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In The Supreme Court of the State of Utah

HARVEY BURTON HATHAWAY,

Plaintiff-Appellant,

-vs-

JOHN W. TURNER, Warden, Utah State Prison,

Defendant-Respondent.

Case No. [illegible]

BRIEF OF RESPONDEN[illegible]

APPEAL FROM A JUDGM[illegible] DENIAL OF A WRIT OF HABEA[illegible] IN THE THIRD JUDICIAL DI[illegible] COURT, IN AND FOR SALT LA[illegible] TY, STATE OF UTAH, THE HO[illegible] JOSEPH G. JEPPSON, JUDGE, P[illegible]

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In The Supreme Court of the State of Utah

HARVEY BURTON HATHAWAY,
Plaintiff-Appellant,

-vs-

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

Case No. 12858

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF 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 Honorable Joseph G. Jeppson, who denied the writ.

RELIEF SOUGHT ON APPEAL

The respondent, John W. Turner, seeks affirmation of the decision of the court below to deny the writ.

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). This information was based on evidence presented in a preliminary hearing held May 8, 1965, in Orderville, Utah. That evidence included a voluntary written and signed statement by defendant that he had intentionally shot a man many times so that he could rob him (Preliminary Hearing Record, Exhibit 1, p. 67, 76.) Appellant's attorneys, Mr. Mattson and Mr. Vernieu, expressed doubts as to Hathaway's chances of acquittal (R. 42) and began negotiations with the prosecuting attorney. It was agreed that the charge would be reduced to second degree murder if Hathaway would plead guilty to that charge (R. 60).

Mr. Mattson testified that he and Mr. Vernieu had a number of conferences with appellant in which he was advised of the nature of the charges against him, the penalties that could be imposed, the possibilities of acquittal, possible defenses, and the results of a guilty verdict (R. 56).

Hathaway was informed of the plea negotiations and was fully advised of the penalties for first and

second degree murder. He knew that he had a constitutional right to a trial and that a guilty plea would mean no trial (R. 60). His choice of pleas was thoroughly discussed, and he was given a "day or two" to think the decision over (R. 60-61). Hathaway decided that if he could get the charge reduced, he would plead guilty to second degree murder (R. 61).

Mr. Mattson further testified that he and Mr. Vernieu were successful in communicating with Hathaway (R. 62), and that he was not aware of any difficulty in communicating with appellant when he was discussing the different degrees of murder and the possible penalties with him (R. 63, 64).

The record further shows that appellant underwent two independent examinations, one by the state mental hospital and another by a private psychiatrist. Both found him to be sane (R. 57-58).

Mr. Mattson also testified that manslaughter was never mentioned (R. 61, 63), and that although it was possible that the other attorney talked to Hathaway, when he was not present, he and Mr. Vernieu were in constant contact during the entire case (R. 64).

Hathaway testified there had been a whole week of meetings and discussions with his attorneys (R. 37), that they had explained his constitutional rights regarding trial (R. 42), the different degrees of murder, and the various consequences of being convicted of them (R. 52).

On August 31, 1965, Harvey Burton Hathaway pleaded guilty to second degree murder (Exhibit 2). Appellant testified that it was difficult to remember what he thought the day he entered the plea (R. 41, 51), but that he thought he was pleading guilty to "manslaugther or maybe even second degree." (R. 40). The Minute Entry of the court shows that appellant was accompanied by counsel at the time of the plea, and that he was given a sentence of ten years to life (Exhibit 2).

Petitioner also testified that a week later he saw a copy of his commitment order and noted that it read, 2nd degree murder (R. 41). Neither the conviction nor the sentence was appealed.

Six years later, on November 26, 1971, Hathaway filed a writ of habeas corpus claiming that his plea of guilty was not made knowingly and intelligently.

ARGUMENT

POINT I

THE COURT BELOW DID NOT ERR IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS AS APPELLANT HAS FAILED TO MEET HIS BURDEN TO ESTABLISH THAT HIS PLEA OF GUILTY WAS NOT ENTERED KNOWINGLY AND INTELLIGENTLY.

