

1956

State of Utah v. Eugene Myers : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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STATE OF UTAH,

Respondent,

— vs. —

EUGENE MYERS,

Appellant.

Clerk, Supreme Court, Utah

Case No.
8504

Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

— vs. —

EUGENE MYERS,

Respondent,

Appellant.

} Case No.
8504

Respondent's Brief

STATEMENT OF FACTS

Eugene Myers was charged in a complaint signed by T. A. Callicott, charging the appellant with grand larceny. The complaint was filed July 1, 1954. With his counsel the appellant was present in the chambers of examining magistrate where he answered to his true name, received a copy of the complaint and thereafter personally waived preliminary hearing (R. 2). At this time the court bound the defendant over to the District Court. On the same day Eugene Myers was arraigned in the District Court, and with counsel present, entered a plea of guilty to the charge of grand larceny (R. 5).

The State then moved to dismiss the original complaint filed against the appellant charging him with armed robbery, the grand larceny complaint having been substituted when appellant agreed to enter a guilty plea.

On July 21, 1954, upon the motion of appellant and based on an affidavit filed by him, the court allowed appellant to withdraw his guilty plea and enter a plea of not guilty, a new trial date being set. Alan Swan, the first of five court appointed attorneys, withdrew as counsel July 31, 1954 (R. 31). On October 4, 1954, Donn E. Cassity was appointed counsel; the next day he submitted his withdrawal (R. 32). That same day James E. Houston was appointed counsel and on October 7th he was allowed to withdraw. On October 26th, Lee Hobbs was appointed counsel for appellant. During the month of September 1954, upon motion of the appellant, the District Attorney furnished two separate bills of particular concerning the charge against appellant. On January 13, 1955, the court set the date for trial as March 15, 1955. On March 7, 1955, Mr. Hobbs was released from an order issued by Judge Lewis Jones, which required him to perfect an appeal on the denial of a writ of habeas corpus and also released him from subpoenaing certain witnesses named by the defendant as being material (R. 46-51). On March 8, 1955, a minute order was made by Judge Jones regarding the Eugene Myers writ of habeas corpus, which minute entry made all of his orders subject to modification by the Criminal Division of the Third District Court (R. 50).

Upon the court's motion on March 11, 1955, two doctors were designated to examine the appellant as to his sanity. After the examination the doctors recommended to the court that the appellant be sent to the State Hospital in Provo for a thirty day observation period (R. 58-60). On April 7, 1955, Dr. Owen P. Heninger, Superintendent of the State Hospital, in a letter addressed to Judge Ellett, said that based upon the thirty day observation it was the opinion of Dr. Heninger and his staff that Mr. Myers was in need of hospitalization. He also indicated that it would be inadvisable for Myers to attend the sanity hearing because of the adverse effects it might have upon him (R. 62). On April 8, 1955, Judge Ellett ordered that a final hearing regarding the sanity of appellant be held April 18, 1955. Based upon the information presented at the hearing, the court entered an order committing Myers to the hospital until his sanity be restored (R. 67).

On October 26, 1955, the court entered an order, the Superintendent of the Hospital having certified appellant to be sane, that he be transferred back to the Salt Lake County Jail and there await trial (R. 71 and 73). On November 16, 1955, appellant appeared in court, where he was informed that the trial had been set for November 25, 1955, the court having appointed as counsel, Mr. Wayne Ashworth. On November 19, 1955, the court ordered that appellant's motion for continuance of trial be denied (R. 75). Also on November 22, 1955, the court

ordered that Mr. Ashworth's motion to withdraw be denied (R. 76). On November 25, 1955, the appellant did come to trial before Judge Ray VanCott, Jr., the appellant appearing in person and being represented by Mr. Ashworth. In the absence of the jurors, the court informed the appellant that Mr. Ashworth, who had been appointed to defend him, would be present to assume this responsibility if the appellant so desired, and also informed the appellant that if he proceeded as he had threatened to do, to sing the "Star Spangled Banner" and otherwise disrupt the court, that the appellant would be confined to the Judge's chambers while the trial proceeded (R. 134). Prior to the calling of the State's witnesses, the defendant requested that he be permitted to change his plea from "not guilty" to "not guilty by reason of insanity" (R. 136). At this time the court asked him if the appellant wished to enter the defense of insanity and appellant indicated that he didn't claim to be insane; he didn't want the defense of insanity; he just merely wanted to enter the plea of not guilty by reason of insanity (R. 136).

