NOT SHOWN HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant bases much of the strength of his appeal on the very recent Supreme Court case of Holloway v. Arkansas, ___ U.S. ____ (1978), 23, Cr.L. 3001 and the landmark Supreme Court decision of Glasser v. United States, 315 U.S. 60 (1942). Yet a careful reading of those two opinions reveals stark dissimilarities between them and the present case. In Holloway, the defendants' attorney, who was appointed by the court to represent all three defendants, made two motions-- one two and a half weeks before the trial and another the day of the trial--for separate counsel. Harold Hall, the defendants' attorney, had received information from one of the co-defendants that he would run the risk of representing

conflicting interests. The court denied both motions.

In the Glasser case, a weak case against Glasser was presented by the government and the defendant strongly objected to being represented by counsel for his co-defendant. The possible conflict of interest was laid out before the court by the defendants' counsel, Stewart, and was duly recorded on the record. Stewart requested that separate counsel be appointed. The request was denied.

However in the present case, neither appellant, co-defendant nor Esplin felt a conflict of interest problem existed (T.2). No one actively sought separate counsel, as seen in Hollaway and Glasser. Also in Hollaway and Glasser, the records reported that the conflicts of interest indeed hampered Hall and Stewart in the presentation of the cases. No such hindering conflict is reflected in the record in the present case.

Glasser sets forth an important procedure which must be followed in determining whether a conflict of interest problem will arise during the trial. The Supreme Court ruled that the conflict must be "brought home to the court" by the party who believes he is being denied effective counsel. 315 U.S. at 71,76.

Glasser has been interpreted differently in various jurisdictions with regard to this duty of appellant to bring to the court's attention a possible conflict. As noted in John Stewart Geer's article, "Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney," 62 Minn. Law Review 119, 138-139,

"Even if some evidence of the divided loyalties of counsel is apparent from the record, the obstacles that a convicted defendant must hurdle to obtain reversal are greater in some jurisdictions than others. Varied interpretations of the Supreme Court's ambiguous decision in Glasser account for much of this disparity. . . . Regardless of the standard employed, however, an examination of results actually reached reveals that some courts are less disposed to reversing convictions in multiple representation cases than are others. For example, some courts confronted with a record containing substantial or overwhelming evidence against an appellant have concluded that defense counsel's multiple representation did not result in a demonstratable conflict; others have rejected the notion that the substantiality of a government's case renders a defendant's constitutional claim less compelling. These disparities suggest that a defendant's fortunes in a sixth amendment appeal may hinge, in large part, on a fortuity of a sympathetic appeals court."

The question of the severity of the standard in Utah was resolved by this court in the case of State v. Johnson, 25 Utah 2d 46, 475 P.2d 543 (1970). The court, interpreting

the Glasser standard, determined that when a convicted defendant attacks the validity of the trial proceeding,

"the burden is upon him to show that there was some impropriety and that there is at least some likelihood that there was unfairness to him. . .475 P.2d at 546. (Emphasis added)

In Holloway, petitioners raised the claim that their representation by a single appointed attorney, over their objection, violated the federal constitutional guarantee of effective assistance of counsel. Thus, the defendants there met the strict standard of the Utah court (advancing a claimed conflict by petitioners) and would therefore, a fortiori, meet any less severe standards of other jurisdictions. Because defendants' and counsel's objections to the appointment of a single attorney were timely and the motions were denied, the precise Holloway holding is not unexpected:

"We hold that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of 'assistance of counsel.'" 23 Cr. L. at 3003-3004.

Respondent submits that the Holloway holding is distinguishable from the present case and that it not be given a broader interpretation than its narrow facts and circumstances allow. In fact, two important limitations

to Holloway are stressed in Holloway itself. The court emphasises that attorneys, as officers of the court are, first,

"in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial [citation omitted]. Second, defense attorneys have the obligation upon discovering a conflict of interests, to advise the court at once of the problem. . . . Finally, attorneys are officers of the court, and 'when they address the judge solemnly upon the matter before the court, their declarations are virtually made under oath.' [citation omitted] We find these considerations persuasive." 23 Cr. at 3004.

