

1978

State of Utah v. Roy J. Tippetts : Reply Brief of the Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert Hansen; Attorney for Respondent Walter F. Budgen, Jr.; Attorney for Appellant

Recommended Citation

Reply Brief, *Utah v. Tippetts*, No. 15512 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/953

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction of Robbery, a Felony of the Second Degree, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

WALTER F. BUGDEN, JR.
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

FILED

AUG 10 1978

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction of Robbery, a Felony of the Second Degree, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

WALTER F. BUGDEN, JR.
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

TABLE OF CONTENTS

PAGE

STATEMENT OF THE NATURE OF THE CASE	1
RELIEF SOUGHT ON APPEAL	1
ARGUMENT	
POINT I: THE APPELLANT NEVER WAIVED HIS CONSTITUTIONAL RIGHT TO CONFLICT-FREE, SEPARATE COUNSEL.	2
POINT II: APPELLANT CONCEDES THAT HE DID NOT PERSONALLY MAKE A TIMELY OBJECTION TO BEING REPRESENTED BY AN ATTORNEY WITH DUAL LOYALTIES	8
CONCLUSION.	10

CASES CITED

<u>Brady v. United States</u> , 397 U.S. 742, 748 (1970).	2
<u>Coates v. Lawrence</u> , 46 F. Supp. 414 (1942).	3
<u>Cornley v. Cochran</u> , 396 U.S. 406 (1962)	3
<u>Faretta v. California</u> , 422 U.S. 806 (1975).	3,5
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	9
<u>Glasser v. United States</u> , 315 U.S. 60, 71 (1942).	2,7,8
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932)	9
<u>United States v. Armone</u> , 363 F.2d 285, 406 (2d Cir. 1966)	4,5
<u>United States v. Bernstein</u> , 533 F.2d 775 (2d Cir. 1976)	6
<u>United States v. Foster</u> , 469 F.2d 1 (1st Cir. 1972)	5
<u>United States v. Gains</u> , 529 F.2d 1038 (7th Cir. 1976)	6,7
<u>United States v. Garcia</u> , 517 F.2d 272 (5th Cir. 1975)	5

TABLE OF CONTENTS
(Continued)

	PAGE
<u>United States v. Woods</u> , 544 F.2d 242 (6th Cir. 1976)	5

OTHER AUTHORITIES CITED

"Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney"	6
United States Constitution, 5th Amendment.	6
United States Constitution, 14th Amendment	6
United States Constitution, 6th Amendment.	4,

IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF THE APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is the reply brief of the appellant in his appeal from a conviction of Robbery, a Felony of the Second Degree, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of guilt entered against him and a new trial.

ARGUMENT

POINT I

THE APPELLANT NEVER WAIVED HIS CONSTITUTIONAL RIGHT TO CONFLICT-FREE, SEPARATE COUNSEL.

Appellant submits that respondent misconstrues the law on waiver of a constitutional right. It is well settled that an accused may waive his right to protections guaranteed by the Constitution. Thus, although a conflict of interest may indeed violate an accused's right to effective assistance of counsel, that right may be waived. However, it bears repeating that the trial court bears a significant responsibility for ensuring that fundamental rights are relinquished voluntarily and intelligently and only after an accused has an awareness of the relevant circumstances and likely consequences of such a waiver.¹ Thus, in Glasser v. United States, 315 U.S. 60, 71 (1942), the Supreme Court stated that "we indulge every reasonable presumption against the waiver of a fundamental right."

In the case at bar, notwithstanding the fact that the appellant was not present when the decision was made that Esplin would represent both the appellant and his co-defendant (R. 1-4), the State concludes in its brief that this Court should infer that he did nonetheless waive his right to conflict-free, separate counsel.

1. See Brady v. United States, 397 U.S. 742, 748 (1970).

For example, in Point I of respondent's brief it is stated, "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." (Respondent's brief at 14-15; Emphasis supplied). This same reasoning is echoed throughout respondent's brief. Another striking example is found in Point IV of respondent's brief, where respondent states, "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." (Respondent's brief at 28; Emphasis supplied). In Point III respondent also cites authority for the proposition that the appellant's silence can be construed as a waiver. Coates v. Lawrence, 46 F. Supp. 414 (1942).

Appellant submits that the respondent's proxy and silence theories of waiver are dramatically opposed to the decisional law which has evolved in the area of the waiver of a constitutional right. In Cornley v. Cochran, 396 U.S. 506 (1962), the United States Supreme Court laid to rest the notion that waiver of a fundamental right could be inferred from a silent record. The Cornley court held that:

Presuming waiver of the right to counsel from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. 396 U.S. at 516. (Emphasis Supplied)

Similarly, in Faretta v. California, 422 U.S. 806 (1975), where the

Court held that an accused has a Sixth Amendment right to waive counsel altogether, the Court insisted that before an accused could forego the guiding hand of counsel, he must fully understand the benefits he is relinquishing:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [citations omitted] 422 U.S. at 835. (Emphasis Supplied)

In the instant matter, the record is barren of any indication that the appellant was admonished by either the trial court or his trial counsel about the possible ramifications of multiple representation.

