

1967

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

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

v.

EUGENE MEYERS,

Defendant-Appellant.

BRIEF OF RESPONSE

Appeal from a judgment of conviction
Third District Court, Salt Lake County
Honorable Merrill C. Taylor

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

v.

EUGENE MEYERS,

Defendant-Appellant.

} CASE NO.
10944

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

Appellant appeals from a judgement of conviction of the crime of possession of narcotic drugs rendered by a jury on February 8, 1967, in the Third District Court, Salt Lake County, the Honorable Merrill C. Faux, presiding.

DISPOSITION IN LOWER COURT

On November 19, 1965, appellant was charged by information with the crime of unlawfully possessing a narcotic drug, to wit: heroin and demerol (TR-360). On November 26, 1965, appellant filed a motion to suppress certain items of evidence. On December 2, 1965, the motion was denied in a memo-

random decision of the Honorable Bryant H. Croft (TR-362, -370). On April 29, 1966, a hearing was held on appellant's motion to quash the search warrant before the Honorable Marcellus K. Snow, which motion was denied. Appellant was convicted of the offense charged on February 8, 1967, and on March 3, 1967, appellant's motion for new trial was heard before the Honorable Merrill C. Faux and was denied, whereupon an appeal of such conviction was taken to this court.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of conviction of the offense of unlawfully possessing a narcotic drug be affirmed.

STATEMENT OF FACTS

On the 28th day of May, 1965, a petition was filed in the Second District Juvenile Court of Salt Lake County, State of Utah, by William A. Kerr, a probation officer of such court, alleging that Elizabeth Ann Glasglow, then age fifteen, was a dependent child whose future custody should be adjudicated by that court. On June 28, 1965, the petition was amended indicating that said child did, on June 10, 1965, run away from the home of her aunt and uncle (in whose home such child had been residing), and that her whereabouts remained unknown until June 28, 1965 (TR-358). On that date, a search and seizure warrant was issued by Judge R. W. Garff, Jr., of that court commanding any peace

officer of the State of Utah to "forthwith take into custody the . . . child, and detain her in the Salt Lake County Detention Center; that if need be, said officer may enter by force the residence . . ." of Dave Beckstead and Eugene Meyers at 553 Third Avenue, Salt Lake City, Utah, for the purpose of searching for said child.

Armed with the search warrant, Officer Frank Kari of the Salt Lake City Police Department, accompanied by officers Donald Lindsey and Dan Waters of the Salt Lake City Police Department, went to the residence located at 553 Third Avenue, Salt Lake City, Utah, on June 29, 1965 (TR-153). A search was made of the premises to find the child, or evidence as to her whereabouts (TR-158, -159). At the time of the arrival by the officers at the residence located at 553 Third Avenue, Salt Lake City, they had a conversation with a Mr. Floyd Brown, property manager for Tracy Collins Bank and Trust Company, which company at that time was managing the residence (TR-116). Mr. Brown gave the officers permission to enter the house after being advised that they possessed a search warrant (TR-119, 154).

The residence at 553 Third Avenue had been rented by Tracy Collins Bank and Trust Company to a Mrs. James Gibson (TR-116). Mrs. James Gibson was later identified by Mr. Brown to be Virginia Hall (TR-117, 201).

Immediately preceeding the arrival of the officers, Mr. Brown was on the premises investigating a nuisance complaint lodged by a neighbor (TR-

117). At that time the doorbell rang and Mr. Brown proceeded to the front of the house where he saw the appellant, Eugene Meyers. Brown asked appellant what he was doing there, whereupon the appellant informed Brown that he was there to cut the lawn and that he was a friend of Mrs. Gibson (TR-118).

When the officers and Mr. Brown entered the residence, they found Mr. Meyers standing behind the kitchen door (TR-119, 170). Officer Lindsey inquired of appellant what he was doing, and appellant advised Officer Lindsey that he was there to cut the lawn (TR-170). Officer Kari advised appellant that the officers were there in an effort to locate the runaway child. Meyers replied that the only girl at the residence was a sister of the tenant. Meyers advised Officer Kari that he did not know where she was at that time, but that he thought the older sister had taken the child to the doctor because of illness.

