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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff and Respondent, : BRIEF OF APPELLANT

vs. :

JAY RICHARD NEWTON, : Case No. 18987

Defendant and Appellant. :

BRIEF OF APPELLANT

Appeal from a conviction of forgery, a second degree felony, in violation of Section 76-6-501, Utah Code Annotated (1953, as amended), before the Honorable Ernest F. Baldwin, Jr., Judge of the Third Judicial District, in and for Salt Lake County, State of Utah.

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AUG 2 - 1983

Clerk, Supreme Court, Utah

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vs.	:	Case No. 18987
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Defendant and Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The defendant appeals from the denial of his motion to suppress evidence which he alleged was seized in violation of his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution and Article I, Sections 12 and 14 of the Constitution of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was charged by information in the Third Judicial District Court with forgery, a felony of the second degree, and theft, a felony of the third degree.

On January 14, 1983, the appellant's motion to suppress evidence he alleged was seized in violation of his constitutional rights was heard before the Honorable James S. Sawaya, Third District Judge. The motion was subsequently denied.

The appellant then waived his right to a jury trial and was tried before the Honorable Ernest [illegible] Baldwin, Jr., on January 24, 1983. He was found guilty of the forgery charge and not guilty of the theft charge. He was sentenced on the same day to the statutory term of one to fifteen years in the state prison.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the denial of his suppression motion and consequently a reversal of his conviction. The charges should then be dismissed or a new trial granted.

STATEMENT OF FACTS

On January 20, 1982, one James Alfred Clark, store manager for Reams Bargain Annex, was presented with a check for $397.43 drawn on an account entitled Peck and Peck (R-44). He cashed the check (R-45) for the individual who gave it to him, writing down the individual's social security number and driver's license number on the check (R-46). He did not identify the defendant as the person who gave him the check (R-47). The check had not in fact been drawn or authorized by Peck and Peck (R-54), nor had the person to whom the check had been made out ever seen it (R-56).

The man to whom the check had been made out, one Frear, had earlier misplaced his driver's license (R-58). He also stated that while he had a social security number he had no social security card (T-61, 62). Nevertheless, a social security card with his number and a driver's license with his license

number were apparently used as identification for the check (Defendant's exhibit 3, State's exhibit 1).

On February 18, 1982, a Dennis Holm of Adult Probation and Parole went to the premises of a Debbie and Leon Smith to investigate a shooting (R-64, 67-68). Smith was on parole from the state prison (R-65). The Smith's were the exclusive occupants of the premises (R-69). Mrs. Smith then gave Holm a file folder one inch thick full of papers (R-70). The folder contained driver's licenses with the pictures cut out, social security cards, business cards, and several blank checks (R-67, 78). Among the papers was Frear's lost license (R-66). Possession of these items was a violation of Smith's parole (R-72).

On January 19, 1982, a month before the Smith search, the appellant was arrested by a George Sinclair (R-79). The arrest was for a charge not related to the present case as the warrant was issued in December, 1981 (R-80). Newton had in his possession a bank account card with the name Frear on it (R-75). He did not have either the license or the social security card in Frear's name which were shown as identification in Reams the following day. Newton has been incarcerated from January 19th to the present time (R-80, R-130).

On April 14, 1982, a Sandy City police officer named Albert Nortz was advised by Sinclair of Newton's arrest in January and also that Frear's license with Newton's picture taped on it had been found in the search of Smith's home in February (R-100). (Note- at one point Nortz testified this had occurred in June but he later corrected his mistake (R-123, R-101). Nortz decided to interview Newton at the jail (R-95).

The appellant moved to suppress the results of the interview before and during the trial (R-22, R-92, R-138-142). The motion was denied (R-29).

Nortz did in fact contact Newton in the jail (R-125). He told Newton he was investigating a forged check and would like to talk to him about it. He first advised him of his so-called *Miranda* rights (R-126). He had no search warrant (R-128), didn't ask if Newton was represented by an attorney (R-125), didn't ask if he had an attorney (R-125), and no attorney was present during the interview (R-102). However, Newton had been represented by counsel at his request since his arrest on the other charges in January, 1982 (R-130, 131).

Nortz showed Newton two checks, one marked "Leon Smith", the parolee, and the other was the Lee Peck check (R-126). Newton denied any knowledge of either check and Nortz then asked him to fill out a handwriting specimen sheet, telling him first only that he didn't have to do it if he didn't want to, (R-127-128). Newton filled the sheet out (R-129). The sheet was then sent to a handwriting expert at Weber State University (R-129).

The expert testified that the author of the handwriting sample and the endorsement on the rear of the Lee Peck check was the same person (R-106). The Court then found the appellant guilty of forgery and not guilty of theft (R-116).

