1966

# Thomas Danks v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

# IN THE SUPREME COURT OF THE STATE OF UTAH



THOMAS DANKS,
*Plaintiff-Appellant*,

—vs—

JOHN W. TURNER, Warden,
Utah State Prison,
*Defendant-Respondent.*

Case No.
10513

## BRIEF OF RESPONDENT

Appeal From the Judgment of the District Court of Weber County, Denying Appellant's Petition for Writ of Habeas Corpus, Honorable John F. Wahlquist, Judge

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## BRIEF OF RESPONDENT

### STATEMENT OF NATURE OF CASE

The appellant, Thomas Danks, a prisoner confined in the Utah State Prison, appeals from a judgment of the District Court of the Second Judicial District, Weber County, denying his application for writ of habeas corpus.

### DISPOSITION IN THE LOWER COURT

On November 10, 1965, the appellant filed a petition for writ of habeas corpus in the District Court of Weber

County, State of Utah, alleging that his counsel during the course of his trial on the charge of robbery was incompetent, and alleging, further, that there was new evidence which would prove his innocence. A hearing was held on December 10, 1965, at which time the court denied the appellant's petition for writ of habeas corpus and remanded the appellant to the custody of the Warden of the Utah State Prison. No final order was ever entered by the district court denying the appellant's petition for writ of habeas corpus. A notice of appeal was filed by the appellant, and Mr. Jimi Mitsunaga, the legal defender of Salt Lake County, was appointed as his counsel. Thereafter, a dispute arose between the appellant and Mr. Mitsunaga, Mr. Mitsunaga withdrew and Mr. Sheldon A. Vincenti, his present attorney, was appointed to represent him.

## RELIEF SOUGHT ON APPEAL

Respondent submits that the appeal should be dismissed for lack of a final order, or, in the alternative, the decision of the trial court affirmed.

## STATEMENT OF FACTS

Respondent submits the following statement of facts:

The only issue raised in the appellant's brief is that the trial court erred in not appointing counsel for him to represent him on his motion for new trial after his trial on the charge of robbery.

The appellant filed his petition for writ of habeas corpus alleging two grounds for relief: (1) incompetent counsel and (2) newly discovered evidence (R. 1). The trial court at the time of hearing agreed that the contention that the appellant did not have counsel at the time of his motion for new trial was not a part of the petition, but allowed the appellant to raise the issue (Tr. 66). The record discloses that there has never been a final order entered denying the appellant's application for writ of habeas corpus. The only thing in the record indicating that the motion was denied is the court's statement in the transcript, page 75, and a minute entry (R. 7).

A transcript of the testimony and proceedings at the time of the appellant's motion for new trial does not appear of record. Appellant was represented at the time of his trial at preliminary hearing by Mr. Philip S. Kenney. A transcript of the proceedings subsequent to preliminary hearing indicates that at the time of the appellant's arraignment, he indicated that he wanted Mr. Kenney to withdraw and that Mr. Kenney withdrew and that thereafter, the court appointed Mr. L. G. Bingham.

Mr. Bingham testified that he had consulted with Mr. Danks, but had stated he did not take the case since Mr. Danks was unwilling to pay him (Tr. 58), and that, thereafter, the court appointed him as counsel to represent Mr. Danks. Mr. Bingham represented the appellant throughout the trial. At the time of hearing, Mr. Danks testified:

"Q. Now after the jury found you guilty on June 24, of 1959, was Mr. Bingham your attorney after that?

A. No. I went down to the prison, and I filed a motion for re-trial before Judge Cowley.

Q. Who filed a motion?

A. I did.

Q. Had you fired Mr. Bingham at that time?

A. Well the jury trial was over.

Q. Yes.

A. And I thought that was over and done with between him and me, you know. Then I filed my own motion for a re-trial that came before Judge Cowley, *I felt Mr. Bingham was incompetent, and Mr. Cowley appointed Mr. Bingham to represent me on my motion for a re-trial. I fired Mr. Bingham, asked him to withdraw from the case,* asked Judge Cowley to get me another attorney. He said well you're here, and we will hear the argument now. He didn't give me another attorney."

