

1978

the State of Utah v. Arvil A. Harris : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

ARVIL A. WASHINGTON,

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)
)
 Plaintiff-Respondent,)
)
 vs.) Case No. 15560
)
 ARVIL A. HARRIS,)
)
 Defendant-Appellant.)

BRIEF OF APPELLANT

Appeal from sentence and order denying appellant's motion for order allowing him to withdraw his plea of guilty and enter plea of not guilty; motion to arrest judgment; motion for new trial; motion to reconsider sentence and for hearing in which to present evidence in mitigation; motion to review presentence report, the Honorable G. Hal Taylor, Third District Court Judge presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 15560
)	
ARVIL A. HARRIS,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

In its simplest form, defendant seeks an order from this court allowing him to withdraw his plea of guilty and to enter a plea of not guilty. In the alternative, defendant seeks an order vacating the sentence imposed by the Salt Lake County Court, remanding to the district court for resentencing with instructions to allow him to present evidence in mitigation and to review the presentence report.

DISPOSITION IN THE LOWER COURT

Defendant was arraigned before the Third District Court in and for Salt Lake County and entered a plea of guilty to attempting to receive stolen property, a class A misdemeanor. Defendant requested a presentence investigation which request was referred by the court. Thereafter, and after the court had received and reviewed the presentence report,

appellant came before the Honorable G. Hal Taylor for sentencing. He was sentenced to the maximum allowed by law, i. e., \$1,000.00 fine and one year in the Salt Lake County Jail, and committed forthwith.

Defendant thereafter duly filed a motion seeking an order allowing him to withdraw his plea of guilty and enter a not guilty plea; asking that the judgment be arrested, the sentence suspended, and the defendant discharged; requesting a new trial; and seeking to examine and review the presentence report and to have an opportunity to explain or rebut the derogatory allegations which he believed were contained therein. All motions were denied by the court.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this court allowing him to withdraw his guilty plea, substitute a not guilty plea, and proceed to trial. In the alternative, he seeks an order vacating the sentence imposed by Judge G. Hal Taylor and remanding to the district court for resentencing with instructions to allow defendant to present evidence in mitigation and to examine and review the presentence report.

STATEMENT OF FACTS

Appellant was originally charged with receiving stolen property, a third degree felony. After the complaint was amended to charge attempting to receive stolen property, defendant waived preliminary hearing in the Salt Lake City Court and was bound over to the

District Court for trial. To the charge contained in the information (R. 8, 9), defendant pleaded guilty and asked for a presentence investigation and report. (R. 48-52). Approximately four weeks later, he appeared before the Honorable G. Hal Taylor for sentencing. (R. 41-45). The Court thereupon sentenced defendant to the maximum allowed by law and committed him immediately to the Salt Lake County jail. Defendant, within 10 days filed a motion for a new trial (R. 15-20), together with supporting affidavits (R. 21-26), which motion was consolidated with various other motions, the most important of which were his motions to withdraw his guilty plea, and his motion to see the presentence report and to be allowed to explain or rebut the allegations contained therein. (R. 15-20). These motions were denied (R. 27). Appellant thereafter filed his notice of appeal (R. 28, 29), designated the record (R. 21, 29, 40), and otherwise perfected his appeal.

Defendant maintains that his guilty plea was entered upon the expectation that he would be treated as other first offenders involving only offense against property, and that had he been so treated, he would have received only a fine and jail sentence with the jail sentence suspended and he would have been placed on probation. (R. 17, 18). Based upon the remarks of Judge Taylor at the time of sentencing (R. 44, lines 2 through 12), and other remarks made off the record to defendant's counsel, defendant contends that the presentence report contained derogatory infor-

mation to the effect that he was continuously involved in the fencing business and that he had made threats to do bodily harm to the state's witness, and he should be allowed access to the information contained in the presentence report and given an opportunity to explain or rebut such allegations. (See Motion for New Trial, etc., R. 15-20, and particularly the affidavit in support thereof, R. 24-26.)

