

1970

John Michael Kryger and William Frederick Stewart v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN MICHAEL KRYGER and WIL-
LIAM FREDERICK STEWART,
Plaintiffs-Appellants,

vs.

JOHN W. TURNER, Warden, Utah
State Prison,
Defendant-Respondent.

BRIEF OF RESPONDENT

An Appeal from the Judgment of the District Court, in and for Salt Lake County, rendered by the Honorable Leonard W. Elton, Judge.

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Defendant-Respondent.

Case No.

12073

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The Appellants, John Michael Kryger and William Frederick Stewart, were denied a petition for writ of habeas corpus before the Third Judicial District Court, in and for Salt Lake County, The Honorable Leonard W. Elton, Presiding.

DISPOSITION IN LOWER COURT

John Michael Kryger and William Frederick Stewart pleaded guilty to the crime of robbery on the 10th day of June, 1968, in the Third Judicial District Court, in and for Salt Lake County. On December 29, 1969, a petition for writ

of habeas corpus was filed in the Third Judicial District Court, in and for Salt Lake County. A response of the Attorney General was duly filed and hearing held on the matter before the Honorable Leonard W. Elton. On the 14th day of April, 1970, Judge Elton entered an order denying the appellants' writ of habeas corpus.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the District Court should be affirmed.

STATEMENT OF THE FACTS

John Michael Kryger and William Frederick Stewart were arrested on May 15, 1968 (T. 33, 47), and charged with robbing one Thomas Edwin Finch (T. 33, 47). Subsequently on June 10, 1968, John Michael Kryger and William Frederick Stewart, with counsel, made an intelligent and voluntary plea of guilty to the crime of robbery. (Arraignment and plea T. 1, 2, 3).

ARGUMENT

POINT I.

APPELLANTS' GUILTY PLEAS WERE VOLUNTARILY AND UNDERSTANDINGLY MADE AND AS A RESULT WAIVE ALL DEFENSES OF ILLEGALLY OBTAINED EVIDENCE.

Counsel for appellants states that petitioners were forced to plead guilty. He puts great stress on the illegality of the evidence obtained against Kryger and Stewart,

and claims the guilty pleas were induced as a result of this evidence. Appellants specifically complain that a confession, a knife, and a lineup (which appellants claim were illegally obtained or accomplished), coupled with arresting officers' failure to make a *Miranda* warning, voids the guilty plea.

Before delving into court law on these allegations, it is important to note two points. First, all so-called "illegal evidence" as represented by appellants is nothing more than allegations on their part. Because the appellants pleaded guilty, trial was never held, and thus no judge or jury ever determined if the allegations made by Stewart and Kryger were true. Second, the guilty pleas by Stewart and Kryger were voluntarily and understandably given. The Judge told them the consequences of their plea, and counsel asked them if they had been coerced in any way — both answered no. Then both appellants stated they were pleading guilty solely because they were guilty of the crime charged.

THE COURT: Which one is Stewart? Alright. Mr. Stewart and Mr. Kryger, the Court wants to inform you that this is a felony and in the event either of you should plead guilty thereto or be found guilty thereof you will be subjected to a possible indeterminate term in the Utah State Prison. Are you aware of that fact, Mr. Stewart?

MR. STEWART: Yes.

THE COURT: Are you aware of that fact, Mr. Kryger?

MR. KRYGER: Yes, sir.

THE COURT: Record may so show and, also, you and each of you have at least two days and not more than ten days before entering pleas to this charge unless you desire to waive that time and enter pleas at this time.

MR. STEWART: I'd like to waive it.

THE COURT: Alright. Time may be waived on behalf of Defendant Stewart. And, you, Mr. Kryger, would also like to waive?

MR. KRYGER: (Nods head.)

THE COURT: Alright. Time may be waived on behalf of the Defendant Kryger.

MR. BOWN: Your Honor, prior to the entry of a plea may I have the convenience of the record?

THE COURT: You may.

MR. BOWN: Mr. Stewart and Mr. Kryger, I understand at this time you are about to enter a plea of guilty to the crime of robbery as charged in the Information, which was just read to you, is that correct?

MR. STEWART: Yes.

MR. KRYGER: Yes.

MR. BOWN: Now, in regard to this plea, Mr. Stewart and Mr. Kryger, has anyone from my office, from the District Attorney's office, the County Attorney's office, the police department, the County Sheriff's department, the Court or anyone given any promise or done anything to coerce you into pleading guilty to this charge as you've just heard read to you, Mr. Stewart, and Mr. Kryger? Answer audibly, would you please?

MR. STEWART: No.

MR. KRYGER: No.

