

1961

State of Utah v. David Farnsworth : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

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STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

DAVID FARNSWORTH,

Defendant and Appellant.

} Clerk, Supreme Court, Utah
Case
No. 9546

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
 Plaintiff and Respondent,
— vs. —
DAVID FARNSWORTH,
 Defendant and Appellant.

}
} Case
} No. 9546

BRIEF OF RESPONDENT

NATURE OF CASE

Defendant was convicted of burglary in the second degree, 76-9-3, U.C.A. 1953, in the Second Judicial District Court on June 16, 1961, and contends that an incompetent defense and other legal errors require reversal.

DISPOSITION MADE BY LOWER COURT

Defendant was convicted of burglary in the second degree on June 16, 1961, at a trial before the Honorable

Charles G. Cowley, sitting without a jury. After conviction, the defendant was referred to the Adult Probation and Parole Department for a pre-sentence report. On July 3, 1961, defendant was present in court with counsel who argued the imposition of the sentence, and the court continued the sentence date until July 10, 1961. On July 10, 1961, defendant was sentenced to the State Penitentiary for an indeterminate period of one to twenty years. At the time of imposition of sentence, the defendant's counsel was not present. On July 31, 1961, the defendant's motion for a new trial was denied. The defendant filed a notice of appeal and is free on bond, pending the outcome.

RELIEF SOUGHT ON APPEAL

Affirmance of the Trial Court's judgment.

STATEMENT OF FACTS

On the 12th of December, 1960, a complaint was issued against defendant for the crime of burglary in the second degree. (R. 1) On the 15th of December, 1960, the defendant and counsel appeared in open court and waived preliminary hearing. (R. 3) Thereafter, an information was filed (R. 5) and defendant entered a plea of not guilty on the 3rd of January, 1961. On June 16, 1961, the defendant was tried without a jury and convicted of the charge.

The facts and circumstances of the trial are material to the defendant's claim of incompetent representa-

tion. A jury trial was waived by the defendant (R. 1), who was represented by counsel. Counsel was apparently hired by the defendant, as no indication of appointment appears of record.

Six witnesses were called by the State. The first witness, Donna Young, testified that she had closed Young's Market in Roy, Utah, on the evening of the 6th of December, 1960, and then opened it on the morning of the 7th of December at about 10:00 a.m. (R. 3, 4). She indicated the padlock on the door had been ripped off, and certain items were missing from the store. She identified certain property in the courtroom as being items from her store. (R. 5) She was cross-examined by the defense counsel concerning whether there was any indication of a breaking. (R. 7, 8)

The second witness, Gene King, testified as an accomplice and admitted the commission of the burglary with the defendant. (R. 8-11) With reference to the time of the crime, the record discloses (R. 9):

“Q. Did you shortly after midnight, which would be early morning of December 7th, have occasion to be in Roy, Utah?

“A. Yes.”

Thereafter, he testified that at that time he and the accused burglarized Young's Market. He testified that after the burglary (R. 12):

“We transferred the stuff from the back seat to the trunk of the car. Then we stayed in the car and slept until that morning.”

During the course of the direct examination of King, defense counsel objected to the admission of evidence. (R. 14) There was no cross-examination.

Thereafter, a Roy City Patrolman testified as to the apprehension of the defendant during a routine check, and the seizure of items taken from the store. (R. 14-17) During the course of examination, several objections were raised by defense counsel, and sustained by the court. (R. 17)

Thereafter, two peace officers testified as to the physical evidence at the site of the burglary, and the chain of custody of items found at the scene (R. 18-19), and as to the chain of custody of items taken from the presence of defendant. (R. 20-21) A deputy sheriff further testified as to chain of custody of the sized items, and as to a criminalistic examination of a screwdriver taken from the presence of the defendant and King. (R. 24) The State rested.

The defense chose not to put on evidence, and no arguments were made. (R. 25) The court adjudged defendant guilty.

