1990

State of Utah v. Brian E. Maguire : Petition for Writ of Certiorari

Utah Supreme Court

R. Paul Van Dam; Attorney General; Judith S. H. Artherton; Assistant Attorney General; Attorney for Petitioner.
Brian E. Maguire; pro Se.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No. 900555
v.	:	
BRIAN E. MAGUIRE,	:	Category No. 13
Defendant-Respondent.	:	

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the court of appeals erroneously held that State v. Gibbons, 740 P.2d 1309 (Utah 1987), adopted a "strict compliance" with rule 11(5), Utah Rules of Criminal Procedure, test which supersedes the "record as a whole" test traditionally applied on review to determine whether a guilty plea was knowingly and voluntarily entered.

OPINION BELOW

The court of appeals' opinion was issued on November 16, 1990, and appears in State v Maguire, No. 900045-CA (Utah Ct. App. Nov. 16, 1990) (unpublished) (a copy of the court's opinion is contained in the addendum).

JURISDICTION OF THIS COURT

This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1990).

STATEMENT OF THE CASE

On January 21, 1988, defendant was charged with aggravated assault, a third degree felony in violation of Utah Code Ann. § 75-5-103 (1990); mayhem, a second degree felony, in violation of Utah Code Ann. § 76-5-105 (1990); and being a habitual criminal, a first degree felony, in violation of Utah Code Ann. § 76-8-1001 (1990)(R. 31). On March 4, 1988, defendant pleaded not guilty to all charges. On April 21, 1988, defendant executed an affidavit and entered a no contest plea to the charge of aggravated assault (R. 111-12); (transcript of plea hearing (hereinafter "T.") 8). The other two charges were withdrawn on the same date (T. 9). Pursuant to a plea agreement, the prosecution recommended to the trial court that defendant be sentenced for the offense as a class A misdemeanor (T. 11). The trial court accepted the prosecution's recommendation and sentenced defendant to one year in the Salt Lake County Jail with credit for 30 days served (T. 14-15). Defendant chose to serve his sentence at the Utah State Prison (T. 15), and he completed his term on or about March 22, 1989. Defendant filed a motion to withdraw his guilty plea on August 10, 1988 (R. 124-29). On November 30, 1989, a hearing was held on defendant's motion, and on December 1, 1989 the trial court denied the motion (R. 241-43).[1] The trial court issued findings of fact and conclusions of law, and signed the order on December 15, 1989 (R. 256-60).

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[1] Judge James S. Sawaya presided over defendant's guilty plea proceeding but recused himself after defendant filed his motion to withdraw the plea (R. 217). The case was reassigned to Judge Richard H. Moffat.

Defendant filed his notice of appeal on January 10, 1990 (R. 263-64).

STATEMENT OF FACTS

On April 21, 1988, defendant entered a no contest plea to one count of aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990). Defendant's plea was entered as the result of a plea agreement in which, in exchange for defendant's plea, the prosecution agreed to move to dismiss charges of mayhem, a second degree felony, in violation of Utah Code Ann § 76-5-105 (1990), and of being a habitual criminal, a first degree felony, in violation of Utah Code Ann. § 76-8-1001 (1990), and to recommend that defendant be sentenced as though the offense were a class A misdemeanor (T. 2-3, R. 112). The charge had resulted from an incident in which defendant allegedly assaulted his grandmother, ripping off part of her ear and inflicting other injuries (R. 31).

At the hearing on defendant's no contest plea defendant signed a standard affidavit explaining to him his rights, in conformity rule 11(e), Utah Rules of Criminal Procedure. The transcript of the hearing reflects that defendant was told the acts he committed which gave rise to the charges (T. 3); that, by virtue of his prior not guilty plea, he was presumed innocent until he had been proven guilty beyond a reasonable doubt (Id.); that the State had the burden of proving each element of each crime charged beyond a reasonable doubt (T. 3-4,7); that defendant had no burden to prove his innocence (T. 4); that defendant had a right to a trial by jury (Id.); that the court

treated a no contest plea the same as a guilty plea (Id.); and that the court was not bound by the prosecution's recommendation concerning sentencing (T. 5). Defendant stated that he had read and understood the affidavit he was signing and the rights, elements of the crime and facts giving rise to the charges, as set forth in that affidavit (T. 6-7). Defendant also testified that he understood the penalties for the offense of a third degree felony and that he was signing the affidavit of his own free will without force, coercion or threat (T. 5,8). After signing the affidavit, defendant entered a no contest plea (Id.).

