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UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

MAY 20 1966

Clerk, Supreme Court, Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LAWRENCE R. SEYMOUR,
Defendant and Appellant.

Case No. 10586

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County Aldon J. Anderson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent

vs.

LAWRENCE R. SEYMOUR,
Defendant and Appellant.

Case No. 10596

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

The appellant, Lawrence R. Seymour, appeals from his conviction upon jury trial in the District Court of the Third Judicial District for the crime of attempting to obtain money by false pretenses in violation of Section 76-1-30, Utah Code Annotated, 1953.

DISPOSITION IN THE LOWER COURT

The appellant was charged by complaint with the crime of attempting to obtain money by false pretenses. After several continuances, he appeared before the City

Court of Salt Lake City without counsel and waived preliminary hearing, after which he was bound over to district court. At the time of his appearance in the district court, he was represented by counsel, entered a plea of not guilty, whereupon a full trial was held on the charge and the appellant was found guilty.

RELIEF SOUGHT ON APPEAL

The respondent submits that the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits that the facts are adequately set forth in the appellant's brief. However, respondent would like to call to the court's attention the fact that no motion was apparently made at the time of the appellant's arraignment in district court to remand the case to the city court for the purposes of a preliminary hearing. Further, counsel for the appellant in no way indicated that he was prejudiced or unprepared because of a failure to have a preliminary hearing.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO QUASH THE INFORMATION AND

THE MOTION FOR NEW TRIAL ON THE GROUNDS THAT THE APPELLANT WAS NOT REPRESENTED BY COUNSEL AT THE TIME OF PRELIMINARY HEARING, SINCE A PRELIMINARY HEARING IS NOT A CRITICAL STAGE REQUIRING THE APPOINTMENT OF COUNSEL, AND THE RECORD APPEARS TO SUBSTANTIATE THAT THE APPELLANT WAIVED PRELIMINARY HEARING.

The only issue raised on appeal by the appellant is whether a preliminary hearing is a critical stage that requires the appointment of counsel. It appears from the transcript of proceedings in the city court that the appellant appeared in the City Court of Salt Lake City on December 3, 1965, and did waive preliminary hearing (R. 3). If the affidavit of Mr. Hisatake is to be believed, he was not present, and the transcript indicates that he was not present, since it states that the appellant was present without counsel. Consequently, the only question is whether there is an absolute requirement to counsel at the time of preliminary hearing. If there is no such absolute requirement, then the trial court was correct in denying the motion to quash the information. Respondent further contends that the trial court acted in accordance with law in denying the motion for a new trial since it was not timely filed.

Section 77-38-4, Utah Code Annotated, 1953, provides that a motion for new trial must be served and

filed within five days after the rendition of the verdict or decision. The decision in the instant case was rendered on November 5, 1965, and the motion for new trial was not filed until November 15, 1965. Consequently, the only question is whether the trial court erred in not granting the motion to quash the information on the grounds of a lack of preliminary hearing. Since the transcript indicates that preliminary hearing was waived, there is no evidence to contradict the fact that a preliminary hearing was offered to the appellant and he did, in fact, waive it. Further, no motion to remand for a preliminary hearing was made. The only question, therefore, is whether appellant had a constitutional right to have counsel appointed, although he apparently waived preliminary hearing.

Appellant has framed as the sole issue in his brief on appeal the question of whether under recent decisions of the United States Supreme Court a preliminary hearing is such a critical stage as to require the appointment of counsel. The appellant points to three decisions from the United States Supreme Court to justify his position.

The first is *Powell v. Alabama,* 287 U.S. 45 (1932). This case merely laid down the rule that in a capital case a state must provide counsel for an indigent defendant. Nowhere in the Powell case did the court rule that counsel was essential at a preliminary hearing.

In the second case cited by the appellant, *Hamilton v. Alabama,* 368 U.S. 52 (1961), the United States

Supreme Court held that under Alabama procedure the arraignment was a "critical stage" which required the appointment of counsel. That case is substantially different from the instant case, since the appellant does not contend that he was denied counsel at the time of his arraignment but at the time of preliminary hearing. Further, the Supreme Court noted that under Alabama procedure, if a defense of insanity or various special motions were to be brought to the court's attention, that they would have to have been plead at the time of arraignment or thereafter lost. There is no requirement that a defendant enter any plea or raise any defense at the time of preliminary hearing under Utah procedure upon penalty that if he fails to do so he will be foreclosed from raising the defense. The Hamilton case in no way considered the question of necessity of counsel at preliminary hearing.

