

1963

# State of Utah v. Roland Dean McQueen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

MAY 12 1963

State of Utah,

Plaintiff-Respondent,

v.

No. 9850

Olson Dean McQueen,

Defendant-Appellant.

UNIVERSITY OF UTAH

OCT 29 1963

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APPELLANT'S BRIEF

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Appeal from the Judgment of the  
3rd District Court for Salt Lake County  
Hon. Marcellus K. Snow, Judge.

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## STATEMENT OF KIND OF CASE

This is an appeal from a conviction of robbery.

## DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict of guilty and judgment thereon, defendant appeals.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and the judgment be entered in his favor as a matter of law.

## STATEMENT OF FACTS\*

On July 28, 1962, at about 6:00 p.m., officers Parley W. Blight and Keith Buckner, deputy sheriffs of

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\*The author incorporates by reference to the transcripts of the preliminary hearing and trial of Terry D. Lowden entered in the appeal of State of Utah v. Terry D. Lowden, No. 9851, certain facts which took place during the arrest of Terry D. Lowden and the defendant Roland Dean McQueen.

Salt Lake County, went to Spiking Tourist Lodge, located at 2866 South State Street in Salt Lake City, upon information they had received that criminals were staying there. (Lowden R. 73 & 74) They sought out the landlady, Mrs. Mary Stoddard, and obtained her permission to enter the room of Terry D. Lowden to look around, but they failed to obtain the tenant's permission to conduct such a fishing expedition. (Lowden R. 75) The officers then entered Lowden's room, accompanied by Mrs. Stoddard, and conducted a search at which time they found some crowbars, other miscellaneous items and a gun, the serial number on that gun being later matched to the number of a gun taken in a burglary of Harmon City to the southwest of Salt Lake City. (Lowden R. 75)

Subsequent to the first intrusion, officers Blight and Buckner waited outside and awaited the return of the occupants of the room. At about 6:30 p.m., Terry Lowden and Roland McQueen returned to the room. (Lowden R. 76) The officers proceeded up the stairs with drawn guns toward the open doorway. (Lowden R. 83) They announced that they were from the sheriff's office and entered the room without knocking or asking permission to gain entrance thereto. They belatedly asked permission after having already made their entrance and McQueen and Lowden were told to get up to the wall for a "shakedown." Thereafter, the officers very assumptively looked around. The suspects were not informed of the nature of the investigation or that they were even suspected of anything.

(Lowden Preliminary Hearing Tr. 28, 31  
& Lowden R. 84, 86, 87, 89 & 103)

After this highly irregular intrusion, the suspects were taken before Mel Humpherys, Justice of the Peace of Precinct No. 2 of Salt Lake County. Mr. McQueen was charged with vagrancy and was taken to the Salt Lake County Jail subsequent thereto and booked on the vagrancy charge.

(Supplemental Record #2, at 2 & 3)

He remained incarcerated in the County Jail without the existence of a proper warrant of arrest and complaint until August 17, 1962. On this particular day, a proper warrant of arrest was issued and a complaint on the charge of robbery was filed. (R. 2)

The robbery in question, and the crime for which McQueen was charged, took place at Great Basin Food Service,



2622 South Second West, Salt Lake City. (R. 48) At about 3:00 a.m. on the 20th day of July, 1962, two men, one carrying a rifle, entered Great Basin. (R. 49 & 51) The four employees present were informed that they were being "held up," and the two men locked the employees of Great Basin in the cooler and later in a wire cage. They then commenced to search the building. The witnesses indicated that they saw the two men start to search the building, but they did not see the men take anything from the building. (R. 55) After the two men made their exit, the employees were later released from the wire cage; and Mrs. Pat Trujillo, one of the four employees, discovered about \$2.00 missing from her purse. On July 30, 1962, Officer Allen R.

Sexton of South Salt Lake obtained a statement from McQueen that he had been one of the two men involved in the robbery. (R. 98)

### ARGUMENT

POINT I. THE COURT BELOW COMMITTED ERROR IN REFUSING TO INSTRUCT THE JURY THAT A CONFESSION REQUIRES ADDITIONAL CORROBORATIVE EVIDENCE TO SUPPORT A CONVICTION.