In the present matter, Esplin, after careful and deliberate consideration, determined that there would not be any conflict of interest (T.1-4) and the court accepted his judgment. Esplin related that both he and Carter had worked together on the case and Esplin knew how Carter had planned on presenting Lopez's case (T.3); he therefore concluded he would effectively represent both defendants without a conflict of interest.

The Holloway court also limits its holding to exclude bad faith maneuverings by defense attorneys. In response to Arkansas' concern that the court's holding would place too much authority in defense attorneys' hands and undermine the trial court's power, the Supreme Court responded by asserting that Arkansas

"has an obvious interest in avoiding such abuses. But our holding does not undermine that interest. When an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics [citations omitted]. Nor does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client. [citation omitted] In this case the trial court simply failed to take adequate steps in response to the repeated motions, objections and representations made to it, and no prospect of dilatory practices was present to justify that failure." 23 Cr. L. at 3004.

Respondent suggests that this second abuse which Arkansas was fearful of is being evidenced in the present case. That is, a defense attorney's dilatory action and untimely motions are being employed as the foundation in the present appeal. For no conflict of interest objections were raised pre-trial or during trial. No such conflict problem appears anywhere in the court record. The only basis of the alleged conflict lies in the post-trial affidavits appearing in Appellant's Brief (Appendices A and B). However, these affidavits appear as purely self-serving devices (See Respondent's Brief, Appendix A).

One other important aspect of the Holloway decision

is that joint representation

"is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" Glasser v. United States, supra, 315 U.S., at 92 (dissenting). 23 Cr. L. at 3003.

This principle has been observed by numerous other courts, State v. Jeffery, 515 P.2d 364, (Mont. 1973); Commonwealth v. LaFleur, 1 Mass. App. 827, 296 N.E.2d 517 (1973). In State v. George, 100 Ariz. 350, 414 P.2d 730 (1966) the court in a remarkably similar fact situation refused a convicted defendant's claim that he was denied effective counsel when both defendants initially had counsel but, by arrangement, only one attorney represented the defendants at trial. Appellant George raised Glasser v. United States, supra, as his basis for appeal. The Arizona high court, however, rejected the appeal saying:

"[w]e find the Glasser case clearly distinguishable. In that case the trial court appointed an attorney already in the case to also defend Glasser prior to the commencement of the trial. The possibility of inconsistent interests of the co-defendants was shown the trial court, and it was shown that 'Glasser wished the benefit of the undivided assistance of counsel of his own choice.'

None of these facts are present in the principal case. Defendant has failed to show any conflict of interest between himself and the other defendant represented by his attorney. [citations omitted] The defendants were identified as two of the persons responsible for the crimes; were arrested together and charged with the same crimes; and part of the stolen items were found in their possession.

The only conflict was that George desired to establish an alibi. . . Had defendant made his desires known as to . . . his intent to call alibi witnesses prior to the trial, the trial court, in its discretion, could have accommodated his request.

We will not disturb a trial court's denial of a motion for a new trial unless it appears there has been an abuse of discretion. [citations omitted] We cannot say the trial court abused its discretion in refusing to grant a new trial in this case.

Judgment affirmed." 414 P.2d at 734.

In the present case a very similar situation exists: defendants have been positively identified by four persons at the Riverbend Lounge as the two who held up the bar (T.13,28, 36,39); the defendants were arrested together and charged with the crime (T.52-54); part of the stolen money was found in their possession (T.49); appellant now wishes to establish an alibi and claims alibi witnesses were improperly excluded (Appellant's brief p. 18,21 and Appendices A and B); and the trial court has ruled with its discretion as to a

potential conflict of interest (T.1-4). Thus the two cases are most similar.

