

1981

## State of Utah v. Phillip Francis : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- :

Case No. 12345

PHILLIP FRANCIS, :

Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a verdict of guilty in the District Court, in and for Weber County, State of Utah, Honorable John F. Wahlquist, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH,        | : |                |
| Plaintiff-Respondent, | : |                |
| -v-                   | : | Case No. 17627 |
| PHILLIP FRANCIS,      | : |                |
| Defendant-Appellant.  | : |                |

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BRIEF OF APPELLANT

Appeal from a verdict of guilty in the Third Judicial District Court, in and for Weber County, State of Utah, the Honorable John F. Wahlquist, presiding.

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# TABLE OF CONTENTS

|   | PAGE |
|---|------|
| STATEMENT OF THE NATURE OF THE CASE . . . . . | 1    |
| DISPOSITION IN THE LOWER COURT. . . . .       | 1    |
| RELIEF SOUGHT ON APPEAL . . . . .             | 1    |
| STATEMENT OF THE FACTS. . . . .               | 2    |
| ARGUMENT                                      |      |

POINT I: THE CONFESSION ELICITED BY DETECTIVE AFUVAI FROM THE APPELLANT WAS A RESULT OF COERCION, INTIMIDATION AND INNUENDO AND THEREFORE INVOLUNTARY AND THUS THE TRIAL COURT ERRED IN RECEIVING THE CONFESSION INTO EVIDENCE. . . . . 3

POINT II: APPELLANT CONTENTS THAT THE FURTHER QUESTIONING AFTER INVOCATION OF APPELLANTS RIGHTS TO REMAIN SILENT WAS IN VIOLATION OF DUE PROCESS OF THE 14TH AMENDMENT AND THEREFORE INADMISSIBLE. . . . . 8

POINT III: THE CONFESSION OF THE APPELLANT SHOULD NOT HAVE BEEN ACCEPTED INTO EVIDENCE BECAUSE THE APPELLANT WAS NOT GIVEN A MIRANDA WARNING PRIOR TO BEING QUESTIONED ABOUT THE BURGLARY CASE . . . . . 11

POINT IV: THE COURT MISAPPLIED THE LAW TO ITS FINDINGS OF FACT BY NOT SUPPRESSING THE CONFESSION AFTER HOLDING THAT THE CONFESSION WAS AN ATTEMPT BY THE DEFENDANT TO APPEASE DETECTIVE AFUVAI AND AVOID INCURRING ANGER AND DISPLEASURE. . . . . 12

CONSLUSION. . . . . 13

## CASES CITED

|   |   |
|---|---|
| <u>Miranda v. State of Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L Ed. 2d 694 . . . . . | 4 |
| <u>Blackburn v. Alabama</u> , 361 U.S. 199, 4L ed 2d 242, 80 S.Ct. 274. . . . .             | 4 |
| <u>Haynes v. Washington</u> , 373 U.S. 503, 10 L ed 2d 513, 83 S.Ct. 1336.4                 |   |
| <u>People v. Sanchez</u> , 451 P2d 74 . . . . .   | 4 |
| <u>People v. Pettingill</u> , 578 P2d 108 . . . . .   | 4 |
| <u>Fikes v. Alabama</u> , 352 U.S. 191, 16 ed 2d 246, 77 S.Ct. 281. . . . .                 | 4 |
| <u>Lynn v. Illinois</u> 372 U.S. 528, 534, 9 L ed 2d 922, 926, 83 S.Ct. 917. . . . .        | 6 |

## STATUTES CITED

|   |   |
|---|---|
| Utah Code Ann. Section 76-6-202 (1953 as Amended) . . . . . | 1 |
|---|---|

IN THE SUPREME COURT OF THE STATE OF UTAH

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|-----------------------|---|----------------|
| STATE OF UTAH,        | : |                |
| Plaintiff-Respondent, | : |                |
| -v-                   | : | Case No. 17627 |
| PHILLIP FRANCIS,      | : |                |
| Defendant-Appellant.  | : |                |

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, PHILLIP FRANCIS, appeals from a conviction of Burglary in the Third Judicial District Court, in and for the County of Weber, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, PHILLIP FRANCIS, was found guilty by the court sitting without a jury before the Honorable John F. Wahlquist, of the crime of Burglary on February 13, 1980 and was thereafter sentenced to a term in the Utah State Prison pursuant to Utah Code Ann. Section 76-6-202 (1953 as Amended) not to exceed fifteen years.

RELIEF SOUGHT ON APPEAL

Appellant, PHILLIP FRANCIS, seeks a reversal of his conviction and a new trial.



testified during this period of time that Detective Afuvai paced the floor and at point stopped, hitched up pants and stated that the appellant was causing him to lose his composure. The appellant testified that he felt threatened and was frightened by Detective Afuvai and because of that he confessed. Detective Afuvai testified that during this period that he may have raised his voice and called the appellant a liar and that its not unusual to do so.

A few days later the appellant was taken out to Washington Terrace on a traffic citation. Detective Jensen of the Washington Terrace Police Department had the appellant brought again to his office for questioning about the burglary he had confessed to. Detective Jensen, by this time, had been informed by Detective Afuvai of the appellant confession on the burglary case. The appellant hesitated to speak to Detective Jensen at his office because the appellant wasn't certain he wanted to make a statement to Detective Jensen. The appellant supposedly stated he felt that the office may contain some recording device, therefore he wanted to talk somewhere outside the office. Detective Jensen and the appellant drove to a secluded spot where they spoke for approximately one and a half hours about the burglary and other things. After the interrogations the appellant finally confessed to Detective Jensen.

The appellant was then charged and convicted of burglary, a second degree felony.

## ARGUMENT

### POINT I

THE CONFESSION ELICITED BY DETECTIVE AFUVAI FROM THE APPELLANT WAS A RESULT OF COERCION, INTIMIDATION AND INNUENDO AND THEREFOR INVOLUNTARY AND THUS THE TRIAL

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COURT ERRED IN RECEIVING THE CONFESSION INTO EVIDENCE.

The issue is well settled that a confession which is the result of coercion, intimidation or promises, is not voluntary and therefore inadmissible into evidence and that the use of such a confession at the time of trial is a violation of the due process clause of the fourth and fourteenth amendment of the United States Constitution, Miranda v. State of Arizona, 384 U.S. 436, 86 S Ct 602, 16 L ed 2d 634, Blackburn v. Alabama, 361 U.S. 199, 4L ed 2d 242, 80 S Ct, 274, Haynes v. Washington, 373 U.S. 503, 10 L ed 2d 513, 83 S Ct 1336, People v. Sanchez, 451 P2d 74, People v. Pettingill, 573 P2d 108. As the Supreme Court stated in Fikes v. Alabama, 352 U.S. 191, 16 ed 2d 246, 77 S Ct 281,

- "The voluntary character of an alleged confession depends upon whether the confession as a whole was made voluntarily and without inducement or compulsion, and not whether the particular communications contained in the confession were voluntary or not. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. To be voluntary the confession must be the expression of free choice by one who, at the time he confesses, is in possession of mental freedom to confess to or deny a suspected participation in a crime, or to refuse to answer. The confession must not be produced by inducement engendering either hope or fear; by duress, intimidation, or other improper influences, or by fraud, collusion, trickery, and subornation of perjury on the part of those representing the state."

Thus pursuant to that holding the courts must hold inadmissible confessions which are the product of any of the influences described above.

In reviewing a confession where there has been a claim of involuntariness the courts must examine the totality of the circumstances surrounding the giving of the confession to determine if there were any impermissible influences exerted upon the defendant. Applying this



standard the court should consider all the facts attendant to the appellants result confession, State v. Hall, supra, Haynes v. Washington, supra.

According to the testimony received at the trial the following events occurred; the appellant was suspected of committing the Washington Terrace burglary, however, there was not enough evidence to charge the appellant. The appellant was approached four times by a detective of the Washington Terrace Police Department for the purposes of obtaining a confession and/or taking a polygraph. The appellant refused each request. The appellant was picked up for questioning in Ogden City concerning an Ogden City case. The appellant was charged with the commission of three offenses on that day and was booked into jail. Detective Afuvai testified that the appellant was informed of his Miranda rights two times up at the jail, so we can assume that Detective Afuvai attempted to question the appellant about something but the appellant refused. The appellant is then brought downstairs into the detectives office where Detective Afuvai testified he was interrogated for some four hours. During this interrogation period, the appellant is persuaded to confess to the theft of the silver bar, an Ogden City case. After the signing of the confession, the appellant is told he is going back to the jail, but instead the appellant is taken back to the detectives office again where he is further interrogated about the Washington Terrace burglary. Detective Afuvai indicated that Detective Jensen of the Washington Terrace Police Department had informed him that they had attempted to obtain a confession from the appellant but that the appellant had refused and he asked if Detective Afuvai could get the appellant to confess. The appellant testified that during this interrogation, that he claimed he knew nothing about the

burglary but that Detective Afuvai, nevertheless, continued to question the appellant. The un rebutted testimony of the appellant was that Detective Afuvai paced the room and became upset because of the appellants refusal to implicate himself by admitting his involvement in the burglary. The appellant testified that Detective Afuvai then stopped, hitched up his pants and said, "You're causing me to lose my composure." The appellant testified that he was intimidated by this gesture and statement and as a result confessed. Detective Afuvai testified that he and the appellant were on a friendly basis and that the interrogatories went peacefully. However, upon cross examination by the defense he conceded that he raised his voice during the interrogations and he may have called the appellant a liar.

The United State Supreme Court in Haynes v. Washington, supra, in reversing a conviction held that where a confession is obtained as a result of threats or other impermissible techniques that due process had been violated and that "the question in each case is whether the defendant will was overborne at the time he confessed", citing Lynum v. Illinois, 372 U.S. 528, 534, 9 L ed 2d 922, 926, 83 S Ct 917. The court cited other cases to support its position that "...the true test of admissability is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."

In the Haynes case, supra, the defendant was denied the opportunity to call his wife or attorney for six days. The defendant was repeatedly told that there would be no phone calls until the defendant "cooperated" (emphasis added) and signed the confession. The court, applying the test announced in the cases it cited held that the confession was not the

product of free will, but resulted from the threats of continued incom-  
municado detention and psychological pressure exerted against the defendant.

The appellant readily concedes that the actions of the state  
authorities were more grievous in the Haynes case, supra, than the facts  
surrounding the challenged confession before the court. However, the  
appellant contends that when the principals cited and enunciated in Haynes,  
supra, are applied to the circumstances surrounding the appellants confession  
that there must be a finding that the appellants confession was a result  
of the impermissible pressure exerted upon the appellant by Detective  
Afuvai and not a product of the appellants free will. The appellant  
relies upon the following factors to support his contention that his will  
to resist was overborne by the pressure exerted by Detective Afuvai. The  
appellant refused to confess to the Washington Terrace detectives. He is  
arrested on another charge by Detective Afuvai and is approached twice up  
at the jail by Detective Afuvai about some cases. At that point the  
appellant refuses to talk. The appellant is brought into the detectives  
office where he is interrogated for four hours. During these four hours  
the appellant is in the office with Detective Afuvai alone without means  
of escaping the pressure exerted by Detective Afuvai. The appellant  
confesses to the Ogden City charge and signs a confession, he is then  
taken back to the detectives office interrogated further, even though  
the appellant has indicated his reluctance to speak about the case.  
During this interrogation period Detective Afuvai raises his voice,  
paces the floor, maybe calls the appellant a liar and finally becoming  
frustrated by the appellants refusal to confess that he stops, hitches  
his pants and states, "You're causing me to lose my composure!", it's

shortly after this that the appellant confesses.

It is clear that the appellant conceded to the pressure of Detective Afuvai when he confessed. There was testimony from Detective Afuvai that the appellant was intelligent enough to recognize the consequences of confession. The appellant was also intelligent enough to recognize that the state had no evidence upon which to convict him of this charge, so we are left with the question, why did the appellant want to confess? It is the testimony of Detective Afuvai that the appellant was informed no deals could be made, so that could not be a motive to confess. The appellant contends that the confession was a result of the intimidating gestures and innuendo of Detective Afuvai and that that is what caused him to confess. Again applying these factors to the test in Haynes, supra, it is evident that the confession was not made voluntarily but was brought about by oppressive circumstances the appellant found himself in. Therefore, the confession, not being the product of a voluntary exercise of the appellants free will, should not have been accepted into evidence. The admission of the confession into evidence was a denial of due process and therefore the conviction should be reversed and remanded for a new trial.

## POINT II

APPELLANT CONTENDS THAT THE FURTHER QUESTIONING AFTER INVOCATION OF APPELLANTS RIGHTS TO REMAIN SILENT WAS IN VIOLATION OF DUE PROCESS OF THE 14TH AMENDMENT AND THEREFORE INADMISSIBLE.

In the case of People v. Pettingill, supra, the defendant was picked up on a burglary charge. The police, after informing the

defendant of his rights to remain silent and right against self incrimination, attempted to interrogate the defendant, however, the defendant invoked his rights and refused to discuss the case. Two hours later the same police officer approached him again, again reciting the Miranda warnings, and again the defendant invoked his rights and refused to discuss the case. Another officer from another jurisdiction approached the defendant some three days later, after obtaining some evidence and confessions from the defendants companions, and after showing the defendant the evidence he had obtained, recited the Miranda warning and the defendant confessed. The California Supreme, in reversing the conviction, held the police officers violated the fourth, fifth, and fourteenth amendment rights. The court, relying on the Miranda decision and a string of other California Supreme Court cases, held that once an individual has invoked his rights to remain silent then all interrogations must cease until and unless the individual approaches the authorities indicating his willingness to waive his constitutional rights. As the Supreme Court in Miranda stated,

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

Applying that holding to the circumstances before the court it is apparent that the interrogations by Detective Afuvai was in violation of the protective devices created by Miranda. The undisputed testimony

is that the appellant was given the Miranda warning up at the jail on two occasions. Although there is no direct testimony that the appellant invoked his rights, we are still left with the question, why was the appellant given the warnings if there wasn't an attempt to question him about a case? If the appellant hadn't invoked his rights to remain silent and/or his right against self incrimination but was willing to speak to Detective Afuvai why two warnings? If the appellant was willing to speak why was it necessary to take him downstairs and interrogate him for four hours? Even if Detective Afuvai attempted to speak to the appellant about other cases and the appellant invoked his rights, Detective Afuvai, nevertheless, violated the appellants rights as set out in Pettingill, supra, because, as in Pettingill, all interrogations must cease and apparently it did not.

Furthermore, in Miranda, the Supreme Court stated, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogations must cease." for "(with)out the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Again there is un rebutted testimony by the appellant that he stated he wasn't sure he wanted to talk about the Washington Terrace burglary. Taking into consideration that the appellant has just confessed to the theft of the silver bar the fact he is told he was being taken to jail but instead is taken back to the detectives office, the fact that Detective Afuvai, who had supposedly been the appellants friend, is now pacing the floor raising his voice and maybe calling the appellant a liar and the fact that the

appellant is alone with Detective Afuvai who is approximately 5 foot 10 inches, and weighs approximately 270 pounds, it is clear that the appellant was indicating his desire to terminate the questioning and under the Miranda decision the continued questioning of the appellant was in violation of right to remain silent and right against self-incrimination.

Relying on the cases and facts cited above the appellant contends that his confession was involuntary. The appellant contends that the continual interrogations by Detective Afuvai was in violation of his right to remain silent and right against self-incrimination.

The appellant also contends that the confession was involuntary because his will to resist the pressure of Detective Afuvai was outborne by the exhausting interrogatories, the gestures and statements of Detective Afuvai and the belief that a confession was the only way to escape his predicament.