The sentencing was continued, and later a new counsel argued the appropriate sentence to the court, and the matter was continued. (R. 1A-4A) Thereafter, the defendant was sentenced to confinement in the Penitentiary in the absence of counsel. (R. 4A) A motion for a new trial thereafter made was denied. (R. 19)

Based upon the above facts, the defendant claims three errors exist which require reversal. The State submits none of the claimed errors require reversal.

STATEMENT OF POINTS

POINT I.

THE DEFENSE OF THE DEFENDANT AT TRIAL WAS NOT SO INCOMPETENT AS TO CONSTITUTE A SHAM OR MOCKERY OF JUSTICE AND THUS TO REQUIRE REVERSAL.

POINT II.

THE EVIDENCE SUSTAINS A FINDING THAT THE BURGLARY CHARGED WAS COMMITTED IN THE NIGHTTIME.

POINT III.

THE ABSENCE OF DEFENSE COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE DOES NOT REQUIRE REVERSAL.

ARGUMENT

POINT I.

THE DEFENSE OF THE DEFENDANT AT TRIAL WAS NOT SO INCOMPETENT AS TO CONSTITUTE A SHAM OR MOCKERY OF JUSTICE AND THUS TO REQUIRE REVERSAL.

The defendant contends that he was inadequately represented at trial, and, as a result, he is entitled to a

new trial. The appellant bases his contention upon the provisions of Amendments Five, Six and Fourteen of the Federal Constitution, and upon Article I, Sections 7 and 12 of the Utah Constitution, being the right to counsel and due process provisions. To the degree that the defendant may rely upon the Fifth and Sixth Amendments to the Federal Constitution, his reliance is misplaced, since the Fifth and Sixth Amendments to the Federal Constitution are not applicable to the states. *Betts v. Brady*, 316 U. S. 455 (1942). The constitutional construction is succinctly noted in 11 Am. Jur., Constitutional Law, Sec. 316, where, referring to the Fifth Amendment, it is said:

“The foregoing provisions of the Federal Bill of Rights, however, apply only to the United States. In no manner are these provisions limitations on the States.”

And, in reference to the Sixth Amendment, it is noted in the same section, 1961 Supplement:

“However, the due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment * * *.”

In *Powell v. Alabama*, 287 U. S. 45, the Supreme Court held that the due process clause of the Fourteenth Amendment may incorporate certain rights to counsel, and held that in all capital cases the right to counsel was essential to due process. Subsequently, in *Betts v. Brady*, supra, the court was confronted with a contention that due process requires counsel in all non-capital cases.

The court rejected the contention and stated the rule in terms of essential fairness. It said:

“As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”

Thus, any claim of Federal Constitutional violation must be a matter of due process. As to the specific issue of whether due process of law can be said to encompass the question of competency of counsel, it was noted in *Penn v. Smith*, 188 Va. 367, 49 S.E. 2d 600 (1948), that there had been no express holding by the United States Supreme Court on the issue.¹ The situation apparently is still the same today, since it is noted in 74 ALR 2d, p. 1397, that:

“* * * there seemingly has been up to this time no direct pronouncement by the United States Supreme Court concerning the subject under discussion [incompetency of counsel] * * *.”

It is to be noted that in *Powell v. Alabama*, supra, as well as *Hawk v. Olson*, 326 U. S. 271 (1945), and *Reece v.*

¹ Beane, *Right to Counsel in American Courts* (1955), p. 189, notes: “Perhaps the only area where the lower courts have been under siege on a matter not clarified by the Supreme Court is that of competency of counsel and effective appointment of counsel.”

Georgia, 350 U. S. 85 (1955), among other cases, the Supreme Court stated that effective assistance of counsel in a state prosecution for a capital crime is a requirement of due process, and in *Betts v. Brady*, supra, it noted that in certain non-capital cases it may be necessary to essential fairness; however, the standard of what is required has never been passed on by the U. S. Supreme Court.

