

1979

William Chess v. Lawrence Morris : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- :
WILLIAM CHESS, :

Plaintiff-Appellant, :

-vs- :

LAWRENCE MORRIS, Warden, :
Utah State Prison, :

Defendant-Respondent. :
----- :

Case No.
16085

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE JAMES S. SAWAYA,
JUDGE, PRESIDING, DENYING APPELLANT'S
COMPLAINT FOR A WRIT OF HABEAS CORPUS

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Clark, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

WILLIAM CHESS,	:	
Petitioner-Appellant,	:	
-vs-	:	Case No. 16085
LAWRENCE MORRIS, Warden,	:	
Utah State Prison,	:	
Respondent-Appellee.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal of an action filed in the Third Judicial District Court in a habeas corpus petition in which the appellant sought release from custody of the Warden of the Utah State Prison by reason of the commitment issued by the Second Judicial District Court in and for Weber County in Criminal No. 12095-A.

DISPOSITION IN THE LOWER COURT

The appellant's petition came on for hearing on Thursday, August 17, 1978, before the Honorable James S. Sawaya who heard testimony and reviewed the trial transcript and ordered that the relief sought in the

complaint for a writ of habeas corpus be denied.

RELIEF SOUGHT ON APPEAL

The respondent seeks affirmation of the order of the Third District Court.

STATEMENT OF THE FACTS

The appellant was tried on December 16 and 17, 1976, before a jury in the Second Judicial District Court on a charge of Aggravated Robbery, a First Degree Felony. The appellant was one of two co-defendants in the case, each charged with being an accomplice. The person who admitted to robbing the gas station, Ray "Steve" Shearer, was not on trial because of a previous plea of guilty to the offense (T. 58).

The evidence, taken in the light most favorable to the State, included the fact that on the evening of September 27, 1976, shortly before 10:00 p.m., appellant and the co-defendant pulled into Star Service Station located at 2725 Wall Avenue in Ogden, Utah (T. 10). Appellant was driving and the co-defendant was sitting in the passenger's side (T. 10). The station was self-service, but the two defendants just sat in the car until the attendant, Gregg Dunn, went out to see if they needed anything (T. 10). Appellant then asked Dunn if he (Dunn) could put a dollar's worth of gas in his car for free (T. 10). Dunn responded

that he could not oblige them. Approximately 30 to 45 seconds later, one of the co-defendants pulled out a dollar and said, "Here's a dollar for some gas if you will put it in for us." (T. 11). Dunn responded by putting the gas in for them. At trial, Dunn testified that during this whole process, the two men in the car kept making conversation with him and looking nervous (T. 10). "They kept looking towards the front door [of the station]." (T. 10, 27).

After Dunn put the gas in, he returned to the station house to begin closing up. The defendants did not leave, but continued to sit there in the car (a blue Ford Galaxie, approximately a 1964 model, T. 10, 43) (T. 11). Upon returning inside, Dunn went to the back room where he was met by a man with a nylon stocking over his head and a gun. (The gun was described by Dunn as looking like a long barreled low-caliber .22) (T. 11, 12). This masked person was later determined to be Robert Shearer, who also went by the name "Steve." (T. 155). At this time, the station manager (Mike Martinez), came in to help close up, and Shearer demanded that the money in the night deposit bag be turned over (T. 12, 13). The money was given to Shearer, and he left the station; headed reportedly west down Doxey Street (T. 13). Evidence adduced at trial shows

that Shearer entered the gas station during the time Dunn was outside "waiting on" the co-defendants Chess and White (T. 60). Further testimony by Mike Martinez revealed that the defendants had been inside the station on prior occasions, knew where the money was kept, and would likely have known that only one employee works and "closes up" at night (T. 33).

Later that same night, a 1964 Galaxie fitting the description of the suspect vehicle was spotted at 30th and Wall (T. 43), at approximately 10:10 P.M. by Officer Coonradt of the Ogden City Police Department (T. 42, 43). He subsequently exited his patrol car, looked at the suspect vehicle and felt the hood. He testified that the hood was warm and the engine had therefore been operating very recently (T. 43). He then looked around the premises, noticed a black male in the upstairs apartment, and motioned him to come down (T. 43). Two men came down, at which time Officer Coonradt explained that an armed robbery had just occurred, and that the immediate vehicle matched the suspect vehicle used in the robbery (T. 44). The two men (co-defendants Chess and White) stated that the vehicle belonged to them (T. 44).

Permission was granted to search the vehicle. Found under the front seat of the car were three pair of a

woman's nylon stockings (all had been cut off), and a gray, plastic gun (T. 44, 48). Becoming more suspicious, Officer Coonradt asked permission of White and Chess to search their apartment for a white male. Acting very nervous, the co-defendants said they did not know a white male and had not seen one (T. 44). Officer Coonradt looked through their apartment, and found a holster for a long barreled revolver or pistol (T. 44). White and Chess denied any knowledge of the holster (T. 44).

Further investigation by Officer Coonradt led him to the apartment manager, who related that White and Chess had a friend named Steve, a white male with blond hair (T. 45). Further description of Steve by the manager fit the description of the armed robbery suspect (T. 45). The officer then asked White and Chess about this man, at which time they admitted that they had a friend named Steve and that the holster was his (T. 45).

