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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN MICHAEL KRYGER and
WILLIAM FREDERICK STEWART,

Plaintiffs and Appellants,

-vs-

Case No. 12073

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant and Respondent.

BRIEF OF APPELLANTS

An Appeal From the Judgment of the
Third Judicial District Court, State of Utah
the Honorable Leonard W. Elton, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN MICHAEL KRYGER and
WILLIAM FREDERICK STEWART,

Plaintiffs and Appellants,

-vs-

Case No. 12073

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant and Respondent.

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The appellants appeal from a decision of the Honorable Leonard W. Elton, Judge, Third Judicial District Court, denying the appellants' petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

John Michael Kryger and William Frederick Stewart plead guilty to the crime of robbery on the 10th day of June, 1968, in the District Court, Third Judicial District, State of Utah. On December 29, 1969, a petition for writ of habeas corpus was filed in the Third Judicial District Court, Salt Lake County. A response of the Attorney General was duly filed and

pre-trial held on the matter. Hearing was held on the 10th day of April, 1970, before the Honorable Leonard W. Elton and on the 15th day of April, 1970, Judge Elton entered an Order denying the appellants' relief under their petition.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the trial court's decision denying their petition for writ of habeas corpus.

STATEMENT OF FACTS

On or about May 15, 1968, a robbery occurred in Salt Lake County. (R. 33) Thereafter the petitioners, Kryger and Stewart, were charged with the robbery. They plead guilty to the crime of robbery and subsequently filed a complaint for a writ of habeas corpus alleging that their pleas of guilty were not voluntarily entered. (R. 1) The appellants alleged that their pleas of guilty were the result of Kryger being subjected to an illegal lineup, that Kryger gave a confession under circumstances that rendered it illegal in Stewart's case as well as Kryger's, evidence was obtained against them as a result of an illegal search and seizure. The only testimony offered at the hearing

on the appellants' complaint for habeas corpus was that of the appellants. The State offered no testimony to rebut their contentions. Kryger testified that he was arrested on May 15, 1968 at approximately 1:00 A.M. (R. 33) He was pulled over at a store, his car was searched and he was ordered to stand on the sidewalk while another car circled around the road a few times. (R. 33) At that time Kryger was apparently identified as being one of the perpetrators of a robbery which had occurred earlier. He was not advised of his right to have counsel present at the lineup. He was identified apparently as having been involved in a robbery of a service station. (R. 34) He was then taken to the police station where he was interrogated. He was told that if he didn't give a confession he was going to "serve time - a lot of time * * *" He was not advised as to any of his constitutional rights. As a result of the coercion and interrogation he confessed to robbing a service station with William Stewart and told the officers where a knife was located which had apparently been used in the robbery. (R. 37-38) He did not give the officers permission to search the apartment where the knife was located. At the time

of preliminary hearing the testimony of the confession, a knife, which was subsequently recovered from his apartment, and the identification was used against him. He testified that this effected his plea. (R. 39-41) Mr. Kryger was represented by counsel but counsel did not discuss the question of the lineup, his confession or the use of evidence obtained from the apartment against him. (R. 41) There was apparently no discussion to the effect that possibly these items of evidence could not be used in a prosecution in the District Court.

William Stewart testified that he was in his apartment on the 15th of May, 1968, and at approximately 4:00 A.M. in the morning he was awakened by officers from the Salt Lake City Police Department. (R. 48) He was immediately placed under arrest and asked where the knife was located. He was given no advice of his right to remain silent or of the other elements of the Miranda warning. (R. 49) He did not give a statement to the police and a search of his apartment disclosed nothing. Subsequently, the police returned to the apartment without a warrant, searched the

apartment and found the knife. (R. 49, 58, 62) At the time of preliminary hearing, Kryger's statement implicating Stewart was admitted into evidence (R. 50) as was the knife taken from the apartment. There was no discussion with Stewart's attorney, who also represented Kryger, concerning the search nor any discussion of a search warrant (R. 55, 62) Stewart said that his attorney felt that they had a weapon and a confession and that this was sufficient to make out a good case against him. (R. 56) Based upon evidence at preliminary hearing and counsel's statement, he entered a plea of guilty.

Neither Kryger or Stewart had graduated from high school and Stewart had only a ninth grade education.

ARGUMENT

POINT I

TRIAL COURT'S DENIAL OF APPELLANTS' COMPLAINT FOR WRIT OF HABEAS CORPUS SHOULD BE REVERSED BECAUSE THE UNCONTESTED EVIDENCE DISCLOSES THAT APPELLANTS' PLEAS OF GUILTY WERE INDUCED AS A RESULT OF ILLEGALLY OBTAINED EVIDENCE.

At the time that the appellants filed their petition for writ of habeas corpus, and at the time of hearing before the trial court, the United States Supreme Court had not decided the cases of McMann v. Richardson, U.S. _____, 90 S. Ct. 1441; Parker v.

North Carolina, ___ U.S. ___, 90 S. Ct. 1458 (1970);
and Brady v. United States, 90 S. Ct. 1463. At the
time the appellants filed their petition the law was
generally to the effect that a plea of guilty induced
by an illegal confession or illegally obtained evidence
could not be deemed a voluntary plea. See Brennan,
Dissenting, McMann v. Richardson, supra, 90 S. Ct. 1451,
F.N. 2. However, the appellants submit that their
case is not controlled by the principles of McMann v.
Richardson, supra, Parker v. North Carolina, supra, or
Brady v. United States, supra. In the instant case,
holding Kryger for identification without affording
him an opportunity to have counsel present was arguably
a violation of the United States Supreme Court's decision
in United States v. Wade, 388 U.S. 218 (1967), since
there may have been no adequate basis for arrest,
Wong Sun v. United States; Nedrud, The Supreme Court
and the Law of Criminal Investigation, 145-148.
Subsequent to his arrest, Kryger was taken to the Salt
Lake Police Department where he was interrogated without
being warned of his constitutional rights. The failure
to advise Kryger prior to the interrogation was a clear
violation of Miranda v. Arizona, 384 U.S. 436 (1966)

and rendered his confession involuntary and inadmissible. Further, the coupling of the threats with the absence of a warning rendered the confession involuntary especially in light of the limited education of the appellant, and the circumstances surrounding the interrogation. Haynes v. Washington, 373 U.S. 503 (1963) Lynumn v. Illinois, 272 U.S. 528 (1963). In addition, both Kryger and Stewart at the preliminary hearing were faced with the lineup, the illegal confession and evidence illegally seized. The use of the confession of Kryger against Stewart would not be constitutionally permissible at the time of trial. Indeed, both men could not be tried in a common trial if Kryger's confession were to be introduced against him. Bruton v. United States, 391 U.S. 123 (1968).

The police entered the apartment of Stewart after his arrest, after he had been taken to jail, and after a prior search of the apartment had been made and nothing uncovered. The search was without the consent of either Stewart or Kryger. They recovered a knife apparently used in the robbery. This search and the seizure of the knife was without consent, without warrant, nor incident to arrest and was thus clearly unconstitutional. Stoner v. California, 376 U.S. 483 (1964); Recznik v.

City of Lorain, 393 U.S. 166 (1968); Shipley v. California, 395 U.S. 818 (1969); Preston v. United States, 376 U.S. 364 (1964). The undisputed testimony of Kryger and Stewart was to the effect that the illegally obtained and tainted evidence directed induced their pleas of guilty. Kryger further testified that there was no discussion with his attorney concerning his confession, the lineup, or the apparent illegal search and seizure. (R. 41) Stewart testified that there was no discussion with counsel concerning the search, and he also testified that the attorney had indicated that since there was a confession and evidence uncovered at a search, a plea of guilty was in order. It is submitted in the first instance that this case is within both of the two exceptions to the rule in McMann that a plea of guilty cures non jurisdictional deficiencies. The first exception is that this case presents a circumstance where the coercion of Kryger had an abiding and continuing impact so as to taint his plea. McMann v. Richardson, 90 S. Ct 441, pg. 447. Certainly there was nothing done by the police or appointed counsel to dispel the impact of the confession, the lineup or the search. In addition, Kryger was exposed to the confession being used against

him at the preliminary hearing. This would appear to bring the matter well within the Chambers v. Florida, 309 U.S. 227 (1940) exception noted in McMann. In McMann v. Richardson, supra, the court stated the rule as follows:

"In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the grounds that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (Emphasis added)

