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Lonnie E. Strong v. John W. Turner : Brief of Respondent

Utah Supreme Court

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In The Supreme Court of the State of Utah

LONNIE E. STRONG,

Plaintiff-Appellant,

vs.

**JOHN W. TURNER, Warden,
Utah State Prison,**

Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from the judgment of the District
Court of Salt Lake County, State of Utah,
H. Croft presiding.

JOHN W. TURNER,
Warden,
Utah State Prison,
Salt Lake City,
Utah,
Attorney for Respondent.

LONNIE E. STRONG
P. O. Box 250
Draper, Utah

Appellant in Propria Persona

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In The Supreme Court of the State of Utah

LONNIE E. STRONG,

Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant-Respondent.

Case No.

11150

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Lonnie E. Strong, appeals from the denial of his writ of habeas corpus.

DISPOSITION IN LOWER COURT

Based upon findings of fact, the Honorable Bryant H. Croft after conducting a hearing on appellant's petition concluded that there was no "showing by clear and convincing evidence that there was a mentally coerced plea of guilty to the charge of robbery." The petition was therefore denied.

RELIEF SOUGHT ON APPEAL

Respondent submits that the denial of appellant's petition for writ of habeas corpus in the Third District Court should be affirmed.

STATEMENT OF FACTS

Lonnie H. Strong was sentenced to the Utah State Prison on September 22, 1965, following his plea of guilty to a charge of robbery. The defendant was represented by court-appointed counsel, Frank Hanson. Mr. Hanson conferred with the defendant and his co-defendant for a short time before the preliminary hearing and then conducted the preliminary hearing in their behalf (T. 3-7). Later, at the time of trial, Mr. Hanson recommended that the appellant plead guilty to the charge based upon the state offer that the charges of attempt to escape and destruction of state property would not be filed by the state. At the hearing on the writ of habeas corpus, counsel for the petitioner had in his possession the transcript of the proceedings below but declined to submit it as evidence (T.14). The only evidence submitted at the hearing was the testimony of the petitioner and his co-defendant, Charles Meredith. The trial court found that the arrangement whereby the charges of attempted escape and destruction of state property were not filed in return for the plea of guilty to the charge of robbery was not in and of itself adequate evidence to prove that the plea of guilty had been coerced.

ARGUMENT

POINT I

THE PRESENT APPEAL IS NOT SUBJECT MATTER FOR AN EXTRAORDINARY WRIT SUCH AS HABEAS CORPUS BUT RATHER SUBJECT MATTER FOR REGULAR APPELLATE REVIEW.

The petitioner is alleging that he is not guilty of the charge of robbery but rather of grand larceny at the most. The guilt of the petitioner is not a proper issue to be raised in this appeal nor is it proper subject matter for the granting of a writ of habeas corpus. The petitioner is attempting to do what the Utah Supreme Court has previously addressed itself to and has ruled upon as in the case of *Bryant v. Turner*, 19 U.2d 284, 431 P.2d 121 (1967) wherein the court said :

This proceeding is an attempt to do that which should not be done nor countenanced in our procedure: To turn habeas corpus into an appellate review . . . After judgment is entered, there is assured a right of appeal with the proper time to seek redress for any such error of transgression of those rights, i.e., the rights of one accused of crime and safeguards against conviction of the innocent. 19 U.2d at 286.

The writ of habeas corpus is not a substitute for and cannot properly be treated as a regular appellate review. It is an extraordinary remedy which is properly invocable only when the court has no jurisdiction over the person or the offense or where the requirements of law have been so disregarded that the party is substantially and effectively denied the due process of law, or where some fact is shown that it would be unconscionable not to reexamine the conviction. If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in a manner and within the time permitted by regular prescribed procedure or the judgment becomes final and is not

subject to further attack except in some unusual circumstances as we have mentioned above.

In the case of *Sullivan v. Turner*,U.2d....., 448 P.2d 907 (1968) the Utah Supreme Court said:

The effort to upset this conviction in this manner must be considered in connection with our rules of procedure. When an accused is convicted of a crime, our law requires that any claimed error or defect be corrected by regular appeal within the time allowed by law, and if this is not done, the judgment becomes final. It can then be subjected to collateral attack by an extraordinary writ only when the interest of justice so demand because of some extraordinary circumstance or exigency: e.g., lack of jurisdiction, mistaken identify, where the requirements of law have been so ignored or distorted that the accused has been deprived of "due process of law," or where there is shown to exist some other circumstances that it would be unconscionable not to review the conviction. (Footnotes omitted.)

See also *Brown v. Turner*, 21 U.2d 96, 440 P.2d 968 (1969). Where it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent, *Wise v. Turner*, 21 U.2d 101, 440 P.2d 971 (1968).

As held by the court in those cases, the time for appellate review has long since passed and this is not a case in which the court did not have jurisdiction nor in which any of the other extraordinary circumstances have been shown. Respondent submits that the necessary subject mat-

ter is not in evidence in the case at bar and that therefore the denial of the writ should be affirmed.

POINT II

AN AGREEMENT TO DROP SOME CHARGES AGAINST THE PETITIONER IN RETURN FOR HIS PLEA OF GUILTY TO THE CHARGE OF ROBBERY WAS NOT IN AND OF ITSELF MENTAL COERCION. THE PETITIONER HAS FAILED TO SUSTAIN THE BURDEN OF PROOF THAT HE IS BEING DETAINED AS THE RESULT OF MENTALLY COERCED PLEA OF GUILTY.

