

1962

State of Utah v. Wallace Plum : Brief of Respondent

Utah Supreme Court

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Norman Wade; Attorney for Defendant and Appellant;

A. Pratt Kesler; Herber Grant Ivins; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

WALLACE PLUM,

Defendant-Appellant.

1982

Court,

Case

No. 9731

BRIEF OF RESPONDENT

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

A. PRATT KESLER

Attorney General

RONALD N. BOYCE

Assistant Attorney General

Attorneys for Respondent

NORMAN WADE

812 First Security Building

Salt Lake City, Utah

Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, <i>Plaintiff-Respondent,</i> vs. WALLACE PLUM, <i>Defendant-Appellant.</i>	} Case No. 9731
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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant was convicted of burglary in the third degree upon his plea of guilty and thereafter moved the court to set aside his plea of guilty and enter a plea of not guilty. It is from the denial of the motion to withdraw the plea of guilty that defendant has appealed.

DISPOSITION IN LOWER COURT

The lower court denied the appellant's motion to set aside his plea of guilty, made after judgment had been entered, appellant sentenced, and a commitment to the State Prison issued.

RELIEF SOUGHT ON APPEAL

The State of Utah contends that the trial court should be affirmed in its ruling refusing to allow appellant to withdraw his plea of guilty.

STATEMENT OF FACTS

The appellant, after full preliminary hearing, was arraigned on the charge of third degree burglary on March 30, 1962 and entered a plea of not guilty (R. 4). Trial was set upon the charge on May 10, 1962. On May 10, 1962, the appellant appeared before the court, with counsel, and announced that he desired to change his plea. The court permitted the appellant to withdraw his plea of not guilty. Thereafter, the appellant entered a plea of guilty and the court referred the matter to the Department of Adult Probation and Parole for a presentence report (R. 21). On May 25, 1962, the appellant came before the court for pronouncement of sentence (R. 23). The appellant's counsel was allowed to make a statement in his behalf, in which he requested probation. The appellant responded to questions the court put to him. During the course of the hearing on the sentence, the following occurred:

“[MR. WADE:] I would like to recommend to the Court that he be placed on probation. It is my understanding that the District Attorney's office will also make that recommendation to the Court.

MR. IVINS: I am sorry I didn't understand that.

MR. WADE: I think it's my understanding

that the District Attorney's office would make that recommendation to the Court?

MR. IVINS: The State does recommend probation in this case, Your Honor.”
(R. 23)

The court, however, noted that the appellant had a prior criminal record and, being advised as to the appellant's record, the court sentenced him to the State Prison. On the same day, May 25, 1962, the appellant was committed to the State Prison. On the 31st of May, 1962, a motion to allow the appellant to withdraw his plea of guilty was prepared along with two affidavits in support of the motion; and on June 1, 1962, they were filed with the clerk of the court (R. 6-10).

The appellant's motion requested withdrawal of the plea of guilty “on the grounds and for the reason that said plea was induced to be entered by promises and representations of the State that the defendant would be placed on probation if he would enter such a plea.” (R. 6). The affidavit of the appellant's counsel, however, shows a different fact situation (R. 7). Paragraphs 3, 5 and 6 thereof state the following:

“3. That in the course of these conversations, Mr. Ivins approached said Norman Wade, the deponent herein, with the proposition that if the defendant herein would plead ‘guilty’ to the charge of third degree burglary against him, that he would *recommend to the probation department and also to the judge that Mr. Plum be placed on probation.* Mr. Ivins further represented that on this recommendation there would be a very good

chance that Mr. Plum would be placed on probation.

* * *

"5. That Mr. Wade advised Mr. Plum that he had a case that was very difficult to win in light of what deponent knew; and that under the circumstances Mr. Wade felt that it was best that he plead 'guilty' to this charge, as it was probably the only *possibility* he had to get probation, and Mr. Wade had been assured by Mr. Ivins that the *chance* was very good for probation.