The lower federal courts have passed on the matter. However, they have generally said that “lack of preparation or interest, incompetency or inadequacy” are ordinarily not sufficient circumstances to set aside a conviction. *Ex Parte Haumesch*, 82 F. 2d 588 (9th Cir. 1936); *Hudspeth v. McDonald*, 120 F. 2d 962 (10th Cir. 1941); *Johnnene v. Graham*, 138 F. Supp. 542 (D. C. Utah 1956); *Barker v. United States*, 227 F. 2d 431 (10th Cir. 1955).

The state courts, passing on the same contention, have also held that their constitutional provisions similar to Article I, Sections 7 and 12 of the Utah Constitution, were to be construed in the same fashion. *Ex Parte Gammon*, 255 Ala. 502, 52 So. 2d 369 (1951); *Darries v. People*, 10 Ill. 2d 11, 139 N.E. 2d 216 (1956); *People v. Grgurevich*, 153 Cal. App. 2d 806, 315 P. 2d 391 (1957). For these reasons, it is submitted that whether the issue is framed under the State or Federal Constitutional provisions, the same standard is applicable. The general rule applicable in cases where post-conviction or appellate

claims of ineffective counsel are made is summarized in 74 ALR 2d 1403 in the following terms:

“* * * most courts considering * * * the question of incompetency of retained counsel are generally agreed that the judgment of conviction is void when counsel’s representation has been so inadequate as to make the trial a farce and a mockery of justice, thereby denying the accused a fair trial (due process of law) * * *.”

The Nevada Supreme Court stated it as follows in *State v. Jukech*, 49 Nev. 217, 242 Pac. 590 (1926):

“We think that the rule deducible from the cases is that a new trial should not be granted by an appellate court in a criminal case on account of the incompetency or neglect of counsel, unless it is so great that the defendant is prejudiced and thereby deprived of a fair trial.”

Thus the trial must be of such a low character as to render the trial a “farce and a mockery.” *People v. Durpee*, 156 Cal. App. 2d 60, 319 P. 2d 39.

It is submitted that the defense in this instance, although some may say it could have been done better, was not a “mockery of justice” so as to warrant reversal.

Defendant protests that certain aspects of the case require a judgment of reversal. An examination of these contentions discloses that they are without merit. First, it is inferentially contended that the waiving of a jury trial was such a circumstance as would support a claim of misconduct. It can hardly be claimed that a trial before a judge makes the trial a mockery, nor can such an

inference be drawn, based on other facts of record. Trial strategy or tactics may be best served in laying the matter before a judge alone. In *Lucas v. State*, 227 Ind. 486, 86 N.E. 2d 682 (1949), the defendant appeared at trial and apparently acquiesced in the waiver of a jury trial, as defendant did here. Thereafter the contention was made that defendant desired a jury and some evidence supported this contention; however, the Indiana Court denied any claim to relief based on a claim of incompetency.

The absence of an opening statement in no way reduces the trial to a mockery. The purpose of the opening statement is to inform the jury or the court of the evidence to be presented so as to make the evidence easier to follow. However, where the case is not complex, and issues are being tried to the judge, the need to present an opening statement is not present. It should be noted that the prosecution also waived the opening statement, and such a practice is common in a non-jury trial for both sides. Indeed, authorities differ as to the value of an opening statement, Rothblatt, *Successful Techniques in the Trial of Criminal Cases*, 1961, p. 38, and its absence here will not add to a claim of jurisprudential mockery.

Defendant's contentions that defense counsel should have compelled the State to prove facts or elements making up the crime are somewhat ludicrous. The duty is on the prosecution to prove the defendant's guilt beyond all reasonable doubt. The duty rests upon the prosecution to prove each element of the crime, and a defense counsel

who disclosed weaknesses to the prosecution or proved omitted elements might himself be suspect in his loyalty. Indeed, the defense counsel's actions in holding the prosecution to their own proof might have been his best trial tactic, since should the prosecution neglect to prove an essential element, the trial judge could only acquit. Where the evidence of guilt is overwhelming, this course may be the only defense open.

