216 Va. 660
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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

Record No. 750095

LLOYD PASKEL KIBERT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,
W. D. BLANKENSHIP, SUPERINTENDENT
OF BLAND CORRECTIONAL CENTER,

Appellee.

APPENDIX

Birg E. Sergent
P. O. Box 426
Pennington Gap, Virginia
Attorney for Appellant

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Original Petition

(To Be Submitted Separately)

VIRGINIA: IN THE CIRCUIT COURT OF LEE COUNTY

LLOYD PASKEL KIBERT — PETITIONER

V.

COMMONWEALTH OF VIRGINIA,
(W. D. BLANKENSHIP, Superintendent
Bland Correctional Center) — Respondent

ORDER AND OPINION

It appearing that petitioner has filed a petition for a writ of corum vobis now pending herein and it further appearing that respondent, pursuant to an Order of this Court, has filed a pleading moving the Court to dismiss the petition without a hearing, and after complete review of all pleadings filed and the records pertaining to the matter now before the Court, the Court is of the opinion that respondent's motion to dismiss should be granted for the reasons stated therein.

NOW, THEREFORE, it is ORDERED that the petition for a writ of corum vobis be denied and dismissed to which action of the Court, the petitioner objects. Let the Clerk of this Court certify copies of this Order to the petitioner, the respondent, and to Burnett Miller, III, Assistant Attorney General.

ENTERED this 14th day of January, 1975.

/s/ Joseph N. Cridlin
JUDGE

ASSIGNMENT OF ERROR

The Court erred in ruling that Virginia law did not require an Introduction of Evidence by the Commonwealth upon a plea of guilty to the Short Form Murder Indictment and further erred in ruling that the failure to take such evidence is not of Constitutional Magnitude.

VIRGINIA:

At a Circuit Court continued and held for Lee County, at the Courthouse thereof, on Thursday, the 4th day of June, 1959.

Present: The Honorable E. T. Carter, Judge of the Twenty-Fourth Judicial Circuit of the Commonwealth of Virginia.

COMMONWEALTH OF VIRGINIA PLAINTIFF

VS. (An Indictment for a Felony - Murder #897

L. P. (Bill) KIBERT DEFENDANT

This day came the Attorney for the Commonwealth, and the Associate Counsel for the Commonwealth, and the Defendant appeared in court in person and by Counsel. The defendant, after being fully advised of his rights and the consequences of his plea, by Counsel, of his own choosing, came before the court and announced that he desired to waive arraignment and enter a plea of guilty to Murder of the first degree as charged in the indictment; thereupon, the court accepted said plea of guilty and being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear and determine the case without the intervention of a jury as provided by law, and having heard the evidence doth find the accused guilty of Murder of the first degree, and upon the recommendation of the Attorneys for the Commonwealth, and after mature consideration, ascertains his punishment to be life imprisonment in the Penitentiary of this Commonwealth.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this court that the said L. P. (Bill) Kibert be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the period of his natural life, the period by the court ascertained as aforesaid; and that the Commonwealth of Virginia do recover against the said L. P. (Bill) Kibert its costs by it about its prosecution in this behalf expended, for which execution may issue.

And it is further ordered that as soon as possible after the entry of this order the prisoner, L. P. (Bill) Kibert, be removed and safely conveyed according to law from the jail of this court to the said Penitentiary, therein to be kept, confined and treated in the manner provided by law.

The court orders that the prisoner be allowed credit for the time spent in jail awaiting trial. The court certified that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

/s/ E. T. Carter
JUDGE

VIRGINIA, LEE COUNTY, TO-WIT:

I, Arthur T. Burchette, Clerk of and for the Circuit Court of Lee County, do hereby certify that the foregoing is a true copy of Order as appears of record in this Office in Criminal Order

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VIRGINIA, LEE COUNTY, TO-WIT:

I, Arthur T. Burchette, Clerk of and for the Circuit Court of Lee County, do hereby certify that the foregoing is a true copy of Order as appears of record in this office in Criminal Order Book No. 13, page 87.

Given under my hand and the seal of this office, this the 15th day of January, 1969.

Teste: Arthur T. Burchette, Clerk

By: /s/ Claudia G. Lee
Deputy Clerk

VIRGINIA:

At a Circuit Court continued and held for Lee County, at the Courthouse thereof, on Thursday, the 4th day of June, 1959.

Present: The Honorable E. T. Carter, Judge of the Twenty-Fourth Judicial Circuit of the Commonwealth of Virginia.

COMMONWEALTH OF VIRGINIA PLAINTIFF

VS. X An Indictment for a Felony - Murder #898

L. P. (Bill) KIBERT DEFENDANT

This day came the Attorney for the Commonwealth and the Associate Counsel for the Commonwealth, and the Defendant appeared in court in person and by Counsel. The Defendant, after being fully advised as his rights and the consequences of his plea, by Counsel, of his own choosing, came before the Court and announced that he desired to waive arraignment and enter a plea of guilty to Murder of the first degree as charged in the indictment; there upon, the court accepted said plea of guilty and being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear and determine the case without the intervention of a jury as provided by law, and having heard the evidence doth find the accused guilty of Murder of the first degree, and upon recommendation of the Attorneys for the Commonwealth, and after mature consideration, ascertains his punishment to be life imprisonment in the Penitentiary of this Commonwealth.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this court that the said L. P. (Bill) Kibert be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the period of his natural life, the period by the court ascertained as aforesaid; and it is ordered that this sentence shall run concurrently with the sentence imposed against the defendant, L. P. (Bill) Kibert, in Case #897, on this day in this court.

It is further ordered that the Commonwealth of Virginia do recover against the said L. P. (Bill) Kibert its costs by it about its prosecution in this behalf expended for which execution may issue.

And it is further ordered that as soon as possible after the entry of this order the prisoner, L. P. (Bill) Kibert, be removed and safely conveyed according to law from the jail of this court to the said Penitentiary, therein to be kept, confined and treated in the manner provided by law.

The court orders that the prisoner be allowed credit for the time spent in jail awaiting trial. The court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

/s/ E. T. Carter
JUDGE

Book No. 13, page 86.

Given under my hand and the seal of this office, this the 15th day of January, 1969.

Teste: Arthur T. Burchette, Clerk

By:/sClaudia G. Lee

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1660

L. P. Kibert,

Appellee,

-versus-

Superintendent, Virginia
State Penitentiary,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge.

FILED

Submitted: May 6, 1974 Decided: MAY 29 1974

WILLIAM K. SLATE, II
CLERK

MEMORANDUM DECISION

This is a state appeal from the order of the district court granting habeas relief to L. P. Kibert. In his habeas petition, Kibert challenged his convictions for first degree murder entered upon a plea of guilty to two short form murder indictments. Kibert raised the following claims below: (1) that his guilty plea and confession were involuntary, (2) that he was not advised of his right to remain silent or have an attorney, (3) that pre-trial publicity made a fair trial impossible, (4) that he was

denied the effective assistance of counsel, (5) that evidence was illegally seized, (6) that the warrant was not read to him, (7) that the charges were not read, (8) that he was tried and sentenced while wearing handcuffs in open court, (9) that he was denied the right to appeal, (10) that he was insane at the time of his trial, and (11) that he was convicted without the introduction of evidence of his guilt. The district court granted relief on the ground that no evidence was introduced. We reverse.

Appendix - I

The Appellant does not dispute, and the record supports, that Kibert has exhausted his state remedies with respect to claims 1 through 9.

Kibert claims that he was "scared, frightened, and shocked into a state of insanity...and that he did not understand any of the court action that was taken against him." In support of this claim, Kibert alleges that he was under pressure from the arrest, questioning, pre-trial publicity and ineffective counsel. We will treat this claim as part of his claim that his guilty plea was not made knowingly and voluntarily.

