

1979

State of Utah v. Clinton Roberts : 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.

Shelden R. Carter; Attorney for Appellant;

Robert B. Hansen; William W. Barnett; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *State of Utah v. Roberts*, No. 16098 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1454

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.

Group Name Address Zip Phone Email Website Notes

2

2

2

2

2

2

1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100
1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	

Attorneys for Respondent

Attorney for Appellant

FILED

1979

TABLE OF CONTENTS

PAGE

STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF THE FACTS -----	2
ARGUMENT	
POINT I: UTAH CODE ANN. § 78-24-9 (1953), IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT ---	3
A: STANDARD OF REVIEW -----	7
B: APPLICATION IN THE PRESENT CASE -----	8
POINT II: THE DECISION TO FURNISH A DEFENDANT WITH A COPY OF THE PRESENTENCE REPORT RESTS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT; APPELLANT'S RIGHTS TO COUNSEL AND CON- FRONTATION OF WITNESSES WERE NOT DENIED SINCE THIS DIS- CRETION WAS NOT ABUSED -----	11
CONCLUSION -----	14

CASES CITED

Greaves v. State, 528 P.2d 805 (Utah 1974) -----	7,8
Krause v. Sacramento, 479 F.2d 988 (CA. 9th, 1973) -----	6
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911) -----	8
Reddish v. Smith, 576 P.2d 859 (1978) -----	13
State v. Bennett, 517 P.2d 1029 (1973) -----	11
State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1971) -----	12
State v. Duran, 522 P.2d 1374 (1974) -----	11

TABLE OF CONTENTS (Continued)

	PAGE
State v. Harless, 23 Utah 2d 128, 459 P.2d 210 (1969) -----	10
State v. Harris, 585 P.2d 450 (1978) -----	12
State v. Kazda, 14 Utah 2d 263, 382 P.2d 407 (1963) -----	8,9
State v. Mora, 558 P.2d 1335 (1977) -----	11

STATUTES CITED

Utah Code Ann. § 41-61-12 (1953, as amended) -----	7
Utah Code Ann. § 76-6-501 (1953, as amended) -----	1,3
Utah Code Ann. § 77-35-13 (1953, as amended) -----	12
Utah Code Ann. § 77-44-5 (1953, as amended) -----	9
Utah Code Ann. § 78-24-9 (1953, as amended) -----	3-5,8,10,11

OTHER AUTHORITIES CITED

United States Constitution, Amendment XIV -----	4
Rule 55, Utah Rules of Evidence -----	5
Wigmore, I Wigmore on Evidence § 194a -----	4

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CLINTON ROBERTS,

Defendant-Appellant.

Case No.
16098

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with forgery, a felony of the second degree, in violation of Utah Code Ann. § 76-6-501 (1953).

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted before a jury of uttering, with purpose to defraud, a bank check in the amount of \$331.14 purporting to bear the signature of David Farmer, in the District Court of the Fourth Judicial District, in and for Utah County, Utah, the Honorable George E. Ballif, presiding. Appellant was sentenced to confinement in the Utah State Prison for a period of not less than one nor more than fifteen years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the conviction and judgment entered against the appellant in the lower court. In addition, respondent seeks a decision from this Court upholding the sentencing procedure used below.

STATEMENT OF FACTS

On March 24, 1978, appellant entered Bullock's Billiards, 190 West Center, Provo, Utah, with two other men, Ned Lynn Topham and Terry Moore (T.26,40). Appellant had obtained a check drawn on the account of the All-Weather Insulation Company from Terry Moore (T.28), who had previously been an employee of All-Weather (T.23). Upon entering Bullock's Billiards, appellant told Mr. Mortenson, an employee of Bullock's, that he was Glen Reynolds (T.11). Appellant endorsed a check for \$331.14 payable to Glen Reynolds and Mortenson gave him \$100.00 (T.11). The remaining \$231.14 was received by Terry Moore on March 27, 1978 (T.12), for the appellant.

