1970

Frank Lopez v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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FRANK LOPEZ, Appellant, v. JOHN W. TURNER, Warden, Utah State Prison, Defendant.	Case No. 11788

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court

of Salt Lake County, Utah,

The Honorable Stewart M. Hansen, Judge

FRANK LOPEZ

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TABLE OF CONTENTS

TABLE OF CONTENTS

AUTHORITIES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK LOPEZ, Appellant, v. JOHN W. TURNER, Warden, Utah State Prison, Defendant.	Case No. 11788

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STATEMENT OF THE CASE

This is an appeal from a denial of habeas corpus in the Third District Court, Salt Lake County, Utah.

DISPOSITION OF THE CASE BY LOWER COURT

The Honorable Stewart M. Hanson, Judge of said District Court, issued an order on April 16, 1969, dismissing appellant's petition for habeas corpus on the grounds that appellant was properly sentenced and had adequate counsel at the time of sentencing. (See Record on Appeal, p. 6)

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RELIEF SOUGHT ON APPEAL

Appellant asks this Court to reverse the decision of the lower court and set aside his plea of guilty entered in the Third Judicial District Court on March 14, 1966, in that the guilty plea, as entered, was repugnant to the laws of the State of Utah, and in violation of the due process and equal protection of the law clause of the Fourteenth Amendment.

STATEMENT OF THE FACTS

On or about September 14, 1964, appellant was arrested in Salt Lake City, Utah, and charged with the crime of robbery, 76-51-1, U.C.A.

About two days later, appellant was arraigned on this charge in City Court. Appellant entered a plea of not guilty and also requested that the court appoint an attorney to defend him against this charge. A preliminary examination was then scheduled in this matter for November of 1964.

Appellant was later informed that Mr. Jim Mitsunaga, of the Public Defender's Office, had been appointed to him and one Able Garcia, Jr., who was also charged with this same crime, and was appellant's co-defendant in the

in the subsequent trial proceedings.

At the preliminary hearing, appellant was not identified by any of the witnesses as being a participant in the alleged robbery, but was bound over to the District Court along with Mr. Garcia, said co-defendant, to stand trial on this charge.

However, on or about February 16, 1965, the charge against appellant and his co-defendant was reduced to that of grand larceny, 76-38-4, U.C.A.

On or about September 1, 1965, appellant's co- defendant plead guilty to grand larceny or a related charge and at that time received a sentence of one year in the Salt Lake County Jail.

Thereafter, on March 14, 1966, appellant appeared in the Third District Court, after being advised by his court appointed attorney, Mr. Mitsunaga, that he was to plead to the same charge as his co-defendant, and that he would be sentenced accordingly. When appellant's case was called before the court, Mr. Mitsunaga was not present. Instead, a person that appellant had never seen before, Mr. Gerald Grundy, stepped forward and claimed that he was representing appellant. The court

then immediately sentenced appellant to a term in the Utah State Prison for the crime of grand larceny. (p. 8, Record on Appeal)

POINT 1

THE COURT DENIED APPELLANT AN ADEQUATE DEFENSE BY APPOINTING ONE ATTORNEY TO REPRESENT BOTH DEFENDANTS

The collateral references of Section 77-22-12, U.C.A., state that it is the "duty of the court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a co-defendant. 3 A.L.R. 2d 1003."

Also, all of the Utah state statutes regarding appointment of counsel always refer to the defendant in the singular person, never in the plural.

> If the defendant appears without counsel he must be informed. . . . 77-22-12, U.C.A.
> Provide counsel for every indigent person. 77-64-1(1), U.C.A.
> Assume undivided loyalty of defense counsel to the client, 77-64-1(5), U.C.A.
> Assigned counsel shall represent each indigent person. 77-64-2, U.C.A.
> (Emphasis added)

The framers of these provisions must have understood that a public defender is an officer of the court and that his primary duty is the administration of

justice (State v. Crank, 105 U. 332, 142 P. 2d 178, 182). And when an attorney is assigned to defend two co-defendants, one of whom denies that he is guilty, while the other admits the crime and alleges that the other was a participant, the attorney must form an opinion as to whom to believe and in what manner justice may best be served.

However, if the attorney allows his judgment to be swayed by the guilty party, who may possess a more persuasive manner, if he forms an erroneous opinion as to how to best administer justice to both defendants, the party who is innocent is of necessity bound by the conduct of the attorney and by his presentation of the case in court. Such conduct and presentation may be detrimental to the interests of the innocent defendant, thereby denying him an adequate defense.

This is exactly what happened in the instant case. Appellant, who was not guilty, was apparently unable to convince his court appointed attorney of the fact because this attorney chose to accept the story told by the co-defendant.

Appellant submits that, under the circumstances, the defense counsel could not present an adequate defense

in this case. Since both defendants told him conflicting stories and counsel did not know which to believe, he took the path of least resistance and plead both defendants guilty.

POINT 11

COUNSEL WAS NOT PRESENT AT THE TIME OF SENTENCING

Mr. Jim Mitsunaga, who was appointed by the court to represent appellant and the co-defendant, assured appellant that if he plead guilty, his sentence would be in accordance with that of his co-defendant. However, when appellant was sentenced, this attorney was not in court. Instead, another attorney, Mr Gerald Grundy, claimed that he was representing appellant.

Since the attorney who had been representing appellant during all of his previous court appearances was not present to protect his rights, appellant was not represented in the proper, legal meaning of the term.

POINT 111

THE COURT DID NOT FULLY ADVISE APPELLANT OF THE CONSEQUENCES OF HIS GUILTY PLEA

POINT III

The Honorable Marcellus K. Snow, who sentenced appellant, did not inquire to determine whether appellant was aware of, or had been advised as to the nature of the charge to which he was pleading guilty.

When the offense provides for different degrees of guilt, and varying punishments may be imposed, it is the duty of the court to ascertain that the defendant fully understands the exact charge to which he is pleading guilty, in accordance with Belgard v. Turner, Case No. C-95-69 (1969), in the U.S. District Court for the District of Utah, Central Division.

Also, in Boykin v. Alabama, No. 642, October Term, 1968, the United States Supreme Court, in setting aside a plea of guilty, stated that:

> . . . a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. . . .
>
> What is at stake for an accused facing . . . imprisonment demands utmost solicitude of which courts are capable in canvassing the matter

with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories. . . .

Appellant did not realize that he was pleading guilty to grand larceny, and would never have so plead had he been aware that he was pleading to a felony.

Guilty pleas were declared void because the court neglected to advise a defendant of the maximum penalty for the charge to which he plead guilty in State ex rel. Beibinger v. Ellsworth, 415 P. 2d 728; People v. Mackey, 211 N.E. 2d 706; People v. Leach, 41 N.W. 2d 377; Rimanich v. U.S., 357 F. 2d 537.

CONCLUSION

Appellant submits that, from the foregoing, the judgment of the lower court should be reversed and the guilty plea set aside.

Respectfully submitted,

FRANK LOPEZ, Appellant In Pro Se