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State of Utah v. Milda Hopkins Ashdown : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

MILDA HOPKINS ASHDOWN,

Appellant.

} Case No.
8456

BRIEF OF RESPONDENT

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In the Supreme Court of the State of Utah

STATE OF UTAH,

vs.

MILDA HOPKINS ASHDOWN,

Respondent,

Appellant.

} Case No.
8456

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Milda Hopkins Ashdown, at Cedar City, Iron County, Utah, on the 5th day of July A. D., 1955, murdered her husband, Ray Ashdown, by administering to him strychnine poison; was charged with murder in the first degree and found guilty by a jury of her peers who recommended life imprisonment as punishment and not the death sentence.

The Fifth Judicial District Court, Honorable Will L. Hoyt, Judge, imposed sentence in accordance with the verdict and the recommendation of the jury.

Through counsel, defendant prosecutes this appeal.

STATEMENT OF FACTS

We shall adopt the appellant's Statement of the Facts but for the purpose of continuity in the presentation of respondent's argument and authorities, the facts will be further and more fully developed under the points hereinafter set forth.

STATEMENT OF POINTS

POINT I

THE LAW AND THE EVIDENCE SUPPORT THE VERDICT.

POINT II

THERE WAS NO COERCION, DURESS OR PROMISE OF IMMUNITY MADE TO THE DEFENDANT NOR WAS THERE A VIOLATION OF ANY CONSTITUTIONAL RIGHT OF THE DEFENDANT AND THE COURT WAS CORRECT IN SO FINDING.

POINT III

THE DEFENDANT'S STATEMENTS TO THE OFFICERS PRIOR TO HER ARREST AND PRIOR TO HER REQUEST FOR COUNSEL WERE PROPERLY ADMITTED IN EVIDENCE.

POINT IV

THE COURT DID NOT ERR IN THE GIVING OF INSTRUCTION NO. 6.

ARGUMENT

POINT I

THE LAW AND THE EVIDENCE SUPPORT
THE VERDICT.

It is the appellant's contention that:—

“Aside from the oral admissions made by the defendant during the questioning by the officers, there was no other evidence in the record connecting the defendant with the crime.”

The State thinks otherwise.

Dr. R. G. Williams testified to the following conversation had with Ray Ashdown just before the said Ray Ashdown died:

“* * * And I said: ‘Ray have you taken anything poison?’ And he said ‘No.’ I said: ‘Have you eaten anything spoiled?’ He said ‘No.’ I said: ‘Were you well this morning when you got up?’ He said: ‘Yes.’ I said: ‘When did you get sick?’ And he said: ‘A little while ago.’ I said: ‘Haven’t you drunk anything or eaten anything?’ He said: ‘I had some lemonade about half hour ago.’”

* * * * *

“* * * He said: ‘I had some lemon juice about a half hour ago.’ And I said: ‘How did it taste, Ray?’ And he started into another convulsion, and he said, ‘Doc, it tasted bitter’” (R. 23).

The defendant had told the witness Gloria Jean Barnhurst that her husband hadn't felt well since his breakfast (R. 18).

We would contend that the defendant in fact knew that her husband had taken, internally, strychnine; other-

wise, why did she administer to him two or three glasses of salt water in the hope that it would act as an emetic (R. 29). The State conclusively proved that the stomach of Ray Ashdown and the contents thereof contained strychnine, (R. 47) of an “appreciable” amount (R. 54). Mrs. Ashdown told Sheriff Nelson, freely and voluntarily on the day of the murder and before the interrogation of which defendant now complains, that she gave her husband a *cup* of lemond juice (R. 70) ; that was the aluminum cup with a red ring around the top of it which was:

“* * * setting on the top of the rest of the dishes turned upside down.

“Q. Tell us whether or not the dishes had been washed, Mr. Nelson.

“A. I didn’t think they had.

“Q. In relation to this cup you spoke about, had it been washed?

“A. Yes, the cup was clean” (R. 68).

