

1967

The State Of Utah v. Eugene Meyers : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

EUGENE MEYERS,
Defendant-Appellant.

Case No.
10944

APPELLANT'S BRIEF

This is an appeal from a judgment and conviction rendered in the
Third Judicial District Court, Salt Lake County, State of Utah
Honorable Merrill C. Faux, presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

EUGENE MEYERS,

Defendant-Appellant.

} Case No.
10944

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

This is an appeal from a criminal case wherein the appellant seeks review of a judgment and conviction of possession of narcotic drugs rendered by a jury on the 8th day of February, 1967 before the Honorable Merrill C. Faux, Judge.

DISPOSITION IN LOWER COURT

The defendant was tried by Jury and convicted of Possession of a Narcotic Drug, to wit: Heroin and

Demeral, in a three-day trial. A stay of execution was granted pending this appeal.

The defendant's motion to quash the search warrant was held before the Honorable Marcellus K. Snow on April 20, 1966 and denied. Defendant's motion to suppress all items seized and any oral testimony as to what was seized or observed was held on November 29, 1965 before the Honorable Bryant H. Croft and denied. The defendant's motion for new trial was held before the Honorable Merrill C. Faux on the 3rd day of March, 1967 and denied.

At the time of trial, the motion to suppress was renewed and denied. A continuing objection was preserved by the defendant with permission of the trial court, Honorable Merrill C. Faux.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the lower court's ruling on the motion to quash the search warrant, motion to suppress the items taken from the premises and oral testimony relating thereto and the admissibility of statements of the defendant. In the alternative, the appellant seeks a judgment of acquittal.

STATEMENT OF FACTS

The appellant was charged with possession of narcotic drugs, to wit: heroin, dilandid and demeral on the 29th day of June, 1965.

Officer Fran Kari of the Salt Lake City Police Department, accompanied by Officers Donald D. Lindsey and Daniel W. Waters, went to a residence located at 553 Third Avenue, Salt Lake City, Utah on June 29, 1965 at approximately 9:30 a.m. (Tr. 41) The avowed purpose of going to the residence was to serve a "search warrant" which called for the pickup of one Elizabeth Ann Glasgow, a minor, who was believed to be harbored at the residence by the appellant and Dave Beckstead. (Tr-154) The method of obtaining the search warrant is referred below in Point II.

Upon their arrival, they observed a Mr. Brown, who identified himself as a property-manager for Tracy-Collins Bank and Trust. (Tr-115) Mr. Brown stated that he was there to investigate a complaint of nuisance. (Tr-115) The residence had been rented to one Mrs. Gibson on June 17, 1965 on a monthly basis. (Tr-116) The rent, in fact, was current at the time of this incident. (Tr-132) The rental agreement, Exhibit 3, was received in evidence over defendant's objection as to no foundation. (Tr-202) Mrs. Gibson was identified as Virginia Hall through a photograph. (Tr-117) The appellant was also outside of the residence when the officers arrived. (Tr-42, 117) Mr. Brown had let himself inside the residence and, after hearing the door bell, answered the door and the defendant was at the door. (Tr-117) It was at this point that the officers arrived. (Tr-119) Whereupon, Mr. Brown "gave them permission to enter the house." (Tr-119) The defendant, who also entered, was standing behind the kitchen

door. (Tr-119) Francis Kari informed Mr. Brown that she had a search and seizure warrant and Mr. Brown stated that it was alright. (Tr-154) In response to her inquiry, the appellant said that he "was there to mow the lawn." (Tr-156, 170) Francis Kari did not show Mr. Brown or the defendant the warrant. (Tr-42, 129, 165) Officer Lindsey having entered the house talked to the defendant whereupon defendant made the statement about mowing the lawn. (Tr-54) The appellant did not ask for a warrant. (Tr-50, 54) This officer testified that he entered the residence under the authority of the search warrant and with the permission of Mr. Brown. (Tr-54).

After entering the house the officers proceeded to search the premises ultimately reaching an upstairs locked bedroom, marked Bedroom "A" on Exhibits 2-D. (Tr-134, 139) Mr. Brown, the trustee, did not have the key so Officer Lindsey dispatched Officer Waters to obtain the same from the main office of Tracy-Collins Bank and Trust (Tr-54, 32) with the permission of Mr. Brown. (Tr-32) Between the time of entry into the house and the unlocking of Bedroom "A", the appellant was permitted to leave. (Tr-33, 57) No conversation was had concerning the locked Bedroom "A".

