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Mark Wickham v. George Fisher : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MARK WICKHAM,

Plaintiff-Appellant,

-vs-

GEORGE FISHER, Weber
County Sheriff,

Defendant-Respondent.

Case No.
16322

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER OF THE SECOND
JUDICIAL DISTRICT COURT, IN AND FOR
WEBER COUNTY, STATE OF UTAH, THE
HONORABLE JOHN F. WAHLQUIST, JUDGE

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IN THE SUPREME COURT OF THE
STATE OF UTAH

: MARK WICKHAM,
: Plaintiff-Appellant,
: Case No.
-vs- : 16322
: GEORGE FISHER, Weber
County Sheriff,
: Defendant-Respondent.
: -----

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

On October 26, 1978, the appellant filed a petition for writ of habeas corpus to remedy the alleged unconstitutional conditions at the Weber County Jail (R.1-5). An amended complaint was filed on November 17, 1978 (R.8), and a hearing on the petition was set for November 30, 1978. On December 28, 1978, Judge Wahlquist rendered a memorandum decision and court order on the matter (R.23-33). This is an appeal from the order entered December 28, 1978, by Judge John F. Wahlquist of the Second Judicial District for Weber County, Utah.

DISPOSITION IN THE LOWER COURT

The order granted partial relief regarding the place and condition of confinement of pretrial detainees in the Weber County Jail. Judge Wahlquist ordered the following:

1. Jailers are to supply the appropriate court with a list of the names of all detainees on a weekly basis. In addition, after a detainee has been confined for 30 days, he shall be brought before an appropriate court in an effort to determine if the ordeal of his confinement can be lessened. The Judge noted that shortening of pretrial confinement would, of course, result in longer sentences.

2. It was suggested that the county submit a plan for an improved form of visitation (similar to that used on the ninth floor). Contact visits were not ordered.

3. It was also suggested that the county contact the State Welfare Department to determine if there are funds available by which toothbrushes, etc., could be supplied to the detainees.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court dismiss the petition or, in the alternative, to affirm the lower court's order.

STATEMENT OF THE FACTS

On October 26, 1978, nine pretrial detainees, confined at Weber County Jail, filed a pro se petition complaining of the place and conditions of their confinement. On November 30, 1978; a final hearing was held before Judge Wahlquist. At that time only one of the original nine detainees, Mark Wickham, remained in pretrial status. Soon after the hearing, the appellant pled guilty to auto theft and robbery (R.118). He was then sent to the Diagnostic Center at St. Mark's Hospital in Salt Lake City for a 90 day evaluation preceding setencing (see Appellant's Brief, p. 3, n. 4).

The appellant contends that the conditions at the Weber County Jail are unconstitutional because the jail is overcrowded, physical contact visitation is not allowed, the detainees are not furnished with toothbrushes, toothpaste and stamps, and there is no form of outdoor recreation available.

A. Place and Conditions of Confinement.

The appellant was confined to the south half of the Weber County Jail's 12th floor (South-12). At South-12 there are two 4-man cells (65 square feet of floor space), one 8-man cell (104 square feet of floor space) and one day-room (195 square feet of floor space)

(see exhibit 2, R.34). Each cell contains a sink and toilet. The day-room contains a sink, a toilet, and a shower. Judge Wahlquist stated in his memorandum decision that the practice of holding all detainees together in the day-room was to protect the detainees from violence and was the best utilization of space (R.25).

The average population of South-12 is nine detainees (R.24,155), although there have been 12 on several days (R.157). There was only one day, however, in the four months preceding the hearing where there were 14 detainees at South-12 (R.156). The average length of stay is 30 days (R.83).

Each detainee is furnished with towels, pants, shirts, and clean sheets twice a week (R.93). Soap, toilet tissue, aspirin, etc., are distributed daily (R.93). Additional personal hygiene items such as toothpaste, can be purchased by the inmates. Robert Humphreys, Chief Corrections Officer, testified that inmates were not given toothpaste and toothbrushes but that the inmates could use salt to clean their teeth (R.95,155). In addition, Humphreys stated that the inmates could not receive toothpaste from visitors because contraband such as razor blades, drugs, etc., had been found in the tubes of toothpaste (R.154).

The detainees are allowed to have visitors once a week (R.84,92), but no contact visitation is allowed (R.92), since it has been found in the past that contraband has been passed between visitors and inmates (R.92). Inmates are allowed to make one phone call each Saturday (R.91). Additional calls are allowed when an inmate has a court date (R.91).

Outdoor recreation is not made available to pretrial detainees. Allowing inmates outside the jail would cause a threat to security since the jail has had pretrial detainees simply walk away (R.89). Humphreys testified, however, that individual forms of exercise (sit-ups, etc.) are allowed and the inmates could exercise all day long if they wish (R.90). Furthermore, detainees are supplied with a variety of hardback and paperback books by the Weber County Library. The books are circulated throughout the jail and replaced by different books regularly (R.90).

The jail is heated by a forced air heating system and lighting is provided by windows running the complete length of the cell block and by fixtures located in the corridor outside the cells (R.93,94).

ARGUMENT

POINT I

THE APPELLANT DOES NOT HAVE
STANDING TO SUE.

An actual controversy must exist at all stages of appellate review and not simply at the date the action is initiated. Cook v. Hanberry, 592 F.2d 248 (5th Cir. May 1979); Roe v. Wade, 410 U.S. 113 (1973). ~~Section 15 of the Enabling Act, Constitution of Utah, 1 Utah Code Ann. 61, 121 (1953), states that Utah courts possess the same powers, must perform the same duties, and are governed by the same regulations as the other courts of the United States. Therefore, this case should not be reviewed by this Court unless an actual case or controversy exists.~~

In Cook v. Hanberry, supra, the court reviewed a petition for a writ of habeas corpus but held that the appellant's request for a transfer was moot since an actual controversy did not exist at that stage of appellate review (Id. at 249).

In Lyon v. Batemann, 119 Utah 434, 228 P.2d 818 (1951), this Court held that a judgment cannot be rendered unless a real controversy, which is definite, concrete and substantial, exists (Id. at 820,821).

Baird v. State, 574 P.2d 713 (Utah 1978), reiterated the Lyon decision. In Baird, this Court dealt with the matter of a declaratory judgment but stated that to maintain such an action, the justiciable and jurisdictional elements requisite in ordinary actions must still be present, "for a judgment can be rendered only in a real controversy between adverse parties." (Id. at 715). See also Salt Lake City v. Salt Lake City, 570 P.2d 119 (Utah 1977). This Court went on to note that if an actual controversy was absent, the court had a duty to dismiss the action (Id. at 716).

Furthermore, this Court has stated:

(A) claimant must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action. It is insufficient to assert a general interest he shares in common with all members of the public, viz., a generalized grievance.

Baird at 717.

The appellant is no longer a pretrial detainee; he has not alleged a direct injury. Therefore, he cannot bring this action on behalf of himself or those presently detained at the jail.

While it is true, as the appellant asserts, that one party in Roe v. Wade, supra, Miss Jane Roe, was

granted standing to attack an abortion statute, the other party, John and Mary Doe did not have standing. The Court held that their alleged injury did not present an actual case and controversy since the couple did not face the legal consequences of abortion at that time. Similarly, the nine pretrial detainees who originated the instant suit no longer face confinement in the Weber County Jail. Paralleling Roe at 128, the possibility that these detainees may sometime in the future be reconfined to the Weber County Jail does not present this Court with an actual case and controversy. The claims asserted, therefore, are moot and the petition should be dismissed.

In addition, respondent submits that the information contained in the Appellant's Brief regarding the other eight detainees and the conditions surrounding their confinement should not be considered by this Court since none of those men were pretrial detainees at the time the petition was heard (November 30, 1978).

