

1961

State of Utah v. David Wayne Banford : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *State v. Banford*, No. 9395 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

DAVID WAYNE BANFORD,

Defendant and Appellant.

FILED
1931-10-23

Supreme Court, Utah

Case
No. 9395

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

DAVID WAYNE BANFORD,

Defendant and Appellant.

FILED
1978-01

Supreme Court, Utah

Case
No. 9395

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

DAVID WAYNE BANFORD,

Defendant and Appellant.

} Case
No. 9395

BRIEF OF RESPONDENT

NATURE OF CASE

On January 5, 1960, the defendant David Wayne Banford plead guilty to the crime of second degree burglary, 76-9-3, U.C.A. 1953, in the District Court of the Second Judicial District, and on January 19, 1960, he was sentenced to confinement for one to twenty years. The instant appeal is based on a claim that the plea of guilty was not properly taken because of the absence of counsel and the failure of the Court to instruct the defendant as to the consequences of his plea of guilty.

DISPOSITION OF MATTER BEFORE THE LOWER COURT

The defendant plead guilty to the crime of second degree burglary in the Second Judicial District on January 5, 1960. On January 19, 1960, after referral of his case to Adult Probation and Parole for a pre-sentence report, the defendant was sentenced to one to twenty years confinement. Notice of appeal was filed on February 19, 1960. On January 19, 1960, the defendant was committed to the State Prison. On August 9, 1960, Judge John R. Wahlquist entered an order allowing the defendant's release pending appeal upon the posting of a \$2,000 bond (R. 16), and on August 16, 1960, the defendant was released from the State Prison.

RELIEF SOUGHT

Affirmance of the lower court's actions.

STATEMENT OF FACTS

The appellant claims that he was a minor at the time of entering his plea of guilty and that he was not provided counsel before entering his plea, and that since he was not admonished as to the consequences of his plea, his plea was a nullity requiring reversal, and a new trial.

The facts of record disclose that on December 18, 1959, the defendant was brought before the Justice's Court, South Central Precinct, Davis County, by virtue of a warrant of arrest and complaint upon the charge of

second degree burglary (R. 1). He was there advised of his right to be “represented by counsel” and of other rights he may have had. The defendant waived preliminary hearing (R. 1), and by order of the Justice of the Peace was bound over to the District Court for trial (R. 2). An information was filed and on January 5, 1960, the defendant and two other companions were brought before the District Court of the Second Judicial District for joint arraignment on the charge of second degree burglary (R. 24). The arraignment transcript discloses the following transaction (R. 25):

“THE COURT: The record will show this is the time set for the arraignment of Edwin Oscar Fillen, *David Wayne Banford*, and Dennis Austin. You may read the Information.

“Each of them have a copy, do they not, Mr. Anderson?”

“MR. ANDERSON: Yes.

“THE COURT: The record will show each of them received a copy of the Information. (Information read by Clerk of Court.) * * *”

Thereafter, Edwin Oscar Fillen, joint defendant with appellant, was asked if he desired counsel, told that he needn't proceed further until he had counsel, and that he could have 48 hours before entering his plea (R. 26). Fillen waived counsel and the time period, and thereafter entered a plea of guilty. Then the Court directed its attention to the appellant and the following occurred (R. 26):

“Mr. David Wayne Banford, if you are not designated in this information by your true and correct

name, you may declare your true name now, or be prosecuted under the name of David Wayne Banford.

“MR. BANFORD: That’s my name.

“THE COURT: *The Court informs you that you are entitled to be represented by an attorney, and need take no affirmative steps until you have counsel. Is it your desire to have an attorney?*

“MR. BANFORD: *No sir.*

“THE COURT: *Do you waive services of an attorney in open Court?*

“MR. BANFORD: *Yes sir.*

“THE COURT: The Court advises you that you may have and take at least 48 hours before you are required to plead to the information charging you with burglary in the second degree, or you may waive that time and enter your plea now.

“MR. BANFORD: I waive it.

“THE COURT: The record will so show. To the Information charging you with burglary in the second degree, what is your plea? Guilty or not guilty?

“MR. BANFORD: Guilty, sir.

“THE COURT: The record will show the defendant enters a plea of guilty, and upon such plea the Court adjudicates him guilty of the offense charged. * * *.” (Emphasis supplied)

Thereafter a similar procedure was followed in the case of Dennie Austin, in the presence of the defendant.

The Court thereafter referred all cases to the Adult Probation and Parol Department (R. 28), and expressly

indicated that he was not granting the defendant or the others probation (R. 29).

