1972

Wayne Sterling Pearson v. John W. Turner, Warden Utah State Prison : Brief of Respondent

In The Supreme Court of the State of Utah

WAYNE STERLING PEARSON,
Plaintiff-Appellant,

-vs-

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

Case No. 12748

BRIEF OF RESPONDENT

AN APPEAL FROM THE DEC
THE THIRD JUDICIAL DIST
IN AND FOR SALT LAKE COU
OF UTAH, THE HONORABLE
K. SNOW, PRESIDING, DENYI
LANT'S PETITION FOR A
HABEAS CORPUS.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Wayne Sterling Pearson, appeals from a decision of the Third Judicial District Court denying his petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

On June 18, 1971, a hearing was set and heard on a petition for a writ of habeas corpus before the Honorable Marcellus K. Snow in the Third Judicial District Court, Salt Lake County, alleging that Wayne Sterling Pearson's commitment to the Utah State

Prison was invalid. After hearing the matter, Judge Snow denied the petition.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the denial of the writ made by Judge Snow.

STATEMENT OF FACTS

On October 16, 1970, appellant was tried and convicted by a jury of the crimes of grand larceny and burglary in the second degree. The transcript of the trial was admitted into evidence in the habeas corpus hearing, necessitating reference in this brief to the trial transcript as "T" and the habeas corpus transcript as "H".

At the habeas corpus hearing, appellant testified that immediately following his conviction his attorney, Walter Ellett, told him that he would file a notice of appeal (H. 4). Mr. Ellett did not file the appeal, so appellant filed it himself and received confirmation (H. 5). Appellant testified that subsequently Mr. Ellett again met with him and informed him that "he felt that" three or four more charges" would probably "be filed against the petitioner, and if petitioner would dismiss his appeal all new charges would be dropped (H. 6, 7). Mr. Ellett also informed appellant that at a later time he could try to obtain release on a writ of habeas corpus (H. 7). Appellant testified that he felt

that if he were charged with the other offenses he would be convicted (H. 8, 9). He, therefore, dismissed his appeal (H. 8). The other charges were in fact dismissed (H. 8, 9-A).

The trial transcript revealed the following pertinent facts:

On the evening of April 18, 1970, between 8:00 and 8:30 p.m. a red Avis panel truck was observed stopping in front of the Richard R. Jensen residence located at 5202 East Moor Road, Salt Lake City, Utah (T. 21). Approximately 20 minutes later, a red Avis panel truck was observed on the lawn of the Jensen residence with the back of the truck near the doorway (T. 22). Two men were seen loading a large object into the back of the truck (T. 22). When observer's automobile lights were shown on the area, the truck hastily drove away with the two men running behind it (T. 22, 22). No license number was obtained (T. 24).

At approximately 10:00 p.m., the Jensen's returned home, found their front door open, and discovered their gold sofa, money, and a coin collection missing (T. 7, 10, 12). Mr. Jensen later identified his sofa that had been found in a home rented to a Mr. and Mrs. Bogue (later identified as appellant and his co-defendant (T. 6, 48).

Clyde Thomas Beard, an employee of the Great Salt Lake Transportation Company, testified that on April 18, 1970, before 5:30 p.m. he rented a red Avis

panel truck to Loretta K. Bogue (T. 27), and that business records indicated the truck was returned at 10:49 p.m. on the same date (T. 29, 30, 33). Appellant was identified as having dropped Mrs. Bogue off at the Avis rentals (T. 74). He later picked her up when the truck was returned (T. 62, 84). Mr. Beard testified that there were no other Avis licensees in the Salt Lake area (T. 31).

Mrs. Joan S. Huston testified that she rented, unfurnished, the home at 1248 North 1400 West to Mr. and Mrs. Wayne Bogue on February 28, 1970, and identified those persons as appellant and Loretta Bogue (T. 39, 40). She recalled that appellant paid the first month's rent in cash (T. 40), that the home was occupied until the middle of June (T. 43), and that other payments were made by postal money orders and she did not know who paid them (T. 43). She also testified that she visited the home approximately eight times and observed appellant at the home twice, and on the second occasion appellant was there alone and informed her that "his wife" was not at home (T. 41, 44). Mrs. Huston endeavored to collect the rent at that time, and appellant replied that he could not pay it then, that he would have his wife send the money order the following day (T. 43).

Denese Merrell testified that she lived next door to Mrs. Bogue and appellant and had been a babysitter for them about ten times (T. 34). She observed that appellant was present five or six of these occasions

dressed in coat and tie (T. 37), and noted that the children referred to him as their father (T. 36). Miss Merrell said she was paid by appellant on four of those occasions (T. 37). She noticed appellant coming and going from the house and occasionally saw his car parked there (T. 36). She also testified that on the 21st or 22nd of April she observed more furniture in the house including a gold couch (T. 35).

Detective Neil C. Boswell testified that after obtaining information from the Jensens, their neighbors, officials of Avis rental, and Denese Merrell (T. 46, 47) he obtained a search warrant, and proceeded to the Bogue residence (T. 47). Detective Boswell found Mrs. Bogue home with her children, observed a sofa matching the description in the warrant (T. 47), arrested her, and arranged for the evidence to be transported to the police department (T. 47). Mrs. Bogue was permitted to make telephone calls at her neighbor's home (T. 55), and Mrs. Bogue testified that one of those calls was to the residence of Mr. Gary Winger, where she left the following message for appellant: "Tell him they are coming to arrest me and I am going" (T. 67). Appellant arrived at the Bogue home shortly thereafter, and Detective Boswell informed him that he did not have a warrant for his arrest, but would seek one (T. 51) to which appellant replied "You have got nothing on me. This is not my house" (T. 51). Appellant was arrested the following day (T. 52).

ARGUMENT

POINT I

THE ISSUES WHICH PETITIONER RAISES AS TO SUFFICIENCY OF EVIDENCE ARE NOT JUSTICIABLE IN A HABEAS CORPUS PROCEEDING.

Appellant alleges he was denied due process of law because there was insufficient evidence to justify submitting his case to the jury, and insufficient evidence to support a verdict of guilty. These issues were known to the petitioner at the time of his commitment to the Utah State Prison, yet he discontinued taking his appeal on these issues (H. 8). According to Utah law, the proper procedure should have been to appeal his sentence.

Appellant is trying to use the writ of habeas corpus as a means of appellate review. This is not the purpose for which the writ was established. See *Bryant v. Turner,* 19 Utah 2d 284, 431 P. 2d 121 (1967), wherein it states:

> "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 exists 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,* or where some other such circumstance exists that it would be wholly unconscionable not to re-examine the conviction." (emphasis added). *Id.* at 286-287, 122-123.

When the same facts alleged in a petition for a writ of habeas corpus were known to the petitioner at the time of his judgment, his proper remedy is not a writ. In *Brown v. Turner,* 21 Utah 2d 96, 440 P. 2d 968 (1968), the petitioner contended that he was denied a right to counsel, and that he did not understand the consequences of his guilty plea. The Supreme Court of Utah held that petitioner was not entitled to the habeas corpus remedy:

> "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular proscribed procedure, or the judgment becomes final and is not subject to further attack, except in some such *unusual circumstances* as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and limitations of time specified therein would be rendered impotent." (emphasis added) *Id.* at 98-99, 969.

In Sullivan v. Turner, 22 Utah 2d 85, 448, P. 2d 907 (1968), the Utah Court held:

> "When an accused is convicted of a crime, our law requires that any claimed error or defect be corrected by a regular appeal within the time allowed by law, and if this is not done the judgment becomes final. It can then be subjected to collateral attack by an extraordinary writ only when the interests of justice so demand because of some *extraordinary circumstance* or exigency: e.g., lack of jurisdiction, mistaken identify, *where the requirements of law have been so ignored or distorted* That the accused has been deprived of 'due process of law' . . . ." (emphasis added) *Id.* at 87, 908.

The facts of the present case do not reveal any "unusual" or "extraordinary circumstances" in which legal principles were "ignored or distorted." The writ of habeas corpus, being an extraordinary writ, demands a showing of such before it can be granted. Insufficiency of evidence, is a commonly invoked argument used by defendants at the trial and appellate levels of the judicial structure, and is rarely extreme enough to serve as a ground in a habeas corpus proceeding.

This view was recently expressed by the United States Court of Appeals for the Tenth Circuit in *Mathis v. Colorado,* 425 F. 2d 1165 (10th Cir. 1070)

wherein it was held that evidence is subject to review on habeas corpus only if the record is totally devoid of such:

> "The sufficiency of the evidence to sustain a connection is not subject to federal habeas review . . . Unless the conviction is so totally devoid of evidentiary support as to raise a due process issue," *Edmondson v. Warden,* 35 F. 2d 608, 609 (4th Cir. 1965)." *Id.* at 1166.

The trial record in the present case contains ample evidence to connect petitioner with the crime and is far from being "totally devoid" of evidence.

Those state courts which have ruled on this issue uphold the stricter concept that evaluation of the evidence is not an issue to be asserted on habeas corpus. Oklahoma, for example, adheres to the following view:

> "On the question of the sufficiency of the evidence, this was a question that can only be reached by appeal, and habeas corpus is not a substitute for appeal." *Application of Lewis,* 339 P. 2d 799, 800 (Okla. Crim. 1959).

Also see *In re Lessard,* 62 Cal. 2d 497, 399 P. 2d 39, 42 Cal. Rptr. 583 (1965).