We would claim for this cup and its cleansed condition something more than a mere coincidence; we would claim that the washing of the cup, when done, in and of itself, was sufficient to cast a grave suspicion upon the defendant.

On July 9th, during the questioning of the defendant, at the start thereof and before any confession, Mrs. Ashdown related the facts about the cup, saying:

“Q. And after that, sheriff, who spoke and what was said?

“A. I believe that we asked her—I don’t know whether I asked her or someone else at that time, I

believe it was me though that asked her—if Ray drank all of the lemon juice that was in the cup.

“Q. And what was the answer?

“A. She said no, he didn’t drink it all. And I asked her what became of what was left. And she said that she threw the lemon juice out of the back door?

“Q. Did she tell you what she did with the cup after she threw the lemon juice out of the back door?

“A. Yes. She said that she washed the cup and set it on top of the dish pan.

“Q. Did she tell you when in relation to the death of Ray Ashdown she threw the lemon juice out the back door and washed the cup?

“A. I asked her when she washed the cup.

“Q. And what was the answer?

“A. I asked her. She said ‘I washed the cup after I had made the second telephone call.’ I said to her, I said ‘Well, that sounds pretty funny, Mrs. Ashdown, that you would stop and wash a cup while your husband was taking convulsions.’ I says ‘Can you tell us the reason for that?’ She says, ‘No, I can’t.’ A little later on she says ‘I guess I was excited’ ” (R. 75, 76).

On the 27th day of July, 1955, at the defendant’s arraignment, when entering her plea of not guilty, the defendant said:

“I am not guilty, not guilty. I didn’t mean to do it” (R. 102).

The court ruled this last statement inadmissible as evidence against the defendant and the statement was not offered as evidence in the presence of the jury (R. 154).

POINT II

THERE WAS NO COERCION, DURESS OR PROMISE OF IMMUNITY MADE TO THE DEFENDANT NOR WAS THERE A VIOLATION OF ANY CONSTITUTIONAL RIGHT OF THE DEFENDANT AND THE COURT WAS CORRECT IN SO FINDING.

The trial of this cause commenced at 10:00 o'clock a. m., on August 22, 1955; the selection of a jury was completed and court recessed at 5:00 p. m. of said day. At 10:00 a. m. of the following day, August 23, 1955, the actual trial commenced (R. 1, 2, 3).

The State called the witness Martha Turnbaugh who testified that she was acquainted with the deceased, Ray Ashdown, and that she saw him alive in his back dooryard on July 5th, 1955 (R. 4, 5, 6).

The second witness for the State was one Mrs. Pat Sorenson, a neighbor of the Ashdowns. This witness testified (1) as to the defendant's having used the telephone at the home of the witness on the morning of July 5th, 1955 and of circumstances connected therewith; (2) as to a visit to the Ashdown home on the afternoon of that July 5th, to give condolences; (3) as to what this witness observed pertaining to the physical appearance of the defendant on these occasions (R. 6 to 13).

Next, the State called one Gloria Jean Barnhurst, another neighbor of the Ashdowns. The witness testified generally: (1) That she saw the defendant in the morning

of July 5th, 1955; (2) that the defendant used the witness's telephone to call a doctor; (3) that the defendant returned to the home of the witness almost immediately after having left from the first visit; (4) that the defendant was real upset; (5) that the witness and the defendant commenced certain preparation to take the defendant's husband to the hospital but that before they could do so, the doctor arrived; (6) *that the defendant said her husband had not felt well since his breakfast*; that he was in a lot of pain and was going paralyzed from his waist down (R. 13 to 20).

Dr. R. G. Williams was the next witness called by the State. The doctor testified as to his attendance of the deceased at the home of the deceased and the defendant on the morning of July 5th, 1955, and as to the death of the deceased thereat; as to arranging for a coroner's jury; as to the performance of an autopsy on the body of the deceased; as to the preparation of specimens for examination by the State Chemist; and, on cross-examination, as to some of the things defendant said to him during his attending the deceased and as to the physical and mental state of the defendant at such time. The doctor was interrogated as to his diagnosis of strychnine poisoning as the cause of death; and, as to other toxins which also affect the central nervous system (R. 20 to 36).

