1965

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

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.

Case No. 10417

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County, State of Utah, Hon. Joseph G. Jeppson, Judge

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STATEMENT OF THE KIND OF CASE

The appellants, Anastacio Gallegos and Juan Rellis Gallegos, appeal from a decision of the Third Judicial District Court denying their release upon Petition for Writ of Habeas Corpus.

DISPOSITION IN LOWER COURT

On April 20, 1965, Anastacio and Juan Rellis Gallegos filed a Petition for Writ of Habeas Corpus

in the District Court for Salt Lake County attacking their conviction for the crime of Second Degree Murder. An answer to the petition was filed by the State on the 12th day of May, 1965, and on June 4, 1965, the matter came on for hearing before the Honorable Joseph Jeppson, Judge, who dismissed the petition, finding it without merit.

RELIEF SOUGHT ON APPEAL

The respondent submits the decision of the trial court denying relief by habeas corpus should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts. The appellants filed a petition for writ of habeas corpus, alleging that the prosecution knowingly used perjured testimony and that the jury failed to follow the court's instructions that no inference of guilt should be drawn from the mere fact that appellants failed to testify in their own behalf (R. 2). An answer to the petition was filed denying the allegations (R. 9). At the time of hearing, two witnesses were called on behalf of the appellants, both of them testifying on the issue of whether the jury followed the court's instructions relating to the failure of the appellants to testify in their own behalf (R. 24 through 27, 29 through 31). Both jurors testified that they did follow

the court's instructions and drew no inference of the appellants' guilt from the fact that they failed to testify but, as a result of the appellants' failure to testify, the evidence against them was unrebutted, which caused them to return a verdict of guilty.

The appellants before this court have raised no issue relating to the question presented in the trial court as to whether the jury properly followed the court's instructions relating to the failure of the appellants to testify in their own behalf.

The only issue remaining on appeal is the question of whether the prosecution knowingly used perjured testimony. (See Appellant's Brief.) The transcript of trial was received in the trial court as was the transcript of the preliminary hearing had at the time of appellants' original trial (R. 33). The nature of the claim of alleged knowing use of perjured evidence by the prosecution does not clearly appear of record. Appellants' counsel below alleged that there were inconsistencies between the testimony of the principal State's witnesses at the time of preliminary hearing and at the time of trial (R. 34). No evidence was offered to show that the testimony given by the principal State's witness, Mike Hoopiiana, was in fact false or false in any material aspect. Appellants' counsel below made a proffer as to the prosecution's knowledge, claiming that the district attorney would have been familiar with the preliminary hearing transcript and, consequently, would have been aware of any deviation in the testimony of

the State's witnesses from what appeared at the time of the preliminary hearing. Based upon that record, the trial court found no knowing use of perjured testimony and dismissed the petition for habeas corpus.

ARGUMENT

POINT I

THE RECORD IS VOID OF ANY EVIDENCE SHOWING A KNOWING USE OF PERJURED TESTIMONY.

The trial court had before it the transcript of the preliminary hearing and the transcript of the original trial of the appellants. These records are not part of the record on appeal in the instant case. Consequently, the trial court was better able to determine whether the claimed inconsistent statements actually warranted relief by habeas corpus. The facts that appear in the instant record are only that there was a variance in the testimony of one witness from the time of the preliminary hearing and the time of trial. This court has previously reviewed the record in this case and found the evidence sufficient as against the alleged claims for reversal on appeal. *State v. Gallegos,* 16 U.2d 102, 396 P.2d 414 (1964).

Nowhere in the record does it appear that the evidence actually given at the time of trial was in fact false. In 70 C.J.S., *Perjury,* Section 46, it is stated:

> "It has been held or stated that where perjury is based on contradictory oaths it is essential to show which is true and which is false."

In *State v. Lowe,* 60 Ida. 98, 88 P.2d 502 (1939), the Idaho Supreme Court, Chief Justice Ailshie concurring, noted:

> "It has been stated by very high authority that: 'If the pleader sets out contradictory oaths, it is also essential to show which is true and which is false.' Hilliard v. United States, 5 Cir., 24 F.2d 99, 100; 3 Bishop, New Cr. Proc., sec. 918."

Generally, proof of falsity of an item testified to is essential to show that a statement given was perjured. *State v. Anderson,* 35 Utah 496, 101 Pac. 385 (1909). Nor does every statement which is inconsistent or partially false constitute perjury. In *Marrs v. People,* 135 Colo. 458, 312 P.2d 505 (1957), the court noted that the elements of perjury to be proven are falsity of the statement, its materiality to the issue, and the admission of the oath. The record in the instant case is materially deficient in showing that there was any perjury. The record does not disclose wherein the alleged testimony was false nor show that it was material rather than an insubstantial variance in the testimony.

This court observed in *State v. Hawkins,* 81 Utah 16, 16 P.2d 713 (1932), that evidence merely inconsistent with previous evidence would not justify a new trial. See also *Jeter v. Commonwealth,* 268 Ky. 285, 104 S.W.2d 979; 24 C.J.S., *Criminal Law,* Sec. 1460.

In *Ward v. Turner*, 12 U.2d 310, 366 P.2d 72 (1961), this court reversed release on habeas corpus on the basis of knowing use of perjured testimony in a case substantially stronger than the instant case. This court observed:

> " * * * In order to justify a release of a convicted person under a writ of habeas corpus or coram nobis, or other special writ, the evidence of his innocence must be stronger than would be necessary in the first instance in support of a motion for a new trial, for such special writs are applied for after the defendant's conviction has been affirmed or denied on appeal, and in a sense they invade the usual rules for the finality of judgments."

Additionally, it should be noted that there is not one scrap of evidenice in the record to show that the prosecuting attorney had knowledge of the falsity in fact of any part of the alleged inconsistent testimony. This is an essential to the appellants' case. Further, since the instant case was a homicide case and a transcript of the testimony given at preliminary hearing was available to the defendants (Section 77-15-14, Utah Code Annotated, 1953), the appellants, through their counsel, had full opportunity to point out to the jury any alleged inconsistency. At the time of trial, the appellants' counsel did in fact point out a variance between an unsworn statement given by the principal witness to the police and a subsequent testimony at the time of trial. (See Case No. 10109, Brief of Respondent, pages 4 through 6.) Certainly, under these circum-

stances, there is no basis for extraordinary relief at this time.

In order to justify release on habeas corpus, it must be shown by clear and convincing evidence that there was the knowing, wilful, and intentional use of perjured testimony for the purposes of securing a conviction. *Butt v. Graham,* 6 U.2d 133, 307 P.2d 892 (1957); *Story v. Burford,* 78 F.2d 911 (10th Cir. 1949); Ex Parte Mooney, 10 Cal.2d 1, 73 P.2d 1955 (1936); *Mooney v. Halohan* ,294 U.S. 103 (1935); *Napue v. Illinois,* 360 U.S. 264 (1959); *Alcorta v. Texas,* 355 U.S. 28 (1957); 60 Columbia Law Review 858; 5 Utah Law Review 92. This has not been shown.

The appellants' contention that somehow the proceedings below did not afford them a fair forum in which to present their petition is equally without merit. Appellants' counsel called witnesses who testified to appellants' theory of the case. The fact that the court did not allow a continuance to obtain the testimony of the district attorney is meritless since the court considered the appellants' proffer of proof as being a fact and found it wanting. Further, the question of a continuance rests in the sound discretion of the trial court. *State v. Mathis,* 7 U.2d 100, 319 P.2d 134 (1957). Under the circumstances of this case, it is apparent that it cannot be said that there is any merit for the extraordinary writ of habeas corpus. *Ward v. Turner,* supra.

CONCLUSION

The appellants were given a full and fair trial at the time of the original charges in the instant case, afforded appellate review and an opportunity to present in an extraordinary proceeding evidence which would justify a determination of their innocence, the granting of a new trial, or relief by habeas corpus. In each instance, they have failed. In the instant appeal, it is patently obvious that the appellants' claim is wholly unmeritorious.

Rsepectfully submitted,

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