MR. BOWN: Then I understand you're entering a plea of guilty solely because you are guilty of the crime as charged here, is that right?

MR. STEWART: Yes.

MR. KRYGER: Yes.

(Arraignment and Plea T. 2, 3.)

The transcript in the habeas corpus proceeding also seems to indicate Kryger and Stewart knew they were guilty and gave voluntary pleas.

Q. And did you subsequently plead guilty?

A. Yes, sir.

Q. Would you tell the Court whether this evidence, the identification, the presence of the knife, the other things, the statement that you made, induced to any extent your plea?

A. No, sir.

Q. What was your reason for pleading?

A. We just thought we'd just get out there and do our time because they said it would be until about December and we didn't want to wait around in the County jail for about eight months.

Q. Did you believe there was no other alternative than to plead guilty in view of this evidence?

A. No, sir.

(T. 40.)

The above transcripts clearly indicate that Stewart and Kryger voluntarily and intelligently, with the advice

of counsel, pleaded guilty to the crime charged, especially in light of a recent Tenth Circuit decision :

“It is a fundamental basic right that an accused be advised of the nature of charges against him and consequences of plea of guilty; however, it is not mandatory that judge ritualistically and personally advise accused of these matters; it is sufficient that the accused be in fact aware of such regardless of the source from where the information comes; the accused can be put on real notice through his own lawyer.” *Miller v. Crouse*, 346 F. 2d 301 (10th Cir. 1965). *Id.* at 306. See also: *William v. Cox*, 350 F. 2d 849 (10th Cir. 1965).

Because petitioners Stewart and Kryger pleaded guilty to the crime charged, they have no basis to bring the present habeas corpus. It is a well known rule of law, supported to decisions of the United States Supreme Court, that all non-jurisdictional defects are waived on a plea of guilty. *Kercheval v. United States*, 274 U. S. 220 (1926). Therefore, petitioners' claims of illegal evidence, forced confession, which in turn forced the guilty plea, illegal lineup, and incomplete *Miranda* warning which are non-jurisdictional claims were waived when they pleaded guilty.

In a United States Supreme Court case dealing with Rule II of the Federal Rules of Criminal Procedure, the majority opinion states the following :

“A defendant who enters such a plea (guilty) simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the due process clause, it must be ‘an inten-

tional relinquishment or abandonment of a known right or privilege.’” *McCarthy v. United States*, 394 U. S. 459 (1969). *Id.* at 465.

This same principle was also held in *Boykin v. Alabama*, 395 U. S. 238 (1969).

“Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the state by reason of the fourteenth. *Malloy v. Hogan*, 378 U. S. 1. Second is the right to trial by a jury. *Duncan v. Louisiana*, 391 U. S. 145. Third is the right to confront one’s accusers. *Pointer v. Texas*, 380 U. S. 400.” *Id.* at 243.

This year the Supreme Court has handed down a decision which expands the *McCarthy*, and *Boykin* decisions, *supra*. In *McMann v. Richardson*, U. S., 90 S. Ct. 1441 (1970), the court held:

“*Because guilty plea is a waiver of trial and, unless applicable law otherwise provides, a waiver of right to consent admissibility of any evidence state might have offered against defendant, guilty plea must be an intelligent act done with sufficient awareness of relevant circumstances and likely consequences.*” *Id.* at 1446. (Emphasis added.)

In Utah there is no other applicable law and of course, the Supreme Court decision is binding — a guilty plea waives right to consent to admissibility of evidence by defendant. This decision specifically prohibits Kryger and Stewart from alleging the evidence was illegally seized, through their guilty pleas they waived *consent* of prohibiting evidence in court.

McMann v. Richardson, *supra*, also held that a guilty plea resulting from a confession is not grounds to allege a coerced or induced plea. (In the present situation petitioners claim the confession of Kryger could not be used against Stewart and that the confession was coerced.)

“New York defendants, who with the advice of counsel had entered pleas of guilty, were not entitled to hearing on habeas corpus petitioners alleging that their confessions had been coerced and that the improperly procured confessions induced their guilty plea where there was no further showing.” *Id.* at 1449.

See also *Parker v. North Carolina*, U. S., 90 S. Ct. 1458 (1970); and *Brady v. United States*, U. S., 90 S. Ct. 1463 (1970).

The other federal courts including the Tenth Circuit adhere to the same principle. Note the following language taken from *Benton v. United States*, 352 F. 2d 59 (10th Cir. 1965) wherein the defendant alleged that there was an illegal search and seizure, coercion, and illegal confessions.

