1989

Candelario v. Cook : Reply Brief

Utah Supreme Court

Mark H. Turner; attorney for plaintiff.
R. Paul Van Dam; attorney general; Kent M. Barry; assistant attorney general; attorneys for respondent.

SUPREME COURT

BRIEF

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

TRACY CANDELARIO, Petitioner-Appellant, vs. GERALD COOK, Warden, Utah State Prison, State of Utah, Defendant, REspondent.	)	APPEAL NO. 890157

REPLY BRIEF OF APPELLANT

Mark H. Tanner (5015)
Attorney for Plaintiff
Post Office Box 1148
Castle Dale, Utah 84513
(801) 381-2922

R. PAUL VAN DAM (3312)
Utah Attonrey General
KENT M. BARRY (0213)
Assistant Attorney General
Attorneys for Respondent
6100 South 300 East, Suite 300
Salt Lake City, Utah 84107

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

TRACY CANDELARIO, Petitioner-Appellant, vs. GERALD COOK, Warden, Utah State Prison, State of Utah, Defendant, REspondent.	)	APPEAL NO. 890157

REPLY BRIEF OF APPELLANT

Mark H. Tanner (5015)
Attorney for Plaintiff
Post Office Box 1148
Castle Dale, Utah 84513
(801) 381-2922

R. PAUL VAN DAM (3312)
Utah Attonrey General
KENT M. BARRY (0213)
Assistant Attorney General
Attorneys for Respondent
6100 South 300 East, Suite 300
Salt Lake City, Utah 84107

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

TRACY CANDELARIO, Petitioner-Appellant, vs. GERALD COOK, Warden, Utah State Prison, State of Utah, Defendant, REspondent.	)	APPEAL NO. 890157

REPLY BRIEF OF APPELLANT

ARGUMENT

I. RULE 65B(i) UTAH RULES OF CIVIL PROCEDURE, ALLOW FOR THE PROPER RAISING OF ISSUES IN THIS APPEAL

Rule 65B(i) of the Utah Rules of Civil Procedure provide an additional opportunity for a criminal defendant to challenge his commitment. The rule is independent of 65B(f) which governs a writ of habeas corpus. The rule does not prohibit the bringing of similar issues under 65B(i) as may have been brought under 65B(f). To the contrary, 65B(i)(2) indicates that a Complaint under this rule is not barred because similar proceedings in any court, state of federal, have been instituted by the complainant, but merely requires that the complaint set forth such pleading. Thereafter, if the Court determines, as did the Third District Court, through Judge Rokich, that the constitutionality or legality of the confinement has been adjudged in such prior proceedings, the complaint shall be dismissed. Subsection (10) of 65B(i) then provides for appellate review.

Clearly Appellate's request that this Court review the revocation of his probation is not barred by the doctrine of res judicata. To the contrary, because Judge Rokich used Judge Daniel decision as his basis for dismissing the Complaint brought pursuant to Rule 65B(i) the same issues as litigated by Judge Daniels are preserved for appeal. Had some other different issues been the basis of Judge Rokich's dismissal, then Respondent's argument of timeliness of appeal would have merit. As it stands, it does not.

In Andrews v. Morris, 677 P.2d 81 (Utah 1983) the Supreme Court of Utah stated that Rule 65B(i) qualified a review of an order that was claimed to have substantially denied rights under the United States Constitution of the Utah Constitution, or both, not withstanding prior proceedings. The Court indicated that 65B(i) provided a second round of petitions for collateral review, when, as here, the issues of denial of constitutional rights are raised.

Respondent cites Rule 65B(10) Utah R. Civ. P., and argues that it required Appellant to bring the denial of his Writ of Habeas Corpus to the Court for review. Respondent quotes, however, Rule 65B(i)(10), which Appellant argues give rise to his right to bring the dismissal of his complaint for appellate review. Rule 65B(f), Utah R. Civ. P., does not have a subsection (10) and its presence at the end of subsection (i) specifically permits this appeal on all the issues raised herein.

Since Judge Rokich relied on Judge Daniel's reasoning for

dismissing the Appellant's case, and because Judge Rokich perceived he was bound by Judge Daniel's earlier ruling, it is that reasoning that is at issue. Appellant should be allowed to attack the reasoning in this appeal, where same was used to dismiss his extraordinary writ. While not intending to "circumvent the direct appellate process," Rule 65B(i) appears to specifically provide a second opportunity to the Appellant to redress his claimed substantial denial of constitutional rights.

Respondent's "curiosity" argument, in that it isn't understood by Respondent why there is no argument by Appellant that the doctrine of res judicata was improperly applied, is itself, self deceiving. Respondent appears to hope the Court will choose to ignore the issue that because the District Court was wrong the first time it denied Appellant's Writ of Habeas Corpus, that it didn't make it right the second time it denied Appellant's extraordinary writ, using the doctrine of res judicata. Judge Rokich;s statement that he was barred by said doctrine does not make the earlier ruling proper. Judge Rokich's ruling is equally erroneous as Judge Daniel's because he invoked res judicata to dismiss the action. Because he relied on Judge Daniel's ruling to reject Appellant's Writ, Judge Rokich invites, and nearly certifies for review, the same challenge to his ruling as would have been brought against Judge Daniel's ruling.

In fact, as is graciously pointed out by the Respondent, if the doctrine of res judicata is properly applied where it should be applied, it would have prevented Judge Daniel's changing of

his mind regarding the Defendant's probation. By arguing that this doctrine does not apply to the probation violation proceeding, Respondent seems to be saying that the protection afforded to a person, by law and equity, do not apply when the need them the most. The protection are only there for the state, not the individual. The individual can be subjected to jeopardy more than once, but the state shouldn't have to face a challenge to its actions more than once if it doesn't feel like it.

Appellant has properly brought the additional due process issue of the lack of notice. Rule 65B(i) does not carry with it a time frame for bringing the challenge. That there was no prior appeal in this matter allows the bringing of the issue in this first appellate review. Additionally, the argument makes perfect sense. Because he was not afforded proper notice, Appellant was unable to properly prepare his objections to the affidavit at that time. By learning of the second hearing on an Order to Show Cause only moments before it took place, Appellant was denied the opportunity to properly prepare his defense. Respondent now argues that because he didn't raise the lack of notice argument then, he shouldn't be allowed to raise it now. Additionally, and more nonsensically than any argument of Appellant's, Respondent states that notwithstanding the lack of notice, Appellant should have been prepared anyway. Respondent attempts to capitalize on a defendant's inability to properly prepare for hearing, by saying in essence that since the defendant wasn't prepared initially, he shouldn't be able to bring a claim that he didn't

have proper notice, even though the improper notice was the cause of the non-preparation.

Respondent additionally seeks to penalize Appellant because his counsel at the time of the second hearing on the Order to Show Cause failed to object to said hearing on his behalf. It should come as no surprise to Respondent that the Appellant would merely follow his counsel's recommendation, particularly if the Appellant has no clue as to what is happening to him. His counsel told him to admit the allegations, and that by doing so, it would not affect his time incarcerated. The advice of counsel turned out to be very erroneous. Appellant should not be denied his Appeal merely because he possessed insufficient knowledge to object to what was happening, especially after receiving no notice of the second hearing.

II. CONSTITUTIONAL PROVISIONS SHOULD APPLY WHENEVER A DEFENDANT IS IN JEOPARDY OF LOSING LIBERTY, NOTWITHSTANDING THE TYPE OF HEARING OR HEARING BODY, AND THEREFORE THE CONSTITUTIONAL DOUBLE JEOPARDY CLAUSE MUST APPLY TO PROBATION REVOCATION HEARINGS

The Constitution of the United States and of the State of Utah contain no provisions excepting any person or entity from being controlled by its protection. Clearly, certain constitutional rights may be suspended, however, those provisions which provide for due process of law, and protection against double jeopardy should never be exorcised from any entity's responsibility whenever said entity can deprive another person of other constitutional rights. By allowing any entity to disregard

constitutional provisions and protection, as it considers revoking or denying other constitutional rights of any individual invites absolute corruption. When a person is in jeopardy of losing certain constitutional rights, all constitutional protection, including the prohibition against placing a person twice in jeopardy for the same offense, should be strictly enforced.

Respondent should pay more attention to the excellent dissent in Davenport vs. State, 574 S.W.2d 73 (Tex.Crim.App. 1978) than it has. Said dissent provides a much more plausible and fair argument than the majority. Said dissenting opinion states in pertinent part:

> Yet the anxiety, insecurity, strain and potential of imprisonment are real "risks" faced by the probationer brought before the court on a motion to revoke probation filed by the State. The stigma from a revocation of probation is real, especially when the revokee is subsequently considered for parole.... 574 S.W.2d, at 78.
>
> ...the doctrine of double jeopardy should certainly attach to any subsequent efforts to revoke the probationer's conditions on the same offense. 574 S.W.2d at 79.
>
> As stated by the Supreme Court in Burks v. U.S, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, (1978), "the purposes of the Clause (double jeopardy) would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple.'"437 U.S. at 17, 98 S.Ct. at 2150. 574 S.W.2d at 79.

The Utah Supreme Court has placed a jeopardy protection on preliminary hearings. If in fact the probation revocation hearing and the preliminary hearing are similar, as is argued by the Respondent, then the Supreme Court's ruling in State v Brickey, 714 P.2d 644 (Utah 1986) ought to apply in the probation

revocation hearing also. In Brickey, the Court stated,

> We find merit in the approach taken by the Oklahoma courts. In Jones v. State, 481 P.2d 169 (Okla.Crim.App.1971), the Oklahoma Court of Criminal Appeals held that due process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling. 481 P.2d at 171.... Imposing this requirement on prosecutors places a relatively small burden on them, yet adequately protects the due process interests of an accused. We therefore adopt this approach for Utah.

If, as the Respondent argues, a probation revocation hearing and a preliminary hearing are similar, sufficiently so to either apply the doctrine of jeopardy or not apply it, then based on Brickey, we agree. In any event, whether in a probation hearing or a preliminary hearing, unless there is good cause, or new evidence is available, there should be no refiling of either an information, or an Order to Show Cause.

Respondent attempts to say that it would be absurd or impossible to have a defendant on probation and incarcerated at the same time. This is neither impossible nor absurd. Many times, as a condition of probation, a probationer will be ordered to serve time incarcerated. Additionally, a probationer is very likely to comply with his probation while incarcerated. Additionally, it is not inconceivable that an incarcerated prisoner has sufficient autonomy to either cooperate or refuse to comply with probation officials while in prison. Nevertheless, the record of Appellant would show him to be a model prisoner who would very likely comply in all respects with probation, had it

been continued the second time.

CONCLUSION

Respondent states simply that fairness dictates that one convicted of robbery while on probation for aggravated robbery ought to be committed to prison. This attitude is fairly clear from the states refiling the same affidavit for an Order to Show Cause to revoke Appellants probation when they did not obtain their desired results the first time. As stated above, however, fairness dictates that the state not get the second bite at the apple. Judge Wilkensen apparently disagreed with the state, at least the first time, when he deemed insufficient cause to revoke Appellant's probation. Fairness, and Appellant's due process and jeopardy protection rights require that the second apple bite be taken away, and the probation for the aggravated robbery charge continued.

DATED this _____ day of September, 1989.

Mark H. Tanner

CERTIFICATE OF MAILING

I do hereby certify that on the ___ day of September, 1989, I sent to Kent M. Barry, Assistant Attorney General, 6100 South 300 East, Suite 300, Salt Lake City, Utah 84107, 4 true and correct copies of the above and foregoing instrument by depositing same in the U.S. Mail, postage fully prepaid.

09/15/89 MHT5336