

1980

State of Utah v. Bert Leon Hanson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH, :
Plaintiff/Respondent, :
vs. : Case No. 17078
BERT LEON HANSON, :
Defendant/Appellant. :

BRIEF OF APPELLANT

AN APPEAL FROM A PLEA OF GUILTY TO MANSLAUGHTER
IN THE FOURTH JUDICIAL DISTRICT COURT IN AND
FOR DUCHESNE COUNTY, STATE OF UTAH
THE HONORABLE DAVID SAM, PRESIDING.

ROBERT M. McRAE
McRAE & DeLAND
Attorneys for Appellant
319 West First South, Suite A
Vernal, Utah 84078

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

FILED

AUG 25 1980

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 17078
BERT LEON HANSON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal action brought by the State of Utah against the defendant/appellant Bert Leon Hanson, alleging that defendant/appellant did recklessly cause the death of another, Camie Lee Hanson, in violation of Utah Code Ann. (1953), as amended, §76-5-205, a felony of the second degree.

DISPOSITION IN THE LOWER COURT

Defendant/appellant pleaded guilty to the charge of manslaughter and was sentenced by the court to be confined in the Utah State Prison for an undetermined term of not less than one year nor more than fifteen years.

RELIEF SOUGHT ON APPEAL

Defendant/appellant seeks that he be placed on probation or that he be permitted to withdraw his plea of guilty and that his case be remanded for trial.

STATEMENT OF THE FACTS

The present case evolves from the death of the infant daughter of defendant/appellant on September 4, 1979 in Roosevelt, Duchesne County, Utah. Defendant was charged with murder in the second degree, a felony of the first degree. In a preliminary hearing held October 18, 1979, in the Circuit Court, Seventh District, Duchesne County, the Honorable Kenneth G. Anderton found sufficient cause to bind the matter over to the Fourth Judicial District Court for further proceedings on November 13, 1979.

On November 5, 1979, defendant was admitted to the psychiatric unit of St. Marks Hospital in Salt Lake City for treatment of severe depression. Arraignment was continued to December 10, 1979, because defendant was still hospitalized on November 13, 1979.

Defendant notified the District Court, pursuant to §77-24-17, Utah Code Ann. (1953) on November 26, of his intention to rely on an insanity defense. Having been released from St. Marks, defendant pled not guilty and not guilty by reason of

insanity at the December 10 arraignment hearing. Judge David Sam ordered psychiatric examinations by two alienists and set a jury trial for February 7, 1980.

Prior to the rescheduled trial date of March 5, 1980, defendant, through counsel, and in reliance upon the reports of the court appointed alienists and his own medical evidence, entered into plea bargaining with the prosecution. Consequently an amended information charging defendant with manslaughter, a felony of the second degree, was filed with the court. Foregoing his criminal culpability defense, defendant pleaded guilty to the reduced charges in belief credence would be given the medical reports. The expert opinions of examining alienists, along with the agreed abstinence of the prosecuting attorney on sentence, that defendant continue to receive treatment and not be incarcerated were noted at this time in open court. The court did state that it was not bound by the recommendations of doctors, the county attorney, or the Adult Probation and Parole Department. Sentencing was continued until April 11, 1980 to allow the Parole Department time to assess defendant's background and prepare a pre-sentence report.

The investigation by the Department resulted in a guideline recommendation of probation. However, after a hearing known as "paneling", the Department overruled the recommendation and recommended incarceration without comment or reasoning.

incarceration of defendant was imminent, counsel moved in court for a continuance of one week within which to file an affidavit against Judge Sam proceeding in the case. Such motion was denied. Counsel then made a motion to allow the withdrawal of the guilty plea to allow trial on the original charge. Such motion was also denied. After a stay of execution to allow time to file a certificate of probable cause, defendant was committed to the Utah State Prison for an indeterminate term of from one to fifteen years, where he is now detained.

ARGUMENT

POINT I

THE COURT COMMITTED REVERSIBLE ERROR IN ABUSING ITS DISCRETION BY NOT ALLOWING DEFENDANT TO WITHDRAW HIS GUILTY PLEA.

This appeal poses the problem of whether the trial judge abused his discretion in not permitting defendant, prior to imposition of sentence, to withdraw his guilty plea which was made pursuant to a plea bargain. Although it is well established in Utah that §77-24-3, Utah Code Ann. (1953) (the statute controlling withdrawal of guilty pleas at the time of the trial) does not grant an absolute right to withdraw a guilty plea, but merely gives the court discretionary power, it is just as well established that the appellate court will interfere when the lower court has abused its discretion. At the outset it should be made clear that appellant does not request that this policy be changed, so that

in the future courts, would grant automatic approval to all those wishing to retract their pleas. Appellant merely urges that this is just such an instance where the manifest injustice perpetrated compels this Court to declare the right of petitioner to withdraw his plea.

