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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

MAR 24 1964

Clerk, Supreme Court, Utah

THE STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

LENO MARTINEZ,
Defendant and Appellant.

Case No. 10031.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Second Judicial District Court, Weber County
Honorable Lewis Jones, Judge

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Attorney General

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

LENO MARTINEZ,
Defendant and Appellant.

Case No. 10031.

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant, Leno Martinez, was convicted upon jury trial in the Second Judicial District Court, Weber County, State of Utah, of the crime of burglary.

DISPOSITION IN LOWER COURT

An information charging the appellant with the crime of burglary in the second degree was filed December 17, 1962. On the 27th day of December, 1962, the appellant, through his counsel, Norman B. Hendricks, filed a motion for a continuance for time to enter a plea. The continuance was granted. On January 8, 1963, the defendant, in the presence of counsel, entered a plea of not guilty. Thereafter, various preliminary steps were taken. On March 12, 1963, notice of a trial setting in the case for April 16, 1963, was sent to counsel for the defendant. An amended notice

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of trial setting on March 19th was sent to counsel, setting trial for March 27th. At the time set for trial the defendant was tried by jury and convicted. He was represented by counsel other than the counsel who had first represented him. A motion for new trial was filed on April 1, 1963, and on May 28, 1963, the motion for new trial was denied and the defendant committed to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent submits the decision of the District Court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts in addition to those stated in the brief of the appellant, but concedes the accuracy of the facts stated in the appellant's brief only to the extent they appear in the record on appeal.

On the 13th day of December, 1962, a complaint was issued in the City Court of Ogden City, charging the defendant with the crime of burglary in the second degree. Preliminary hearing was waived on December 14, 1962 by the defendant and he was admitted to bail. On December 17th, an information was filed by the District Attorney charging the defendant with second degree burglary, and the court appointed Ralph Raat, Esq., to represent the defendant (R. 2, 3). On December 24, 1962, the appellant was brought before the court for arraignment (R. 6). Mr. Raat had withdrawn and the appellant was represented by Norman B. Hendricks, Esq. The case was continued pursuant to defense motion to allow the defendant to enter a plea. On January 8, 1963, the appellant entered a plea of not guilty and the matter was set down for trial (R. 8). On

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the same day a demand for a bill of particulars was filed and a motion to suppress evidence (R. 9, 10). Notice of trial setting was mailed to Mr. Norman Hendricks, the appellant's counsel, on the 11th and 19th day of March (R. 14, 15). On the 27th day of March, the date set for trial, the defendant appeared in court represented by Gordon Hoxsie. Mr. Hoxsie indicated that Mr. Hendricks had withdrawn and moved the court for additional relief (R. 17).

The appellant moved the court for permission to change his plea to not guilty by reason of insanity, which the court denied (R. 17-A). The court indicated that the defendant could bring out on direct examination of his client any issue of sanity and present the matter to the jury (R. 17-A). Thereafter trial was held and the appellant was found guilty (R. 20).

On April 1, 1963, a motion for new trial was filed by the appellant on the grounds that the trial court erred in not allowing a change of plea to not guilty by reason of insanity and newly discovered evidence (R. 22). On May 28, 1963, the court heard the motion for a new trial. In support of the motion for new trial, two letters were considered by the court (R. 30, 38). The first was a letter from Ernest G. Beier, a psychologist, as to the results of psychological tests given to the appellant. The second was a letter from Dr. Charles E. Parmalee as to an examination performed on the appellant. In the letter of Dr. Parmalee, he indicates that he first saw the appellant when requested to do so by Norman Hendricks, appellant's previous attorney, on December 26, 1962. In neither of the letters does either person conclude that the appellant did not understand the nature of the act he did, or not know that the act was wrong, or that

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he was in anyway prohibited from adhering to the right (R. 30, 38). Neither of the letters presented were in affidavit form. The trial court overruled the appellant's motion for new trial.

In the appellant's brief, page 7, there is a letter dated December 18, 1963, from Dr. Parmalee to Judge Foley of the Federal District Court of Nevada, referring to a federal criminal charge against the appellant. This letter was not received or considered by the trial court on the motion for new trial, nor does it appear to have been offered. In that letter, however, the Doctor notes that he had first examined the appellant on December 26, 1962, at the request of Norman Hendricks, appellant's counsel. A comparison of the letter of Dr. Parmalee, dated December 18, 1963, to Judge Foley, and the letter presented to Judge Jones at the time of the motion for new trial, indicates that the diagnosis was generally the same. Again, the letter to Judge Foley does not indicate whether or not the Doctor is of the opinion the appellant was legally insane.

No notice pursuant to 77–22–16, U.C.A. 1953, was filed by the appellant indicating that he intended to raise a defense of insanity. Additionally, it should be noted that the record on appeal does not contain a transcript of the proceedings before the trial court, but merely contains the particular pleadings filed and minute entries of what occurred. The nature of the evidence, the arguments made and the reasons for the rulings do not appear from the record.

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ARGUMENT

POINT I.

THE DISTRICT COURT COMMITTED NO ERROR IN DENYING THE DEFENDANT'S MOTION TO ALLOW A CHANGE OF PLEA OF NOT GUILTY TO ONE OF NOT GUILTY BY REASON OF INSANITY, SINCE A PLEA OF NOT GUILTY BY REASON OF INSANITY IS UNKNOWN TO UTAH CRIMINAL PROCEDURE, NOR DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR A CONTINUANCE.

In Point I of the appellant's brief he contends that the trial court erred in not allowing a change of plea from not guilty to not guilty by reason of insanity. It is submitted that the trial court committed no error in this regard since there is no provision in Utah law for a plea of not guilty by reason of insanity. 77–24–1, U.C.A. 1953, provides:

"There are four kinds of pleas to an indictment or information:

(1) Guilty.

(2) Not guilty.

(3) A former judgment of conviction or acquittal of the offense charged.

(4) Once in jeopardy.

A defendant who does not plead guilty may enter one or more of the other pleas."

The only provisions in the Utah Code providing for a restriction upon the defense of insanity are those which require that notice of a proposed defense of insanity be given prior to the time of trial. Thus, 77–22–16, U.C.A. 1953, provides:

"Whenever a defendant shall propose to offer in his defense evidence that he is not guilty by reason of insanity, such defendant shall at the time of the arraignment, or within ten days thereafter, but not less than four days before the trial of such cause, file and serve upon the prosecuting attorney in such cause, notice in writing of his intention to claim such defense. If the defendant fails to file such notice, he shall not be entitled to introduce evidence tending to establish such defense. The court may, however, per-

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mit such evidence to be introduced where good cause for the failure to file notice has been made to appear."

In the instant case the record does not reflect that the appellant filed any notice of an intention to raise the defense of insanity within the time required by statute. The court's duty to appoint alienists to examine the defendant is based upon prior notice of the defense of insanity being given to the court. 77–24–17, U.C.A. 1953. The trial court, therefore, acted correctly in not accepting any change of plea since a plea of not guilty could raise the defense of insanity were notice of insanity timely filed. Further, it is well settled that the failure to file timely notice will, in the discretion of the trial court, preclude the receipt of evidence based upon the defense of insanity.

In 22 C.J.S., Criminal Law, Sec. 449, p. 1264, it is stated with reference to statutes requiring that notice be given of the defense of insanity:

"Where an accused fails to give notice at the time required, he has no absolute right to avail himself of the insanity defense, although the court may, in its discretion for just cause shown, permit him to do so."

In *State v. Wallace,* 170 Ore. 60, 131 P.2d 222 (1942), the Oregon Supreme Court upheld a similar provision of Oregon law, ruling that it was a legitimate exercise of procedural power. The court stated:

"The foregoing authorities establish that the Oregon statute, insofar as it requires notice of purpose to present the insanity defense, is valid. Counsel for the defendant recognized and the authorities also demonstrate that the statute was applicable to the case at bar and that the only question is whether the trial court abused its discretion. No such abuse appears from the record. No question was ever asked concerning the defendant's ability to distinguish between right and wrong or concerning his previous or subsequent mental condition. * * *"

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See also *People v. Nolan,* 126 Cal. App. 623, 14 P.2d 880; *People v. Troche*, 206 Cal. 35, 273 Pac. 767; *People v. Leong Fook,* 206 Cal. 64, 273 Pac. 779.

A similar result was reached by the Arizona court in *State v. Reid,* 87 Ariz. 123, 348 P.2d 731 (1960), where the court ruled that the failure to give timely notice of the defense of insanity precluded the defendant from claiming that it was error for the trial court not to allow the presentation of evidence on the issue.

In *People v. Nolan,* 126 Cal. App. 623, 14 P.2d 880, the California court was faced with a situation almost identical to that in the instant case and the court ruled that there was no basis for a claim of error. In doing so the court noted that the case had been pending for some months before trial and had been delayed in one instance at the request of the appellant.

Even so, however, in the instant case Judge Jones indicated that the defendant could present any evidence on the insanity issue he desired (R. 17). Further, the record clearly demonstrates that counsel for the appellant had ample time within which to file a notice of a plea of insanity.

In December, 1962, appellant's counsel, Norman Hendricks, had had the appellant examined by a psychiatrist. Consequently, in 1963, at the time he assumed the defense in the instant case, he was well aware of any claims to the appellant's mental condition. Being so advised, counsel, had he felt it worthwhile, could well have filed timely notice of the defense of insanity. Since the plea which the appellant sought to impose is improper, he can claim no error on that basis, nor can the appellant claim error in denying him a continuance since, as noted above, a continuance for the purposes of raising the defense of insanity was a matter

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within the sound discretion of the court since no timely notice four days prior to the time when trial was set was filed, even though counsel then representing the appellant had timely notice of the date of the trial and had notice of the mental condition of the appellant.

Finally, there would be no error in the court refusing to grant the appellant a continuance. The case had been pending for some time. The record is completely silent as to the basis upon which the appellant sought to justify his continuance, the reasons for withdrawal of prior counsel and the extent of preparation that counsel who handled the case at trial had made, and whether there had been any consultation with the previous counsel.

In *State v. Mathis,* 7 U.2d 100, 319 P.2d 134 (1957), this court noted:

> "The request for continuance is addressed to the sound discretion of the trial court and unless there is plain abuse its ruling will not be disturbed. * * *"

This court has repeatedly followed the rule that the trial judge will only be held to have erred if in exercising his discretion he went beyond the bounds of reason and thus denied the accused an opportunity for a fair trial. *State v. Fairclough,* 86 Utah 326, 44 P.2d 692 (1935); *State v. Green,* 89 Utah 437, 57 P.2d 750 (1936); *State v. Hartman,* 101 Utah 298, 119 P.2d 112 (1941); *State v. Williams,* 49 Utah 320, 163 Pac. 1104 (1917); *State v. Cano,* 64 Utah 87, 228 Pac. 563 (1924); *State v. Anselmo,* 46 Utah 137, 148 Pac. 1071 (1915). This is the rule of general application in this country, and the courts have ruled that this is true even where the claim of insufficient time for preparation is made. *Prescott v. State,* 56 Okl. Cr. 259, 37 P.2d 830 (1934); *State v. Badgley,* 140 Kan. 349, 37 P.2d 16 (1934).

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In *State v. McQueen,* 14 U.2d 311, 383 P.2d 921 (1963), a continuance was requested where counsel had been appointed to represent the defendant only one and one-half days prior to trial. However, it appeared that previous counsel had been retained some months before and had consulted with counsel at the time of trial. The court noted that the question of continuance was within the sound discretion of the trial court, and ruled that there was no abuse of discretion.

Finally, it should be observed that since the appellant has not brought before the court a complete record of what transpired at the time the motion for continuance was made, it must be presumed that the trial court had sufficient basis to support its judgment. *Watkins v. Simonds,* 14 U.2d 406, 385 P.2d 154 (1963); *Baine v. Beckstead,* 10 U.2d 4, 347 P.2d 554 (1959); *Johnson v. People's Finance and Thrift Company,* 2 U.2d 246, 272 P.2d 171 (1952).

POINT II.

THE TRIAL COURT COMMITTED NO ERROR IN DENYING THE APPELLANT'S MOTION FOR NEW TRIAL.

The appellant assigns as error the failure of the trial court to grant a new trial. Once again the record does not disclose in specific detail the arguments of the parties or the basis upon which the court acted in denying a new trial. The appellant apparently takes the position that the court should have granted a new trial based upon newly discovered evidence. 77–38–3(7), U.C.A. 1953, provides:

> "When new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial."

In addition, the before referenced section also provides:

> "When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing in

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> support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case may seem reasonable."

As can be seen from the statutory requirements, in order to allow a motion for newly discovered evidence, it must appear that the evidence was material and could not have been obtained with reasonable diligence at the time of trial. Further, the statute specifically requires that any claim of newly discovered evidence be set down in affidavit form.

In the insant case the appellant offered two letters, one from a psychologist, and one from a medical doctor. Neither of these letters are in affidavit form. This, in and of itself, would have been sufficient grounds to warrant the denial of the motion for new trial. In addition, it is submitted that there are numerous other reasons upon which the court could properly have based its decision in denying the appellant's motion.

In *State v. Weaver,* 78 Utah 555, 6 P.2d 167 (1931), this court noted:

> "Newly discovered evidence, to be ground for a new trial, must satisfy several elementary requirements. The courts are not in accord respecting all these requirements, but fairly agree that the newly discovered evidence be such as could not with reasonable diligence have been discovered and produced at the trial, that it be not merely cumulative, and that it be such as to render a different result probable on the retrial of the case."

In *State v. Moore,* 41 Utah 247 (1912), this court denied an appellant's claim that a new trial should have been granted based upon newly discovered evidence where it was clear that with reasonable diligence the evidence could have been ascertained at the time of trial.

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In *State v. Montgomery*, 37 Utah 515, 109 Pac. 815 (1910), this court noted:

> "* * * It is elementary that, in granting or refusing motions for new trials, a certain amount of discretion is vested in the trial courts which they alone can exercise. * * *"

In addition, the court stated that in order for newly discovered evidence to justify a new trial, it must appear that the evidence was so strong as to have affected the result. Thus, the court stated:

> "* * * In no event, therefore, is this so-called newly discovered evidence 'so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first,' which would have to be the case in order to authorize us to grant a new trial. * * *"

Applying these rules to the facts of the instant case, it is clear, first of all, that the appellant did not use due diligence and, in fact, that the evidence is not newly discovered. The letter offered to the court dated May 20, 1963, from Dr. Parmalee, expressly notes that the original examination of the appellant was made on December 26, 1962 at the request of the appellant's attorney who represented the appellant in the instant case up until a few days before trial. Consequently, the evidence was well known to counsel representing the appellant long before trial. The letter to Judge Foley from Dr. Parmalee, although not a matter of record, also notes that the appellant's counsel knew of the psychiatric situation of the appellant. It is obvious that this is evidence which clearly was known to the appellant, which one of appellant's counsel was fully aware of, and which could have been presented at the trial had due diligence been exercised.

Secondly, it should be noted that in none of the letters and materials from the psychiatrist is there any indication

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that the defendant was legally insane within the rules laid down by this court in *State v. Kirkham,* 7 U.2d 108, 319 P.2d 859 (1957), and *State v. Poulson,* 14 U.2d 213, 381 P.2d 93 (1963). Consequently, it cannot be said that the evidence offered in support of the motion for new trial was of such a conclusive nature that the result would have been different. Indeed, the letters make little reference to the crime in question and generally are not directed to the question of whether or not the defendant was legally sane or insane at the time of the commission of the offense.

Finally, it should be noted that since the appellant filed no notice of an intention to raise the defense of insanity, and apparently did so fully realizing his previous psychiatric history, as did counsel who then represented the appellant, there would be no basis to warrant a new trial since the appellant, having notice of the possible defense, waived it.

It is submitted, therefore, that the trial court did not abuse its discretion in denying the appellant's motion for new trial.

CONCLUSION

The issues raised by the appellant in support of relief from this court clearly show that he is both procedurally and substantively without remedy. As a consequence, this court should affirm.

Respectfully submitted

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Attorney General

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