1972

Robert P. Pacheco v. John W. Turner, Warden, Utah State Prison : Respondent's Brief

In The Supreme C
of the State of

OBERT P. PACHECO,

Plaintiff-Ap

-vs-

OHN W. TURNER, Warden,
tah State Prison,

Defendant-R

BRIEF OF RE

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CASES CITED

In The Supreme Court of the State of Utah

ROBERT P. PACHECO,
Plaintiff-Appellant,

-vs-

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

Case No. 12910

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Robert P. Pacheco, appeals from the decision of the Third Judicial District Court denying his release from the Utah State Prison upon a Petition for Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

Appellant, Robert P. Pacheco, filed a Complaint and Petition seeking a Writ of Habeas Corpus alleging he is being illegally and unlawfully restrained of his liberty. The matter was heard on the 4th day of April, 1972, before Judge Joseph Jeppson. Appellant's peti-

tion was denied on the grounds that all allegations were without merit.

RELIEF SOUGHT ON APPEAL

The state submits that this Court should affirm the decision of the Third Judicial District Court.

STATEMENT OF THE FACTS

The state adopts appellant's statement of facts except as hereinafter set forth.

Appellant's counsel at his original trial, Mr. Jay Barney, testified that he did not recall discussing the habitual criminal statute with Mr. Pacheco. (R. 50) Mr. Barney further testified that the habitual criminal statute did not influence his decision to recommend that Mr. Pacheco plead guilty to the lesser offense of attempted burglary. (R. 49, 50)

ARGUMENT

POINT 1

THERE IS NO EVIDENCE THAT APPELLANT'S PLEA OF GUILTY WAS ANYTHINGS BUT VOLUNTARILY AND INTELLIGENTLY MADE.

Realizing that a guilty plea has the same final effect as a conviction upon conclusion of a jury trial,

courts have, of necessity, been required to assure themselves completely that the plea was made voluntarily with understanding of the nature of the charge and of the effect of the plea. Because of this precautionary practice there has developed a presumption that such guilty pleas are valid. *Guglielmetti v. Turner,* 27 U.2d 341, 496 P.2d 261, 262 (1972). This presumption of validity places the burden of proof on appellant and courts of appeal sitting in review of the plea proceedings, as the District Court did and the Utah Supreme Court now must do in this case, have set aside judgments only upon a strong showing of proof. In *Shelton v. United States,* 246 F.2d 571, 575 (1957), a case cited by appellant, the court said that upon a motion to vacate judgment and set aside a plea of guilty:

> "The burden of proof is on the movant to establish by a *preponderance of the evidence* that he has been deprived of some right under the Constitution . . ." (Emphasis added.)

The court said further:

> "To constitute a sufficient reason for withdrawal of a plea, the circumstances must amount to a fraud or imposition upon the defendant . . ."

The recent Utah case of *Guglielmetti v. Turner, supra,* said at page 263:

> "Habeas Corpus is a civil proceeding, and the petitioner has a burden of showing unlawful restraint."

Respondent submits that appellant has not met his burden of proving that he is unjustly and unconstitutionally restrained of his liberty. Appellant claims that his counsel, Mr. Jay Barney, coerced him by threatening him with the possibility of being convicted as an habitual criminal. To support this a vague statement of Mr. Barney to the effect that he *may* have indicated to appellant that he *could* be convicted of the habitual criminal charge is lifted out of context and offered as appellant's attempt to meet his burden of proof. In light of other testimony by Mr. Barney, this is not a preponderance of the evidence as required by *Shelton v. United States, supra,* and case law in general.

A look at Mr. Barney's entire testimony shows that the habitual criminal statute was not a factor in the process of deciding to plead guilty. Mr. Barney testified that:

> ". . . in my opinion it appeared the likelihood of conviction in any one of the three cases was good, and rather than run the risk of being tried on three cases, or being found guilty and serving time on three cases, I believe I made a recommendation to him that if he could manage it that it would be better to take

a plea to a lesser offense, or one of the offenses." (R. 49)

The United States Supreme Court said in the case of *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441 (1970):

> "That a guilty plea must be intelligently made is not a requirement that all advice offered by defendant's lawyer withstand retrospective examination on a post-conviction hearing.
>
> A defendant's guilty plea, based upon reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged."

In that case, defendant plead guilty, even though he knew that the only good evidence against him was his inadmissible confession. The judgment on the plea was upheld. Mr. Barney's advice, as stated above, in light of the actual possibility of subsequent convictions, was easily within the category of "reasonably competent" advice. The following testimony of Mr. Barney further indicates that his advice was not coercive and threatening as appellant contends:

> Q. Was one of the conversations on which you based your judgment the possibil-

ity of the State filing a habitual criminal charge against Mr. Pacheco?

A. Not to my recollection.

Q. Do you recall discussing the habitual criminal statute with Mr. Pacheco?

A. Not specifically, though that is possible. (R. 50)

A later answer of Mr. Barney to this same line of questioning stated:

A. What I said was that I recall that he had one felony conviction for which he was either on parole at that time or was out of prison, that there were two other charges, and that it is possible that if he were convicted on one of the offenses, and the second offense or third offense were brought, that the habitual offender act might be invoked on that. *I say that as a possible circumstance, though I never talked about it specifically with him.* (R. 50) (Emphasis added.)

In light of Mr. Barney's entire testimony, it cannot be said that a preponderance of the evidence shows Mr. Barney coerced appellant by use of the habitual criminal act.

CONCLUSION

As the transcript of the plea proceeding indicates, appellant knowingly and intelligently waived his right to trial and entered a plea of guilty. Because of the presumption of validity of this plea proceeding and appellant's failure to meet his burden of proof on this Petition for Writ of Habeas Corpus by a preponderance of the evidence, the state respectfully submits that the decision of the Third District Court, denying appellant's petition, should be upheld.

Respectfully submitted,

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