During the colloquy between the court and Mr. Myers (R. 136 to 139) appellant kept insisting that he wanted Ashworth to withdraw because he claimed that Ashworth would not be able to help him receive a fair trial, the Judge at all times insisting that Ashworth would be present to offer advice and assistance whenever appellant desired unless the appellant actually discharged Mr. Ash-

worth. At the request of the appellant all witnesses were excluded (R. 144).

The first witness called by the State was Wayne Luck, one of the persons from whom the property in question had been stolen (R. 148). Mr. Luck testified that he was in the company of Mr. Dean Jones, Miss Rose Arlene Thompson and a Miss Joan Reser early on the morning of March 29, 1954. While thus gathered together in the motel, two masked men entered the cabin and forced Mr. Luck and Mr. Jones to stand with their faces against the wall and thereafter stripped from each man's wrist a watch and took from each man a wallet. Mr. Luck also had taken from him his glasses (R. 150-151).

The next witness called on behalf of the State was Mr. Marion F. Barnett, a police officer from Twin Falls, Idaho. He testified that March 30, 1954, he stopped a car which was being driven by the appellant because of a request from the Salt Lake City police department that the Idaho police forces be on the lookout for that car (R. 185). After the arrest the appellant was taken to the Police Station at Twin Falls and a search disclosed that he was carrying a plastic bag tied around his waist which contained two watches and a small revolver (R. 185). Mr. Barnett identified the watches that had been placed in evidence as those recovered from the defendant in Twin Falls, one of the watches also having been identified by Mr. Luck as the one stripped from his wrist on the night of March 29th (R. 186).

The State's next witness was a Mr. Spencer Duffin. Mr. Duffin testified that he was the owner of a motor lodge called the Maple Motel. He testified to the fact that he had seen the appellant on March 29, 1954 at his motel, accompanied by a girl (R. 201). The girl entered his office and rented the cabin, said cabin being the one in which the two wallets taken from Luck and Jones were found the day after the robbery (R. 210).

Mr. Max B. McHenry was the next witness called on behalf of the State. Mr. McHenry testified that he was a deputy sheriff of Salt Lake County. It was he, accompanied by Mr. T. A. Callicott, that returned the appellant and his companions from Idaho to Utah (R. 208). He also testified that the watches and gun that had been placed in evidence were received from the Idaho Falls Police and had been transported by him to Salt Lake City (R 208).

The State's next witness was Rose Arlene Thompson. Miss Thompson testified that she had met Mr. Luck and Mr. Jones during the late afternoon of March 28, 1955, and that she remained in their company proceeding from one tavern to another during the rest of the evening (R. 224). When Luck and Jones returned Miss Thompson to her home, she discovered a note requesting that she come to the Nelson Motor Lodge, the note being signed by "Gene." Luck and Jones drove Miss Thompson to the motor lodge, and after she had consulted with the occupant of the cabin, she invited both of the men in for a few drinks (R. 225). This was approximately

12:30 on the morning of March 29, 1954. After the men and Miss Thompson had been at the cabin for approximately an hour, two masked men entered the cabin, one holding a gun (R. 226). At their command Jones and Luck took the position facing the wall and were then relieved of their watches and wallets, and in the case of Mr. Luck, his glasses. Miss Thompson testified at this time that she recognized the appellant's voice (R. 227). Miss Thompson testified that later during the same day she was in the company of Miss Reser, the appellant and another man, and at that time saw watches and wallets similar to the ones taken from Jones and Luck when she, along with the other persons named, were at the Maple Motor Lodge (R. 233).

The next witness for the State was Jay Emer Nelson, owner of the Nelson Motor Lodge, the place where the robbery took place. Mr. Nelson testified that he saw the defendant enter the cabin the one in which Luck and Jones were robbed, on March 28, 1954, and felt that he could make a positive identification because he had seen the defendant several times prior to that date and had seen the defendant enter the same cabin (R. 312).

Mr. Myers then took the stand and testified in his own defense substantially as follows. Appellant claimed that at the time the robbery was committed he was either at a movie or at the Porters and Waiters Club (R. 330). He says that he was requested by Miss Thompson and Miss Reser to drive them to Boise and took the job because they had offered him \$75.00 to do so (R. 333). His

claim is that while they were traveling towards Boise the girls asked him to take the bag in which the watch and gun were contained and he did it at their request (R. 335). He also admits that the watches and the gun were found on him by the police after his arrest at Twin Falls.

The matter was submitted to the jury which returned a verdict of guilty of grand larceny. Thereafter, at the request of the appellant, the court appointed Grover Giles to help him to perfect his appeal. The date of sentencing was set for December 24, 1955, however, the appellant was sentenced on December 23, 1955. Mr. Giles withdrew as counsel and the appellant proceeded on his own with this appeal.

