1969

State of Utah v. Craig Carlsen : Brief of Respondent

IN THE

SUPREME CO

OF THE

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STATE OF UTAH,
Plaintiff-Re

vs.

CRAIG CARLSEN,
Defendant-A

BRIEF OF

AN APPEAL FROM TH
TRICT COURT, IN AND
STATE OF UTAH, THE
JUDGE, PRESIDING.

CRAIG CARLSEN
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IN THE

SUPREME COURT

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STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

CRAIG CARLSEN,
Defendant-Appellant.

Case No. 11884

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Craig Carlsen, appeals from his conviction of grand larceny in violation of Utah Code Ann. § 76-38-4 (1953).

DISPOSITION IN LOWER COURT

The appellant, Craig Carlsen, was charged with the crime of grand larceny by information filed in the First Judicial District Court of the State of Utah, in and for Box Elder County. He was arraigned on February 21, 1969, where he entered a plea of not guilty. Trial by jury commenced on May 7, 1969, and concluded the same day. The jury found the defendant guilty of the crime charged in the information. On May 27, 1969, the defendant was sentenced to the Utah State Prison for an indeterminate term of not less than one year nor more than ten years. The

court granted stays of execution until August 14, 1969, where the court again sentenced the defendant to the Utah State Prison for a term of not less than one nor more than ten years.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

On January 5, 1969, Mr. Wallace A. Bowden, an employee of the Salt Lake Sanitation Treatment Plant at 650 West 3300 South in Salt Lake City, Utah, observed, while at work, a panel truck and an automobile pull up at the gate of the plant and transfer white meat packages from the truck to the car. This observation was made with the aid of field glasses. Mr. Bowden then telephoned the county sheriff to report the suspicious conduct of the three defendants charged in the information. Minutes later, Mr. Earl W. Julian of the County Sheriff's Office arrived at the scene, investigated the conduct and placed the three men under arrest.

ARGUMENT

POINT I.

THE APPELLANT WAS AT NO TIME DEPRIVED OF HIS CONSTITUTIONAL RIGHTS OF PRIVILEGE AGAINST SELF INCRIMINATION AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMEND-

MENTS OF THE UNITED STATES CONSTITUTION.

The appellant contends that he was deprived of his constitutional warning prior to incriminating statements made by himself. In *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the Supreme Court of the United States held that police must inform an individual of his constitutional rights prior to interrogation, but same restrictions on the application of the holding were placed. In the instant case, Officer Julian arrived at the scene of the suspicious conduct reported by Mr. Bowden and asked the appellant what he was doing with the meat (Tr. 28). The appellant then answered that the meat had been brought down from the Dale Olsen Distributing Company for selling purposes (Tr. 28). It is quite clear that at this point of the investigation by Officer Julian, no right to a constitutional warning had arisen. It was not clear, at that point of time, that the defendant had committed a crime. There was merely sufficient evidence to investigate further and the court in *Miranda,* directing itself to that point, stated:

> "General on-the-scene questioning as to facts surrounding a crime *or other general questioning of citizens in the fact finding process is not affected by our holding.*" *Miranda* v. *Arizona,* supra. (Emphasis added.)

In a similar case in the Second Circuit, *United States* v. *Thomas,* 396 F. 2d 310 (2nd Cir. 1968), railroad policemen observed two suspects carrying cartons late at night near a railroad yard. When stopped by the officers, the two men made exculpatory statements which were later

used in their conviction. The court in that case determined that at that point in time no arrest had been made and that no significant deprivation of freedom had occurred. The court pointed to the fact that no restraining, frisking or handcuffing had taken place and therefore under such circumstances, the questioning which related to where the defendants had obtained the cartons they were carrying, was held to be on-the-scene questioning to determine if a crime had been committed, and not a custodial interrogation.

In *Jennings* v. *United States*, 391 F. 2d 512 (5th Cir. 1968), a policeman was examining a parked automobile on which a theft had been reported. The defendant approached the officer and asked what the trouble was and at that point the officer responded by asking the defendant if he owned the car. The defendant stated that he was the owner and produced a registration and drivers license which patently did not belong to him. All of this was prior to arrest and was determined by the court not to be a custodial interrogation.

In still another case, *United States* v. *Gibson*, 392 F. 2d 373 (4th Cir. 1968), an officer, knowing that the automobile in question may have been stolen, pursued defendant into a tavern, asked him to step outside, and there proceeded to question defendant as to the ownership of the car, all prior to a constitutional rights warning.

Therefore, the question asked by Officer Julian in the instant case, was within the scope of on-the-scene questioning or routine investigation of circumstances of a suspicious nature to determine if a crime had been committed,

and consequently no warning of the defendant's constitutional rights was, at that time, appropriate or required.

POINT II.

THE APPELLANT WAS AT NO TIME DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

In *Miranda* v. *Arizona, supra,* it is true the court held that an accused person does have the right to counsel when he is first subjected to interrogation. Again, however, the court in *Miranda* directed itself to the scope of its holding in stating that on-the-scene questioning as to facts surrounding the crime or the general questioning of citizens in the fact finding process did not give rise to the rules relating to warnings and waivers. Therefore, for the same reasons as established in Point I of respondent's brief, the appellant was at no time denied his constitutional rights to warnings and waivers.

POINT III.

NO PREJUDICIAL ERROR WAS COMMITTED WHEN THE TRIAL COURT FAILED TO ADMONISH WITNESSES TO REMAIN SEPARATED WHEN EXCLUDED FROM THE COURTROOM.

The appellant alleges prejudicial error for the trial court's failure to admonish witnesses excluded from court and error by the trial court for failing to comply with Utah Code Ann. § 77-15-12 (1953), which provides:

> "While a witness is under examination, the magistrate *may* exclude all witnesses who have not been examined. He *may* also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they have all been examined." (Emphasis added.)

Appellant also alleges that there is a statutory duty of a magistrate to admonish witness under Rule 43(F), Utah Rules of Civil Procedure, which provides:

> "Upon motion of either party, the court shall exclude from the courtroom any witness of the adverse party, so that he may not hear the testimony of the other witnesses."

A close reading of both Utah Code Ann. § 77-15-12 (1953), and Rule 43(F), Utah Rules of Civil Procedure, will show that in neither statute can a statutory duty be found upon the magistrate to admonish witnesses. At best, the magistrate's obligation rests with an exercise of his discretionary power in such matters and in the instant case such an exercise was in favor of not admonishing the witnesses. *Whitely* v. *State,* 418 P. 2d 164 (Wyo. 1966); *State* v. *Kendrick,* 239 Ore. 512, 398 P. 2d 471 (1966); *State* v. *Denton,* 101 Ariz. 455, 420 P. 2d 930 (1966).

However, appellant contends that even the failure to admonish here was prejudicial error. Respondent submits it was not. Appellant seeks to impart same thread of collusion in testimony between plaintiff's attorney and witnesses during a conference at lunch on the morning of May 7, 1969. As the transcript will show (Tr. 58, 61, 62), no discussion between plaintiff's attorney and witnesses was

engaged in regarding Mr. Hill's testimony later that same day.

Consequently, for the above stated reasons, appellant's allegation of prejudicial error is utterly without merit.

POINT IV.

NO PREJUDICIAL ERROR IS TO BE FOUND IN THE JURY CHARGE.

Appellant erroneously contends that two statements were made by the court in its instructions to the jury which were prejudicial. A close examination of the jury charge will show that neither of the statements were made to the jury.

First, appellant claims that the court instructed the jury in instruction numbered two, paragraph numbered first, that, "A special right to possession is sufficient basis to establish ownership." Nowhere in the above stated instruction or paragraph, or anywhere else in the jury instructions, is such a statement to be found. What the court did instruct in instruction numbered two and paragraph numbered five was "and so the state must establish either that Gary Hill was such owner or that he had some kind of a special ownership or special right to possession of the same *so that it can be said that, for the purpose of a thief or thievery,* that he was the owner." (Emphasis added.) Such an instruction, of course, does not, whatsoever, connote the same meaning as appellant's erroneously alleged instruction. *Borrelli* v. *State,* 453 P. 2d 312 (Okla. 1969); *People* v. *Price,* 46 C. A. 2d 59, 115 P. 2d 225 (1941).

Second, the appellant contends that the court, in instruction numbered five, committed prejudicial error in stating "in fact, the evidence points to the contrary." Again, a close reading of the jury instruction will bear out the fact that no such instruction or comment was ever made. Rather, the comment in question was stricken from the instructions prior to the court's delivery of the said instructions.

Consequently, appellant's contentions in his point IV are erroneous and entirely without merit.

POINT V.

DENIAL BY THE COURT OF DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT WAS PROPER.

Appellant's last point requires a two-part response.

He first contends that there was a break in the evidence leading to the conviction of defendant. As can be seen, however, from Utah Code Ann. § 76-38-1 (1953), the state did complete the chain of prima facie evidence of guilt. The section reads:

> "Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. *Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.*" (Emphasis ours.)

Consequently, the fact that respondent did show the stolen property of Gary Hill (Tr. 75) to be in the posses-

sion of the defendant (Tr. 28) without satisfactory explanation as to ownership (Tr. 28), was prima facie evidence of guilt; to-wit, the inference that the defendant did commit the larceny and that this inference with all other circumstances could be considered by the jury in determining whether or not the defendant was beyond a reasonable doubt guilty of such larceny. *State* v. *Allred,* 16 U. 2d 41, 395 P. 2d 535 (1964); *State* v. *Wood,* 2 U. 2d 34, 268 P. 2d 998 (1954).

Appellant contends in his Point V that the information as filed was defective in that it failed to identify the appropriate name of the aggrieved party; to wit, the partnership name of Box Elder Meat Packing Company. From this allegation, appellant contends that the respondent failed to make its proof in conformance with the alleged defective information, since the stolen property may have been the personal property of Mr. Hill's partner in the business. However, it is easily seen that the information filed naming the personal property as that of one Mr. Gary Hill, falls directly within the purview of Utah Code Ann. § 77-21-17 (1953), which states:

> "Whenever it is necessary in an information, indictment, or bill of particulars, to make any averment as to or to describe any personal property belonging to several partners or owners, *it is sufficient to refer to or describe such property as belonging to any one or more of such partners, without naming them all, or to state that anyone or more of such partners or owners had a right of possession of such property without naming them all.*" (Emphasis ours.)

Therefore, the trial court's denial of appellant's motion for judgment of acquittal, notwithstanding the verdict, was proper and appellant's Point V is without merit.

CONCLUSION

In view of the foregoing facts and authorities, the respondent respectfully submits that the appellant was not denied any of the constitutional rights, that the court committed no prejudicial error, the defendant's motion was properly denied and the judgment of the district court should be affirmed.

Respectfully submitted,

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