

1991

# Utah v. Forsyth : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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JUN 1977

RT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent, :

vs.

: Case No. 14586

WILLIAM L. FORSYTH,

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment, Sentence and Denial of  
Motion to Withdraw Plea as entered by the Fourth Judicial  
District Court for Utah County, Honorable J. Robert  
Bullock, Judge.

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AUG 13 1976

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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## BRIEF OF APPELLANT

### STATEMENT OF THE CASE

The Appellant, William L. Forsyth, appeals from the order denying him the right to withdraw his plea of guilty and the judgment and sentence of the Fourth Judicial District Court, Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

### DISPOSITION IN THE LOWER COURT

The Honorable J. Robert Bullock, after a hearing on the Appellant's motion to withdraw his guilty plea, denied that motion on March 31st, 1976 and sentenced the Appellant to a term in the State Penitentiary on April 9th, 1976, with execution of that sentence stayed pending appeal.

### RELIEF SOUGHT ON APPEAL

Appellant respectfully requests that the order and judgment of the District Court, denying the Motion to withdraw the plea of guilty, be reversed and that Appellant be allowed to enter a plea of not guilty and be granted his right to a fair trial by an impartial jury.

### STATEMENT OF THE FACTS

On or about August 18th, 1975, Appellant was arraigned on five counts of theft by deception for alleged violations of Sections 76-6-405 and 76-6-412, Utah Code

Ann. (1953 as amended). The charging statute and complaint describe this as a specific intent crime. The statute states: "Theft by deception. (1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof." Each of the five counts in the indictment contain the language that "at the time and place" the money was taken "by deception and with a purpose and intent to deprive said individuals of the same."

Trial was set for January 5th, 1976. On January 5th, 1976, the trial was continued until February 2nd, 1976 because Appellant and defense counsel had not then met together sufficiently to adequately prepare the defense. The reasons given by Appellant and his counsel for the delay were that Appellant had not been able to pay his attorney, and felt he could not reasonably make the extensive demands on the attorney's time necessary for adequate preparation. (Hearing Transcript of January 5th, 1976 P. 5). Appellant had been lead to believe by his attorney, that the attorney would be unable to successfully defend him against the charge because of Appellant's inability to pay necessary fees and expenses. (Affidavit of February 27, 1976, p.3). As an additional concern to Mr. Forsyth at the time of the scheduled trial on January

5th, his attorney had before the Court a motion to withdraw as counsel.

In a hearing before the Court on January 30th, 1976, Appellant requested permission to change his plea as to Count 1 of the information and the State agreed to dismiss the remaining Counts. (Hearing Transcript of January 30th, 1976, p.2). When asked by the Court whether he was pleading guilty to Count 1 because he was guilty, Appellant initially responded that he was changing his plea for another reason. (Hearing Transcript of January 30th, 1976, p.6). He had been lead to believe that he could plead "no contest" instead of guilty to Count 1. (Hearing Transcript of February 27th, 1976, p.3). After a brief conference in the hall with defense counsel and the prosecutor, Appellant made the plea of guilty. (Hearing Transcript of January 30th, 1976, p.8). During the conference, the prosecutor commented to the Appellant that he would face a "red-necked" jury, which would probably convict him in all Counts, if he did not plead guilty, and both defense counsel and the prosecutor represented to Appellant that he would likely get probation by pleading guilty. (Affidavit of February 27th, 1976, p.3).

On February 27th, 1976, prior to sentencing, Appellant petitioned to the Court to withdraw the plea of

guilty and substitute a plea of not guilty. Appellant asserted his innocence and that the plea was not knowingly or voluntarily made because of the intimidations of the prosecutor and the lack of adequate representation and undue influence of defense counsel. (Affidavit of February 27th, 1976). Defendant testified that he did not know that he was scheduled to enter a guilty plea until just five minutes prior to entering Court, thinking instead that he was to enter a "no contest" or nolo contendere plea. (Transcript of February 27th, 1976, p.3).

On March 22, 1976, in a hearing to consider the motion to withdraw the plea, the Court heard a proffer of evidence from the State and from the defense. (Hearing Transcript of March 22, 1976). The Court employed a probable cause standard in accessing the sufficiency of the State's evidence to prove guilt. (Hearing Transcript of March 5, 1976, p.25). Subsequently, on March 31, 1976, the Motion to withdraw the plea was denied, and Defendant was sentenced on April 9, 1976. From that order and sentence, the appeal is taken.

#### ARGUMENT

#### POINT I.

APPELLANT'S GUILTY PLEA WAS NOT MADE VOLUNTARILY,  
WITHOUT UNDUE INFLUENCE, OR UNDERSTANDINGLY.

The standard for a valid guilty plea is expressed in Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969), wherein it was stated that "a plea of guilty must be made voluntarily, without undue influence or coercion. . . ." Id. at 296, 324. In that case it was further commented "that under some circumstances the extraction of a plea to one charge as a condition to the dismissal of others might be used in such a manner as to amount to undue influence or coercion, which would negate the voluntariness of the plea." Id. at 296, 324. In the present case the prosecution's remarks to appellant concerning the appellant having to face a "red-necked" or hanging jury, constituted undue influence in exacting a plea of guilty as a condition for the dismissal of the other charges.

Further, such pressure from the prosecution would be classified as a "subtle threat" within the meaning of Boykin v. Alabama, 395 U.S. 238, 243 (1969). It was said there that such acts might be "a perfect cover up of unconstitutionality." Id. at 243. The prosecution did not at any time deny or refute these intimidating comments. In the face of such evidence, the trial court should have granted the motion to withdraw the plea and the denial of the motion constituted a denial of the Appellant's constitutional rights to due process and a fair trial by an im-

partial jury.

The short delay between the entering of the plea and the assertion of innocence evidenced a strong indication that the plea was entered in haste and confusion. Confusion in the Appellant's mind as to the impact and the reasons for the plea was evident in his initial assertion to the Court that there was another reason for entering the plea besides making a plea of guilty. He did not want to admit guilt. He maintained that he was innocent. He had in fact made a tactical decision to plead "no contest" when faced with counsel's representations that adequate defense would not be forthcoming without pay. At the time Mr. Forsyth entered his plea of guilty, he was still under the opinion, in the words of his attorney, ". . . that unless he paid me I would not represent him. . . and that he was embarrassed and felt it would be futile to contact me until he had raised some money." (Hearing Transcript of January 5th, 1976, p.5). Appellant was unable to raise any money for his attorney and under all these pressures resigned himself to entering a "no contest" plea. His dilemma was further compounded when five minutes prior to entering his plea he was informed that "no contest" was not a valid plea and was confronted with the subtle threats in the hall from the prosecution and his own defense attorney. (Hearing

Transcript of Feb. 27, 1976, p.3).

As long ago as State v. Lee Lim, 79 Utah 68, 89, 7 P.2d 825, 833, (1932) this Court gave the indication that a guilty plea that was "influenced unduly or improperly either by hope or fear, or that . . . was entered by reason of mistake or misapprehension or undue influence," should properly be allowed to be withdrawn. If Appellant's affidavit and other arguments made to the Court concerning the undue influence exerted on the Appellant were inadequate to satisfy the District Court, then Appellant's offer of further sworn testimony should have been accepted. (Hearing Transcript of March 5, 1976, p.3)

With a showing of undue influence on the part of the prosecution and the misunderstanding on the part of the Appellant, the Appellant should have been granted his right to withdraw the plea to insure preservation of his constitutional rights to due process and a fair jury trial.

The transcript of the hearing of January 30th, at which time the plea of guilty was entered must be considered in light of the evidence contained in Appellant's affidavit in Support of Motion to Withdraw Plea and other evidence before the Court. The Appellant claims that he only "acted out" his required role before Judge Bullock,

having been intimidated and coerced into saying what the Court, his attorney and the prosecutor obviously wanted, to allow the guilty plea to be accepted.

## POINT II

### THE COURT ERRED IN USING A PROBABLE CAUSE STANDARD OF PROOF IN ASCERTAINING IF THERE WAS A FACTUAL BASIS FOR THE PLEA OF GUILTY

Probable cause is the standard of proof applied to justify a search or seizure. U.S. Constitution, Amendment IV, Utah Constitution, Art. I, §14. The assertion of probable cause must be supported by sworn oath or affirmation before the Court. *Id.* The Defendant, his counsel and the prosecutor stipulated to the Court's hearing an offer of proof of the evidence against the accused and in his defense. The Court determined that such offer of proof would be unsworn and considered on the basis of probable cause. (Hearing Transcript of March 5, 1976, p.5).

Since the rendering, acceptance and retention of a guilty plea over the objections of the accused is an even more serious action than a search or seizure and constitutes at least a waiver of a basic constitutional right, it requires a higher standard of proof than a mere showing of probable cause. A guilty plea in fact becomes more than a waiver of constitutional rights; it is itself a conviction. Boykin, *supra*, at 242.

The Appellant's plea of guilty and statement that he was guilty were later offset by his frequent assertions and claims of innocence. In North Carolina v. Alford, 400 U.S. 25, 27 (1974) the U.S. Supreme Court held that a factual basis for accepting a plea of guilty which was coupled with assertions of innocence, was adequately established with the showing of "strong evidence of guilt". This required standard is a higher level of proof than the "reasonable grounds to believe" test and the "what the State thought it could prove and intended to prove" standard as used in this case. (Hearing Transcript of March 22, 1976, p.18).

Considering the gravity, impact and finality of a guilty plea, the Court should have used a higher level of proof and required strong and convincing evidence from the prosecution before denying the Motion to withdraw the plea.