Officer Kari then asked appellant if it was all right if the officers were to "look the place over," whereupon appellant replied that "it was all right with him. He was just there to mow the lawn." (TR-155).

A search was made of the premises. The officers advised appellant that they had a search and seizure warrant for that residence. The appellant claimed he did not live at the residence, and did not ask to see the search warrant (TR-49, -50, -54).

The search was made by the officers of the main floor and the second floor. A bedroom, designated

as bedroom "A" on Exhibit 2-D (TR-32), was locked. Mr. Brown obtained a key to that bedroom, which was ultimately searched by the officers.

The runaway child was not present in that bedroom. However, the officers, in searching for evidence as to her whereabouts, did find a paper sack containing what was later determined to be narcotics (TR-233, -234).

Certain items belonging to the appellant were found in bedroom "A" and were taken by the police officers. Included among those items were an automotive repair bill with appellant's name on it (TR-283); a Utah drivers license in the name of appellant (TR-301); and prescription bottles with appellant's name on the labels (TR-60). Certain other items were taken from the bedroom designated as bedroom "A," including certain clothing, a tool box, a car battery, a TV-record player, and records (TR-173, 180). Those items were taken at the request of Mr. Brown, who was in the process of evicting those tenants from that residence (TR-186).

Testimony was given by Officer Lindsey that on two occasions the appellant had a conversation with the officer in which he requested the return of certain items taken from bedroom "A." Included in the request were the clothing, records, auto battery and record player (TR-190, 195, 196, 209).

As to other factual matters, respondent relies on the Statement of Facts contained in appellant's brief on appeal.

ARGUMENT

POINT I

THE OFFICERS WERE PROPERLY ON THE PREMISES SEARCHED AND ANY NARCOTICS SEIZED AS A RESULT THEREOF COULD PROPERLY BE USED AS EVIDENCE AGAINST APPELLANT.

Repl. Vol. Utah Code Ann. § 58-13a-2 (1963) provides:

It shall be unlawful for any person to . . . possess, have under his control, . . . any narcotic drug except as authorized in this act.

Repl. Vol. Utah Code Ann. § 58-13a-29 (Supp. 1967) provides:

All narcotic drugs, or other habit-forming drugs, depressants or stimulants as defined in this act, . . . may be seized by any peace officer; . . .

The officers, in searching the premises at 553 Third Avenue, were looking for the whereabouts of the runaway child or evidence as to her whereabouts (TR-34, 122). In the course of their search for such evidence, they observed certain items which, in the opinion of officers Lindsey and Waters, were narcotics. As such, the officers, seized the contraband and secured it for later testing by the State chemist (TR-198).

The officers had a search warrant issued by the Juvenile Court of Salt Lake County which authorized them to

. . . forthwith take into custody the above child and detain her in the Salt Lake County Detention Center; that if need be, said officer may enter by force the residence of Dave Beckstead for the purpose of searching for said child.

The search warrant was issued pursuant to the provisions of Repl. Vol. Utah Code Ann. § 55-10-23 (1963), the pertinent provisions of which are:

When 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 eighteen 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 . . . peace officer . . . to search for the child, and to take and detain it in a place of safety . . . Any person authorized by such search warrant served upon . . . the custodian of the premises to search for any child and to take it and detain it . . . may enter, . . . by force, any house, building or other place specified in the warrant, and may remove the child therefrom.

A petition had been filed in the Second District Juvenile Court of Salt Lake County in the interest of Elizabeth Ann Glosgow on May 28, 1965, and amended on June 28, 1965 alleging that said child did "run away from the home of her aunt and uncle on June 10, 1965, and her whereabouts remained unknown until June 28, 1965" (TR-358). The petition was signed by William A. Kerr, a probation officer. The petition was verified by Mr. Kerr.

Utah Const. Art. I, § 14 states:

. . . 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.