“In view of the allegation of fact made by appellant on this appeal with respect to the search and seizure, the coercion, and the confession issues, we agree with appellee that appellant’s plea of guilty prevents any consideration thereof on this point.” *Id.* at 60.

In another Tenth Circuit case, *Lattin v. Cox*, 355 F. 2d 397 (10th Cir. 1966), the appellant (appeal from denial of his habeas corpus petition) presented several issues at

the pretrial hearing; that no warrant was issued for appellant's arrest; his plea of guilty was not voluntary; that statement made to police officers was without his knowledge and hence illegal; that property was taken through an illegal search and seizure; and finally, he complains of cruel and unusual punishment and delay in being brought before a justice of the peace. The Tenth Circuit then held:

"After a careful consideration of the entire record before us, we must conclude that the pleas of guilty entered by Lattin in the state court to the charges of involuntary manslaughter and rape were voluntary and understandingly made and were not induced by any promises or threats. Such pleas of guilty waived all nonjurisdictional defects in proceedings had prior thereto." *Id.* at 400.

State court precedence is also in accord. The Supreme Court of Arizona in *State v. Martinez*, 102 Ariz. 215, 427 P.2d 533 (1967) states the following:

"We find no validity in this argument for none of the matters complained of by defendant attacks any jurisdictional defect in the proceedings and it is a well established rule of law that when a defendant voluntarily and knowingly pleads guilty at his trial such constitutes a waiver of nonjurisdictional defenses, defects and irregularities." *Id.* at 534.

From these cases, it is clear that a guilty plea similar to Kryger and Stewarts', which are voluntarily and knowingly given, waive all nonjurisdictional defenses, defects or irregularities.

Appellants try to distinguish the *McMann* decision

on two counts. First, he states that the Supreme Court decision in *McMann, supra*, is a minority view and goes against reason. A Supreme Court decision is not considered a minority view, on the contrary it is considered the supreme law of the land! Most of appellants' brief is based on Supreme Court decisions which were so called "minority decisions". Where applicable, Supreme Court decisions are the final and authoritative law of America.

Appellants also try to attack or distinguish *McMann* on the basis of incompetent counsel. *McMann* held "plea of guilty in state court is not subject to collateral attack in federal court on ground that it was motivated by a coerced confession unless defendants were incompetently advised by their attorney." *Id.* at 1948. Appellants assert original counsel was incompetent and therefore *McMann* does not apply. Counsel for appellants was and is a well-known and respected lawyer in the community. He was with appellants when they pleaded guilty and surely advised appellants as to what he thought was best for them. Even the Supreme Court realizes how hard it is to advise your client whether or not to plead guilty.

"But because of inherent uncertainty in guilty plea advice" *McMann v. Richardson*, U. S., 90 S. Ct. 1441. *Id.* at 1449.

"Considerations like these [whether or not to plead guilty] frequently present imponderable questions for which there are no certain answers; judgments may be made which in the light of later events seem improvident, although they were perfectly sensible at the time." *Brady v. United States*, U. S., 90 S. Ct. 1463 (1970). *Id.* at 1473.

In *Syddall v. Turner*, 20 Utah 2d 263, 437 P. 2d 194 (1968), the court looked to the record to see if anything suggested that the prisoner had been improperly induced to enter his plea of guilty. Since nothing was shown, the court held that he had been adequately represented by counsel.

Arizona allows a contention of deprivation of adequate counsel to be asserted in habeas corpus proceedings only in extreme cases:

"If appellant sets forth no facts which indicate the appointed attorney's performance was so substandard as to render the trial a farce or sham, the petition is properly denied." *Baron v. State*, 7 Ariz. App. 223, 437 P. 2d 975 (1968). *Id.* at 977.

Considering the transcript, original counsel's reputation, and all circumstances involved, it is difficult to understand why or when counsel was inadequate, rather, respondent contends that original counsel for petitioners was completely competent and advised his clients to the best of his ability.

"When defendant weighs his state court remedies and admits his guilt, he does so under the law then existing *and assumes risk of ordinary error in either his or his attorney's assessment of law and facts*, and although he might have pleaded differently had later decided cases then been the law, *he is bound by his plea, and his conviction will not be set aside unless he can allege and prove serious derelictions on part of counsel sufficient to show that his plea was not a knowing and intelligent act.*" *McMann v. Richardson*, *supra*. (Emphasis added.)

CONCLUSION

The respondent respectfully submits that the habeas corpus petition should be denied. Petitioners Stewart and Kryger entered an intelligent and voluntary guilty plea, and based on cases cited, they have no right to allege their constitutional rights were violated. Respondent prays that the lower court order denying the petition for habeas corpus be affirmed.

Respectfully submitted,

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