Equally as unmeritorious is any claim that the defense counsel was remiss in not impeaching a state witness. Defendant appears to be referring to the accomplice, Gene King; however, King testified to committing the crime with the defendant (R. 10), and hence, by his own admission, had committed a felony. Certainly, it is not incumbent upon defense counsel to point out to the court what is obvious for all to see, upon penalty of an accusation against his competency.

The defendant's contention that defense counsel failed to object to inadmissible evidence, apparently the result of an illegal search and seizure, is equally questionable in demonstrating incompetency. The trial of defendant was on June 16, 1961. At the time of trial the Utah law was not to exclude evidence illegally obtained. *State v. Fair*, 10 U. 2d 365, 353 P. 2d 615 (1960). The U. S. Supreme Court did not hand down its revolutionary decision in *Mapp v. Ohio*, 367 U. S. 343 (1961), compelling such exclusion, until June 19, 1961, or three days after the defendant's trial. Even had an objection been made, and overruled, it is doubtful if the defendant's position

would be any better on appeal, since the present trend of authority is not to apply the Mapp rule retroactively. *People v. Figueroa*, 30 LW 2158 (N. Y.); *People v. Bertrand*, 30 LW 2028 (N. Y.). It would appear that defendant would have counsel do things of dubious value in order to demonstrate his competency.

The only real issue raised by defendant attacking his counsel's performance is whether his failure to cross-examine all the State's witnesses, and to present evidence on behalf of the defendant was of such a nature as to reduce the trial to a "mockery of justice." Apparently defendant would have counsel examine every witness whether the examination would or would not contribute to the defendant's position. However, Rothblatt, *supra*, p. 47, points out:

"Only cross-examine when you can aid defendant's case or weaken prosecution's case."

See also Wellman, *The Art of Cross-Examination*, p. 8. Had counsel cross-examined the accomplice or police officers, it is doubtful that it would have in any way aided the defendant, and certainly could have seriously harmed him. Thus, it could have resulted in an assertion by King that defendant had suggested or initiated the idea of the burglary, or that he had made damaging admissions or got smart with the police. It appears clear as to what the defense counsel here intended to do. With the evidence of guilt overwhelming, and with a previous bad record to overcome (R. 1A-4A), his obvious strategy was one well known to experienced criminal lawyers — to place the

crime before the court in the simplest, most unaggravated terms in an effort to mitigate a sentence. With only a *prima facie* case before the court, showing a burglary where food and beverage items were taken, coupled with the defendant's age, the trial court would be more likely, in view of a bad past record, to accord the accused another chance than had defense counsel thrashed the witness without chance of changing the result, elicited hostile testimony, and had defendant perjuriously denied his guilt in the face of overwhelming evidence to the contrary. Had defendant taken the stand, his past criminal conduct may well have been placed before the court, without the diluting accompaniment of a probation report. Had additional character testimony been presented, it would have opened the door for rebuttal.

In *Darcy v. Claudy*, 367 Pa. 130, 79 A. 2d 785 (1951), the court was faced with an argument that counsel was incompetent because he did not put defendant on the stand or produce reputation testimony. In rejecting the argument, the court said:

“Whether he should have had the relator take the witness stand and have produced reputation testimony was obviously, as every trial lawyer knows, a matter of judgment to be decided in the light of the circumstances as measured by various considerations of policy.”

In the instant case the trial strategy obviously called for limiting the evidence to its simplest form. Defense counsel made objections in areas where it was possible that damaging testimony could have been elicited. (R. 17, 18)

In addition, he cross-examined the essential witness on the issue of the breaking. Under these circumstances, the defendant cannot complain because he now feels a different tack would have been more successful. 24 ALR 1022, 64 ALR 437.

