1970

State of Utah v. Harrison Largo, Harry Tsosie, Chavez Whitehorse, Reid Barber, Mose Clark and Clarence Peter : Brief of Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Appellant,

vs.

HARRISON LARGO, HARRY TSOSIE, CHAVEZ WHITEHORSE, REID BARBER, MOSE CLARK and CLARENCE PETER,

Defendants-Respondents.

BRIEF OF APPE

Appeal From an Order in Arr
in the First Judicial District Cou
County, State of Utah, the Hon
Presiding.

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STATE OF UTAH,
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vs.

HARRISON LARGO, HARRY TSOSIE, CHAVEZ WHITEHORSE, REID BARBER, MOSE CLARK and CLARENCE PETER,
Defendants-Respondents.

Case No. 11832

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellant seeks a reversal of an order in arrest of judgment entered in the First Judicial District Court, in and for the County of Box Elder, State of Utah.

DISPOSITION IN THE LOWER COURT

Respondents Chavez Whitehorse, Reid Barber, Mose Clark, Clarence Peter and Harry Tsosie were convicted of the crime of assault with intent to commit rape, and respondent Harrison Largo was convicted of simple assault. All defendants were tried together with the benefit of a jury. Subsequent to a verdict of guilty, defense counsel

moved the court for an order in arrest of judgment. The motion was granted. It is from that order that the State now prosecutes this appeal.

RELIEF SOUGHT ON APPEAL

The appellant submits that the decision of the trial court granting the motion for an order in arrest of judgment was error. Thus, the order granting the motion should be reversed and the jury verdict of guilty reinstated.

STATEMENT OF FACTS

On April 7, 1969, following an evening basketball game at the Intermountain Indian School located at Brigham City, Utah, the electricity was interrupted, thus plunging Brigham City as well as the Indian School into darkness (T. 231). During the blackout period, several male students entered one of the girls' dormitories and accosted three female students, two of which were subsequently raped (T. 231-233).

Officer Tom Sneddon of the Brigham City Police Department conducted a formal investigation of the incident commencing April 8, 1969 (T. 217). He began questioning sixty to eighty students on April 9, 1969, and continued at various intervals through April 12, 1969 (T. 217, 218). The names of the students questioned were obtained pursuant to student dormitory meetings which were conducted by guidance counselors who were employees of the school charged with the responsibility of various dormitories (T. 185). Each student questioned was asked to come to the office of the guidance supervisor where Officer Sneddon

was conducting the investigation (T. 186). The guidance supervisor and the guidance counselor of each respondent were present during the questioning (T. 313, 323, 343, 347, 360, 364). The purpose of the counselors' presence was to insure that nothing transpired which the student could not or did not understand (T. 245, 246).

The students were first taken to a room adjacent the guidance supervisor's office, where the questioning was being conducted. They waited until their turn came for questioning (T. 193, 246, 247). During this waiting period, the guidance counselor was with the student to be questioned. Most of the students, including the respondents in the instant case, were advised by their guidance counselor to tell the truth if involved in the investigation (T. 328, 343, 375). At no time was a student advised by his counselor of the rights embodied in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). However, when each respondent entered the guidance supervisor's office for questioning, Officer Sneddon advised him of his *Miranda* rights by reading from a prepared card (T. 219, 382, 396). As each element of *Miranda* was read, Officer Sneddon, the guidance supervisor and the guidance counselor assured themselves that each respondent understood and comprehended his *Miranda* rights (T. 315, 323, 343, 347, 361, 362). All of the students questioned, including the respondents, waived their rights under *Miranda* (T. 396, 397).