Finally, the appellant cites the case of *White v. Maryland,* 373 U.S. 59 (1963). In this case, the defendant contended that the failure to give him counsel at the time of preliminary hearing was a violation of his constitutional rights. The argument was based upon the fact that at the time of preliminary hearing under Maryland procedure, the defendant entered a plea of guilty. Thereafter, before the dictrict court, after being bound over, he entered a plea of not guilty. At the time of his trial, his plea of guilty at the time of preliminary hearing could be used against him as an admission against his interest which resulted in his conviction. The United States Supreme Court ruled that since at the time of

preliminary hearing, a plea could be entered which could later be used against the defendant at the time of trial, the preliminary hearing was a "critical stage" requiring the appointment of counsel. This case is, of course, substantially different than the issue now before the court. Under Utah procedure, no plea is entered at the time of preliminary hearing. In the instant case, there is no evidence that anything was said at the time of the appearance before Judge Beck where the appellant waived preliminary hearing that was used against him at the time of trial. Consequently, the decision in *White v. Maryland,* supra, is not material to the present fact situation. Further, in the present fact situation, there was no motion to remand the case for additional preliminary hearing nor any showing that the absence of a preliminary hearing in any way prejudiced the appellant's position. In addition, appellant here was afforded a full trial on his plea of not guilty, was represented by counsel, and convicted only upon the evidence offered to the jury.

The same issue raised in this case which was before the court in *State v. Braasch,* 119 Utah 550, 229 P.2d 289 (1951). In that case, this court noted that:

> "The preliminary hearing is an inquiry, not a trial. It is held in the place of the common law grand jury where the accused is only present if called as a witness and is never represented by counsel."

The court in the Braasch case further noted that at the preliminary hearing there was no prejudice to the de-

fendant from the failure to have counsel. This court determined that there could be no prejudice to the defendants where they had a full trial subsequent to appearing at preliminary hearing without counsel. There is no reason to depart from the Braasch rule.

Recently, courts have generally recognized that a preliminary hearing is not a critical stage within the meaning of Hamilton and White.

In *DeToro v. Peppersack,* 332 F.2d 341 (4th Cir. 1964), a state prisoner sought a petition of writ of habeas corpus from a federal court. The matter came before the Fourth Circuit Court of Appeals. The court ruled that under Maryland law, as modified since the White decision, that a preliminary hearing was not a critical stage of judicial process and that defenses not raised were not irretrievably lost. Therefore, the failure to appoint counsel for the accused charged with murder did not violate his constitutional right to counsel. The court stated:

> "Despite the very able arguments advanced by counsel for DeToro, we are unable to accept either of these contentions. We take as our starting point, as do the parties, Powell v. Alabama, supra, which states the broad proposition that an accused has the right to counsel 'at every step in the proceedings against him.' 287 U.S. at 69, 53 S.Ct. at 64. In Powell, this was taken to mean that the accused has the right to have counsel appointed sufficiently in advance of trial to make adequate preparation. Later decisions of the Court have reaffirmed the importance of pre-

trial preparation. In Avery v. Alabama, 308 U.S. 444, Mr. Justice Black warned that:

> '[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.'

While Hamilton v. Alabama, supra, and White v. Maryland, supra, have further extended the right to counsel prior to trial, we are unable to read them as extending that right to the extent and in the manner urged by DeToro. In Hamilton, the defendant, indicted for burglary, and without counsel, entered a plea of not guilty at arraignment. The Supreme Court reversed his later conviction, holding that the defendant had been entitled to counsel, since, under Alabama law, arraignment is 'a critical stage in a criminal proceeding.' 368 U.S. at 53, 82 S.Ct. at 158. It was a critical stage, according to the Court, because certain defenses, specifically a plea of insanity, a plea in abatement, and a motion to quash based on an improperly drawn grand jury, not raised at arraignment, were considered waived.

