1970

Edward Earl Pass v. John W. Turner, Warden Utah State Prison Et Al. : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

EDWARD EARL PASS,
Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden, Utah State Prison,
Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from the Denial of a Petition for Writ of Habeas Corpus in the Fifth Judicial District Court for Millard County, State of Utah, the Hon. [illegible] Day, Judge, Presiding.

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EDWARD EARL PASS, *Plaintiff-Appellant,* vs. JOHN W. TURNER, Warden, Utah State Prison, *Defendant-Respondent.*	Case No. 11729

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant, Edward Earl Pass, is appealing from a denial of his petition for writ of habeas corpus in the Fifth Judicial District Court, in and for Millard County, the Honorable C. Nelson Day, Presiding.

DISPOSITION IN LOWER COURT

The Honorable C. Nelson Day, after a full hearing, ruled that Edward Earl Pass's petition for writ of habeas corpus should be denied.

RELIEF SOUGHT ON APPEAL

Respondent submits that the denial for writ of habeas corpus by Judge Day should be affirmed.

STATEMENT OF THE FACTS

Edward Earl Pass was arrested on or about January 15, 1968 (T. 59, 60), and was subsequently charged with the first degree murder of Jack Stokes (Record 3). On March 12, 1968, Edward Earl Pass, with counsel, entered a voluntary and intelligent guilty plea to second degree murder (Guilty plea trans. 2, 3). Mr. Pass was then sentenced to the Utah State Prison for a term not less than ten years and which may be for life (Sentencing trans. 3). On February 14, 1969, and May 2, 1969, in the Fifth Judicial District, Mr. Pass had a full hearing at which his petition for habeas corpus was denied.

ARGUMENT

POINT I.

APPELLANT GAVE A VOLUNTARY, INTELLIGENT AND UNDERSTANDING GUILTY PLEA.

The United States Supreme Court in *Boykin* v. *Alabama*, 395 U. S. 238 (1969) and *McCarthy* v. *United States*, 394 U. S. 459 (1968) set down certain guidelines for a judge in accepting a guilty plea. Appellant contends that these guidelines (i. e., that the guilty plea must be intelligently and knowingly given, and the defendant must know the nature of the charges against him) were not followed in this particular case and therefore his constitutional rights were violated. However, the transcript clearly indicates that Pass's guilty plea was intelligently and knowingly given and that he was completely aware of the

charges against him. The amended information was read to Mr. Pass and then the following took place:

"THE COURT: Mr. Edward Earl Pass, what is your plea to the amended information just read to you and which charges you with the felony of murder in the second degree; are you guilty or are you not guilty?

"EDWARD EARL PASS: Guilty.

"THE COURT: And by that plea of guilty, am I to understand that you did, on or about the 15th day of January, 1968, and in Millard County, Utah, willfully and maliciously murder one Jack William Stokes, also known as Jack Pitts?

"EDWARD EARL PASS: Yes, your Honor.

"THE COURT: Do I understand further that you enter this plea of guilty to the amended information after you have conferred at length with Mr. Waddingham?

"EDWARD EARL PASS: Yes, sir.

"THE COURT: And you know what the penalty is and what the charge against you is?

"EDWARD EARL PASS: Yes, I have been advised.

"THE COURT: Mr. Pass, you know, at least I assume you know, that we are prepared to go ahead with your trial this morning on the matter and submit the matter to a jury?

"EDWARD EARL PASS: Yes, sir.

"THE COURT: But it was with your consent, was it, that the trial has been called off and you now enter this plea?

"EDWARD EARL PASS: Yes, sir.

"THE COURT: Has any duress or menace or undue influence of any kind been used —

"EDWARD EARL PASS: No, sir.

"THE COURT: — in this regard and with regard to your plea?

"EDWARD EARL PASS: No, sir.

"THE COURT: Has any promise or offer of leniency or reward, or anything like that, been made to you?

"EDWARD EARL PASS: No, sir, your Honor, been no promises made.

"THE COURT: All right. Your plea of guilty will be entered in this matter, and your plea of not guilty as to the original information is ordered withdrawn. We will pass that, then. Mr. Waddingham, as you know, the statute provides sentence is not to be imposed for at least two days." (Guilty plea Trans. 2, 3, 4).

The above transcript clearly indicates that Pass voluntarily and intelligently, with the advice of counsel, pleaded guilty to the crime charged. Note that the court directed its questions to Mr. Pass, not his attorney, and asked him specific points to insure that his guilty plea was knowingly, voluntarily and intelligently given.

The transcript clearly indicates Pass's complete awareness of his guilty plea. But besides what Pass himself testified to, his lawyer testified that he left Pass a copy of the Utah Code Ann. (1953) section on homicides, so Pass could study the law himself (T. 70, 71). Thus, Pass had

a copy of the Utah Code Ann. (1953) relating to the charges against him, and a capable lawyer for advice, before he went in court to plead guilty to second degree murder. On this basis there is no doubt that Pass knew exactly what he was doing and the consequences thereof when he pleaded guilty.

POINT II.

APPELLANT WAIVED ALL NON-JURISDICTIONAL DEFENSES WHEN HE MADE A VOLUNTARY AND INTELLIGENT GUILTY PLEA.

Appellant contends in his brief that some evidence was illegally seized. What appellant overlooked was that a guilty plea like his own specifically waives the right to object to an illegal search and seizure or any other non-jurisdictional defect.

This year the Supreme Court of the United States held:

> "*Because guilty plea is a waiver of trial and,* unless applicable law otherwise provides, *a waiver of right to consent admissibility of any evidence state might have offered against defendant,* guilty plea must be an intelligent act done with sufficient awareness of relevant circumstances and likely consequences." *McMann* v. *Richardson,* ..... U. S. ....., 90 S. Ct. 1441, at 1446 (1970). (Emphasis added.)

In Utah there is no other applicable law and of course, the Supreme Court decision is binding — a guilty plea waives all rights of defendant to consent to admissibility

of evidence that is against him. This decision specifically prohibits Pass from alleging the evidence was illegally seized, because of his guilty plea, he waived the right of prohibiting evidence in court.

Other federal courts, including the Tenth Circuit, adhere to the same principle. Note the following language taken from *Benton* v. *United States,* 352 F. 2d 59 (10th Cir. 1965), wherein the defendant alleged that there was an illegal search and seizure, coercion, and illegal confession.

> "In view of the allegation of fact made by appellant on this appeal with respect to the search and seizure, the coercion, and the confession issues, we agree with appellee that appellant's plea of guilty prevents any consideration thereof on this point." *Id.* at 60.

In another Tenth Circuit case, *Lattin* v. *Cox,* 355 F. 2d 397 (10th Cir. 1966), the appellant (appeal from denial of his habeas corpus petition) presented as one of his issues that evidence was taken through an illegal search and seizure. The court held:

> "After a careful consideration of the entire record before us, we must conclude that the pleas of guilty entered by Lattin in the state court to the charges of involuntary manslaughter and rape were voluntary and understandingly made and were not induced by any promises or threats. Such pleas of guilty waived all non-jurisdictional defects in proceedings had prior thereto." *Id.* at 400.

State court precedence is also in accord. The Supreme Court of Arizona in *State* v. *Martinez,* 102 Ariz. 215, 427

P. 2d 533 (1967) states the following:

> "We find no validity in this argument for none of the matters complained of by defendant attacks any jurisdictional defect in the proceedings and it is a well established rule of law that when a defendant voluntarily and knowingly pleads guilty at his trial such constitutes a waiver of non-jurisdictional defenses, defects and irregularities." *Id.* at 534.

From these cases it is clear that a guilty plea similar to the one appellant made, which is voluntarily and knowingly given, waives all non-jurisdictional defects, including illegal search and seizure.

POINT III.

COUNSEL PROVIDED FOR APPELLANT AT HIS ORIGINAL TRIAL WAS EFFECTIVE AND COMPETENT AND DID NOT CONSTITUTE A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant tries to attack his counsel at the original trial claiming he was deprived of effective aid and assistance by counsel in deciding whether or not to plead guilty. Counsel for appellant was and is a well known and respected attorney. Mr. Burns, the attorney prosecuting Pass, testified that Mr. Waddingham (Pass's counsel) was very thorough in his examination, research and presentation of the law (T. 134). Mr. Waddingham, acting as court-appointed counsel, advised Pass to the best of his ability. Even the Supreme Court of the United States realizes how hard it is to advise your client whether or not to plead guilty.

> "But because of inherent uncertainty in guilty plea advice . . ." *McMann* v. *Richardson,* ..... U. S. ....., 90 S. Ct. 1441, 1449 (1970).
>
> "Considerations like these (whether or not to plead guilty) frequently present imponderable questions for which there are no certain answers; judgments may be made which in the light of later events seems improvident, although they were perfectly sensible at the time." *Brady* v. *United States,* ..... U. S. ....., 90 S. Ct. 1463, 1473 (1970).

The court, in *Grubbs* v. *State,* Okl. Cr., 397 P. 2d 522 (1969), held:

> "Petitioner was not entitled to a writ of habeas corpus, where an allegation that court-appointed counsel was incompetent and not supported, and court-appointed counsel was a duly licensed member of the bar and was qualified by training and experience to protect the rights of an accused in criminal proceedings." *Id.* at 522.

Arizona and California allow a contention of deprivation of adequate counsel to be asserted in habeas corpus proceedings only in extreme cases where the trial was a farce or a sham.

> "If appellant sets forth no facts which indicate the appointed attorney's performance was so substandard as to render the trial a farce or sham, the petition is properly denied." *Baron* v. *State,* 7 Ariz. App. 223, 437 P. 2d 975, 977 (1968).
>
> "To justify relief on ground that counsel was inadequate, it must appear that trial was reduced to farce or sham through attorney's lack of competence, diligence or knowledge of law." *In re Beaty,*

51 Cal. Rptr. 521, 64 C. 2d 760, 414 P. 2d 817, 819 (1966).

See also *McGree* v. *Crouse*, 190 Kan. 615, 376 P. 2d 792 (1962) and *Gresham* v. *Page*, Okl. Cr., 441 P. 2d 478 (1968), *cert. denied*, 393 U. S. 916 (1968).

None of the allegations made by appellant can be proven. In fact, most the evidence relating to this issue indicates Mr. Waddingham is a competent attorney who spent a great deal of time and effort on behalf of his client, Mr. Pass.

CONCLUSION

Petitioner Edward Earl Pass entered an intelligent, knowing, and voluntary guilty plea and based on cases cited, that plea prohibits him from alleging his constitutional rights were violated. Respondent prays that the lower court order denying the petition for habeas corpus be affirmed.

Respectfully submitted,

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