A. THE PLEA BARGAINING SYSTEM

Defendant's plea of guilty to the reduced charge was a result of plea bargaining with the prosecution. Before considering the abuse in this particular instance, an understanding of the role of plea bargaining in the criminal justice system is necessary, as well as the rights of a defendant who has pleaded guilty under a plea bargain and not received the concessions anticipated under the bargain.

The United States Supreme Court has recognized the efficacy of plea bargaining. "[P]lea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged." Santobello v. New York, 404 U.S. 257 (1971). It is impossible to see how the system is encouraged by denying both the defendant's anticipated penalty or the right to withdraw his plea. In discussing Rule 11 of the Federal Rules of Criminal Procedure, the Columbia Law Review takes note that the "basic recognition that a defendant should be able to rely on the authority of bargaining prosecutors seems sensible in context of today's criminal justice system." 76 Colum. L. Rev. 1072 (1976); accord: Jordan v. Commonwealth, 225 S.E.2d 661,

664 (Va. 1976). "Rule 11 now permits a defendant to withdraw his guilty plea whenever a judge decides not to impose the sentence upon which the prosecutor and the defendant have agreee." Id., 1070.

This recognition in the federal system of the right to withdraw a plea, as well as in several state jurisdictions, reflects the need of maintaining the integrity of the system in the accused's perception of plea bargaining. The policy reason of keeping dockets clear applies to the state court system as well as the federal. Expediency is a major basis for the present system. Estimates of the percentage of cases settled through guilty or nolo contendere pleas range as high as 95%. 9 Cum.L. Rev. 1 (1978).

The willingness of defendants to plead guilty is not premised on a desire to unclog courts, but to bargain directly for the sentence imposed, and thus avoid the uncertainties of a trial result.

The defendant who enters a plea bargain with the state offers his consent to judgment in exchange for a substantially lighter sentence than he would have received had he been convicted after trial. This sentence discount for defendants willing to plead guilty is common knowledge among lawyers. It has been a fact of the American system of criminal justice for at least half a century, and has recently received the imprimatur of the United States Supreme Court.

7 Linc. L. Rev. 138 (1972), citing Brady v. United States, 397 U.S. 742, 751-753 (1970); Parker v. N.C., 397 U.S. 790, 795 (1970).

The arguments for upholding the plea bargaining system, based both on its utility to the courts and the equitable

fairness of allowing defendants to rely on bargains made result in recognition for the process by legal organization.

Thus the American Bar Association has declared:

If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should . . . permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant charge or sentence concessions. ABA Standards Relating to the Function of the Trial Judge, (Approved Draft), §4.1.

The official commentary to this section recommends mandating that the defendant be given the opportunity to withdraw his plea regardless of the advance statements of the judge concerning his concurrence, reasoning that there is always "at least the taint of false inducement."

The American Bar Association stance is echoed by the American Law Institute:

If, at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided for in the plea agreement between the parties, the court shall inform the defendant of the fact and shall inform the defendant that the court will entertain a motion to withdraw the plea. American Law Institutes's Model Code of Pre-arraignment Procedure, § 350.6.

B. JUDICIAL ABUSE IN THE PRESENT CASE

At the time of trial the withdrawal of a guilty plea in Utah was controlled by § 77-24-3, Utah Code Annotated, (1953). This section permitted, prior to judgment, the plea to be withdrawn. Numerous cases by the Utah Supreme Court construed that

statute not to vest any absolute right in the accused, but rather to give the trial judge a discretionary power. Nonetheless, the court has stated that it would interfere to set aside a sentence whenever defendant can prove an abuse in the failure to exercise that discretionary power. State v. Forsyth, 560 P.2d 337,339 (Utah 1977); State v. Soper, 559 P.2d 951, 953 (Utah 1977). The present case is a clear example of such abuse.

(Section 77-24-3 has been replaced in the new Code of Criminal Procedure, effective July 1, 1980, by Section 77-13-6. The new section also permits the withdrawal of a guilty plea prior to conviction with good cause and leave of court.)

