

1990

Kerry Ross Boren v. Gary W. Deland, Director, Utah State Dept. of Corrections : Brief of Appellee

Utah Supreme Court

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Kerry Ross Boren; Appellant pro se.

R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorneys for Appellee.

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BRIEF

900161

IN THE SUPREME COURT OF THE STATE OF UTAH

KERRY ROSS BOREN,

:

Case No. 900161

Petitioner/Appellant

:

v.

:

Priority No. 2

GARY W. DELAND, Director, Utah
State Dept. of Corrections;

:

:

Respondent/Appellee.

BRIEF OF APPELLEE

- - - - -

THIS IS AN APPEAL FROM A DENIAL OF PETITION
FOR WRIT OF HABEAS CORPUS INVOLVING A
CONVICTION OF SECOND DEGREE MURDER, A FIRST
DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT
COURT, IN AND FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE JAY E. BANKS, JUDGE,
PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

KERRY ROSS BOREN
P.O Box 250
Draper, Utah 84020

Appellant pro se

IN THE SUPREME COURT OF THE STATE OF UTAH

KERRY ROSS BOREN, :
 : Case No. 900161
Petitioner/Appellant :
v. : Priority No. 2
 :
GARY W. DELAND, Director, Utah :
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R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

KERRY ROSS BOREN
P.O Box 250
Draper, Utah 84020

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IN THE SUPREME COURT OF THE STATE OF UTAH

KERRY ROSS BOREN, :
 : Case No. 900161
Petitioner/Appellant :
v. : Priority No. 2
 :
GARY W. DELAND, Director, Utah :
State Dept. of Corrections; :
 :
Respondent/Appellee.

BRIEF OF APPELLEE
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a denial of Petition for Writ of Habeas Corpus involving a conviction of second degree murder, a first degree felony. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 77-2-2 (3)(i) (Supp. 1990).

STATEMENT OF ISSUE PRESENTED ON APPEAL

AND STANDARD OF APPELLATE REVIEW

1. Whether the lower court correctly ruled as a matter of law that petitioner's opportunity to rebut the presentence report was waived by counsel? A trial court's statement of law or legal conclusion is afforded no deference and is reviewed for correctness. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 77-18-1 (4) (Interim Supp. 1984):

(4) Prior to imposition of any sentence for an offense for which probation may be granted, the court may, with the concurrence of the defendant, continue the date for the

imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence report on the defendant. The report shall be prepared by the Department of Adult Probation and Parole. The report shall include a specific statement of pecuniary damages, accompanied by a recommendation from adult probation and parole regarding the payment of restitution by the defendant. The contents of the report shall be confidential. The court may disclose all or parts of the report to the defendant or his counsel as the interest of justice requires. At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney may wish to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant.

STATEMENT OF THE CASE

Plaintiff pled guilty to second degree murder, a first degree felony, on April 16, 1984, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding (R. 32-38). Plaintiff was sentenced on May 17, 1984, to serve an indeterminate term of 5 years to life in the Utah State Prison (R. 40-43).

On August 20, 1987, defendant filed a Motion to Withdraw Plea of Guilty and a brief memorandum in support of his motion (R. 45-48). In his motion, plaintiff asserted that his defense counsel failed to disclose to him the contents and information contained in the presentence report (Id.). After an evidentiary hearing held October 28, 1987, Judge Frank G. Noel, Third District Court Judge, denied plaintiff's motion concluding that plaintiff freely, voluntarily and knowingly entered his plea of guilty to second degree murder (R. 50-54).

On appeal, the Utah Court of Appeals affirmed the lower court's denial of plaintiff's motion to withdraw his guilty plea in an unpublished opinion filed October 11, 1989. State v. Boren, No. 890328-CA (Utah Ct. App. Oct. 11, 1989) (unpublished opinion) (see Addendum "A"; Opinion). This Court denied plaintiff's Petition for Writ of Certiorari on January 22, 1990.

In a separate action, plaintiff filed a Petition for Postconviction Relief in the Third Judicial District Court on March 16, 1988, claiming that his guilty plea was affected by defense counsel's non-disclosure of the contents of the presentence report (R. 72-75). The petition was dismissed by Judge Frank G. Noel on June 6, 1988, as an attempt to circumvent the regular appellate process (R. 76-80). Plaintiff did not appeal the dismissal of the petition.