### POINT III

EVEN IF A PROBABLE CAUSE STANDARD OF PROOF  
WAS NOT PROPER, THE TRIAL COURT ERRED IN  
NOT ADEQUATELY ASCERTAINING IF THERE WAS  
A FACTUAL BASIS FOR THE PLEA OF GUILTY.

The Federal Courts have stressed that "guilt pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea. . ." North Carolina v. Alford, supra, at 38. In Alford the denial of withdrawal of the plea was not an abuse of discretion because

the prosecution presented "strong evidence of guilt and the defendant had no substantial evidentiary support for the claim of innocence. In determining the factual basis for the plea in Alford, the Court heard the sworn testimonies of a police officer who summarized the State's case, two other witnesses, and the defendant. That evidence was held to be sufficiently strong to prevent a reversal.

In the present case such "strong evidence", to establish the required factual basis is absent. (See Transcript of Hearings of March 22, 1976). There were only the assertions of the prosecutor as to what the State's evidence would be. Even if probable cause was the proper standard of proof to apply, oath or affirmation was not made supporting the showing of probable cause. There was no sworn testimony. There were no affidavits or depositions of witnesses. Even the integrity of some of the prosecution's recorded information was challenged by defense counsel. (Hearing Transcript of March 22, 1976, p.17, 18). The losses of one of the alleged victims were challenged, but were not substantiated by the prosecution. When defense counsel challenged the proposed evidence as inadmissible, no attempt was made to establish its admissibility.

A credible claim of meritorious defenses was also raised by defense counsel undermining any claim the prosecution may have had for strong evidence of guilt. Defense

counsel raised substantial issue as to whether the prosecution could prove the required intent of the alleged crime. Here again, no sworn testimony or any direct evidence was offered to establish a factual basis for that element. Without adequate, strong evidence establishing a factual basis for the plea, it was error to deny the withdrawal of the plea.

#### POINT IV

THE DENIAL OF APPELLANT'S MOTION TO WITHDRAW THE GUILTY PLEA WAS AN ABUSE OF THE COURT'S DISCRETION RESULTING IN MANIFEST INJUSTICE AND UNFAIRNESS.

No prejudice to the State would have ensued with the granting of the Motion to withdraw the plea as was admitted by the prosecution, but by denying the motion the trial Court prevented the Appellant from getting a fair trial before an impartial jury. Further, since the motion was a pre-sentence request, it was not a hidden challenge to the Judge's sentence. The fact that the Appellant asserted his legal innocence was an important factor to be weighed. Indeed, in such cases a pre-sentence withdrawal should be freely granted. United States v. Joslin, 140 U.S. App. DC 252, 434 F2d 526 (1970).

#### POINT V

APPELLANT WAS DENIED EFFECTIVE COUNSEL IN REGARD TO MAKING THE PLEA OF GUILTY.

Appellant asserted by affidavit that defense counsel led him to believe that because he was unable to

pay counsel that his defense would be jeopardized. Appellant further maintained that the defense counsel had not adequately represented him from the time the continuance was granted on January 5, 1976, until the time that the Appellant requested withdrawal of the plea. Although Appellant expressed the feeling that the defense counsel was capable of adequately representing him, and in fact he desired that defense counsel continue to represent him because of his familiarity with the case, Appellant did maintain that representation had been inadequate and misleading during the time the guilty plea was entered. Counsel had lead him to believe that an adequate defense could not be presented without prepayment of fees to the attorney and payment of professional fees to an accountant, (Hearing Transcript of January 5, 1976, p.7), and that Appellant could likely expect probation by pleading guilty. There was direct implication made that Defendant would be treated more strictly with a finding of guilt as opposed to a plea of guilt. Neither contention was contested by either defense counsel or the prosecution. Such actions on the part of the defense counsel caused fear and misapprehension for the Appellant of undesirable consequences if he did not plead guilty.

The importance of safeguarding the right to adequate counsel at the time of the entry of a guilty plea was emphasized in Alires v. Turner, 22 Utah 2d 118, 121, 449 P.2d 241, 243 (1969). Such a challenge to the adequacy of counsel as in the present case merited further inquiry by the Court or at least rebuttal by the prosecution.

#### CONCLUSION

Appellant contends that the guilty plea was made under the stress of undue influence and coercion from the prosecution and defense counsel and that he should have the right to withdraw that plea. Further, it is contended that the trial Court abused its discretion by denying the withdrawal, resulting in manifest injustice to Appellant. No prejudice to the State would have ensued, but the Appellant, asserting innocence was denied a hearing before an impartial jury. Additionally, in the face of Appellant's claims of innocence, no adequate factual basis for accepting the plea was established. Appellant was further denied the right to effective counsel because of his financial circumstances.

Appellant therefore respectfully requests that the judgment of the lower court be reversed to allow Appellant to withdraw the plea of guilty and substitute a plea of not guilty.

Respectfully submitted,

Steven L. Grow,  
Attorney for Appellant