

1962

# State of Utah v. Coy Ringo : Brief of Respondent

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

THE STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

COY RINGO,

*Defendant-Appellant.*

Clerk Supreme Court, Utah

Case No.

9712

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the  
3rd District Court for Salt Lake County  
Hon. Aldon J. Anderson, Judge

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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THE STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

COY RINGO,

*Defendant-Appellant.*

Case No.

9712

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

The appellant has appealed from a conviction for assault upon a fellow convict with malice aforethought in violation of Section 76-7-12, Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

The appellant was tried and convicted for committing an assault upon a fellow prisoner, while confined in the

Utah State Prison, upon jury trial in the Third Judicial District Court and sentenced to life imprisonment.

### RELIEF SOUGHT ON APPEAL

The state contends the appellant's conviction should be affirmed.

### STATEMENT OF FACTS

The state submits the following statement of facts in supplement to those set out in the appellant's brief as being directly applicable to the sole issue raised on appeal. The sole issue raised on appeal is that the oral admissions or confession obtained from the appellant, and introduced at trial, were obtained in violation of the appellant's State constitutional right against being compelled to give evidence against himself. Article I, Section 12, Utah Constitution.

The record discloses the following pertinent testimony on the issue raised. Shortly after the assault by the appellant on Howard LeRoy Ollerdisse, the appellant was interrogated by Ferris D. Andrus, Salt Lake County Sheriff's Office, in the presence of Deputy Warden Fitzgerald, Ernest Wright, Executive Secretary of the Board of Corrections, and Lieutenant Jooston of the prison staff. The interrogation took place in the office of the deputy warden on January 2, 1962, at about 1:30 p. m. (R. 230). No force, threats or promises were made during the interrogation. Mr. Wright took notes of the interrogation, which lasted from 45 minutes to an hour (R. 235). The questions during the interrogation were asked by Deputy Andrus (R.

241-242). At the outset of the interrogation, the appellant entered the room and stated:

“Well, what are you going to ask me” (R. 242).

Thereafter, Deputy Andrus indicated that he was just interested in finding out what happened. The appellant then explained the motive for and admitted stabbing Ollerdisse with a laundry pin. No coercion of any kind appears in the record, and it further appears that the appellant’s statement was spontaneous and voluntary. However, the appellant was in custody at the time the statement was given and was not warned of any right to remain quiet or to have counsel. It is the latter facts that appellant contends amount to constitutional violations.

At the time of trial, when the above evidence was offered, counsel for appellant requested an out-of-court hearing as to the voluntariness of the statement (R. 230). After laying initial foundation, the district attorney offered to complete the matter out of court (R. 231). The defense counsel then stated, “I withdraw the objection at this time.” Thereafter, the statement of the appellant, as reported by Deputy Andrus, was admitted before the jury, and defense counsel cross-examined Andrus thereon. Thereafter, Ernest D. Wright was called and testified similarly, without any objection to the testimony from defense counsel, and defense counsel cross-examined Mr. Wright on his direct testimony (R. 239-245). Subsequently, the appellant’s opening statement was made and his witnesses and evidence presented. After the defense rested, the defense counsel made a motion to strike the testimony of



Officer Andrus and Mr. Wright on the grounds that it was not voluntary (R. 292). The motion was denied (R. 293). No instructions on the question of voluntariness were requested nor exceptions taken to the failure of the court to submit the matter to the jury (R. 298, 312-330). No issue is raised on appeal concerning the court's actions in this regard.

## ARGUMENT

### POINT I

#### THE APPELLANT WAIVED ANY CLAIM AS TO THE VOLUNTARINESS OF HIS STATEMENT OR ADMISSIONS AT THE TIME OF TRIAL.

It is submitted that the appellant waived any claim he may now have as to the voluntariness of his statement by conduct at trial. Generally, the court should allow a defendant an out-of-court hearing on the voluntariness of any confessions. *State v. Braasch*, 119 U. 450, 229 P. 2d 289 (1951); *State v. Crank*, 105 U. 332, 142 P. 2d 178 (1943). Such a procedure, to establish preliminary voluntariness, is not necessary if the statement merely amounts to an admission. Thus, in *State v. Masato Karumai*, 101 U. 592, 126 P. 2d 1047 (1942), the court stated:

“Although there are some cases to the contrary, the great weight of authority and the better-reasoned cases hold that before receiving an admission—as distinguished from a confession—in evidence, it is not necessary that a preliminary show-

ing be made to the effect that the statement was voluntary.”