The record further reflects that on the 19th of January, 1960, the appellant was again brought before the Court for determination of the sentence to be imposed (R. 20). The appellant was not represented by counsel (R. 15), but he responded as to questions put to him by the trial judge in open court, and had apparently consulted with the probation officer (R. 20). He intelligently responded to the court's questions, and from the conversation it appears appellant was married (R. 21), and had spent at least two terms in the State Industrial School. Whether a passing reference of the attitude of the administration of the Industrial School can be taken to support a claim that defendant was a minor is questionable, but since the State feels the issue to be immaterial it will assume that the defendant was less than 21 years old. The court sentenced the defendant to confinement for one to twenty years in the State Prison, whereupon the defendant, upon his own motion, asked for a "stay of execution" to get his affairs in order, which was denied (R. 22).

The notice of appeal was filed after the defendant had been confined in prison for about 30 days. At no time did the appellant ever indicate a desire for counsel, deny his guilt, or evidence any incomprehension of the charges or procedures.

The defendant has raised five points upon which he claims error. Four of these relate to the issue of counsel.

The State will respond to all of these points under Point I of its brief, and will reply to the remaining contention in Point II.

STATEMENT OF POINTS

POINT I

THE DEFENDANT WAS PROPERLY ADVISED WITH REFERENCE TO HIS RIGHTS TO COUNSEL AND WAIVED HIS RIGHT THERETO.

POINT II.

THE FAILURE OF THE TRIAL COURT TO ADMONISH THE DEFENDANT DOES NOT WARRANT REVERSAL UNDER THE FACTS OF THE INSTANT CASE.

ARGUMENT

POINT I

THE DEFENDANT WAS PROPERLY ADVISED WITH REFERENCE TO HIS RIGHTS TO COUNSEL AND WAIVED HIS RIGHT THERETO.

The record reflects that at the time of the hearing before the Davis County magistrate prior to being bound over to District Court, the defendant was advised of his right to counsel (R. 1), and after being bound over, at the time of arraignment, the court informed the defendant that he was entitled to counsel, and that he need take no affirmative steps until he had counsel (R. 26). The defendant indicated he did not desire to have an attorney (R. 27)

and expressly waived his right thereto. Thereafter, he entered his plea of guilty. He was also provided with a copy of the information, which was read, (R. 25) and was present while the other defendants were also advised of their right to counsel.

The issue raised with reference to the question of whether the defendant, being a minor, could properly waive counsel was before the Supreme Court in *State v. Spiers*, 12 U. 2d 14, 361 P. 2d 509 (1961), where the facts were similar to those here raised. The same legal argument was raised in support of reversal. The Supreme Court rejected the contention of error, stating:

“It is argued that the evidence shows that Spiers was only 19 years old, that he was immature for his age, that his I. Q. was only 75, that he graduated from high school with low grades and was obviously somewhat immature for his age. The burden is upon the defendant to show that he has been denied his constitutional rights. The trial court, after hearing the witnesses and seeing appellant give his testimony, was in much better position than we to judge his intelligence. There was no evidence of fear or coercion, or any other reason why he was induced to waive his rights other than he thought the course he took was for his best good. There was nothing to indicate that at any stage of the proceedings he did not understand what was going on, the questions asked, or the effect of his waiver of counsel. In view of this situation we conclude that the trial court’s finding that he intelligently waived his right to counsel must be sustained.”

The similarity of the Spiers case to the issues now before the Court adequately disposes of any claim that the de-

fendant, being a minor, could not waive counsel, or that being under age 21, must be presumed incompetent. The Utah law is settled to the contrary. In the instant case the record shows the magistrate properly advised the defendant of his rights in accord with Section 77-15-1, U.C.A. 1953, and again at arraignment under Section 77-22-12, U.C.A. 1953. In both instances he waived counsel. There is no evidence of record to indicate any incompetency or inability to understand the proceedings or rights afforded. Indeed, Section 76-1-41, U.C.A. 1953, seems to imply a presumption of competency where the defendant is over 14. In view of the fact that the defendant is married, under Utah law the defendant has obtained his majority. 15-2-1, U.C.A. 1953.

The trial judge had full opportunity to observe the defendant at arraignment, and at sentencing, as well as the probation report. In the absence of any showing of record, the matter of the defendant's fitness to proceed must be left to the sound discretion of the trial judge, and in view of the defendant's past record and his request for a "stay of execution," there is no room for doubt as to the defendant's competency to waive his rights. *State v. Spiers*, supra.

The defendant claims that even so the court should have forced him to consult with counsel. Article I, Section 12 of the State Constitution gives a person the right to proceed without counsel if he so desires, and the failure to accord a defendant that right may itself be error. *State v. Penderville*, 2 U. 2d 281, 272 P. 2d 195 (1954). The

accused has the right to waive counsel, and a court may not force counsel upon him. Certainly where he has been afforded the opportunity to have counsel, appraised of right to counsel, has indicated no desire for counsel, and has a constitutional right to defend himself, it would place a trial judge in a dilemma to require him to require the defendant to consult with counsel. *State v. Petrucelli*, 37 N. J. Super. 1, 116 A. 2d 721.

