1979

Delmont Gentry v. Lawrence Morris : Brief of Respondent

Utah Supreme Court

Robert B. Hansen; Attorneys for Respondent;
Delmont Gentry; Plaintiff Pro Se;

IN THE SUPREME COURT OF THE

STATE OF UTAH

DELMONT GENTRY, :

Plaintiff-Appellant, :

-vs- : Case No. 16090

LAWRENCE MORRIS, Warden, Utah State Prison, :

Defendant-Respondent. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT, THE HONORABLE JUDGE JAMES S. SAWAYA PRESIDING, DENYING THE APPELLANT'S COMPLAINT FOR A WRIT OF HABEAS CORPUS.

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STATEMENT OF THE NATURE OF THE CASE

On May 5th, 1978, appellant, a prisoner at the Utah State Prison, filed a complaint for a writ of habeas corpus in the Third Judicial District, State of Utah.

DISPOSITION IN THE LOWER COURT

The Honorable James S. Sawaya, Judge of the Third Judicial District, conducted a hearing on August 17, 1978. The matter was taken under advisement and both sides were directed to submit memorandums. On the 21st of September, 1978, the petition was denied with prejudice.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the denial of the writ of habeas corpus.

STATEMENT OF FACTS

Appellant was found guilty of having committed aggravated sexual assault and aggravated kidnapping by a jury in the Seventh District Court in Carbon County on November 22, 1975. One of appellant's defenses was that he was asleep in his parent's home when the crime was committed. His alibi was supported by the testimony of his mother. The State's case in chief included the testimony of the victim and a girlfriend present throughout the incident. Additional rebuttal witnesses were also presented.

On August 17, 1978, the instant matter was heard before the Honorable James S. Sawaya of the Third District. Appellant's counsel from the 1975 trial, Mr. Bryce Bryner, and appellant both testified. On September 21, 1978, appellant's petition for habeas corpus was denied, with prejudice.

ARGUMENT

POINT I.

APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS WAS PROPERLY DENIED SINCE ALL OF HIS CLAIMS COULD HAVE BEEN RAISED IN A TIMELY APPEAL.

It is well settled in Utah that habeas corpus proceedings are not a substitute for appeal and may not be

used to invoke claims of error that could have been raised in a timely appeal. Maguire v. Smith, Utah, 547 P.2d 697 (1976); Gee v. Smith, Utah, 541 P.2d 6 (1975). As this Court noted in Brown v. Turner, 21 U.2d 96, 440 P.2d 968: 969 (1968):

> "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 . . ."

In the instant case, none of appellant's claims for relief were shown to be such that they could not have been raised on appeal of the original conviction. No such appeal was ever taken. It follows that appellant should not be allowed to raise them now via habeas corpus petition.

POINT II.

APPELLANT'S PETITION FOR HABEAS CORPUS WAS PROPERLY DENIED SINCE THE ORIGINAL TRIAL COURT DID NOT ABUSE APPELLANT'S CONSTITUTIONAL RIGHTS IN WAIVING THE NOTICE REQUIREMENTS FOR ALIBI REBUTTAL TESTIMONY FOR "GOOD CAUSE SHOWN."

Utah Code Ann. § 77-22-17 provides:

> "(1) . . . Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the

> prosecuting attorney shall file and serve upon the defendant the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. . . .
>
> (4) For good cause shown the court may waive the requirements of this section."

In Williams v. Florida, 399 U.S. 78 (1970), the United States Supreme Court considered the constitutionality of a virtually identical Florida rule. That court noted:

> "The adversary system is hardly an end in itself; . ... we find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by ensuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." (Id. at 82).

That court also held, in Wardius v. Oregon, 412 U.S. 470 (1973), that a notice-of-alibi rule which does not allow the defendant a reciprocal right to discover the state's rebuttal witnesses was void on its face as a violation of due process. In neither case, Wardius or Williams, however, was a provision allowing the trial court to waive the requirements of the rule "for good cause shown" discussed. The court was aware that such a provision was part of the Florida rule held valid in Williams (Williams, supra, footnote 6 at p. 80), but that portion of the rule simply

was not a part of the issue before the court at that time.

Nevertheless, as the above-quoted portion from Williams indicates, the purpose of the rule is "to enhance the search for truth." The rule should not be interpreted so strictly as to preclude the introduction of rebuttal evidence discovered, in good faith, after the deadline for notice has passed. In State v. Case, Utah, 547 P.2d 221:223 (1976), this Court held that:

> "While we are of the opinion that the defense and the prosecution should meet the requirements of the statute (77-27-17), with meticulous care . . . There is no showing that the prosecution intentionally attempted to make any concealment of the facts regarding the alibi or its refutation. We are of the opinion that the trial court was justified in waiving the requirements of the statute."

In the instant case, the trial court waived the notice requirements and allowed alibi-rebuttal witnesses following a showing of good cause. The statements of the court at that time clearly indicated that the court was convinced that the prosecution was acting in good faith:

> "MR. BRYNER: Your Honor, before the witness answers the question I feel I must object on the ground that proper notice was not given. Although I have discussed this with counsel I feel that I must make the objection and make that part of the record upon the ground that the prosecution has not complied with the statute in giving timely notice of any evidence of this kind.