POINT II. THE EVIDENCE FAILS TO ADEQUATELY CORROBORATE THE CONFESSION.

POINT III. THE DEFENDANT WAS SUBJECTED TO AN UNLAWFUL SEARCH AND SEIZURE, CONTRARY TO THE MANDATES OF BOTH THE FEDERAL AND STATE CONSTITUTIONS WHICH CREATE IN THE INDIVIDUAL THE RIGHT TO BE SECURE

IN PERSON, HOME AND EFFECTS.

POINT IV. THE DEFENDANT WAS DEPRIVED OF THE DUE PROCESSES OF LAW BY AN IMPROPER ARREST AND IMPRISONMENT.

POINT V. THE DEFENDANT WAS EFFECTIVELY DEPRIVED OF HIS RIGHT TO BE REPRESENTED BY COUNSEL AT ALL STAGES OF THE PROCEEDINGS BECAUSE OF THE LOWER COURT'S REFUSAL TO GRANT A CONTINUANCE UPON GOOD CAUSE SHOWN, THUS NEGATING DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF DUE PROCESS OF LAW.

POINT I. THE COURT BELOW COMMITTED ERROR IN REFUSING TO INSTRUCT THE JURY THAT A CONFESSION REQUIRES ADDITIONAL CORROBORATIVE EVIDENCE TO SUPPORT A CONVICTION.

The court gave the following instruction, to which exception was taken (Supplemental Record #1, at 4):

You are further instructed that you cannot return a verdict of GUILTY for one or both of the named defendants without additional corroborative evidence tending to prove that one or both of the defendants committed the crime of robbery. (Supplemental Record #1, at 3)

The rule applicable to confessions and supporting corroborative evidence is well stated in 20 Am. Jur., Evidence § 1242:

It is generally held that a mere naked confession, uncorroborated by any circumstances inspiring belief in the truth of the confession, is not sufficient to warrant the conviction of the accused for the crime with which he is charged . . .

This rule apparently meets with approval in the Utah courts. The Utah Court

stated the rule in *State v. Johnson*, 95 Utah 572, 580, 83 P.2d 1010, as follows:

The rule we deduce from the way it is applied in the overwhelming majority of the cases is that there must be evidence, independent of the confession, corroborative thereof, consistent therewith, forming a basis or foundation for the confession, and tending to confirm and strengthen it, before the confession may be considered by the jury as evidence of guilt.

The Court generally discusses the subject on pages 580-83. See also, *State v. Wells*, 35 Utah 400, 100 Pac. 681, 684.

Although a reading of the record indicates that the confession in this case is not without corroboration, the lower court's failure to charge the jury as requested is prejudicial error. The corroboration rule manifests

the attitude of courts to view with caution statements which come from the mouth of a person accused of crime because of the dangers inherent in the arrest and incarceration of an accused. This awareness on the part of courts has been derived from long experience and from familiarity with abuses such as the "third degree." Without proper instruction, a lay jury may fail to appreciate these attendant dangers of a confession and the necessity of a careful consideration of all the other supporting evidence, thereby placing undue reliance upon a confession, even disregarding altogether the other evidence put before them.

POINT II. THE EVIDENCE FAILS TO  
ADEQUATELY CORROBORATE THE CONFESSION.

In *State v. Wells*, 35 Utah 400, 100 Pac. 681, 684, the Court states that a "... well-recognized principle of the criminal law [is] that the state is required to prove the corpus delicti independent of the defendant's confession, and must so prove it beyond a reasonable doubt, by evidence other than the confession of the accused." Prerequisite to a conviction of the crime of robbery is the requirement that there be a felonious taking of personal property. U.C.A. § 76-51-1 (1953).

