

1971

Kjeld Victorio Guglielmetti v. John W. Turner, Warden, Utah State Prison : Respondent's Brief

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Guglielmetti v. Turner*, No. 12600 (Utah Supreme Court, 1971).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KJELD VICTORIO GUGLIELMETTI,
Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden, Utah
State Prison,
Defendant-Respondent.

RESPONDENT'S BRIEF

An Appeal from the Judgment of the
District Court for Salt Lake County, State of Utah,
Honorable Stewart M. Hansen, Judge, Presiding.

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FILE

DEC 30 1947

Clerk, Supreme Court

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KJELD VICTORIO GUGLIELMETTI,
Plaintiff-Appellant,

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JOHN W. TURNER, Warden, Utah
State Prison,
Defendant-Respondent.

Case No.

12600

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the denial of the petition of Kjeld Victorio Gulgielmetti, for a writ of habeas corpus, and the order thereof.

DISPOSITION IN THE LOWER COURT

Kjeld Victorio Guglielmetti was charged with two separate counts of unlawfully selling a narcotic drug, to-wit: Cannabis Sativa, in violation of Utah Code Ann. § 58-13a-2 (1953). The appellant pled guilty to one charge (the other charge was dismissed) and Guglielmetti was

sentenced to serve the indeterminate term as provided by law for the offense. Guglielmetti petitioned the Third District Court for the County of Salt Lake, State of Utah, for a writ of habeas corpus which was denied. This appeal is from said order of the Court denying the petition.

RELIEF SOUGHT ON APPEAL

The State submits that the decision of the District Court should be affirmed.

STATEMENT OF THE FACTS

The State adopts Guglielmetti's Statement of Facts, except as hereinafter set forth.

The appellant, Guglielmetti was not nineteen years old as alleged in his brief but was twenty-four years old at the time he entered his plea.

Further, there is no evidence except for the unsupported allegations of the appellant to suggest that the appellant was ignorant of the possible prison sentence he could receive for selling a narcotic drug, but there is evidence showing that Guglielmetti thoroughly discussed the matter with his attorney and was aware of the possibility of a prison sentence for the felony (R. 29, 30).

ARGUMENT

POINT I.

GUGLIELMETTI VOLUNTARILY AND INTELLIGENTLY ENTERED A GUILTY

PLEA, WHICH THE RECORD AFFIRMATIVELY SHOWS, AND GUGLIELMETTI HAS FAILED TO SHOW THE TRIAL COURT'S DECISION TO DENY HIS PETITION WAS INCORRECT.

The United States Supreme Court has clearly held that before a state accepts a guilty plea, the court must determine whether the plea was voluntarily and intelligently entered. *Boykin v. Alabama*, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), *Parker v. North Carolina*, 397 U. S. 790, 90 S. Ct. 1474, 25 L. Ed. 2d 785 (1970), and *North Carolina v. Alford*, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Further, *the record must affirmatively show that the plea was entered voluntarily and intelligently*, see *Boykin v. Alabama*, *supra*. On these requirements the state fully agrees with Guglielmetti.

However, the State disagrees with Guglielmetti's contention that there is insufficient information in the transcript of his arraignment to affirmatively show that his guilty plea was voluntarily and intelligently entered, and the State asserts that the denial of his writ by the Third District Court for Salt Lake County, was correct.

It is important to note that a habeas corpus proceeding is a civil matter and the trial court's findings are presumed to be correct on appeal and evidence is to be surveyed in the light most favorable to the trial court's findings and judgment. See, *Brown v. Turner*, 21 U. 2d 96, 440 P. 2d 968 (1968), *Maxwell v. Turner*, 20 U. 2d 163,

435 P. 2d 287 (1967). The trial court had a full hearing and Guglielmetti had his opportunity to present his evidence to show his plea was not voluntarily and intelligently entered. Utah law is also clear that at trial the petitioner has the burden to prove facts which will entitle him to relief. See, *Larrabee v. Turner*, 25 U. 2d 248, 480 P. 2d 134 (1971) and *Johnson v. Turner*, 24 U. 2d 439, 473 P. 2d 901 (1970). After Guglielmetti's hearing the trial court made, inter alia, these specific findings:

“5. There is no evidence that petitioner's withdrawal of his plea of not guilty or his entrance of a guilty plea was not voluntary (sic) and understandingly made.

6. Petitioner has failed to sustain his burden of proof in support of his contention that his guilty plea was not voluntary (sic) and understandingly entered.”

In examining the record, the state asserts that the transcript of Guglielmetti's arraignment affirmatively shows his plea was freely entered and is sufficient evidence to justify the denial of his writ of habeas corpus by the trial court.