STATEMENT OF POINTS

POINT I

APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHT WHEREIN IT IS PROVIDED THAT IN A CRIMINAL PROSECUTION THE ACCUSED SHALL HAVE THE RIGHT TO APPEAR AND DEFEND BY PERSON OR BY COUNSEL BECAUSE HE HAD THE SERVICES OF SIX CAPABLE AND EXPERIENCED ATTORNEYS.

POINT II

THE APPELLANT HEREIN WAS NOT PLACED IN JEOPARDY A SECOND TIME WHEN THE SECOND COMPLAINT AND INFORMATION WERE FILED NOR WAS HE PREJUDICED BY THE COURT'S REFUSAL TO ALLOW APPELLANT TO

AMEND HIS PLEA TO NOT GUILTY BY REASON
OF INSANITY.

POINT III

APPELLANT WAS NOT DEPRIVED OF HIS
CONSTITUTIONAL RIGHT TO CONFRONT THE
WITNESSES AGAINST HIM.

POINT IV

APPELLANT WAS NOT DEPRIVED OF HIS
CONSTITUTIONAL RIGHTS TO COMPEL THE
ATTENDANCE OF WITNESSES IN HIS OWN BE-
HALF.

POINT V

THE VERDICT AND JUDGMENT IS NOT CON-
TRARY TO THE LAW AND EVIDENCE AND DOES
NOT VIOLATE THE APPELLANT'S CONSTITU-
TIONAL RIGHTS.

ARGUMENT

POINT I

APPELLANT WAS NOT DEPRIVED OF ANY
CONSTITUTIONAL RIGHT WHEREIN IT IS PRO-
VIDED THAT IN A CRIMINAL PROSECUTION THE
ACCUSED SHALL HAVE THE RIGHT TO APPEAR
AND DEFEND BY PERSON OR BY COUNSEL BE-
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ABLE AND EXPERIENCED ATTORNEYS.

On July 1, 1954, appellant appeared in court and entered a plea of guilty to grand larceny. During all the proceedings he was represented by an attorney whom he had retained. The attorney he retained has the reputation of being a good criminal lawyer. After his attorney had made an investigation of the case he apparently felt that appellant would be best served by entering a plea of guilty to grand larceny and this appellant did by stepping forward and personally entering the guilty plea (R. 5). Within two weeks after appellant had entered his plea of guilty he filed with the court an affidavit claiming that his counsel had coerced him into pleading guilty. This affidavit was prepared with the assistance of another attorney and the record does not show for certain whether he was employed by appellant or appointed by the court. After the filing of this affidavit both attorneys, the one originally retained and the second attorney to enter the case withdrew.

Appellant has ever since tried to proceed upon the theory of "unlimited substitution" of counsel in the hopes that he could find an attorney willing to take the case and proceed as appellant directed, doing so without question. This dedication was to be displayed as to the procedural aspects of the case as well as to the law. The "unlimited substitution rule" devised by appellant caused the court to appoint two other attorneys each in turn. It is interesting to note that both of these attorneys apparently filed withdrawals with the court after the initial interview with appellant. Again the court obliged appellant by appointing another attorney to rep-

resent him. This time it was Mr. Lee Hobbs who, under the authorization of the court appointment, spent considerable time and effort on behalf of appellant. All of the attorneys that had been either retained by appellant or appointed by the court were capable and experienced in the practice of law.

Included in the record is a letter sent by Mr. Hobbs to Judge Lewis Jones concerning a hearing held before Judges Jones and some orders issued by the court at that time. This letter discloses the handicap Mr. Hobbs was forced to work under while representing appellant, and respondent feels the letter would be wholeheartedly endorsed as a factual and true picture of the appellant's attitude by all the attorneys who had represented him prior to and since Mr. Hobbs' appointment. Mr. Hobbs explained to the judge that he had " * * * had a great deal of trouble with this case, all of it due to Mr. Myers' insistence on dictating how the case should be handled in every detail." Mr. Hobbs goes on and explains the situation in the following words:

" * * * My immediate concern is with the following problems.

First, the question of Mr. Myers' supposedly necessary witnesses. I did not and do not want to jeopardize Mr. Myers' position before the court and so to date have made no record as to my reasons for refusing to obtain Mr. Myers' witnesses. Mr. Myers has admitted to me and I am advised by his former attorney that Myers admitted to him that these witnesses would say anything that Myers wanted them to. Further, following our appearance in your court here in Salt Lake, I went

to see Myers in jail and demanded to know why he had claimed to want these witnesses after agreeing with me that they would not called. He stated at that time, without any hesitancy, that he had made the plea for these witnesses for the sole purpose of delaying his trial and indicated that the addresses that he gave for the out of state witnesses would prove fruitless * * * (R. 43).

