1969

The State of Utah v. Gerald Scandrett : Brief of Appellant

In the Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff-Respondent,

- vs. -

GERALD SCANDRETT,

Defendant-Appellant.

Case No. 11733

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court
of Salt Lake County, State of Utah,
The Honorable Merrill C. Faux, Judge

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STATEMENT OF THE KIND OF CASE

Appellant appeals from his conviction in the Third Judicial District Court, Honorable Merrill C. Faux, Judge, presiding, of the crime of Murder in the Second Degree.

DISPOSITION IN THE LOWER COURT

Appellant was originally charged with Murder in the First Degree, in violation of 76-30-1, Utah Code Annotated, 1953. Prior to the trial, appellant discovered (R. 19) that the prosecution intended to rely upon certain statements and admissions which were made by appellant during his interrogation. Appellant moved to suppress the evidence (R. 26) on the ground that there

had been no valid waiver of appellant's constitutional right to remain silent and to have the assistance of counsel. After a hearing, Judge Faux denied the motion to suppress.

On March 25, 1969, the trial was held before Judge Faux. Appellant pleaded not guilty to a reduced charge of Murder in the Second Degree. Upon a hearing of the evidence, as stipulated by the prosecution and defense, Judge Faux found Gerald Scandrett guilty of Murder in the Second Degree.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of appellant's conviction in the Third Judicial District Court.

STATEMENT OF FACTS

On November 8, 1968, the appellant, Gerald Scandrett, was in the ninth day of continuous drinking of intoxicating liquors. During this period he had consumed an inordinate amount of liquor and on November 8th he had been drinking a high-alcohol content Tokay wine. His entire food intake during November 8 was a half of a bacon sandwich consumed at approximately 10:15 A.M. (R. 52-53).

At approximately 5:00 P.M. on November 8th, a stabbing occurred in appellant's hotel room. Present in the room were the appellant, the appellant's drinking companion, Quimby Ferguson, who was also in a highly intoxicated condition, and Tony Trujillo, the victim of the stabbing. About five minutes after the stabbing appellant notified the desk clerk that the police should be called. During the five minutes which elapsed between the stabbing and the notification of the desk clerk, the appellant consumed more wine (R. 55).

A few minutes after 5:00 P.M. the police arrived and appellant was placed under arrest (R. 107). He was taken to police headquarters and at 5:50 P.M. a tape recording was made of his interrogation (R. 109). The first part of the interrogation was an involved attempt to explain the elements of *Miranda v. Arizona,* 384 U.S. 436 (1966), to the appellant (R. 93-94).

Thereafter, appellant supposedly waived his constitutional rights to remain silent and to assistance of counsel (R. 94). Thereafter, appellant made self-incriminating statements and admissions.

The interrogation was concluded one hour and 30 minutes after appellant's last drink. At that time a blood alcohol test was administered. The City Chemist reported that at 6:30 P.M. appellant's blood alcohol level was .260 (R. 70-71).

ARGUMENT

POINT I

APPELLANT'S ADVANCED STATE OF INTOXICATION RESULTED IN AN IMPAIRMENT OF HIS MENTAL FACULTIES WHICH RENDERED HIM INCAPABLE OF A "KNOWING AND INTELLIGENT" WAIVER OF HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Supreme Court of the United States laid down specific rules regarding the admissibility of statements obtained from an individual who is subjected to custodial police interrogation. As a constitutional prerequisite to the admissibility of such statements, the suspect must be warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the immediate presence of counsel and if he cannot afford counsel, counsel will be provided for him without expense. If the defendant chooses to make a statement without exercising his constitutional rights it must be shown that he made a clear intelligent waiver of those guaranteed rights.

A heavy burden rests upon the state to show that a valid constitutional waiver was made.

> "If the interrogation continues without the presence of an attorney and a statement is taken, *a heavy burden rests on the government* to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475. (Emphasis added.)

Appellant contends that his highly intoxicated condition at the time of questioning made it impossible for him to make a "knowing and intelligent" waiver of his constitutional rights.

In *Logner v. State of North Carolina,* 260 F. Supp. 970 (M.D. N.C. 1966), it was established that when a defendant is intoxicated to a degree which impairs his judgment, an attempt to waive his constitutional rights is ineffectual. In *Logner,* the defendant had been drinking heavily and had been taking amphetamines. The police noted that "he wasn't walking like a sober man," but they did not believe that he was drunk enough to be arrested for public drunkenness. Upon closer observation the police discovered that the defendant was "obviously drunk." The alleged waiver of his constitutional rights was embodied in the remark "I can tell you anything I want to. You still have to prove it." In ruling that there was no valid waiver, the court said:

> "The accused may always waive his rights, but this waiver must be made voluntarily, knowingly, and intelligently.

> However, no such waiver can be said to have taken place in this case. The petitioner in his condition was incapable of acting knowingly or intelligently. Once in custody and when the investigation had focused on the petitioner as the accused, at that moment a cloak of constitutional rights enveloped the petitioner. This cloak could only be removed by some affirmative action on the part of the petitioner and at the time the petitioner was incapable of any affirmative action. *Even though the petitioner in his intoxicated state might attempt to waive his constitutional right to remain silent or to have counsel, the waiver would have to be ineffectual because the petitioner's judgment was impaired.* To waive his constitutional rights, the petitioner must be capable of doing so in a voluntary, knowing, and intelligent manner. The petitioner was not in that position." 260 F. Supp. at 977.

The critical issue before this Court is whether the appellant, Gerald Scandrett, was in such a state of intoxication that his judgment was impaired. If it can be shown that there was an appreciable impairment of appellant's mental faculties at the time of the alleged waiver of his constitutional rights, this court must hold that the confession was inadmissible, and reverse the judgment of the lower court. *Carnley v. Cochran,* 369 U.S. 506 (1962); *Glasser v. United States,* 315 U.S. 60 (1942).

The record shows that at 6:30 P.M. on November 8, one hour and thirty minutes after appellant's last drink, a

blood-alcohol test was administered and appellant showed a level of .260 (R. 69-70). A conservative estimate of the blood-alcohol level at the time of the arrest and interrogation was placed at .282 (R. 71). The only evidence before the lower court on this issue was the testimony of Dr. Stewart Harvey, a pharmacologist who had done extensive research in the area of blood-alcohol levels and the effect of alcohol upon body metabolism and mental faculties. Dr. Harvey testified as follows respecting the ability of the appellant to make judgments:

> "My opinion is, this individual would be impaired in his ability to perceive the consequences of any responses that are elicited by questioning of the officer . . . and the fact that an alcoholic or person under the influence of alcohol . . . will do things under the influence of alcohol that are detrimental to himself and to his well-being, indicates that a person under the influence, is incapable of acting, intelligently, in his self-interest, whether it is behind the wheel or in response to questioning — and situations of this sort.
>
> Q. And would it be your judgment, then, that, at the level of (point).26 — that is you are basing this answer upon the point .26 level; is that correct?
>
> A. I am basing it on any level above (point) .1. Now, the exact extent of the impairment at (point) .26, I am unable to say, except it would be considerably higher than level of

> (point) .1, above which all experts in this field are agreed, there is some impairment." (R. 81-82).

The prosecution did not call any expert witnesses to contradict Dr. Harvey's testimony. His testimony was certainly sufficient to establish that the appellant's judgment was considerably impaired at the time of his alleged waiver, and a "knowing and intelligent" waiver in the true spirit of *Miranda* was impossible.

Ample support for the validity of Dr. Harvey's testimony can be found in current medical research and writings. However, the most pertinent statement is found in McCarthy (ed.): *Alcohol Education for Classroom and Community,* McGraw Hill, New York, 1964. In an article entitled "The Response of the Body to Different Concentrations of Alcohol: Chemical Tests for Intoxication," the effect of alcohol on brain functions is discussed. The conclusion in this area was that deterioration of judgment and self-control was the first symptom of intoxication.

> "These [judgment and self-control] represent the highest functions of the brain, and impairment begins with concentrations of alcohol below those which will cause muscular incoordination." *Id.* at 93.

It is significant that Judge Faux arrived at his decision to deny the appellant's motion to suppress because of

the absence of halting speech or slurring by the appellant as evidenced by the tape recording (R. 99). This alone is hardly conclusive evidence, especially when weighed against the previous testimony of Dr. Harvey (R. 88-89). Support for this argument is in Forrester: *Chemical Tests for Alcohol in Traffic Law Enforcement,* Charles C. Thomas, Springfield, Illinois, 1950. Although the writer was focusing on the issue of blood alcohol level and its relation to driving ability, the following statements are highly relevant to the case at hand:

> "The question frequently arises whether there are some drivers so little affected by alcohol that it requires more than .15% of blood alcohol to lower their driving ability. Many tests have failed to find such a person. *A few do not stagger or exhibit thick speech until the blood alcohol reaches perhaps .25% but all the heavy drinkers tested have shown definite lowering in driving and other skills when the blood alcohol reached .15%.* In fact all were somewhat adversely affected when he blood alcohol was above .10%. *Judgment is the first body faculty to be affected by alcohol. Id.* at 28-29. (Emphasis added.)

