1987

State of Utah v. Myron A. Hamilton : Response to Petition for Rehearing

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

NO. 20646

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 20646
vs.	:	
MYRON A. HAMILTON,	:	Category No. 2
Defendant/Appellant.	:	

REPLY TO PETITION FOR REHEARING

Pursuant to invitation of the Court, plaintiff/respondent replies to the appellant's petition for rehearing of a per curiam decision of the Utah Supreme Court filed October 20, 1986, where this Court entertained the appeal of the constitutional claims by the appellant that he was denied his right to trial and appellate counsel. In that decision this Court upheld the misdemeanor convictions and sentencing of the trial court and the decision of the district court.

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STATEMENT OF THE CASE

This is a response by invitation of the Court to the appellant's petition for rehearing of the Court's per curiam opinion filed October 20, 1986. State v. Hamilton, 4 Utah Adv. Rep. 11 (Utah 1986). There the Court in the second paragraph fully addressed all of the issues raised by the facts on appeal by defining the two issues as being (1) the trial court's failure to appoint an attorney or obtain a waiver of right to counsel; and (2) the district court's failure to appoint counsel (although never requested) on his first appeal. In its per curiam decision the Court clearly not only deliniates that isssue of waiving the right to appellate counsel (id. 11 ¶ 1) but holds "neither judge denied defendant the right to talk with his lay counsel, and neither interfered with the defendant when the defendant availed himself of that right. There is still "nothing in the record before us that would mandate a different result here." Id. p. 12, last paragraph.

STATEMENT OF FACTS

Although "defendant has not furnished us with a transcript of the jury trial but merely transcripts of his several preliminary hearings, to the extent that it is before us, the record reveals that defendant in those hearings gave notice and demand for counsel of choice, accompanied by a brief 31 pages long. Both in the appellate and trial briefs and in oral trial argument, defendant demanded that his lay counsel be heard and he represent himsel, and "there is nothing in the record to indicate that appellate counsel was refused and that defendant at that stage had requested legal counsel." (First emphasis ours.) Id. p. 11, paragraph 4. The fact is that this Court clearly found that "neither judge denied defendant the right to talk with his lay counsel, and neither interfered when the defendant availed himself of the right." Id. p. 12.

ARGUMENT

THIS COURT'S OPINION ADDRESSES THE ISSUES RAISED IN THE APPEAL AND ON THE RECORD

Rule 35 of the Rules of Appellate Procedure only allows a rehearing if the court has overlooked or misapprehended points of law or fact and such issues must be stated with particularity. This Court's standard for rehearing is that the point argued must be material and will affect the case results. It must have "misapplied or overlooked something which materially affects the result." Cummings v. Nelson, 129 P. 619, 624 (Utah 1913), and Brown v. Pickard, 11 P. 512 (Utah 1886).

This Court clearly did not err in its per curiam decision and although the appellant may wish a longer opinion,

based on the scanty record presented the Court has clearly addressed the issue of right to counsel on the first appeal of an appellant who is deliberately and "with eyes open" demanding his basis constitutional right to represent himself or for lay counsel and with knowledge and some legal sophistication rejecting any offers of any licensed counsel. As this Court pointed out in its decision, the defendant/appellant in his brief to the Appellate Court below, though similar to the one filed in the Trial Court, not only rejects any encroachment upon his right to lay counsel, again historically and conclusively demands his common law right to be represented by a "friend" rather than an attorney, and makes written demands for his right to defend himself without "being subject to exorbitant legal fees of a closed shop union." (Addendum A, respondent's appeal brief, p. 11.)

Defendant clearly chose to and asked to be his own pro se counsel. For example, "Defendant also asks the Court to take Judicial Notice that other Defendants in criminal cases are allowed to plan their defenses minus interference by the Courts, and Defendant herein claims that same right." (Addendum A, p. 22.) As pointed out by this Court, both the trial court and the appellate court allowed that opportunity and right as demanded in writing and did not interfere with it.

These issues were addressed by this Court and by both counsel in their briefs. As pointed out, "of reference to this case (Angersinger v. Hamlin, 407 U.S. 25 (1975)) under these entire circumstances shows that this defendant knew at all stages

of the appeal that he could have a member of the bar represent him if he so desired. (R. 354)." (Respondent's brief, p. 23.) "He clearly knew he could have but did not want an attorney from the bar. He made a knowing and voluntary waiver of his right to an attorney and chose to participate in the court proceedings and the district court appealed pro se." Appellant's brief, p. 25.

This Court clearly says in its per curiam opinion as did the United States Supreme Court and the Eighth Circuit Court of Appeals, that if an individual voluntarily demands the basic constitutional right to represent themselves or knowingly waives or rejects the right to counsel, or even advisory counsel, then the trial courts and the appellate courts have the discretion to not only appoint advisory counsel but to allow the unfetered use of the constitutional right to represent one's self.

The decision points out as did the United States Supreme Court, that the appellant "has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel." The Supreme Court also infers that where the circumstances show that the appellant's rights would have been fairly protected without counsel, the due process clause would not invalidate his conviction, especially where in a state case, the defendant "should carry the same burden of proving non-waiver as required of a defendant in a federal case." Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed. 2d, 167 (1957). As pointed out in the appeal brief, the appellant would put this Court and all appellate courts on the

horns of a dilemma by forcing the courts to allow him to represent himself and then forcing the courts to, through some sophisticated knowledge of the law and historical gymnastics, to then impose an unfriendly licensed attorney upon him in order to obtain a rehearing and start the circle again. But this Court stopped that abuse in its memorandum decision by pointing out that only the infamous Star Chambers Tribunal would adopt a practice of forcing counsel upon an unwilling defendant. As this Court has pointed out, either in a trial or appellate stage, "it is well established that a defendant does not have an immutable right under our state or the federal constitution to reject court appointed counsel for the purpose of forcing the court appoint private counsel of his own choice. State v. Wulffenstein, 27 Utah Adv. Rep. 32 (1986). Nor does he have the constitutional right to be represented by lay or unlicensed counsel." (Emphasis respondent's, supra p. 12.)

The memorandum decision says, and the scanty but not silent record shows, that this particular defendant chose voluntarily to represent himself and knowingly rejected licensed counsel and now attempts to claim that an appellate court erred in not appointing advisory counsel even though it was not requested by defense "counsel pro se." This Court cites U.S. v. Olsen, 576 F.2d 1267, 1270 (8th Cir.), cert. denied, 439 U.S. 896 (1978), for the judges having a similar situation. After citing from Faretta v. California, 422 U.S. 806, 45 L.3d. 2d 562, 95 S.Ct. 2525 (1975) and the language cited by this Court on "fair ascertainment" that the defendant will not accept licensed

counsel, the Olsen Court quotes, "indeed, we have rejected the view that a defendant has a right to both represent himself and to be represented by counsel--even if a request for such hybrid representation is made. United States v. Williams, 534 F.2d 119, 123 (8th Cir. 1976). As noted in Williams, the matter is properly left to the discretion of the trial court, and there is no abuse of discretion here. We add that Olsen, in fact, exhibited considerably more courtroom skill than would most lay persons." Olsen at 1270. (As did this defendant if one listens to the trial tapes or reads the trial briefs.) This Court leaves not only the trial judge but the appellant judge with discretion in the face of a revealed sophisticated appellant rejecting "stealthy encroachment upon his right to counsel" pointing out "there is nothing in the record to indicate that appellate counsel was refused and that defendant at that stage had requested legal counsel."

The record in fact shows that the appellant here chose to represent himself and never requested counsel until this Court later determined that he was indigent and appointed counsel. And of course, since this Court did appoint counsel, the cases on counsel for indigent appellants cited in the petition for a rehearing have not been violated, since this appellate court did appoint counsel.

CONCLUSION

As argued on appeal, since this defendant has failed to provide a complete and adequate record this Court need not rule on mere allegations in the appeal. As the Court said in its

memorandum decision," there is nothing in the record to indicate that appellate counsel was refused and that defendant at that stage had requested legal counsel."

In any event, with sophisticated knowledge the appellant in writing in his brief to the district court continued to demand the right to represent himself and made it clear that the Star Chamber proceedings would not be allowed to force licensed counsel upon him. As this Court said, citing the eighth circuit both "judges acknowledged the defendant's right to defendant himself." The Court in its decision acknowledged as one of the two issues the district court's failure to appoint counsel on his "first appeal." The Court also acknowledged that defendant waived his right to licensed counsel and pointed out that "neither judge denied defendant the right to talk with his lay counsel, and neither interfered when the defendant availed himself of that right." This Court rightfully concluded from the tenor of the defendant's appellate brief and his demeanor before the Trial Court, the same as the reviewing court in Olsen and the reviewing Utah district court, that all courts say that after fair ascertainment that the defendant will not accept licensed counsel, the Courts have discretion to not appoint advisory counsel at trial or on appeal.

Since there is nothing material on the record pursuant to Appellate Rule 35 or any wrong principal of law that would materially effect the results, the petition for rehearing should be denied.

DATED this 2 day of January, 1987.

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MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing reply to appellant's petition for rehearing to Curtis C. Nesset, attorney for appellant, 333 South Second East, Salt Lake City, Utah 84111, postage prepaid, this 2 day of January, 1987.