1980

State of Utah v. Ronald John Martinez : Brief of Respondent

Utah Supreme Court

Hansen and Hansen; Attorneys for Appellant;
Robert B. Hansen; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RONALD JOHN MARTINEZ,

Defendant-Appellant.

BRIEF OF

APPEAL FROM THE
JUDICIAL DISTRICT
LAKE COUNTY, STATE
ABLE DEAN E.

HANSEN AND HANSEN

250 East Broadway, Suite
Salt Lake City, Utah 84

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15744
RONALD JOHN MARTINEZ,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Ronald John Martinez, was charged with the crime of unlawful possession of a controlled substance with intent to distribute for value in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953).

DISPOSITION IN THE LOWER COURT

The appellant was tried by a jury before the Honorable Dean E. Conder, in the Third Judicial District Court, Salt Lake County, State of Utah. The appellant was found guilty, and appeals that conviction.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the result

STATEMENT OF FACTS

The appellant was initially stopped by Deputy George and Deputy Anderson while in his car at about 3900 South and 900 West in Salt Lake City (T.13), on July 18, 1977, at about 7:30 p.m. (T.50). The appellant was advised that the officers had a warrant to search his person and his residence, and was informed of his Miranda rights (T.51). At that time the appellant was searched (T.51), and was advised that the officers were going to search his residence, and that the appellant could accompany them to the residence. The appellant was also informed that force would be used to gain entrance to the residence if necessary (T.51).

The appellant testified that he was arrested at the time his car was stopped by the officers (T.159).

The appellant accompanied the officers to his residence at 1158 Warbler (T.13). At that point, Deputies Anderson and George, the appellant and his wife (T.13,14), Detectives Duncan and Alexander, Special Deputy Akins, and Sergeant Patience were present in the home (T.12). The officers began a systematic search of the house (T.14), and located a blender, a suspected container of heroin, a cutting edge, a quarter

teaspoon measure (T.14,15), an aluminum funnel (T.21), a package of toy balloons (T.24), a strainer (T.25), and two packages of lactose (T.27). After the suspected heroin was discovered at about 7:50 p.m., the appellant was placed under arrest (T.29). At this time, Deputy George asked the appellant if he understood his Miranda rights as they had been read to him at the time he was stopped in his car (T.31). The appellant replied affirmatively, and agreed to answer some questions (T.31). After the appellant had answered several questions (T.34,35), Deputy George testified that on his own the appellant blurted out, "yes, I deal dope, but I sold my last bag last night. If you find any dope here, you planted it." (T.35).

The Chief Toxicologist for Salt Lake City, Donald Gunderson, testified that the substance found in the appellant's home was 6.4 grams (T.96) of 4.3 percent heroin (T.101). Deputy George testified that in Salt Lake City, heroin sold on the street ranged from one to two percent, with most of it being one percent (T.60,61). George testified that a balloon of heroin would contain approximately one quarter gram of substance (T.76), and that the amount of heroin found in the house would be

enough for 104 doses of street quality heroin (T.77). Deputy George testified further that all of the paraphernalia found, including the balloons, was located together in the kithcen cupboard directly opposite the cupboard in which the heroin was found (T.78).

The appellant testified that at the time of his arrest both he and his wife were using heroin (T.152,154), and that their combined usage ranged from ten to eighteen bags per day (T.155).

Deputy George testified that of the several hundred addicts he knew that it was uncommon for them to have a supply of heroin on hand (T.42), and that in Salt Lake City it was common for the purchaser to be forced to use the heroin at the time of purchase (T.43). Jack Burdette, a defense witness, testified that the most heroin he had ever been able to purchase at one time was two spoons, or the equivalent of eight balloons (T.132).

ARGUMENT

POINT I

THE APPELLANT WAS ADEQUATELY ADVISED OF HIS MIRANDA RIGHTS.

The testimony at trial indicates that the

appellant was initially stopped by the authorities in an automobile stop at about 7:30 p.m. on July 18, 1977 (T.50). At that time the appellant was advised by Deputy George that he had the right to remain silent, that anything he said could and would be used against him in a court of law, that he had the right to an attorney during questioning, and that if he was unable to afford an attorney one would be appointed by the court without cost (T.30). At that time the appellant indicated that he understood his rights (T.30).

At trial, there was some question as to whether the appellant was free to go after the authorities searched him at his car (T.52); however, he was advised that they would search his residence whether he was there or not (T.52). The appellant testified that he was placed under arrest at the time the car was stopped (T.159).

The appellant in fact accompanied the officers to his home (T.52), and Deputy George testified that he was placed under arrest at about 7:50 p.m. on the 18th of July, about 20 minutes after he was initially stopped (T.31). At this time, Deputy George again asked the appellant if he understood his rights (T.31). The appellant said that he did, and answered several questions.

