

1960

# State of Utah v. Jesse M. Garcia, Jr. : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Hansen and Miller; Counsel for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

STATE OF UTAH

*Plaintiff and Respondent,*

— vs. —

JESSE M. GARCIA, JR.,

*Defendant and Appellant.*

Supreme Court, Utah  
Case  
No. 9092

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APPELLANT'S PETITION FOR  
RE-HEARING and BRIEF IN  
SUPPORT THEREOF

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH  
*Plaintiff and Respondent,*

— vs. —

JESSE M. GARCIA, JR.,  
*Defendant and Appellant.*

Case  
No. 9092

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## APPELLANT'S PETITION FOR RE-HEARING

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The Appellant, Jesse M. Garcia, Jr., respectfully requests the Court to set aside its decision heretofore rendered on September 8, 1960, and to grant a re-hearing in the above entitled matter for the reason that said decision is not in accordance with the law in that:

### POINT I.

THE APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV, AND THE CONSTITUTION OF UTAH, ART. I, § 12 IN THAT HE WAS DENIED A FAIR TRIAL BEFORE AN IMPARTIAL JURY IN THAT THE

**TRIAL JUDGE IMPROPERLY COMMUNICATED  
WITH A JUROR.**

**POINT II.**

**THE APPELLANT WAS DENIED DUE PROCESS  
OF LAW IN VIOLATION OF THE CONSTITU-  
TION OF THE UNITED STATES, AMEND. XIV,  
AND THE CONSTITUTION OF UTAH, ART. I,  
§ 12 IN THAT HE WAS DENIED HIS RIGHT TO  
BE PRESENT AT ALL STAGES IN THE PRO-  
CEEDINGS.**

The Appellant Garcia submits herewith a brief mem-  
orandum in support of the foregoing petition.

Dated October 31, 1960.

**HANSEN AND MILLER**

By.....  
Gerald R. Miller

# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH

*Plaintiff and Respondent,*

— vs. —

JESSE M. GARCIA, JR.,

*Defendant and Appellant.*

Case  
No. 9092

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING

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### ARGUMENT

#### POINT I.

THE APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV, AND THE CONSTITUTION OF UTAH, ART. I, § 12 IN THAT HE WAS DENIED A FAIR TRIAL BEFORE AN IMPARTIAL JURY IN THAT THE TRIAL JUDGE IMPROPERLY COMMUNICATED WITH A JUROR.

In the Court's opinion in the instant case which was filed on September 8, 1960, appellant's argument, as stated in Point I above, was discussed. The Court decided that there was nothing about the situation which would tend to prejudice the defendant, and that in fact it was quite proper. The Court's reasoning on this point is in error. The communication which took place between the judge and a member of the jury was clearly improper. The trial judge should have refused to hear the question of the juror, except in open court with the defendant and his counsel present.

The statutes of this state are clear on this subject. They make no exception in the case of the trial judge. See Utah Code Ann. §§ 77-31-27, 77-31-28 (1953). The statutes prohibit any communication between a member of a jury and a third person. The good intentions of the trial judge cannot correct the error.

The appellant had no duty or burden to show prejudice. The incident itself is enough. As this Court said in *State v. Thorne*, 96 Utah 208, 117 Pac. 58 (1911):

“... To say that the accused cannot sustain his claim of prejudice until he also shows that the juror talked about something harmful to the accused's rights is to fritter away the constitutional and statutory provisions requiring the jury to be kept secluded from all outside influences.”

It is enough that the incident was contrary to the proper conduct of a trial judge.

The decisions of other jurisdictions support the position that such a communication is reversible error. In *Berness v. State*, 38 Ala. App. 1, 83 So. 2d 607, Aff'd 83 So. 2d 613 (1953), the defendant appealed from a conviction of murder in the second degree. The appellate court reversed, and in so doing stated as follows:

“An incident occurred however during the course of this trial which, in our opinion, necessitates a reversal of this cause, which incident was fully brought to the court’s attention by a motion for a new trial and hearing thereon.

“After the hearing and arguments had been completed, but *before the court had instructed the jury*, the court declared a noon recess. The jury were permitted to separate, but cautioned by the court not to discuss the case either among themselves or with anyone else.

“As appellant’s attorney was returning to the court house after lunch, accompanied by another attorney, they observed on a corner near the court house several of the jurors in conversation with one of the State’s main witnesses. There was also in the group Mr. Luther Tays, a distant relative of the deceased girl.

