1971

The State of Utah v. Eugene Myers : Brief of Appellant

In The Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff-Respondent

-vs-

EUGENE MYERS,

Defendant-Appellant

BRIEF OF APPE

Appeal from a judgment in the
the Second Judicial District in and
ty, State of Utah, the Hon
presiding.

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Respondent.
-vs-
EUGENE MYERS,
Defendant-Appellant.

Case No. 12733

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Eugene Myers appeals from a verdict of guilty of the charge of contributing to the delinquency of a minor.

DISPOSITION IN THE LOWER COURT

The Honorable R. W. Garff found the defendant guilty of the charge of contributing to the delinquency of a minor. The defendant was sentenced to six months in the Salt Lake County Jail.

RELIEF SOUGHT ON APPEAL

Appellant requests that the judgment of the trial court be reversed.

STATEMENT OF FACTS

This case involves the crime of contributing to the delinquency of children under the age of eighteen years.

The defendant, Eugene Myers, on the 13th day of June, 1970, had occasion to be in Room No. 19 of Scotty's Motel in Salt Lake City. At about 3:00 p.m. several police officers entered the room looking for one Lynn Beebe, a juvenile runaway. Upon seeing the girl the officers had her mother identify her as Lynn Beebe; then the officers proceeded to conduct a search of the room occupied by the defendant. During such search, a bag of substance was found which later proved to be marijuana. Prior to the discovery of the marijuana no arrest had been made, in fact it does not appear defendant was ever officially arrested prior to his being booked into the Salt Lake County Jail. Defendant was charged with the crime of contributing to the delinquency of children.

ARGUMENT

POINT I

THE SEARCH AND SEIZURE OF THE EVIDENCE INTRODUCED AT APPELLANT'S TRIAL WERE UNLAWFUL UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THE ADMISSION INTO EVIDENCE AT PETITIONER'S TRIAL OF SUCH ITEMS SEIZED DURING THE UNLAWFUL SEARCH WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

The law is well settled that a search made by official authorities will be reasonable under the Fourth

Amendment only under one of the following three circumstances:

1) Pursuant to search warrant. *Aguilar v. Texas,* 378 U.S. 102, 12 L.Ed.2d 723 (1964)
2) Incident to a lawful arrest. *Ker v. California,* 374 U.S. 23, 10 L.Ed.2d 726 (1963)
3) With the consent of the owner of the place or item searched. *Stoner v. California,* 376 U.S. 483, 11 L.Ed.2d 856 (1964)

In the case at bar the search was not under authority of a warrant, (T. 7) nor was it with consent. (T. 7) In a search incident to lawful arrest, the arrest must come first, the search after the arrest. *Dearing v. State,* 79 N.E. 2d 535, 226 Ind. 273 (1948); *United States v. Sully,* 56 F. Supp. 942 (1944). From the transcript it is quite clear that the search in question came prior to arrest.

In answer to the question "did you place anyone under arrest that day" Officer Thirst testified "no, I did not." (T. 21, line 21) In answer to the question "Did you or any other officer that was with you place Mr. Myers under arrest?" Detective Bernardo testified "Thirst did. I never."

By their own testimony neither officer arrested the appellant, they simply entered Room 19 at Scotty's Motel, searched the room and then took the appellant downtown and booked him.

The evidence seized during the illegal search was the only physical evidence introduced at defendant's trial. A conviction could not have been obtained without the evidence.

In *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed.2d 171 (1964) the Supreme Court held that a conviction in which illegally seized evidence had been produced at trial must be overturned unless the effect of the introduced evidence could be declared "harmless beyond a reasonable doubt." This is in keeping with the common law rule of shifting the burden to the one admitting the prejudicial error. (1 Wigmore, Evidence Section 21, 3rd Ed. 1940)

Three years later, the Supreme Court reiterated this position of placing of the burden on the prosecution in cases of constitutional error. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. State of California,* 386 U.S. 125, 87 S.Ct. 824 (1967).

In *State v. Scandrett,* 468 P.2d 639, 24 Utah2d 202 (1970) on the issue of introduction of illegally obtained evidence, the Utah Court citing *Chapman, supra,* stated "there is a presumption that such error is prejudicial."

POINT II

DEFENDANT WAS TRIED IN HIS ABSENCE IN VIOLATION OF HIS RIGHTS.

The transcript shows that the trial was continued until November 19, 1970 at 10:00 a.m. (T. 70) The transcript further shows that trial was commenced on January 29, 1971 without any explanation or indication that any notice of this new date was ever given to the defendant. (T. 71) The transcript shows that the defendant was not present. (T. 71)

Apellant contends that continuing his trial in his absence was a denial of due process.

In *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.2d (1884), it was recognized that if the defendants was deprived of his life or liberty without being personally present at his trial, and if such deprivation violated the requirements of certain territorial legislation, such deprivation would be without due process of law by the Constitution.

While holding that an appellate court did not deprive the defendant of due process by taking certain action in his absence, in *Dowdell v. United States,* 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753 (1911), the court expressed the view that in *Hopt v. Utah, supra,* it had been held that due process of law required the accused to be present at every stage of the trial.

Other cases have held that the defendant must be present at all stages of the trial and even voluntary absence would be a ground to set aside the verdict and grant a new trial. *State v. Smith,* 90 Mo. 37, 1 S.W. 753 (1886), *Sherrod v. State,* 93 Miss. 774, 47 St. 554 (1908), *Warfield v. State,* 96 Miss. 170, 50 So. 561 (1909).

In *State v. Mannion,* 19 U. 505, 57 P. 742 (1899), the court recognized that the Constitution of Utah provides that the accused in criminal prosecutions shall have the right to appear and defend in person. The court also found that a defendant cannot waive this right. (See Utah Constitution, Article 1, Section 12, Section 7 and Utah Code Annotated, Section 77-27-3).

Appellant further contends that continuing his trial in his absence violated his Sixth Amendment Rights of the United States Constitution.

In *United States v. Hayman,* 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952), the court expressed dictum to the effect that in a criminal trial where the guilt of the defendant is in issue . . . his presence is required by the Sixth Amendment.

More recently in *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) reh den 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80 the United States Supreme Court said that the confrontation clause of the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be

confronted with the witnesses against him, and that one of the most basic of the rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial. The court went on to say that a disruptive defendant could be removed from the court and his trial continued in his absence. However, the appellant is not in the same position as *Allen*. Rather, appellant was absent from a part of his trial and he was not removed from the court for being unruly. *Allen* deals with unruly defendants and grants the court the right to remove them and proceed without such defendants being present. *Allen,* however, recognizes that defendants who are not unruly have to be present during trial.

POINT III

THE APPELLANT WAS NOT REPRESENTED BY COUNSEL DURING THE MAJOR PART OF HIS TRIAL. THE RESULTING CONVICTION IS THEREFORE INVALID.

The transcript shows that prior to trial the appellant's attorney conversed with the prosecuting attorney informing him that due to matters in Third District Court requiring her presence, she could not be present at appellant's trial. (T. 71) The attorney for appellant further represented that her objections to continuance of the trial in her absence be noted. (T. 71)

The court proceeded with the appellant's trial in the absence of his attorney. (T. 71) The defendant was evidently found guilty although the transcript does not so indicate. At any rate, the defendant was sentenced to six months in the Salt Lake County Jail on June 2, 1971. (T. 88)

In *Argersinger v. Hamlin,* 32 L.Ed.2d 530, 92 S.Ct..... (1972), the United States Supreme Court reversed the conviction on a misdemeanor charge of a Florida man tried without benefit of counsel. The court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial." Though *Hamlin, supra,* was decided after the case at bar, that its application is retroactive seems quite clear from a statement made by the court in *Hamlin, supra* concerning *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 799, 83 S.Ct. 792 (1963). "We dealt with a felony trial. But we did not so limit the need of the accused for a lawyer."

Also *Gideon, supra,* clearly applies to convictions obtained prior to 1963, Lester J. Mazor, "The Right to Be Provided Counsel, Variations on a Familiar Theme," 9 Utah LR 50 (1964) annotation No. 61 at Page 56.

It follows that *Hamlin, supra,* applies to convictions prior to 1972. Appellant's trial without the presence of his attorney was a denial of due process necessitating the reversal of his conviction.

CONCLUSION

The appellant's trial was conducted without the presence of either himself or of his attorney. The conviction was based entirely upon evidence illegally seized in violation of petitioner's rights as guaranteed under the Fourth Amendment of the Constitution of the United States. The appellant respectfully submits that for these reasons the judgment of the court below be reversed and that his case be remanded.

Respectfully submitted,

JACK W. KUNKLER

Attorney for Appellant