Subsequent to the *Miranda* warning, each respondent confessed to his part in the alleged crime and signed a statement to that effect (T. 316, 324, 325, 344, 357, 358,

362, 363, 365). Prior to trial, a hearing was held pursuant to defense counsel's motion to suppress the statements (T. 160). No determination as to the admissibility of the statements was made by the court. Immediatey after the hearing on the motion the trial commenced (T. 229). After the evidence was presented, including the written statements made to Officer Sneddon by the respondents, final argument made and the jury instructed, a verdict of guilty was returned against each respondent (T. 510, 511, 512, 513). Subsequent to the verdict, defense counsel moved the court for an order in arrest of judgment alleging that the statements made by the respondents were improperly obtained because they were not advised of their *Miranda* rights by their guidance counselor during periods of questioning prior to Officer Sneddon questioning them; and, because the guidance counselor had advised them to tell the truth if involved in the investigation (T. 514). The court granted the motion (T. 518) and in so doing said:

> "This court feels that it's within the purview of the decisions of the so-called Earl Warren Court that no statement, oral or written, can be taken from anyone within these fifty states when the accusatory phase is commenced without the giving of *Miranda* warnings." (T. 515).
>
> * * * *
>
> "As long as I sit here, I will not receive any confessions by any school officer, any peace officer if such be based on a secret private confession theretofore obtained, without giving the *Miranda* warning." (T. 517).

ARGUMENT

POINT I.

THE STATE IS LEGALLY ENTITLED TO PROSECUTE AN APPEAL IN THIS CASE.

Utah Code Ann. § 77-39-4(2) (1953) provides, ". . . an appeal may be taken by the state: * * * (2) From an order arresting judgment."

The facts in the instant case show that after the jury verdict was in, and pursuant to a motion by defense counsel, the trial court ordered an arrest of judgment (T. 518). As a consequence the State has the right of appeal as specified by the foregoing statute.

POINT II.

THE RESPONDENTS WERE NOT ENTITLED TO THE *MIRANDA* WARNING WHEN DISCUSSING THE ALLEGED CRIME WITH THEIR GUIDANCE COUNSELORS PRIOR TO THEIR BEING QUESTIONED OFFICIALLY BY OFFICER SNEDDON.

A. THE RESPONDENTS WERE NOT TAKEN INTO CUSTODIAL INTERROGATION BY THEIR GUIDANCE COUNSELORS.

B. THE GUIDANCE COUNSELORS WERE NOT LAW ENFORCEMENT OFFICERS.

In *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the United States Supreme Court held:

> ". . . The prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant . . . By custodial interrogation, we mean *questioning* initiated by *law enforcement officers* after a person has been taken into *custody* or otherwise deprived of his freedom of action in any significant way." Id. at 444. (Emphasis added.)

Thus, according to the *Miranda* standard, two elements must exist before the incriminating statement of an accused is inadmissible: (1) custodial interrogation, by (2) law enforcement officers.

In light of these two elements embodied in *Miranda*, can it be said that the respondents in the instant case were denied their rights when they were not given the *Miranda* warning by their guidance counselor prior to their discussing with him events surrounding the alleged crime? The appellant submits that it cannot.

A. THE RESPONDENTS WERE NOT TAKEN INTO CUSTODIAL INTERROGATION BY THEIR GUIDANCE COUNSELORS.

In *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), it was said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to *focus on a particular suspect* . . . and the police have not effectively warned him of his absolute constitutional right to remain silent . . . that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. at 490, 491. (Emphasis added.)

In *Miranda,* in a footnote to the explanation of custodial interrogation, it was said:

> "This is what we meant in *Escobedo* when we spoke of an investigation *which had focused on an accused.*" 384 U. S. at 444, n. 4. (Emphasis added.)

The facts of the instant case clearly show that all relationships between the guidance counselors and the students, including the respondents herein, were prior to the time when the investigation had focused on a particular suspect. The initial names of students to be questioned were obtained by guidance counselors pursuant to dormitory meetings where students in attendance merely offered what help they could (T. 185). Surely at this point in a general investigation the *Miranda* warning is not a prerequisite to receiving answers either by a guidance counselor or a police officer, nor does *Miranda* so hold. *State* v. *Williams,* 5 N. C. App. 260, 168 S. E. 2d 217, 218 (1969). Moreover, the arm of law enforcement had not at this time focused on any particular person or persons.