The argument raised by the appellant is that the Miranda warning was not given subsequent to the time the appellant was placed under arrest by Deputy George (Appellant's Brief, p. 3-9), and that the statement, "yes, I deal dope," allegedly made by the appellant was admitted into evidence in violation of his Miranda rights.

A.

THE APPELLANT WAS UNDER THE CONTINUUING CUSTODY OF THE AUTHORITIES FROM THE TIME HE WAS STOPPED IN HIS CAR UNTIL THE TIME THE INCRIMINATING STATEMENT WAS MADE.

The trial court ruled that the appellant was sufficiently "restrict(ed) of his freedom to render him in custody" at the time he was stopped in his car. In effect, the court distinguished the case at hand from Oregon v. Mathiason, 429 U.S. 492 (1977), in which the United States Supreme Court noted that "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'," 429 U.S. at 495, and held that interviews conducted in police stations are not inherently coercive.

The question of how much restriction is required to create an "in custody" situation has been addressed on on numerous occasions by the courts. In State v. Paz,

31 Or.App. 851, 572 P.2d 1036 (1977), the court noted:

> "A difficulty arises as to whether this restraint should be measured in an objective or subjective manner. The objective manner would look to how the various circumstances surrounding an interrogation might affect a reasonable person, while the subjective manner would look to whether a particular interrogated defendant believed himself to be in custody . . . The majority of the courts have chosen the objective test." 572 P.2d at 1040.

The Oregon court relied on an earlier decision, State v. Evans, 241 Or. 567, 407 P.2d 621 (1965), to set forth the following criteria to determine whether a person is "in custody":

> ". . . a person is in custody if there is . . . some element of police control and consequent inhibition on freedom of movement, some circumstance, or some word or action on the part of the police that can be reasonably construed as physical or psychological restraint. . . ." (Emphasis original.) 572 P.2d 1041.

In State v. Kennedy, 116 Ariz. 566, 570 P.2d 508 (1977), the court stated:

> "Custody is an objective condition. The subjective intent of the interrogator to arrest the suspect is not, in itself, a sufficient basis upon which to conclude that custody exists. [Citation omitted.] When an arrest has not yet taken place, the factors to be considered in deciding whether the custody has attached are many. Among the most important are (1) the site of the interrogation; (2) whether the investigation has focused on the suspect;

(3) whether the objective indicia of arrest are present; and (4) the length and form of the interrogation." 540 P.2d at 511.

Although Paz and Kennedy are factually unrelated to the case at hand, they nevertheless set forth valid criteria with which to determine the "in custody" issue.

The testimony in the case at hand indicates that the appellant was stopped by the authorities while driving his car (T.13), that he was searched (T.51,52), advised why he was stopped (T.13), and told that the officers possessed a search warrant for his residence (T.13). He was also advised of his Miranda rights. Although he was asked if he wanted to accompany the officers back to his residence (T.13), he was advised that force would be used to gain entrance if necessary (T.52). Under the objective test, it makes no difference whether the officers considered the appellant to be "in custody" at this time, since the determination hinges on whether a reasonable man would consider himself in custody. Under the Paz test, it is clear that there was some "consequent inhibition of control" and some action that could "reasonably be construed as physical or psychological restraint." Even though the appellant was stopped in his car, which is not customarily a coercive environment, the manner in which

he was stopped, and the threat of resort to violent entry to his home was adequate to lead appellant to conclude that he was "in custody."

In United States v. DiGiacomo, 579 F.2d 1211 (10th Cir. 1978), the Tenth Circuit determined that when a defendant had been (1) separated from a companion in his car, (2) simultaneously confronted by four officers, (3) told he was suspected of passing counterfeit money, (4) told to surrender counterfeit money in his possession, and (5) given the choice between immediate arrest and "voluntary" appearance the next day, the action of the officers was "functionally equivalent to an arrest," 579 F.2d at 1214, and that a Miranda warning was necessary. The DiGiacomo criteria closely parallel the circumstances surrounding the automobile stop in the instant case.

If the subjective approach is used to determine whether or not the appellant was "in custody," the appellant's own testimony at trial that he was placed under arrest at the time he was stopped (T.159), is dispositive of the issue. Indeed, the appellant's testimony may indicate that he was actually placed under arrest at the time he was stopped.

B

THE CLOSE PROXIMITY BETWEEN THE TIME THE APPELLANT WAS STOPPED AND THE TIME THE STATEMENT WAS MADE OBVIATED THE NEED FOR A SECOND MIRANDA WARNING.