This is not a case where it can be said that counsel's advice was within the range of competence demanded by attorneys in criminal cases. Alires v. Turner,

22 U.2d 118, 449 P.2d 241 (1969). The state did not call counsel to rebut the testimony of Kryger and Stewart that there was no discussion concerning the alleged illegally obtained evidence or that in fact the attorney felt that there was a good case against the petitioners. The evidence as it is now before the court clearly supports a determination that Kryger's confession was illegally extracted, and that the knife taken from the apartment was obtained as a result of illegal search and seizure. Further, there is no rebuttle to the assertion that counsel did not discuss the legal implications of these matters with appellants. This is not a case like Brady v. United States and Parker v. North Carolina, where counsel would have been required to anticipate future Supreme Court decisions. The law was clear. Under these circumstances it is submitted that McMann v. Richardson compels a determination that the plea of guilty of the appellants was not free and voluntary but the product of illegally obtained evidence.

POINT II

THE APPELLANTS' PLEA OF GUILTY WAS ACCEPTED IN VIOLATION OF ARTICLE I, SECTION 7 OF THE CONSTITUTION OF THE STATE OF UTAH.

Appellants submit, that assuming that their plea is controlled by the decision of McMann v. Richardson, supra, as respects their federal constitutional allegations, that this court should rule that their pleas cannot stand under Article I, Section 7 of the Constitution of the State of Utah. The McMann v. Richardson, supra, decision is a distinct minority expression as respects overall judicial evaluation on the issue of whether a plea of guilty will be deemed voluntarily entered in the face of illegally obtained evidence. Moreno v. Beto, 415 F.2d 154 (C.A. 5th Cir. 1969); United States ex rel. McCloud v. Rundle, 402 F.2d 853 (C.A. 3d Cir. 1968); Kott v. Green, 387 F.2d 136 (C.A. 6th Cir.1967); Reed v. Henderson, 385 F.2d 995 (C.A. 6th Cir. 1967); United States ex rel. Collins v. Maroney, 382 F.2d 547 (C.A.3d Cir.1967); Smiley v. Wilson, 378 F.2d 144 (C.A.9th Cir.1967); Carpenter v. Wainwright, 372 F.2d 940 (C.A. 5th Cir. 1967); Doran v. Wilson, 369 F.2d 505 (C.A.9th Cir. 1966); White v. Pepersack, 352 F.2d 470 (C.A.4th Cir. 1965); Zachery v. Hale, 286 F. Supp. 237 (D.C.M.D.

Ala.1968); United States ex rel. Cuevas v. Rundle,
285 F. Supp. 647 (D.C.E.D.Pa. 1966); People v. Spencer,
66 Cal.2d 158, 57 Cal.Rptr. 163, 424 P.2d 715 (1967);
Commonwealth v. Baity, 428 Pa. 306, 237 A.2d 172 (1968).

The overwhelming weight of judicial consideration rejects the proposition that a person who enters a plea of guilty as a result of illegally obtained evidence enters a knowing, intelligent, and voluntary plea. Substantial reason militates against the position taken by the Supreme Court in McMann v. Richardson, supra. The overwhelming majority of criminal cases are settled without trial upon a plea of guilty. The purpose for the exclusionary rule adopted in Mapp v. Ohio, 367 U.S. 643 (1961) was to deter police activity which violated the 4th and 14th Amendments to the Constitution of the United States and may be criminal (18 U.S.C. 241, etc.) or at least tortious. Monroe v. Pape, 365 U.S. 167 (1961). If officers may now believe that if an accused pleads guilty the fruits of their illegal activity will be justified the reason for complying with constitutional standards will be diluted. It is submitted that the better rule would be that urged by the dissenting opinions in McMann and that this court should determine that due process of law under

the Constitution of the State of Utah is violated where an accused's plea is a result of illegally obtained evidence.

CONCLUSION

The pleas of guilty entered by the appellants in the instant case were as a result of illegally obtained evidence and unconstitutional police practices. The decisions of the United States Supreme Court in McMann v. Richardson, supra, does not support a conclusion that the pleas were voluntarily entered since there was not the adequate consultation with counsel that the McMann case requires. Further, as a matter of state constitutional law, the pleas were taken in violation of due process. This court should reverse.

Respectfully submitted,

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