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IN THE SUPREME COURT of the STATE OF UTAH

FILED
APR 2 2 1964
Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

LLOYD B. HART

Defendant and Appellant.

Case No. 9995

BRIEF OF APPELLANT

Appeal from the Conviction of the District Court of Salt Lake County, Hon. Ray Van Cott, Jr.

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THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL TRIAL BY JURY AS PROVIDED FOR IN ARTICLE 1, SECTION 12 OF THE UTAH CONSTITUTION AND WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW IN VIOLATION OF THE RIGHTS OF THE DEFENDANT UNDER THE 4TH, 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION SINCE THE TRIAL JUDGE OVERRULED TIMELY OBJECTION BY DEFENDANT AND ADMITTED INTO EVIDENCE ADMISSIONS AND CONFESSION OF DEFENDANT WHICH WERE OBTAINED FROM DEFENDANT DURING UNREASONABLE DELAY BETWEEN TIME OF ARREST AND ARRAIGNMENT BEFORE COMMITTING MAGISTRATE 3

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IN THE SUPREME COURT of the STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

LLOYD B. HART

Defendant and Appellant.

Case No. 9995

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is a criminal action. The defendant was convicted of Burglary in the Second Degree by use of his own statements and testimony of an admitted accomplice who was placed on probation upon a plea of guilty along with another accomplice who did not testify, though under subpoena and present.

DISPOSITION IN LOWER COURT

The case was tried to a jury in the District Court of Salt Lake County. Judge Ray Van Cott, Jr. presided.

The defendant was convicted and appeals.

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RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and dismissal of the information as a matter of law; or, that failing, a new trial.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the defendant and two co-defendants had consumed a considerable amount of alcoholic beverage during the better part of the 27th day of January, 1963, after which time they discussed committing the burglary for which they were charged, the place being the Maurice Warshaw apartment on East Second South in Salt Lake City, Utah. (T. 36)

To put matters in a more pronounced light of ironic dismay, inter alia, all three *purchased* rubber gloves from a *Grand Central Market* to avoid detection of fingerprints in an effort to conceal their respective indentities in having been at the scene.

The Warshaws were not at home. No one was in attendance at the scene when all three defendants entered through an unlocked door, little realizing such had effected a signal by a burglar alarm system to a local detective agency.

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Almost immediately, before anything had been disturbed, taken or even touched, it was evident they had been caught. As the arresting officers entered at about 8:15 p.m.: (T. 10) two co-defendants were discovered inside the apartment, just standing, helpless in their plight, and offering no resistance to their arrest. The defendant was not found at that time; but, instead, he was later discovered *outside* the apartment on a catwalk behind plants (T. 14). The only access to that area was through the apartment . . . or by help from Him, it would seem.

All three were arrested and taken to the Salt Lake City Jail, where they were booked for Burglary in the Second Degree at 9:30 p.m. (T. 20).

It was not until 11:00 o'clock a.m. the following day, 15 hours later, when the defendant admitted his part in the act to Salt Lake Police Officer Dave Bradford. (T. 27) All, before they were arraigned before a committing magistrate, otherwise properly advised of their respective constitutional rights or had a complaint signed against them. (T. 28, 29)

POINT I

(and only)

THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL TRIAL BY JURY AS PROVIDED FOR IN ARTICLE 1, SECTION 12 OF THE UTAH CONSTITUTION AND WAS

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DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW IN VIOLATION OF THE RIGHTS OF THE DEFENDANT UNDER THE 4TH, 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION SINCE THE TRIAL JUDGE OVERRULED TIMELY OBJECTION BY DEFENDANT AND ADMITTED INTO EVIDENCE ADMISSIONS AND CONFESSION OF DEFENDANT WHICH WERE OBTAINED FROM DEFENDANT DURING UNREASONABLE DELAY BETWEEN TIME OF ARREST AND ARRAIGNMENT BEFORE COMMITTING MAGISTRATE AS FURTHER GUARANTEED BY STATE STATUTE.

