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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

RONALD EASTHOPE,
Defendant-Appellant.

Case No. 12739

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE BRYANT H. CROFT, JUDGE.

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Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Ronald Dale Easthope, appeals from convictions of the crimes of rape, robbery and sodomy entered against him in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty by a jury of rape, robbery and sodomy on October 19, 1971, and sentenced to the Utah State Prison for the term prescribed by law for each conviction.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Third District Court should be affirmed.

STATEMENT OF FACTS

Respondent agrees basically with the facts as stated by appellant except as hereinafter stated:

When Detectives Floyd Ledford and John Cameron contacted Ronald Easthope on February 26, 1971, they first gave him the complete *Miranda* warnings and ascertained that he understood those warnings (R. 93, 105). Appellant was then asked if he would be willing to stand in a lineup, and he willingly agreed to do so (R. 94, 106). Officer Ledford informed appellant that the same rights under *Miranda* applied to the lineup, and specifically that he had the right to have an attorney present during the lineup, and that one would be furnished if he so desired (R. 94, 106). Appellant chose not to have an attorney present at the lineup (R. 94, 106), and he fully cooperated at the lineup proceedings later that evening (R. 107).

After the lineup, and after his arrest, appellant was handed a telephone directory to select a lawyer, but he decided not to call one (R. 111). At that point, Mr. Easthope initiated a new conversation by asking the basis of his arrest, and he was told that he had been identified in the lineup, whereupon appellant voluntarily replied, "I didn't think anybody could identify me with a silk stocking over my face" (R. 111, 112).

At trial, no objection was made by the defense as to the admissibility of both the lineup identification and the incriminatory remark made by appellant (R. 79, 111).

ARGUMENT

POINT I.

APPELLANT SHOULD BE PRECLUDED FROM CONTESTING, ON APPEAL, THE ADMISSIBILITY OF THE LINEUP IDENTIFICATION AND THE INCRIMINATORY REMARK MADE BY HIM, SINCE HE FAILED TO OBJECT TO THEIR ADMISSIBILITY AT TRIAL.

It is a well-known principle of evidentiary law that any objection to the admissibility of certain evidence must be made when that evidence is offered, and the precise ground for that objection must also be stated at that time. The trial record clearly reveals that no objection was ever made by the defense as to the admissibility of either the identification of Mr. Easthope during the lineup (R. 79), or the incriminatory remark he made after his arrest that he "didn't think anybody could identify [him] with a silk stocking over [his] face" (R. 111). We submit that the rule expressed by this court in *Pettingill v. Perkins*, 2 Utah 2d 266, 272 P. 2d 185 (1954), is controlling on this issue:

> "Generally, appellate courts will not review a ground of objection not urged in the trial court . . . The duty is incumbent upon counsel to give the trial court the opportunity to correct the error before asking the appellate court to reverse a verdict and judgment thereon." *Id.* at 269, 186.

This Court was even more specific as to the procedure which should be followed to challenge the admissibil-

ity of lineup identifications under the *Wade* and *Gilbert* decisions, *infra*:

> "The proper way to raise a *Wade* objection is by a motion to suppress identification testimony before trial. That procedure allows a suppression hearing and a decision on the disputed evidence before a jury is empaneled, and promotes an orderly and uninterrupted trial. A distinctly second-best procedure is a defense motion to suppress during trial. That procedure at least allows decision of the constitutional issue before fatally prejudicial testimony comes before the jury (Cite omitted).
>
> "In the interest of orderly procedure defense counsel should be admonished to seek an evidentiary hearing to determine the admissibility of identification testimony prior to trial. In the instant action, defense counsel made no objection to the allegedly inadmissible testimony until the prosecution had rested; he should have at least made a motion to strike the testimony of any witness in violation of the *Wade-Gilbert* rules at the conclusion of the witness' testimony." *State* v. *McGee*, 24 Utah 2d 396, 400, 473 P. 2d 388 (1970).

In the present case, appellant failed to make any objection to the admissibility of the aforementioned evidence during the entire course of the trial, and such failure precludes him from raising his objections on this appeal. Nevertheless, should this court determine that appellant's objections should be heard on appeal, the two remaining points of this brief are submitted by respondent.

POINT II.

EVIDENCE OF THE IDENTIFICATION MADE AT THE LINEUP WAS PROPERLY ADMITTED BY THE LOWER COURT SINCE APPELLANT HAD MADE AN INTELLIGENT WAIVER OF HIS RIGHT TO HAVE COUNSEL PRESENT AT THE LINEUP.

Appellant exclusively relies on two landmark United States Supreme Court decisions (*United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967)) to support his contention that his lineup identification should have been excluded because he was denied his right to counsel at the lineup. Respondent submits that the *Wade* and *Gilbert* decisions are distinguishable and are not controlling here since Mr. Easthope intelligently waived his right to be represented by counsel at the lineup.

The Court in *Wade* and *Gilbert* held that the lineup is a critical stage of the criminal prosecution, and the accused, therefore, has the right to counsel at the lineup. However, the Court did not construe the Sixth Amendment of the United States Constitution to mean that counsel *must* be present at lineups, but merely that the accused has the *right* to have counsel present. Thus, the accused may either accept or waive his right to counsel. This assertion was expressed in the *Wade* decision as follows:

> ". . . both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct the lineup, *absent an 'intelligent waiver.'*" (Emphasis added.) *Id.* at 237.

Justice Clark, in his concurring opinion, also emphasized that counsel need not be present at a lineup where the accused has made an effective waiver:

> ". . . the requirement of the presence of counsel arises, *unless waived by the suspect.*" (Emphasis added.) *Id.* at 243.