Upon entering Bedroom "A", it became apparent to all three officers that there was no one present. (Tr-33, 44, 58) Whereupon, Officers Lindsey and Waters began to open closet doors, bureau drawers,

ruffle bed sheets and search under the mattresses and bed. (Tr-122, 211, 225) Their avowed purpose was to find something as to the whereabouts of Elizabeth Ann Glasgow. (Tr-34, 122) Officer Kari proceeded to inspect the night stand located near the bed. (Tr-44, 158) Her stated purpose was to determine whether the minor child had been there or where she might be. (Tr-46)

The night stand is approximately 24-30 inches tall with two or three drawers. (Tr-77) It was so constructed that the bottom of the night stand was flush against the rug. (Tr-119) The only opening was in the back facing the wall. (Tr-177) Officer Kari pulled the night stand away from the wall and observed a paper sack between the floor and the bottom of the last drawer, (Tr-48) the contents of which were immediately placed on the bed and examined by Officers Lindsey and Waters. (Tr-158) Out of this paper sack came a plastic bag containing various pills, prescription bottles and prescription blanks. (Exhibit 5). (Tr-197) Moreover, a gum wrapper holding three demeral tablets, (Exhibits 6) another gum wrapper with demeral pills, (Exhibit 8) a medicine container holding a clear liquid, tested and identified as heroin, (Exhibit 9) two clear gelatin found in an Old Gold cigarette package, (Exhibit 10) (Tr-218) heroin, (Exhibit 10) and a bottle containing heroin and demeral capsules (Exhibit 11) were obtained from the plastic bag. (Tr-113, 232, 235) Other items found in the plastic bag were found to be pills, some of which contained codine.

(Tr-232) This proposed Exhibit 7 and testimony relating thereto was stricken by the trial court on defense counsel's motion (Tr-233) and the jury was admonished. (Tr-233)

The principle witness for the state in establishing the possession charge comes from the testimony of Elizabeth Ann Glasgow, a minor, and statements purportedly made by the defendant to Officer Lindsey concerning the defendant's clothing, found in Bedroom "A". These will be handled in turn.

Elizabeth Ann Glasgow, age 15, testified that she was residing at 553 Third Avenue, Salt Lake City on the last three weeks of June, 1965. (Tr-133) She moved in on June 14, 1965, some two days before the rental agreement had been executed. (Tr-141) She may be mistaken as to the date. (Tr-141) She had lived with the defendant, Dave Beckstead and Virginia Hall. The defendant roomed with Virginia Hall and the keys to the Bedroom "A" were held by both. (Tr-135) The defendant's stay was apparently intermittent and occasional. (Tr-136) In the latter part of June, 1965 she saw the defendant twice with something foreign in his hand, to wit, a bottle with pills, however she never was able to identify the items nor did she ever have a conversation with the defendant concerning them. (Tr-137) She recognized the paper bag, Exhibit 5, found under the night stand (Tr-138), and testified as follows:

Q. (by Kay Lewis) : Miss Glasgow, have you seen the defendant himself take those pills or put any pills into this bag, or a bag similar to this?

A. No, I haven't. (Tr-138)

She did see Virginia Hall get pills from the bag (Tr-139) when only she and Virginia Hall were present. (Tr-146) Aside from white pills, larger than aspirin, and prescription bottles in the plastic bag, (Tr-147) she saw nothing else. (Tr-148) Further, she never witnessed Virginia Hall give the defendant any pills. (Tr-144) She left the house on the morning of June 29, 1965 and just prior to leaving, she saw or heard the defendant and Virginia Hall fighting. (Tr-141, 255) Elizabeth Ann Glasgow, herself, was a runaway and was aware that the Juvenile authorities were looking for her. (Tr-245)

Officer Donald B. Lindsey testified substantially as to the same facts as heretofore indicated. In addition thereto, he indicated that he had a conversation with the defendant regarding the clothing and other items, such as portable TV, Old Gold cigarettes, auto battery and wrist watches, (Tr-71) and driver's license bearing the defendant's name and a different address. (Tr-301) These items were seized at Mr. Brown's request for safekeeping (Tr-72) and remain in the police evidence room.

In response to the question as to what items were found in Bedroom "A", Officer Lindsey volunteered the statement "There were prescription blanks, pill

bottles of various types, and clothing around, which belonged to the defendant." (Tr-172) The latter's statement regarding the ownership of the clothing was stricken as being a conclusion on the part of the witness. (Tr-173)

Thereafter, the prosecutor attempted to admit the defendant's admission as to the clothing. (Tr-173) At the defendant's request an out of jury hearing was held. (Tr-174) At this time, defense counsel moved for mistrial on the basis that the defense counsel requested an out of jury hearing before the crucial question was asked with regard to any conversation had with the defendant. (Tr-174) This was denied. (Tr-175)

During the out of jury hearing, Officer Lindsey could not recall the dates of the conversation nor did he take notes of the two conversations held with the defendant. (Tr-175) These conversations were had after the defendant had been charged. (Tr-175) and he was considered a suspect in this possession charge. (Tr-176) Defendant was not advised of his right to counsel. (Tr-176) The first conversation was a telephone call initiated by the defendant; (Tr-178) the second, in the police car enroute from the city court to jail, while he was in custody. (Tr-179) No Miranda warning was given in either case. (Tr-180) At the time of both conversations, the Officer Lindsey was well aware that defendant was represented by counsel. (Tr-183) In both conversations, the officer indicated that

the defendant wanted his clothes, tool box, car battery, and records returned. (Tr-180) A motion to suppress was made on the ground that the Miranda warnings were not met and further on the grounds that since there was no authority under the search warrant to seize the items and since the consent of Mr. Brown, ~~OF PROPERTY WAS NOT BINDING ON THE DEFENDANT~~ excludible on the "Poisonous fruit" doctrine; (Tr-184) and further that the taking of the ~~above items~~ the clothes, portable TV, Old Gold cigarettes, wrist watches and auto battery was unlawful and therefore any conversation relating thereto would be tainted and excludible on the "Poisonous fruit" doctrine; (Tr-184) and further that the taking of the above items were accomplished solely for evidentiary value, thus coming with the prohibition of the "Mere evidence rule." (Tr-193) The motion was denied. (Tr-190) A continuing objection was preserved. (Tr-191)

