

1979

William Chess v. Lawrence Morris : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM CHESS,

Petitioner-Appellant,

-v-

LAWRENCE MORRIS, Warden,
Utah State Prison,

Respondent-Appellee.

Case No. 16085

BRIEF OF APPELLANT

Appeal from the order of the Third Judicial District Court
in and for Salt Lake County, State of Utah, James S. Sawaya, Judge
presiding, denying appellant's complaint for a writ of habeas corpus.

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FILED

JAN 20 1979

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF THE FACTS.	2
ARGUMENT	
POINT I: THE APPELLANT DENIED HIS RIGHT TO APPEAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS THE RESULT OF THE REPRESENTATION CONTAINED IN THE LETTER OF HIS APPOINTED COUNSEL. . . .	3
POINT II: THE APPELLANT WAS DENIED OF HIS RIGHT TO DUE PROCESS OF LAW BECAUSE HE APPEARED BEFORE THE JURY DRESSED IN IDENTIFIABLE PRISON CLOTHES	4
POINT III: BECAUSE OF THE CONFLICT OF INTEREST WHICH EXISTED BETWEEN THE REPRESENTATION OF THE APPELLANT BY HIS COUNSEL AND THE KEY WITNESS FOR THE STATE AND THE FAILURE TO PROPERLY OBJECT DURING THE TRIAL, THE APPELLANT WAS DENIED A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL	5
POINT IV: THE APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE CUMULATIVE ERRORS THAT OCCURRED AT THE TRIAL AND HE SHOULD THEREFORE BE AWARDED A NEW TRIAL AND THE CIRCUMSTANTIAL EVIDENCE DOES NOT SUPPORT THE VERDICT	8
CONCLUSION.	11

CASES CITED

<u>Borrough v. Estelle</u> , 497 F.2d 1007 (C.A. Tex. 1974)	3
<u>Chapman v. United States</u> , 469 F.2d 634 (C.A. Ga. 1972).	3
<u>Estelle v. Williams</u> , 96 S.Ct. 1691 (1976)	4,5
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	5

TABLE OF CONTENTS (Continued)

<u>Glasser v. United States</u> , 315 U.S. 60, 70 (1942)	5
<u>Holloway v. Arkansas</u> , ___ U.S. ___ (1978) 23 Cr. L. 3001.	6
<u>Levine v. Peyton</u> , 444 F.2d 525 (4th Cir. 1971)	3
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1965).	9
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932).	5
<u>State v. Castro</u> , 554 P.2d 914 (Ariz. App. 1976).	3
<u>State v. Gantt</u> , 492 P.2d 1199 (Ariz. 1972)	3
<u>State v. Olsen</u> , N.W. 2d 898 (Minn. 1977)	7
<u>State v. St. Clair</u> , 282 P.2d 323 (Utah 1955)	8
<u>United States v. Foster</u> , 469 F.2d 1 (1st Cir., 1974)	7

OTHER AUTHORITIES CITED

United States Constitution, Fourth Amendment	10
United States Constitution, Sixth Amendment.	5
United States Constitution, Fourteenth Amendment, Due Process Clause.	3,4,5
Utah Constitution, Article I, Section 12	5
Utah Rules of Evidence, Rule 19.	9
Utah Rules of Evidence, Rule 45.	10
Utah Rules of Evidence, Rule 56.	9

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal of an action filed in the Third Judicial District Court in a habeas corpus petition in which the appellant sought release from custody of the Warden of the Utah State Prison by reason of the commitment issued by the Second Judicial District Court in and for Weber County in Criminal No. 12095-A.

DISPOSITION IN THE LOWER COURT

The appellant's petition came on for hearing on Thursday, August 17, 1978, before the Honorable James S. Sawaya who heard testimony and reviewed the trial transcript and ordered that the relief sought in the complaint for writ of habeas corpus be denied.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the order of the Third District Court and an order of this Court granting him release from the commitment or a new trial.

STATEMENT OF THE FACTS

The appellant was tried on December 16 and 17, 1976, before the Second Judicial District Court on a charge of Aggravated Robbery, a First Degree Felony. The appellant was one of two co-defendants in the case, each charged with being an accomplice. The person who admitted to robbing the gas station, Ray Shearer, was not on trial because of a previous plea of guilty to a reduced offense (T. 55). He was called at the trial, but did not implicate the appellant or the co-defendant.

The evidence, taken in the light most favorable to the State, included the fact that the appellant and the co-defendant merely pulled into a gas station in a vehicle (T. 43). The two persons in the car that pulled into the gas station did not get out of the car and left after a purchase of gasoline. The State's theory at trial rested upon the fact that the appellant was identified at or near the time Raymond Shearer entered the situation.

The appellant was found guilty and later sentenced to the Utah State Prison.

At the hearing held before the Court in the habeas corpus proceeding the appellant testified that he appeared in jail clothes at the trial held on December 16 and 17, 1976, in the Second Judicial District Court. He stated that he requested to appear otherwise, but was told by his counsel that it was too late to make any arrangements for other clothes.

