1972

Lewis Banks Jr. v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

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IN THE

SUPREM

OF

STATE

LEWIS BANKS, JR.

JOHN W. TURN
State Prison,

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APPEAL
THIRD
FOR SALT
HONORABLE
SIDING.

LEWIS BANKS, JR.
P. O. Box 250
Draper, Utah 84020
Petitioner In Pro Se

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IN THE

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OF THE

STATE OF UTAH

LEWIS BANKS, JR.,
Plaintiff-Appellant,

vs.

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

Case No. 12923

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Lewis Banks, Jr., 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 December 30, 1971, appellant 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 petition was denied at the hearing held March 2, 1972. On the appel-

lant's motion, the case was reopened and additional evidence received, May 23, 1972, at which time the petition was again denied.

RELIEF SOUGHT ON APPEAL

Respondent submits that the denial of appellant's petition for writ of habeas corpus in the Third District Court should be affirmed.

STATEMENT OF FACTS

On July 30, 1970, Lewis Banks, Jr., in the Third Judicial District Court, in and for Salt Lake County, State of Utah, pled guilty to the crime of forgery. The court did not have a formal bindover from the City Court, but upon stipulation of counsel it was agreed that Mr. Banks could be arraigned and enter a plea to the charge (Exhibit 1-P, p. 3, R. 40). Mr. Banks was represented during this time by Mr. Jay D. Edmonds. He was explained and understood his right to a preliminary hearing, a trial by jury, and the nature and consequences of his crime and plea (Exhibit 1-P, pp. 4-7). He understood that as a result of his plea another charge pending against him would be dismissed (Exhibit 1-P, p. 7). He was not coerced by any threats or promises but voluntarily waived the above-mentioned rights in entering his guilty plea (Exhibit 1-P, p. 7). The court took it upon itself to make sure the above mentioned facts were true and concluded that:

> ". . . the plea of guilty . . . is made freely and voluntarily, intelligently, after consultation with his attorney and with the understanding of his constitutional rights that he was not incriminating himself, right to trial by jury, right to confront witnesses and cross-examine them in court before him, and based upon that finding, the court directs the defendant's guilty plea to the charge contained in this information be entered" (Exhibit 1-P, p. 8).

ARGUMENT

POINT I.

THE LOWER COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID HAVE JURISDICTION TO ACCEPT APPELLANT'S PLEA OF GUILTY.

The appellant seeks to have his conviction declared void on the ground that the trial court lacked jurisdiction. The basis for this allegation is that the transcript from the City Court was not before the District Court when the information was filed. Under Utah Code Ann. § 77-15-32 (1953), this transcript is supposed to be filed with the clerk of the District Court within five days from the time that the determination is made that the defendant is to be held to answer for the crime charged.

> "When the magistrate has discharged the defendant or has held him to answer he must within five days, return to the clerk of the district court the warrant, if any, the complaint and the depositions, if any; . . ."

Not until this procedure has been followed, binding-over the defendant to the District Court, can an information

properly be filed. *State* v. *Freeman*, 93 Utah 125, 131, 71 P. 2d 196, 199 (1937).

It is clear from the record, however, that appellant has failed to prove that the transcript was not in the hands of the District Court at the time the information was filed. The only evidence produced to substantiate appellant's claim, was the testimony of John Dearman of the Salt Lake County Clerk's office. Mr. Dearman testified there was some irregularity in the order of filing of the documents with regard to appellant's case (R. 60). Mr. Dearman, however, had no specific recollection of the matter (R. 60). The lower court held such evidence to be speculative and inconclusive (R. 3).

Appellant also claims that the bind-over to the District Court was improper because the signature of the City Court judge did not appear on the complaint as required in Utah Code Ann. § 77-15-19 (1953).

> "If it appears from the examination that a public offense has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the complaint an order, signed by him, . . ."

Clearly this non-compliance is not grounds for refusing jurisdiction to the District Court. *State* v. *Laris*, 78 Utah 183, 196, 2 P. 2d 243, 249 (1931).

> ". . . although the order holding the defendant to answer in the district court was not indorsed on the complaint, such an order had been made and entered by him in his docket with the other proceedings had in the case, and a transcript of the

> docket duly certified to by the justice of the peace was filed with the complaint and other papers in the case in the district court. This was held in the case of *State* v. *Crook*, 16 Utah 212, 51 P. 1091, to be a sufficient compliance with the statute in question. These assignments are without merit." *Id.*

While appellant argues that for *State* v. *Laris* to apply other requirements must be met, namely transferring a transcript to the District Court, he is unable to show that such a requirement was not met. Therefore, his claim that the bind-over was improper under Utah Code Ann. § 77-15-19 (1953), is unsupported.

From the foregoing, respondent submits that the lower court's decision was correct and that the appellant has failed to meet his burden of proof in showing that the trial court lacked jurisdiction. *Maxwell* v. *Turner*, 20 Utah 2d 163, 435 P. 2d 287 (1967).

> "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, 288.

POINT II.

THE LOWER COURT'S DECISION SHOULD BE AFFIRMED BECAUSE APPELLANT ENTERED HIS GUILTY PLEA INTELLIGENTLY AND VOLUNTARILY.

In *Brady* v. *United States*, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 47 (1970), the court discussed the standards of a guilty plea which is given voluntarily and intelligently.

To be voluntary a guilty plea must be entered:

> ". . . by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel . . ." *Id.* at 755.

Such a plea will stand unless ". . . induced by threats, . . . misrepresentations, . . . or (improper) promises . . ." *Id.* The fact that the guilty plea was encouraged by the possibility of a lighter sentence is not improper. The restrictions upon the State are that:

> ". . . the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Id.* at 750.

A further requirement to a voluntary guilty plea is the requirement that the record show affirmatively that the defendant who pled guilty did so voluntarily. *Boykin* v. *Alabama*, 395 U. S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

An examination of the present case will show that the appellant pled guilty voluntarily at his trial. Appellant admits that the trial judge questioned him at the time he entered his plea to establish that he was aware of his constitutional rights and that he was voluntarily waiving them to enter his plea of guilty. This is also established in the record (Exhibit 1-P, pp. 6, 7). The court was assured that the appellant knew the nature of the charge against him and the consequences of his guilty plea (Exhibit 1-P, 5-7). Specifically, appellant assured the court that he realized the possibility of probation was entirely within the discretion of the trial judge and that if the trial judge saw fit a sentence of one to twenty years could be imposed (Exhibit 1-P, pp. 5, 7). And, lastly, appellant stated no improper promises or coercion had been used to induce his plea (Exhibit 1-P, pp. 5, 6).

It is appellant's position that while the record indicates his plea was given voluntarily as required in *Brady, supra,* and *Boykin, supra,* his plea was actually involuntary. He claims his counsel promised he would receive probation by pleading guilty and thus influenced him against his own feelings on the matter to plead guilty (R. 45, 46). This was clearly denied by his counsel, Mr. Edmonds, at the habeas corpus hearing (R. 40, 41). An examination of appellant's testimony at the same hearing also indicates that he was aware of the likelihood of being convicted of the felony charges against him (R. 45). His major concern was not the possibility of acquittal on the charges against him, but the taking advantage of bail and his desire to "stay out as long as possible" (R. 46). The

decision to plead guilty was made with appellant's approval and as a result another charge pending against him was dismissed (R. 52).

In light of these facts, it is reasonable to conclude that the decision to plead guilty was made on the likelihood that there was little possibility of acquittal, the desire to limit the penalties which might have been imposed, and the possibility that the appellant might receive probation. These motivating factors are all proper. *Brady* v. *United States, supra,* at 752. Appellant's present contention that the *promise* of probation was *the* motivating factor is unsupported. The lower court properly exercised their prerogative to not believe the appellant's testimony on this matter. *Strong* v. *Turner,* 22 Utah 2d 294, 295, 452 P. 2d 323, 324 (1969). Undoubtedly, appellant's trial counsel, Mr. Edmonds, advised him as to the possibility of probation. This was proper. The fact that it was not realized does not make his guilty plea vulnerable to attack.

> "A defendant is not entitled to withdraw his plea merely because he discovers . . . (he has) misapprehended . . . the likely penalties attached to alternative courses of action." *Brady* v. *U. S., supra,* at 757.

Respondents submit therefore that appellant's plea was voluntary.

The appellant's second contention, whether or not his plea was given intelligently, can also be tested by the decision in *Brady* v. *United States, supra.* To be given

intelligently it must be shown that when the appellant pled guilty:

> "He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental facilities." *Id.* at 756.

Appellant has not challenged the competency of his counsel nor has he claimed ignorance of the nature of the charge against him. Apparently his only contention is that due to his lack of education he was incompetent to correctly assess his counsel's advice and decide what was in his best interest. Again this contention is unsupported. Appellant was in control of his mental facilities at the time he pled guilty (R. 6). In his schooling, he had reached the tenth grade (R. 6). He had been charged and convicted of a felony before and was familiar with the criminal process and his rights therein (R. 6, Exhibit 1-P, p. 8).

The appellant in this case knew "precisely" what he was doing. The trial court satisfied itself that the plea of guilty was voluntarily and intelligently made by a competent defendant with adequate advice of counsel and there was nothing to question the accuracy and reliability of the appellant's admissions. See *Brady* v. *United States*, *supra*, at 758.

CONCLUSION

The appellant has failed to show that the trial court lacked jurisdiction. He has also failed to show that his guilty plea was not given voluntarily and intelligently. To the contrary, the recard shows his plea was given voluntarily and intelligently. Therefore, respondents request that the lower court's decision be affirmed.

Respectfully submitted,

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