1968

Willie Folkes v. John W. Turner, Warden Utah State Prison, et al. : Brief of Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

WILLIE FOLKES,

Plaintiff-Appellant,

vs. : Case No.

JOHN W. TURNER, Warden, Utah State Prison, et al., : 11270

Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from an order denying the petition for writ of habeas corpus in the Third District Court, Salt Lake County, Utah, the Honorable Joseph G. Jeppson presiding

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IN THE SUPREME COURT OF THE

STATE OF UTAH

LIE FOLKES, :

Plaintiff-Appellant, :

Case No.

s. :

11270

N W. TURNER, Warden, :
h State Prison, et al.,

:

Defendant-Respondent.

:

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Willie Folkes, appeals from an

er denying his petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

By order dated May 14, 1968, accompanied by Find-

s of Fact and Conclusions of Law, bearing the same

e, the trial court, Honorable Joseph G. Jeppson, ge, denied appellant's petition for a writ of eas corpus.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

The respondent State of Utah submits the follow- statement of facts as being more consistent with t the record reveals.

For the sake of clarity a distinction is made in following sequence of events between those facts wn specifically from the transcript of the hearing the subject case and those facts drawn from the re- nder of the record. The former will be marked "T", the latter "R".

On October 11, 1966, the appellant was released arole from the Utah State Prison (T.6). On or t April 3, 1967, while still on parole (T.7), appellant aided and abetted one Carol Ann Williams scape from the Utah State Mental Hospital at or it which time he was returned to and confined in Utah State Prison (T.8). The aforementioned aid- and abetting resulted shortly thereafter in the al and conviction of the appellant in Orem City rt, Utah (R.13).

Approximately three weeks following the appel- t's reconfinement, appellant's parole was formally oked (May 24, 1967) (T.9). Prior to said revoca- n appellant petitioned for a writ of habeas corpus the Fourth Judicial District. On July 25, 1967, lowing the hearing on said petition, the appellant ordered released and his Orem City Court conviction

lared a nullity on the grounds that the Orem City
:t lacked proper jurisdiction to try the case (R.13).

The appellant was thereafter properly tried on
lary 24, 1968, in the Fourth Judicial District on
aforementioned charge of aiding and abetting an
ape from the State Mental Hospital. The trial re-
ted in the conviction of appellant and an 80 day
son sentence. This sentence was suspended, however,
the appellant released since appellant had already
n imprisoned in excess of 80 days as a result of
voided Orem City conviction (R.12,13).

On or about January 25, 1968, approximately one
after the appellant's release, appellant allegedly
aulted and battered his wife, breaking her jaw (R.11;
1,12). On February 8, 1968, the appellant was re-
ned to the Utah State Prison, and on February 21,
8, appellant's parole was formally revoked by the

d of pardons (T.13). It is not clear from the rd to what degree this alleged assault and bat- was considered by the board, since the board gnized that there had been neither a trial nor a iction on the alleged assault and battery (R.11). was there an admission of guilt before the board he appellant (R.11). At the time of the board's ing, however, the appellant's conviction in the th Judicial District was specifically referred to grounds for revocation (R.11).

The appellant petitioned a second time for re- se on a writ of habeas corpus, on this occasion in Third Judicial District. Said petition was heard hout a jury on the 25th day of April, 1968, before Honorable Joseph G. Jeppson. The plaintiff ap- red in person and was represented by Robert Van Ver, Attorney at Law. The defendant, John W. Turner,

en, Utah State Prison, was represented by LeRoy S. nd, Assistant Attorney General. Pursuant to this ing, the appellant's petition was denied on May 1968 (R.14). An appeal from denial of the peti- was filed by appellant on May 20, 1968.

The remainder of the respondent's statement of s is in essence a summation of the transcript of trial court whose judgment is the object of this al. It is of necessity repetitive in part as to ters of testimony.

During the hearing of April 25, 1968, Mr. Axland, rney for the plaintiff, initially moved for dis- al on the grounds that there was at that time ding before the Utah Supreme Court, an appeal on aforementioned conviction of the appellant in the rth Judicial District (t.3). The court denied the ion to dismiss (T.5), presumably on the basis, as

:ed by the attorney for appellant, that "this peti-
ner for writ of Habeas Corpus does not seek to
iew the conviction, but seeks to review the hold
:h has been adjudicated through the Board of Pardons,
ilting in his confinement at the Utah State Prison."
3). The question remained before the court as to
ther or not the parole of appellant was properly
minated (T.5).

Mr. Lawrence Morris, Executive Secretary of the
h State Board of Pardons was thereupon called as
itness on behalf of the appellant. The witness
tified on direct examination, that "upon receipt
the parole violation report submitted by the Adult
bation and Parole Department, the Board issued a
rant ordering Mr. (Willie) Folkes returned to prison
for him to be scheduled at the next meeting of
Board for a parole violation." (T.8). The witness

r testified that "the Board reviewed the infor-
on they had; they revoked the parole of Mr. Folkes
. ." (T.9), the effective date of revocation being
24, 1967. The information referred to by the
ess and as submitted by the Adult Probation and
le Department was specifically the conviction of
llant in Orem City Court. The witness further
ified that following said hearing and revocation
arole the Board received an order dated July 25,
, signed by the Honorable Allen B. Sorenson, Judge,
th Judicial District ordering the release of the
llant, and that "based upon the fact the convic-
had been set aside, they (the board) reinstated
on parole. We heard nothing further from the mat-
until he was convicted in the Fourth Judicial Dis-
t Court on the charge." (T.9,10).

Upon further questioning by the attorney for

ntiff, Mr. Morris testified that "some time shortly
r to February 21, 1968, the Board was again advised
the Adult Probation and Parole Department (that)
Folkes had been convicted in Fourth Judicial Dis-
t Court, and that he was involved in the assault
is former wife on January 25, 1968. Based upon
information, the Board again issued a warrant
his return . . . ." (T.10) which was executed
ary 9, 1968. A second parole violation hearing
held on April 25, 1968. A photo copy of the trans-
ption of said parole violation hearing was entered
Plaintiff's exhibit # 1 (T.10, R.11). Pertinent
tions of this transcript were read into the record
the subject habeas corpus hearing, in particular,
statement of George Latimer, chairman and one of
three members of the Board. " . . . we have signed
this indicating your (appellant's) wife suffered

roken jaw, and whether you did it or not is some-
ng else. We have no conviction on that, so for
time being, we will consider the first one refer-
to the conviction (in the Fourth Judicial District)
the aiding and abetting question."

During further examination of Mr. Morris by the
orney for the plaintiff-appellant, Mr. Van Sciver
id:

Q. Now do you have an opinion of the reason why Mr. Folkes was revoked by the Board of Pardons, the second time?

A. Again, I would have to state my opinion was the board apparently construed the conviction as a serious enough violation to return him to the institution (T.12).

During the cross examination of Mr. Morris by Mr.
ng, it was established that Mr. Morris was an

inistrative officer, not a member of the Board of
ions and therefore had no "controlling voice in
outcome of a parole revocation hearing . . . ."
14).

Q. (Mr. Axland) So you do not know then, do you, what went through the minds of these voting member? (T.14).

A. (Mr. Morris) No, sir.

Mr. Lou Bertram, an agent with the Adult Pro-
ion and Parole Department, was called as the second
the two witnesses on behalf of the plaintiff-appel-
nt and testified that in this parole-parolee relation-
ip with the appellant he had on two separate occasions
uested that the appellant be brought before the
rd. In both instances the basis for his request
information of a criminal conviction of the appel-
nt. However, the testimony leaves some doubt as to

Bertram's precise information with regard to his and request to the board (T.17).

Q. (Mr. Van Sciver) . . . did you not request he be revoked later on the Orem City conviction, the first time?

A. I requested a warrant be issued and returned to the Utah State Prison for a parole violation hearing.

Q. . . . That was the basis of the initial request, was it not?

A. Yes.

Q. The action taken by the Orem City Court?

A. Yes.

Q. Was that not the same basis you made the request in the second?

A. Yes.

Respondent submits that since the power to re-
e a parole rests solely with the Board of Pardons
point of law to be discussed subsequently), and
t since from the record of the subject hearing the
rd recognized that the Orem City conviction had been
dified prior to its second hearing on appellant's
ole violation (see R.11), it then follows that Mr.
tram's answer as to the basis for the second re-
st (stated above) is irrelevant, if correct.

Both plaintiff-appellant and the State rested
ir cases at this juncture. The court thereupon
ied plaintiff-appellant's motion for relief under
writ of habeas corpus.

The trial court acknowledged the Orem City con-
tion as a nullity (R.13), but found as a conclu-
n of law that there had been no double jeopardy
sed as the result of the second trial and conviction

f January 24, 1968, in the Fourth Judicial District
R.13). The court further found that the conviction
f January 24, 1968, constituted a violation of plain-
iff-appellant's executed parole agreement, this
espite the fact that the conviction resulted in a
uspended sentence (R.13,14).

ARGUMENT

POINT I

THE BOARD OF PARDONS ACTED WITHIN THE SCOPE OF
S AUTHORITY IN REVOKING THE APPELLANT'S PAROLE.
TAH CODE ANN. § 77-62-17 (1953).

With regard to the historical development and
e of parole, attention is drawn to a leading article
the subject of the revocation of conditional libert
particular, to what protections, if any, circum-
ribe its revocation. Due Process and Revocation of
Conditional Liberty, 12 Wayne Law Review, 638-656

1966). In this article it is stated that of the three types of conditional releases, i.e., parole, probation and conditional pardon, the use of parole in the states as well as in the federal system has never existed without enabling legislation. People v. Bendoni, 263 Mich. 295, 248 N.W. 627 (1933). Nor is such legislation authorizing the grant of conditional liberty constitutionally compelled. Ughbanks v. Armstrong, 208 U.S. 481 (1908); People v. Bendoni, supra. Statutes providing for post-conviction parole procedures may be characterized as acts of grace by the state, Burns v. United States, 287 U.S. 216 (1932); Cole v. Stevens, 190 F. Supp. 938 (1960); Woodward v. Murdock, 124 Ind. 439, 24 N.E. 1047 (1890). Such statutes are typically phrased in broad discretionary language. 18 U.S.C. § 4203 (1948); Utah Code Ann. § 77-27-2 (1953). Moreover, the determination of

whether or not to grant conditional liberty is solely within the power of the appointed authorities, whose decision involves "a discretionary assessment . . . (of) what a man is and what he may become rather than simply what he has done." Kadish, The Advocate and the Expert - Counsel in the Peno - Correctional Proce 45 Minn. L. Rev. 813 (1961).

It appears that the appellant bases his appeal on an alleged denial of due process and equal protection of the law. Specifically:

1. It is alleged that appellant was twice punished for the same crime.

2. It is alleged that appellant was not advise of the right to have benefit of counsel during the revocation proceedings against him, nor was he represented by counsel at his hearing before the Board of Pardons.

3. It is alleged that appellant's parole unlawfully revoked in that said revocation lacked basis other than a mere whim of the Board of ions.

The respondent denies any violation of due pro- s or equal protection of the law in all matters levant to appellant's cause.

1. In answer to the matter of alleged double ardy, respondent refers to the first conclusion law as made and entered by the Third Judicial Dis- ct Court of trial, the Honorable Joseph G. Jeppsen siding. "That there has in fact been no double ardy raised against this petitioner in that the t proceeding in Orem City was declared on or about 25, 1967, by the Honorable Allen Sorenson, dis- t judge of the Fourth Judicial District, to be a ity." (R.3). Respondent asks that the trial court

sustained in its judgment on this issue.

2. In answer to the question of whether or not pellant has the right to be represented by counsel ring parole revocation proceedings or to what degree, any, there exists a duty of the Board so to advise pellant of such right, respondent against refers to Wayne Law Review 652-654 (1966) which specifically tresses this issue and its various treatment:

> . . . the states are further restricted by the equal protection clause. This constitutional right is significant in those states assigning different rights in revocation proceedings involving different types of conditional liberty. Inasmuch as the types of conditional liberty are different in name and derivation only, and have the same substantive characteristics, legislation allowing counsel in probation revocation hearings but not parole revocation hearings arguably would be a denial of equal protection to the parolee . . . .

There would appear to be no reason for a difference in the protection of the rights granted a parolee as distinguished from those granted a probationer. Without such reason, legislation establishing such dichotomy might be considered arbitrary and violative of equal protection.

The strongest case for the application of equal protection involves the indigent defendant. Most statutes allowing for counsel at revocation hearings limit such right to 'counsel of one's own choice', i.e., Mich. Comp. Laws § 791.240 (1948), Mich. Stat. Ann. § 28.2310 (1954). The equal protection argument has been dismissed on the theory that Gideon v. Wainwright, 372 U.S. 335 (1963) which established the right to appointed counsel at felony trials and Massiah v. United States, 377 U. S. 201 (1964) extending this right to all stages of the criminal proceedings, are inapplicable to revocation hearings, which are not criminal prosecutions. Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964). However, Chief Judge Sobeloff, in a concurring opinion, at 876, suggests that distinctions between indigents

and those with means is not warranted in view of Griffin v. Illinois, 351 U.S. 12 (1956). . . (the) argument that counsel must be provided to an indigent probationer or parolee is not based on a theory that a revocation hearing is a criminal prosecution. It merely rests on the proposition that where a statute provides for counsel of one's choice, a prisoner unable to hire private counsel has a right to have counsel appointed. Hoffman v. State, 404 P.2d 644 (Alaska 1965). In other words, the argument recognizes that a state need not make any provision for counsel at revocation hearings since Escoe v. Zerbst, 295 U.S. 490 (1935) obviates such requirement. However, if the state does make such provision it must apply to the indigent as well or constitute a denial of equal protection of the laws.

. . . In states granting a hearing but not detailing the incidental rights, the defendant is usually entitled to present witnesses, cross-examine adverse witnesses, and obtain the aid of counsel. States having no explicit statutory provisions

> referring to notice and hearing normally provide a hearing although it is often just an informal interview. Thus, irrespective of the lack of constitutional compulsion, most states provide those rights associated with procedural due process and considered fundamental to a deprivation of liberty.

Utah Code Ann. § 77-62-17 does not specifically
t a parolee right to a hearing prior to revoca-
of parole. "The Board of Pardons is empowered
erminate at any time, the parole of any offender."
V. Harris, 108 U. 407, 160 P.2d 721 (1945) states
principle that the Board has power to revoke parole
out affording prisoner any hearing. As a matter
rivilege but not right, Utah Code Ann. § 77-62-16
) states that the "board of pardons shall permit
ffender reimprisoned for parole violation to be
at its next regular meeting." Respondent submits

by not providing for the right to a hearing it lows that the State of Utah is effectively removed m any question of equal protection under the laws, ecifically with regard to the allegation of the pellant that he was unlawfully denied benefit of unsel at his parole revocation hearing.[1] Respondent ther submits that the laws of the State of Utah

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The subject appeal is factually and procedurally distinguished from Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254 (1967), wherein the petitioner was convicted of an offense upon a plea of guilty entered with the advise of court-appointed counsel and thereafter put on probation. Sentence was deferred according to Washington Law. Subsequently, at a hearing in which petitioner was not represented by counsel, the court revoked petitioner's probation and passed sentence. The Supreme Court of the State of Washington denied petition for writ of habeas corpus, but the Supreme Court of the United States reversed on writ of certiori, holding that in a case where an accused agreed to plea guilty, although he had a valid defense, because he was offered probation, absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal.

not place a duty on the Board of Pardons to
se the parolee of any right to counsel at his re-
ation hearing in that (1) the code of criminal pro-
ure is silent on the matter, and (2) as previously
ined, there exists no right, as such, to a revo-
ion hearing. Rose v. Haskins, 388 F.2d 91 (1968)
Circ.; Williams v. Patterson, 389 F.2d 374 (1968)
h Circ.; Gonzales v. Patterson, 370 F.2d 94 (1966)
h Circ.

3. In answer to the appellant's claim that his
ole was revoked at the whim of the Board of Pardons
therefore lacked any proper basis, the respondent
ects the courts attention once again to the tran-
pt of the trial court wherein two possible bases
said revocation are recorded. One is the alleged
ult and battery of the appellant's wife. The
d had at the time of appellant's revocation hearing

...ied records indicating (his) wife suffered a broken ... ." However, the Board apparently placed ...tle if any weight on this charge since they had ... no conviction on that." (T.12). As to the ...ond possible basis for revocation, specifically ...appellant's conviction dated January 24, 1968, in ...Fourth Judicial District Court, State of Utah, of ...crime of aiding and abetting an escape from the ...State Hospital (R.14), this is a matter of record ...as such is an irrefutable basis for revocation of ...ole. Furthermore, it is clear that at the time ...appellant's revocation hearing, the Board had ...cific knowledge of said conviction and put great ...ght upon it as grounds for appellant's parole re-...ation (R.11 - the transcript of said parole viola-... hearing). Respondent maintains that it is clear ... the record that the Board's consideration of

pellant's case and its subsequent decision to revoke pellant's parole were not arbitrary or in any sense manifestation of mere whim. Therefore, there was violation of due process by the Board of Pardons.

Indeed, an effective conditional liberty system imately depends upon fair treatment of the parolee, the threat of arbitrary revocation does not en- rage or aid the process of rehabilitation of the ditionally released prisoner. See Burns v. United tes, 287 U.S. 216 (1932); 65 Harv. L. Rev. 309 (1951) Wayne L. Rev. 650. The discretionary power of the rd is broad but not unlimited, and the reversal of evocation may be the result of its misuse. Swan v. e, 200 Md. 420, 90 A.2d 690 (1952); United States rel. De Lucie v. O'Donover, 82 F. Supp. 435 (N.D. . 1948), affirmed, 178 F.2d 876 (7th Cir. 1949), t. den., 340 U.S. 886 (1950). Examples of abuse

as would call for revocation are "suspicion of conduct not proven," United States v. Van Riper, F.2d 816 (2nd Cir. 1938) wherein it is stated although the state normally bears the burden of ving a violation, "no probation statute specifies degree of proof necessary to meet this burden." . L. Rev. 311, 332 (1959) as cited in 12 Wayne ev. 651. Normally, the evidence required to re- is that which satisfies the judge; proof beyond asonable doubt is not required. Manning v. United s, 161 F.2d 827 (5th Cir. 1947); Blaylock v. State pp. 880, 78 S.E.2d 537 (1953), cited in 12 L. Rev. 651. It is submitted that these limita- were not violated by the trial court, and that rectly found no whim or caprice by the Board of in its revocation of appellant's parole.

The Law of Utah makes it clear that the Board of

ions of the State of Utah is a constitutionally
ablished body, Utah Const. art. 7, § 12, with
clusive authority to remit fines and foreitures,
mute punishments, and grant pardons after convic-
ns . . . ." See also Cardico v. Davis, 91 U. 323,
P.2d 216 (1937). The statutes of this state grant
Board of Pardons broad discretionary powers to
ke paroles and reincarcerate parolees. "All
soners released on parole, pursuant to the pro-
ons hereof, shall remain in the legal custody and
e control of the chief adult parole and adult pro-
on officer, and shall be subject at any time to
retaken to the institution from which he was paroled
such time as his sentence is terminated. Full
e to retake and reimprison any convict upon parole
conferred upon the board of pardons, whose written
e certified by its secretary shall be sufficient

...nt for all officers authorized to make arrests, ...ther persons named therein, to return to actual ...ody any such prisoner." Utah Code Ann. § 77-62-16 ...3). This statute is essentially a restatement ...principle of law set out in McCoy v. Harris, 108 ...07, 160 P.2d 721 (1945) which states that "viola- ...of rules for the conduct of a paroled prisoner ...milar to a violation of rules within the prison ...constitutes an abuse of the privilege for which ...privilege may be withdrawn, and the rules confer ...gal right."

CONCLUSION

The respondent maintains that on the basis of ...acts of this case, the laws of this State, and ...ering continuum of the law of the United States, ...e can be little doubt that the Board of Pardons ...well within the scope of its authority in re- ...the parole of the appellant. The respondent

refore submits that the trial court's order deny-
appellant's petition for a writ of habeas corpus
uld be affirmed.

Respectfully submitted,

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