Subsequent to the obtaining of the names, Officer Sneddon directed Stanley Speaks, the Guidance Supervisor, to ask students whose names were listed to come to his office for general questioning (T. 186, 246). Most of these requests were executed through the guidance counselor of the student (T. 186, 246). When the respondents went for questioning they were accompanied by their counselor, an occurrence totally in accord with school policy (T. 245). Since school policy required that students be accompanied by their guidance counselor when questioned by persons not

associated with the school, there can be no inference that the counselors' presence in any way imposed a constructive custody on the respondents or "deprived (their) freedom of action in any significant way." *Miranda* v. *Arizona,* 384 U. S. 436, 444 (1966). During this period of the investigation the respondents were at no time advised that they were being taken into police custody as one suspected of having committed the crime. Moreover, the respondents were not placed under arrest (T. 335) either prior to or immediately after the questioning by Officer Sneddon. As a matter of fact, he did not know of their whereabouts either before or after the questioning (T. 391, 394).

During this portion of the investigation, prior to Officer Sneddon's questioning of each respondent, the respondents never left the premises of the school. They were continually in familiar surroundings to which they were accustomed. As stated in *Miranda*:

> ". . . compulsion to speak in the isolated setting of the police station may be greater than in courts or *other official investigations where there are often impartial observers to guard against intimidation or trickery.*" 384 U. S. at 461. (Emphasis added.)

The very purpose of the presence of the guidance counselors was to represent the best interests of the student (T. 245, 246) and to prevent "intimidation or trickery."

The fact that the respondents were placed in a room adjacent the office used for questioning cannot be construed as custodial interrogation. The respondents were placed there for administrative purposes only. They waited

there until is was their turn to be questioned (T. 193, 246, 247). The purpose of their waiting in the room was to protect them from the scornful eyes of their peers (T. 193, 247), thus sparing them unwarranted intimidation and harassment from other students (T. 320, 321). The respondents were asked to wait in the adjacent rooms for only a short time (T. 315, 319, 321, 342, 359, 360, 365). Moreover, often they were left alone (T. 321, 342) with the doors unlocked (T. 342). Clearly these administrative precautions did not amount to custodial interrogation as defined in *Miranda.* Consequently there was no legal responsibility on the guidance counselor to advise each respondent of any *Miranda* rights.

In a recent case, whose factual setting is very similar to the instant case, the Ninth Circuit refused to find custodial interrogation. In *United States* v. *Manglona,* 414 F. 2d 642 (9th Cir. 1969), the defendant, who was employed in the accounting office of a Naval installation on Guam, forged a government check. He voluntarily agreed to be questioned by a special agent dispatched to the installation to investigate the incident. Prior to the questioning the agent failed to completely advise the defendant of his *Miranda* rights. During the questioning the defendant made incriminating statements which were later admitted into evidence at trial. On appeal the Circuit Court ruled that no reversal was warranted on the basis of the incomplete *Miranda* warning because the questioning was ***not*** custodial interrogation:

> "The evidence shows, however, that Manglona was not in actual custody at the time of the interview. Nor did he testify that he thought he was in custody at that time. Moreover, Manglona was specifically told that he was not under arrest and was free to terminate the interview at any time. As soon as the interview was over, Manglona did leave the Special Agent's Office.
>
> "Under these circumstances it cannot be said that, at the time of the questioning, defendant was in custody or otherwise deprived of his freedom of action in any significant way." (Citations ommitted.) *Id.* at 644.

If Manglona was not in custodial interrogation during the actual questioning by the Special Agent, then clearly the respondents in the instant case were not in custodial interrogation by their guidance counselors prior to Officer Sneddon's questioning them.

Because custodial interrogation is necessary before the *Miranda* warning must be given and because the facts show the respondents *not* to have been in such custody by their guidance counselors, it is clear that the trial court erred in granting the motion for an order in arrest of judgment. *Miranda* does not go as far as the trial court suggests; thus, it should be reversed and the verdict of guilty reinstated.

B. THE GUIDANCE COUNSELORS WERE NOT LAW ENFORCEMENT OFFICERS.

The second element required before the *Miranda* warning is necessary is that the questioning be conducted by a police officer. In the instant case the guidance counselors

cannot be construed as being police officers or law enforcement officers. Their function is to assist the student with his problems and counsel with him on matters leading to an education and a useful life (T. 246).

In *People* v. *Ronald W.* (*Anonymous*), 24 N. Y. 2d 732, 249 N. E. 2d 882 (1969), the question of whether or not a probation officer was a law enforcement officer within the spirit and meaning of *Miranda* was decided:

> "Viewed in this perspective, it is apparent that the probation officers were not required to give appellant the *Miranda* warnings before they inquired about the needle marks on his arm. The questioning of the appellant was hardly the sort of incommunicado, police-dominated atmosphere of custodial interrogation and overbearing of the subject's will at which the *Miranda* rule was aimed. The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer (citations omitted) are totally foreign to the elements the Supreme Court addressed itself to in *Miranda*." 249 N. E. 2d at 883.

In *Clark* v. *State*, 222 S. 2d 766 (Fla. 1969), the Court said on this issue:

> "It seems to us that he (probation officer) can be of most usefulness in the rehabilitation of those who have erred if he is not compelled to act like a policeman instead of a sympathetic supervisor . . . We find nothing wrong in his asking Clark about an alleged violation of probation, and having been informed of it he is under a duty to advise the court, which he did." *Id.* at 767.

See also, *Bean* v. *Carlos,* 21 Utah 2d 309, 445 P. 2d 144 (1968),; *Ouletta* v. *State,* 442 S. W. 2d 216 (Ark. 1969); *People* v. *Omell,* 15 Mich. App. 154, 166 N. W. 2d 279 (1968).

The appellant submits that the guidance counselors in the instant case are analogous to the probation officers of the cases cited above in that their function, like that of the probation officer, is one of counsel and rehabilitation and not that of law enforcement. This negates any duty on their part to administer the *Miranda* warning prior to speaking with their assigned students about their alleged involvement in the incident in question.

The evidence is clear that the guidance counselors did in fact discuss the incident with the respondents prior to their being questioned by Officer Sneddon (T. 314, 315, 341, 342, 343, 360, 365). At no time was the *Miranda* warning given as a predicate to these discussions. However, in light of the foregoing, it was not legally necessary that such admonition be given.

POINT III.

THE RESPONDENTS WERE PROPERLY ADVISED OF THEIR *MIRANDA* RIGHTS BY OFFICER SNEDDON, AND HAVING A FULL UNDERSTANDING THEREOF, VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED THE SAME.

The record clearly supports the fact that each respondent was given the *Miranda* warning prior to being questioned by Officer Sneddon (T. 219, 315, 323, 343, 347, 361,

362 365, 382, 396). The facts of the case also support the conclusion that each respondent understood his right under *Miranda* and voluntarily and knowingly waived the same.

The *Miranda* case allows for a suspect in custodial interrogation to waive his *Miranda* rights. 384 U. S. at 444. However, such a waiver will not be found from a silent record. 384 U. S. at 475. Moreover, the state has the burden of establishing that such a waiver occurred. 384 U. S. at 475. In *United States* v. *Hayes,* 385 F. 2d 375 (4th Cir. 1967), the court held:

> ". . . the cases in which it is clear that the *Miranda* warnings have been given must be considered on their own facts in order to determine the question of waiver. The courts must do this on an ad hoc basis, and no per se rule has thus far been adopted dealing with this problem." *Id.* at 377.

In light of the foregoing principles it is necessary to analyze the facts of the instant case in deciding whether or not the respondents herein waived their *Miranda* rights.

In all cases each respondent was given the *Miranda* warning (T. 219, 382). Although the record shows that in some instances no affirmative waiver was made, it is clear that immediately upon receiving the warning, and affirmatively voicing an understanding thereof, each respondent made incriminating statements (T. 316, 323, 344, 347, 357, 362, 366). These statements were not subsequent to a long period of custodial interrogation or obtained by trickery or cajoling, they came voluntarily subsequent to a complete and full understanding of their *Miranda* rights. None of the respondents were questioned longer than 5 to 40 min-

utes (T. 224, 315, 330, 365). In *People* v. *Johnson,* 75 Cal. Rptr. 401, 450 P. 2d 865 (1969), the court said:

> "Once the defendant has been informed of his rights and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them." 450 P. 2d at 876.

It may be contended arguendo that the respondents, because of their race and lack of education, were not capable of understanding their *Miranda* rights and thus could not knowingly and intelligently waive them. However, the evidence contained in the record is contra.

According to a reading vocabulary and reading comprehension exam the respondents' reading ability varied from grade 5.8 to 7.3 (T. 165). However, the *Miranda* warning was given verbally. The evidence established that the grade level of the respondents relative to oral instructions and communication was at least three grades above the reading level, i.e., 8.8 to 10.3 (T. 169).

In *State* v. *Thornton,* 22 Utah 2d 140, 449 P. 2d 987 (1969), this Court held that the defendant adequately waived his *Miranda* rights although he had but a fourth grade education and could not read or write. His intelligence quotient was about 68. This Court said regarding the question of waiver:

> ". . . the question must be resolved from examining the whole record, — which we have done in the instant case and see no error in the trial courts admitting the confession in evidence or the jury in

> adjudging defendant guilty as charged." 449 P. 2d at 988.

In light of the respondents' educational levels in the instant case, and in *Thornton,* it is clear that the respondents were capable of understanding their *Miranda* rights pursuant to waiving them.

Moreover, the guidance counselors of each respondent testified that the respondent over which he was assigned knew and understood English and was performing either average or above average in his academic work (T. 312, 322, 341, 361, 362, 364).

In some instances, if one of the respondents appeared to not understand any element of the *Miranda* warning, the guidance counselor was there to make further explanation and clarify the difficulty (T. 344, 361). Generally no such explanation was necessary.

In light of the whole record it is clear that the respondents were capable of understanding their *Miranda* rights; that they did so understand those rights and pursuant thereto did voluntarily, knowingly and intelligently waive the same. Their immediate incriminating statements evidences this conclusion. Therefore, it was error for the trial court to allow the case to be decided by the jury and then subsequent to a verdict of guilty negate the same by an order in arrest of judgment.

POINT IV.

THE DOCTRINE OF DOUBLE JEOPARDY IS NOT AT ISSUE IN THIS CASE.

Although the State is the appellant in this case there is no double jeopardy issue involved. Double jeopardy constitutionally protects victims of the criminal judicial process from being tried twice for the same crime. U. S. Const. Amend. V. As a consequence, this Court, in cases heretofore appealed by the State, wherein trial courts have been reversed, has barred the state from further prosecution because the basis for appeal occurred after jeopardy attached, but prior to a final verdict. *State* v. *Iverson*, 10 Utah 2d 171, 350 P. 2d 152 (1960), *State* v. *Sandman*, 4 Utah 2d 69, 286 P. 2d 1060 (1955).

In the instant case, the basis for the State's appeal arose after both the time jeopardy attached and a jury verdict. It is the State's contention that the jury verdict should be reinstated, thus negating the need for a new trial on the grounds that the trial court's order in arrest of judgment was error. As a consequence there is no double jeopardy issue in this case and thus, it is clearly distinguishable from the *Iverson* and *Sandman* cases cited above.

CONCLUSION

It is the State's contention that the respondents herein were not constitutionally entitled to a *Miranda* warning from their school counselors prior to their being questioned by Officer Sneddon; that Officer Sneddon properly gave the respondents the *Miranda* warning prior to their custodial interrogation; that the respondents were capable of understanding their *Miranda* rights and that they did in fact so understand those rights; that pursuant to said understanding they knowingly, intelligently and understand-

ingly waived their *Miranda* rights and made incriminating statements to Officer Sneddon, which were properly used at trial; that based thereon, the jury correctly returned a verdict of guilty and that the subsequent order of the court granting a motion in arrest of judgment was in error. Thus, the order granting the motion in arrest of judgment should be reversed, thereby reinstating the jury verdict of guilty.

Respectfully submitted,

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