1972

Milton Curtis Zumbrunnen v. John W. Turner, Warden Utah State Prison : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON CURTIS ZUM

vs.

JOHN W. TURNER,
Utah State Prison,

APPEAL FROM
THIRD JUDICIAL
SALT LAKE COUNTY
HONORABLE

DAVID P. RHODE
231 East Fourth South
Salt Lake City, Utah 84111
Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS – Continued

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

MILTON CURTIS ZUMBRUNNEN,

Plaintiff-Appellant,

vs.

CASE NO. 12754

JOHN W. TURNER, Warden, Utah State Prison,

Defendant-Respondent.

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Milton Curtis Zumbrunnen, appeals from a decision of the Third Judicial District Court denying his release from the Utah State Prison upon a petition for writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

On September 21, 1971, Milton Curtis Zumbrunnen filed a petition for a writ of habeas corpus in the Third Judicial District Court, Salt Lake County, alleging that his commitment to the Utah State Prison was invalid. An amended petition was filed on November 12, 1971. The matter came on for hearing on November 18, 1971, before Judge Ernest F. Baldwin, Jr., who denied the petition on November 29, 1971.

RELIEF SOUGHT ON APPEAL

Respondent, John W. Turner, requests that the judgment and order of the Court below be affirmed.

STATEMENT OF FACTS

On April 5, 1971, in the District Court of Wasatch County, State of Utah, appellant pleaded guilty to the charge of second degree burglary and two other counts of second degree burglary were dismissed (R. 27, 28, Exhibit 1-P, pp.5,7). When appellant pleaded guilty to the second degree burglary charge, he stated that no one had applied any pressure to get him to plead guilty (Exhibit 1-P, p.2). He stated, further, that no promises had been made to him except that two other counts of burglary would be dismissed if he pleaded guilty (Exhibit 1-P, p.4). The court asked appellant if he understood that he had the right to a trial by jury (Exhibit 1-P, p.1). He was told on two other occasions that his guilty plea would take the place of a trial by jury (Exhibit 1-P, pp.2,7). The court asked appellant if he wanted to change his plea from his previous not guilty plea (Exhibit 1-P, pp.4,5). Appellant was asked if he knew what he was charged with and the charge was explained to him by the court (Exhibit 1-P, pp.3,4). Appellant was asked if he had discussed the matter of his plea thoroughly with his attorney and he stated: "Yes, we have." (Exhibit 1-P,p.3). Appellant was then asked his age and whether he entered the house with intent to steal, to which he answered by describing the events that happened during the burglary (Exhibit 1-P, pp.4,5).

At the habeas corpus hearing on November 18,1971, appellant was represented by counsel, James R. Hall (R.27).

Mr. Hall testified that appellant and four other defendants had asked him to represent them in connection with the burglary charge (R.30). Mr. Hall also testified that he had numerous discussions with the defendant regarding his rights and plea of guilty (R.28,29). Appellant also testified at the habeas corpus hearing that he and the codefendants had asked Mr. Hall to represent them (R.32). Appellant further testified (1) that he understood that two charges of burglary would be dropped if he pleaded guilty to one, and (2) that he would be "sentenced to the same thing" if he pleaded guilty as he would if he were convicted by a jury (R.42).

ARGUMENT

POINT I

THE COURT BELOW PROPERLY DENIED APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE APPELLANT'S GUILTY PLEA WAS INTELLIGENTLY AND VOLUNTARILY ENTERED.

The petitioner relies on *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) to require that constitutional rights must be individually described and explained before an accused may waive his rights. Respondent contends that this is not required to waive constitutional rights. The case involved a robbery wherein the defendant pleaded guilty to a robbery charge. In discussing the rights involved in a waiver when a guilty plea is entered, there are three constitutional rights that are present. First, there is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment. Second is the right to trial by jury. Third is the right to confront one's accusers. In

order to waive these rights, a guilty plea must be voluntarily and intelligently made. The problem is to determine from the record in the present case whether the guilty plea was voluntary and intelligent.

In deciding whether a plea is voluntary, it is proper to consider all the circumstances. *Boykin, supra,* was not the only case to discuss these constitutional rights. In *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) the Supreme Court established the test when it stated:

> "The voluntariness of Brady's plea can be determined only by considering all the relevant circumstances surrounding it." 397 U.S. at 749.

The *Brady* Court in its opinion discussed the requirement that the guilty plea be intelligently made. In discussing the case, the court said:

> "The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental facilities . . . Brady was aware of precisely what he was doing." 497 U.S. at 749.

