1970

State of Utah v. Russell Leonard Moraine : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF UTA

STATE OF UTAH,
Plaintiff-Respondent,

vs.

RUSSELL LEONARD MORAINE,
Defendant-Appe

BRIEF OF RESPON

APPEAL FROM THE JUDGME
JUDICIAL DISTRICT COURT,
LAKE COUNTY, STATE OF UT
ALDON J. ANDERSON, PRESIDING

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IN THE

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STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

RUSSELL LEONARD MORAINE,
Defendant-Appellant.

Case No. 12148

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

This is an appeal from the appellant's conviction of the crime of robbery, entered by a jury's verdict on April 22, 1970, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Aldon J. Anderson, Judge, presiding.

DISPOSITION OF THE CASE IN LOWER COURT

The appellant, Russell L. Moraine, was convicted of robbery following a jury trial. He was sentenced on the 28th day of April, 1970, to an indeterminate term in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent asks this Court to affirm appellant's conviction of robbery and hold that no errors were committed by the trial court.

STATEMENT OF FACTS

The respondent agrees with the statement of facts as outlined by the appellant, but wishes to emphasize that the appellant was in fact shot in the leg as he was leaving the scene of the robbery (T. 86); and further that the police officers in pursuing the robbers followed a trail of blood to where the appellant was hiding (T. 79). It should also be noted that the appellant was followed by a Harold P. Ford, and it was according to his directions that the police found the blood and then the appellant.

ARGUMENT

POINT I.

THE STATEMENTS MADE BY APPELLANT TO POLICE OFFICERS WERE COMPLETELY VOLUNTARY AND ADMISSIBLE UNDER *MIRANDA*.

Miranda v. *Arizona*, 384 U. S. 436 (1966) applies only to custodial interrogations.

> ". . . the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privileges against self-incrimination. 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.

Miranda does not apply to statements which are given

voluntarily. In writing the opinion for the Court, Mr. Chief Justice Warren emphasized:

> "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" *Id.* at 478. (Emphasis added.)

In this case the appellant Moraine was given the *Miranda* warning by both Officers Eugene P. Hunt and Norman Steen (T. 90; 101). The appellant does not contest the warning itself as being deficient in any way. Moraine was told twice that he had the right to remain absolutely silent and that anything he said could and would be used against him at his trial. There is no question but that Moraine understood the warnings given him. The appellant made no response to the warning and did not indicate whether he wanted an attorney present. The appellant was taken into custody and transported by police car to the hospital. On the way to the hospital, Mr. Steen, who knew the appellant previously, talked to him. There is no testimony as to what was said except that Mr. Steen asked the appellant "why he had done it" (T. 103). There is nothing in the trial transcript to indicate that other questions were asked about appellant's connection with the robbery. There was no interrogation being conducted by Officer Steen. After the question was asked, the appellant, who had been fully advised of his rights, including the right against self-

incrimination, responded voluntarily by saying that he needed the money for Christmas (T. 103). This statement was made after appellant was fully advised of his rights, and he *knew* that he had the right to remain silent.

The setting in which the statement was made is important. Even though the appellant had been shot in the leg, there is no testimony that he was in extreme pain. There was no police brutality or coercion. There is no evidence that other questions were asked by Officer Steen concerning the robbery. There was no *interrogation* of the appellant. As stated in *Miranda*: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 484 U. S. at 478. There were no compelling influences in this case and the appellant's statement was given freely and voluntarily.

The appellant claims in his brief that there was no valid waiver of his right against self-incrimination. The fact is, however, that appellant answered the question after knowing that he did not have to answer. Just by answering the question the appellant waived his rights, and all that the State needed, to show that the appellant did waive his rights, was that he answered the question. So the appellant's argument that the record is absolutely devoid of any showing by the State of a waiver is without merit. Further, there is no showing that the appellant did indicate after the warnings that he wished to remain silent. He said nothing after the warnings were given to him. This silence was not the basis of the waiver, but the silence is important when coupled with the fact that the appellant did in fact

answer a question put to him by Officer Steen. Having said nothing, the arresting officer could ask him if he wished to waive his rights. Officer Steen, in effect, did just that when he asked appellant "why he had done it."

The statement by appellant to Officer Steen is admissible both because it was voluntary and because it constitute a waiver of his constitutional right against self-incrimination. The statement was voluntary in the traditional sense and *Miranda* does not require its exclusion, but on the contrary, sanctions its admission as evidence. The trial court did not err in allowing the statement into evidence.

The appellant also challenges the statement made by himself to Officer Calvin J. Crockett while in the hospital recovering from a gunshot wound (T. 86). Officer Crockett had been assigned to guard the appellant at this hospital. He had also taken part in the robbery investigation, but his assignment had been completed prior to his assignment as a guard. The appellant and Officer Crockett were discussing guns one day, and the appellant told Officer Crockett that "since he had been shot in the leg coming out of the Seven-Eleven Store attempting to bring the hammer forward without actually firing it he had become somewhat leery of that type of weapon" (T. 86). Again, this statement was made voluntarily and freely and is admissible under *Miranda.* In *People* v. *Spearman,* 1 Cal. App. 3d 898, 82 Cal. Rptr. 277 (1969), the defendant made the statement "I have been trying real hard to go straight, I just made a mistake last night." The officer had just given him the *Miranda* warning and was not going to interrogate him.

