1983

State of Utah v. Jay Richard Newton : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 18987

JAY RICHARD NEWTON, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT AND CONVICTION RENDERED BY THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ERNEST F. BALDWIN, JR., JUDGE PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

STATEMENT OF THE NATURE OF THE CASE

Appellant was found guilty of forgery, a second-degree felony, in violation of Utah Code Annotated § 76-6-501, 1953 (as amended). He appeals from the denial of his motion to suppress evidence.

DISPOSITION IN THE LOWER COURT

Appellant was charged with forgery, a second-degree felony, and theft, a third degree felony. On January 14, 1983, appellant made a motion to suppress evidence. The

motion was denied by the Honorable James S. Sawaya, Third District Judge. Appellant was subsequently convicted of forgery.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction in the trial court.

STATEMENT OF FACTS

On January 20, 1982, Jim Clark, the front-end manager for Ream's Bargain Annex located at 70675 South 7th East, (transcript of January 24, 1983, hereinafter T., p.4) cashed a check for an individual. The check was made payable to Robert Lynn Frear in the amount of $397.43 and was drawn on the account of Peck & Peck, a painting company (T. 44). Following standard procedure, Clark wrote the individual's social security number, driver's license number, and birth date on the back of the check (T. 46). Later, however, Clark testified that he could not describe the individual who had given him the check because the time he had spent with him was so brief (T. 46)

Valley Bank stopped payment on the check because the signature on it was improperly written (T. 15). It was then discovered that Peck & Peck did not authorize the issuance of the check (T. 14). Furthermore, Robert Lynn Frear had never received the check (T. 17).

Frear explained that he had lost his driver's license in the summer of 1981. He did not worry about it,

however, because it had expired and was therefore invalid (T. 18).

Frear also stated that the social security number on the forged check was his (T. 21). He testified further that he was acquainted with the appellant (T. 19).

Detective George Sinclair arrested appellant on January 19, 1982, on the charge of aggravated burglary (T. 40, Hearing of January 14, 1983, hereinafter H., P. 10) Sinclair discovered in appellant's possession a Capital City Bank account card issued under the name of Robert Lynn Frear (T. 36). Appellant was incarcerated after this arrest (T. 41).

On February 18, 1982, Dennis Holm of Adult Probation and Parole went to investigate a shooting at the residence of Debbie and Leon Smith (T. 29). Leon Smith was on parole from the state prison (T. 26). During the investigation, Holm found Frear's lost driver's license in one of Smith's folders which contained other drivers' licenses, social security cards, and blank checks. (T. 28). Frear's photograph had been cut from his 1981 license and replaced by appellant's photograph. Appellant's photograph had been taped into place. (T. 37).

Albert Nortz, a Sandy City Police officer, was investigating the suspected forged check (T. 61). He telephoned Sgt. Sinclair and informed him that the appellant was a good suspect (H. 4).

With the knowlege linking appellant to the Frear bank account card and driver's license but without a search

warrant, Nortz interviewed appellant who was already in the Salt Lake County Jail (T. 56) on April 14, 1982. Appellant had been incarcerated for three months at the time of the interview (T. 40, 56). Detective Nortz, prior to questioning, advised appellant of his Miranda rights by reading from a Miranda card. (H. 6, T. 57). Appellant acknowledged that he understood those rights and stated that he would be willing to talk with Detective Nortz without having an attorney present (H. 6). Appellant made no effort to contact an attorney (H. 5), although he had been represented by an attorney three months earlier on the unrelated charge (H. 10, 11). Having obtained appellant's approval to continue the interview, Detective Nortz showed him two checks, one of which was the "Peck" check (T. 6) with Robert Frear as the designated payee. Appellant claimed to know nothing about them (H. 6). Nortz asked appellant if he minded filling out a handwriting specimen. He explained to appellant that it was for comparison purposes (H. 7). Nortz also told appellant that he had a right to refuse to (H. 8) cooperate. Appellant, however, said he had nothing to hide and provided the handwiting sample. (H. 8)

Both the suspected forged "Peck" check and appellant's handwriting exemplar were sent to a handwriting expert at the State of Utah Crime Laboratory H. 9, T. 60). The expert testified that the same person had authored both the signature on the "Peck" check made out to Robert Frear and

appellant's handwriting exemplar.

It appears that appellant had obtained Frear's driver's license and social security number and used them to forge a detective signature and cash a check made out to Frear. He altered the driver's license, replacing Frear's picture with his own (T. 20), and changed the expiration date to 1982 (T. 24).

