2000

Edward Oniskor v. Samuel W. Smith, Warden, Utah State Prison : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

EDWARD ONISKOR,

Plaintiff-Appellant,

-vs-

SAMUEL W. SMITH, Warden, Utah State Prison,

Defendant-Respondent.

Case No. 14003

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEWART M. HANSON, SR., JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the appellant, Edward Oniskor, from an order granting a motion to dismiss.

DISPOSITION IN THE LOWER COURT

The Honorable Stewart M. Hanson, Sr., of the Third Judicial District Court granted respondent's motion to dismiss in response to appellant's petition for a writ of habeas corpus.

RELIEF SOUGHT ON APPEAL

Respondent submits that the order of the lower court granting the motion to dismiss should be affirmed.

STATEMENT OF FACTS

Complaints were signed charging the appellant with committing robbery from a person on or about the first day of January, 1971, and did at the same time and place commit the crime of murder in the first degree and further, committed at

the same time and place the crime of rape.

All evidence indicated that in the early morning hours of New Year's Day, 1971, Mrs. Lucille R. Pierron, who lived alone in an apartment located on 25th Street in Ogden, Utah, was assaulted, robbed, raped and murdered by the appellant. Appellant was apprehended by the Ogden City Police after he was observed to be in the possession of a ring and certain keys belonging to the deceased Pierron (T. 905). After questioning he confessed to the killing and the robbery (T. 907).

A verdict of guilty on all three charges was returned by the jury.

Appellant appealed his conviction to the Utah Supreme Court which affirmed in an opinion reported in State v. Oniskor, 29 Utah 2d 395, 510 P.2d 929 (1973).

ARGUMENT

POINT I

APPELLANT'S USE OF THE WRIT OF HABEAS CORPUS IS INAPPROPRIATE AND THUS THERE WAS NO ERROR IN GRANTING THE MOTION TO DISMISS.

The appellant's use of a writ of habeas corpus to (1) present issues that were unsuccessfully raised on appeal, (2) challenge the sufficiency of evidence, and (3) raise alleged error which was known at the time of a prior appeal but which was not then contested, is inappropriate.

(1) Appellant raises two issues which were previously raised and unsuccessfully appealed in State v. Oniskor, 29 Utah 2d 395, 510 P.2d 929 (1973), Case No. 12696. Appellant alleges

no new facts and the constitutional issues--the right to confrontation and the admissiblity of expert testimony based on hearsay evidence--are identical.

In State v. Oniskor, supra, the petitioner alleged that it was a denial of his Sixth Amendment right to confrontation to allow the state to read testimony given at the preliminary hearing by two witnesses, who were outside of the state at the time of the trial. 510 P.2d at 930.

The Court ruled on this issue by saying:

> "The use of the depositions at the trial constituted a denial of defendant's constitutional right of confrontation. However, the testimony of these two absent witnesses was merely cumulative since others also testified to essentially the same facts. A survey of the record reveals that the other evidence against defendant was so overwhelming that this court is compelled to conclude beyond a reasonable doubt that the denial of defendant's rights constituted harmless error." 510 P.2d at 931.

At the time of his appeal, petitioner also contended that the trial court erred in its ruling that an expert witness may render an opinion based upon hearsay evidence. 510 P.2d at 931. The court ruled on this issue by saying:

> "The trial court erred in its ruling that this opinion evidence, based on hearsay, was admissible. This error and its effect must be evaluated in conformity with Section 77-42-1, U.C.A. 1953, which requires this court to render judgment without regard to errors or defects which do not affect the substantial rights of the parties. To interfere with a jury verdict, the error must be such that it was reasonably probable that there would have been a result more favorable to the defendant in the absence of error. An evaluation of this extensive record compels a conclusion that the asserted errors were insignificant and in no way resulted in prejudice to defendant's cause. The judgment of the trial court is affirmed." 510 P.2d at 932.

As to the permissiblity of using the writ of habeas corpus for such purposes, the Utah Supreme Court has held that a litigant cannot present the same issues in a habeas corpus proceeding that he had heretofore unsuccessfully raised on appeal. Scandrett v. Turner, 26 Utah 2d 371, 489 P.2d 1186 (1971); State v. Morgan, __ Utah 2d ___, 527 P.2d 225 (1974).

Likewise, the Arizona Supreme Court in Yanich v. Eyman, 108 Ariz. 585, 503 P.2d 807 (1972), held that a trial court had no jurisdiction to consider a writ of habeas corpus where an appeal from the petitioner's conviction was pending

and raised the same issues as set forth in the petition. The court, citing State ex rel. Bessman v. Theisen, 142 S.W. 1088 (1912), stated:

> "Where one court has competent jurisdiction of the person and is proceeding to exercise it, it would be a great outrage upon the administration of justice if a court of equal or inferior jurisdiction should by virtue of the writ of habeas corpus seek to override the jurisdiction of the former by discharging the person and thus annulling its writs and processes and rendering abortive any judgment it might lawfully render."

Appellant cites Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963), and maintains that the rationale behind the decision should apply to state prisoners seeking relief in state courts. The Supreme Court in Fay indicated that a federal district court could review a decision previously rendered by a competent state court by means of the writ of habeas corpus. The reasoning given was stated:

> " . . . the state adjudication carries the weight that federal practice gives to the conclusion of a court . . . of another jurisdiction on federal constitutional issues. It is not res judicata."

The Court merely reiterated its position on federal review of state determination of federal constitutional issues. The attempt by appellant to apply the above case to a state prisoner's use of habeas corpus to circumvent a previously rendered state final decision is inappropriate and there is a vast difference between federal review of a state interpretation of federal questions and the type of intra-state review appellant is seeking.

Appellant presents the same due process arguments to this court in the form of a petition for a writ of habeas corpus as was unsuccessfully presented to the Utah Supreme Court in the appeal from conviction. Therefore, as per the case law cited above, the motion to dismiss should be affirmed.

(2) Appellant contends that his conviction of rape and murder is so devoid of evidentiary support as to amount to a denial of due process. It is well established that the appellant cannot raise questions of insufficiency of evidence to sustain a petition for a writ of habeas corpus.

In Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970), the Court of Appeals stated:

> "The sufficiency of the evidence to sustain a conviction is not subject to review in our federal habeas corpus proceedings unless the conviction is so devoid of evidentiary support as to have a due process issue."

See also Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), cert. den. 405 U.S. 1048 (1972); Mathis v. Colorado, 425 F.2d 1165 (10th Cir. 1970).

In addition, appellant's claim of insufficient evidence is without merit because (1) there was a confession which was entered into the record and was ruled voluntarily given, wherein petitioner admitted suffocating the victim (T.750); (2) petitioner took the stand and related the events of the murder and admitted that he had suffocated and had sexual intercourse with the victim (T.881,882); (3) petitioner called his own psychiatrist who testified that the petitioner had informed him he had suffocated and had intercourse with the victim (T.811). Furthermore, in State v. Oniskor, supra, the court found that the evidence against appellant was "overwhelming." 510 P.2d at 931.

(3) Appellant did not raise the issue of insufficiency of evidence at his appeal from conviction in State v. Oniskor, supra. If appellant claims that there was insufficient evidence to sustain the conviction for

murder and rape, this certainly would have been known to him at the time he appealed his conviction. His failure to raise the issue on appeal bars him from using the writ of habeas corpus as a substitute appeal under current case law.

The Utah Supreme Court has held in Velasquez v. Pratt, 21 Utah 2d 229, 443 P.2d 1020 (1968):

> "[H]abeas corpus is not and cannot properly be used in the place of a regular appellate review. As to any claimed error or irregularity which was known or should have been known to the appellant at the time of judgment, there was first an obligation to call it to the trial court's attention and seek remedy; and that failing, there was next a duty to seek review and correction on appeal. If that is not done within the time allowed by law, the judgment becomes final and not subject to further attack for any matters which could have been so reviewed on regular appeal."

The California Supreme Court held accordingly in In re Walker, 112 Cal. Rptr. 177, 518 P.2d 1129 (1974), when it stated:

> "The general rule is that habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."

See also Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968); People v. Jones, 108 Cal. Rptr. 345, 510 P.2d 705 (1973).

For the above reasons, respondent contends that appellant has made inappropriate use of the writ of habeas corpus and, therefore, the order granting the motion to dismiss should be affirmed.

POINT II

ANY POSSIBLE VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT AND THUS THERE WAS NO ERROR IN GRANTING THE MOTION TO DISMISS.

It is well settled that if the errors of the lower court, alleged on appeal, are so insignificant as to be harmless beyond a reasonable doubt, such errors cannot be used as a basis for reversal.

The United States Supreme Court in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), declined to adopt the rule that all federal constitutional errors must be per se "harmful." The Court stated:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

The Court went on to establish the standard to be used in determining when a particular error is "harmless,"

> ". . .that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Emphasis added.)

Chapman reaffirmed in Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969).

The Utah Supreme Court in State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970), held:

> ". . .[T]here is a presumption that such error is prejudicial, but that it can be overcome when the court is convinced beyond a reasonable doubt that it had no such prejudicial effect upon the proceedings. Correlative to this it is also true that when the guilt is shown by other untainted evidence so overwhelming that there is no likelihood whatsoever of a different result in the absence of such error or irregularity, there should be no reversal."

Furthermore, this position has been codified in Utah Code Ann. § 77-42-1 (1953):

> "After hearing an appeal the court must give judgment without regard to defects which do not affect the substantial right of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

The Utah Supreme Court has already held in State v. Oniskor, supra, that the errors asserted in this petition -- the denial of the right to confrontation and the admissibility of expert testimony -- were, as a matter of law, "harmless beyond a reasonable doubt." Referring to the errors alleged on appeal, the Court said:

> "A survey of the record reveals that the other evidence against defendant was so overwhelming that this court is compelled to conclude beyond a reasonable doubt that the denial of defendant's rights constituted harmless error.
>
> "An evaluation of this extensive record compels a conclusion that the asserted errors were insignificant and in no way resulted in prejudice to defendant's cause."

The evidence against appellant, consisting of his own confession and the direct testimony of other witnesses, is so overwhelming, any possible violation of appellant's constitutional rights was harmless beyond a reasonable doubt and does not call for reversal.

POINT III

PRIOR UTAH SUPREME COURT HOLDINGS DO NOT PRECLUDE THE USE OF THE WRIT OF HABEAS CORPUS AS A POST-CONVICTION REMEDY.

Appellant contends that the holdings of Scandrett v. Turner, supra, and Velasquez v. Pratt, supra, abrogate Article I, § 5 of the Utah Constitution in that they preclude the use of the writ of habeas corpus as a post-conviction remedy. Such assertion is without merit.

First, Article I, § 5, which states that the writ of habeas corpus will not be suspended unless required by rebellion,

invasion, or public safety, pertains to the traditional type of habeas corpus as outlined in Rule 65B(f) of the Utah Rules of Civil Procedure--not the post-conviction type of Rule 65B(i) sought by appellant in this case.

Second, the cases cited only limit the availability of the writ of habeas corpus as a post-conviction remedy--they do not preclude it. The Utah Supreme Court in Scandrett v. Turner, supra, and Velasquez v. Pratt, supra, has indicated the need to limit the use of habeas corpus as a post-conviction remedy based mainly on the public policy as expressed in Johnson v. Turner, 24 Utah 2d 439, 473 P.2d 901 (1970):

> "The efficient and orderly administration of justice and respect for the finality of judgments regularly arrived at demand that the merry-go-round of litigation stop somewhere."

However, the Court has not precluded the use of habeas corpus altogether as a post-conviction remedy. The Court in Johnson v. Turner, supra, went on to say:

> " . . . where it appears that there has been a miscarriage of justice that it would be unconscionable not to re-examine a conviction, . . . we do not regard the rules of procedure as being so absolute as to prevent us from

> correcting any such obvious injustice."

The above indicates when such use of habeas corpus would be appropriate.

In Sullivan v. Turner, 22 Utah 2d 85, 448 P.2d 907 (1968), the Utah Supreme Court indicated that the use of the writ of habeas corpus as a collateral attack to an appeal is appropriate only:

> " . . . when the interests of justice so demand because of some extraordinary circumstances or exigency: e.g.,
> (1) lack of jurisdiction,
> (2) mistaken identity,
> (3) where the requirements of law have been so ignored or distorted that the accused has been deprived of due process of law, or
> (4) there is shown to exist some other such circumstance that it would be unconscionable not to review the conviction." (Emphasis added.)

Thus, while the Utah Supreme Court has specified under what circumstances the writ of habeas corpus can be used as a collateral attack to an appeal, those available situations are limited and carefully scrutinized.

In the instant case, appellant has failed to show such "extraordinary" or "exigent" circumstances. Appellant

was represented by competent counsel during his original appeal in State v. Oniskor, supra, and the Court found that the evidence against him was so overwhelming that any possible error was harmless beyond a reasonable doubt. Thus, appellant's use of the writ of habeas corpus fails to satisfy the requirements of Sullivan v. Turner, supra, or Johnson v. Turner, supra, and thus should be dismissed.

POINT IV

THE RELIEF SOUGHT BY APPELLANT IS INAPPROPRIATE IN THAT IT GOES BEYOND THE AVAILABLE SCOPE OF APPEAL FOR THIS CASE.

Appellant seeks as relief on appeal "the reversal of the order of the lower court and the granting of his petition." Such relief is inappropriate since the only issue on appeal is the validity of the order granting the motion to dismiss. Thus, the only issues to be appealed are those presented in the motion to dismiss; namely, the use of the writ of habeas corpus as a substitute for appellate review, as a second appeal, or to challenge the sufficiency of evidence; and the extent of harmless error. Requesting this Court to grant appellant's petition is improper since

this would deny respondent the opportunity of presenting supporting evidence in an appropriate hearing. The only relief that may be requested by appellant is a remand for hearing--not a granting of the writ of habeas corpus.

CONCLUSION

Appellant's inappropriate use of the writ of habeas corpus and the "harmless" and non-prejudicial nature of the alleged errors warrants an affirmation by this Court of the order granting the motion to dismiss. Furthermore, as a policy matter, appellant should be precluded from using the writ of habeas corpus to relitigate issues that have previously been adjudicated and finally determined on appeal. There must be at some point an end to the judicial process. The writ of habeas corpus was never intended to be a tool to needlessly extend the resolution of previously adjudicated issues.

Respectfully submitted,

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