The appellant having been successful in delaying his trial by being uncooperative and demanding upon his counsel, also managed to impress the court in such a manner that the court, upon its own motion, set up a mental examination for appellant by the appointment of two alienists (R 59). Based upon this initial examination appellant was sent to the hospital at Provo for an observation period of 30 days. At the end of the 30 day period the Superintendent of the Hospital, in a letter addressed to Judge Ellett of the Third District Court, expressed the opinion that appellant was in need of hospitalization. Based upon that letter the court in April of 1955 held a mental hearing and committed appellant to the hospital until restored to sanity (R. 67). The medical staff at the hospital within a six months period became increasingly aware of the fact that appellant was not insane and apparently had cleverly duped them into believing that he was. Upon certification by the hospital that appellant was sane, he was returned to the Salt Lake County Jail to await trial (R. 71). At this time the court appointed another attorney to represent appellant because Mr. Hobbs had withdrawn. The court appointed Mr. Wayne Ashworth.

The record of appellant's trial held in November of 1955 contains many statements made by appellant about his lack of counsel and the fact that Mr. Ashworth was not prepared nor willing to represent him. However, the record does not show that Mr. Ashworth ever in any way displayed that he was unwilling or unprepared in this matter. However, he did file a motion for continuance which was denied by the judge. This denial was within the discretion of the court, wherein Section 77-24-18, U.C.A. 1953, provides that:

“After his plea the defendant shall be entitled to at least two days to prepare for trial, but the time for trial shall not be postponed for a longer time than the court may deem imperative.”

In the cases of *State v. Green*, 89 Utah 437, 57 P.2d 750; *State v. Loughney*, 70 Utah 526, 261 P. 606, this Court has recognized that it is within the discretion of the trial court to expand or limit the time which the accused may have to prepare his case between the plea and the date of trial. The statute provides that two days is sufficient. In this instance appellant and counsel had full seven days to prepare for his trial. Courts in other jurisdictions have held that where the court appoints an attorney to represent an individual accused of a crime, except in capital cases, there is sufficient time for preparation where counsel is allowed two days or more. In the case of *People v. Shiffman*, 350 Ill. 243, 182 N.E. 760, the court held that where the accused was on trial for grand larceny, the defendant's attorney not appearing and the court assigned him another, there was not sufficient time to prepare for trial where the defendant and

his counsel were allowed only five minutes. In the following cases it was held that defendant had been deprived of counsel where the court had appointed an attorney to represent the accused on the day of the trial and then required the accused to stand trial that very same day. *McArver v. State*, 114 Ga. 514, 40 S.E. 779; *Reliford v. State*, 140 Ga. 777, 79 S.E. 1128. Even in capital cases the courts have indicated that two or three days is sufficient time for preparation, the court objecting to a forty minute consultation period allowed defendant his newly appointed attorney in *Dunmas v. State*, — Okla. Crim. Rep. —, 16 P.2d 886.

The court in denying Mr. Ashworth's motion to withdraw, again acted within its discretion. Mr. Ashworth then was obligated as an officer of the court to continue and prepare to the best of his ability a case in defense of the appellant. Judge Ray VanCott, Jr., in refusing both of the motions made by Mr. Ashworth said simply that the case had been continued too often and that the trial was not going to be delayed any longer. Therefore, Mr. Ashworth was obligated to be prepared and be present on the day of the trial, and he did fulfill his obligation.

On the day of trial, November 25, 1955, the appellant was present as was Mr. Ashworth. Appellant insisted that he did not feel or think that Mr. Ashworth could guarantee him a fair trial and therefore did not wish Mr. Ashworth to represent him (R. 136-138, 167-168). When the court reconvened after the noon recess, the

court again informed appellant that Mr. Ashworth was there, ready and willing to represent him. The court questioned appellant as to his reasons for not using the talents of Mr. Ashworth, and finally concluding, and we think very justly so, that appellant had discharged Mr. Ashworth as his counsel (R. 168). Appellant, though denying he was acting as his own counsel, had assumed the burden of cross-examining the witnesses presented by the State and did a good job of it.

All during the trial appellant kept insisting that he was being denied counsel, and that therefore his constitutional rights were being violated. This was done always when the jury was present. After a careful reading of the record a person could not conclude that appellant had been denied counsel. His own testimony refutes this.

