1959

State of Utah v. The District Court of Salt Lake County, State of Utah : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Jay E. Banks; District Attorney; Walter L. Budge; Attorney General;

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Appellant,

vs.

THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, AND ALL THE JUDGES THEREOF,
Defendants and Respondents.

Case No. 9117

PETITION FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF

JAY E. BANKS
District Attorney
3rd Judicial District

WALTER L. BUDGE
Attorney General

PRINTERS INC. SUGAR HOUSE

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Appellant,

vs.

THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, AND ALL THE JUDGES THEREOF,
Defendants and Respondents.

Case No. 9117

PETITION FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF

PRELIMINARY STATEMENT

On September 10, 1959, this court rendered a decision, Case No. 9117, recalling an Alternative Writ it had previously issued against the Defendants and Respondents, prohibiting inspection of the transcript of the testimony of witnesses listed on an indictment by the Salt Lake

County Grand Jury returned against Theodore I. Guerts for "Misconduct In Office." In accordance with Rule 76(e), Utah Rules of Civil Procedure, appellant herewith petitions for a rehearing of said cause on the grounds hereinafter set forth.

STATEMENT OF POINTS

POINT I.

THE MAJORITY ERRED IN ITS INTERPRETATION OF THE LAW IN THAT THE HARRIES CASE AND THE UTAH STATUTES INTERPRETED THEREBY INDICATE THAT A DEFENDANT IS ENTITLED TO VIEW THE GRAND JURY TRANSCRIPTS ONLY AFTER THE COMMENCEMENT OF TRIAL.

POINT II.

THE MISSOURI SUPREME COURT, UPON WHOSE OPINION IN CLAGGETT V. JAMES THE MAJORITY RELY, HAS, SINCE THE DATE OF THE MAJORITY'S OPINION, CLARIFIED ITS POSITION AND THEREBY LENT SUPPORT TO THE VIEWS OF PETITIONER.

ARGUMENT

POINT I.

THE MAJORITY ERRED IN ITS INTERPRETATION OF THE LAW IN THAT THE HARRIES CASE AND THE UTAH STATUTES INTERPRETED THEREBY INDICATE THAT A DEFENDANT IS ENTITLED TO VIEW THE GRAND JURY TRANSCRIPTS ONLY AFTER THE COMMENCEMENT OF TRIAL.

Title 77, Chapter 19, Section 10, Utah Code Annotated, plainly states:

> "No member of the grand jury, nor any person at any time present at any session of the grand jury, shall disclose what he himself or any other grand juror or person may have said at such session. No grand juror shall divulge in what manner he or any other grand juror may have voted on a matter before them. Any grand juror or other person may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, *for the purpose of ascertaining whether it is consistent with that given by the witness before the court,* or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony, or upon his trial therefor."

This section plainly states the exceptions to the general rule of secrecy and says the Grand Jury testimony may be examined" * * * for the purpose of ascertaining whether it is consistent with that given by the witness *before the court.*" Prior to trial there can hardly be any testimony of a witness *before the court.* The statute therefore precludes any disclosure to show inconsistency until there has been testimony to be proven inconsistent.

This language was thus interpreted by the Utah Supreme Court in the case of *State v. Harries, 221 P2d 605,* wherein the court said at page 614 after quoting the above noted language:

> "The quoted sections establish that the legislature only intended to lessen the tension of the common law rules to the extent of making a transcript available to the defendant for impeachment purposes * * *. Furthermore the legislature could have very easily prescribed that a copy of the transcript be furnished the defendant had it in-

> tended to be the case. * * * *If use of the transcript is limited to impeachment purposes, then defendant could not make a claim of contradictory stories until a witness who had appeared before the Grand Jury had testified in the trial of the cause. Until that time there could be no showing made that there were variances in the testimony of any witness on the two occasions."*

The District Court exercised its discretion in the Harries case and denied defendant's motion to view the Grand Jury transcript prior to trial. The above noted passages indicate the reasons the Supreme Court upheld the trial court's action.

It is true the Supreme Court was merely upholding the use of the trial court's discretion and it could be argued that this same court would uphold the discretion of a trial court in allowing the defendant to view the Grand Jury transcript before trial. However, the language used in the Harries case, in support of the ruling of the trial court, clearly establishes that in no instance could the statutory provision for impeachment come into existence until trial commences. It is equally clear, no disclosure of Grand Jury testimony to a defendant other than for impeachment upon the basis of inconsistent statements is permitted by command of the legislature.

Hence the trial court may exercise its discretion *only* after a former Grand Jury witness has testified at trial as to whether that witness's Grand Jury testimony may be revealed. In short, there is no option allowed the trial court until trial has commenced.

POINT II.

THE MISSOURI SUPREME COURT, UPON WHOSE OPINION IN CLAGGETT V. JAMES THE MAJORITY RELY, HAS, SINCE THE DATE OF THE MAJORITY'S OPINION, CLARIFIED ITS POSITION AND THEREBY LENT SUPPORT TO THE VIEWS OF PETITIONER.

The Supreme Court of Missouri, in denying a petition for rehearing in the case of *Claggett v. James.* *Mo.* , *S. A. 2d* in a decision handed down on September 14, 1959, went to some lengths to clarify and explain their position as stated in the opinion cited by the majority. This clarification and explanation voiced after the majority here handed down their decision, effectively and clearly supports the position of petitioner.

In the case of Claggett v. James the court did allow defendant to see the record of the Grand Jury prior to trial; however, it must be noted that defendant therein alleged four separate instances wherein his access to the transcript was necessary. In the instant case, defendant has alleged only one, and that one is the very one the Missouri Supreme Court specifically rejects, namely that preparation for trial will thereby be easier. The court, in its latest pronouncement, states in clarification of its original opinon, that:

> "In accordance with these cases we hold that inspection of grand jury transcript should not be permitted for purposes of discovery or as a substitute for taking depositions of witnesses endorsed on the indictment, but only when and to the extent that is shown to be necessary to meet the ends of justice. * * * Our ruling did not mean that anyone

> indicted is entitled to all of the testimony of all the witnesses before the grand jury even if it is all material and relevant, and it might well be an abuse of discretion to permit it."

These pronoucements point up the fatal flaw in defendant's argument. Even conceding arguendo that in Utah the law allows grand jury transcript to be viewed by a defendant prior to trial, such can only be the case when a proper showing of legitimate need has been made, and not as a substitute for the established disclosure procedure. The fact that defendant could thereby more conveniently prepare his case can hardly justify deviation from the long established rule of grand jury secrecy. Any information which defendant claims he must have through grand jury testimony prior to trial or be irreparably damaged, may just as easily be acquired through interrogation of the witnesses involved who are in no way precluded from relating what information they may have concerning the particular crime alleged in the indictment. As the U. S. Supreme Court said in *U. S. v. Proctor & Gamble, 356 U. S. 669:*

> "* * * This indispensable secrecy of grand jury proceedings must not be broken except where there is a *compelling necessity*. There are instances when that need will outweigh the countervailing policy but that must be shown with particularity. No such showing was made here. * * * If the grand jury transcript were made available, discovery through depositions which might involve delay and substantital costs would be avoided, *yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or*

> *that without reference to it an injustice would be done.* * * * We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceeding is lifted discretely and limitedly. We only hold that no compeling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript * * *. We hold that a much more particularized, more discrete showing of need is necessary to establish good cause."

Defendant in this case has made the barest showing of convenience and no more. Certainly defendant made absolutely no showing of "good cause" as discussed in the Proctor and Gamble case noted above.

CONCLUSION

Petitioner respectfully submits the decision of the majority in the instant case is contrary to the established law of the State of Utah as pronounced by the legislature and interpreted by this honorable court. The blanket authority granted to defense counsel to go on "a fishing expedition" for purposes of discovery under the guise of trial preparation is contrary to legislative intent as interpreted by the Harries Case. Allowing any party indicted by a Grand Jury access to the heretofore secret transcripts of said Grand Jury upon a bare showing that it would assist his trial preparation ignores established principles of law. This does not invoke a court's discretion, but es-

tablishes procedure wherein through mere formality of making a motion to the court he can obtain said transcripts. Is this not the case in each and every instance? When then would a defendant be refused? It may also be noted that the majority opinion suggests no guides or standard for the trial court in the exercise of its discretion. There, too, it appears that the censoring of the transcript, or excising of certain portions, would involve an exercise of discretion by the trial court which the defendant might be entitled to have reviewed on appeal after conviction.

It is stated by Justice Eager in his dissent in the Claggett Case, "The resultant question always is whether the ends of justice will be furthered by the request of disclosure. This involves not only the rights of the accused, but the rights and interest of the public in the administration of the criminal laws."

Petitioner in no way concedes that the defendant is entitled to the transcripts prior to trial, but to the contrary, as we interpret the legislative intent and ruling of the Harries Case, defendant is only entitled to the transcript after commencement of the trial for the purpose of ascertaining whether the trial witnesses' testimony is consistent with that given by him before the Grand Jury, and then only upon good cause shown. Assuming arguendo that defendant is entitled to view the transcripts prior to trial, it is our position that good cause still must be shown in order for the trial judge to allow inspection.

It should be remembered that the divulging of Grand Jury testimony is an exception to the general rule and

should be engaged in not when the court feels no harm will be done thereby, but rather when they are convinced great and irreparable harm will result from denial. The action of the District Court in granting defendant's motion on such a meager showing is clearly an abuse of discretion.

It is respectfully requested This Honorable Court should in the interests of justice review its decision in this instance.

Respectfully submitted,

JAY E. BANKS
District Attorney
3rd Judicial District

PETER F. LEARY
Deputy District Attorney
3rd Judicial District

WALTER L. BUDGE
Attorney General

RICHARD R. BOYLE
Assistant Attorney General

ARTHUR A. ALLEN, JR.
Special Prosecutor
Attorneys for Appellant.