POINT II

THE TRADITIONAL FUNCTION OF HABEAS CORPUS IS TO SECURE RELEASE FROM ILLEGAL CUSTODY; THE REMEDY HAS BEEN IMPROPERLY USED IN THIS CASE.

A federal civil rights action brought under 42 U.S.C. § 1983, is the proper remedy for one who is

making a constitutional challenge as to the conditions of his detainment. Preiser v. Rodriguez, 411 U.S. 475 (1973). Habeas corpus is proper when an attack is made on the fact or duration of physical confinement and where immediate release from physical confinement is sought. The Writ, therefore, is to be used to attack the legality of conditions leading up to confinement rather than the living conditions arising after confinement. The appellant here is seeking equitable relief. He is attacking something other than the fact or length of his confinement and, therefore, is not seeking immediate release--the heart of Habeas Corpus. Cook v. Hanberry, 592 F.2d 248 (5th Cir. May 1979). In Cook, the court held that habeas corpus is not available to prisoners complaining only of mistreatment during confinement, since the sole function of habeas corpus is to provide relief from unlawful imprisonment in the form of release (Id. at 249).

In Johnson v. Simpson, 421 F.Supp. 333 (W.D. Va. 1976), the petitioner argued that his confinement at Lynchburg City Jail constituted cruel and unusual punishment. The court held that an attack on the conditions of confinement rather than the validity of such confinement

was not an appropriate use of the writ of habeas corpus (Id. at 336).

Conditions of confinement were also attacked in Preiser v. Rodriguez, supra. The Supreme Court noted that where the conditions of confinement are challenged, 42 U.S.C. § 1983 is specifically suited to handle cases where there is an alleged deprivation of rights, privileges, or immunities secured by the constitution and laws of the United States. A civil rights complaint, therefore, is better suited to meet the demands for equitable relief sought in this case.

Similarly, in Chapman v. Graham, 2 Utah 2d 156, 270 P.2d 821 (1954), this Court held that the function of habeas corpus was to determine the legality of restraint and that where one was confined lawfully, arguments as to his physical welfare and comforts would rarely be heard. Under Chapman, Utah courts will not entertain habeas corpus petitions attacking conditions of confinement unless those conditions constitute cruel and unusual punishment. This Court stated:

We prefer to adhere to the principle, until that rare case approaches which to date we have not encountered, that courts, by means of the writ, will not interfere with the management, control or internal affairs, nor will they, nor can they

substitute their judgment in discretionary matters for those of administrative agencies of a different department of government. . . . it would seem to be a rare case where cruel and unusual punishment would persist where legal and administrative remedies properly had been pursued,--a procedure which must be followed before the writ may be employed. At least, for nearly 200 years, the dearth of cases suggesting the use of the writ of habeas corpus as an instrument to discharge from custody for cruel and unusual punishment, where the individual is lawfully restrained, is either a monument to our democratic administrative processes or a testimonial to the belief that the writ has not been considered available for such employment.

Id. at 823. See also Smith v. Turner, 12 Utah 2d 66, 362 P.2d 581 (1961).

The Tenth Circuit Court in Perez v. Turner, 462 F.2d 1056 (1972), held that the supervision of the internal affairs of a correctional institution rests in the hands of its administrators and that such supervision is not ordinarily subject to judicial review. See also Sawyer v. Sigler, 445 F.2d 818 (8th Cir. 1971), and Sanders v. United States, 438 F.2d 918 (5th Cir. 1971). This Court in Hughes v. Turner, 14 Utah 2d 129, 378 P.2d 888 (1963), said:

This court has held that in the absence of cruel and unusual punishment the writ should not be used to interfere with the management and control of internal affairs in the prison.

Id. at 889.

A federal class action Section 1983 suit is currently pending in the Federal District Court. On February 20, 1979, Judge Aldon J. Anderson stayed those proceedings upon learning of the instant appeal. The doctrines of comity, federalism and abstention do not bar the Federal Court from granting relief to pretrial detainees held at a state facility. Campbell v. McGruder, 580 F.2d 521, 525, 526 (D.C. Cir. 1978). There is no legal basis for insisting that this court, rather than the Federal District Court, decide this case. Respondent submits that the Federal Court is a more appropriate forum for the type of remedy sought in this case. Therefore, this petition should be dismissed. In the alternative, however, respondent contends that the conditions at the Weber County Jail do not rise to the level of cruel and unusual punishment. Therefore, respondent asks this Court to uphold the order given by Judge Wahlquist and deny the appellant's request for additional relief.

POINT III

THE APPELLANT HAS NOT BEEN SUBJECTED
TO CRUEL AND UNUSUAL PUNISHMENT.

Conditions of confinement do not constitute
cruel and unusual punishment unless they are "so grossly

incompetent, inadequate, or excessive as to shock the conscience." Dewell v. Larson, 489 F.2d 877 (10th Cir. 1974). See Fisher v. Turner, 335 F.Supp. 577, 580 (D.C. Utah 1971). See also Novak v. Beto, 453 F.2d 661 (5th Cir. 1972), where the court stated that courts traditionally have "confined their review of prison regulation to such standards as 'barbarous' and 'shocking to the conscience.'" Id. at 670-671. In making this evaluation, it should be noted that while inmates do retain certain constitutional rights, this does not mean that these rights are not subject to restrictions and limitations. "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application'. . . A detainee simply does not possess the full range of freedoms of an unincarcerated individual." Bell v. Wolfish, ___ U.S. ___, 25 Cr.L. 3053, 3060 (May 14, 1979). These statements of law apply to pretrial detainees as well as convicted prisoners. Id.

A. Overcrowding.

In White v. Sullivan, 368 F.Supp. 292 (S.D. Ala. 1973), the court dealt with the constitutionality of a facility built to house 800-900 inmates but which actually held 1107. The court held that the overcrowded

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conditions, though undesirable, did not "shock the conscience," could not be considered "barbarous" and therefore, did not constitute cruel and unusual punishment. Id. at 296. See also Woods v. Burton, 503 P.2d 1079 (Wash. 1972), and Trop v. Dulles, 356 U.S. 86 (1958).

The appellant contends that the Weber County Jail is unconstitutionally overcrowded because the following organizational standards have been violated: The American Correctional Institution, The National Sheriff's Ass'n Handbook on Jail Architecture, The National Council on Crime and Delinquency, and the Special Civilian Committee for the Study of the U.S. Army Confinement System (see Brief of Appellant, p. 20).

Failure to comply with minimum standards does not constitute unconstitutional conditions. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). Compliance with standards such as those mentioned by appellant is only one factor in determining the constitutionality of jail conditions (Id. at 1214). Violation of minimum standards set by relevant professional and governmental bodies does not mean that an institution fails to comport with constitutional minima, Palmigiano v. Garrahy, 443 F.Supp. 956, n. 30 (D.R.I. 1977), since the "totality of the circumstances must be considered in determining if the conditions of confinement are cruel and unusual. Williams, supra at 1214.

In Nelson v. Collins, 455 F.Supp.727 (D. Md. 1978), the court stated:

ACA standards for the operation of correctional institutions are instructive and useful guidelines but they are not dispositive on the question of constitutional deprivations. They are postulated as desirable correctional goals and in many instances appear to be aspirational.

Id. at 731. See Woods, supra, at 1081.

In addition, the Fourth Circuit in Crowe v. Leeke, 540 F.2d 740 (1976), stated that the number of inmates assigned to one cell rests within the sound discretion of the administration and held that three inmates in one 63 square-foot cell was not a condition of confinement which shocks the conscience so as to amount to cruel and unusual punishment. (Id. at 742).

A recent case, Bell v. Wolfish, ___ U.S. ___, 25 Cr. L. 3053 (May 14, 1979), involved pretrial detainees and their jail conditions. The Supreme Court held that pretrial detainees were not entitled to a cell of their own which would be the result in this case if the appellant was granted the relief requested. The Bell court stated:

We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment.

In that case, the Supreme Court held that double-bunking in a 75 square foot cell did not violate constitutional standards. The Court made reference to the amount of time spent in the cell each day as well as the general length of confinement at the institution, and stated that their decision was "buttressed" by the fact that the detainees spent no more than seven or eight hours in their cells (sleeping time), and that nearly all inmates were released within 60 days. (Id. at 3059 and 3060).

In the present case, the detainees spend no more than twelve hours a day in their cells (most of which is sleeping time) (R. 90), and the average length of stay at the Weber County Jail is 30 days (R. 88). The "totality of the circumstances" indicate that conditions, though uncomfortable, do not "shock the conscience." The detainees are held only a short time at the facility, they are supplied with clean clothes, sheets, and towels twice a week. They receive reasonably adequate food and shelter and additional supplies, should they desire them, are made available to them.

B. Visitation and Recreation.

Appellant contends that the pretrial detainees located at the Weber County Jail are entitled to contact visitation and outdoor recreation. The facts, however, indicate that these privileges are not available because

The Government's interest in assuring a detainee's presence at trial is not the only objective that justifies the imposition of restraints on pretrial detainees. Authorities must be able to maintain security and to make certain that weapons, drugs and other contraband do not reach the detainees.

Restraints that are reasonably related to the institutions interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.

Bell, supra., at 3059.

In addition, courts should not second-guess administrative decisions regarding the means chosen to effectuate those interests since the administrators should be given "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed . . . to maintain institutional security." Id. at 3060 and 3061.¹

Furthermore, the decision to allow recreation is also affected by the type of opportunities available at the facility and the duration of a detainee's pretrial incarceration. Campbell, supra. at 546. The pretrial

¹ See 51 ALR 3rd 172-177.

detainees in this case are held for a short time as compared to other pretrial detention facilities² and due to security risks additional forms of recreation cannot be accommodated.

C. Personal Hygiene.

The appellant complains that he was not furnished with a toothbrush or toothpaste. In Scellato v. Dept. of Corrections, 438 F. Supp. 1206 (W.D. Va. 1977), an inmate made the same complaint. The court noted that the practice fell within the internal administration of the facility and held:

A practice may be undesirable and condemned but may still not be so abusive as to violate a constitutional right. Sweet v. South Carolina Department of Correction, 529 F.2d 854 (4th Cir. 1975). Thus, as this limitation cannot be shown to be seriously harmful to plaintiff's health, it does not rise to the magnitude of a constitutional deprivation.

Id. at 1207.

Pretrial detainees cannot receive tubes of toothpaste from their visitors. Once again, the decision is one mandated by the concern for jail security. In Bell, supra, pretrial detainees were not allowed to receive packages from outside the facility which contained food and items of personal property. The Court held that the

2 In Bell v. Wolfish, supra, at 3060, the average length of duration at the facility was 60 days; that figure was quoted as being 60-90 days in Campbell v. McGruder, supra, at 523 and 524.

practice was justified by problems of security since "It is also all too obvious that such packages are handy devices for the smuggling of contraband," (Id. at 3063), and concluded that depriving pretrial detainees of such articles did not amount to a denial of due process of law. Id.

POINT IV

PRETRIAL DETAINEES ARE NOT ENTITLED TO FREE USE OF UNITED STATES MAILS.

In Bounds v. Smith, 430 U.S. 817 (1977), a 6-3 decision (Justice Powell, dissenting), the Supreme Court held that prison authorities were required to provide prisoners with law libraries or assistance from persons trained in the law in order to maintain meaningful access to the courts (Id. at 828). The Court did not hold, as appellant suggests, that prisoners must be given stamps.

Justice Stewart, dissenting, made the observation that the only duty of a state institution is simply not to deny or obstruct a prisoner's access to the court but that there is no affirmative constitutional obligation to assure access (Id. at 837).

The principle that indigent convicts must be given an opportunity for meaningful access to the courts means that they must be given an opportunity to appeal which includes provision of a transcript or furnishing counsel.

Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

Johnson v. Avery, 393 U.S. 483 (1969), Procunier v. Martinez, 416 U.S. 396 (1974), and Wolff v. McDonell, 418 U.S. 539 (1974), stand for the proposition that since the state, having already incarcerated the convict and eliminated outside contact, cannot limit contacts, such as inmates having legal knowledge, from aiding the prisoner in preparing a petition seeking judicial relief. These decisions do not mandate the provision of stamps.

In Williams v. Ward, 404 F. Supp. 170 (S.D.N.Y. 1975), the court chose not to interfere with administration of an institution and held that failure to provide stamps was not a "shocking" interference with First Amendment rights. The court said that a prisoner has no more right to free postal service than does the ordinary citizen (Id. at 172).

Similarly, the court in Tate v. Kassulke, 409 F.Supp. 651 (W.D. Ky. 1976), stated that there is no constitutional requirement that stamps be provided or even stocked in the commissary (Id. at 662). The court reasoned that the prisoners can get these items from their visitors or attorneys. Id.

There are cases which support the practice of providing some postage for correspondence to courts. However, the right is not absolute. In Tate, supra, the court held that inmates were not denied access to the courts when they were required to pay postage for an envelope which contained a bulky complaint since inmates are not entitled to free use of the mails. The facts in the present case indicate that inmates are allowed some free correspondence to courts. Judge Wahlquist indicated that he often receives correspondence from inmates which does not bear a stamp (R.161), since the jail personnel often deliver the mail themselves.

Pretrial detainees are not denied access to the courts and stamps are made available to them if they desire to purchase them.

POINT V

UTAH CODE ANN. § 17-22-5, 1953, HAS NOT BEEN VIOLATED.

Utah Code Ann. § 17-22-5 (1953), provides:

Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room.

The appellant contends that after Sonny Gabaldon was sentenced on October 20, 1978, Gabaldon was locked up in the same room with the appellant for 40 days. (See Appellant's

Brief, p. 33). Additional facts, however, show that Gabaldon was returned to South-12 for about two and a half weeks (R. 110), because he was awaiting trial on two additional cases (R. 109, 110). But for those charges, Gabaldon would not have been confined to South-12. At that time, while awaiting trial, he was theoretically a pretrial detainee. The decision to have the two men share the same space did not violate § 17-22-5.

POINT VI

THE TRIAL JUDGE DID NOT ERR IN ONLY GRANTING PARTIAL RELIEF.

The decision to grant relief pursuant to a writ of habeas corpus rests within the sound discretion of the trial court. Boies v. Dovico, 97 Ariz. 306, 400 P.2d 109 (1965), and Hart v. Best, 119 Colo. 569, 205 P.2d 787 (1949). A trial court can grant relief consistent with the evidence received by the court and, as a general rule, the trial court is granted broad discretion in fashioning equitable relief. Rowe v. Burrup, 95 Idaho 747, 518 P.2d 1386, 1389 (1974).

In Erickson v. Beardahl, 20 Utah 2d 287, 437 P.2d 210 (1968), this court held that reviewing courts should:

. . . give deference to the advantaged position and prerogatives of the trial judge as the finder of facts; allow him considerable latitude of discretion as to the orders made; and . . . not upset his judgment and substitute (their) own unless it clearly appears that he abused his prerogatives.

Id. at 212.

This Court reiterated that principle in Ream v. Fitzer, 581 P.2d 145 (Utah 1978), noting that "the trial judge is in a far better position to judge the credibility of the witnesses, to observe their demeanor, and to weigh the respective merits of the case in the light thereof." (Id. at 147). See also Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972), and Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976).

In Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977), this court stated that it would defer to the findings of the trial court unless as a matter of law, it could be determined that no one could reasonably find as did the fact finder. The order rendered by Judge Wahlquist must be clearly against the weight of the evidence in order to justify interference with that judgment. Ream, supra, at 147, and First Security Bank of Utah, N.A. v. Hall,

504 P.2d 995 (Utah 1972). Furthermore, the discretion exercised by the Judge has not been abused if the conclusions made are predicated upon and find their support in the findings of fact. Lone Star Uranium and Drilling Co. v. Davis, 9 Utah 2d 175, 341 P.2d 201 (1959), which quotes Parrot Bros. Co. v. Ogden City, 50 Utah 2d 512, 167 P.807 (1917).

Judge Wahlquist concluded that under current correctional standards the conditions at the Weber County Jail may be unconstitutional if the period of detainment was long but that the conditions in this case are "defended" by the fact that confinement is of a short duration (R. 30). This conclusion is consistent with Bell v. Wolfish, *supra*, where the Supreme Court stated that the length of pretrial confinement was an important factor in determining the constitutionality of prison conditions. The trial court here also noted that all pretrial detainees were being held for some sufficient legal reason and that there had not been any abuse of discretion in requiring bail (R. 29).

The trial court's decision, therefore, to fashion a remedy that would shorten confinement rather than increase the space allotted to each detainee at the jail is supported by the facts and conclusions of law made by Judge Wahlquist.

The court's order regarding an improved visitation program is consistent with its findings that inmates probably do use paper cups in order to be heard on each side in the visitation area, and that visitation procedures are somewhat uncomfortable (R. 27). The court, therefore, ordered that a program be devised to remedy that problem. The decision not to order contact visits was a result of security precautions as evidenced by the testimony at trial (R. 92). These considerations for internal security met with approval in Bell v. Wolfish, supra.

Pretrial detainees are not constitutionally entitled to be given a toothbrush. The court found that medical and dental care at the jail was adequate, and therefore, was correct in ruling that toothbrushes be provided only if funds are available (R. 32).

With regard to exercise and recreation, the trial court found that some detainees indulge in large amounts of individual exercise, but that the inmates generally ignore the opportunity for exercise (R. 28). In light of these findings and the obvious security risks involved in allowing outdoor activity, Judge Wahlquist was justified in refusing to grant relief.

Finally, the trial court noted that confinement at the Weber County Jail was rigid, but that it was not alarming in light of the short duration of confinement (R. 29).

Judge Wahlquist, therefore, could reasonably find that the facilities were adequate, not unconstitutional, and that the relief granted was consistent with the needs of the detainees as shown by the evidence at trial. The trial court did not abuse its discretion by granting only partial relief, and the facts indicate that additional relief is not justified.

CONCLUSION

This petition should be dismissed since the appellant does not have standing to sue. The appellant is no longer a pretrial detainee; therefore, an actual controversy does not exist at this stage of appellate review. In addition, the claims made by the other eight detainees should not be considered by this Court since those men were not pretrial detainees at the time of the hearing.

This petition should also be dismissed because federal action is a more appropriate remedy and a federal class action suit has been stayed pending this appeal.

In the alternative, respondent contends that the conditions at the Weber County Jail do not rise to the level of constitutional deprivation necessary to justify judicial intervention in the internal management of that facility. The detainees are provided with reasonably

adequate food, clothing, shelter and personal hygiene items. Keeping in mind the "totality of the circumstances", the housing arrangements at the jail cannot be said to be "shocking" or "barbarous". Furthermore, the restrictions imposed are justified by legitimate security considerations or are limitations which necessarily accompany lawful detention.

Respondent, therefore, urges this Court to dismiss the petition, or, in the alternative, to affirm the lower court's order and deny any additional relief.

Respectfully submitted,

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