ARGUMENT

THE APPELLANT WAS DENIED
HIS SIXTH AMENDMENT AND
ARTICLE I, SECTION 12
RIGHT TO COUNSEL

The actions of the police deprived the appellant of perhaps the most fundamental right in the criminal justice system, the right to counsel. The investigating officer, acting on a tip not amounting to probable cause, went without a search warrant to the jail where the appellant had been held for three months on another charge. His intention was to gather evidence. The absence of a warrant would seem to violate the precepts of the Fourth Amendment and Article I, Section 14 of the federal and state constitutions. Once there, the officer made no inquiry as to whether the appellant had counsel although he was aware of the pending charges and the length of time the appellant had been jailed. He took a handwriting sample from the appellant which proved to be the sole link at trial between the appellant and the alleged forgery. This, too, would seem to violate a constitutional guarantee, the state Article I, Section 12 right not to give evidence against oneself, Hansen v. Owens, 619 P.2d 315 (Utah 1980). To these claimed constitutional violations the State will be heard to say that the appellant was given a Miranda warning and thus he voluntarily waived his rights. Such an argument cannot be sustained because even a Miranda warning will not overcome the fact that all of the officer's actions occurred in the absence of the appellant's counsel. It is the denial of this most fundamental right which mandates a suppression of the handwriting exemplar and thus a reversal of the conviction.

It is permissible to interrogate an accused who has invoked his right to silence, his Fifth Amendment right, about

other, unrelated crimes he may have committed once he has again been given the Miranda warning, Michigan v. Mosely, 423 U.S. 96 (1975). It is significant here that "at no time in the questioning did Mosely indicate a desire to consult with a lawyer . . ." 423 U.S. 96, 97. A more recent case, Edwards v. Arizona, 451 U.S. 477 (1981), demonstrates the greater protection afforded to one who invokes his right to counsel, his Sixth Amendment right.

In Edwards, the accused was charged with three serious felonies. The arresting officers proposed a plea bargain and he responded, "I want an attorney before making a deal", 451 U.S. 477, 479. Questioning ceased. The following day, Edwards was again given his Miranda rights and questioned about the crime. This time he confessed, 451 U.S. 477, 479. The Court observed, "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused' [citations omitted]," 451 U.S. 477, 483. The Court concluded, ". . . that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights,(emphasis added). We further hold that an accused, such as Edwards, having

expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police, 451 U.S. 477, 484-485. Edward's confession was suppressed and his conviction reversed.

The impact of Edwards on the present case is starkly apparent. The appellant here had not only invoked his right to counsel, he had secured representation. He may have given the handwriting sample after receiving a Miranda warning but Edwards expressly held that the mere giving of such a warning would not constitute the waiver of counsel by one who had invoked that right. The police here, as in Edwards, were constitutionally bound to deal with the appellant through his attorney and their failure to observe that right requires that the handwriting sample acquired in the absence of counsel be suppressed.

It is of no significance that the officer here interrogated the appellant about an offense unrelated to the one for which counsel had been requested and secured because Edwards creates no such exception to its rule. To repeat, Edwards says that an accused, "having expressed a desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him," unless he himself initiates the contact, 451 U.S. 477, 484-485. Edwards does not permit interrogation of one who asks for or who has counsel on some subjects but not

others, it flatly prohibits any interrogation in the absence of counsel.

The antecedents of this aspect of the Edwards decision lie in a group of cases decided in New York under the state constitutional right to counsel, precisely the same as the Utah provision. The first of these cases was People v. Rogers, 48 N.Y. 2d 167, 397 N.E. 2d 709 (1979). Rogers was arrested for robbery, an attorney entered the case, and interrogation on the robbery ceased. However, several hours later, after the accused purportedly waived his rights, interrogation commenced on some unrelated activities to which the accused confessed, 397 N.E. 2d 709, 711. The Court declared, " . . . that once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel," 397 N.E. 2d 709, 713. The Court's rationale for its conclusion is illuminating, "An attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge. It cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned. Finally, it is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the

extant charge. Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence.

The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the position's of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver of self incriminating statements is immaterial to our system of justice, [citations omitted]. Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution. Available are means other than subjecting a person represented by an attorney to interrogation in the absence of counsel," 397 N.E. 2d 709, 713. Rogers has been followed in People v. Ferrara, 54 N.Y. 2d 498, 430 N.E. 2d 1275 (1981); People v. Coulter, 84 A.D. 669, 446 NYS 2d 618 (1981); and People v. Moore, 448 NYS 2d 213 (1982).

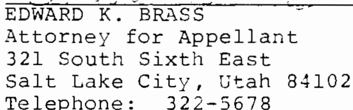
The reasoning of Edwards and Rogers ought to be compelling here if the right to counsel is not to be diluted in the state of Utah. The appellant was a captive audience for the interrogation, having been in jail for three months. He had an attorney. The attorney should not have to concern himself over whether the police are visiting his client without his knowledge or consent. It would be ludicrous to conclude that if interrogation is permitted, unknown to the attorney, on "unrelated" matters, the interrogators will scrupulously avoid the charge on

which representation has been secured. Finally, the value of counsel must not be underestimated. Had his counsel been present, the defendant, an unsophisticated prisoner, would have immediately been informed that the handwriting sample could not be acquired without a warrant and in any event he could refuse to give it pursuant to Hansen v. Owens. As the Court observed in Rogers, it is the presence of any attorney which serves to equalize the power of the state and the accused. If the state is permitted by this Court to circumvent the attorney then that precarious balance will tip overwhelmingly in favor of the state.

CONCLUSION

The handwriting sample taken in the absence of counsel must be suppressed and the conviction reversed.

DATED this 1st day of AUGUST, 1983.



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DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was delivered via TRS to the Utah Attorney General, Criminal Division, 236 State Capitol Building, Salt Lake City, Utah 84112 this 1st day of AUGUST, 1983.

Edward Brass