The record is void of any substantial evidence that indicates the defendant McQueen took any personal property. This fact is only supplied by his own confession. All of the employees present at Great Basin during the robbery were first locked in a cooler and then in a wire cage. They

merely saw the two men start a search throughout the building, nothing more. There is no indication in the record that any of the Great Basin employees saw either of the two men take money from the purse of Pat Trujillo. Moreover, Mrs. Trujillo was somewhat less than sure of the contents of her purse and the amount of money therein, if any. (R. 55, 78, 79, 85, 86 & 87)

A logically plausible explanation of the missing money from Mrs. Trujillo's purse is that it easily could have been lost. In such case, where there are two equally plausible inferences to be drawn from the evidence, the state should be required to supply some convincing evidence, aside the confession, to prove the portion of the corpus delicti that there was a felonious taking.



POINT III. THE DEFENDANT WAS SUBJECTED TO AN UNLAWFUL SEARCH AND SEIZURE, CONTRARY TO THE MANDATES OF BOTH THE FEDERAL AND STATE CONSTITUTIONS WHICH CREATE IN THE INDIVIDUAL THE RIGHT TO BE SECURE IN PERSON, HOME AND EFFECTS.

Both the state and federal constitutions insure that the individual ". . . be secure in . . . [his person, house,] papers and effects against unreasonable searches and seizures . . ." by requiring that this right "shall not be violated." (Emphasis added.) Utah Const., Art. I, § 14; U.S. Const. Fourth Amendment. The rule supporting this provision is that a person must obtain a search warrant to search the premises of a private individual. 47 Am. Jur., Searches and Seizures § 16.

This section further states:

Nor is belief, however well-founded, that an article sought is concealed in a house sufficient to justify a search thereof without a warrant. Mere suspicion or hearsay that some sort of crime may have been committed in a house or that such house contains some evidence that a crime has been committed is not sufficient justification for a search of it without a search warrant.

This last quoted material should not be construed so narrowly as to negate the rights of appellant. In State v. Warfield, 184 Wis. 56, 198 N.W. 854, the Court extended the above rule to roomers and it was indicated that the landlord is without authority to waive the constitutional rights of a roomer, by permitting an unlawful search of the premises. The fact that Mrs. Stoddard permitted officers Blight and Buckner to break the close of her

tenants cannot be justified. The officers made their entry because of the very kind of hearsay censored by the above rule, and without the aid of either a search warrant or warrants of arrest.

Moreover, it has been held that a search and seizure must be incidental to an arrest. It cannot be the basis upon which to predicate an arrest.

United States v. Setaro, 37 F.2d 134.

In this case, the officers, acting on a rumor, gained entry into the room from which they later took Lowden and McQueen into custody and, after making their illegal entry, they acquired the basis for the arrest, i.e., the stolen gun and other items in possession of McQueen and Lowden.

Appellant McQueen's arrest was freighted with illegality from the very outset. The illegal entry provided

the State's officers with evidence that set the chain of events in motion which ultimately led to his conviction. To permit the State to take advantage of its wrongdoing is to effectively emasculate the accused of his cherished constitutional rights. The language of the constitutions is mandatory-- "shall not be violated." The only effective remedy for adequately securing to the individual the promises held out to him by these inspired documents is that the state be prevented from furthering its cause in the courts where its officers are parties to such grievous wrongs as are present in this case. The offended party is little appeased by the prospect of his becoming whole through a trespass action or perhaps an action sounding in false arrest or false imprisonment. Officers

of the state's police forces are not likely to be affluent and, therefore, in a position to satisfy substantial judgments rendered against them. Nor should the responsibility fall squarely upon the shoulders of officers, since the governmental agencies frequently fail to meet their training responsibilities. Furthermore, the individual whose rights have been infringed is in no position to effectively protect his rights.

POINT IV. THE DEFENDANT WAS DEPRIVED OF THE DUE PROCESSES OF LAW BY AN IMPROPER ARREST AND IMPRISONMENT.

Defendant McQueen was deprived of his freedom in a completely unjustified manner. There was no warrant of arrest. McQueen and Lowden were not

told why the investigation or of the nature of any charges being preferred against them or that they were suspected of anything.

Even more shocking than the facts related above is the fact that the defendant was taken from the confines of a motel room under perfectly ordinary circumstances and then taken to jail where he was booked on a charge of vagrancy. Also, he remained jailed without the existence of a valid warrant of arrest and complaint from the date of his arrest, July 28, 1962, until August 17, 1962.