The statements given in the *Masato Karumai* case are similar to those of the instant case where the court was of the opinion that they were merely admissions. The court said:

“In the statement testified to there was no express admission of the guilt of any crime of which defendant was charged. Construed against defendant in its strongest possible light, it was, at most, merely an admission that the defendant killed the deceased because deceased was no good. On the other hand, it might well be taken to mean that the defendant merely asserted that the deceased was no good, without admitting the killing or offering a reason therefor. Even if taken as an admission that the defendant killed the deceased because deceased was no good, this does not admit that the killing was done with a criminal intent” (105 Utah at 602).

However, even so, it is well established that before error may be claimed, a contest must have been raised. *State v. Mares*, 113 U. 255, 192 P. 2d 861 (1948). In the instant case, defense counsel expressly withdrew his objection to the testimony of Deputy Andrus. As to Mr. Wright, no objection to his testimony reciting the accused’s statements was voiced. Not until after full cross-examination of the state’s witnesses, and presentation of the defense, was any objection voiced. This was in the nature of a motion to strike after the full testimony had, with appellant’s express consent, been placed before the jury. No effort was made to have the appellant testify out of the

hearing of the jury as to the voluntariness of the statements, nor were instructions requested by the appellant on the issue. The general rule is stated in Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 348:

“It is a general rule that, in order to take advantage of the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court.”

Sec. 351, *ibid.*:

“Any objection to the admissibility of evidence is waived by failure to object thereto. If defendant fails to object to evidence when first offered, he waives its incompetency.”

Sec. 352, *ibid.*:

“A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it stricken out, but at most to have the jury instructed to disregard it.”

It is submitted, therefore, that the appellant's express withdrawal of his objection to Deputy Andrus's testimony, his failure to object to the testimony of Mr. Wright, his belated motion to strike and his failure to request an instruction to the jury waived any claim of error.

Further, since the appellant offered no evidence, nor sought to place the matter before the jury, no complaint could be had. In *State v. Dunkley*, 85 U. 546, 39 P. 2d 1097 (1935), a claim of improper admission of a confession was based on the failure to allow the appellant to see counsel. No issue, however, was joined at trial. The court stated:

“\* \* \* The matter, for what it is worth, ought to have been put before the jury. But since the defendant did not offer to do so, nor offer any evidence before the jury bearing on the question of voluntariness, we think the defendant is not in position to complain.”

It is submitted, therefore, no claim of error is properly before the court.

## POINT II

THERE HAS BEEN NO VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION UNDER ARTICLE I, SECTION 12, OF THE UTAH CONSTITUTION.

The appellant contends that the circumstances of his questioning by prison officials and members of the sheriff's office, and the resulting admissions made by him occurred in violation of his state constitutional rights against self incrimination. The appellant's contention is based upon the facts that the appellant was in custody at the time of the interrogation, and at that time was not advised of his rights to counsel, nor advised that he need not say anything incriminatory. On the other hand, there is no showing in the record that the appellant ever asked for counsel and was refused, or that he was unaware of his rights. Additionally, it appears that no coercion, force, threats, or promises were made to the appellant to induce the admissions, nor was the appellant a person of immature age or experience. Finally, appellant was only interrogated

a comparatively short time and appeared to respond to questions with complete spontaneity.

There is no mandatory constitutional requirement that a suspect be afforded counsel at an interrogation, nor that he be advised of a right to counsel or warned of making any incriminating statement. The absence of a warning as to these matters may, however, be a factor in determining whether or not a confession or admission so obtained was in fact voluntary. *State v. Masato Karumai*, supra. The essential question is: Was the confession voluntary? It is the evidentiary consequences of appellant's confession or admissions with which the court is in fact concerned. If the confession is voluntary, the absence of counsel or warning and the fact of custody are all immaterial. If the confession was involuntary, the evidence should have been excluded, and the admission of the confession would be reversible error. Maguire, *Evidence of Guilt* (1959), Chap. 3, and especially Section 3.07. Therefore, before reversal is in order, it must appear that the confession or admissions of the appellant were involuntary *as a matter of law* because of the deficiencies complained of on appeal. Further, appellant must bear the burden in this respect.

