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

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

EUGENE MYERS,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE [illegible] 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 RESPONDENT

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

Respondent seeks affirmation of the conviction.

STATEMENT OF FACTS

Responding to a call on June 13, 1970, police officers went to Scotty's Motel to assist a Mrs. Beebe in locating her twelve year old daughter who had run away from home (T. 11, 12). The officers knocked on the door of room 19 and upon gaining admittance through the consent of its occupants, they noticed a bag of what appeared to be marijuana laying on a nightstand in the room (T. 13). The marijuana was seized and the defendant was charged with contributing to the delinquency of a minor (T. 18, 83). Counsel was appointed for the defendant who represented him at the preliminary hearing and at the first of two days of trial, (T. 2, 3, 26) but failed to appear for the second day of trial (T. 71). The defendant was free on bail and was in attendance at the preliminary hearing (T. 3), but did not attend either day of his trial (T. 26, 71).

ARGUMENT

POINT I.

THERE WAS NO VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS IN THE SEIZURE AND ADMISSION OF EVIDENCE AT HIS TRIAL, AS OBJECTS FALLING IN THE PLAIN VIEW OF AN OFFICER WHO HAS THE RIGHT TO BE IN A POSITION TO HAVE THAT VIEW ARE SUBJECT TO SEIZURE AND MAY BE INTRODUCED AS EVIDENCE.

The foregoing contention was confirmed by the Supreme Court of the United States in the case of *Harris* v. *United States*, 88 S. Ct. 992, 390 U. S. 234, 19 L. Ed. 2d 1067 (1968), wherein the Court stated:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker* v. *California*, 374 U. S. 23, 42, 43 (1963); *United States* v. *Lee*, 274 U. S. 559 (1927); *Hester* v. *United States*, 265 U. S. 57 (1924)." *Id.* at 993.

The Supreme Court recently reaffirmed this basic constitutional principle in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022 (1971) as it stated:

> "What the plain view cases have in common is that the police officer in each of them had a prior justification for an *intrusion* in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Id.* at 2038.

The plain view doctrine is based on the logical notion that where an officer can observe and seize evidence without having to look for it, he has not conducted a "search" within the meaning of the Fourth Amendment. *United States* v. *Lee*, 274 U. S. 559 (1927).

In *State* v. *Allred*, 16 Utah 2d 41, 395 P. 2d 535 (1964), the Utah Supreme Court stated,

> "No search was necessary for the officer to find these articles, they being fully disclosed to his view when he approached the car. Under such

> circumstances, where no search is required the constitutional guaranty is not applicable." *Id.* at 537.

In the recent case of *State* v. *Martinez*, 23 Utah 2d 62, 457 P. 2d 613 (1969), an officer had gone to a suspect's home to ask him to appear in a lineup and was invited in to speak to the suspect. The Utah Supreme Court found that his observation and seizure of an item of evidence laying on a chair within his view was not an unlawful search and seizure under the Fourth Amendment. In its opinion, the court declared:

> ". . . no search under the constitution interdiction takes place when items having evidentiary value are (1) outside a building and in plain view, or (2) they are in plain sight inside a building to which access has been lawfully gained." *Id.* at 615 Note 5.

A number of other Utah decisions also support the plain view doctrine. See *State* v. *Knapp*, 28 Utah 2d 258, 501 P. 2d 264 (1972), *State* v. *Hatcher*, 27 Utah 2d 318, 495 P. 2d 1259 (1972), *State* v. *Martinez*, 28 Utah 2d 80, 498 P. 2d 651 (1972), *State* v. *Eastmond*, 28 Utah 2d 129, 499 P. 2d 276 (1972).

As the following facts indicate, the present case falls squarely within the plain view doctrine as (1) the police officers had a right to be in the motel room where the marijuana was found and (2) the bag of marijuana was within the plain view of the officers once they had entered the room. No search of the motel room was ever conducted.