The jury was reconvened and Officer Lindsey testified as to the first telephone conversation and the second police car conversation wherein the defendant stated that he wanted some of the things taken from Bedroom "A" returned, to wit: the clothing, auto battery, and auto accessory. (Tr-190) On cross-examination, he indicated that the conversations were had after the instant case was initially dismissed by the committing magistrate. (Tr-209) This matter was refiled. (Tr-209).

Thereafter, Officers Lindsey and Waters proceeded to establish the identity of the items found in the

plastic bag and established the chain of evidence. (Tr-194, 202; 218-230)

Officer Fran Kari was recalled to testify that she observed the defendant reach in his pocket and conceal something under the rug on the stairway leading to the upstairs (Tr-249) An out of jury-hearing was held at defense counsel's request and an objection was made regarding any of the above testimony as to the hiding of the pills on the grounds that the State was unable to show that the items were of narcotic character, which would fall within the categories listed in the Information. (Tr-164) This testimony was ordered stricken and the jury admonished. (Tr-251) Defense counsel's motion for mistrial on the basis that the admonition by the court would not remove the prejudiced effect imbedded in the minds of the jury was denied. (Tr-251) Prosecutor was admonished by the trial court. (Tr-251)

The state rested. (Tr-251) The defendant's motion to dismiss was denied. (Tr-251) In considering the defendant's motion to dismiss, the trial court expressed doubt as to submitting the matter to the jury since there had not been any proof that the defendant knew of its narcotic character. (Tr-253) However, the trial court then considered the stricken testimony of Francis Kari as to observing the defendant secreting some items under the carpet. (Tr-254-255) The trial court recognized the error of striking the testimony from the jury and yet restoring it for the purpose of considering the

motion to dismiss. (Tr-257) Trial court reversed his ruling and permitted the testimony of Francis Kari to be re-instated for the purpose of this motion, (Tr-259) and on the ultimate issue of guilt or innocence. (Tr-266, 275)

At this point, defense counsel requested that the items be produced and examined as to narcotic character to rebut the inference that is in the minds of the jury that the items were narcotics. (Tr-259) The items were, in fact, co-mingled with other pills at the police station and could not be separated or found at this time. (Tr-259) The trial was continued for one week with the defendant's consent, for the purpose of locating the pills and analyzation. (Tr-261)

As the trial resumed a week later, after much discussion as to the court's procedure, Officer Fran Kari was cross-examined by defense counsel. (Tr-278) She did not see anything in the defendant's hands which was passed underneath the carpet of the stairway, (Tr-278) and she could not recall what the pill and capsule looked like. (Tr-279-280) She turned the items over to the narcotics man unmarked. (Tr-282)

Thereafter, Officer Donald B. Lindsey was recalled on further direct examination. (Tr-289) Over defense counsel's objection, he was permitted to testify that items turned over to him by Fran Kari were a red capsule, which in his opinion was secondal, non-narcotic and a pill which was tuinal, non-narcotic. (Tr-

300) He had no opinion as to another item which he found himself. (Tr-314)

Defense counsel's motion to dismiss was renewed and denied. (Tr-314) Motion for mistrial was renewed and denied. The word "dilaudid" was stricken from the Information and the jury instructed to disregard it. (Tr-315) One specific motion for mistrial was renewed with respect to State's Exhibit 7 and 17, which established that codine was also found in the Bedroom "A" (Tr-316), which evidence and exhibits were stricken from the jury. This motion was denied. (Tr-317) The motion to suppress was again raised and denied. (Tr-317) The defense rested with a statement that no evidence could be presented in behalf of the defendant without jeopardizing his rights in the unlawful search and seizure or his rights on the ultimate issue of guilt or innocence. (Tr-318)

The matter was submitted to the jury and the defendant was found guilty of the charge. Defendant's motion for new trial was argued on March 3, 1967 and denied. (Tr-353) A stay of execution of the sentence was granted pending this appeal upon the filing of a certificate of probable cause signed by Justice A. H. Ellett. (Tr-354)

POINT I

THE LOWER COURT ERRED IN DENYING THE APPELLANT STANDING TO SUPPRESS EVIDENCE OBTAINED IN VIOLA-

TION OF HIS CONSTITUTIONAL RIGHTS AGAINST UNLAWFUL SEARCHES AND SEIZURES.

This is a case of first impression in the State of Utah on the precise issue herein presented. In presenting this matter, it should be kept in mind that the defendant's initial motion to suppress was denied after hearing on the sole basis that the defendant, under the facts hereafter referred to, did not have standing to raise the objection as to the violation of his constitutional right against unlawful search and seizure. The hearing on this motion is included in the appeal transcript on pages 24-85, inclusive. At the time of the trial, the motion to suppress was renewed at the commencement of the trial and after the State rested and denied each time. (Tr-92). A continuing objection was preserved. (Tr-92) Since the precise issue is that of standing to assert a constitutional right, reference to the evidence in support of this point on appeal will not be limited to testimony adduced at the time of the hearing on the motion to suppress, but will include all the evidence produced at trial.