Finally, it is urged that there could be no intelligent waiver of the right to counsel unless the defendant was told that, if a pauper, he could still have counsel. At the outset, it should be noted that the record of arraignment and sentencing does not clearly indicate impecuniosity, but even so, it is submitted that in the instant case a proper and intelligent waiver was made.

What we are here concerned with is whether 77-22-12, U.C.A. 1953 was complied with. A clear reading of the statute shows that it was. It provides:

“If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked whether he desires the aid of counsel. *If he desires*, but is unable to employ, counsel, the court must assign counsel to defend him.” (Emphasis supplied)

A clear reading of the statute commands only that the trial judge ask the defendant if he desires counsel. This was done in the instant case. If a desire is manifested, the court should then determine from the accused his ability to employ counsel. In the instant case the trial

judge was relieved from such a duty because the accused did not indicate a desire for an attorney.

In *State v. Crank*, 105 Utah 332, 142 P. 2d 178 (1943), the court seemed to note that the duty to obtain counsel or advise, with reference to impecunious persons, that the state will supply counsel, arises on an indication from an accused, at least, that he desires counsel. Defendant cites cases which he claims stand for the proposition that advice must be given that counsel will be appointed even if impecunious. The majority of these cases appear to involve a situation where no advice was given at all, and one indicates some evidence of impecuniosity plus a desire for counsel. It is sufficient to point out that other cases have gone against the position advocated by defendant. In *People v. Van Cour*, 137 NYS 2d 167 (1954), the court said:

“There is no requirement in law that a defendant be advised that he may have counsel and that the court will furnish such counsel without the necessity of the defendant paying him, if he is unable to do so. The requirements have been satisfied if the defendant is advised that he has a right to counsel * * *.”

In *People v. Thompson*, 108 P. 2d 105 (Cal. 1940), the court reached the same result, stating:

“The first specification of error is the failure of the court to adequately advise the defendant regarding his right to counsel and that if he was unable to employ counsel the court would assign counsel to defend him. The statement on appeal discloses that at the time of the arraignment the

defendant was asked by the court whether or not he had counsel or desired to obtain counsel. Defendant was not told that counsel would be assigned to him if he was unable to employ an attorney, nor was defendant asked regarding his inability to employ one. Defendant stated that he did not desire counsel. In view of this statement of the defendant we know of no statutory or constitutional provision requiring the court to impose counsel upon him. The right to be represented by counsel was one for him to enjoy or waive, as he desired.”

In *State v. Rigg*, 95 N. W., 2d 252 (Minn. 1959), the Minnesota Court held that there was sufficient compliance with the Minnesota statutory provisions, similar to those of Utah, where the accused was advised of the right to counsel, no reference to impecuniosity being made, and defendant indicated he didn't want a lawyer.

It is submitted that the Utah statute was adequately complied with under the circumstances, and that the accused made an intelligent and understanding waiver of counsel.

POINT II.

THE FAILURE OF THE TRIAL COURT TO ADMONISH THE DEFENDANT DOES NOT WARRANT REVERSAL UNDER THE FACTS OF THE INSTANT CASE.

The State will concede that under the provisions of Section 77-24-6, U. C. A. 1953, a duty is placed upon the trial court to admonish an accused of the consequences of a plea of guilty where the accused is without counsel.

It will further concede that the failure of the trial court to directly admonish the defendant was irregular. The only issue presented, therefore, is whether that failure warrants a reversal of the trial court's action in adjudicating the defendant guilty.

The general rule is that a plea of guilty waives any defect not jurisdictional. *Abbott, Criminal Trial Practice*, 4th Ed., Sec. 91. The determination of whether or not the failure to admonish is jurisdictional depends upon the construction to be given 77-24-6, U.C.A. 1953, and must be based upon the intent of the Legislature. It may be generally said that apart from a statutory requirement, there is no requirement at law, jurisdictional in nature, that makes mandatory the admonishment of a defendant prior to the acceptance of a plea of guilty. *Johnson v. State*, 39 Tex. Crim. Rep. 625, 48 S. W. 70 (1898); *Berliner v. State*, 6 Tex. App. 181 (1879); *People v. Brown*, 87 Colo. 261, 286 Pac. 859 (1930). Some courts have engrafted the requirement onto their criminal procedure in capital cases. *Commonwealth v. Battis*, 1 Mass. 95 (1804); *State v. Hill*, 81 W. Va. 676, 95 S. E. 21 (1918). However, the instant case is non-capital, and the determination to be made is, did the Legislature intend to make the requirement jurisdictional?