Respondent submits that the requirements of Repl. Vol. 6, Utah Code Ann. § 55-10-23 (1963) and Utah Const. Art. I, § 14 were fully met, the issuance of the warrant was proper and the warrant was valid. A verified petition was on file with the Juvenile Court and executed by Mr. Kerr, a person obviously acting in the interest of the child. Officer Kari further swore before Judge Garff of the Juvenile Court as to the facts surrounding her knowledge concerning the child's whereabouts prior to the issuance of the search warrant by Judge Garff (TR-11, 13, 14).

Repl. Vol. 6, Utah Code Ann. § 55-10-23 (1963) requires that there be reasonable cause for the Juvenile Court to **suspect** that a child under eighteen years is neglected or in any place likely to be injurious to the health or morals of the child. If the court so suspects, it may issue a warrant authorizing any peace officer to search for the child, take it and detain it.

In this instance the Juvenile Court determined there was reasonable cause to suspect the child was in a place likely to be injurious to her health and morals, and accordingly issued the warrant. There appeared probable cause for the issuance of

the warrant, which was supported by the oath of Officer Kari. Since the statute under which the search warrant was issued required no execution of an affidavit in support of the search warrant, as is presently required by Repl. Vol. 6, Utah Code Ann. § 55-10-111 (Supp. 1967) and is also required by Utah Code Ann. § 77-54-4 (1953), there was no violation of either Repl. Vol. 6, Utah Code Ann. § 55-10-23 (1963), Utah Const. Art. I, § 14 or United States Const. Amend. IV and XIV.

Armed with the search warrant, the officers went to the premises to be searched where they obtained the permission and assistance of the property manager for Tracy-Collins Trust Company (TR-32, 54, 119). Narcotics were found and seized.

The state will concede that as a general proposition property other than that for which the search is being made under authority of a warrant cannot be seized under authority of the warrant if the property seized does not come within the description of the warrant, but where the officer has entered the premises upon a valid search warrant and finds contraband or property the possession of which is illegal, the officer has the right to seize such property although it was not described in the warrant. See **Brooks v. State**, 235 Md. 23, 200 A.2d 127 (1964); **People v. Collier**, 169 Cal. App. 19, 336 P.2d 582 (1959).

It has been repeatedly held that, even though not specifically described in a search warrant otherwise valid, the seizure of items, the possession of

which constitutes a crime or which are instrumentalities or fruits of crime, is valid.

In the case of **State v. Muetzel**, 121 Ore. 561, 254 Pac. 10 (1927), the Oregon Supreme Court upheld the seizure of certain papers not particularly described in the search warrant. The Court stated:

While it is a general rule that the officer, in executing his search warrant, has no right to seize any property by virtue of such warrant other than that described therein, this does not effect his duty, if lawfully upon the premises, to seize property that he discovers by his own senses as being then and there used as an instrumentality in the commission of a crime.

See also **Marron v. United States**, 8 F.2d 251 (9th Cir. 1925), in which officers lawfully on the premises pursuant to a search and seizure warrant confiscated other evidence not contemplated within the search warrant, which confiscation and seizure was upheld on the basis that the possession of liquor and maintenance of a nuisance were continuing offenses and that these offenses were committed in the presence of the officers making the search and seizure. See also **Saunders v. United States**, 238 F.2d 145 (10th Cir. 1956), and **Zachary v. United States**, 275 F.2d 793, (6th Cir. 1960), **cert. den.**, 364 U.S. 816, **reh. den.**, 364 U.S. 906 (1960). During the course of the search, the officers found objects constituting contraband, or which they suspected as being contraband, and as such they were entitled to take into custody such objects. See **Ker v. California**, 374 U.S.

23, (1963); **Heffley v. State**, 83 Nev., 423 P.2d 666 (1967).

See also the case of **State v. Wesson**, Iowa 150 N.W.2d 284 (1967) in which officers searched a hotel room for stolen checks and found stolen bonds, possession of which was a crime. The Nebraska court held that if the search was valid, the Fourth Amendment did not prevent seizure of other property the possession of which is a crime. See also **Harris v. United States**, 331 U.S. 145, (1947); 79 C.J.S., **Search and Seizure**, § 83 (e) (1952).