The issue of standing is essentially two fold: Did the defendant have sufficient constitutionally protected interest in the premises searched, to wit: 553 Third Avenue, or Bedroom "A" (?) Did the defendant have a sufficient legal interest in the items seized where the offense with which he is charged requires some dominion and control by the defendant (?)

The question whether a specific interest in the premises unlawfully searched is a sufficient basis to object to an introduction of evidence so obtained is well settled. The United States Supreme Court discusses at length the interest in the premises as a requisite of an accused's standing to raise the question of the constitutionality of the search. In the leading case of *United States v. Jeffers*, 342 U.S. 48, 96 L. Ed. 59, (1951), the court sweeps away any heretofore subtle distinctions as that of lessee, sublessee, tenant by sufferance of licensee and puts the issue of standing squarely upon the principles which appellant contends should be herein employed.

The defendant, Jeffers, stored contraband narcotics in a hotel room without the knowledge of the occupants who had permitted him to use the room. Without search or arrest warrants, police officers gained access to the room in the absence of the defendant and the occupants, searched it, and seized the narcotics. On the basis of the seized narcotics, defendant was convicted of possession.

In an opinion by Justice Clark, six members of the court held that the constitutional guaranty against unreasonable searches and seizures had been violated, notwithstanding that "no property rights shall exist" in contraband goods, and that the defendant had standing to have the evidence suppressed although the illegal seizure was made in rooms rented by other persons.

In the case at bar the officers searched without a warrant as the instrument itself gave no authority to search but rather to arrest and take into possession the juvenile. The *Jeffers* case, supra, as in this case should be resolved without regard to largely historical property distinctions. Justice Clark in the *Jeffers* case comments on such distinctions when they are in conflict with principle in this manner,

“The search and seizure are therefore, incapable of being untied. To hold that this search and seizure were lawful as to the defendant would permit a quibbling distinction to overturn a principal which was designed to protect a fundamental right.”

The government in the *Jeffers* case argued that the search did not invade the defendant's privacy and he therefore lacked the necessary standing to suppress. The significant act according to the government was the seizure, not the search. Because the defendant, Jeffers, had not paid the rent or was not a sublessee, he could not object to the search. The search was secondary. The court rejected such reasoning and has placed to rest such intangible subtleties which heretofore were largely founded upon real property concepts where such concepts are inconsistent with constitutional rights.

Permission to use the room is all that appellant herein must show to have the requisite standing to object to its search. The fact that his personal clothing and drivers license were in the room, supported by

Elizabeth Glasgow's testimony of the interval of occupancy by appellant herein (Tr-136), and the defendant's admission as to the return of his clothes (Tr-195-196), conclusively permit him to object and to suppress the evidence therein obtained. The trial court had all of this evidence before him after the State rested.

The *Jeffers* case, *supra*, also is cited by appellant for another novel proposition. The government contended that no property rights within the meaning of the Fourth Amendment exist in narcotics because they are contraband goods in which the legislature declared no property rights exist. In disposing of this assertion the court said,

"We are of the opinion that Congress, in abrogating property rights in such goods merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment. See *Re Fried*, 161 F.2d 453, 1 ALR 2d 996 (1947)."

Since the evidence illegally seized was contraband, the appellant was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled to motion to have it suppressed as evidence on his trial.

On the second issue, the lower court offered the defendant the horns of a dilemma, to wit: to object to the introduction of evidence on the ground it was obtained by an illegal search and seizure, the accused

in order to show his standing to raise the objection must show an interest in the items searched or seized; on the other hand, by doing so he may establish an element of the offense with which he is charged.

Where, as here, the offense charged involves unlawful possession of the narcotics, there must be some dominion and control over the narcotics. *State v. Winters*, 16 Utah 2d 139, 396 P.2d 872, (1964). At the hearing on the motion to suppress, by disclaiming his interest, he loses his standing to object. At this hearing, had he claimed any dominion or control of the narcotics, he would have waived his defenses since any admission as to dominion and control would have been tantamount to a confession of one of the essential elements of the charge. The defendant thus impaled on the horns or the dilemma went to trial.

The distinguished jurist Learned Hand addressed himself to this novel incongruity in *Connolly, et al v. Medalie*, 58, F.2d 629, (1932) where he said:

“The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means of conviction.

* * *

Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor and avoid the perils of the part,

but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to encase them without question. The Petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

More properly, the prosecution herein is the party impaled on the horns of the dilemma. *Jones v. United States*, infra, *Ball v. State*, Miss., 194 S.2d 502 (1967), *United States v. Dean*, 50 F.2d 905 (1931). In all of the aforesaid cases, the courts clearly indicated that where the indictment involves an assertion that the property was in the possession of or control of the defendant, the State cannot maintain that he was the owner of the property for the purpose of convicting him and, yet, was not the owner for the purpose of the search. In *Ball v. State*, supra, the court further stated that even if the defendant put his objection to the search on a false ground, as the prosecution claims, the search was nevertheless against his will and consent. The Mississippi Court found no merit in the prosecution's contention that the defendant claimed that he had rented the premises and was not in possession and control. The instant case is unlike *State v. Montayne*, 18 Utah 2d 38, 414 P2d 958 (1966), which held that the sole pre-requisite is that the defendant claimed a proprietary or possessory interest in the searched or seized property. The *Montayne* case dealt with the charge of Robbery and Grand Larceny, not possession.

