1966

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

In the Supreme Court of the State of Utah

VIRGIL L. WOOD,

Plaintiff-Appellant,

- vs -

JOHN W. TURNER, Warden,

Defendant-Respondent.

Case No. [illegible]

Brief of Respondent

Appeal from the Judgment of the Third Judicial [illegible] Court for Salt Lake County, Hon. A. H. [illegible]

PHIL L. [illegible]
Attorney General

State of Utah
State Capitol
Salt Lake City, Utah

Attorney for Respondent

JIMI MITSUNAGA
Legal Defender

JOHN D. O'CONNELL
[illegible] East Fourth South
Salt Lake City, Utah
Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—(Continued)

In the Supreme Court of the State of Utah

VIRGIL L. WOOD,

Plaintiff-Appellant,

- vs -

JOHN W. TURNER, Warden,

Defendant-Respondent.

Case No. 10471

Brief of Respondent

STATEMENT OF NATURE OF CASE

The appellant, Virgil Wood, appeals from a Judgment of the District Court of Salt Lake County, State of Utah denying the appellant's petition for writ of habeas corpus on the grounds: (1) appellant's petition was res judicata, and (2) the appellant is serving a concurrent sentence for robbery which was unassailed by the present petition and the appellant's present complaint was improper.

DISPOSITION IN LOWER COURT

The appelant filed a petition for writ of habeas corpus on various grounds on September 9, 1965.

An answer and amended answer were filed, and on October 5, 1965, Judge A. H. Ellett denied the appellant's petition based upon previously filed Findings of Fact and Conclusions of Law. Respondent filed a motion to dismiss this appeal which was denied.

RELIEF SOUGHT ON APPEAL

The respondent submits the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The appellant filed a complaint for a writ of habeas corpus seeking release from the Warden of the Utah State Prison (R. 1). He stated that he was illegally detained on conviction of the crimes of grand larcency and robbery. The record shows his conviction was to run concurrently with convictions for crimes for which he was then serving in the Utah State Prison (R. 2). An answer was filed by the Warden, and then an amended answer denying that appellant was entitled to consideration on habeas corpus because he was concurrently serving a sentence for the same crimes (R. 23). The trial court at the time of hearing denied the petition for habeas corpus on the grounds that the appellant was serving a concurrent sentence for the same crime which he was not attacking, and his petition was barred because he hadn't raised the matter on a previous petition for habeas corpus attacking his other sentence (R. 26).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT SINCE APPELLANT WAS SERVING A CONCURRENT SENTENCE FOR THE SAME CRIME WHICH WAS UNASSAILED, NO BASIS EXISTED FOR HABEAS CORPUS.

The issue contended for by the appellant is that the trial court erred in not allowing appellant to collaterally attack his robbery conviction because he was serving a concurrent sentence for robbery. Both sentences were from five years to life, Utah Code Ann. §§ 71-51-1, -2 (1961).

It is submitted that the decision in **Wilkinson v. Harris,** 109 Utah 76, 163 P.2d 1023 (1945) controls this case. In that case the appellant was convicted of burglary and grand larcency and sentenced to indeterminate terms of imprisonment. Appellant challenged the sentence for both crimes. The court ruled that appellant was validly held on at least one charge and hence it need not consider the validity of his contention. The court observed, 109 Utah at 77, 163 P.2d at 1023:

> **The court had jurisdiction of the subject matter and the conviction for one of such offenses charged was valid. Appellant has not yet served his sentence on either conviction, and so we need not determine here whether the court exceeded its jurisdiction in sentencing him for two offenses. Until appellant has served his sentence on one conviction he is not entitled to a discharge on a writ of habeas corpus.**

In the instant case the appellant is concurrently serving a valid robbery conviction unassailed in the

present action. Therefore, under the rule in the **Wilkinson** case habeas corpus will not lie to consider the other conviction. The appellant requests the court to abandon the Wilkinson rule and adopt a position allowing habeas corpus attacks on other convictions even though the appellant is still serving a valid sentence. Appellant contends **Conners v. Pratt,** 38 Utah 258, 112 Pac. 399 (1910) so ruled and should be reinstated as good precedent. It is submitted that that case does not support the appellant's position, and since **Wilkinson** was a later case decided under the "indeterminate sentence" law and more in tune with the present day prolific use of the writ, the trial court's decision should be left undisturbed.