“The Court: Well I will have to remind you again that you have persistently refused to have a lawyer until today.

Mr. Myers: Your Honor, I have not. I don't wish to dispute you. Your Honor, I have asked the lawyers to exercise the court's orders. On January 13th Judge Jones ordered that a writ of habeas corpus—

The Court: Well now, wait. I am not going into that. You have spent 18 months going into that.

Mr. Myers: *I have not really refused lawyers. I have refused men who came over and who refused to carry out the court's orders.*” (R 360)

It is interesting to contrast this with the sentiments expressed in Mr. Hobbs' letter to Judge Lewis Jones. This alone should be almost enough to convince the court

that it was not the attorneys' refusal to represent appellant, but rather their objection to trying the case on his theories. It was the appellant's insistence that the attorneys do his bidding that caused the withdrawal of not only the lawyer he had first hired, but also all five of the court-appointed counsel. See *U. S. v. Gutterman*, 147 P.2d 540.

Respondent agrees that in the State of Utah the trial court is under a duty to appoint counsel for an accused criminal where the criminal is unable to employ his own. Other jurisdictions, both federal and state, indicate that though the court is obliged to appoint counsel initially, the court is not obliged to appoint as counsel a new attorney each week until the appellant is satisfied that the man is wholeheartedly behind him and sincerely believes in his cause. *State v. Griffith*, 14 N.J.S. 72, 81 Atl. 2d 382 held:

"A person accused of a crime is only entitled to counsel to aid him in his defense, not to save him from his voluntary acts."

Appellant's attempt to dictate to the attorneys the basis upon which they were to carry on his case, though not an express discharge of counsel, certainly made it impossible and impractical for the attorneys to continue, and we believe is equivalent to an actual discharge of counsel. *U. S. v. Gutterman*, 147 F.2d 540 states as follows:

"An accused unable to employ an attorney must accept such counsel as the court assigns unless he can find a better reason for asking a change than the fact that the accused does not approve of counsel's judgment or unless the accused chooses to undertake his own defense."

As the record bears out, up to and through the trial held in November 1955, six competent attorneys were at one time or other either hired by appellant or appointed to represent him. The fact that appellant did not approve of counsel's judgment is certainly not reason, as above stated, for him to be allowed time and again to have the court appoint men under his "unlimited substitution" rule until he be satisfied. In the case of *People v. Adamson*, 210 P.2d 13, 34 C.2d 320, the court held that a defendant's right to counsel did not include the right to postpone his trial indefinitely and reject the services of competent counsel appointed by the court while the defendant, at his leisure, attempted to find counsel who would serve without charge and whose ideas about the case were similar to his own. Also in the case of *U. S. ex rel. Mitchell v. Thompson*, 56 F. Supp. 683, the court declared that the court's choice of counsel should not be subject to impeachment on the ground that the defendant claimed displeasure with the appointment or that defendant lacked confidence in his attorney. It is only upon a showing of good cause why the appointment should not be made that the defendant can expect to receive additional counsel by way of court appointment. Could anyone who has had the services of six capable and experienced attorneys be said to have been denied his right to counsel? In this case it was only the appellant's obstinate attitude, uncooperativeness and misconception of the law that denied him the right of counsel, if it can be said by the furtherest stretch of the imagination that he was denied counsel.

POINT II

THE APPELLANT HEREIN WAS NOT PLACED IN JEOPARDY A SECOND TIME WHEN THE SECOND COMPLAINT AND INFORMATION WERE FILED NOR WAS HE PREJUDICED BY THE COURT'S REFUSAL TO ALLOW APPELLANT TO AMEND HIS PLEA TO NOT GUILTY BY REASON OF INSANITY.

It is common practice and I am sure that the court is aware of it, that in many instances the prosecuting attorneys in this state find it both desirable and expedient to make an agreement with the accused that upon the accused's promise to enter a plea of guilty to a lesser offense included in the offense charged in the information the prosecuting attorney will recommend to the court that it accept said plea and thereby dismiss the more serious crime alleged in the information. Section 77-24-8, U.C.A. 1953, provides that:

“The defendant, with the consent of the court and the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the information or indictment, or of any lesser degree of the offense charged.”

