

1981

# Walter Preston Boggess, Jr v. Lawrence Morris, Warden, Utah State Prison : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Boggess v. Morris*, No. 16894 (Utah Supreme Court, 1981).

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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WALTER PRESTON BOGGESS, JR., :

Plaintiff-Respondent, :

-vs-

: Case No. 16894

LAWRENCE MORRIS, Warden, :  
Utah State Prison, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT  
-----

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID K. WINDER, JUDGE, PRESIDING

-----  
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FILED

FEB 13 1981

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BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

The respondent, Walter P. Boggess, Jr., responds to the state's appeal from the trial court's order granting a writ of habeas corpus. The writ of habeas corpus was based on trial counsel's failure to file a timely appeal.

DISPOSITION IN THE LOWER COURT

The Third Judicial District, the Honorable David K. Winder presiding, ordered that if this Court did not take jurisdiction of respondent's out-of-time appeal by January 6, 1980, he was to be released and his conviction of manslaughter set aside on that date.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the trial court's order which granted his petition for writ of habeas corpus, and

he argues that this Court should decline to invoke jurisdiction to hear an out-of-time appeal as previously ruled.

#### STATEMENT OF THE FACTS

Respondent, Walter Boggess, was tried on May 18, 1978 for second degree murder in violation of Utah Code Ann. §76-5-2 (1953 as amended), before the Honorable J. Robert Bullock of the Fourth Judicial District. Respondent was represented at trial by court appointed counsel, George Mangan. Counsel for respondent pursued the lesser included offense of manslaughter as theory at trial. Respondent was convicted of manslaughter on May 19, 1978. Respondent was desirous of an appeal of his case and he made verbal and written demands on his appointed counsel to perfect an appeal on his behalf. Mangan did not file a timely Notice of Appeal.

On November 30, 1978, the Honorable Ernest Baldwin, one of the Judges of the Third Judicial District Court, Salt Lake County, State of Utah, received evidence at an evidentiary hearing on respondent's Petition for Writ of Habeas Corpus that proved the following facts: that respondent did contact Mangan before time for filing Notice of Appeal had run and demanded an appeal on his behalf be filed; that respondent did mail a letter to Mangan on or about July 10, 1978, demanding that an appeal on his behalf be filed; that Mangan did receive the foregoing letter on or about July 18, 1978, within time to file timely

Notice of Appeal for respondent; that Mangan did understand and know that respondent wanted an appeal; that Mangan at the time of receipt of the letter from respondent on July 18, 1978, knew timely appeal could still be perfected; and that Mangan failed to file a timely Notice of Appeal on behalf of respondent.

Following the evidentiary hearing in which testimony, evidence and argument was heard, the Honorable Ernest F. Baldwin, Jr., ruled that the respondent had been denied his right to an appeal and his right to counsel under the Fourteenth and Sixth Amendments of the United States Constitution. The court entered the following order by stipulation of counsel for petitioner and the State of Utah: he granted respondent permission to file an out-of-time appeal; and in the event the Supreme Court declined to invoke jurisdiction he directed respondent return to the ordering court for appropriate relief.

On October 16, 1979, this Court refused to invoke jurisdiction for an appeal based on Utah Code Annotated §77-39-5 (1953 as amended). State v. Boggess, 601 P.2d 927 (Utah 1979). Respondent's counsel, though having been demanded to do so, failed to file a timely Notice of Appeal.

On December 6, 1979, the Honorable David K. Winder ordered that if the Supreme Court did not take jurisdiction of the substantive merits of the appeal by respondent within thirty (30) days, respondent's Petition for a Writ of Habeas

Corpus would be granted. On January 6, 1980, the Writ of Habeas Corpus was granted, and respondent was released from prison and his conviction was set aside.

## ARGUMENT

### POINT I

THE AUTHORITY AUTHORIZING THE SUPREME COURT OF THE STATE OF UTAH TO EXERCISE ITS APPELLATE POWER IS JURISDICTIONAL.