Appellant submits that the motion to suppress evidence should have been granted by Judge Faux. The State had a "heavy burden" of proof to show that the waiver was made "intelligently and knowingly," and it has failed to sustain that burden. In *Miranda,* the court was emphatic in placing the burden of proof upon the state:

> ". . . a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in custody interrogation." 384 U.S. at 475.

Dr. Stewart Harvey presented expert testimony in support of appellant's contention that an "intelligent and knowing" waiver was impossible in his intoxicated condition. The state did not elect to rebut Dr. Harvey's testimony with contrary expert testimony. The state relied only upon cross-examination by the District Attorney in an effort to discredit Dr. Harvey's testimony. Therefore, the state has not shown that there was a valid waiver of appellant's constitutional rights, and thus the denial of appellant's motion to suppress was a reversible error.

In cases decided decades berore *Miranda* the Supreme Court defined the qualitative standard a trial court judge should follow in a situation where a defendant wished to waive his constitutional right to counsel at trial. Possibly the most definitive description of the quality of waiver necessary to relinquish this constitutional right is found in *Von Moltke v. Gillies,* 332 U.S. 708 (1948) where Justice Black described the extent of a judge's duty:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." 332 U.S. at 723-24.

It is not appellant's contention that the duty placed on judges by *Von Moltke* must necessarily be extended in entirety to interrogating police officers by *Miranda,* but it is contended that whether at trial or during questioning it is equally important that the standards for waiver should be at very least similar since the same reasons for caution are present. Appellant considers it significant that the Supreme Court, in defining the quality of waiver necessary under *Miranda,* cites and quotes from an earlier case, *Carnley v. Cochran,* 369 U.S. 506 (1962):

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. at 516.

The problem of the "voluntary, knowing and intelligent" waiver has not escaped the attention of legal scholars and writers. Indeed many have proposed standards far more broad than the narrow ruling appellant requests this court to make. Richard Kuh in "Some Views on Miranda v. Arizona," 35 Fordham L. Rev. 233 (1966) contends:

> "Putting these relatively rare situations out of the way and turning to the far more common situation of someone taken into custody involuntarily, and not shrewdly advised by his lawyer, I would like to explore my reasons for stating there is rarely such a thing as an intelligent, voluntary waiver." at 233.
>
> * * *
>
> "If . . . the defendant does waive and say that he wants to talk, then he talks for either of two reasons: (1) he did not understand the whole "formula," and, if he did not understand it, there is a "waiver" that was made without an understanding of the warning; such an alleged waiver is a nullity; or (2) although he understood the warning, he still *wanted* to waive. . . . [A] syllogism demonstrates the invalidity of this waiver. The *major* premise is: To hurt oneself intentionally is not intelligent, but is stupid. The *minor* premise is: a defendant, who with knowledge that he can only hurt himself by talking, talks, intentionally hurts himself. The *conclusion* is: His act in talking intentionally is a stupid, non-intelligent act." at 234-5.

The reporters of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services § 7.3 (Tent. Draft 1967) reached the following conclusion:

> "If a person who has not seen a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with him. No waiver should be accepted unless he has at least once conferred with a lawyer."

Obviously, the true meaning of "knowingly and intelligently" must lie somewhere between the idealistic realm of the legal theorists and the ritualistic lip service given by many courts. Many courts appear to ignore rather than interpret "knowingly and intelligently." The Court of Criminal Appeals of Texas in *Grayson v. State,* 438 S.W. 2d 553 (Tex. App. 1969) affirmed a conviction of murder. The defendant, a fifty year old man, was deemed to have waived his right to remain silent and to the assistance of counsel even though a psychologist and a psychiatrist testified that the defendant had an I.Q. of 51 and classified him as a low grade moron. The psychiatrist testified that it was his opinion that the defendant was not as intelligent as a normal three or four year old child and that "on very rare occasions [he had] seen people as severely retarded as this man walking on the streets." Surely if this was the type of qualitative standard intended by the Supreme Court in *Miranda,* they would not have used the phrase "knowingly

and intelligently." Appellant does not contend that every police station must have a lawyer or that only persons of advanced legal education may waive their constitutional rights. Appellant does contend that the term "knowingly and intelligently" means, if it is to mean anything at all, that constitutional rights, one of the most precious gifts of our society, cannot be waived by drunks, morons, and infants.