It should be noted that the evidence of record indicating the guilt of the accused is extremely strong. In *Hendrickson v. Overlade*, 131 F. Supp. 561 (1955), the court noted the importance of evidence of guilt where the allegation was of an incompetent defense counsel. It said:

“We also recognize that in a habeas corpus proceeding this court * * * [is] not concerned as to the guilt or innocence of the petitioner of the crime for which he was convicted. However, when the question of incompetency of counsel is called into question by the petitioner, the question of guilt must be considered by us for the reason that if defendant was conclusively guilty the question as to just what his counsel could do by way of defense is important.”

Other cases and authorities have so noted. *Wilson v. State*, 273 Wis. 522, 78 N.W. 2d 917 (1956); *Miller v. Hudspeth*, 164 Kan. 688, 192 P. 2d 147 (1948); 74 ALR 2d 1414.

Where the evidence, as here, is compelling as to the accused's guilt, counsel has little alternative as to how to conduct the defense. Here counsel apparently determined that the best way to proceed was to diminish the criminality by limiting the evidence presented on both

sides to a prima facie case. A defendant has a right to plead not guilty and to charge the State to its burden of proof. If the State meets the burden by overwhelming evidence, the defendant has no case to present, can he claim his trial was a sham because none was manufactured? It is submitted he cannot.

Mere irregularities, or differences of opinion as to strategy will not suffice to make a trial a sham, *Soulia v. O'Brien*, 94 F. Supp. 764, nor incompetency or neglect alone. 74 ALR 2d 1399.

In the instant case defense counsel was an experienced and reputable attorney of many years, well schooled in the defense of criminal matters. His strategy was obviously directed towards placing the State to its burden, limiting the proof to the barest essentials in an effort to mitigate criminality, with the hope of sustaining a second chance. In such an instance, as was noted in *People v. Martin*, 210 Mich. 139, 177 N.W. 193 (1920):

“An appellate court cannot determine whether the course pursued by an attorney defending a man charged with crime * * * was the best means of promoting his defense.”

It is submitted the defendant's contention is without merit, and that the facts fully support a conclusion that defendant's trial was not of such a low level as to constitute a mockery of justice, and, hence, there was no denial of due process warranting reversal.

POINT II.

THE EVIDENCE SUSTAINS A FINDING THAT THE BURGLARY CHARGED WAS COMMITTED IN THE NIGHTTIME.

The defendant contends that the evidence was insufficient to show that the burglary in question was committed in the nighttime. The evidence of record shows that Young's Market in Roy, Utah, was closed on the evening of December 6, 1960, and opened at about 10:00 a.m. the morning of the 7th of December, 1960, at which time it appeared that the store had been burglarized. If this were all the evidence of record concerning the time of the burglary, there would be no more evidence than that presented in *State v. Miller*, 24 Utah 312, 67 Pac. 790 (1902) upon which the defendant relies, and wherein the Court noted:

“Nor are there any circumstances in evidence of such a character as to show beyond a reasonable doubt that the prisoner took the goods in the nighttime.”

In the instant case, however, additional evidence of record does appear to show that the burglary in question was committed in the nighttime. The record reflects the following: (R. 9)

“Q. Did you shortly after midnight, which would be the early morning of December 7th, have occasion to be in Roy, Utah?

“A. Yes, we were.

“Q. And was David with you at that time?

“A. Yes.

“Q. And how did you get out to Roy at that time?

“A. We were in his car.

“Q. Where did you go when you went to Roy at that time?

“A. Well, we went to a little store in Roy there in the southwest end of Roy.

“Q. Can you describe the store that you went to, Mr. King?

“A. Well, it was a brick in the front and a cinder block on the sides. It had a door on the south — front door on the south — a side door on the west side. It had windows around the sides.

“Q. As you approached the store, what was done with the car?