“As the two attorneys passed the group one of them remarked ‘There goes Berness’ lawyer.’ The two attorneys passed on down the street, and after discussing for a few minutes what they had seen, they proceeded to the chambers of the trial judge. Judge Hill was then in the Register’s Office, which adjoins his private office, reading decisions in preparation for his oral charge. As to what occurred from this point we quote the following excerpt from Judge Hill’s statement read into the



record on the hearing on the motion for a new trial:

‘At approximately 12:45 p.m. someone knocked on the door and I opened it and found that Mr. Eugene Burts, Attorney for the defendant, Berness, together with a friend of his, a lawyer, Mr. Emmett Roden, wanted to see me. They stated that they had seen one of the State’s witnesses, to wit: Mr. Grady P. Yancey, talking to one or more jurors on the southeast corner of the intersection of Court and Tennessee Streets, which point was visible from the office in which I was working and in which the three of us were then standing. They directed my attention through the window to the group, and I saw some men standing and talking, though I could not make out who it was. I then stated to Mr. Burts that I was very sorry this circumstance had arisen, that I had instructed and reinstructed the jury not to talk to anyone about the case, etc., but that I would go down there immediately and see what they were talking about and tell them that they should not talk to any witness in the case about any subject — or words to that effect. *I do not remember whether the Attorney for the defendant made any reply to this suggestion on my part, or any statement whatsoever concerning it.*

‘I went to the corner in question and saw two or three jurors whose names I do not remember, but Mr. Grady P. Yancey was not there at that time. I then told these jurors that it had been reported to me that a witness for the State had been talking to them on that corner a few moments before. I told them, in substance, that we had to be very, very careful about the actions of jurors dur-

ing recesses in cases in court, and that they should not engage in conversation with any person who had been a witness in a case or who had anything to do with the case, or who might have any interest in the case one way or the other, and that they should not let any such person converse with them. I further stated that it would be better for them not to talk to anybody in the case, or any such person who might have any interest in the case about any subject, not about the weather or any such innocent subject. These three men assured me at that time that no one had talked to them about anything concerning the case at trial.

‘I then left that corner, crossed the street, went into the second store from the corner, which was Milner’s Drug Store, and there found Mr. Grady P. Yancey. I told Mr. Yancey that it had been reported to me that he had been seen talking to one or more of the jurors. Mr. Yancey quickly told me that he had not meant any harm and was sorry that he had talked to any of the men at all on the street corner, but that he had merely told one man that some man named Williams, who had been absent from this County approximately fifty years was back in the County and wanted to see some kinsman of one of the jurors, or words to that effect. I told Mr. Yancey that it would be better for him not talk to any juror about any subject — the weather or otherwise. I then ate my lunch in Milner’s Drug Store and returned later to the Courtroom.’

“Undoubtedly the spontaneous actions of the very able trial judge were motivated by his earnest desire to see that this case was conducted according to all the rules of trial procedure, the observ-

ance of which he had studiously enforced so long as the participants were under his direct and orderly control. Regardless it would seem that the net result of his actions upon being informed that the jurors had disobeyed his injunctions created a situation aptly described by Robert Burns when he observed that:

‘The best laid schemes o’ mice an’ men  
Gang aft a-gley,  
An’ lea’ve us nought but grief an’ pain.’

“In two recent cases, one by the Supreme Court, and one by this court, See *Neal v. State*, 257 Ala. 496, 59 So. 2d 797; *Chancy v. State*, 36 Ala. App. 374, 56 So. 2d 385, it was held to be reversible error for the judge, even though accompanied by defense counsel, solicitor, and court reporter, to go into the jury room and further instruct the jury in the absence of the defendant.

“This for the reason that it has been a long recognized tenet of the common law, based both upon the interest of the accused as well as the interest of the public, that the continuous presence of the accused from arraignment to sentence is an essential part of the process of trial and without which the courts have no jurisdiction to pronounce judgment upon him. Conformity to this rule is jurisdictional.

*“In the discharge of his official duties the judge’s place is upon the bench. Even there, he can have no communication with the jury except in open court, and, in felonies, in the presence of the accused and his counsel if reasonably available.*

“In the present case *the communication between the judge and jurors was in the street, and in the absence of both counsel and accused. Fun-*

damental constitutional rights of the accused were thus infringed, negating the court's jurisdiction to render judgment. *Under such circumstances there can properly be no application of the doctrine of error without injury.*" (Emphasis supplied)

Certainly the facts of the instant case fall well within the scope of *Berness*. A conversation in the street, during a noon recess, and before the jury was instructed, seems far less harmful than the incident in the instant case. However, as the court in the *Berness* case correctly held, the communication itself was error regardless of harm or lack of harm to the defendant. There can be no question but what the trial judge meant well in the instant case. In *Berness* the trial judge had equally good intentions. In fact, he was acting in a manner which he believed would avoid error in the proceedings. His intentions were immaterial to the question before the court. The Alabama court held that the trial judge could properly act only in open court with the defendant and his counsel present. The fact that the defense counsel in *Berness* neglected to raise any objection to the action the judge proposed did not mitigate the error. Nor was it necessary for the defendant to change his position, or introduce additional evidence. There was nothing about the situation presented in the *Berness* case in regards to the communication between the judge and the jurors which would tend to prejudice the defendant expressly. That is, nothing in the conversation as reported by the trial judge in any way injured or harmed the defendant. In this regard *Berness* is similar to the instant case. This is not the test, however. The test merely inquires as to whether or not

an improper communication occurred. The *only* proper communication between the judge and jury is in open court in the presence of the defendant and his counsel.