It should finally be noted that in every Utah case cited by appellant to show habeas corpus being used to review corrections, not one petition for the writ was

granted. These cases represented such grounds as coerced confession, right to counsel, failure to call witnesses and unlawful arrest, yet this Court did not find the circumstances of these cases "extraordinary" enough to grant the writ.

From the foregoing, it is reasonable to conclude that sufficiency of evidence is not an initiable issue in a habeas corpus proceedng, and since appellant failed to pursue his appeal, he should not be allowed to use a habeas corpus hearing as a substitute for appeal.

POINT II

IF THE SUFFICIENCY OF EVIDENCE ISSUE IS JUSTICIABLE, THE EVIDENCE WAS SUFFICIENT TO JUSTIFY SUBMITTED THE CASE TO THE JURY, AND TO SUPPORT THE JURY'S VERDICT OF GUILTY.

The rules governing the scope of review as to sufficiency of the evidence in a criminal case to sustain the verdict are well settled: It is for the jury to judge the credibility of witnesses and determine the facts; evidence will be reviewed in the light most favorable to the verdict; and if when so viewed it appears the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed. *State v. Ward,* 10 Utah 2d 34, 341 P. 2d 865 (1959).

Reasonable doubt is described as follows:

> " 'Reasonable doubt' is not a mere imaginary, captious, or a possible doubt, but a fair doubt, based upon reason and common sense, and growing out of the testimony of the case. It is such a doubt as will leave the juror's mind, after a careful examination of all the evidence, in such condition that he cannot say that he has an abiding conviction, to a moral certain, of the defendant's guilt." *State v. Taylor,* 21 Utah 2d 425, 429, 446 P. 2d 954, 956 (1968).

State v. Sullivan, 6 Utah 2d 110, 307 P. 2d 212 (1957), cert. denied, 355 U.S. 848, 2 L. Ed. 2d 57, 78 S. Ct. 74 (1957), further adds:

> ". . . proof beyond all peradventure of doubt could seldom be had. Nor does the law require it." *Id.* at 114, 215.

Due to the desirability of safeguarding the integrity of the jury system, the courts are reluctant to interfere with jury verdicts, and they refuse to do so when there is "any reasonable basis in evidence" to justify the decision. See *Brunson v. Strong,* 17 Utah 2d 364, 368, 412 P. 2d 451, 453 (1966). "Reasonable basis in evidence" or "substantial evidence" has been described as evidence from which, together with fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did. See *Gordon v.*

Provo City, 15 Utah 2d 287, 290, 391 P. 2d 430, 433 (1964).

The evidence in the trial record, viewed under the above standards, is more than adequate to justify the jury's verdict of guilty. The record disclosed that the petitioner dropped Lorretta Bogue off at Avis Rentals to rent a panel truck (T. 74), and picked her up when the truck was returned (T. 62, 84). The same truck was observed on the front lawn of the home that was burglarized, and two men were seen loading a "large object" into the back of the truck (T. 22). *The burglarized items were subsequently found in a home rented in the name of petitioner.* (T. 6, 48). Witnesses testified that petitioner was often seen at the home where the incriminating evidence was found and that the children in the home referred to him as "father" (T. 36).

Respondent submits that the above facts provide a "reasonable basis in evidence" to support the jury's decision.

Petitioner was convicted of burglary in the second degree and grand larceny under Utah Code Ann. §§ 76-9-3, 76-38-1, 76-38-4 (1953).

The only elements the state need establish for the crime of larceny are recently stolen property in the possession of the defendant, and an unsatisfactory explanation of the possession. See *State v. Allred,* 16 Utah 2d 41, 43-44, 395 P. 2d 535, 537 (1964).

In *State v. Gellatly,* 22 Utah 2d 149, 151, 449 P. 2d 993, 995 (1969), the Utah Supreme Court stresses that under the possession of stolen property provision (Utah Code Ann. § 76-38-1, supra) the state need not present direct proof identifying the defendant as the thief or directly connecting him with the felonious taking or asporation since the legislature has deemed possession of recently stolen property without a satisfactory explanation as being sufficient to support the conviction.

The elements of possession without satisfactory explanation may also be used to prove the commission of the crime of burglary. In *State v. Thomas,* 121 Utah 639, 641, 244 P. 2d 653, 654 (1952), the court held that possession of articles recently stolen, when coupled with circumstances inconsistent with innocence, such as hiding or concealing them, or making a false, improbable, or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the offense of burglary and justify his conviction of it.