“A. We had parked it about fifty, sixty feet back from the store on the east side of the store.

“Q. Did you then go to the store?

“A. Yes.”

The record further reflects that the accomplice King testified: (R. 12)

“Q. What did you do?

“A. We transferred the stuff from the back seat to the trunk of the car. Then we stayed in the car and slept until that morning.”

Thus there is direct evidence, therefore, that the burglary was committed around midnight, and additional inferential testimony to indicate that it was not yet morning. This supplies the evidence found lacking in the Miller case. In *State v. Richards*, 29 Utah 310, 81 Pac. 142 (1905), the court was also faced with a claim that the evidence did not support a finding that the burglary

in question was committed in the nighttime. The court noted that other circumstantial evidence would support a finding that the burglary was committed during the nighttime. The evidence disclosed that the owner had full view of the burglarized premises from sunrise until opening of the store and detected nothing. The court held the Miller case to be inapplicable because circumstantial evidence of the burglary being committed in the nighttime was of record.

Here, the evidence, without contradiction, shows that the breaking and entering occurred shortly after midnight in the early morning, and that after the burglary, defendant stayed in his car until the next morning. The evidence amply sustains the conclusion that the burglary was committed in the nighttime. The evidence is similar to that in *People v. Mendoza*, 17 Cal. App. 157, 118 Pac. 964 (1911), where the court said:

“The evidence, however, without contradiction, shows that the entry to the building was made ‘in the evening some time after dark. This was clearly sufficient to justify the conclusion of the jury that the offense was committed after sunset.’”

Certainly, here, the evidence would clearly justify the trial court’s conclusion that the crime was committed in the nighttime. The facts in the instant case are no less supporting than those in *State v. Manger*, 7 U. 2d 1, 315 P. 2d 976 (1957), where the court noted:

“Appellant’s contention that there was no evidence from which the jury could have determined the entry into the Trading Post was made during

the nighttime is also without merit. Although there is no direct testimony of anyone discovering the entry before daybreak, nevertheless the evidence disclosed that appellant was at a party until 1:30 or 2:00 a.m. of July 13, and that at about 3 o'clock someone was heard to enter the house in which appellant lived and shortly thereafter was seen to stand on his bed and reach up to the ceiling for something. From all these circumstances the jury could reasonably find beyond a reasonable doubt that appellant had entered the store sometime between 2 and 3 a.m. of July 13 with the intent to commit larceny."

Here there is direct evidence fixing the commission of the burglary at a time shortly after midnight, which amply sustains findings that the burglary was committed in the nighttime.

POINT III.

THE ABSENCE OF DEFENSE COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE DOES NOT REQUIRE REVERSAL.

The defendant contends it was error to impose sentence upon him in the absence of his counsel. The record reflects that on June 16, 1961, the defendant was adjudged guilty. The sentencing was continued until June 26, 1961, and a pre-sentence report requested. (R. 26, 27). On the 26th of June, the matter was continued until the 3rd of July at the request of new counsel. (R. 12) On the 3rd of July, 1961, the accused and his counsel appeared before the Honorable Parley E. Norseth, and counsel was afforded the opportunity of presenting his views on

the sentence to be imposed, and arguing the merits of probation. (R. 1A-4A)

The matter was continued until July 10, 1961, at between 2:00 and 3:00 P.M.; however, on July 10, 1961, at 10:00 A.M., the court, having apparently forgotten the time setting, sentenced defendant to confinement. Subsequently, on July 31, 1961, the defendant made a motion for a new trial, which was denied. (R. 19) Based upon the above facts, the defendant contends error was committed, and that he was denied his constitutional rights under the State and Federal Constitutions.

