1981

State of Utah v. Phillip Francis : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-v-

PHILLIP FRANCIS,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from a verdict [illegible]
Judicial District Court, [illegible]
Utah, the Honorable John [illegible]

ROGER A. FLORES
Weber County Public Defender
2568 Washington Boulevard
Ogden, Utah 84401
Attorney for Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

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

BRIEF OF RESPONDENT

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.

DAVID L. WILKINSON
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROGER A. FLORES

Weber County Public Defender Assoc.
2568 Washington Boulevard
Ogden, Utah 84401

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

Page

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted without a jury on February 13, 1981 in the Second Judicial District Court before the Honorable John F. Wahlquist. On February 27, 1981 appellant was sentenced to 1-15 years at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment and sentence rendered by the trial court.

STATEMENT OF THE FACTS

On April 30, 1980, Wayne Vandenakker reported to Washington Terrace Police in Weber County that his home had been burglarized (T.10). When police investigated the scene, Mr. Vandenakker told them the names of individuals who regularly were around the house (T.29). That same day, Officer Richard Cope and Officer Dean Jensen questioned appellant at the Washington Terrace City building concerning the burglary (T.29,50,85). Officer Cope, before questioning appellant, advised him of his Miranda rights (T.29). After indicating that he understood his rights (T.29), appellant discussed with Officer Cope the burglary and his activities on April 29th, the day of the burglary (T.30-31).

During the interrogation, which lasted about 1 1/2 hours, the police asked appellant if he would take a polygraph test; however, they informed him that he had a right to refuse (T.44-49). Appellant did refuse to take the polygraph on this and other occasions (T.102).

Appellant did not confess during this initial interrogation (T.31). However, approximately thirty minutes

after he was allowed to leave, the police received a call from an unknown individual, who stated that there was a package for Officer Cope in a garbage bin of a local business (T.32). Officer Cope retrieved the package and found some of the missing items from the Vandenakker house (T.33,34).

On May 1, 1980, Officer Cope briefly talked with appellant at his home concerning the burglary. Appellant again reiterated that he had no information concerning the crime (T.40).

On May 8, 1980, appellant voluntarily came to the police station, where the police conducted a third interrogation (T.46,54). Four policemen; Officer Cope, Officer Jensen, Sergeant Powell and Chief Tracey; conducted the interrogation, each of the officers taking turns questioning the appellant (T.47). During this interview, which lasted about one hour and forty five minutes (T.46), Officer Jensen told appellant that they would try and work something out with the County Attorney if he would talk (T.86). Appellant responded that he did not commit the burglary and that he did not want to talk about it at all (T.88). The officers withdrew their offer to talk with the County Attorney and allowed appellant to leave (T.88).

There are a couple of references to a fourth

interrogation in the record, but no evidence concerning a fourth interrogation was ever brought out (T.50,55).

Officer Cope testified that he never gave appellant any promises in return for a confession (T.55) nor did he ever threaten appellant (T.51). He also testified that appellant never confessed during any of these sessions (T.55).

From May to November of 1980 the only other contact the Washington Terrace Police had with appellant was by Officer Jensen, who stopped appellant a couple of times on traffic violations in August or September (T.89). Officer Jensen told appellant he would like to talk and that maybe he could do something about the traffic citations. When appellant said he did not commit the burglary, Officer Jensen followed through with the citation (T.89). Officer Jensen also indicates that on one occasion he talked to appellant and asked him to take a polygraph. Appellant, as he had done in the past, refused to take the test (T.101).

On November 3, 1980, Appellant was taken into custody and interrogated by the Ogden City Police on an Ogden City case (T.59). Following appellant's arrest he was taken to the police station, where he was interrogated by Officer Afuvai (T.59). Prior to this interrogation, Officer Afuvai advised appellant of his Miranda rights (T.59). Appellant said that

he was aware of his rights and he discussed the Ogden City case with Officer Afuvai (T.59).

During this interrogation, Officer Afuvai offered to drop three outstanding charges against appellant in connection with the Ogden City case (T.60,61,66). However, no promises were ever given appellant in exchange for his confession on the Washington Terrace case (T.61).

After appellant had confessed in the Ogden city case and signed a written confession, Officer Afuvai began questioning him about the Wasington Terrace case (T.61). Appellant told Officer Afuvai that he had broken into the Vandenakker house on the 29th of April and had taken some of the missing property and that he had left the stolen property in a garbage bin for Officer Cope (T.62,63).