An increasing number of jurisdictions, as exemplified by Rule 11 of the Federal Rules of Criminal Procedure, are liberalizing the right of defendants to withdraw guilty pleas whether before or after sentencing. This recognition may come through legislative or judicial action. See e.g. State v. Theurer, 118 N.J. Super.485, 288 A.2d 587 (1972), rev'd 62 N.J. 64, 298 A.2d (1972); People v. Delles, 873 Cal. Rept. 389, 447 P.2d 629, 632 (1968), providing:

If a defendant pleads guilty as part of a bargain with an apparently authoritative and reliable public official -- usually the prosecutor or, as here, the trial judge himself -- whereby he is assured of receiving in return for his plea probation, a lenient sentence, or some other form of special consideration, the trial judge may not impose judgment contrary to the terms of such bargain without affording the defendant an opportunity to withdraw his guilty plea either by a motion under Penal Code, section 1018

before judgment (People v. Griggs, 17 Cal.2d, 621, 110 P.2d 1031) or by a motion to vacate judgment or a petition in the nature of coram nobis after judgment (People v. Wadkins, 63 Cal.2d 110, 45 Cal. Rptr. 173, 403 P.2d 429). (Emphasis added.)

This trend, granting greater protection to the accused's constitutional rights, is merely an extension of the practice, acknowledged by the Utah Supreme Court, that plea withdrawal is occasionally necessary to prevent a manifest injustice, therefore it is judicial abuse to deny the motion to withdraw. See State v. Plum, 14 Utah 2d 124, 378 P.2d 671, 673 (1963); ABA Standards, supra. The denial of the withdrawal by the trial judge violated clearly defined Utah standards. It should have been withdrawn pursuant to Utah and United States Supreme Court standards. Santobello, supra, p. 261; State v. Harris, 585 P.2d 450, 453 (Utah 1978); State v. Olafson, 567 P.2d 156, 158 (Utah 1977), citing Boykin v. Alabama, 395 U.S. 238 (1969); State v. Garfield, 552 P.2d 129, 131 (Utah 1976). Despite the court having inquired as to the defendant's state of mind and knowledge of the freedom of the court to act, the circumstances under which the plea was entered indicate that it was in reliance on medical evidence not supporting incarceration as it would accomplish no purpose in treatment or rehabilitation of the appellant in the prison facilities as they presently exist. The present plea should be declared to be involuntary because it was made in belief that credence

would be given the unanimous medical reports and a possible meritorious culpability defense was dropped in reliance thereon. Defendant has been victimized if this Court declares that after he entered freely into a system where both sides negotiate, enter agreements, and more promises, his plea and decision to drop a defense were voluntary even when his anticipations are frustrated. Although the court may flatly state that the only promise was a recommend of leniency, the logic and result defy the definition of "voluntary".

In this regard it should be noted that generally, motions to withdraw guilty pleas are more liberally granted when a potentially meritorious defense has been abandoned in favor of a disregarded bargain. See 66 A.L.R. 3d 896, 943 (1975); 21 Am Jur 2d, Criminal Law § 505. Considering the overwhelming, unanimous agreement of three psychiatrists and one Ph.D. in psychology that defendant did not mean to injure or cause death as indicated by his attempt to give mouth-to-mouth resuscitation (see psychiatric evaluation of Dr. Crist): that the death of the daughter was accidental and that defendant has positive characteristics that can be used with help of supportive psychotherapy (see Summary and Recommendation, Psychological Assessment of Douglas K. Gottfredson, Ph.D.); and that he "lacked substantial capacity" and that "it is my ultimate conclusion that his needs and the needs of society would best be served if he were shifted

from the criminal justice system to the mental health system with compassion for his background" (Report of Eugene J. Faux, M.D. F.A.P.A.), it seems irrefutable that defendant gave up an arguably valid insanity defense.

Yet respondents would argue that the subjective opinion of one judge, contrary to all principles, skills and knowledge used in sociology, psychology, psychiatry, criminology, and generic social work, is not an abuse. By denying the attempt to withdraw the guilty plea, the trial judge has not only defeated the policy reasons behind plea bargaining, he has abused the constitutional rights of this particular defendant. Defendant entered into good faith bargaining with the prosecution after which he voluntarily and knowingly pleaded guilty. He is not presently asking this Court for clemency for his action, but merely a return to status quo ante. Defendant seeks the right to proceed to his constitutionally guaranteed right to trial.

Further, the psychiatric findings of marginal I.Q., profound grief, mental defect, compel compassion and preclude a holding that the plea was totally "voluntary and intelligent". If the possibility exists that defendant's actions did not meet the standards of criminal responsibility, the possibility also exists that defendant could not make a rational plea believing that all medical evidence would be disregarded. The trial judge abused his power by failing to allow the withdrawal of the plea based on his own personal feelings of the guilt of the accused by the nature of the crime and facts. See State v. Triplett, 96 Ariz. 199, 393 P.2d, 666 (1964).

The survival of the constitutional right to trial has been noted in the United States Supreme Court and acknowledged by the Supreme Court of Utah.

The right to a jury trial is constitutionally guaranteed but it may be waived, and when no issue is raised as to innocence, there is nothing to try. Once a plea of guilty is knowingly and voluntarily entered, there are no issues for trial. State v. Yeck, 556 P.2d 1248 (Utah 1977).

This fact of constitutional protection of the right to trial, as well as it's application in the plea withdrawal context, was noted by Justice Marshall in a partly concurring opinion in Santobello, joined by Justice Brennan and Steward:

There is no need to belabor the fact that the Constitution guarantees to all criminal defendants the right to a trial by judge or jury, or, put another way, the "right not to plead guilty," United States v. Jackson, 390 US 570, 581, 20 L Ed 2d 138, 145, 88 S Ct 1209 (1968). This and other federal rights may be waived through a guilty plea, but such waivers are not lightly presumed and, in fact, are viewed with the "utmost solicitude". Boykin v. Alabama, 395 US 238, 243, 23 L Ed 2d 274, 279, 89 S Ct 1790 (1969). Given this, I believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment. In other words, in such circumstances I would not deem the earlier plea to have irrevocably waived the defendant's federal constitutional right to a trial.

Here, petitioner never claimed any automatic right to withdraw a guilty plea before sentencing. Rather, he tendered a specific reason why, in his case, the plea should be vacated. (Emphasis added.) Santobello, Supra, at 267.

No Utah case seems on point in deciding the present issue. Although several cases hold that the ability to withdraw a plea is discretionary, with the trial court, all are distinguishable.

Many Utah cases involve the attempt to withdraw the guilty plea after sentencing, rather than before as present. See, e.g. State v. Harris, supra; State v. Garfield, supra; State v. Plum, supra. Thus after apparently gambling with the courts and being dissatisfied with the results, defendants were denied a second chance. Here, defendant constantly defened his right to his bargained plea and had not lost it through apathy or want of diligence, consider Ballard v. State, 131 Ga. App. 347, 207 SE 2d 246 (1974), in which, although pursuant to a mandatory statute, the Georgia Supreme Court showed compassion in allowing the withdrawal of a guilty plea by liberally construing the time of sentencing. Also note the A.L.R. and Am. Jr. cites, supra, recommending generous exercise of discretion by the court in instances when the motion is made timely, i.e., prior to sentencing.

Other Utah cases relied on for more compelling reasons to deny the motion to withdraw. Thus in Olafson and Yeck, supra, express findings of voluntary and intelligent pleas were made. In the Forsyth case, supra, the court was unwilling to believe unsupported facts, in State v. Larson, 560 P.2d 335 (Utah 1977), unwilling to believe self-serving statements. None of these

rationales apply at present.

Finally, in addition to these decisions that compel a finding of abuse, the public policy arguments add a convincing voice.

It is in the public interest to maintain defendant, confidence in the plea bargaining process. In fact, the public receives a double benefit in the instant case. It is presented with smoothly functioning unclogged courts in which defendants comfortably bargain for fair and humane treatment, and it allows the rehabilitation of a useful member of society. Indeed, the pre-sentence report prepared by the Adult Probation and Parole Board indicates nothing but potential for defendant. The public loses nothing when this Court declares that as a matter of fundamental fairness. Defendant is entitled to a trial on the merits.

POINT II

THE "PANELING" BY THE ADULT PROBATION AND PAROLE DEPARTMENT WAS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS.

The trial judge had referred the matter of sentence recommendation to the Adult Probation and Parole Department for a pre-sentencing report. The result of the department's investigation, as scored on an objective "guideline recommendaton form" indicated that defendant should be released on probation. This recommendation, along with the findings in the investigation that the individual had mental and emotional problems, a stable employment history,

a history as a victim of child abuse as corroborated by a member of the Utah Highway Patrol, and the favorable comments of the local Justice of the Peace in Roosevelt were overlooked after the matter was "paneled" by the department. This procedure is of a meeting of department members in which they discuss various referrals from the court and then make recommendations. In the present case, "paneling" violated defendant's due process rights, when over the guidelines they recommended incarceration in the Utah State Prison.

The Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees citizens the right to be present and heard and to confront and cross-examine witnesses against them at any hearing in which there is a possibility of a serious deprivation of liberty. See Pointer v. Texas, 380 U.S. 400 (1965). "Due process of law is an opportunity to be heard and defend a substantive right. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

This right to be heard has broad application:

"The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'. Those principles are applicable

alike in all the States and do not depend upon or vary with local legislation." *Hebert v. Louisiana*, 272 US 312, 316, 317.

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence." *Holden v. Hardy*, 169 US 366,390.

Bute v. Illinois,333 US 647, 648 (1947).

The Supreme Court has also declared that the accused has the right to be present at every stage of the trial at which his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U.S. 806, 819 (1975). Although the paneling was not a function of the trial court proper, it's relationship to the whole was such that a denial of representation at the hearing frustrated the trial fairness.

Defendant was entitled to legal counsel at every step of the proceedings that may have lead to incarceration. The violation of this due process guarantee should result in this Court ordering a reversal.

POINT III

INCARCERATION AT THE UTAH STATE PRISON CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The United States Supreme Court has held the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution applicable to the states by reason

of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962).

The standards for what constitutes cruel and unusual punishment have been explicitly laid out by the Federal District Court in Utah, relying on United States Supreme Court directives, in Clements v. Turner, 364 F. Supp. 270, 278 (D.C. Utah 1973):

The principal legal test for determining whether punishment is cruel and unusual has come to be one related to current community standards of decency. This test asks whether under all the circumstances the punishment in question is ". . . of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness." Lee v. Tahash, 352 F.2d 970, 972 (9th Cir. 1965) (see also Church v. Hegstron, 416 F.2d 449, 451 [2d Cir. 1969]). Underlying the Eighth Amendment prohibition against cruel and unusual punishment is the basic concept of "the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). The Court added in Trop at 101, 78 S. Ct. at 598:

The Amendment must draw it's meaning from the evolving standards of decency that mark the progress of a maturing society.

To the above test have been added two further tests set forth by the court in Jordan v. Fitzharris, 257 F. Supp. 674, at 679 (N.D.Cal. 1966).

punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. Weems v. United States, 217 U.S. 349, 368 (1910); Robinson v. State of California, (370 U.S. 660) at 676, (1962) (concurring opinion of Douglas J.); Rudolph v. Alabama, 375 U.S. 889, 890 (1963) (dissenting opinion of Goldberg, J.). Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. Weems v. United States, supra, 217 U.S. at 370, 30 S.Ct. 544; Robinson v. California, supra, 370 U.S. at 677, (concurring opinion of Douglas, J.);

Rudolph v. Alabama, supra (375 U.S.) at 891,
84 S. Ct. at 155 (dissenting opinion of Goldberg,
J.).

Considering the totality of all factors, the accused's history as a child abuse victim, his stability and value to the general community despite his mental defects and psychological problems, and the overwhelming possibility of successful rehabilitative therapy as expressed by all examining physicians, including appointed alienists, appointed by the court, the decision to imprison defendant cannot be said to meet the above standards, although sanctions against defendant may ultimately be desirable to ensure that he continues to conform to society's norms. Incarceration not only "goes beyond that legitimate penal aim," it is counter-productive to it. It is cruel and unusual punishment to lock defendant away from the support systems capable of rehabilitating him in the circumstances of this case.

CONCLUSION

Appellant requests this Court to determine incarceration under the reasoning of the trial court is cruel and inhuman punishment, it being more logical to impose a sanction of obtaining required treatment or be incarcerated for failure to obtain treatment as the medical evidence does not support incarceration for the act for which there is evidence that the defendant committed, his mental responsibility and knowledge and intent being questionable.

In the alternative, appellant seeks a finding by this Court that the trial judge abused his discretion in failing to permit the withdrawal of his voluntary plea of guilty prior to sentencing and to permit him to be tried on the original charge of second degree murder.

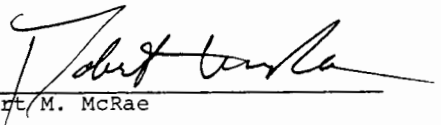
Respectfully submitted this 25 day of August, 1980.



Robert M. McRae
McRAE & DeLAND
Attorneys for Defendant/appellant
319 West First South, Suite A
Vernal, Utah 84078

CERTIFICATE OF MAILING

The undersigned hereby certifies that he mailed, postage prepaid, a copy of the foregoing to Robert B. Hansen, Attorney General of Utah, Attorney for Respondent, 236 Utah State Capitol Salt Lake City, Utah 84114 on this 25 day of August, 1980.



Robert M. McRae