Following a bench trial, appellant was found guilty of forgery. He was sentenced to the Utah State Prison for an indeterminate sentence of one to five years (T. 49).

ARGUMENT

POINT I

APPELLANT VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHTS UNDER MIRANDA.

Appellant contends that he was denied his right to counsel because counsel was not present during the police interrogation of the forgery charge against him. Appellant makes this contention in spite of the fact that he was given a Miranda warning and voluntarily and intelligently consented to the interrogation.

At the outset, it is important to note that several factors distinguish the instant case from mere right to counsel analysis. These facts are that first, appellant had obtained counsel three months earlier for an unrelated aggravated robbery charge; (H.10) and second, that it had been

three months since the last unrelated interrogation. This gap in both the time and subject matter of the later interrogation demonstrates that the issue in this case cannot be properly framed simply as a right to counsel problem. Because of these unique circumstances, the issue is rather the larger problem of whether appellant did in fact voluntarily and knowingly waive his Miranda rights, including his right to counsel, prior to the separate and distinct forgery interrogation.

The record is clear that appellant affirmatively waived both his right to counsel and his right to remain silent after Detective Nortz informed him of his rights. The recent Supreme Court case of Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975) is factually very similar to the instant case and is controlling of the issue. In both Mosley and the instant case, the defendants were initially arrested on one charge, interrogated about it, and then later questioned about another unrelated offense following the readmonition of Miranda. They are dissimilar, however, in that in Mosley, the interval between the unrelated interrogations was only two hours whereas in the instant case, the interval between the two interrogations was three months. Also, the defendant in Mosley never saw an attorney in relation to the first, unrelated charge; while in the instant case, appellant saw an attorney for the first charge, but did not ask to see him on the unrelated charge three months later.

The Supreme Court in Mosley said that it was clearly impermissible for the police to continue interrogation after only a momentary cessation, it added that to impose a blanket prohibition against the taking of voluntary statements, regardless of the circumstances, "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." Id. at 102. The Mosley Court then stated

> Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent. Id. at 102-103. (Footnote omitted)

The Court then explained that the most critical inquiry is whether the person's right to cut off questioning was "scrupulously honored" by the police. Id. This respect for the person's rights does not mean, however, that once that person has indicated a desire to remain silent, further interrogation may resume only when counsel is present. Id. at 104 (footnote 10). The Court in Mosley then found, following a review of the circumstances, that the defendant's right to cut off questioning was fully respected.

In the instant case, appellant's right to cut off questioning was scrupulously honored following his invocation of the right to counsel during the course of the first interrogation on the unrelated burglary charge. Three months later, pursuant to legitimate investigative action, questioning on a different matter occurred. This separate and distinct interrogation was preceded by a Miranda warning, and only upon receipt of the new warning did appellant voluntarily and intelligently consent to the questioning.

Appellant affirmatively waived his right to remain silent by agreeing to speak with Detective Nortz. In addition, appellant waived his right to have an attorney present by acknowledging that he understood his Miranda rights and that there was no need for him to contact an attorney. Appellant then explained that he "had nothing to hide" (H. 8) and demonstrated his willingness to cooperate at this custodial interrogation.

The test for whether the waiver of a right is valid was formulated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In the instant case, the circumstances clearly demonstrate that appellant knowingly and intentionally relinquished his right to have an attorney present. Appellant did not request an attorney after being reinformed of this right by Detective Nortz. He cannot complain of the failure to have an attorney present when counsel's absence during this particular custodial interrogation was the product of his own informed choice. This allowance for a subsequent waiver of the right to counsel is supported by the recent case of Offutt v. State, 463 A.2d 876 (Md.Ct. Spec. App. 1983). In Offutt, the defendant made incriminating statements in response to police initiated questioning despite his earlier invocation of the right to counsel the previous day during custodial interrogation about an unrelated crime. The defendant, Offutt, was arrested for burglary and was taken to the Montgomery County Detention Center. The police attempted to question him. Afte being given a Miranda warning, however, the defendant invoked his right to consult with an attorney. The first interrogation of the defendant was then terminated.