This principle is well recognized in the law of this state as well as in most other jurisdictions. In the case of *Radej v. State*, 152 Wis. 503, 140 N.W. 21, the rule was stated that where by agreement the accused is allowed to plead guilty to a lesser offense that it is a bar to the prosecution for the greater offense on a new trial. In all of the cases dealing with this problem, it is, of course, pointed out that

the accused did agree, prior to the prosecuting attorney's recommendation to the court, to enter a plea of guilty to the lesser offense. Though appellant's consent does not appear in the record, it is most logically presumed that he did either personally or by and through his attorney agree to plead guilty to grand larceny if the robbery charge was dismissed. As the record points out (R. 2) and in spite of appellant's affidavit to the contrary, he personally appeared and waived preliminary hearing after having answered to his true name and after a copy of the complaint had been delivered to his attorney. On that same day he appeared in the District Court where he was arraigned on an information filed by the District Attorney. The information charged appellant with grand larceny. In open court, with his attorney present and representing him, appellant came forward and entered a plea of guilty to grand larceny. In appellant's affidavit which was filed about 16 days later (R. 7) he makes great importance of his claim that his attorney coerced him into entering such a plea. There is no evidence or testimony other than appellant's affidavit concerning the claimed coercion.

In the case of *Sayer v. Commonwealth*, 194 Ky. 338, 238 S.W. 737, the court, referring to an individual who later complained that he had not received the aid of competent counsel in perfecting his defense, said:

“A defendant who is *suri juris* cannot complain after the trial, for the first time, that he selected the wrong lawyer to represent him at his trial. If his attorney is unwilling to present his true defense, or proposes to offer a false defense, or to

do anything which to the defendant appears at war with the facts, with good faith, and in fair dealing, it is the defendant's duty then to appeal to the court, on whom he has the right to rely for protection. If he fails to do so before the trial is concluded, so as to give the trial judge an opportunity to assign him counsel, stop the proceedings, and impanel a new jury or take such steps as will insure the defendant a fair trial, the acts of his counsel will be imputed to the defendant, who will be regarded as sanctioning the proceedings concluded thereby."

Appellant, though the record doesn't show it, must have agreed to the filing of the grand larceny information; certainly through his attorney he did in fact consent and through his attorney, undoubtedly after consulting with him, agreed to enter his plea of guilty to the grand larceny complaint.

There is no question about the law in Utah concerning former jeopardy. When a jury has been once impanelled and sworn the accused is placed in double jeopardy when or if he is again called into court to answer an information charging him with a crime based upon the same facts. However, in appellant's case the District Attorney filed with the court a new information only after the defendant had consented to this action and had agreed to plead guilty to grand larceny.

In the case of *Amrine v. Times*, 131 F.2d 827, the court held that where the first information is dismissed and the accused does not seasonably object thereto, a second trial does not constitute double jeopardy. Where the

accused consents to the dismissal of a jury that has been impanelled and sworn or to the dismissal of the original complaint and the refile of another information and complaint, the defense of former jeopardy is not available to the accused. This is also the rule where the court declares a mistrial, where the accused has either given his consent, or requested the court to so act. *State v. Malouf*, 287 S.W.2d 79; *U. S. v. Cimino*, 224 F.2d 274; *U. S. v. Harriman*, 130 F. Supp. 198; *People v. Zendano*, 136 N.Y. Supp. 2d 106; *DeYoung v. State*, 274 S.W.2d 406 and *McLendon v. State*, 74 So.2d 656. See also *State v. Crocker*, 80 S.E.2d 243, 239 No. Caro. 446, where the court held that when the accused has consented to the actions of the court, though double jeopardy would have attached without his consent, his consent is a bar to the defense of former jeopardy. The court in *State v. Rowland*, 239 P.2d 949, 172 Kan. 222, held that a dismissal of a criminal case without prejudice by the county attorney did not prejudice a new information charging accused with the crime based upon identical facts that were the basis of the original information filed.

Grand larceny is an included offense when the accused is charged with robbery in this state. *State v. O'Day*, 73 P.2d 965; *State v. Davis*, 76 P. 705, 28 Utah, 10. Since grand larceny is included in the offense of robbery, the appellant herein could have entered a plea of guilty to grand larceny without the District Attorney ever finding it necessary to file the second complaint. *State v. O'Day* and *State v. Davis*, supra. It would seem to be a very undesirable situation where, because of a minor pro-

cedural mistake on the part of a prosecuting attorney such as occurred in this case, the defendant in a criminal action could be turned loose.

Appellant, instead of being prejudiced by the second complaint, was given an unfair advantage over the State. Based upon an affidavit filed by the appellant, the court allowed him to change his plea from guilty to not guilty. At this point appellant was in the very enviable position of going to trial, not on the robbery charge as originally set up, but under the lesser charge of grand larceny—a charge he had already plead guilty to.

