1995

City of Orem v. Luisa Mataele : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CITY OF OREM, Plaintiff/Appellee, v. LUISA MATAELE, Defendant/Appellant.	)))))))))	APPELLEE'S BRIEF Case No.950335-CA Priority No. 2

ON APPEAL FROM JUDGMENT IN THE FOURTH CIRCUIT COURT
THE HONORABLE JOSEPH I. DIMICK, PRESIDING

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LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of all the parties in the proceedings before the Fourth Circuit Court, State of Utah, Utah County, Orem Department:

The Honorable Joseph I. Dimick, Judge, Presiding

The City of Orem, Plaintiff, represented by Edward A. Berkovich, and on remand by Laura Cabanilla, City Prosecutors

Luisa Mataele, Defendant, represented by Randy Lish, Esq., on remand by Bradley P. Rich, Esq.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1995).

STATEMENT OF ISSUES

1. Did the trial court properly admit appellant's non-custodial statements made to the police?

2. Was counsel ineffective for failing to file a motion to suppress appellant's non-custodial statements?

STANDARD OF REVIEW

In reviewing whether the appellant was denied Miranda warnings and whether she was ineffectively assisted by counsel, this Court applies a correction of error standard of review. *State v. Mincy*, 838 P.2d 648 (Utah App. 1992). This Court reviews factual findings made by the trial court on a clearly erroneous standard. *Id.*

STATEMENT OF THE CASE

On December 8, 1994, appellant, Luisa Mataele, (hereinafter referred to as "appellant") and two friends, Anna Topou (hereinafter referred to as "Topou"), and Kelly Kava (hereinafter referred to as "Kava") were shopping at the University Mall in Orem, Utah. (R. 17[1], p. 18). After purchasing items at several other stores, appellant and her two friends entered "Copper Rivet." (R. 17, p. 4,18-19). Appellant had two shopping bags with her from previous purchases.

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[1] Record entry #17 is the trial transcript in its entirety. The original corresponding page numbers of the transcript are cited in this reply brief.

R. 17, at p. 25). Upon entering Copper Rivet, appellant and her two friends went to the back of the store to look at aerobic outfits. (R. 17, pp. 4,19).

While browsing in the aerobic wear section, appellant opened one of the bags she was carrying so her friend, Topou, could place stolen merchandise into it. (R. 17, pp. 8,13,25). Lori Moss, (hereinafter referred to as "Moss") a Copper Rivet employee, had observed the women browsing through the aerobic racks. Shortly thereafter, Moss noticed that some aerobic wear hangers were empty and hanging on the rack and became suspicious. Moss checked the register to see if the girls had bought any items. (R. 17, pp. 3-4). Upon ascertaining that the girls had left the store without paying for anything, Moss along with another Copper Rivet employee, confronted the girls and accused them of shoplifting. (R. 17, pp. 5-7).

The girls were asked to return to the store to answer some questions and so as not to create a scene in the mall. (R. 17, p. 11). Rather than return, the girls began to curse at the Copper Rivet employees and tried to physically pull appellant away from Moss' grasp. (R. 17, pp. 11-12). After a few minutes of struggling, one of the girls fled the scene and appellant agreed to return to the store, admitting that she was in possession of the stolen merchandise. (R. 17, p. 12, 15) Mall security had been contacted as well as Orem Police. (R. 17, p. 12)

Officer Terry Steele of the Orem City Police Department arrived to question appellant about the shoplifting. (R. 17, p. 14) He testified that appellant was crying and very upset. (R. 17, p. 15). The trial court found that Officer Steele asked one question, which was a request for the appellant's name. (R. 31). "Following that single question, the defendant volunteered additional information..." (R. 31). He testified that "she just started blurting out things" and volunteered the events of the afternoon. (R. 17, p. 15). Appellant told Officer Steele that Topou took the items

off the hangers and that she held the bag open so Topou could place them in the bag she was carrying. (R. 17, pp. 15-16). During her time in the store, appellant offered several times to pay for the items and told the Officer that "this could ruin her and she'd lose her [Ms. West Valley] crown." (R. 17, p. 16).

The appellant was charged with Retail Theft, in violation of § 76-6-602, Utah Code Ann. (1995). The Honorable Joseph Dimick, Fourth Circuit Court, found appellant guilty as charged on April 11, 1995. (R. 17, p. 45). She was given a suspended sentence of ninety days in jail and a fine of $300.00 She is to perform twenty-four hours of community service in lieu of the fine. (R. 17, p. 46). The appellant appeals her conviction. Following a Rule 23B remand from this Court, the trial court entered additional findings on appellant's ineffective assistance of counsel claim. (R. 31, *See also* Appellant's Opening Brief, Addendum III). The court found that appellant was not in police custody when questioned in Copper Rivet and was, therefore, not deserving of *Miranda* warnings. (R. 32, *See also* Appellant's Opening Brief, Addendum III). Accordingly, the court concluded that counsel was not ineffective for failing to file a motion to suppress appellant's statements. (R. 31-32, *See also* Appellant's Opening Brief, Addendum III).

SUMMARY OF THE ARGUMENT

There was no error committed by the trial court in admitting appellant's statements. She made the statements in a non-custodial setting. As such, *Miranda* warnings were not required. This Court presumes that counsel acted competently. Because appellant's statements were admissible, her defense counsel made a tactical decision not to file a motion to suppress. Such tactical decisions are given wide latitude and unless appellant was prejudiced, a finding of ineffectiveness will not be made.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S NON-CUSTODIAL STATEMENTS MADE TO THE POLICE.