At trial, the appellant chose to take the witness stand. On cross-examination, he was asked whether he had previously been convicted of a felony (T.48). The appellant answered in the affirmative, stating that the offense was for insufficient fund checks (T.48). No objection to this

line of questioning was made. Appellant now contends that the questioning (expressly authorized by Utah Code Ann. § 78-24-9 (1953)) denied him equal protection of the law.

The jury found the appellant guilty of violating Utah Code Ann. § 76-6-501 (1953) (T.75), and counsel for appellant requested that a presentence report be compiled (T.77). This request was granted and imposition of sentence was set for September 8, 1978 (T.78). This date was later changed to September 15, 1978 (R.15).

ARGUMENT

POINT I

UTAH CODE ANN. § 78-24-9 (1953), AS AMENDED,
IS NOT VIOLATIVE OF THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant asserts that Utah Code Ann. § 78-24-9 (1953), as amended, which allows the prosecution on cross-examination to ask a witness if he has previously been convicted of a felony, creates an invidious discrimination against him, depriving him of equal protection of the laws because the admission of this evidence "minimizes his opportunity for a fair trial upon the relevant issues as compared to a defendant not yet having been convicted of a previous felony." (Appellant's Brief, p. 8.) Appellant also alleges that Section 78-24-9 is not supported by any rational basis for differentiation.

The appellant bases his argument on Amendment XIV of the United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The concept embodied in Section 78-24-9, which the appellant attacks, is a time-honored rule dating back to 1898. The English Criminal Evidence Act of 1898 removed the accused's incompetence to testify and enabled an accused's record of prior convictions to get before a jury under certain conditions.¹

The United States first adopted the rule in 1911 when a Pennsylvania Statute closely followed the provisions of the English Act.² Since that time, the general rule with regard to prior convictions has been that such evidence is admissible to show intent, motive, plan, etc., character of the witness, and credibility of the witness.

Appellant's contentions are without merit for several reasons. First, the appellant is barred from raising

1 Wigmore, I Wigmore on Evidence § 194a, pp. 652-659.

2 Ibid., p. 657.

an equal protection argument since he failed to assert such argument in the lower court. Appellant's counsel failed to object and is now raising the issue for the first time.

In the instant case, witness Roberts was asked whether he had previously been convicted, the date of the conviction, and the nature of the conviction (T.48). The failure of the defense attorney to object could have been trial strategy; perhaps he did not want to stress the fact and felt it was unnecessary to object. In any event, if he failed to voice objection he cannot raise the issue for review on appeal. Further, Utah Code Ann. § 78-24-9 (1953), as amended, provides that "a witness must answer as to the fact of his previous conviction of felony," and thus the prosecution had the right, sanctioned by statute, to adduce evidence of appellant's prior felony convictions once appellant took the stand; therefore, appellant's contention is without merit. The evidence of prior conviction could have been admitted to show intent, knowledge, or absence of mistake or accident. Rule 55, Utah Rules of Evidence. In addition, the evidence of prior conviction could have been introduced to impeach appellant's credibility once he had taken the stand.

Appellant, however, contends that this situation constitutes an exception to the rule of practice which provides that an issue cannot be raised for the first time on appeal. In Krause v. Sacramento, 479 F.2d 988 (1973), relied on by appellant, the Ninth Circuit agreed to hear an equal protection argument not raised in the Federal District Court and said:

Relaxation of this rule is sometimes appropriate in appeals wherein there are significant questions of general impact or when injustice might otherwise result.

Id. at 989.

The comments adduced by the prosecutor in the instant case were elicited during fundamental foundation questions to the State's witness; they were not emphasized nor highlighted by further testimony and, therefore, are not prejudicial to appellant. The rationale of Krause, therefore, is inapplicable.

In making a determination of the constitutionality of statutes, the duty rests upon the courts to determine the scope of the powers of all three branches of government and they must exercise a high degree of restraint to keep themselves from infringing upon the prerogatives of the executive or the legislative branches. It is, therefore, a well established rule that legislative enactments carry

a "strong presumption of validity" and "should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework." Greaves v. State, 528 P.2d 805, 807 (Utah 1974).

