1987

State of Utah v. Richard Lynn Wright : Response to Petition for Rehearing

Utah Supreme Court

Kevin P. Sullivan; Attorney for Appellant.
David L. Wilkinson; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintff-Respondent.	:	Case No. 20746
	:	
vs.	:	
	:	
RICHARD LYNN WRIGHT,	:	Priority 2
	:	
Defendant-Appellant.	:	

RESPONDENT'S ANSWER TO
PETITION FOR REHEARING

APPEAL FROM CONVICTION OF TWO COUNTS AGGRAVATED ROBBERY, FIRST DEGREE FELONIES, IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, DAVID E. ROTH, PRESIDING, AND APPEAL FROM THE DENIAL OF DEFENDANT'S MOTION TO DISMISS, RONALD O. HYDE, PRESIDING

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Defendant-Appellant.	:	

RESPONDENT'S ANSWER TO
PETITION FOR REHEARING

This Court issued its unanimous decision in defendant-appellant's case on June 9, 1987. Defendant-appellant has petitioned for a rehearing of the case, pursuant to Rule 35, Utah Rules of Appellate Procedure. This Court has invited the State of Utah to file an answer to the petition for rehearing. This answer is filed in response to that invitation.

STATEMENT OF THE CASE

State of Utah adopts the Statement of the Case from its amended brief on appeal.

STATEMENT OF THE FACTS

The State of Utah adopts the Statement of Facts from its amended brief on appeal and all facts contained in the Argument portion of said brief with the following supplementation:

When this case was orally argued to this Court on March 13, 1986, counsel for appellant, for the first time on appeal,

submitted copies of a complaint which apparently had been filed in Ogden City Court (Complaint No. 6-471-472F) on September 8, 1976, charging Richard Lynn Wright with two counts of aggravated kidnapping. However, the complaint indicates that it was amended on September 13, 1976, deleting Richard Lynn Wright's name, and substituting the name of Leonard Eugene Wright. The complaint also contains the notations, "DEFENDANT STATES TRUE NAME IS LEONARD EUGENE WRIGHT." This complaint is attached as Appendix A. Also, at oral argument, counsel for appellant submitted a minute entry from Ogden City Court (Case No. 27295) which indicates that on September 13, 1976, the complaint was indeed amended to charge Leonard Euguene Wright with aggravated kidnapping, and that on September 24, 1976 (the day set for Leonard Wright's preliminary hearing), the Deputy Weber County Attorney dismissed the complaint altogether. This minute entry is attached as Appendix B. Finally, at oral argument, counsel for appellant also submitted a newspaper article which stated that two counts of aggravated kidnapping had been filed "late Wednesday" against Richard Lynn Wright who was still at large. This article is attached as Appendix C.

During oral argument, counsel for appellant conceded that these documents previously had not been made part of the record on appeal, but noted that the 1976 complaint had been alluded to at hearing in district court on the defendant's motion to dismiss the charges. The transcript of that hearing T2 at 298-99 reads as follows:

> BERNARD ALLEN (Defense Counsel): Counsel for the State has also said that because actual charges are not filed against the defendant that tnat lets them off the hook in terms of the speed [sic] trial in this case.
>
> Well, there are two issues there. One, were charges actually filed? Yes, they were actually filed. Yes, the charge against Leonard Eugene Wright was apparently filed for the purpose of being against the defendant here.
>
> You can see if you look at the -- Where's the charge, Counsel? You can see by looking at that, the original State's report, the original file was reported in the name Richard Lynn Wright, which is the individual they knew to be the one they were looking for. At some point in time they had taken white and whited it out, and said that, "Now we're looking for Leonard Eugene Wright, when I have the identification of an individual named Leonard Eugene Wright."
>
> To use tnat and say, "Well, but we've never filed against this individual is a ludicrous argument, your Honor.

Later, during the lower court proceedings, defense counsel stated:

> BERNARD ALLEN: Finally, the prosecutor, Mr. Daroczi, is trying to state that no compliant was filed against the defendant. Well, that's pure nonsense.
>
> In every police report we have here and in the copy of the newspaper article, two counts ot aggravated kidnapping were filed against a California man. Complaints were issued late Wednesday. This is later on the same date. The complaints were issued against Richard Lynn Wright, the defendant who is sitting here currently.

T2 at 330-31.

ARGUMENT

POINT I

THIS COURT NEITHER OVERLOOKED NOR MISAPPREHENDED ANY POINTS OF FACT OR LAW IN REACHING ITS DECISION TO REJECT DEFENDANT'S SPEEDY TRIAL CLAIM.