The instant case is shot through with this inconsistent position assumed by the prosecution. It is note-

worthy that the prosecutor, during the motion to suppress, initially makes no mention of the lack of standing of the defendant; rather he relies solely on the search warrant, (Tr-27) and permission of Mr. Brown, trustee of the premises. (Tr-27) The lower court in his remarks at the conclusion of the motion makes no mention on the issue of standing although it was clearly raised. (Tr-84) The standing issue was raised in the lower court's memorandum, wherein the court held that the defendant, having disclaimed any interest in the premises or items seized, waived his right to object to the search and seizure. Memorandum, page 9. There is serious doubt as to whether there can be any consent to search where the defendant had not been fully advised of his rights under the Fourth Amendment. *United States v. Nickrasch*, 367 F.2d 740 (1966), held under the principles of *Johnson v. Zerbst*, *infra*, that no consent was shown for failure to so advise the defendant.

Other jurisdictions have had the instant issue presented. Compare such statements as:

Wiggin v. State, 206 P.373 (1922)—“All right”

Helpen v. State, 181 P.2d 862 (1947)—“No, help yourself”

Edwards v. State, 177 P.2d 143 (1947)—
“Look it over. You won't find anything.”

In each instance, the above jurisdictions held that there was no waiver.

A significant distinction should be observed in determining the waiver question. Each of the cases relied upon the lower court in concluding that a waiver was shown dealt with waivers made by the defendant or his counsel during the course of the trial or with waivers that unequivocally disavowed any property interest in the premises or items seized. The facts in each of the cases are distinguishable. Moreover, six of the ten cases were decided before *United States v. Jeffers*, supra, which has flatly rejected the historical property distinctions as a basis for determining the standing issue. No federal decisions decided after the *Jeffers* case were cited by the lower court. It is doubtful that the federal cases would still prevail since the current trend in this general area is one of establishing a policy against any waiver or disclaimer in the absence of clear and convincing proof.

A waiver of a right presupposes that the right exists. In this case, the lower court found that the defendant has standing but waived his right to contest the illegal search and seizure because he, in answer to the officer's inquiry, said, "I am here to mow the lawn." (Tr-49, 156, 170) This is clear error.

The doctrine of waiver is well embedded in our law. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed 1461 (1938) states that any waiver must be shown to be intelligently and freely made. When the State relies upon a waiver of any constitutional right, it is incumbent that the waiver be proved by clear and

convincing proof. 79 CJS 812. The evidence as to waiver rests solely upon the statement that the defendant stated that he was there to mow the lawn. This falls drastically short of the criteria set forth in the *Johnson* case.

The statement was made after the officer entered the premises with Mr. Brown's permission. (Tr-54) Moreover, officer Fran Kari informed Mr. Brown that she had a search and seizure warrant although she never exhibited it. (Tr-154, 42, 29, 165) This amounts to submission to official coercion of the type that is condemned in *Wiggin v. State*, 206 P.373 (1922) The defendant has a right to assume the warrant was valid. *Coleman v. Commonwealth*, 219 Ky. 139, 292 S.W. 771 (1934). The obvious show of force of the three police officers, initial entry, and representation of a legally valid search and seizure warrant is not a waiver or consent freely given, but mere acquiescence to the powers of the police. This cannot meet the test expressed in *Judd v. United States*, 190 F.2d 649 (1951) where the court stated:

"The obtaining of a search warrant may be waived by an individual and he may give his consent to search and seizure but such waiver or consent must be proven by clear and positive testimony and there must be no duress or coercion, actual or implied, and the government must show a consent that is unequivocal and specific, freely and intelligently given and the burden of the government is particularly heavy . . ."

Appellant herein was charged with a possession offense and possession offenses present special problems. In the *Jeffers* and *Jones* cases the courts clearly held no invasion of privacy need be established before the accused has standing to object to a search and seizure.

The United States Court of Appeals for the Second Circuit in the case of *DeForte v. Mancusi*, decided in Court of Appeals, Second Circuit, June 28th, 36 Law Week, Page 2022, (1967) in expanding the standing to suppress concept held that the mere fact that the search was directed against a person will give him standing to object to evidence illegally obtained at trial.

The United States Supreme Court recently resolved the dilemma in *Jones v. United States*, 362 U.S. 257, 4 L. Ed. 2d 697 (1960). The accused was charged with unlawful possession of narcotics located in an apartment in which he was a guest of the owner. Justice Frankfurter, speaking for eight members of the court, held that because of accused's presence in the apartment, the search was legal. He had standing to raise the question of the legality of the search and he did not lose this standing merely because he fails to allege either that he owned or possessed the property seized or that he had a possessory interest in the premises searched. The possession on the basis of which it is sought to convict suffices to give the accused standing and his timely motion to suppress should have been granted.