The court held that the statement was spontaneous and voluntary and hence admissible. It was also determined that at this point it was unnecessary to determine if the *Miranda* warning was complete, understood or waived.

Also in *Williams* v. *Johnson,* 225 Ga. 654, 171 S. E. 2d 145 (1969), the Georgia Supreme Court ruled that admissions made by a defendant were admissible where they were made without interrogation. Both statements were made voluntarily and after the appellant was given his *Miranda* warnings.

On the question of waiver, there is ample authority for the proposition that by answering questions or making statements after receiving the *Miranda* warning, the defendant does make a valid waiver by making a statement or answering a question. In *Pettyjohn* v. *United States,* 419 F. 2d 651 (D. C. Cir. 1969), the accused made a confession after being warned of his right to remain silent. He was asked if "he wanted to talk about it." *Id.* at 655. The defendant then answered all the questions freely and easily. He waived his right to remain silent by talking when the question was asked. As in this case, the defendant in *Pettyjohn* was told more than once that he had the right to remain silent and that counsel would be appointed to represent him. This fact that Pettyjohn was so advised convinced the Court that he meaningfully and knowingly waived his Fifth Amendment right to remain silent. The Court premised this holding with the following:

> "Thus we conclude that, under the law today, *it is possible* for a person to waive his right to remain silent and to wish to voluntarily discuss the

> action that he had so recently taken which must have weighed so heavily on his mind." *Id.* at 654.

The case before this Court is an excellent example of the D. C. Circuit Court's premise. The appellant did waive his right against self-incrimination and both statements were made voluntarily and in the absence of any threats or coercion. *See also, Pryor* v. *State,* 449 S. W. 2d 482 (Tex. Cr. 1970); *Smith* v. *State,* 229 So. 2d 551 (Miss. 1970); *State* v. *Jiminez,* 22 Utah 2d 233, 451 P. 2d 583 (1969). The *Jiminez* case applies particularly to the second statement made by the appellant to Officer Crockett while at the hospital. The statement was not solicited by the police officer, and was not made in response to any questions asked by Officer Crockett.

The respondent submits that the trial court did not commit error in allowing both statements into evidence. Both were made voluntarily and both constituted a waiver of his rights of which he had been warned twice.

POINT II.

THE APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS NOT INFRINGED BY STATEMENTS MADE BY THE PROSECUTOR CONCERNING APPELLANT'S SILENCE IMMEDIATELY FOLLOWING THE *MIRANDA* WARNING.

It should be pointed out at the outset that this is not a situation where the prosecutor made reference to the jury about appellant's refusal to testify at trial. The statement

made by the assistant district attorney was with reference to appellant's silence immediately after he was given his *Miranda* warnings (T. 106). Also the record does not indicate clearly, exactly what comment was made to the jury. No proffer of proof was made by the appellant so that his point could be preserved on appeal. The near silent record makes it very difficult for this Court to find any prejudicial conduct. There is nothing in the transcript which indicates that the appellant was prejudiced. The Supreme Court cannot consider facts stated in briefs which may be true but which are not present in the official record. *Watkins* v. *Simonds*, 14 Utah 2d 406, 385 P. 2d 154 (1963). *Cooper* v. *Forester's Underwriters, Inc.*, 123 Utah 214, 257 P. 2d 540 (1953).

In this case any remark made by the prosecutor regarding the appellant's waiver of his *Miranda* rights was proper since the appellant had in fact waived those rights. The waiver is discussed in Point I. Even assuming error, it was not prejudicial error and did not effect the substantial rights of the appellant.

> "After hearing on appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties." Utah Code Ann. § 77-42-1 (1953).

Once a fair trial has been given and the verdict is supported by the evidence, the proceedings are presumed to be valid and the court will not reverse for mere technicalities or irregularities. *State* v. *Valdez*, 19 Utah 2d 426, 429, 433 P. 2d 53, 55 (1967).

The United States Supreme Court has recognized that some constitutional errors are harmless.

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 states have harmless error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U. S. C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of the state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman* v. *California,* 386 U. S. 18, 21-22 (1967).

The error, if any, in this case was of such a nature. The comment was made by the prosecutor *after* the appellant had *waived* his right to remain silent. Since the appellant's Fifth Amendment right had been waived, the prosecutor was within his rights to mention appellant's silence, which silence occurred immediately after the *Miranda* warning

was given. Such a comment would be no different than a comment to the jury that a defendant had waived his Fifth Amendment right by taking the witness stand.

In the absence of a controlling mandate from the High Court, many states have applied the harmless error doctrine to confessions obtained in violation of *Miranda*. *Soolook* v. *State*, 447 P. 2d 55 (Alaska 1968); *Guyette* v. *State*, 438 P. 2d 244 (Nev. 1968). The Guyette court held that failure to advise the accused of his right to the presence of counsel, either appointed or retained, constituted harmless error. The court said:

> "Although the High Court has not yet ruled that the doctrine of harmless error may be applied to a *Miranda* warning violation, the drift of its opinions would suggest that the rule of harmless error may be utilized when any of the new procedural safeguards, as expressed in [citations omitted], are breached. We say this mainly because the constitutional doctrine of those cases were not given retrospective application, apparently for the reason that a violation may occur without necessarily affecting the fundamental fairness of the trial. Due process in the traditional sense is not necessarily denied the accused. The very integrity of the fact finding process is not necessarily infected by the violation. The reliability of the evidence received is not necessarily suspect. Hence, the rule of 'automatic reversal' does not control appellate disposition." *Id.* at 248.

The Nevada Court then ruled that there was limited room for a "state court to consider the rule of harmless error when the procedural safeguards of *Miranda* are not fully honored." *Id.* at 249.

The respondent submits that the facts of this case provide such a setting. The appellant was not denied due process of law. The appellant had made voluntary statements which were admissible. These statements constituted a waiver of his right to remain silent. The appellant was given his complete *Miranda* warnings twice.

The trial judge determined that the prosecutor did not commit reversible error. Even assuming that this determination was error, it can be deemed harmless error since it did not affect the appellant's substantial rights.

POINT III.

THE PROSECUTING ATTORNEY IS NOT REQUIRED TO SUPPLY THE DEFENSE WITH THE EVIDENCE BEFOREHAND, AND THE APPELLANT CANNOT CLAIM SURPRISE.

As stated by this Court in *State* v. *Jameson,* 103 Utah 129, 133, 134 P. 2d 173, 175 (1943), "the bill of particulars need not plead matters of evidence." The purpose of the bill of particulars was outlined in *State* v. *Winters,* 16 Utah 2d 139, 396 P. 2d 872 (1964), wherein this Court said:

> "The purpose of the bill of particulars is to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense; the bill need not be so detailed as to state matters of evidence." *Id.* at 144, 396 P. 2d at 875, 876.

The statements made by the appellant to Officer Crockett were matters in evidence and did not go to the particu-

lars of the offense of robbery and did not need to be pleaded in the bill of particulars.

In *State* v. *Lack*, 118 Utah 128, 221 P. 2d 852 (1950), the defendant made a motion to have the court impound certain documents for examination by the defendant prior to trial. He alleged that the court abused its discretion in denying the motion. The court held:

> "It is within the sound discretion of the trial court whether a defendant shall be allowed or denied the privilege of examination of evidence in the possession of the prosecution prior to trial." *Id.* at 134, 221 P. 2d at 855.

This question was again settled in *State* v. *Martinez*, 21 Utah 2d 187, 442 P. 2d 943 (1968), wherein the court ruled that the refusal to require disclosure of prosecution's evidence was not error. *Id.* at 198, 442 P. 2d at 944.

The surprise spoken of in *King* v. *United States*, 402 F. 2d 289 (10th Cir. 1968), cited on page 7 of appellant's brief, is related to the particulars of the offense with which the defendant is charged. The Tenth Circuit is saying that the accused must be adequately informed of the charges against him so as to avoid prejudicial surprise. Nothing is said with reference to evidence being given by the prosecution. Furthermore, it cannot be claimed that the appellant was gravely prejudiced by the statements made to Officer Crockett being offered into evidence at trial. If anyone should have known of such statement, it was the appellant himself. The statement was made by him, and surely the

state is under no obligation to tell defense counsel what his client should tell him.

Of particular importance is the fact that when Officer Crockett testified in court as to the statements made by the appellant, the objection by defense counsel was not based upon the fact that he was surprised by the statements made, but upon the basis that there had been no showing of a waiver of his right to remain silent (T. 86). The appellant did not make the proper objection at trial and should not be entitled to make it at this time. This Court has held that a party may not take exception on one ground and then, if he is convicted, use different grounds to obtain a reversal. *State* v. *Valdez,* 19 Utah 2d 426, 429, 432 P. 2d 53, 55 (1967).

In any event, the appellant was not entitled to the evidence that the prosecutor had in his possession via a bill of particulars. The prosecutor was within his right not to give such evidence in the bill of particulars. The respondent submits that there was no prejudice in this situation and that the appellant cannot now claim surprise.

CONCLUSION

The respondent asks this Court to affirm the conviction of the appellant, Russell L. Moraine, on the basis that he was given a fair trial and that no prejudicial errors were committed by the trial court. The statements made by the appellant were made voluntarily and with a full understanding of his right to remain absolutely silent. No

prejudice resulted from the prosecuting attorney mentioning to the jury that after the appellant was given his *Miranda* warning he remain silent.

Respectfully submitted,

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