The **Connors** case presented a situation where appellant was held on a first degree murder conviction and a subsequent burglary conviction. The first degree murder conviction was concededly defective. The court agreed it could send the appellant back to the Warden's custody. However, the court did not do so because the life sentence precluded consideration by the Board of Pardons of a reduced sentence which would have entitled the appellant to release. Thus, the court stated, 38 Utah at 261, 112 Pac. at 399:

> **In view of this anomalous situation, in so far as plaintiff is concerned, and in view of the fact that, although the life sentence may be void, the state may nevertheless prosecute the plaintiff for the crime of murder in case it be determined that he was tried for that crime in a court having no jurisdiction, it**

> seems to us that justice requires that we at this time pass upon the legality of the first commitment, so that in the event that it should be declared void the plaintiff may timely and in a proper manner present the question of the reduction of the ten-year sentence under which he is now held and which would be terminated if the board of pardons reduced that sentence for the maximum period of time fixed by the statute . . .

The situation was unusual and not the same as the instant one, because even assuming the invalidity of the one sentence, appellant is still validly held on the other. Also, there is no impediment to his seeking timely release by the Board of Pardons as was apparently the case in **Connors.** The **Wilkinson** rule should remain inviolate. The flood of habeas corpus petitions requires some reasonable limitation and the Wilkinson rule appears more in harmony with the majority of jurisdictions including the Federal Courts in the Tenth Circuit and the United States Supreme Court.

In **McNally v. Hill,** 293 U.S. 131 (1934), the United States Supreme Court took a position comparable to the **Wilkinson** case of this court. It ruled that habeas corpus, as referred to in the Federal statute, meant the common-law writ with its powers and limitations. The court ruled that the writ was available only to test "the lawfulness of the detention" and would not lie where the prisoner is "serving a part of his sentence not assailed as invalid." Thus, the appellant herein, serving a valid sentence which runs concurrently with the sentence he challenges, is not entitled to relief by habeas corpus.

In **Browning v. Crouse,** 327 F.2d 529 (10th Cir. 1964), the court was faced with a case similar to the instant case. The appellant therein was convicted of several robbery counts and was sentenced thereon. He was also convicted of being an habitual offender and was sentenced thereon. The appellant assailed the habitual criminal conviction on the grounds that he did not have counsel, nor was he advised of his rights to counsel at the time of his previous convictions that constituted his habitual criminal status. The court ruled it need not consider the issue, since appellant was otherwise serving a concurrent term for robbery. The court observed, in affirming the trial court's denial of habeas corpus relief, 327 F.2d at 530:

> The first point raised is that the life sentence as an habitual criminal is void because the two prior felony convictions, on which the habitual criminal incarceration is based, were violative of appellant's constitutional rights because he was not advised of his right to, or permitted to have, the assistance of counsel. The trial court found that in the first of these, a 1943 Missouri conviction when appellant was 17 years of age, he was neither furnished counsel nor advised of his constitutional rights. The court also found that in the second, a 1950 Oklahoma conviction, he was advised of his consitutional right to be represented by counsel and did not request counsel.
>
> We need not concern ourselves at this time with the validity of either the Missouri or Oklahoma convictions. On three counts charging robbery, appellant was sentenced January 2, 1957, to concurrent 15-year terms. The trial court found that under the 'Rules and Regulations of the Kansas Prison Board' appellant could not be released from this sentence

until he has served at least eight years and eleven months. The finding is not contested.

McNally v. **Hill, Warden,** 293 U.S. 131, 135, 55 S.Ct. 24, 79 L.Ed. 238, holds that when the detention of a habeas petitioner is lawful under the sentence on one count, there is no occasion for inquiry into the validity of his conviction under another count. Although **McNally** concerned a federal prisoner, the rule is applicable to federal habeas proceedings for the release of a prisoner held under a state judgment because the federal courts have no greater habeas powers when considering the applications of state prisoners. The present detention under the sentence on the robbery counts is valid. The sentence as an habitual criminal is separable. To review the habitual criminal sentence at this time would depart from the consistent federal practice of refusing to review habeas corpus questions which do not concern the lawfulness of the detention.

The above case is clear precedent for the trial court's action in this case, and it is in accord with a long line of unbroken decisions from the Tenth Circuit. **McMahan v. Hunter,** 150 F.2d 498 (10th Cir. 1945); **Reger v. Hudspeth,** 103 F.2d 825 (10th Cir. 1939); **McGann v. Taylor,** 289 F.2d 820 (10th Cir. 1961); **Crawford v. Taylor,** 290 F.2d 197 (10th Cir. 1961); **Holloway v. Looney,** 207 F.2d 433 (10th Cir. 1953); **Wood v. Crouse,** 327 F.2d 81 (10th Cir. 1964).

In **Clark v. Turner,** 350 F.2d 294 (10th Cir. 1965), the court refused to inquire into appellant's detention at the Utah State Prison on a conviction where he was otherwise validly held on another count, citing both **Browning** and **McNally.**

Numerous decisions from other federal courts support the rule. **Wilson v. Gray,** 345 F.2d 282 (9th

Cir. 1965); **Miller v. Gladden,** 341 F.2d 972 (9th Cir. 1962); **Oughton v. U.S.,** 215 F.2d 578 (9th Cir., 1954); **Sink v. Cox,** 142 F.2d 917 (8th Cir. 1944); **U.S. ex rel. Rinaldi v. New Jersey,** 321 F.2d 885 (3rd Cir. 1963); It is submitted that this position is based on a realistic appraisal of the purposes of habeas corpus. Further, various state courts, indeed the majority, also follow the same rule. **Moore v. Hand,** 187 Kan. 260, 356 P.2d 809 (1960); **Application of Current,** 76 Nev. 41, 348 P.2d 470 (1960); **Burleaigh v. Raines,** 359 P.2d 340 (Okla. Crim. App. 1961); **Ex parte Mooney,** 26 Wash. 2d 243, 173 P.2d 655 (1946); **Petition of Wagner,** 145 Mont. 101, 399 P.2d 761 (1965); **Goodman v. State,** 96 Ariz. 139, 393 P.2d 148 (1964).

It is, of course, recognized that some courts have taken a contrary view. However, a reading of many of these cases shows a local necessity or special need. None is here present and the **Wilkinson** rule should continue.

The trial court correctly denied the application for habeas corpus.

POINT II

THE TRIAL COURT CORRECTLY DENIED THE APPLICATION FOR A WRIT OR HABEAS CORPUS BECAUSE OF RES JUDICATA.

The trial court made a finding of fact (R. 26):

> 1. That the petitioner, Virgil L. Wood, has heretofore filed petitions for Writ of Habeas Corpus, seeking review of his convictions and has failed to raise in either of those petitions, the items raised in the instant petition.

The doctrine of res judicata has been recognized as applicable to habeas corpus matters in Utah. **Burleigh v. Turner,** 15 Utah 2d 118, 388 P.2d 412 (1964). It is the rule in Utah that where a party brings a suit and fails to raise a basis for relief where the opportunity presents itself a subsequent action seeking to adjudicate such an issue will be deemed barred. **Wheadon v. Pearson,** 14 Utah 2d 45, 376 P.2d 946 (1962); **East Mill Creek Water Co. v. Salt Lake City, 108** Utah 315, 159 P.2d 863 (1945).

Since appellant could have raised the same issues in the previous actions the matter is now barred.

- CONCLUSION -

The action of the trial court was based on sound Utah precedent and policy. There is no reasoned basis for abandoning the **Wilkinson** doctrine. It is submitted that this court should affirm.

Respectfully submitted,

PHIL L. HANSEN
Attorney General,

State of Utah
State Capitol
Salt Lake City, Utah

Attorney for Respondent