### POINT III

THE CONFESSION OF THE APPELLANT SHOULD NOT HAVE BEEN ACCEPTED INTO EVIDENCE BECAUSE THE APPELLANT WAS NOT GIVEN A MIRANDA WARNING PRIOR TO BEING QUESTIONED ABOUT THE BURGLARY CASE.

The court in People v. Pettingill, supra, stated that once a defendant has invoked his right to remain silent that all questioning must cease. This decision was based on the rational of the court that the Miranda decision required that an individual be warned of his rights against self-incrimination and that the individual be given an opportunity to invoke these rights. In the Pettingill case the defendant had invoked his right against self-incrimination and refused to confess. The police continued to interrogate the defendant for a period of time after the invocation of the Miranda rights by the defendant. The court ruled that



because the defendant had invoked his rights that any further questioning was in violation of the due process clause of the Fourth and Fourteenth Amendments.

In the case before the court, there's testimony that the defendant waived his rights concerning the silver bar. There is also testimony that the defendant was not warned of his right to remain silent nor that whatever he said could be used against him. It cannot be argued that the defendant was ignorant of his rights in light of fact he had been warned just prior to the confession of the theft of the silver bar, but the appellant argues that he was not given an opportunity to invoke his right to remain silent and his right against self-incrimination.

Implicit in the warnings is the opportunity to invoke the rights outlined in the Miranda warning. Included in the Miranda warning is the question, "Having these rights in mind, do you wish to speak about the matter?" The purpose of this statement the appellant contends is to give the defendant the opportunity to invoke his rights. In the case before the court this opportunity was lacking because immediately after signing the confession of the appellant to the theft of the silver bar the interrogations began on the Washington Terrace burglary without the benefit of the opportunity to invoke the rights outlined in Miranda. Therefore, the defendant was, for all intents and purposes, deprived of his right against self-incrimination as guaranteed by the Miranda, case.

#### POINT IV

THE COURT MISAPPLIED THE LAW TO ITS FINDINGS OF FACT BY NOT SUPPRESSING THE CONFESSION AFTER HOLDING THAT THE CONFESSION WAS AN ATTEMPT BY THE DEFENDANT TO APPEASE DETECTIVE AFUVAI AND AVOID INCURRING ANGER AND DISPLEASURE.



The court erred in its application of the law by not suppressing the confession because the court indicated in its holding that it found that the defendant was attempting to appease Detective Afuvai in the hope of avoiding any anger or displeasure and any physical abuse by Detective Afuvai. All the case law cited in the three preceding points indicate that the confession must be the product of rational intellect, Sanchez, supra, made freely, voluntarily and without compulsion or inducement of any kind, State v. Hall, supra. Clearly by the finding of the court the confession was involuntary, under the standard described above, because the court specifically found that the defendant's will was overcome by the pressure of Detective Afuvai and yet failed to hold the confession involuntary and therefore, inadmissible.

### CONCLUSION

The appellant contends that the trial court erred in receiving the appellants confession into evidence. The appellant cites the courts holding that the appellants confession was an attempt on the appellants part to appease Detective Afuvai as an accurate conclusion of the facts presented to the trial court. The appellant asserts that the trial misapplied the law to its finding of facts because the trial court clearly found that the confession was not voluntary.

The appellant further contends that there was clearly prejudicial error committed by the trial court in receiving the confession into evidence. The appellants refusal to give a confession to the Washington Terrace detectives, the setting in which the confession was obtained, the length of the interrogation and the reluctance of the appellant to speak about the crime, are indications that the confession was not given

voluntarily. That being evident, the trial court should have held that the confession was involuntary and thus inadmissible.

The appellant contends that the continued interrogatories after the invocation of his Miranda rights was a denial of due process which made the confession elicited for the appellant inadmissible and therefore the trial court committed prejudicial error in receiving the confession into evidence.

The appellant asserts that because of the admission of the confession into evidence that he was denied due process and therefore the appellant is entitled to a reversal of the conviction and a new trial.

Respectfully Submitted,

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