It should be noted at the outset that the due process clause of the Fourteenth Amendment of the Federal Constitution does not fully incorporate the right to counsel at all stages of the proceedings, but rather, the Supreme Court of the United States has held that counsel, in a non-capital case, need only be afforded where the absence of counsel would cause the defendant's trial to be said to lack fundamental fairness. *Betts v. Brady*, 316 U. S. 455 (1942). It does not appear that the Supreme Court has yet said that the absence of counsel at the sentencing of an accused in a non-capital case is per se a violation of due process of law in the absence of circumstances clearly demonstrating a "fundamental lack of fairness."² Thus, defendant's claim of a federal violation is only valid if the facts demonstrate such a

² *Townsend v. Burke*, 334 U. S. 736 (1948) is a case where the Supreme Court found such a fundamental unfairness where the court considered matters as true in affixing the sentence which were in fact false, and acted in an extremely unjudicious manner.

fundamental unfairness. Not even the federal courts have been able to reach an unanimity on whether the absence of counsel at the imposition of sentence in a federal case requires reversal.

In *Kent v. Sanford*, 121 F. 2d 216 (1941), the court held no prejudice resulted. Compare *Batson v. United States*, 137 F. 2d 288 (1943); *Taylor v. Hudspeth*, 113 F. 2d 825 (1940); *Losvorn v. Johnsson*, 118 F. 2d 704 (1941); *Janney v. United States*, 227 F. 2d 105 (1955), with *Thomas v. Hunter*, 153 F. 2d 834 (1946) and *Martin v. United States*, 182 F. 2d 225 (1950). It must be concluded that the mere absence of counsel at the time of sentencing is not a factor evidencing such fundamental unfairness as to warrant reversal, because of a denial of federal due process. The cases cited by defendant from the federal courts did not themselves result in reversal.

In *Sheehan v. Delmore*, 225 F. 2d 271 (1955), the Ninth Circuit held that the absence of counsel in a state proceeding where defendant was being resentenced was not a denial of due process.

The only real issue to be resolved is whether the provisions of the Utah Constitution, Article I, Sections 7 and 12, require the presence of counsel at every stage of the proceeding, irrespective of the prejudice that may result.

The state court decisions are apparently in conflict as to whether or not the absence of counsel during the trial is such an error, constitutional or otherwise, as to

require reversal. The conflict is noted in Beaney, *The Right to Counsel in American Courts*, (1955), p. 123, where it is said:

“* * * there is a division of judicial opinion as to the effect of the absence of counsel at any of the various stages of trial.”

As to the effect of counsel's absence at the sentencing portion of the trial, it is generally deplored, but it is usually held that in the absence of a showing of prejudice, the defendant cannot object. In 24 C. J. S., Criminal Law, Sec. 1574, it is said:

“While the practice of sentencing accused in the absence of his counsel has been condemned, it has been held that where the statute does not so require, and where the sentence is not considered part of the trial, it is not necessary that counsel for accused be present when sentence is pronounced, and that the fact that such counsel was not present when sentence was pronounced, notice of the time having been given to him, in the absence of a showing that accused was prejudiced thereby, is not ground for objection.”

Although some cases have indicated an absolute constitutional right to have counsel present at the time of sentencing, others have not. *McCall v. State*, 79 So. 2d 51 (Ala. 1955). In addition, most courts have examined the circumstances surrounding the imposition of sentence to ascertain if prejudice resulted before declaring a violation of constitutional rights. Typical of the cases, and one similar in circumstance to that now before the

Court, is *People v. Pisczek*, 404 Ill. 465, 89 N.E. 2d 387 (1950), where the Illinois Court said:

