1972

Edward Harold Schad, Jr. v. John W. Turner : Brief of Respondnet

Utah Supreme Court

David P. Rhode; Attorney for AppellantVernon B. Romney; Attorney for Respondent

In The Supreme Court of the State of Utah

EDWARD HAROLD SCHAD, JR.,
Plaintiff-Appellant,

-vs-

JOHN W. TURNER, Warden,
Utah State Prison,
Defendant-Respondent.

Case No.
12[illegible]

BRIEF OF RESPONDE[illegible]

APPEAL FROM THE [illegible]
WRIT OF HABEAS CORPUS [illegible]
JUDICIAL DISTRICT COURT, [illegible]
SALT LAKE COUNTY, STATE [illegible]
THE HONORABLE BRYANT [illegible]
JUDGE, PRESIDING.

VERNON [illegible]
Attorney Ge[illegible]

DAVID S. [illegible]
Chief Assistant [illegible]
General
236 State Capitol
Salt Lake City, Utah
Attorneys for Respondent

DAVID P. RHODE
Legal Defender Association
231 East Fourth South
Salt Lake City, Utah 84111
Attorney for Appellant

LORRAINE PRESS 1397 SOUTH MAIN STREET SALT LAKE CITY, UTAH PHONE [illegible]

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In The Supreme Court of the State of Utah

EDWARD HAROLD SCHAD, JR.,
Plaintiff-Appellant,
-vs-
JOHN W. TURNER, Warden,
Utah State Prison,
Defendant-Respondent.

Case No. 12485

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the denial of a writ of habeas corpus on February 17, 1971, by the Honorable Bryant H. Croft.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of murder in the second degree on December 11, 1968. Appellant's conviction for the crime of murder in the second degree was affirmed by the Supreme Court of the State of Utah. *State v. Schad,* 24 Utah 2d 255, 470 P.2d 246 (1970). Subsequent to this the appellant's writ of habeas corpus

was denied on February 17, 1971, by the Honorable Bryant H. Croft, in a memorandum decision.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court affirm the judgment of the lower court denying appellant's writ of habeas corpus.

STATEMENT OF FACTS

The body of Clare Odell Mortensen was discovered by his sister. The body was in a closet, nude (T. 213). A cloth was around the decedent's face tight enough to be in his mouth (T. 507). He was bound by leather thongs and a silk-like cord. The thongs were tied around the victim's wrist and interwoven between the silk-like cord which tied the ankles to the wrists (T. 508). The back door of the residence was ajar (T. 206).

According to expert testimony, the cause of the death of Clare Odell Mortensen was the ligature around his neck which restricted the flow of blood from the head which caused the blood vessels on the brain to swell and burst (T. 512). This was caused by a cloth tied around his neck tight enough that one would have difficulty putting his finger underneath it (T. 508). Dr. James T. Weston, the medical examiner who performed the autopsy, concluded that the purpose of the cloth was

to heighten erotic stimulus during an act of sodomy and that it was placed there by one who assisted in the erotic act (T. 759). The time of death was between noon and 10:00 p.m. July 4, 1968 (T. 513).

Dr. James T. Weston also found that there was a high concentration of acid phosphate within the decedent's rectum as well as within his mouth (T. 520). Acid phosphate is one of the enzymes present in male semen. Fecal material was found on the decedent's penis (T. 521).

The night before his death, the victim was seen in the company of the appellant at a nightclub by the victim's mother (T. 190). Another witness, Sandra Twitchell, noticed the victim and the appellant enter the nightclub together and she observed the victim invite the appellant to go home with him, to which the appellant refused (T. 392). At about 6:00 a.m. on the 4th of July, the appellant was again with the decedent, at the decedent's apartment (T. 631). The appellant testified that after 12:30 p.m. on the 4th of July he never saw the decedent again (T. 626).

On July 4, 1968, at about 2:00 p.m. the decedent and the appellant were seen by the bartender at The Lounge (T. 775). They left together at about 4:00 p.m. (T. 776). No other witness was found who saw them together that afternoon.

On the night of the murder, the appellant met Sandra Twitchell at the Roundup at about 8:30 p.m. The appellant told her that he wanted to move into a motel and that the decedent had flown to Seattle (T. 395). Appellant also told this witness that the victim was "kind of queer" and that appellant had busted him (T. 396). She testified that the appellant seemed much more shaky or nervous than before (T. 398).

A neighbor to the decedent testified that she had talked with appellant outside the decedent's home at 9:15 p.m. on July 4 (T. 285). Appellant told this lady that his friend (the decedent) had been called unexpectedly out of town (T. 286).

Another neighbor testified that he had seen the appellant replace a screen on a window in decedent's apartment on the day after the killing (T. 310). Appellant himself testified that he picked up his belongings (T. 641).

The evidence at the trial showed that the silk-like cord used to tie the decedent's wrists and ankles was a lace from combat boots (T. 482). The manager of the motel where appellant stayed observed appellant's combat boots and testified that they were lacking laces (T. 345).

The appellant moved to a motel and discarded cer-

tain items of the decedent's personal property (including decedent's wallet) in a trash barrel at the motel (T. 350). The defendant then used the decedent's Walker Bankard to obtain money for an airline ticket to Germany. The appellant was arrested by the military authorities in Germany (T. 440).

Appellant was convicted of murder in the second degree on December 11, 1968. Appellant's conviction for the crime of murder in the second degree was affirmed by the Supreme Court of the State of Utah. *State v. Schad,* 24 Utah 2d 255, 470 P.2d 246 (1970). Subsequent to this the appellant's writ of habeas corpus was denied on February 17, 1971 by the Honorable Bryant H. Croft, in a memorandum decision.

ARGUMENT

POINT I

THE ISSUES RAISED BY APPELLANT SHOULD NOT BE REVIEWED BY THIS COURT BECAUSE THEY DO NOT PRESENT PROPER ISSUES FOR A HABEAS CORPUS PROCEEDING.

A

THE ISSUES RAISED BY APPELLANT CONCERNING THE LEGALITY OF THE

SEARCH AND SEIZURE SHOULD NOT BE REVIEWED AS IT PRESENTS SUBSTANTIALLY THE SAME ISSUE RAISED ON APPELLANT'S ORIGINAL APPEAL FROM HIS CONVICTION.

Point A of Appellant's Argument raises the issue of the legality of the search and seizure of his suit cases and the items contained therein. It is argued that this resulted in prejudicial error requiring reversal. This presents substantially the same issue raised by appellant and ruled on by this court in his original appeal from his conviction. *State of Utah v. Schad,* 24 Utah 2d 255, 470 P.2d 246 (1970) at 248, 249. Therefore, appellant is using this appeal from the denial of a writ of habeas corpus to provide him with another review of the same issue raised during the original appeal. This is not the purpose of habeas corpus.

The same conclusion that respondent urges was expressed in *Bryant v. Turner,* 19 Utah 2d 284, 431 P.2d 121 (1967). *Bryant* involved a writ of habeas corpus which followed a conviction for second degree murder. No appeal was taken from this conviction. The Court in *Bryant* reasoned that the purpose of habeas corpus "is not to review a final judgment arrived at through regular proceedings and due process of law by a court having jurisdiction." Id. at 122. The court said further

that to turn habeas corpus into an appellate review "should not be done nor countenanced in our procedure. . . ." Id. at 122.

An important decision that is even more germane to the case at bar is *Sinclair v. Turner,* 20 Utah 2d 126, 434 P.2d 305 (1967). In *Sinclair* substantially the same issues complained of in the appeal from the denial of a writ of habeas corpus were raised and ruled upon in the appeal from her conviction. The court stated the following:

> "We took occasion to explain in the recent case of *Bryant v. Turner,* that it is not a proper purpose of a habeas corpus proceeding to provide another review of the same issues that have been previously adjudicated on a regular appeal." *Id.* at 308.

An identical holding was recently handed down in *Scandrett v. Turner,* ....Utah 2d...., 489 P.2d 1186 (1971). The court held that a writ of habeas corpus may not be used to relitigate issues that had been previously litigated in a regular appeal. The court used this as the basis for affirming the trial court's denial of the writ of habeas corpus.

The same problem is presented in the case at bar. During the original appeal from his conviction the appellant raised the issue of the legality of the search and

seizure. *State v. Schad,* supra, at 247. The court in *Schad* ruled on this issue by holding that the admission of the evidence seized could not be regarded as reversible error. *State v. Schad,* supra, at 249. In the case at bar, the appellant is using the appeal from the denial of his writ of habeas corpus to relitigate this issue. Under the authority of *Sinclair v. Turner,* supra, and *Scandrett v. Turner,* supra, habeas corpus may not be used for this purpose and this Court in the case at bar should again follow this precedent.

B

THE ISSUE RAISED BY APPELLANT, WHEREIN IT IS ALLEGED THAT INQUIRIES MADE BY THE DISTRICT ATTORNEY CONCERNING APPELLANT'S PRIOR FELONY CONVICTIONS RESULTED IN PREJUDICIAL ERROR, SHOULD NOT BE REVIEWED BY THIS COURT AS IT SHOULD HAVE BEEN RAISED BY REGULAR APPEAL.

The principle reason why this issue is not proper for consideration in this appeal from the denial of a writ of habeas corpus is that the appellant, in arguing this issue, is attempting to turn the habeas corpus proceeding into an appellate review. The alleged irregularity was known or should have been known to the appel-

lant at the time of judgment or during the time permitted for regular appellate review. This being so, the issue should have been raised by the regular appeal process. Case law in Utah has consistently supported this proposition.

The Utah Supreme Court, in *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (1968), discussed a number of limitations on habeas corpus proceedings. In *Brown,* after emphasizing that habeas corpus cannot properly be treated as a regular appellate review, the Court stated:

> "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack. . . ." *Id.* at 969.

The *Brown* decision pointed out that there are only a few unusual circumstances when the court will review an issue in a habeas corpus proceeding that could have been raised on appeal. *Id.* at 969. The first is lack of jurisdiction, which is not applicable to the case at bar. The second is where the party is substantially and effectively denied due process of law. It is not alleged that this questioning has substantially denied the appellant due process of law. The third is that some fact has been

shown that it would be unconscionable not to re-examine the conviction. This issue does not demonstrate such outrageous prejudice so that it could be considered unconscionable not to review it. Indeed, the issue raises no prejudice to the appellant at all, as is demonstrated by Point II of Respondent's Brief. The issue clearly does not fall within one of the "unusual circumstances" given in *Brown,* and therefore should have been raised by regular appeal. See also *Miller v. Crouse,* 346 F.2d 301 (10th Cir. 1965).

The principles discussed in *Brown v. Turner,* supra, were also considered in *Velasquez v. Pratt,* 21 Utah 2d 229, 443 P.2d 1020 (1968). *Velasquez* concerned a petition for a writ of habeas corpus for release of a juvenile from the Industrial School. The court's reasoning relevant to the case at bar is as follows:

> "As to any claimed error or irregularity which was known or should have been known to the appellant at the time of judgment, there was first an obligation to call it to the trial court's attention and seek remedy; and that failing, *there was next a duty to seek review and correction on appeal.* If this is not done within the time allowed by law, the judgment becomes final and not subject to further attack for any matters which could have been so reviewed on regular appeal." *Id.* at 1022 (Emphasis supplied).

The alleged irregularity raised by appellant falls within the scope of *Brown v. Turner,* supra, and *Velasquez v. Pratt,* supra. The issue is one that was known or should have been known to the appellant in time for it to be argued by regular appeal. Also, the issue fails to fall within the "unusual circumstances" outlined in *Brown.* Therefore, the issue is not a proper issue for review in a habeas corpus proceeding.

POINT II

THE DISTRICT ATTORNEY'S CROSS-EXAMINATION OF THE APPELLANT CONCERNING APPELLANT'S PRIOR CONVICTIONS WAS NOT IMPROPER OR PREJUDICIAL.

Notwithstanding that this issue should have been raised during appellant's regular appeal, the alleged improper inquiries will be discussed in order to demonstrate that the inquiries did not prejudice the appellant nor were they improper.

The appellant contends that there were three instances where the cross-examination by the district attorney exceeded permissible examination. The first is the questioning concerning the appellant's discharge from the service (T. 545). Appellant alleges this questioning was neither probative nor relevant. It is difficult

to contend this questioning was prejudicial since the appellant was being cross-examined, which places the credibility as a witness in issue. The appellant was asked what type of discharge he received from the service and he replied that he did not know (T. 545). This could hardly be deemed prejudicial or improper.

The second alleged instance of improper questioning was when appellant was asked the time and place of his prior felony convictions (T. 545, 546, 547). This type of questioning is clearly permissible in Utah. See *State v. Kazda,* infra. and *State v. Younglove,* infra.

The third allegation concerns questioning about the illegal wearing of a United States Army uniform (T. 547, 548). This questioning could not be considered prejudicial nor is it a basis for appeal. This questioning included the question of whether the appellant had been convicted of a felony for illegally wearing a United States Army uniform. An objection was raised by defense counsel charging that this was not a felony and was irrelevant. The trial court sustained the objection granting remedy to the defense and preventing error (T. 548). Appellant cannot now claim error when he was granted a remedy at trial by the court sustaining his objection. In *Velasques v. Pratt,* supra, the Court discusses the procedure for redressing claimed error. The opinion says that there is first an obligation to call

an error to the trial court's attention and seek remedy, 443 P.2d at 1022. In the case at bar, defense counsel met this obligation. *Velasquez* goes on to say: ". . . that *failing,* there was next a duty to seek review and correction on appeal." 443 P.2d at 1022 (Emphasis added). In the instant case the attempt to seek a remedy did not fail since the objection was sustained, and therefore, there is nothing to correct on appeal. It is clear that this line of questioning was not allowed to advanre to the point of being improper or prejudicial.

The second alleged improper questioning concerning prior felonies deserves further discussion. The scope of this questioning included questioning as to whether the appellant had been convicted of a felony, the number of felony convictions, when and where they were committed, and what those felonies were. This scope of questioning is permissible under Utah case law. Moreover, this questioning is authorized by statute.

Utah Code Ann., § 78-24-9 (1953), requires that a witness must, among other things, ". . . answer as to the fact of his previous conviction of felony." This type of questioning has been developed by judicial decision. In *State v. Kazda,* 14 Utah 2d 266, 382 P.2d 407 (1963), the court was confronted with an allegation of error because of the cross-examination of the defendant

as to prior convictions. The court discharged this allegation by saying:

> "When an accused voluntarily takes the witness stand he may be asked whether or not he has ever been convicted of a felony. . . . If the accused answers in the affirmative, he may ask the nature of the felony. Further, the accused may be asked if he has been convicted of more than one felony, and if so, the type and nature thereof." *Id.* at 409.

The questioning in the case at bar falls within the permissible limits of questioning outlined in *Kazda.*

In a more recent decision the Court was again confronting this issue. *State v. Younglove,* 17 Utah 2d 268, 409 P.2d 125 (1965). In this case the defendant, in a bastardy action, took the witness stand in his own defense. On cross-examination the trial court required him to respond to questions relating to what his prior felony was and when it was committed, among other things, *Id.* at 126. The court did not hold that these questions went beyond the permissible scope of questioning. So it is in the case at bar; the questioning by the district attorney simply asked the permissible what, where, and when about prior felonies which is not improper or prejudicial. The questioning did not venture into the area of improper questioning which are questions that seek "details or circumstances" of the felony. See discussion in *State v. Younglove,* supra, at 126.

It is important to understand the reason for allowing such questions about a witness's prior felony convictions. In *State v. Kazda,* supra, the court said that its purpose was to affect his credibility as a witness. 382 P.2d 409. In *State v. Dickson,* 12 Utah 2d 8, 361 P.2d 412 (1961), a case cited by appellant in support of his position, the court again said that the purpose of allowing questioning as to prior felony convictions is to allow a witness's credibility to be impeached. 361 P.2d at 413.

The appellant cites *Dickson* and quotes from the opinion in an attempt to show that this evidence of prior felonies should have been excluded as it is an attempt to show a bad reputation and relying on that for conviction (Appellant's Brief at 14). A closer analysis of this case is needed in order to fully understand its meaning and significance. *Dickson* stands for the proposition that the previously defined limits of questioning about prior felony convictions is a valid use of cross-examination. 361 P.2d at 413. But, in *Dickson,* "the prosecutor pressed beyond that." *Id.* at 413. The Court did hold the purpose of certain questioning to be the showing of a bad reputation and casting aspersions on the defendant, but this particular questioning was not about a prior felony conviction.

Rather it was about a crime that the defendant had only been charged with. *Id.* at 414. The questioning in the case at bar was whether the appellant had been

convicted of a felony, not *charged* with a crime. The only questioning that could possibly relate to ***Dickson*** was that concerning the illegal wearing of a United States Army Uniform, which, of course, was not admitted due to the trial court's sustaining of the defense's objection.

The questioning that is alleged by appellant to be improper and prejudicial is clearly proper under both statute and judicial decisions. Moreover, if the questioning could possibly be considered improper by any line of reasoning, it could not be deemed of such significance as to result in substantial injustice. Whether justice was done and guilt established is the determination that must be made in habeas corpus proceedings. ***Brown v. Turner,*** supra, at 969, 970. In the case at bar substantial justice was clearly the end product of the trial. Further, if the questioning were considered error, it could not be considered substantial error. In ***Alires v. Turner,*** 22 Utah 2d 118, 449 P.2d 241 (1969), a case wherein a writ of habeas corpus was granted, the Utah Supreme Court expressed the policy of our law. The Court declared:

> ". . . it is the policy of our law, established both by statute and decision, that we do not reverse for mere error or irregularity, but only where it is substantial and prejudicial. That is, not unless the error is of sufficient import-

ance that it might have had some effect upon the result." *Id.* at 242.

It can be concluded that the alleged improper questioning was not improper or prejudicial and therefore it cannot be the basis for granting a writ of habeas corpus.

CONCLUSION

Respondent submits that the trial court's denial of petitioner's writ of habeas corpus should be affirmed by this court. The first issue raised by appellant, concerning an alleged illegal search and seizure, is substantially the same issue raised by appellant on his original appeal from his conviction. This attempt to relitigate issues already ruled upon by this court should not be countenenced in our procedure. This position is fully supported by case law in Utah. Similarly, the second issue raised by appellant, concerning alleged improper questioning by the district attorney, should not be reviewed by the court as it should have been raised on regular appeal. Appellant is attempting to turn the time-honored procedure of habeas corpus into another appellate review. Again, case law in Utah rejects this use of the habeas corpus procedure. Further, the inquiries made by the district attorney, that appellant alleges were improper,

are not improper nor did they prejudice the appellant.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

Attorneys for Respondent