The second interrogation of Offutt on the unrelated charges occurred when a detective, who was not involved in the first interrogation, met with the defendant, thirty hours after the first questioning, during which time the defendant had invoked his right to cousel. Id. at 881, the detective on this second occasion told the defendant that he faced further charges on additional burglaries and then issued the Miranda

warning. The defendant then affirmatively stated that he did not want a lawyer during this second interrogation and gave an inculpatory statement. Id. at 882.

Offutt contended that the admission of this statement into evidence violated his rights under Miranda v. Arizona, 384 U.S. 436 (1966), as interpreted by Edwards v. Arizona, 451 U.S. 477 (1981). The court in Offutt, supra, held, however, that Edwards, supra, was inapplicable to the case before it. Since Edwards was factually dissimilar from Offutt inasmuch as Edwards focused upon a single investigation of a single crime and did not address the Offutt circumstance of two separate police investigation of two separate crimes. Id. at 880. The Offutt court then observed:

> It is Michigan v. Mosely that controls that phenomenon involving separate investigations of separate crimes. The appellant seeks to slip out from under the controlling authority of Michigan v. Mosley by pointing out that the specific right invoked in the initial interrogation in Michigan v. Mosley was only the right to silence, whereas the right invoked in the initial interrogation in this case was the more-difficult-to-waive right to counsel. That coincidentally happens to be very true, but it is not the doctrinal hinge on which Michigan v. Mosley pivoted. The Supreme Court did not deal with what would be required properly to resume an interrogation, following the invocation of either right, with respect to a single case but went to great lenghts to point out the separate natures of the two investigations and consequently of the two interrogations.

> Of critical significance was the fact that, after Mosley had invoked his right under Miranda in the first investigation, the different team of officers investigating the second crime scrupulously "restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."

Id. at 881 (Citation Omitted).

Edwards v. Arizona, supra, and the more recent Oregon v. Bradshaw, _____U.S._____, 103 S. Ct. 2830 (1983) which was a plurality opinion interpreting Edwards, supra do not apply to the circumstances of the instant case, as well. In the case at bar, the second interrogation of appellant came a significant time after his invocation of the right to counsel and the second interrogation of appellant was restricted to a crime that had not been the subject of the first interrogation.

Furthermore, a recent case from the Supreme Court of North Carolina makes the point that a defendant's invocation of his right to counsel for one crime does not automatically attach to a subsequent interrogation of the accused for another crime. This case, State v. Franklin, 304 S.E.2d 579 (N.C. 1983) differs somewhat from the present case in that officers questioned the defendant about a a crime (unaware that he had invoked his right to counsel) and he unexpectedly confessed to another, unrelated crime. Without deciding the issue of whether the officers erred in initiating the questioning, the court held that the defendant's right to counsel was not violated when he when he confessed to a crime

about which there had never been any intent to question him, and for which he had never requested an attorney. The court made the following statement:

> It is true that under Edwards v. Arizona once a suspected criminal invokes his right to counsel, he may not be questioned further until counsel is provided unless the suspected criminal himself initiates the dialogue at which time he may waive his right to have an attorney present. However, in the case sub judice, defendant never invoked his right to counsel with respect to the Moody (the unrelated) murder. He specifically stated, prior to any questioning, that he just wanted "to go ahead and get this over with. I do not want a lawyer." Officer Price further testified on voir dire that he told defendant for his best interest he ought to obtain a lawyer before trial.(Emphasis added)

Franklin, supra, held that a defendant does not insulate himself entirely from any future custodial inquiry once he has invoked his right to counsel for an earlier and unrelated crime. Such a conclusion promotes the interests of suspects to evaluate their interests with respect to new charges. An earlier invocation of right to counsel with respect to an earlier, unrelated charge does not constitute an eternal moratorium on a suspect's future exercise of his perogative when confronted with different allegations on a subsequent occasion.

When this aspect of Franklin is applied to the instant case, it is clear that appellant voluntarily and intelligently waived his right to counsel after receiving his

Miranda rights before the detective's forgery interrogation. Detective Nortz scrupulously honored appellant's Miranda rights and restricted his questions to the new forgery charge.

A defendant should have the affirmative opportunity to decide with each charge whether he will invoke the right to silence or to an attorney so long as those rights are "scrupulously honored" by the custodial authorities and the subsequent relinquishment of either or both of those rights is shown to be intelligent and knowing.