In the *Jones* case, the court in laying down the rule said:

"The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized which ordinarily is required when standing is challenged."

* * *

"The petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of the search upon which the conviction depends were admitted into evidence on the ground that Petitioner did not have possession of narcotics at that time."

"It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing."

Under this case, appellant herein suggests that the filing of the Information against the accused gave appellant the standing as a matter of law to object to the search and seizure. The prosecution, thus committed, must permit the accused to object to the search. If the search be otherwise sustained then the conviction must stand. The prosecution cannot give the accused standing by its own act and then deny him standing to object because of a restriction on the right to

object which only the prosecution can enjoy. Such a one sided use of a concept, the contours of which escape use by the defendant, is repugnant to any system of fairness.

POINT II

THE LOWER COURT ERRED IN DENYING THE MOTION TO QUASH THE SEARCH WARRANT IN THAT THE ISSUANCE THEREOF WAS VIOLATIVE OF THE DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST UNLAWFUL SEARCH AND SEIZURE.

It is submitted that the search warrant referred to in the entire record was obtained without the proper safeguards as provided under the Juvenile Court legislation, Utah Criminal Code and State and Federal Constitution, Fourth Amendment.

Utah Code Annotated, 55-10-23 (as amended 1953) is the applicable statute. (The new Juvenile Court Act did not take effect until July 1, 1965.) This provides:

"Where it appears to the court on petition filed by any person who in the opinion of the court is bona fide acting in the interest of any child, that there is reasonable cause to suspect that such child under the age of 18 years has been or is being ill-treated, is dependent or neglected, in any place within the jurisdiction of the court, in a manner likely to cause the child

unnecessary suffering, or to be injurious to its health or morals, the court may issue a warrant authorizing any probation or other peace officer named therein to search for the child . . . ”

This section further provides must be served upon the parent or guardian or on the custodian of the premises.

Under this provision the search warrant was issued. (Defendant's Exhibit D-1, (hearing on the motion to suppress) It is respectfully submitted that the above provision is blatantly unconstitutional in that it violates the mandate contained in the Utah Constitution, Article 1, Section 14 which states that:

“ . . . and no warrant shall be issued but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.”

This constitutional provision places a limit on the authority of the legislature in enacting search warrant provision for special circumstances. Thus if the Juvenile Court statute does not meet the constitutional mandate, it must fall and the practices thereunder must fall also.

This court has so held in *Allen v. Lindbeck*, 97 Utah 471, 93 P.2d 920 (1939). This court struck down a statute which permitted the court to issue a search warrant for property “whenever any person shall make affidavit before the court of competent jurisdiction that he have reason to believe and does believe that

any receptacle . . . is in the possession of any person engaged in any business specified herein.” Justice McDonough stated:

“Since our constitution requires a showing of probable cause to support a search warrant and Section 95-2-10 requires merely an affidavit on information and belief, we hold, in line with the over-whelming weight of authority in the federal and state courts, that such affidavit does not meet the constitutional requirements and the statute is therefore void.”

Under this case, the conclusion is inescapable that the Juvenile Court statute insofar as it authorizes the issuance of a search warrant is in derogation with the Utah Constitution and is therefore void. This conclusion is re-enforced when one considers that the current Juvenile Court Act requires an affidavit sworn to by a peace officer and requires a finding by the court of probable cause to believe before a search warrant is issued. See Utah Code Annotated 55-10-111 (as amended, 1965)

Assuming arguendo that the “reasonable cause to suspect” requirement of the statute can be saved by an interpretation by this court that reasonable cause is contended to be probable cause. (See *Allen v. Lindbeck*, supra at page 923), this interpretation could not restore the statute to constitutionality. The “oath and affirmation” requirement is conspicuously lacking in the Juvenile Court procedure. The statute requires merely that a petition be filed. This falls short of an oath and affirmation. In the instant case, a verified

petition was filed. (See recital contained in the search and seizure warrant). Nevertheless, this does not restore the constitutional requirement because the statute requires the same person who files the petition be the same person who makes application for the search and seizure warrant. Here, there is no showing that officer Fran Kari was the same person who filed the petition yet she obtained the search and seizure warrant. In fact, she did not sign the petition. (Tr-16).

Following the same arguendo, and aside from the breach in procedure utilized in the instant case, the statute does not permit a search and seizure warrant in cases where the assertion is that of delinquency. This statute is an emergency procedure and restricts the Juvenile Court in the issuance of warrants to cases where the child "has been or is ill-treated, is dependent or neglected, . . . , in a manner likely to cause the child unnecessary suffering, or to be injurious to its health or morals." The issuance of the warrant is not provided in cases where the allegation is for delinquency as being a runaway. This statute is an emergency procedure designed to protect the child where immediate and necessary action is required. No emergency facts were provided the Juvenile Court Judge, nor were any stated in the search and seizure warrant itself. *In Re State in the Interest of Johnson*, 110 U 500, 175 P.2d 486 (1946)