Guglielmetti had two charges of unlawful sale of a narcotic drug pending against him. The defendant with the advice of his attorney desired to change his plea from not guilty to guilty, and before accepting his guilty plea, Guglielmetti's attorney asked his client several questions *which affirmatively* show that Guglielmetti voluntarily and intelligently changed his plea:

"THE COURT: The record may show that the defendant, Kjeld Victorio Guglielmetti, is present, and that the case is set for trial this morning: Number 22607, that he is represented by his attorney Sumner J. Hatch; that the State is represented by Richard Shepherd; that there is also another case pending, Case Number 22608 on another charge of unlawfully selling a narcotic drug. And the record may also show that we have a jury and are ready for trial on the 22607.

Do you have some other disposition that you wish to make?

MR. HATCH: I would like to make a record before we do.

I understand, Mr. Guglielmetti, that both of these charges, that you are charged with sale of a narcotic drug, to-wit: cannabis sativa, marijuana. One being charged on May 4th, and one being charged on May the 26th; both being charges of sale to one Ronald Baker. Do you understand that?

MR. GUGLIELMETTI: Yes.

MR. HATCH: Do you understand, though, that the charges you are charged with under our *present law are felonies?*

MR. GUGLIELMETTI: *Right.*

MR. HATCH: And conviction, or plea of guilty to either, or to both *could result in your incarceration in the State Prison?*

MR. GUGLIELMETTI: *Right.*

MR. HATCH: And you also understand that the Court has some discretion in this matter in a probationary basis as to probation and condition?

Now, as has been indicated the State, on a plea of guilty to one of the charges, would be willing to move the Court to dismiss the other charge, which is discretionary of the Court. Do you understand that?

MR. GUGLIELMETTI: Yes.

MR. HATCH: *You and I have talked the matter over thoroughly together on the matter of the type of disposition, is that correct?*

MR. GUGLIELMETTI: Yes.

MR. HATCH: *And is it your desire to change your plea with regard to the sale that is alleged to have been made to Ronald Baker on the 4th day of May of 1970?*

MR. GUGLIELMETTI: Yes, I am.

MR. HATCH: Do you understand that there are no promises, and we could make no promises of what the Judge would do in the way of sentencing? It's entirely within his discretion?

MR. GUGLIELMETTI: Yes.

MR. HATCH: Is there anything more the Court feels he should be advised of?

THE COURT: I think not. On the charge of Case Number 22608 we have heretofore entered a plea of not guilty. Do you withdraw that plea?

MR. GUGLIELMETTI: Yes.

THE COURT: And do you enter a plea of guilty to that charge?

MR. GUGLIELMETTI: Yes.

THE COURT: The plea of guilty is entered" (See R. 28, 29). (Emphasis added.)

Guglielmetti knew that he was pleading guilty to a felony which could result in his incarceration in the State Prison (R. 28) and he admitted that he had thoroughly discussed the matter with his attorney before entering his plea of guilty (R. 29). This is amply shown in the record and from this evidence it is clear that his plea was intelligently entered.

The United States Supreme Court has made clear that when an accused is represented by a competent attorney and upon the advice of his counsel pleads guilty, the plea is deemed to be intelligently entered even if counsel may have misjudged the strength of the prosecution's case. *McMann v. Richardson*, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

Guglielmetti also answered that it *was his desire* to change his plea to guilty and admitted that no promises were being made to him (R. 29). There is no evidence suggesting that Guglielmetti's plea was involuntary, but the appellant asserts that plea bargaining by the prosecutor extirpates the voluntariness of his plea.

Guglielmetti was charged with two separate crimes, one committed on May 4, 1970 and the other committed on May 26, 1970. The offense committed on May 26, 1970 involved a much larger quantity (\$3,000 worth) (R. 24) of narcotic drugs than did the offense committed on May 4, 1970. It seems apparent that after reviewing the evidence against him, Guglielmetti felt his best strategy would be to plead guilty to the one charge with the knowledge that the state would move to dismiss the other

charge. (The court subsequently dismissed the second charge) (R. 30). Apparently Guglielmetti and his counsel believed that he had a good chance to be put on probation (see R. 28) rather than sentenced, so in view of all the circumstances and with the advice of his counsel, Guglielmetti elected to change his plea to guilty.

After receiving a report from the Adult Probation and Parole Department the trial court sentenced Guglielmetti to the indeterminate sentence as provided by law (R. 25) rather than placing him on probation as Guglielmetti and his attorney had hoped the court would do.

Courts have recognized that plea bargaining is a common and an acceptable practice in criminal law. In *United States v. Brady*, 397 U. S. 742, 753, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) the Court said:

“ . . . But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.”