Defendant waived the statutory time limit for sentencing and was sentenced, as recommended by the prosecution, to a term of one year with a credit of 30 days, as though he had pleaded no contest to a class A misdemeanor charge (T. 9, 14). In a discussion regarding defendant's sentencing, defendant's counsel, with defendant present, discussed defendant's parole status. She stated, in pertinent part, "[t]he Board of Pardons will have to consider some technical matters, violations as well as this new conviction, and they will no doubt give him some more time than that [referring to the class A misdemeanor sentence] . . ." (T. 11).

At the hearing on defendant's motion to withdraw his plea, defendant testified that he had not read the affidavit he had signed at the time of his plea (transcript of hearing on motion to withdraw plea (hereinafter "TA.") 49) but admitted to having testified to the contrary at the plea hearing (TA. 51-52). He testified to his belief that he was entering a contract with

the "Executive Branch" of the Utah State government and that any agreement he made in his plea was binding on both the county attorney and Adult Probation and Parole, as agents of the "Executive Branch" (TA. 53-54). Defendant also asserted, without offering documentary or other evidence, that his parole from the Utah State Prison was revoked solely as a result of the conviction arising from his no contest plea (TA. 54). He stated that he was coerced into entering the plea (TA. 57). Defendant did not testify to and no other evidence was offered asserting any deficiencies in the taking of the no contest plea.

In denying defendant's motion, the trial court concluded, inter alia, that defendant's plea was entered knowingly and voluntarily and that the State of Utah had kept good faith with defendant and delivered each of its promises made to defendant up through sentencing (R. 258).

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT STATE V. GIBBONS, 740 P.2D 1309 (UTAH 1987), ADOPTED A TEST OF STRICT COMPLIANCE WITH RULE 11(5), UTAH RULES OF CRIMINAL PROCEDURE, WHICH SUPERSEDES THE "RECORD AS A WHOLE" TEST TRADITIONALLY APPLIED ON REVIEW TO DETERMINE WHETHER A GUILTY PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED.

On appeal defendant asserted several bases for reversing the trial court's denial of his motion to withdraw his no contest plea. First, in response to the court of appeals' holding in State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988), defendant stated that the trial court improperly applied the "record as a whole"

analysis in determining the validity of his plea.[2] The State responded that, under the "record as a whole" test traditionally applied by this Court on post-conviction review of the validity of a guilty plea, the record clearly supported the trial court's denial of defendant's motion. See, e.g., Jolivet v. Cook, 784 P.2d 1148 (Utah 1989), cert. denied, 110 S.Ct. 751 (1990); State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. Miller, 718 P.2d 403, 405 (Utah 1986) (per curiam).[3]

In reversing and remanding to allow defendant to withdraw his guilty plea, the court of appeals rejected the State's argument, continuing to conclude that this Court in State v. Gibbons replaced the "record as a whole" test with a strict rule 11 compliance test. Maguire, Case No. 900045-CA at 3. The court of appeals decision misconstrues Gibbons and ignores significant language in both pre-Gibbons and post-Gibbons opinions of this Court.

In Gibbons, this Court did not review either the trial court's ruling on a motion to withdraw a guilty plea or the voluntariness of the defendant's guilty pleas. Rather, the Court, in the context of remanding the case because an attack on

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[2] Because the court of appeals reversed on the basis of lack of on-the record strict compliance with rule 11, it did not reach the merits of defendant's other arguments.

[3] The "record as a whole" test was stated in Miller as follows:

> [T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving.

718 P.2d at 405.

the voluntariness of a guilty plea must first be presented to the trial court in the form of a motion to withdraw, concluded that "a statement of the law concerning the taking of guilty pleas in all trial courts in this state is appropriate." Gibbons, 740 P.2d at 1312. It then set out the specific requirements for taking of guilty pleas under rule 11 for the purpose of assisting the trial court on remand in determining the validity of the defendant's pleas. Ibid. The Gibbons Court did not even mention the record as a whole test for determining voluntariness of a guilty plea, and the reason seems obvious: the Court was not reviewing the trial court record to determine the voluntariness of the defendant's pleas. Thus, the court of appeals' conclusion that Gibbons replaced the record as a whole test with a strict compliance test reads far too much into Gibbons. The Gibbons Court simply did not address that issue.

Furthermore, certain language in several post-Gibbons opinions of this Court strongly suggests that the record as a whole test was not modified by Gibbons. For example, in Jolivet v. Cook, this Court stated:

> We first address Jolivet's claim that his guilty pleas were unknowing and involuntary. Specifically, Jolivet argues that Judge Burns erred in the taking of his guilty pleas because he did not make findings that Jolivet understood the elements of each crime charged and how those elements related to the facts, as required by State v. Gibbons, 740 P.2d 1309 (Utah 1987), or that Jolivet knew the possibility of the imposition of consecutive sentences. In fact, Jolivet claims that he did not know or understand these things when he entered his pleas.
>
> [Rule 11(5)(d)] requires that before a trial court accepts a guilty plea, it must

> find that the defendant understands the nature and elements of the offense to which he or she is entering the plea. In Gibbons, this Court stated that in making this finding, the trial court must ensure that the defendant understands "the elements of the crimes charged and the relationship of the law to the facts." Id. at 1312. In addition, [rule 11(5)(e)] requires that before the trial court accepts a guilty plea, it must find that the defendant knows of the possibility of the imposition of consecutive sentences. The record clearly shows that at the time the guilty pleas were accepted, Judge Burns did not make the findings required by [rule 11(5)], i.e., that Jolivet understood the elements of each crime charged and how these elements related to the facts and that Jolivet knew the possibility of the imposition of consecutive sentences. However, this Court has held, "[T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving." State v. Miller, 718 P.2d 403, 405 (Utah 1986); Brooks v. Morris, 709 P.2d 310, 311 (Utah 1985); Warner v. Morris, 709 P.2d 309, 310 (Utah 1985).

784 P.2d at 1149-50 (footnotes omitted). In State v. Copeland, the Court, without citing Gibbons, said:

> The United States Supreme Court has said, "[T]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." McCarthy, 394 U.S. at 470, 89 S.Ct. at 1173 (emphasis in the original). We think the most effective way to do this is to have the defendant state in his own words his understanding of the offense and the actions which make him guilty of the offense. By this statement, the trial court can assure itself that the defendant is truly submitting a voluntary and knowing plea. Moreover, the record on appeal will clearly reflect the defendant's understanding. Although this method is therefore preferable to others, it is not absolutely required. The test is voluntariness. We hold that the record

> demonstrates that defendant admitted acts sufficient to justify his conviction of the offense to which he pleaded guilty.

765 P.2d at 1273 (footnote omitted and emphasis added).

Although both Jolivet and Copeland involved pre-Gibbons guilty pleas, this Court did not note or attach any significance to that fact in either opinion, and, in fact, directly applied Gibbons in Jolivet in concluding that although the trial court did not strictly comply with rule 11, the record as a whole demonstrated that Jolivet entered his guilty pleas knowingly and voluntarily. Jolivet, 784 P.2d at 1149-51. This seriously undermines the court of appeals' effort to distinguish Jolivet and Copeland on the basis that the record as a whole test was applied in those cases because they involved pre-Gibbons guilty pleas.[4] Significantly, in State v. Smith, 777 P.2d 464 (Utah 1989), which involved a post-Gibbons guilty plea, this Court appeared to apply the record as a whole test in reversing the trial court's denial of the defendant's motion to withdraw.[5]

Finally, that the record as a whole test represents the most reasonable standard upon which to assess a post-conviction

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[4] It is not clear what significance State v. Hickman, 779 P.2d 670 (Utah 1989) (per curiam), which was issued five days before Jolivet, has in this inquiry. Unlike Jolivet, Hickman declined to apply Gibbons to a pre-Gibbons guilty plea on the ground that Gibbons represented a clear break from the past and would therefore not be applied retroactively. Hickman, 779 P.2d at 672 n.1. Insofar as Hickman might be read to support the court of appeals' strict compliance test, it is inconsistent with Jolivet and should not be followed.