The Court in Greaves upheld the constitutionality of Utah Code Ann. § 41-61-12 (1953), as amended, as legislation reasonably related to a valid state interest and stated further that a statute would not be stricken down as being unconstitutional unless it appeared to be unconstitutional beyond a reasonable doubt. Respondent submits that the appellant has not shown that Section 78-24-9 is unconstitutional beyond a reasonable doubt.

A. STANDARD OF REVIEW

As noted above, the respondent contends that there is no "classification" on which to base an equal protection argument. Assuming, arguendo, that the statute in question does set up a scheme of classification, an appropriate standard of review must be chosen. In assessing the constitutionality of a statute on a denial of equal protection theory, two tests have traditionally been applied.

One test requires that a compelling state interest be the purpose behind the statute. This test is applied when one of the following suspect classifications is involved: race, alienage, wealth, indigency and illegitimacy.

In ordinary cases, like the instant one, the reviewing court will apply the rule that differential treatment is valid providing there is a reasonable basis for the classification. Courts have recognized a presumption which operates in favor of the reasonableness of legislative classifications. If any state of facts can reasonably be conceived that would justify the classification, the existence of those facts will be assumed by the court to be the basis for the classification in order to uphold the legislation. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Greaves v. State, 528 P.2d 805 (Utah 1974).

B. APPLICATION IN THE PRESENT CASE

Utah Code Ann. § 78-24-9 (1953), as amended, serves a legitimate purpose. This purpose was outlined in State v. Kazda, 14 Utah 2d 263, 382 P.2d 407 (1963), when this Court stated:

The apparent purpose and reason for permitting the prosecution to question the accused regarding prior felony convictions is to affect his credibility as a witness. However, the details or circumstances surrounding the felony or felonies for which the accused was convicted may not be inquired into except under unusual circumstances, when the inquiry would tend to show a scheme, plan, modus operandi, or the like. In the instant case the details of the prior felony conviction were not asked of the defendant.

Id. at 409.

In Kazda, the defendant appealed from a conviction of assault with intent to commit murder and robbery and assigned as error the fact that on cross-examination, it was elicited that he had several prior felony convictions, unrelated to the instant charge, and that the admission of the evidence amounted to a general assault upon his character constituting prejudicial error. This Court found the appellant's argument to be without merit stating that when a defendant voluntarily takes the witness stand he may be asked whether or not he has ever been convicted of a felony and this question is sanctioned by the statute. Kazda at 409. The rational basis of the statute, therefore, is to test the credibility of the defendant as a witness the same as would be done for any other witness. Utah Code Ann. § 77-44-5 (1953), states: "If a defendant offers himself as a witness, he may be cross-examined by the counsel for the

state the same as any other witness. . . ." Utah Code Ann. § 78-24-9 (1953), as amended, states:

A witness must answer questions legal and pertinent to the matter in issue, . . . [including] a witness must answer as to the fact of his previous conviction of felony.

State v. Harless, 23 Utah 2d 128, 459 P.2d 210 (1969).

This Court in Harless described the state interest involved here:

That this type of interrogation (asking a defendant if he had been convicted of a felony) is generally allowed derives from the idea that there is a basis in reason and experience why one may place more credence in the testimony of one who has lived within the rules of society and the discipline of the law than in that of one who has demonstrated antisocial tendency as to be involved in and convicted of serious crime.

The Court went on to say:

. . . it seems hardly fair to suppress such facts and let him (the defendant) testify with the same credit as one who has led a more blameless life. The exposure of the felony record of an accused of course does not mean that his testimony is necessarily to be entirely disbelieved or discredited, but inasmuch as it is the responsibility of the jury to judge the credibility of the witnesses, it is deemed to be something which they are entitled to know so they can take it into consideration with all the other facts and circumstances in determining what they will believe.

Id. at 211 (emphasis added).

More recent Utah cases have similarly upheld the use of Section 78-24-9. State v. Bennett, 517 P.2d 1029 (1973), State v. Duran, 522 P.2d 1374 (1974), and State v. Mora, 558 P.2d 1335 (1977).