In the case of **State v. McMann**, 3 Ariz. App. 111, 412 P.2d 286 (1966), police officers obtained a search warrant to search the defendant's residence for marijuana. During the course of the search, the officers discovered heroin, the possession of which constituted a crime for which defendant was convicted. Defendant objected to the introduction of the heroin, claiming it should have been suppressed as it was not described in the warrant. In affirming the judgment of conviction, the court found no merit to this contention.

It is well established that if a search produces something different from that for which the officers were initially searching it does not render the seizure of contraband invalid, since the officers do not have to blind themselves to that which is apparent merely because it is disconnected with the purpose for which the search is initiated. See **People v. Smith**, 26 Cal. Repr. 620 (1962); **United States ex rel. Stoner v. Myers**, 219 F.Supp. 908 (D.C. Pa. 1963); **Peo-**

ple v. Kraps, 48 Cal. Reprtr. 89 (1965); **State v. Blood**, 190 Kan. 812, 378 P.2d 548 (1963).

Since the contraband narcotics seized by the officers was lawfully obtained, it could be used to prosecute appellant for an offense totally unrelated to that upon which the search was founded. See **Gouled v. United States**, 255 U.S. 298, (1920); and **Boyd v. United States**, 116 U.S. 616 (1886).

In **Harris v. U.S.**, *supra*, the court stated at 331 U.S. 145, 155:

. . . A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of the court give support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which followed be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of . . . property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.

Even though the search of the apartment was authorized for one purpose, i.e., the runaway girl, the taking of contraband narcotics found in that search would not be in violation of appellant's constitutional rights. The evidence was admissible against defendant in this action, and the trial court properly refused to quash the warrant or suppress the evidence.

POINT II

APPELLANT DISCLAIMED AND DIS-
AVOWED ANY INTEREST IN THE PREMISES
SEARCHED, CONSENTED TO THE SEARCH,
AND THEREFOR LACKED STANDING TO
MOVE TO SUPPRESS NARCOTICS SEIZED AS
A RESULT OF THE SEARCH.

The Fourth Amendment of the United States
Constitution reads as follows:

The right of the people to be secure in their persons
houses, papers, and effects, against **unreasonable**
searches and seizures, shall not be violated, and no
warrant shall issue upon probable cause, supported
by oath or affirmation, and particularly describing
the place to be searched, and the persons or things
to be seized. (emphasis added.)

Utah Const. art. I, § 14, provides, in effect, the
same guarantees against unreasonable searches
and seizures.

The Fourth Amendment to the Constitution of
the United States has been made applicable to the
states and enforceable against the states through
the due process clause of the Fourteenth Amend-
ment. See **Wolfe v. Colorado**, 338 U.S. 25, (1949); **Ker**
v. California, *supra*. A person may waive his right to
be free from unreasonable search and seizures, and
no rule of public policy forbids such waiver. One
can validly consent to a search of his premises, and
consent will render competent the evidence thus
obtained. By consent to a search and waiver of right
to be free from unreasonable searches and seizures
the defendant relinquishes the protection of the
Fourth Amendment to the United States Constitution

which prohibits unreasonable searches and seizures, and also relinquished protection given by the state constitution's provision against unlawful search and seizure. See **State v. Little**, 270 N.C. 234, S.E.2d 61 (1961); **People v. Harris**, 34 Ill.2d 282, 215 N.E.2d 214, cert. den. 384 U.S. 993 (1966). Although a consent to a search must be proved by the prosecution by clear and positive evidence and that there must be no duress or coercion, actual or implied, the prosecution must show that consent is unequivocal and specific, freely and intelligently given. (See **Judd v. United States**, 190 F.2d 649 (C.A.D.C. 1951); **Johnson v. Zerbst**, 304 U.S. 458, (1938).

In this instance the officers were validly on the premises to make a search thereof. Consequently, the consent, or lack thereof, by the appellant was not necessary in order for the officers to search the premises.

Although appellant argues that he did not consent, and that he did not waive any interest in and to the premises to be searched or disclaim any interest in and to the premises to be searched, it has been stated that the determination of the voluntariness of the consent must be tested by the totality of the circumstances surrounding the purported waiver or disclaimer of the constitutional rights. See **Shultz v. United States**, 351 F.2d 287 (10th Cir. 1965), **United States v. Burgos**, 269 F.2d 763 (2nd Cir. 1959).