[5] The court of appeals obviously disagrees with this reading of Smith, having cited it in support of its decision in , and stating directly in State v. Pharris, 143 Utah Adv. Rep. 35, 38 n.6 (Utah Ct. App. Sept. 14, 1990), that Smith applied the "strict compliance test articulated in Gibbons."

attack on the voluntariness of a guilty plea is made clear in the following passage from State v. Kay, 717 P.2d 1294 (Utah 1986):

> A final word on the State's Rule 11 arguments. In its zeal to set aside Kay's guilty pleas or renege on the bargain that was struck, the State has argued, in effect, that otherwise voluntary and lawful guilty pleas should always be voided when the trial court violates any provision of Rule 11. The concurring opinions of Chief Justice Hall and Justice Howe adopt this reasoning as well. This position is shortsighted, for to follow it would be to sanction a remedy far worse than the wrong. If we were to hold any violation of Rule 11 automatically voids the resultant plea, even when the plea is knowingly and voluntarily entered, we would encourage defendant's, convicted and sentenced after such a plea, to attack their convictions for purely tactical reasons, either by direct appeal or by seeking habeas corpus long after the fact. We have refused to overturn convictions upon such challenges in the past, e.g., State v. Knowles, Utah, 709 P.2d 311 (1985); State v. Morris, Utah, 709 P.2d 310 (1985), [sic] and we find no reason to encourage such attacks in the future.
>
> Overturning such convictions--which we would have to do if we embraced the rationale advanced by the State and the Chief Justice's concurring opinion--would require the State to reprosecute numerous defendants, probably long after the challenged guilty pleas were entered and when the passage of time would make reprosecution impractical, if not impossible. Almost certainly, the ultimate result would be to free a number of convicted persons for nothing more that technical errors in the acceptance of their voluntary guilty pleas.

717 P.2d at 1301-02 (footnote omitted)[6]. In so ruling, this

[6] Most jurisdictions apply a record as a whole test rather than the strict compliance rule adopted by the court of appeals. See, e.g., United States v. Barry, 895 F.2d 702 (10th Cir. 1990) (district court's failure to strictly comply with rule 11 does not warrant reversal where defendant's knowledge of rights waived was otherwise apparent); Wood v. State, 190 Ga.App. 179, 378

Court adopted the harmless error rule in assessing rule 11 errors, a rule long recognized by this Court in a variety of contexts. See, e.g., State v. Johnson, 771 P.2d 1071 (Utah 1989) (harmless error standard for nonconstitutional error); State v. Verde, 770 P.2d 116, 121 n.8 (Utah 1989) ("with respect to certain constitutional errors, we must place on the State the burden of proving that the error was harmless beyond a reasonable doubt"). See also Utah R. Crim. P. 30(a); Utah R. Evid. 103(a); Utah R. Civ. P. 61.

In sum, a careful reading of Gibbons and this Court's pre- and post-Gibbons decisions indicates that the court of appeals erred in holding that Gibbons replaced the record as a whole test with a strict compliance test. A strict compliance test is not required either by Gibbons or logic.

Accordingly, this Court should grant certiorari because the court of appeals has rendered a decision on a question of law which is in conflict with decisions of this Court. Utah R. App. P. 46(b). Insofar as the issue of what standard applies on review of the voluntariness of a guilty plea is unsettled in light of Gibbons, certiorari should be granted because the court

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[6] Cont. S.E.2d 520 (Ga. App. 1989) (where defendant was otherwise informed of rights waived, harmless error standard is applied to trial court's failure to comply with rule governing taking of pleas); People v. Bettistea, 181 Mich.App. 194, 448 N.W.2d 781, 783 (Mich. App. 1989) ("record as a whole" demonstrated that plea was made knowingly and voluntarily); People v. Harris, 61 N.Y.2d 9, 459 N.E.2d 170 (N.Y. 1983) (voluntariness of plea determined by considering all relevant circumstances surrounding it, not by judge's ritualistic recitation of rights waived).

of appeals has decided an important question of law which should be settled by this Court. Utah R. App. P. 46(d).

CONCLUSION

Based on the foregoing arguments, the State's petition for certiorari should be granted pursuant to rule 46(b) or (d), Utah Rules of Appellate Procedure.

RESPECTFULLY submitted this 3 day of December, 1990.

R. PAUL VAN DAM
Attorney General

Judith S. H. Atherton
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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Petition were mailed, postage prepaid, to Brian E. Maguire, pro se, P.O. Box 250, Draper, Utah 84010, this 3 day of December, 1990.