The New Mexico court in *State v. Beal*, 48 N.M. 84, 146 P. 2d 175 (1944), reversed a conviction of murder because the trial judge after jury had retired to deliberate, and without the knowledge or consent of the defendant or his counsel, sent to the jury room certain exhibits which had been entered by the state. In doing so they cited *State v. Hunt*, 26 N. M. 160, 189 Pac. 1111 (1920), which comes very close to the facts in the instant case.

In *State v. Hunt*, the court announced a recess; as the jury were leaving the jury box and before the judge left the bench, a juror approached the judge and stated that the jury was curious about a certain shoe which had been introduced in evidence. The jury desired to have the shoe in question opened so that the interior thereof might be discovered in order to determine whether or not the toe of the shoe contained blood. There were several bystanders within hearing distance of the juror at the time he addressed the judge. The New Mexico court then stated as follows:

“... the judge of the court thereupon stated to said juror that, if the jury desired that this be done, the proper course to follow was for one of the jury to rise before the court in the jury box in open court and make such request; that at the time said request was so made by said juror... in reponse (sic) to said request, the defendants were not, nor was either of them, and counsel for de-

fendants were not, nor was either of them, within hearing so far as the court is aware of said juror . . . or of the said court, or of the said colloquy which occurred between the said juror . . . and the court."

Later in the trial it appears that the juror followed the judge's advice and made his request from the jury box in open court. The court in *Hunt* held the communication between the judge and the juror to be improper.

It will be noted that the only thing the trial judge did in the *Hunt* case was to advise the juror that his conduct was improper and to indicate the proper procedure to follow in asking his question. What possible harm could this do the defendants in that case? There is a suggestion that the counsel for the state became aware of the communication, and since the juror did not make his request in open court until after arguments had been made it seems reasonable that the state's attorney used this information to his advantage. The appellant Garcia in the instant case argued this same point in his brief on appeal, claiming that counsel's knowledge of the jury's thinking unfairly affected the subsequent course of the trial. See Brief of Appellant, page 22.

The court in the *Hunt* case ruled on the basis that there was an improper communication. It did not inquire into the actual harm which may or may not have inured to the defendants. This is the proper rule of law. The Court in the instant case has committed error, and a re-hearing should be granted.

## POINT II.

THE APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV, AND THE CONSTITUTION OF UTAH, ART. I, § 12 IN THAT HE WAS DENIED HIS RIGHT TO BE PRESENT AT ALL STAGES IN THE PROCEEDINGS.

It is a fundamental principle of the law of criminal procedure that the defendant in a felony case has the right to be present at all stages in the proceedings. This is an absolute right, and there can be no valid trial or judgment unless he has been afforded that right. The Court is in error in holding that the communication which took place in the instant case between judge and juror was not properly considered part of the proceedings. Anything which affects the rights of the defendant from the time the jury is impaneled until a verdict is reached is properly considered part of the proceedings. This communication certainly affected the rights of the defendant in that it went to the merits and the law of the case.

This position has been upheld in many jurisdictions. In *Midgett v. State*, 216 Md. 26, 139 A. 2d 209, the Maryland Court of Appeals stated that the accused in a criminal prosecution has a constitutional guarantee that he must be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict, and this includes the right of the accused to be present when there is any communication whatsoever between the court and the jury. See also *Crowe v. United States*, 200 F. 2d

526; *White v. State*, 149 Tex. Crim Rpts. 419, 195 S.W. 2d 141.

In *Berness v. State*, 38 Ala. App. Ct. 1, 83 So. 2d 613, the Supreme Court of Alabama stated as follows:

“We cannot agree with the validity of the State’s argument to the effect that as the court had declared a short recess, the “trial” was not then in progress so as to require the presence of the defendant at the time additional admonitions and instructions were given to some members of the jury by the presiding judge.”

“It is necessary for the orderly administration of justice that the trial court have disciplinary power over the jurors, the parties, and officers of the court, continuously from the beginning of the trial to the final return of the verdict. The manner in which the trial court exercises this discipline, is a matter of supreme interest to the defendant. Unless he voluntarily absents himself, he and his counsel, if reasonably available, have a right to be present at every exchange between the judge and jury, where the conversation is germane to any important incident of the trial.”

In *Berness* the communication took place *in the street* outside of the court house during the noon recess. Yet the court held this to be part of the proceedings. See Page 8.

These cases stress the point that nothing affecting the rights of the defendant can properly be done in his absence. The communication between the judge and juror took place during the trial. It went to the law and merits



of the case. The defendant had an absolute right to be present at that conversation. That right was denied him. To hold that such a communication was not properly considered part of the proceedings is clearly erroneous. The Court has committed error in this regard and a re-hearing should be granted.

### CONCLUSION

The Appellant Garcia respectfully urges that the Court will find its decision rendered in this case to be untenable and therefore grant a re-hearing.

Respectfully submitted,

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