1973

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

EUGENE MEYERS,
Defendant-Appellant.

Case No. 12738

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT AND SENTENCE ENTERED AGAINST APPELLANT BY THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH G. JEPPSON, JUDGE, PRESIDING.

VERNON B. ROMNEY
Attorney General
DAVID S. YOUNG
Chief Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

D. GILBERT ATHAY
Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102
Attorney for Appellant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	2
POINT I. 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	2
CONCLUSION	5

CASES CITED

Commonwealth v. Diehl, 107 A. 2d 543 (Pa. 1954)	5
Commonwealth v. Flemmi, 277 N. E. 2d 523 (Mass. 1971)	5
Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250 (1911)	3, 5
Hanley v. State, 434 P. 2d 440, 83 Nev. 461 (1967)	5
Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202 (1884)	3, 4
McKinney v. Commonwealth, 474 S. W. 2d 384 (Ky. 1971)	5
People v. Teitelbaum, 329 P. 2d 157 (Cal. 1957)	5
State v. Aikers, 87 Utah 507, 51 P. 2d 1052 (1935)	4, 5
State v. Mannion, 19 Utah 505, 57 P. 542 (1899)	3, 4
State v. Stockton, 185 S. E. 2d 459 (N. C. 1971)	5
State v. Tacon, 488 P. 2d 973, 197 Ariz. 353 (1971)	5
State v. Utecht, 36 N. W. 2d 126 (Minn. 1949)	5

TABLE OF CONTENTS—Continued

Page

Wilson v. State, 90 S. E. 2d 557 (Ga. 1955) 5

OTHER AUTHORITIES CITED

18 U. S. C. A. Rule 43 5

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent,* vs. EUGENE MEYERS, *Defendant-Appellant.*	Case No. 12738

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Eugene Meyers, appeals from a judgment and sentence entered against him in the Third Judicial District Court convicting him of forgery.

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted of forgery on December 22, 1971. On January 4, 1972, Judge Joseph G. Jeppson committed appellant to the Utah State Prison to serve a sentence of one to twenty years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the lower court's decision.

STATEMENT OF FACTS

Appellant was charged with forging a check on the account of Royal Bell. Trial was held on December 16, 1971, December 17, 1971, and then was continued upon the motion of appellant until December 22, 1971 (R. 59, 60). Appellant who was free on bail throughout the course of the proceeding, was present the first two days of trial but failed to appear on December 22, 1971 (R. 68). The court allowed the trial to be delayed while efforts were made to find appellant and bring him to trial (R. 66 and 72). When those efforts proved unsuccessful, the state's motion to proceed with the trial was granted over the objection of appellant's counsel. Counsel for appellant then informed the court that he had no witnesses to call but stated that he would not rest his case and that the court would have to rest for him (R. 66-67). The court responded by requiring the defense to rest and final arguments were heard (R. 67). The jury returned a verdict of guilty (R. 71) and sentencing was held on January 4, 1972.

ARGUMENT

POINT I.

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 final day of his 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. Furthermore, the defendant in *Hopt* v. *Utah, supra,* was not free on bail but was held in custody and his absence from trial was not voluntary.

Appellant also cites *State* v. *Mannion,* 19 Utah 505, 57 P. 542 (1899), as authority for the notion that the right to be present may not be voluntarily waived. That, however, was not the issue in *Mannion, supra.* In that case, the defendant did not voluntarily waive his right to be present, but was removed by court order.

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. Twice during the trial, the defendant voluntarily absented himself from the proceeding. He later claimed on appeal that the continuing of the trial in his absence constituted a violation of his constitutional rights. In affirming his conviction, the Supreme Court stated:

> "But, where the offense is not capital and the accused is not in custody, the prevailing rule has

> been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." *Id.* at 254.

The case of *State* v. *Aikers*, 87 Utah 507, 51 P. 2d 1052 (1935), makes it clear that Utah follows the general rule. It should be noted that *Aikers*, *supra*, was decided after both *Hopt*, *supra*, and *Mannion*, *supra*, cited by appellant. In that case, the defendant, Aikers, was free on bail and failed to learn of the commencing of his trial. Consequently, he missed the first morning of the trial and claimed on appeal that he had, thereby, been denied his constitutional right to be present. In upholding his conviction for robbery, the Utah Supreme Court said:

> ". . . The defendant may, by conduct or 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.

Defendant was found to have voluntarily waived the right to be present, guaranteed not only by the state and federal constitutions, but also by a state statute.

The general rule set forth in *Diaz*, *supra*, and *Aikers*, *supra*, is so well established that it has been adopted as part of Rule 43 of the Federal Rules of Criminal Proced-

ure. The second sentence of that rule reads as follows: "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." 18 U. S. C. A. Rule 43.

A note to that rule makes it clear that the rule did not make new law, but was merely a restatement of the already existing law in that area. *Id.* at 308, note 2.

An examination of the case law of the various states throughout the country makes it clear that the general rule expressed in *Diaz*, *supra*, and *Aikers*, *supra*, is also adopted by the vast majority of state courts. The following are but a few recent examples of such decisions: *State* v. *Tacon*, 488 P. 2d 973, 197 Ariz. 353 (1971); *Hanley* v. *State*, 434 P. 2d 440, 83 Nev. 461 (1967); *McKinney* v. *Com.*, 474 S. W. 2d 384 (Ky. 1971); *Com.* 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); *Com.* v. *Diehl*, 107 A. 2d 543 (Pa. 1954).

CONCLUSION

Appellant was present at the first two days of his trial and was also present when the trial was ordered continued, at his request, until the following week. He was free on bail but voluntarily failed to appear on the continued date. Respondent respectfully submits, therefore,

that appellant, by his conduct, waived his right to be present and cannot now complain. Appellant violated a legal duty by failing to appear at his trial. The granting of the relief which he seeks on appeal would allow him to profit by his own misconduct. Neither the law nor justice provide for such a result.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

Attorneys for Respondent