Judith S. H. Atherton

ADDENDUM

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	MEMORANDUM DECISION
Plaintiff and Appellee,	)	(Not For Publication)
	)	
v.	)	Case No. 900045-CA
	)	
Brian Maguire,	)	
	)	F I L E D
Defendant and Appellant.	)	(November 16, 1990)

Before Judges Jackson, Bench, and Orme.

PER CURIAM:

Defendant appeals from a denial of a motion to withdraw a no contest plea to aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990).

On April 21, 1988, defendant entered a no contest plea to one count of aggravated assault, a third degree felony. In exchange for the no contest plea, the prosecution agreed to move for dismissal of a charge of mayhem, a second degree felony, and a charge of being a habitual criminal, which allows enhancement to a first degree felony, and to recommend that defendant be sentenced for a class A misdemeanor. The charges resulted from an incident in which defendant allegedly assaulted his grandmother, ripping off part of her ear and inflicting other injuries.

At the hearing on defendant's change of plea to no contest, defendant signed a form affidavit, with handwritten additions, which set forth rights that would be waived by entry of the plea. The transcript of the hearing reflects that the defendant was informed by the trial court that by virtue of his prior not guilty plea, he was presumed innocent until he had been proven guilty beyond a reasonable doubt; that the state had the burden of proving each element of each crime charged beyond a reasonable doubt; that defendant had a right to a trial by jury; that the court treated a no contest plea the same as a guilty plea for purposes of sentencing; and that the court would not be bound by the prosecution's recommendation concerning sentencing.

Although the trial court next questioned defendant about his understanding of the affidavit, the record reflects no specific discussion of the rights against compulsory self-incrimination or the right to confront and cross-examine witnesses against him. The court asked defendant if he was aware of the possible sentence for a third degree felony and defendant responded affirmatively; however, the court did not advise defendant of the minimum and maximum sentences.

Defendant contended in support of the motion to withdraw his plea that the trial court failed to strictly comply with the requirements of Rule 11(5), as required by State v. Gibbons, 740 P.2d 1309 (Utah 1987). Defendant further contended that the facts set forth in the affidavit did not satisfy the statutory elements of the offense.[1] Defendant's final contention is that he was deprived of the benefit of the plea bargain, i.e., sentencing to a class A misdemeanor, because he was not advised that the conviction would result in a revocation of parole on two prior convictions.

On appeal, the defendant makes the same arguments that were asserted in the trial court and also challenges the subject matter jurisdiction of the trial court to hear the motion to withdraw. Our determination of the issues raised under Utah R. Crim. P. 11 is dispositive of the appeal, making it unnecessary to consider defendant's claim that the prosecution or the trial court was obligated to advise him of the effect of the plea on his parole status. We find the challenge to the trial court's subject matter jurisdiction to be wholly without merit.

The state concedes "that the trial court did not conduct the complete on-the-record review with defendant of the rule 11(e) requirements as mandated by" State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988); State v. Valencia, 776 P.2d 1332 (Utah Ct. App. 1989) (per curiam); State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. 1990) and State v. Pharris, 143 Utah Adv. Rep. 35 (Utah

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1. Utah R. Crim. P. 11(5)(d) requires that the trial court find "the defendant understands the nature and elements of the offense to which he is entering the plea." Defendant does not specifically address Rule 11 in his argument that the elements of the offense were not established.

Ct. App. 1990).[2] The State urges this court to reverse its prior holdings that a trial court must strictly comply with Rule 11 in accepting a guilty plea, which we decline to do. State v. Pharris is dispositive of the issues raised in this case. We conclude that the trial court did not review with the defendant on the record each of the requirements of Rule 11 and that the motion to withdraw should have been granted.

We find that the trial court failed to strictly comply with Rule 11 and Gibbons, and we vacate defendant's conviction and remand to the trial court to allow defendant to withdraw his no contest plea.

ALL CONCUR:

Norman H. Jackson, Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge

2. The State contends that the Court of Appeals decisions cited above incorrectly interpret State v. Gibbons, 740 P.2d 1309 (Utah 1987) as requiring strict compliance with Rule 11 requirements. Thus, the State continues to make this argument in order to preserve the issue for possible certiorari review.