At least one court has found a valid waiver where an attorney represented to the court that he had discussed the possibility of a conflict of interest with the defendant and the defendant agreed that no conflict was present. In United States v. Armone, 363 F.2d 385, 406 (2nd Circuit 1966), the defendant challenged his conviction on the basis that a conflict of interest prevented him from receiving a fair trial. There the possibility of a conflict was probed at a pre-trial hearing. In rejecting the defendant's conflict claim, the Second Circuit pointed to the fact that the record revealed that the defendant was present when his attorney represented to the trial court that he had fully discussed the matter with the defendant and that he consented to the dual representation. Comparing Armone to the case at bar, it is readily apparent that none of the circumstances of the defendant's informed consent in

Armone are present in the instant matter. Mr. Esplin never made any such representations to the trial court and the appellant was never present when the conflict issue was specifically addressed. For these reasons, respondent's reliance on United States v. Woods, 544 F.2d 242 (6th Cir. 1976) and United States v. Foster, 469 F.2d 1 (1st Cir. 1972), is misplaced. In both of those cases, reference is made to on-the-record discussion with the defendants to insure that they were aware of the risks of multiple representation. It bears repeating that appellant Tippetts was never present during any such inquiry.

In United States v. Garcia, 517 F.2d 272 (5th Cir., 1975), the Fifth Circuit construed Faretta v. California, supra, to mean that a defendant has a constitutional right to waive the effective assistance of counsel and choose a lawyer serving conflicting interests. In reaching this result, however, the Fifth Circuit analogized an accused's waiver of his attorney's possible conflict of interest to the procedural requirements associated with accepting a guilty plea:

. . . the . . . court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the . . . court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. . . . It is, of course, vital that the

waiver be established by 'clear, unequivocal, and unambiguous language.' . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment 'fundamental fairness' basis. 517 F.2d at 276.

Courts are beginning to increasingly recognize the intricacies of obtaining a knowing and intelligent waiver of a complicated right, such as the right to conflict-free counsel, by a lay person who lacks a lawyer's sophistication. Thus, in the article cited by respondent, "Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney", the commentator states:

A generalized admonition by the trial court that counsel's duties to one client may conflict with duties to another is hardly sufficient to supply this knowledge, nor is the significance of potential conflicts likely to be understood. 62 Minn. L. Rev. 119, 140-141.

Cognizant that some defendants may not be intelligently capable of fully understanding the significance of conflicts, some courts have declined to find a waiver despite explicit or implicit consent to multiple representation. In United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), the Court found no waiver had been given despite the defendant's consent to multiple representation. And in United States v. Gains, 529 F.2d 1038 (7th Cir. 1976), the Court

refused to find a waiver where the defendant had not been specifically warned about the risks lurking in multiple representation. The

Gains court stated:

When the possibility of a conflict appears during trial, the court must investigate the relevant facts, advise the defendant, and determine whether continued representation, absent waiver, would violate the sixth amendment. 529 F.2d at 1043. (Emphasis Supplied)

In this regard, it is worthy of note that the Supreme Court in Glasser v. United States, supra, eschewed the Government's argument that Glasser had waived his Sixth Amendment rights. In Glasser the defendant's attorney, Stewart, was appointed to represent the co-defendant, Kretske. Glasser, an experienced trial lawyer who had served for more than four years as a U. S. attorney prosecuting criminal cases, objected and stated he preferred the individual loyalty of his own attorney. However, after an on-the-record discussion of the matter with all parties present, the Court appointed Stewart to assume the defense of Kretske. Glasser did not object at that time.

In the instant case, appellant is not a veteran trial lawyer. He obviously lacked the knowledge of the need to preserve objections for appellate review. And unlike Glasser v. United States, supra, the appellant was not present during a lengthy discussion of the conflict problem.

Furthermore, respondent has misstated the holding of Glasser v. United States, supra, when he states on page 6 of the

brief:

The Supreme Court ruled that the conflict must be "brought home to the court" by the party who believes he is being denied effective assistance of counsel.

Respondent interprets Glasser as thrusting an affirmative duty on the defendant to convince the trial court that a conflict exists. This is not the holding of Glasser; and the quoted language is taken out of context. The sentence, in its entirety, is reprinted below, and appellant asserts that respondent's purported holding cannot reasonably be inferred from the Court's language:

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.

POINT II

APPELLANT CONCEDES THAT HE DID NOT PERSONALLY
MAKE A TIMELY OBJECTION TO BEING REPRESENTED
BY AN ATTORNEY WITH DUAL LOYALTIES.

In response to Point III in respondent's brief, appellant readily concedes that "he comes before the appellant court only now waiving the banner of conflict of interest at this late date. No mention was made of such an objection at trial." (Respondent's brief at 23). Respondent fails to understand that the absence of a timely objection to the dual representation is entirely consistent

with appellant's contention that the conflict hampered his attorney and precluded him from receiving effective assistance of counsel. Apparently respondent feels that despite the fact that the appellant was never warned by either the trial court or his attorney of the risks inherent in dual representation, he nonetheless should have made a pro se objection to preserve the issue for appeal.

This argument is certainly paradoxical. On the one hand, we have case law which vigorously guards the accused's precious right to counsel. After decades of discussion, the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), put to rest the notion that an accused can have a fair trial without a lawyer's assistance. Justice Black's opinion for the Court reaffirmed Justice Sutherland's now famous words from Powell v. Alabama, 287 U.S. 45 (1932):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence how much more true is it of those of feeble intellect. Id at 58.

But on the other hand, respondent argues that the appellant should

simultaneously be held responsible for evaluating the attorney's tactics. Thus, the respondent submits that the appellant must establish by his own efforts the very things for which the Supreme Court recognized he needed the assistance of counsel in the first place and which he did not receive. Appellant submits that this reasoning is constitutionally infirm.

CONCLUSION

For the reasons stated above and the arguments previously asserted in appellant's original brief, it is requested that the judgment of the trial court be reversed and the appellant granted a new trial.

DATED this ____ day of August, 1978.

Respectfully submitted,

WALTER F. BUGDEN, JR.
Attorney for Appellant