The appellant was stopped in his car at about 7:30 p.m. (T.50), and less than one half hour later he made the allegedly inadmissible statement. Immediately prior to the time he made the statement, Deputy George asked him if he understood his rights (T.31). This served to remind appellant that the rights were available to him and that the officers were cognizant of those rights.

In State v. Lenon, 570 P.2d 901 (Mont. 1977), the defendant was arrested for possession of dangerous drugs and taken to jail. He was advised of his Miranda rights at about 3:00 a.m. At 9:00 a.m. the same morning, without a subsequent warning having been given, the defendant executed a statement in response to police questions. The Court stated:

> "Such a brief time lapse between the verbal warning and the confession did not by itself, under the facts of this case, create a duty to verbally repeat those warnings. . . Rather, defendant gave every indication that he understood his rights when he told Officer Hossack on the morning of the confession that he did not want to call

> a lawyer. Under the 'totality of the circumstances,' the defendant understood his rights, confessed voluntarily, and there was no need to repeat the Miranda warning." 570 P.2d at 907.

In State v. Pyle, 216 Kan. 423, 532 P.2d 1309 (1975), the defendant was charged with murder of his grandmother. On one occasion prior to his arrest, the defendant, subsequent to being advised of his rights, was interviewed by two state agents. During the course of the interview, the defendant attempted suicide by taking an overdose of drugs. After being taken to the hospital he confessed to the crime. On appeal, the defendant contended that the confession was involuntary because it was not immediately preceded by a warning as to his rights. The Kansas Court rejected the argument:

> "There is no merit to this contention. Just three hours earlier he had been given a concededly complete warning in his attorney's office . . . Once a suspect is fully advised of his rights and understands them, it is not necessary to give repeated Miranda warnings each time he is interviewed." 532 P.2d at 1321.

The State submits that the appellant was in custody from the time he was stopped in his car, and that he was advised timely of his Miranda rights. In addition, the close proximity in time between the initial warning and the subsequent statement eliminated the need for a second warning.

POINT II

ASSUMING, ARGUENDO, THAT THE MIRANDA WARNING WAS NOT GIVEN TIMELY, THE STATEMENT COMPLAINED OF IS ADMISSIBLE AS A SPONTANEOUS DECLARATION.

Deputy George testified that subsequent to placing the appellant under arrest at his home and asking him if he understood his Miranda rights, he asked the appellant a few questions (T. 31).

> "Then without any question asked by anyone, the Deputies or any provocation on our part, the suspect just blurted out to us he said, yes--he said yeah, I deal dope, but I sold my last bag last night. If you find any dope here, you planted it." (T. 35)

The Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436 (1966), promulgated several important guidelines for the protection of the rights of a suspect and yet left unchanged an area that is relevant to the instant case.

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478.

The conduct of the officers in the instant case preserved an atmosphere free from coercion. The circumstances

surrounding the event point to a spontaneous, voluntary statement: petitioner was not placed in an interviewing room or any confining area; no appreciable amount of time passed between his apprehension and the statement; no deception or trickery was used; in sum, all elements of the so-called "third degree" were missing.

In State v. Easthope, 29 Utah 2d 400, 510 P.2d 933 (1973), the Utah Supreme Court stated:

> "It was he who initiated the further conversation. . . . He voluntarily made the response of which he now complains. The privilege against self-incrimination does not protect an accused against statements he voluntarily makes after he has been informed of his rights." 29 Utah 2d at 404.

In Easthope, supra, the defendant agreed to participate in a lineup. Prior to the lineup, he was advised of his Miranda rights. The defendant was identified as the assailant and placed under arrest, and was reminded of his rights. He then asked the basis for his arrest, and was advised that he had been identified in the lineup. The defendant then remarked that he did not see how he could be identified with a silk stocking over his face. It was this statement he sought to suppress.

The facts in Easthope parallel those in the instant case, and the standard of voluntariness should be applied in the instant case.

POINT III

THE FAILURE OF THE OFFICER TO ADVISE APPELLANT OF HIS RIGHT TO STOP QUESTIONING WAS NOT A VIOLATION OF HIS FIFTH AMENDMENT OR MIRANDA RIGHTS.

In Miranda v. Arizona, supra, the court held that:

> ". . . an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." 86 S.Ct. at 1626.

The court continued:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

It is clear from Miranda itself that the need to advise the party of his right to cease answering questions is not mandatory. 384 U.S. 473-474.

In United States v. DiGiacomo, supra, the government argued that Miranda imposed no obligation to

expressly advise suspects they can terminate questioning at any time. The court replied:

> "Although there may be no express requirement to warn suspects of the right to terminate questioning, the government's failure to so warn is certainly an important factor to be considered in determining the voluntariness of any statements made." 579 F.2d at 1214.

