1978

the State of Utah v. Arvil A. Harris : Defendant - Appellant's Brief and Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

DEFENDANT - APPELLANT'S BRIEF AND PETITION FOR REHEARING

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.

ROBERT L. LORD
118 Metropolitan Law Building
431 South 300 East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

DEFENDANT - APPELLANT'S BRIEF AND PETITION FOR REHEARING

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.

ROBERT L. LORD
118 Metropolitan Law Building
431 South 300 East
Salt Lake City, Utah 84111
Attorney for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT'S PETITION FOR REHEARING

Comes now the above named defendant, by and through his attorney, Robert L. Lord, and hereby petitions this honorable court for a rehearing of the defendant's appeal in the above stuled and numbered cause upon the following grounds and reasons, among others:

1. The Court has labored under a mistake of fact and has made certain erroneous assumptions conerning the events preceeding the entry of the defendant's plea of guilty.

2. Defendant is entitled to a ruling upon all points and issues raised by his appeal. The Court did not make any attempt to distinguish or justify its ruling in light of the recent case of Gardner vs. Florida referred to extensively in defendant's brief and which formed the basis of the constitutional issues raised therein. Also, the Court did not address

itself to the problems raised by 77-35-12 and 77-35-13 of the Utah Code Annotated and discussed at length in defendant's brief.

3. The Court has erroneously equated the legal effect of a guilty plea (an admission in effect of the facts that constitute the crime charged) with an inquiry or determination that there are actually facts which warrant such admission.

4. The sentence imposed by the trial court is erroneous and illegal on its face.

5. The court has never ruled on defendant's motion to complete the record.

WHEREFORE, appellant prays for a rehearing of this matter on the merits and upon the grounds stated herein and in appellant's appeal brief, and for an order declaring the sentence imposed by the trial court to be illegal and void, thereby discharging the defendant, or, in the alternative for an order remanding to the district court for resentencing as requested in appellant's appeal brief.

Respectfully submitted,

ROBERT L. LORD
118 Metropolitan Law Building
431 South 300 East
Salt Lake City, Utah 84111
Attorney for Appellant - Defendant

TABLE OF CONTENTS

CASES CITED

RULES & STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT'S BRIEF AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

In defendant's appeal on file herein he 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.

Since submission of briefs herein, and subsequent to the decision of this Court, counsel for defendant has discovered that the sentence imposed is apparently illegal and void, and defendant therefore now seeks, in addition to the above, an order declaring the sentence void and discharging defendant.

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 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 derrogatory 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.

In addition, and as part of this petition for rehearing, defendant seeks to have the Court declare the sentence imposed to be illegal and void, and to discharge the defendant.

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 preliminay 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).

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 derrogatory information 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 HAS LABORED UNDER A MISTAKE OF FACT AND HAS MADE CERTAIN ERRONEOUS ASSUMPTIONS CONCERNING THE EVENTS PRECEEDING THE ENTRY OF THE DEFENDANT'S PLEA OF GUILTY.

1. In the first paragraph of the decision filed September 29, 1978, Mr. Justice Crockett, speaking for the Court notes that the defendant Harris was originally charged with receiving stolen property, a third degree felony, which observation is, of course, correct. In the very next sentence, however, it is evident that the Court has completely misconstrued the events preceeding the entry of the guilty plea. Justice Crockett continues:

"As a consequence of discussions between the prosecutor,

> and defendant's counsel and the defendant, and with the approval of the court, the state moved to reduce the charge to an attempt to receive stolen property, a class A misdemeanor, and the defendant entered a plea of guilty.
>
> " . . . The alternatives were discussed with him, including the possibility that he might be convicted of the more serious crime . . . "

All of the foregoing "facts" as quoted from the decision of the Court are erroneous and cannot, in fairness, even be implied from the record. Defendant was originally charged in the Salt Lake City Court with the crime of receiving stolen property, a third degree felony. (R. 6). Defendant then filed a Motion for Bill of Particulars (R. 53-55), to which plaintiff responded by Bill of Particulars (R. 57-58). In interrogatories 6 and 7 of the motion (R. 54), defendant asked for information concerning the alleged stolen property. Plaintiff responded (R. 58) to the effect the "stolen" coffee referred to in Count I had been borrowed from Smith's Food King for use in the operation, and that the "stolen" chain saw referred to in Count II of the complaint was, in fact, the property of the Salt Lake City Police Department having been purchased by them for use in the operation.

Inasmuch as the property involved had never been stolen, was properly and legally in the possession and control of the Salt Lake City police with permission of the rightful owners, defendant could not possibly be guilty of receiving stolen property. See 66 Am. Jur. 2d. pp. 298-300; State of Utah vs. Don Leon Sommers (Sept. 16, 1977), Supreme Court

#15066. The county attorney agreed with defendant's contention that he he could not be convicted of the offense charged, and moved accordingly to have the complaint ammended to allege only an attempt to receive stolen property. Defendant then waived preliminary hearing (since all information which he could hope to obtain from such a hearing had already been supplied to him in the Bill of Particulars), and was bound over to the district court for arraignment. (R. 4).

An information was then filed in the district court charging attempt to receive stolen property, a class A misdemeanor. (R. 8). At no time was defendant ever told by counsel that he could be convicted of the greater offense. In fact counsel's advice to defendant was just the opposit, i.e., there was no chance of his being convicted of a felony. It was in this context that defendant then entered his plea of guilty before the district court.

In summary, then, the Court erroneously as assumed that defendant (a) was in jepardy of conviction for a third degree felony, (b) that such possibility motivated him to enter his plea of guilty, (c) that the ammendment to then charge a class A misdemeanor was the result of a plea bargain, (d) that the court approved the alleged plea bargain, and (e) that defendant entered his plea at the time of the ammendment.

2. Justice Wilkins and Justice Maughn in their concurring opinion proceed on the assumption that defendant did not request the pre-sentence report until after the sentence had been imposed. It is true that

such request was not formally made to the court until after sentencing. However, counsel did make inquiry of the Department of Probation and Parole and was advised that there was very little to be concerned about and that Judge Taylor had given specific instructions not to reveal the contents of the report to anybody. (R. 25, 26). Based upon counsel's belief, and the custom of the court, a formal request to the court would have been futile.

POINT II

DEFENDANT IS ENTITLED TO A RULING UPON ALL POINTS AND ISSUES RAISED BY HIS APPEAL.

1. The opinion of the Court fails to consider or respond to a number of issues or points raised by the defendant, and completely overlooked the case of Gardner vs. Florida (March, 1977), 97 Supreme Court 1197, 430 U.S. 349, 51 L. Ed. 2d. 393. The writer feels that the Gardner case should either be distinguished, rejected, or followed. Being a decision of the United States Supreme Court on a relevent constitutional issue, it cannot, however, be ignored. Defendant believes that the Gardner decision stands for the proposition that (1) the sentencing process, as well as the trial itself, must satisfy requirements of due process; (2) sentencing is a critical stage of a criminal proceeding at which the defendant is entitled to the effective assistance of counsel; (3) the defendant is denied due process when the penalty is 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 proceedure cannot 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 be permissible to withold a portion of the report from the defendant or his counsel, it is nevertheless necessary to include the report in the record on appeal; and (6) failure of defense counsel to request access to the report does not justify the failure to submit the report as part of the record or constitute an effective waiver of the constitutional error in the record.

The writer submits that a careful reading of the Gardner case mandates (at the very least) that the presentence report be included in the record on appeal.

2. The Court has made no mention of the effect of 77-35-12 and 13, Utah Code Annotated, 1953, referred to in defendant's appeal brief, pages 11 - 14. The statute mandates that mitigating or aggravating circumstances be presented in open court. This Court should either declare the statute to be unconstitutional, or should require the lower courts to follow it. Neither they nor this court can, however, simply ignore it and

hope it will go away.