It should further be noted that in both *Wade* and *Gilbert*, the lineups occurred over two weeks after indictments had been made, and after counsel had been appointed, and the police failed to notify counsel of the lineup.

In the present case, the police officers initially gave Mr. Easthope the complete *Miranda* warnings and ascertained that he understood those warnings (R. 93, 195). Moments later, the possibility of a lineup was discussed, and Officer Ledford repeated that the same rights under *Miranda* applied to the lineup, and specifically stated that Mr. Easthope had the right to have an attorney present at the lineup, and one would be provided for him if he so desired (R. 94, 106). The *Miranda* warning could not have been more explicit. Appellant replied that he didn't have anything to hide and didn't need a lawyer (R. 106). At no other time prior to or during the lineup did appellant request an attorney. Respondent, therefore, submits that appellant was afforded every oppor-

tunity to seek a lawyer to accompany him to the lineup, and that he instead chose to waive his *Wade-Gilbert* right to counsel.

The remaining question is whether appellant's waiver was made intelligently. The United States Supreme Court in *Carnley* v. *Cochran*, 369 U. S. 506 (1962), squarely dealt with the "intelligent waiver of counsel" issue and held that:

> "Presuming a waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." *Id.* at 516.

Nowhere in appellant's brief does he offer any evidence to support his contention that his waiver was not intelligently made. He instead relies solely upon his own unsubstantiated, self-serving statement that such was the case. The record in the instant case is not silent as to circumstances surrounding appellant's waiver of counsel at the lineup. Mr. Easthope had previously been given complete *Miranda* warnings once, and it had been determined that he understood those warnings. He was given the warnings again and was specifically told he could have an attorney present at the lineup, and that if he wished, an attorney could be provided for him. He clearly and unequivocally replied that he did not want an attorney (R. 106).

Respondent submits in conclusion that Mr. Easthope made an "intelligent" waiver of his right to counsel

at the lineup, and that evidence of the lineup identification was, therefore, properly admitted.

POINT III.

APPELLANT'S STATEMENT MADE IN OFFICER ROGER'S PRESENCE WAS PROPERLY ADMITTED BY THE TRIAL COURT.

The United States Supreme Court in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), held the following:

> ". . . 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 privilege against self-incrimination* . . . As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. *Prior to any questioning*, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.* If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be *no questioning*." (Emphasis added.) *Id.* at 444-445.

Respondent submits that in the present case the above procedural safeguards were afforded Ronald Easthope,

when he was in the custody of Officer Paul Rogers, and that appellant voluntarily and knowingly waived his privilege against self-incrimination before making the incriminating statement in question.

Officer Rogers arrested Mr. Easthope, carefully advised him of his constitutional rights, and ascertained that he understood those rights. Appellant, then for the first time, asked for an attorney. Officer Rogers immediately refrained from any interrogation at that time due to the admonishment in *Miranda* which reads:

> ". . . Once warnings have been given, the subsequent procedure is clear . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U. S. 473-474.

At this point, instead of remaining silent, appellant, on his own initiative, resumed conversation with Officer Rogers by asking the basis for his arrest. The silence had been voluntarily and knowingly broken by appellant, and Officer Rogers therefore responded to the question of replying that he (appellant) had been arrested because he was identified in the lineup. No questions were asked by the officer which might constitute interrogation, yet appellant then voluntarily and knowingly made the following incriminatory remark: "I didn't think anybody could identify me with a silk stocking over my face."

Clearly the above situation displayed a voluntary desire on the part of appellant to speak, and Officer Roger's response was hardly a continuance of police in-

terrogation. His reply certainly was not interrogative in nature since it lacked any focus or intent to incriminate. It was rather a good faith response to a question posed by appellant. The California Court of Appeals, Second District in *People* v. *White*, 275 Cal. 2d 877, ... P. 2d ....., 80 Cal. Rptr. 461 (1961) stated:

> "We also recognize that there is no requirement in *Miranda* which compels police officers to shut their ears *or refuse to participate in general conversation volunteered by a defendant . . .*" 80 Cal. Rptr. at 465.

Officer Rogers did nothing more than participate in conversation initiated and volunteered by Mr. Easthope.

Appellant nevertheless contends that since he had previously requested an attorney his statement should not have been admitted. In a sense, his argument implies that *Miranda* prohibits his changing his mind to speak, and that an accused deprives himself of his freedom of choice and expression merely by initially invoking the Fifth Amendment privilege. Such a result was never intended in *Miranda*. After discussing interrogative problems created when an indigent accused requests counsel and one cannot be immediately appointed (the exact situation in the present case), Chief Justice Warren, writing the majority opinion in *Miranda*, stated the following:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimina-

> tion and his right to retained or appointed counsel." [Cite omitted.] See 384 U. S. at 475.

Just as a person is not estopped to invoke his privilege after an initial waiver, so the person should be able to expressly retract his earlier claim of privilege and talk to police. This is exactly what Mr. Easthope did, and his statement was therefore properly admitted into evidence by the lower court.

CONCLUSION

Respondent respectfully submits that appellant's failure to timely raise any objections to the admissibility of his lineup identification and his incriminatory remark precludes him from raising such objections on appeal. Secondly, since appellant intelligently waived his right to have counsel at the lineup, the trial court properly admitted the lineup identification. Finally, the incriminatory remark volunteered by appellant in the absence of any police interrogation was properly admitted by the lower court.

Respectfully submitted,

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