An Eighth Circuit case, Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974) held that Miranda expressly allows the defendant to waive his right to counsel following counsel's earlier appointment:

> If an accused can voluntarily, knowingly and intelligently waive his right to counsel before one has been appointed, there is no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. Of course, the Government will have a heavy burden to show that the waiver was knowingly and intelligently made, but we perceive no compelling reason to adopt the per se rule advocated by petitioner. In fact, Miranda expressly recognizes that such interrogation may continue without presence of counsel, though the burden of showing a knowing and intelligent waiver is a heavy one. Moore at 37.

Although appellant in this case testified that he "could not recall" receiving a second Miranda warning prior to Nortz's interrogation (H.14), the record is clear that

appellant not only received a Miranda warning (H. 6), but also acknowledged that he understood it, and voluntarily consented to talk with Detective Nortz. Appellant state that he would be willing to talk to the officer without having an attorney present (H. 6). Significantly appellant did not deny being re-Mirandized. The State has met its burden of showing a voluntary and intelligent waiver.

Finally, Mosley, supra, has been applied to right to counsel cases when factually warranted. Two Wisconsin cases, Wentela v. State, 290 N.W.2d 312 (Wis. 1980), and Leach v. State, 265 N.W.2d 495 (Wis. 1978), applied Mosley, supra, even through the suspect invoked the right to counsel. The court in Leach, supra explained its decision thusly:

> The defendant argues that Mosely is limited to those situations in which a defendant invokes only the right to remain silent, and that it was expressly not addressed to the question of whether statements obtained after a defendant requests an attorney are a per se violation of Miranda. To a degree, the defendant is correct. In an explanatory footnote, the court in Mosley stated, "The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at anytime." Michigan v. Mosley, 423 U.S. at 101, n. 7, 96 S.Ct. at 325. Nevertheless, the fundamental concept expressed in Mosley is that a defendant's exercise of one of the rights enumerated in Miranda - whether it be the right to terminate questioning or the right to the assistance of a lawyer-will not prohibit all subsequent questioing under all circumstances. Indeed, it was probably to

> differ with the Mosely majority for failing to broaden its basis of decision tht Mr. Justice WHITE, in his concurring opinion, stated: "Unless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case . . . To do so would be to "imprison a man in his privileges.'" 423 U.S. at 108-09, 96 S.Ct. at 329, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 280, 63 S.Ct. 236, 87 L.Ed 26 (1942).

Leach at 501. There is no allegation in the instant case that appellant is incompetent. He was therefore quite capable of choosing not to consult with an attorney prior to talking with Detective Nortz.

Leach, supra, adds further weight to the proposition that Mosely, supra, may be applied toward both the right to remain silent and the right to counsel.

Appellant relies heavily upon Edwards v. Arizona, 451 U.S. 477 (1981), for the proposition that once an accused has expressed his desire to deal with the police only through counsel, he is not subject to any subsequent interrogation until counsel has been made available to him. Edwards, however, is factually distinguishable from the instant case.

In Edwards, supra, the defendant was arrested on one charge, informed of his Miranda rights, and he subsequently confessed.

Edwards, supra, differs from the instant case inasmuch as the lapse of time between interrogations in Edwards, was less than 24 hours, the interrogation was

involuntary, and the second interrogation concerned the identical topic which had been terminated by the defendant's specific request for appointment of counsel. In the instant case, the interrogations were three months apart, concerned entirely different subject, and the rights of appellant were scrupulously honored by the police and voluntarily waived by him. Furthermore, in Edwards, counsel was not provided to the defendant; in the instant case, appellant received counsel for the burglary charges, and three months later, before the unrelated interrogation, was told he had the right to have an attorney present, a right he declined to exercise. The factual discrepancies illustrate that Edwards, supra, is not directly on point and does not control the instant case.

Another problem with applying Edwards to the instant case is that the record is unclear as to whether appellant requested counsel on the prior charge specifically to help him with all custodial interrogations or for other purposes. The importance of this distinction was made clear in Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982):

> Appellant contends that Miranda as applied in Edwards requires the suppression of his recorded confession. We conclude that the question before the Court in Edwards is clearly distinguishable from that presented in the case sub judice. In Edwards, the Court addressed the issue of "whether the Fifth, Sixth and Fourteenth Amendments require the suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further

> interrogation." 451 U.S. at 478, 101 S.Ct. at 1881, 68 L.Ed.2d at 382 (emphasis added). In the instant case, Jordan never requested the assistance of counsel with repect to custodial interrogation; he merely told the judge that he would like appointed counsel to assist him in further judicial proceedings. In Edwards, the expressed desire to deal with the police only through counsel was made to the police during a custodial interrogation session. Unlike Edwards, Jordan never "invoked his right to have counsel present during custodial interrogation" or "expressed his desire to deal with the police only through counsel." Moreover, he expressed no reluctance to speak with his interviewers, and he never attempted to cut off questioning.