Other cases point out that joint representation "is not per se violative of constitutional guarantees," Holloway, supra. In Barron v. State, 7 Ariz. App. 223, 437 P.2d 975 (1968), the court ruled that the

"appellants did not indicate in their petition the existence of any conflict or potential conflict which would impose a duty upon defense counsel to suggest that independent legal representation be afforded to appellants. The appellants cannot complain of denial of assistance of counsel where no showing of conflict has been made [citation omitted]. The mere fact that the same attorney represented all the defendants does not ipso facto warrant habeas corpus relief." 437 P.2d at 977.

Effective assistance is not determined by equal numerical ratios of counsel to defendants. State v. Little, 201 Kan. 101, 439 P.2d 383, (1968), is illustrative of this point.

"Defendant claims the trial court erred in appointing the same attorney to represent both him and his brother because their defenses were interrelated and the defendant was thereby denied effective assistance of counsel.

This contention is without merit. The record does not support these statements. Counsel for appellant fails to point out in what particular trial counsel failed to fully and fairly represent the defendant and we fail to discern such a failure." 439 P.2d at 387.

In order for a claim of joint representation resulting in ineffective counsel to be valid, defendants must prove their assertions. Thus, in United States v. Woods, 544 F.2d 242, (CA6, 1976), the constitutional representation was outlined as follows:

"The Sixth Amendment guarantees the right to counsel in criminal proceedings and a conflict of interest on the part of counsel representing two defendants may deprive the accused of the effective assistance of counsel. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680 (1942). However, the mere fact of joint representation does not per se establish a denial of the effective assistance of counsel [citation omitted]. Our court requires a party claiming that joint representation resulted in a conflict of interest to demonstrate that some actual prejudice resulted to him." 544 F.2d at 268, 269.

The Woods court then concluded by asserting that

"[w]e find no actual conflict of interest preventing adequate representation of appellant Blair. Moreover, it would be especially inappropriate for us to infer prejudice from the mere fact of joint representation where, as was the case here, the defendant was advised of the possibility of a conflict of interest, and of his right to sever his case and be represented by separate appointed counsel." 544 F.2d at 269.

Clearly defendant Lopez was informed of his right to continue the trial (T.1-4) and it can be inferred that Esplin, appellant's original sole counsel, fully explained

the situation to appellant before the pre-trial conference. This can be inferred by Esplin's statements to the court (T.2,3) with respect to his assurance that there would be no conflict of interest problem when Lopez decided to go ahead with the trial on October 4th using Esplin as his counsel, Judge Bullock asked Esplin:

THE COURT: Do you feel that you can do that, Mr. Esplin?

MR. ESPLIN: I think so, your Honor. I don't know that there's any real conflict. When I brought that up, that's [sic] the possibility of conflict, I don't know now of a conflict between Mr. Tippetts and Mr. Lopez. The only thing I would point out to the Court, there may be a difference in the way the --

THE COURT: As far as testifying is concerned?

MR. ESPLIN: As far as testifying is concerned. At this point I don't.

THE COURT: Do you feel that you could properly advise both of them in that regard?

MR. ESPLIN: I believe so, your Honor. I did represent Mr. Lopez at the Preliminary Hearing and also Mr. Tippetts.

THE COURT: So you are conversant with the facts in the case and what they claim to be, the facts and so on?

MR. ESPLIN: That's correct, your Honor.

THE COURT: And as far as you know there aren't any other witnesses that Mr. Lopez should have present or anything of that nature?

MR. ESPLIN: No, your Honor, I don't know of any.

THE COURT: Now, Mr. Carter was working on the case right up until yesterday so that he would have subpoenaed any witnesses --

MR. ESPLIN: That's right.

THE COURT: --that he felt at least would aid in Mr. Lopez' defense?

