1987

John Frances McKenna v. Gerald Cook, David L. Wilkinson : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN FRANCES McKENNA,	:	
Plaintiff-Respondent,	:	Case No. 870534-CA
v.	:	
GERALD COOK, Warden; DAVID L. WILKINSON, Utah State Attorney General,	:	Category No. 3
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM A DISMISSAL OF A PETITION FOR WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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Respondent-Appellee.	:	

BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a dismissal of a Petition for Writ of Habeas Corpus in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1988).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether petitioner could raise issues in a post-conviction relief action which were not raised on direct appeal?

2. Whether petitioner could have raised his claim of ineffective assistance of trial counsel on direct appeal?

STATEMENT OF THE CASE

Petitioner was convicted of two counts of Aggravated Assault, third degree felonies, in violation of Utah Code Ann. §76-5-103 (1978, as amended), in a jury trial held October 21-22, 1985, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, Judge, presiding. Judge Conder sentenced petitioner on March 31, 1986, to two concurrent terms of zero to five years in the Utah State

to two concurrent terms of zero to five years in the Utah State Prison. The Utah Supreme Court affirmed petitioner's conviction in State v. McKenna, 728 P.2d 984 (Utah 1986). (See Addendum "A")

Petitioner filed a Petition for Writ of Habeas Corpus in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding. (R. 2). Upon the State's motion, Judge Sawaya dismissed the petition because petitioner could and should have raised all issues concerning his conviction on direct appeal. (R. 44-6). (See Addendum "B") Petitioner now appeals that dismissal.

STATEMENT OF THE FACTS

Petitioner visited his estranged wife early in the morning of August 21, 1985 (R. 22). Upon learning she had spent the night with another man, petitioner became enraged (R. 22). Petitioner left, obtained a gun, and returned to his wife's apartment (R. 22). Petitioner beat, kicked, and threatened the other man until petitioner successfully chased him from the apartment (R. 22).

Angered, petitioner's wife ordered petitioner out of her apartment (R. 22). Petitioner administered a severe and vicious beating upon his wife (R. 22, 23). In the course of the beating, petitioner shot his wife in the shoulder (R. 22).

Petitioner was convicted by a jury of two counts of aggravated assault (R. 22). Petitioner's conviction was affirmed by the Utah Supreme Court on appeal (R. 21-23) (See Addendum "A").

Petitioner filed a Writ of Habeas Corpus attacking his conviction (R. 2). On October 8, 1987, Judge Sawaya signed a minute entry dismissing the Writ and sent copies of the minute entry to the parties (R. 41, 44-46). Petitioner filed a notice of appeal on November 16, 1987, more than 30 days after the signed dismissal (R. 42). Judge Sawaya later entered Findings of Fact, Conclusions of Law, and an Order on January 5, 1988 (R. 44-46).

SUMMARY OF ARGUMENT

Petitioner's alleged errors could and should have been raised on direct appeal and therefore cannot be raised for the first time in a post-conviction relief action.

Petitioner had adequate opportunity to raise the issue of ineffective assistance of counsel on direct appeal and therefore cannot use his ineffectiveness claim to raise new issues in a post-conviction relief action.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY RULED THAT PETITIONER COULD AND SHOULD HAVE RAISED ALL ISSUES CONCERNING HIS CONVICTION ON DIRECT APPEAL.

Petitioner first asserts that his petition for a Writ of Habeas Corpus is not an attempt to circumvent proper appellate procedure.[1] Defendant's assertion is meritless.

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[1] As noted above, a minute entry was signed on October 8, 1987, dismissing petitioner's writ (T. 41). Copies were sent to the parties (T. 41). In Dove v. Cude, 710 P.2d 170 (Utah 1985) the Utah Supreme Court said that "[a] signed minute entry may be a final order for purposes of appeal." Id. at 171 n.1. Because petitioner filed his notice of appeal on November 16, 1987,

It is well settled law in Utah that if alleged errors could have been raised on direct appeal, this court is "precluded under basic principles of appellate review from addressing them now." Bundy v. Deland, 94 Utah Adv. Rep. 9, 9 (Sup. Ct. October 26, 1988) In stating a post-conviction claim, a petitioner must allege an "obvious injustice or a substantial and prejudicial denial of a constitutional right in the trial of a matter; . . ." Id.

The Utah Supreme Court in Codianna v. Morris, 660 P.2d 1101 (Utah 1983) clearly emphasized the standards for Habeas Corpus review:

> It is therefore well settled in this state that allegations of error that could have been but were not raised on appeal from a criminal conviction cannot be raised by habeas corpus or postconviction review, except in unusual circumstances.
>
> A much-quoted statement of the type of errors that are and are not cognizable by habeas corpus is the following from this Court's unanimous opinion in Brown v. Turner, 21 Utah 2d 96, 98-99, 440 P.2d 968, 969 (1968) (Crockett, C.J.):
>
> > [Habeas corpus] is an extraordinary remedy which is properly invocable only when the court had no jurisdiction over the

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[1] Cont. petitioner exceeded the time limit for filing a notice of appeal as required by Rule 4(a), Rules of the Utah Court of Appeals. This Court would therefore lack jurisdiction.

However, the State recognizes that the Rules of the Utah Court of Appeals, Rule 4(c), states that a notice of appeal "filed after the announcement of . . . an order but before the entry of the . . . order of the district court . . . shall be treated as filed after such entry and on the day thereof." Id. Because the trial court entered Findings, Conclusions and an Order on January 5, 1988, petitioner's notice of appeal could arguably be considered filed on the same date.

> person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction. If the contention of error is something which is known or should be known to the party at the time the judgement was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstance as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Codianna v. Morris, 660 P.2d at 1104-05 (bracketed material and emphasis in original). See also Bundy v. Deland, 94 Utah Adv. Rep. at 9-10.

The court in Codianna rejected the argument that ineffective assistance of counsel necessarily constitutes the "unusual circumstances" that would allow petitioner to bypass the regular appellate process in favor of Habeas Corpus. The court stated:

> To permit the inevitable instances of attorney oversight or ignorance to qualify for the "unusual circumstances" exception would allow that exception to swallow up the rule, thereby transforming habeas corpus from an extraordinary remedy into an alternative appeal mechanism in contravention of the finality of criminal judgments that is the settled policy of this state.

Id. at 1105.

The following must be considered in determining whether a conviction should be set aside on the basis of ineffective assistance of counsel:

> (1) The burden of establishing inadequate representation is on the defendant, "and proof of such must be a demonstrable reality and not a speculative matter." State v. McNicol, 554 P.2d at 204. (2) A lawyer's "legitimate exercise of judgment" in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel. State v. McNicol, 554 P.2d at 205. (3) It must appear that any deficiency in the performance of counsel was prejudicial. State v. Forsyth, Utah, 560 P.2d 337, 339 (1977); Jaramillo v. Turner, 24 Utah 2d 19, 22, 465 P.2d 343, 345 (1970). In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result. . ." State v. Gray, 601 P.2d at 920. Similarly, as we noted in State v. Malmrose, 649 P.2d at 58, "the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance."

Codianna v. Morris, 660 P.2d at 1109. "If counsel's deficiencies were sufficiently grievous [to meet these requirements], they constituted a violation of due process that is clearly reviewable" in this action. Id. at 1105.

In the present case, petitioner claims his attorney was ineffective because she did not press for admission of corroborating and mitigating evidence. However, petitioner fails to demonstrate how the result of his conviction would have been different had his attorney pressed for admission of such

corroborating and mitigating evidence.[2] Petitioner has done nothing more than speculate that the result might have been different.[3] Thus, the trial court did not err in ruling that petitioner failed to plead inadequate representation amounting to a denial of due process justifying collateral review.

