

The Burger Court Opinion Writing Database

Lakeside v. Oregon

435 U.S. 333 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

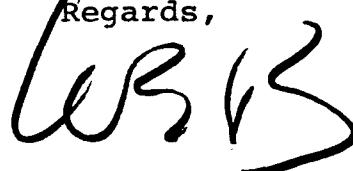
March 14, 1978

76-6942 - Lakeside v. Oregon

Dear Potter:

I join -- with the hope that trial judges
do not seize on this and give more problems.

Regards,



Mr. Justice Stewart

Copies to the Conference

Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-6942

Ensio Ruben Lakeside, Petitioner, } On Writ of Certiorari to
v. } the Supreme Court of
State of Oregon. } Oregon.

[March —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner did not take the witness stand at his trial on a criminal charge in a state court. Over his objection the trial judge instructed the jury not to draw any adverse inference from the petitioner's decision not to testify. The question before us is whether the giving of such an instruction over the defendant's objection violated the Constitution.

I

The petitioner was brought to trial in an Oregon court on a charge of escape in the second degree.¹ The evidence showed that he had been an inmate of the Multnomah County Correctional Institution, a minimum security facility in Multnomah County, Ore. On June 16, 1975, he received a special overnight pass requiring him to return by 10 o'clock the following evening. He did not return. The theory of the defense, supported by the testimony of a psychiatrist and three lay witnesses, was that the petitioner was not criminally responsible for his failure to return to the institution.²

¹ Section 162.155 of Oregon Revised Statutes provides, in pertinent part:

"(1) A person commits the crime of escape in the second degree if:

"(c) He escapes from a correctional facility."

² Section 161.295 of the Oregon Revised Statutes provides that

"(1) A person is not responsible for criminal conduct if at the time of such

Psychiatrist
of the Petitioner

Justice Stewart

Med: _____

Dated 7/19/1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES RE PROG 5,8

No. 76-6942

Ensio Ruben Lakeside, Petitioner, v. On Writ of Certiorari to
the Supreme Court of
State of Oregon. Oregon.

[March —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner did not take the witness stand at his trial on a criminal charge in a state court. Over his objection the trial judge instructed the jury not to draw any adverse inference from the petitioner's decision not to testify. The question before us is whether the giving of such an instruction over the defendant's objection violated the Constitution.

I

The petitioner was brought to trial in an Oregon court on a charge of escape in the second degree.¹ The evidence showed that he had been an inmate of the Multnomah County Correctional Institution, a minimum security facility in Multnomah County, Ore. On June 16, 1975, he received a special overnight pass requiring him to return by 10 o'clock the following evening. He did not return. The theory of the defense, supported by the testimony of a psychiatrist and three lay witnesses, was that the petitioner was not criminally responsible for his failure to return to the institution.²

¹ Section 162.155 of Oregon Revised Statutes provides, in pertinent part:

"(1) A person commits the crime of escape in the second degree if:

"(c) He escapes from a correctional facility."

² Section 161.295 of the Oregon Revised Statutes provides that

"(1) A person is not responsible for criminal conduct if at the time of such

To: The Chief Justice
 Mr. Justice BREWSTER
 Mr. Justice WHITE
 ✓ Mr. Justice MARSHALL
 Mr. Justice BLACKMUN
 Mr. Justice POWELL
 Mr. Justice REHNQUIST
 Mr. Justice STEVENS

From: Mr. Justice STEWART

Circulated: 14 MAR 1978

3rd DRAFT

Recirculated: 6

SUPREME COURT OF THE UNITED STATES

No. 76-6942

Ensio Ruben Lakeside, Petitioner, | On Writ of Certiorari to
 v. | the Supreme Court of
 State of Oregon. | Oregon.

[March —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner did not take the witness stand at his trial on a criminal charge in a state court. Over his objection the trial judge instructed the jury not to draw any adverse inference from the petitioner's decision not to testify. The question before us is whether the giving of such an instruction over the defendant's objection violated the Constitution.

I

The petitioner was brought to trial in an Oregon court on a charge of escape in the second degree.¹ The evidence showed that he had been an inmate of the Multnomah County Correctional Institution, a minimum security facility in Multnomah County, Ore. On June 16, 1975, he received a special overnight pass requiring him to return by 10 o'clock the following evening. He did not return. The theory of the defense, supported by the testimony of a psychiatrist and three lay witnesses, was that the petitioner was not criminally responsible for his failure to return to the institution.²

¹ Section 162.155 of Oregon Revised Statutes provides, in pertinent part:
 "(1) A person commits the crime of escape in the second degree if:

"(c) He escapes from a correctional facility."

