1972

Richard B. Dolan v. State of Utah, Weber County Sheriff, Utah State Parole Department : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF UTA

RICHARD B. DOLAN,

Plaintiff-Appe

- vs -

STATE OF UTAH, WEBER CO
SHERIFF, UTAH STATE BO
OF PARDONS, UTAH STATE
PAROLE DEPARTMENT,

Defendants-

BRIEF OF

APPEAL FROM
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UNTY, STATE OF U
. WAHLQUIST, JUD

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RICHARD B. DOLAN,
Plaintiff-Appellant,

- vs -

STATE OF UTAH, WEBER COUNTY SHERIFF, UTAH STATE BOARD OF PARDONS, UTAH STATE PAROLE DEPARTMENT,
Defendant-Respondent.

Case No. 12914

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a decision of the Honorable John F. Wahlquist denying petitioner's petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

District Court Judge John F. Wahlquist of the Second Judicial District Court denied petitioner's petition for a writ of habeas corpus in a memorandum decision dated March 16, 1972, after a hearing at which both appellant and respondent appeared, were represented by counsel, and presented testimony and argument to the

court. The petition was denied on the bases that the issues raised were res judicata because of an earlier habeas corpus proceeding by this petitioner and because no factual showing was made by petitioner which would support his petition.

RELIEF SOUGHT ON APPEAL

The respondents submit that the judgment of the Second Judicial District Court should be affirmed.

STATEMENT OF FACTS

The respondents stipulated to appellant's statement of the facts except as follows:

The attorney who represented petitioner at the time of his plea and sentencing, Mr. L. G. Bingham, specifically stated that he had never promised anyone, including the petitioner, that they would get probation (T. 26, R. 110); that he always discussed the seriousness of the charges with his clients, especially in a felony situation (T. 27, R. 111); that he had never allowed anyone including petitioned to plead guilty to a felony if they claimed they were innocent (T. 27 and 29, R. 111 and 113); that it definitely was his practice to review the entire case with his client and to discuss the particular elements of the crime with the client (T. 28, R. 112); and that it was his general practice to discuss relevant court procedures with a client in the event the case should go to trial (T. 28, R. 112).

Judge Wahlquist's opinion, dated March 16, 1972, was specifically based on two grounds, namely that the issues raised were res judicata because of the 1968 habeas

corpus petition and proceedings, and second, because there was not sufficient factual showing to support petitioner's contention.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS THAT THE ISSUES RAISED WERE RES JUDICATA BECAUSE THE GROUNDS ALLEGED FOR SUCH WRIT EXISTED AND COULD HAVE BEEN RAISED BY APPELLANT IN HIS PREVIOUS

As appellant concedes, the Utah Supreme Court has repeatedly held in cases involving a petitioner's second writ of habeas corpus that:

> "Since plaintiff could have tendered these issues upon which he now seeks relief in the first proceeding, but failed to do so, he is barred from presenting them for judicial determination. The issue of the validity of his detention is res judicata." *Rees v. Turner*, 26 Utah 2d 441, 491 P. 2d 1093 (1971).

See also *Maynard v. Turner*, ... Utah 2d ....., ... P. 2d ..... (No. 12703 filed September 18, 1972); *Maxwell v. Turner*, 23 Utah 2d 12, 455 P. 2d 912 (1969); *Dodge v. Turner*, 12 Utah 2d 341, 445 P. 2d 707 (1968); *Wood v. Turner*, 19 Utah 2d 133, 427 P.2d 397 (1967); *Burleigh v. Turner*, 15 Utah 2d 118, 388 P. 2d 412 (1964).

Petitioner attempts to distinguish this line of cases by emphasiizng the word "could" insofar as a petitioner "could" haive raised an issue in an earlier petition. The

The principle of barring successive habeas corpus proceedings is well founded in strong policy considerations. The Utah Supreme Court has stated;

> "Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid to rest. He should be denied a second attempt at substantially the same objective under a different guise." *Wheadon v. Pearson*, 14 Utah 2d 45, 376 P. 2d 946 (1962).

The doctrine of res judicata is to be applied:

> " . . . not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated. . . ." *East Mill Creek Water Co. v. Salt Lake City*, 108 Utah 315, 159 P. 2d 863 (1945).

The policy of discouraging successive habeas corpus petitions is specifically embodied in the requirement of Rule 65B(f) of the Utah Rules of Civil Procedure which requires that a petitioner allege that the legality of his confinement has not been previously adjudicated.

Respondents respectfully submit that neither of the federal cases cited by appellant serve as proper authority to upset the long line of Utah cases establishing the applicability of the doctrine of res judicata to state habeas corpus proceedings, and that the district court correctly dismissed appellant's petition because of the 1968 petition and hearing at which appellant have raised the issues he now relies upon.

POINT II

APPELLANT'S GUILTY PLEA WAS VALID UNDER THE LAW EXISTING AT THE TIME IT WAS GIVEN AND REMAINS VALID BECAUSE RECENTLY ADOPTED STANDARDS REGARDING GUILTY PLEAS DO NOT OPERATE RETROACTIVELY TO VOID SUCH PLEAS.

The standards by which guilty pleas should be judged by a reviewing court were changed by the case of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The pre-*Boykin* standard for guilty pleas in the Tenth Circuit was clearly set forth in the case of *Arbuckle v. Turner* 306 F. Supp. 825 (C.D. Utah 1969). The district court said:

> "Prior to the *Boykin* decision, due process was concerned with whether voluntariness and understanding existed, and not with the manner or means by which they came to exist. . . . A Utah trial judge may assume in the usual circumstance that a defendant is well advised by his counsel. The rule in the Tenth Circuit has been that a representation by defendant's attorney to the trial court that he has so advised the defendant coupled with the acquiescence of a defendant who appears to comprehend what is being done indicates that a valid plea has been entered (citations). Although we do not reach the question of whether such record is sufficient after *Boykin*, the rule will continue to have validity for pre-Boykin cases." *Ibid.* p. 827-8.

On appeal to the Tenth Circuit this decision was affirmed with the Court further stating:

> "And we do not believe that a determination

> of guilty plea's voluntariness depends on a detailed showing of waiver of the three rights stressed by appellant. The trial court's determination to voluntariness covered the foundamentals of comprehension of the nature of the charge and the consequences of the plea. . . . We view the further proof relating to the several rights emphasized by appellant as part of the facts and circumstances to be considered in determining whether the plea was intelligently and voluntarily made, as the trial court did." *Arbuckle v. Turner*, 440 F. 2d 586 (10th Cir. 1971).

These cases plainly stand for the proposition that pre-*Boykin* guilty pleas should be judged by a standard of voluntariness and understanding, but that the specific methods used to make such a determination are not critical. The trial court in considering a petition for writ of habeas corpus cay consider all relevant sources of information, not just the original record, in determining whether a guilty plea was properly accepted.

Respondents submit that appellant was not denied any constitutional rights by the acceptance of his guilty plea, and that such has been properly determined by a competent reviewing court applying the applicable standard of review for pre- *Boykin* guilty pleas. Judge Wahlquist's memorandum decision (R. 73-76) adequately sets forth findings of fact which support his conclusion that appellant's rights "were not prejudiced in any way by the failure of Judge Norseth to discuss these matters with him in open court." (R. 276).

The Utah Supreme Court has held:

> ". . . the question as to whether he (the petitioner) was accorded the right of counsel and was

> properly advised as to the consequences of his plea of guilty are primarily questions of fact. The trial court having heard the evidence relating thereto and having found the issues against the plaintiff, it is our further duty to indulge the usual credit due his findings and judgment." *Brown v. Turner*, 21 Utah 2d 96, 440 P. 2d 968, 970 (1968).

The only evidence suporting appellant's claims regarding his guilty plea were his own statements, about which this Court has recently said, "The trial judge was not obligated to believe the self-serving testimony of the plaintiff." *Jenkins v. Turner*, ... Utah 2d ....., ... P. 2d ..... (1972), Case No. 12769, filed October 16, 1972.

Appellant's reliance on the case of *McCarthy v. United States*, 349 U.S. 459, 89 S. Ct. 1166, 22 L. Ed 2d 418 (1969) is ill-founded to support the contention that the trial court's duty to make a record of the guilty plea acceptance is a duty of constitutional proportions. The Supreme Court expressly limited this decision by its statements that:

> "This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal." *Ibid.* at 464.

Appellant's contention that the *Boykin* decision should be given retroactive effect is likewise settled in the Tenth Circuit. The Tenth Circuit has adopted the reasoning found in the case of *Halliday v. United States*, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969) which considered the retroactive effect to be given to the case of

McCarthy v. United States, supra. The Supreme Court said:

> "Thus in view of the general application of in *McCarthy*, and in view of the large number of constitutionally valid convictions that may have been obtaind without full compliance with Rule 11, Rule 11 in a manner inconsistent with our holding we decline to apply *McCarthy* retroactively." *Halliday, supra,* p. 833.

The Tenth Circuit stated:

> "The courts and prosecuting authorities were not advised of a constitutional requirement of an affirmative record showing of voluntariness until the *Boykin* decision and both proceeded in reliance on prior practice. The effort of retrocative application would obviously be to throw in jeopardy many pleas in fact voluntarily and intelligently made, but accepted without an affirmative record showing thereon. . . . Thus both the reliance factor and the adverse effect on the administration of justice argue persuasively against retroactivity." *Perry v. Crouse,* 429 F. 2d 1083 (10th Cir. 1970).

This rejection of the retrocative effect of *Boykin* has been adhered to by the Tenth Circuit in the subsequent cases of *Arbuckle v. Turner, supra,* and *Freeman v. Page,* 443 F. 2d 493 (10th Cir. 1971).

Both the *Halliday* case, *supra,* and the *Perry* case, *supra,* examined the three criteria urged by appellant in his brief (p. 18) as applicable to judging the retroactive effect of a newly enunciated rule, and both cases ruled for the non-retroactive effect of rules relating to guilty plea procedure. Appellant urges that the purpose of the *Boykin* rule is such as would outweigh both the reliance

element and the effect on justice elements of this three part test. The *Perry* case, however, stated:

> ". . . the basic purpose involved would not be sacrificed by prospective application of the *Boykin* case since that decision did not introduce the rule that a plea must be made voluntarily and intelligently to be valid." *Perry, supra,* p. 1084.

Appellant cites the case of *Belgrade v. Turner*, 307 F. Supp. 936 (Utah 1969) which predates the *Arbuckle* decision by two and one half months and which cannot be considered good precedent for the proposition that *Boykin* should be applied retrocatively, if indeed it could ever have been so considered.

The case of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) adds nothing to the standard for judging guilty pleas as discussed above; neither does it indicate that *Boykin* should be applied retroactively.

The following cases exemplify the overwhelming authority against applying the *Boykin* decision retroactively: *Hughes v. Rundle*, 419 F. 2d 118 (3rd Cir. 1969); *Commonwealth v. Godfrey*, 434 Pa. 532, 254 A. 2d 923 (1969); *State v. Griswold*, 105 Ariz. 1, 457 P. 2d 331 (1969); *Ernst v. State*, 43 Wisc. 2d 661, 170 N.W. 2d 713 (1969); *Endsley v. Cupp*, 459 P. 2d 448 (Or. App. 1969) (dictum); *In re Tahl*, 1 Cal. 3d 81 Cal. Rptr. 577, 460 P. 2d 449 (1969); *Montayne v. State*, 7 Md. App. 627, 256 A. 2d 706 (1969); *Ward v. People*, 472 P. 2d 673 (Colo. 1970); *Reynolds v. Warden*, 89 Nev. 941, 478 P.2d 574 (1970); *State v. Guy*. 81 N.M. 641, 471 P. 2d 675 (1970).

CONCLUSION

Respondents submit that the trial court properly denied appellant's petition for writ of habeas corpus because appellant had previously (1968) filed a similar petition and had a hearing to determine the propriety of his incarceration. Appellant should, or could have known and raised issues in his present petition and his failure to do so makes such issues res judicata.

Respondents further submit that the *Boykin* case has not and should not be given retrocative effect as a constitutional standard relating to guilty pleas. Appellant herein was given an opportunity to present evidence to show some infringement upon his constitutional rights. The Second District Court heard such evidence and concluded that none of appellant's constitutional rights were prejudiced by the manner in which his original guilty plea was accepted. Therefore, respondents respectfully submit that the judgment of the Second Judicial District Court should be affirmed.

Respectfully submitted,
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