Officer Coonradt asked about a room next to the co-defendants'. They said that the room was vacant, locked, and never used (T. 45). Attempting to open the door to the apartment, Officer Coonradt found it to be chained from the inside (T. 45). The door opened a few inches, at which time the officer saw what appeared to be a person in a white shirt move across the room, maybe 20 feet away (T. 46).

(The robbery suspect had been described as wearing a light colored shirt (T. 30). The officer then pushed the door open, went into the room, and noticed a large window on the east side of the home slid completely open (T. 46). He testified that the window had been closed when he first arrived a few minutes earlier (T. 46).

Following this series of events, Chess and White were asked to come to the police station for questioning (T. 35). There, White said that a guy named Steve had robbed the gas station (T. 37). White described Steve as being about 5'11", 27 or 28, having sandy brown hair, a mustache, goatee, and parting his hair down the middle (T. 37). He further stated that Steve had been planning to rob the gas station (T. 38). White also stated Steve had a .22 with a brown handle, about four to six inches long (T. 38). White stated that the guy next door to their apartment was a white friend named Steve, and that Steve had told him (Chess) that he was going to rob a place that day, and that he had a gun (T. 55).

Testimony by Ronda Knapp revealed that she not only knew Shearer, White, and Chess, but had seen them together on several occasions, particularly the night of the robbery, September 27, 1976 (T. 70, 71). She stated that

she had seen all three of them together about 7:30 p.m. at the Kokomo Lounge (T. 70, 71), and later saw them all leave together around 8:30 p.m. or 8:45 p.m. (T. 71). She further testified that she had a conversation with Shearer, Chess, and White in front of the Kokomo Lounge before they all left (T. 72). At that time, they were in Chess' car, with Chess in the driver's seat, White on the passenger's side in the front seat, and Shearer in the back seat (T. 72). Shearer asked Ronda if she had any nylons, to which she said no. She did, however, ask her friend Pat Wolfe, who in turn went inside the Lounge, took her nylons off, came back out and gave them to Shearer (T. 72)¹. Shearer, White, and Chess then left, saying that they would be back in an hour (R. 73). Ronda saw Shearer later that evening standing in front of the lounge, somewhere in the neighborhood of 10:15 p.m. (T. 72).

Following the events of September 27, Ronda Knapp did not see Shearer again until the following Thursday, again at the Kokomo Lounge (T. 73). She stated that his appearance was somewhat different, as he had cut his hair

1 Pat Wolfe corroborated this testimony. She stated that upon being asked by Ronda for her nylons, she entered the lounge, took them off, then gave them to Shearer (T. 98).

and shaved off his goatee (T. 74).² She asked him why he had cut his hair, to which he responded that he and Chess and White had robbed a gas station, and ". . . if the cops came in and asked . . . any questions, his name was Raymond and not Steve." (T. 74, 75). He also told her that he had to jump out of a second story building because the cops came down to Herbert's (White's) place (T. 75).

There were several inconsistencies in the testimony of many of the witnesses. The jury, however, apparently believing the prosecution's version of the events of September 27, 1976, as well as those events leading up to and following that night, found appellant guilty. He was later sentenced to the Utah State Prison.

At the hearing held before the Court in the habeas corpus proceeding, the appellant testified that he appeared in jail clothes at the trial held on December 16 and 17, 1976, in the Second Judicial District. He stated that he requested to appear otherwise, but was told by his counsel that it was too late to make any arrangements for other clothes.

Appellant also stated that he did not appeal his conviction based upon the fact that he received a letter

2 Ronda Knapp described Shearer's appearance the night of the robbery, September 27, as follows: "His hair was long and he was wearing a goatee and mustache . . ." "He had on a light shirt. . . ." (T. 74).

from his trial counsel which represented that if he was awarded a new trial, he may be found guilty and sentenced to a greater prison term than he was presently serving for the conviction. A copy of that letter was introduced into evidence.

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED HIS RIGHT TO APPEAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS THE RESULT OF THE REPRESENTATION CONTAINED IN THE LETTER OF HIS APPOINTED COUNSEL.

A.

THE REPRESENTATIONS MADE BY APPELLANT'S COUNSEL IN CORRESPONDENCE TO APPELLANT WERE NOT FALSE OR IMPROPER REPRESENTATIONS, AND REPRESENTED CORRECT STATEMENTS OF THE LAW AS SET FORTH BY THE UNITED STATES SUPREME COURT.

Appellant has claimed that but for improper representations of appointed counsel as set forth in a letter, he (appellant) would have pursued his statutory right to appeal. The letter to which appellant refers reads as follows:

June 6, 1977 . . . Dear Mr. Chess:
As I have discussed with you on several occasions, it is my opinion that we do not have any legal issues substantial enough to allow us to win. Furthermore, if we were to appeal and win, it would mean a new trial. If you were found guilty at a new trial, you stand a substantial chance of receiving a sentence of 5-life, rather than the 1-15 you have already been sentenced to. Therefore, I recommend that we notify the Supreme Court that you do not intend to pursue the appeal.

I would like to hear from you as soon as possible regarding your desires in this matter. If you would like to appeal your conviction, I would appreciate it if you would outline the reasons upon which you would like me to bare the appeal.

The letter was signed by Maurice Richards, trial counsel for appellant.

Appellant bases his argument, as stated in his brief at p. 4, on the fact that "If awarded a new trial, the Fourteenth Amendment would have prevented a greater punishment than he is presently receiving. . . ."

Respondent submits that in light of the United States Supreme Court decisions in North Carolina v. Pearce, 395 U.S. 711 (1969); Moon v. Maryland, 398 U.S. 319 (1970); and Chaffin v. Stynchcombe, 412 U.S. 17 (1973), that appellant's allegation that ". . . the Fourteenth Amendment would have prevented the trial court from imposing upon the appellant a greater punishment than he is presently receiving "if a new trial were granted, is totally without merit and contrary to existing Federal law.

In North Carolina v. Pearce, *supra*, the respondent was convicted of a crime and sentenced to a prison term. The original conviction was set aside in a post-conviction proceeding for constitutional error several years later. On retrial, the respondent was again convicted and sentenced. In one case, the new sentence, when added

to the time respondent had served, amounted to a longer total sentence than that originally imposed; in the other case, respondent received a longer sentence, with no credit being given for the time already served. In neither case was any justification given for imposition of the longer sentence. In holding the sentences unconstitutional, the Supreme Court specifically rejected the notion that the Fourteenth Amendment bars a harsher sentence where a retrial is granted:

We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities. *William v. New York*, 337 U.S. 241, 245.

395 U.S. at 723.

Speaking specifically in terms of the Due Process Clause of the Fourteenth Amendment, the Court said:

. . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Id. at 726.

The Court went on to state criteria upon which those reasons must be based.

In Moon v. Maryland, supra, a defendant was found guilty of armed robbery and sentenced by the judge to 12 years imprisonment. On appeal, his conviction was set aside. At a second trial for the same offense, the defendant was again convicted, but the trial judge imposed a sentence of 20 years imprisonment, less credit for time served under the original sentence. The second conviction was affirmed on appeal, and the United States Supreme Court dismissed the writ of certiorari as improvidently granted. The Court, in declaring that the guidelines in Pearce had been met in the imposition of the harsher sentence on retrial, stated that reasons for the harsher sentence include "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 398 U.S. at 321.

In Chaffin v. Stynchcombe, supra, the United States Supreme Court addressed the situation where a jury, functioning in the sentencing process, imposed a harsher sentence on retrial and conviction than had the jury on the original conviction and sentence. In Chaffin, the defendant was convicted of a felony and sentenced by the jury to 15 years in prison. On a habeas petition, a retrial was ordered because of the giving of an improper alibi instruction. Upon retrial before a different judge and jury in the state court (Georgia), the defendant was reconvicted and sentenced

by the new jury to life imprisonment. The new jury was aware of the previous trial, but unaware of the previous sentence imposed therein. In affirming the second conviction and sentence, the United States Supreme Court, speaking through Justice Powell, held that:

. . . The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prison sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be "difficult," does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction.

412 U.S. at 35.

Thus, the law is well settled that the Constitution does not prohibit the giving of a harsher sentence upon retrial and reconviction. If, on the new trial, the sentence the defendant receives from the court is greater than that imposed after the first trial, it must be explained by reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," other than his having pursued the appeal or collateral remedy. North Carolina v. Pearce, 395 U.S. at 726. On the other

hand, if the sentence is imposed by the jury and not by the court, if the jury is not aware of the original sentence, and if the second sentence is not otherwise shown to be a product of vindictiveness, a harsher sentence will stand. Chaffin v. Stynchcombe, 412 U.S. at 17.

Thus, appellant's contention that the Fourteenth Amendment precludes the trial court from imposing a greater punishment than he is presently receiving upon retrial and reconviction is unfounded. Therefore, the advice given to him by his counsel that upon retrial, a harsher sentence could be imposed, was correct in a legal sense, and not a misrepresentation of the law.

B.

THE CORRESPONDENCE TO APPELLANT
FROM HIS COUNSEL AND THE RE-
PRESENTATIONS MADE THEREIN
FURNISHED A SOUND BASIS ON WHICH
APPELLANT COULD BASE A DECISION
WHETHER OR NOT TO EXERCISE HIS
STATUTORY RIGHT TO APPEAL..

Appellant has alleged that because of the representation of his appointed counsel, he was denied his right to appeal and therefore he is being unjustly and unlawfully restrained of his liberty. He cites a few cases, which, as he says, support his theory that a ". . . defendant be freed of the apprehension of receiving

a harsher sentence after the retrial of his case and that the Due Process Clause forbids harsher sentences after re-trial." Appellant's Brief, p. 3. Respondent has already shown that appellant's theory is not the law. (See Point I-A, supra).

Appellant seemingly says that because his counsel made him aware of the realities of a possible harsher sentence if a new trial was granted and another conviction occurred, he waived his right of appeal. Such argument is without merit, as appellant's right to appeal was not "chilled." The decision to be made by appellant whether or not to appeal may have been difficult, but the Constitution does not forbid or preclude such a decision making process. As the United States Supreme Court said in Chaffin v. Stynchcombe, 412 U.S. at 32:

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which come to follow . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.
Cite omitted.

The Court, in equating some of the harsh incidental consequences of exercising the right to remain silent with exercising a right to appeal, thereby risking a greater or harsher sentence upon reconviction stated:

. . . Just as in the guilty plea cases and Crampton [forgery right to remain silent on the issue of guilt in a single trial as opposed to bifurcated trial], an incidental consequence of that practice is that it may require the accused to choose whether to accept the risk of a higher sentence or to waive his rights. We see nothing in the right to appeal or the right to attack collaterally a conviction, even where constitutional errors are claimed, which elevates those rights above the rights to jury trial and to remain silent.

Petitioner was not himself "chilled" in the exercise of his right to appeal by the possibility of a higher sentence on retrial and we doubt that the "chill factor" will after be a deterrent of any significance. . . .

412 U.S. at 32, 33.

Appellant's decision to sign a motion dismissing his appeal was based on competent advice from his attorney. The record reveals that on June 6, 1977, appellant's attorney sent him a letter (see Point I-A, supra) stating his opinion that there was no legal issue that would support a reversal. The attorney also pointed out that a victory in the Supreme Court would simply result in a new trial, with the possibility that the sentence therein would be more severe than that which the appellant was already serving. The attorney then asked appellant to express his desire as to whether or not the appeal should be made. On June 15, 1977,

the attorney spoke with appellant regarding the appeal, and on that same date sent to appellant a Motion to Dismiss, which appellant signed. That letter also discussed the attorney's continued involvement in the affairs of the petitioner in regard to another sentence he was serving at the time. This chain of correspondence indicates that the attorney was acting in appellant's interest by advising him of the options available to him and by offering to pursue the appeal if the appellant so desired. The correspondence also implies that appellant acquiesced in the Motion to Dismiss, as is evidenced by his signature on the letter. In summary, appellant made an informed decision not to appeal his conviction.

Appellant's decision not to appeal does not fall into the category of, nor is it controlled by Anders v. California, 386 U.S. 738 (1967). In Anders, the United States Supreme Court held that where the convicted party wanted to pursue a first appeal, but his attorney did not feel that there was grounds to support an appeal and desired to withdraw, that the attorney had a duty to prepare a brief discussing all potential sources of appeal and submit it along with a letter requesting withdrawal from the case and appointment of new counsel. In the case at bar, there is no indication that the appellant desired to pursue an appeal.

Furthermore, the letter of June 6, 1977, indicates that the attorney would have pursued the appeal at appellant's request.

State decisions falling within the ambit of the present factual situation sustain respondent's assertions. In Duran v. Turner, 30 Utah 2d 249, 516 P.2d 353 (1973), the Utah Supreme Court held that where a prisoner failed to request his attorney or anyone else to file an appeal on his behalf, especially where he (prisoner) had been familiar with the appeals process, there was no showing that the attorney was incompetent because of his failure to file an appeal.

In Maimona v. State, 82 N.M. 281, 480 P.2d 171 (1971), a defendant claimed that his attorney did not perfect an appeal even though he had requested him to do so. The attorney had written to the defendant and advised him of his right to appeal, but stated that he was no longer his attorney. The record in that case, as in the case at bar, did not establish that the defendant had requested his court-appointed attorney to appeal. The court in Maimona denied the defendant's request to appeal the order convicting him, and stated further, at page 174, that refusal to appeal, standing alone, could not indicate inadequacy of representation.

The Iowa Supreme Court in Blanchard v. Bennett, 167 N.W. 2d 612 (1969), was confronted with a case in which an attorney had failed to follow the statutory procedures

for appeal, causing the defendant to lose his right to appeal. In a petition for habeas corpus, the petitioner alleged incompetency of counsel for failure to perfect the appeal. At page 615, the court concluded:

From a careful review of the cases which have considered the problem, two general principles emerge: (1) failure to appeal is not generally excused by a mere showing of neglect of counsel and (2) in any event to become entitled to relief by way of collateral attack on such a claim petitioner must allege and demonstrate prejudicial error in the trial proceedings.

(emphasis added).

In conclusion then, respondent submits that appellant has not shown any error in the trial proceedings that warrants reversal. Nor has he demonstrated that he requested that an appeal be pursued. The advice received from his counsel was sound, competent, and legally correct in substance. Appellant made his decision thereon and should have to live with his exercise of judgment.

POINT II

APPELLANT WAS NOT DENIED A FAIR TRIAL
NOR HIS DUE PROCESS OF LAW BECAUSE HE
APPEARED BEFORE THE JURY IN IDENTIFIABLE
PRISON CLOTHES.

Appellant contends that his appearance in jail clothes before the jury denied him his due process of law and a fair trial. He claims to have made a request to his appointed counsel not to appear in jail clothing.

Assuming that appellant's allegations that he was tried in prison clothing and that he informed his counsel that he desired otherwise are true, he would still not be entitled to relief under the controlling cases of Estelle v. Williams, 96 S.Ct. 1691, reh. denied 96 S.Ct. 3182 (1976); State v. Archuleta, 28 Utah 2d 255, 501 P.2d 263 (1972); and State v. Fair, 28 Utah 2d 242, 501 P.2d 107 (1972).

In Estelle v. Williams, supra, a Texas defendant was tried for a crime of assault with intent to commit murder. Unable to post bond, the defendant remained in custody awaiting trial. When he learned that he was going to trial, the defendant asked an officer at the jail for his civilian clothes. This request was denied, and the defendant was tried in distinctly marked prison clothes. No objection to the clothing was raised at trial, and the

defendant was convicted and sentenced to the State Prison. The defendant then sought release by means of a federal writ of habeas corpus. The United States Supreme Court held:

. . . the failure to make an objection to the court as to being tried in such clothes [prison clothes], for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

96 S.Ct. at 1697 (emphasis added).

The Court, in discussing the requirement that an accused object to the court to being tried in prison garments, said that a defendant must invoke or abandon the right not to be tried in jail clothes, just as he would invoke or abandon any other right:

"We held [in Hernandez] that the defendant and his attorney had the burden to make known that the defendant desired to be tried in civilian clothes before the state could be accountable for his being tried in jail clothes. . . ."

96 S.Ct. at 1695.

In State v. Archuleta, supra, the Utah Supreme Court stated:

. . . Even if [the defendant were tried in jail clothes], it does not strike us that there would be anything strange, shocking or prejudicial if the jury became aware that a man who had been arrested and charged with robbery was in custody and being held in jail.

501 P.2d at 264.

In State v. Fair, supra, the Utah Supreme Court reached the conclusion that where no objection was made at trial to the defendant's presence in prison clothes, there was no error.

The facts of the instant case show no error was committed. Neither appellant nor his counsel objected to the court concerning his desire not to be tried in jail clothes. Furthermore, evidence at trial clearly revealed to members of the jury that appellant was being detained in custody for some time prior to trial (T.104,105). Thus, even without the presence of the jail clothes, the jury would have known of appellant's confinement prior to trial. As the United States Supreme Court said in Estelle v. Williams, supra, "'No prejudice can result from seeing that which is already known.'" Id. at 1694.

Respondent therefore urges that no error was committed and no prejudice resulted from the appearance of appellant in his prison clothes at trial.

POINT III

APPELLANT HAS SHOWN NO CONFLICT OF INTEREST NOR PREJUDICE FROM CONFLICT OF INTEREST AS A RESULT OF THE REPRESENTATION OF THE APPELLANT AND A WITNESS FOR THE STATE BY APPELLANT'S COUNSEL WHERE THE WITNESS' CASE HAD ALREADY BEEN DISPOSED OF PRIOR TO THE TRIAL AT WHICH APPELLANT WAS REPRESENTED BY THE SAME COUNSEL.

Appellant alleges in his brief that he was denied effective assistance of counsel because his attorney was also the attorney for Ray "Steve" Shearer, one of the prosecution's witnesses. As authority, he cites cases which deal with the representation of multiple defendants by the same attorney, under varying circumstances.

The case at bar however is distinguishable from the cases and arguments cited by appellant in that in the present case appellant's attorney was representing only one defendant during the trial. Shearer, one of the prosecution witnesses, who was also called by the defense, had been represented by appellant's attorney when he (Shearer) had pled guilty to the robbery. That case, however, had been disposed of prior to appellant's trial.

Nevertheless, case law, which appears to be the majority rule, holds that while the dual representation of a prosecution witness and a defendant places the attorney in a conflict of interest, the defendant must demonstrate that the attorney did something or failed to do something which he otherwise would have, and which resulted in actual prejudice to the defendant. Goodson v. Peyton, 351 F.2d 905 (CA 4, 1965); Porter v. United States, 298 F.2d 461 (CA 5, 1962); Bresnahan v. People, 487 P.2d 551 (Colo. 1971); and Ciarelli v. State, 441 S.W.2d 695 (Mo. 1969).

In a recent case, United States ex rel. Means v. Solem, 452 F.Supp. 1256 (D.C.S.D. 1978), the trial court refused to permit withdrawal of petitioner's counsel because of a prior attorney-client relationship between petitioner's counsel and one of the prosecution's witnesses. Petitioner alleged that his constitutional rights to effective assistance of counsel were violated by the trial court's action. His allegations were refuted by the court. In denying petitioner's claim, the Federal court cited certain factors to be considered relative to a possible conflict of interest: (1) a lawyer's pecuniary interest in future business with the client; (2) the possibility that privileged information obtained from the witness might be relevant to cross-examination. United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), cert. denied 423 U.S. 1066, 96 S.Ct. 805, 46 L.Ed.2d 656 (1975). A third consideration or factor cited by the Solem court to be considered in possible conflict cases is whether the trial transcript reveals that the defendant's attorney conducted a vigorous cross-examination. See Olshen v. McMann, 378 F.2d 993 (2d Cir. 1967), cert. denied 389 U.S. 874, 88 S.Ct. 165, 19 L.Ed.2d 157 (1967); Harrison v. United States, 387 F.2d 614 (5th Cir. 1968).

Turning to the specifics of the case at bar and applying the factors set forth by the Jeffers and Solem courts,

it becomes apparent that petitioner has failed to show any particular prejudice which may have arisen because of the alleged conflict. Regarding the first factor, respondent submits that appellant's attorney was not in a position to affect a pecuniary interest by his conduct since he was the appointed counsel for Shearer, and had no reasonable expectation of a continuing relationship.

Referring to the second factors, the use of privileged information and cross examination, the Jeffers court said:

We think the courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect. Moreover . . . it is the witness, rather than the defendant, who should object to the cross-examination by his former attorney.

520 F.2d at 1265.

In the case at bar, appellant's attorney advised the witness, Shearer, not to incriminate himself in any other matter. Thus, appellant's attorney was left free to conduct his examination on matters pertinent to the case at bar and pertinent to the defense of appellant.

The third factor to be considered is the vigor with which the witness is examined. The record (transcript) reveals that appellant's counsel conducted a vigorous examination of Shearer concerning the events of September

27, 1976, as well as all events leading up to the night of the robbery and all events subsequent thereto (T.142-146). In this respect, it is noteworthy that Shearer's testimony to the effect that he acted alone in the commission of the crime was actually exculpatory for the appellant (T.62). The transcript shows that Shearer, having pled guilty to the robbery charge, was called as a prosecution witness as well as a defense witness. The record also clearly shows that appellant's attorney was concerned only that Shearer might incriminate himself in another matter (T.58). Thus, the "door was wide open" for examination and cross-examination of Shearer by appellant's attorney regarding the robbery itself and matters incidental thereto. The record reveals that no potential conflicting situations arose.

A final factor considered important by the courts in discussing conflict of interest is the defendant's awareness of the potential conflict. Bresnahan, supra; State v. Johnson, 549 S.W.2d 348 (Mo. 1977). There is nothing contained in the record to show that the appellant was actually aware of the potential conflict, but it is significant that the appellant, his co-defendant, and Shearer were housed in the same cell in the Weber County Jail

for some time prior to the trial (T.189). It is unreasonable to assume that the appellant was not aware that his attorney also had represented Shearer, and that Shearer would be called as a witness. At no time prior to, or during the course of the trial, did the appellant object to this potential conflict.

Appellant's claim of ineffective assistance of counsel due to potential conflict of interest is unsubstantiated by the record in this case. Appellant has the burden to persuade the court that his counsel failed in some manner to represent his interests, resulting in prejudice to his defense. State v. Forsyth, 560 P.2d 337 (Utah 1977). There is no evidence that appellant's attorney failed to do something he should have done or that he was in any way hampered in his defense of appellant.

The standard for effective assistance of counsel in Utah was clearly stated in Andreason v. Turner, 27 Utah 2d 182, 493 P.2d 1278 (1972):

The accused is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify with the interests of the defendant and present such defenses that are available to him under the law and consistent with the ethics of the profession.

493 P.2d at 279.

The appellant has the burden of proving that the representation he received was only a sham or pretense. Andreason, supra. The record in the case at bar will not support such a burden.

POINT IV

THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT THE VERDICT AND THE ERRORS COMPLAINED OF BY APPELLANT WERE IN FACT NOT ERRORS IN ANY LEGAL CONNOTATION.

Appellant has listed several alleged points of error in Point IV of his brief, which, he says, when cumulatively viewed, call for reversal. Examination of these allegations reveals no support for such a claim.

First, appellant claims that the evidence does not support the verdict. The record of course must be reviewed in the light favorable to the judgment and under the assumption that the trier of fact believed the evidence which supports the verdict. State v. Mecham, 23 Utah 2d 18, 456 P.2d 156 (1969); State v. King, 564 P.2d 767 (Utah 1977). When this is done, the evidence presented clearly supports the verdict of the jury.

There is no dispute over the fact that the appellant and the co-defendant were present at the gas station immediately prior to the robbery (T.10). After receiving a dollar's worth of gas, they remained at the station in the car, instead of driving off as most customers

do following completion of their purchase (T.10,11).³
Upon re-entering the station, the attendant, Greg Dunn,
was robbed by a white male wearing a light shirt (T.30),
later determined to be Ray "Steve" Shearer (T.11-13).

Later that night, appellant and his co-defendant
were confronted at the co-defendant's apartment. There,
the car which they had been driving was searched. In
it were found women's nylon stockings which had been
cut off, very similar to the type stocking used as a
mask by Shearer in the robbery earlier that night (T.44,48).
A subsequent investigation of the co-defendant's apartment
rendered a holster made for a long barrelled revolver or
pistol (T.44).⁴ The investigating officer then inquired
of the apartment manager if the appellant and co-defendant
had a white male friend. The apartment manager responded
that they indeed had a friend named "Steve," with blond
hair, who was a white male. Further description of this
man by the apartment manager fit the description of
the armed robbery suspect (T.45).

3 Greg Dunn testified that the appellant and his companion
acted "very nervous," and kept looking toward the front
of the station during this period of time (T.10,27).

4 The gun used in the robbery was described as being a
long barrelled low caliber .22 (T.11,12).

Following this encounter, evidence reveals that the officer went back upstairs to a room located next to co-defendant White's room. Upon trying to enter, the officer found the door chained from the inside (T.45). He opened the door a few inches and saw what appeared to be a person in a white shirt moving across the room (T.46). The door was then pushed open, at which time the officer noticed a large window, which minutes before was closed, now open (T.46).

Appellant and his co-defendant were then asked to come to the police station, where the co-defendant White said that guy named "Steve" robbed the gas station. He gave a description of this person, and related that he (Steve) had been planning to rob the gas station (T.35-38). White stated that Steve had a .22 caliber, about 4 to 6 inches long (T.38). The appellant stated that the guy in the room next to his apartment was a white friend named Steve, who had a gun, and who had told him (appellant) that he was going to rob a place that day (T.55).

Testimony by Ronda Knapp revealed that she had seen Shearer, White and the appellant together prior to the time of the robbery the same night of the robbery (T.70,71). They were at the Kokomo Lounge. She stated that she saw them all leave the lounge together at

approximately 8:45 p.m., which was about an hour and fifteen minutes prior to the robbery (T.71). She also revealed that she had a conversation with Shearer, White, and appellant before they left, at which time Shearer asked her for a pair of nylons (T.72). The nylons were supplied by Pat Wolfe, a friend of Ronda Knapp's (T.72, 98). This occurred while the appellant, Shearer, and White were sitting in appellant's car, the same car which was described as being used in the robbery (T.72,43-44).

Several days later, Ronda Knapp saw Shearer again, at which time she noticed that he had cut his hair and shaved his goatee (T.74). Upon inquiring as to why he had cut his hair, Shearer responded that he, appellant, and White had robbed a gas station, and ". . . if the cops came in and asked . . . any questions his name was Raymond and not Steve." (T.74,75). He also related that he had jumped out of a second story building because the cops came down to Herbert's (White's) place (T.75).

There were inconsistencies in the testimony, but apparently the jury in exercising their function, chose to believe that version of the testimony which supported the prosecution's theory. As such, this Court should not now disturb the verdict as being unsupported by the evidence.

Second, appellant complains that the trial court erred in allowing the statements made by him after the robbery into evidence without any showing of the Miranda warning (T.35). Respondent submits that the statements made by appellant to the police prior to his arrest were properly admitted at trial.

The appellant was identified by the victim of the robbery as having been at the station at or near the time the principal, Shearer, entered the station. Within minutes after the crime, the police located the car that appellant had been driving at the gas station. The police also located the appellant (T.43). Because the appellant and his companion, the co-defendant at trial, seemed to know a great deal about the robbery, they were brought down to the police station and interviewed (T.35). At that time appellant and the co-defendant made separate statements. The transcript indicates that they were interviewed separately (T.46).

In State v. Masato Karumai, 101 Utah 592, 602, 126 P.2d 1047, 1052 (1942), the Utah Supreme Court defined admission and confession:

A confession is an admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime.

Only the most strained reading of appellant's statement could construe it as a confession. The statement made by appellant indicates only that he was at the station at about the time it was robbed. The balance is directed toward his knowledge of a third party named Steve Hadley. There was no discussion at the trial as to whether the statement was an admission or confession, and in fact, it was appellant's attorney who offered the statement into evidence (T.163) because of his belief that the statements were exculpatory (T.238). At no time during the trial did appellant object to the admission into evidence of the statements.

The statement that appellant now complains of was voluntarily given. Assuming, arguendo, that it was not voluntarily given, it must be treated as an admission under the definition in Karumai. The Utah Supreme Court stated in Karumai at 126 P.2d 1052:

. . . The great weight of authority and the better reasoned cases hold that before receiving an admission--as distinguished from a confession--in evidence, it is not necessary that a preliminary showing be made to the effect that the statement was voluntary.

This holding was followed in State v. Hymas, 102 Utah 371, 131 P.2d 791, 793 (1942). Therefore, since the statement

was at least an admission, it is admissible without regard to whether it was voluntarily given.

Appellant asserts that his statement was made without him being advised of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1965). In that case, the Court directed its remarks to statements obtained through interrogation. At 384 U.S. 484, the Court said:

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. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Since Miranda, the Escobedo v. Illinois, 378 U.S. 478 (1964) "focus of the investigation" test has been replaced by the "in custody interrogation" test. State v. Bainch, 109 Ariz. 77, 505 P.2d 248 (1973).

In the case at bar, appellant was asked to accompany the police officers to the police station. Officer Coonradt

testified that at the time he considered the appellant to be a suspect (T.46), but the suspect was not under arrest at the time; nor was there any evidence that he objected to going to the police station. The fact that the appellant was not under arrest at the time is not dispositive of the issue, United States v. Pearce, 397 F.2d 128 (CA 4, 1968); however, it does reflect on the total situation and the appellant's reasonable belief that he was or was not "in custody." After the appellant was interviewed, he was free to go, and he did so. There is no evidence that he was "in custody" at the time the statement was voluntarily given.

The United States Supreme Court, in a recent decision Oregon v. Mathiason, 429 U.S. 492 (1977), discussed Miranda and the "in custody" doctrine. In Mathiason, supra, the defendant was asked to come down to the state patrol office, which he voluntarily did. The officer advised Mathiason that he was a suspect in a burglary but that he was not under arrest, and then falsely stated that Mathiason's fingerprints had been found at the scene of the burglary. The defendant, without being advised of his rights, admitted the burglary. The officer was allowed to testify as to this statement at trial. After the admission, the officer advised the defendant of his rights and took a taped conversation. The Oregon Supreme Court held (549 P.2d 673), that the

interrogation took place in a coercive environment and that the testimony relating to the conversation prior to the giving of the Miranda warning was not admissible. The Supreme Court reversed the decision and discussed the "custodial interrogation" theory at 429 U.S. 495:

In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview respondent did in fact leave the police station. Without hindrance, it is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

In summary, the Supreme Court held in Mathiason that police station interrogations of a defendant are not inherently coercive, thus requiring Miranda warnings.

Numerous state court decisions have discussed the "in custody" theory. In the California case of

People v. Morse, 452 P.2d 607 (1969), at 613, the court stated:

We have also made it clear on a number of occasions that any determination as to whether or not a process of interrogations was undertaken must rest upon an objective test according to which we "analyze the total situation which envelopes the questioning by considering such factors as the length of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." (People v. Stewart (1965) 62 Cal.2d 571, 579, 43 Cal.Rptr. 201, 206, 400 P.2d 97, 102, affd. sub. non. California v. Stewart (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.)

The Arizona Supreme Court stated its test for custodial interrogation in State v. Halton, 116 Ariz. 142, 568 P.2d 1040 (1977), as being "would a reasonable man feel that he was deprived of his freedom of action in any significant way."

In summary, there are several factors which indicate that a Miranda warning was not necessary under the circumstances: (1) even though the appellant was a suspect he was not "in custody" at the time he voluntarily made the statement, (2) the appellant went to the station house voluntarily, and was allowed to leave after answering questions, and (3) the statement was not obtained in a coercive manner.

At the trial, no objection was made to the introduction of the statement, or to the testimony of the officer who took the statement. Apparently the appellant himself did not view the statement to have been taken in violation of his constitutional rights because he did not object to its admission, nor does it appear that he viewed it as grounds for appeal at the time he was asked by his attorney, Mr. Richards, to identify potential issues for appeal.

Even if, arguendo, the statement was improperly admitted into evidence, Rule 4, Utah Rules of Evidence, is dispositive of the issue:

RULE 4 EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE. A verdict or finding shall not be set aside, nor shall judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (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. However, the court in its discretion and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated.

There was no objection at trial to the evidence, and in view of the emphasis given the statement by the defense attorney as being exculpatory, it cannot be argued

that the statement had any substantial influence in bringing about the guilty verdict. Appellant's complaint that the trial court erred in admitting his statement is therefore not well founded.

Appellant's third complaint alleges that the prosecutor asked a series of four leading questions "designed to elicit conclusions which the witness did not have the ability to draw from his personal observations." Appellant's brief, p. 9. The colloquy went as follows:

(Prosecutor) Q. Mike, inasmuch as the defendants are familiar with the station, do you know if they have ever been inside the station?

(Witness) A. Yes, they have.

(Prosecutor) Q. Would they know where the back room is?

(Witness) A. Sure.

(Prosecutor) Q.. I assume they would know where the money was kept?

(Witness) A. Yes, I imagine they would.

(Prosecutor) Q. Would they likely know that only one employee works at night and closes up?

(Witness) A. Yes.

(T.33).

Appellant alleges that the foregoing line of questioning violated Rules 19 and 56 of the Utah Rules of Evidence.

There is no foundation in appellant's claim.

Examination of the record reveals that the questions were

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Martinez was the station manager of the station robbed. He testified on direct examination that he knew appellant and his companion, co-defendant White (T.29). He also testified that they (appellant and co-defendant) had come into the station to get gas, cigarettes, coke, etc., on many occasions (T.29). On cross-examination by appellant's attorney, Martinez was asked if the co-defendants were good customers, thereby implying that they frequented the station on more than one occasion (T.31). He replied that "They came in all the time, yes, sir." (T.31). Thus, the questions asked on redirect examination were not leading at all, but in further search of the area opened up by appellant's counsel on cross-examination. The area of questioning had also been explored on direct examination, thereby establishing a foundation (T.29).

Appellant's argument that the questions are a violation of Rules 19 and 56 of the Utah Rules of Evidence is without merit. Rule 19 deals with prerequisites of knowledge and experience of witnesses as establishing a basis for testimony on relevant or material matters. The applicable portion to this case reads:

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof. . . .

Rule 56, as applicable to this case, reads in part:

(1) If the witness is not testifying as an expert his testimony in the form of opinion or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue. . . .

Clearly, the questions asked and the answers given were based upon the personal observation; personal knowledge and perception of the witness, Mike Martinez (T.29-33), thus precluding a violation of the rules.

Furthermore, assuming, arguendo, that the questions should not have been permitted, these admissions would have been harmless error under Rule 4 of the Utah Rules of Evidence, since they would not ". . . probably had a substantial influence in bringing about the verdict. . . ." In addition, appellant's counsel made no objection to the testimony at the time, thus himself not complying with Rule 4(a) of the Utah Rules of Evidence. Appellant's argument is therefore without merit.

Appellant's fourth allegation of error concerns the search of the apartment. He states in his brief at pages 9 and 10 that "There also exists a substantial question as to whether the search of the appellant's premises was constitutional error. . . ." Respondent initially would point out that the premises searched did not

belong to appellant. Only co-defendant White lived on the premises searched (T.176). Secondly, nothing was found on the premises of an incriminating nature, with the possible exception of the holster. Even excluding the admission of the holster, the verdict would not be affected, nor would there be any likelihood thereof. Finally, appellant has never challenged the search up until this point in time (it is still highly questionable whether he is presently doing so), and has no standing to challenge the search, since he did not reside there.

Appellant's final point of contention alleges that the testimony of the Weber County jailer that appellant and co-defendant were inmates at the jail and were housed in the same area as the witness, Steve Shearer, was unduly prejudicial and was not relevant to any issue in the trial. It is obvious that the reason for calling the jailer to the stand was to make it known that the codefendants and the admitted robber, Shearer, being housed in the same area of the jail, had ample opportunity to converse with each other prior to trial, thereby enhancing the possibility of "corroborating" their stories and testimony as to what they would say at the trial (T.103-106). This goes to the credibility of the co-defendants and Shearer, the admitted robber and a twice convicted felon.

The mentioning of appellant's incarceration would be totally harmless due to the fact that appellant was dressed in prison or jail clothing, thereby making it known to the jury that he was presently incarcerated, notwithstanding the testimony of the jailer. Thereby, no error or harm resulted.

CONCLUSION

Respondent submits that none of the issues raised are of sufficient merit to support a claim of prejudice or to have denied appellant a fair trial on the merits. Judge Sawaya found no merit in appellant's allegations, and respondent respectfully requests this Honorable Court to so affirm his findings.

Respectfully submitted,

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