In White, the accused was without counsel at a preliminary hearing. Unlike arraignment under Alabama law, a preliminary hearing under Maryland law is not, in and of itself, a critical stage in the judicial process. Defenses not raised at a preliminary hearing are not irretrievably lost and may be raised later. In the context of the

particular facts of White, however, the Court was persuaded that White's preliminary hearing had been a critical stage. This was so because White's plea of guilty, taken at the preliminary hearing and subsequently withdrawn, was introduced into evidence against him during trial. On this ground, the Court reversed the conviction.

DeToro calls our attention to what he considers to be the key sentence of the case:

> 'For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.' 373 U.S. at 60, 83 S.Ct. 1051.

The district court, we think, effectively brought the above sentence into the proper perspective:

> 'This sentence cannot be read out of context. It must relate to the case before the Court, namely that the "plea" was "guilty," and it was offered in evidence at the trial.' 222 F. Supp. at 624.

In our view, Hamilton and White teach that an accused is denied rights afforded him under the sixth amendment when he is subjected to an arraignment or to a preliminary hearing without the assistance of counsel, where events transpire that are likely to prejudice his ensuing trial. The court, in each case, refused to speculate as to whether in fact prejudice actually accrued.

Thus, the thrust of Powell's admonition that an accused has a right to counsel 'at every step in the proceedings against him,' as borne out by subsequent decisions, including Hamilton and White, seems to be that if the effectiveness of legal assistance ultimately furnished an accused

is likely to be prejudiced by its prior denial, the earlier period may be deemed a critical stage in the judicial process and a conviction obtained in such circumstances is rendered invalid. We find nothing in the Supreme Court decisions, however, that would permit us to extend the duty of the State to appoint counsel in proceedings where even the likelihood of later prejudice arising from the failure to appoint is absent."

It should be noted that the United States Court of Appeals for the Tenth Circuit in *Latham v. Crause,* 320 F.2d 120 (1963), handed down subsequent to both White and Hamilton, ruled that an accused has no constitutional right to be furnished counsel at a preliminary hearing in a state court capital case. In that case, two individuals by the names of Latham and York were responsible for a series of killings throughout the United States, and were tried and convicted of murder in Kansas after being apprehended in Utah. The Tenth Circuit Court of Appeals relied on its previous decision in *Utah v. Sullivan,* 227 F.2d 511 (10th Cir. 1952). It stated:

"The first contention is that petitioners were entitled to have counsel appointed for them prior to the preliminary examination. Heavy reliance is placed on the decision of the United States Supreme Court in Gideon v. Wainright, Corrections Director, 372 U.S. 385, 83 S.Ct. 792, 9 L.Ed. 2d 799. That case concerned the right of an accused to counsel at trial — not a preliminary hearing. In State of Utah v. Sullivan, 10 Cir., 227 F.2d 511, 513, certiorari denied, sub nom. Braasch v. Utah, 350 U.S. 973, 76 S.Ct. 449,

100 L.Ed. 844, we held that in circumstances where an accused did not enter a plea of guilty at a preliminary hearing, did not make a confession, did not testify and did not say anything of an incriminating nature, the failure to furnish counsel at such hearing did not abridge the accused's fundamental constitutional rights. That decision is controlling here. No claim is made of any incriminating statements or acts of nation. All they did was to waive the right to a preliminary hearing. Prejudice is asserted on the ground that counsel would have forced the prosecution to disclose at least some of its evidence. The point is not well taken as more than a month in advance of trial copies of the confessions and lists of the prosecution witnesses were given defense counsel. Our conclusions in State of Utah v. Sullivan are supported by the decisions of other circuits. We find nothing in Gideon v. Wainright which requires a review of the decision in State of Utah v. Sullivan."

Further, most recently, in *Loato v. Cox,* 344 F.2d 916 (10th Cir. 1965), the Tenth Circuit Court of Appeals in a per curiam opinion adhered to the position noted above. The court observed that the preliminary proceedings were entirely independent of the prisoner's formal arraignment and sentencing, and at the time of preliminary hearing, the prisoner was not prejudiced. In the Loato case, the defendant appeared before a justice of the peace without counsel and thereafter, at the time of arraignment, entered a plea of guilty. The court concluded that the defendant was in no way deprived of any constitutional right.