This interrogation lasted about four hours (T.62). Officer Afuvai testified that he may have raised his voice during the interrogation, but that the atmosphere was peaceful and he never cajoled or threatened the appellant (T.64,67,68, 80,83). Officer Afuvai also testified that appellant never tried to stop while he was confessing (T.64).

The record also indicates that Officer Afuvai had questioned appellant prior to the interrogation that led to his confession (T.68). Officer Afuvai stated that he had questioned appellant two or three times while appellant was in jail, that some of these interrogations involved the Washington

Terrace case, and that appellant had been advised of his Miranda rights at the jail (T.68).

Appellant contradicts some of Officer Afuvai's testimony. He alleges that Officer Afuvai promised to drop certain charges if he confessed (T.110,111) and he testified that Officer Afuvai threatened him by hitching up his pants and stating, "You're causing me to lose my composure." (T.111).

A week after appellant confessed to Officer Afuvai, he also confessed to Officer Jensen of the Washington Terrace Police (T.93). The trial court ruled this confession inadmissible on the grounds that the defendant believed it was an off the record discussion. The court also found that appellant confessed in order to pacify the police officers. Nevertheless, the court found the original confession admissible (T.131,132).

ARGUMENT

POINT I

APPELLANT VOLUNTARILY CONFESSED TO THE WASHINGTON TERRACE BURGLARY.

The voluntariness of a confession is determined by reviewing all of the circumstances under which the confession was made. State v. Kaae, 30 Utah 2d 73, 513 P.2d 435 (1973). This Court has stated that it will not disturb the trial court's ruling on this issue if there is substantial evidence

to support it. State v. Allen, 29 Utah 2d 88, 505 P.2d 302 (1973). This rule remains the same even though the evidence presented at trial is conflicting. Palfreyman v. Bates and Rogers Const. Co., 108 Utah 142, 158 P.2d 132 (1945). Clearly, the trial court is in the best position to assess the credibility of the witnesses and to determine what weight should be given to their testimonies. On appeal, the evidence should be viewed in the light most favorable to the lower court's judgment. Nielsen v. Chin-Hsien Wang, 613 P.2d 512 (Utah 1980).

In State v. Watkins, 219 Kan. 81, 547 P.2d 810 (1976), the court listed the following factors as bearing on the issue of voluntariness:

> . . . The duration and manner of interrogation; the ability of the accused on request to communicate with the outside world; the accused age, intellect and background; and the fairness of the officers in conducting the interrogation . . . Generally if the accused was not deprived of his free choice to admit, deny or refuse to answer, the statement may be considered voluntary.

Id. at 824 (citation omitted).

In addition to the above facts the court in Watkins pointed to the numerous Miranda warnings the defendant had received in ruling the confession was voluntary. The Miranda warning is designed to assure that a confession is voluntary and to inform the defendant of his right to remain silent and his right to have counsel present during questioning.

Even though proof that the Miranda warning was given is not dispositve of the issue of voluntariness (State v. Peterson, 560 P.2d 1387 (Utah 1977)), it clearly is some indication the confession was the product of the defendant's free and rational choice.

In Watkins the court considered the following facts with reference to the voluntariness of the defendant's confession. The defendant was taken to the district attorney's office at about 3:00 p.m. and placed in the library with another suspect, who had told the district attorney that he could get the defendant to tell the truth. The police were aware that this individual had fought with the defendant earlier in the day. One hour later the police began an interrogation of the defendant which lasted four hours. During the course of the interrogation the defendant implicated another individual, who was brought in to confront the defendant. Both individuals became hostile and an argument ensued. Later, a police officer moved close to the defendant and told him it was "all over" and "it was time to face up to it." Shortly thereafter the defendant confessed.

The court in Watkins found some of the police conduct questionable. Nevertheless, the court found the confession was admissible because it was the product of a "free will and independent mind."

The evidence in the instant case establishes that appellant's confession was voluntary. When appellant confessed to Officer Afuvai, he knew that he had a right to remain silent and to have counsel present. Appellant has been convicted of several felonies (T.118). With this criminal experience, appellant knew that the police had to follow certain procedures in conducting an interrogation. The record also contains numerous accounts of appellant being advised of his Miranda rights (T.29,59,68). When interrogated by the Washington Terrace police, appellant stated he understood his Miranda and still he talked with the police and denied any complicity in the burglary (T.30). Appellant never seemed to be intimidated by the police. During the third interrogation with the Washington Terrace Police, appellant told them he had not committed the burglary and he did not want to talk about it. The police then allowed appellant to leave (T.88).