The United States Supreme Court has enforced its *Rule* 5(*a*) *of Criminal Procedure* in the federal courts by excluding confessions received during an unreasonable delay between time of arrest and arraignment before a committing magistrate where the accused can be properly advised of his constitutional rights, with particular attention being focused for the present instance toward rights against self incrimination. (*McNabb v. United States,* 318 U.S., 332; *Mallory v. United States,* D.C. Cir. F.2d; *Miller v. United States,* 1958, 357 U.S. 301, *Seals v. United States,* 1963, D.C. Cir. F.2d.)

However, thus far, *Rule* 5(*a*) has not been applied to States by constitutional due process of the 5*th Amendment* through the 14*th Amendment* of the *United States Constitution.* It is, nonetheless, the contention of the defendant that it should. And he so requests this state court of last resort to so rule.

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It is fundamental law that before a confession can be admitted into evidence, it must be made *voluntarily*, as a matter of law and fact. (*State v. Crank*, 105 U. 332, 142 P. 2d 178, 170 A-L.R. 542.)

The *state* has the burden to prove that such was *voluntary*. (*State v. Bonolo*, Wyo., 207 P. 1065, *Graham v. State*, Okl., 184 P. 2d 984, *Cervantes v. United States*, 263 F. 2d 800, *State v. Crank*, 105 U. 332, 142 P. 2d 178, 170 A.L.R. 542.) *Voluntariness* cannot be presumed.

The latest federal decision pertaining to Rule 5(a) is the Seals case, supra, wherein it was held that 3-1/2 hours was an unreasonable delay between arrest and arraignment, and ½ hour was such in the Mallory case, supra.

Our state, by statute, in Title 76-28-51, U.C.A., 1953, makes it a *crime* for "every public officer or other person, having arrested any person upon a criminal charge, who willfully delays taking such person before a magistrate having jurisdiction to take his examination."

Procedurally, our state, by statute, in cross reference to the statute above, in Title 77-13-17, U.C.A., 1953, states that when an arrest is made without a warrant by a peace officer or private person, the person arrested *without unnecessary delay*, be taken to the nearest and most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person must be made before such magistrate . . . , and inTitle 77-12-14, U.C.A., 1953, states that

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"the defendant must in all cases be taken before the magistrate without unnecessary delay"

What constitutes *unnecessary delay* must be decided as a matter of law and fact from the circumstances of each particular case. (*Mapp v. Ohio,* 1961, 367 U.S. 643, *Rabinowitz v. United States,* 1950, 339 U.S. 56; *Rios v. United States,* 1960, 364 U.S. 253.)

Unless otherwise met by the burden of proof by the state, when the defendant contends a confession to have been involuntary (T. 23), the court as a matter of law should so find as contended and not permit into evidence a confession so obtained. Such is the instant case. *With no proof to the contrary,* 15 hours delay between arrest and arraignment is *unnecessary,* unreasonable and in violation of the 5th Amendment through the 14th Amendment of the United States Constitution.

The trial judge erred by impliedly finding as a matter of law the defendant's confession was *voluntarily* given when he admitted same into evidence over objection (T. 23) *without proof by the state to the contrary.*

Furthermore, by the same reasoning, *with no proof to the contrary,* 15 hours delay between arrest and arraignment is *unnecessary* and unreasonable because *illegal* (76-28-51, U.C.A., 1953) and in violation of the 4th Amendment through the 14th Amendment of the United States Constitution.

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All *illegally* obtained evidence is inadmissible in both state and federal courts. (*Mapp v. Ohio*, 1961, 367 U.S. 643, et al.)

The concurring opinion of the Mapp case, as well as in *Boyd v. United States*, 1886, 116 U.S. 616, et al, it is reasoned that neither the *4th nor 5th Amendments* should be divorced from the other so far as they are to be applied through the due process clause of the United States Constitution, wherein the view is taken that *no distinction of noteworthy value can be made between words or tanglibles when both have been illegally obtained*. Neither should be admitted into evidence. Both would be unconstitutionally obtained and should not be allowed to violate fundamental rights of an accused.

Such is the contention of the defendant, and he so requests this state court of last recort to so rule.

CONCLUSION

The defendant has been denied due process of law which is guaranteed by our State and Federal Constituitnos and Statutes. He has been deprived of a fair trial before an impartial jury. His conviction is not substantiated by the evidence. The trial and verdict constitute a miscarriage of justice and should be reversed.

Respectfully submitted,

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