This position is virtually identical to the one enumerated by the Supreme Court in Michigan v. Mosely, 423 U.S. 96 (1975), and referred to by the appellant in his brief at pages 10 and 11.

Whether appellant's right to cut off questioning was violated hinges not on whether he was advised of the right, but on whether his "right to cut off questioning" was in fact "scrupulously honored." 423 U.S. 105.

In the instant case, there is no evidence that this right was violated. The appellant indicated his willingness to respond to questions (T. 31). He was asked only five or six questions, and furthermore, the comment he seeks to have suppressed was not made in response to any question, but was spontaneously made (T. 34,35).

Appellant's submission in his brief (page 11) that his right to cut off questioning is not honored unless

he is advised of the right is entirely unsupported by case law, and indeed rejected by Miranda itself. 86 S.Ct. at 1627. State v. Workmen, 20 Utah 2d 178, 435 P.2d 919 (1968), reversed per curiam 393 U.S. 21, is clearly distinguishable from the instant case. In Workmen, supra, the defendant was not advised of his right to have an attorney appointed if he could not afford one. This was one of the elements which the Supreme Court stated in Miranda to be mandatory. 86 S.Ct. at 1627. Respondent asserts that no Miranda violation occurred in the instant case.

POINT IV

ASSUMING, ARGUENDO, THAT THE MIRANDA WARNING WAS NOT TIMELY GIVEN, THE ADMISSION OF THE VOLUNTARY STATEMENT IS NOT REVERSIBLE ERROR.

Rule 4, Utah Rules of Evidence, states:

> "A verdict or finding shall not be set aside nor shall the judgment or decision thereon be reversed, by reason of the erroneous admission of evidence unless . . . (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding . . ."

This court has on numerous occasions pointed out that "it will not reverse criminal cases for mere error or

irregularity." State v. Neal, 1 Utah 2d 122, 262 P.2d 756 (1953). Section 77-42-1, Utah Code Ann., (1953) states in part:

> "If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

Chapman v. California, 386 U.S. 18 (1967), considered the problem resulting from an error at trial involving a right protected by the federal constitution.

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of facts and circumstances, must always be deemed harmful. . . . We decline to adopt any such rule." 386 U.S. at 21-22.

In a Tenth Circuit case, Chase v. Crisp, 523 F.2d 595 (Ca. 10 1975), cert. denied, 424 U.S. 947, the court analyzed the Chapman test of "harmless beyond a reasonable doubt," and noted that in light of Harrington v. California, 395 U.S. 250 (1969), the Supreme Court had not held that a "departure from constitutional procedures should result in an automatic reversal." 523 F.2d at 598. The Tenth Circuit also addressed the problem of determining the effect of the improper evidence on the jury and said:

> "We must focus on its probable impact upon the minds of 'an average jury.' 'Our judgment must be based upon our own reading of the record and on what seems to us to have been the

> probable impact . . . (of the inadmissible evidence) on the minds of the average jury. Harrington, supra.'" 523 F.2d at 598.

The court also compared the weight of the properly admitted evidence to that of the inadmissible evidence.

Assuming, arguendo, that the testimony regarding the appellant's declaration was improperly admitted in this case, there was still adequate evidence to convince the reasonable juror of the appellant's guilt. Apart from the challenged testimony, the State offered evidence of the paraphernalia found in the appellant's home (T. 14,15,18,21, 24,25,26,27,28) and of the amount and quality of the heroin found (T. 96, 101). The State also offered evidence of the street value of the heroin (T. 165,166), and of the appellant's and his spouse's income (T. 164,176). In addition, the State introduced testimony in regards to the difficulty of purchasing a sizeable amount of heroin in Salt Lake City, and the appellant's own witness testified that the most heroin he was able to buy at the time in question was "two spoons," (T. 135), a small quantity.

It is clear that an error purported to affect constitutional rights does not require automatic reversal. In addition, unless the trial court's determination of admissibility is shown to be clearly erroneous, the Supreme

Court should not reverse. No such showing has been made.

CONCLUSION

Because appellant was advised timely of his Miranda rights, the testimony of Deputy George (T. 35) relating the appellant's statement was properly admitted at trial. Even if the Miranda warning was not properly given, the statement is admissible as a voluntary, spontaneous declaration. If this Court finds that the statement was improperly admitted, respondent submits that in light of the other evidence presented at trial, admission of the statement does not rise to the level of reversible error.

Appellant's second claim, that the Miranda warning he received was incomplete, is without merit. There is no case law to support his contention, and he offers no evidence to show that this right to cut off questioning was not "scrupulously honored."

In light of the foregoing reasoning and authority, respondent urges this Court to affirm the decision of the trial court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent