

1972

James Richard Moore v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

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In The Supreme Court of the State of Utah

JAMES RICHARD MOORE,

Plaintiff-Appellant

-vs-

JOHN W. TURNER, WARDEN,
UTAH STATE PRISON,

Defendant-Respondent

BRIEF OF APPEAL

Appeal from the denial of appeal from a
Writ of Habeas Corpus in the
the Honorable Joseph G. Jeppesen

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In The Supreme Court of the State of Utah

JAMES RICHARD MOORE,

Plaintiff-Appellant,

-vs-

JOHN W. TURNER, WARDEN,
UTAH STATE PRISON,

Defendant-Respondent.

} Case No.
12797

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, James Richard Moore, appeals from the denial of his petition for writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

Appellant's petition for writ of habeas corpus was heard and denied on January 20, 1972 by the Honorable Joseph G. Jeppson, Judge of the Third District Court, in and for Salt Lake County.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the denial of his petition for writ of habeas corpus. Counsel on appeal re-

quests permission to withdraw from the appeal and submits this brief in compliance with *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF FACTS

The testimony at appellant's habeas corpus hearing reveals the following facts.

In the early morning of May 5, 1971, appellant was found by police inside the Eagles Lodge in Salt Lake County. Appellant had been without sleep for four or five days (R. 33) and was under the influence of amphetamines, LSD and barbiturates at the time of his apprehension. (R. 32, 51, 53, 62, 63). The fact of appellant's use of drugs at this time was substantiated by testimony of Deputy Sheriff Grant Peterson to the effect that appellant had drugs in his possession immediately following his apprehension. (R. 68)

It was apparently the intent of appellant's co-defendant, Allen Weideman to burglarize the lodge, but appellant had no knowledge of this and had merely followed Weideman into the lodge just prior to the arrival of police. (R. 57, 58).

Appellant was charged with second degree burglary, grand larceny and habitual criminal. The habitual criminal charge was dismissed conditional on his plea to the other two charges. (R. 34).

Appellant had briefly discussed his case with ap-

pointed counsel, Margret Taylor, prior to the entrance of his guilty plea (R. 31, 47, 48) but Mrs. Taylor apparently did not consult the co-defendant regarding the influence of drugs on appellant or investigate the extent of appellant's involvement in entering the lodge. (R. 48).

ARGUMENT

POINT I

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY REASON OF COUNSEL'S ADVICE TO ENTER A GUILTY PLEA WITHOUT EVALUATING THE PROBATE RESULT AT TRIAL.

Appellant was apprehended inside the lodge (R. 65) and it would therefore seem that the asportation element of larceny was missing from the State's case. The strength of the State's case would therefore rest on the burglary count and proof of appellant's intent in entering the lodge. Since appellant was under the influence of drugs and did not know of his co-defendant's intent in entering the lodge there was an absence of the specific intent requirement for burglary.

A defendant is denied effective assistance of counsel where appointed counsel encourages a guilty plea without evaluating the chances of prevailing at trial. *Smith v. Colson*, 438 F.2d 1075, 1081 (CA 5, 1971).

It would appear from the testimony in the hearing below that if appellant's appointed counsel had adequately investigated the factual circumstances she would have concluded appellant's culpability did not extend beyond the misdemeanor of unlawful entry under Section 76-9-9, Utah Code Annotated, (1953) as amended. The failure of counsel to investigate is particularly prejudicial in light of appellant's inability to inform counsel of much more than the fact that he had been picked up and arrested. (R. 31).

POINT II

APPELLANT'S PLEA OF GUILTY IS INVALID BY REASON OF THE FACT IT WAS ENTERED INVOLUNTARY, UNKNOWINGLY AND UNINTELLIGENTLY.

The argument presented in Point I, *supra*, illustrates that appellant entered his guilty plea out of ignorance of weaknesses in the State's case. Such a plea cannot be considered to be knowing and intelligent.

Appellant's plea was also involuntary in that he was acting upon advice of counsel who had not adequately investigated potential defenses.

A plea entered under such circumstances is not an intentional relinquishment of a known right and is therefore void as violative of due process. (See *Boykin v. Alabama*, 395 U.S. 238, 23 n.5. (1969)).

CONCLUSION

The testimony at appellant's habeas corpus hearing indicates that appellant was denied effective assistance of counsel and was denied due process by the entrance of his guilty plea. This court therefore has a basis for reversing the lower court and remanding the case with instruction to grant appellant's petition for habeas corpus.

REQUEST FOR WITHDRAWAL OF COUNSEL

The foregoing brief discusses the only issues presentable on appeal, and counsel for appellant respectfully requests permission to withdraw, believing this appeal is frivolous.

Pursuant to *Anders v. California, supra*, appellant should be allowed time to raise any additional points pro se, and then this court can either dismiss the appeal as being without merit or proceed to a decision on the merits.

RAYMOND S. SHUEY

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with *Anders v. California, supra*, I have caused to be mailed a copy of the foregoing brief to the appellant, James Richard Moore,

P.O. Box 250, Draper, Utah 84020, this day
of January, 1973.

RAYMOND S. SHUEY