1972

Walter L. Dillingham v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ALTER L. DILLINGHAM,
Plaintiff-Appellant,

vs.

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

Case No. 12835

BRIEF OF RESPONDENT

AN APPEAL FROM THE JUDGMENT AND DER OF THE THIRD JUDICIAL DISTRICT URT, HONORABLE JOSEPH G. JEPPSON, PRE-DING, DENYING APPELLANT'S WRIT OF BEAS CORPUS.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment and order of the Third Judicial District Court, Honorable Joseph G. Jeppson, presiding, denying appellant's writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

Appellant's writ of habeas corpus was denied pursuant to findings of fact and conclusions of law made after a hearing on appellant's petition.

RELIEF SOUGHT ON APPEAL

Respondent submits that the denial of appellant's petition for writ of habeas corpus in the Third District Court should be affirmed.

STATEMENT OF FACTS

Walter Louis Dillingham was sentenced to the Utah State Prison on November 9, 1964, after pleading guilty to a charge of grand larceny (R. 41, 44). He was represented by Blaine Hofeling, who conferred with him prior to the preliminary hearing, was present at the preliminary hearing (R. 48-49) and was also present when the guilty plea was entered on the charge of grand larceny (R. 49). On his pleading guilty to grand larceny a burglary charge was dropped. A transcript of these proceedings was unavailable because of the death of the judge and court reporter and inability of any other reporter to read the notes (R. 15-16, 52).

Mr. Dillingham filed no appeal from his sentence and served over six years before filing a writ of habeas corpus in the Third District Court on November 26, 1971. The court refused to grant the writ. His claim for relief on appeal is twofold: 1. He claims his counsel was incompetent because he did not question him about evidence allegedly seized illegally (R. 41); 2. He claims his plea of guilty to the grand larceny charge was produced by "mental pressure" surrounding his entry into court (R. 51).

ARGUMENT

POINT I.

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE PETITIONER WAS ADEQUATELY REPRESENTED BY COMPETENT COUNSEL.

The test for competency of counsel, as established by this court, is fulfilled when an attorney manifests real concern for the interests of his client so that his representation is not tantamount to a sham or pretense of an appearance in the record. *Alires* v. *Turner*, 22 Utah 2d 118, 449 P. 2d 241 (1969). *Andreason* v. *Turner*, 27 Utah 2d 182, 493 P. 2d 1278 (1972). Actions of counsel which amount to "an oversight or a matter of strategy" are not grounds for relief on habeas corpus. *Andreason, supra.* And a competent counsel is presumed to have satisfied his burden of properly advising his client:

> "Where a person is represented by a member of the bar in good standing; and where, insofar as the record discloses, he represented the accused in a diligent manner, it seems fair to assume that he similarly fulfilled his duties in other respects and advised him concerning his rights." *Johnson* v. *Turner*, 24 Utah 2d 439, 473 P. 2d 901 (1970).

Thus, where the alleged act of incompetence "is something that ordinarily does not take place in court, and the record is silent as to whether or not an attorney did advise his client in that regard," there must be an "affirmative showing" in the record that such act of incompetence actually occurred. *Id.* at 903.

The petitioner in a habeas corpus hearing carries the burden of "proving the grounds upon which he relies for his release by evidence that is clear and convincing." *McGuffey* v. *Turner*, 18 Utah 2d 354, 423 P. 2d 166 (1967).

Appellant in this case claims that he was not adequately represented by counsel. This stems from the allegation that his counsel did not question him about the allegedly illegal circumstances surrounding his arrest, seizure of incriminating evidence and statements made to police without the benefit of counsel (R. 41). However, the mere allegation that counsel was inadequate or incompetent, unsupported by clear and convincing evidence, does not overcome his burden. There is no affirmative showing in this record that his counsel neglected to question him concerning the alleged illegal search, seizure and arrest. He has made only a naked assertion of incompetence.

