

1980

Lonnie Morishita v. Lawrence Morris, Warden,
Utah State Prison, and Thomas R. Harrison,
Chairman, Utah State Board of Pardons : Brief of
Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:
LONNIE MORISHITA,
:

Plaintiff-Appellant,
:

-vs-
:

Case No. 16846
:

LAWRENCE MORRIS, Warden,
Utah State Prison, and
THOMAS R. HARRISON, Chairman,
Utah State Board of Pardons,
:

Defendant-Respondent.
:
:

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT DENYING PETITION
FOR A WRIT OF HABEAS CORPUS BY THE THIRD
JUDICIAL DISTRICT COURT ON THE 19TH DAY
OF DECEMBER, 1979, THE HONORABLE DAVID
K. WINDER, JUDGE PRESIDING

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Region	Population	Area	Capital	Language	Religion	Government	Major Cities	Major Industries	Major Exports	Major Imports	Major Imports	Major Imports	Major Imports	Major Imports	Major Imports
Algeria	34,000,000	2,381,741	Algiers	Arabic	98% Muslim	Presidential	Algiers, Oran, Constantine	Oil, Gas, Agriculture	Crude Oil, Natural Gas	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Angola	16,000,000	1,246,700	Luanda	Portuguese	98% Muslim	Presidential	Luanda, Benguela, Namibe	Oil, Gas, Agriculture	Crude Oil, Natural Gas	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Argentina	40,000,000	2,780,400	Buenos Aires	Spanish	95% Catholic	Presidential	Buenos Aires, Rosario, Cordoba	Automotive, Agriculture, Industry	Automotive, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Armenia	2,800,000	29,743	Yerevan	Armenian	95% Christian	Presidential	Yerevan, Gyumri, Vanadzor	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Australia	20,000,000	7,741,229	Canberra	English	65% Christian	Parliamentary	Canberra, Sydney, Melbourne	Minerals, Agriculture, Industry	Minerals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Austria	8,500,000	83,858	Vienna	German	85% Christian	Parliamentary	Vienna, Salzburg, Innsbruck	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Azerbaijan	8,500,000	86,600	Baku	Azerbaijani	95% Muslim	Presidential	Baku, Ganja, Nakhichevan	Oil, Gas, Agriculture	Crude Oil, Natural Gas	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bahrain	1,200,000	780	Manama	Arabic	70% Muslim	Monarchy	Manama, Muharraq, Riffa	Oil, Gas, Finance	Crude Oil, Natural Gas	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bangladesh	140,000,000	147,570	Dhaka	Bengali	95% Muslim	Parliamentary	Dhaka, Chittagong, Comilla	Textiles, Agriculture, Industry	Textiles, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Barbados	280,000	430	Bridgetown	English	75% Christian	Monarchy	Bridgetown, St. James, St. Michael	Tourism, Agriculture, Industry	Tourism, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Belarus	9,500,000	207,600	Minsk	Belarusian	75% Christian	Presidential	Minsk, Grodno, Brest	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Belgium	10,500,000	30,528	Brussels	Dutch, French, German	65% Christian	Parliamentary	Brussels, Antwerp, Ghent	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Belize	400,000	22,967	Belize City	English	75% Christian	Parliamentary	Belize City, San Jose, Orange Walk	Tourism, Agriculture, Industry	Tourism, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bhutan	2,500,000	38,394	Thimphu	Tibetan	95% Buddhist	Monarchy	Thimphu, Paro, Gangtok	Tourism, Agriculture, Industry	Tourism, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bolivia	10,000,000	1,098,581	Sucre	Spanish	65% Catholic	Presidential	Sucre, La Paz, Cochabamba	Minerals, Agriculture, Industry	Minerals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bosnia and Herzegovina	3,500,000	51,129	Sarajevo	Bosnian	95% Muslim	Parliamentary	Sarajevo, Banja Luka, Tuzla	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Brazil	190,000,000	8,511,763	Brasilia	Portuguese	65% Catholic	Presidential	Brasilia, Rio de Janeiro, Sao Paulo	Automotive, Agriculture, Industry	Automotive, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Bulgaria	7,500,000	110,910	Sofia	Bulgarian	85% Christian	Parliamentary	Sofia, Plovdiv, Varna	Metals, Agriculture, Industry	Metals, Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Burkina Faso	15,000,000	274,200	Ouagadougou	French	65% Christian	Presidential	Ouagadougou, Bobo Dioulasso, Koudougou	Agriculture, Industry	Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Burundi	7,500,000	27,834	Bujumbura	Kirundi	75% Christian	Presidential	Bujumbura, Gitega, Ngozi	Agriculture, Industry	Agriculture, Industry	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals	Grain, Machinery, Chemicals
Cambodia	15,000,000	181,035	Phnom Penh	Kh											

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from an order granting the respondent's motion to dismiss and denying the petition for the issuance of the writ with prejudice.

DISPOSITION IN THE LOWER COURT

On June 1, 1979, at a hearing held before the Honorable Jay E. Banks, the appellant's probation was revoked and he was committed to the Utah State Prison to serve an indeterminate term of from five years to life. On August 27, 1979, the appellant filed a petition for a writ of habeas corpus and a hearing was scheduled to convene before the Honorable David K. Winder. On October 25, 1979, both parties were ordered to file a memorandum on the issues involved. The respondent thereafter moved to dismiss the petition on the ground that it failed to state a claim upon which relief could be granted. On December 6, 1979 in a memorandum decision the Honorable David K. Winder granted the respondent's motion to dismiss on the grounds that the appellant's probation was properly revoked and that the record provided a sufficient written basis as to the evidence and reasons relied upon for revoking appellant's probation.

RELIEF SOUGHT ON APPEAL

The respondent seeks affirmance of the lower court's order granting the motion to dismiss the petition for a writ of habeas corpus, and affirmance of the trial court's order

revoking the appellant's probation.

STATEMENT OF THE FACTS

On September 15, 1978, pursuant to a plea of guilty to the crime of aggravated robbery, the appellant was sentenced to a term of imprisonment of from five years to life by the Honorable Jay E. Banks (R. at 27). The execution of the sentence was stayed and the appellant was placed on probation conditioned on several factors, one of which being that he have no weapons in his possession (R. at 27).

On or about May 6, 1979, Salt Lake City police officers had occasion to observe the appellant outside of the Elks Club (T. at 3). At that time, the officers had observed the appellant urinating on the side of the building (T. at 3). The officers then called the appellant over to the patrol car where he was briefly searched and informed that he was being placed under arrest for obscene conduct (T. at 4,5,15). The appellant was then transported to the Salt Lake County jail by officers James Yontz and Kevin Kenna; Officer Yontz was driving, the appellant was sitting in the front passenger seat, and Officer Kenna was sitting in the back seat behind the appellant (T. at 27, 28). Upon arrival at the jail, the front passenger door was opened and the appellant was assisted out of the car. It was at that time that Officer Yontz noticed a gun on the floor of the car between the front passenger's seat and the door (T. at 6, 28). Later, at the appellant's probation

revocation hearing, it was adduced that although the officers had transported another person sitting in that same seat, to the jail, a search of the seating area previous to the time the appellant had been picked up, failed to yield the existence of the gun (T. at 24, 26). It was not until after appellant was taken to the jail, that the weapon was discovered.

There after on May 14, 1979, the appellant's probation agent filed an affidavit stating that the appellant had violated the conditions of his probation by having been in possession of a firearm on or about May 6, 1979 in violation of U.C.A. § 76-10-503, and by having concealed upon his person a firearm in violation of U.C.A. § 76-10-504. On May 17, 1979 an order to show cause issued and a hearing was scheduled for May 21, 1979. At that hearing, the appellant denied the allegations and the hearing was continued to May 29, 1979 and June 1, 1979 at which time the court found the appellant to be in violation of the terms of his probation. The court then ordered the appellant committed to the Utah State Prison to serve his original sentence. A transcript of the probation revocation proceedings was appropriately preserved.

On July 31, 1979, the appellant came to trial on the alleged violations of U.C.A. § 76-10-503 and U.C.A. § 76-10-504 before the Honorable Ernest F. Baldwin. After the jury was

sworn, count two of the information was dismissed, and the appellant pleaded not guilty. On August 1, 1979, the jury found the appellant not guilty.

