

1966

State of Utah v. Lawrence R. Seymour : Appellant's Brief

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UNIVERSITY OF UTAH

1966

AUG 25 1966

State Supreme Court Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff and Respondent,	:	Case
vs	:	No.
LAWRENCE R. SEYMOUR,	:	
	:	10596
Defendant and Appellant	:	

APPELLANT'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, : Case
vs : No.
LAWRENCE R. SEYMOUR, : 10596
Defendant and Appellant .:

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF
CASE

This is an action in which the appellant was charged for the crime of attempting to obtain money by means of false pretenses, in violation of Title 76, Chapter 1, Section 30, Utah Code Annotated, 1953.

DISPOSITION IN LOWER COURT

This case was tried to a jury. From a verdict of guilty, and sentence of the Court, the appellant appeals.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the conviction.

STATEMENT OF FACTS

On August 10, 1964, a Complaint was filed against the defendant charging him with the crime of attempting to obtain money by means of false pretenses. (R. 3) A warrant of arrest was issued and the appellant appeared without counsel before the Honorable Horace C. Beck, Judge of the City Court of Salt Lake, Salt Lake County, State of Utah on August 11, 1964. (R. 3) The arraignment was continued to August 18, 1964, to afford the accused an opportunity to secure counsel, (R.3)

and he was placed in the County Jail.

On August 18, 1964, appellant again appeared before the Court without counsel. Hearing was set for October 8, at which time appellant was present without counsel and the Court continued the matter to November 12, to give appellant further opportunity to secure counsel. (R. 3) On November 12, 1964 appellant had still not obtained counsel and the Court set the next hearing date for December 3. Prior to that hearing, the appellant wrote to Judge Beck a letter (R. 4), part of which reads as follows:

" So now as a result, of my car being looted while supposedly under city protection-- I will not be able to obtain my own counsel- and because of my past record- the limited work court appointed counsel can do-- I have no other choice but to accept same, waive the hearing-- and plead guilty" (R.10) (Underline ours)

On December 3rd, 1964, appellant was brought before the Court without counsel. The Minute Entry reads as follows:

"December 3, 1964, Defendant presented without counsel. Upon advice of his counsel, Ken Hisatake, defendant waived his preliminary hearing, the State consenting thereto. Court ordered defendant bound over to District Court to stand trial. Court ordered bail \$2,000.00."

Appellant was arraigned on December 14, 1964 in District Court and entered a plea of Not Guilty. (R. 18). Prior to the commencement of trial, appellant's trial counsel moved the Court to quash the information upon the ground that appellant was without counsel at the preliminary hearing. (R. 40) The motion was denied and appellant was convicted upon jury trial of attempting to obtain money by means of false pretenses as charged in the information. (R. 19-A)

At the conclusion of trial, appellant moved the Court for a new trial upon the basis that he was not represented by counsel at the preliminary hearing, contrary to Article I, Sec. 12 of the Utah Constitution and in violation of the due process laws under the Sixth and Fourteenth Amendments to the Constitution of the United States. (R. 21) Thereafter, appellant's trial counsel withdrew and the Court appointed this writer to represent appellant as counsel for purposes of the motion. (R. 24,25) Argument was heard by the Court and the motion was continued to secure an Affidavit from attorney Hisatake regarding his purported services in appellant's behalf at the preliminary hearing. The affidavit was submitted (R. 29) wherein attorney Hisatake deposed that he neither appeared as counsel for appellant at the preliminary hearing nor did he advise appellant to waive preliminary hearing.

Appellant's motion for a new trial was taken under advisement and subsequently denied. (R. 31)

This appeal was taken therefrom.

ARGUMENT

POINT I. THE FAILURE TO FURNISH THE AID OF COUNSEL AT THE PRELIMINARY HEARING STAGE, AND TO ACCEPT APPELLANT'S WAIVER OF PRELIMINARY HEARING WITHOUT THE APPEARANCE OF COUNSEL IN HIS BEHALF OR WAIVER THEREOF, VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND THE UTAH CONSTITUTION, SECTIONS 7 AND 12, ARTICLE I.

It is a fundamental concept of state and federal constitutional law that an accused has the right to the appointment of counsel sufficiently in advance of trial to permit the effective preparation for trial. This is an element of due process of law

guaranteed the accused by the Fourteenth Amendment. Powell v Alabama, 287 U. S. 45 (1932).

A similar provision is embodied in Article I, Sections 7 and 12 of the Utah Constitution. Although these constitutional provisions are far sweeping in their language, it has been settled law that the guarantee of counsel does not apply to every step in the criminal prosecution, but only to what has come to be denominated, with some circularity " critical stages " of the criminal proceeding .

It has been held that arraignment could be considered a " critical stage " in a criminal proceeding in the case of Hamilton v Alabama, 368 U. S. 52, (1961). Title 77-22-12, Utah Code Annotated, 1953, similarly provides that the right to counsel is applicable to the arraignment in Utah.

In 1963, the United States Supreme Court examined the question whether a preliminary hearing

was such a "critical stage" in a criminal proceeding as to require the appointment of counsel. White v Maryland, 373 U. S. 59 (1963). In that case, the accused, unrepresented by counsel at a preliminary hearing, entered a plea of guilty to a capital offense and that plea was offered in evidence against him at the trial after he had, on advice of counsel, pleaded not guilty at arraignment. The court held that Hamilton v Alabama, supra, required reversal of the conviction even though the Maryland Court of Appeals had declared that under state law the accused had not been required to plead at the preliminary hearing nor were any rights or defenses preserved or lost at that time. White v State, 177, A. 2d 877, 881-82 (Md. 1961). In its decision, the U. S. Supreme Court compared the critical stage of an arraignment to that of a preliminary hearing in the following language:

"Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.

" We repeat what we said in Hamilton v Alabama . . . that we do not stop to determine whether prejudice resulted: ' Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.' ' 373 U. S. 59, 60.

The distinction between capital and non-capital offenses concerning the right to counsel at trial seems likely to have been erased in the case of Gideon v Wainwright, 372 U. S. 335 (1963). As Justice Clark observed in his concurring opinion,

"The constitution makes no distinction between capital and non-capital cases. The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for the deprivation of 'life' and there

cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved."

372 U. S. 335, 349.

An examination of the record in the instant case does not require an over-extension of the foregoing authorities to support a reversal of the conviction. Appellant remained 115 days in the county jail from the time of his arrest on August 10, 1964 until he was bound over to the District Court. During all of this time he was unable to secure counsel. The record does not reveal the appearance of counsel in behalf of appellant at any proceeding before the magistrate. In total despair, the appellant wrote to Judge Beck (R. 4-10) stating he would waive preliminary hearing, accept Court appointed counsel and plead guilty. Thereafter, on December 3, 1964, the magistrate permitted the appellant to waive preliminary hearing but did not appoint counsel for him prior to accepting the waiver. The failure of the

court to comply with appellant's request for court appointed counsel, or the failure of the court to appoint counsel on its own motion when appellant agreed to waive his right to a critical stage in the criminal proceeding constituted a violation of the appellant's constitutional rights.

The minute entry in the City Court (R. 3) states that appellant's waiver of the preliminary hearing was upon advice of attorney Hisatake, implying that appellant had counsel at that hearing. Mr. Hisatake denied having given this advice. (R. 29) In any event, no appearance was made by Mr. Hisatake either personally or by pleading at any phase of the criminal proceeding before the magistrates court. The Court's willingness to accept a waiver of the hearing without counsel under these circumstances and particularly after appellant had requested court- appointed counsel was a violation

of constitutional rights of appellant.

Some courts have held 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. People v Daniels 199 N. E. 2d 33, (Ill. 1964). It would appear that Utah has previously followed this line of reasoning in State v Braasch, 119 U 450, 229 P2d 289 (1951).

*** Thus, at the preliminary hearing the state ought to provide counsel for any defendant desiring but unable to procure counsel for himself. This should have been made clear to defendants before they decided whether they were ready for that hearing.

"But under the circumstances of this case such failure did not constitute prejudicial error.*** The defendant must be present at a preliminary hearing and is always entitled to counsel which, if necessary, the state must provide. *** Under such circumstances a preliminary hearing without counsel is only invalid where prejudice is shown."

In most, if not all instances an insurmountable burden is imposed upon an accused to show prejudice where he has waived preliminary hearing in the absence of counsel. He may claim that without counsel he does not know whether to demand or waive a hearing or how to cross examine witnesses and is not prepared to effectively discuss with the prosecuting attorney possible reduction of the charges against him. He may claim that he is incapable of benefitting from the value of the preliminary hearing as a discovery device as emphasized in Washington v Clemmer, 339 F 2d 715 (D. C. Cir. 1964). Or he may claim that without counsel he was unaware that the state had the burden at the preliminary hearing to establish probable cause to believe that the defendant was guilty of the crime charged and that failure by the state to meet this burden must result in the discharge of the defendant.

These generalities as to the benefits of counsel at the preliminary hearing stage of the criminal proceeding are usually insufficient, however, to show prejudice where counsel has not been furnished the defendant at that phase of the prosecution. Thus, the Supreme Court has repeatedly refused to consider the element of prejudice when a constitutional right has been denied.

"In this case, as in those, the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." Hamilton v Alabama, supra.

" We repeat what we said in Hamilton v Alabama . . . that we do not stop to determine whether the prejudice resulted: ' Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently ." ' White v Maryland, supra.

Also, Justice Cohen, dissenting in the Pennsylvania case of Commonwealth ex rel

Maisenhelder v Rundle, 198 A. 2d 565, (1964)

observed that:

"Even though there is no showing of prejudice, I would reverse since the rationale of White v State of Maryland... and Hamilton v Alabama... does not require such a showing.

The argument that a preliminary hearing is a critical stage in a criminal proceeding acquires added force by the Utah legislation adopted in 1965 which provides for the appointment of counsel at or before the preliminary hearing. 77-64- 4 Utah Code Attotated, 1953, as amended. Also, the extension of the constitutional right to counsel established in Escobedo v Illinois, 378 U. S. 478 (1964), indicates the " critical" nature of that stage of the criminal proceeding. There, the court held that an accused had been denied the assistance of counsel in violation of the Sixth Amendment as made obligatory upon the states by the Fourteenth

Amendment where a criminal investigation begins to focus upon particular suspects and the suspect has requested and been denied opportunity to consult with the lawyer. Justice Gddberg, writing the majority opinion, said:

"The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. Powell v Alabama*** This was the 'stage when legal aid and advice' were the most critical to petitioner. Massiah v United States*** It was a stage surely as critical as was the arraignment in Hamilton v Alabama*** and the preliminary hearing in White v Maryland***"

CONCLUSION

Appellant submits that the aid of competent counsel at every stage of the criminal proceeding is a fundamental constitutional right guaranteed at all critical stages in a criminal proceeding. A preliminary hearing is a critical stage in a criminal proceeding for which an accused is entitled to

counsel. Judge Beck denied appellant his constitutional right to counsel at the preliminary hearing when he accepted the waiver of said hearing without furnishing counsel prior thereto. It is elementary that an accused must clearly understand the nature the right he is asked to waive before he actually waives that right or before he can be said to have waived that right and appellant could not clearly understand the nature of that right without counsel.

Appellant earnestly submits that he has been denied the right to counsel at a critical stage in the criminal proceeding in violation of his constitutional rights and that the Court should reverse the conviction herein.

Respectfully submitted,

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