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

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Appeal fr[illegible]
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Appellant In [illegible]

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FANK LOPEZ,

Appellant,

vs.

JOHN W. TURNER, Warden, Utah State Prison,

Respondent.

Case No. 11788

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant seeks a reversal of a judgment entered in the Third District Court, in and for the County of Salt Lake, State of Utah, denying his petition for writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

The District Court, after examining the record and transcript of the sentencing proceedings, upon its own motion, and without a hearing, dismissed appellant's petition.

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The respondent herewith accepts Appellant's statement of facts and adds the following.

The transcript of the trial court proceedings wherein the appellant changed his plea from "not guilty" to "guilty" was not a part of the record as submitted with appellant's brief. However, part of appellant's argument challenges that proceeding. Therefore, the respondent has obtained said transcript and filed the same as a supplemental record in this case. Also, a copy of said transcript has been sent to appellant advising him that the same is now a part of this case on appeal.

In addition, the respondent asks this Court to take judicial notice of the fact that appellant never timely appealed the conviction which he now challenges by writ of habeas corpus.

ARGUMENT

POINT I.

THIS COURT SHOULD NOT JUDICIALLY DECIDE THE ISSUES RAISED BY APPELLANT.

The appellant challenges the constitutionality of his conviction of grand larceny on the grounds that (1) he was denied adequate counsel, (2) that counsel was not present at the time for sentencing, and (3) that he was not fully advised of his rights when he plead guilty. He did not timely appeal his conviction, but rather, has raised

the foregoing issues by writ of habeas corpus, long after the time for appeal has expired.

Utah law is clear under these circumstances. If one is convicted of a crime and fails to timely appeal, he cannot later use habeas corpus to gain appellate review. *Bryant* v. *Turner,* 19 Utah 2d 284, 431 P. 2d 121 (1967).

In the *Bryant* case, this Court explained the foregoing principle by saying:

> "We do not mean to say that the time honored writ of habeas corpus does not have a very important and useful purpose in our law. But that purpose is not to review a final judgment arrived at through regular proceedings and due process of law, by a court having jurisdiction. The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there is no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law . . ." 19 Utah 2d at 286 and 287.

Later in the opinion this Court concluded:

> *"No appeal having been taken from the judgment it became final and the issue was res adjudicata.* Therefore, consistent with the principles herein above discussed, it is not subject to review in this habeas corpus proceeding." *Id.* at 287. (Emphasis added.)

In the instant case, the appellant should be denied the relief prayed for because he failed to redress his alleged

error by a timely appeal. This is so even though his alleged errors are constitutional in nature. This Court implicitly so held in *Brown* v. *Turner*, 21 Utah 2d 96, 440 P. 2d 965 (1968). Brown was appealing a denial of his petition for writ of habeas corpus on the grounds that he was not accorded his right to counsel, and that he was not adequately advised of the consequences of his plea of guilty — the same contentions that the appellant in the instant case is making. This Court cited *Bryant* in defining when the writ of habeas corpus is applicable, and then stated:

> "If the contention of error is *something which is known* or should be known to the party at the time judgment was entered, *it must* be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some unusual circumstances as we have mentioned above." 21 Utah 2d at 98. (Emphasis added.)

Clearly, the appellant knew of the alleged errors surrounding his conviction at the time of his trial and certainly could have challenged its validity by timely appealing to this Court. He did not elect to do so. Moreover, there are no unusual circumstances surrounding this case which might invoke the exception as defined in the *Bryant* case and affirmed in the *Brown* case. Therefore, the judgment of the trial court became final and thus cannot now be reviewed on habeas corpus.

In view of the foregoing, it is clear that this Court should not judicially decide the issues raised in this appeal,

but rather, should summarily affirm the judgment of the trial court below.

POINT II.

POINT I OF APPELLANT'S BRIEF IS NOT A JUSTICIABLE ISSUE ON THIS APPEAL.

Point I of appellant's brief alleges that appellant was not adequately represented by counsel. However, this issue was not raised in his habeas corpus petition, nor was it considered by the trial court below. The appellant now wishes this Court to consider this issue for the first time on this appeal.

Again, Utah law is clear regarding this matter. In *Burleigh* v. *Turner*, 15 Utah 2d 118, 388 P. 2d 412 (1964), the petitioner appealed a denial of a writ of habeas corpus. On appeal, he raised a point for the first time which had neither been raised in his petition nor by the trial court. In disposing of this issue, the Court stated:

> "This matter was not presented in the pleadings or the hearing before the Fourth District Court. It is raised for the first time on appeal. Habeas corpus being a civil remedy, it is not necessary for this Court to consider this point." 15 Utah 2d at 120.

See also *Riter* v. *Cayias*, 19 Utah 2d 358, 431 P. 2d 788 (1967) and *In re Ekker*, 19 Utah 2d 414, 432 P. 2d 45 (1967).

Thus, this Court should not judicially decide Point I as raised in the appellant's brief.

POINT III.

