1980

The State of Utah v. Nathan J. Hill : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

vs. : Case No. 17234

NATHAN J. HILL, :

Defendant-Appellant. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT JUVENILE COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE MERRILL L. HERMANSEN, JUDGE

ROBERT J. SCHUMACHER
Utah County Legal Defender
Association, Inc.
107 East 100 South
Provo, Utah 84601

Attorney for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol
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. 17,234

NATHAN J. HILL, :

Defendant-Appellant. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT JUVENILE COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE MERRILL L. HERMANSEN, JUDGE

ROBERT J. SCHUMACHER
Utah County Legal Defender
Association, Inc.
107 East 100 South
Provo, Utah 84601

Attorney for Appellant

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

Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 17224
NATHAN J. HILL,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant Nathan J. Hill was charged with delinquency based upon two counts of burglary in that he unlawfully remained in a building with intent to commit theft, in violation of Section 76-6-202, Utah Code Annotated, (1953) as amended.

DISPOSITION IN THE LOWER COURT

The Honorable Merrill L. Hermansen of the Third District Juvenile Court accepted an admission on both counts of the charge. Appellant later moved to withdraw the admission and enter a denial. That motion was denied.

RELIEF SOUGHT ON APPEAL

The Appellant requests that the judgment be vacated and the case be remanded to the lower court with instructions to withdraw the admission and to allow the Appellant

to enter a denial of the charge.

STATEMENT OF THE FACTS

On January 30, 1980 Nathan J. Hill, a juvenile, appeared with his father and a probation officer before the Honorable Merrill L. Hermansen of the Third District Juvenile Court. At that time he was informed that he was charged with two counts of unlawfully remaining in a building with intent to commit theft. Appellant and his father had been told by juvenile court probation personnel that an immediate admission would expedite his being placed on a release program to his parent. Appellant's father, upon whom Appellant depended for counsel in this matter, understood the offense to be equivalent to trespass and as a result Appellant did not fully understand the charge. Appellant and his father were told nothing about the range of possible punishments but only that it was a serious charge. The court informed Appellant that he had a right to discuss the charge with legal counsel before pleading. Nathan indicated that he did not wish to consult counsel and entered an admission. His father concurred in the decision. The court accepted the admission to two felony counts of burglary in violation of Section 76-6-202, Utah Code Annotated (1953) as amended.

The Appellant through counsel later appearing in the case moved the court to withdraw the admission and

allow the entry of a denial of the charge and to set the matter for trial. That motion was denied May 20, 1980 by Judge Hermansen.

ARGUMENT

SINCE APPELLANT DID NOT MAKE A VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL, THE COURT ERRED IN ACCEPTING HIS ADMISSION AND ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW THAT ADMISSION.

The Appellant contends that owing to his age, a lack of information, and the suggestion by the court's probation officer that an immediate admission would be in his best interest, he was not in a position to make an intelligent waiver of his right to counsel. It is clear that a person charged with a felony has an unconditional and absolute constitutional right to have a lawyer. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). It is also clear that the right attaches at the pleading stage of the criminal process. Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). The question in the present case is whether the appellant was adequately instructed and informed by the court to intelligently waive that right. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

In the case of Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Supreme Court laid down the standard for waiver of the accused's right to counsel:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily a relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. 304 U.S. at 464, 58 S.Ct. at 1023.

In the present case there are several factors which militate against a finding of waiver. The first such factor is the Appellant's age. While it is true that the accused's minority does not necessarily preclude a finding of voluntary waiver, the general rule is that judges should approach with particular caution any waiver by juveniles. In the case of Williams v. Huff, 146 F.2d 867 (D.C. Cir. 1945) a 17-year-old accused entered an uncounseled guilty plea to a charge of assault with a deadly weapon, committed when he was 15 years of age. The record showed that the defendant had been advised of his constitutional right to a lawyer which he had expressly waived. The defendant testified that he had been advised by fellow prisoners that a guilty plea would improve his chances for probation. In holding that there had been no proper waiver the court said:

> But in this case the fact that appellant was 17 years old at the time of the plea corroborates his testimony. It creates an inference of fact that his waiver was not intelligent. Such an inference would be rebutted if the record showed that he was examined at the time of his plea on the question of his intelligent capacity to waive

> his constitutional right to counsel. Such a precaution is always advisable where the accused who waives his right to counsel is a minor. In the absence of such a record it is incumbent upon the government to show some other facts which rebut the inference arising from the age of the accused. 146 F.2d at 868.

The U.S. Supreme Court endorsed the reasoning in Williams in the case of Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed 2d 167 (1957). The defendant had entered a hasty guilty plea partly out of fear of possible violence directed against him. The court said:

> A rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver. This conclusion against an intelligent waiver is fortified by the inferences which may be drawn from the age of the petitioner, Williams v. Huff . . . . 355 U.S. at 165, 78 S.Ct. at 197.

The inference against waiver established by the Appellant's minority is strengthened by the fact that he was not adequately informed as to the nature of the charge and was not instructed at all as to the possible consequences of pleading guilty. The charge itself was read to Nathan but not further explained. Nathan's father, upon whom Nathan was relying for counsel, understood the offense to be equivalent to trespass. The exact title and section of the Utah Code was not read, the court relying rather on the Appellant's finding that information in the summons. The Appellant was told nothing as to the punishment but was only told generally that the charge was a serious one.

The Supreme Court in Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed 309 (1947), outlined the responsibility of the trial judge in properly instructing the accused. In that case the court stated:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other factors essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. 332 U.S. at 724, 68 S.Ct. at 323.

The judge's conduct in the present case clearly did not meet the constitutional standard. The court did only that which the Supreme Court rejected as less than sufficient--tell the accused he could have a lawyer if he wished and then accept his stated waiver.

The judge's acceptance of Appellant's plea also runs afoul of Utah State statute. Section 77-24-6, Utah Code Annotated (1953) as amended, which was in effect at all times pertinent to the present case, states:

> Plea of guilty - Court to explain consequences. - Where the defendant is not represented by counsel, the court shall not accept a plea of guilty until it shall have explained to the defendant the consequences of such plea.

Section 77-35-11 of the new Criminal Procedure Code effective July 1, 1980 preserves the essential import of the previous statute but provides greater detail as to the judge's responsibility. The new statute states:

> (e) The court may refuse to accept a plea of guilty on no contest and shall not accept such a plea until the court has made the findings:
>
> (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
>
> (2) That the plea is voluntarily made;
>
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross examine in open court the witnesses against him, and that by entering a plea he waives all those rights;
>
> (4) That the defendant understands the nature and elements of the offense to which he is entering a plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
>
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of imposition of consecutive sentences . . . .

In State v. Banford, 13 Utah 2d 63, 368 P.2d 473 (1962) this Court reversed a conviction in a case strikingly similar to the present one for noncompliance with the 1953 statute. The defendant in Banford had pleaded guilty to a charge of Second Degree Burglary. At the time he entered his plea, the Court told him that he was entitled to have

counsel and that he could delay entering his plea 48 hours to secure counsel. The defendant said he did not want a lawyer and entered his plea immediately. This Court cited Section 77-24-6 and remended the case with instructions to withdraw the plea and allow the case to go to trial.

The trial court's failures are not rendered harmless by the fact that the juvenile may have had previous experience in the courts. The U.S. 10th Circuit Court of Appeals in Shawan v. Cox, 350 F.2d 909 (10th Cir. 1965) made it clear that experience is only one of several factors to be considered in deciding whether there has been an intelligent waiver of a right to counsel.

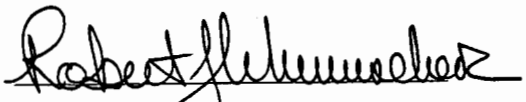
> Appellee (the State) made little or no attempt to make a record sufficient to refute the oral testimony of appellant. We disagree with the trial court's finding that because this accused has been involved in previous criminal cases, it is to be inferred that he possessed all of the requisite understanding and intelligence to waive his right to counsel. That may be a fact to be given consideration with all of the other facts and circumstances in the case, but standing alone it is not sufficient. 350 F.2d at 912

CONCLUSION

The Appellant submits that the court erred in accepting Appellant's guilty plea to two counts of burglary without his having legal counsel. The court should have been alerted to particular caution before accepting any waiver of fundamental constitutional rights because of the Appellant's age. Failure to thoroughly inform the

Appellant as to the nature of the charge and the range of possible punishments before accepting his uncounseled plea was in violation of the U.S. Constitution as interpreted by the Supreme Court and by Utah Statute. Under all the facts of the case this Court should remand with instructions to withdraw the plea and award the Appellant a trial.

Respectfully submitted,



ROBERT J. SCHUMACHER
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed 11 copies of the foregoing Brief Of Appellant, to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, and 3 copies of the same to the Office of the Utah Attorney General at 236 State Capitol, Salt Lake City, Utah 84114, this 12th day of August, 1980.