Boykin, supra, did not change the law concerning a guilty plea but as the court noted in footnote 4 of *Brady*:

> "The new element added in Boykin was the requirement that a defendant who pleaded guilty entered his plea understandingly and voluntarily." 497 U.S. at 747.

In *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160,

27 L.Ed.2d 162 (1970), the Supreme Court again stated this test:

> "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 164.

The *Alford* court went on to say:

> "That he (Alford) would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." 400 U.S. at 31.

The Utah Supreme Court has previously decided that a desire to free a codefendant represented by the same counsel, from a felony charge does not make a guilty plea involuntary. This Court decided in *Combs v. Turner,* 25 Utah 2d 397, 483 P.2d 437 (1971) that the defendant, Combs, voluntarily and understandingly entered a plea of guilty where it was agreed that charges against his wife, who was represented by the same counsel, would be dismissed after his plea. The *Combs* court stated:

> "To us the evidence at the time of plea is clear that Mr. Combs 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." 483 P.2d at 438. See also *McGuffey v. Turner,* 18 Utah 2d 354, 423 P.2d 166 (1967).

In *McGuffey v. Turner,* 267 F.Supp. 136 (1967),

Judge Christensen concurred with this court's decision in *McGuffey v. Turner,* 18 Utah 2d 354, 423 P.2d 166 (1967). Both cases involved the same parties and reviewed the same guilty plea of McGuffey and held that it was voluntarily and intelligently entered. McGuffey waived his right to counsel and pleaded guilty to the crime of robbery. In the Federal District Court Judge Christensen stated:

> "One properly advised may enter a plea of guilty in the belief that a favorable result to others may be a product of the plea without throwing into question the validity of the plea." 467 F.Supp. at 140.

Thus, the Court found the following criteria relevant to the decision:

> "I find in this respect that prior to the entry of his plea he (McGuffey) was told that if he plead guilty the charge against his wife probably would be dismissed, that this was a development genuinely desired by the petitioner and that it was a consideration which he had in mind when he entered the plea. I further, find, however, that there were considerations which led to the entry of the petitioner's plea of guilty including his own belief that he was guilty, a realization that it would be futile to contest the matter, and his desire to get the proceedings over with by reason of his hoped for probation." 467 F.Supp. at 141.

In the present case, the court below inquired thoroughly into the motives of appellant for changing his plea. The court asked appellant if he had discussed his plea with his counsel (E. 1-P, p.3). Mr. Hall testified that he had discussed the matter numerous times with appellant (R.28,29). The court below asked whether anyone forced appellant to change his plea and explained the crime for which he was charged (Exhibit 1-P, p.7). Appellant was advised that he

had a right to a jury trial yet entered a plea of guilty (Exhibit 1-P, p. 5,7). The record clearly shows that Zumbrunnen was aware of precisely what he was doing when he pleaded guilty. The record in this case meets the test of *Boykin, Brady,* and *Alford, supra,* by showing that Zumbrunnen made an intelligent and voluntary choice, with the advice of competent counsel, based on his expressed reasons that he desired to be incarcerated in Utah rather than Minnesota, and two charges of burglary would be dismissed, and that a favorable result to others would be a product of his plea (R.28, 41). Therefore, the judgment below should be affirmed.

POINT II

THE COURT BELOW PROPERLY DENIED APPELLANT'S PETITION FOR HABEAS CORPUS BECAUSE JOINT REPRESENTATION OF CODEFENDANTS BY HIS COUNSEL DID NOT DENY APPELLANT ADEQUATE AND EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent contends that the appellant received adequate and effective assistance of counsel. He further contends that joint representation of codefendants by appellant's counsel did not result in a conflict of interest and, therefore, his guilty plea was voluntarily understandingly and intelligently entered. Thus, the judgment below should be affirmed.

Contrary to the position taken by appellant, it is recognized that common representation of criminal defendants by a single counsel is permissible. In *United States* ex. rel. *Small v. Rundle,* 442 F. 2d 235 (3rd Cir. 1971) the court

upheld this practice where petitioner and a codefendant were simultaneously represented by a single attorney in a prosecution for assault, battery, rape, and other crimes. The court said that:

> "It merits statement at the outset that dual representation of criminal defendants tried together is not necessarily a deprivation of the Sixth Amendment right to effective assistance of counsel." 442 F. 2d at 237.