"6. Upon this representation and upon the persuasion of Norman Wade, Mr. Plum finally agreed to plead 'guilty' to the charge, but Mr. Plum did not at any time state to Mr. Wade that he was guilty at any time."

Further, the appellant's affidavit recited the following (R. 9):

"That prior to the trial of the cause, his attorney, Norman Wade, came to him with an offer from the State, that if he would plead guilty to the cause, that the State would *recommend probation* for him to both the probation department and to the sentencing judge; and that in light of this, he would in *likelihood* be granted probation, and placed on probation. * * *"
(Emphasis added.)

On June 29, 1962, a hearing was held before Judge R. L. Tuckett on the appellant's motion to set aside the plea of guilty. The appellant testified that he was 23 years old, almost 24, had completed the tenth grade, and was working for the State Road Commission at the time of the occurrence of the criminal incident (R. 20). The appellant testified as to his presence at the burglary,

but denied knowledge or participation. He did not testify as to any of the matter that allegedly induced his plea of guilty. Further, at the time of argument on the motion, appellant's counsel stated:

“* * * In the course of the preparation for trial he was offered this *particular hope* that if he would plead guilty he would have a *recommendation from the prosecuting attorney's office* to both the parole department and the sentencing judge he be placed on parole probation, * * *.” (Emphasis added.) (R. 22, p. 10).

Further, the record shows the following statement by the prosecutor (R. 22, p. 12):

“Your Honor, in order that the record may be straight in this matter, the facts as they evolved prior to the entry of plea were these: Mr. Wade came to my office and said he thought he had a very difficult case, and with the evidence that I had I was inclined to agree. He said, ‘What would the State do in this case if we changed our plea to enter a plea of guilty?’ I said, ‘In view of the Defendant's age, if he's not been convicted of a previous felony, I will give you my assurance as the assistant prosecutor that I will recommend probation.’ Now, I have had Mr. Roundy dig out the minutes of his reporter's notes of the proceedings at which Mr. Plum was sentenced and they definitely reveal that this promise was kept; that the assistant prosecutor did recommend probation. In spite of this the court, in view of the man's long record of arrests without convictions, felt that a judgment of the statutory sentence should be imposed. * * *”

Mr. Wade then agreed that this statement was cor-

rect (R. 22, p. 13). The court commented at the time of the hearing R. 22, p. 11):

“The difficulty with this situation is that it’s a matter of bargaining. The Defendant entered a plea of guilty and then when he gets a judgment he doesn’t like it.”

Thereafter, the court denied the appellant’s motion.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED THE APPELLANT’S MOTION TO WITHDRAW HIS PLEA OF GUILTY WHERE IT WAS MADE AFTER JUDGMENT, SENTENCE AND COMMITMENT.

It is submitted that the trial court could properly have denied the appellant’s motion on the grounds that it could not entertain such a motion under Section 77-24-3, Utah Code Annotated 1953. This section provides:

“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.”

Thus, the plain language of the statute indicates that defendant will only be allowed to withdraw his plea before judgment is entered. If it were construed to allow him to withdraw his plea at any time, the words “before judgment” would be superfluous. It is a general legal maxim of statutory construction that meaning

should be given to all the words of a statute if possible. Thus, Sutherland, *Statutory Construction*, 3rd Ed. Vol. 2, Sec. 4705, notes:

“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.”

Applying the above rule to Section 77-24-3, U.C.A. 1953, it would appear that the court could not consider a motion under that statute after the appellant in this case had been adjudged guilty, sentenced and committed. The State recognizes that there is a split of authority on the issue as to when a judgment can be withdrawn, 22 C.J.S., *Criminal Law*, 421(4), p. 1155; 4 Wharton's *Criminal Law and Procedure* 1909. However, the State submits that states having similar statutes to that of Utah have recognized the better rule to be that after judgment, such motions are not proper. The Arizona statute is similar to that of Utah, and in *State v. Telavera*, 76 Ariz. 183, 261 P. 2d 997 (1953), the Arizona Supreme Court held that the plea of guilty of a 17 year old rapist could not be set aside after commitment. The Arizona court stated:

“It will be seen that the authority of the court to permit a withdrawal of a plea of guilty is limited to the period prior to the pronouncement of sentence and even then it is discretionary with the court. In the instant case the defendant was

sentenced on August 13. The judgment of commitment and the statement of facts required by law to accompany the judgment committing the defendant to the state penitentiary were signed by the trial judge on that date. While the record does not show upon what date defendant was received at the penitentiary it is reasonable to assume that he was committed thereto soon after August 13 and certainly long before September 12. When the court denied defendant's motion to withdraw his plea of guilty and to enter a plea of not guilty, he had long before that time entered upon the execution of his sentence. Therefore in addition to the above statutory limitation upon the power of the court to permit the withdrawal of a plea of guilty and enter a plea of not guilty it is enjoined from doing so after defendant had entered upon the execution of his sentence under the rule laid down in *State v. McKelvey*, 30 Ariz. 265, 246 P. 550."

The California court has adopted a similar rule based on the California statute¹ which is the same as Utah's. *People v. Grgurevich*, 153 Cal. App. 2d 806, 315 P. 2d 391 (1957). Thus in *People v. Wade*, 53 Cal. 2d 322, 348 P. 2d 116 (1959), a unanimous California Supreme Court held that after judgment, coram nobis was the appropriate remedy. The court stated:

"The record reveals that at the hearing set to order the execution of sentence, after judgment had been rendered, the defendant attempted to withdraw her plea of guilty. She was not joined by counsel in this attempt. The trial court properly ruled that it had no jurisdiction to entertain

¹Cal. Penal Code, Sec. 1018. This statute is also cited in appellant's brief.

such a motion after judgment had been entered. (Pen. Code, §1018.) As the case is being remanded to the trial court as to this defendant in any event, she will be free to petition for a writ of error coram nobis, the proper procedure for a defendant seeking to obtain leave to withdraw a plea of guilty after judgment." 348 P. 2d at 128.

Iowa has so ruled with an apparently similar statute, Iowa Code 1950, Sec. 777.15; *State v. Harper*, 220 Iowa 515, 258 N.W. 886 (1935). See also *Commonwealth v. Phelan*, 271 Mass. 21, 171 N.E. 53 (1930), and *Commonwealth v. Dascalakis*, 246 Mass. 12, 140 N.E. 470 (1923), also refusing to allow such relief. The New Jersey court in *State v. Oats*, 32 N.J. Super 435, 108 A. 2d 641 (1954), held that it would only grant relief after judgment if habeas corpus or coram nobis would lie.

It does not appear that this Court has ruled on the Utah statute, since in *State v. Lee Lim*, 79 Utah 68, 7 P. 2d 825 (1932), the Court denied the defendant's motion where it was presented prior to entry of a corrected sentence. It is submitted that, based upon the clear statutory language and the above court rulings, the Utah statute should be construed as not allowing the withdrawal of a plea of guilty after judgment. Certainly finality of judgments should be accorded recognition and an accused should not be allowed to gamble with the court's time and power. It is submitted that the Legislature foresaw just such circumstances as those of the instant case and desired to foreclose the court from being besieged with motions from defendants who, having plead to the charge, disliked the consequences.

Additionally, it should be noted that in 1935 the American Law Institute recommended enactment of a Model Code of Criminal Procedure. Therein, the Utah statute was cited in support of the proposition that a withdrawal could be had by an accused but withdrawal was limited to pre-sentence motions. It is, therefore, submitted that the motion of the appellant, coming after judgment, sentence and commitment, was not timely.

POINT II

ASSUMING 77-24-3, UTAH CODE ANNOTATED 1953, DOES NOT PROHIBIT A MOTION TO WITHDRAW A PLEA OF GUILTY AFTER JUDGMENT, THE TRIAL COURT HAD DISCRETION TO GRANT OR DENY THE MOTION, AND IT DID NOT ABUSE ITS DISCRETION.

In *State v. Lee Lim*, supra, the Utah court held that the trial court had discretion under what is now Section 77-24-9, U.C.A. 1953, to grant or deny a motion to withdraw a plea of guilty prior to final judgment. If it be determined that the above referenced statute does not prohibit such motions after judgment, the same rule, that of discretion vested in the trial court, would apply. Thus, in 146 A.L.R. 1431, the rule is stated:

“In a number of cases the appellate courts, without referring to any particular statute, have held that a motion to withdraw a plea of guilty, after the plea has been received by the court and judgment entered thereon, is addressed to the sound discretion of the trial court, and that the action of the court on such motion will not be disturbed unless a clear abuse of discretion is shown.”

See also, 22 C.J.S., Criminal Law, 421(2); Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 118. Thus, it becomes necessary to determine whether or not, based on the facts of the instant case, the trial court abused its discretion. The appellant has cited the general rule that where fraud, duress or some official overreaching is manifest, a court should set aside a plea of guilty. However, in the instant case, there is no evidence of fraud, duress or unlawful action. At best, the evidence shows that the Assistant District Attorney offered to merely make a recommendation of probation for appellant, which was done. There was no firm promise that probation would be granted, nor did the prosecutor fail to keep his promise. Further, the appellant in his affidavit makes it clear that he was under no misapprehension of law or fact, for it recites as a fact the understanding that the State would only "recommend probation," and a "likelihood" of it being obtained (R. 9). Additionally, the appellant acted after thoughtful advice of counsel and deliberation. Appellant was not a minor, immature, nor inexperienced in matters of criminal law. It clearly appears that he was aware of the consequences of his plea. Appellant's testimony on the merits of the case can hardly be called obviously exculpatory. Thus, there are no facts warranting a conclusion of official overreaching. *State v. Spiers*, 12 U. 2d 14, 361 P. 2d 509 (1961).

At best, the record discloses that appellant, concluding that his case was most probably without merit for trial, plead guilty on advice of counsel, with full understanding of the consequences along with the hope

that he would receive probation. This is clearly not a sufficient basis to claim that the plea should be withdrawn or that the trial judge abused his discretion in not allowing appellant to withdraw his plea. Thus, in 22 C.J.S., Criminal Law, 421(3)e, it is said:

“It is frequently stated that the mere fact that accused, knowing his rights and the consequences of his act, hoped or believed that by pleading guilty he would receive a shorter sentence or a milder punishment than that which would fall to his lot after trial and conviction by jury, presents no ground for the withdrawal of his plea or the exercise of the court’s discretion, and some authorities state the rule more broadly so as to include a case where accused was led so to hope or believe by his counsel or anyone else. It has been held that the court does not abuse its discretion in denying leave to withdraw a guilty plea even though such plea was induced by the prosecution’s promise with respect to its recommendation as to sentence and the court refused to follow such recommendation.”

Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 118, notes:

“The mere fact that an accused, knowing his rights and the consequences of his act, hoped or believed, or was led to believe, that he would receive shorter sentence or a milder punishment, or some other favor, by entering a plea of guilty, than that which would fall to his lot after trial and conviction by a jury, *presents no ground for permitting the withdrawal of the plea of guilty.*”

In *Futtermann v. United States*, 202 F.2d 185 (D.C. Cir. 1952), the court determined that no basis existed for

granting withdrawal of a plea of guilty because of advice of counsel and accompanied by an expectancy of probation. The court stated:

“And based upon that record, we are in complete agreement with the trial judge that appellants were fully advised by ‘able and vigorous counsel’ as well as by the court concerning the charges against them. As to counsel’s representation concerning probation, they were clearly those of hope and not of promise. Thus appellants failed to prove that the withdrawals of their guilty pleas were necessary in order to ‘correct manifest injustice.’ ”

In a case almost identical with the instant case, the facts were held to afford no basis for relief by the Supreme Court of Illinois. *People v. Ensor*, 319 Ill. 255, 149 N.E. 737 (1925). The accused contended he plead guilty to burglary upon advice of counsel and upon promises of the prosecutor that he would recommend probation and, further, he contended that he had a meritorious defense. The court denied the appellant’s contention, noting:

“* * * The above cases also recognize the rule that, if an accused, knowing his rights and the consequences of his act, hopes or believes that by pleading guilty he will receive a shorter sentence or milder punishment or some other favor than he would upon a trial and conviction by a jury, he has no right to withdraw his plea of guilty if the sentence or punishment imposed upon him by the court is not what he hoped or believed it would be. Such procedure would allow the accused to speculate upon the supposed clemency of the judge, and, if his sentence or punishment were not

as he hoped or believed it would be, to retract his plea and secure a trial before a jury. Plaintiff in error was well advised by counsel, and he should have known that the state's attorney, even if it is true that he promised he would recommend probation, is not the officer vested with the power of probation, but that it is entirely a function of the court. The court should, and often does, deny probation even though recommended by the state's attorney, where the facts show that the accused is an unsavory and habitual criminal."

In *United States v. Fox*, 130 F.2d 56 (3rd Cir. 1942), cert. den. 63 S.Ct. 74, the court denied relief where the prosecutor made an agreement and kept it. The court stated:

"The agreement which was made by the prosecuting authorities was fully kept. So we have a case where there was neither misunderstanding at the beginning of what was being agreed to, nor a failure thereafter to adhere to the agreement. It is not error to refuse leave to withdraw the plea if the defendant fully understood his rights, the nature of the charge against him, and the consequences of such a plea."

The fact that after judgment and sentence the defendant claims innocence itself gives no basis for relief. *People v. Moffett*, 290 P.2d 667 (Cal.App.). Numerous cases and authorities support the conclusion that upon facts like those presented in the instant case, no basis for relief can be claimed. *People v. Griffin*, 224 P.2d 47 (Cal.App.); *People v. McGee*, 273 P.2d 883 (Cal.App.); *Gleckman v. United States*, 16 F.2d 670 (8th Cir.); *People v. Bacciocco*, 81 Cal.App. 19, 251 P. 817 (where entry of plea was made upon promise by the prosecutor

that other charges would be dismissed, which promise was kept). It appears clear then that all the appellant's claim boils down to is hope of leniency coupled with advice of counsel. As is noted in 146 A.L.R. 1450:

"As a general rule, reliance on advice of counsel in entering a plea of guilty is no ground for allowing withdrawal of same after judgment."

And, at page 1442:

"[the] denial of a motion, made after judgment, to withdraw a plea of guilty, on the alleged ground, together with possibly others, that the plea of guilty was made in reliance upon the promise of leniency by the court, prosecuting attorney, or other official, or by the defendant's own belief that he would receive a lighter sentence by so pleading [does] not under the peculiar circumstances of the [cases] constitute an abuse of discretion or warrant reversal."

The appellant here seeks to accomplish the result that the court in *Ex Parte Gutierrez*, 265 P.2d 16 (Cal. App. 1954), warned against. There the court said:

"* * * A defendant charged with an offense cannot be permitted to gamble on the anticipated result of a plea of guilty and when disappointed in the outcome reestablish a right to a trial. For aught that appear, the court was fully justified in refusing to vacate the guilty pleas."

The appellant's case, when examined against the record and the applicable law, leads to the conclusion that the appellant has not sustained the burden he must carry of demonstrating an abuse of discretion by the trial judge. It appearing that no basis for a claim of abuse of discretion exists, the decision should be affirmed. *State v. Lee Lim*, supra.

CONCLUSION

The record in the instant case reflects that the appellant, a mature experienced person, who fully comprehended his situation, plead guilty with the hope of leniency. Having gambled with the chance of probation, appellant cannot now contend that because the trial judge felt that appellant should not receive his hope, he should now be allowed to gamble with a jury.

Respectfully submitted,

A. PRATT KESLER

Attorney General

RONALD N. BOYCE

Assistant Attorney General

Attorneys for Respondent