Furthermore, petitioner knew or should have known, prior to appeal, that his attorney did not press to admit the above evidence. Therefore, petitioner knew or should have known prior to appeal whether or not his counsel was ineffective at trial. Consequently, petitioner is foreclosed from raising this issue in a post-conviction relief action. See Codianna v. Morris, 660 P.2d at 1105.

POINT II

PETITIONER HAD ADEQUATE OPPORTUNITY TO RAISE THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Petitioner asserts that he could not have known about his counsel's ineffectiveness concerning his appeal until after the appeal was already filed. He then concludes that he could

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[2] Petitioner asserts a conference occurred in chambers wherein the court decided to exclude the possible mitigating testimony. Petitioner further claims that he was not included in the conference. Petitioner cites to a trial transcript which is not a part of the record on appeal. Accordingly, this court should limit its review to the facts supported by the appellate record. State v. Wulfenstein, 657 P.2d 289, 292-93 (Utah 1982), cert. denied, 460 U.S. 1044 (1983).

[3] Petitioner apparently takes the position that because he alleges that mitigating evidence exists, he has established a "demonstrable reality." Petitioner fails to explain how the content of the evidence would change the result of his trial. Merely alleging the existence of evidence without demonstrating the content of the evidence is insufficient to establish a "demonstrative reality."

not have raised ineffective assistance of counsel on appeal. Petitioner's assertion is errornous.

In Hafen v. Morris, 632 P.2d 875 (Utah 1981), the Utah Supreme Court encountered the same claim. In Hafen, defendant was convicted and sentenced to prison. Id., at 876. Hafen appealed and his conviction was affirmed. Id. Hafen then sought Habeas Review and claimed that his trial attorney "failed to honor his request to challenge a juror who appellant knew. Appellant also claimed that his trial attorney failed to raise that issue on appeal although appellant had so requested." Id., at 876. Naturally, petitioner Hafen in his post-conviction action claimed "he was denied effective assistance of counsel. . . " Id. The lower court:

> dismissed his petition on the ground that he had waived any right to raise the issue of the failure of his attorney to challenge the juror. The court determined that it would not grant an evidentiary hearing on that issue since it could have been raised at appellant's trial or on appeal. . . .

Id. The Supreme Court upheld the lower court and stated:

> We explained further, in Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968), that "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstances as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent."
>
> Waiver was found in Schad v. Turner, supra, where the petitioner in a petition for habeas corpus attempted to raise as an issue

> that the District Attorney had exceeded the bounds of propriety in his cross-examination of the petitioner at the trial. We there observed that since that was an issue which could have been raised on the petitioner's former appeal of his case to this Court, we would not take cognizance of it on a later petition for habeas corpus.
>
> If the appellant's counsel did in fact fail to honor his request to challenge the juror, the appellant had the adequate opportunity at the trial to have made complaint to the court. Furthermore, following his conviction that issue could have been raised by him in this Court in his appeal which pended in this Court for many months. In view of his silence, the trial judge correctly ruled that he had waived any claim of error in this regard. There are not here any of the "unusual circumstances" referred to in Bryant v. Turner, supra.

Id.

In the instant case, petitioner had adequate opportunity to raise his complaint at trial and on direct appeal to the Utah Supreme Court. State v. McKenna, 728 P.2d 984 (Utah 1986). Thus, petitioner's ineffective assistance of counsel claim cannot be considered an "unusual circumstance" justifying an exception to the requirement that all claims of error be raised before the appellate court. Other than ineffective counsel, petitioner fails to assert any additional "unusual circumstances." Therefore, the trial court properly ruled that the petition was barred due to petitioner's circumvention of the regular appellate process.

CONCLUSION

Based upon the foregoing, respondent respectfully requests this Court to affirm the lower courts dismissal of the Petition for Writ of Habeas Corpus.

DATED this 28th day of November, 1988.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief was mailed, postage prepaid, to John Francis McKenna, Pro Se, P. O. Box 250, Draper, Utah 84020, this 28th day of November, 1988.