It is apparent that all the essential elements of the crimes of grand larceny and burglary are present in this case. The evidence discloses sufficient circumstances to show that personal property was taken from the Jensen home on the night of April 18, 1970 (T. 21, 22, 23). The property was later found in a house rented by petitioner (T. 6, 48). The only explanation made by the defendant concerning his possession was the following: "You have got nothing on me. This is not my house." (T. 51). Possession, according to the court in

State v. Butterfield, 70 Utah 529, 533, 261 P. 804, 805 (1948), must be personal, conscious, and exclusive. Respondent contends that petitioner was in the presence of the stolen goods, that he was conscious of their presence, he exercised dominion over them, and that he failed to make a satisfactory explanation of his possession. Utah law on larceny demands a satisfactory explanation of possession. We, therefore, submit that defendant refused or failed to meet the requirements of the law to establish a satisfactory explanation of his possession.

Finally, petitioner has contended that the evidence was insufficient to justify submitting the case to the jury. We submit that the rules expressed in *State v. Thatcher,* 108 Utah 63, 157 P. 2d 258 (1945), are controlling on this issue. *Thatcher,* supra, held that when different reasonable inferences can be drawn from the evidence, the question is one exclusively within the province of the jury; that it is not the function of the court to substitute its judgment on questions of fact for that of the jury. Justice Wolfe, in his concurring opinion in *Thatcher,* supra, stated the following:

> "The rule which must be applied upon a motion to dismiss a criminal case is that all reasonable inferences are to be taken in favor of the state, and only if the record itself reveals that no reasonable man could draw an inference of guilt therefrom is the trial court

justified in taking the case from the jury. *Id.* at 74, 263.

The record clearly displays sufficent evidence, which raises reasonable inferences to justify submitting the case to the jury.

For the above reasons, we submit that the evidence was sufficient to justify submitting the case to the jury, and to support the jury's verdict of guilty.

POINT III

APPELLANT WITHDREW HIS APPEAL VOLUNTARILY AND WITH FULL KNOWLEDGE OF THE CONSEQUENCES.

The case of *Hines v. Baker,* 422 F. 2d 1002 (10th Cir. 1970), is factually analogous to the present case. The petitioner argued that he had made no intelligent and knowing waiver of his right to appeal. He had been convicted of first degree murder, and had received a sentence of life imprisonment. He and his attorney agreed that no appeal should be taken due to the concern they had over a possible death sentence if a reversal and new trial were obtained. The Tenth Circuit Court of Appeals ruled that if a petitioner decides to forego his appeal after discussion with competent counsel to escape the possibility of other punishment there is no "constitutional infringement" in denying the writ of habeas corpus on those grounds.

In the present case, petitioner and his attorney discussed whether an appeal should be taken. After considering the possibility of having other charges against him dropped, the petitioner knowingly and voluntarily decided not to pursue his appeal.

In Utah there is a presumption that pleas of guilty and waivers counsel are voluntarily and knowingly made, and a defendant who attacks this presumption must overcome it by showing clearly that he was prejudiced by a denial of his constitutional rights. See *Mayne v. Turner,* 24 Utah 2d 195, 198, 468 P. 2d 369, 371 (1970). We contend that this presumption applies to one who foregoes appealing his conviction, and that petitioner has failed to overcome this presumption.

Appellant further alleges that the offer to drop other charges pending against him if he dismissed his appeal amounts to coercion. This argument is totally without support. The courts in this country recognize "bargaining" as an acceptable procedure. It is common practice, for example, for prosecuting attorneys to agree to dismiss or not file additional charges against a defendant in return for a plea of guilty to certain charges. See *Smith v. People,* 162 Colo. 558, 565, 428 P. 2d 69, 73 (1967). The Supreme Court of Utah recently discussed the coercion issue in two cases that involved "bargaining":

> ". . . the mere fact that a defendant, against whom there are multiple charges pend-

ing, pleads guilty to one of them on the condition that the others be dropped certainly does not in and of itself compel a finding of coercion." *Strong v. Turner,* 22 Utah 2d 294, 296, 452 P. 2d 323, 324 (1969).

"To us the evidence of the proceedings at the time of plea is clear that [defendant] was adequately represented by counsel and that he knowingly, understandingly, and voluntarily entered the plea of guilty. True it is that one of his motives was to free his wife from the felony charge, but a bargain to that effect with the district attorney does not necessarily amount to coercion." *Combs v. Turner,* 25 Utah 2d 397, 399, 483 P. 2d 437, 438 (1971).

The record shows that no other charges have been filed against appellant. Therefore, appellant was in no way prejudiced in not taking his appeal. We, therefore, respectfully submit that there is nothing in the record to justify a conclusion that the will of the plaintiff was overcome, or that he did not rationally weigh the choices before him and choose the one which he thought was most beneficial to his interest.

CONCLUSION

The State submits that sufficiency of evidence is not a justiciable issue in a habeas corpus proceeding; that if it were justiciable, the evidence was sufficient

to submit the case to the jury and to support the jury's verdict of guilty; and that appellant knowingly and voluntarily withdrew his appeal.

Respectfully submitted,

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