

1968

James E. Wise v. John W. Turner, Warden: Utah State Prison : Brief of Respondent

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In The Supreme Court of the State of Utah

JAMES E. WISE,

Appellant

- v -

JOHN W. TURNER, Warden, Utah
Prison,

Respondent

BRIEF OF RESPONSE

Appeal from an Order granting writ of habeas corpus by the Third District Court of Salt Lake County, Utah, Honorable Joseph C. [illegible]

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Clerk, Supreme Court, Utah

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In The Supreme Court of the State of Utah

JAMES E. WISE,

Appellant,

- v -

JOHN W. TURNER, Warden, Utah State
Prison,

Respondent.

Case No.

11051

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The appellant, James E. Wise, appeals from an order dismissing his petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

By order dated September 29, 1967, the trial court, Honorable Joseph G. Jeppson, Judge, dismissed appellant's petition for a writ of habeas corpus.

RELIEF SOUGHT ON APPEAL

Respondent submits that the trial court's order dismissing appellant's petition for a writ of habeas corpus should be affirmed.

STATEMENT OF FACTS

On October 9, 1963, in the Third District Court, Salt Lake County, Honorable Ray Van Cott, Jr., presiding, appellant was convicted on trial by jury under Utah Code Ann. § 76-20-11 (1953) of the crime of issuing a check against insufficient funds and was committed to the Utah State Prison for the indeterminate term provided by law.

At the hearing on appellant's complaint and petition for a writ of habeas corpus held on September 5th and 18th, 1967, Honorable Joseph G. Jeppson presiding, appellant testified that two days before his trial was to be held, on October 7, 1963, he received by mail service of notice of withdrawal of counsel from his attorney, Mr. James F. Housley (T. 12). Immediately thereafter, according to his testimony, appellant went to the chambers of Judge Ray Van Cott, Jr., and requested of that judge a continuance of his trial so that he might retain other counsel. According to the testimony of appellant, that request was denied (T. 13). According to his testimony, appellant then said: "Well, may I at least defend myself so that there will be some sort of defense?" Judge Van Cott replied, no, that he would

refuse to let Mr. Housley withdraw (T. 14). It was not shown that there was a reporter present, and if this conversation did indeed take place it was not made part of the record. The only evidence to the fact that it did take place, or to the substance of it, came from the testimony of appellant (T. 13) and a woman companion, Mrs. Greta Butterfield, appellant's girl friend (T. 28).

ARGUMENT

POINT I

THE FACTS HERE PRESENTED DO NOT REVEAL A SUBSTANTIAL DENIAL OF DUE PROCESS AND ARE DISTINGUISHABLE FROM THIS COURT'S HOLDING THAT A FAILURE TO PERMIT A DEFENDANT TO REPRESENT HIMSELF CONSTITUTES REVERSIBLE ERROR.

In the hearing on appellant's petition for habeas corpus, and in this appeal appellant relies heavily on this court's opinion in **State v. Penderville**, 2 Utah 2d 281, 272 P.2d 195 (1954), where it was held that refusal to allow a defendant to represent himself constituted reversible error. That case is distinguishable from the present case on appeal both factually and in its rationale.

In **State v. Penderville, supra**, the defendant, by letter to the trial court on the day before the trial, complained of the service being rendered him by his attorney and requested a postponement to enable him to procure other counsel. The court had

Penderville brought before it where he repeated his request for a postponement in the presence of a reporter, the conversation being made a part of the record. The request for postponement was denied. This court held this denial was not error as there had been no showing that the attorney was unfaithful, incompetent, or unprepared for trial. Penderville then asked to defend himself rather than proceed with counsel in whom he had lost confidence. This was denied, and trial was held with representation by the original counsel. This court held, granting a new trial: "The right to defend in person certainly should not be denied an accused in a situation where he must either choose to use it or proceed with counsel in whom he has lost confidence." (2 Utah 2d at 288).

In the present case, appellant was represented by Mr. Housley at the preliminary hearing and made no attempt to discharge him at that time (T. 16), or in the intervening four to six weeks (T. 25), between the time of the preliminary hearing and the date at which Mr. Housley attempted to withdraw as counsel. He had made no move to discharge Mr. Housley when, two days before trial, he received the notice of withdrawal. Respondent submits this supports a fair inference that appellant fully intended to go to trial with Mr. Housley representing him and had confidence in that attorney's ability to provide him an adequate defense.

Therefore, the trial court's refusal to allow Mr. Housley to withdraw would work no prejudice to

appellant under the rationale of **State v. Penderville, supra**. As in **Penderville**, appellant initiated the attempt to change counsel and had expressed a reluctance to go to trial with his original counsel, saying that he would rather defend himself than be represented by that attorney. Respondent submits that appellant's testimony as to what he said in the conversation with Judge Van Cott supports a fair inference that his primary concern was not defending himself but in insuring "... some sort of defense ..." (T. 14), and that he obviously felt, as witnessed by that statement, that Mr. Housley's withdrawal and Judge Van Cott's refusal to grant a continuance would force him to trial without a defense. The subsequent refusal by Judge Van Cott to allow Mr. Housley's withdrawal would seem to have alleviated that fear, and respondent suggests that knowledge of the **Penderville** holding may account for the emphasis in the appellant's account of the conversation with Judge Van Cott on his purported desire to defend himself.

POINT II

THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BY HOLDING AS A MATTER OF LAW THAT THE COMPLAINT APPELLANT ATTEMPTED TO RAISE WAS NOT REACHABLE BY A WRIT OF HABEAS CORPUS, BEING OUTSIDE THE SCOPE OF THAT WRIT.

In **Thompson v. Harris**, 107 Utah 99, 152 P.2d 91 (1944), this court, on rehearing, held that the scope

of habeas corpus was limited to the correction of jurisdictional errors and the determination of whether or not a petitioner had been deprived of constitutional rights, and that with the exception of these two areas, errors of the trial court must be corrected by appeal.

Appellant makes no contention that the trial court lacked jurisdiction, therefore, his petition must demonstrate denial of constitutional rights to come within the scope of the writ. This court in **Bryant v. Turner**, 20 Utah 2d 284, 431 P.2d 121 (1967) defined the function of the extraordinary writ of habeas corpus in stating:

We do not mean to say that the time honored writ of habeas corpus does not have a very important and useful purpose in our law. But that purpose is not to review a final judgment arrived at through regular proceedings and due process of law by a court having jurisdiction. The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other such circumstance exists that it would be wholly unconscionable not to re-examine the conviction. (431 P.2d at 122, 123)

The burden of showing error or prejudice is on the appellant who seeks to upset the conviction. **State v. Hamilton**, 18 Utah 2d 234, 419 P.2d 770 (1966), and he must show such grounds by evidence that is clear and convincing. **McGuffey v. Turner**, 18 Utah 2d 354, 423 P.2d 166 (1967). Appellant made no

contention that any prejudice resulted to him. The fact that no prejudice resulted from an alleged denial of constitutional rights has been held to justify dismissal or denial of habeas corpus petitions based on alleged denials of constitutional rights. **Gallegos v. Cox**, 341 F.2d 107 (10th Cir. 1965); **Armstrong v. Bannan**, 272 F.2d 577 (6th Cir. 1959); **Carson v. Haskins**, 2 Ohio 2d 324, 208 N.W.2d 742 (1965).

Appellant makes no claim that he was not represented adequately. The attorney who defended him was prepared for trial (T. 24). Respondent submits that it cannot be said that appellant was substantially or effectively denied due process of law or that any prejudice resulted to him.

It has been stated:

If the trial court had jurisdiction, it is only in extraordinary cases, where the circumstances surrounding the trial make it a sham and a pretense, that the writ will lie on the ground for want of due process of law even though it be alleged that the accused has been denied rights guaranteed by the Constitution.

Johnson v. Zerbst, 92 F.2d. 748 (C.C.A. Ga. 1937), cert. granted 303 U.S. 629, 58 Sup.Ct. 610, 82 L.Ed. 1089, rev. on other grounds 304 U.S. 458, 58 Sup. Ct. 1019, 82 L.Ed. 1461; See also, **State ex rel Dunlap v. Utecht**, 206 Minn. 41, 287 N.W. 229 (1939).

The respondent submits that the writ is discretionary and that unless it appears that the judge below clearly abused his discretion, that decision should not be overturned. **State v. Crank, et al**, 105 Utah 322, 142 P.2d 178 (1943).

CONCLUSION

Appellant's reliance on the **Penderville** case fails to take into account the factual distinctions between that decision and the instant case. The trial judge here correctly required counsel to proceed to trial in the matter. To do otherwise would have been to give substance to appellant's self-expressed fear of his inability to defend himself.

Further, this case represents another attempt by an appellant to take a belated appeal. The court below correctly found the issue presented not justiciable through habeas corpus.

Respectfully submitted,

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