> THE COURT: The statute you referred to says for good cause shown the Court may waive the requirement of that particular statute. The County Attorney has shown good cause stating to the Court in your presence in chambers that he only learned of this witness, I think he said last night. And did not know about this particular witness and what he would testify to with respect to this matter until last evening. Although he had made a thorough investigation to try to find this witness. Upon that showing the Court is going to waive the requirement of the statute and permit, I think good cause has been shown to waive it. I do waive it, and the witness may answer." (Reported Transcript of the original trial at page 114, also in respondent's Memorandum of Law in the instant matter; R. at 10).

As in Case, supra, there is no showing that the prosecution made any attempt to conceal anything. In fact, the prosecution had made a "thorough investigation" in an attempt to find the rebuttal witnesses. Most certainly, a perversion of justice would have resulted were such newly discovered rebuttal evidence to have been excluded simply because it was not found until after the notice deadline specified in the statute had passed. The court acted properly in waiving the notice requirements and allowing the alibi-rebuttal testimony.

Commonwealth v. Jackson, 457 Pa. 79, 319 A.2d 161 (1974) is distinguishable and is not determinative in the instant case. In Jackson, the prosecution simply refused to divulge the names of the rebuttal witnesses after compelling the defendant to give notice of his alibi defense. The state's witnesses in Jackson were not, as in the instant case, newly discovered.

It should also be noted that in Jackson the petitioner met his burden of proof in demonstrating that he was harmed by the "error" in his trial. The majority in Jackson held: "We cannot say that this error was harmless beyond a reasonable doubt." (Id. at 163). In the instant matter, there was no showing that appellant was substantially harmed by not knowing of the rebuttal witnesses any earlier than he did. There was substantial testimony beyond that of the "surprise" witnesses placing appellant away from his parent's home and identifying him as the perpetrator of the crime. If there was error in the admittance of the surprise testimony, unless appellant demonstrates that his rights were substantially harmed, there are no grounds for a writ of habeas corpus. Rule 61 U.R.C.P; Rule 4, Utah Rules of Evidence; Alires v. Turner, 22 U.2d 118, 449 P.2d 241:242 (1969); State v. Seymour, 18 U.2d 153, 417 P.2d 655:658 (1966); State v. Winkle, Utah 535 P.2d 82 (1975).

POINT III.

APPELLANT'S TRIAL IN PRISON CLOTHING WAS NOT A VIOLATION OF HIS CONSTITUTIONAL RIGHTS AND WILL NOT FORM THE BASIS FOR A WRIT OF HABEAS CORPUS.

The mere fact that appellant was tried in prison clothing and that appellant requested civilian clothing from his counsel do not entitle him to the relief he seeks. In Estelle v. Williams, 425 U.S. 501 (1976), a Texas defendant was tried for the crime of assault with intent to commit murder. Unable to post bond, the defendant remained in custody awaiting trial. When he learned that he was going to trial, the defendant asked an officer at the jail for his civilian clothes. The request was denied, and the defendant was tried in distinctly marked prison clothes. No objection to the clothing was raised at trial, and the defendant was convicted and sentenced to the State Prison. The defendant then sought release by means of a federal writ of habeas corpus. The Supreme Court held that:

> ". . . the failure to make an objection to the Court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." [Emphasis added].

The Supreme Court denied relief. 425 U.S. at 513.

This court, in State v. Fair, 28 U.2d 242, 501 P.2d 107 (1972), also concluded that in the absence of an objection to the court, there is no error in trying a defendant clad in prison clothes. The court also noted, in State v. Archuletta, 28 U.2d 255, 501 P.2d 263:264 (1972), that:

> "It does not stike 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."

Appellant has not, at any time, indicated that any objection to his trial in prison clothing was made to his original trial court. Instead, based upon a mis-reading of Estelle, supra, he contends that he did not make a personal, knowing waiver and should be granted the relief he seeks. Clearly, there is no "right" to a trial in civilian clothes unless and until a formal objection is lodged with the trial court. Neither must there be any "waiver" of any sort to allow a trial in prison clothing in the absence of such an objection. The trial court in the instant matter properly refused the writ of habeas corpus since none of appellant's constitutional rights were violated by his trial in prison clothing.

POINT IV

DENIAL OF HABEAS CORPUS WAS PROPER SINCE APPELLANT WAS AFFORDED COMPETENT ASSISTANCE OF COUNSEL AT HIS ORIGINAL TRIAL.

Appellant's brief, at pages 7-8, cites Utah Code Ann. § 77-64-1, 1953 as amended, and then asserts that "the record reveals" a lack of effective counsel under the standards of that statute. Appellant also directs the court's attention to a portion of respondent's memorandum of law to the lower court. The argument sought to be made is unclear, but it appears that appellant either wishes this court to search the trial record for instances of attorney misconduct or that appellant contends the lower court applied the wrong standard in finding that appellant was adequately represented at his first trial.

If appellant contends the former, that the evidence at his hearing was simply insufficient to support the findings of fact and conclusions of law of Judge Sawaya in denying habeas corpus, appellant has failed to sustain his burden in this appeal. It is well settled, in this state, that on appeal the appellant has the burden of proof. As this court noted in R.C. Tolman Construction Co. Inc., v. Myton Water Association, Utah, 563 P.2d 780-782 (1977):

> ". . . it is appropriate to have in mind three basic rules of review on appeal: that we indulge the findings and judgment of the trial court with a presumption of validity and correctness; review the record in the light favorable to them; do not disturb them if they find substantial support in the evidence; and require plaintiff (appellant) to sustain the burden of showing error."

See also First Security Bank of Utah, N.A. v. Wright, Utah, 521 P.2d 563 (1974); Holman v. Sorenson, Utah, 556 P.2d 499 (1976); and Hall v. Blackham, 18 U.2d 164, 417 P.2d 664 (1966). This is particularly true in a habeas corpus proceeding where the petitioner bears a specific statutory duty to outline, in detail, the instances which give rise to a claim of denial of constitutional rights. U.R.C.P. Rule 65 B(i)(2). Judge Sawaya heard testimony from both appellant and his original trial counsel, Mr. Bryce Bryner. (R. at 15). Presumably, he also examined the trial record. Appellant has given no reason to doubt the conclusions of Judge Sawaya as trier-of-fact in the instant matter. Accordingly, his decision to deny habeas corpus should be affirmed.

Nevertheless, appellant might be arguing that Judge Sawaya applied the wrong standard in determining that appellant was afforded adequate representation of counsel in his previous trial (R. at 20).

Initially, it should be noted that Utah Code Ann. § 77-64-1, 1953 as amended, was enacted by the legislature in 1965, well in advance of a number of decisions of this court which have made clear the proper standard to be applied in determining adequacy of counsel. Although the statute may be slightly more explicite than the case law, it is not inconsistent with the holdings of this court. The provisions of Utah Code Ann. § 77-64-1, supra, are that the counties shall:

> "(1) Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction.
>
> (2) Afford representation which is experienced, competent, and zealous.
>
> (3) Provide the investigatory and other facilities necessary for a complete defense.
>
> (4) Come into operation at a sufficiently early stage of the proceeding so as to fully advise and protect the defendant.
>
> (5) Assure undivided loyalty of defense counsel to the client.
>
> (6) Include the taking of appeals and the prosecuting of other remedies, before or after a conviction, considered by the defending counsel to be in the interest of justice.

> (7) Enlist community participation and responsibility and encourage the continuing co-operation of the organized bar."

For convenient analysis, the subsections can be considered as (a) those affecting defendants at trial or other hearings, subsections 1, 2, and 5; and, (b) those which relate more to adequate assistance outside of a courtroom, subsections 3, 4, and 6. Subsection 7 appears to be a general requirement not applicable to specific cases.

It is clear that appellant has been represented by counsel in every proceeding, except in the instant matter, thus satisfying the requirements of subsection 1. Subsections 2 and 5 do not add or go beyond the standard declared by this Court in Anderson v. Turner, 27 U.2d 182, 493 P.2d 1278 (1972):

> "The accused is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify with the interests of the defendant and present such defenses that are available to him under the law and consistent with the ethics of the profession." (Id. at 1279).

The statute states that counsel must be "experienced," Anderson does not, although that could be fairly implied. At any event, Judge Sawaya specifically found that appellant's counsel was experienced (R. at 19), thus meeting the wording

of the statute. The statute additionally requires competency, loyalty, and zealous defense. Anderson requires counsel that is competent, identifies with his client's interests, and presents such defenses as are ethically available under the law. Clearly, there are not two conflicting standards for trial representations in the statute and case law. The two sources, rather, simply state congruent requirements which were applied in the instant case.

There is no indication that appellant was inadequately represented under the out-of-court sections (3,4, and 6) of Utah Code Ann. § 77-64-1, supra, either, It is apparent that appellant's counsel was involved and carrying on an investigation well in advance of trial. (Note appellant's indication that he, presumably through counsel, complied with the notice of alibi rule, appellant's brief p. 3). Although no appeal of appellant's conviction was undertaken, there is no reason to assume that appellant was unable to do so through lack of counsel.

The lower court's denial of habeas corpus should be affirmed since appellant has failed to sustain his burden of showing error in the lower court's conclusion or that the lower court failed to apply the proper standard of law.

CONCLUSION

Appellant's petition for writ of habeas corpus was properly denied since all of his claims could have been raised via timely appeal, but were not. Nevertheless, even if appellant's claims should be considered on the merits, the decision of the lower court in denying the writ should be affirmed. Appellant's constitutional rights were not violated by allowing the state to present newly discovered rebuttal witnesses. Neither were his rights offended by a trial in prison clothing. He was represented by an experienced, competent member of the bar and has failed to show in what respect the lower court erred in finding that he was not denied adequate assistance of counsel.

Respondent therefore prays that the decision of the lower court be affirmed.

Respectfully submitted,

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