THE APPELLANT WAS NOT DENIED ADEQUATE COUNSEL BECAUSE THE PUBLIC DEFENDER WAS ASSIGNED TO REPRESENT HE AND HIS CO-DEFENDANT.

The United States Supreme Court has spoken on this issue and held that, pursuant to the Sixth Amendment, a defendant is entitled to separate counsel during his prosecution if he chooses, *Glasser* v. *United States,* 315 U. S. 60 (1942).

Glasser had been appointed counsel who had also been appointed to represent his co-defendant. Glasser objected to the appointment on the grounds that the dual appointment of counsel would result in prejudice to him, and thus, he requested independent counsel. The trial court denied Glasser's request. Glasser appeal. The United States Supreme Court upheld his contention and said:

> ". . . (we are also) clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent *conflicting interests.*" 315 U. S. at 70. (Emphasis added.)

Glasser had objected to the Court's simultaneous appointment of counsel and had pointed out to the court the nature of the conflict of interest which would result from the appointment. 314 U. S. at 68 and 69.

In the instant case, the record is silent on the issue of whether or not the appellant objected to the court when he

was assigned the legal defender as his counsel. Surely the appellant knew at the time that the legal defender had also been assigned to represent his co-defendant. Therefore, if such simultaneous appointment would have caused the appellant prejudice, then it was incumbent on him to so advise the Court. The *Glasser* case *does not* hold that one is entitled to appointment of independent counsel when he cannot or does not advise the court of possible conflicts of interest which may result in prejudice to him.

This standard has been applied by the California Court of Appeals. In *People* v. *Klimek,* 172 Cal. App. 2d 36, 341 P. 2d 722 (1959), the defendant appealed raising the same objection as the appellant now raises on this appeal. In answer thereto, the Court said:

> "In the instant case no objection was made by anyone, either prior to or during the entire trial, and it does not appear at all that the appellant or anyone, prior to the taking of this appeal, was not satisfied with the alleged appointment. Nor was there anything to indicate to the trial judge that there might be conflicting interests, hence it cannot be held that the trial judge failed in any responsibility in the matter of affording appellant an opportunity for proper representation by counsel." 341 P. 2d at 726.

This same standard has been applied to habeas corpus petitioners as well. In *In re Waltreus,* 42 Cal. Rptr. 9, 397 P. 2d 1001 (1965), the court said:

> "It would seem, however, that having been advised that he had a right to be represented by the public defender it was incumbent upon petitioner,

had he wished to have other counsel assigned, to raise the matter in the trial court, and there is no claim that he did so." 397 P. 2d at 1005.

In the instant case, the appellant did not object to the simultaneous appointment of the legal defender as counsel for he and his co-defendant. As a result, the judge had no reason to suspect some possible conflict of interest. Thus, the court below should be affirmed on this issue.

POINT IV.

THE LOWER COURT RECORD CLEARLY SHOWS THAT APPELLANT WAS PROPERLY AND ADEQUATELY REPRESENTED BY COUNSEL AT THE TIME OF SENTENCING.

It is clear that appellant was in fact represented by counsel at his sentencing (T. 7, 8, 9). However, appellant argues that because he had different counsel at his sentencing than he had during the proceedings prior thereto, that in effect he was denied right of counsel at a critical stage of the judicial process. He argues further that his prior counsel had advised him that his sentence would be like that of his co-defendant, his co-defendant was sentenced to one year in the county jail, (appellant's brief p. 3), and that his new counsel was the cause of the judge sentencing him to an indeterminate term in the Utah State Prison.

Appellant's contention can only establish grounds for habeas corpus relief if he can show that counsel at the time of his sentencing was incompetent or inadequate.

In order for appellant to show that counsel was inadequate, he must state facts showing that his representation was so substandard as to render his representation a farce or a sham. In *Barron* v. *State*, 7 Ariz. App. 223, 437 P. 2d 975 (1968), the Arizona Court of Appeals held:

> "We find no error in the lower court's denial of relief since the appellants have set forth *no facts* (citations omitted), which indicate the attorney's services were so substandard as to render his *representation a farce or a sham.*" 7 Ariz. App. at 225. (Emphasis added.)

The following cases have also applied this same standard in habeas corpus proceedings: *In re Beaty*, 51 Cal. Rptr. 521, 414 P. 2d 817 (1966); *McGee* v. *Crouse*, 190 Kan. 615, 376 P. 2d 792 (1962), and *Grubbs* v. *State*, 397 P. 2d 522 (Okla., 1964).

In the *Beaty, supra,* case, the California Supreme Court stated this standard for inadequacy of counsel and then gave an example of a situation which might reduce the representation to a farce or a sham:

> "If a *crucial defense* is withdrawn from the case through the failure of counsel to investigate carefully all defenses of fact and law, the defendant has not received adequate representation." 414 P. 2d at 819. (Emphasis added.)

In the instant case, the appellant has made no factual allegations establishing a possible defense which may have been crucial at the time of his sentencing. He simply alleges that he had not seen his counsel until the time he was called before the trial court for sentencing.

According to Utah law, the appellant has the burden to justify upsetting a conviction on habeas corpus, *Syddall* v. *Turner*, 20 Utah 2d 263, 437 P. 2d 194 (1968), and must allege sufficient facts to show that he was not adequately represented by counsel. *Id.* at 265. The appellant has not met this burden in the instant case; thus, the judgment of the court below should be affirmed.

POINT V.

APPELLANT WAS FULLY ADVISED OF THE CONSEQUENCES OF HIS PLEA OF GUILTY.

The petitioner challenges the constitutionality of his guilty plea on the grounds that the court did not advise him of the consequences thereof. The respondent submits, however, that the appellant was thoroughly advised of the consequences of his plea by his own counsel, the public defender. The transcript of appellant's plea of guilty, pages 2 and 3, support this contention.

> THE COURT: Alright, you understand, Mr. Lopez, if the court grants your motion to withdraw your former plea of not guilty to this charge and to allow you to enter a different plea, then you will thereby subject yourself to a possible indeterminate term in the Utah State Prison. Do you understand that?
>
> MR. LOPEZ: Yes.
>
> THE COURT: Record may so show. And based thereon the defendant is given permission to withdraw his former plea of not guilty to the count of

grand larceny. Do you desire the convenience of the record?

MR. MITSUNAGA (defense counsel): Yes, sir.

THE COURT: You may.

MR. MITSUNAGA: Mr. Lopez, I'm going to ask you some questions with regard to the plea that you are about to enter to grand larceny. Now, you are aware that grand larceny in the State of Utah calls for one to ten years in the state penitentiary?

MR. LOPEZ: Yes.

MR. MITSUNAGA: Now, has anyone from my office, either my staff or myself, offered you any promise or probation?

MR. LOPEZ: No.

MR. MITSUNAGA: Has anyone forced you or coerced you to get you to enter the plea you're about to enter?

MR. LOPEZ: No.

MR. MITSUNAGA: Are you entering the plea on the basis of your own free will?

MR. LOPEZ: Yes.

MR. MITSUNAGA: Has either the prosecutor or the Judge promised you any leniency or probation?

MR. LOPEZ: No.

MR. MITSUNAGA: I have nothing further, your Honor.

From the foregoing dialogue, it is clear that the appellant understood the consequences of his plea of guilty, and that it could result in his being sentenced to the Utah State Prison. Moreover, his plea was voluntarily made, without coercion or undue influence, and thus was completely in accord with the Utah standard of accepting guilty pleas. *Strong* v. *Turner*, 22 Utah 2d 294, 452 P. 2d 323 (1969).

The thrust of appellant's argument seems to be that the court must advise him of the consequences of his plea, and that for his counsel to so advise him is error, thus giving rise to habeas corpus relief. Such a contention is without merit.

In *Greenwood* v. *Harp*, 432 P. 2d 663 (Okla. Cr. 1967), the Court of Criminal Appeals of Oklahoma rejected a similar argument. Greenwood appealed from a denial of a writ of habeas corpus on the grounds that his plea of guilty was not pursuant to an explanation of his constitutional rights. However, the writ was denied because the evidence at the hearing showed that the petitioner was thoroughly advised by his counsel of all constitutional rights relating to his case. The Oklahoma Court affirmed the trial court's decision on the grounds that:

> "From the testimony gathered at the district court hearing, we are unable to accept petitioner's claim that he did not knowingly enter his plea of guilty, notwithstanding the innocent ignorance he portrays. To accept petitioner's unsupported contentions, in face of the testimony contained in this

record, would make a mockery of our system of jurisprudence." 432 P. 2d at 664.

The instant case is even stronger for such a holding than is the *Greenwood* case. Here the appellant was interrogated by his own counsel, in the presence of the court, as to his understanding of the plea he was making. Surely, for one to argue that simply because the interrogation was not conducted personally by the judge, would be to place procedure over substance, and would result in "a mockery of our system of jurisprudence." *Id.* at 664.

The appellant cites *Belgard* v. *Turner*, Case No. C 95-69 (1969) decided by the United States District Court for the District of Utah, Central Division, Judge Christensen, presiding, and *Boykin* v. *Alabama*, 395 U. S. 238 (1969) as authority for his contentions. However, both of these cases were decided on whether or not the record was sufficient to show an understanding and voluntary plea of guilty, and not on the issue of who conducted the interrogation in order to establish a record showing the plea of guilty to be knowing and voluntary.

In view of the foregoing, it is clear that the trial court should be affirmed on this issue.

CONCLUSION

This Court should not judicially decide the issues raised on this appeal because of a prior final judgment which is res judicata as to this habeas corpus proceeding.

In the alternative, if this Court accepts the issues raised and judicially decides them, then the trial court

should be affirmed in light of the record, the facts, and the case law applicable to this appeal.

Respectfully submitted,

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