Utah Code Ann. § 78-24-9 (1953), as amended, therefore, is constitutional. It has a rational basis in that it serves as a means of testing the credibility of a witness. In addition, it serves a legitimate state interest in supplying the court and the jury with information which is helpful to them in determining what they will and will not believe.

POINT II

THE DECISION TO FURNISH A DEFENDANT WITH A COPY OF THE PRESENTENCE REPORT RESTS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT; APPELLANT'S RIGHTS TO COUNSEL AND CONFRONTATION OF WITNESSES WERE NOT DENIED SINCE THIS DISCRETION WAS NOT ABUSED.

Appellant contends that the unavailability of a copy of the presentence report and the fact that the court, in making its decision not to place him on probation relied on information in that report, effectively denied the appellant of his rights to counsel and to confrontation of the witnesses. Appellant claims that his right to confrontation of the witnesses was denied because Utah

Code Ann. § 77-35-13 (1953), as amended, states that circumstances in aggravation and mitigation of the punishment to be imposed must be presented by the testimony of witnesses in open court. This contention is without merit.

This Court has consistently held that the decision to furnish a defendant with a copy of the presentence report rests within the sound discretion of the trial court. In the case of State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1971), the defendant sought reversal of her sentence on the sole ground that the court failed to allow the defense to inspect the presentence report. This Court held:

In order that there be no doubt as to what we believe to be the proper rule, it is the opinion of this court that it be left to the sound discretion of the trial court to determine whether or not the contents of the presentence investigation report should be furnished to the defendant.

Id. at 529.

This statement of the law was reaffirmed in State v. Harris, 585 P.2d 450 (1978), where the appellant claimed that the court committed reversible error by not disclosing the contents of the presentence report to the defendant and his counsel. Once again, this Court stated that whether the presentence report should be furnished to the defendant is something which rests within the sound discretion of the trial court.

In another recent case, Reddish v. Smith, 576 P.2d 859 (1978), the defendant requested a presentence report. The Court received the report but did not make it available to the defendant. The defendant was sentenced to the Utah State Prison. On appeal, the appellant claimed that the report contained false information and that he was denied an opportunity to rebut such information. There was no claim that the appellant was being held under an improper sentence. This Court held that while "the discretion of the court would permit it to indicate to defendant's counsel the nature of the statements made and then permit the defendant to offer evidence on the matter," there was no obligation to permit inspection of the presentence report.

It should be noted that there were two dissents in the Reddish case, due largely to the fact that the defendant claimed that the presentence report was inaccurate and that he should have had the opportunity to determine if the court had relied on the alleged inaccuracies in assessing the sentence. In the present case, however, no claim of inaccuracy has been made. In addition, the lower court specifically stated that it was relying on the defendant's past record in denying probation. The appellant's counsel was asked to verify that information:

THE COURT: . . . But probation isn't indicated in Mr. Robert's case. His record is too long. He has been in trouble too much.

THE COURT: He has had probation revoked twice and he has had parole revoked twice. That's right, isn't it?

Appellant's brief, p. 23.

The court, therefore, did not abuse its discretion by relying on the information contained in the presentence report to assess the sentence and to deny inspection of the report.

CONCLUSION

The history of equal protection is indicative of the court's unfledgling resolve to ensure equality of treatment before the law. Respondent, however, submits that the equal protection doctrine was never intended to protect defendants from treatment accorded to all witnesses. Appellant has, as do all defendants, the right to refrain from taking the witness stand. Once he makes the decision to testify, he becomes a witness, subject to examination to test his credibility as any witness. Moreover, appellant failed to raise his equal protection claim to the court below and failed to object to the questioning he now complains of. Thus, he has waived the right to raise the issue for the first time on appeal.

The trial court did not abuse its discretion by denying appellant's request to see the presentence report. The appellant was aware of those facts relied on by the court in denying probation and failed to provide evidence that the information was inaccurate.

On the basis of the above authority and the evidence at trial, respondent asserts that the judgment of the lower court was proper and prays that the verdict and sentence be affirmed.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent