2001

William Wayne Wellwood v. John W. Turner : Brief of Respondent

Utah Supreme Court

WILLIAM WAYNE WELLWOOD,
Plaintiff-Appellant,

-vs-

JOHN W. TURNER, Past Warden, and SAMUEL W. SMITH, Present Warden, Utah State Prison, et al.,
Defendant-Respondent.

Case No. 13550

BRIEF OF RESPONDENT

APPEAL FROM THE DENIAL OF A PETITION FOR A WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEWART M. HANSON, JUDGE, PRESIDING.

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IN THE

SUPREME COURT

OF THE

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a denial of petition for writ of habeas corpus pursuant to Rule 72, Part IX of Utah Rules of Civil Procedure, Utah Code Ann. (1953).

DISPOSITION IN LOWER COURT

Petition for writ of habeas corpus was heard be-

fore the Honorable Stewart M. Hanson, Judge, District Court of Salt Lake County, on September 27, 1973, in Case No. 210613. Petition was denied October 9, 1973.

RELIEF SOUGHT ON APPEAL

Respondent seeks that the lower court's decision be affirmed.

STATEMENT OF FACTS

On October 14, 1971, at approximately 9:00 p.m., two men robbed Joe's Husky Station at 2100 South and Third East in Salt Lake City (T. 5,6). One of the men, described by the victim Robert A. Barney as Caucasian, about thirty, five feet, eight inches in height, weight around 150 to 175 pounds, receding hairline, long hair, long sideburns, and drooping mustache (T. 7), held a distinctive sawed-off shotgun (T. 21,22) with an unusual pistol grip to the midsection of the victim, while the other man, described as Caucasian, about thirty, fairly large (250 pounds), six foot four, receding hairline, long sideburns, big drooping mustache (T. 10-14), opened the service station cash box and took money, a credit card, belonging to Mortensen Furniture, and other valuables (T. 18). The two men escaped in a light colored automobile (T. 84).

On October 16, 1971, police officers, led by an informant familiar with the petitioner-appellant's activities, went to a "motorcycle club" located at First West

and Fifth South. There the informant pointed out petitioner-appellants as the robbers of Joe's Husky Station. Police officers, noting that petitioners closely fit the description of the robbers as given by the victim and noting a car parked behind the "club house" fitting the description of the getaway car, arrested petitioners without a warrant. Incident and contemporaneous with this arrest, police officers searched the room in which petitioner Harris was found and also the room in which petitioner Wellwood was found (T. 58). In the latter room, officers found a distinctive sawed-off shotgun with a pistol grip. Officers also obtained from petitioner Harris a Husky Oil Company credit card belonging to Mortensen Furniture.

Petitioners were tried January 12 and 13, 1972, before a jury which found them guilty of robbery. Each were sentenced to an indeterminate term provided by law.

Counsel for petitioners filed notice of appeal from the trial court decision. Subsequently, petitioners voluntarily elected to forego the appeal; in return, Case Nos. 23869, 23870, and 23871, were dismissed against them.

On September 27, 1973, a full hearing was given for petitioner's petition for a writ of habeas corpus. On October 9, 1973, the petition was denied. On November 21, 1973, a notice of appeal from the denial of the petition for writ of habeas corpus was filed with this Court.

ARGUMENT

POINT I

THE WRIT OF HABEAS CORPUS IS NOT A PROPER REMEDY UNDER THE FACTS OF THIS CASE.

Appellant alleges several issues in his brief for which he seeks review. All these issues were known to petitioner at the time of his commitment to the Utah State Prison, yet he voluntarily elected to forego the appeal in exchange for dismissal of three cases against him. According to Utah law, the proper procedure should have been to appeal his sentence.

Appellant is trying to use the writ of habeas corpus as a means of appeallate review. This is not the purpose for which the writ was established. In *Bryant v. Turner,* 19 Utah 2d 284, 431 P.2d 121 (1967), this Court held:

> "The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term 'due process of law,' or where some other circumstances exists that it would be wholly unconscionable not to re-examine the conviction." *Id.* at 286-287, 122, 123.

When the same facts alleged in a petition for a writ of habeas corpus are known to the petitioner at the

time of his judgment, his proper remedy is not a writ. In *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (1968), the petitioner contended that he was denied the right to counsel, and that he did not understand the consequences of his guilty plea. The Supreme Court of Utah held that the petitioner was not entitled to the habeas corpus remedy:

> "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 limitations of time specified therein would be rendered impotent." *Id.* at 98-99, 969.

In *Jaramillo v. Turner,* 24 Utah 2d 19, 465 P.2d 343 (1970), the petitioner charged with the crime of robbery withdrew his plea of not guilty, plead guilty and did not appeal from the judgment and sentence. Instead he petitioned for a writ of habeas corpus alleging that at the time of his change of plea, he was not advised of the consequences of his plea of guilty, and that his counsel inadequately defended him. The Utah Supreme Court held that the writ of habeas corpus could not be used as a means of appellate review, and affirmed denial of the writ.

In the case of *Zumbrunnen v. Turner,* 27 Utah 2d 428, 497 P.2d 34 (1972), the defendant plead guilty to burglary upon dismissal of two similar charges. He petitioned for a writ of habeas corpus after his time for appeal had expired claiming (1) his plea was involuntary and unintelligent and (2) his counsel was incompetent. This Court held that both points could have been argued on a regular appeal, and that the writ of habeas corpus may not be used as a substitute for such appeal.

In the present case, the defendant's attorney, who the lower court described as "adequate, if not excellent," filed a timely notice of appeal following the defendant's conviction. Subsequently the defendant *voluntarily* elected to forego the appeal in return for the dismissal of Case Nos. 23869, 23870, and 23871, against him. Defendant now seeks to reap the benefits of his bargain and dismiss its disadvantages.

For the above reasons, the petition for writ of habeas corpus in this case is an improper remedy, and the decision below should be affirmed.

POINT II

THE APPEAL WAS NOT FILED WITHIN THE TIME STIPULATED WITHIN RULE 73(a) OF THE UTAH RULES OF CIVIL PROCEDURE AND SHOULD THEREFORE BE DISMISSED.

The Utah Rules of Civil Procedure, Rule 73(a), stipulates:

> "The time within which an appeal may be taken shall be *one month* from the entry of the judgment or order appealed from. . . ." (Emphasis added.)

Judge Stewart M. Hanson denied petitioner's petition for a writ of habeas corpus on October 9, 1973, and stipulated within the written denial, that petitioner had thirty days to appeal the decision to the Utah Supreme Court. A copy of Judge Hanson's denial was delivered to the defendant.

On November 21, 1973, one month and twelve days after Judge Hanson's denial, petitioner filed this notice of appeal in the Utah Supreme Court. Petitioner did not previously file a timely motion to terminate the running of time, nor does the petitioner now attempt to demonstrate excusable neglect based on a failure of a party to learn of the entry of judgment. This appeal, as stands, has not followed the stipulated procedure required, by law, to be followed in such appeals and, therefore, should be dismissed.

POINT III

THE SEARCH AND SEIZURE WAS INCIDENT TO A LAWFUL ARREST; THUS, THE EVIDENCE SEIZED PURSUANT THERETO WAS PROPERLY ADMITTED IN TRIAL.

A. THE POLICE OFFICERS HAD PROBABLE CAUSE TO MAKE THE ARREST.

Utah Code Ann. § 77-13-3(3) (1953), allows a peace officer to make a warrantless arrest:

> "(3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

In *State v. Lopez*, 22 Utah 2d 257, 451 P.2d 772 (1969), this Court established the standard of reasonable or probable cause prior to an arrest without a warrant:

> "The requirements, as in so many areas of the law, is one of reason: that it be shown that under the facts and circumstances known to the officer, a reasonable and prudent man in his position would be justified in believing that the suspect had committed the offense." *Id.* at 261.

The arresting officers had sufficient facts to reasonably believe petitioner had indeed committed the offense. An informer, familiar with the petitioner's activities, told the police that he believed petitioners had committed several armed robberies in the area and pointed out petitioners when police investigated the motorcycle club.

The United States Supreme Court held in *Draper*

v. United States, 358 U.S. 307, 79 S.Ct. 329 (1958), that when the information given by an informer is "personally verified" then the arresting officers had "reasonable grounds" to believe that the remaining unverified bit of information--that Draper had committed a felony--was likewise true. The police officers were personally directed by the informant to the petitioners and took the petitioners into custody only after the informant personally pointed the petitioners out as the robbers. The two petitioners fit the description given by victims of the robberies in their size, hair style, appearance, and clothing. A car, fitting the description of the getaway car in the numerous robberies, was parked near the clubhouse. Relying upon the personal identification by the informant, and their own observation as to the similarities between petitioner, petitioner's car and the descriptions given by the victims of the robberies, the officers had reasonable grounds to make the arrest. Such arrest, respondent contends, was clearly valid.

B. THE SEARCH OF THE "CLUBHOUSE" AND PERSON OF DEFENDANT WAS INCIDENT TO AND CONTEMPORANEOUS WITH NORMAL VALID ARREST PROCEDURES AND THEREFORE EVIDENCE OBTAINED WAS PROPERLY SEIZED.

In *Preston v. United States,* 376 U.S. 364 (1964), the Court stated:

> "Unquestionably, when a person is lawfully arrested, the police have a right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or the fruits of or implements used to commit the crime. *Weeks v. United States,* 232 U.S. 383, 392 (1914). *Angello v. United States,* 269 U.S. 20, 30 (1925). This right to search and seize without a warrant extends to things under the accused's immediate control, *Carroll v. United States,* 267 U.S. 132, 158 (1925), and, to an extent depending on the circumstances of the case, to the place where he is arrested. (Citations.)" 376 U.S. at 367.

The Court went on to point out:

> "The rule allowing contemporaneous searches is justified, for example, by the need to *seize weapons* and other things which might be used to assault an officer or effect an escape, as well as by the need *to prevent the destruction of evidence of the crime.* Things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." 376 U.S. at 367. (Emphasis added.)

The Supreme Court, in *Chimel v. California,* 395 U.S. 725 (1969), indicated that no mechanical formula can be looked to in deciding the legality of a search conducted without a warrant and incidental to an arrest. Rather, the reasonableness of the search, and therefore its legality, is dependent upon the facts and circumstances surrounding the particular case. This Court has applied the *Chimel* standard for some time.

In *State v. Criscola,* 21 Utah 2d 272, 444 P.2d 517 (1968), this Court stated:

> "The question to be answered is whether under the circumstances the search or seizure is one which fairminded persons knowing the facts, and giving due consideration to the rights and interests of the public, would judge to be an unreasonable or oppressive intrusion against the latter's rights." 21 Utah 2d at 274 and 275.

In light of the *Chimel* and *Criscola* cases, the legality of the search must be decided on its reasonableness based upon the precise facts which exist in the instant case. (See also *State v. Gibson,* 459 P.2d 22 (Wash. 1969).)

The search following petitioner's arrest was valid for several reasons. First, it was necessary for the protection of the police officers. Several of defendant's friends, who might have been hostile to the police officers, were in and around the building. Petitioner Wellwood was actually in the room in which the sawed-off shotgun was found at the time police officers first saw him. (Trial transcript of State v. Wellwood and Harris, Case No. 23868, at page 58, lines 7-9). Therefore, the officers were entitled to "seize weapons . . . which might be used to assault an officer and effect an escape."

Second, the officers were required to seize weapons used to commit a crime. The victims of the several robberies had described the robber's weapon as a unique sawed-off shotgun with a pistol-grip stock. Upon find-

ing such a weapon, pursuant to the taking in custody of suspects fitting the description of the said robbers, the officers were obligated to seize the gun as evidence of the crime.

Third, the officers, acting as reasonable and prudent men under the circumstances, were entitled to seize the Husky Oil Company credit card of Mortenson's Furniture. The credit card was reported as the fruits of a crime and, as such, was evidence of the crime. To prevent the easy destruction of the thin, plastic card, the officers acted reasonably and responsibly by taking the evidence from the petitioner.

In light of the above, it is clear that the officers had probable cause to arrest the petitioners and that the following search was incident to and contemporaneous with the arrest for purposes of protection and preventing a possible loss of pertinent evidence necessary to obtain a conviction.

Based on the facts of this case, the respondent submits that the arrest was lawful and that the trial court acted correctly in admitting the gun and credit card as evidence.

POINT IV

THE PHOTOGRAPHIC IDENTIFICATION OF THE PETITIONERS BY THE VICTIM WAS NOT PREJUDICIAL AND WAS PROPERLY ADMITTED AT TRIAL.

The facts prove that the showing of certain photographs (mug shots), from which appellant was identified as one of the robbers of Joe's Husky Station, was not a lineup as used in Utah Code Ann. §§ 17-13-37, 38, and 39, and need not follow the procedure prescribed therein. The facts further prove that the presentation of photographs was fair, as it included pictures of differing physique and stature. Mr. Rhode, counsel for the appellant, reviewed the pictures and raised no objection to their fairness or admissibility in trial.

The admissibility of this extra-judicial evidence is supported by decisions of this Court. Chief Justice Callister, speaking for this Court in *State v. Jiron,* 27 Utah 2d 21, 492 P.2d 983 (1972), held:

> "Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached, evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind . . . The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evi-

dence is not present since the witness is available at the trial for cross-examinations." *Id.* at 22-23.[1]

In the instant case, the witness made positive identification of both defendants at the time of the presentation of photographs and corroborated that identification in the courtroom during trial. The defendant's counsel, Mr. Rhode, did not object, at any time, to the photographic evidence or identification nor to the witness' identification within the courtroom. It is believed that the defendants were not deprived of any constitutional rights, that the identification was fair and proper, and that the lower court's decision on this point should be affirmed.

POINT V

THE RECORD SHOWS NO MOTION TO SEVER MADE BY APPELLANT.

The record gives no indication that petitioner, or petitioner's counsel, ever made a motion to sever. The burden to show such evidence is upon the appellant. (*Maxwell v. Turner,* 23 Utah 2d 12, 455 P.2d 912 (1969).) When the appellant fails to provide an appropriate record, the court need not take cognizance of it.

Since petitioner did not make timely objection to

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[1] Mr. Justice Traynor, *People v. Slobodion,* 31 Cal.2d 555, 559-560, 191 P.2d 1 (1948).

the court's joining o fthe two cases at the time of trial, it should not be considered now or on appeal from a denial of a writ of habeas corpus.

POINT VI

APPELLANT'S ATTIRE DID NOT PREJUDICE HIS APPEARANCE IN COURT.

The facts show that appellant was dressed in a civilian shirt, denim pants, and tennis shoes. This court, in *State v. Archuletta,* 28 Utah 2d 255, 501 P.2d 263 at 264 (1972), a similar fact situation, held that such dress was not unusual for young men and not necessarily associated with jails. The Court stated:

> "Even if it were, it does not strike us that there would be anything strange, shocking, or prejudicial if the jury became aware that a man who had been arrested and charged with robbery was in custody and being held in jail."

In *Archuletta,* this Court followed closely the decision in *Gregory v. United States,* 365 F.2d 203, 205 (9th Cir. 1966), in which it was ruled that a view of the defendant in handcuffs by two members of the jury was not prejudicial error. The Court ruled:

> "To justify a new trial this alleged error must appear to have seriously affected the fairness of the trial. The burden of proof to sustain this allegation is on the appellant. The

> handling of the defendant during the trial is best regulated by the trial court and is a matter for its sound discretion. For this court to question the discretion of the trial court, the record needs to show something more than mere fact defendant was handcuffed in the presence of the jury."

In the present case, appellant has not demonstrated that he was in attire that the jury viewed as "jail clothing," that such attire was unduly prejudicial to his case, nor that the trial judge abused his discretion in allowing appellant to be tried in such garb.

Furthermore, neither the appellant nor his counsel objected to the disputed attire at the time of trial. Respondent feels that the matter of defendant's clothing at trial is a procedural right and like many other procedural rights, it may be lost if not properly asserted. Following this Court's decision in *State v. Fair,* 28 Utah 2d 242, 501 P.2d 107 (1972), respondent believes appellant's failure to make timely objection at the trial disallows appellant's assertion of prejudicial error at this time. The lower court's decision should be affirmed.

POINT VII

APPELLANT WAS GIVEN A FULL AND FAIR EVIDENTIARY HEARING.

In *Townsend v. Sain,* 372 U.S. 293 (1962), a case revolving around the admission of a murder confession

by a narcotic addict under a "truth serum," the Supreme Court held:

> "Where the facts are in dispute, the *federal* court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . . In other words, a *federal* evidentiary hearing is required unless the state court trier of facts has, after a full hearing, reliably found the relevant facts." *Id.* at pages 312 and 313. (Emphasis added.)

The Court pointed out by footnote:

> "In announcing this test we do *not* mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law." *Id.* at footnote 9, page 313. (Emphasis added.)

Thus, the standard of *Townsend* does not apply to state writ of habeas corpus proceedings and petitioner's claim is groundless. But even if such a test did apply, petitioner would still be without cause as the court's procedure stayed well within the Supreme Court's test. The record as a whole amply supports the respondent's contentions that:

(1) The merits of the factual dispute were resolved in the lower court hearing.

2. The lower court factual determination is fairly supported by the record.

(3) The fact-finding procedure employed by the court was adequate to afford a full and fair hearing.

4. There was no substantial allegation as to new evidence.

(5) The material facts were developed at the court hearing.

The record shows that petitioner's counsel dynamically and carefully represented the best interest of his client. He allowed the petitioner to give his own testimony as to the events surrounding the facts of the crime and his arrest, developed facts favorable to the petitioner, and challenged the incriminating (and ultimately convincing) testimonies of other witnesses.

Throughout the proceeding, the court remained open to all testimony and even questioned the witness himself to reveal all facts surrounding the allegations of the petitioner. (See District Court hearing transcript, Case No. 210612, pages 2 through 7 and especially pages 11-13 for petitioner Wellwood's extensive and candid interrogatory with the court. See pages 7-11 for petitioner Harris's testimony.) At the end of each petitioner's testimony, the court inquired as to whether the petitioner had anything further to say. (Id., page 11, lines 11 and 28-29.)

Respondent believes that petitioner's hearing in the district court was fair and proper in all respects.

POINT VIII

THE FOURTEENTH AMENDMENT

DOES NOT EXEMPT APPELLANT FROM FOLLOWING PRESCRIBED PROCEDURES.

The law, in essence, is the system of order within our society. To maintain effeciency in justice, there must be order within the law itself. This is achieved by the adoption of certain rules of procedure, without which law, and society, would succumb to chaos.

Procedure should never dominate justice. This Court relized the important balance between the two in *Utah Sand & Gravel Products Corp. v. Tolbert,* 16 Utah 2d 407, 402 P.2d 703 (1965). There Justice Crockett stated:

> "It is true that our new rules of civil procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits. However, this does not mean that procedure before the courts has become entirely 'without form and void.' The law itself is a system of rules designed to safeguard rights and preserve order. This can be accomplished only by compliance with the rules established for that purpose." *Id.* at 409, 704.

(See also *Holton v. Holton,* 121 Utah 451, 243 P.2d 438 (1952).)

Appellant claims no mistake, excusable neglect, or any other ground which has caused this Court, here-

tofore, to liberally construe the rules. Appellant makes no reference to state or federal laws or cases which support appellant's contention. For these reasons, respondent prays that this point be dismissed.

CONCLUSION

For the above stated reasons, respondent prays that the lower court's decision denying petitioner's petition for writ of habeas corpus be affirmed.

Respectfully submitted,

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