1981

Charles Alvin Kennedy v. Lawrence Morris, Warden, Utah State Prison : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

CHARLES ALVIN KENNEDY, :

Plaintiff-Appellant, :

v. : Case No. 17617

LAWRENCE MORRIS, Warden, Utah State Prison, :

Defendant-Respondent. :

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT DENYING PETITION FOR WRIT OF HABEAS CORPUS BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, ON THE 11TH DAY OF FEBRUARY, 1981, BY THE HONORABLE CHRISTINE M. DURHAM, JUDGE, PRESIDING.

DOUGLAS E. WAHLQUIST
Attorney at Law
100 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

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STATEMENT OF THE NATURE OF THE CASE

The plaintiff-appellant, CHARLES ALVIN KENNEDY, appeals from an order in the Third Judicial District Court, Salt Lake County, State of Utah, entered by the Honorable Christine M. Durham, Judge, denying, after hearing, appellant's Petition for Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

The above-entitled matter having come on regularly for hearing in the above-entitled Court on Thursday, the 29th day of January, 1981, before the Honorable Christine M. Durham, Judge, on appellant's Petition for Writ of Habeas Corpus, and the appellant being sworn and testifying to the allegations of his Petition, the Court having heard his testimony and having received copies

of the trial transcript of appellant's criminal proceeding, and having heard and received testimony and evidence from respondent, and having reviewed all exhibits submitted by the respective parties, and having considered the respective memorandums of law submitted by the parties and having taken the matter under advisement the Court ordered that appellant's Petition for Writ of Habeas Corpus be denied.

RELIEF SOUGHT ON APPEAL

The appellant seeks an order granting his Petition for Writ of Habeas Corpus, and in the alternative he seeks a reversal of the Trial Court's order that denied his Petition for Writ of Habeas Corpus.

STATEMENT OF THE FACTS

Appellant was charged by amended information with two counts of forceable sexual abuse, in violation of Utah Code Annotated Section 76-5-404, 1953 as amended. The charge was based on appellant's alleged causing of other persons to take indecent liberties with appellant's then wife with the intent to arouse the appellant's sexual desires. Appellant was arrested following the filing of the information and at all times pertinent hereto was incarcerated in the Juab County Jail. That during said incarceration he was given medication to sedate him.

Greg Warner of the Utah County Legal Defender's Office was appointed to represent appellant in connection with the charge. A preliminary hearing was held on September 13, 1979, and petitioner was bound over to stand trial in the Fourth Judicial District Court for Juab County.

That on or about November 21, 1979, while appearing before the Honorable Allen B. Sorenson, Judge of the Fourth Judicial District, on motions pertaining to appellant's case, Mr. Warner requested a non-jury trial. Appellant, CHARLES A. KENNEDY, was not present at the foregoing hearing that was held in Provo, Utah.

Appellant was first informed of the actions taken by Mr. Warner on Saturday evening, the 24th day of November, 1979, at a conference between he and Mr. Warner that took place at the jail house. There is dispute as to whether Mr. Warner at that time counselled appellant concerning his constitutional right to trial by jury. Appellant has testified he had not been so counselled, they had not discussed the matter previously and he had no independent knowledge of the significance of the constitutional right to trial by jury.

The Court Transcript of the trial proceedings of November 27, 1979, at page 3, sets forth the Court's inquiry of counsel as to what explanation, if any, he had given appellant about appellant's constitutional right to trial by jury. In addition, the Court made inquiry directly of appellant concerning the purported

waiver of his constitutional right to trial by jury, but the Court gave no explanation as to, and to use the language of the Court, "explained to him (appellant) the full significance of that right?" No prospective jurors were summoned for the trial scheduled November 27, 1979.

The Court, Honorable Allen B. Sorenson, Judge, presiding, found appellant guilty as charged and on January 4, 1980, appellant was sentenced to two concurrent terms of zero to five years and committed to the Utah State Prison. Appellant appealed the conviction to the Utah Supreme Court. The Supreme Court affirmed the judgment of the District Court in State v. Kennedy, Utah, 616 P2d 588 (1980).

The appellant on the 10th day of December, 1980, filed a Petition for Writ of Habeas Corpus. The issues raised in the instant proceeding were not raised on direct appeal.

Appellant's Petition for Writ of Habeas Corpus was tried before the Third District Court, the Honorable Christine M. Durham, Judge, presiding on January 29, 1981, and the Court taken the matter under advisement ruled that appellant had not met his burden of showing that his waiver of trial by jury was involuntary or unknowing. Appellant appealed to the above-entitled Court for relief sought in his Petition for Writ of Habeas Corpus or reversal of the Trial Court ruling.

ARGUMENT

POINT I

APPELLANT'S APPROPRIATE REMEDY IS A WRIT OF HABEAS CORPUS.

A Petition for Writ of Habeas Corpus is an extraordinary remedy pursuant to Rule 65B(f), et sec, Utah Rules of Civil Procedure, which provides in pertinent part as follows:

> (i) any person imprisoned in the penitentiary or county jail under commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probational parole, who asserts that any proceedings which resulted in his commitment there was an underlying substantial denial of his rights under the constitution of the United States or the State of Utah, or both, may institute proceedings under this Rule (emphasis added).

The foregoing language is absent of any condition precedent of a requirement that the issues raised pursuant to said rule requires that a direct appeal be exhausted before one seeks remedies thereunder.

Notwithstanding the foregoing, a Writ of Habeas Corpus is properly invoked when the Court has jurisdiction over the person or the offense, or the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where such fact is shown that it would be unconscionable not to re-examine the conviction. See Bryant v. Turner, 19 U2d 284, 431 P2d 121 (1967), Helmuth v. Morris, 598

P2d 333 (Utah, 1979), Gentry v. Smith, 600 P2d 1008 (Utah, 1979).

The Utah Supreme Court has steadfastly proclaimed that a Habeas Corpus proceeding is not a substitute for an appeal save and except a Petition for Writ of Habeas Corpus is appropriate in the event of the following:

> . . . a claim of fundamental unfairness in the trial or a substantial prejudicial denial of a persons constitutional rights. (See Chess v. Smith, 617 P2d 341, 343 (Utah, 1980), and Morishita v. Morris, 621 P2d 691 (Utah, 1980).

Appellant in the instant case has been substantially and effectively denied his constitutional right to trial by jury. The appellant's right to trial by jury is a fundamental right protected both by the United States and Utah Constitutions.

It is submitted that upon review the Court should find that the proceedings rose to the level of fundamental unfairness, appellant was denied substantially and effectively his constitutional rights and it would be unconscionable not to allow appellant his remedy as to said issues by Writ of Habeas Corpus.

POINT II

APPELLANT HAS A FUNDAMENTAL CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

The right to trial by jury is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Article 1, Section 10 of the Constitution of Utah and Section 77-27-1 Utah Code Annotated, 1953 as amended, and said right has been con-

strued by the applicable case law as a fundamental Federal Constitutional Right.

The application of the Sixth Amendment to the United States Constitution guaranteeing an accused to a right to trial by jury and the resulting case law thereunder became applicable to the States following the decision of Duncan v. Louisiana, 391 U.S. 145, 20 LEd.2d 491 (1968) which held in pertinent part:

> The right to jury trial in criminal cases is a constitutional right fundamental to the American scheme of justice and is one that is guaranteed by the Fourteenth and Sixth Amendments to the U.S. Constitution . . .

Appellant, in the instant case, had his jury effectively waived by counsel outside his presence. He did not make a knowing, intelligent and voluntary waiver of his fundamental right to have a jury trial. Appellant was advised by counsel on Saturday, November 24, 1979, just days before trial that he (counsel) had waived the jury in the upcoming criminal trial. Appellant has testified that he had not previously discussed the waiver of the jury with his appointed counsel. Appellant has further testified counsel had not given him an explanation as to the meaning and significance of his right to trial by jury. The Court failed to explain to appellant the full significance of that right, and there is no other evidence from the record of the trial proceedings to substantiate that an explanation had been given to the appellant by his counsel or the Court.

POINT III

APPELLANT DID NOT MAKE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

The United States Supreme Court in Patton v. U.S., 281 U.S. 312, 74 LEd. 854, defined the elements of the constitutional right to trial by jury as follows:

> (1) Jury shall consist of a (specified) number of individuals.
>
> (2) Trial in the presence of a judge and under his supervision and the judge instructs the jury as to the law and advises them in respect to the facts.
>
> (3) The jury shall be unanimous to convict.

The Court in the Patton case went on to say that in order for there to be a waiver of this constitutional right, certain requirements must be met. The federal rules, case law and now the new Utah Rules of Criminal Procedure, Section 77-35-17, Utah Code Annotated, 1953 as amended, mandate a waiver must include the following:

> (1) The consent of the government counsel.
>
> (2) Sanction of the Court.
>
> (3) Be an express and intelligent consent by the accused with the duty of the Court not to discharge his constitutional right as a matter of rote.

The mandate is that the Court must make inquiry to ascertain whether waiver by the accused is with knowledge, intelligent and voluntary. The Court in accepting such a waiver from an accused of such a fundamental constitutional right as a waiver of trail by jury must:

> ". . . indulge every reasonable presumption against waiver of a fundamental constitutional right . . ." See Johnson v. Zerbest, 304 U.S. 458, 464 (1938).

The Court in Zerbest, went on to state as follows:

> Where there is a proper waiver it should be clearly determined by the trial court and it would be fitting and appropriate for that determination to appear upon the record.

The appellant in the case at bar was not given an explanation by defense counsel of his fundamental right to trial by jury. Appellant was not present when the waiver was effectively made by counsel some days before the scheduled trial date. Appellant had been incarcerated in the Juab County Jail and while in custody had been given drugs to sedate him. Appellant did not understand the role of the jury and the requirement of the State regarding its burden of proof in jury cases. The appellant has had limited dealings with the judicial system. The appellant has completed high school, has generally lived in smaller communities as opposed to large urban areas and he does little outside reading. He has little background from which to draw information

that would assist him in making an intelligent, knowing and voluntary waiver of his fundamental constitutional right to trial by jury absent a legally acceptable explanation by defense counsel or the judge presiding.

The record of the proceedings before the Honorable Allen B. Sorenson, Judge Presiding of the Fifth Judicial District Court, Juab County, State of Utah, is absent of any inquiry that the Court indulged in every reasonable presumption against waiver of fundamental constitutional rights as required by Zerbest, ibid. The official transcript of the criminal trial proceedings, at page 3 set forth the following exchange which fails to reach the standard prescribed by the foregoing case law, as follows:

> THE COURT: Is the defendant ready?
>
> MR. WARNER: Yes, Your Honor.
>
> I have advised my client that he does have a right to a jury trial. It's my understanding it's his desire to waive such right.
>
> THE COURT: Have you explained to him the full significance of that right?
>
> MR. WARNER: Well, Your Honor I have indicated to him --
>
> THE COURT: I think you had better question him on the record.
>
> MR. WARNER: Mr. Kennedy, do you realize you have the right -- do you want him sworn first, Your Honor?
>
> THE COURT: Oh, no. No, no.

MR. WARNER: You understand you have the right to be tried before a jury rather than the court?

THE DEFENDANT: Yes, sir.

MR. WARNER: And you waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: You may proceed.

The language taken from the transcript does not raise to the standard of the guidelines and learning given us by Patton, ibid., which forbade discharge of a fundamental constitutional right as a matter of rote.

POINT IV

PREVIALING CASE LAW REQUIRES THAT THE COURT HAVE A WRITTEN WAIVER OF CONSTITUTIONAL RIGHT OR MAKE INQUIRY ON THE RECORD REGARDING THE KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF A FUNDAMENTAL CONSTITUTIONAL RIGHT.

There are few Utah cases that specifically address and rule on the issue of knowing, intelligent and voluntary waiver of the accused's right to trial by jury. A decision from the Third Judicial District, Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin presiding, accepted a defendant's verbal waiver in open Court of his right to trial by jury where defense counsel conducted a thorough examination of defendant's understanding of his constitutional right to trial by jury, and the Court made an independent inquiry specifically explaining to the

accused the requirement of a unanimous decision by the jury in order for there to be a finding of guilty of the charges for which the defendant stood accused.

The explanation given by the Court met the standards described by Patton, ibid., see State v. Christian, 533 P2d 872 (Utah, 1975).

It is submitted that the prevailing federal case law and the case law from surrounding states require a writing to waive the constitutional right of jury trial, or if done verbally in open Court, the judge must make inquiry of the accused to insure in his mind that the accused waiver is expressly and intelligently waived. See Hayes v. State, 541 P2d 210 (Oklahoma, 1976), McCarthy v. U.S., 394 U.S. 459 (1969), and Heiden v. U.S., 353 F2d 53 ( ). The latter federal cases hold as follows:

> That mere recital of ones waiver does not comply with the requirements to waive a fundamental constitutional right.

The Utah Supreme Court in earlier decisions, State v. Lopez, 22 U2d 257, 451 P2d 772 (1969), and Barlow v. Young, 108 U2d 523, 161 P2d 927 (1945), have held that it is sufficient to waive ones right to jury trial if from the record it was determined as follows:

> . . . which provides that the waiver must 'be made in open court and entered in the minutes and the record indicates with sufficient clarity that the right was waived' . . . The matter of trial tactics is not the concern of the court, but the defendant and his counsel.

It is submitted that the Court in Lopez, ibid., failed to understand the significance and impact of the fundamental right to trial by jury. The right to trial by jury though a trial tactic is nonetheless a fundamental constitutional right that is guaranteed by both the United States and State Constitutions.

Furthermore, the requirement that the record indicates with sufficient clarity the right was waived still puts the burden on the Court to assure the accused waived his fundamental right knowingly, intelligently and voluntarily.

POINT V

THE ADEQUACY OF THE COURT RECORD TO DETERMINE THE APPROPRIATENESS OF THE STATE COURT'S ACCEPTANCE OF A WAIVER OF A FUNDAMENTAL CONSTITUTIONAL RIGHT IS CONTROLLED BY FEDERAL STANDARDS.

The waiver of a Federal Constitutional Right is governed by federal standards. See Douglas v. Alabama, 380 U.S. 14, 13 LEd.2d 934 (1965); no waiver can be presumed from a silent record, see Boykin v. Alabama, 395 U.S. 238, 23 LEd.2d 274 (1969), and reasonable adherence by state courts of federal mandates must be clear from the record to sustain attack for inadequacy, see Garner v. Louisiana, 368 U.S. 157, 173, 7 LEd.2d 207 (1961).

The Court Transcript of the Proceedings and the Court Record at the trial below considered in its entirety, fails to comply with

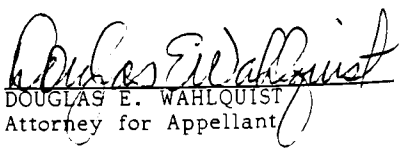
the federal standard and it is devoid of sufficient inquiry by the Court or counsel written, on the record, or otherwise, to establish that appellant when waiving his fundamental constitutional right to trial by jury did so knowingly and voluntarily.

CONCLUSION

It is submitted that based on the foregoing cited constitutional sections, statutes, case law and the facts, appellant did not make an intelligent, knowing and voluntary waiver of his right to trial by jury. That based thereon, the order of the Third District Court, Salt Lake County, State of Utah, should be reversed, and in the alternative, appellant should be granted the relief prayed for in his Petition for Writ of Habeas Corpus.

DATED: August 13, 1981.

RESPECTFULLY SUBMITTED:



DOUGLAS E. WAHLQUIST
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify I delivered a true and correct copy of the foregoing Brief of Appellant to David L. Wilkinson, Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this the 14th day of August, 1981.