Arch Benson, Deputy Sheriff of Iron County, then related the method and means by which the specimens taken from the body of the deceased by Dr. Williams were delivered to the State Chemist at Salt Lake City for analysis (R. 37, 38, 39).

The State Chemist, M. Elmer Christensen, then testified for the State concerning the results of his findings from an examination of the said specimens; that the contents of the stomach of the deceased contained strychnine (R. 37 to 59).

Deputy Sheriff Arch Benson on re-direct examination related the return of the specimens with the report of the State Chemist to Cedar City (R. 59, 60).

Dr. R. G. Williams was recalled to identify the State's Exhibits 1 and 2 which were later admitted without objection by the defense (R. 60, 61, 62 and 187). On cross-examination, the doctor was further interrogated as to the autopsy findings and as to the presence of alcohol in the stomach of the deceased (R. 62, 63, 64).

The State then called Sheriff Arthur Nelson as a witness (R. 65). The sheriff testified as to his activities on the day of the murder and in connection therewith; i. e., July 5, 1955 (R. 65 to 68). Then the Record shows the following as having taken place:

"Q. Now, Mr. Nelson, I call your attention to the afternoon of the 5th of July 1955, did you have occasion to return to the Ashdown home?

"A. Well, we went up to the Ashdown home.

"Q. Who do you mean? Who was with you?

"A. Myself and Arch Benson, deputy sheriff, Charles Wells, Deputy Sheriff, and A. M. Marsden, county attorney.

"Q. When you got to the Ashdown home, what did you do?

"A. Well, there was Mrs. Ashdown was—

“Q. Mrs. Ashdown?

“A. Mrs. Ashdown was out in the back of the house. We drove up to the yard and got out of the automobile and shook hands with Mrs. Ashdown, and talked to her a second or two and then I asked her if she would mind getting in the car, that we would like to talk to her.

“Q. And what happened?

“A. And she did get in the car with us.

“Q. Who was present if you recall at this time?

“A. The same group, A. M. Marsden, Wells, Benson, and myself.

“Q. And Mrs. Ashdown?

“A. And Mrs. Ashdown.

“Q. Will you tell us if you can who spoke and what was said, as nearly as you can remember?

“A. As near as I remember I started the conversation. I think I said to Mrs. Ashdown that we would like to talk to her a little about the case, and I asked her if she knew really what happened. She said no she didn't know what had happened. I said to her, ‘Well, Mrs. Ashdown, Dr. Williams seems to think that Ray has been poisoned or had some poison.’ ‘Well,’ she says, ‘I didn't do it. I wouldn't even poison a rat.’

“MR. ERICKSON: Just a minute, your Honor.

“THE COURT: We will take a short recess.

“(3:15 p. m. Jurors admonished by the Court. Recess)” (R. 68 and 69).

Thereafter at 3:55 p. m., the court re-convened *in the absence of the jury*.

Without the presence of the jury, the following witnesses were examined before the court.

[For the State]

Arthur Nelson, Sheriff (R. 69-100).

Charles Wells, Deputy Sheriff (R. 100-102).

[For the Defendant]

John Walter Segler (R. 103-111).

Milda Hopkins Ashdown, Defendant (R. 111-113).

William Henry Hopkins (R. 113-116).

Objections were then made to the admission of the written confession of the defendant (R. 118, 119). The court took the matter under advisement and recessed, 5:45 p. m., until August 24th, 1955.

August 24th, 1955, at 10:00 a. m., the Court re-convened *in the absence of the jury*.

The State called as witness:

Charles Wells, Deputy Sheriff (R. 120-140).

The *Court* called as witness:

Patrick H. Fenton, District Attorney (R. 143-148).

Thereafter the court recessed at 11:45 a. m., August 24th, 1955.

The court re-convened at 2:00 p. m., in the absence of the jury, and from the testimony taken (R. 69 through 148) made the following statement of its findings:

“THE COURT: Regarding the question of whether the prosecution can go into the evidence which has been testified to by the Sheriff Arthur Nelson and by Deputy Wells and Mr. Fenton, the court wishes to make the following statement of its findings:

“First, that there was no promise made or assurance given of any immunity from prosecution.

“Second, the court finds that the defendant was advised before the statements that are sought to be introduced in evidence were made; that she had the right to refuse to answer questions or make a statement and that she had the right to have an attorney.

“Third, that the defendant did not at that time ask for an attorney, nor until after the statements offered were made, except as to certain statements made in answer to questions as to where she procured the strychnine, which questions were asked and answers made after she indicated that she should have or desired to have an attorney.

“Fourth, that the defendant was questioned or interviewed by Sheriff Nelson and Deputy Wells and the District Attorney from approximately 4:00 p. m. until approximately 8:30 p. m. before she made the statements that are under question here; that she was then in the courtroom in the presence of those three officers, two peace officers and the District Attorney, and that her sister, although she came with her to the sheriff's office, wasn't permitted to go into the room, nor was her father or her uncle permitted to go into the courtroom during the course of that questioning.

“The court finds that there were no threats of violence or other threats made by either of the officers or by the District Attorney.

“Sixth, that there was no promise made nor any assurance given of any benefit or reward, except that the District Attorney informed the defendant that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and the District Attorney read to the defendant the statute relating to first degree murder and involuntary manslaughter, and informed the defendant of the penalties for those respective offenses.

“The court believes that neither the method of questioning of the defendant under the circumstances shown by the evidence, nor the physical or mental distress suffered by the defendant under the circumstances shown by the evidence were severe enough to amount to compulsion as that is contemplated by the constitutional provisions or statutes which provide that a person shall not be compelled to give evidence against himself.

“The court believes that the circumstances were not such as to induce the defendant to make the statements in question herein, that is such serious statements as the statement that she had furnished or given strychnine to her husband.

“The court believes that the inducing cause of the statement was not fear nor duress, nor compulsion, nor any promise or assurance of any reward or immunity. The court concludes that the statements made by the defendant to the officers after she stated that she desired or should have counsel are not admissible; that any inquiry as to those statements should not be made in the presence of the jury.

“The court believes that the statements made to the officers prior to that time are admissible, but the court proposes to give to the jury an appropriate instruction as to its consideration of the weight and credibility of such statements. Counsel may proceed accordingly” (R. 150-152).

Thereafter the record shows, as follows:

“MR. FENTON: Before the jury comes in I wonder if the court would indicate if the ruling is intended to cover the acts of the 10th of July also, in which the written confession was solicited.

“THE COURT: Yes. The court believes that under the conclusion just stated that Exhibit 3 would be admissible in evidence on a proper foundation being laid in the presence of the jury, as was laid in the absence of the jury before the court.

“MR. MARSDEN: That would be admissible?

“THE COURT: Will be admissible if a proper foundation is laid.

“MR. MARSDEN: All right.

“THE COURT: In other words, the court does not believe that the fact that the written confession was signed while the defendant was incarcerated—no, just a minute. No, that would be after she had requested counsel.

“MR. FENTON: That is correct.

“THE COURT: That that would be inadmissible under the same principle as the other statements, because of having been procured after she had indicated that she desired to have counsel.

“MR. FENTON: All right, sir.

“THE COURT: Any statement by the defendant after that would be subject to objection and the State should carefully refrain from going into that in the presence of the jury.

“The court requests that counsel use care to avoid any reference to those things that are excluded under the present ruling of the court. Anything further before we call the jury?

“MR. FENTON: If I understand correctly then, your Honor, we are to be permitted in relation to the 9th, up to the time Mrs. Ashdown asked for counsel, and at that time be cut off and nothing after, that anything up to that time is admissible.

“THE COURT: Of course you will have to develop it by laying the proper foundation in your questioning before the jury.

“MR. FENTON: Yes, your Honor.