When appellant was interrogated by Officer Afuvai a number of factors may have influenced him to confess. He had just been arrested and placed in jail (T.60,68). The evidence against him for drug possession, driving with a revoked license, and for theft in an Ogden City case was extremely strong. Finally, appellant's confession in the Ogden City case may have reduced his resistance and made him more susceptible to confessing.

During the interrogation appellant never asked to see anyone, nor did he ever decline to discuss the case with Officer Afuvai.

Officer Afuvai testified that he never threatened or cajoled the defendant, nor was the confession made pursuant to any promises. He testified that the interrogation, which lasted about four hours, was peaceful (T.64,67,68,80,83).

Appellant claims that Officer Afuvai is 5 foot 10 inches and 270 pounds (appellant's brief, page 11). This information is not found in the record and cannot be verified. The only reference to Officer Afuvai's size is that he is an imposing figure (T.82). Therefore, respondent submits that this information is not properly before the court and it should not be considered.

Appellant infers in his brief that the interrogations conducted by the Washington Terrace Police had a cumulative effect upon him. However, respondent maintains that the interrogations conducted by the Washington Terrace Police were too far removed in time from the interrogation that led to appellant's confession to have had any coercive effect upon him.

Appellant also claims that other actions taken by the police violated his rights. Respondent submits that many of the techniques used by the police to elicit information from a defendant are not proscribed by Miranda. The police

are not required to talk in monotones or to maintain complete neutrality in conducting an interrogation.

The mere fact appellant confessed, when he knew his confession could be used against him, is not proof that his confession was involuntary. As the Supreme Court said in Culombe v. Connecticut, 367 U.S. 568 (1961):

> . . . A confession is not always the result of an overborne will. The police may be a midwife to a declaration born of remorse, relief, or desperation, or calculation.

Id. at 576.

In the instant case the trial court found that appellant confessed to pacify the officers (T.131). However, appellant's confession is not rendered involuntary by the fact that he was motivated by a desire to appease Officer Afuvai. This desire and appellant's free will could coexist at the same time.

Respondent maintains that appellant was not deprived of his free choice. Appellant knew what his rights were; he knew that he could decline to discuss the case further and he knew he could ask for counsel. Appellant clearly had the choice to confess or to invoke his rights, and he chose to confess.

POINT II

THERE IS NO EVIDENCE THAT APPELLANT INVOKED HIS RIGHT TO REMAIN SILENT, NOR IS THERE AN ABSOLUTE PROSCRIPTION AGAINST RESUMING QUESTIONING ONCE THAT RIGHT HAS BEEN INVOKED.

There is no evidence in the instant case which establishes appellant invoked his right to remain silent. Appellant postulates from the following facts that this right was invoked. Officer Afuvai questioned appellant three or four times on the day he was arrested. Two of the sessions involved the Washington Terrace burglary, while the other sessions involved other cases. Finally, Officer Afuvai advised appellant of his Miranda rights two times during the course of these interrogations (T.68). Appellant's counsel speculates that since appellant was questioned and advised of his rights on two occasions, that he must have initially refused to discuss the case with Officer Aluvai.

To adopt appellant's position would be improper. Appellant's counsel is merely speculating that appellant invoked his right to remain silent. There is no evidence in the record which would support the conclusion. It is fundamental that this court will not rule on evidence which is not supported by the record.

The fallacy of appellant's argument, that since

Officer Afuvai gave appellant two separate Miranda warnings appellant must have initially declined to discuss the case, is also apparent.

The mere fact Officer Afuvai talked with appellant more than once does not necessarily lead to the conclusion that appellant invoked his right to remain silent. Appellant could have talked with Officer Afuvai, but claimed he was innocent. He had done this on prior occasions with the Washington Terrace Police (T.31,40). If this were the case, subsequent questioning would not have been improper.

In support of his claim that once the right to remain silent has been invoked the police are proscribed from resuming questioning, appellant cites People v. Pettingill, 578 P.2d 108 (Calif. 1978). In Pettingill, the police on two separate occasions gave the defendant a Miranda warning and asked him if he would discuss the case. The appellant on both occasions refused. Three days after the arrest a third interrogation was initiated by a new officer after a fresh Miranda warning had been given the defendant. In this interrogation the defendant confessed. The instant case is easily distinguishable from Pettingill because here there is no evidence that appellant invoked his right to remain silent.

The position taken by California in Pettingill was rejected by the United States Supreme Court in Michigan v. Moseley, 423 U.S. 96 (1975). In Mosely the court held that

under certain circumstances, where the right to cut off interrogation has been "scrupulously honored," police can resume questioning without violating the defendant's constitutional rights. Respondent maintains that in this case it would be improper to decide this issue because there is no evidence that appellant ever invoked his right to remain silent.

