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Dee Larrabee v. John W. Turner, Warden of Utah State Prison : Brief of Respondent

IN THE

SUPREME CO

OF THE

STATE OF U

DEE LARRABEE,

Plaintiff

vs.

JOHN W. TURNER, W
State Prison,

Defendant

BRIEF OF

APPEAL FROM THE
DISTRICT COURT OF
ABLE LEONARD W.

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CASES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DEE LARRABEE,
Plaintiff-Appellant,

vs.

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

Case No. 12100

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an appeal by petitioner from an order of the Third District Court denying a petition for writ of habeas corpus.

DISPOSITION IN LOWER COURT

The district court judge denied petitioner's application for habeas corpus relief and remanded him to the custody of the respondent.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the order denying habeas corpus relief.

STATEMENT OF FACTS

Respondent generally agrees with the statement of facts as set forth in appellant's brief, which facts are a condensation of appellant's testimony during the habeas corpus hearing in the court below.

On cross-examination, appellant admitted that he knew of his right to an attorney, either retained or appointed (R. 39, 40, 41). Also, appellant acknowledged that at his appearance before the trial court, the judge asked if any promises had been made, to which appellant replied "no" (R. 40).

The district judge specifically found that appellant's waiver of counsel and plea of guilty were made voluntarily and knowingly and denied the writ (R. 43).

The trial court record was also available to the district judge in appellant's habeas corpus hearing. It reflects a knowing, intelligent waiver of counsel by appellant (R. 12, 15, 16).

ARGUMENT

POINT I.

THE TRIAL COURT FULLY PROTECTED APPELLANT'S RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The sole contention raised by appellant in this appeal is that the trial court should have appointed counsel with-

out delay and that by not doing so, it deprived appellant of his rights as guaranteed by the Sixth Amendment to the United States Constitution.

Respondent does not disagree with the principles enunciated in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963) and *Coleman* v. *Alabama,* ..... U. S. ....., 90 S. Ct. 1999 (1970). The real issue involved in this case is one of appellant's waiver of his right to counsel.

Coleman v. *Alabama, supra,* held that Alabama's preliminary hearing is a critical stage of the accusatory process entitled a defendant to the assistance of counsel. Appellant herein was advised of his right to counsel at his preliminary hearing and waived that right. See, Minute Entry of September 3, 1968, Provo City Court Case No. 15901, as annexed to the Record between 28 and 29. Thus, the principles of *Coleman* v. *Alabama, supra,* were complied with in instant case.

This Court has held that a defendant must be informed of his right to counsel at every stage of the proceedings, and that there must be an intelligent waiver of counsel. *State* v. *Spiers,* 12 Utah 2d 14, 15, 16, 361 P. 2d 509 (1961). Also, it has been held that the burden rests on the defendant to show denial of his constitutional rights. *Id.* at 17, citing *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

In *McGuffey* v. *Turner,* 18 Utah 2d 354, 423 P. 2d 166 (1967), it was held that a petitioner for a writ of habeas corpus must show by clear and convincing proof that he did not competently and intelligently waive his right to

counsel. *Id.* at 358-359. A later case seems to have modified the "clear and convincing" rule of *McGuffey* to a simple "preponderance of the evidence" burden. *Maxwell* v. *Turner*, 20 Utah 2d 163, 165, 453 P. 2d 287 (1967).

Presumably, appellant failed to meet the burden of proof requirement and as a result, the district judge entered his order denying the writ (R. 21).

It has also been held that in habeas corpus cases, the reviewing court will give consideration to the advantaged position of the trial judge, and will not disturb his judgment unless it is clearly in error, *Application of Conde*, 10 Utah 2d 25, 347 P. 2d 859 (1959), or if such findings have any substantial support in the evidence, *Maxwell* v. *Turner*, *op. cit.*, at 165.

In *Velasquez* v. *Pratt*, 21 Utah 2d 229, 443 P. 2d 1020 (1968), this Court said that on appeal the record is surveyed in a light most favorable to the findings and judgment of the lower court and it will not reverse if there is a reasonable basis therein to support the trial court's decision. *Id.* at 232. See, *Brown* v. *Turner*, 21 Utah 2d 96, 440 P. 2d 968 (1968). Respondent submits that this case should be decided in the light of the *Velasquez* ruling.

Despite appellant's claims of undue influence and coercion, from the record it is clear that the trial court made every attempt to assure appellant's right to counsel. The record indicates four attempts by the court to provide the appellant with counsel (R. 12, 15, 16). The trial court admirably fulfilled its duty to provide counsel to assist

appellant in his defense. Also, the court advised appellant as to the consequences of a guilty plea, again offering the services of free counsel, which appellant declined (R. 16).

Having pleaded guilty, appellant also waived any non-jurisdictional defects in his case, to-wit: failure to have the assistance of counsel. See, *McMann* v. *Richardson*, ... U. S. ....., 90 S. Ct. 1441 (1970); *Lamb* v. *Beto*, 423 F. 2d 85 (5th Cir. 1970).

CONCLUSION

Respondent asks that the decision of the district court be affirmed, since the record clearly indicates a knowing, intelligent waiver of counsel.

Respectfully submitted,

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