The statement of Officer Kari in obtaining the search warrant was insufficient as a matter of law in

providing the Juvenile Court Judge sufficient information with which to make an independent judgment on the reasonable or probable cause to issue the warrant. All of her statements were based upon hearsay and informants, the reliability of whom was never shown. Clearly, hearsay alone will not render the search warrant invalid. However, where the information as to the whereabouts of Elizabeth Ann Glasgow was obtained from "her investigation" or "after contacting several people," and no further inquiry made or request by the Judge, there is no basis for the issuance of the search warrant. (Tr-12, 14) Nothing appears to have been observed personally by Officer Fran Kari, nor was there any assertion that she had personal knowledge. (Tr-15) Illustrative facts are found in *Aguilar v. Texas*, 378 U.S. 109 (1964) where the court struck down a search warrant on the grounds that the magistrate "necessarily accepted without question the informant's suspicions, belief and mere conclusions" and was "not able to judge for himself the persuasiveness of the facts relied upon . . . to show probable cause," and *Jones v. United States*, 362 U.S. 257, 80 Sup. Ct. 725, 46 L. Ed. 2d 697 (1960) where the court said:

"We hold in *Nabhanson v. United States* . . . that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating the facts upon which that belief was based."

It is respectfully submitted that the procedures in Juvenile Court are to be no less scrupulous with

regard to constitutional rights merely because of the immaturity of its wards. *In Re Williams*, 267 N.Y.S. 2d 91 (1966) The statute in question and the procedure employed must be examined by this court in light of the *In Re Gault*, 35 L. W. 4399 (1967) and principles set forth therein. The appellant asks foresight, not hindsight.

POINT III

THE TRIAL COURT ERRED IN PERMITTING ORAL TESTIMONY CONCERNING ITEMS SEIZED BY THE POLICE AT THE REQUEST AND WITH THE CONSENT OF THE LANDLORD.

The police, after discovering the narcotics, proceeded to remove men's clothing, a portable TV, Old Gold cigarettes, auto battery and wrist watches. (Tr-71) Moreover, a drivers license was confiscated. (Tr-301) None of these items were listed in the search warrant nor were any of the items claimed by the State to be evidence of the whereabouts of Elizabeth Ann Glasgow. These items were taken from Bedroom "A" at the request of and with the consent of Mr. Brown, the trustee, (Tr-71) despite the fact that the rent was fully paid. (Tr-132) Nor could it be successfully maintained that the items taken were contraband or suspected stolen property. (Tr-72) The items were taken for safekeeping in the police evidence room. (Tr-72) The items themselves were not produced at trial, with

the exception of the drivers license, Exhibit 18. Oral statements of the defendant concerning the return of some of the items were introduced through the testimony of Officer Lindsey, over defendant's objection. (Tr-180-193) Trial court denied the motion to suppress the oral statements.

The testimony of the officer concerning oral admissions as to ownership of the items taken is clearly inadmissible as "fruits from the poisonous tree." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319 (1920).

It is well settled in Utah that a landlord or similar person cannot give a consent to search and seize items from a room rented by another party. *Stoner v. California*, 376 U.S. 483 (1964), *Chapman v. United States*, 365 U.S. 610 (1961), *State v. Loudon*, 379 U.S. 1 (1964). It needs no legal gymnastics to suggest that this same principle applies equally with the removal of items from the room and testimony relating thereto. The removal of the items was clearly without any legal sanction or justification. The consent of the property trustee cannot bind the defendant nor vicariously convey away his rights. The trustee of the property, acting as a landlord, had no right to declare the premises abandoned, or otherwise evict the tenants and secure the personal items of the tenants where the rent was current and no notice had been served. The items having been legally confiscated, any oral testimony is suppressable under the poison

fruit doctrine. *Wong Sun v. United States*, 371 U.S. 471. (1963)

See *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955) where testimony as to what the searching officers observed during an illegal search was excluded. The court said in discussing the full measure of the constitutional protection:

"We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction. Moreover, it seems to us that the protection offered by the constitution against unreasonable search and seizure would be narrowed down to a virtual nullity by any such view of law, which in effect would grant to the victims of unreasonable search and seizure the rather unsubstantial right to be convicted on the basis of evidence which was illegally observed rather than evidence which was illegally taken."

In *French v. State*, 198 So.2d 668 (1967), the Florida court states:

"Once the trial court found that the tangible evidence obtained, as a result of an illegal search and seizure, could not be introduced into evidence it should have precluded the introduction into evidence of oral or written confessions of the appellants, which were obtained after the police official confronted them with the tangible evidence which was illegally seized."

