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Virgil L. Wood v. John W. Turner, Warden : Brief of Appellant

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In the Supreme Court of the State of Utah

VIRGIL L. WOOD,

Plaintiff-Appellant,

- vs -

JOHN W. TURNER, Warden,

Defendant-Respondent.

Case No.
10471

UNIVERSITY OF UTAH

BRIEF OF APPELLANT

MAR 31 1967

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Appeal from the Judgment of the Third Judicial District
Court for Salt Lake County, Hon. A. H. Ellett, Judge

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VIRGIL L. WOOD,

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JOHN W. TURNER, Warden,

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Case No.
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BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

The appellant brought a petition in the Third Judicial District Court for a writ of habeas corpus against the warden of the Utah State Prison, alledging the illegality of his confinement on a commitment which was based on a conviction for robbery obtained against petitioner without due process of law.

DISPOSITION IN LOWER COURT

The Honorable A. H. Ellett, District Judge, dismissed the petition without a hearing on the merits.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the trial court's ruling and a remand of the case to the trial court for a hearing on the merits.

STATEMENT OF FACTS

Appellant is currently serving two separate sentences, based upon two separate convictions for robbery, in the Utah State Prison. On September 9, 1965, appellant filed a petition for a writ of habeas corpus (R-1-10), in the Third Judicial District Court, which alleged the illegality of the commitment on one of the robbery convictions on the ground that he was denied due process of law as guaranteed by various provisions of state and federal constitutions.

The matter came up for hearing before the district court on September 30, 1966. The petition was dismissed without a hearing on the merits. The court stated as its conclusion of law:

That the petitioner's request for a writ of habeas corpus is premature and as long as the petitioner is serving a valid sentence, the court will not entertain an additional petition for Habeas Corpus by the court. (R-27)

ARGUMENT

POINT I

APPELLANT WAS ENTITLED TO A HEARING ON THE MERITS OF THE ALLEGATIONS CONTAINED IN HIS PETITION FOR HABEAS CORPUS DESPITE THE EXISTENCE OF ANOTHER, UNCONTESTED, OUTSTANDING SENTENCE.

The basic question presented by this case has been presented to this court twice before with opposite results. The earlier of the two cases, *Connors v. Pratt*, 38 Utah 258, 112 Pac. 399 (1910), involved a constitutional attack upon a life sentence based on a murder conviction where the petitioner was also held on a conviction and sentence for burglary which the petitioner conceded was valid. The respondent warden claimed that habeas corpus would not lie until the ten years for burglary had been served since the petitioner would not be entitled to immediate release until then even if his claims were valid. The court discussed the problem at length and rejected respondent's argument, citing numerous authorities and pointing out that: 1) The Utah statutes obviously contemplated that a court had more alternatives than denying the petition or outright immediate release; 2) the petitioner's liberty and rights were presently affected by the murder conviction since it precluded his chances for reduction of sentence by the parole authorities; and 3)

the interests of justice would be best served in the event of re-prosecution by avoiding unnecessary delay. The court therefore held that where a petitioner is held on two charges and concedes the legality of one, he may, none-the-less, attack the other by way of habeas corpus, and, if successful, be remanded to serve the remainder of the valid sentence and conditionally discharged on the other pending reprosecution, if any.

The same basic problem was presented to the court again in *Wilkinson v. Harris*, 109 Utah 76, 163 P. 2d 1022 (1945). In that case petitioner, arguing pro se, contended that it was unlawful to sentence him for both burglary and grand larceny on convictions on a single information. He did not contest the trial or convictions. The court held, in a *per curiam* opinion, which did not mention the *Connors* case, that the petitioner was not entitled to immediate discharge since he had not completely served either sentence and therefore it was not error to dismiss the petition regardless of the merits.

Appellant submits that *Wilkinson* is a narrow holding distinguishable from the instant case and of questionable validity, and that *Connors* states the more applicable and valid rule of law.

It should be noted at the outset that *Wilkinson* was argued *pro se* and that the petitioner was seeking out right discharge. The court ruled correctly that he was

not entitled to immediate discharge because he still had admittedly valid time to serve. The court then quoted *Corpus Juris Secundum* as follows:

“Where defendant is subject to two or more sentences as under different indictments or counts, habeas corpus will not lie on any of such sentences, as being invalid, until the other valid sentences have been served or satisfied, although the sentences are to run consecutively. [39 C.J.S. Habeas Corpus, §26, P. 504]

This quote is from the section dealing with habeas corpus petitions contesting sentences on grounds arising after conviction and is premised by the following:

A writ of habeas corpus *for discharge* from imprisonment under a judgment or sentence, by reason of matters arising subsequent thereto, may be granted only when the prisoner . . . is entitled to immediate release. 39 C.J.S. Habeas Corpus §26. (emphasis added)

This quote merely states that a court on habeas corpus cannot grant *discharge* where the petitioner still has valid time to serve. However, in the quote used by this court in *Wilkinson*, C.J.S. expands this to the proposition that habeas corpus will not *lie* — which expansion makes the unwarranted assumption that the only remedy on habeas corpus is that of immediate discharge. This fallacy is pointed out in a well reasoned opinion of the Oregon Supreme Court:

It is true that habeas corpus will not lie to *discharge* a prisoner under an excessive sentence but it does not follow that habeas corpus will not lie to correct an excessive sentence. An analysis of the cases will disclose that a large number of the courts have, in habeas corpus proceedings, granted appropriate relief in one form or another to rectify the excessive sentence and dispose of the prisoner's rights as justice required. *Application of Lambreth*, 324 P. 2d 475, (Ore. 1958)

The Oregon court goes on to cite and discuss in detail cases from Idaho, Pennsylvania, New York, Nebraska, Florida, Alaska, Maine, Mississippi and Michigan and points out that cases to the contrary are based on an outdated conception of fixed-time sentencing. That Utah falls within that group of jurisdictions where courts have a broad scope of remedies on habeas corpus (including the obvious one of conditional discharge) is made clear in *Connors, supra*, and *Ex parte Falk*, 102 Utah 470, 132 P. 2d 130 (1942) (attack on commitment to wrong jail).

Other jurisdictions, not mentioned in the Oregon decision, which allow attacks on sentencing although petitioner is not entitled to immediate discharge include: North Carolina, see, *e.g. State v. Stewart*, 255 N.C. 571, 122 S. E. 2d 355 (1961); Minnesota, see *State ex rel. Holm v. Tahash*, 139 N.W. 2d 161 (1965) (overruling a long line of cases to the contrary); Michigan, *Petition of Carey*, 372 Mich. 378, 126 N.W. 2d 727 (1964) (Habeas corpus petition but relief granted by way of mandamus).

However, regardless of the correctness of the broad statement in C.J.S., quoted by the court in *Wilkinson*, neither that statement nor the actual holding of *Wilkinson* is applicable to the instant case. The C.J.S. statement and *Wilkinson* involved an attack on the sentence, and a request for outright discharge, whereas in the instant case, appellant is attacking his trial and conviction on the ground that he was denied fundamental due process. He is requesting conditional discharge on that invalid conviction and remanded to the warden on his other conviction. While some argument can be made for delaying decision until a petitioner is entitled to immediate release when an excessive sentence is attacked (assuming fixed-term sentences), there is nothing to gain by similar delay where the conviction itself is challenged, and, in fact, there is much to lose. The most obvious of the disadvantages of delay is that in the event the petition is granted and prosecution reinstigated, both parties are prejudiced on retrial by the passage of time. Another disadvantage is that the petitioner is prejudiced in his chances for parole. These disadvantages were discussed in *Connors, supra*. An additional disadvantage is that delay denies the petitioner his right to a post-conviction remedy of a denial of rights guaranteed under the federal constitution. *State ex rel. Holm v. Takash*, 139 N.W. 2d 161 (Minn. 1965).

The law of other jurisdiction is split on the question. For years the federal courts denied a hearing on habeas

corpus unless the petitioner claimed a right to immediate release. However the recent trend in the majority of the lower federal courts is to the contrary. See, *State ex rel. Holm v. Takash*, *supra*, at 165 and cases cited n. 15 therein.

Appellant maintains that the better reasoned cases of other states support the proposition, stated by this court in *Connors*, *supra*, that a prisoner is entitled to question the constitutionality of a conviction even though there are other outstanding sentences which are not contested. See *Neal v. State*, 55 Cal. 2d 839, 9 Cal. Rptr. 607, 357 P. 2d 839 (1961) (arson sentence set aside and petitioner remanded to serve two attempted murder sentences); *State v. Stewart*, *supra*, (petitioner remanded for proper sentencing despite other valid sentences); *Kane v. Cochran*, 146 So. 2d 364 (Fla. 1962) (petition granted but petitioner remanded to serve sentences on subsequent convictions); *State v. Burke*, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965) (facts and reasoning similar to *Connors*, petition denied on merits); *Commonwealth ex rel. Dermendzin v. Myers*, 156 A. 2d 804 (Pa. 1959) (habitual criminal sentence invalidated although sentence on valid principal offense not completed); *Smyth v. Midgely*, 199 Va. 727, 101 S.E. 2d 575 (1958) (void convictions set aside and petitioner remanded to serve valid escape sentences). See also, *Petition of Carey*, *supra*; *Application of Lambreth*, *supra*; *State ex rel. Holm v. Takash*, *supra*; *Cave v. Cunningham*, 203 Va. 737, 127 S.E. 2d 118 (1962); *State ex rel. Wydmeyer v. Boles*, 144 S.E. 2d 322

(W. Va. 1965). (All allowing relief although petitioner not entitled to immediate discharge.)

Appellant realizes that there are a number of cases to the contrary but submits that a reading of those cases will indicate that they are either merely holding that a petitioner is not entitled to his immediate release or are an unreasoned rote reiteration of the old rule that no writ will lie where the court cannot grant immediate release.

CONCLUSION

It is therefore submitted that *Connors* case correctly states the law that a petitioner may contest the constitutionality of a conviction despite another uncontested outstanding sentence and that this case was not overruled by the narrow holding of *Wilkinson*. In the alternative, appellant respectfully submits that the court should overrule *Wilkinson*. For the reasons stated above and in the *Connors* decision, it was error for the trial court to deny petitioner a hearing on the merits when he alleged the unconstitutionality of the conviction upon which is based a sentence he is now serving.

Respectfully submitted,

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