Utah Code Annotated §77-39-5 (1953 as amended) provides in pertinent part as follows:

All appeals in criminal cases must be taken within one month after the entry of judgment appealed from.

The strict adherence to the jurisdictional aspect of the appellate power has been discussed and confirmed in numerous cases. The strict adherence to the prescribed time requirement was construed in Sullivan v. District Court of Summit County, 65 Utah 400, 237 P. 516 (1925). Following the learning from Sullivan, *ibid.*, the Utah Supreme Court, not unlike other appellate tribunals operating under similar jurisdictional directives, have jealously preserved the integrity of the jurisdictional requirement to refuse to hear appellate matters not timely filed even though pressured by other courts to make discretionary exceptions. The Utah Supreme Court declined the out-of-time appeal of the respondent in the instant case for failing to invoke the jurisdiction of the court timely, State v. Boggess, 601 P.2d 927 (Utah 1979). Prior in time, this Court



refused to succumb to the pressure directed by the U.S. 10th Circuit Court of Appeals which sought and directed that the Utah Supreme Court should hear an out-of-time appeal. See Rahowie v. Smith, F.2d (19 ).

## POINT II

GRANTING APPELLATE JURISDICTION IN THE INSTANT CASE, AT THIS TIME, FOR ERRORS ARISING FROM THE INITIAL TRIAL PROCEEDINGS IS BARRED BY RES JUDICATA.

The Supreme Court of the State of Utah has previously considered all the issues of jurisdiction on appeal in the instant case, State v. Boggess, 601 P.2d 927 (Utah 1979). The Court refused to take jurisdiction of the appeal based on the Utah Code Annotated §77-39-5 (1953 as amended).

The Court, in the cited case, found that the Notice of Appeal was not timely filed as prescribed to the foregoing statute and therefore ruled it was precluded from addressing the merits of the respondent's contentions.

Furthermore, the Court in State v. Boggess, *ibid.*, went to say that:

. . . A habeas corpus proceeding can neither be used as a substitute for an appeal nor can it extend that statutory time allotted for filing an appeal.

In support of the foregoing proposition the Court cited Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968), Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967).

Consistent with the foregoing case law, counsel for appellant generally contends that a Petition for a Writ of Habeas Corpus may not be used as a substitute for an appeal. Nevertheless, in the case at bar, counsel for appellant urges otherwise. A position contrary to his often cited case law.

### POINT III

THE RELEASE OF THE RESPONDENT AND THE  
SETTING ASIDE OF HIS CONVICTION IS THE  
PROPER REMEDY.

Respondent's court appointed counsel had an obligation pursuant to Anders v. California, 386 U.S. 738 (1967) to perfect an appeal on behalf of respondent.

Furthermore, as was pointed out in the brief submitted by counsel for the appellant, in the event the appointed counsel believes the appeal was wholly frivolous, counsel still has the duty to his client and the Court to preserve and protect the client's constitutional rights of appeal--a right that is fundamental and one that must be protected to insure due process and in equal protection of the law.

At the evidentiary hearing on Respondent's Petition for Writ of Habeas Corpus, the Court did not find evidence that court appointed counsel for respondent complied with the requirements of his duty to his client as directed by Anders v. California, *ibid.* Judge Baldwin specifically found respondent's fundamental right of appeal had been denied.

The Court, following the majority case law, ordered that the parties attempt to have the Supreme Court invoke its appellate jurisdiction to grant respondent an out-of-time appeal. Furthermore, in the event the Supreme Court declined to invoke jurisdiction, then the respondent could apply to that Court for further relief.