Id. at 1073. (Emphasis added in the original, footnotes omitted)

In discussing the reasoning behind this distinction, the court drew on the following anaysis:

> [S]ome defendants may well wish to have an attorney to represent them in legal proceedings, yet to wish to assist the investigation by talking to an investigating officer without an attorney present. "While the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice." To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise the prerogative would transform the Miranda safeguard, among which is the right to obtain appointed counsel, "into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessment of their interests."

Id. at 1073 and 1074. Adoption of appellant's blanket interpretation of request of counsel would actually inhibit a defendant's right to make decisions for himself, lessening his role in his own trial.

Since it is unknown whether appellant made a specific request to have an attorney present at the custodial interrogation, his claim is impossible to consider. To assume, without knowing, the purposes for which appellant invoked his right to an attorney would diminsh rather than enhance his rights.

The inapplicability of Edwards, supra, to the particular Mosley-like circumstances in the instant case, becomes more evident in light of the Court's recent decision in Oregon v. Bradshaw ___U.S.___, 103 S.Ct. 2830 (1983). Bradshaw's plurality opinion, following a review of its holding in Edwards, supra stated:

> [there] we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges, or conversation with the police." 451 U.S. at 485, . . .

Bradshaw at 2834.

Justice Rehnquist then explained that even after the accused has initiated a conversation with the police following his invocation of the right to counsel, "the burden remains upon the prosecution to show that subsequent events

indicated a waiver of the . . . right to have counsel present during the interrogation." Id. The plurality in Bradshaw, supra agreed with the trial court's finding that the police had committed no impropriety but instead had properly advised the defendant of his rights and the defendant, having understood those rights, knowingly waived them. Id. at 2835. Significantly, Justice Powell, concurring in Bradshaw, supra, stated that, he did not agree with the plurality's apparent adoption of a per se rule which requires a two-step analysis (1) whether the accused has "iniated the dialogue with the police following a request for counsel; and (2) whether a knowing waiver has occurred via the Zerbst standard. Id. at 2836. Justice Powell observed:

> The Zerbst standard is one that is widely understood and followed. It also comports with common sense. Fragmenting the standard into a novel two-step analysis - if followed literally often would frustrate justice as well as common sense. Courts should engage in more substantive inquires than "who said what first." The holding of the Court in Edwards cannot in my view fairly be reduced to this. Id. at 2838.(Footnote omitted).

Justice Powell agreed with the Bradshaw plurality that once an accused has invoked his right to counsel he is certainly entitled to additional safeguards. Id. at 2838. The central question of whether he has waived the right however is uniquely one of fact that should be determined by the totality of the circumstance in each case. Id. at 2838. (Footnote 4).

In the instant case, since there existed no initation by appellant neither Edwards, supra nor Bradshaw, supra apply. Under Mosely and its progeny, it is clear that appellant made a knowing and intelligent waiver of his right to counsel, and that the police who conducted this interrogation, committed no impropriety.

Even assuming arguendo that Edwards were applicable, it does not necessarily provide a per se rule that an attorney must be present every time an accused talks with police. The court notes in Footnote 6 p. 486 of Edwards that "[v]arious decisions of the courts of appeal are to the effect that a valid waiver of an accused's previously invoked Fifth Amendment right to counsel is possible." These cases are not overruled. The Court goes on to quote from United States v. Rodriguez - Gastelum, 569 F.2d 482, 486, cert. denied, 436 U.S. 919 (1978):

> it makes no sense to hold that once an accused has requested counsel, he may never, until he has actually talked with counsel, charge his mind and decide to speak with the police without an attorney being present.

The Court in Rodriguez - Gastelum, supra rejected the invocation of a per se rule on this issue, holding that the Miranda requirements must be applied with flexibility and realism.

Appellant also cites People v. Rogers, 48 N.Y. 2d 167, 397 N.E. 2d 709 (N.Y. 1979) and several other New York

cases for the proposition that once a defendant is represented by an attorney, the police may not elicit further statements from him. Appellant maintains that Edwards is based on these case. Edwards, however, is not as extensive in its holding as these cases because they are based on an interpretation of the New York, rather than the United States, constitution. The New York courts have expanded the right to counsel beyond what is constitutionally required under Miranda.

