

1973

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

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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 RESPONDENT

APPEAL FROM THE DENIAL OF APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT, COUNTY OF KANE AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH G. JEFFERSON, JUDGE, PRESIDING.

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**BRIEF OF RESPONDENT**

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**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 Judicial District Court, in and for Salt Lake County.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the denial of appellant's petition for writ of habeas corpus.

## STATEMENT OF FACTS

In the early morning of May 5, 1971, appellant, James Richard Moore, was found by police inside the Eagles Lodge in Salt Lake County, State of Utah. The evidence indicates that appellant had drugs in his possession immediately following his apprehension (R. 68). Although there was some testimony in the habeas corpus proceeding to the affect that appellant appeared to be under the influence of drugs, Deputy Peterson testified that appellant appeared in all respects normal upon his apprehension (R. 42-45).

A complaint was subsequently issued on May 17, 1971, charging appellant with second degree burglary, grand larceny and being in the status of an habitual criminal. The information was amended to drop the habitual criminal charge (R. 34). On Friday, July 2, 1971, appellant appeared before the Honorable Gordon R. Hall in the District Court of the Third Judicial District, Salt Lake County, State of Utah. Appellant pleaded guilty to the charges of burglary and grand larceny and was sentenced to serve in the Utah State Prison the indetermi-

ate sentence provided by law, the two sentences to run concurrently.

## ARGUMENT

### POINT I.

THE TRANSCRIPT OF THE ARRAIGNMENT AND SENTENCING COMPEL THE CONCLUSION THAT APPELLANT'S PLEA OF GUILTY WAS INTELLIGENTLY AND VOLUNTARILY ENTERED.

Appellant, James Richard Moore, was charged with the crime of burglary in the second degree and grand larceny in violation of Utah Code Ann. §§ 76-9-3 and 76-38-1 and 4 (1953), to-wit:

### COUNT I

"That on or about the 15th day of May, 1971, in Salt Lake County, State of Utah, the said James Richard Moore entered the building of Eagles Lodge, a corporation, with intent to commit larceny therein;

### COUNT II

"That on or about the 15th day of May, 1971, in Salt Lake County, State of Utah, the said James Richard Moore stole personal property having a value in excess of \$50.00 lawful money of the United States, from Eagles Lodge, a corporation" (T. 3, 4).

In the hearing upon arraignment before the Honor-

able Gordon R. Hall, the information containing the charges above quoted was read to appellant. The record affirmatively shows that Judge Hall meticulously apprised appellant of his right to trial by jury, his right to remain silent, and his right to confrontation of witnesses (T. 4) pursuant to the standards established in *Boykin v. Alabama*, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 273 (1969). The record also reveals appellant understood that a plea of guilty takes the place of a trial where the elements of the crime would have to be proved (T. 4); that he had conferred with counsel on repeated occasions before entering his plea (T. 5); and that he desired of his own free will to enter a plea of guilty and in fact did enter such plea (T. 6, 7).

Recently, the Tenth Circuit handed down a decision which greatly strengthens the effect Judge Hall's appraisal should have upon the issue of voluntariness. *Stinson v. Turner*, No. 71-1556 (10th Cir. February 27, 1973) involved a habeas corpus proceeding wherein petitioner-appellant, imprisoned on the basis of his plea of guilty to a grand larceny charge, argued this his plea was invalid because the record failed to show affirmatively that he intelligently and voluntarily waived his privilege against self-incrimination. The Court held the plea valid pursuant to *Boykin*, notwithstanding a finding that the record showed no reference to the privilege against self-incrimination. It stated:

"In *Brady v. U. S.*, 397 U. S. 742, the court stated that '[t]he new element added in *Boykin*

was the requirement that the record must affirmatively show that a defendant who pleaded guilty entered his plea understandingly and voluntarily' . . . we feel that *Boykin* imposed only that requirement of an affirmative record showing of a voluntary and intelligent plea . . . The main purpose is . . . to make sure [the accused] has full understanding of what the plea connotes and of its consequences.' " *Id.* at 6.

The Court's ruling that the appellant fully understood the consequences of his plea despite the trial court's failure to mention the privilege against self-incrimination was based upon an enumeration of rights and privileges appearing in the record substantially identical to those listed by Judge Hall referred to previously. The added element in the instant case, that the record affirmatively showed reference to and subsequent waiver of the right to remain silent (T. 4), renders appellant Moore's guilty plea *ipso facto* valid.

The foregoing amply demonstrates that appellant's guilty plea was intelligently and knowingly entered upon the advise of counsel. In *United States, ex rel. Sadler v. Commonwealth of Pennsylvania*, 434 F. 2d 997 (3d Cir. 1970), a habeas corpus proceeding, the petitioner-appellant claimed that his plea of guilty was invalid because he was denied adequate assistance of counsel. The court ruled that appellant's plea of guilty entered with the advice of counsel is presumptively valid and the burden is on the habeas corpus applicant to show that the plea was not knowingly and voluntarily made. The court found



that the petitioner had not met that burden. The record in the instant case compels a similar finding by the court.

The *Sadler* court further approved the holding in *Moore v. United States*, 432 F. 2d 730 (3d Cir. 1970) which held that the burden of proving inadequate assistance of counsel is also placed upon the habeas corpus applicant. In the instant case, the record clearly indicates that appellant was represented by legal counsel who met with appellant on several occasions before the plea was entered, who was adequately familiar with the circumstances of appellant's arrest, and who deemed it tactically advisable to plead to the burglary and larceny counts so that the habitual criminal charge would be dropped (R. 4-5, 14-15, 22). Nothing in the record would indicate that the facts are otherwise. Any claim that appellant was denied effective assistance of counsel is entirely without merit.

It is manifest that the trial court had ample evidence upon which to base its finding that appellant's guilty plea was intelligently and voluntarily entered. In *Seibold v. Turner*, 20 Utah 2d 165, 435 P. 2d 289 (1967), also a habeas corpus proceeding, the court held that the appellant had entered a guilty plea voluntarily after consultation and advice from counsel. The court added the following:

"Those findings were amply supported by the evidence and it is our duty to sustain the trial court when his rulings are based upon competent evidence." *Id.* at 169. See also *Farrell v. Turner*, 25 Utah 2d 351, 355, 482 P. 2d 117 (1971).

This Court should likewise sustain the finding of the lower court that appellant's plea was intelligently and voluntarily entered.

### CONCLUSION

For the reasons above stated, respondent respectfully submits that the judgment and order of the court below be affirmed.

Respectfully submitted,

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