The prevailing case law provides that in the event the infirmity cannot be cured, the alternative relief can only be release from custody and the setting aside of the conviction. Nearly all of the following originated as State cases and proceeded into the Federal system by process of exhausting remedies of appeal on Petitions for Writ of Habeas Corpus proceedings. Kinsey v. Wainwright, 254 Fed. Sub. 30 (1965); Pate v. Holman, 341 F.2d 764 (1965); Patterson v. Medberry, 290 F.2d 275 (1961). The latter, a Tenth Circuit case, dealt with the denial of the State to provide a transcript for the purposes of appeal. The denial abrogated the defendant's right to appeal his conviction, and the Court in considering the appropriateness of release on balance with the inability to cure the infirmity in the appeal process, stated:

. . . the problem of releasing one convicted murderer . . . our system or constitutional guarantees of due process and equal protection both call for procedures in criminal trials which all allow no individous discriminations between persons and different groups of persons . . .

The above Court further saw the State as having a statutory remedy and stated:

. . . retry the defendant, difficult but not insurmountable.

In Coffman v. Bomar, 220 Fed. Sub 343 (1963), the defendant requested that state officials appoint counsel for his appeal process. The defendant believing he was represented by appointed counsel was denied an appeal because no timely notice had been filed in his behalf. The State failed to appoint defendant counsel and failed to advise defendant of its inaction. Time for the appeal had run. The Court found the only remedy was to release defendant from custody and set aside the conviction and allow the State to re-prosecute the defendant. The theory was to insure due process by putting the defendant in the same position he would have been should an appeal been granted.

#### POINT IV

THE STATE, IN THE INSTANT CASE, HAS STATUTORY REMEDY TO RE-PROSECUTE THE RESPONDENT.

Utah Code Annotated §76-1-405 (1953 as amended) specifically provides in pertinent part as follows:

Subsequent prosecution not barred-  
Circumstances.-A subsequent prosecution for an offense shall not be barred under the following circumstances:

. . . (2) The former prosecution resulted in a judgment of guilt held invalid in a subsequent proceeding on writ of habeas corpus, coram nobis, or similar collateral attack.

The legislative branch has limited the time for invoking the appellate jurisdiction of the Supreme Court by providing for filing of Notice of Appeal within thirty (30) days. Likewise, the legislature has provided the State authorities with a statutory authority to re-prosecute cases collaterally attacked by Writs of Habeas Corpus. The Legislature has not granted any discretionary authority to the Court to modify the thirty (30) day limitation rule. In light of the prevailing case law and the theory of separation of powers, any such change or modification of the jurisdictional rule should be by legislative mandate.

#### CONCLUSION

The decision of the Third District Court granting respondent relief pursuant to his Writ of Habeas Corpus, releasing him from State custody, should be affirmed. The limitation on the time for appeal is jurisdictional and counsel for respondent failed to file a timely Notice of Appeal. The power of the Supreme Court to now hear the merits of the defendant's contentions of errors at the time of trial, previously considered on direct appeal is now barred by Res Judicata. In addition, this Court simultaneously, in the same ruling, held this respondent could not use a Petition for Writ of Habeas Corpus as a substitute for direct appeal.

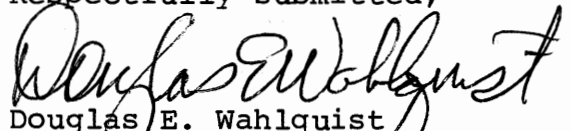
The respondent was effectively denied his right to appeal. The trial court in an evidentiary hearing found that

counsel for respondent failed to perfect the appeal as is required under Anders v. California, *ibid.*, denying respondent fundamental constitutional rights.

The prevailing case law provides for a cure of the infirmity in the denial of due process on appeal, and in the event the infirmity cannot be cured, then the respondent must be released and the conviction set aside. The State has a statutory remedy to re-prosecute the respondent. The contrived scheme of constructive notice argued by counsel for appellant is not sanctioned by statutory law or case law. Such a scheme could only properly be affected by appropriate legislation directing such a procedure.

Based on the foregoing, the Order granting respondent a Writ of Habeas Corpus directing his release and the setting aside of his conviction should be affirmed.

Respectfully submitted,

  
Douglas E. Wahlquist  
Attorney for Respondent