1972

Harvey Burton Hathaway v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

In The Supreme Court of the State of Utah

HARVEY BURTON HATHAWAY,

Plaintiff-Appellant,

-vs-

JOHN W. TURNER, WARDEN, UTAH STATE PRISON,

Defendant-Respondent.

BRIEF OF APPELLA

Appeal from a judgment of denial o habeas corpus in the Third Judicial Distric Lake County, State of Utah, Honorable Jeppson, Judge.

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JOHN W. TURNER, WARDEN, UTAH STATE PRISON,

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Case No. 12858

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Harvey Burton Hathaway, appeals from a decision in the Third Judicial District Court denying his petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

On November 26, 1971, Harvey Burton Hathaway filed a petition for a writ of habeas corpus in the Third Judicial District Court, Salt Lake County, alleging that his confinement by Respondent was invalid and illegal. The matter came on for hearing on February 24, 1972,

before the Honorable Joseph G. Jeppson, Judge, who denied the writ on February 24, 1972.

RELIEF SOUGHT ON APPEAL

The appellant, Harvey Burton Hathaway, seeks a reversal of the decision and judgment below with directions that he be released from the custody of Respondent and be allowed to withdraw his previous plea of guilty.

STATEMENT OF FACTS

On May 10, 1965, an information charging Harvey Burton Hathaway with murder in the first degree was filed in the Sixth Judicial District Court. (Exhibit 2) The information was amended on August 31, 1965, to allege the crime of murder in the second degree. (Exhibit 2) On August 31, 1965, Harvey Burton Hathaway pleaded guilty to the crime of murder in the second degree. (Exhibit 2) Mr. Hathaway testified that he thought he was pleading guilty to a manslaughter charge. (R. 40) Appellant testified that he did not see his original commitment order until a week or so after he was committed to Respondent's custody, and that he thought it said "second degree murder, one to ten." (R. 41) Appellant stated that he still was not sure what his sentence was (R. 43) but he was under the impression that the charge was dropped to voluntary manslaughter. (R. 42)

For some period of time before the entry of the plea, negotiations were occurring as to whether or not the charge against appellant would be reduced. (R. 50, 59) Mr. Mattson, one of appellant's court appointed attorneys, testified that voluntary manslaughter never entered into the negotiations. (R. 61, 63) However, Mr. Mattson also testified that he and Mr. Vernieu, the other court appointed attorney, had some difficulty in communicationg with Mr. Hathaway, enough difficulty so that the attorneys felt Mr. Hathaway's behavior was eccentric, and Mr. Hathaway's behavior was one factor involved in the attorneys' decision to have Mr. Hathaway undergo a psychiatric evaluation. (R. 61, 62) Mr. Mattson also testified that Mr. Vernieu could have had conversations with Mr. Hathaway when he (Mr. Mattson) was not present. (R. 63)

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS IN THAT APPELLANT DID NOT ENTER HIS PLEA OF GUILTY KNOWINGLY AND INTELLIGENTLY BECAUSE HE WAS NOT AWARE OF WHICH CHARGE HE WAS ENTERING HIS PLEA OF GUILTY TO.

This court has held that a plea of guilty must be made voluntarily, without undue in-

> fluence or coercion, and with a *clear understanding* of what the charge is . . . (Emphasis added.) *Strong v. Turner,* 22 Utah2d 294, 452 P.2d 323 (1969).

It is appellant's contention that when he pleaded guilty in 1965 to the crime of murder in the second degree he did not know what he was pleading guilty to and therefore his plea of guilty must be withdrawn because it was not knowingly and intelligently entered with a *clear* understanding of the charge and penalty.

Numerous courts, including the United States Supreme Court, have dealt with the problem of whether or not a guilty plea was entered intelligently and knowingly. In *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 737 (1970), fn. 6, the Court said:

> The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decision in . . . *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Appellant does not contend that the requirement of *Boykin* that the record show that a defendant was advised of the rights he waives when he pleads guilty applies to his case, but contends that, as the Court said in *Brady v. United States, supra,* fn. 4, 25 L.Ed.2d at 756:

> The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. See nn. 5 and 6, *infra*. . . . The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and volutarily. . . .

The law as it existed at the time of appellant's guilty plea was well stated by the Missouri Supreme Court in *State v. Williams*, 361 S.W.2d 72 (Mo. 1962). There the defendant moved to withdraw his guilty plea to a rape charge. The trial court had asked the defendant's attorney if he had explained the penalties to the defendant and the attorney responded that he had. However, the trial court did not ask the defendant anything. On appeal from the denial of the motion to withdraw the plea the court reversed the lower court and ordered a new plea be entered and said:

> It [a guilty plea] should never be received unless it is freely and voluntarily made. If the defendant should be misled or be induced to plead guilty by fraud or mistake, any misapprehension, fear, persuasion, or the holding out of hopes which prove to be false or ill founded, he should be permitted to withdraw his plea. The law favors a trial on its merits. (citing cases) 361 S.W.2d at 775.

A leading case is *United States ex. rel. Crosby v. Brierley,* 404 F.2d 90 (3rd Cir. 1968). In that case, an appeal from a denial of habeas corpus relief, the defendant had pleaded "guilty generally" to murder. Under Pennsylvania law a hearing was then held to determine the degree of the offense. The court there stated the general rule that if a guilty plea is not voluntarily entered with a full understanding of the consequences the requirements of due process are not met. The record of the plea was quite barren, but the defendant testified at the habeas corpus hearing that he did not know the consequences of his plea nor the nature of the offense he was pleading to. Under a state rule (which was simply a restatement of the general common law rule prevailing) the court was not to accept a guilty plea unless it was competently and intelligently made. The court said that it was a factual question whether or not the guilty plea was knowingly and intelligently entered. The court said that in the absence of a record of the arraignment the burden shifts to the commonwealth to prove the issue of whether or not the plea was knowing and intelligent. The court looked at the "totality of the circumstances," including the defendant's age, background, his testimony, and so on, and determined that the plea was not entered with a full understanding of the consequences and allowed the plea to be withdrawn.

Appellant contends that his guilty plea was not entered knowingly and intelligently. He testified that he thought he was pleading guilty to voluntary man-

slaughter, and that he was not sure what his sentence was. There was further testimony that appellant and his attorneys had a problem in communication and that appellant's behavior was eccentric. These circumstances show satisfactorily that appellant did not understand fully the charge he was pleading guilty to nor the sentence under such charge. It is crucial that appellant understand what he is charged with and what the possible sentence is. As this court stated in *Strong v. Turner, supra,* a guilty plea must be entered with "*clear* understanding of what the charge is. . . ." (Emphasis added) Further, as the court in *Berry v. United States,* 412 F.2d 189 (3rd Cir. 1969) said:

> Except for capital punishment, no other consequence can be as significant to an accused as the period of possible confinement when one enters a plea of guilty.

See also *Nealy v. Cupp,* 2 Ore. App. 240, 467 P.2d 649 (1970), where the court held that information given to a defendant regarding the maximum sentence must be accurte. If a defendant is not fully informed, the defendant cannot be said to understand the true legal consequences of his guilty plea.

Appellant contends that he has adequately shown that he did not make his guilty plea knowingly and intelligently. While it is true that under decisions of this court the evidence the plaintiff in a habeas corpus proceeding presents need not be taken as fact (see

Strong v. Turner, supra), appellant submits that he has met his burden. This court in *McGuffee v. Turner,* 18 Utah2d 359, 423 P.2d 166 (1967), said that in a habeas corpus proceeding the plaintiff has the burden to prove his allegations by "clear and convincing" evidence. However, this court later in *Farrell v. Turner,* 25 Utah2d 351, 482 P.2d 117 (1971), said that the plaintiff "had the burden of convincing the trial court by a preponderance of the evidence" that she was unlawfully incarcerated. Therefore appellant submits that even though this court has held that his testimony need not be taken as fact, as the court in *United States ex. rel. Crosby v. Brierley, supra,* said, appellant's testimony should be considered as much a part of his guilty plea as his uttering of the word "guilty." That is, if a court can believe appellant when he says he is guilty, it is difficult to understand why he cannot be believed when he says he did not know what the charge was he was pleading guilty to and he did not know the corresponding sentence. As such, appellant contends that based upon the totality of the circumstances, including appellant's testimony, appellant has met his burden and shown that his guilty plea was not knowingly and intelligently entered. As a result, appellant's guilty plea should be set aside and he should be entitled to plead anew.

CONCLUSION

For the reasons above stated, that appellant's guilty plea was not knowingly and intelligently entered, appellant respectfully submits that the judgment below

be reversed and that appellant be released from respondent's custody and be allowed to withdraw his guilty plea and enter a new plea.

Respectfully submitted,

BRUCE C. LUBECK

Attorney for Appellant