“THE COURT: You can't admit it to the jury without appropriate questioning.

“MR. FENTON: Yes.

“THE COURT: And the court requests that you avoid leading questions in the presence of the jury.

“MR. FENTON: Yes, your Honor.

“THE COURT: One more thing, the court rules that the testimony of Mr. Wells regarding what the defendant said at the time of her arraignment before this court is not admissible before the jury and should not be referred to.

“The court believes that the statement made at the time the defendant was called upon to enter a plea should not be admitted as evidence against her.

“You will call the jury” (R. 151-154).

The finding of the trial court as to the admissibility of the evidence is fully substantiated by the Record. Mere *excerpts from the Record could not suffice* to apprise this Court of the facts upon which the court below based its decision; a reading of the record will show substantial evidence from which that court could reasonably find as it did.

We have carefully and fully examined the testimony adduced without the presence of the jury and we can only conclude that the facts as recorded clearly sustain the findings of the court, in that:

First: There was no promise made or assurance given the defendant of any immunity from prosecution.

Second: *The defendant was advised of her constitutional rights.*

Third: There were no threats of violence or other threats, no promise or assurance given of any benefit or reward; and

Fourth: *Neither the method of questioning nor the physical or mental distress suffered by the defendant were, under the circumstances shown by the evidence, severe enough to constitute the abridgement of any constitutional guarantee of due process of law.*

POINT III

THE DEFENDANT'S STATEMENTS TO THE OFFICERS PRIOR TO HER ARREST AND PRIOR TO HER REQUEST FOR COUNSEL

WERE PROPERLY ADMITTED IN EVIDENCE.

The Court below refused to admit in evidence the written confession of the defendant upon the ground that the defendant had executed the said confession after having made a request for counsel and for no other reason. The Court found that the defendant's oral confession made during the interrogation between 4:00 p. m. and 8:30 p. m. on July 9th was freely and voluntarily made.

At 2:25 p. m. on August 24, 1955, the trial resumed in the presence of the jury. Sheriff Arthur Nelson resumed the witness stand:

“Q. Mr. Nelson, do you remember where you were with your testimony when the jury was excluded yesterday afternoon?

“A. I believe it was where Mrs. Ashdown had said that she didn't do it, 'I wouldn't even poison a rat' ” (R. 154).

The sheriff then related what had been said about the deceased's insurance policy; (R. 155) thereafter, the sheriff's testimony concerned the interview had with the defendant on July 9th, in the courtroom, prior to her arrest and before the defendant asked for counsel (R. 156 to 163).

Twice within the past two years the United States Supreme Court has re-affirmed its rule of long standing that courts are not bound to exclude a confession because it was obtained during unlawful detention or in the absence of counsel. *Brown v. Allen*, 344 U. S. 443, 476, 73 Sup. Ct. 347, 417; 97 L. Ed. 469, 499 (Feb. 9, 1953) ; *Stein v. People*

of the State of New York, 346 U. S. 156, 187, 188; 97 L. Ed. 1522, 1544; 73 Sup. Ct. 1077, 1094 (June 15, 1953).

Our Honorable Court has said:

“* * * ‘The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process’, and the mere fact that a confession is made while the accused is in the custody of the police officers does not render it inadmissible.”

“* * * We have found no case which holds that a confession is not admissible in evidence merely because the defendant was immature and without the advice of counsel, friends or relatives when it was made and *Mares v. Hill*, supra, considered this very problem and held that those facts did not make the confession inadmissible in evidence.”

State v. Braasch, et al., 119 Utah 450, 229 P. 2d 289.

Deputy Sheriff Charles Wells was called as a witness for the State (R. 154) and testified as to the happenings at the Ashdown residence on July 5th and to the interrogation of the defendant at the Courthouse on July 9th (R. 154 to 172).

Sheriff Nelson was recalled by the defense and questioned as to whether or not the use of a lie detector was discussed during the questioning of the defendant on July 9th; (R. 183) the sheriff said that the use of the instrument was not mentioned.