² Section 161.295 of the Oregon Revised Statutes provides that

"(1) A person is not responsible for criminal conduct if at the time of such

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 27, 1978

Re: 76-6942 - Lakeside v. Oregon

Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-6942, Lakeside v. Oregon

I vote to reverse the judgment of the Supreme Court of Oregon. In the circumstances of this case, the trial court's giving of the instruction constituted a comment on the defendant's failure to testify. No legitimate interest of the prosecution could be served by this instruction. The court itself has an interest in ensuring that the defendant's right to a fair trial not be subverted by defense counsel's incompetence, and this interest might be implicated in a case in which, for example, the objected-to instruction were one on reasonable doubt and the prosecution's burden of proof. But I do not see how this interest could conceivably have been furthered by the instruction here, since there were good arguments both ways as to whether the instruction would harm the defendant, just as there are often arguments both ways as to whether a defendant should testify at trial. Once the defendant had made his choice, the court had no good reason to interfere with it, and its insistence on doing so denied petitioner his Fifth Amendment right not to have anyone call the jury's attention to his silence.

J.M.
T.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1978

Re: No. 76-6942, Lakeside v. Oregon

Dear Potter:

I shall await the dissent in this one.

Sincerely,

JM .

T. M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 17, 1978

Re: No. 76-6942, Lakeside v. Oregon

Dear John:

Would you please note at the end of your dissent:

"MR. JUSTICE MARSHALL joins this opinion, with the exception of the first paragraph and footnote 5."

Sincerely,

T.M.
T. M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 27, 1978

Re: No. 76-6942 - Lakeside v. Oregon

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

FILE COPY
PLEASE RETURN
TO FILE

February 27, 1978

No. 76-6942 Lakeside v. Oregon

Dear Potter:

I have joined your opinion, and write only to suggest the possibility of additional emphasis on one point.

It seems to me that the element of compulsion found to be present in Griffin is absent in this case. The instruction here, unlike the prosecutor's comments and the court instruction in Griffin, has no inevitable tendency - as you point out - to disadvantage a defendant because of his silence. Again, as you note, the instruction here was designed to prevent any such disadvantage. In these circumstances, there just isn't the kind of "compulsion" about which the Fifth Amendment is concerned.

Sincerely,

Mr. Justice Stewart

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 27, 1978

No. 76-6942 Lakeside v. Oregon

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1978

Re: No. 76-6942 - Lakeside v. Oregon

Dear Potter:

Please join me.

Sincerely,

WRM

Mr. Justice Stewart

Copies to the Conference

11
Linda - Attach & Cert

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

John will vote to grant

September 29, 1977

MEMORANDUM TO THE CONFERENCE

Re: 76-6942 - Lakeside v. Oregon

This case was relisted in order to make sure that the federal question was presented to, and decided by, the Oregon Supreme Court. It clearly was.

In the trial court, the defendant's attorney said:

"I made this in Chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of the jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him." Pet. App. at 1, n. 1.

On appeal to the intermediate state court, defendant stated the following question:

"Did the trial court violate appellant's rights, guaranteed by the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, by instructing the jury concerning appellant's failure to testify, when appellant objected to the giving of this instruction prior to the charge to the jury?" Respondent's Br. at 3.

The Oregon Supreme Court, after quoting this assignment of error, reviewed the trial transcript and held: "We shall,

for the purposes of this opinion, consider [petitioner's] exception sufficient to preserve defendant's claim of error." Pet. App. at 2, n. 1.

At several points in its opinion, the Oregon Supreme Court made it clear that the Fifth Amendment claim is the issue before it. For example, the court said, at the close of its opinion, "[i]n taking the position that defendant's Fifth and Fourteenth Amendment rights were not violated, we make no law which either requires or proscribes any legislative action." Pet. App. at 23.

The dissent also recognized that "[t]he majority states the issue to be whether the trial court's instruction violates the defendant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution." Pet. App. at 24.

Accordingly, I adhere to my vote to grant certiorari.

Respectfully,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 27, 1978

RE: No. 76-6942 - Lakeside v. Oregon

Dear Potter:

In a few days I will circulate a dissent.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

2nd DRAFT

Circulated: Mar 13 1978

SUPREME COURT OF THE UNITED STATES

No. 76-6942

Ensio Ruben Lakeside, Petitioner, | On Writ of Certiorari to
v, | the Supreme Court of
State of Oregon. | Oregon.

[March —, 1978]

MR. JUSTICE STEVENS, dissenting.

Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons—those who are actually innocent—from wrongful conviction.

The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials.¹ Every trial lawyer knows that some truthful denials

¹ "But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed

✓
pp. 3-4, 7

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

3rd DRAFT

Recirculated: MAR 14 '78

SUPREME COURT OF THE UNITED STATES

No. 76-6942

Ensio Ruben Lakeside, Petitioner, | On Writ of Certiorari to
v. | the Supreme Court of
State of Oregon. | Oregon.

[March —, 1978]

MR. JUSTICE STEVENS, dissenting.

Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons—those who are actually innocent—from wrongful conviction.

The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials.¹ Every trial lawyer knows that some truthful denials

¹ "But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed

P.7

Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

MAR 20 1978

Recirculated:

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-6942

Ensio Ruben Lakeside, Petitioner, | On Writ of Certiorari to
 v. | the Supreme Court of
 State of Oregon. | Oregon.

[March —, 1978]

MR. JUSTICE STEVENS, dissenting.

Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons—those who are actually innocent—from wrongful conviction.

The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials.¹ Every trial lawyer knows that some truthful denials

¹ "But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed