1972

John Michael Shane v. John v. Turner, Warden, Utah State Prison : Brief of Appellant

In The Supreme C
of the State of

JOHN MICHAEL SHANE,

Plaintiff-A

-vs-

JOHN W. TURNER, WA
UTAH STATE PRISO

Defendant-R

BRIEF OF A

Appeal from a denial of a
of habeas corpus by the
Salt Lake Coun
Honorable Joseph G.

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Attorn

VERNON B. ROMNEY

Attorney General, State of U
State Capitol

Salt Lake City, Utah

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CASES CITED

In The Supreme Court of the State of Utah

JOHN MICHAEL SHANE,
Plaintiff-Appellant,
-vs-
JOHN W. TURNER, WARDEN, UTAH STATE PRISON,
Defendant-Respondent.

Case No. 12905

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, John Michael Shane, appeals from a decision of the Third Judicial District Court, denying his release from the Utah State Prison upon a petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

On April 3, 1972, John Michael Shane filed a petition seeking a writ of habeas corpus in the Third Judicial District Court, Salt Lake County, alleging that his commitment to the Utah State Prison was invalid. The matter came on for hearing on April 18,

1972, before the Honorable Joseph G. Jeppson, Judge, who denied the petition on April 25, 1972.

RELIEF SOUGHT ON APPEAL

The appellant, John Michael Shane, seeks a reversal of the judgment of the court below with the direction that he be released from the custody of the respondent upon a writ of habeas corpus.

STATEMENT OF FACTS

John Michael Shane entered a plea of guilty on December 6, 1971, to the crime of Fradulent Use of a Credit Card before the Honorable John F. Wahlquist of the Second Judicial Court. (R. 29, Exhibit 1-D, p. 8). He was sentenced on December 22, 1971 to be committed to the Utah State Prison for the indeterminate term of not more than five years as provided by law (R. 29).

The record of the Ogden City Court indicates that upon being informed by the Court of his right to the aid of counsel at every stage of the proceedings against him, the appellant requested "to go as 'pro-per status'." (R.22). On December 1, 1971, the appellant requested that counsel be appointed by the court; said request was granted and Richard W. Brahn was appointed (R. 23). On December 2, 1971, the appellant appeared in court with Mr. Brahn and the financial statement of appellant

[apparently sheet 3 of the affidavit is missing] (R. 27, 28) was submitted to the Court and the court found that the appellant was not impecunious. Thereupon the Court dismissed Mr. Brahn as appellant's counsel. (R. 23). After Mr. Brahn was dissmissed, and without having discussed the matter with counsel, appellant waived his preliminary hearing on the charge. (R. 24).

Without knowing the purpose of the financial statement (R. 35) and apparently thinking that it related to either bail or sentence (R. 36), the appellant listed assets in the affidavit which he in reality did not own or have under his control. (R. 36)

The transcript of the entry of the plea of guilty (Exhibit 1-D) indicates that the Court informed the appellant of the following:

> Right to counsel and right to have counsel appointed free of charge (p. 2); Right to have time to decide what plea to enter (p. 2); Right to trial by jury and right to subpeona witnesses and the right to cross-examine witnesses against him (p. 2); That a plea of guilty is a judicial confession and no further proof of guilt is required (p. 4); That appellant would be "vulnerable to the sentence provided by law for the charge." (p. 4)

The transcript of the entry of the plea also reflects a dialogue between appellant and the court concerning the appellant's right to counsel in which the appellant

indicated that he would handle his own case and that he had "three and one half years of law school at UCLA" and that he had represented himself before. (Exhibit 1-D, p. 3). At the habeas corpus hearing the appellant indicated that he had not been in law school at UCLA and that instead the appellant had been monitoring classes with a friend. (R. 40)

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE APPELLANT WAS EFFECTIVELY DENIED HIS RIGHT TO APPOINTED COUNSEL.

It is well settled that an indigent must be provided counsel in felony cases, *Gidcon v. Wainwright,* 372 U.S. 335, 9 L.ed 2d 799, 83 S. Ct. 792, 93 ALR 2d 733 (1963), and recently the U.S. Supreme Court extended that right to any accused who may be deprived of his liberty whether he be charged with a felony or misdemeanor, *Argersinger v. Hamlin,* .... U.S. ....., 32 L.Ed. 2d 530, 11 Criminal Law Reporter 3089 (June 12, 1972.)

It is submitted that in the case at bar the appellant was effectively denied his right to counsel, and that appellant did not knowingly and intelligently waive his right to counsel. Although it appears on the record

that appellant initially wanted to proceed without counsel, it also appears that appellant requested appointed counsel before the preliminary hearing. Counsel was appointed, appellant filled out the affidavit of financial status and counsel was taken away. (R. 23) At the time that appellant changed his plea the court said, "If you are unable to employ an attorney on your own, the court will help you to see that you have one." (Exhibit 1-D, p. 2) While this information might be sufficient in many circumstances, it is submitted that at least in this particular situation such a warning was sufficient to apprise appellant of his right to appointed counsel because appellant's experience with the court was that he could ask for an attorney but that attorney would be taken away.

Further, it is submitted that it is clear that from the record that appellant did not validly waive his right to counsel. A waiver is an intentional relinquishment or abandonment of a known right or privilege which must be made by a defendant who has been apprised of his rights and who has an intelligent conception of the consequences of his act. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 83 L.Ed 1461 (1937); *Carnley v. Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962).

It is submitted that appellant clearly did not have an intelligent conception of the consequences of his act. Appellant testified at the habeas corpus hearing that he pleaded guilty because he was advised by a police officer

that if he pleaded guilty, he would get probation. The court failed to apprise appellant of the consequences of his waiver of counsel and only said that a person who represents himself has problems in addition to those which an attorney would have in representing another person. (Exhibit 1-D, p. 3). It is submitted that such a warning did not sufficiently apprise appellant of the consequences of his waiver of counsel and thusly that appellant's waiver was invalid. It is further submitted that because appellant's waiver of counsel was invalid, appellant's right to counsel was effectively denied him. Because of that denial, appellant's guilty plea was clearly unlawful and unconstitutional as a denial of due process.

POINT II

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE THE RECORD DOES NOT SHOW THAT APPELLANT'S PLEA WAS KNOWINGLY AND INTELLIGENTLY ENTERED.

Appellant contends that his plea of guilty was not knowingly and intelligently entered because the record failed to show that the appellant intelligently and knowingly waived his privilege against self-incrimination nor does it show that he was adequately informed of such privilege as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed2d 274 (1969). In *Boykin*,

supra, the United States Supreme Court made clear the minimum requirements which satisfy due process in the taking of pleas of guilty in state courts. The Court held that the record must show the circumstances of a waiver of rights and it must indicate that the guilty plea is knowingly made. As the Court stated:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth [citation omitted]. Second, is the right to trial by jury [citation omitted]. Third, is the right to confront one's accusors [citation omitted]. We cannot presume a waiver of these important federal rights from a silent record." 23 L.Ed 2d at 279.

The Court in *Boykin* held, as have numerous other courts, that a guilty plea must be intelligently and voluntarily entered. Such is and has been the general rule. See *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed2d 747 (1970) at 756, fn. 5 and 6 and cases therein cited. The standard enunciated by the Court was simply that the voluntariness of the plea, if it exists, must be made apparent on the record and the record must show that a defendant accused of a crime is aware of the various rights he is giving up by entering a plea of guilty to the charge.

In the present case the Court failed to inform appellant of his Fifth Amendment right, the privilege against self-incrimination. The Court did tell appellant that a plea of guilty was a "judicial confession" (Exhibit 1-D, p. 4) but at no time did the court warn the appellant that he was not required to "confess" in court nor that the Constitution of the United States gives him a privilege to not say anything that might incriminate him in anyway.

It is admitted that the court did adequately inform appellant of the other two federal rights involved in *Boykin,* but it is submitted that by failing to inform appellant of his privilege against self-incrimination the court ineffectively complied with the standards of *Boykin.* It is also submitted that an ineffectual attempt to comply with *Boykin* is as insufficient as no compliance at all. The involuntariness of appellant's guilty plea is further substantiated by appellant's testimony at the habeas corpus hearing that he was told that he would get probation if he pleaded guilty and by appellant's request to withdraw his guilty plea before sentencing was imposed. (R. 31, 29) Further, the record discloses that at no point was appellant advised of the penalty for the offense to which he eventually pleaded guilty except that he would be "vulnerable to the sentence provided by law for the charge." (Exhibit 1-D, p. 4)

It is submitted that because it is clear that the mandates of *Boykin* were not followed, appellant's con-

finement is illegal and void and he must be granted the writ of habeas corpus he seeks.

CONCLUSION

For the reasons above stated, that appellant did not enter his plea of guilty knowingly, intelligently and voluntarily because he was not advised of his privilege against self-incrimination and that appellant was effectively denied the assistance of counsel, appellant submits that the judgment and order of the court below be reversed and the appellant granted his writ of habeas corpus.

Respectfully submitted,

GREGORY L. BOWN

Attorney for Appellant