MR. ESPLIN: Yes. And we discussed the possibility of a couple other witnesses, calling a couple of witnesses, and discounted the doing that, both Mr. Carter and myself." (T.2-3)

Thus, it is clear that Esplin in no way felt a conflict of interest would arise; that he believed he could represent both defendants adequately; and that he and Carter had discussed trial strategy prior to Carter becoming ill so Esplin was well aware of both defendants' possible defenses. No mention was made of the alleged conflict which appellant now claims Esplin had been informed of in September, 1977. Respondent submits that no such conflict as alleged existed prior to or during the trial and defendants were effectively represented (See Respondent's Appendix A).

POINT II

THE TRIAL COURT MET ITS DUTY OF ASCERTAINING WHETHER DEFENDANTS WOULD BE DEPRIVED OF THEIR SIXTH AMENDMENT RIGHTS BY JOINT REPRESENTATION.

In both Glasser v. United States, supra, and Holloway v. Arkansas, supra, the United States Supreme Court stresses the fact that the trial judge has the responsibility to assure that the accused receives all the protections of law. In Glasser the court said:

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . The trial court should protect the right of an accused to have the assistance of counsel." 315 U.S. at 71

Later in the opinion, the court again emphasizes this important trial court function and cautions trial judges against random dismissal of a counsel's conflict of interest claim.

"Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court." 315 U.S. at 76.

These same instructions to trial court judges are echoed in the Holloway opinion. 23 Cr. L. at 3004.

In the instant case, Judge Bullock should be commended for his thorough examination into potential problems with Esplin acting as joint counsel for the defendants (T.1-4). None of the cautions or warnings that the Glasser and Holloway opinions detail as possible trial court abuses are evidenced in the present case.

The federal court system has adopted this same responsibility for its trial courts. In United States v. Foster, 469 F.2d 1 (CA1, 1972), the court not only forcefully sets the requirements for trial judge examinations, but also details how such an examination will limit a defendant's ability to attack joint representation on appeal.

"Under those circumstances, where trial commences after the publication date of this opinion, it shall be the duty of the trial court, as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government... There may be unusual circumstances where... the court may exercise its discretion to pursue the inquiry with defendants and their counsel on the record but in chambers.

If the court has carried out this duty of inquiry, then to the extent a defendant later attempts to attack his conviction on grounds of conflict of interest arising from joint representation he will bear a heavy burden indeed of persuading us that he was, for that reason, deprived of a fair trial.

When a satisfactory inquiry does not appear on the record, the burden of persuasion will shift to the government. If the case comes before us on direct appeal, the government will be required to demonstrate from the record that prejudice to the defendant was improbable." 469 F.2d at 4,5 (Emphasis added)

Appellant relies on Foster to stand for the proposition that "a lack of satisfactory judicial inquiry" into joint representation problems automatically shifts the burden of persuasion to the government. (Appellant's Brief, p.14). However, a careful reading of the case reveals that the burden shifts only if "a satisfactory inquiry does not appear on the record." Foster, supra. at 5. Appellant urges that the burden is now on respondent to prove no conflict of interest existed. Respondent contends, however, that inasmuch as the trial judge's careful examination into the possible conflict is well documented on the record (T.1-4) no such burden shifts to respondent. On the contrary, the Foster decision holds that when such an inquiry is on the record, appellant---it is worth repeating---"will bear a heavy

burden indeed of persuading us that he was, for that reason, deprived of a fair trial." 469 F.2d at 5.

In a remarkably similar case to the present matter, the Second Circuit Court of Appeals ruled that when appellant's counsel became ill during trial, the trial court could properly make a determination whether to continue the trial by having counsel for co-defendant act as appellant's attorney or appoint separate counsel. United States v. Dardi, 330 F.2d 316 (CA2, 1964), cert denied 379 U.S. 845 (1964). The trial court ruled that such an

"[a]ssignment would not give rise to a conflict of interests, but indicated that if a conflict were to arise, the appropriate precautions would be taken." 330 F.2d at 335.

