1970

State of Utah v. Albert Allan Melton : Brief of Appellant

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-vs-
ALBERT ALLAN MELTON,
Defendant-Appellant.

Case No. 12149

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Albert Allan Melton, appeals from a conviction of robbery rendered in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellant, Albert Allan Melton, was found guilty by a jury of the crime of robbery on April 23, 1970, and was thereafter sentenced to be committed to the Utah State Prison on April 27, 1970, for the term prescribed by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the robbery conviction and a new trial.

STATEMENT OF FACTS

On June 26, 1969 at about 7:30 p.m. the attendant at the Boston Building Garage, Frank Jamnik, was robbed by a man with a shotgun. (R. 84) Mr. Jamnik testified that at a lineup on January 10, 1970, and at the preliminary hearing he had said he was "pretty sure" that appellant was the man who robbed him, but he was not "positive," not "100% sure." (R. 88-90). Mr. Jamnik identified appellant at trial as the one who robbed him on June 26, 1969. (R. 86)

James Tea testified over objection of appellant that on June 26, 1969, the appellant borrowed a shotgun at about 5:00 or 6:00 o'clock p.m. and returned it that same night at about 9:30 p.m. (R. 91, 92) He admitted, however, that he did not remember that it was June 26, 1969, when this occurred, but that the district attorney had told him that was the date. (R. 92)

Officer Floyd Ledford testified that he and Officer Percy Clark arrested appellant on January 2, 1970, for armed robbery, and told him his rights under the *Miranda* decision. (R. 95) He stated that in the police car he showed appellant some handcuffs that

were involved in the robbery. Appellant objected at this point on the grounds that there was no showing of a waiver of appellant's rights. (R. 95, 96). Officer Ledford testified over objection that appellant said he had some handcuffs but he didn't know if that pair was his. He testified that appellant said he understood his rights, and that he wished to talk. However, when asked about the robbery he had nothing to say. (R. 97) Appellant was taken to the Salt Lake Jail Facility and booked. Officer Ledford stated that as he and Officer Clark were about to leave, appellant called them back and stated he wanted to talk. (R. 97, 98) This is in conflict with Officer Ledford's prior testimony at the Motion to Suppress hearing where he did not mention that appellant volunteered any information. Appellant was not readvised of his rights at this point in the jail, but Officer Ledford testified that he told appellant that the same rights still applied. This also was not testified to at the Motion to Suppress. Over objection, Officer Ledford stated that appellant told him and Officer Clark that he was the one who borrowed Tea's shotgun and held up the Boston Building Garage on June 26, 1969. (R. 98, 99) On cross examination Officer Ledford stated he did not threaten appellant, but told him that he was a suspect in other cases. (R. 101) He didn't recall whether or not he told appellant these other charges (including a Federal charge) might be filed. (R. 102) Appellant was told about these other charges

merely "to inform him that there were other cases pending that he was a suspect." (R. 103) However, Officer Ledford did admit that part of the purpose was to induce a statement, but he said that was basically not the reasons, (R. 103, 104) because they (the police) felt the case was solved, despite the fact that the victim could not positively identify the defendant at that point in time. (R. 104, 105).

At the Motion to Suppress (R. 49-74) which was held prior to trial on March 23, 1970, appellant testified that on the date of his arrest, January 2, 1970, Officers Ledford and Clark told him that if he did not cooperate other charges would be filed against him (R. 52, 53) and that they would try to see to it that his parole was revoked and that they would check to see if any other robberies could be pinned on him. (R. 55). He further testified that they did not readvise him of his rights at the jail and that he didn't know from the first warning whether he had to make a statement, though he had understood the first warning. (R. 57) He stated that they said he could fight the robbery from prison because he would get his parole revoked, but that if he cooperated they (the police) would see that no hold was placed on him, (R. 57) and he would be back out of prison.

Officer Ledford denied making any threats or promises at this hearing (R. 64-66) and at the trial. (R. 101) Officer Clark also testified that no threats or

promises were made to get appellant to cooperate, but that appellant was told about other charges that could be filed merely to inform him of that fact. (R. 70, 72)

The trial court denied appellant's Motion to Suppress the statements in question.

ARGUMENT

POINT I

STATEMENTS MADE BY APPELLANT TO POLICE OFFICERS WERE IMPROPERLY ADMITTED BECAUSE THERE WAS NO ADEQUATE SHOWING BY THE STATE OF AN INTELLIGENT AND KNOWING WAIVER BY APPELLANT OF HIS CONSTITUTIONAL RIGHTS.