The Nebraska Supreme Court confronted a similar "New York" argument in State v. Jackson, 290 N.W. 2d 458 (Neb. 1980). The defendant in Jackson, supra referring to argued that the police were precluded from further interrogation in the absence of counsel once the defendant has invoked his right to counsel. In short, the defendant in Jackson, supra argued that once counsel is appointed there can be no waiver unless the waiver took place either in the presence of counsel or by counsel. Id. at 461. The Nebraska Supreme Court disagreed and emphatically stated: "'Miranda does not go that for.'" Id. at 461. The court further noted:

> There has been little acceptance of the Arthur rule outside New York. Even in that jurisdiction, there appears to be a disagreement as to the extent of the rule.

Id. at 461-462. These cases are therefore also inapposite.

Once it has been established that the interrogation was proper and appellant waived his right to have counsel

present, there is no question that the handwriting exemplar was properly admitted into evidence. Yet appellant contends that the handwriting sample violates the right not to give evidence against himself. Appellant cites Hansen v. Owens, Utah, 619 P.2d 315 (1980), in support of this proposition. Hansen, however, was a unique case in which the accused was ordered by the court to do the affirmative act of writing. This Court stated that "[w]e do not mean this decision to be understood as going beyond its particular facts." Hansen, supra, at 317. The Court reaffirmed its attitude toward compelling an accused to furnish handwriting samples in State v. McCumber, Utah, 622 P.2d 353 (1980):

> . . .[A] handwriting exemplar requires an affirmative act and hence, this case goes beyond making observations or comparison of an accused's appearance, or his body, or its parts or substances obtained therefrom. (McCumber at 358, citations ommitted)

Hansen v. Owens is inapplicable to the instant case since appellant voluntarily gave a handwriting sample.

The fact that appellant consented to the handwriting sample also negates appellant's contention that the police should have had either a search warrant or probable cause before obtaining the sample. Scheckloth v. Bustamonte, 93 S.Ct. 2041 (1973) held that one exception to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.

Moreover, the idea that once an accused invokes his right to counsel he cannot be searched or consent to a search is without merit. An accused may consent to a search in spite of the fact that he had invoked his right to counsel because these are separate rights. This concept was explained in United States v. Clymore, 515 F. Supp. 1361 (E.D.N.Y. 1981). In discussing the relationship between the holding in Edwards and the holding in Schneckloth, the court stated:

> Finally, we note the distinction between the instant case and the Supreme Court opinion in Edwards v. Arizona. In that case the Supreme Court noted that once a suspect who is being interrogated invokes his right to counsel, all questioning and examination must halt and may not resume unles the suspect himself initiates the continuation. Specifically, the Court said that "it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." The Court was extremely careful to distinguish between the Miranda rights, so to speak, of a suspect and his Fourth Amendment rights: "Schneckloth does not control the issue presented in this case."
>
> What this case impliedly holds is that it is perfectly proper for the authorities to initiate inquiry into possible waiver of a suspect's Fourth Amendment rights even after he has invoked his right to counsel.

(Clymore at 1368; citations omitted, emphasis added). Appellant's contention is unsound, particularly so when the case on which he chiefly relies comes to an opposite conclusion.

CONCLUSION

Appellant received and understood his rights under Miranda before the police interrogated him for a second time. He was advised of his rights to obtain counsel, yet affirmatively waived that right. Appellant claimed he "had nothing to hide" and agreed to cooperate with the police.

Although appellant had obtained an attorney three months earlier, it was for an unrelated charge, and therefore was far removed from the second interrogation by both time and subject matter.

Furthermore, appellant may waive his right to an attorney by himself. He need not obtain the advice of an attorney in deciding he does not require his assistance. Indeed, it is doubtful that an attorney would ever decide for his client that his client does not need him.

A per se rule on this issue would only serve to diminish and not protect the rights of the accused. Appellant's rights in the instant case were scrupulously honored by the police and the circumstances clearly show that appellant had intelligently and knowingly waived his rights before he was interrogated on the forgery charge. For these reasons, the judgment of the lower court should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of October, 1983.

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Earl F. Dorius for :
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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to, Bradley P. Rich, attorney for defendant, 44 Exchange Place, Salt Lake City, Utah, 84111, this 17th day of October, 1983.

Kathleen D. Kellis-Berge