A similar case is *United States v. Rundle,* 349 F.2d 952 (3rd Cir. 1965).

In Vol. II, No. 4, of the Defender News Letter, July 6, 1965, there is an excellent discussion of the right to counsel at preliminary hearing. It is noted:

> "Some courts have understood the White case to mean that the absence of counsel at the preliminary hearing is not a violation of the defendant's constitutional rights, if the absence of counsel is not, in the eyes of the court, prejudicial."
>
> Thus, in People v. Daniels, 199 N.E.2d 33 (Ill. App. 1964), an Illinois appellate court saw no deprivation of the accused's right to counsel, since:
>
> 'there is neither a claim or any showing that the absence of counsel at the preliminary hearing or a failure of an earlier appointment of counsel in any manner prejudiced the defendant or in any way adversely affected or contaminated the subsequent proceedings in the case'."

The same newsletter notes:

> "Other courts have found there to be no constitutional injury in the failure to appoint counsel where no plea offered at the preliminary hearing could be offered in evidence at the trial ***."

In *United States ex rel. Cooper v. Reincke,* 333 F.2d 608 (2nd Cir. 1964), a United States Court of Appeals reasoned that the preliminary hearing in Connecticut could not be deemed a critical stage. The court stated:

"The Connecticut hearing in probable cause has been accurately characterized as a mere 'inquest' made to determine the existence of probable cause, and to discharge the accused if none exist ***. The finding of probable cause is not final and it cannot be used against the accused on trial before the superior court. ***

The Connecticut hearing in probable cause cannot, therefore, be characterized as critical as in the arraignment in Alabama. Indeed, it can hardly be termed a proceeding against the accused. To the contrary, it appears to operate entirely for the accused's benefit. And the mere fact that an accused is required to plead does not, in itself, demand the contrary conclusion where the plea entered is a self-serving denial of guilt. At trial, appellant had every opportunity to present any events that was available initially."

Further, in *Freeman v. State,* 392 P.2d 542 (Ida. 1964), the Supreme Court of Idaho stated:

"While it is recognized that an accused has a right to counsel at every stage of the proceedings, we do not understand this to mean that he must be so represented in the preliminary processes which take place primarily for the purpose of ascertaining whether a crime has been committed and whether there are reasonable grounds to believe that the accused has committed it, and particularly, where no prejudice has befallen him."

Numerous decisions from other courts from other states support the proposition urged in this brief.

Thus, in *Montgomery v. State,* 176 So.2d 331 (Fla. 1965), the court ruled that a preliminary hearing was

not a critical stage in Florida. Defendant had not been informed of his right to counsel at arraignment before the magistrate on preliminary hearing.

In *State v. Cox,* 193 Kan. 571, 396 P.2d 326 (1964), the Kansas Supreme Court ruled that the lack of representation by counsel at the time of preliminary hearing did not violate the constitutional rights of the defendant who did not request appointment and made no claim that there was any particular prejudice at the time of his trial from the failure to have counsel at the time of preliminary hearing. The Supreme Court of Kansas cited the Tenth Circuit case in *Latham v. Crause,* supra, and indicated that the purpose of a preliminary hearing in Kansas was comparable to that in Utah in that it was an inquiry to determine probable cause and nothing more.

A similar result was reached by the New Mexico Supreme Court in *French v. Cox,* 74 N.M. 593, 396 P.2d 423 (1964).

In *State v. Jackson,* 400 P.2d 774 (Wash. 1964), the Washington Supreme Court indicated that the right to counsel extends only to critical stages in the judicial process and that the critical point is to be determined both from the nature of the proceeding and from what actually occurs. The court there found that the preliminary hearing was not a trial in the sense that one could be found guilty, but was a mere inquest made to determine the existence of probable cause; and that since nothing that occurred at the preliminary hearing could

be used against the defendant, it was not a critical stage which would warrant the appointment of counsel. The court carefully distinguished the Hamilton and White cases on the same basis that other cases heretofore cited and discussed have distinguished their application.