The Circuit Court then continued by ruling that while

"the right to counsel is absolute, its exercise must be 'subject to the necessities of sound judicial administration.' [citation omitted]; and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant... Such an assignment is not, in itself, a denial of effective assistance of counsel. Since Glasser v. United States [supra] it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel." 330 F.2d at 335.

These same circumstances are present in the instant case: co-defendant's counsel became ill during the course of the litigation, the trial court made a determination that appellant's counsel could effectively represent both defendants, and no clear showing was made at the in-chambers conference as to a conflict of interest.

It is respondent's position that Judge Bullock made a proper and adequate investigation into possible conflict problems and he discharged well his duty of inquiry into whether a joint counsel assignment would deprive appellant of his Sixth Amendment rights.

POINT III

BY RAISING THE ALLEGED CONFLICT OF INTEREST CLAIM FOR THE FIRST TIME ON APPEAL, APPELLANT HAS WAIVED THAT BASIS OF APPEAL BECAUSE IT WAS NOT TIMELY RAISED.

The Holloway decision twice refers to the importance of raising objections to joint representation in a timely fashion. The thrust of that decision, which the dissenting judges had great reservations about, can be seen in the court's interpretation of Glasser.

"We read the Court's opinion in Glasser, however, as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 23 Cr. L. at 3005.

To soften the blow of the harsh result of "automatic reversal," the court assuaged the dissenters by emphasizing that such a result would occur only under very narrow circumstances. With regard to the "automatic reversal" rule, the court said by

"requiring a defendant to show that a conflict of interests--which he and his counsel tried to avoid by timely objections to the joint representation--prejudiced him in some specific fashion would not be susceptible to intelligent, even-handed application." 23 Cr. L. at 3005

These two excerpts point out that in order for appeal courts to look favorably upon a claimed conflict of interest and ineffective counsel motions, such objections must be "timely." Otherwise, the objections on appeal will "be susceptible to intelligent, even-handed application."

The Supreme Court of Illinois has ruled that where a defendant at trial made no objection to being represented jointly with his co-defendant, and where there was no suggestion by either defendant that a conflict of defenses existed, the objection raised on appeal alleging such was

"completely unsupported by this record which contain[ed] no evidence of the theory. . .relied upon. McCasle's defense was his uncorroborated testimonial alibi. . .Additionally, there is no showing that defendant was prejudiced by counsel's representation of both him and his co-defendant. . .we ought not to

disturb a judgment on the basis of conjectural or speculative conflicts between the interests of co-defendants which are envisioned for the first time on appeal. People v. McCasle, 35 Ill.2d 552, 221 N.E.2d 227, 230 (1966) (Emphasis added)

Much the same situation is presently before the court. Appellant comes before the appellate court only now waiving the banner of conflict of interest at this late date. No mention was made of such an objection at trial. No alibi testimony or denied defense witnesses objection can be found in the record. Compare this stark absence with the record in the Holloway case where, when a testifying co-defendant made a statement so startling and incriminating to appellant from the witness stand, appellant, Holloway, jumps to his feet to make a pro se objection. Other recorded examples of the conflict are evident as well. No such attempt by appellant is present in the instant case. On point here is the case of Coates v. Lawrence, 46 F.Supp. 414 (1942), where the District Court held

"[i]t is a familiar rule of evidence that silence, when there is a duty to speak, is tantamount to, and often creates an estoppel against, or waiver of the right of, later saying otherwise." 46 F.Supp. 424

Such a rule of silence being interpreted as a waiver, however, is a severe result and must only be triggered

under circumstances where the defendant was cognizant of giving up a right. As is stated in People v. Johnson, 74 Cal. Rptr. 889, 450 P.2d 265 (1969)

"[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 450 P.2d at 269.

The California court has further defined this principle in People v. Mattson, 51 Cal.2d 777, 336 P.2d 937, (1959) by outlining the particular circumstances required for a defendant to have properly waived the claim of denial of effective counsel on appeal. The waiver is determined by

"such matters as the intricacy of the accusatory pleading, the complexity of the law as to the offense charged and included offenses, defendant's intelligence, education, experience (including familiarity with the criminal law derived from prior prosecutions), youth, mental and physical health and emotional condition, the attitude of the court and the prosecuting officials and the existence of inflamed public opinion, and also the severity of the penalty. Considering the foregoing matters, the courts have developed familiar rules, . . . as to the scope of an accused's right to representation by counsel at the trial and in the antecedent proceedings." 336 P.2d at 946.

One reason courts are reluctant to accept dilatory objections raised only on appeal is the court's desire to

avoid "piecemeal litigation."

In the California case of Wieczorek v. Texas Co., 45 Cal.App.2d 450, 114 P.2d 377 (1941), the court rejected an objection raised first on appeal and ruled

"[i]t is the policy of the law that litigation shall not be had in piecemeal and that when a party has a defense to a pending cause of action it must be presented then, otherwise it will be deemed waived." 114 P.2d at 382.

The same court ruled one year later that if

"the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly plead or otherwise urged. . . . Dilatory tactics in neglecting to present all points on a first appeal may often lead to an ineffective disposition of the rights of the respective parties on the vital question of time limitation. . . . In the present case it might cause confusion. . . . The courts do not countenance piecemeal litigation." Ornitz v. Board of Dental Examiners, 55 Cal.App.2d 888, 132 P.2d 272, 275-276 (1942).

Similar confused, piecemeal, dilatory tactics are present in the instant case. Respondent urges the court to rule that appellant has waived his claimed alibi defense by not raising it at trial. The attempted defense and

alleged conflict of interest should be quickly disposed of by the court as manipulative maneuverings.

POINT IV

WHEN DOUBT ARISES AS TO WHETHER EITHER A) APPELLANT RECIEVED EFFECTIVE ASSISTANCE OF COUNSEL OR B) A CONFLICT OF INTEREST EXISTED AT TRIAL, THE QUESTIONS MUST BE RESOLVED BY EXAMINING THE COURT RECORD.

Several Utah Supreme Court cases hold that when an appellant is claiming he has been denied effective representation, the court must look to the record to determine if appellant's contention has merit. State v. Farnsworth, 13 Utah 2d 103, 368 P.2d 914 (1962); State v. Dodge, 19 Utah 2d 44, 425 P.2d 781 (1967); and State v. Heath, 27 Utah 2d 13, 492 P.2d 978 (1972). Perhaps Justice Crockett best summed up this frequent objection raised by appellants in the recent case of State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974), when he said:

"In regard to the defendant's contention that he was denied effective counsel: we are impelled to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service, when the

real difficulty was that he had a guilty client. In this respect also defendant had his entitlement of adequate representation by capable and conscientious counsel." 517 P.2d at 1315

Nothing in the present record indicates that appellant was denied effective counsel. On the contrary, the record shows that counsel very methodically and deliberately worked in appellant's best interests (T.1-4, especially).

This same analysis of the record is needed to answer appellant's charge that a conflict of interest existed between him and co-defendant Lopez. United States v. Gallagher, 437 F.2d 1191, (CA7, 1971), stands for the proposition that

"The existence of a conflict of interest, to warrant the result here sought, must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants. And counsel had ample opportunity to make such a showing if such conflict existed." 437 F.2d at 1194

The court denied defendant's motion for a new trial and affirmed his conviction. State courts follow the same standard of examination of record. In State v. Kennedy, 8 Wash. App. 633, 508 P.2d 1386 (1973), a defendant appealed his conviction on grounds of both ineffective counsel and conflict of interest. The court rejected defendant's claim

that he need only establish " a possibility of conflict or prejudice" and went on to rule that

"when we review the proceedings in this trial court we are not confined to the application of such a speculative standard. Concededly, in judging the effectiveness of counsel we must indulge in some sort of speculation as we see only the 'tip of the iceberg' in the record before us. [citation omitted]. However, we do have the verbatim transcript of the proceedings in the trial court. Accordingly, if we can find anything in the record which indicates that there is a possibility that the defendant may have been actually prejudiced, he has been denied his right to effective counsel. [citation omitted] We do not find even a possibility that the defendant may have been actually prejudiced." 508 P.2d at 1389.

In searching the record of the present case, the only reference to a conflict of interest problem appears at the pretrial discussion in Judge Bullock's chambers (T. 1-4). After carefully considering the matter Lopez, Esplin, the trial judge, and appellant--through the proxy representation of Esplin acting in his behalf--all agreed that there would be no conflict problem. In Esplin's own words, the decision was made that, ". . .I don't know now of a conflict between Mr. Tippetts and Mr. Lopez." (T.2).

In appellant's reliance on Glasser v. United States,

supra, one important ruling of the Supreme Court's decision is absent from appellant's brief. In determining a court's role in reviewing a conviction, the high court rules

"[i]t is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."
315 U.S. at 80.

A reviewing court, therefore, may only look at the court record and evidence presented at trial and must affirm the conviction if "substantial evidence" supports it. Appellant would have this court rely upon two self-serving affidavits attached as appendices to his brief as the sole basis for establishing a conflict of interest between the two defendants. Utah case law is very clear with regard to the unacceptability of "facts" stated in briefs as bases for appeal. The Utah Court in Watkins v. Simonds, 14 Utah 2d 406, 385 P.2d 154 (1963), stated: "this court cannot consider facts stated in the briefs which may be true but absent in the official record." 385 P.2d at 155. See also Cooper v. Foresters Underwriters, Inc., 123 Utah 215, 257 P.2d 540 (1953); Skyline v. Data-cap, 545 P.2d 512 (Utah, 1976).

The reliance by appellant on such improper "facts"

discolors his entire brief--for when appellant has no sound basis on which to build his conflict of interest review, the whole appeal must fail.

CONCLUSION

Respondent contends that appellant was not denied effective assistance of counsel and that no conflict of interest existed between co-defendant Lopez and appellant Tippetts (See Respondent's Appendix A). It must again be stressed that joint representation is not per se violative of Sixth Amendment rights.

The trial court properly dealt with and fulfilled its duty of ascertaining whether defendants would be deprived of their constitutional rights.

Respondent submits that appellant has waived his right to object to his dual representation because the motion has not been timely raised.

A search of the official trial record is the sole basis for resolving claims of either conflict of interest or ineffective trial counsel. It is respondent's position that such a search will result in finding no basis for appellant's claims.

Respondent asserts that the rulings of the lower court were proper and prays that the conviction be affirmed.

Respectfully submitted,

ROBERT B. HANSON
Attorney General

MICHAEL L. DEAMER
Deputy Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

THE STATE OF UTAH, :

Plaintiff and Respondent, :

-vs-

A F F I D A V I T.

ROY J. TIPPETTS, :

Defendant and Appellant. :

No. 15512

STATE OF UTAH,)

: SS.

COUNTY OF UTAH.)

MICHAEL D. ESPLIN, being first duly sworn

according to law, deposes and says:

1. That I am the defense counsel who represented Roy J. Tippetts and Gilbert M. Lopez (aka Henry Lopez during the course of the trial) in the above entitled action in the District Court in and for the Fourth Judicial District, Utah County, Utah, on the 4th day of October, 1977.

2. That there was not a conversation as alleged by Appellant's friend in her Affidavit attached to Appellant's brief (Appendix B). No such discussions of a possible alibi for Appellant was ever held in my office during September, 1977. No such conversations with Joy Anderson, and Sandra Gibson was held in my office prior to trial. A conversation did take place with Appellant's sister after the trial had been held wherein she alleged a purported alibi for Appellant.

Dated this 30th day of June, 1978.

Page 2

SUBSCRIBED and SWORN to before me this
30th day of June, 1978.



NOTARY PUBLIC

Residing at: *Orlando*

My Commission Expires:

3-20-81