Appellant also claims that the court erred in refusing him the right to amend his plea to “not guilty by reason of insanity.” The Code of Criminal Procedure requires that an accused, in order to use as a defense insanity, double jeopardy, etc., must comply with the statute. The appellant herein was not willing to place the matter of sanity before the court. He didn’t want to use it as a defense (R. 136). Section 77-24-17, U.C.A. 1953, provides that:

*“When a defendant gives notice of the defense of insanity the court may select and appoint two alienists to examine the defendant and investigate his sanity * * *”*

The time referred to in this section in which notice must be given is set out under 77-22-16, U.C.A. 1953, which reads as follows:

“Whenever a defendant shall propose to offer in his defense evidence that he is not guilty by rea-

son of insanity, such *defendant shall at the time of the arraignment, or within ten days thereafter, but not less than four days before the trial* of such cause, file and serve upon the prosecuting attorney in such cause, notice in writing of his intention to claim such defense. *If the defendant fails to file such notice, he shall not be entitled to introduce evidence tending to establish such defense.* The court may, however, permit such evidence to be introduced where good cause for the failure to file notice has been made to appear.”

Appellant failed to give notice as required, and therefore it was within the discretion of the court to refuse to allow him to amend his plea after the trial had commenced. Also the court had knowledge of appellant's recent stay in the State Hospital at Provo and was also aware of the fact that if he were insane he would still be there. The record also contained an order issuing from the Third District Court stating that the Hospital had certified appellant to be sane and directing the Sheriff of Salt Lake County to return him to the Salt Lake County Jail and to there await trial (R. 71).

The law in this state is settled regarding a person's sanity. It is that all persons are presumed to be sane. *State v. Hadley*, 65 Utah 109, 234 P. 940; *State v. Green*, 78 Utah 580, 6 P.2d 177. This presumption applies also when the person has been discharged from a mental hospital, assuming, of course, that the person was discharged as being sane. *Cannon v. Commonwealth*, 243 Ky. 302, 47 S.W.2d 1075. Even though it may be shown that the accused may have been insane at the time the criminal offense occurred, where he had lucid intervals it is pre-

sumed that the crime was committed during such a lucid interval unless there is proof to the contrary. *State v. Peterson*, Mo., 154 S.W. 2d 134. Appellant herein has never introduced any evidence to show that he was not sane at the time the robbery took place in 1954 and, as the court order indicates, he was certified as sane when he was returned to the County Jail. Therefore, the court did not abuse its discretion when it refused the appellant's motion to change his plea to not guilty by reason of insanity.

POINT III

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The record discloses that Wayne Luck was called by the State and did testify to the fact that he was one of the victims of the robbery that the jury found appellant to have committed. He also testified to the fact that the watch that had been taken from him had been purchased just a year prior to the robbery and at the time of the robbery was worth \$50.00. He indicated in his testimony that he would not have sold it for anything less than \$50.00 since it had cost him originally \$73.00.

In the case of stolen property the value is usually determined by what the property's market value would have been at the time of the larceny, and where it would be difficult to determine the value, as in the case of certain jewelry and other personal property, the testimony

of the owner may be accepted as establishing a value for the property. *State v. Moll*, 112 Kan. 63, 209 P. 820; *In Re Spaulding*, 75 Kan. 163, 88 P. 547. Mr. Luck also testified to the fact that besides his watch his wallet was also stolen and contained something less than \$20.00, and that his glasses were also taken and had a market value of \$30.00 since it cost him that amount to replace them. Therefore, Mr. Luck's testimony was to the fact that from him personally the robbers took well in excess of \$50.00 worth of personal property. (R. 152, 153).

The appellant objects very strongly to the facts that Luck was asked certain questions regarding State Exhibit No. 3, which was another watch, the State claiming that it had been taken from Dean Jones on the night of the robbery. A careful reading of the record (R. 181-183) will disclose that Luck at no time testified as to the value of that watch, nor to anything Jones may have said about his watch, only to the fact that Exhibit No. 3 had the same general appearance as the watch that Jones was wearing on the night of the robbery. His testimony is not hearsay; it is a disclosure of his own observations, and that alone. Both the watch identified by Mr. Luck as his and the one he had identified as having the same general appearance as the one owned by Jones were identified by the next witness, Mr. Marion F. Barnett, the police officer from Twin Falls, Idaho, as the watches found secreted on the appellant's person (R. 186).

In the case of *State v. Johnson*, 37 New Mex. 280, 21 P.2d 813, 89 ALR 1368, the court declared that articles found in the possession of the accused are admissible when such articles of property have been identified as belonging to the victims or victim of the crime. See also *State v. Leftwich*, 216 Iowa 1226, 250 N.W. 489. It is also relevant to show that following the commission of the crime the defendant had possession of specific articles which were later identified as belonging to the victims. *People v. Collins*, 64 Calif. 293, 30 P. 847; *State v. Barnes*, 47 Ore. 592, 85 P. 998. Therefore, respondent believes that the appellant did have the opportunity of facing the witnesses against him, of cross-examining them, of objecting to all evidence presented by the State, and therefore did not have his right abridged whereby he was entitled to face the witness against him.

POINT IV

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO COMPEL THE ATTENDANCE OF WITNESSES IN HIS OWN BEHALF.

Appellant makes the claim that his attorney was not given sufficient time to subpoena witnesses in his behalf. However, in the record and the brief submitted by appellant there is no claim that he ever gave the names to Mr. Ashworth, who was representing him at that time. Since there had been seven days between the time of Mr. Ashworth's appointment and the date of trial, there was more than ample time to have had issued subpoenas for appellant's witnesses. The record discloses (R. 273-276), that

the court informed appellant that he could contact those named by him as witnesses and, in fact, issued an order whereby the deputy who would take custody of the appellant and return him to the County Jail was informed that appellant was to have the privilege of phoning the people named at that particular time. The next day when it came time for the appellant to put on his case, he informed the court that he had not been able to get in touch with any of his important witnesses and therefore was willing to let one man that did appear go since his testimony was not apparently very relevant to the defense appellant hoped to establish (R. 281).

The order referred to by appellant that was issued by Judge Lewis Jones was made not during any criminal proceeding, but during a hearing on a writ of habeas corpus. This order was later modified by Judge Jones (R. 51) wherein he directed the clerk to enter an order that all orders issued by him at the habeas corpus hearing were to be subject to modification by the criminal division of the Third District Court.

POINT V

THE VERDICT AND JUDGMENT IS NOT CONTRARY TO THE LAW AND EVIDENCE AND DOES NOT VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS.

The appellant objects to the instruction given by the court regarding the value of the property taken. Instruction 6 informed the jury that:

"You are instructed in determining the value of the property alleged to have been taken from Jones and Lewis as charged in the information you may add the total value of the property together in determining its value as to whether or not it exceeds the sum of \$50.00 lawful money of the United States or is equal to or under \$50.00."

The law has been long established that where different articles are stolen at the same time, it is but one transaction and the aggregate value of all the articles determines the grade of the offense. *State v. McKee*, 17 Utah 370, 53 P. 733; *State v. Mickel*, 23 Utah 507, 65 P. 484; *Ackerman v. State*, 7 Wyoming 504, 54 P. 228; *State v. Mandich*, 24 Nev. 336, 54 P. 516; *People v. Reghetti*, 66 Calif. 184, 4 P. 1185. Therefore, there was no error in the instruction given by the court. Also where the accused is in possession of certain valuable property after the commission of the crime, it is relevant where the crime was committed for pecuniary gain and where there is evidence that the accused was not likely to have owned such property prior to that time.

Appellant also complains that he was accused of

stealing from Dean Jones and Wayne Luck by the information and therefore Dean Jones should have been present during the trial.

In the case of *State v. McKee*, supra, the court said this concerning the name of the owner of stolen property appearing in an information or indictment:

“The name of the owner of stolen property is not a part of the crime. It is stated in indictments and informations as a matter of description,—as to the particular species of stock or animals stolen, or as the kind, quality or peculiarity of other personal property taken may be mentioned.
* * * The name of the owner is mentioned for the purpose of identification only.”

The appellant in examining Mr. Luck, brought out the fact that the bill of particular furnished Mr. Lee Hobbs, when he was acting as appellant's counsel, stated that the property taken from Luck had a total valuation of approximately \$22.00. However, appellant brought out the fact that Luck had not been asked about the value of the property when the bills of particular were furnished and therefore the figures thus supplied must give way to the actual testimony of Mr. Luck during the trial. Also appellant tries to make a great event of the fact that the watches that were introduced as evidence had been changed in some respects, i.e. the replacing of the torn wrist bands. However, we feel this is of little consequence since the watches were properly identified as the ones found on appellant; there was no material change in the appearance of the watch and the testimony of Luck

placed a value on his watch that met the minimum amount fixed by statute for grand larceny and since the watches had been returned to the parties from whom they had been taken with the permission of the court. There was no abuse of the court's discretion since the watches were properly identified and marked.

CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully, submitted,

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