The facts relied on by the appellant and those apparent from all the circumstances must be considered in determining whether the appellant's statement was voluntary. *Stein v. New York*, 346 U. S. 156, 185 (1953). The appellant contends that the facts of the instant case give rise to a mandatory conclusion that appellant's confession or admissions were involuntary, and relies upon a federal dis-

strict court case in support of that contention, *United States v. Kallas*, 272 Fed. 742 (D. C. Wash. 1921). It is the position of the state that the *Kallas* case does not stand for the position urged by the appellant, is not the general federal rule, is somewhat contrary to the applicable federal cases, and is inconsistent, to the extent it may be claimed as applicable in this case, with decisions of the Utah Supreme Court.

The *Kallas* case must be viewed in light of the circumstances surrounding the decision. The case involved an application for a writ of habeas corpus to which the United States Attorney merely filed demurrer. The court had nothing before it but the bare facts of the petition and a record of hearing before a United States Commissioner. The petition claimed that the evidence before the United States Commissioner, upon whose order he was being detained for the grand jury, was insufficient to warrant detention. The petition alleged that the only evidence of wrongdoing was contained in certain statements he made to a government investigator while confined for investigation. There was no evidence before the commissioner of the crime except the claimed confession, which in the absence of a corpus would not suffice in any event to detain the accused. The court then by *dicta* indicated that a warning while in custody should be given, saying it was the "safer course." What the court was in effect saying was that such circumstances may be of a compelling nature, but the court merely overruled the demurrer, thus requiring proof of voluntariness. That the case is not authority to

support a conclusion that detention and absence of a warning of an accused's constitutional rights requires a finding of voluntariness can be found from other federal cases commenting on the *Kallas* case.<sup>1</sup> Thus, in *United States v. Lydecker*, 275 F. 2d 976 (D. C. N. Y. 1921), the petitioner made a claim contending the indictment against him should have been quashed for failure to warn him of his rights and because the confession was taken while the petitioner was in custody. Petitioner relied on the *Kallas* case. The court stated:

“The case of *U. S. v. Kallas* (D. C.) 272 F. 742, does not support defendant's broad contention.”  
The court further noted:

“\* \* \* *it is ruled that the fact that an accused was in custody does not render his confession involuntary, nor is it necessary that he should have been warned that what he said would be used against him.* It is sufficient if the confession was voluntarily made, though he was not warned or advised that he had the right to remain silent. Not to have had the aid of counsel, or that the confession was made to an officer while in custody, or drawn out by cross-questioning put to the accused and that Pinkerton detectives and other police officers were called in to assist in the questioning or to be present, or that he was confined in the police station and on the next day requestioned, are all matters bearing upon his asserted involuntary statement.”

Thus, the court recognized that question of custody and warning went only to the weight of the evidence in

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<sup>1</sup>Additionally, a reading of the *Kallas* case shows the judge to be confusing the question of procedural correctness which relates also to self incrimination with that of due process based on compelled evidence.

determining voluntariness and did not per se render the confession involuntary. It is submitted, therefore, the *Kallas* case is no precedent for the contention broached by appellant.

Additionally, the *Kallas* case would be contrary to the holdings of other subsequent federal cases and with decisions of the United States Supreme Court if the interpretation urged by appellant were adopted.

In *Wilson v. United States*, 163 U. S. 613 (1896) the United States Supreme Court noted:

“In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.”

The defendant in the *Wilson* case was in custody, before a magistrate who questioned him without warning him of his rights, nor allowing him counsel. The court noted:

“And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned.”

The court then went to the facts of the case and noted:

“It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel, and he was not warned that the statement might



be used against him or advised that he need not answer. There were matters which went to the weight or credibility of what he said of an incriminating character \* \* \*. They were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as a matter of law."

It is noteworthy that the judge who presided in *Kallas* did not refer to the *Wilson* opinion; apparently he was unaware of it.

