

1968

## Harold Sullivan v. Ohn W. Turner, Warden, Utah State Prison : Brief of Respondent

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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HAROLD SULLIVAN,

:

Plaintiff-Appellant,

:

-v-

:

Case No.

JOHN W. TURNER, Warden,  
Utah State Prison,

:

11363

:

Defendant-Respondent.

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
DISTRICT COURT, THE HONORABLE ALLEN B. SORESENSEN  
PRESIDING

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**FILED**

SEP 13 1968

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Clerk, Supreme Court, Utah

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Utah State Prison	:	
Defendant-Respondent.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF NATURE OF THE CASE

The appellant appeals from a denial of a petition for a writ of coram nobis by the District Court.

DISPOSITION IN THE LOWER COURT

The appellant petitioned for a writ of coram

nobis. The extraordinary writ was denied by the District Court.

## RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Fourth Judicial District Court, in and for Utah County, should be affirmed.

## STATEMENT OF FACTS

Appellant is presently serving a sentence at the State Penitentiary following a conviction for issuing a check against insufficient funds.

Subsequently appellant petitioned the District Court for a writ of habeas which was denied. Appellant is now appealing that denial to this court.

Appellant now appeals to this court from a decision in which he was denied a writ of coram nobis by the District Court.

## ARGUMENT

### POINT I

THE DISTRICT COURT DID NOT ERR IN REFUSING TO GRANT THE WRIT OF CORAM NOBIS AS A MATTER OF LAW.

In the case at bar, appellant in petitioning for a writ of coram nobis fails to show sufficient cause for issuance of the writ. Appellant fails to allege that the evidence is newly discovered and could not have previously been discovered by due diligence. Further there is no hint that the "evidence" would have prevented the rendition of the judgment. The petitioner, through the office of the writ of coram nobis, is attempting to retry the facts as they pertain to petitioner's guilt, after petitioner gave an uncoerced plea of guilty to the bad check charge.

Chief Justice Traynor, in *People v. Shipman*, 42 Cal. Rptr. 1, 397 P.2d 993 (1965), outlined the requirements that must be fulfilled in order for the extraordinary writ of coram nobis to be granted. They are as follows:

(1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." (Emphasis added) (Cases cited)

(2) Petitioner must also show that the "newly discovered evidence does not go to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." (Cases cited)

(3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ." (Emphasis added) (Cases cited) 397 P.2d at 995.

Clearly these are very strict requirements, the fulfilling of which is necessary, in order for the extraordinary writ to be granted. Justice Traynor pointed out that it would often be readily apparent from the petition and the court's own records that the petition for coram nobis was without merit and should be summarily denied.

The Utah Supreme Court has adopted this same general view. The writ of coram nobis is available in a proper case, Neal v. Beckstead, 3 Utah 2d 403, 285 P.2d 129 (1955); see also Butt v. Graham, 6 Utah 2d 133, 307 P.2d 892 (1957). In State v. Woodard, 108 Utah 390, 160 P.2d 432 (1945), the defendant was convicted of grand larceny on a plea of guilty. Defendant was accused of stealing certain rims, tires and a tube, the value of which was over \$50. He pleaded guilty and was sentenced by the court to an indeterminate term in the State Prison. While in prison he concluded that the true value of the goods which he had stolen was \$48.94, and was not in excess of \$50 as alleged by the complaint of the State.



defendant then petitioned for a writ of coram nobis which was subsequently denied. On appeal this court stated:

A writ of coram nobis, where available, seeks to obtain a review of a judgment on the ground that certain mistakes of fact have occurred which were unknown to the court and to the parties affected, and would not have been rendered. (citations omitted) However, for a party to be entitled to this writ it must appear that the failure to present the facts to the court was not due to any negligence or fault of the party seeking the writ. (Emphasis added) 108 Utah at 391.

This court determined that the true value could have been discovered with very little effort on the part of the defendant, and inasmuch as the defendant did not exert the necessary effort to acquire the information he was clearly negligent and therefore the lower court did not err in refusing to grant the writ.

Appellant alleges that the reason he withdrew his plea of not guilty by reason of insanity was, he was not aware of the use of or meaning of, "over-draft credit." This is incredible in view of the frequency in which he allegedly used his claimed over-draft credit. Appellant's Brief at 3, 4, 5) Who would better know of the appellant's claimed over-draft credit than the appellant himself!

It seems to respondent that the reason appellant withdrew his plea of not guilty by reason of insanity, was in light of the doctors findings, i.e., that appellant was mentally competent. The judge as well as the appellant's attorney were well aware of the doctors findings and the defense was severely weakened by the findings of mental competency.

Petitioner would have us reopen and retry his case on grounds that he allegedly has evidence which might bring a different result with reference to his conviction. It seems very clear that appellant was aware of these additional facts or at least could have made himself aware of them with very little effort. Appellant did not exercise due diligence, nor the necessary effort, and is therefore clearly negligent. The requirements for the writ have not been satisfied and the lower courts denial should be affirmed.

## POINT II

APPELLATE COURT MAY NOT CONSIDER THE ALLEGED FACTS OF APPELLANT, CONCERNING BANK RECORDS, INASMUCH AS THEY ARE NOT PROPERLY PART OF THE RECORD.

It is well established in this jurisdiction,

as well as others throughout the United States, that the appellate court looks to the record only. It can consider only matters properly a part of the record. The general rule has been adopted by this court. In State v. Cooper, 114 Utah 531, 201 P.2d 764 (1949), appellant was convicted of indecent assault. The contention that the trial court erred, was disposed of by this court, in the following language:

Defendant also asserts that the trial court erred in denying a motion for new trial on the grounds that the prosecuting attorney, in his argument to the jury, made improper and prejudicial statements. The arguments to the jury by counsel are not preserved in the record, and hence we cannot say that the trial court abused its discretion in denying a motion for new trial on this ground. In the recent case of Schlatter v. McCarthy, 113 Utah 543, 196 P.2d 968, 975, we said:

"Since the arguments of counsel were not preserved in the record, we are hardly in a position to say that the argument of plaintiffs' counsel to the jury was improper, and grounds for reversal.' Error will not be presumed, nor can we presume misconduct on the part of counsel.

. . . There is nothing in the record before us on which this court could hold counsel guilty of improper conduct." 114 Utah at 544.

This court re-affirmed this rule most recently

in State v. Rogers, 21 Utah 2d \_\_\_\_, \_\_\_\_, P.2d \_\_\_\_  
No. 10850, (July 17, 1968).

Respondent further submits that there is a presumption of regularity as to the proceedings and decisions of the lower court. The general law is stated in 24A C.J.S., Criminal Law, § 1849, as follows:

As a general rule, the appellate court, in the absence of a showing in the record to the contrary, will indulge all reasonable, fair, or legitimate presumptions in favor of the correctness or validity of the judgment, rulings, findings, or decisions of the trial court, and will presume that the proceedings had in the progress of that cause were regular, legal and free from error. Likewise, the presumption is indulged, on appeal, that accused was accorded a fair or impartial trial and that official duty was performed, or was regularly, or lawfully, performed. The record must be viewed in the light most favorable to the courts rulings' after an accused has been convicted on a plea of guilty or after trial, the people are not required to assume the burden again of establishing that what was done was regular, in the absence of evidence to the contrary.

After conviction, all intendments are in favor of the people, of upholding the judgment of the trial court, and of the regularity of the action and proceedings of the court below. All permissible inferences must be made in favor of the prosecution.

In the case at bar appellant, in his brief appealing from a denial for a writ of coram nobis, cites at length, bank records which allegedly show that he had an understanding with the bank to pay his over-draft checks. These bank records, however, are not part of the official record. Inasmuch as the appellate court is to consider only matters properly a part of the record, and the bank records are not a part of the record, they may not be considered on appeal.

#### CONCLUSION

Respondent submits that it is readily apparent from the petition, and the court's own records, that the petition for coram nobis is without merit and the relief sought by appellant here should be summarily denied.

Respectfully submitted,

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