1970

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

In The

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Appellant,

-vs-

Case No. 11832

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

Defendants-Respondents.

BRIEF OF RESPONDENT

Appeal From an Order in Arrest of Judgment Entered in the First Judicial District Court, in and for Box Elder County, State of Utah, the Honorable Lewis Jones, Judge, Presiding.

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SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The respondents seek the affirmance of the Court's order granting said respondents' motion for Arrest of Judgment.

DISPOSITION IN THE LOWER COURT

The respondents concur in the allegations of the State, concerning the disposition in the lower court wherein 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. Respondents further agree that after the return of the aforementioned verdicts by the jury, the Court granted

respondents' motion for Arrest of Judgment.

STATEMENT OF FACTS

Respondents agree with the Statement of Facts as listed in the brief of the appellant , insofar as they go. However, it is the contention of respondents that in addition to the facts as stated in said brief of appellant certain other factual information is required to place in proper perspective the occurrences.

The facts indicate that on April 7, 1969 there was a power failure at the Intermountain Indian School located at Brigham City, Utah. This power failure resulted in the campus being plunged into darkness and considerable amount of vandalism occurred, as well as the attack on a number of female students, including the rape of two of said students (T.231-233).

The Indian School then conducted its own investigation for some time, and indicated to certain tribal leaders that they intended to call in the Brigham City Police Department for assistance, as indicated in the testimony of one of the supervisors of the Indian School:

> "Also, I met with them and informed them of our procedure that we were following, how we were involving Mr. Sneddon (Brigham City police officer), and the sessions, the question sessions with the students and how we were going to proceed."

On April 8, 9, 10, 11, and 12, the investigation and questioning took place (T.194).

The questioning of these students was conducted both by Indian School staff as well as by Officer Sneddon. The time period during which the

students were questioned ranged from after noon until as late as 5:00 A.M. (T.217). In one instance a defendant, Reid Barber, was brought from his bed at 11:00 P.M. on the ninth day of April, 1969, was not questioned but returned to his bed after a wait of approximately one hour. He was then returned to the office where Mr. Sneddon was conducting the questioning on the tenth day of April, 1969, and remained there for approximately one hour and was again returned to his dormitory. The third time he was brought for questioning was at approximately 1:00 A.M. and he remained approximately one hour before being questioned (T.326).

The transcript is replete with instances wherein the school authorities indicated they took an active part in the interrogation of specific students (T.185, T.328, T.215, T.314, T.316, T.319, T.323, T.328, T.338, T.444).

In several instances the school authorities indicated during the testimony that they considered their position to be one in which they had investigative responsibilities and duties. This included statements (T.375) that the employees considered they were representing "both sides." In addition (T.444), there is testimony that a Mr. Smith interrogated Harry Tsosie as follows:

> "A. I was there when I was about -- and then he took me out, and this was about 2:30 A.M.
>
> "Q. Two-thirty in the morning?
>
> "A. Yes.
>
> "Q. And who had you talked to between 10:00 o'clock and 2:30 in the morning?

"A. Just Mr. Smith.

"Q. And what question did Mr. Smith ask you?

"A. He told me that I was involved with the breaking into the girls' building and he told me to tell what I was doing over there. He had a tape recorder that I talked into.

"Q. And did he have a tape recorder all the time?

"A. Yes. He turned it off when he went out."

We concur with the statement of appellant that at no time did the employees of the Intermountain Indian School advise the defendants of their rights under the rule embodied in Miranda v. Arizona, 384 U.S. 436 (1966). We further agree that a reading of a so-called "Miranda card" was given by police Officer Sneddon. We contend, however, that the employees of the Intermountain Indian School who were present with the boys during the interrogation by the Brigham City police officer were not there to protect the rights of these defendants, but were there to assist Officer Sneddon and were a part of the investigatory team. It is not contended at any place, either in the transcript or in the brief of appellant, that the defendants were informed that they need not be interrogated. In most instances they were brought from their beds late at night, or early in the morning, and were not given a choice whether or not they would be summoned. They were awakened by Indian School personnel and taken to an office for questioning by Officer Sneddon (T.196).

It is the contention of the appellant that

a meaningful and knowledgeable waiver of the rights of the defendants under the Miranda rule was had. However, the transcript is replete with numerous instances wherein no attempt was made to indicate to these students the penalty for rape. (T.197, T.215, T.223).