In *Powers v. United States*, 223 U. S. 303 (1912), the defendant was arrested on the charge of murder. He was taken before a United States Commissioner. The defendant, in custody, was also without counsel, and was not warned of his rights. The record otherwise showed the defendant "voluntarily" testified to the crime before the commissioner. The court held the evidence admissible, holding:

"We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him."

The court cited the *Wilson* case as valid precedent for its conclusion.<sup>2</sup>

Additionally, the lower federal courts have also followed policies that are not compatible with the broad concept espoused by appellant. In *Gerard v. United States*, 61 F. 2d 872 (7th Cir. 1932), the accused made a statement

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<sup>2</sup>The *Wilson* case, as well as the *Powers* case, was cited with approval in *United States v. Carignan*, 342 U. S. 36, 41 (1951), which allowed admission of a confession while in custody and without counsel.

while in custody and without having been advised of his rights. Also, he obviously was without counsel. The court said, in rejecting a contention of error:

“Appellant further contends that there was error in refusing to strike and exclude the testimony of the arresting officers relative to appellant’s denial of the facts that he was acquainted with Cohen and Spivak, that he purchased the plates, and that he was ever in Spivak’s car. He bases this contention upon the fact that the officers failed to advise him, while he was under arrest and in their custody, that any statement he might make to them might be used against him, and that he was under no obligation to make any statement. There was no duress proven, and this contention is without merit. *Powers v. United States*, 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448; *Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.”

In *Wood v. United States*, 128 F. 2d 265 (D. C. Cir. 1942), the court said:

“\* \* \* The only bar arises when compulsion destroys the confession’s probative value. Confessions, it is said, do not become involuntary because elicited by questions, or made while the confessor is under arrest, or in the absence of counsel, without warning or caution that the statement may be used against him, nor by the concurrence of all these conditions in a single case. Admittedly these principles apply when the statement is not made in the course of judicial proceedings.”

See also *Himmelfarb v. U. S.*, 175 F. 2d 924 (C. A. 9th, 1949); *Anderson v. United States*, 124 F. 2d 58 (6th Cir. 1941).

Many federal district court cases have reached similar results. *U. S. v. Papworth*, 156 F. Supp. 842 (D. C. Tex. 1958), cert. den. 358 U. S. 854; *U. S. v. Wheeler*, 172 F. Supp. 278 (D. C. Pa. 1959)<sup>3</sup>; *United States v. Simpson*, 162 F. Supp. 677 (D. C. DC 1958). The latter case is especially relevant to the instant claim. In the *Simpson* case, the defendants were members of the Air Force. They were brought by an air policeman to the Provost Marshal, where they were interrogated by the F. B. I. in the presence of military officials. Counsel was not present nor were the accused advised or warned of their rights. A factor, not present here, also complicated the issue in the *Simpson* case in that Article 31, Uniform Code of Military Justice, 10 U. S. C. 831, makes mandatory the advising of a military accused of his rights before any evidence may be used against him in a court martial. Under these circumstances, the court held the confession properly admitted, finding that they were not thereby rendered involuntary where other evidence disclosed no duress and that "no physical force was employed and \* \* \* no mental coercion and no promises."

It must be concluded that the federal cases, including that of *Kallas*, do not favor appellant's contention. Nor do the authorities from other jurisdictions. *State v. Evans*, 345 Mo. 398, 133 S. W. 2d 389 (1939); *People v. Pongetti*, 72 C. A. 2d 749, 165 P. 2d 479; *People v. Tipton*, 48 Cal. 2d 389, 309 P. 2d 813; *State v. Preis*, 89 Ariz. 336, 362 P.

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<sup>3</sup>Affirmed 275 F. 2d 94.

2d 660<sup>4</sup>. Therefore, appellant must find support from decisions in this state if he is to succeed.