Conceded, the vagrancy statute is very broad and sweeping. Section 76-61-1 (1), U.C.A. 1953, the only conceivably applicable portion of the statute, states that "every person (except an Indian) without visible means of support, who has the physical ability

to work, and who does not seek employment, nor labor when employment is offered him\* is guilty of vagrancy.

Is it to be understood that a student could be arrested as a vagrant? The statute if construed in its broadest sense would give license, as the officers in this case seemingly assumed it does, for the police to arrest a student or a similarly situated person, or almost anyone for that matter, and then hold him for a substantial period of time to inquire into the background of such person.

Black's Law Dictionary, Fourth Edition, defines vagrancy as follows:

At common law, the act of going about from place to place by a person without viable means of support, who is idle, and who, though able to work for his or her maintenance, refuses to do so, but lives without labor or on the charity of others.

Another statement which seems, impliedly at least, to limit the scope of what might constitute vagrancy is found in 4 Am. Jur., Arrest § 41: "While, however, a police officer may arrest for vagrancy without a warrant, all the facts essential to constitute one a vagrant should be present in order to justify the arrest."

The Lowden Record, which discusses the arrest of McQueen, fails to show these men were idle or that they were "bumming around" or transient. In addition, there is no indication that the officers inquired of McQueen and Lowden as to whether or not they were working. The police had no report that the rent was unpaid. They simply acted upon the hearsay of a woman who told them there were criminals at the motel.



Furthermore, section 77-13-9, U.C.A.

1953, requires:

The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest and the authority to make it, except when the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense, or is pursued immediately after its commission or after an escape.

The Lowden Record seems to indicate that the defendant was not clearly apprised of what was going on at the time of his arrest.

Both the state and federal constitutions require that a person not be "deprived of life, liberty or property, without due process of law." Utah Const., Art. I, § 7; U. S. Const. Fourteenth Amendment. The arresting of a person for vagrancy from the confines of a motel without a warrant of arrest and

with little or no evidence to support the vagrancy charge would seem to fall far short of due process. Can the state's officers trump up specious charges, haul a person to jail, and then leave that person there for 19 days without providing the accused with a valid warrant of arrest and complaint? This type of action can only be curbed by providing an accused with an effective remedy, viz., the release of the convicted where such conviction has been procured by such an unlawful arrest.

POINT V. THE DEFENDANT WAS EFFECTIVELY DEPRIVED OF HIS RIGHT TO BE REPRESENTED BY COUNSEL AT ALL STAGES OF THE PROCEEDINGS BECAUSE OF THE LOWER COURT'S REFUSAL TO GRANT A CONTINUANCE UPON GOOD CAUSE SHOWN, THUS NEGATIVING

DEFENDANT'S RIGHT TO A FAIR AND  
IMPARTIAL TRIAL IN VIOLATION OF DUE  
PROCESS OF LAW.

Mr. Robert McRae was appointed to defend Roland McQueen and George DeWitt on the charge of robbery. (Supplemental Record #1, at 2) However, Mr. McRae told McQueen: "you better rake up all [money] you can because . . . at that time I'm not going to put more in it than I get out of it." (Supplemental Record #1, at 4) This is corroborated by Mr. McRae's own letter that he wrote to the wife of the accused in Grand Island, Nebraska. (Supplemental Record #2, at 4 & 5, affidavit & letter) Defendant McQueen was advised by his family attorney in Nebraska that he should fire Mr. McRae and have the court appoint new counsel. (Supplemental Record #2, at 4) Two

days prior to the trial, McQueen fired Mr. McRae and the court was notified of this action. (Supplemental Record #2, at 2)

This author was notified at approximately 2:00 p.m., November 7, 1962, that he was to appear the next morning at 10:00 a.m. in the court below to defend Roland McQueen on the charge of robbery. (Supplemental Record #1, affidavit) Having been admitted to the practice of law only nine days before, there was inadequate time to review the necessary law relating to the case and the rules of criminal procedure, to become familiar with the facts, and to review the regularity of matters which had theretofore concluded. There was no time to confer with the accused, since the time was spent in discussing the problem with attorney McRae.

