2001

State of Utah v. Blaine Olsen Larson : 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. 14678
BLAINE OLSEN LARSON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Blaine Olsen Larson, appeals from an order of the Fourth District Court denying his motion to withdraw a plea of guilty to a charge of knowingly and intentionally possessing marijuana, a Class A Misdemeanor.

DISPOSITION IN LOWER COURT

On March 5, 1976, the Honorable J. Robert Bullock accepted appellant's change of plea from not guilty to guilty.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence rendered by the trial court.

STATEMENT OF THE FACTS

On September 19, 1975, a complaint was filed in Provo City Court charging the appellant with knowing possession of marijuana in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1953), as amended, and that appellant had been previously convicted of possession of a controlled substance, making the penalty provisions of Utah Code Ann. § 58-37-8(2)(b)(ii) (1953), as amended, applicable (maximum sentence of one year in the county jail and $1,000 fine). Appellant was arraigned the same day and requested a preliminary hearing. On November 25, 1975, appellant appeared in the city court represented by his appointed counsel, Gary H. Weight, and waived a preliminary hearing. Appellant was bound over to the Fourth Judicial District Court. The Utah County Attorney filed an information in the district court alleging that "Blaine Larson knowingly and intentionally possessed a Schedule I controlled substance, to wit: marijuana." (R.47). On December 4, 1975, appellant was arraigned in the District Court, and at this time the information was read to the appellant, and a copy was handed to him. On December 12, 1975, the appellant entered a plea of not guilty, through his

appointed counsel, Gary H. Weight. On March 5, 1976, the appellant appeared before the Honorable J. Robert Bullock and requested a change of plea. The court conducted a thorough hearing before accepting the guilty plea. In response to the court's questioning, the appellant indicated that he understood the consequences of a plea, that it constituted a waiver of his right to a jury trial, and that the punishment imposed would not depend upon a guilty plea (R.31,32). The county attorney questioned the appellant to insure that he understood that a subsequent conviction might result in a felony charge (R.33). The appellant waived the reading of the information, and the court explained that the information generally charged the "offense of knowingly and intentionally possession (sic) marijuana." (R.33). The appellant then stated that he was pleading guilty because he was guilty and for no other reason, and the court expressed its satisfaction that the plea was entered "freely and voluntarily, without any coercion, promises or threats of whatever nature . . . intentionally, and . . . with a full and complete understanding of the consequences." (R.34). Appellant was then referred to the Adult Probation and Parole Department for a pre-sentence investigation. On March 15, 1976, the appellant met with the probation agent and expressed his dissatisfaction

with the guilty plea (R.38). On March 26, 1976, Mr. Weight requested and was granted permission to withdraw as counsel. Appellant's new counsel, Larry N. Long, then addressed the court, and made a motion to withdraw his client's guilty plea. On April 2, 1976, a hearing was held on that motion, and the appellant testified in his own behalf. On April 6, 1976, the Honorable Allen B. Sorenson issued a ruling that the plea was entered freely, voluntarily and understandingly and denied the motion (R.28). Appellant subsequently filed a motion to reconsider the ruling, and an affidavit alleging that appellant had not knowingly possessed marijuana, that this fact was unknown to his original counsel and was only made known to his present counsel one day prior to his original appearance (March 26, 1976) (R.21). Appellant further alleged that he had withheld the information because he thought it "irrelevant," but that as he had now been made aware that it constituted a defense, he wished to withdraw his plea. A hearing was held on this motion on May 21, 1976, and the court relied on its previous ruling, refusing permission to withdraw the guilty plea.

On May 28, 1976, the appellant was sentenced to one year in the county jail provided that after the expiration of

ninety days he could apply for a suspension of the unserved portion of the sentence (R.16). Appellant's previous conviction for possession of a controlled substance occurred on March 26, 1975. He was twenty years old at the time he entered the guilty plea at issue in this appeal.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT APPELLANT TO WITHDRAW HIS PLEA OF GUILTY.

Appellant has correctly stated the law that under the terms of Utah Code Ann. § 77-24-3 (1953), as amended, and according to the great weight of authority, a motion to withdraw a plea of guilty is addressed to the sound discretion of the trial court, and that a criminal defendant may not withdraw a guilty plea as a matter of right. State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963). Appellant is contending, however, that this discretion is of such a limited scope that any motion made prior to sentencing, supported by an affidavit, must be granted, and that a refusal to do so amounts to a reversible abuse of discretion.