ARGUMENT

POINT I

THE COURT ERRED WHEN IT ACCEPTED DEFENDAN'S PLEA OF GUILTY WITHOUT MAKING A DETERMINATION THAT THERE WERE FACTS SUFFICIENT TO WARRANT A FINDING OF GUILTY

The trial court adequately determined that the defendant was entering a voluntary plea and that he understood the consequences. It utterly failed, however, to determine if there were facts sufficient to warrant the acceptance of a guilty plea as required by the principles enunciated in the case of State vs. Forsythe (Utah, 1977), 560 P.2d. 337. (R. 48-52). In the Forsythe case the defendant had been charged with numerous counts of theft by deception. Pursuant to a plea bargain he pleaded guilty to one charge and all the rest were dismissed upon motion of the prosecutor. Before accepting the plea, however, the Court heard a summary from the prosecutor and from the defense counsel of their evidence and their respective positions, and based upon such summaries, accepted the plea. Apparently a presentence report was requested, although

January 30, 1976, and appeared for sentencing on February 27, 1976). At the time of sentencing Forsythe moved to withdraw his plea of guilty and to enter a plea of not guilty. Whether this motion came before or after the court had pronounced sentence is unclear. In any event the sentencing court refused to allow the withdrawal of the plea.

Defendant thereupon appealed to this court asserting two grounds for relief, i. e., (a) that his plea had not been freely given, and the (b) the trial court did not sufficiently ascertain whether there was sufficient factual basis to justify accepting his guilty plea. Justice Crockett, speaking for the court at page 339 of the Pacific Reporter made the following observation:

"We recognize, of course, that it is the duty of the trial court to see that the interests of justice are served by not allowing a person to enter a plea of guilty to a crime he has not committed. In performing that duty, the court is not bound to any rigidity of rule or procedure, but may do it in any manner consistent with reason and fairness which he thinks will best accomplish that purpose. This responsibility was properly taken care of here by the court hearing a summary by the prosecutor and by the defendant's counsel of their evidence as to the position of each, upon the basis of which the court accepted the plea of guilty on the one count and granted the motion to dismiss to the others. (Emphasis added)

Unlike the Forsythe case, the trial court in the instant case made no inquiry into any factual matters constituting the alleged offense, either at the time of arraignment (R. 48-52), or at the time of sentencing. (R. 41-45). In fact, the allegations contained on pages 2 and 3 of the

defendant's motion for new trial (R. 16, 17) raise the presumption that there was a legitimate defense and hence no factual basis for accepting the guilty plea. Because there are no facts at all upon which to sustain a determination of guilty established in the record, defendant should be allowed to withdraw his plea of guilty and enter a not guilty plea as requested in his motion for new trial (R. 15, paragraph numbered 1).

POINT II

RELIANCE UPON THE PRESENTENCE REPORT AND FAILURE TO DISCLOSE EVEN ITS SUBSTANCE TO DEFENDANT CONSTITUTES REVERSABLE ERROR

I

With ever increasing frequency the sanctity of the secret presentence report is being challenged by defendants at all levels of the state and federal systems. Traditionally the courts have held that the sentencing judge was allowed wide discretion as to the information and the source thereof to be considered by him at the time of sentencing. In addition, he was not ordinarily required to reveal to the defendant the information contained in any presentence investigation commissioned by the court. Even so, such discretion was not without limits, and had to meet certain due process requirements. See, for example, *United States vs. Espinoza* (5th Cir. 1973), 481 F.2d. 553, where the court held that "Despite broad discretion left to the trial

judge in assessing background information for sentencing purposes a defendant retains the right not to be sentenced on the basis of invalid premises. "

At the time of sentencing, the judge in the Espinoza case explicitly stated that he had information that Espinoza had been involved in various threats and assaults. Espinoza asked for an evidentiary hearing, or at least an opportunity to rebut the allegations which he contended were factually erroneous. The trial judge refused. On appeal the court reversed and sent the case back for resentencing with instructions to allow defendant an opportunity to explain or rebut the allegations. Quoting from a 1965 United States Supreme Court case, *Harris vs. United States*, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d. 240, the court said:

"Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion, but will impose sentence with insight and understanding. "

See also *Townsend vs. Burke* (1948), 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690; *United States vs. Battaglia* (5th Cir. 1972), 478 F.2d. 854; *United States vs. Weston* (9th Cir. 1971), 448 F.2d. 626; and *United States vs. Malcolm* (2nd Cir. 1970), 432 F.2d. 809, all standing for the proposition that the trial judges discretion is not unlimited, that it must appear that he actually exercised his discretion intelligently and not

arbitrarily, and that where there is any dispute concerning the accuracy of the presentence report, defendant must be given an opportunity to rebut.

Although defendant's counsel has developed information which leads him to believe that the presentence report contains allegations that defendant conspired to do bodily harm to the state's witness, defendant Harris does not have any certain knowledge that the presentence report was infected with inaccuracies, or even that it contained any derogatory information. However, as is stated in his motion for new trial (R. 15-20 at pages 17 and 18), considering the disposition of other first offender cases, he had every reason to believe he would be given probation. The sentence is clearly unusual and out of line with that usually meted out to first offenders involving crimes against property only. Defendant moved the court for an opportunity to submit evidence in mitigation of the offense, and for an opportunity to examine the presentence report (R. 15, 16), which motions were denied by the court. Although it was not reported by the reporter, this writer, as counsel for the defendant, asked the court at the time of sentencing for some facts in justification of the sentence, but the judge refused.

The present state of the record makes it clear that defendant should be afforded an opportunity to present evidence in mitigation of the offense, and particularly should be made aware of at least the substance

of the derogatory information in the presentence report and given an opportunity to offer evidence in rebuttal. Even more compelling than any of the above, however, is the decision of the United States Supreme Court in the recent case of Gardner vs. Florida (March, 1977), 97 S.Ct. _____, 51 L. Ed. 2d. 393. In that case Gardner was convicted of first degree murder in a Florida court. After the required separate sentencing hearing, the jury recommended a life sentence on the ground that the mitigating circumstances outweighed the aggravating circumstances. But the trial judge, relying in part on a presentence report that he had ordered, portions of which were not disclosed to or requested by counsel for either party, imposed the death sentence on the ground that aggravating circumstances justified it and that there were no mitigating circumstances. Upon writ of certiorari the United States Supreme Court vacated the death sentence and remanded to the Florida Supreme Court with directions to order further sentencing proceedings at the trial level.

Justice Stevens announced the judgment of the court and expressed the view that (1) the sentencing process, as well as the trial itself, must satisfy requirements of due process; (2) sentencing was a critical stage of a criminal proceeding at which the defendant was entitled to the effective assistance of counsel; (3) the defendant in the case was denied due process when the death penalty was imposed, in part, on the basis of confidential information which was not disclosed to the defendant

or his counsel, and which the defendant thus had no opportunity to deny or explain; (4) such procedure could not be justified as (a) being essential to enable investigators to obtain sensitive disclosures from persons unwilling to comment publicly about a defendant's background or character, (b) preventing delays which would result if full disclosure of the presentence report were required, (c) preventing disruption of the rehabilitation process, or (d) being warranted by the trust to be put in trial judges to exercise their sentencing discretion in a responsible manner; (5) even if it were permissible to withhold a portion of the report from the defendant or his counsel, it would nevertheless be necessary to include the full report in the record on appeal in order that the reviewing court could fulfill its duty of determining that sentencing procedures were administered with an even hand; (6) the failure of defense counsel to request access to the full report did not justify the submission of only a partial record to the reviewing court or constitute an effective waiver of the constitutional error in the record, and (7) thus the procedure employed by the Florida courts did not satisfy the constitutional command that no person shall be deprived of life, liberty, or property without due process of law.

It is important to note that there was nothing in the record of the Gardner case to indicate that there was anything derogatory in the presentence report, and that the defendant's counsel did not ask to see the report prior to the sentencing. Even so, the Supreme Court held

that due process required that the defendant be given an opportunity to explain or rebut and that he could not do so unless the presentence report were revealed to him. At the very least, it must be included in the record on appeal.

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And then there is the statute law of the State of Utah itself, Section 77-35-12, Utah Code Annotated, 1953, provides that where discretion is allowed the sentencing judge, he may take into account any aggravating or mitigating circumstances which may be presented by either party. Section 77-35-13 provides in relevant part as follows:

"The circumstances must be presented by the testimony of witnesses examined in open court . . . No affidavit or testimony, or representation of any kind, verbal or written, shall be offered to or received by the court or a judge thereof in aggravation or mitigation of the punishment except as provided in this section." (Emphasis added)

The Utah court has not faced head on the constitutional questions involved in withholding information obtained in a presentence report, nor has it squarely faced the clear meaning of the foregoing statutory provision. In the case of *State vs. Martin* (1917), 164 P. 500, the sentencing judge had apparently presided over another trial involving the same defendant. Based upon the knowledge which he had acquired at the previous trial, as well as information from the current trial, the judge imposed a rather severe sentence. Defendant contended that consideration of information obtained at the prior trial was a violation of the statute re-

quiring testimony in open court, i. e. 77-35-12. The Utah court held that to vacate the sentence would be tantamount to inquiring into the mental attitude and mind of the judge. He could not be required to disregard what he obviously knew. In that respect, at least, the application of 77-35-13 was never passed upon by the court.

In 1969 the court again had an opportunity to decide the applicability of 77-35-13. Again it sidestepped the issue. In *State vs. Cuñico*, 23 U. 2d. 325, 462 P. 2d. 720, Justice Tuckett, writing for the court held that where clemency had actually been extended to the defendant and he was placed on probation upon the condition that he serve one month in the county jail, there could not be any violation of the statute nor abuse of judicial discretion.

In 1973, the case of *State vs. Doremus* was decided, 29 U. 2d. 373, 510 P. 2d. 529 -- again on the basis that defendant had nothing to complain about since clemency had in fact been extended to the defendant.

And finally the case of *Reddish vs. Smith*, no. 15455, was decided March 1, 1978. One of the contentions of the appellant was that there were factual errors in the presentence report which came to his attention after judgment and commitment to the Utah State Penitentiary. He filed a writ of habeas corpus which was summarily denied by the district court. The Supreme court denied his writ upon the ground that habeas corpus was not an appropriate remedy where the matter could have been

raised on appeal. Dicta in the case makes reference to the fact that no discretion was allowed the sentencing judge, and therefore, sections 77-35-12 and 13 did not come into play. The decision, however, simply decided that habeas corpus was not an appropriate remedy.

If the statute is to mean anything, it must mean, at the very least, that defendants be given the substance of any presentence reports. If the plain meaning of the words is to be accorded them, it means that presentence reports cannot be utilized. The writer believes that a reasonable interpretation would allow their use where both parties are in agreement and know the contents, otherwise they must be prohibited. It is interesting to note that this writer can find no authorization for a presentence report or investigation in the statutes. There are references to such, as in 76-3-104, but nothing expressly authorizing, limiting, or otherwise defining the use of the traditional presentence report. Section 76-3-104 expressly authorizes commitment to prison for a 90 day evaluation and report, and defines the conditions and limits thereof. One of the conditions is that counsel for the prosecution and for the defendant be appraised of the results of the evaluation. The same conditions should be required for use of the traditional presentence report.

CONCLUSION

The trial court did not carry out its responsibility to determine that there were facts sufficient to justify accepting the

defendant's guilty plea. For that reason he should be allowed to withdraw the plea and enter a new plea of not guilty. In addition, the sentence is disproportionate to the severity of the offense, particularly so since it constitutes a first offense for appellant.

The constitutional requirements of due process as outlined in the Gardner vs. Florida case absolutely prohibit the use of a secret presentence report, particularly where, as here, the defendant asks for an opportunity to consider the allegations of the report and to present evidence in rebuttal. And finally, the mandate of the Utah statute prohibits the use of any information developed by the court in the sentencing process unless that information is presented by testimony in open court. For all of the foregoing, and for each of them, the case should be remanded to the district court with instructions to allow defendant to withdraw his guilty plea and enter a plea of not guilty, or, in the alternative, the sentence should be vacated and the matter remanded with instructions to allow inspection of the presentence report and an opportunity to present evidence in rebuttal prior to resentencing.

Respectfully submitted,

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