A similar result was reached again by the Kansas Supreme Court in the case of *State v. Blacksmith,* 194 Kan. 643, 400 P.2d 743 (1965). In that case, the court further held [referring to a previous Kansas case]:

> "That any so-called alleged 'irregularity' pertaining to a preliminary examination is deemed to be waived where a defendant enters a voluntary plea of guilty in the district court."

The Arizona Supreme Court in *State v. Schumacher,* 97 Ariz. 354, 400 P.2d 584 (1965), also reached the same conclusions as the New Mexico and Kansas courts. Further, the Arizona court relied upon the decision of the Nevada Supreme Court in *Application of Hoff,* 393 P.2d 619 (Nev. 1964). Thus, almost every state surrounding Utah has adopted the position that this court recognized in the case of *State v. Braasch,* supra.

In *Poris v. State,* 195 Kan. 313, 403 P.2d 959 (1965), the Kansas Supreme Court ruled again that an indigent defendant has no constitutional right to be furnished court-appointed counsel at his preliminary hearing.

A similar result was reached in the decision of *State v. Atkins,* 195 Kan. 182, 403 P.2d 962 (1965).

The appellant cites the decision of the Pennsylvania Supreme Court in *Butler v. Rundle,* 206 A.2d 283 (Penn. 1965). This decision does not support the appellant's position. The Pennsylvania Supreme Court concluded that a preliminary hearing was not a critical stage requiring the appointment of counsel for an indigent defendant. The quotation in the appellant's brief is not from the majority opinion. Pennsylvania also reached the same result in *James v. Russell,* 207 A.2d 792 (Pa. 1965).

The Ohio Court in *Bussey v. Maxwell,* 202 N.E. 2d 698 (Ohio 1964), ruled that a preliminary hearing was not a critical stage where its only purpose was in determining whether the defendant should be held for arraignment in the court of general jurisdiction. The Ohio court has most recently reached the same result in *Tabor v. Maxwell,* 209 N.E.2d 206 (Ohio 1965).

Thus, the overwhelming majority of states have reached the conclusion that a preliminary hearing under the procedure comparable to that existing in Utah is not a critical stage, warranting the appointment of counsel. See *The Preliminary Hearing — An Interest Analysis,* 51 Iowa L.Rev. 164, p. 169 (1965). All the states surrounding the State of Utah have apparently reached the same conclusion. The position urged by the appellant is not only contrary to previous Utah precedent, but is contrary to the great majority of states and is a distinct minority position. It may be that under particular fact situations, it could be said that the failure

to provide counsel at preliminary hearing would be a denial of a constitutional right, but in the instant case there is no showing that any adverse statement was made by the appellant or that he was in any particular prejudice. Although the appellant argues that prejudice need not necessarily be shown in a case involving a violation of constitutional rights, this statement is an overly broad conclusion, since the United States Supreme Court has noted that in certain cases, the question of prejudice determines whether a critical stage has been reached.

The appellant's reliance upon the recent decisions in *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Massiah v. United States,* 377 U.S. 201 (1964), is misplaced. Both of these cases involve situations where in the absence of counsel, confessions were obtained. This is not the case in the instant situation. The preliminary hearing resulted in absolutely no prejudice to the defendant. The respondent is aware of no case in which the United States Supreme Court has held that the failure to have counsel at the time of an interrogation where no confession or any admission is obtained against the interest of a defendant violates his constitutional rights and results in a vitiation of the conviction. Further, both of these cases are directed to the discouragement of particular abusive police practices, which is not the situation in the instant case.

It therefore is respectfully submitted that the trial court acted properly in ruling that preliminary hearing

was not a critical stage and that the defendant could waive the right to counsel and that the absence of counsel would not result in a vitiation of his conviction.

CONCLUSION

The issue in the instant case seems to be one that has been decided by the overwhelming majority of states adverse to the position urged by the appellant on appeal. It is respectfully submitted that this court should adhere to its position in *State v. Braasch,* supra, and rule that the failure to provide counsel at the time of appellant's preliminary hearing, especially where there is an indication of waiver in the record and nothing to rebut it, did not result in any violation of any constitutional right. This court should affirm.

Respectfully submitted,

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