It is conceded that the present statute was taken from the 1930 ALI Code of Criminal Procedure, and as introduced into the Legislature, read:

“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; *but a failure of the court to explain the consequences of the plea shall not affect the validity of any proceeding in the cause.*” (Emphasis supplied)

The italicized portion of the ALI proposal was deleted from the statute as it was finally passed. An analysis of contemporaneous publications, IV Utah Bar Bulletin, 1935; V Utah Bar Bulletin; and p. 670, ALI, Code of Criminal Procedure, 1930, gives no clue as to what the intent of the Legislature was in deleting the above italicized portion. It would appear that none of the statutes upon which Section 224 of the ALI Code was predicated seem to have been concerned with making the advice jurisdictional, but were interested in showing that the plea was not based upon any unwarranted persuasion.¹

The most reasonable construction to be given Section 77-24-6, U.C.A. 1953, is to construe it in harmony with 77-42-1, U.C.A. 1953, which is similar to Section 461 of the ALI, Code of Criminal Procedure, 1930, which section was based in part on the Compiled Laws of Utah, 1917, Sec. 9231. Such a construction would require a finding of prejudice since Section 77-42-1, U.C.A. 1953 reads:

“After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. *If error has been committed, it shall not be presumed to have resulted in prejudice.* The court must be satisfied that it has that effect be-

¹Comp. Laws Colo. 1921, Sec. 7095; Illinois Rev. Stat. 1929, Ch. 38, Sec. 756; S. Dak. Rev. Code, 1919, Sec. 4741; Tex. Rev. Cr. Stat. 1925, Art. 501; Mich. Pub. Acts No. 175, VIII, Sec. 35, 1927.

fore it is warranted in reversing judgment.” (Emphasis supplied)

In addition, such a construction would probably be in accord with 77-22-18, which indicates a plea shall waive all defects in the arraignment.

A showing of a prejudicial effect from the failure to so admonish a defendant would require a reversal of the conviction since a showing of prejudice would void the adjudication of guilty and then destroy the effect of the plea of guilty. In the absence of prejudice where it appears that the defendant was in no way harmed by the failure to admonish, no substantial reason would require reversal and the plea could stand. Certainly where it appears that a defendant, unfamiliar with court procedure or the possibilities that could flow from his plea, enters a plea without admonition, it may be presumed prejudicial, but in the instant case no basis for claiming any prejudice exists.

The defendant here “waived” the 48-hour waiting period before entering his plea (R. 27), and, according to the record, had been in the State Industrial School twice, was married, had been somewhat uncooperative with the pre-sentence investigating officer, and had committed other burglaries than those charged (R. 20, 21).

Prior to the date fixed for sentencing and on the same day as the defendant plead guilty, the Court admonished the defendant that he may well not receive probation. The Court said (R. 28) :

“Now I want to warn all of you that if you lie to Mr. Larsen, we’ll know about it. If I find out that any one of you lied, you won’t get any kind of probation consideration. *I want to warn you now that I’m not granting you probation.* I don’t know whether I’ll give you probation or not. You have acted like a bunch of blamed fools.” (Emphasis supplied)

Although this transpired after the plea, when coupled with the absence of any protest on the part of the defendant, and the fact that when the defendant came back into court for sentencing he failed to indicate any desire to change his plea or receive other relief, the conclusion arises that defendant was aware of the consequences of his plea. This is bolstered by the previous record and experience of the defendant.

Upon receiving his sentence, the defendant merely requested a “stay of execution” to get his affairs in order, and in no way protested the sentence. At the time of arraignment he was furnished a copy of the information and advised of his right to counsel (R. 24, 26, 27). His first protest to his sentence was the filing of his own notice of appeal approximately a month after commitment.

Under these circumstances it must be concluded that the defendant plead knowing full well the effect of his plea, and now, as an afterthought, being disgruntled at the result, seeks relief from its effect. Under these circumstances no prejudice resulted to the defendant, and the Court should conclude that the failure to admonish

the defendant under 77-24-6, U.C.A. 1953, does not, in this instance, require reversal.

CONCLUSION

The claims of the defendant are, for the most part, without merit based upon previous decisions of this Court, and the balance of the alleged errors cannot be said to have resulted in his prejudice.

As to the defendant's claim that reversal is required by 77-24-6, U.C.A. 1953, it is submitted that the proper construction to be given to the statute is the one urged by the State. As is said in *Sutherland, Statutory Construction*, 3rd Ed., Vol. 3, Sec. 5601:

“While it is true that there is great justification to be found in the common law principles creating safeguards in favor of the accused, nevertheless it cannot be denied that too rigid application of the rules of procedure have brought about undesirable consequences.”

Certainly a construction that averts reversal where the record affirmatively shows the absence of prejudice accords with proper criminal judicial administration.

The Court should affirm the conviction.

Respectively submitted

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