He also stated that he did not appeal his conviction

based upon the fact that he received a letter which represented that if he was awarded a new trial, he may be found guilty and punished for a greater offense than the prison sentence he is presently serving for the conviction. A copy of that letter was introduced in evidence.

POINT I

THE APPELLANT DENIED HIS RIGHT TO APPEAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS THE RESULT OF THE REPRESENTATION CONTAINED IN THE LETTER OF HIS APPOINTED COUNSEL.

An abridgment of the appellant's right to appeal his conviction is incompatible with his due process rights under the Fourteenth Amendment to the United States Constitution. Chapman v. United States, 469 F.2d 634 (C.A. Ga. 1972). When the state procedure provides for an appellate review, the appeal afforded to a defendant must comport with due process of the law. Borrough v. Estelle, 497 F.2d 1007 (CA. Tex. 1974).

In Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971), the Federal Court of Appeals held that due process requires that the defendant be freed of the apprehension of receiving a harsher sentence after the re-trial of his case and that the Due Process Clause forbids harsher sentences after re-trial. This rule has also been applied continually by the state courts which also prohibit the courts from giving greater sentences upon re-trial than were originally meted out by the trial court. State v. Castro, 554 P.2d 914 (Ariz. App. 1976) and State v. Gantt, 492 P.2d 1199 (Ariz. 1972).

In the present case, but for the improper representations of appointed counsel set forth in the correspondence introduced in evidence, the appellant would have pursued his statutory right to appeal. At the hearing, the appellant testified that but for these representations he would have pursued his appeal. If awarded a new trial, the Fourteenth Amendment would have prevented the trial court from imposing upon the appellant a greater punishment than he is presently receiving and he would have been entitled to credit for time served. Because of the representations of his appointed counsel, the appellant was therefore denied his right to appeal and therefore he is being unjustly and unlawfully restrained of his liberty.

POINT II

THE APPELLANT WAS DENIED OF HIS RIGHT TO DUE PROCESS OF LAW BECAUSE HE APPEARED BEFORE THE JURY DRESSED IN IDENTIFIABLE PRISON CLOTHES.

In the case of Estelle v. Williams, 96 S.Ct. 1691 (1976), the United States Supreme Court held that a state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury dressed in prison clothes. The Court also found that the trial judge had no duty to inquire of the defendant as to whether he was going intentionally to trial in prison clothes.

However, in this case, the appellant actually made a request to his appointed counsel and therefore the case of Estelle v. Williams is distinguishable. The waiver of the appellant's con-

stitutional right was not the type of personal, knowing waiver
is was contemplated by the Estelle decision.

POINT III

BECAUSE OF THE CONFLICT OF INTEREST WHICH EXISTED
BETWEEN THE REPRESENTATION OF THE APPELLANT BY
HIS COUNSEL AND THE KEY WITNESS FOR THE STATE AND
THE FAILURE TO PROPERLY OBJECT DURING THE TRIAL,
THE APPELLANT WAS DENIED A FAIR TRIAL AND EFFECT-
IVE ASSISTANCE OF COUNSEL.

At the appellant's trial, the State called Raymond Shearer,
the self-confessed perpetrator of the robbery of the gas station
which the appellant was also charged as an accomplice (T. 55).
The record reveals that the witness called by the State was repre-
sented by the attorney who was defending the appellant in the case
before the Court (T. 57).

Article I, Section 12 of the Utah Constitution and the
Sixth Amendment to the United States Constitution guarantee an
accused the right to counsel at trial. Gideon v. Wainwright, 372
U.S. 335 (1963). It is well settled that one lawyer may represent
more than one defendant so long as his representation is effective.
Powell v. Alabama, 287 U.S. 45 (1932). However, effective assistance
of counsel contemplates that such assistance be "untrammelled and
unimpaired by . . . requiring that one lawyer shall simultaneously
represent conflicting interests." Glasser v. United States, 315
U.S. 60, 70 (1942).

The danger implicit in dual representation is that an
attorney who undertakes such a task finds himself simultaneously

balancing the interests of each defendant against the other. The problem is aggravated by the fact that an attorney can rarely predict when a conflict of interest will or will not arise. There are too many unknown variables in a criminal trial for an attorney to presume to know whether the interests of one client will conflict with another.

Since Glasser v. United States, supra, the Supreme Court has only recently re-examined the issue of ineffective assistance of counsel due to conflicts of interest. In Holloway v. Arkansas, ___ U.S. ___ (1978), 23 Cr. L. 3001, three co-defendants were jointly represented by a court appointed lawyer.

The Supreme Court held that the failure to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel, in the face of the representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of assistance of counsel. In reaching this result, the Court stated that:

In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable . . . But in a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. 23 Cr. L. at 3005.

thus, the Holloway court concluded that because of the masked nature of such an error, requiring a defendant to show any amount of prejudice would be too much.

The plaintiff submits that where no on-the-record waiver of his right to conflict-free counsel appears (R. 1-4), the burden shifts to the State to prove either that no conflict existed, or to prove that the conflict did not impair his representation at trial. The importance of the right to counsel has sparked courts to formulate a prophylactic rule to insure his protection of the important right to counsel.

In United States v. Foster, 469 F.2d 1 (1st Cir., 1974), a drug defendant challenged his conviction where his attorney had also represented his co-defendant. In rejecting this claim, the Court found that there was no divergence in the interests of the co-defendants. Although the First Circuit held that dual representation had not adversely affected the defendant in that case, the Court went on to announce a rule that the lack of a satisfactory judicial inquiry into dual representation shifts the burden of proof on the question of prejudice to the government. In such a situation, the government is required to demonstrate from the record the unlikelihood of prejudice by a preponderance of the evidence. In stating this rule, the Court specifically recognized the difficulties associated with an after-the-fact reconstruction of prejudice. See also, State v. Olsen, 258 N.W. 2d 898 (Minn., 1977).

In the present case, the trial court made no inquiry as

to problems raised by the dual representation by appellant's counsel. Furthermore, the appellant was prejudiced when this entire matter was brought to the jury's attention during the trial (R. 58). Therefore, the appellant submits that he is entitled to either a new trial or release from custody because of the dual representation and conflict of interest and the denial of his Sixth Amendment right to counsel.

In addition, the appellant asserts that he was also denied effective assistance of counsel because of his attorney's failure to properly object to the testimony introduced at trial or to raise this matter prior to trial. The conflict should have been resolved prior to trial to avoid the prejudice that resulted to the appellant.

POINT IV

THE APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE CUMULATIVE ERRORS THAT OCCURRED AT THE TRIAL AND HE SHOULD THEREFORE BE AWARDED A NEW TRIAL AND THE CIRCUMSTANTIAL EVIDENCE DOES NOT SUPPORT THE VERDICT.

In State v. St. Clair, 282 P.2d 323 (Utah, 1955), the Supreme Court held that a combination of errors which when singularly considered might be thought insufficient to warrant a reversal, may when considered as to the cumulative effect call for reversal.

In the appellant's case, the circumstantial evidence at best would indicate that the appellant merely pulled into a gas

station in a car and then left the station. The State alleged that this was part of a plan to rob the gas station by distracting the attention of the attendant. However, the principal to the offense denied that the appellant was involved and the evidence introduced does not support the State's contention.

The appellant submits the trial court erred in allowing the statements made by the palintiff after the robbery into evidence without any showing of the Miranda Warning (T. 35). Miranda v. Arizona, 384 U.S. 436 (1965). The officer taking the statements stated that he considered Mr. Chess a suspect when he was taken down to the police headquarters for interrogation (T. 46). The "request" to go down to the station occurred right after the officers had conducted a search of both the premises and the vehicle parked in front of the premises at which the appellant was staying (T. 44).

During the examination of the owner of the gas station, the prosecutor asked a series of leading questions designed to elicit conclusions which the witness did not have the ability to draw from his personal observations (Line 12 to line 22, T. 33). This testimony was extremely prejudiced because the State had to rely upon circumstantial evidence to elicit certain assumptions about the state of mind of the appellant whose actions standing alone were entirely innocent. This line of questioning violated Rules 19 and 56 of the Utah Rules of Evidence.

There also exists a substantial question as to whether

the search of the appellant's premises was constitutional under the parameters of the Fourth Amendment to the United States Constitution. At page 44 of the transcript one of the officers searching the premises stated:

I asked the young man--both of them were very nervous--at this time if I may search their premises for a white male involved. They told me they didn't know of a white male; they didn't have a friend, and hadn't seen one.

I looked through their apartment anyway. Going through their apartment I found another holster for a long barreled revolver or pistol. I asked them about this, and they didn't know anything about it. (T. 44).

This testimony is in contradiction to the earlier testimony that the search was based upon the consent of the appellant.

Finally, the State called the head jailer of the Weber County Jail (T. 103). He testified that the appellant and the co-defendant, Herbert White, were inmates at the jail and were housed in the same area as the witness, Steve Shearer (T. 105). This evidence was extremely unduly prejudicial and was not relevant to any issue in the trial. Utah Rules of Evidence 45. As pointed out in Point I of this brief, the Due Process Clause of the Fourteenth Amendment prevents the unnecessary interjection of the fact of the appellant's incarceration. The error of introducing this testimony magnified by the fact that the testimony was not relevant to prove any material issue in the case. The error was further compounded by the improper comment of the prosecution concerning this evidence (T. 228).

In light of the circumstantial and in-direct evidence of the guilt of the appellant at trial, the cumulative effect of the evidentiary errors is magnified. The theory of accomplice totally is stretched past the limit in the present case. The evidence introduced concerning the actual events surrounding the robbery show no overt act or indication that the two persons in the car at the gas station were knowingly participating in the robbery committed in fact by Raymond Shearer.

The appellant respectfully submits that a review by the Court of the evidence introduced, the trial court should not have permitted this matter to have been submitted to the jury.

CONCLUSION

Therefore, the appellant submits that in light of the improper evidence introduced at trial coupled with the errors set forth in Points I, II, and III of this brief, the appellant was denied a fair trial and this Court should award the appellant a new trial.

Respectfully submitted,

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