1962

State of Utah v. Wallace Plum : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,
vs.
WALLACE PLUM,
Defendant and Appellant.

Case No. 9731

APPELLANT'S BRIEF

Appeal from judgment of the Fourth District Court of Utah County, State of Utah, the Honorable R. L. Tuckett, Judge.

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STATEMENT OF THE KIND OF CASE

This is a criminal action by the State of Utah against the defendant, in which the defendant was charged with the crime of third degree burglary.

DISPOSITION IN LOWER COURT

The defendant was arraigned on information and plead **not guilty** to the charge. At a later date, however, the defendant moved the court to allow him to withdraw his plea of **not guilty** and substitute a plea of **guilty** therefor. After the court allowed the plea of **not guilty** and the substitution of a plea of **guilty,** the court sentenced the defendant to serve the term as required by law in the Utah State Peni-

tentiary. Whereupon, defendant filed a motion to withdraw his plea of **guilty** and re-enter his plea of **not guilty.** The court denied defendant's motion to withdraw his plea of **guilty** and re-enter his plea of **not guilty.**

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the District Court's judgment denying defendant's motion to withdraw his plea of **guilty** and re-enter his plea of **not guilty.**

STATEMENT OF FACTS

On or about December 4, 1961, the defendant, Wallace Plum, was arrested while in the company of one Dick Falkner, a former felon from the Utah State Penitentiary, by Utah County authorities. The said Dick Falkner admitted to the authorities that during the day he had been taking money from coin boxes on soft drink dispensers, by means of keys which he, Falkner, had in his possession. He, Falkner, then made a deal with the authorities that if he would testify against the defendant in this case that he, Falkner, would be merely charged with petty larceny, which Mr. Falkner agreed to do, and as a consequence of which he was charged with petty larceny and sentenced to serve some time on the misdemeanor of petty larceny. The defendant in this case was charged with third degree burglary. The defendant, Wallace Plum, after this charge, contacted his attorney, Norman Wade, and presented to his attorney the defense that he was not a party

to this crime that he was merely with Falkner at the time that Falkner stole money from these coin boxes, if the said Mr. Falkner did steal any money; and that he was therefore not guilty of the crime. A preliminary hearing was had on March 27th, 1962, in the City Court of Provo, Utah; and at the preliminary hearing, the defendant was bound over to stand trial in the District Court of Utah County, State of Utah. The defendant was then duly arraigned in the District Court of Utah County, and at the said arraignment the defendant Wallace Plum pleaded **not guilty** to the charge, and at that time his trial was set for May 10th, 1962. The defendant's attorney had told Mr. Plum on several occasions since first talking with him that if his story was true, that he was not in on the taking of money from coin boxes, that he was not guilty; but that circumstances under which he was taken, and the other party with whom he was at that time, made this a very difficult type of case to win, and that there was a very good probability that he would be found guilty of the charge.

Mr. Plum's attorney, in the course of the conduct of the case, had some discussions with Heber Ivins, the prosecuting attorney who was in charge of the prosecution of this case, and in the course of these conversations, Mr. Ivins approached the defendant's attorney with the proposition that if the defendant would plead **guilty** to the charge of third degree burglary against him that he, Mr. Ivins, would recommend to the probation department and also to the judge that Mr. Plum, the defendant, be placed on probation. Mr. Ivins further represented that on

his recommendation there was a very good chance that Mr. Plum would be placed on probation. The defendant's attorney advised Mr. Plum of these representations, and told Mr. Plum that under the circumstances he felt that it was best that the defendant change his plea from **not guilty** to **guilty,** as his case was a difficult one to defend, and in all probability he would be found guilty of the charge, if the case went to trial and that here was his opportunity to be sure, or practically certain, of being placed on probation, so that he would not have to serve time in prison. The defendant had at all times maintained to his attorney that he was **not guilty** and he resisted the persuasion of his attorney at first to change his plea. However, upon the representations and the persuasion of his attorney, the defendant agreed to change his plea from **not guilty** to **guilty.** At no time had the defendant told his attorney that he was guilty of the offense charged in the cause. Upon the representations and upon the persuasion of his attorney, Mr. Plum, the defendant, did appear in court at the time set for trial on May 10th, 1962, and changed his plea from **not guilty** to **guilty,** which the court allowed him to do and the court continued the matter for sentencing until such time as the court could have a report from the adult probation and parole departments. On May 25th, 1962, then, the defendant appeared before the Honorable R. L. Tuckett, District Judge of the Court, for sentencing, at which time the defendant, Wallace Plum, was sentenced to serve his time in the Utah State Penitentiary, and was **not** placed on probation. Immediately there-

after, the defendant's attorney prepared affidavits and a motion to withdraw defendant's plea of **guilty** and re-enter his plea of **not guilty;** the said affidavits and motion were filed with the court on May 31st, 1962, the day after Decoration Day, which was a court holiday. A hearing was had upon the said motion, and during the hearing the defendant was called to testify as to his actual defense, if his case should go to trial. After the said hearing was had, the motion was taken under advisement, and after a period of time, the court denied defendant's motion to withdraw his plea of **guilty** and re-enter his plea of **not guilty.** It is from the denial of this motion that the defendant appeals.

STATEMENT OF POINTS

POINT I. THE DISTRICT COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND RE-ENTER PLEA OF NOT GUILTY.

ARGUMENT

POINT I. THE DISTRICT COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND RE-ENTER PLEA OF NOT GUILTY.

Volume 22, Corpus Juris Secundum, Criminal Law, Sec. 421, sub-section 3, page 1144, says:

> **"In a proper case the discretion of the court should be *freely* exercised to allow a withdrawal of the plea of guilty. It should be liberally exercised,**

> especially in the capital cases, in favor of life and liberty and innocence and liberty; as the law favors a trial on the merits, the court should resolve *all* doubts and exercise its discretion in favor of such trial. . . . The court may, and surely should permit a plea of guilty to be withdrawn where it appears that the accused had a defense worthy of consideration by a jury; or any reasonable grounds for going to the jury is offered . . . indeed the withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be served by permitting *not guilty* to be pleaded in its place."

In the same volume, sub-section (e), page 1151, the heading is 'Hope, Belief or Speculation as to Clemency', and under that particular section, on page 1152, it says:

> ". . . there is authority that it is proper to permit a withdrawal of a plea of guilty induced by promises or representations of the prosecution or court with respect to punishment to be imposed, *even though there were no fraud or intentional misrepresentation.* It is not an abuse of discretion to permit a withdrawal of the plea on the grounds of the accused's belief induced by the sheriff that he would receive a light sentence, and where his counsel misled accused by misrepresentation, improper advice or assurance relative to the sentence. The court *should,* or at least has, the discretion to permit the withdrawal of the plea. Also the general statement has been made that where there is reason to believe that a plea of guilty has been entered through inadvertence or without deliberation, or ignorantly, and mainly from the hope that punishment may thereby be mitigated, the court should be indulgent in permitting the plea to be withdrawn . . ."

If this general principle were followed in the present case, it can be seen that it was an abuse of the court's discretion not to allow defendant to withdraw his plea here. He had, at all times insisted that he was not guilty. He is a boy who has not completed high school, and was relying on his attorney and he was given assurances from his attorney and from the district attorney that if he would enter a plea of **guilty** he would be placed on probation, and this did **not** occur. The State of Utah argued, when the motion was before the court, that 77-24-3 Utah Code Annotated, 1953, did not allow the withdrawal of a plea after the judgment and entry of the sentence. The said statute reads as follows:

> **"A plea of guilty can be put in only by the defendant himself in open court, except upon information or indictment against a corporation, in which case it may be put in by counsel. The court may at any time before judgment upon a plea of guilty permit it to be withdrawn and a plea of not guilty substituted."**

It was the State's contention that this only authorized the withdrawal of a plea of guilty before judgment.

It is interesting to note that the State of California has exactly the same statute in their penal code, (Deering's Cal. Penal Code, sec. 1018) and yet that State has followed the general principles as laid down in the Corpus Juris Secundum, as quoted above.

In the California case, People vs. Savin, 98 Pac

2d, 773, the defendant was told that if he would plead guilty, he would in all likelihood receive a sentence which would be lighter than that which was actually given. He was told this by his own attorney and by a deputy prosecutor, who was handling the case for the State. Actually he was given a sentence stiffer than that promised. The facts are practically identical with those in the case now before the Utah Supreme Court, and the California Court held that it was an abuse of the trial court's discretion to not allow the defendant to withdraw his plea of guilty and substitute a plea of not guilty therefor after sentence was passed. In that case the California court said:

> "It is settled in this State that where, on account of duress, fraud or other fact over-reaching the free will and judgment of the defendant he is deprived of the right to a trial on its merits, the court in which he is sentenced may, after judgment . . . if properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and assuming the position occupied by him before plea of any kind was entered . . . the law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress and is considerate in viewing the motives which may influence him, to take one or another course. Therefore, it will permit a plea of guilty to be withdrawn, if it fairly appears that the defendant was in ignorance of his rights and the consequences of his act, *or was unduly and improperly influenced, either by hope or fear in the making of it.*"

In the present case it can be seen that this de-

fendant, who is a young man of little education, was unduly and improperly influenced by hope of being placed on probation, when making his decision to enter a plea of guilty. Although the California Court has on many occasions not allowed the defendant to withdraw his plea of guilty and enter a plea of not guilty, where the defendant, without any advice from his own counsel or from an officer of the court or of the State, thought that if he plead guilty he would receive preferred treatment. The State of California has consistently held that where the facts are that the defendant was led to believe by an officer of the court and his own attorney that he would receive this preferred treatment, and did not receive the said treatment, that he should be allowed to withdraw his plea of guilty and enter a plea of **not guilty.**

The State of Montana also has a statute which is similar to 77-24-3, Utah Code Annotated, 1953; that is, Montana's Rev. Code 1947, Sec. 94-6803. The State of Montana has consistently allowed defendants to substitute a plea of not guilty for that of guilty after sentence has been imposed, in cases similar to the one now before the Court. In the case of State vs. Nance, 184 Pac 2d, 551, the Montana Court said:

> **"The Court may permit the withdrawal of a plea of guilty and the substitution of a plea of not guilty after judgment has been pronounced, and a change of plea would ordinarily be permitted if it fairly appears that the defendant was in ignorance of his rights, and the consequences of his act, or *if unduly influenced or improperly influenced, either by hope or fear, in pleading guilty.*"**

In the Montana case of State vs. McBane, 275, Pac.2d, 218, the Court said:

> **"All doubt should be resolved in favor of trial on its merits . . . Leave should ordinarily be given to withdraw a plea of guilty, if it was entered by mistake or under misconception of a nature of the charge, through a misunderstanding of its effects, through fear, fraud or official misrepresentations, or was made involuntarily for any reason."**

In both of the above-cited Montana cases the defendant was allowed to enter a plea of not guilty after sentence had been given. The other courts within the Pacific Reporter area have followed the principle as set out above. In the Missouri case of State vs. Hovis, 183 S.W. 2d, 147, 353 Mo. 602, the defendant believed that if he pleaded guilty he would be paroled; facts which are practically identical with those in the present case; and the Court said:

> **"The guilding rules are that a plea of guilty is but a confession in open court; like a confession out of court it should be received with caution. It should never be received unless it is freely and voluntarily made. If the defendant should be misled or induced to plead guilty by fraud or mistake, by misapprehension, fear, persuasion or the holding out of hopes which prove to be false or illfounded, he should be permitted to withdraw his plea. The law favors a trial on its merits."**

In the case of Harjo vs. State, 22 Okla. St.Ann 517, 106 Pac. 2d, 527, the Oklahoma Court said:

> **"The general rule of law as stated by numerous**

> **decisions of this and other courts is that an application to withdraw plea of guilty is addressed to the sound discretion of the trial court; that the law favors the trial of criminal cases on the merits and where it reasonably appears that a plea of guilty was influenced by persons in authority or apparent authority, which has led the defendant to believe that by entering a plea of guilty his punishment will be thereby mitigated, he should be permitted to withdraw the plea of guilty *and the refusal to permit him to do so in an abuse of discretion.*"**

In the Oklahoma case of Morgan vs. State, 243 Pac. 2d, 993, 33 Okla CR 277, the defendant relied on an agreement between the prosecuting attorney and his own attorney that sentence would be lighter than that which was actually given. The Court in that case held it was an abuse of the trial court's discretion not to allow the withdrawal of the plea.

The Wyoming Court in the case of Hubbel vs. State, 285 Pac. 153, 41 Wyo. 275, held that the discretion of the court in permitting a plea of guilty to be withdrawn should be exercised liberally in favor of life and liberty.

If the principles recited in the text and cases above are applied to the present case, it can clearly be seen that the trial court should have allowed the defendant to withdraw his plea of guilty and reenter his plea of **not guilty.** Here we have a defendant who is still a very young man, who had not completed high school and who was relying on his attorney to do everything he could for him. In light of this fact, he was told right at the beginning that he had a very hard case to win, but that if the facts

as he told them to his attorney were true, he was not guilty of the crime. And upon his attorney's advice, this defendant entered a plea of **not guilty** to the charge. During the course of the trial, the defendant's attorney was approached by the attorney for the State of Utah, with an offer that if he would change his plea of guilty he would in all likelihood receive probation, since the State's attorney would recommend both to the probation department and to the sentencing judge that defendant should be placed on probation. The defendant still did not wish to enter a plea of guilty. However, when his lawyer told him that it was the only thing to do, that it was his chance for probation and he would probably not have one otherwise, and when he was assured by his lawyer that he would probably get probation, the defendant then changed his plea from **not guilty** to **guilty.** Thereafter the Court failed to follow the recommendations and sentenced defendant to the penitentiary. Clearly, this defendant should have his day in court. He has a reasonable defense to this cause, and he should be allowed to present this defense to a jury and the jury should consider and return their verdict in the matter.

CONCLUSION

It is clear that in the present case, that if justice is to be done, this defendant should be allowed to

withdraw his plea of guilty and re-enter his original plea of **not guilty.** The defendant's liberty is at stake here and he should be allowed his day in court.

Respectfully submitted:

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