All the evidence, including the various circumstances of the giving of consent or disclaimer, must be objectively viewed with diligent care by the trial

court, and if the court finds no evidence showing coercion or duress, it is proper to hold that the consent was voluntary or the disclaimer was voluntary and was knowledgable on the part of the defendant.

Since the appellant, at the time of his motion to suppress, motion to quash, or at the time of trial, offered no testimony or evidence contradictory to the evidence concerning his disclaimer and waiver, the statement of facts regarding his disclaimer and waiver remains unchallenged.

Such was the finding of the trial court, and the appellant offered no contradictory evidence with respect thereto. It follows that this court should uphold that determination by the trial court. Since the trial court, having the advantage of seeing and hearing the witnesses and being able to evaluate their credibility, is in the best position to weigh the significance of the pertinent facts involved and determine whether, under the totality of all the facts and circumstances, the defendant voluntarily consented to the search or disclaimed any interest in and to the property to be searched, this court should affirm that determination of the trial court.

In disclaiming and disavowing any interest in the premises, the appellant stated he was just there to cut the lawn (TR-118, 155, 170). He further consented that the search "was all right with him" (TR-155). He claimed he did not live at the residence to be searched, and did not ask to see the search warrant (TR-49, 50, 54). Respondent submits that this uncontroverted testimony constitutes a disclaimer and

disavowal of any interest in and to the premises searched, and further constitutes a consent to search.

The following cases have held language similar to that of appellant's sufficient to constitute consent to search:

People v. Hood, 149 Cal. App. 36, 309 P.2d 135 (1957)—“Go ahead.”

People v. Burke, 47 Cal.2d 45, 301 P.2d 241 (1956)—“Go ahead.”

In re Watson's Petition, 146 Mont. 125, 404 P.2d 315 (1965)—“Yes, go right ahead; I have nothing to hide.”

People v. Galle, 153 Cal. App. 88, 314 P.2d 58 (1957),—“Go right ahead.”

People v. McCoy, 16 Cal. Rptr. 117 (1961)—“Well, go ahead. It's not my room.”

State v. Tuttle, 16 Utah 2d 288, 399 P.2d 580 (1965)—If they (Town Marshall) wanted to go ahead knowing they were violating the law to make the search, . . . they could go.

As a general proposition, the law with respect to disclaimer of interest is stated in 79 C.J.S. **Searches and Seizures**, § 60 (1952) as follows:

When a person disclaims interest in the premises or possessions searched, or in the article seized, he cannot question the legality of the search and seizure.

See also **Show v. United States**, 209 F.2d 298 (C.A., D.C. 1953). **cert. den.** 347 U.S. 905 (1954); **Commonwealth v. Mayer**, 359 Mass 253, 207 NE.2d 686

(1965); **Parr v. United States**, 255 F.2d 86 (5th Cir. 1958); **Neil v. State**, 206 Tenn. 492, 344 S.W.2d 731 (1960).

Assuming, **arguendo**, that the search warrant issued by the Juvenile Court was invalid, the appellant nonetheless consented to the search and disclaimed any interest in the premises searched or property seized. As such he cannot now claim that his rights have been violated. Respondent submits, however, that the officers were legally on the premises by reason of the search warrant, and the appellant's consent and disclaimer further supports the validity of the search and seizure.

By reason of the disclaimer and consent of appellant, he lacked standing to move to suppress the narcotics seized. Appellant relies heavily on the case of **United States v. Jeffers**, 342 U.S. 48 (1951). However that case is easily distinguishable in that in the **Jeffers** case the police officers who conducted the search of the hotel room which Jeffers had access to did not have a search warrant, nor were the occupants of the room present at the time of the search. The court stated at 342 U.S. 52:

. . . In entering the room and making the search for the sole purpose of seizing respondent's narcotics, the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted surreptitiously and by means denounced as criminal.

In this case, as previously pointed out, the officers were on the premises properly, armed with a

warrant, and further had the consent of defendant to search and his disclaimer and disavowal of any interest in and to the premises.