While the United States Supreme Court has made it clear that an attorney is not to represent codefendants where a conflict of interest actually exists in *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. ed 680 (1941), respondent contends that *Glasser, supra,* does not control the case before this court. In *Glasser, supra,* the conflict held to prejudice the defendant occurred during the trial. *Glasser's* counsel was found to have been impaired in his cross examination of witnesses because of his dual representation. This situation did not arise in appellant's case. Appellant avoided any conflict at trial by pleading guilty to the burglary charge. Any advice given to appellant by Mr. Hall could be based on an objective evaluation of appellant's defenses and probability of being released without compromising Mr. Hall's duty to the codefendants.

The mere existence of a potential conflict does not require this court to set aside appellant's guilty plea. In *United States v. Williams*, 429 F. 2d 158 (8th Cir. 1970), Williams appealed from a conviction of transporting a stolen motor vehicle. Williams and a codefendant plead guilty to the crime. The court held that it was not reversible error for the trial court to deny a request by Williams' attorney that separate counsel be appointed. The Williams' court

said:

> "In short, we are faced in this case with but a bald assertion and conclusory statement made by court appointed counsel at arraignment, that a conflict of interest between two codefendants was a possibility in futuro. From this speculative assertion, appellant maintains that the district court committed prejudicial error in peremptorily denying appointment of separate counsel without 'inform (ing) the defendants of their right to have individual counsel, or indicat (ing) to defendants the dangers and problems existing for two defendants who are represented by the same attorney.' We cannot ascribe reversible error to the district court's action." 429 F. 2d at 160.

The Williams' court then stated:

> "As shown above, there is nothing pointing to an actual or a substantial possibility of a conflict of interest between appellant and his codefendant, Brinkley. We need go no further. A reversal here would be tantamount to holding that joint representation is illegal per se, a result not mandated by the Sixth Amendment, *Glasser,* or its progeny." 429 F. 2d at 161.

This court has already faced the issue raised by appellant that dual representation of codefendant's denies a defendant the effective assistance of counsel. See *Combs v. Turner,* 25 U. 2d 397, 483 P. 2d 437 (1971) discussed in Point I, supra, and decided no conflict resulted.

In *State v. Bible,* 77 Wash. 2d 69, 459, P. 2d 646 (1969), the court held defendants right to effective counsel was not denied. The *Bible* court stated:

> "Representation of defendants by the same attorney who represented his codefendant did not deny the defendant benefit of effective counsel where de-

> fendant never asked for separate counsel, never indicated in what respect his interests were in conflict with those of codefendant, and never registered dissatisfaction with his counsel." 459 P. 2d at 647.

Appellant relies on *Lollar v. United States,* 376 F. 2d 243, (D.C. Cir. 1967) as prescribing the test to be used in deciding that some prejudice resulted from joint representation by Mr. Hall. (Appellant's Brief p. 13). Other courts have refused to follow *Lollar* and require that an actual conflict resulting in prejudice must exist. In *Carlson v. Nelson,* 443 F. 2d 21 (9th Cir. 1971) the court said:

> "The (Lollar) test does not apply in the Ninth Circuit. In this Circuit counsel may represent more than one defendant if the interests of the latter are not in conflict." 443 F. 2d at 22.

The *Carlson* court then said:

> "This is not to be decided on the basis of speculation, but by a considered determination of whether, in fact, a conflict of interest existed." 443 F. 2d at 22.

Fryor v. United States, 404 F. 2d 1071 (10th Cir. 1968) appear to require that an actual conflict exists as well. The Fryor court stated:

> "It has been clear since *Glasser* (supra), that the Sixth Amendment is not violated by joint representation of codefendants unless a conflict of interest or prejudice results from such procedure." 404 F. 2d at 1073.

The record indicates that no conflict of interest between appellant and his codefendants existed. Mr. Hall advised appellant of the probability of conviction and incarceration. (R. 28, 29). The record shows that appellant was asked nu-

merous times if it were his desire to plead guilty. (Exhibit 1-P, p. 2, 4, 5, 7). Appellant requested that Mr. Hall represent him. (R.30). Two other charges of burglary against the appellant were dismissed (R.28). These facts indicate that appellant had ample opportunity to decide between alternate courses of action, that he made a voluntary and intelligent choice between alternatives with the advice of competent counsel and that appellant knew precisely what he was doing when he plead guilty.

CONCLUSION

The respondent submits that no conflict of interest existed between appellant and his codefendants; that appellant was not prejudiced by Mr. Hall's dual representation of codefendants; that appellant has failed to give reasons sufficient to warrant this his guilty plea be set aside.

For the reasons and analysis above stated, this appeal should not be granted and the judgment and order of the court below should be affirmed.

Respectfully submitted

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

LARRY V. LUNT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent