

1978

# the State of Utah v. Arvil A. Harris : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
15560

ARVIL A. HARRIS, :

Defendant-Appellant. :

----- :  
BRIEF OF RESPONDENT. :  
----- :

APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT, IN THE  
LAKE COUNTY, STATE OF UTAH, IN  
G. HAL TAYLOR, JUDGE.

----- :  
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## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I: ONCE THE TRIAL COURT HAD ACCEPTED A VALID GUILTY PLEA, THE DECISION TO VACATE THE PLEA LAY WITHIN THE SOUND DISCRETION OF THE COURT-----	3
POINT II: CURRENT LAW DOES NOT REQUIRE THE DISCLOSURE OF A CON- FIDENTIAL PRE-SENTENCE REPORT WHERE THE COURT DOES NOT EXPLICITLY RELY UPON THE INFORMATION CONTAINED THEREIN-----	7
CONCLUSION-----	12

### CASES CITED

Boykin v. Alabama, 395 U.S. 238 (1969)-----	3
Gardner v. Florida, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)-----	8,9
Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976)-----	9
Reddish v. Smith, 576 P.2d 859 (Utah 1978)-----	7
State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1973)-----	7
State v. Forsythe, 560 P.2d 337 (Utah 1977)-----	5
State v. Larson, 560 P.2d 335 (Utah 1977)-----	6
State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932)---	6
Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969)-----	3
United States v. Gardner, 480 F.2d 928 (10th Cir. 1973), cert. den. 414 U.S. 977, 38 L.Ed.2d 220-----	7

### STATUTES CITED

Utah Code Ann. § 76-6-408 (as amended 1973)-----	1
Utah Code Ann. § 77-35-12 (1953 as amended)-----	10,11
Utah Code Ann. § 77-62-30-----	11

### OTHER AUTHORITIES CITED

Federal Rules of Criminal Procedure, Rule 32(c)---	7
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
STATE OF UTAH, :  
 :  
Plaintiff-Respondent, :  
 :  
-vs- : Case No.  
 : 15560  
 :  
ARVIL A. HARRIS, :  
 :  
Defendant-Appellant. :  
 :  
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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant pled guilty to the charge of attempting to receive stolen property, a class A misdemeanor, in violation of Utah Code Ann. § 76-6 408 (as amended 1973).

DISPOSITION IN THE LOWER COURT

Appellant was arraigned before the Third District Court in and for Salt Lake County and entered a plea of guilty to the reduced charge of attempting to receive stolen property. He requested a pre-sentence investigation. Subsequently the court received and reviewed the pre-sentence report and appellant came before the Honorable G. Hal Taylor for sentencing, whereupon appellant was ordered to pay a

\$1,000.00 fine and sentenced to a one-year term in the Salt Lake County Jail.

Appellant 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 be discharged; requesting a new trial, and seeking to examine and review the pre-sentence 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

Respondent seeks an order of this court which refuses to allow appellant to withdraw his guilty plea and which affirms the judgment and sentence of the trial court.

#### STATEMENT OF THE FACTS

Appellant was originally charged with receiving stolen property, a third degree felony (R.6) After the complaint was amended to charge attempting to receive stolen property, appellant 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), appellant pled guilty and asked for a pre-sentence investigation and report (R.48-52). Approximately four weeks later,

he appeared before the Honorable G. Hal Taylor for sentencing, where he was ordered to pay a \$1,000.00 fine and serve a one-year term in the court jail.

#### ARGUMENT

##### POINT I

ONCE THE TRIAL COURT HAD ACCEPTED A VALID GUILTY PLEA, THE DECISION TO VACATE THE PLEA LAY WITHIN THE SOUND DISCRETION OF THE COURT.

Before accepting appellant's guilty plea to the charge of attempted theft by receiving stolen property, the trial court explained to appellant that his constitutional rights would be affected, that some rights, such as a trial by jury, would be waived (R.49). The court included the following statement, pertinent in the case at bar:

"You can't be forced to incriminate yourself in any manner, but by entering a plea of guilty you do incriminate yourself, and you admit the facts that support the crime charged." (R.49)  
(Emphasis added)

Then, in order to meet the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), that a guilty plea be knowingly and intelligently given, and Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969), that the plea be made voluntarily, without undue influence or coercion, the court interrogated appellant.

"THE COURT: To the charge in the Information what is your plea, guilty or not guilty?"

MR. HARRIS: Guilty.

THE COURT: Before the Court accepts that plea I'll ask you some questions. Were you present in the courtroom when I gave advice on constitutional rights?

MR. HARRIS: Yes, I was.

THE COURT: You understand those?

MR. HARRIS: Yes, I do.

THE COURT: Are you freely and voluntarily entering a plea at this time?

MR. HARRIS: Yes, I am.

THE COURT: Has any promises been made to you to induce this plea?

MR. HARRIS: No.

THE COURT: Has any threats or coercion been made against you to induce this plea?

MR. HARRIS: No.

THE COURT: Are you presently under the influence of any drugs, narcotics, or alcoholic beverages?

MR. HARRIS: No, I'm not.

THE COURT: A plea of guilty is received by the Court. The Court finds that the Defendant freely and voluntarily entered the plea, that he's not presently under the influence of any drugs, narcotics, or alcoholic beverages, and I base those findings on my observations of the Defendant in the courtroom together with the questions that were asked of him and his responses thereto." (R.50-51)

Appellant now seeks release from the guilty plea and complains that the court did not make a determination that there were facts sufficient to warrant a finding of guilty before accepting his plea. Respondent asserts that the trial court fulfilled its duty under the law. It had before it the affidavit of the Chief Criminal Deputy County Attorney for Salt Lake County wherein William Hyde alleged that "the evidence in the case supports the charge made against the defendant named." (R.9). It had before it the appellant's plea of guilty, given after the admonishment to him that such a plea was an admission that the facts charged were true. Finally, it had before it the record of the case, which revealed that appellant was pleading to a reduced charge, the result of a negotiated plea. These factors provided a sufficient basis for the trial court's satisfaction that facts warranting a finding of guilty existed. Therefore, acceptance of the plea was proper and valid under State v. Forsythe, 560 P.2d 337 (Utah 1977), which allows flexibility in plea-taking procedures:

"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." 560 P.2d at 339 (Emphasis  
added)

Finally, counsel for appellant states that even at the time of sentencing the court made no inquiry into the facts of the crime or of appellant's culpability. However, before sentencing, defense counsel stated in his plea for leniency:

"He [the appellant] has received the property involved in this case, and we admitted to that. I think there may be some indication on another occasion or two before that he received some property." (R.43)

Appellant now insinuates that he had a defense of entrapment. He could have raised that issue when he entered his plea or at sentencing. He did not. What he did say at sentencing is recorded at T.44:

"This is the first time that I have been a fence. Now if we can reconsider in this condition: This man--it was a stool pigeon."

This court has consistently held that a motion to withdraw a guilty plea is addressed to the sound discretion of the trial court. State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932); State v. Larson, 560 P.2d 335 (Utah 1977). As appellant has failed to meet his burden of demonstrating abuse of that discretion, respondent urges rejection of his claim.

## POINT II

CURRENT LAW DOES NOT REQUIRE THE DISCLOSURE OF A CONFIDENTIAL PRE-SENTENCE REPORT WHERE THE COURT DOES NOT EXPLICITLY RELY UPON THE INFORMATION CONTAINED THEREIN.

Neither federal nor state law requires the disclosure of a pre-sentence report. United States v. Gardner, 480 F.2d 928 (10th Cir. 1973), cert. den. 414 U.S. 977, 38 L.Ed.2d 220 states that Rule 32(c) of the Federal Rules of Criminal Procedure places the disclosure of pre-sentence reports within the discretion of the trial court and that denial of a defendant's request to inspect is not a due process violation. In Utah the disclosure issue has arisen on several occasions, and in each instance this court has found disclosure of the pre-sentence investigation report lying within the sound discretion of the trial court. Reddish v. Smith, 576 P.2d 859 (Utah 1978); State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1973).

"In order that there be no doubt as to what we believe the proper rule, it is the opinion of this court that it be left to the sound discretion of the trial court to determine whether or not the contents of the pre-sentence investigation report should be furnished to the defendant in its entirety or such portions thereof as the court might deem appropriate." 510 P.2d at 529

The United States Supreme Court recently considered this issue in Gardner v. Florida, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Although relied upon by appellant, respondent asserts that Gardner is not dispositive, but distinguished on its facts. Gardner had been convicted of first degree murder, with the jury recommending a life sentence. Thereafter the trial judge disregarded the jury's advisory opinion and sentenced the defendant to death, relying in part on a pre-sentence investigation report, a confidential portion of which was neither disclosed to nor requested by the defendant or his counsel. On appeal, the state supreme court affirmed the conviction and sentence, stating that the record had been carefully reviewed, although the confidential report had not been included in the record.

The United States Supreme Court vacated the death sentence, and while not agreeing on an opinion, six members of the court agreed that imposition of the death penalty in that case were invalid.

Mr. Justice Stevens, speaking for three members of the Court, held that petitioner's due process was denied when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny

or explain. Because the death penalty is now recognized as a punishment different in kind from any other (see Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976)), the capital sentencing procedure, as well as the trial, must satisfy due process. While the Court did not find any rationale in the Gardner case for withholding the report, the Court concluded that even if good cause for nondisclosure did exist, it is constitutionally impermissible to exclude the confidential report from the record on appeal as the reviewing court would be unable to determine if the death penalty was being imposed evenhandedly.

The instant case is not a capital case; it is a class A misdemeanor. Appellant faced a maximum one-year jail sentence, not extinction of his person. The Gardner requirements of full disclosure are inapplicable to the sentencing procedures of a non-capital case, and sound discretion of the court is still the standard.

The record contained no request by appellant for inspection of the pre-sentence report prior to sentencing. At sentencing the trial judge gave no indication whatsoever that he was relying upon the contents of the report and made no references to it. (Defense counsel concedes he has no knowledge that the report contained any inaccuracies or derogatory statements about appellant.) After listening

to a plea for leniency by defense counsel in accordance with Utah Code Ann. § 77-35-12 (1953 as amended)<sup>1</sup>, Judge Jaylor imposed the one-year sentence adding:

"The operation of fencing in this community gives the common criminal an accessible source for the distribution of stolen goods and their effects. I would venture to say 95 percent of the burglaries that occur in this community are drug related, and the same spokes on the wheel keep coming by.

The burglar burglarizing in order to sell property in order to buy drugs. I think this has got to stop. I am going to deny probation and commit you forthwith to the Salt Lake County Jail. That will be the order of the Court."  
(R.44)

Clearly, the court imposed the maximum sentence because the "fences" in this community enable the burglars, who often need money for narcotics, to market their stolen goods and to that extent, provides a medium in which thieves can thrive. Respondent submits that the crime of receiving stolen property--or attempting to receive it--is not, as

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<sup>1</sup> 77-35-12. Discretion of court--Exercise.--When discretion is conferred upon the court as to the extent of punishment, the court, at the time of pronouncing judgment, may take into consideration any circumstances, either in aggravation or mitigation of the punishment, which may then be presented to it by either party.

appellant suggests, an ordinary crime against property; therefore, appellant's reliance on his first-offender status for leniency was misplaced. The professional fence, by his accessibility and his actual involvement, encourages thieves to steal and is thereby a vital link in this chain of crime. The court, in the exercise of its sound discretion, chose to remove the link and weaken the chain.

Utah Code Ann. § 77-35-12 (1953 as amended and Utah Code Ann. § 77-62-30<sup>2</sup> are not mutually exclusive. In complementing each other the former allows either party to present evidence specifically in aggravation or in mitigation of the punishment. The latter authorizes the court to request a pre-sentence investigation report from a neutral source, the division of corrections, with the resulting investigation likely to uncover both aggravating and mitigating factors. This unbiased report, with its recommendations, can then be used with the arguments of the interested

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<sup>2</sup> 77-62-30. Clinics and examinations.--The division of corrections shall establish and maintain clinics for the purpose of thoroughly investigating the social, mental and physical conditions and background of those charged with the various crimes and shall conduct examinations wherever required, and, upon completing such an examination, the division shall file a copy of its findings and formal clinical report with the court having jurisdiction and make such recommendations to the court as it may see fit. For this purpose the division may, without expense to it, command the services of an expert in the employ of the state of Utah or any other expert in the employ of any state institution.

parties and in a filtering and meshing process, determine the most appropriate sentence. Of course, a defendant may waive the pre-sentence report and be sentenced immediately.

Respondent submits that these statutes can work in harmony and that disclosure of the confidential report to the defendant is unnecessary unless the trial judge states that he has relied on specific information contained therein, which revelation may force disclosure. However, that situation is not before the court.

#### CONCLUSION

Because the trial court validly accepted a guilty plea and did not abuse its discretion in sentencing or in refusing to vacate the plea, respondent urges the court to affirm the judgment and sentence.

Respectfully submitted,

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