The record shows that the police officers went to the motel where the marijuana was found in response to a call from a Mrs. Beebe (T. 11). The officers met Mrs. Beebe near the motel where she informed them that her daughter, Lynn Beebe, age 12, had run away from home and that according to information she had received, Lynn was in a room at the motel (T. 12). The officers confirmed the information received by Mrs. Beebe (T. 13), and also called their dispatcher to confirm that Lynn was, in fact, a runaway (T. 14). They then proceeded to the motel room and knocked on the door which was opened by one of the occupants of the room (T. 13). Looking through the open door, the officers observed two girls on the bed in the room and asked Mrs. Beebe to approach and observe the girls. Once she had identified one of them as her daughter, the officers entered the room (T. 13) to assist in taking custody of the child (T. 16). There is nothing in the record to indicate that the occupants of the room did not consent to such entry by the policemen. Once inside, one of the policemen observed what appeared to be a part of a lid of marijuana lying in plain view on a nightstand in the room (T. 13). Although there is some confusion as to who actually placed the appellant, Myers, under arrest, the officers agreed that he was placed under arrest and the marijuana was then seized (T. 18, 83). A review of the record reveals that during the trial, the defendant, two police officers, and three occupants of the motel room testified as witnesses. Each of them was asked to state the whereabouts of the marijuana when it was observed by the police. Every one of them, with

the exception of the defendant, testified that the marijuana was on the night stand open to the view of the officers (T. 18, 48, 55, 63, 76, 89, 84).

Clearly, the record establishes that (1) the officers were rightfully within the motel room and that (2) the marijuana which was seized as evidence was in the plain view of the officers. The plain view doctrine applies and there was, therefore, no illegal search within the meaning of the Fourth Amendment.

POINT II.

THE COURT BELOW DID NOT ERR IN CONTINUING THE TRIAL IN DEFENDANT'S ABSENCE, AS VOLUNTARY ABSENCE CONSTITUTES A WAIVER OF THE RIGHT TO BE PRESENT.

Respondent contends that appellant's voluntary absence from the trial constituted a waiver of his right to be present and he cannot now complain.

Appellant cites *Hopt* v. *Utah*, 110 U. S. 574, 4 S. Ct. 202 (1884), as authority for the proposition that a defendant cannot waive his right to be present at trial by his voluntary absence. Although that may be true for cases involving capital offenses, as was *Hopt*, *supra*, it is not true of noncapital cases. Capital cases are in a class by themselves (see below). Furthermore, the defendant in *Hopt*, *supra*, was not free on bail but was held in custody and his absence from the trial was not voluntary.

The general rule in both the state and federal courts is set forth in *Diaz* v. *United States*, 223 U. S. 442, 32 S. Ct. 250 (1911). The defendant in that case was on trial for homicide, a noncapital offense, and was free on bail. On two different occasions he voluntarily absented himself from the proceedings of the trial. Later, on appeal, he claimed that continuing the trial in his absence constituted a violation of his constitutional rights. In affirming his conviction, the Supreme Court held that in noncapital cases, voluntary absence by a defendant constitutes a waiver of his right to be present. *Id.* at 254.

Appellant also cites *State* v. *Mannion*, 19 Utah 505, 57 P. 542 (1899), as authority for the notion that the right to be present at trial may not be voluntarily waived. That, however, was not the issue in *Mannion, supra.* In that case, the defendant did not voluntarily absent himself from the trial, but was removed by court order. The *Mannion, supra,* decision, therefore, is not authority for the issue presented in this case.

The case of *State* v. *Aikers*, 87 Utah 507, 51 P. 2d 1052 (1935), makes it clear that Utah follows the general rule. It is important to note that *Aikers, supra,* was decided after both *Hopt, supra,* and *Mannion, supra,* which are cited by appellant. In the *Aikers, supra,* case, the defendant was charged with robbery, but was free on bail. The commencement of the proceedings had to be delayed for several days past the date set for trial, so there was some uncertainty as to when Aikers should appear in court. When the case was called for trial, Aikers could

not be found and the first part of the trial was held with the defendant absent. On appeal, Aikers claimed that the commencement of the proceedings without his presence constituted a violation of his constitutional rights. In denying his appeal, the Utah Supreme Court stated:

> ". . . The defendant may by conduct or in words, waive such right, and that he may not take advantage of his voluntary absence, if he is at liberty on bail, during some part of the proceedings at which it is his duty as well as his right to be in attendance." *Id.* at 1055.