The admission of the drivers license is clearly error. Under the above cases, the court should have been excluded the same from the jury. All of the items seized and the oral testimony describing the items as men's suits, shorts, etc., were used as evidence probative to the defendant's occupancy of Bedroom "A". These items were taken as mere evidence to establish the element of possession. The "mere evidence rule" would preclude the taking of such items. *Gouled v. United States*, 255 U.S. 298 (1960). Clearly, this case has been overruled, in *Warren, Maryland Penitentiary v. Hayden*, 87 S. Ct. 1642 (1967). However the prior case was applicable when this matter was heard by the trial court and should have been binding upon him and this court. The court, in the *Gouled* case, stated that search warrant "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making searches to secure evidence to be used against him in a criminal or penal proceedings. . . ." This case, through the principles enunciated in *Ker v. California*, 374 U.S. 23, (1963) should be given serious consideration by this court in determining the scope of police searches as applied in the State of Utah. The standard of reasonableness is the same under the Fourth Amendment and the Fourteenth amendment. The words of Learned Hand is particularly applicable in the instant case insofar as the mere evidence rule is involved. He stated that the "limitations upon the fruits to be gathered tend to limit the quest itself." Police exploratory searches and

seizures would thus be prevented. By reason of the Fourth Amendment, which is designed to protect the right of privacy, "the police may not rummage among personal effects, no matter how formally perfect their authority may be." They may not seize them. If they do, they may not be used in evidence. Any invasion whatsoever of those personal effects is "unreasonable" within the meaning of the Fourth Amendment." *Warden v. Hayden*, supra, (Justice Douglas, dissenting opinion.)

The *Hayden* case admittedly rules out the heretofore distinction between mere evidence and fruits, instrumentalities and contraband. No such distinction was found to be warranted by the language of the Fourth Amendment. The right of privacy is no more disturbed in a search for mere evidence than in a search for the other. The *Hayden* case, however, is not applicable here for two reasons: (1) the decision was handed after the trial of the instant case, (2) the facts are distinguishable in that the search in the *Hayden* case was deemed valid as a result as "hot pursuit" and the officers were looking for a robbery suspect and items to connect the suspect to the robbery. In the instant case, the initial search was unlawful as being executed through an improper warrant and on consent of the landlord not binding on the part of the defendant. Moreover, the defendant was not a suspect for the commission of any wrongdoing at the time of the search nor were the officers looking for any items to connect the defendant to any wrongdoings. They were only

looking for evidence which would lead them to the whereabouts of the delinquent child. (Tr-34, 122, 46) To permit the instant search to stand is to give the police unlicensed discretion to seek out items in the far corners of houses, and intrude into the private affairs, documents, and family records, thereby violating the sanctity of the home far beyond that which is necessary to perform their duties, preserving the peace.

POINT IV

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE STATEMENTS OF THE DEFENDANT MADE WHILE IN THE CUSTODY OF A POLICE CAR AFTER THE CHARGE WAS FILED IN THE ABSENCE OF THE WARNINGS UNDER *MIRANDA V. ARIZONA*.

A hearing was held outside of the presence of the jury regarding certain statements made by the defendant to Officer Lindsey. (Tr-175) Two conversations were had concerning the clothing found in Bedroom "A", each probative to the possible occupancy of Bedroom "A". (Tr-177) Each conversation was after the complaint had been filed and the defendant was a definite suspect. (Tr-176) The first conversation was a phone call initiated by the defendant; the second was a conversation in a police car while transporting the defendant from the court room to the jail. (Tr-178, 179) The phone conversation was to the effect

that the defendant wanted some things that had been taken from the apartment, however, he "didn't care to say much about it. [case]" (Tr-179) The second conversation, in the custody of a police car, began by a discussion of "our various philosophies concerning drugs and narcotics, and crime, in general." (Tr-179) At this time, defendant said he wanted his stuff back. (Tr-179) Officer Lindsey at the time was well aware that the defendant was represented by counsel. (Tr-181) The *Miranda* warnings were ignored in each conversation.

The trial court admitted both conversations over defendant's objection. The appellant submits that while there may be some justification for the trial court not to exclude the first conversation over the phone as being voluntary, non-custodial and non-interrogatory, there is no justification for not excluding the second conversation. This conversation was had while the defendant was a suspect; in fact, after he had been charged by the interrogating officer. (Tr-183) He was in the physical custody of Officer Lindsey in the police car and the admission was the result of a subtle interrogation process by the same officer. Absence of *Miranda* warnings renders the statements made inadmissible. (Tr-181) *Miranda v. Arizona*, 384 U.S. 436 (1966), *Escobedo v. Illinois*, 378 U.S. 478 (1964) The admission of the statements constitutes reversible error without regard to the prejudicial effect of said statements. The harmless error rule does not apply to the admission of statements taken in violation of the privi-

lege against self-incrimination. *Spano v. New York*, 360 U.S. 315, (1959); *Haynes v. Washington*, 373 U.S. 503 (1962).

CONCLUSION

The appellant respectfully submits that the lower court committed error in rejecting appellant's claims with regard to the evidence and oral testimony at the time of the trial. Disclaimer or waiver is not to be taken lightly where constitutional rights are at stake; nor should police be permitted to use the pretext of a search warrant obtained in Juvenile Court in order to search and seize items totally unrelated to the purpose of the search warrant which goes beyond the ends contemplated by the Juvenile Court Act. Oral testimony regarding items found and defendant's statements were put before the jury in total violation of the constitutional mandates which should not be ignored by this Court. All of the evidence was improperly received; consequently the appellant requests that the case be remanded with instructions for re-trial in accordance with the appellant's position sought on appeal; or, in the alternative, the appellant requests that this Honorable Court reverse the judgment and conviction and enter a judgment of acquittal.

Respectfully submitted,

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