1979

Dale Pierre v Lawrence Morris : Brief of Respondent in Opposition to Petition for Rehearing

Utah Supreme Court

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* Cited in Andrews v. Morris, Respondent's Brief in opposition to Petition for Rehearing, No. 16168.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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DALE S. PIERRE,

Petitioner-Appellant,

-vs-

LAWRENCE MORRIS, as Warden of the Utah State Prison,

Respondent-Appellee.

: Case No. 16169

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

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POINT I

APPELLANT HAS NOT RAISED ANY ISSUES WHICH WOULD JUSTIFY A REHEARING IN THIS MATTER.

The authorities cited and explained in Point I of Respondent's Brief in opposition to rehearing in Andrews v. Morris with respect to the purposes for and requisite standards of petition for rehearing are herewith incorporated by reference. (pp. 3 to 9). Moreover, the application of that authority to the issues raised by appellants Pierre and Andrews in the instant matter is also incorporated as set forth in Respondent's brief in opposition to rehearing, at

pp. 3 to 9.

Appellant Pierre raises one additional point in support of rehearing not discussed in the petition for rehearing in Andrews v. Morris.

In his third point, Appellant Pierre, for the first time, cites Martinez v. Smith, 602 P.2d 700 (Utah 1979) and argues that this Court's opinion in the instant matter is inconsistant with that case. Appellant also argues, for the first time, that a refusal to allow a hearing on his complaint for a writ of habeas corpus is a denial of due process under the United States and Utah Constitutions. Appellant, however, demonstrates no affirmative mistake of law or fact by this Court to justify a rehearing. Moreover, any possible application of the Martinez v. Smith case to appellant's case could have been briefed and submitted to this Court even after appellant's brief had been submitted since Martinez was decided months before this Court's decision in Pierre v. Morris. (See U.R.C.P. Rule 75(p)(3)). In any event, the fact that an opinion may be difficult to reconcile with an earlier opinion of the same court should not be a ground for a rehearing. Appellant does no more in Point III than to seek a second try at an appeal. Clearly, this is an improper use of the rehearing procedure.

In summary, appellant has failed to demonstrate any affirmative mistake of law or fact. He presents nothing that has not and could not have been considered in the previous appeal. A rehearing should not be allowed.

POINT II

THIS COURT HAS PROPERLY CONSIDERED ALL OF APPELLANT'S CLAIMS RELATIVE TO THE ALLEGED UNCONSTITUTIONALITY OF THE UTAH DEATH PENALTY AND SUCH CONSIDERATION IS FURTHERMORE CONSISTENT WITH STATE V. BROWN.

Respondent herewith incorporates by reference the argument submitted in Point II of Respondent's Brief in opposition to Petition for Rehearing in Andrews v. Morris, case no. 16168.

POINT III

THIS COURT HAS ADEQUATELY CONSIDERED AND REJECTED APPELLANT'S CLAIM THAT THE METHOD OF EXECUTION IN UTAH IS UNCONSTITUTIONAL.

Respondent herewith incorporates by reference the argument submitted in Point IV of Respondent's Brief in opposition to Petition for Rehearing in Andrews v. Morris, case no. 16168

POINT IV

THE COURT'S DECISIONS IN THE INSTANT MATTER ARE NOT IN CONFLICT WITH MARTINEZ V. SMITH NOR HAS APPELLANT BEEN DENIED ANY DUE PROCESS RIGHTS TO A HEARING UNDER THE UTAH AND UNITED STATES CONSTITUTIONS.

Appellant contends that Martinez v. Smith, 602 P.2d 700 (1979), decided in October of last year, and the decision of this Court in this matter are in conflict and that a rehearing should be granted to deal with that inconsistancy. This is a new issue, raised here for the first time. As noted in Point I, supra, new issues and arguments should not be considered in a petition for rehearing.

Moreover, since Martinez was decided four months prior to the decision in the instant case, it is clear that appellant could have filed a supplemental brief alerting the court to new case law which he might feel relevant to his case, as required by U.R.C.P. Rule 75(p)(3).

Furthermore, even if this Court should decide to consider this argument, respondent submits that appellant reads Martinez v. Smith too broadly. Both Martinez v. Smith and the instant opinion cited the earlier cases of Brown v. Turner, 21 U.2d 96, 440 P.2d 968 (1968) and Bryant v. Turner, 19 U.2d 284, 431 P.2d 121 (1967) to set forth the

"scope and limitations upon the use of habeas corpus after conviction." (Andrews at 5). In Martinez v. Smith, supra, the Court said:

> the writ should be available in rare cases, where it appears that there is a strong likelihood that there has been such unfairness, or failure to avoid due process of law, that it would be wholly unconscionable not to re-examine the conviction.

Id. at 702.

The dismissal of petitioner Martinez' complaint for a writ of habeas corpus was reversed and a hearing was ordered because this court felt that his pleadings had raised sufficient questions of fact to make it unconscionable not to provide such a review. In the instant matter this court noted specifically that:

> No issues have been made to appear such that it would be wholly unconscionable not to re-examine.

Pierre at 4.

Although appellant contends that he is being treated unfairly because while this court considered issues raised in petitioner Martinez' petition and memorandum in support, appellant claims to have never had an opportunity to have submitted a memorandum in the District Court. He does not seek to explain why no memorandum explaining the legal aspects of his claim was not timely submitted with

his petition. Clearly, he could have done so (See U.R.C.P. Rule 65 B(i)(1)(3)). In fact, to allow a petitioner to file complaint for writ of habeas corpus containing blatant, unresearched allegations would encourage bad faith pleading by allowing improper delay of the imposition of sentence and would contradict the requirements for post-conviction habeas corpus relief as explained in Andrews v. Morris, supra.

An even more important difference between Martinez and the instant matter is the extent to which the two cases have been subjected to review. This Court noted in Pierre, supra at 3:

> . . . the trial court correctly dismissed as a matter of law since the Utah Statute is clearly constitutional 'on its face' and we determined in Pierre that it was meticulously followed.

Appellant had a trial and has had his trial reviewed by this court extensively on at least one occasion. In Martinez, on the other hand, petitioner had no trial due to a guilty plea and there had been no appeal nor any other form of review before petitioner Martinez sought a writ of habeas corpus. His pleadings raised issues which were determined by the Court to be factual, not legal, and which had never been considered by any court. They were serious claims

on effectiveness of defense counsel (an issue not raised in the instant case) and this court made it clear that in Martinez's extraordinary situation, due to extenuating facts, some review must have been allowed, even when to allow such a review by habeas corpus circumvented the technicalities of the law. Respondent in this appeal has repeatedly shown that appellant has failed to raise any issues which cannot be determined from the record. His complaint was not only insufficient as a matter of law, it did not, in the opinion of this Court, raise any issues which would require further review in the interest of justice. (See Pierre at 4, supra). Martinez does no more than require such hearings in very narrow circumstances not applicable here and is not inconsistant with this Court's action in this matter.

Appellant claims that he is being denied due process under the United States and Utah Constitutions by the District Court's refusal to grant a hearing on his habeas corpus petition. Nevertheless, it is clear that the instant matter is distinguishable from the due process cases cited by appellant and that appellant has not been denied his right to due process under the Utah and United States Constitution. Of the cases cited by appellant in

support of his due process claim, all but one, Sherbert v. Verner, 374 U.S. 398 (1963), dealt with defects in or the absence of hearings conducted before a State acted in some way to limit a significant right of a citizen. In Bell v. Burson 402 U.S. 535 (1971) a provision for summary suspension of the driver's license of an uninsured motorist who was involved in an accident and failed to post security for possible damages was held improper when the only hearing did not determine if any potential for a judgment against the driver existed. In Slochower v. Board of Education, 350 U.S. 551 (1956) a New York law which provided that any public official who invoked Fifth Amendment privileges would be automatically terminated was a violation of the due process requirements of the Fourteenth Amendment. Speizer v. Randall, 357 U.S. 513 (1958), held that tax exemptions could not be arbitrarily denied and that the state must bear the burden of establishing that a taxpayer is not qualified. Finally, Goldberg v. Kolly, 397 U.S. 254 (1970), held that a hearing must be provided before welfare benefits may be terminated. The fifth case cited by appellant Sherbert v. Verner, 374 U.S. 398 (1963), did not discuss the right to a hearing but held, instead, that a person who cannot find work because of religious beliefs regarding

work on Saturday cannot be denied unemployment benefits because of a failure to find work without cause.

All of these cases speak about the proof or hearing requirements necessary at the initiation of any rights deprivation. Before appellant was sentenced he was given the most extensive, careful and complete hearing available under the laws of the State of Utah. Dozens of potential jurors were called from which twelve were selected to listen to evidence for days. The State was required to prove guilt beyond a reasonable doubt and then, in a seperate hearing, to show by a preponderance of the evidence that appellant should receive the sentence of death. Appellant's case was appealed to this Court which carefully reviewed the proceedings. The trial was also scrutinized by the United States Supreme Court. Respondent does not deny that a vital interest of appellant is at stake. However, it is abundantly clear that appellant has not been deprived of a due process hearing. Habeas corpus is an extraordinary remedy and due process does not require that every petitioner for such a writ be granted a hearing, especially in situations where the issues raised in the petition are shown to be legal in nature and thus subject to a motion to dismiss as a matter of law. To so hold would render the regular appellate

process a nullity. This Court should deny appellant's request for a re-hearing.

CONCLUSION

Respondent submits that the recent decision by this Court in Pierre v. Morris, No. 16169, filed Feb. 13, 1980, was correct and that a rehearing is not merited. Respondent prays that the present petition for rehearing be denied.

Respectfully submitted,

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