Respondent submits that this argument is faulty in two particulars. First, it assumes that a trial court must accept as true whatever self-serving allegations a criminal defendant may chose to make in order to escape the effects of his guilty plea. This Court has held that a trial court need not accept evidence offered by a defendant to show that a guilty plea was not voluntarily and intelligently made. Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969). Second, appellant's position, if adopted, would effectively deny the trial court the opportunity to exercise its discretion in determining whether the allegations warrant a withdrawal of the plea. The trial court's discretion would not be of any effect if a trial court could not discriminate between meritorious and obviously frivolous grounds for the withdrawal of a plea.

Appellant's brief cites a plethora of authority where a trial court's refusal to allow a withdrawal of a guilty plea has been held an abuse of discretion. Respondent does not challenge these authorities ". . . as they do nothing more than to illustrate when, under given factual situations, the appellate courts have, or have not, seen fit to overrule the actions of trial courts in the exercise of the sound discretion which the law vests in such tribunals." Plum, at 126, 672.

All of the cases are factually dissimilar to the case at bar. Appellant was at all times represented by a competent member of the bar who demonstrated an identity of interests with the appellant. At the time appellant entered his plea, he was an intelligent adult who had been previously convicted of the same offense. Such a previous conviction is evidence that the appellant understood the charge against him, the elements thereof, and the procedure in a criminal trial. Hahn v. Turner, 530 P.2d 789 (Utah 1975); Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971); and Price v. Turner, 28 Utah 2d 328, 502 P.2d 121 (1972).

The information charging the appellant was clear, comprehensible to a layman, and set forth all the essential elements of the crime. The proceedings were not hurried, and no plea bargain was involved in obtaining appellant's plea. There was no fraud, misrepresentation or misconduct on the part of either counsel or the courts.

The case of State v. Virgi, et al., 81 N.E.2d 295, 84 Ohio.App. 15 (1948), upon which appellant most heavily relies, is not apropos. The case is decided as much upon the grounds that the trial judge received ex parte information via a telephone conversation with the prosecutor which caused him to withhold a tentative plea agreement as upon the grounds

cited by appellant. In addition, there were factors in the Virgi decision that are not present here. First, the defendants had discovered new evidence in the Virgi case. In this appeal, the information relied on by appellant was all available in his defense. Second, in the Virgi case, the defendants had made a credible allegation that they had misunderstood the nature of the charge and the effect of a guilty plea. Appellant can make no such claim in this appeal.

Appellant has cited a number of older authorities that contain language to the effect that "all doubts should be resolved in favor of a trial on the merits." Respondent submits that the trend of the law is not in that direction. As the Washington Appellate Court has noted, the older rule was developed at a time when trial courts used less exacting procedures for protecting a defendant's rights in accepting a plea of guilty. State v. Armstead, 13 Wash.App. 59, 533 P.2d 147, 149 (1975). When the trial court has carefully safeguarded the defendant's rights before accepting a guilty plea, as it did in this case, the defendant should meet a heavier burden in a motion to withdraw it. The Washington Court has adopted the test that a defendant should establish

that a withdrawal is necessary to correct a manifest injustice. This is the standard recommended in the ABA Standards relating to Criminal Justice, Pleas of Guilty, § 2.1 (1968). These standards provide:

> "Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;
> (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or
> (5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea."

The effective assistance of counsel will be discussed in Point II, infra. Appellant clearly does not come within the other provisions of these standards, and should therefore not be allowed to withdraw his plea. It is surely a better practice to use preventative rather than remedial practices in this area of the law, and to insist that a defendant's rights are fully protected at the time he enters the plea rather than

to provide an over-liberal remedy in the assumption they are not protected. 55 Colum.L.Rev. 366, 380 (1955). On two occasions the trial court received evidence and heard arguments in support of appellant's motion, and on each occasion resolved the factual issue of the voluntariness of the plea against the appellant. This finding is supported by substantial evidence. The appellant was presented with an information charging him in everyday language with the intentional and knowing possession of marijuana. Appellant is an intelligent adult who has previously been convicted of that offense, and he stated in open court that he understood the nature of the charge as explained to him by the trial court. Yet appellant claims he withheld the information that his possession was not "knowing" because he did not think it was relevant. Appellant's further contention that his desire to withdraw his plea is based on Mr. Long's advice that he had a defense is flatly contradicted by the record, as appellant expressed his dissatisfaction with his guilty plea to the parole agent ten days prior to receiving the advice (R.20,38).

The indication in appellant's brief that questions as to the legality of the search should be a factor in determining the trial court's discretion is not well founded. A guilty plea waives all objections to the manner of obtainment of evidence. Mach v. State, 492 P.2d 670 (Okla.Crim. 1972); Still v. State, 97 Idaho 375, 544 P.2d 1145 (1976).