POINT III

APPELLANT'S CONFESSION WAS PROPERLY ADMITTED INTO THE EVIDENCE BECAUSE APPELLANT WAS ADVISED OF AND WAIVED HIS MIRANDA RIGHTS.

Once a defendant is fully appraised of his/her rights, and those rights are intelligently waived, the police are not required to repeat those rights each time questioning is commenced. People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367, U.S. cert. den. 392 U.S. 396 (1968); State v. Dixon, 489 P.2d 225 (Ariz. 1971); Biddy v. Diamond, 516 F.2d 118, U.S. cert. den. 425 U.S. 950 (1975).

The evidence establishes that appellant was aware of his Miranda rights when he confessed to the crime in this case. Appellant has been convicted of several felonies (T.118) From this fact a general understanding of the criminal justice system can be ascribed to appellant. During the course of the investigation in the instant case, appellant was advised of his Miranda rights by the Washington Terrace Police and he

discussed the case without confessing (T.29-31). On one occasion appellant even invoked his right to remain silent by declining to talk to the police (T.88). Just prior to the interrogation that led to appellant's confession, Officer Afuvai again gave appellant his Miranda rights and appellant said he was aware of them (T.59). In this interrogation the questioning initially dealt with the Ogden City case. After appellant confessed in that case, Officer Afuvai began questioning appellant about the Vandanakker burglary. These facts clearly establish that appellant was aware of his Miranda rights when he confessed to the Vandanakker burglary, that he knew he could invoke his rights and that Officer Afuvai was not obligated to repeat them before questioning appellant about the Washington Terrace case. People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367, U.S. cert. den 392 U.S. 396 (1968).

The result might be different in a case where the defendant is confused, unfamiliar with his rights, or where a significant amount of time has elapsed between the giving of the warning and the confession. However, in this case the defendant clearly understood his rights under Miranda when he confessed.

POINT IV

THE TRIAL COURT PROPERLY FOUND APPELLANT VOLUNTARILY CONFESSED.

In State v. Allen, 29 Utah 2d 88, 505 P.2d 302 (1973),

this Court stated that it would not disturb the finding of the trial court that a confession was voluntarily made "where there is substantial evidence upon which the trial court could reasonably so find." In Nielsen v. Chin-Hsein Wang, 613 P.2d 512 (Utah 1980), this Court stated:

> The findings and conclusions of the district court must be affirmed unless there is a no reasonable basis in the evidence to support them. Further, the evidence and all inferences that fairly and reasonably might be drawn therefrom must be viewed in a light most favorable to the judgment entered.

Id. at 514.

In the instant case the trial court ruled appellant's confession was admissible (T.132). Implicit in this ruling is the fact that the confession was voluntarily made. Even though the evidence presented at trial on the issue of voluntariness was conflicting, the trial court's ruling will not be disturbed if there is evidence to support it. Palfreyman v. Bates and Rogers Const. Co., 108 Utah 142, 158 P.2d 132 (1945)

The evidence in the instant case, when viewed in the light most favorable to the trial court's ruling, establishes that appellant's confession was voluntarily made. Appellant was advised of his Miranda rights on numerous occasions prior to confessing (T.29,59,68). This fact coupled with appellant's previous experience with the criminal system suggest that appellant knew at the time he confessed that he could cut off

the questioning by invoking his right to remain silent. Officer Afuvai testified that appellant was never threatened, nor were any promises made in exchange for a confession (T.64,68,80).

Appellant points out that the trial court found he confessed to pacify the officers. This however does not mean the trial court found appellant's confession involuntary. Even though appellant was motivated by a desire to pacify the officers, the evidence establishes that he was never deprived of his free choice.

CONCLUSION

There is no evidence in the record that indicates appellant ever invoked his right to remain silent. However, the evidence does establish that appellant made a voluntary confession. Officer Afuvai was careful to advise appellant of his Miranda rights prior to questioning him. Appellant clearly understood his rights and therefore Officer Afuvai was not obligated to repeat the warning after appellant confessed to the Ogden City case. Therefore, respondent urges this Court to affirm the finding of the trial court that appellant's confession was admissible.

Respectfully submitted,

DAVID L. WILKINSON
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Brief of Respondent to Mr. Roger A. Flores, Attorney for Appellant, Weber County Public Defender Association, 2568 Washington Boulevard, Ogden, Utah 84401, this 4th day of November, 1981.

Craig L. Barlow