In **Jones v. United States**, 362 U.S. 257, (1960), the defendant was present at the time of the search. The court, at 362 U.S. 267, recognized that:

. . . anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.

The question then posed is whether or not the appellant was legitimately on the premises in order that the merits of his motion to suppress be adjudicated. The trial court, having considered the same, concluded that the appellant had no proper standing to move to suppress by reason of that fact that he had previously disclaimed any interest in and to the premises (see Memorandum Decision, TR 362-370).

The trial court could and did find that the appellant's statement to the police amounted to a total disclaimer or disavowal of any right or interest in connection with the premises. Accordingly the police could take him at his word. The defendant cannot now be heard to complain that his constitutional rights were violated.

In **People v. McCoy**, *supra*, a somewhat similar case wherein the defendant disclaimed any interest to the premises, the court held the evidence

seized admissable against defendant, stating at 16 Cal. Reprtr. 117, 118:

"We do not believe the appellant's false disclaimer of residency vitiated the consent given to search the room; the evidence obtained was not inadmissible as the product of an unlawful search and seizure."

In the case of **State v. Montayne**, 18 Utah 2d 38, 414 P.2d 958, 960, (1966), this court stated:

In approaching the problem of standing, the origin and nature of the rule concerning suppression should be noted. Evidence is suppressed or excluded only if the same was obtained by a violation of the Fourth Amendment, designed to protect a person's right of privacy and property. Evidence sought to be excluded is admissible, however, until the accused has established that his rights under the rule have been invaded. Citing **Murray v. United States**, 338 F.2d 409 (10th Cir. 1964). See **Jones v. United States**, 362 U.S. 257, 80 S.C. 125, 4 L.Ed.2d 697 (1960).

Therefore, it is entirely proper to require of one who seeks to challenge the legality of a search as a basis for suppressing relevant evidence that he alleges, and if the allegation be disputed, that he establish, that he himself was a victim of an invasion of privacy. Under this philosophy, the appellant has no standing because he was not a victim of an invasion of privacy. To give a person standing who neither alleges nor establishes the proprietary nor possessory interest in the car and who in fact was without ownership therein, so determined before the search was made, would clearly be an extension beyond the scope that the constitutional protection was intended to cover.

The appellant did not in any sense contradict

the testimony of the officers, nor was there any evidence offered by the appellant that there had been any coercion or that appellant was submitting to any implied authority at the occasion at the residence located at 553 Third Avenue, or that appellant did not know what he was doing at the time. Full opportunity was afforded the appellant to show force, duress, or other improper methods used, if such was the fact. This he entirely failed to do. Appellant also failed to demonstrate that he was the victim of an invasion of privacy.

Respondent submits that the trial court's finding in this regard should not be disturbed in view of the fact that the evidence in the record does not compell a different finding since the appellant herein did not offer any testimony or evidence with respect to such disclaimer of interest in and to the premises to be searched, waiver of his right to object to the search, or consent to the search. See **Cassity v. Castagno**, 10 Utah 2d 16, 347 P.2d 834 (1959); **Napp v. Life Insurance Corp. of America**, 8 Utah 2d 220, 332 P.2d 662 (1959); **DeVas v. Noble**, 13 Utah 2d 133, 369 P.2d 290, **cert. den.**, 371 U.S. 821 (1962).

As this Court stated in **State v. Tuttle, supra**, at 399 P.2d 580, 582:

“The practical exigencies of a trial render it imperative that the trial judge have the prerogative of ruling upon questions of admissability of evidence and upon issues of fact incidental to that purpose. For this reason, and because of his position of advantage to observe the demeanor of witnesses and

other factors bearing on credibility, his ruling thereon should not be disturbed unless it clearly appears he was in error. If the court were not indulged this prerogative and were bound by any story which a self-interested witness may tell which could make a search unlawful, it requires but brief reflection to reveal what mischief could result in thwarting efforts of officers proceeding reasonably and in good faith to solve crimes and enforce the law."

POINT III

THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF APPELLANT.