Respondent respectfully submits that the trial court's refusal to allow appellant to withdraw his plea of guilty was within the discretion granted that court by law, and supported by substantial evidence.

POINT II

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW APPELLANT TO WITHDRAW HIS PLEA OF GUILTY.

The second prong of appellant's argument that attempts to demonstrate an abuse of discretion by the trial court is novel. Appellant contends that the trial court must allow him to withdraw his guilty plea because he was denied effective assistance of counsel. It is not claimed that the counsel was incompetent, uninterested or unwilling to present the appellant's defenses. The claim of counsel's ineffectiveness is based on the fact that "he was not aware of certain pertinent facts which imbued defendant with a defense to the charge." Brief of Appellant, page 15. Appellant hopes to make his own non-disclosure

of relevant facts to his admittedly competent counsel into an automatic ground for a withdrawal of a guilty plea.

The adverse affect of such a rule upon the administration of criminal justice is obvious. Any criminal defendant could keep relevant facts from his attorney, and enter a plea of guilty hoping to prejudice the State's case by delay, or gain some advantage for himself or a codefendant by a plea bargain. The defendant could then retain a new attorney, reveal his "newly" discovered defense, and withdraw his plea as a matter of right. Public policy demands that the criminal law not be subjected to such an abuse.

This is not to imply that a defendant may never withdraw a plea upon discovery of a defense, only that such a judgment is best committed to the discretion of the trial court where the evidence can be best viewed and balanced. The trial court in this case gave a full and fair hearing to appellant on this issue, its finding is supported by the evidence, and should not be disturbed on appeal.

Appellant has cited the cases of In Re Cronin, 336 A.2d 164 (Vermont, 1975), and State v. Kinchloe, 87 N.M. 34, 528 P.2d 893 (1974). The court in the Cronin case remanded to the trial court for further proceedings

a juvenile's motion to withdraw a plea of guilty. The court felt that there was a possibility that a misunderstanding between the juvenile and his own attorney could reasonably have led the juvenile to believe he was being promised lenient sentencing in return for a plea of guilty. The court held that if the plea was induced by such an apparent promise, it was not voluntary and could be withdrawn.

In Kinchloe, the New Mexico Court considered a list of ten allegations made in respect to a criminal defendant's counsel. The list included counsel's terminal illness, failure of counsel to discuss issues raised by the defendant, and counsel's manifest desire to "get the case over with." In light of all of the factors, the court held that defendant had received ineffective legal assistance. Neither of these cases come near establishing the principle that unawareness of certain facts is equivalent to ineffective assistance of counsel.

The case of Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967), is more in point. In that case, a criminal defendant had hoped to interpose a plea of not guilty by reason of insanity, and counsel had given

incorrect advice on the standard of mental responsibility. The defendant claimed that the incorrect advice had robbed his guilty plea of its voluntary character, and that he should be able to withdraw it. The Circuit Court affirmed the trial court's refusal to allow a change of plea.

As this Court has made abundantly clear, a defendant is entitled to the assistance of a competent member of the Bar who shows a willingness to identify himself with the interests of the defendant and present such defenses that are available to him under the law and consistent with the ethics of his profession. Andreason v. Turner, 27 Utah 2d 182, 493 P.2d 1278 (1972); Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969). This requirement is not met by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. However, the requirement does not demand that the attorney's representation of the accused be perfect, of that he present the case exactly as the accused, with the benefit of hindsight, chooses to define as "effective." In this context, the language of Kryger v. Turner, 25 Utah 2d 214, 479 P.2d 477 (1971), is appropriate. In affirming the trial court's denial of a writ of habeas corpus, this Court stated:

> "In the instant action, there is no allegation that counsel's representation was a sham or a pretense, but merely an assertion that in retrospect counsel misapprehended the facts allegedly related by the plaintiffs and that he failed to interrogate the plaintiffs in regard to certain particulars. Defense counsel actively participated through all the critical stages of the proceedings and admittedly conferred with plaintiffs as to many of the significant facts." 25 Utah 2d at 218.

The appellant in this action has not demonstrated or alleged that his counsel was ineffective by the standards established by this court. Respondent submits that the trial court's refusal to allow a change of plea be affirmed.

CONCLUSION

Based on the foregoing points and authorities, respondent respectfully submits that the refusal of the trial court to allow appellant to withdraw his guilty plea was well within the discretion granted that court by law. The judgment and sentence of the district court is without error, and respondent respectfully submits the same should be affirmed by this Court.

Respectfully submitted,

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