1965

Anastacio Gallegos and Juan Rellis Gallegos v. John W. Turner, Warden Utah State Prison : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

ANASTACIO GALLEGOS and
JUAN RELLIS GALLEGOS

Appellants,

VS.

JOHN W. TURNER, WARDEN
Utah State Prison

Respondent.

BRIEF OF

Appeal from
Third District
of Utah -
No. 15633.

PHIL L. HANSEN
Attorney General
State Capitol
Salt Lake City,

Attorney for

TABLE OF CONTENTS

POINT I.

THE LOWER COURT ERRED IN DECISIONS OF LAW AND FACT ARISING DURING THE HEARING OF APPELLANTS PETITION FOR HABEAS CORPUS, AND THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE LOWER COURT; NOR WAS THE FACT-FINDING PROCEDURE EMPLOYED BY THE LOWER COURT [illegible] TO AFFORD A FULL AND FAIR HEARIN

AUTHORITIES CITED

(Authorities cited - cont.)

IN THE SUPREME COURT

OF THE STATE OF UTAH

ANASTACIO GALLEGOS and
JUAN DALLIS GALLEGOS,

Appellants,

vs.

CASE NO.

156534

JOHN M. TURNER, Warden,
Utah State Prison,

Respondant.

BRIEF OF APPELLANTS

Appeal from the Judgement of the Third District Court for Salt Lake County, State of Utah - Hon. Joseph G. Jeppson, Judge. Civil No. 156534.

STATEMENT OF THE CASE

April 19, 1965, Appellants petitioned the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, for the Writ of Habeas Corpus. (See Writ, Civil No. 156534.)

DISPOSITION IN LOWER COURT

Civil No. 156534 came on for hearing the 4th day of June, 1965, and said court having heard both plaintiffs and defendant, denied petition for habeas corpus at the hearing,(R-44).

RELIEF SOUGHT ON APPEAL

Appellants seeks to reverse order of lower court denying writ of Habeas Corpus and discharge from custody of Respondant.

PRELIMINARY STATEMENT

Reference in Appellants' Brief to the Transcript of proceedings on hearing Appellant's Petition for Habeas Corpus will be designated by the letters "TR" and the Record by the letter "R". Reference to the Transcript of the original trial will be designated as such.

STATEMENT OF KIND OF CASE

Parties will be referred to as they stand on appeal. Appellants were convicted of Murder-In-The-Second-Degree by Jury in the Third Judicial District Court of Salt Lake County, Utah on or about the 10th day of December, 1963. On the 9th day of November, 1964, their conviction was affirmed by this Court. (State vs. Gallegos, 103 P.2d 414.)

On the 16th day of February, 1965, a "Motion To Vacate Sentence And Judgement and Motion For New Trial in the Nature of Coram Nobis" was filed in the Third Judicial District Court of Salt Lake County. On the 16th day of February, 1965, Motions were by the Honorable Ray Van Cott, Jr., Judge, denied without hearing.

On the 22nd day of March, 1965, a petition for a writ of Habeas Corpus was filed in the United States District Court for the District of Utah. On the 13th day of April, 1965, petition was by the Honorable Willis W. Ritter, Chief Judge, denied, on the grounds the appellants' State remedies had not been exhausted.

On the 19th day of April, 1965, a petition for Habeas Corpus was filed in the District Court of Salt Lake County, Utah, and a hearing date was set for the 4th day of June, 1965, and said court having heard both Appellants and Respondant, denied petition for habeas corpus at the hearing. (R-4)

On the 9th day of June, 1965, this Appeal was initiated to this court for a review of the District Courts' procedure in hearing and denial of appellants' petition for Habeas Corpus, Civil No.156534.

STATEMENT OF POINTS

POINT I.

THE LOWER COURT ERRED IN DECISIONS OF LAW AND FACT ARISING DURING THE HEARING OF APPELLANTS' PETITION FOR HABEAS CORPUS, AND THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE LOWER COURT; NOR WAS THE FACT-FINDING PROCEDURE EMPLOYED BY THE LOWER COURT ADEQUATE TO AFFORD A FULL AND FAIR HEARING.

ARGUMENT OF POINTS

POINT I.

The lower court erred in decisions of law and fact arising during the hearing of appellants petition for habeas corpus, and the merits of the factual dispute were not resolved in the lower court; nor was the fact-finding procedure employed by the lower court adequate to afford a full and fair hearing, and the lower court by its very own statement ruled that State's witness, Mike Donnelone, perjured himself (TR-38) but that perjury was not a crime. The lower court erroneously ruled, in effect, that even though two lives may very well be at stake, that all a perjurer is required to say is that: "He is now telling the truth, it is no (sic) harm done." (TR-38) The United States Supreme Court says different, the law says differnt. The United States Supreme Court says: (Mesarosh vs. United State 77 S. Ct. 1.) "A lie is a lie, no matter what its subject." And that: "If a witness lies one time, under oath, he is no longer worthy of being believed.

The American concept of due process most certainly encompasses the right of an accu to be confronted by trustworthy witnesses and the right to show, if he can, that witnesses against him

may not be worthy of belief. Due process most certainly also encompasses the concept that the state will not seek to conceal material evidence in the accused favor. If due process of law does not encompass such concepts, then we have most assuredly departed a long way from the very foundation upon which our system of justice rests--the ideal that every man is presumed innocent until proven guilty beyond a reasonable doubt. In the words of Mr. Justice Holmes, Olmstead vs. United States, 277 U.S. 438, 58 S. Ct. 564, 72 L. Ed. 944:

> "It is better that one criminal escape than that the government play an ignoble part."

In Massrosh v. United States, 77 S. Ct. 1; 77 S. Ct. 2,3, the government moved to remand a case to the Trial Court because of untruthful testimony given before other tribunals by Mazzei, a government witness. although contending that the testimony given in the instant case by Mazzei was "entirely truthful and credible." The government sought to have the matter remanded to the District Court for a full consideration of the credibility of the testimony of the witness Mazzei. The countermotion of petitioner's asked for a new trial. In reviewing the judgement below with direction to grant the petitioners a new trial, Mr. Chief Justice Warren, speaking for the court had this to say, (77 S.Ct. 8):

> "Mazzei, by his testomony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity...."

MIKE DON HOOPIIANA was the sole eye witness to testify in the instant case. The testimony of Mr. Hoopiiana may well have been involved honestly by an unreliable imagination working together unconsciously with a dazed and distorted memory anesthetized by alcohol. But it was false.

In petition for habeas corpus in the lower court, appellants alleged (R-2): "That the prosecuting officer knowingly employed false testimony during the trial of petitioners, to obtain conviction."

In Mesarosh v. United States, supra, Mr. Chief Justice Warren had this to say:

> "Dignity of the United States Government will not permit conviction of any person on tainted testimony."

In State v. Brooks, 101 Utah 584, 126 P. 2nd 1044, this court stated:

> "While District Attorney is obligated to prosecute persons brought to trial for crimes with vigor and earnestness, he owes defendant duty to be fair in conduct of trial." (Emp. added)

In Webb v. State, Okla. Cr., 311 P. 2d 819, that court stated:

> "We cannot understand why prosecuting attorney will insist on heedlessly and needlessly injecting errors of this kind into a trial. The only way we can put an end to this evil is to set aside verdicts where such practices are resorted to under circumstances calculated to injure a defendant. If this kind of practice is tolerated, the doctrine of harmless error would become a rank injustice." (See also Bingham v. State, 44 Okla. Cr. 258, 280 P. 636.

On hearing of petition in the lower court appellants sought to have a subpoena served on Mr. Jay E. Banks, District Attorney,(Tr-21). At the time of hearing, appellants had reason to believe that Mr. Banks was somewhere in the City and County Building and, upon being informed by the Clerk of the Court, (TR-23) that Mr. Banks was not in his Office, appellants made a motion for a short recess for the purpose of locating Mr. Banks; (TR-36). Appellants argued in the lower court that a cross-examinatio of Mr. Banks would show that he knew at the time of appellants trial, that his witness, Mike Dem Keopiian was lying in his testimony during the trial,(TR-34). The lower Court erroneously chose to answer for Mr. Banks, (TR-34) by its statement to the effect that: "He would not remember that". The lower court's procedure amounts to a denial of due process of law, (TR-33,34, 35, 36.)

Under Constitution of State of Utah and Constitution of the United States, appellants have the guarantee of compulsory process to compel the attendance of witness in their behalf. The lower court erroneously denied appellants motion for a short recess, for the purpose of locating Mr. Banks whom petition for habeas corpus alleged that Mr. Banks as State Prosecutor knowingly used perjured testimony to convict appellants. The record is clear in indicating that there is ample evidence and law to support appellants allegation that the prosecuter knowingly used perjured testimony.

The lower court in denying appellants a chance to locate Mr. Jay E. Banks, (TR-34,35,36), denied appellants their Constitutional Right to have witnesses testify in their behalf. The testimony of Mr. Banks would have shown, as a matter of fact, that he knowingly used false testimony during the trial of appellants. The Trial Transcript shows that the testimony of Mike Don Hoopiiana was perjured. Mr. Hoopiiana sought to explain the overt discrepeancies in his testimony under oath by stating that he was "drunk", that he had consumed a "fifth of bourbon" during the evening in question, (Trial Transcript-191).

It is well established that a conviction obtained through false evidence, including false testimony, known to be such by representatives of the State must fall under the 14th Amendment. Mooney v. Holohan, 294 U.S. 103. (See excerpts from testimony of State's witness, Mike Don Hoopiiana, E-2,3,4).

Briefly reviewing the pertinent testimony of Mr. Hoopiiana, we find that, when closely scrutinized, it shows prevarication and, a lie is a lie, no matter what it's subject. And if it is in any way revelant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. People v. Shaffer, 309 P. 2d 475:

> "Where case is closely balanced and guilt has not been so clearly established as to render it improbable that harmful effect of misconduct may have turned scales against accused, misconduct is ground for reversal."

The lower Court's ruling in regards to the discrepancies in the testimony of Mike Don Hoopiiana, during the trial, and preliminary hearing, to the effect that such discrepancies were for the JURY (TR-34,35) IS A RULING IN EFFECT THAT THE allegations contained in appellants' petition for writ of habeas corpus were true. Said allegations being that the District Attorney knowingly used false testimony, and further, the lower court ruled in effect: "that nothing could be done about it now, that it was for the jury to determine, (TR-34).

In the instant case the Trial Court had the duty to reject such perjured testimony, not the jury. In Durley v. Mayo, 76 S. Ct. 806, it was stated:

> "It is well settled that to obtain a conviction by the use of testimony known by the prosecution to be perjured offends due process. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 Pyle v. State of Kansas, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214."

In Huffman v. Alexander, 253 F. 2d 289; and the great arrany of cases cited therein:

> "The appropriate writ to secure relief from a judgement of conviction by the use of perjured testimony known by the prosecution to be false is Habeas Corpus."

The lower court in the instant case refused to allow a short recess, (TR-36), in violation of Appellants' State and Federal Constitutional Rights

Walker Mining Co. v. Industrial Accident Commission, 95 P. 2d 183:

> "The authority of courts and judicial tribunals to compel the attendance of witnesses necessary to a just determination of proper issues is necessarily incident to the power to adjudicate a cause."

and:

> "The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim."

For this court to affirm the lower courts denial of appellants petition for habeas corpus would be to say, in effect, that a judge of the District Court of Salt Lake County, Utah, has the power to overrule the United States Supreme Court.

It is extremely obvious, in view of the testimony given by Mr. Frank Earl Kilpack, (TR-28, 29, 32) that not only did Mr. Kilpack, along with Mr. Blaine Wilcox, (TR-23,27), act in violation of appellants constitutional rights, but that the entire Trial Jury in the case at bar exceed their trial purposes, and violate their oath to render a verdict according to the evidence, by ASSUMING the guilt of appellants, and, (TR-29,32), by discussing appellants' failure to testify in their own behalf. In the case of Glenn v. State, 229 S.W. 521, 89 Tex.Cr. 13:

> "The Appellant Court must also reverse a conviction on such grounds as... discussion by the jurors, during their deliberation, of accused's failure to testify...uncertainty as to the bases of the verdict."

Before the trial convenes the jurors take the following oath:

> "You and each of you swear that you will fair and truly try the matter in issue and a true verdict render, (according to the evidence), and instructions of the Court."

The jury foreman, Mr. Blaine Wilcox, (Tr-21-27), and jury member, Mr. Frank Karl Kilpack, (Tr-28-32), failed to comply with the oath which they took as jurors to render a verdict according to the evidence. Ill.--People v. Fisher, 172 N. E., 745:

> "To set aside verdict on account of conduct of jury, it must be shown that defendants were prejudiced."

Both Mr. Wilcox, and Mr. Kilpack, jurors made the following statement:

> "Although as a juror I was instructed that their not testifying in their own behalf did not mean innocence or guilt, I am sure that because they did not testify and their lawyer did not attempt at any time to establish their whereabouts, did make me ASSUME that the testimony given by the witness was correct." (TR-28).

In Slochower v. Board of Higher Ed. of City of New York, 76 S. Ct. 637, that court held:

> "No sinister meaning should be imputed to one's exercise of his constitutional right, under the Fifth Amendment, to testify, and such refusal is not to be taken as equivalent to confession of guilt or conclusive presumption of perjury."

Foster v. Foster, 234 P.2d 413:

"Verdict of jury may be based upon reasonable inference from established facts, but may not be based upon inference drawn from other inferences."

For this court to affirm the lower courts decision would be holding that the oath is a meaningless ritual to be dispensed with if expedient to uphold a conviction. This court has held otherwise. (Spangler v. District Court of Salt Lake County, 140 P.2d 755). Failure to give the oath is prejudicial; an admitted disregard of that same oath could be no less.

In People v. Albertson, 145, P. 2d 7, at 8 and 9, it has been held, that:

"*** Since a conviction must be supported by something more substantial than silence, it is essential that the jury be instructed as to the limitations upon the consideration that it may give a defendant's failure to testify."

In 2 R.C.L. Criminal Law, Section 194 - Page(s) 339, 340:

"Conversely, a judgement must be reversed for an error, defect, or omission which is not technical but which denies or effects the substantial rights of accused or results in a miscarriage of justice, as in the case of denial, deprivation or violation, of a constitutional or statutory right.
"Before conviction may be sustained, (State v. Holden, 35 P.2d 703, 88 Ariz. 43.) it is necessary that the constitutional and statutory provisions which outline the procedure to be followed must be complied with and guilt is not established in accordance with law if

> accused has been denied any of the rights guaranteed to him by the Constitution and Statutes of the state.
>
> "and this is said to be the rule even though the evidence may legally support the judgment, or the court, on reviewing the evidence, is satisfied with the verdict. If the court cannot say that the judgment was not substantially swayed by error, it must conclude that substantial rights were affected, and that error was not harmless. One prejudicial error clearly presented may be enough to accomplish reversal of a conviction by the appellant court."

and: In O'Neil v. Alabama, 207 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527:

> "When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law."

In appellants petition for habeas corpus, (R-4) it was called to the attention of the lower court that the testimony of one of the state's witnesses was the direct fruitage of coerced perjury.

In Mesarosh v. United States, supra, a case wherein "Mazzei" had testified before another tribunal, Mr. Chief Justice Warren, speaking for the court, said: "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity...." In the instant case, we have an identical set of circumstances. In the case at Bar Mr. Richard Martinez testified during appellants' tri

on the 2nd and 3rd days of December, 1963, that he would "tell the truth, the whole truth, and nothing but the truth, so help me God."

On the 13 day of April, 1965, Mr. Martinez gave testimony by statement, subscribed and sworn to, wherein he declared that he has been coerced to the effect that if he did not "cooperate" in the prosecution of appellants that there would be "trouble".(See petition for writ of Habeas corpus, A-4).

Mr. Martinez testified under oath that he was at the Annex Bar on the night in question.

Mr. Martinez now declares that he was coerced into testifying as he did.

The question before this Court, as was in Wesbrook v. United States, supra, is not which of the statements to believe, but instead, the question at Bar is: Do we clean this reservoir by draining it of all impurity? Or do we allow judgment to be based on "Tainted Testimony"?

In view of recent opinions handed down by the United States Supreme Court, the lower court properly disallowed the statement of Mr. Martinez into the evidence, but, the lower court did erroneously deny Habeas Corpus, in view of the law and facts set out in appellants petition habeas corpus, or in view of the tainted testimony in the premises.

Cal.--People v. Shannon, 305 P. 2d 101:

> "Witness who is wilfully false in one material part of his testimony, is to be distrusted in others...."

The merits of the factual dispute were not resolved in the lower court. Appellants, by their silence, precluded and prohibted the prosecuting offic from introducing or presenting to the jury before whic they were on trial for their very lives, by impeachment or otherwise, any evidence of other and distinct offenses, and failure of the trial court to protect th substantial and constitutional right to a fair and impartial trial denied appellants due process of law and the equal protection of the laws guaranteed them by the Constitution of the United States, AmendmentXIV Section 1, and the Constitution of the State of Utah, Article 1, Section 7; Article 1, Section3.

CONCLUSION

In the instant case, due process of law and the equal protection of the laws means that which the law provides. It is appellants' contention that the judgement of the lower court denying their petition for the Writ of habeas corpus should be reversed and appellants be ordered discharged from custody.

Respectfully submitted,

Anastacio Gallegos

Juan Rellis Gallegos

Appellants
Prop. Per.
Utah State Prison
Box 250
Draper, Utah