(Supplemental Record #1, affidavit)

The following morning, in behalf of defendant McQueen, I moved the court to separate the two defenses and to continue as to McQueen. The motion was denied and the case went on to trial immediately thereafter under my protest.

(Supplemental Record #1, at 1)

Section 77-1-8 states: "In criminal prosecutions, the defendant is . . . entitled . . . to appear and defend in person and by counsel." The Code of Criminal Procedure provides various rules, the above being one, which must be substantially complied with to keep the proceedings within the due processes of the law. *Christiansen v. Harris*, 109 Utah 1, 7, 163 P.2d 314, 316. Moreover, Article I, Section 12 of the Utah Constitution insures this right to an accused.

Without meaning to cast aspersions on my own good name, it appears that the court below has effectively deprived the defendant of his constitutional right to counsel.

The duty imposed on the courts to assign counsel to defend one accused of a crime who is himself unable to employ counsel was not intended to be a mere empty formality. It means more than the mere appointment of counsel. Such duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. It is a general rule that a reasonable time for the preparation of a defendant's case must be allowed between the time of assignment of counsel by the court and the date of trial. 20 Am. Jur., Evidence § 1242.

In addition, "a court cannot . . .  
refuse a continuance properly requested  
where the ends of justice clearly require  
it to be granted, but if an abuse of

discretion clearly appears, its ruling will be reversed." (Emphasis added)

12 Am. Jur., Continuances § 5.

The Utah Court faced this question in *State v. Fairclough*, 86 Utah 326, 44 P.2d 692. The opinion sets forth the rule at page 694 as follows:

It is a general rule, and justice requires, that a person charged with crime should have a reasonable time to prepare his defense, otherwise a defendant's right to a fair and impartial trial might be nullified. . . . To insure defendant the full enjoyment of his constitutional privilege, the time between the appointment of counsel by the court and the time of trial should be such as to afford a reasonable opportunity for preparation of the defense.

The continuance was not granted in that case. However, it will perhaps clarify the reasons therefor by contrasting the facts of the *Fairclough* case with those

of this case. In this case a serious crime was involved with its accompanying severe penalty, whereas the crime in the cited case was much less severe. The counsel involved in that case met with the accused while here there was no opportunity to meet with the accused. The Fairclough attorneys were experienced counsel. I had no experience. Fairclough's attorneys made the motion to accomodate their own convenience and moved for a long continuance. The court offered them a few days grace, but they were dissatisfied. Here defendant was furnished inexperienced counsel with little or no notice and the court would not grant a day's grace. Furthermore, an appearance was made by a member of the firm for the member who had a conflict, and it was the former



attorney that was appointed on short notice. This would provide much more opportunity to be familiar with the case than was the case here. The several days continuance offered by the court in that case would appear to be adequate under the circumstances.

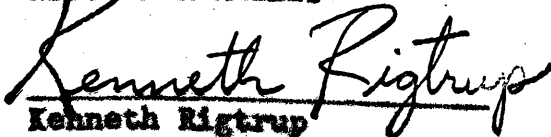
Though the State's attorney argued below that the defendant knew of the impending trial and that it was through fault of his own which created the unfortunate circumstance of an unprepared counsel, for the State to now raise such an argument is without merit. Section 77-1-9 reads that "in no instance shall any accused, before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." A quick persual of the letter written by the fired attorney, included in the Supplemental Record, will quite clearly

show that McQueen was justified in firing Mr. McRae, and his conduct was not just a ruse to stall for more time. Under such circumstances a fair and reasonable time was not afforded to prepare an adequate defense.

### CONCLUSION

The defendant was the victim of an unreasonable search and seizure and an unlawful arrest. He was then provided a counsel that was not apprised of these facts in time to assert them in his behalf. Such invasions of constitutionally guaranteed rights and freedoms can only be effectively safeguarded and secured to the individual through the reversal of the lower court and the release of the prisoner.

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