The United States Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Supreme Court has declared that "the ultimate inquiry is simply where there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler* 463 U.S. 1121, 1125 (1983).

The Utah Supreme Court has identified five factors it considers in determining whether a defendant "who has not been formally arrested is in custody." *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983). These five factors are: "(1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; . . . (4) the length and form of interrogation; and (5) whether the defendant came to the place of interrogation freely and willingly." *Mincy*, 838 P.2d at 653 (quoting *State v. Sampson*, 808 P.2d 1100, 1105 (Utah App. 1990)). Using these five factors, this Court can analyze whether appellant was in custody when questioned by the officer in Copper Rivet.

While the investigation eventually focused on the appellant, it was due to her spontaneous admissions in the common area of the mall that she had the stolen items. (R. 17, p. 12). The investigation also focused upon her as her two friends fled the area and she was the only one remaining at the scene to be questioned. (R. 17, p. 11-13).

Appellant then voluntarily accompanied Copper Rivet employees to a back room of Copper Rivet. (R. 17, p. 13). This is where she was when Officer Steele arrived. (R. 17, p. 15). Even though the door may have been closed, there was nothing about the site that would indicate that it was in any way oppressive or that appellant's movement was restricted. Appellant was not handcuffed, shackled or physically restrained. She was never told that she was not free to leave. She was not under arrest nor was she told that she was under arrest. *See Mincy*, 838 P.2d at 654. Officer Steele's single question was merely investigatory in nature, rather than accusatory. *See Id.* at 653. Rather, it was appellant who volunteered the information and Officer Steele merely listened to what she was saying. (R. 17, p. 15).

This Court in *Mincy* stated that Utah courts place "a great deal of emphasis on the form of questioning" used in the interview. *Id.* at 653 (quoting *Sampson*, 808 P.2d at 1105.) If the questioning is merely investigatory, then there is no custodial relationship and the questioning is permitted without *Miranda* warnings. *Mincy*, 838 P.2d at 653.

There is nothing in the record to suggest that the officer's questioning of appellant was anything but investigatory. He was only able to ask for her identification before appellant began to state what she had done. (R. 17, p. 24). Rather than conduct an accusatory interview, he merely listened as the appellant confessed to holding the bag open so that Topou could put the aerobic wear into appellant's bag. (R. 17, pp. 15-16). For these reasons, the police interview in the back of Copper Rivet was non-custodial, *Miranda* warnings were not required, and appellant's statements were properly admitted.

Appellant is claiming that it was error on the part of the court to admit her statements. However, as this was a non-custodial setting, *Miranda* warnings were not required. *Miranda*,

384 U.S. at 436. Because *Miranda* warnings were not required, there was no error in admitting them and no Constitutional protection was violated.

II. BECAUSE *MIRANDA* WARNINGS WERE NOT REQUIRED, COUNSEL EFFECTIVELY AND ADEQUATELY REPRESENTED THE APPELLANT.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong analytical framework for evaluating ineffective assistance of counsel claims brought under the Sixth Amendment to the United States Constitution. In order for appellant's Sixth Amendment challenge to succeed, the appellant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the appellant by the Sixth Amendment. *State v. Snyder*, 860 P.2d 351, 354 (Utah App. 1993). Second, the appellant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the appellant of a fair trial. *Strickland*, 466 U.S. at 687. *State v. Templin*, 805 P.2d 182, 186 (Utah 1990).

When evaluating counsel's performance, the court '"must determine whether counsel's representation fell below an objective standard of reasonableness."' *Snyder*, 860 P.2d at 359 (citing *Strickland*, 466 U.S. at 688). Appellant must overcome a strong presumption that counsel acted competently and that there was no legitimate basis for counsel's tactics. *Snyder* 860 P.2d at 359.

In examining the record, it would have been clear to any counsel that appellant's statements consisted of spontaneous admissions made after the struggle in the mall's common area as well as spontaneous and excited utterances made prior to any substantive questioning by

the officer. Such statements were not made while in custody and thus would not have required any *Miranda* warnings. Knowing that appellants statements were admissible, there would have been no tactical reason to file a motion to suppress.

This Court must also objectively examine counsel's alleged deficient performance and determine whether counsel's performance prejudiced appellant. *Id.* This court must determine whether the verdict against the appellant would have been more favorable to the appellant had the information from the interview been suppressed. *Id.* The evidence before the court included appellant's statement, made after the struggle in the mall. Moss testified that appellant said words to the effect of "[I]t's okay girls, I've got the stuff, I'll go back with them." (R. 17, p. 12). Appellant then did accompany Moss back to Copper Rivet where the missing items were found in appellant's bag. (R. 17, p. 13). Based on this evidence alone, appellant could have been convicted had the statements from the interview with Officer Steele been kept out. Because the verdict would have been no different had the statements been excluded, appellant has not been prejudiced. *Id.*

CONCLUSION

The interview of appellant by Officer Steele never took on the elements of a custodial setting. Since the interview never reached the level of being custodial in nature, there were no requirements that *Miranda* warnings be given. Since no *Miranda* warnings were required, there was no Constitutional violation for failing to give them. Appellant has failed to show that her counsel's actions were so deficient as to deny her Constitutional protection. She has also failed to establish that she was prejudiced by the statements being admitted. As such, there can be no

finding of ineffective assistance of counsel. For these reasons, it is respectfully requested that this Court deny appellant's request for reversal of her conviction and remand for review.

RESPECTFULLY SUBMITTED this 18 day of March, 1997.

ROBERT J. CHURCH
Orem City Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Appellee's Brief, postage prepaid, this 18 day of March, 1997, to the following:

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