The Utah Supreme Court has also considered whether a plea is voluntarily made when a defendant with multiple charges against him enters a plea of guilty which results in the other charges being dismissed. In *Strong v. Turner*, 22 Utah 2d 294, 296, 452 P. 2d 323 (1969) the court stated:

“... the mere fact that a defendant, against whom there are multiple charges pending, pleads guilty to one of them on the condition that the others be dropped certainly does not in and of itself compel a finding of coercion.”

It is clear that plea bargaining is a legal option available to a prosecutor and an accused, and the mere fact that one pleads guilty with the promise of the state's motion to dismiss other charges does not render a guilty plea involuntary.

It is conceded that both Guglielmetti and his attorney were hopeful that he would be placed on probation rather than receive a prison sentence, but the record affirmatively shows that Guglielmetti's attorney, Mr. Hatch, advised the defendant that a plea of guilty could result in a prison sentence and that probation was solely within the discretion of the trial court and that no promise had been made or could be made on what the judge would do in the way of sentencing (R. 28, 29). With this in mind Guglielmetti plead guilty and was subsequently sentenced. The fact that the defendant, and his attorney had overestimated his chances for probation and were disappointed when a prison term was prescribed cannot now be used to thwart a voluntary plea, unless the advice of his counsel was so incompetent as to amount to gross error. See *McMann v. Richardson, supra*, and *Kryger v. Turner*, 25 U. 2d 214, 479 P. 2d 477 (1971). Surely the record demonstrates that no promise of probation was received and the advice given to the defendant that probation is in the discretion of the trial court was

factually true and is not misleading or incompetent. The appellant has utterly failed to show in what regard the mentioning of probation, with the accompanying explanation, prejudiced or reduced the voluntary nature of his plea.

The appellant appears to assert that the failure of the trial court to mention the maximum and minimum terms provided by law for a guilty plea is so prejudicial that a guilty plea cannot be deemed to be voluntary in their absence. While the record does not specifically mention the maximum and minimum terms for selling narcotic drugs, the record does disclose that Guglielmetti was advised that his guilty plea could result in a prison sentence (R. 28), the record also discloses that Guglielmetti knew he was pleading guilty to a felony (R. 28), and the record further discloses that Guglielmetti had thoroughly discussed the disposition of the matter with his attorney (R. 29). There is more than adequate evidence to thus uphold the trial court's finding that his plea was voluntarily and intelligently entered, and except for the appellant's assertion, there is no evidence suggesting that he was ignorant of the length of the prison term for this offense. In view of the extensive experience of his attorney and of the admissions in the record that he had thoroughly discussed the matter and that he knew he was pleading guilty to a felony which could result in a prison sentence the trial court was justified in its findings, and there is no reason to reverse their decision on appeal.

POINT II.

GUGLIELMETTI'S CONTENTION THAT THE SENTENCING JUDGE WAS UNAWARE HE COULD GRANT PROBATION TO GUGLIELMETTI IS WITHOUT MERIT IN VIEW OF THE EVIDENCE IN THE RECORD WHICH JUSTIFIED THE SPECIFIC FINDING OF THE TRIAL COURT REJECTING THIS CONTENTION.

As has been previously noted the burden of proving facts sufficient to issue a writ of habeas corpus is upon the petitioner, and when the trial court denies a petition its findings are presumed to be correct.

After a full hearing the trial court made the following finding of fact:

"7. There is no evidence that the sentencing judge was unaware of the fact that he could grant the petitioner probation or that the sentencing judge desired to or would have granted such probation."

Under Utah law the trial court has the discretion to grant probation where "it appears compatible with the public interest." See, Utah Code Ann. § 77-35-17 (1953). After pleading "guilty" Guglielmetti agreed to waive his right to be sentenced within ten days in order that a report from the Adult Probation and Parole Department be prepared (R. 30). At sentencing, counsel for Guglielmetti appealed to the court to disregard what he must have felt to be a derogatory report (see R. 29). The court

indicated it examined the report (R. 25) and the court at no place indicated it felt probation should be granted. There is no evidence suggesting the trial court was under misapprehension that it could not grant probation if it so desired, but rather the record indicates that the court did not feel probation should be granted in view of the Adult Probation and Parole report (R. 24, 25).

CONCLUSION

The state respectfully submits that Guglielmetti had a full opportunity to prove the allegedly unconstitutional entry of his guilty plea in the court below and following a full hearing his petition was denied. On appeal Guglielmetti has failed to show error on the part of the district court. Accordingly it is urged that the district court's decision should be affirmed.

Respectfully submitted,

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