Appellant's brief seems to reflect somewhat of a misconception of the law in this area. The events in question took place in 1965 while *Boykin v. Alabama,* 395 U.S. 238 (1969) was not decided until 1969. *Brady v. United States,* 397 U.S. 742, ft. note 4 states that *Boykin* has not been applied retroactively by the Supreme Court.

In *Arbuckle v. Turner,* 306 F. Supp. 825 (1969), the issue of the retroactivity of *Boykin* was raised, and the United States District Court for Utah held that *Boykin* should not be applied retroactively. That case was upheld by the 10th Circuit Court of Appeals in *Arbuckle v. Turner,* 440 F.2d 586, 588 (1971).

Therefore, although this case is subject to the rule that a guilty plea must be made voluntarily and understandingly, it is not subject to the rule of the *Boykin* decision which states that it cannot be presumed from a silent record that a plea was entered voluntarily.

The burden of proof is on the appellant to show by clear and convincing evidence that the plea was not made voluntarily and understandingly. *McGuffee v. Turner,* 18 Utah 2d 359, 423 P.2d 166 (1967).

This principle is well stated in *Maxwell v. Turner,* 20 Utah 2d 163, 435 P.2d 287 (1967). That case like this one involved an appeal from a hearing in which the appellant had claimed to have pleaded guilty involuntarily and the lower court had denied habeas corpus relief. In affirming the denial, the Utah Supreme Court stated:

> "Proceedings in habeas corpus are generally regarded as civil in nature and consequently follow the same rules of procedure as in other civil actions. In the original trial the burden is on the petitioner to prove by a preponderance of the evidence facts which will entitle him to relief. On appeal recognition is given to the prerogatives and the advantaged position of the trial court. His findings and judgment are indulged a presumption of correctness. It is our duty to survey the evidence in the light most favorable to them and not to upset them if they find any substantial support in the evidence." *Id.* at 165.

The record of the proceedings in the trial court in this case makes it clear that the decision is substantially supported by the evidence.

The record shows that the prosecution had a very strong case against Hathaway which could have convicted him of first degree murder. Hathaway had made a voluntary confession of the murder which was placed in the preliminary hearing record (Exhibit 1, p. 67-76), his attorney stated that he felt that it was a "losing case," (R. 42), and appellant himself stated, "I think the facts stood for itself. There is no doubt that I did it. There is no doubt at all, and everybody knows it." (R. 40).

Because of almost certain conviction of first degree murder, appellant's attorneys negotiated a reduc-

tion on the charge from first to second degree murder. Hathaway's attorney testified that a reduction in the charge to manslaughter was never discussed (R. 61, 63), and in view of the existing circumstances that seems to be only logical, there is no reason why manslaughter should ever have been considered.

The record further shows that appellant was advised fully of his constitutional right to a trial, his chances of acquittal, the consequences of conviction, his option to plead guilty to second degree murder, the sentences that could be imposed, and that he was given more than adequate counsel and time to reach an understanding decision (R. 56, 60, 61). Hathaway made the only reasonable choice under the circumstances, and pleaded guilty to the lesser offense (R. 61). The evidence further shows that he was present with both of his attorneys at the time he pleaded guilty to second degree murder and was sentenced to from ten years to life (Exhibit 2). There is no evidence that appellant or his counsel made any objection to the conviction or the sentence at that time, or that there was any attempt to appeal the conviction or the sentence. Hathaway had another opportunity to raise an objection a week later when he saw his commitment papers and noticed that they read "2nd degree murder." (R. 41), but again no objection was made.

The clear weight of the evidence seems to indicate that Hathaway completely understood his situation and his options and that he received exactly what he bar-

gained for. As has been noted, appellant has the burden of proof to show that his guilty plea was not understandingly made, and yet he offers very little to meet that burden and rebutt the clear and convincing evidence to the contrary. He admits that he had a whole week of discussions with his attorneys (R. 37) and that he was competently advised by them (R. 54) concerning his rights regarding a trial (R. 42), the different degrees of murder and the consequences of being convicted of them (R. 52). Appellant attempts to meet his whole burden of proof by the ambiguous statement, "I'd have to say I thought it was a manslaughter charge, or maybe even a second degree, but I understood it was on its way down to a manslaughter charge." (R. 40). At the same time, he admits that it was pretty hard to remember what he thought the day he entered the plea (R. 41, 51).

Clearly, appellant has not only failed to meet his burden of proof to show that his plea was not made understandingly, but the overwhelming weight of the evidence is to the contrary. It plainly shows that the plea was made intelligently and understandingly. There can be little doubt that at the time of the plea Hathaway completely understood that he was pleading guilty to second degree murder and that a sentence of ten years to life could be imposed. The fact that now, seven years later, he may no longer remember or understand those proceeding is irrelevant.

Appellant's brief raises several issues which are claimed to be grounds for reversal in this case, which clearly are not.

First, appellant cites a Missouri case. *State v. Williams,* 361 S.W.2d 72 (Mo. 1962) as authority for the idea that a failure by the court to inquire of the defendant as well as his attorney concerning his plea is grounds for reversal. However, *Machibroda v. United States,* 368 U.S. 487 (1962), a Supreme Court decision was the controlling law at that time. In that case, the court held that the failure of the trial court to specifically inquire at time of sentencing whether appellant personally wished to make a statement in his own behalf was not error of itself which could be raised to set aside sentence (*Id.* at 511).

Appellant also argues that the slightest misunderstanding by the defendant as to the charges against him or the sentnce that could be imposed would be sufficient to allow withdrawal of the plea. Again, this is not necessarily true. In *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (1968), Brown brought habeas corpus proceedings to seek the withdrawal of his guilty plea on the grounds that he was inadequately advised of the consequences of the plea. In denying his petition, the Utah Supreme Court held that the accused was adequately advised of the consequences of his plea of guilty where he was advised that he was charged with a felony, that the charge was punishable by a prison sentence, that he had the right to trial by jury and where

the accused indicated his desire to waive trial and entered the plea of guilty (*Id.* at 970).

Hathaway's case clearly meets these standards.

An Oregon case, *Tucker v. Gladden,* 245 Or. 109, 420 P.2d 625 (1966) said that the test of the validity of a guilty plea is whether defendant understood the nature of the crime to which he had pleaded and was able to weigh this understanding against his own knowledge of the act he had performed; whether he knew of some degree of the crime to which he did not plead or its maximum sentence is irrelevant (*Id.* at 626). Again, Hathaway's case meets this standard.

Appellant seeks to be allowed to withdraw his plea seven years after sentence has been imposed. This request raises a serious issue as to the timeliness of the attempt to withdraw it. As the Utah Supreme Court stated in *State v. Stewart,* 110 Utah 203, 171 P.2d 383 (1946), "unless timely withdrawn, a plea of guilty places a defendant in the same position as a verdict of a jury finding him guilty of the charge after a fair and impartial trial (*Id.* at 385).

Brown v. Turner, supra, a Utah Supreme Court case, explains the law regarding the timeliness of a habeas corpus petition. In the case, the court states:

> "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time

> permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack except in unusual circumstances." (*Id.* at 696).

In view of the fact that both the appellant and his attorneys have known of the conviction and the sentence for over seven years, his request to withdraw cannot be considered timely. There has been no showing of any reason why this issue could not have been raised on appeal or at least within a reasonable amount of time after the sentencing.

Federal Rule 32(d), although not binding in this case, expresses the general rule, that withdrawal of a plea after sentence has been imposed should only be allowed to prevent manifest injustice. Hathaway's case does not meet this standard. He was aware of the conviction and the sentence in ample time to request withdrawal or to perfect an appeal at the time of his plea.

Furthermore, he was allowed to escape almost certain conviction of first degree murder and the death penalty by pleading guilty to second degree murder. A refusal to allow him now to withdraw that plea and again face charges of first degree murder cannot be deemed manifestly unjust.

On the other hand, it would be manifestly unjust to the state to force it to go to trial after the passage of seven years during which much of the evidence and many of the witnesses may have become unavailable.

If the court were to allow this, it would encourage the use of the guilty plea, subsequently withdrawn years later, as a method to escape justice.

CONCLUSION

The appellant has failed to meet his burden of proof to show that the trial court's decision to deny the writ of habeas corpus was not supported by any substantial evidence. Furthermore, his request to withdraw his guilty plea was not timely nor will the denial of it result in manifest injustice. The denial of the writ of habeas corpus should, therefore, be affirmed.

Respectfully submitted,

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