3. Rule 76 (a), Utah Rules of Civil Procedure reads in part as follows: ". . . every decision of the court, together with the reasons therefore concisely stated shall be given in writing . . . " Article VIII, Section 25, of the Constitution of the State of Utah reads in pertinant part as follows: "When a judgment or decree is reversed, modified, or affirmed by the Supreme Court, the reasons therefore shall be stated concisely in writing . . . " Defendant believes that he is, by rule of court and by the Constitution, entitled to a written ruling on all points raised in his appeal.

POINT III

THE COURT HAS ERRONEOUSLY EQUATED THE LEGAL EFFECT OF A GUILTY PLEA WITH AN INQUIRY OR DETERMINATION THAT THERE ARE ACTUALLY FACTS WHICH WARRANT SUCH ADMISSION.

The Court has confused the effect of a guilty plea with the ultimate question to be determined by the arraignment judge, i.e., whether there are facts sufficient to justify accepting the plea. This court, in finding that the trial judge had not failed in his duty to ascertain sufficient facts to justify the entry of the plea quoted from page 49 of the record wherein Judge Banks said:

> "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."

That, of course, is an accurate statement of the legal effect of the guilty plea. It, by no means, is a determination that Mr. Harris

believed he was buying stolen coffee, that he paid for it, that he took possession or control of it, that he was not entrapped, etc. And anyway, that question or instruction was not given or directed to Mr. Harris individually, but was merely a general charge given to al defendants at the opening of court proceedings, and before any of them had been called for arraignment. It merely represents an explanation of the legal effect of a guilty plea, equivalent in many respects to a statement to an errant motorist that if he chooses to pay the bail and avoid a court appearance his drivers record will show a conviction. There is no attempt by such means to determine if there were sufficient facts to convict him had he chosen to go to trial.

In the instant case, a preliminary hearing would have undoubtedly have supplied the necessary facts, but since it was waived, we do not even have the benefit of such a finding by the committing magistrate. The writer believes that Rule 3.6 (c) of the District Court and Circuit Court Rules of Practice is in harmony with State vs. Forsythe (Utah, 1977), 560 P.2d. 337, which requires some inquiry (apart from the legal consequences of the plea) into the fact behind the charge.

The Court on page two of its decision makes the statement that before accepting the plea the trial judge "had the assurances of both the deputy county attorney and the defense counsel as to the justification for the defendant's entry and the court's acceptance of the plea of guilty."

The writer submits that such conclusion is wrong. An examination of the transcript of proceedings at the time of the arraignment fails to disclose anything by which such conclusion could be reached. (R. 49 - 52). The Court may have been thinking about some very ambiguous statements made by counsel at the time of sentencing (R. 43 - 45), but they, of course, came after arraignment and do not satisfy the requirement.

POINT IV

THE SENTENCE IMPOSED BY THE TRIAL COURT IS ERRONEOUS AND ILLEGAL ON ITS FACE.

This issue was not raised by the defendant in any of his pleading or briefs filed prior to this time. The issue is, however, jurisdictional and of fundamental importance and should be resolved by this court at this time. The writer appologizes for not brining it to the attention of the Court sooner, but a careful examination of the record has only now brought it to the attention of the writer. Page 13 of the record is the commitment order and sentence signed by Judge G. Hal Taylor. The attention of the Court is directed to the title of that order which, by its terms, states that sentence is being imposed for a class B misdemeanor. The maximum sentence allowed by law for a class B is 6 months imprisonment (76-3-204, Utah Code Annotated, 1953), and/or $299 (76-3-301, Utah Code Annotated, 1953). The imposition of a prison sentence of one year and $1,000 fine for a class B is illegal and void. In addition the sentence is confusing and unintelligible reading:

"It is the judgment and sentence of this Court that you, Arvil A. Harris be confined and imprisoned in the Salt Lake County Jail and fined $1,000.00 the period of one (1) year as provided by law for the crime of Attempted Theft by Receiving."

Just what is meant if one is fined $1,000 the period of one year? Perhaps it is an attempt to say that defendant is to be imprisoned for a period of one year and fined $1,000. Even if that be so, the fact that the sentence is clearly behond the maximum provided by law, especially where coupled with the apparent ambiguity, should compel, at the very least, a determination that the matter be remanded for re-imposition of sentence.

POINT V

THE COURT HAS NEVER RULED ON DEFENDANT'S MOTION TO COMPLETE THE RECORD.

On or about March 10, 1978, defendant filed with the Court a Motion for Order to Complete Record requesting the Court to bring up the presentence report from the district court. That motion was heard March 10, and the Court deferred making a ruling and ordered that it be considered and ruled upon in connection with the determination on the merits of the appeal. That motion has never been ruled upon by the Court. Defendant believes that the due process principles set forth in the Gardner vs. Florida case (supra) are controlling and require the report to be included as part of the record before this court can make a rulin on the merits.

CONCLUSION

To justify rehearing or modification of a decision of the Supreme Court a strong case must be made that the Court has seriously

erred and that the error materially affects the result. Cummings vs. Nielson, 42 Utah 157, 129 P. 619. Matters justifying rehearing or modification of a decision include situations where the Court has (a) misconstrued or overlooked some material fact, (b) has overlooked some statute or decision, (c) has based the decision on some wrong principle of law, (d) has misapplied or overlooked something which materially affects the results, (e) has failed to correctly state the law, etc. Beaver County vs. Home Indemnity Co., 88 Utah 1, 52 P. 2d. 435; Cummings vs. Nielson, supra. The Court seriously erred in numerous areas and in numerous matters which materially affected the result of this case as follows:

1. The Court erroneously assumed that defendant was in jeopardy of conviction for a 3rd degree felony.

2. The Court erroneously assumed that defendant's plea was motivated by such possibility.

3. The Court erroneously assumed that a plea bargain had been struck.

4. The Court erroneously assumed that defendant entered his plea at the time of the ammendment to the complaint reducing the charge to a class A misdemeanor.

5. The Court erroneously assumed that defendant's counsel and the deputy county attorney assured the arraignment judge that there were facts to justify the entry of the guilty plea.

6. The Court confused the effect of a guilty plea with the ultimate question to be determined by the arraignment judge, i.e. if there were facts sufficient to justify accepting the plea.

7. The Court erroneously assumed that no attempt had been made to secure the presentence report prior to sentencing.

8. The Court overlooked the case of Gardner vs. Florida setting forth certain constitutional standards which must be applied by the trial court in the sentencing procedure.

9. The Court overlooked the Utah statutes 77-35-12 and 13, which require presentation in open court of all factors in aggravation or mitigation of the sentence.

10. The Court (and all counsel to this point) overlooked the fact that the term of imprisonment and the fine imposed exceed that allowed by law for a class B misdemeanor, and that the sentence is ambiguous and confusing.

On the basis of the last point (#10) alone, the defendant should be discharged and the sentence declared void. On the basis of each of the foregoing points, and on all of them, defendant should be granted a rehearing and the case remanded to the district court with instructions to allow defendant to review and rebut the presentence report and for other relief as requested in defendant's appeal on file herein.

Defendant respectfully requests that this Petition for Rehearing

be scheduled for oral argument.

Respectfully submitted,

ROBERT L. LORD
Attorney for Appellant

I hereby certify that I personally delivered two copies of the foregoing to William W. Barrett, assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, and one copy to John Nielsen, deputy Salt Lake County Attorney, Metropolitan Hall of Justice, Salt Lake City, Utah 84111, this 2nd day of November, 1978.

ROBERT L. LORD
Attorney for Appellant