It is important to point out at the onset that the petitioner does not allege mentally coercive tactics other than if he would plead guilty to the charge of robbery the state would not file the charge of attempted escape and destruction of state property. As expressed by the Honorable Bryant H. Croft sitting at the hearing on the petition, this in and of itself does not amount to mental coercion.

A holding to the effect that it was such would deprive not only the state of a valuable tool in the prosecution of criminals, but would further deprive many violators of the law of a means of having the harshness of the law ameliorated in the form of a lessor punishment than that to which they could rightfully be subjected. The defendant was free to refuse the offer of the state and defend himself against all charges. The decision was one of strategy which is presented to every accused in proceeding with the defense of his own innocence. In this respect, it is important

to note that the petitioner's counsel after having evaluated the facts and the law involved recommended that the defendants in this case plead guilty. It would be unjust for this court to hold that as a matter of due process and procedure, that counsel in future cases defending those accused of crimes could not recommend such a plea because of the fact that in this case the petitioner claims such advice amounted to or aided in a mental coercion. Respondent submits that neither it nor this court should be prepared to admit that this is or should be the law.

The petitioner has the burden of showing by clear and convincing proof that he has been denied some fundamental constitutionally protected right in order to justify the issuance of the extraordinary writ of habeas corpus. *McGuffey v. Turner*, 18 U.2d 354, 423 P.2d 166 (1967). All that was presented in the hearing below was the testimony of the petitioner and his partner in crime, Charles Meredith, to the effect that the agreement presented to them by the state along with the advise of their attorney amounted to tactics which constituted mental coercion.

In *Dexter v. Crouse*, 192 Kan. 151, 386 P.2d 262 (1963), the court held:

It is presumed an attorney appointed to represent an accused in a criminal case discharged all duties supposed of him by our statute and this presumption is not overcome by the uncorroborated statements of the petitioner in a habeas corpus proceeding.

The court stated further:

The unsupported and uncorroborated statements of the petition in a habeas corpus proceeding do not sustain the burden of proof or justify the granting of a writ where the judgment rendered is regular on its face and entitled to a presumption of regularity and validity.

The Utah Supreme Court in the case of *Sullivan v. Turner, supra*, stated:

It should be pointed out that there is a basic fallacy in the propositions urged by the petitioner: He assumes that the trial court was obliged to believe his evidence and draw conclusions favorable to him therefrom. The law is to the contrary. Petitions in habeas corpus and coram nobis are generally regarded as being analagous procedurally to civil proceedings. The petitioner has the burden of persuading the trial court by perponderance of evidence facts which will entitle him to relief. When the trial judge has made findings of facts and entered judgment thereon, they are entitled to the presumption of correctness on appeal the evidence is surveyed in the light favorable to them; and if there is any reasonable basis in the evidence to support them, they will not be overturned. (Foot-notes omitted.)

Respondent submits that the appellant has not sustained his burden of showing that there was a mentally coerced plea and further submits that there is more than reasonable basis in the evidence to support the denial of the petition for habeas corpus.

POINT III

THE POINT RAISED BY APPELLANT OF LACK OF COMPETENT REPRESENTATION IS NOT PROPERLY BEFORE THE COURT ON APPEAL.

In petitioner's brief submitted on appeal, it is now his contention that the court-appointed counsel was negligent insofar as to be incompetent in rendering appellant representation at the time of the guilty plea and as such the defendant was denied the effective representation of counsel. This contention was not raised at the hearing below and the evidence introduced there was only the statements of the petitioner and his co-defendant to the effect that they met with their counsel only briefly. Judge Croft at the hearing below stated :

Well, in the Lonnie Strong case I don't think that there is any showing by clear and convincing evidence that there was a mentally coerced plea of guilty to the charge of armed robbery. I think that's the only point raised in this habeas corpus petition and for that reason the petition of Lonnie Strong for the issuance of writ of habeas corpus is denied. (T.23)

The petitioner cannot now raise issues for the first time on appeal and to do so would amount to a travesty of the rules of procedure. *Dodge v. Turner*,U.2d....., 445 P.2d 707 (1968). See also *Wood v. Turner*, 19 U.2d 284, 431 P.2d 121 (1967).

POINT IV

THIS COURT IS NOT THE COMPETENT COURT TO ENTERTAIN THE QUESTION OF THE DE-

TAINER ALLEGING ESCAPE FROM THE KANSAS STATE PENETENTIARY.

The petitioner has alleged that there is an unlawful detainer against him from the State of Kansas for escape from prison. With regards to this escape, he alleges that he was illegally detained in Kansas as the result of failure to properly inform him of his constitutional rights and provide counsel. This issue was properly stricken by the court below at the time of a pretrial hearing on the habeas corpus petition and defense counsel properly did not raise this matter at the time of the hearing (T.15).

It is apparent that the basic principle of law that one state will not attempt to enforce the criminal laws of another is present here. This issue can best be settled in the courts of Kansas at such time as the petitioner has paid his debt to society in this state and returns to the State of Kansas and applies to their court for whatever relief he may be entitled to.

CONCLUSION

Petitioner has failed in his burden to sustain by clear and convincing evidence that his plea of guilty to the charge of robbery was coerced. Petitioner has further failed in his burden to show that the agreement to not file other charges against him in return for the plea of guilty to the charge of robbery was in and of itself mental coercion. The other points raised by appellant in his petition are not properly before the court. For these reasons

it is therefore submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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