1981

Walter J. Thomas v. Lawrence Morris, Warden, Utah State Prison : Brief of Respondent

Utah Supreme Court

IN THE SUPREME

SUPREME COURT

WALTER J. THOMAS,

Plaintiff

-vs-

LAWRENCE MORRIS,
Utah State Prison

Defendant

APPEAL
JUDGE
SALT
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IN THE SUPREME COURT OF THE

STATE OF UTAH

WALTER J. THOMAS,

Plaintiff-Appellant,

-vs-

LAWRENCE MORRIS, Warden,
Utah State Prison,

Defendant-Respondent.

Case No.
17340

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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WALTER J. THOMAS,

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with and pleaded guilty to one count of forcible sexual abuse upon a child, pursuant to Utah Code Annotated § 76-5-404(1)(b). After an initial commitment to the Utah State Hospital and a later imposition of a suspended sentence and placement on probation, the appellant's probation was revoked and he was incarcerated in the Utah State Prison.

The appellant sought relief in the form of a petition for habeas corpus which was denied when respondent's motion to dismiss was granted. Thereafter, respondent

stipulated to an order vacating the judgment of dismissal. Appellant's second application for habeas corpus relief was similarly dismissed; from that order the present appeal is taken.

DISPOSITION IN THE LOWER COURT

The appellant filed a petition for a writ of habeas corpus in the Third Judicial District Court, in and for Salt Lake County. The respondent moved to dismiss the petition. The Honorable James S. Sawaya, took the motion under advisement and eventually dismissed the petition. The respondent later stipulated to a motion to vacate the order of dismissal. After considering appellant's reply memorandum and respondent's supplemental memorandum in support of a motion to dismiss, the court again granted the motion to dismiss on the grounds stated in respondent's memoranda.

RELIEF SOUGHT ON APPEAL

The respondent seeks an order and judgment affirming the order of the lower court dismissing the appellant's petition for a writ of habeas corpus.

STATEMENT OF THE FACTS

The appellant was charged with the crime of forcible sexual abuse, a violation of Utah Code Ann. § 76-5-404(1)(b), a felony of the third degree (R. at 5). On October 1, 1973, the appellant entered a plea of guilty to the charge and the court ordered a mental evaluation of the appellant for purposes of a sanity hearing (R. at 14). Based on expert testimony produced at the hearing (the date of the hearing does not appear in the record), the court found that the appellant suffered from an abnormal mental condition, and on November 8, 1973, ordered him to be committed to the Utah State Hospital for life "or until such time as further action as provided" by U.C.A. § 77-49-1 et seq. occurred (R. at 6,14). The court further ordered that the appellant be returned to the court on November 8, 1974 to hear additional psychiatric evaluations of the appellant's status (R. at 6). The appellant took no direct appeal from the court's order of commitment which issued November 8, 1973. Approximately two and one half months after the order of commitment was entered, a letter was written to the Honorable D. Frank Wilkins from doctors Johnson and Austin recommending that the appellant "could be more appropriately managed" in prison

rather than in a hospital setting.

Apparently, the hearing which was scheduled for November 8, 1974, was held four months later on April 10, 1975. During the April, 1975 hearing, the appellant's status was reviewed and the recommendations from several doctors at the Utah State Hospital were considered (R. at At the conclusion of the hearing, the court found no basis for placing the appellant on probation and the appellant was returned to the hospital (R. at 14,15). As before, no review of this decision was sought. In approximately May of 1977 (no definite date is found in the record), the court once again reviewed appellant's commitment to the hospital (R. at 15). On July 29, 1977, the court once again reviewed appellant's status and sentenced him to an indeterminate term of zero to five years in the Utah State Prison (R. at 15). The court, however, suspended the sentence and placed the appellant on probation on condition that he take part in the Sexual Offenders Program at the Utah State Hospital and continue to reside at the hospital during his participation in the program (R. at Again, appellant sought no appellate review of the sentencing order. In December of 1977, the Department of Adult Probation and Parole requested that the appellant's probation be revoked on the ground that the conditions of

his probation had been violated (R. at 15). The revocation request stated that the appellant had failed to abide by the rules and regulations of the Sexual Offender Program by refusing to eat or drink for three days or to take the required medication, and by requesting to be released from the hospital (R. at 15). On January 25, 1978, the court ordered the appellant's probation revoked and the original sentence imposed on July 29, 1977 to commence. The appellant, again, sought no review of the revocation order.

On October 29, 1979, the appellant filed a pro se petition for a writ of habeas corpus (R. at 2). However, on the court's own motion, counsel was appointed to aid the appellant (R. at 11). The petition alleged that sentence was unlawfully imposed and that appellant's due process rights had been violated (R. at 3). The petition further alleged that appellant was entitled to credit for "time served in the Utah State Prison [Hospital]." On November 6, 1979, respondent filed a motion to dismiss the petition, accompanied by a supporting memorandum (R. at 12,14). On February 22, 1980, after a hearing at which arguments were considered, the court granted respondent's motion to dismiss (R. at 22). Once more, the appellant failed to take a timely appeal for review

of the order of dismissal. Later, on March 17, 1980, a stipulation to vacate the order of dismissal was filed to allow the appellant to submit a memorandum in response to the respondent's motion to dismiss (R. at 23). After the filing of respondent's supplemental memorandum in support of the motion to dismiss, an order granting the motion was entered (R. at 37).

ARGUMENT

POINT I

THE APPELLANT HAS WAIVED THE CONSIDERATION OF ISSUES CONCERNING SENTENCING BY FAILING TO RECORD TIMELY OBJECTIONS IN THE COURTS BELOW AND BY FAILING TO RAISE SUCH ISSUES ON DIRECT APPEAL.

The chronology of events and statement of facts reveal that the appellant took no direct appeal from the order of commitment or from the order imposing a suspended sentence and probation. Similarly, there is no record of contemporaneous objections interposed to the lower court's actions or attempts made by the appellant to assert his desire for sentencing and transfer to the Utah State Prison previous to the instant petition for habeas corpus. Failure of the appellant to properly preserve these issues requires application of the doctrine of waiver to each of

appellant's allegations raised in the instant appeal. In Brown v. Turner, 440 P.2d 968, 969 (Utah 1968), this Court addressed the consideration of issues raised for the first time in an appeal from a denial of post-conviction relief:

> If the contention of error is something which is known or should be known to the party at the time judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed [appellate] procedure, or the judgment becomes final and is not subject to further attack . . .

This doctrine of waiver has been sustained in more recent opinions of this Court. See Andrews v. Morris, 607 P.2d 816 (Utah 1980); Pierre v. Morris, 607 P.2d 812 (Utah 1980). In the present case, the appellant was or should have been aware of any issue of sentencing delay at the time he was sentenced to a suspended term of confinement in the Utah State Prison and placed on probation on July 29, 1977. However, it was not until October 29, 1979, over two years after the appellant's probation was revoked, that the issue of sentencing delay was first raised in the present petition for habeas corpus.

Appellant's present assertion of his alleged Sixth Amendment right to speedy sentencing is further weakened by the fact that the record on appeal contains

no mention of a contemporaneous objection interposed by the appellant to the court's order of commitment or sentencing procedure. Such contemporaneous objections are required to properly preserve issues on appeal. See Rule 4 of the Utah Rules of Evidence and Rule 46 of the Utah Rules of Civil Procedure.

Alternatively, Utah Code Ann. § 78-12-31.1 states that, "Within three months: For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner." A period of over two years expired between the order imposing a suspended prison sentence and probation on appellant on July 29, 1977, and the filing of the instant petition for habeas corpus relief on October 29, 1979. Certainly, any potential claim of sentencing delay allegedly in violation of the Sixth Amendment was apparent or should have been apparent in July of 1977 or at the latest in January of 1978 when appellant's probation was revoked. It is also certain that any due process claim, equal protection claim or claim for credit for commitment time at the state hospital was apparent at the time of sentencing. Only the

claim of judge disqualification escapes the application of the three month statute of limitations. However, even the issue of judge disqualification was waived by appellant in the lower court (see Point IV infra).

As a general rule, the appellant should be barred from litigating these issues in the present appeal where they were neither preserved at trial by contemporaneous objection nor timely asserted on direct appeal. Appellant's contentions should be deemed waived for purposes of this appeal.

The sole exception to the waiver doctrine occurs where an appellant shows both cause for his failure to comply with the state procedural rule, and actual prejudice resulting from the alleged constitutional violation. Wainwright v. Sykes, 433 U.S. 72 (1977). The appellant in the instant case makes no attempt to show either cause or prejudice.

At every stage of the proceedings in the lower courts, the appellant was represented by counsel. Counsel was present when the plea of guilty was entered. Appellant was also represented by counsel at all hearings before and after commitment to the state hospital. Presently, the appellant makes no attempt to explain his lack of

compliance with procedural rules requiring contemporaneous objections at trial and that issues be raised on direct appeal where they were known or should have been known at the time of appeal. The requirement of "cause" has not been met.

Correspondingly, appellant has failed to meet the prejudice requirement of the Wainwright test. Although the opinion in Wainwright failed to provide guidelines as to the degree of prejudice that must be experienced to enable an appellant to overcome the waiver doctrine, subsequent decisions have provided appropriate standards. In United States v. Addonizio, 442 U.S. 178 (1979), three federal prisoners who had been denied parole sought to collaterally attack their sentences, alleging that a post-sentencing change in the policies of the United States Parole Commission had prolonged their actual imprisonment beyond the time intended by the sentencing judge. In holding that the alleged error did not support a collateral attack, the Court stated: "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." 442 U.S. at 184. The Court continued its analysis by examining the degree

of prejudice which would support a collateral attack: "The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." 442 U.S. at 185. If the alleged error claimed by appellant had in fact been an error, it would not rise to the level of a defect which inherently results in a complete miscarriage of justice.

The appellant had numerous opportunities to assert his claims, but he failed to avail himself of the orderly processes of appellate procedure. Futhermore, the appellant's claims could have been tested in the lower courts at each of his review hearings as well as at the sentencing hearing, but the appellant failed in his duty to contemporaneously object to the proceedings. Moreover, the manner in which the commitment and sentence was imposed was proper and in every way consistent with the statutory requirements.

The appellant has waived the consideration of issues contained in his present brief and petition for post-conviction relief by failing to comply with the procedural requirements of appellate review of this state. Moreover, he has failed to make the requisite demonstrations

of "cause" and "prejudice" to allow this Court to consider issues previously waived.

POINT II

THE COMMITMENT OF THE APPELLANT TO THE UTAH STATE HOSPITAL PURSUANT TO U.C.A. § 77-49-1 ET SEQ. AND THE SUBSEQUENT SENTENCING OF THE APPELLANT TO A SUSPENDED TERM OF CONFINEMENT IN THE UTAH STATE PRISON, WERE DIRECTED BY THE LAWS OF UTAH UNDER THE JURISDICTION OF THE COURT, AND WERE NOT VIOLATIVE OF THE SIXTH AMENDMENT'S GUARANTEE OF A SPEEDY TRIAL.

Utah Code Annotated Section 77-49-1 states:

> Whenever any person is convicted of, or pleads guilty to, a charge of rape, sodomy, incest, indecent exposure, an attempt to commit any of the foregoing crimes, assault with intent to commit rape, assault with intent to commit sodomy, or indecent assault upon, and taking indecent liberties with the body of a minor child, and when it appears the court, either upon its own observation, or upon the testimony of a duly licensed physician that the person so convicted or pleading guilty is suffering from any form of abnormal or subnormal mental condition, or mental illness, the court shall order a mental examination of such person prior to imposition of sentence.

In the present case, the appellant was charged with one count of forcible sexual abuse (U.C.A. § 76-5-404(1)(b)), in that he took indecent liberties with the body of a child under fourteen years of age (R. at 5). To this crime, the appellant entered a plea of guilty. Accordingly, the court ordered that a mental examination of the appellant be

conducted and the results be presented at a hearing. At the conclusion of the hearing, and upon the recommendation of the examining psychiatrists, who found evidence of an abnormal mental condition, the court committed the appellant to the Utah State Hospital "for life or until such time as further action as provided by said statute takes place." (R. at 6). By the imposition of this commitment the court was specifically referring to U.C.A. § 77-49-5 which states:

> If, however, it appears from such examination that the person convicted suffers from any form of abnormal or subnormal mental illness, or other psychosis, which caused the commission of the sex offense of which he was convicted, then the judge shall order the commitment of such person to the Utah state hospital, to be confined therein for life, unless he shall be paroled or pardoned as hereinafter provided.

The court additionally ordered that the appellant be returned to the court one year from the date of the order if the appellant was still residing at the hospital (R. at 6).

On April 10, 1975, the court conducted a hearing in review of the appellant's status (R. at 14). The court considered the recommendations of several doctors at the hospital but found no basis for placing the appellant on probation (R. at 14). In approximately May of 1977, the court again reviewed the appellant's commitment (R. at 15). On July 29, 1977, the court sentenced the appellant to serve

an indeterminate sentence of from zero to five years at the Utah State Prison but suspended the sentence and placed the appellant on probation (R. at 15). The appellant's probation was conditioned on the requirement that the appellant participate in the Public Offenders Program and reside at the hospital (R. at 15). At every stage, including the sentencing on July 29, 1977, the court's actions were taken pursuant to the laws of Utah. Section 77-49-7 of the Utah Code Annotated states in pertinent part that: "The parole, probation, or pardon authority may order the probation, parole, or pardon, following such certification, and may order the release of such persons upon such terms, conditions, and limitations as shall appear necessary to safeguard the convicted person and the public." The appellant did not then, nor does he now, contest the propriety of the conditions placed on his probation. Similarly, the appellant at no time objected to the amount of time passing between the entry of his guilty plea and conviction, and the hearing at which probation was granted. Moreover, contrary to appellant's petition, the record contains no evidence documenting appellant's attempts to return to court for an earlier sentencing. It was not until four months after the appellant's probation had been revoked, that the

appellant, in his petition for a writ of habeas corpus, asserted his claim of a violation of his Sixth Amendment right to a speedy trial. Even more interesting is the fact that after respondent filed the first motion to dismiss the petition, the appellant allowed the dismissal without filing any type of reply memorandum (R. at 24). This entire scenario of events demonstrates that the appellant has not acted with good faith in attempting to escape a legally imposed sentence.

Statutes such as those under which the appellant was committed have generally withstood constitutional attacks such as those asserted by appellant. See Minnesota v. Probate Court, 309 U.S. 270 (1940). On equal protection grounds, such statutes are firm against attack since "[e]qual protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made." State v. Little, 261 N.W.2d 847, 850 (Neb. 1978). In Minnesota, the Court held that such classifications are reasonable since a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the needs are deemed to be the clearest.

Noticeably absent from appellant's brief is any authority expressly stating that the Sixth Amendment's guarantee of a speedy trial applies to the period of time between conviction and sentencing. Appellant refers only to cases which assume arguendo that such an application is appropriate. In Pollard v. United States, 352 U.S. 35 (1956), the defendant attacked the sentence he received in 1954 on the basis of the Sixth Amendment. In 1952, the defendant had pled guilty to a charge of embezzlement. The sentence that was then imposed later proved to be erroneous. It was not until 1954 that a valid sentence was finally imposed. The Court, assuming arguendo that the sentence was part of the trial for purposes of the Sixth Amendment, stated that, "Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends on the circumstances . . . The delay must not be purposeful or oppressive." 35 U.S. at 354. The Court, after finding that the delay was neither purposeful nor oppressive, held that the two year "delay" in sentencing did not violate the defendant's Sixth Amendment rights. Similarly, in the case of United States v. Tortorello, 391 F.2d 587 (2nd Cir. 1968), also cited by appellant, the court held that a three year delay

between the entry of a guilty plea and sentencing was justified where the government requested the delay for the purposes of trying co-defendants who had not pleaded guilty. Appellant also refers to Lott v. United States, 309 F.2d 115 (5th Cir. 1962), where the court, in affirming the propriety of a sentence imposed after a ninety-day delay stated, "Appellate courts must assume, in absence of anything in the record to the contrary, that delay in pronouncing sentence was for a lawful purpose in the orderly process of handling the case." 309 F.2d at 122. Appellant refers to United States v. Grabina, 309 F.2d 783 (2nd Cir. 1962). However, the decision in Grabina was later vacated and remanded by the United States Supreme Court on the basis of a recommendation by the Solicitor General. United States v. Grabina, 369 U.S. 426 (1961). Research does not disclose the final disposition of the case on remand, nor does it disclose the entire text of the Solicitor General's memorandum. However, a portion of the memorandum is quoted in United States v. DeBlasis, 206 F. Supp. 38, 39, 40 (D.Md. 1962). This quoted portion refers primarily to a defendant's right of allocation and only vaguely refers to time constraints placed on the sentencing procedure.

At best, Gabrina only tangentially involves the issue of sentencing delay and is of no precedential value to this Court. Welsh v. United States, 348 F.2d 885 (6th Cir. 1965), cited by appellant wherein a four year "delay" in sentencing was affirmed, also supports the respondent's position in the present case.

In this case, the commitment to the Utah State Hospital, the subsequent sentence of probation, and the ultimate revocation of appellant's probation, were all accomplished pursuant to the laws of this state. Interest to note is the fact that in each of the cases cited by the appellant, the appellants there relied primarily upon Rule 32 of the Federal Rules of Criminal Procedure to support their cause. Rule 32 states in essence that sentence shall be imposed without unreasonable delay. Appellant attempts to analogize this reliance with his reliance on Utah Code Ann. § 77-35-1 which states in pertinent part that the time for pronouncing judgment must be at least two days and not more than ten days after the verdict. However, appellant's attempt to misuse this statute to rob the court of jurisdiction to impose a valid sentence must fail as attempts in the cases referred to by the appellant have failed.

In State v. Fedder, 262 P.2d 753 (Utah 1953), this Court addressed the proper application of Utah Code Ann. § 77-35-1. "This court has held that the time fixed by the statute is not jurisdictional . . ., and since it is regarded as merely directory the further provision that the judgment should be rendered within a reasonable time has been judicially read into the statute." 262 P.2d at 755. Any "delay" which is attributable the operation of a particular statute, e.g., Utah Code Ann. § 77-49-1 et seq., must be viewed as reasonable. Moreover, delay alone is not a sufficient reason to grant appellant's requested relief. As indicated in Pollard, supra, the appellant was required to demonstrate that any delay was purposeful or oppressive; no such demonstration is made in the instant case. Furthermore, even if the "delay" was labelled "purposeful" because commitment was ordered by the court, appellant fails to show that he suffered any prejudice.

The leading case regarding the Sixth Amendment right to a speedy trial is Barker v. Wingo, 407 U.S. 514 (1972). Although the delay in that case occurred between arrest and trial, in light of the assumption that the Sixth Amendment applies to sentencing delays, the principles of Barker may be extended to the instant case even though

the appellant in this case stands on a much different fo
than an appellant who experiences delay before trial.
The Court, in Barker, stated that the "deprivation of th
right to a speedy trial does not per se prejudice the
accused's ability to defend himself." 407 U.S. at 521.
Court then proposed a balancing test for resolving speed
trial issues which identified four factors to be used in
assessing whether a defendant had been deprived of his ri
(1) length of delay; (2) the reason for the delay; (3) th
defendant's assertion of the right; and (4) prejudice to
defendant. 407 U.S. at 530. In analyzing the first two
factors, it is important to note that the "delay" in the
present case is significantly different than "delay" as
commonly discussed. Most commonly, delay refers to a per
of time during which a proceeding should have occurred bu
not because of a procedural breach by one of the parties
caused the interruption of the normal course of events.
However, in the present case, no procedural breach occurr
and the normal course of events, pursuant to law, continu
uninterrupted. The appellant had been committed for
approximately three and one-half years when, after severa
hearings, it was determined by the court that he should r
a suspended sentence and be placed on probation. Both th
commitment and sentence were authorized by law. Seen in
light, there was in fact no "delay" as the term is commo

used. Even if the commitment time could be termed "delay," the reason for the "delay" was justified. After the appellant's entry of a guilty plea, the court conducted a hearing pursuant to Utah Code Ann. § 77-49-5 to determine whether the appellant suffered from an abnormal mental condition. Experts testifying at this hearing had found evidence of an abnormal or subnormal mental condition which contributed to the commission of the crime. Hearings conducted after the letter from Drs. Johnson and Austin (see Statement of Facts) addressed to the Honorable D. Frank Wilkins dated January 29, 1974, recommending that the appellant be transferred to the Utah State Prison failed to elicit evidence sufficiently persuasive to support a transfer or earlier sentencing. Simply stated, no legal error was committed by the lower court in not transferring the appellant on the recommendation contained in the letter of January 29, 1974. Such a recommendation is simply not binding on the court. To hold otherwise would allow a psychiatrist to impose sentence through his report. Trueblood v. Tinsley, 366 P.2d 655 (Colo. 1961). In other words, without an accompanying hearing, the letter alone did not rise to the level of a legal reason supporting the transfer of the appellant.

An analysis of the third factor mentioned in Barker, the defendant's assertion of his Sixth Amendment

right, likewise does not favor the appellant's position. He asserts that several attempts were made to return to court for sentencing, yet the record does not support this assertion. In view of this deficiency, the appella has failed to overcome his affirmative burden to demonstrate any purposeful delay by the State during or after the appellant's assertion of his speedy trial rig Likewise, there is no record of the appellant objecting or contesting his commitment. There is also no basis fo assuming that the appellant at the review hearings did a thing more than attempt to secure his release via probat or pardon. There is no record of the appellant assertin right to a speedy sentencing at any time previous to his present petition for habeas corpus.

The fourth factor referred to in Barker is prejudice to the defendant. The appellant here does not demonstrate any prejudice, with the possible exception o having to serve more time in the Utah State Prison than if there had been no commitment to the hospital. However such a distinction affords no basis for habeas corpus re on either due process or equal protection grounds. Thibodeau v. Commonwealth, 319 N.E.2d 712 (Mass. 1974). People v. Superior Court, 145 Cal.Rptr. 711 (Cal.App. 1 the defendants assailed the extended commitment provisi

California's mentally disordered sex offender (MDSO) statute. They contended that they were denied equal protection since persons convicted of the same crime, but sentenced to prison rather than committed as MDSOs, were not subject to extensions of commitment past the maximum sentence. The court held that there was no violation in stating that, "The difference in the mental condition of the two classes is an adequate constitutional ground for the difference herein involved." 145 Cal.Rptr. at 715. This constitutionally sound difference is grounded in the reasons for commitment and prison confinement; prison confinement is punishment for the offense committed, whereas commitment for the sex offender is for the treatment and rehabilitation of the offender and the protection of society. Laws providing for the commitment of sex offenders are not penal in nature. Butler v. Burke, 360 F.2d 118 (7th Cir. 1966). Such underlying purposes of treatment and rehabilitation have formed the basis for numerous laws which allow offenders coming within their purview to serve longer terms of supervision than the maximum confinement of those otherwise sentenced. See United States v. Vaught, 355 F.Supp. 1348 (W.D. Mo. 1972), and Guidry v. United States, 433 F.2d 968 (5th Cir. 1970), concerning youth offenders.

Furthermore, because the provisions of Utah Code Ann. § 77-49-1 et seq. were properly and constitutionally

applied to appellant, he lacks standing to challenge the here. This Court in State v. Phillips, 540 P.2d 936 (Ut 1975), stated:

> Also important to be considered as pertaining to the problem in this case, is the principle that no one should be entitled to challenge a statute and have it declared void because it may unjustly affect someone else, but could properly do so only if his own rights are adversely affected.

Because appellant was afforded all rights under the laws Constitution of Utah as well as under the United States Constitution, he has no standing to assert his present claims.

POINT III

SINCE THE APPELLANT'S COMMITMENT TO THE UTAH STATE HOSPITAL WAS FOR TREATMENT AND REHABILITATION, AND NOT PENAL IN NATURE, CREDIT FOR THE PERIOD OF COMMITMENT IS PROPERLY DENIED, AND IS, MOREOVER, AN ISSUE APPROPRIATELY DISPOSED OF BY THE BOARD OF PARDONS.

The appellant requests credit against his sente for time spent at the Utah State Hospital after January 1974. Apparently appellant reasons that since January 1974, was the date when it was suggested that the appell be transferred to the Utah State Prison, he should obta credit for the time thereafter spent in treatment at the hospital. However, such a request is wholly unreasonable inasmuch as there is no record that the appellant himse even requested transfer at that time. Moreover, the le

in which the suggestion of transfer was made, was no more than a suggestion having no binding force or effect on the court.

As previously stated, the purposes of commitment to a mental health facility are entirely different than those underlying a sentence to a penal institution. Case law supports this view.

In People v. Safell, 599 P.2d 92 (Cal. 1979), the court faced issues similar to those raised by the appellant in the present case. In upholding California's mentally disordered sex offender (MDSO) statute against equal protection attack, the court noted that the commitment of MDSO's is for the purpose of treatment, not punishment, and that commitment is not a substitute for punishment. 599 P.2d at 94, 95. Similar conclusions were reached in Hill v. Burke, 422 F.2d 1195 (7th Cir. 1970), and State v. Newell, 236 A.2d 656 (Vt. 1967). In Hill, the court agreed that "The commitment proceedings under the statute constitute neither a civil commitment nor a sentencing procedure, but rather an independent criminal proceeding which is triggered by a criminal conviction." 422 F.2d at 1197. The court agreed further that

> An examination of the statutory scheme discloses that the legislature did not intend that the criminal conviction was to become entirely irrelevant. The purposes of the statute are to protect

> society from dangerous sex crimes and to provide treatment for the dangerous sex offender. To accomplish those objectives, a completely indeterminate sentence is necessary.

422 F.2d at 1197. Such statements are evidence that to allow credit for commitment to a sex offenders program to offset the time to be served in a penal institution would seriously undermine the objectives of treatment for the sex offender and protection of society. Furthermore, such a credit would encourage sex offenders not suffering from mental abnormalities to actively seek commitment so as to serve as much time as possible in the less restrictive confines of a mental health facility. In a case factually similar to the instant case, State v. Newell, supra, the defendant pleaded guilty to two counts of assault with intent to commit rape. The court thereafter adjudged the defendant to be a psychopathic personality and committed the defendant to detention and treatment as a sexual psychopath. On direction of the court, three subsequent hearings were conducted to review the defendant's status or progress. At the last of these hearings, the court found that the defendant was no longer a psychopathic personality and imposed equal and concurrent sentences of from six to ten years to be served in prison. The defendant then instituted post-conviction relief proceedings contending that the sentences were erroneous for failing to allow credit for the almost two years served in commit-

as a psychopathic personality. After recognizing the objectives of the commitment statute, the court refused to credit the defendant's sentences with the almost two years spent in commitment. The court reasoned that "[u]nder the provision of our statute, punishment is withheld until the offender's mental condition no longer constitutes a threat to the public." 236 A.2d at 658. In the present case, the appellant's status in treatment at the state hospital did not go unreviewed by the court. The appellant was afforded two review hearings prior to the hearing at which he was placed on probation. The court apparently found no compelling reason to transfer the appellant to the prison or to change his status. On the basis of the differences in the purposes for commitment and sentencing to a penal institution, credit for commitment time served by the appellant is appropriately denied.

Moreover, the granting of credit for the time served by the appellant during his commitment to the state hospital is expressly prohibited by Utah Code Ann. § 77-49-7, which states in part:

> The parole, probation, or pardon authority may order the probation, parole, or pardon following such a certification, and may order the release of such persons upon such terms, conditions, and limitations as shall appear necessary to safeguard the convicted person and the public. No statute relating to the remission of sentences by way of commutation time for good behavior, or for work performed shall apply to the person committed to the Utah state hospital as herein provided.

Simply stated, a person who is committed to the state hospital can receive no commutation time.

Even if it were possible for the appellant to be credited with the time served during commitment, the issue is more appropriately presented before the Board of Pardons. Utah Code Ann. § 77-62-3 states in part:

> It shall be the duty of the board of pardons to determine by majority decision, when and under what conditions, subject to the provisions of this act, persons now or hereafter serving sentences . . . in the penal or correctional institutions of this state, may be released upon parole, pardoned, or may have their fines or forfeitures remitted, or their sentences commuted or terminated; provided, no fine or forfeiture shall be remitted, no parole or pardon granted, or commutation or sentence terminated, except after a full hearing before said board. . . .

As indicated, appellant's request for time credit is appropriately addressed to the Board of Pardons in the first instance, and not to this Court. In any event, however, credit should be denied.

POINT IV

> IN THE ABSENCE OF APPELLANT'S OBJECTION TO THE HABEAS COURT JUDGE AND HIS FAILURE TO REQUEST RECUSAL OF THAT JUDGE, THE UNSUPPORTED ASSERTION OF "A CONFLICT OF INTEREST" ON THE PART OF THE LOWER COURT JUDGE IS NOT PROPERLY BEFORE THIS COURT.

The discussion of the waiver doctrine and its application to issues not properly preserved for review

the denial of post conviction relief as contained in Point I of this brief, is expressly incorporated in, and applied to the instant argument. The appellant has waived any consideration of the issue of judge disqualification by failing to object below or follow the statutorily prescribed procedure contained in Utah Code Annotated 1980 Special Supplement effective July 1, 1980. Section 77-35-29 of that supplement states in part:

> (c) If the prosecution or defendant in any criminal action or proceeding shall file an affidavit that the judge before whom such action or proceeding is to be tried or heard as a bias or prejudice, either against such party or his attorney or in favor of any opposing party to the suit, such judge shall proceed no further therein until the challenge is disposed of. Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. No such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

(See also Utah Rules of Civil Procedure Rule 63(b)). In the present case, appellant filed no affidavit or certificate of good faith at any time before or during the hearing on his petition for habeas corpus relief. The absence of such an application or objection is sufficient to waive review of the issue on appeal.

In Jackson v. State, 247 S.E.2d 512 (Ga.Ct.App. 1978), the appellant similarly failed to interpose a timely objection. As the court stated:

> Appellant enumerates as error, in each case, the failure of the trial judge to disqualify himself in a proceeding involving the sufficiency of search warrants which he had issued personally. However, the appellant failed to raise a proper objection, and "waiver of disqualification of a judge may be effected expressly by agreement, or impliedly proceeding without objection with the trial of the case with knowledge of the disqualification.

Id. In this case, the appellant was aware that the habeas court judge had earlier sentenced the appellant and placed him on probation. Appellant's failure to object should not be rewarded by the consideration of this issue on appeal.

In United States v. Azhocar, 581 F.2d 735 (9th Cir. 1978), the appellant filed an affidavit and moved for recusal on the ground of bias. The trial judge held the affidavit to be legally insufficient and proceeded to trial on the case. On appeal, the appellant not only alleged this ruling to be erroneous, but also alleged that other adverse rulings made by the trial judge were evidence of bias. The reviewing court replied to appellant's assertions by noting that a timely and sufficient affidavit was a prerequisite to recusal. 581 F.2d at 738. As to his claims that adverse rulings were evidence of bias, the court rejected appellant's claims by stating: "First, no timely and sufficient affidavit stating these claims was ever filed. Appellant's failure to follow these procedural requirements therefore defeats

charge of bias." 581 F.2d at 738. The Ninth Circuit Court of Appeals further noted the requirements for a legally sufficient affidavit:

> Thus, to be legally sufficient, the affidavit must meet three requirements. It must state facts which if true fairly support the allegation that bias or prejudice stemming from (1) an extrajudicial source (2) may prevent a fair decision on the merits. The focus is not only on the source of the facts and their distorting effect on a decision on the merits as required by Grimmell, but also on (3) the substantiality of the support given by these facts to the allegation of bias, as required by Berger.

Id. Not only has appellant waived the issue of judge disqualification by failing to interpose a timely objection, but also by failing to file the requisite affidavit and certificate of good faith. Moreover, had the appellant objected and filed his affidavit in a timely manner, the merits of the allegations would not have been legally sufficient to compel recusal.

The appellant could have further guarded against any potential "conflict of interest" on the part of judges of the Third Judicial District by filing his petition in another court. Rule 65(f)(2) of the Utah Rules of Civil Procedure states: "The [habeas corpus] complaint shall be filed in the court most convenient to the plaintiff." The appellant was thus not limited to filing his petition in the Third Judicial District Court, but could have filed it in any court of convenience.

In view of the fact that appellant cites no authority in support of his claim for relief resulting from a so-called "conflict of interest," and has waived this Court's consideration of the issue by failing to object or follow the statutory procedure for judge disqualification, this Court should disregard appellant' claim.

CONCLUSION

The appellant has failed to allege claims upon which his requested relief can be granted. Even if this Court was able to disregard the failure of appellant to properly preserve his allegations for appeal, the allega are totally lacking in merit in that the appellant was properly committed and sentenced under the laws of this state. Furthermore, appellant lacks standing to prosecu his due process and equal protection claims because his were not adversely affected by the appropriate applicati Utah Code Ann. § 77-49-1 et seq.

Respondent notes that this brief was prepared from an incomplete record. Among the numerous deficienc in the record, the respondent did not have the benefit o reading the contents of the transcript which was designa and ordered by the appellant, but was not, for whatever reason, part of the record on appeal (R. at 41, 42, 43).

The respondent therefore submits this brief in the interest of avoiding any further delay, but respectfully reserves the right, based on the accompanying motion, to submit a supplemental brief in the event that respondent's position is prejudiced or compromised by the filing of documents and transcripts at some later date which are not presently a part of the record on appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

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