“The only other contention to be considered is that the trial judge failed to advise Pisczek of his right to have counsel at all times throughout the trial. When the court was disposing of the application for release on probation, it appeared that the attorney who had represented Pisczek throughout the trial had withdrawn from the case because he had not been paid for legal services previously rendered. The record does not show Pisczek was advised of his right to new counsel or that he requested a new attorney. Defendant concedes that the mere fact the court did not inform him of his right to counsel is not in and of itself a ground for reversal. His point is that failure to advise him of the right to counsel, coupled with other surrounding circumstances attending the fairness of the trial does, however, constitute reversible error. In the present case, defendant was tried by the court without a jury and he was competently represented by counsel upon the trial of the cause to and including the making of the motion for probation. When the application came on for hearing eighteen days later, the trial judge had the probation report before him. There was but little, if anything, that counsel could have accomplished at this stage of the proceedings. It may be observed that defendant’s new counsel who presented his written motions for a new trial and in arrest of judgment did not make complaint in either motion of the point now urged. Under the circumstances, we cannot say that defendant was denied any constitutional or statutory rights for the mere reason that the trial judge who had heard the cause without a jury did not appoint new counsel to represent him upon the hearing of

the motion for release on probation and the sentencing. * * *

It is submitted that the Utah cases support the contention that in determining whether there has been a deprivation of constitutional rights, where counsel was absent from any stage of the proceeding, the facts and circumstances of the incident should be examined to determine if prejudice resulted.

In *State v. Stoller*, 107 Utah 429, 154 P. 2d 649 (1945), the Utah Court had before it a claim that the defendant was denied his constitutional rights because his counsel was not present when written instructions were given the jury. The court rejected the contention, apparently feeling no prejudice resulted, and no error was committed.

In *State v. Beeny*, 115 Utah 168, 203 P. 2d 397 (1949), the Supreme Court indicated that additional instructions could be given to the jury in the absence of counsel. Although the court did not decide the constitutional issue, it was aware of it, and inferred that in the absence of prejudice, the action would be unobjectionable.

In *State v. Neal*, 1 U. 2d 122, 263 P. 2d 756 (1953), the defendant raised the very issue raised here; the absence of counsel at the time of sentence. The court rejected the contention in the absence of prejudice, noting:

“Absence of counsel at the time of sentence: Neal had had 12 days’ notice that his sentence would be imposed on October 16th. At that time Judge

Ellett called the case and Neal's counsel was not present; according to the minute entry of the proceeding he was asked if he had any reason to show why sentence should not be pronounced upon him. He answered that he had none and made no request or comment concerning the matter of counsel. A motion for new trial had theretofore been filed on October 9th. It was denied and sentence was imposed. Under the verdict as rendered, without recommendation of leniency, the death sentence was mandatory and there was nothing counsel, nor even the court, could have done except to carry out the mandate of the statute. It would be a useless formality to remand the case for the purpose of having the sentence pronounced with counsel present."³

In *State v. Hines*, 6 U. 2d 126, 307 P. 2d 887 (1957), the court continued to adhere to its practice of weighing for prejudice, for it said:

“In the absence of any showing of disadvantage to the defendant in the procedure followed, it was no abuse of discretion nor variance from proper procedure for the trial court to have the testimony read to the jury without insisting that the defendant's counsel be present. Consequently, we find no prejudicial error as to the defendant Hines.”

Most recently in *State v. Garcia*, 11 U. 2d 67, 355 P. 2d 57 (1960), the Court refused to reverse a murder conviction in the absence of prejudice where the trial judge had a conversation with a juror in the absence of counsel and the accused.

³ Contrary to defendant's assertion the point is not one of first impression for this Court.

In applying the above case law to the instant situation, it appears that no ground for reversal exists. Several continuances were granted defendant, counsel was allowed to present his views on probation to the Judge, a pre-sentence report was before the Court, and it appears the Court investigated the basis which the defendant urged for probation and rejected it. Under these circumstances, there was little, if anything, counsel could do, and thus no prejudice resulted to defendant. Under these circumstances, the defendant certainly was not prejudiced or denied a constitutional right, and the matter does not warrant reversal. *State v. Neal*, supra.

CONCLUSION

The defendant's objections, when properly examined, appear unmeritorious and the defendant's conviction should be affirmed.

Respectfully submitted,

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