Claim 11 was first raised by the trial judge at the state habeas proceeding but was not brought before the Virginia Supreme Court on a petition for error although Kibert

was represented by counsel. In his pro se petition for rehearing before the Supreme Court, Kibert asserted claim 11. Since this claim was not assigned as error, it was never properly before the Virginia Supreme Court. See Rule 5:7 of the new Rules of the Supreme Court (Code of Va. 1973 Supp.) (Rule 5:7 incorporates old Rule 5:1 §4). Kibert's petition for rehearing also failed to provide the Virginia Supreme Court an opportunity to review the merits of this claim since it is the practice of the Virginia Supreme Court not to consider on a petition for rehearing matters not raised on direct appeal. See Tanzewell v. Hermas, 108 Va. 416, 425 (1908). There is nothing in the record to suggest that the Supreme Court did in fact, contrary to its practice, consider the merits of this claim.

Even assuming that Kibert's eleventh claim was before the Virginia Supreme Court since it was mentioned at the trial level of the state habeas proceedings,[1] we find that the federal constitutional claim involved in Kibert's allegation was never fairly presented to the state courts as required by Picard v. Connor, 404 U.S. 270 (1971). The question of whether evidence was required to be taken was put forward by the trial judge. A Brief Statement was made by the state attorney concerning

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[1] See Brown v. Peyton, 435 F.2d 1352, 1355 (4th Cir. 1970).

Virginia law. No argument was made by Kibert's attorney, and no federal constitutional implications were considered.

The principles of comity underlying the exhaustion of remedies doctrine are most acute in the present case. The district court granted habeas relief on its belief that under Virginia law a plea of guilty to a short-form murder indictment will only sustain a conviction for second degree murder unless evidence is adduced to elevate the crime to first degree murder. The district court found that no evidence was introduced and that therefore Kibert was denied due process by his conviction of first degree murder.

Besides the fact that the state courts have never had a fair opportunity to review this question, the constitutional issue might be avoided altogether by a construction of state law. The leading Virginia case which discusses the effect of a guilty plea to the short form murder indictment, holds that such a plea is to first, not, as the district court states, second degree murder. Hobson v. Youell, 15 S.E. 2d 76, 78-79 (1941). See, also, Davis v. Slayton, 353 F. Supp. 571, 572 (W.D.Va. 1973) aff'd. No. 73-1616 (Dec. 27, 1973, 4th Cir.).

While a voluntary and knowing plea to first degree murder would, standing alone, sustain a conviction for first

degree murder, see North Carolina v. Alford, 400 U.S. 25 (1970), the question remains whether state law requires that evidence be taken and whether the failure to take such evidence where required is of constitutional magnitude. See Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960). The resolution of this question is clearly dependant on an interpretation of Virginia law as to when and for what purpose evidence is to be taken. Va. Code §19.1-192 states: "Upon a plea of guilty in a felony case...the court shall hear and determine the case without the intervention of a jury...." This statute has never been authoritatively interpreted in its pertinent part by the Virginia Supreme Court. Va. Code §19.1-250 states that if a person indicted for murder "confess[es] the indictment to be true, the court shall hear the case without the intervention of a jury, and shall ascertain the extent of the punishment within the same bounds and give sentence accordingly." This statute was discussed in Hobson v. Youell, supra, at 79, which condoned the practice by which the essential facts constituting the crime are stated to the court by the attorneys. The Hobson court went on to say, however, that "on a plea of guilty, the accused ...[is] entitled to the independent judgment of the court upon the degree of his guilt and the punishment to be inflicted...." (emphasis added)

Where it is apparent that the state requirements that evidence be taken after a guilty plea have not been definitely resolved the state should not, if at all possible, be denied the opportunity to have its own tribunals interpret the unsettled state law. In this way not only are the considerations of comity satisfied, but the resolution of the constitutional question may be avoided. If the constitutional issue must be faced, under the exhaustion of remedies doctrine, the state should be given the first opportunity.

There is no showing that a resort to state remedies would be futile. Kibert's claims have never been prope[illegible] raised before Virginia courts. See Graves v. Cox, [illegible] Supp. 281 (W.D.Va. 1970). While Va. Code §8-596(b)(2) (1973 Supp.) provides: "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."; this statute has never been authoritatively interpreted. In the absence of such interpretation we will not say that a petitioner who was unaware of the existence of a claim would be denied relief on a subsequent petition because he was aware of the underlying facts comprising his claim. Indeed the Virginia courts may determine that Kibert was unaware of all the relevant facts concerning his claim at the time of the filing of his first petition. In any event

Kibert may reassert his claims in federal court if the state refuses to entertain his petition.

Accordingly claim 11 is dismissed without prejudice to Kibert's reasserting this claim after he has exhausted his state remedies.

Upon a careful examination of the record we conclude that Kibert voluntarily and knowingly pled guilty to first degree murder. See Davis v. Slayton, supra. The evidence from the state habeas hearing establishes that Kibert was aware of the consequences of his plea (two life sentences) which were consistent only with first degree murder.

The state court finding that Kibert was not denied the effective assistance of counsel is amply supported. Townsend v. Sain, 372 U.S. 293 (1963).

Kibert's other claims are without merit. Since the voluntariness of Kibert's plea is not vitiated by the merits of any of these claims, these claims were waived by Kibert's plea. Vanater v. Boles, 377 F.2d 898, 901 (4th Cir. 1967).

Reversed and remanded to the district court with instructions to dismiss the petition.

Clement F. Haynsworth, Jr.
United States Circuit Judge

A True Copy, Test:

William K. Slate, II, Clerk

By _____
Deputy Clerk

_____
United States Circuit Judge

/s/ John A. Field, Jr.
United States Circuit Judge

V I R G I N I A:

IN THE CIRCUIT COURT OF LEE COUNTY

L. P. KIBERT PETITIONER

VS. O P I N I O N

C. C. PEYTON, Superintendent of
The Virginia State Penitentiary RESPONDENT

Petitioner, L. P. Kibert, is before the Court attacking by way of habeas corpus two convictions for murder in the Circuit Court of Lee County on the 4th day of June, 1959.

In his petition for writ of habeas corpus, petitioner alleges:

1. That after his arrest and confinement in the Lee County jail, and before he had the assistance of counsel, statements were given by him to police officers and a news reporter in which he admitted having committed the crime charged against him. The statement given by him to the news reporter was published.

2. That he did not have effective assistance of counsel.

3. That a unlawful search of his parents premises was made and certain incriminating evidence obtained.

4. He was denied the right to appeal from the action of the Circuit Court.

Petitioner was arrested and placed in the Lee County jail on the 25th day of April, 1959, on two charges of murder. Prior to his arrest and afterward, petitioner admitted to having committed the crimes in statements to police officers and a news reporter. These statements were made prior to petitioners' employment of counsel. He was not warned prior to making the statements of his right to remain silent or to have counsel. The Statement made to a news reporter was published in a local paper.

After the arrest of Kibert, a search was made of the premises of his parents by investigating police officers. No search warrant was obtained and the consent of the owners of the property was not given. Certain guns were obtained as a result of the search.

After employment of two attorneys by petitioner, a preliminary hearing was held on May 15, 1959, and petitioner was held to answer indictment. Indictments on two charges of murder were made by a grand jury on June 1, 1959.

On the 4th day of June, 1959, petitioner entered a plea of guilty on each charge and was sentenced to two life terms in the Penitentiary where he is now held. The judgment of the circuit court was not appealed.

Petitioner complains of the fact that he was questioned by police officers prior to employment of counsel and was not warned of his constitutional right to remain silent or to his right to an attorney. The evidence is clear that all statements were made freely and voluntarily. Mr. Glen Williams, attorney for Kibert, testified that there was no question as far as he was concerned that the statements were voluntary. The trial occured prior to Escobedo v. Illinois, 378 U.S. 478 (1964). The sole standard at the time for judging a confession was one of voluntariness. But aside from this fact, the confessions were never used against petitioner in court. The statements made to a news reporter were made voluntary and although published, did not result in prejudice to petitioner since he voluntarily entered a plea of guilty. He does not contend that his previous confession had anything to do with his guilty plea, although this is argued by counsel. Petitioner's guilty plea was his own idea. His explanation of the reason for making the plea was that he desired to take the crime all on himself to exonerate his brother who was also charged. He does not contend that the plea was involuntary or that he was coerced into making the plea. He suggested the plea to his counsel and seemed determined to enter the plea. He was advised by his attorney as to the effect of the plea and the court examined him as to his action.

Petitioner contends that he did not have effective representation by counsel. The evidence is to the contrary. He employed two competent attorneys. They spent considerable time in conference with petitioner and in the investigation of the case. They went through a preliminary hearing in the case and heard the evidence of the Commonwealth. They were cognizant of all aspects of the case. They kept petitioner fully advised. They advised petitioner of the seriousness of the charge and the consequence of a plea of guilty.

Petitioner contends that certain unlawful searches and seizures were made. This is probably correct. Police officers seized certain guns from the home of petitioner's parents. It is not shown that this evidence was incriminating. This, however, was before Mapp v. Ohio, 367 U.S. 643 (1961), and such evidence, although illegally obtained, could have been introduced. The complete answer to this contention, however, is that the seized evidence was never used against petitioner, nor did it enter into his determination to enter a plea.

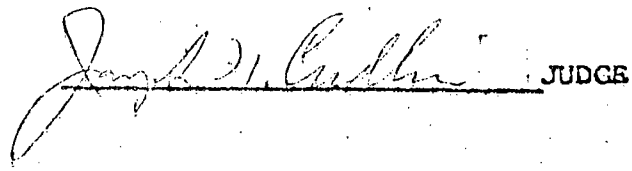
As to the petitioner's contention that he was not permitted to appeal from the judgment of the circuit court, there is no showing that he at anytime desired an appeal. On the contrary he appeared entirely satisfied with the

courts' judgment. At any rate since a plea of guilty was entered, he was not entitled to an appeal. Peyton v. King, 210 Va. 194, 169 SE 2nd 569 (1969).

The court is of the opinion that the petition for writ of habeas corpus should be dismissed.

Counsel will draw an order and submit to the court carrying out this opinion.

This the 5th day of March, 1970.



JUDGE

The following is an extract of testimony of L. P. (Bill) Kibert at the hearing on the Petition for Writ of Habeas Corpus on December 20, 1968, before the Honorable Joseph N. Cridlin, Judge of the Circuit Court of Lee County, Virginia, taken from Page 22.

Q. Now when you came out before the Judge, was any evidence introduced at that time or did you just enter a plea of guilty and were you sentenced?

A. Yes, when we came out someone, Mr. Williams, told us that we didn't have to say anything, he would do all the talking, and when we came in Mr. Williams got up and said plead guilty to the charge, and that's all he said right then. Then the other attorney got up and he said he recommend the two life's for me, and held up two fingers, two life's for Jessee and two twenty year sentences for Lee. My lawyer say I suggest that we run these sentences concurrently; then the other attorney, he says, very well, it is law and it is agreeable. Then the Judge sentenced us then to two life's to run concurrently and Lee two twenty years to run concurrently.

Q. Well, was any evidence introduced as to your guilt at that time?

MR. WHITE:

Objection.

MR. KIBERT:

A. No, Sir.

MR. WHITE:

Why introduce any evidence on plea of guilty, Your Honor?

JUDGE CRIDLIN:

I'm with you. Strike that from the record.

The following taken from Pages 44 and 45.

JUDGE CRIDLIN:

What about that proposition raised, question raised that there was no evidence introduced, I would be hearing, to raise the offense to murder in the first degree?

MR. WHITE:

Your Honor, that is a point greatly confused in Virginia. To raise the offense murder in the first degree those cases must put on evidence even with a plea of not guilty. In Virginia the law has been since Crutchfield against the Commonwealth back in 187 Virginia that a plea of guilty is in itself a conviction and no evidence whatsoever is needed. The Supreme Court of the United States has said this. Our Supreme Court of Appeals said this was on December 16, 1968 in the case of Calvin R. McCleary against C. C. Peyton. The reaffirmed the Crutchfield doctrine and went into a long discussion of guilty pleas and collateral attack. On a plea of guilty all that remains is to sentence the man. Such as the case when he entered the plea here with knowledge of what that plea meant.

JUDGE CRIDLIN:

Very well. .....