Rule 35, Utah Rules of Appellate Procedure, limits Petitions for Rehearing to points where the Court purportedly overlooked or misapprehended facts or law in reaching its decision. Decisions under former rehearing Rule 76(e) reflect additional principles for rehearing applications. The rehearing should not be utilized to challenge areas of the decision which appellant merely disagrees with or considers unsatisfactory. Nor should it be used to reargue grounds originally presented. Cummings v. Nelson, 42 Utah 157, 129 P. 619 (1913); Beaver County v. Home Indemnity Co., 88 Utah 1, 52 P.2d 435 (1935). This Court "must be convinced that there has been a failure to consider some material point in the case; that there has been error in the conclusions heretofore arrived at; or that some matter has been discovered unknown at the time of the hearing." Brown v. Pichard, 4 Utah 292, 11 P. 512, reh'g denied, 4 Utah 292, 9 P. 573 (1886). Applying these standards, rehearing of this case should be denied.

Defendant asserts that this Court's opinion is erroneously based on the presumption that no charges were brought against defendant until January, 1985, when in fact, charges had been filed against him on September 8, 1976. Thus, he claims the case should have been analyzed as a speedy trial issue, rather than a due process (pre-arrest or pre-indictment delay) issue.

As shown in the Statement of Facts portion of this answer, this Court was made amply aware during oral argument of defendant's assertion that a complaint had been filed against him on September 8, 1976. However, during that oral argument, defendant's counsel had to concede that that complaint was subsequently amended on September 13, 1976 naming Leonard Eugene Wright as the defendant, and that the amended complaint was subsequently dismissed on September 24, 1976. Counsel for defendant also had to concede that the record reflects that new charges were not filed against defendant until January, 1985. (Tape of oral argument, dated March 13, 1986).[1]

Accordingly, in footnote 1 of its opinion, this Court correctly assessed the facts when it observed that "another individual was charged shortly after the crime but those charges were dismissed at an early stage." Slip. op. at 1, n. 1. This Court did not misconstrue the material facts of this case. And under those facts, the Court correctly analyzed the issue as one of due process, and not speedy trial. Slip op. at 2-3.

Counsel for the State at oral argument contended that the filing of the complaint against the defendant on September 8, 1976 was not critical because his name was amended out five days later and the complaint was dismissed altogether sixteen days later. In such situations the issue is still treated as one of due process and not speedy trial. Counsel for the State cited

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[1] Justice Zimmerman asked, "You don't contend then that any charges were pending against Richard Lynn Wright after 1976?" Counsel replied, "No," and reaffirmed that no charge or official information had been filed during that time.

United States v. MacDonald, 456 U.S. 1 (1982) for this proposition. There, charges were filed against Mr. MacDonald and were then retiled. Id. at 4-5. The United States Supreme Court rejected MacDonald's speedy trial claim finding the issue one of pre-arrest or pre-indictment delay under the due process clause citing United States v. Marion, 404 U.S. 307 (1971), and United States v. Lovasco, 431 U.S. 783 (1977). It expressly found that:

> [T]he speedy trial clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause.

456 U.S. at 7 (cited in this Court's slip opinion at 3).

Similarly, the Utah Supreme Court did not misapprehend the facts or the law in treating the issue under the Due Process Clause and refusing to analyze this case as denial of speedy trial.

Finally, defendant's related claim on rehearing that this Court was confused over the speedy trial issue because earlier defense failed to cite to the record regarding the original complaint issued in 1976, should be summarily rejected for two reasons. First, as noted above, defense counsel made this Court amply aware of the pertinent facts concerning that complaint during oral argument of this case. He furnished copies of the complaint and cited to pages of the transcript of the lower court proceedings where the complaint had been discussed. Thus, counsel's earlier failure to cite to the record was not critical under the facts of this case. Present defense counsel

is obviously not familiar with the efforts made by former defense counsel during the oral argument of this case. Second, as shown above, this Court obviously was not confused about the material facts when it rendered its opinion using due process analysis.

POINT II

DEFENDANT IS PRECLUDED FROM RAISING CLAIMS OF INEFFECTIVENESS OF COUNSEL FOR THE FIRST TIME ON REHEARING; MOREOVER SUCH CLAIMS LACK MERIT.

In addition to the standards set forth in Point I for petitions for rehearing, courts have long recognized that it is wholly inappropriate to raise issues for the first time on rehearing which could have been earlier presented. See Carr v. F.T.C., 302 F.2d 688, 692 (1st Cir. 1962) (for litigant best familiar with matter directly in issue and claimed to be of paramount importance, to make no mention of subject until after case has been lost on another ground, and to present it in petition for rehearing is a breach of duty to the court if deliberate, and inexcusable if inadvertent); Mitchell v. Greenough, 100 F.2d 1006 (9th Cir. 1939) (appellant cannot contend for first time on rehearing that three-year statute of limitation was controlling; a party cannot shift his position on petition for rehearing); Independent Wireless Telegraph Co. v. Radio Corp., 270 U.S. 84, 86 (1926) (Supreme Court will not consider question as to rights of exclusive licensee of a patent under contracts, when raised for first time on rehearing); United States v. Wabash R. Co., 322 U.S. 198 (1944) (facts which could have been brought to attention of lower court, or raised earlier on appeal will not be considered on rehearing).

Now that defendant has lost on the merits, he claims for the first time on rehearing that his former counsel was ineffective for failing to argue this case as a violation of due process (as opposed to a speedy trial claim),[2] and for failing (under the due process analysis) to adequately introduce evidence of prejudice to his case resulting from the government's delay in refiling the charges. Under the above cited authorities, appellant is precluded from raising this new claim on rehearing.

Assuming the ineffectiveness of counsel issues could be reached, the case law on pre-indictment or pre-arrest delay places the burden on the defendant to establish that (1) the delay was an intentional device by the prosecution to gain tactical advantage over the accused or to harass him, and (2) the delay caused substantial prejudice to defendant's case. Defendant must show both. United States v. Marion, 404 U.S. 307 (1971); United States v. Lovasco, 431 U.S. 783 (1977); and State v. Bailey, 812 P.2d 281 (Utah 1985) (all cited in our prior amended brief at 10-11).

This Court correctly found that "[d]efendant has not alleged, and the facts do not suggest, that the prosecution delayed the filing of charges against him in order to achieve a tactical advantage." (Emphasis added.) Slip op. at 3. It was on this ground that appellant failed to establish a due process

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[2] This claim is obviously wholly inconsistent with present counsel's first claim on rehearing that this Court should have analyzed this case as denial of a speedy trial issue. If this is so, then former counsel would not have been ineffective in failing to analyze the case under the due process clause. Present counsel, like former counsel, cannot have it both ways.

violation, not on the ground of the inadequacy of defendant's showing of substantial prejudice (which received only passing reference in footnote 3 of the Court's opinion). Indeed, "the facts do not suggest" improper motives by the prosecutor. See T2 at 292, 293, 295, 297 and 325 all of which reflect that the prosecutor's motives were largely unknown and at most show prosecutorial concern over whether to proceed given that defendant had received a 20-year sentence in Canada. See T2 at 325.[3]

Therefore, the adequacy of former counsel's efforts to show substantial prejudice from the delay is not determinative of this issue, nor a basis for rehearing. Because defendant could not show, and the record does not support a showing of, improper prosecutorial motive for the delay, no rehearing should be granted.

CONCLUSION

Based upon the foregoing, rehearing should be denied.

DATED this 24th day of November, 1987.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

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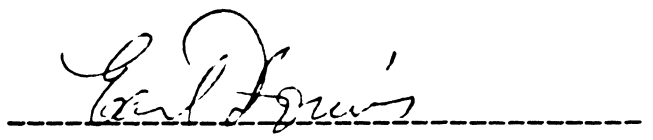
[3] Cf. United States v. Lavasco, supra, where the Court listed legitimate reasons why a prosecutor, even with evidence to prove guilt, might not proceed. Those reasons include lack of availability of defendant, and likelihood of prosecution in the other jurisdiction.

MAILING CERTIFICATE

I hereby certify that on the 24th day of November, 1987, I caused to be mailed, postage prepaid, 4 true and exact copy of the above and foregoing Brief of Respondent to Kevin P. Sullivan, Esq., Public Defender Association, 205 26th Street, Suite 13, Ogden, Utah 84401.



APPENDIX A

IN THE CITY COURT OF THE CITY OF OGDEN
COUNTY OF WEBER, STATE OF UTAH

Before the Judge of the above entitled Court

Setting as a Magistrate

STATE OF UTAH,

vs.

LEONARD EUGENE
~~RICHARD-LYNN~~ WRIGHT Defendant ....

AMENDED 9/13/76
COMPLAINT

DEFENDANT STATES TRUE NAME IS LEONARD EUGENE WRIGHT

STATE OF UTAH
County of Weber } ss

To the Judge of the above entitled court, the undersigned complainant being first duly sworn on oath, deposes and says

That ~~RICHARD-LYNN WRIGHT~~ LEONARD EUGENE WRIGHT

the above named defendant ..., in Weber County, State of Utah, the 8th day of September A.D. 19 76 committed a 1st * Felony to-wit:

AGGRAVATED KIDNAPING 76-5-302 UCA 1953 as amended as follows,

Said defendant intentionally or knowingly, by force, threat or deceit, detained or restrained MIKE SCHLOSSER against his will with intent to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or to inflict bodily injury on or to terrorize the victim or another; or to interfere with the performance of any governmental or political function.

COUNT II

On September 8, 1976, the above named defendant committed a 1st Felony, to-wit: AGGRAVATED KIDNAPING 76-5-302 UCA 1953 as amended as follows:
Said defendant intentionally or knowingly, by force, threat or deceit, detained or restrained BRUCE HARTMAN against his will with intent to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or to inflict bodily injury on or to terrorize the victim or another; or to interfere with the performance of any governmental or political function.

Contrary to the form on the statute in such cases made and provided, and against the peace and dignity of the State of Utah

Wherefore, complainant prays that the said defendant ..., be dealt with according to law.

MIKE SCHLOSSER, WCSO Complainant
76-4725

Subscribed and sworn to before me this 8th day of September 19 76

LET WARRANT ISSUE HEREON

E. F. ZIMMERJudge of the City Court, Ogden City, Weber County, State of Utah

Approved
ROBERT L. NEWEY City Attorney

COMPLAINT # 0-471-4725

APPENDIX D

IN THE CITY COURT OF OGDEN CITY

COUNTY OF WEBER, STATE OF UTAH

BEFORE HON. E. F. ZIEGLER
Judge

CASE NO 27295

STATE OF UTAH
Plaintiff

vs

RICHARD LYNN WRIGHT
aka LEONARD EUGENE WRIGHT
Defendant

OFFENSE: TWO COUNTS OF AGGRAVATE KIDNAPPING - 1st Degree

William F. Daines, Esq.
Atty. for Plaintiff

Don Hammill, Esq.
250 East 3rd South
Salt Lake City
Atty. for Defendant
Phone: 322-2467

PROCEEDINGS

DATE SEPTEMBER 13, 1976 TIME 9:02 a.m. CASE CALLED

Defendant appearing in Court.	Yes	No
A copy of complaint is delivered to defendant	Yes	No
The complaint is read to defendant by the clerk	Yes	No
The defendant is advised of his legal rights	Yes	No
The defendant will consult counsel	Yes	No
The defendant waives right to counsel	Yes	No
ENTER COUNSEL DON E. HAMMILL, ESQ. The Court Orders Counsel be appointed	Yes	No

and _____ is appointed and is notified.

Preliminary Examination is set to be heard before the Court on _____

SEPTEMBER 24, 1976 @ 10:00 a.m.

The matter is continued for plea or decision as to Preliminary Examination

on _____ 9:00 A. M.

Bail BB
SET: $20,000.00 (for both)

Defendant pleads Not Guilty ☐ Defendant Pleads Guilty ☐

Trial is set for _____

The defendant is referred to the Adult Probation and Parole Department for pre-sentence investigation and report.
Case continued for sentencing until _____
9:00 A. M.

—Defendant states his true name is "LEONARD EUGENE WRIGHT". Court orders complaint amended thusly.

SEPTEMBER 17, 1976, per County Attorney's office: matter has been reset to

Con't 10/14/76 @ 9:30 - P.H.

SEP 24 1976 [illegible]

APPENDIX C

..ed Against Coast Suspect

Two counts of aggravated kid naping have been filed agains a California man who got th drop on two Weber County dep uty sheriffs early Wednesday.

Complaints were issued lat Wednesday by the Weber Coun ty attorney's office agains Richard Lynn Wright, 33, sti the subject of a massive searc

Bail on the charges was s at $20,000.

The two deputies, Mik Schlosser and Bruce Hartma managed to escape after th gunman made them kneel fr of their patrol car in "e ecution style."

The gunman fled in a stol Utah auto after ordering t two deputies to walk towa the Weber River. They r after a short distance.

The two deputies had stopp while on routine patrol to che out a car parked in the riv bottoms in the Wilson area ne the Union Pacific Railroad C bridge.

They found a man asleep a while questioning him, he pull a pistol on Deputy Hartm and then took the deput weapons and handcuffed the