An example of a proper implementation of the *Miranda* rule was shown in a recent decision by Judge J. Fauntleroy of the Juvenile Court of the District of Columbia. *In the Matter of a Youth Charged with Homicide,* Wash. D.C. J.C. No. 69-4460-J (Nov. 18, 1969) involved a 16 year-old youth who had supposedly waived his right to counsel and made a voluntary confession of first-degree murder. Judge Fauntleroy suppressed the evidence of the confession and held that a juvenile is unable to waive his right to counsel. The rationale of the decision was that a youth does not have the maturity to waive such an important right. Such a holding is a true interpretation of the principle of the *Miranda* decision. A 16 year old youth is not capable of a "knowing and intelligent" waiver of his constitutional rights, for his judgment is impaired by immaturity; and a drunken adult is not capable of a "knowing and intelligent waiver, for his judgment is impaired by intoxication."

POINT II

APPELLANT DID NOT "KNOWINGLY AND INTELLIGENTLY" WAIVE HIS CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL DURING QUESTIONING, BECAUSE APPELLANT DID ATTEMPT, IN A CONFUSED AND GROPING MANNER, TO EXERCISE THAT RIGHT AND THE ATTEMPT WAS IGNORED BY INTERROGATING OFFICERS.

The Sixth and Fourteenth Amendments of the Constitution of the United States, as interpreted by the Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), guarantees an accused the right to appointed counsel during custodial interrogation. Appellant attempted to exercise this constitutional right. His admittedly confused and imprecise request was ignored by the interrogating officers. Appellant was scared. A violent crime, policemen, excited onlookers, arrest, the police station, questions—any man, guilty or innocent, would be confused and frightened in that situation.

The tape recording of appellant's interrogation as reported in the trial transcript reveals the following exchange on lines 29 of page 93 through 14 of page 94:

"29. Officer: "Right; you have a right to talk to an attorney and have a

right to have him present during questioning."

Appellant: "I don't have an attorney, but I'll have to get one, looks

like, don't it?"

Officer: "Well if you can't afford an attorney, one will be obtained

for you at no expense to you."

Appellant: "Well, I'll get one from the Marine Corps, or try to get one

from the Marine Corps that will defend me. I don't know which one

I ought to get, yet."

Officer: "Well, if you can't afford one, the State will retain one."

Appellant: "One of these will have to; I won't want the Marine Corps

'cause I didn't mean to kill the man and if he dies, I'm gonna be

the son-of-a-bitch that's gonna take it; now, I'm gonna be

12. the son-of-a-bitch that suffers, and I'll admit it."

13. Officer: "Now, do you understand all these rights?"

14. Appellant: "Yes, sir; I understand."

In lines 1 and 2 appellant said ". . . I'll have to get one, looks like don't it?" This statement is evidence of a confused impaired mind trying to grasp a totally overwhelming situation. It is an aborted attempt at exercising a right and gives further testimony of lack of understanding in that it refers to the future, possibly at trial, not the present. In line five the appellant says ". . . I'll get one from the Marine Corps, . . ." What prompted appellant to refer to a Marine Corps lawyer when he was a Navy man? Possibly the Marine Corps was a part of some drunken fantasy or brag, but certainly it was not part of a "knowing and intelligent" attempt to protect appellant's interests. In lines 6 and 7 appellant says "I don't know which one I ought to get, yet." Here the appellant clearly shows that he wants a lawyer. Granted appellant did not specifically and unequivocally demand an attorney, but the meaning was there for the interrogating officers had they wanted to follow the spirit and meaning of *Miranda* rather than trying to thread their way between the literal minimum boundaries of that opinion. The request was made but the interrogating officers ignored it because they knew they could

change and direct appellant's train of thought away from this right, and could with patience obtain an affirmative answer to the question finally posed in line 13.

Clearly, in the dialogue examined, appellant attempted to exercise his right to counsel: a right appellant didn't understand, had never had explained to him in a non-fiction situation, and which was being couched in language which could only further confuse him. Only once was appellant told he had a right to counsel during questioning and there was no mention of the fact that appointed, free counsel was available to him at that time. Appointed counsel, as opposed to retained counsel, is mentioned in lines 4 and 5, where the officer stated "Well, if you can't afford an attorney, one *will* be obtained for you. . ." By this statement the officer implies that free counsel is not now available but will be provided later. "Will" is not a word of the present, it refers to the future: tomorrow, next week, at trial, even after you have talkd to us, but not right now.

The manner in which appellant's rights were explained to him and the manner in which his attempted request for immediate counsel were passed over, led appelllant to the conclusion that he had a right to retain counsel during, which he could not afford, and appointed counsel for for the purpose of trial.

An accused is not required to state and demand his rights in precise constitutional terminology. He need only express his desire for counsel. It is clearly stated in *Miranda*:

> "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If, however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis added).

This portion of the *Miranda* opinion was the basis for the holding made in *State v. Word,* 456 P.2d 210 (N.M. App. 1969). There the court of appeals reversed a second degree murder conviction on the grounds that appellant's conviction was based, in whole or in part, on a confession obtained after the defendant had been deprived of his constitutional right to assistance of counsel. The defendant never made the direct statement "I want a lawyer." Defendant did give indications of wanting a lawyer, but each time the prosecutor "by indirection" circumvented the issue. The court cited the language in *Miranda* "If he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning," and then stated that "the law officers cannot avoid this directive nor should they attempt by direction or indirection, to dissuade a defendant from consulting

an attorney." 456 P.2d at 212. In the case at hand the interrogating officers turned by direction, appellant's already confused, and drunken train of thought away from the task of understanding and utilizing his right to counsel.

POINT III

APPELLANT'S ADVANCED STATE OF INTOXICATION RENDERED HIS CONFESSION "INVOLUNTARY," AND BECAUSE THE CONFESSION WAS ADMITTED INTO EVIDENCE, THE APPELLANT'S CONVICTION MUST BE REVERSED.

The Fifth Amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." This constitutional mandate has been formulated into the rule that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. If such a confession which offends due process forms *any* part of the basis for a criminal conviction, then the conviction cannot stand "even though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno,* 378 U.S. 368 (1964). The rule was applied to the states in *Malloy v. Hogan,* 378 U.S. 1 (1964), where the court stated:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will. . ." 378 U.S. at 8.

The standard of voluntariness has developed into a policy of restricting the admissibility of any confession obtained by questionable practices or under questionable circumstances. As Chief Justice Warren said in *Townsend v. Sain,* 372 U.S. 293 (1963), "If an individual's will was overborne or if his confession was not the product of a rational intellect and a 'free will' his confession is inadmissible because coerced." *Id.* at 307.

A confession made by one in the appellant's advanced state of intoxication could not be the product of a rational intellect and a free will. It has been shown that any person with a .260 blood alcohol level would suffer an appreciable impairment of his mental faculties, especially his judgment and reason. A person who had lost control of his mental faculties is incapable of making an admissible confession.

In *Logner v. State of North Carolina,* 260 F. Supp. 970 (N.C.M.D. 1966), the defendant was a chronic alcoholic who had been drinking heavily and had been taking amphetamines. The court ruled that his confession was involuntary because his mental faculties were appreci-

ably impaired by his advanced state of intoxication; "any decision to incriminate made in the intoxicated state of petitioner could not be free and unconstrained." The court reasoned that if the defendant was charged with being under the influence, this would be adequate evidence that his mental faculties were impaired; and impaired to an extent which would render any confession "involuntary." In holding the confession "involuntary," the court stated:

> "Was this confession the product of an essentially free and unconstrained choice of its maker? This Court must answer in the negative. . . . The petitioner's will had been overborne by the alcohol and drugs. Whether he had a false sense of confidence . . . or an acute sense of remorse, his capacity for self-determination was critically impaired, rendering any confession gained objectionable." 260 F. Supp. at 976.

There can be no doubt that appellant Gerald Scandrett's capacity for self-determination was critically impaired. The Federal District Court in the *Logner* case accepted a charge of driving under the influence as sufficient evidence of a critical impairment. It is significant that in Utah a blood alcohol level of .08 is considered presumptive evidence that the person is under the influence of intoxicating liquor. Section 41-6-44, Utah Code Annotated (1969 Supp.). Appellant's blood alcohol level of .26 was conclusive evidence that he was under the influence of intoxicating liquors, and thus incapable of making an admissible confession.

CONCLUSION

Appellant submits that he did not "knowingly and intelligently" waive his constitutional rights to remain silent and to assistance of counsel during questioning as defined in *Miranda v. Arizona,* 384 U.S. 436 (1966), because his advanced state of intoxication resulted in an impairment of his mental faculties which rendered him incapable of a valid waiver. Furthermore, appellant did attempt, in a confused and groping manner, to exercise his constitutional rights, but the attempt was ignored by interrogating officers. In addition, appellant contends that any statements made by him during the police interrogation were inadmissible as evidence since his blood alcohol content of .260 caused him to be so intoxicated as to render his statements involuntary; and because the involuntary confession was admitted into evidence appellant's conviction must be reversed.

Based upon the foregoing reasons appellant respectfully submits that appellant's conviction in the Third Judicial District Court should be reversed.

Respectfully submitted,

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