On September 26, 1989, plaintiff filed the Petition for Writ of Habeas Corpus which is the subject of this appeal (R. 2-16). At a hearing on the petition held on January 12, 1990, Third District Court Judge Scott Daniels summarily dismissed as frivolous plaintiff's claims regarding alleged pre-guilty plea Miranda¹ and search and seizure violations (R. 127-28).² After supplemental briefing and taking the matter under advisement, Judge Daniels entered an order on March, 27, 1990, denying plaintiff's final claim that a constitutional error occurred when

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² A transcript of the January 12, 1990 hearing has not been provided on appeal.

his attorney waived an opportunity to rebut the presentence report (R. 136-38). (See Addendum "B"; Order).

STATEMENT OF FACTS

On September 15, 1983, plaintiff called a 911 telephone operator to report that his wife, Eliva Boren, was having difficulty breathing (R. 62).³ Robert Staley, a Salt Lake City detective, responded to the call and upon arriving at plaintiff's residence discovered Eliva in a crouched position in the bedroom (Id.). Multiple bruises covered her entire body and she appeared to be dead (Id.).

Medical examination of Eliva confirmed her death and revealed that the cause of death was "blunt force trauma" and could not have been self-inflicted (Id.). Medical examination also concluded that the cause of death, a probable beating, occurred on or before September 10, 1983 and September 13, 1983, at least two to five days prior to plaintiff's 911 call (Id.).

Holly Bollschweile, age 26, and Karen Boren, age 9, were residing at plaintiff's home at the time of the victim's death (Id.). Both of them stated that on or about September 13, 1983, plaintiff entered the victim's bedroom and locked the bedroom door (Id.). They heard sounds of plaintiff beating the victim (Id.). They also said they had heard plaintiff beating the victim on prior occasions (Id.).

On September 19, 1983, plaintiff was arrested and charged with second degree murder, a first degree felony, in

³ The facts of the crime are taken from the Brief of Respondent in State v. Boren, No. 890328-CA.

violation of Utah Code Ann. § 76-5-203(1)(a) and (b)(Supp. 1983) (Id.). On April 16, 1984, plaintiff entered a plea of "guilty" to an amended information charging second degree murder under subsection (c), the depraved indifference subsection (R. 63). Judge Jay E. Banks sentenced defendant to a term of five years to life in the Utah State Prison (R. 40-43). Plaintiff did not appeal his conviction and sentence.

SUMMARY OF ARGUMENT

The lower court properly denied defendant's postconviction claim that constitutional error occurred when his presentence report was unconditionally provided to his counsel, but not directly to him, prior to sentencing. Because counsel was provided a copy of the presentence report and permitted to discuss the contents with defendant, the sentencing court did not err. Defendant does not claim counsel was ineffective for not discussing the presentence report with him, but instead argues that the sentencing court was required to provide a copy of the report directly to defendant. However, no such requirement exists, nor would it be judicially provident.

The lower Court properly dismissed as frivolous and successive defendant's claim of a pre-guilty plea Miranda violation. In any event, defendant waived any Miranda violation claim by pleading guilty.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT NO CONSTITUTIONAL VIOLATION OCCURRED WHEN PLAINTIFF'S ATTORNEY WAIVED AN OPPORTUNITY TO REBUT THE PRESENTENCE REPORT.

On appeal, as in the lower court, plaintiff claims that his sentence was constitutionally defective because a copy of his presentence report was disclosed to his counsel but not to him prior to sentencing. (See Brief of Appellant at 6). Notably, he does not claim that his counsel was precluded from disclosing the contents of the report, but rather that his counsel simply did not show him the report. Neither does plaintiff claim that his counsel acted incompetently. In sum, plaintiff claims that he had a fundamental right to his own copy of his presentence report and that the district court could not rely on defense counsel to disclose the report to plaintiff. Plaintiff's claim should be rejected.

Plaintiff seeks postconviction relief under Utah Rules of Civil Procedure 65B(i). To be successful, plaintiff must establish a substantial denial of his rights under the Constitution of the United States or the Utah Constitution. Utah R. Civ. P. 65B(i)(1).

At the time of plaintiff's conviction and sentence, statutory law provided that the "contents of the [presentence] report shall be confidential. The court may disclose all or parts of the report to the defendant or his counsel as the interest of justice requires." Utah Code Ann. § 77-18-1(4) (Interim Supp. 1984)(emphasis added). This discretionary

language was subsequently deleted from the statute. See Utah Code Ann. § 77-18-1 (Supp. 1990).

Previously, this Court had clearly stated that procedural fairness requires that all parts of a presentence report be disclosed to a defendant or counsel prior to sentencing, except when disclosure of information may jeopardize the life or safety of third persons. State v. Casarez, 656 P.2d 1005, 1008 (Utah 1982); State v. Lipsky, 608 P.2d 1241, 1248 (Utah 1980). In Casarez, this Court indicated that because sentencing is a critical stage of a criminal proceeding, the failure to allow a defendant's counsel sufficient opportunity to read and investigate a presentence report may be equivalent to a denial of access to counsel. Casarez, 656 P.2d at 1007-08.

In the present case, the presentence report was disclosed to plaintiff's counsel prior to sentencing in accordance with Casarez. It is undisputed that plaintiff's counsel had an opportunity to read and investigate the presentence report. It is also undisputed that counsel had an opportunity to refute the information in the presentence report. Apparently, he chose not to do so.

The remaining question is whether the opportunity to rebut a presentence report may be waived by counsel's silence, or in other words, must be personally waived by a defendant. As petitioner's representative before the sentencing court, defense counsel had the opportunity to review the presentence report for accuracy and raise challenges if necessary. It is axiomatic that a represented party is generally deemed to be informed of a

matter when the trial court unconditionally informs the party's counsel. The criminal justice system depends upon the principle that a defense attorney is a defendant's agent before the court. In fact, relatively few constitutional rights cannot be waived by counsel. See State v. Butterfield, 784 P.2d 153, 156 (Utah 1989) (e.g., right to trial, right to be present at trial, right to trial by jury, and the right to an interpreter at trial). In Butterfield, this Court held that the failure of defendant or his counsel to object to the exclusion of the public from the courtroom constituted a waiver of defendant's right to a public trial.

Analogous to Butterfield, defendant's counsel in the present case was provided a copy of the presentence report. While defendant alleges that his counsel did not review the report with him, there is no allegation that counsel was precluded from doing so. Counsel's silence regarding the accuracy of the report constituted a waiver of an objection to the report. It is generally accepted that "[d]ecisions as to ... what objections to make ... are generally left to the professional judgment of counsel." State v. Medina, 738 P.2d 1021, 1023 (Utah 1989). Notably, plaintiff did not argue in the lower court, nor does he argue on appeal, that counsel's failure to rebut the presentence report constituted ineffective assistance.

In sum, procedural fairness requires that a presentence report be disclosed to the defendant or his counsel. If it is disclosed to counsel and no objections are raised, the trial

court is not obligated to inquire whether counsel has disclosed or discussed the report with the defendant. The trial court may rely upon the attorney/client relationship to effectively inform the defendant of the contents of the report. To rule otherwise would unnecessarily intrude upon the attorney/client relationship and require a defendant's personal waiver in mere procedural matters.

POINT II

BY PLEADING GUILTY, PLAINTIFF WAIVED ALL NON-JURISDICTIONAL, PRE-PLEA CONSTITUTIONAL VIOLATIONS.

Plaintiff also claims that information contained in his presentence report was illegally seized in violation of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1966). As a result, he complains that the Board of Pardons has relied on this illegally seized information in determining his length and conditions of confinement.⁴

The lower court granted the State's motion to dismiss plaintiff's Miranda claim on the basis that it constituted a frivolous claim in a successive postconviction petition (R. 127-28). Utah R. Civ. P. 65B(g); Andrews v. Shulsen, 773 P.2d 832 (Utah 1988). Because petitioner does not allege "good cause" for filing a successive petition, this Court need not consider plaintiff's claim.

In any event, it is well-settled that by pleading guilty, a defendant waives all nonjurisdictional defects,

⁴ While plaintiff does not specify the nature of this supposed illegally seized information, it appears to be plaintiff's own confession. (See Brief of Appellant at 11).

including alleged pre-plea constitutional violations. Tollett v. Henderson 411 U.S. 258, 267 (1973); State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989); 4 LaFare, Search and Seizure, § 11.1 (d) (2d ed. 1987). In the instant case, plaintiff's guilty plea was upheld as voluntary by the Utah Court of Appeals. State v. Boren, No. 890328-CA (Utah Ct. App. Oct. 11, 1989) (unpublished opinion) (see Appendix "A"; opinion). By pleading guilty, plaintiff waived any claim that information was illegally obtained by a Miranda violation.

CONCLUSION

Based upon the foregoing, the State respectfully asks this Court to affirm the lower court's denial of plaintiff's petition.

DATED this 29th day of October, 1990.

R. PAUL VAN DAM
Attorney General


DAN R. LARSEN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Response was mailed, postage pre-paid, to Kerry Ross Boren, pro se, P.O. Box 250, Draper, UT 84020, this 29th day of October, 1990.



APPENDICES

APPENDIX A

FILED

OCT 11 1989

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah,)	
)	
Plaintiff and Respondent,)	OPINION
)	(Not For Publication)
v.)	
)	
Kerry Ross Boren,)	Case No. 890328-CA
)	
Defendant and Appellant.)	

Third District, Salt Lake County
The Honorable Frank G. Noel

Attorneys: Connie L. Mower, Salt Lake City, for Appellant
R. Paul Van Dam and Dan R. Larsen, Salt Lake City,
for Respondent

Before Judges Bench, Greenwood, and Bullock.¹

BULLOCK, Judge:

Kerry Ross Boren appeals the denial of his motion to withdraw his guilty plea. We affirm.

Boren was charged in 1983 with the second-degree murder of his wife. The information charging him was amended to include not only a charge for intentional second-degree murder under Utah Code Ann. § 76-5-203(1)(a) and (b) (Supp. 1983), but also for second degree murder "acting under circumstances evidencing a depraved indifference to human life" as provided in Utah Code Ann. § 76-5-203(1)(c) (Supp. 1983). At his arraignment, Boren waived a formal reading of the amended information and pleaded not guilty.

Some time after Boren's arraignment, his counsel discovered that the original information against him had been amended to include a charge under the "depraved indifference" subsection of

1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(1)(j) (1987).

the statute defining second-degree murder. Boren and his counsel discussed the possibility of a plea bargain, and Boren reportedly refused to plead guilty to knowing or intentional murder. Boren's counsel, however, called his attention to the possibility of pleading guilty to charges under the "depraved indifference" subsection of the statute.

On April 16, 1984, Boren appeared with his counsel before the district court, Judge Jay E. Banks presiding, and changed to guilty his plea to the charge of second-degree murder. In the ensuing colloquy, the principal focus was on the "depraved indifference" subsection:

The Court: Your name is Kerry R. Boren, and I believe you are charged with murder in the second degree.

Ms. Carter [Boren's counsel]: Your honor, perhaps I could help the court. He is pleading under the depraved indifference section and not under either the "a" or "b" subsections.

The Court: Is that agreeable with the state?

Mr. Gunnarson [for the State]: Yes, your honor.

. . . .

The Court: By entering a plea of guilty, you do, in fact, admit the facts that support that charge. Do you understand that? That means the depraved indifference to human life.

Mr. Boren: Yes, your honor.

Boren then indicated, among other things, that he was literate in the English language, was without mental impairment, and that he understood his constitutional rights and the fact that he was waiving them by pleading guilty. The court pointed out potential sentences that could be imposed for the crime to which Boren was pleading, and then continued:

The Court: Mr. Boren, to the charge of criminal homicide, murder in the second degree, a first-degree felony, as I have explained it to you, which occurred at 34 East Miller Avenue in Salt Lake County, state of Utah, on or about September 15, 1983, in violation of title 76, chapter 6, section 203, Utah Code Annotated, 1953, as amended, in that you, Kerry R. Boren . . . caused the death of Elvia Boren--while acting under circumstances evidencing a depraved indifference to human life--engaged in conduct which created a grave risk of death to another and thereby caused the death of Elvia Boren. What now is your plea, guilty or not guilty?

Mr. Boren: Guilty, your honor.

The Court: Plea of guilty is received, and the court finds that it was freely and voluntarily made by the defendant, that he is not presently under the influence of any drugs, narcotics, or alcoholic beverages, nor has a physical or mental disability as such that interferes with his free choice to enter such a plea. I base those findings on my observations of the defendant here in the courtroom, together with the questions that were put to him and his responses thereto.

At the hearing, Boren also signed an affidavit acknowledging his plea of guilty. The affidavit recited the elements of the offense as "acting under circumstances evidencing a depraved indifference to human life, Defendant engaged in conduct which created a grave risk of death to another and thereby caused the death of another." The affidavit stated the facts as "I created a grave risk of death to my wife which resulted in her death by my lack of appropriate treatment and care."

In July of 1987, Boren moved to withdraw his plea of guilty. After an evidentiary hearing and review of the transcript of the hearing at which the plea was entered, the district court denied

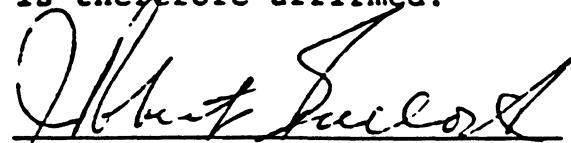
the motion. Boren appeals, arguing that his guilty plea was not knowing, intelligent, or voluntary, or in conformity with Utah R. Crim. P. 11(e).²

The entry of the guilty plea in this case occurred before the decision in State v. Gibbons, 740 P.2d 1309 (Utah 1987), which we do not apply retroactively. State v. Hickman, 115 Utah Adv. Rep. 14 (Utah 1989); State v. Vasilacopulos, 756 P.2d 92 (Utah App. 1988). We therefore review Boren's motion to withdraw his plea to determine whether, based on the record as a whole, the plea was entered with full knowledge and understanding of its consequences and of the rights that Boren thereby waived. Brooks v. Morris, 709 P.2d 310 (Utah 1985); Warner v. Morris, 709 P.2d 309 (Utah 1985); see also Jolivet v. Cook, 115 Utah Adv. Rep. 17, 18 (Utah 1989).

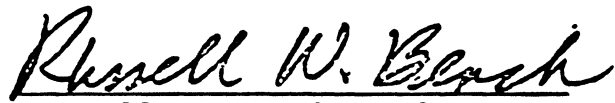
Boren argues that it was not clear from the original proceedings that his plea of guilty was based exclusively on the depraved indifference portion of the second-degree murder statute, subsection 76-5-203(1)(c), and that his guilty plea was not based on a sufficient understanding of the elements of the crime as explained in State v. Fontana, 680 P.2d 1042, 1044-49 (Utah 1984) and its progeny. As indicated above, however, the principal focus of the hearing at which Boren's guilty plea was accepted was the depraved indifference subsection, and Boren's affidavit clearly states the elements of depraved indifference murder. Based on our review of the record as a whole, we cannot conclude that Boren lacked adequate understanding of second-degree murder with depraved indifference, or that the trial court abused its discretion in denying Boren's motion to withdraw his plea.

2. In a supplementary brief filed with this court, Boren also questions other procedures employed in the original proceedings against him. However, these arguments are not timely raised before this court, and do not appear to have been considered by the trial court. We therefore do not address them. Jolivet v. Cook, 115 Utah Adv. Rep. 17, 19 (Utah 1989).

The denial of Boren's motion to withdraw his plea of guilty is therefore affirmed.


J. Robert Bullock, Judge

WE CONCUR:


Russell W. Bench, Judge


Pamela T. Greenwood, Judge

APPENDIX B

MAR 27 1990

By Kerry Boren

R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,	:	
Petitioner,	:	ORDER
v.	:	
GARY W. DELAND, Utah State	:	Case No. 890905823
Prison, Department of Corrections,	:	Judge Scott Daniels
Respondent.	:	

The above-entitled matter came on for oral argument on the Petition for Writ of Habeas Corpus on January 12, 1990, at the hour of 11:00 a.m., before the Honorable Scott Daniels, Third District Court Judge. Petitioner was present representing himself. Respondent was represented by Dan R. Larsen, Assistant Attorney General. After hearing the arguments of the parties, reviewing the supplemental memorandums of law, and taking the matter under advisement, the Court filed a signed Minute Entry on March 9, 1990 ruling on the sole remaining issue as follows:

Petitioner seeks post-conviction relief under Utah R. Civ. P. 65B(i) on the basis that his sentence was constitu-

tionally defective where a copy of his presentence report was disclosed to his counsel but not to him prior to sentencing. A criminal defendant is entitled to review his presentence report and to rebut or correct matters in the report. State v. Casarez, 656 P.2d 1005, 1008 (Utah 1982). However, this right is not a fundamental right and may be waived counsel. See e.g., State v. Butterfield, 123 Utah Adv. Rep. 8, 9 (Utah Dec. 27, 1989). It is undisputed that petitioner's counsel was provided a copy of the presentence report and given an opportunity to challenge the accuracy of the report. Accordingly, petitioner's right to personally review and rebut the presentence report was waived by counsel.

Based upon the foregoing, it is hereby:

ORDERED, ADJUDGED AND DECREED, that the Petition for Writ of Habeas Corpus is denied.

DATED this 27 day of March, 1990.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Scott Daniels", is written over a horizontal line.

HONORABLE SCOTT DANIELS
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Order was mailed, postage prepaid, to Kerry Ross Boren, pro se, P.O. Box 250, Draper, Utah 84020, this 20th day of March, 1990.

Brenda A. Boren