

1978

State of Utah v. Jack Warren Nomeland and Donald Farrell : Brief of Respondent

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 B. Hansen; Attorney for Respondent Sheldon R. Carter; Attornes for Appellant

Recommended Citation

Brief of Respondent, *Utah v. Nomeland*, No. 15556 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1005

This Brief of Respondent 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,

-vs-

JACK WARREN NOMELAND
and DONALD FARRELL,

Defendants-Appellants.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF UTAH COUNTY
HONORABLE J. ROBERT BULLOCK, Judge

ROBERT A. HARRIS
Attorney General

WILLIAM W. BARNETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent

PHILDEN R. CARTER

Utah County Legal Defender Assoc.
407 East 100 South #29
Provo, Utah 84601

Attorney for Appellant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I: THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION BY GIVING JURY INSTRUCTION NUMBER THIRTEEN-----	2
CONCLUSION-----	5

CASES CITED

Griffin v. California, 380 U.S. 690, 85 S.Ct. 1229 (1965)-----	3,4
Hanks v. United States, 388 F.2d 171 (10th Cir. 1968)-----	5
Lakeside v. Oregon, 46 L.W. 4248 (March 22, 1978--	2-5
New Mexico v. Garcia, 84 N.M. 519, 505 P.2d 862 (1972)-----	4

STATUTES CITED

Utah Code Ann. § 76-6-202 (1977 Supp.)-----	1
---	---

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

JACK WARREN NOME LAND
and DONALD FARRELL,

Defendants-Appellants..

Case No. 15556

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of burglary,
in violation of Utah Code Ann. § 76-6-202 (1977 Supp.).

DISPOSITION IN THE LOWER COURT

On November 9, 1977, the matter was tried in the
Fourth Judicial District before the Honorable J. Robert
Bullock, District Judge, sitting with a jury. Both defen-
dants were convicted of the crime charged and sentenced to
one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

Respondent concurs with the statement of facts as presented in Appellant's brief.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION BY GIVING JURY INSTRUCTION NUMBER THIRTEEN.

At the end of the trial in question, Judge Bullock cautioned the jury with the following instruction:

"A defendant in a criminal case is not required to testify in his own behalf. The law expressly gives him the privilege of not testifying if he so desires. The fact that defendant Jack Warren Nomeland has not taken the witness stand must not be taken as any indication of his guilt, nor should you indulge in any presumption or inference adverse to him by reason thereof. The burden remains with the state, regardless of whether the defendant testifies in his own behalf or not, to prove by the evidence his guilt beyond a reasonable doubt." (R.26)

An almost identical instruction was the focal point of a recent United States Supreme Court case. In Lakeside v. Oregon, 46 L.W. 4248 (March 22, 1978) the trial judge gave an instruction which read:

"Under the laws of this State a defendant has the option to take the witness stand to testify in his or her

own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence." Id. at 4249

The petitioner in Lakeside presented the same argument that appellant presents in the present case. He contended that "this protective instruction becomes constitutionally impermissible when given over defendant's objection." Id. at 4249.

In concluding that this argument was without merit the Court observed,

"The petitioner's argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these." Id. at 4250.

The Court specifically distinguished the facts of Lakeside from the case established in Griffin v. California, 380 U.S. 690, 85 S.Ct. 1229 (1965), a case cited in appellant's brief. In Griffin the instruction given by the trial court stated that the jury could take defendant's failure to testify into consideration during its deliberation. Id. at 610. The Supreme Court found that this comment did violate defendant's constitutional rights. Id. at 614.

The Court in Lakeside found an important difference between the cautionary comment set out in Lakeside and the adverse comment given in Griffin:

"The Court concluded in Griffin that unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand. But a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify is 'comment' of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in Griffin. On the contrary, its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. 46 L.W. at 4250.

Such a cautionary instruction serves to clarify the fact that a defendant has a constitutionally protected option to testify or not, as he deems appropriate. This clarification does not waive a red flag of negative inference in front of the jury.

This conclusion was also established in a New Mexico case. In New Mexico v. Garcia, 84 N.M. 519, 505 P.2d 862 (1973), two co-defendants were convicted of rape. The judge gave an instruction similar to the one in question since only one of the co-defendant's had testified during the trial. The Supreme Court said that defendant's argument that this instruction was prejudicial was meritless. "In effect, Garcia attempts to avoid an instruction which protects a constitutional right."

Id. at 863. See also Hanks v. United States, 388 F.2d 171 (10th Cir. 1968).

This Court should affirm the trial court's actions in the giving of the cautionary instruction in question. This result is mandated by law and logic. As commented in Lakeside, supra, "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect."

CONCLUSION

The instruction given by trial court which cautioned the jury against making any negative presumptions or inferences because one of the defendants did not testify was properly given for the purpose of protecting appellant's important right against compulsory self-incrimination. Such action violated no rights or appellant and should be affirmed.