Deputy Wells was recalled by the defense (R. 184) and corroborated the testimony of the sheriff as to the lie detector.

The State rested: The defense rested.

If the ultimate quest in a criminal trial is the truth, society should not be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled. When murders are unwitnessed and when the only positive knowledge on which a solution can be based is peculiarly within the possession of the killer, voluntary and uncoerced confessions, because they are true, ought not to be excluded for the reason had the defendant counsel he would have refrained, *possibly even against his will*, from making any statement. If this is not true, then:

“The people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested.”

So said the United States Supreme Court, speaking through Mr. Justice Jackson, *Watts v. Indiana*, 338 U. S. 49, 93 L. Ed. 1801, 69 Sup. Ct. 1347.

POINT IV

THE COURT DID NOT ERR IN THE GIVING OF INSTRUCTION NO. 6.

Instruction Number 6:

“In this case there has been testimony that on two occasions the defendant was questioned or

interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully all the surrounding circumstances including the events of the day and the experiences of the defendant during the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements were made by the defendant, and if so, whether such statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made" (R. 194, 195).

The instruction was proper. The question of whether or not the statements made by the defendant to the officers were voluntary was for the court; the credibility of the statements, as well as the weight to be given them, was within the exclusive province of the jury. The jurors were told that they could entirely disregard the statements made

by the defendant at any time in the presence of the sheriff and other officers:

“* * * if you [do not] believe that any such statements were made. * * *”

(Instruction No. 6, *supra*, [do not] inserted.)
For, this is what the sentence says: “If you believe that any such statements were made, you are the exclusive judges of the credibility of such statements and the weight to be given them.”

The rule in this State is that the jury cannot determine the “competency” of a confession. The justices placed that very limitations upon the decision of Mr. Justice Larson in the case of *State v. Crank*, 105 Utah 332, 142 P. 2d 178, 196. Mr. Justice Wade understood the main opinion in *State v. Crank*, *supra*, to so hold; Chief Justice Wolfe and Mr. Justice McDonough concurring. Mr. Justice Wade said:

“* * * We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, together with all of the evidence on the question of whether it was voluntary, and the circumstances surrounding its being made, and from such evidence the jury must determine the weight and credibility to be given it, but may not determine its competency as evidence, that being a question for the court. * * * Utah cases which hold contrary should be expressly overruled.”

This Court reiterated its rule in *State v. Mares*, 118 Utah 484, 192 P. 2d 861, 870. In *State v. Braasch, et al.*, supra, the Court, speaking through Mr. Justice Wade, said:

“On the trial the state offered the confessions, the court excluded the jury and took evidence and therefrom concluded that they were voluntary and admissible. The same evidence was submitted to the jury with the instruction that, if the jury found that the confessions were ‘procured through coercion, threats, duress or any promise of immunity or benefit’ they should be disregarded entirely. Such instruction is contrary to our holding in *State v. Crank*, 105 Utah 332, 142 P. 2d 178, 170 A. L. R. 542 (concurring opinion at 371 to 375, Utah Reports and 195 to 197 Pacific Reporter, agreed to by a majority of the court). There we held that a confession should not be admitted until the court was convinced that it was made voluntarily which usually should be determined in the absence of the jury; that if the court decided it was admissible the jury should not be required to determine that question again but should hear all the evidence on whether it was made voluntarily and other evidence affecting its credibility with instructions to give the confession such weight as they concluded it was entitled to *but not allow them to pass on its admissibility*” (229 P. 2d 291). (Emphasis added.)

Appellant’s objection to Instruction No. 6 is without merit; there is no reason her to distinguish between a written or an oral confession.

The court below did not err in denying appellant’s motion for acquittal.

The court below did not err in denying appellant’s motion for new trial.

CONCLUSION

In *Stein v. New York*, supra, the late Justice Robert M. Jackson said:

“We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty * * *. The people of the state are also entitled to due process of law.”

This conviction should be sustained.

Respectfully submitted,

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