Under *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 692 (1966), it is clear that when an accused is in custody he must be given certain warnings before he can be interrogated. There is no question here but that appellant was in custody in that he was under arrest. These rights can be waived, but *Miranda* held that there is a heavy burden on the state to show that the accused knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. 384 U.S. at 475. If an individual is alone and indicates in any way that he does not wish to be interro-

gated after he is warned, the police may not question him. 384 U.S. at 445. This is based on the rationale of trying to stop situations where an accused person says "no" to attempts at questioning and the police refused to accept "no" for an answer. *United States v. Bird,* 293 F. Supp. 1265 (D. Mont., 1968). In *Bird,* the accused stated that he did not wish to discuss the matter and then later made a statement. The court held that where an accused first states that he does not want to talk and then later makes a statement, the burden on the state is greater to show a valid waiver.

In appellant's case, appellant indicated in the police car that he did not have anything to say about the robbery, and that he understood his rights. (R. 97) Soon thereafter in the jail appellant gave a statement to the police officer. Appellant testified at the Motion to Suppress that this was under threats and that he was not readvised under *Miranda.* (R. 52-55) Officer Ledford testified at trial, but not at the Motion to Suppress, that appellant volunteered this statement. (R. 97, 98) He also testified that appellant was not readvised of his rights. (R. 101) Officer Clark testified at the Motion to Suppress but not to the effect that appellant volunteered any statements, but simply that no threats or promises were made. (R. 70-72). Thus, there is the statement of one officer, in which he neglected to mention at the Motion to Suppress, that the statement of appellant was volunteered. This was contradicted by

appellant and was not supported by the other police officer who was present. The Court in *Miranda* stated that a valid waiver will not be presumed from the silence of the accused after he has been warned and from the fact that a statement was eventually obtained. 384 U.S. at 475.

Thus appellant contends that since he refused to talk about the charge to the police in their police car, they were under a duty not to question him further and that any statements resulting from such further questioning are inadmissable under *Miranda*. Further, the state has not met the heavy burden it bears under *Miranda* of showing that there was a valid waiver and a volunteered statement by simply introducing the contradicted and unsupported statement of one police officer, whose testimony was inconsistent with his own prior testimony on the same subject. *Miranda* held that an accused's constitutional rights have been violated if a conviction is based in whole or in part on an involuntary confession regardless of its truth or falsity and even if there is ample evidence aside from the confession to support the convictions. See footnote 33, 384 U.S. at 464. Therefore appellant contends that he is entitled to a reversal of his conviction and a new trial.

POINT II

STATEMENTS MADE BY APPELLANT TO POLICE OFFICERS WERE IMPROPERLY

ADMITTED BECAUSE THEY WERE NOT MADE VOLUNTARILY BUT AS A RESULT OF PROMISES AND THREATS THAT APPELLANT WOULD BE CHARGED WITH OTHER CRIMES.

Appellant testified that he was threatened by police officers that if he did not cooperate with them they had other charges they could bring against him and that they would see to it that his parole was revoked. (R. 52, 53, 55) He also testified that promises were made to him on the condition that he cooperated. (R. 57) These threats and promises were denied by the police officers, but both officers Ledford and Clark testified that appellant was told about the other charges that could be brought (R. 70, 101, 102), merely to inform appellant of this fact. However, Officer Ledford did admit on cross-examination that even though the basic purpose of telling appellant about these other charges was not to induce him to make a statement, "there was some inference to that." (R. 104)

The law seems well settled that a confession is not made involuntary only by the presence of the third degree or physical coercion. "Coercion that vitiates a confession . . . can be mental as well as physical. . . . Subtle pressure may be as telling as course or vulgar ones. . . ." *Garrity v. Jersey,* 385 U.S. 493, 496, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967). The basic standard of whether

a confession is voluntary or not is well summarized in *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 795, 9 L.Ed.2d 770 (1963). The Court said there that if the ". . . individual's 'will is overborn' or the confession not the 'product of rational intellect and free wil,' " the confession will be inadmissable because coerced. Significantly it is also there stated, 372 U.S. at 307, that "these standards are applicable whether a confession is the product of physical intimidation or psychological pressure. . . ."

The United States Supreme Court has further laid out what constitutes a voluntary confession. To be admissable a confession must be ". . . freely and voluntarily given: that is, must not be extracted by *any sort of threats* or violence, nor obtained by any direct or *implied promises, however slight,* nor by the exertion of any improper influence." (emphasis added) ***Brady v. United States,*** 397 U.S. 742, 753, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970). From this language it is clear that speculation as to the amount of pressure exerted will be largely useless as even "implied promises, however slight" and "any sort" of threat will invalidate the confession.

A case similar to appellant's is ***People v. Boles,*** 221 Cal. App.2d 455, 34 Cal. Rptr. 528 (1963). There a conviction of receiving stolen property was reversed because a confession admitted at trial was held not voluntary. The police officer in ***Boles*** told the defendant at

the police station that he wanted to get to the bottom of the thing, and that he was going to charge defendant with burglary. The defendant said that he was not involved in the burglary. The officer told him that he would not charge him if he was not involved and if he told what he knew about the case. The resulting statement was held to be coerced and so invalidated the confession.

In appellant's case, taking the evidence in the light most favorable to the State, the officers did not state that appellant would be charged if he didn't cooperate or that he would not be charged if he did cooperate. However, if one is told that there could be charges filed against him, the obvious inference is that the charges will be brought if he fails to cooperate and they will not be brought if he cooperates. It strains the reality of the situation to believe that police officers tell an accused person about other cases that could be brought against him merely to inform him of this fact so he will be aware of it. They are under no duty to so inform.

Where a defendant is told that other charges could be filed against him while in a jail setting, while an investigation of a robbery is being made and while the victim states he is unable to positively identify the perpetretor of the crime and a confession is clearly needed to solve the case, the conduct by the police officers would clearly fit into the *Brady v. United States, supra,*

category of "implied promise, however slight" in that it was at least an implied promise that if cooperation were forthcoming, other charges would not be filed. This plus the fact that Officer Ledford admitted that an inference of his and Officer Clark's activity would be to induce a statement comes quite clearly within the prohibition of the above cases and therefore the resulting statements should not have been admitted.

Whether the police officers actually had the power and authority to carry out their threats and promises is not a question here. In *Lynumn v. Illinois,* 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed. d 922 (1963), the Court held that it was of no consequence if the promissor had the power to carry out the threat or promise, so long as the confessor believed he had the power. A police officer in a jail would clearly come within this rule of apparent authority. *Bram v. United States,* 168 U.S. 532, 18 S. Ct. 183, 92 L.Ed. 568 (1897).

Appellant submits that as the statements made at the jail were inadmissable his constitutional rights under *Miranda* have been violated regardless of the truth or falsity of the confession or even if there is no other evidence to support the conviction. 384 U.S. at 464.

POINT III

THE TESTIMONY OF JAMES TEA WAS IMPROPERLY ADMITTED BECAUSE THE

PROSECUTION DID NOT DISCLOSE IN THE BILL OF PARTICULARS THAT JAMES TEA WOULD BE A WITNESS FOR THE PROSECUTION AND APPELLANT WAS THEREBY PREJUDICED BY BEING UNABLE TO PREPARE A DEFENSE AND BEING UNFAIRLY SURPRISED AT TRIAL.

The Utah Statute governing the bill of particulars is 77-21-9, Utah Code Ann., (1953). That statute provides in part:

> When an information . . . charges an offense in accordance with provisions of § 77-21-8, but fails to inform the defendant of the particulars of the offense, sufficiently *to enable him to prepare his defense,* . . . the court . . . shall at the request of the defendant order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes. . . .

The purposes of a bill of particulars can be seen from the above statute and from cases like *Wyatt v. United States,* 388 F.2d 395 (10th Cir. 1968), where it was held that the purposes of the bill of particulars are to "inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, *to avoid or minimize the danger of surprise at the time of trial . . .*" (emphasis added). Numerous other cases are to the same effect. See, for

example, *United States v. Leach,* 427 F.2d 1107 (1st Cir. 1970); *United States v. Sullivan,* 421 F.2d 676 (5th Cir. 1970). Appellant contends that he was not able to prepare his defense to the charge adequately and was unfairly surprised at trial. Had appellant known that James Tea was going to testify he could have been able to meet and challenge his testimony which was to the effect that appellant had borrowed a shotgun shortly before the robbery in question and had returned it shortly thereafter. (R. 91-93) Tea was not sure of the date, but had only been told that was the date by the district attorney. (R. 93) Thus, appellant could have had other evidence to show that that was not the date he borrowed the shotgun. Without the knowledge that Tea was going to testify appellant was unfairly surprised. In *State v. Moraine,* 25 Utah2d 51, 475 P.2d 831 (1970) this court held that, 475 P.2d at 833, "all that is required in the bill of particulars is to give information of the particulars of the crime charged so as to enable a defendant to prepare his defense thereto." In that case the defendant had made a statement to a hospital guard that implicated him in a crime. This court said that the prosecution is not required to tell the defendant what evidence will be presented to prove the charge. However, appellant's case is necessarily distinguishable from *Moraine.* In that case the district attorney did not know at the time the bill of particulars was prepared of the defendant's statement to the hos-

pital guard. Further, there was no objection to the testimony on the basis of surprise, but it was objected to on constitutional grounds. In appellant's case, objection was made to Tea's testimony before he testified, (R. 82) on the basis of surprise as this court indicated is necessary in *Moraine*. As a result, appellant contends that the testimony of James Tea should not have been admitted because appellant had no notice from the bill of particulars that he was to be a witness and his testimony unfairly surprised appellant at trial.

CONCLUSION

For the reasons above stated, that appellant's statements should not have been admitted because there was no showing of a valid waiver of his constitutional rights and the statements were not voluntarily and freely given, and that the testimony of James Tea unfairly surprised appellant at trial, appellant respectfully submits that the case should be reversed and remanded for a new trial.

Respectfully submitted,

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