The record indicates that appellant's attorney conferred with him on several occasions: sometime prior to the preliminary hearing (R. 41 and 44); at the preliminary hearing (R. 48-49); and at the entry of the guilty plea to grand larceny (R. 49). Having discussed the case with appellant and having participated in the preliminary hearing, counsel was certainly aware of the nature of all the evidence against him. The fact that a burglary charge was dropped indicates activity by counsel on behalf of his client in the form of plea bargaining. Not raising these issues as defenses was undoubtedly a matter of strategy,

or at worst, an oversight. Neither explanation establishes incompetency of counsel, justifying the release on habeas corpus. The record certainly indicates no sham, pretense of an appearance in the record, or lack of real concern for the client, and the district court was correct in finding that appellant was adequately represented by competent counsel.

POINT II.

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE PETITIONER'S GUILTY PLEA WAS INTELLIGENTLY, KNOWINGLY AND VOLUNTARILY ENTERED.

Appellant originally plead not guilty to grand larceny and burglary (R. 44) but changed his plea to guilty of grand larceny after consultation with his attorney (R. 47). Appellant claims, six years later, that this plea was not voluntarily and intelligently made because of "mental pressure" which included being taken to court dressed in jail clothes and being chained to a murderer, Mr. Holt. The publicity surrounding Mr. Holt's entry into court subjected appellant to view by a multitude of spectators and newsmen. Appellant claims he plead guilty because he didn't know if any prospective jury members were in the crowd watching him chained to the murderer (R. 51).

To be valid, a guilty plea must be voluntarily made with a clear understanding of what the charge is. *Strong v. Turner*, 22 Utah 2d 294, 452 P. 2d 323 (1969). *Boykin v. Alabama*, 395 U. S. 238 (1969), cited by appellant, held

that a guilty plea is not presumed to be voluntary unless the record affirmatively indicates a valid plea. But this case has not been applied retroactively. *Brady* v. *United States*, 397 U. S. 742, 748, n. 4 (1969). *Arbuckle* v. *Turner*, 440 F. 2d 586 (10th Cir. 1970). The courts will grant relief where a guilty plea was coerced by mental pressure, but to justify relief that pressure must usually be directly applied by agents of the state. *Brady*, *supra*, at 751.

Since a habeas corpus hearing is basically civil in nature, the burden is on the petitioner to prove by a preponderance of the evidence that the facts entitle him to relief, and appeal from denial of the writ will be surveyed in a light most favorable to the findings of the lower court. *Maxwell* v. *Turner*, 20 Utah 2d 163, 435 P. 2d 287, 288 (1967). The evidence presented in a trial court by a habeas petitioner need not be taken as fact and the court is not required to believe evidence where there is some factor that "would reasonably justify refusal to accept it as the facts, and this includes the self-interest of the witness." *Strong*, *supra*, 462 P. 2d at 324. Furthermore, relief will not be granted where the record reveals that petitioner's claim is frivolous. *Klotz* v. *Turner*, 23 Utah 2d 303, 462 P. 2d 705, 706 (1969).

Appellant's claim, six years after conviction, is based on his subjective impressions and feelings. If such subjective feelings were allowed as evidence of involuntary pleas, then a guilty man might always claim that some privolous thing scared him into his plea. It would become a loophole by which the guilty attempt to escape just

punishment. No one could ever disprove the truthfulness of such a claim because it has a purely subjective basis. In addition, there is nothing in the record to justify the conclusion that the will of the appellant was overcome, or that he had not intelligently made this plea after consultation with his attorney who was present at the courthouse. The alleged "mental pressure" here was due to the appellant's subjective interpretation (R. 51) of fortuitous circumstances rather than to any objective design by agents of the state to coerce a guilty plea.

The district court was entirely correct in finding that the appellant had not sustained his burden and had not shown that his guilty plea was coerced in any way.

CONCLUSION

The appellant has not established, with clear and convincing evidence, that his trial counsel's representation amounted to a sham or pretense of appearance in the record. Neither has appellant sustained his burden of proving that the guilty plea was unknowingly and involuntarily entered.

The decision of the court below should be affirmed.

Respectfully submitted,

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