In connection with the right to counsel, it was never explained in an adequate manner how these Indian boys, most of whom were hundreds of miles from home, would be able to secure services of an attorney. The mere bald statement that counsel would be provided, we submit, is unsufficient. An illustration of this problem can be found (T.352) wherein the following testimony was given by Ron Edwards, an employee of the school:

"Q. And yet you didn't apprise him of any consequence that might occur as a result of making this statement?

"A. I did not tell him anything about it. All I asked him was to tell the truth. That was my advice to him.

"Q. And that's all the advice you gave him?

"A. Yes.

"Q. Yet you were his guidance counselor?

"A. Right.

"Q. Did you know of what constitutional rights he had at the time?

"A. Yes, I know he could have contacted a lawyer.

"Q. How could he have contacted one?

"A. I don't know, but I know he has a right to.

"Q. How could he have contacted one? Did you tell him that he could get up and walk out of that room and contact a lawyer?

"A. No."

At the beginning of the trial a hearing was made upon defense counsel's motion to suppress the statements of the defendants (T.160). The Court, after listening to the motion and testimony in relationship thereto, met in chambers with counsel and announced thereafter that the trial would commence (T.229). After the trial was concluded and the verdicts rendered, the Court, having not heretofore formally made an announcement in the record concerning the motion to suppress, made the following statement:

> "In this Court's view now -- and I confess that if I had it to do over again I wouldn't have even sent for the jury -- in this Court's view, the statements obtained by the officer were so tainted and so muddied up that they can't or couldn't be said to be free and voluntary.
>
> "Now I realize that what I am saying now is different from what I instructed this jury this morning. If this were nine o'clock A.M., feeling as I do now, I would have had to have told this jury that these written confessions which were received in evidence could not be deemed voluntary, because two prior oral statements previous no warnings had been given." (T.516)

The Court, in further explanation of his order granting the motion for Arrest of Judgment (T.517) stated as follows:

"The defendants have no money, Tribal

Council gave these boys no assistance, the Department of the Interior gave these boys no assistance, they're paupers here before the court, and the court does not propose to 'throw the book' at these boys and force the defendants to appeal in order to clarify this question."

"But as of right now, as long as this individual is sitting in this court in this District, no officer, no guidance authority must ever take any confessions from anyone without giving them the Miranda warning. 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.

The respondents concede that the State may appeal the judgment in this case.

POINT II

THE RESPONDENTS WERE ENTITLED TO THE MIRANDA WARNING WHEN BEING QUESTIONED CONCERNING THE ALLEGED CRIME BY THE INTERMOUNTAIN INDIAN SCHOOL PERSONNEL, PRIOR TO THEIR BEING QUESTIONED BY OFFICER SNEDDON.

(A) THE RESPONDENTS WERE IN A STATUS OF "CUSTODIAL INTERROGATION" BY THEIR GUIDANCE COUNSELOR.

(B) THE GUIDANCE COUNSELORS WERE NOT LAW ENFORCEMENT OFFICERS, BUT WERE IN THE STATUS OF AIDING THE OFFICER IN HIS INVESTIGATION.

We agree with the appellant that the rule governing this issue is as stated in the brief of the appellant:

> ". . . 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." (Emphasis added.) Miranda v. Arizona, 384 U.S. 436 (1966)

(A) THE RESPONDENTS WERE DEPRIVED OF THEIR FREEDOM OF ACTION IN A SIGNIFICANT WAY UNDER THE TERMS OF THE MIRANDA CASE.

The brief of the appellant while quoting the rule in the Miranda case, as set forth above, correctly, speaks only of the question of "custody". It does not discuss the "or" aspect of the rule. The real issue under this argument concerns itself with the question of whether or not these students' freedom of action had been impaired in any significant way. In approaching this argument it is necessary to point out the fact that these students were several hundred miles from home. Were living in a "boarding school" environment. The school, in addition to providing these students with educational opportunities, further provided them with counselors of various types. This guidance service is provided on a twenty-four-hour basis for these students (T.176). These guidance people provided

the students with personal assistance as well as assistance in connection with their formal education. The school, however, as indicated in the statement of facts listed heretofore, determined to take an active part in the investigation of these alleged crimes. This involved investigation work by school personnel, interrogation of individual students, taking of tape-recorded statements of students, and advice to students as to the manner in which they should conduct themselves while being interrogated by police Officer Sneddon. Under these circumstances, it is the contention of the respondents that the Court correctly viewed the total situation in ruling that the students were given no assistance by either the government, the school, or their tribe, in handling a situation which could result in their imprisonment for life (T.517). In questioning these students at all hours of the day and night, including as late as 2:45 A.M. (T.444) in taking them from their beds to answer questions, in one instance for three successive nights (T.325), and in no instance indicating to the students that they did not have to go to be interrogated by police Office Sneddon (T.196), the school was acting as part of the police process.

Under the factual situation as reflected in the transcript, it is clear the students were deprived of their freedom of action in a significant way. It is further clear that the reason for the deprivation of their freedom of action was to assist the police officer in his gathering of evidence against these defendants.

In regard to the question of whether or not the investigation had "focused on the accused," as required in the case of Escobedo v. Illinois, 378 U.S. 478 (1964), a brief resume of the manner in which the school and the Police Department cooperated during this investigation will clearly

indicate that these students who were questioned, both by Mr. Sneddon and by the individual Indian School personnel, were in the category of those defendants upon whom the investigatory light was in fact focused.

The heretofore quoted statement of Mr. Stanlay Speaks, a Senior Supervisor at the Indian School (T.195) wherein he indicated to the Tribal Leaders that "we were involving Mr. Sneddon," indicates the active part the School was playing in the investigation. A Guidance Counselor informed Mose Clark (T.314), after an initial discussion with him, to return and discuss the matter with him again. Defendant Reid Barber (T.319) was questioned by a Mr. Palmer, a school official, and the following testimony was elicited:

> "A. I talked to Reid twice down at the Guidance Center, both times his name had come up again and again as being involved in some way in this, and so we asked him to come down. These two times that I talked with Reid, I just talked to him casually and asked him if he knew anything about what had happened down there that he wanted to tell me. Both times he said he didn't and he went back to the dormitory."

It can hardly be contended by the appellant that this type of interrogation, without benefit of any warning whatsoever, was not of a suspect on whom the investigation had focused. Later, after two appearances before the Student Guidance Personnel, Mr. Barber was taken before the police officer and a statement secured.

The brief of the appellant speaks of the fact that Officer Sneddon questioned students whose names had been supplied him, in the area of "general questioning." In every instance the students questioned by Mr. Sneddon were those who

the Indian School personnel had previously determined were suspects upon which "the investigation should be focused."

The brief of appellant (P.7) further speaks of "requests" by which the students were brought before Officer Sneddon. In no instance does the transcript reflect that any student was "requested" to go before Officer Sneddon. In each instance the student was approached by Indian School personnel and told to come to the area, to the office of Mr. Sneddon for questioning. It is true that the respondents went to Officer Sneddon in the company of their counselor. However, as has been illustrated throughout the transcript, the counselors gave them no advice other than to tell the truth, and had themselves, in most instances, been active in the investigation and interrogation of the students whose welfare they were alleged to be protecting. The brief of the appellant indicates that their presence at the interrogation by Officer Sneddon could not be considered as "constructive custody." It must be left to conjecture whether the students would have gotten out of bed and accompanied their Guidance Counselors to these late hour interrogation sessions if given a choice. The evidence is silent that any of them were told they need not accompany their counselor to these question sessions. Under these circumstances, in view of the peculiar handicaps under which these students were found, the facts negate any serious contention that a voluntary refusal on their part to accompany their counselors was tenable. The clear implication was that they were being ordered by school personnel, to whom they owed a duty to obey, to accompany said personnel for questioning. It is clearly a "deprivation" of their freedom of action in a significant way under the Miranda rule.

The next contention of the appellant, that the

purpose of the Guidance Counselors being present was to represent the best interests of the students is negated by the testimony of the counselors that they were active in the investigation. As has been pointed out (T.375) the Guidance Counselors considered their position to be of a dual nature. This is indicated by the statement that they were on "both sides." The brief of appellant speaks finally of the case of United States v. Manglona, 414 F.2d 642 (9th Cir. 1969). In the Manglona we have a situation where an adult volunteered to be questioned. The case further indicates that the defendant, Manglona, was specifically told that he was not under arrest and was free to terminate the interview at any time. We believe the court correctly ruled in the Manglona case that he was not in custody. In no instance in the present case, however, is there any indication that these students were told, either directly or indirectly, either by word or deed, that they were free to terminate the interview at any time; either the interview with Officer Sneddon or the interviews with their Guidance Counselors, wherein the incriminating evidence was first secured.

In conclusion, it is the contention of the respondents that there was in fact custodial interrogation in this case. In the event, however, it is determined there was not custodial interrogation there surely was a situation in which they were deprived of "their freedom of action in a significant way." I call attention to the specific manner in which the Court states, in the Miranda case, that the deprivation is in "any" significant way. The contention that the students were still on their campus, that they were not taken away from their usual area of living, is not a correct view. They were taken, frequently late at night, to an office building and there required to wait for various periods of time until taken before a police officer. It is hard to conceive of a situation

more conducive to frightening and removing the voluntary nature of an Indian student's statements, than to subject him to being removed from his bed and questioned under the circumstances of this case.

Therefore, we contend there was custodial interrogation. There was significant deprivation of their freedom of action.

(B) THE GUIDANCE COUNSELORS, WHILE NOT LAW ENFORCEMENT OFFICERS, WERE ACTING IN AN INVESTIGATORY CAPACITY.

We concede that the school Guidance Counselors are not police officers. We cannot concede, as alleged by the appellant, that their function was to assist the student with his problems and counsel him in matters leading to an education and a useful life (P.11). While they may be in this capacity in the usual course of their duties at the school, in this instance they were recruited to assist a police officer in an investigation of a crime. The quotations heretofore listed in this brief show the school took an active part in the investigation. The school held meetings and collected names and statements. They interrogated individual students, took statements, tape-recorded statements, and actively advised the students concerning how they should conduct themselves while before the Brigham City police officer.

In Miranda v. Arizona, 384 U.S. 436 (1966) the court indicated that if the questioning was "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, the prohibition would apply to the agents of the officers as well as the officers themselves.

In all of the cases cited by the appellant on this point, People v. Ronald W. (Anonymous), 24 N.Y.2d 732, 249 N.E.2d 882 (1969), and as in Clark v. State, 222 S.2d 766 (Fla. 1969), the allegation that probation officers are similar to these Guidance Counselors is fallacious. The primary difference between the two situations is that in the case of the probation officer, questions were directed to their probationers concerning needle marks and other evidence that might reflect on a probation violation. The probationers made admissions or confessions to their probation officers which indicated they were implicated in crimes. In these instances the questioning was ruled to be a normal part of a probation officer's services to his probationer. However, in the instant case we have a situation where the school actively initiated an investigation as to this specific alleged act, the alleged rapes, and were actively seeking information and suspects. When suspects were located they were questioned by school personnel, and if the answers indicated implication, were taken before Officer Sneddon.

It is significant that on a number of instances the transcript reflects that the students were questioned a number of times, indicating the investigation had been focused upon them. This occurred when a student's name was mentioned more than once others who were being questioned (T.185). The respondents do not believe it can seriously be contended that the school personnel, from the beginning of this occurrence until the statements were taken by police Officer Sneddon, were anything other than investigators assisting the police officer, and that under the terms of the Miranda case their work was in fact "initiated" by a law enforcement officer. Therefore, their acts are the acts of the police officer and come within the purview of and the prohibition of the Miranda case.

POINT III

THE RESPONDENTS WERE NOT PROPERLY ADVISED OF THEIR MIRANDA RIGHTS BY OFFICER SNEDDON. ANY WAIVER THEREOF WAS NOT MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY.

We concede that the record indicates a Miranda warning was given by Officer Sneddon in each instance. We do not concede that there was an understanding of the defendants' rights under the Miranda rule prior to their giving statements to Officer Sneddon. It is the contention of appellant that these statements were not given after long periods of interrogation. This we concede, as well. In fact, the testimony indicates the longest interrogation by Officer Sneddon was thirty-five minutes, and the shortest interrogation was five minutes (T.190). The fact that these students were taken, without being asked if they wished to go, to be interrogated by Officer Sneddon at late and unusual hours, as has been cited repeatedly in this brief, is another factor that would tend to indicate that these statements were not voluntary. The testimony in the case indicates little, if anything, was said concerning the nature of the charges that might be brought or the penalty therefor (T.197, T.215, T.223).

The evidence is summarized by the Court (T.570), wherein he indicated that they had received no assistance from the United States Government, the Tribal Council, or the Indian School itself. In addition to the age and language barriers that existed, the fact that these students were far from home and those who could assist them is important. It is the contention of the respondents that these various factors, separately as well as together, clearly

indicate that these students were not in a position to intelligently and knowingly waive a valuable right, in view of the nature of the charge and the penalty attached thereto.

POINT IV

THE DOCTRINE OF DOUBLE JEOPARDY IS AN ISSUE IN THIS MATTER.

A motion was made by respondents to arrest judgment, after a return of guilty by the jury. The Court had, heretofore, heard evidence in connection with the motion to suppress the statements of the respondents. The Court did not, at the conclusion of this hearing, formally state a decision. The Court did order the trial to commence however. The issue appears to be whether or not the Court, after allowing the case to go to the jury and after having received the verdict of guilty on the charges, can then grant a motion in Arrest of Judgment, and bar the State from enforcement of the jury's verdict under the theory of double jeopardy.

The case of State v. Iverson, 10 Utah 2d 171, 350 P.2d 152 (1960), was a case in which the verdict had not been formally entered. One of the jurors had changed his mind and before entry of the verdict had indicated a refusal to concur in a verdict of guilty. Also, in this case, the Court had reserved ruling on a motion to dismiss. Thereafter, after the failure of the jury to agree, the Court granted the motion to dismiss.

State v. Sandman, 4 Utah 2d 69, 286 P.2d 1060 (1955), was a case wherein the Court, in indicating that there could be no further proceedings in the matter, referred to State v. Thatcher, 108 Utah

63. 157 P.2d 258, as to when jeopardy attaches. In the Thatcher case, after a charge of involuntary manslaughter had been brought, and the State's case had been concluded, the defendant moved for dismissal and this was granted. The defendant was discharged and the State appealed. It is the contention of the respondents that the Court's granting of the respondents' motion in the instant case was tantamount to the granting of a motion to dismiss. We contend that, notwithstanding the Court's failure to expressly reserve decision on the initial motion to suppress, it still did in fact grant the original motion. This intention is reflected in the statement by the Court (T.516):

> "If this was nine o'clock a.m., feeling as I do now, I would have had to have told this jury that these written confessions which were received in evidence could not be deemed voluntary, because two prior oral statements previous no warnings had been given."

An overall reading of the transcript clearly indicates the Court did in fact grant a motion to dismiss on the grounds that the evidence was insufficient to justify the verdict of the jury. To require the motion to be labled in a certain form, or to require the Court to have made a formal reservation of action, would be to defeat the ends of justice.

Therefore, the contention of the State that double jeopardy would not attach in this instance is without merit. The defendants were tried, jeopardy attached, and the Court ruled that there was insufficient evidence to justify a jury in returning the verdicts of guilty. The Court, therefore, granted the motion of the respondents and directed the dismissal of the action. Both the State of Utah and the respondents have had

their day in court, and the judgment of dismissal should stand.

CONCLUSION

It is the respondents' contention that the defendants were entitled to the Miranda warnings prior to being interrogated by their Guidance Supervisors. It is contended that the focus of investigation was upon these defendants at the time the Guidance Counselors questioned them. It is further the contention of the respondents that at the time of their questioning they were doing the work of the police officers, that the questioning was initiated by the police officers and the school supervisory personnel; that the evidence reflects a custodial type questioning by the supervisors as well as by the police officer; that the students were deprived in a significant manner of their freedom under the evidence of this case, and were not free to go or not go to sessions of questioning either with Guidance Counselors or the police officer. The manner in which the police interrogation proceeded, preceded by the interrogation of the Indian School staff, the late night questioning, the failure to adequately advise of penalties, and the failure to effectively communicate with the students their rights to counsel, would place any statement given by them in the category of an involuntary statement under the prohibitions of the Miranda case. Therefore, the appeal of the State should be dismissed and the respondents permanently discharged.

Respectfully submitted,

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