An analysis of the decisions from Utah demonstrates that appellant's contention is without merit. In *State v. Masato Karumai*, 101 U. 592, 126 P. 2d 1047 (1942), a series of admissions were obtained from the appellant while interrogated by a police officer, while in custody, without aid of counsel, without warning the accused of his rights, and where the accused was of Japanese descent and claimed difficulty in understanding English. Further, evidence clearly existed that showed the appellant, at least subsequent to the alleged crime, suffered from some mental illness. The court rejected a contention that this rendered the confession involuntary, saying:

“But even assuming this statement were a confession and not merely an admission—as above concluded—still there was no showing that it was involuntarily made. The fact that the statement was made to an officer while under arrest does not make it involuntary. [Citing cases.] Nor is the fact that no warning was given defendant that what he said might be used against him conclusive, but all these facts and the circumstances existing at the time should be considered in determining the voluntary or involuntary character of the statement. [Citing cases.] The court, therefore, did not err in receiving this testimony in evidence.”

The *Masato Karumai* case is much more compelling in its plea for relief than the facts of the instant case, but since

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<sup>4</sup>Intensive analysis of cases from other states has not been presented in this brief since the state contends Utah precedent is ample on this matter. But see Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 568.

it clearly appeared that the accused's statement was without coercion or duress, the court found no error.

There was in this case no refusal of counsel or long interrogation as was the case in *State v. Braasch*, 119 U. 450, 229 P. 2d 289 (1951), wherein the court again upheld the propriety of the confession. The same standard was accepted in *State v. Bridge*, 3 U. 2d 281, 282 P. 2d 1043 (1955) and *State v. Ashdown*, 5 U. 2d 59, 296 P. 726 (1956), aff'd. *Ashdown v. Utah*, 357 U. S. 426.

In *State v. Nelson*, 12 U. 2d 177, 364 P. 2d 409 (1961), the following contention was raised:

"The defendant seeks reversal of his conviction on the ground that he was deprived of rights assured him under the Fourteenth Amendment of the U. S. Constitution, and Sections 7 and 12 of Article I of the Utah Constitution, because he was taken into custody and kept in the presence of police officers and a magistrate and questioned concerning his conduct during the first two hours following the accident without being advised of his right to the aid of counsel, or that his statements might be used against him."

Again the facts of that case are more severe than those presented in the instant case; however, the court affirmed the use of the admissions against the accused, noting:

"\* \* \* There is no suggestion nor intimidation in the record that he was unwilling or even hesitant to talk to the Officer or to the Justice of the Peace, but he seems to have been voluble enough in conversing with them."

Under these circumstances, it can only be concluded that the appellant's complaint is not well taken. The facts disclosed here show no reluctance on the part of the appellant to speak about his crime. When he first entered the office of the warden, he appeared to invite questions by asking (R. 242) :

"Well, what are you going to ask me?"

Nor could he even have been advised of his rights, for the record shows (R. 235) :

"Q. And did you at any time inform Mr. Ringo he had the right to be represented by counsel?"

"A. No, sir, I didn't have a chance to.

"Q. But you didn't?"

"A. I just asked him what happened and he started talking."

Further, no duress or coercion was used, and, finally, trial counsel failed to even join issue on the theory now claimed for reversal.

This court has consistently said that it would not disturb a jury's determination of the voluntariness of a confession in the absence of a showing of a clear abuse. *State v. Crank*, supra; *State v. Mares*, 113 U. 225, 192 P. 2d 861 (1948). Here the facts in no manner demonstrate such conduct that could be deemed violative of Article I, Section 12 of the Utah Constitution. There is nothing in that article requiring an accused be advised of his rights, or compelled to have counsel present, or be interrogated other

than when he is in custody; quite to the contrary, it is compulsion that is prohibited, and hence the question is one of voluntariness vs. involuntariness. A mechanical recitation of rights prior to interrogation would offer little comfort if a confession is otherwise involuntary and, on the other hand, the failure to advise or provide counsel is immaterial if a confession is otherwise voluntary. See Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U. S. Supreme Court*, 19 Washington & Lee Law Review 35, 39 (1962). This court should refrain from a mechanical or formal attitude and approach the question purely from the view of: Was the confession voluntary? Such a rule allows for flexibility and protects both the public and the individual. When applied in the instant case, it appears appellant's contention of a violation of constitutional rights is unmeritorious.

## CONCLUSION

The appellant has failed to show that he preserved his claim for appellate consideration and, further, that his claim has a proper constitutional foundation. This court should consequently affirm the conviction.

Respectfully submitted,

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