

1986

William Jay Robbins v. Gerald L. Cook, Warden,
Main Facility, Utah State Prison; David L.
Wilkinson, Utah State Attorney General : Brief of
Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM JAY ROBBINS, : 860367
 Petitioner-Appellant, : Case No. 860367
 -v- :
 GERALD L. COOK, Warden, Main :
 Facility, Utah State Prison; :
 DAVID L. WILKINSON, Utah State :
 Attorney General, :
 Respondents-Respondents. : Priority No. 3

BRIEF OF RESPONDENT

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APPEAL FROM DISMISSAL OF PETITION FOR WRIT OF HABEAS
CORPUS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK,
PRESIDING.

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Appellant, pro se

FILED
DEC 8 1986

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BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE CASE

Petitioner was convicted of sexual abuse of a child with aggravation and was sentenced to a term of five years to life with a minimum mandatory term of three years. Petitioner appealed and his conviction was affirmed in State v. Robbins, 709 P.2d 771 (Utah 1985). Petitioner filed a habeas corpus petition which was denied and was affirmed in Robbins v. Cook, 45 Utah Adv. Rep. 12 (Oct. 30, 1986).

Petitioner also filed a motion in the trial court for correction of a sentencing error on February 11, 1986. Judge Cornaby denied the motion on March 27, 1986. Petitioner next filed a successive petition under Rule 65B(i) which was dismissed because it raised claims that should have been raised on appeal and because it was a successive petition filed without good cause to do so. Petitioner now appeals that dismissal.

SUMMARY OF ARGUMENT

Petitioner's petition was properly dismissed because it raised unappealed issues that were known or should have been known at the time of his direct appeal. The errors alleged by petitioner were not of the type which would make it wholly unconscionable not to reexamine his conviction.

Moreover, petitioner did not raise the issues in his prior collateral attack and alleged no good cause why a second petition should be heard by the court.

ARGUMENT

POINT I

THE COURT PROPERLY DISMISSED PETITIONER'S
WRIT OF HABEAS CORPUS.

On appeal, petitioner argues in his conclusion to his brief that the court erroneously dismissed his petition. Petitioner also sets forth his arguments on all of the issues he would have raised in an evidentiary hearing if the Court had not dismissed his petition. The only issue for this Court's consideration, however, is whether the lower court properly dismissed the petition without an evidentiary hearing. If the court acted improperly, then the case should be remanded for a hearing on the issues raised by petitioner.

Judge Federick granted respondent's motion to dismiss the petition on two grounds: (1) the issues raised by petitioner had not been raised in either of the two prior proceedings and, therefore, were waived; and (2) petitioner had filed successive writs without good cause. These were appropriate grounds for dismissing the petition.

First, petitioner had an opportunity to raise on direct appeal the issues he raised in this proceeding but failed to do so. By raising these issues here, petitioner attempted to circumvent the normal appellate process and transform this action into a second direct appeal. It is well established that the post-conviction remedy provided by Rule 65B(i), Utah Rules of Civil Procedure, may not be utilized as a "substitute for or cannot be used to perform the function of regular appellate review." Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983); accord, : Andrews v. Morris, 607 P.2d 816 (Utah 1980); Rammell v. Smith, 560 P.2d 1108 (Utah 1977). Consequently, a petitioner cannot raise issues in a post-conviction proceeding that could or should have been raised on direct appeal, except in unusual circumstances. Codianna, supra; see also Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968).

The types of unusual errors which are properly cognizable by habeas corpus are narrowly limited to the following situations: (1) when the trial court had no jurisdiction over the person or the offense; (2) where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law; or (3) where some such fact is shown that it would be wholly unconscionable not to reexamine the conviction. Brown v. Turner, 21 Utah 2d at 98-99, 440 P.2d at 969. The Court further stated in Brown:

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 unusual circumstance. . . . Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

440 P.2d at 969.

In the instant case, petitioner made several claims, none of which fell within the unusual circumstances, and all of which were known or should have been known at the time his direct appeal was perfected. Petitioner claimed:

(1) That the Fourth Amendment to the United States Constitution prohibits use of an affidavit for the arrest warrant based upon information and belief.

(2) The charging document was constitutionally deficient.

(3) The trial was tainted by the allegedly faulty arrest warrant and the deficient charging document.

(4) The officer who arrested petitioner acted improperly because he lacked a valid arrest warrant and was biased against petitioner.

All of the claims outlined above are issues which should have been raised prior to trial because they are challenges to the validity of the arrest warrant and the information.

As for the validity of an arrest warrant, this Court recently said that probable cause requirement is not jurisdictional. State v. Schreuder, 25 Utah Adv. Rep. 13 (Dec. 27, 1985). Relying on Gerstein v. Pugh, 420 U.S. 103, 119 (1975), the Court noted that an illegal arrest does not void an otherwise valid subsequent conviction. Schreuder, 25 Utah Adv.

Rep. at 17. The probable cause requirement for arrest warrants protects against illegal detention and once the risk of illegal detention is dissipated through a subsequent trial, "the protection is no longer relevant or necessary because other constitutional safeguards have come into play." Id. at 17. See also State v. Lairby, 699 P.2d 1187 (Utah 1984) (Defendant's failure to object to legality of arrest before trial constitutes waiver of issue).

As to the alleged defects in the information, these claims must also be raised prior to trial or they are waived. State v. Curtis, 700 P.2d 1106 (Utah 1985); State v. Lairby, supra.

Petitioner either waived these issues by failing to raise them prior to trial or by failing to raise them on direct appeal. If petitioner raised the issues prior to trial, he either knew or should have known about them at the time of judgment such that he could and should have raised them on appeal. Thus, his attempt to raise them in the proceeding below was an attempt to substitute the post-conviction remedy for direct appeal, which he cannot do.

Second, petitioner abused the post-conviction remedy by filing successive petitions. Rule 65B(i)(4) provides:

All claims of the denial of any of complainant's constitutional rights should be raised in the post-conviction proceeding brought under this Rule and may not be raised in another subsequent proceeding except for good cause shown therein.


Petitioner did not even attempt to comply with this portion of the rule as he did not state any reason why he filed successive petitions. Because there is no good cause why the Court should have heard his successive petition, it was properly dismissed.

CONCLUSION

Based upon the foregoing arguments, respondent requests this Court to affirm the lower court's dismissal of the petition.

DATED this 8th day of December, 1986.

DAVID L. WILKINSON
Attorney General


SANDRA L. SJOGREN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to William Jay Robbins, P.O. Box 250, Draper, Utah 84020 this 8th day of December, 1986.