Officer Lindsey testified as to certain conversations had with appellant following the filing of a complaint against appellant for this offense. The conversations did not take on the complexion of questioning or interrogation (TR-177, 178).

The first conversation was a telephone call from appellant to Officer Lindsey, wherein,

"... he told me he wanted to get his things we had taken out of that apartment." (TR 178), (see also TR 195).

The second conversation occurred in a police vehicle, also between appellant and Officer Lindsey. Among other subjects discussed,

"... Mr. Meyers said he wanted to get his stuff back." (TR 179), (see also TR 196).

Prescription bottles were taken by the officers from bedroom "A" with the name "Eugene Meyers"

on the label (TR 198). Tablets, pills, capsules, and the prescription bottles were all found in a paper bag (TR 198). Certain of the contents of that bag were later determined to be narcotics (TR-232, 233, 234,). Appellant's driver's license was taken from the room, plus articles of clothing and other personal property (TR-301). Appellant stayed in bedroom "A", had a key to that bedroom, was seen coming and going from that residence, and was observed in bedroom "A" with a bottle containing pills (TR-135-138).

Respondent submits there was sufficient evidence before the jury from which it could determine beyond a reasonable doubt that appellant was guilty of the offense charged.

Yet appellant complains that he was prejudiced by the trial court allowing Officer Lindsey's testimony concerning the conversations had between the officer and appellant, since no **MIRANDA** warnings were given to appellant.

In the case of **Miranda v. State of Arizona**, 383 U.S. 903 (1966) the Supreme Court specifically pointed out that the decision is limited to in-custody interrogation in a police dominated atmosphere. The Court stated at 86 S. Ct. 1612:

"By custodial interrogation, we mean questioning **initiated** by law enforcement officers after a person has been taken into custody. . . ' (emphasis added)

The Court further stated at page 1630:

"Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence . . . There is no requirement that police stop a person . . . who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and are not affected by our holding today."

The telephone conversation was admitted in evidence as a declaration or admission against interest by appellant, not as a confession to the crime charged. The second conversation for the same reason. There was no substantive difference in the two conversations. Neither conversation took on the complexion of questioning or interrogation, and it should be pointed out that the telephone conversation was initiated by the appellant. Respondent submits that both conversations were entered into voluntarily by appellant without any compelling influence whatsoever.

Assuming, **arguendo**, that the second conversation, standing alone, would not be admissible, respondent submits that by reason of the fact that the first and second conversations are basically identical, the admission of the second conversation is at best harmless error with no resulting prejudice to appellant. There is nothing in the record to indicate a denial of right or abuse of a privilege which put the appellant at any substantial disadvantage or prejudice by reason of the admission of the second conversation.

The alleged error in the admission of appellant's statements can and should be disregarded by

this Court. See Utah Code Ann. § 77-42-1 (1953); **State v. Seymour**, 18 Utah 2d 153, 417 P.2d 655 (1966); **State v. Sinclair**, 15 Utah 2d 162, 389 P.2d 465 (1964).

Neither error nor prejudice can be assumed by this Court, and the burden is upon the appellant to show error or prejudice. The underlying principle of protections afforded an accused is treatment in conformity with commonly accepted standards of decency and fairness. Respondent submits that appellant has failed to demonstrate, nor does the record contain, any indication that appellant was not afforded a fair trial and in all regards treated decently and fairly. See **State v. Hamilton**, 18 Utah 2d 234, 419 P.2d 770 (1966).

The appellant was afforded the opportunity to have heard his motions to suppress, motion to quash, trial by jury, motions to dismiss, motion for mistrial and motion for new trial. Appellant was represented by able counsel at all stages. He was given a full and fair opportunity to present his case. Accordingly, all presumptions favor the validity of the judgment. **State v. Seymour, supra.**

CONCLUSION

Respondent respectfully submits that the rulings of the trial court with respect to appellant's motions to suppress, quash, dismiss, mistrial, new trial, and its ruling on the admissability of evidence were in all respects proper. Appellant has shown no basis upon which this court should grant the relief

he asks. Accordingly respondent respectfully submits that the judgment of the district court be affirmed.

Respectfully submitted,

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