Aikers, supra, makes it clear that a defendant who is free on bail but does not appear at trial is deemed to have waived his right to be present. It also establishes that it need not be shown that the defendant actually knew of the exact date and time of the trial. The trial court was placed under no duty to seek out the defendant and bring him to trial, but the responsibility was on the defendant who knew his trial was about to be called up to make himself available at the time the trial commenced. The appellant in the present case had much better notice than did Aikers. He was present at the preliminary hearing (R. 3) when his trial date was set for November 6, 1970 (R. 25), and his trial commenced on that date. He was free on bail and his failure to appear on that date was clearly voluntary. Furthermore, he had counsel appointed for him who was aware of all subsequent proceedings and could have informed him of them had Myers made himself available to be contacted. It was Myers' legal duty to be present at his trial and as the

court said in *Aikers, supra,* a defendant will not be permitted to take advantage of his own misconduct. *Id.* at 1056.

The general rule set forth in *Diaz, supra,* and *Aikers, supra,* is so well established that it has been adopted as part of the Federal Rules of Criminal Procedure (See 18 U. S. C. A. Rule 43).

An examination of the case law of the various states throughout the country makes it clear that this general rule is also adopted by the most majority of state courts. The following are but a few recent examples of such decisions. *State* v. *Tacon,* 488 P. 2d 973, 107 Ariz. 353 (1971), *Hanley* v. *State,* 434 P. 2d 440, 83 Nev. 461 (1967). *McKinney* v. *Commonwealth,* 474 S. W. 2d 384 (Kentucky 1971), *Commonwealth* v. *Flemmi,* 277 N. E. 2d 523 (Mass. 1971), *State* v. *Stockton,* 185 S. E. 2d 459 (N. C. 1971). *People* v. *Teitelbaum,* 329 P. 2d 157 (Cal. 1957), *Wilson* v. *State,* 90 S. E. 2d 557 (Ga. 1955), *State* v. *Utecht,* 36 N. W. 2d 126 (Minn. 1949), *Commonwealth* v. *Diehl,* 107 A. 2d 543 (Pa. 1954).

It should also be noted that appellant was on trial for contributing to the delinquency of a minor, a misdemeanor (see Utah Code Ann. § 55-10-51 (1953). Utah Code Ann. § 77-27-3 (1953) provides in part, ". . . but if for a misdemeanor, the trial may be had in the absence of the defendant . . ." It is clear that this statute expressly allows for misdemeanor cases to be held without the defendant present.

POINT III.

APPELLANT'S CONVICTION WAS NOT INVALID BECAUSE OF THE FAILURE OF COUNSEL TO APPEAR FOR PART OF HIS TRIAL AS APPELLANT WAS ON TRIAL FOR A MISDEMEANOR AND, THEREFORE, HAD NO RIGHT TO COUNSEL.

Although in the recent decision of *Argersinger* v. *Hamlin*, 92 S. Ct. 2006, 32 L. Ed 2d 530 (1972), the United States Supreme Court extended the right to counsel to cases involving misdemeanors, it is important to note that appellant's trial was held before that case was decided. This case should, therefore, be decided in accordance with the law as it existed prior to *Argersinger, supra.*

Appellant was on trial for the crime of contributing to the delinquency of a minor, a misdemeanor. Utah Code Ann. § 55-10-51 (1953). The maximum term of imprisonment which he could have received for that offense was six months in the county jail. Utah Code Ann. § 76-1-16 (1953). The controlling law in this case is Utah Code Ann. § 77-64-2 (Supp. 1969) and it states that the right to counsel shall only apply to those persons who are, "Charged with a crime in which the penalty to be imposed could be confinement for more than six months." It is clear, therefor, that appellant could not have been deprived of his right to counsel in this case, because according to the law as it existed at the time of his trial, he had no such right.

POINT IV.

THE DECISION OF *ARGERSINGER V. HAMLIN*, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) SHOULD NOT BE APPLIED RETROACTIVELY.

Appellant contends that *Argersinger, supra,* which grants the right to appointed counsel to indigents accused of misdemeanors, is controlling in this case because it was meant to be applied retroactively. Appellant errs in making such an assumption, as a careful reading of that opinion reveals nothing which would indicate the intent that it be given retroactive application. The question of retroactive application appears to have been consciously ignored and thereby left to the lower federal and state courts to decide individually.

The question of the retroactive application of Supreme Court decisions is discussed at some length in the case of *Johnson* v. *State of New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966). The issue in that case was the retroactive application of *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966) and *Escobedo* v. *Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964). In deciding that question, the Court laid down the criteria for determining whether a decision should be applied retroactively. The Court began its discussion of such criteria by stressing, "That the choice between retroactivity and no retroactivity in no way turns on the value of the constitutional guarantee involved." *Id.* at 1778. It went on to state:

> "*We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.* Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as *Linkletter* and *Tehan* suggest, *we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question.'*" 381 U. S., at 629, 85 S. Ct., at 1737; 382 U. S., at 410, 86 S. Ct., at 461. (Emphasis added.) *Id.* at 1778.

Appellant contends that because *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792 (1963), also dealt with the right to counsel and was found retroactive, *Argersinger* must also be applied retroactively. The foregoing statements from *Johnson, supra*, make it clear, however, that such is not the case. Those statements point out that retroactivity must be decided case by case and that just because the right to counsel, or any other constitutional guarantee is involved, the issue of retroactivity is not automatically resolved.

The Court went on to say that in deciding constitutional issues, the question is largely one of degree. *Id.* at 1779. *Gideon, supra*, dealt with the denial of the right to counsel in felony cases. It is likely that it was found retroactive because of the serious degree to which the constitutional right had been abused, whereas *Argersinger* dealt with misdemeanors, and the denial was of a lesser degree.

In the *Johnson* decision, the Court held that where the states had relied substantially upon previous law to establish their statutes and policies, retroactivity was not in order. It found that the serious disruption of the administration of our criminal laws which would have resulted from the retrial or release of numerous prisoners found guilty under previously announced standards, dictated against retroactive application. *Id.* at 1780.

This rule would also apply to *Argersinger*, although it didn't apply to *Gideon*. When the Court in *Gideon* established that there was a right to counsel in all felony cases, very few states were not already recognizing such a right. On the other hand, the *Argersinger* decision came as a surprise. Most of the states, acting in reliance on *Gideon's* application of the right only to felony cases, had not provided for appointed counsel in cases involving petty offenses. A retroactive application of the *Argersinger* decision would cause a serious disruption of the administration of the criminal law.

Finally, the Court in *Johnson*, *supra*, stressed that *Miranda*, *supra*, and *Escobedo*, *supra*, were not applied retroactively because of the unjustifiable burden it would place on the Court. *Id.* at 1781. That is clearly the case here. Our courts are already hard pressed to keep up with the large number of misdemeanor cases already on their dockets. To require them in addition to rehear the many previous trials which *Argersinger* would invalidate would be an unjustifiable burden on them.

The three opinions concurring with the *Argersinger* decision in which six of the justices join, are mainly de-

voted to discussing the additional burden which the decision will place on the courts. They make it clear that although they expect compliance with their decision, they do not want to unduly tax the already overburdened courts. It is evident that none of them anticipate retroactive application.

POINT V.

GIDEON V. WAINWRIGHT DID NOT EXTEND THE RIGHT TO COUNSEL TO INDIGENT MISDEMEANANTS.

Appellant would also contend that even if *Argersinger* is not retroactive, *Gideon* v. *Wainwright*, *supra*, is controlling in that it granted the right to counsel in misdemeanor as well as felony cases.

The following cases, however, clearly establish that this contention is erroneous.

The right to counsel in misdemeanor cases within the State of Utah was recently decided in *Hortencio* v. *Fillis*, 25 Utah 2d 73, 475 P. 2d 1011 (1970). A unanimous Utah Supreme Court held that the ruling in *Gideon* did not apply to misdemeanors.

Justic Marshall in speaking for a unanimous court in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), said:

> "In *Gideon* v. *Wainwright* . . . however, *Betts* was overruled and this court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States and, accordingly, that there was

> an absolute right to appointment of counsel in *felony* cases." *Id.* at 134. (Emphasis added.)

This clearly indicates that the Court intended the ruling in *Gideon* to be so limited. Also see *In re Gault*, 387 U. S. 1 (1967), where the Court said that Gault would be entitled to have the state provide counsel for him if a *felony* were involved if his parents were unable to afford counsel.

The most recent evidence that *Gideon* applies only to felonies is the following statement from Justice Powell's concurring opinion in *Argersinger.*

> "*Gideon* v. *Wainwright* (Citation omitted) held that the states were required by the due process clause of the Fourteenth Amendment to furnish counsel to all indigent defendants charged with *felonies.*" *Id.* at 2016. (Emphasis added.)

POINT VI.

ASSUMING, *ARGUENDO,* THAT APPELLANT HAD A RIGHT TO COUNSEL, HE WAS NOT DENIED THAT RIGHT IN THE CONSTITUTIONAL SENSE, AS THE COURT APPOINTED AN ATTORNEY FOR HIM AND COUNSEL'S FAILURE TO APPEAR CANNOT BE CONSTRUED AS CONSTITUTING STATE ACTION.

The record shows that counsel was appointed for the appellant (T. 2). His counsel was present at the preliminary hearing (T. 3), at sentencing (T. 88) and at the

first of two days of trial (T. 26). The second day of trial was set for November 19, 1970 (T. 70), however, at the request of appellant's counsel it was continued until January 29, 1971 (T. 2). On that date, counsel failed to appear (T. 71). She made no effort to contact the court or request a continuance, but merely called opposing counsel on the morning of the trial and said that she was too busy to come (T. 71). It is evident that the lack of counsel for the appellant on the second day of trial was in no way the fault of the trial court.

It is well established that constitutional guarantees provide protection only against state, rather than private action. *Civil Rights Cases,* 109 U. S. 3, 3 S. Ct. 18 (1883). It follows then that the failure of counsel to appear could only be construed as a denial of the right to counsel in the constitutional sense if such nonappearance was due to some form of state action. The record makes it clear that counsel's failure to appear was not the fault of the trial court, or any other state entity, but occurred solely because of her own personal neglect. The court's have consistently held that the actions of counsel (even appointed counsel from the public defenders' office), which result in the loss of a client's constitutional rights, do not constitute state action. See *Espinoza* v. *Rogers, et al.,* No. 72-1667 (10th Cir. Dec. 27, 1973), *Thomas* v. *Howard,* 455 F. 2d 228 (3d Cir. 1972), *United States, ex rel. Wood* v. *Blocker,* 335 F. Supp. 43 (D. C. N. J. 1971), *United States, ex rel. Wilkins* v. *Banmiller,* 325 F. 2d 514 (3d Cir. 1963), *Peake* v. *Philadelphia,* 280 F. Supp. 853 (E. D. Pa. 1968).

It appears, therefore, that any loss of appellant's right to counsel was the result of private rather than state action, and the Sixth Amendment does not apply.

POINT VII.

IT WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION TO HEAR A PORTION OF THE TRIAL WHILE COUNSEL WAS NOT PRESENT.

The case of *State* v. *Hines*, 6 Utah 2d 126, 307 P. 2d 887 (1957), establishes that counsel need not be present at all stages of a criminal trial. The defendant in that case, was on trial for robbery and portions of testimony were allowed to be read to the jury while defendant's counsel was absent. In affirming the conviction, the Utah Supreme Court stated:

> "While it was necessary for the defendant to be present at all stages of the trial, there is no absolute requirement that an attorney be there . . .
>
> "In the absence of any showing of disadvantage to the defendant in the procedure followed, *it was no abuse of discretion nor variance from proper procedure for the trial court to have the testimony read to the jury without insisting that defendant's counsel be present.*" *Id.* at 890. (Emphasis added.)

Allowing the trial court to proceed in the absence of counsel when in its sound discretion it finds justification for doing so, only makes good sense. Otherwise the

defendant and his counsel could continually delay the proceeding of the trial by simply failing to appear.

It is important to note that appellant does not contend that his trial was unfair or that the court allowed opposing counsel to in any way take advantage of the absence of appellant's counsel.

It should also be remembered that appellant did not appear at his own trial and it is difficult to conceive that the law should require counsel to be present where the defendant himself, does not care enough to make an appearance.

CONCLUSION

The evidence used in the appellant's trial was lawfully obtained. Although he was not present at a portion of his trial, he waived that right by his voluntary absence and he was not wrongfully denied the right to counsel. Respondent respectfully submits, therefore, that the judgment of the lower court be affirmed.

Respectfully submitted,

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