KASMIRO AMOR, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 81

Appellate Division of the High Court

Ponape District

March 11, 1983

Appeal from conviction for Burglary and Grand Larceny. The Appellate Division of the High Court, Miyamoto, Associate Justice, held that failure to receive effective assistance of counsel did not warrant withdrawal of guilty plea where defendant judicially admitted commission of the offenses alleged, that nondisclosure to the court and nonfulfillment of plea bargain arrangement was error, and that commitment order of court was void as to authority given to Probation Officer to determine when defendant could be released, as a transgression into executive branch authority, and therefore sentence of trial court was vacated and case was remanded for resentencing.

1. Constitutional Law—Right to Counsel

The right to counsel means a right to effective assistance of counsel.

2. Constitutional Law—Right to Counsel—Preparation of Case

Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations, and defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

3. Constitutional Law—Right to Counsel—Particular Cases

Criminal defendant failed to receive effective assistance of counsel before and during arraignment, where counsel had spent only seven minutes with the defendant before the arraignment and had not checked the police report or filed any motion for suppression of evidence.

4. Constitutional Law—Right to Counsel—Remedies

Failure to receive effective assistance of counsel did not warrant giving defendant the opportunity to withdraw his guilty plea, where defendant judicially admitted the commission of the offenses alleged in the information.

5. Civil Procedures—Federal Rules

Where the High Court Rules of Criminal Procedure are deficient in a procedural matter, the Federal Rules of Criminal Procedure are followed in the absence of any Trust Territory procedural requirement touching upon the point.

6. Criminal Law—Plea Bargaining

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.

7. Criminal Law—Probation

Probation is a judiciary function. (11 TTC § 1460)

8. Criminal Law—Pardon and Parole

Confinement in jail, pardon and parole, and commutation of sentence are executive functions. (3 TTC § 540; 11 TTC § 1501)

9. Criminal Law—Probation

Sentence given to criminal defendant, under which defendant was not placed on probation, but Probation Officer was given authority to determine whether the defendant could be released during the confinement, was invalid and therefore void as to limitations set upon the defendant's release while in prison, since the issuance of commitment order placed defendant within jurisdiction of executive branch, and therefore court could not transgress into the province of executive branch by setting limitations on defendant's release.

Counsel for Appellant: BRIAN MCMAHON, ESQ., *Chief Public Defender,* Commonwealth of the Northern Mariana Islands, BRUCE ABRAMSON, ESQ., and EUGENE GORROW, ESQ., *Office of Public Defender,* Federated States of Micronesia

Counsel for Appellee: FREDERICK C. CANOVER, JR., ESQ., *State Litigator, Ponape State Attorney's Office*

Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, and LAURETA, *Associate Justice* by designation

MIYAMOTO, *Associate Justice*

On February 22, 1979, in Criminal cases 14-79 and 15-79, defendant Kasmiro Amor voluntarily entered a plea of guilty to the charges of Burglary and Grand Larceny, and was sentenced to jail on April 4, 1979. On April 16, 1979, defendant filed a motion to withdraw his guilty plea and a few days later entered additional motions to vacate judgment and for reduction of sentence. On May 29, 1979, after a lengthy argument by both counsel, the trial judge denied the motion to vacate the judgment of conviction. Defendant appealed the judgment, claiming ineffective assistance of counsel, breach of plea bargaining, invalidity of sentence, and disqualification of the trial judge.

[1–4] On the issue of incompetency of defendant's counsel prior to and during arraignment, it is undisputed that the counsel had spent only seven minutes with the defendant before the arraignment and had not checked the police report or filed any motion for suppression of evidence if this was warranted. The counsel may have acted in this fashion because of the defendant's record of conviction and confession; however, the counsel had the duty to defend his client with all of the resources within his command. The right to counsel is right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441 (1970). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect

his client's interest, undeflected by conflicting considerations, and defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. *Beasley v. United States*, 491 F.2d 687 (1974). We therefore hold that defendant failed to receive effective assistance of counsel before and during arraignment. But it is a fact that despite this holding, the defendant judicially admitted the commission of the offenses alleged in the information at the hearing held on the defendant's motions. This fact alone countervails against giving the defendant the opportunity to withdraw his plea of guilty.

On the issue of the breach of plea bargaining, defendant claims that the prosecutor did not pursue his end of the bargain by not recommending the sentence agreed upon. The reading of the transcript of the sentencing proceedings indicates that at no time prior to the sentencing did both counsel bring to the attention of the court that there had been plea bargaining. Of course, neither did the court inquire of the parties whether there was a plea agreement. Only after the sentence was imposed did the defendant's counsel seek a bench conference to inform the court of the existence of a plea agreement:

> MR. GORROW: Your Honor, I can appreciate the gravity of the situation. We, in talking with the District Attorney, and the Government has said that they will recommend a maximum of one year added to this present sentence. I realize that the Court does not have to accept the recommendation, but if the Court—it is my understanding if the Court does not accept the recommendation, then the defendant can withdraw his guilty plea.

The prosecutor, John A. Brackett, in an affidavit dated April 25, 1979, submitted as an attachment to the "Opposition to Motion to Vacate Judgment," represented the following regarding the plea agreement entered:

> Pursuant to plea bargain negotiations, I informed that [sic] the Public Defender, Eugene Gorrow, that I felt Kasmiro Amor, the

defendant in this action, should receive extra jail time for his two criminal offenses that were committed during a temporarily [sic] release from custody. The Public Defender argued that additional time would serve no worthwhile purpose. *I then advised the Public Defender that I would recommend one year additional prison time.* There was no agreement on the additional time that the defendant should serve. In fact, the Public Defender was going to ask the Court that the Defendant serve no additional time which was based on the fact that the Public Defender and I could not agree on the proposed sentence. (Emphasis added.)

Clearly, the prosecution made a unilateral commitment that his recommendation to the court would be one year additional prison time to the sentence defendant was already serving. As was indicated in the aforementioned affidavit, appellant did not contend that an agreement in fact had been reached, but had relied upon the promise made by the prosecutor. The transcript of the sentencing proceedings was clearly devoid of any such representation. In fact, the prosecutor said, among other things:

Now, it's a difficult—I look at this as a difficult dilemma for the Court. He is serving five years, but he's shown some indication that he has contempt for the law despite the fact that he's serving time. I know it's a decision for the Court. One thing I would specifically ask is for full restitution to the victims of these two burglaries.

The defense counsel did not do any better. Without making any reference to the plea bargaining, he stated, among other things:

. . . And therefore, I would recommend that any sentence given in this case run concurrent with that which he's already serving and let the prison authorities discipline him for what he has done.

Obviously, both counsel failed in a miserable fashion to fully inform the court of the plea arrangement.

[5] Be that as it may, this court is concerned not with what the counsel did or did not do, but what the trial judge failed to do, i.e., in adhering to the Plea Agreement Pro-

cedure provided for in the Federal Rules of Criminal Procedure. Where the High Court Rules of Criminal Procedure are deficient in a procedural matter, the Federal Rules of Criminal Procedure are followed in the absence of any Trust Territory procedural requirement touching upon the point. *People of Roi-Namur v. Miyamoto*, 7 T.T.R. 3.

[6] In this case, the following problems were presented. First, there was a need for the court to be informed of the existence of the plea agreement.[1] Since there was no inquiry by the court, the parties made no disclosure prior to the sentencing. Secondly, once a disclosure was made at the bench conference, determination had to be made as to the exact nature of agreement reached.[2] Thirdly, once the type of agreement was determined, the court had a duty in Type B agreements (as in this case) to inform the defendant that such recommendation was not binding upon the court.[3] Fourthly, once the agreement was disclosed, there was a need to accept or reject the plea agreement.[4] The trial court failed to do all of the above. In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court, in a somewhat similar case, held that

> . . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

The third issue raised is that the sentence imposed was partially invalid because the second paragraph of the Commitment Order dated April 4, 1979, restricted the release of the defendant during the term of the imprisonment.[5] The objected portion reads as follows:

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[1] F. R. Cr. P. 11(e)(2).
[2] F. R. Cr. P. 11(e)(1)(B).
[3] *Id.*
[4] F. R. Cr. P. 11(e)(3) and (4).
[5] The first paragraph imposed a jail sentence on the defendant.

Said defendant is not to be released under any conditions, before the above named term of imprisonment is served, without the permission of the Ponape District Probation Officer and the High Court.

[7, 8] The administration of criminal justice system involves a complex intertwining of actions of the executive and judiciary branches of the government. The executive agencies investigate, arrest, detain and prosecute alleged criminal offenders. The court tries the defendant and after conviction, imposes sentence. The sentence may take a number of forms. Basically, it places a convicted defendant on probation or sends him to jail. Probation is a judiciary function (11 TTC § 1460). Confinement in jail is an executive function. So also are parole and pardon, and commutation of sentence (11 TTC § 1501; 3 TTC § 540, et seq.).

[9] Here, the defendant was not placed on probation although the Probation Officer was given authority to determine whether the defendant could be released during the confinement.[6] The court, by issuing a commitment order to carry out the sentence, had placed the defendant within the jurisdiction of the executive branch. *Hynes v. United States* (7 Cir. 1929), 35 F.2d 734, 735, cited in *People v. Thomas*, 342 P.2d 889, 895. Apart from possible post-judgment motions that the court could have entertained and acted upon, the second paragraph of the commitment order transgressed into the province of the executive branch by setting limitations on the defendant's release when parole, pardon or commutation of sentence are available to the defendant. *State v. Hovey*, 534 P.2d 777 (1975); see: 21 Am. Jur. 2d Criminal Law §§ 535, 538. The commitment order was invalid and therefore void as to the limitations set upon the defendant's release while in prison.

[6] This provision was not specifically objected to but it is clearly invalid in view of the ruling in this case.

Accordingly, for reasons advanced above, the court vacates the sentence of the trial court, and remands the case to the trial court for resentencing by a different judge with the prosecutor making the agreed-upon recommendation.

REMANDED.