On August 27, 1979 the appellant filed a petition for a writ of habeas corpus alleging that he had been unconstitutionally detained since he had been subsequently acquitted of the charges which were the basis of his probation revocation, and the court erred in not entering written findings of fact (R. at 2, 3, 4). On October 25, 1979, the Honorable David K. Winder ordered each party to file a memorandum on the issues involved (R. at 10). Both parties complied with this order and subsequently thereto, the respondent filed a motion to dismiss on November 27, 1979 (R. at 23). On December 6, 1979 the court, in a memorandum decision, granted the respondent's motion to dismiss and denied with prejudice the issuance of the writ (R. at 24, 25). The court stated that it found the appellant's probation to have been properly revoked and the record of the revocation hearing to be a sufficient written basis as to the reasons relied upon for revocation to meet due process requirements (R. at 24). The court subsequently on December 19, 1979 entered findings of fact and conclusions of law resulting from the habeas corpus proceedings (R. at 26, 27, 28, 29). The court then entered the appropriate order (R. at 30, 31).

ARGUMENT

APPELLANT WAS PROPERLY DENIED HABEAS CORPUS RELIEF BECAUSE THERE WAS NO SUBSTANTIAL DENIAL OF HIS CONSTITUTIONAL RIGHTS WHEN NO WRITTEN FINDINGS WERE ENTERED BY THE TRIAL JUDGE IN REVOKING APPELLANT'S PROBATION.

The United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471, 489 (1972), held that before parole may be revoked, certain minimum requirements of due process must be met. The Court stated that these requirements include:

[(A)] written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Such requirements were adopted by the United States Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778 (1973), and applied to probation revocation hearings. Id at 786. Accordingly, since the Court found that the revocation of probation is constitutionally indistinguishable from the revocation of parole (see footnote 3 at 782), it (the Court) applied the

language used in Morrissey to probation revocation proceedings. The Court in Morrissey said of the requirements for parole revocation that: "We have no thought to create an inflexible structure for parole revocation procedures." (at 490). So too may this language be applied to probation revocation procedures.

Nevertheless Respondent submits that the requirement that the court provide written findings of the facts relied upon for revoking probation was fulfilled by the court's verbal statement and hearing transcript.

It is important to note that the holdings in Morrissey and Gagnon resulted from decisions of revocation made by administrative boards of probation and parole, not by judicial hearing bodies. In most cases, the probationer or parolee did not have the benefit of the assistance of counsel at such hearings. The court therefore held that these administrative boards were to provide written findings of fact to the accused to aid him in prosecuting an appeal to a court of review. The case at bar presents a distinguishable setting from earlier precedents. In the instant case, the hearing was had before a judicial officer, a judge, and the appellant was represented by trained counsel. When presented with these circumstances, the court in People v. Scott, App., 110 Cal. Rptr. 402, 405, 406, (1973) made the following reply

where the appellant's sole contention was that he was denied due process since no written findings were made:

The proceedings held in open court in the case at bench which have been recorded by the official reporter serve the same purpose . . . (at 405)

It is obvious that the circumstances that require written findings in a parole revocation proceeding in a prison do not obtain in a hearing held in open court, which has been fully reported, and where the usual constitutional right to counsel has been given.

We hold that in a proceeding for revocation of probation the making of written findings of fact is not an indispensable concomitant of due process if there is a substantially equivalent substitute therefore, such as appears from the official reporter's transcript of the oral proceedings in the case at bench, and that the defendant here was not deprived of due process. (at 406).

The court in State v. Jaworski, 234 N.W.2d 221, 222, 223 (Neb. 1975) came to the same conclusion in its analysis of Morrissey and Gagnon:

Morrissey and Gagnon were applied to a form of administrative hearing. They did not directly deal with judicial probation and judicial revocation as provided in the Nebraska Probation Administration Act . . . The Morrissey and Gagnon requirement of a written statement does not fit the pattern of a judicial hearing in a court of record where proceedings, findings, and judgments are recorded and subject to appellate review. The differences are further emphasized where a specific charge or information is filed by a prosecutor, and the defendant is represented by counsel. It would be strange indeed if the formal requirements of fact finding and determination of guilt were to

be more strict at a probation revocation hearing than at an original criminal trial.

Neither the Nebraska Probation Administration Act nor Morrissey or Gagnon require the District Court to specify which exhibits or which witnesses were relied upon for its written findings.

The respondent's position is further supported by the conclusion reached in State v. Fortier, Ore. App., 533 P.2d 187 (1975) where the court stated that:

After analyzing the arguments of both counsel we have come to the same conclusion reached in Moreno, namely, that a written statement of the evidence is not required under the circumstances here . . . Inasmuch as there was a full record of the evidence and proceedings on which the Lane County Circuit Court based its decision to revoke probation in this case, there was no necessity to require the court to give defendant a written statement of the evidence upon which the court's action was based.

See also State v. Moreno, Ariz. App., 520 P.2d 1139 (1974), and State v. Marlar, Ariz. App., 511 P.2d 204 (1974), State v. McFarlane, 238 N.W.2d 237 (Neb. 1976). The Washington State Supreme Court in State v. Myers, 545 P.2d 538, 544 (Wash. 1976), not only spoke directly to the issue, but also spoke directly to the appellant's relief sought on appeal when it stated:

The appellant's second argument is that he was denied due process by the failure of the judge at the revocation hearing to make written findings of fact. This contention, however, does not stand scrutiny because the judge's

oral opinion, transcribed in the statement of facts, provides an ample record of the evidence on which the judge relied and the reasons for the revocation. Thus, the absence of specific written findings did not hinder appellant in making his appeal since the oral opinion provided a record sufficient for review. A remand for the purpose of entering formal written findings would serve no useful purpose. Under these circumstances, the failure to enter written findings of fact did not result in a denial of appellant's due process rights.

Thus the respondent submits that these authorities are dispositive of the sole issue posed by the appellant's brief. Moreover, even if this Court should find that the trial court's failure to enter special written findings, was error, the error was harmless and does not render the probation revocation hearing invalid. Utah Code Ann. § 77-53-2 states that: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding shall render it invalid unless it shall have actually prejudice the defendant in respect to a substantial right." The appellant alleges no such prejudice to a substantial right. Furthermore, the appellant himself explicitly shows that no such prejudice occurred since it is obvious from his petition for a writ of habeas corpus that the appellant had been adequately informed of the reasons why his probation was revoked (R. at 2, 3, 4).

The appellant tacitly concedes that, with the exception of the issue at bar, his due process rights were fully protected at the revocation hearing: the appellant had notice of the alleged grounds for revocation by the affidavit and order to show cause; he was present with counsel at the hearing where he presented a defense and called and cross-examined witnesses; the hearing was before a neutral and detached judicial officer; and, the appellant was sufficiently apprised as to why his probation had been revoked by the judge and the hearing transcript.

The appellant cites no valid authorities in support of his argument that his due process rights were violated. The appellant's reliance on this Court's ruling in Farrell v. Turner, 25 Utah 2d 351, 482 P.2d 117 (1971), is misplaced. That case involved a woman who pleaded guilty to a violation of Utah Code Ann. § 76-50-6. The trial court there suspended the execution of the sentence and placed the defendant on probation for a period of two years. Soon thereafter the conditions of probation were violated and after notice and hearing, the defendant's probation was revoked. The defendant then filed a petition for a writ of habeas corpus and thereafter appealed from its dismissal. The opinion of the court in upholding the dismissal of the petition, refers to Rule 52(a), U.R.C.P. and specifically to findings of fact in

habeas corpus proceedings. This Court never meant to require the blanket application of a rule mandating that special written findings of fact be entered in all types of proceedings. The opinion was limited in its application to habeas corpus proceedings. Thus, since the court in the habeas corpus proceedings in the present case promulgated special written findings of fact and conclusions of law (R. at 26, 27, 28, 29), there is no merit to the appellant's reliance on the authority he has cited.

The appellant further misplaces his reliance on Rucker v. Dalton, 598 P.2d 1336 (Utah 1979) which was an appeal from a civil dispute between a home-owner and a non-licensed contractor he had hired to construct an addition to his home. When it was found that much of the work on the house was done in an unworkmanlike manner, the home-owner filed a suit for damages. The trial court awarded the home-owner two thousand dollars in damages and he appealed seeking an increase in the award. The trial court in that case did file specific findings of fact but this Court remanded the case for additional finding since the findings of record were not sufficiently detailed to allow the Court to decide the issue.

As can readily be observed, the authority the appellant has cited has no application to the issue here in question.

CONCLUSION

The respondent maintains that the appellant's due process rights were respected in every way during the probation revocation proceedings. In view of the authorities cited and the arguments set forth, the appellant has failed to show the commission of a reversible error by the trial judge in not making specific findings of fact and specific findings of the reasons for revocation of the appellant's probation. In view of the fact that existing statutory law and case law was complied with at every step of the proceedings, the judgment of the lower court must be affirmed.

Respectfully submitted,

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