The court expressly found with reference to the motion for new trial (Tr. 73):

"So far as the motion for new trial, the Court chooses to believe Tommy Danks testimony that he did request that another counsel be appointed. The Court believes that once being supplied with counsel for trial so far as the Court is aware this counsel has been loyal to him and attempted to do the best he could, and that his counsel was competent. The Court believes now that the defendant is not required to have counsel at an

argument for new trial and does not believe that the requirement is denovo and does not believe that the Court has to give to the defendant who has discharged counsel, once appointed, competent to serve and who is discharged without any apparent cause, with a new counsel."

There is no evidence as to whether the motion for new trial was timely filed. In addition, at the time of the appellant's application for writ of habeas corpus, the court heard all the so-called newly discovered evidence, including the testimony of Mr. Bill Nubold, the complaining witness. There was, in effect, a complete re-trial of the case on the question of whether there was any newly discovered evidence. The court ruled that there was no showing of any newly discovered evidence so as to grant relief by habeas corpus. [1]

Based on the above evidence, the trial court orally denied the petition for writ of habeas corpus.

## ARGUMENT

### POINT I.

APPELLANT'S APPEAL SHOULD BE DISMISSED SINCE NO FINAL ORDER DENYING HIS APPLICATION FOR WRIT OF HABEAS CORPUS HAS BEEN ENTERED.

[1] The trial court was in error in considering the question of newly discovered evidence by habeas corpus, since this only applies for consideration on an application for coram nobis. However, the issue is not germane to this appeal, except to show that the appellant was afforded a full opportunity to present his evidence.

The record does not demonstrate that there was any final order entered by the Utah court denying the appellant's application for writ of habeas corpus. It is, of course, the custom for counsel to prepare an order for the court to execute. However, in the absence of a final order, there can be no appeal to this court.

In *Aldridge v. Beckstead*, 16 U.2d 136, 396 P.2d 870 (1964), an appeal was taken from an alleged denial of a writ of habeas corpus in an extradition proceeding. This court noted that there had *been no final order entered and stated*:

> "The record before us reflects no final appealable judgment. Thus, our jurisdiction fails."

It is submited, therefore, that the instant appeal should be dismissed on the grounds that there has been no final order entered in the trial court.

## POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S APPLICATION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS THAT HE DID NOT HAVE COUNSEL AT THE TIME OF HEARING ON HIS MOTION FOR A NEW TRIAL SINCE (A) THE APPELLANT HAD HAD COUNSEL APPOINTED IN HIS BEHALF AND UNJUSTIFIABLY DISCHARGED HIM, AND CONSEQUENTLY, THERE WAS NO DENIAL OF THE RIGHT TO COUNSEL, (B) THERE IS NO SHOWING THAT THE MOTION FOR A NEW TRIAL WAS TIMELY FILED IN ACCORDANCE WITH THE UTAH CODE OF CRIMINAL PROCEDURE, (C) THE SAME IS-

SUES WHICH WERE APPARENTLY PRESENTED IN THE MOTION FOR NEW TRIAL WERE HEARD BY THE TRIAL COURT ON HABEAS CORPUS AND FOUND TO BE WITHOUT MERIT, AND (D) THE CIRCUMSTANCES SURROUNDING THE APPELLANT'S MOTION FOR NEW TRIAL DO NOT INDICATE THAT THERE WAS A CRITICAL STAGE REQUIRING THE APPOINTMENT OF COUNSEL.

A. The record in this case clearly discloses that the trial court did not commit error in failing to appoint another attorney for the appellant to argue his motion for a new trial. Appellant had counsel at the time of his preliminary hearing and at the time of his arraignment in the district court, discharged counsel. He told Judge Cowley that he did not desire a "civil attorney", but he wanted counsel who would represent him in the manner he wanted to be represented. Mr. Danks had, himself, previously contacted Mr. Bingham about representation, but apparently, because of lack of funds, Mr. Bingham was unwilling to take the case. Judge Cowley thereafter appointed Mr. Bingham to represent the appellant. Thus, appellant had appointed counsel of his own choice. Subsequent to the time of trial, by the appellant's own admission, he discharged Mr. Bingham, when Judge Cowley said he would make Mr. Bingham available to argue the motion. The trial court expressly found that there was no justifiable basis for the discharge.

Under these circumstances, the appellant is in no position to complain about the absence of counsel. Counsel who was most familiar with the case and who would have been of assistance to the appellant in presenting

his motion for new trial was fired by the appellant. There is no unending duty on the part of the court to continue to appoint counsel after the defendant in a case unjustifiably fires counsel.

It is well settled that the right to appointed counsel does not include with it the right of the defendant to dictate his choice of counsel. The choice of counsel is for the court. *Petition of Carrelo,* 352 P.2d 616 (Hawaii 1960); *Vularde v. People,* 399 P.2d 245 (Colo. 1965).

In *People v. Henley,* 2 Mich. App. 54, 138 N.W. 2d 515 (1965), the Michigan Court of Appeals ruled that where the defendant had had three appointed counsel and discharged them, that it was not necessary for the trial court to appoint additional counsel for the defendant.

In *Arellanes v. United States,* 353 F.2d 270 (9th Cir. 1965), the court ruled that where the defendant had maneuvered himself into a position that he was without counsel, and it appeared that the action was deliberate on the part of the defendant, due process was not denied by the failure of the defendant to have counsel.

In *Rogers v. United States,* 325 F.2d 485 (10th Cir. 1963), the court said, speaking of the right of a defendant to have counsel appointed to assist him:

> "But he has no right to continued service, nor to counsel of his choice, nor to dictate the procedural course of his representation."

In *People v. Tabb,* 319 P.2d 656 (Cal. App. 1957), the California court said:

> "Assuming for the moment that the appellant is entitled to have a court appointed attorney to assist him in his appeal, he surely is not entitled to have the court appoint one attorney after another until an attorney wholly satisfactory to appellant is selected. No such a procedure was ever contemplated in the law."

In *State v. Rinaldi,* 156 A.2d 28, 58 N.J. Super. 209 (1959), it was stated:

> ". . . It is enough that the attorney assigned to the appeal is qualified to represent the prisoner, and that he has advised with him and done whatever possible to represent him competently. Counsel is not required to dance to the prisoner's tune.
>
> Those unfortunate enough to be caught up in the web of the law and who, mistakenly or not, consider themselves aggrieved must disabuse themselves of the notion now prevailing in certain prison circles that they may accept or reject assigned counsel, as whim or scheme dictates. The right to assigned counsel is not the right to pick an attorney of one's own choosing, nor the right to select counsel who will completely satisfy a defendant's fancy as to how he is to be represented."

In the Rinaldi case, the court ruled that where a defendant fired his appointed appellate counsel, he was not thereafter entitled to the appointment of new counsel.

The Rinaldi case was cited with approval by the United States Court of Appeals in *United States v. Bell,* 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960), in an opinion by Judge Latimer The court stated with refer-

ence to action on the part of a defendant in refusing counsel:

> "However, if an accused protests against such an order and insists on firing his appointed lawyers, he cannot later complain if the board concludes not to require counsel to remain in the case, for an accused who is sane can always forfeit his right to representation before the board, and actions showing an arbitrary and calculated refusal to accept appointed counsel may constitute an abandonment of that right"

In the instant case, the appellant had discharged apparently without just cause both of his prior attorneys. The trial court in this case found that the discharge was unwarranted. Under these circumstances, it must be concluded that the appellant forfeited his right to representation by appointed counsel at the time of his motion for a new trial.

B. The record in the instant case is silent as to whether the motion for a new trial was even within the jurisdiction of the trial court.

Section 77-38-4, Utah Code Annotated, 1953, provides that the application for a new trial must be made upon written notice of motion designating the grounds upon which it is made and must be filed within five days after the rendition of the verdict or decision. If it is based upon a contention of newly discovered evidence, affidavits are required. Since the appellant in this case did not demonstrate that his motion met the jurisdictional prerequisites, it cannot be said that the trial court committed any error in refusing to entertain his writ

of habeas corpus on the basis of lack of counsel at the time of his motion for new trial.

C. In the case of *State v. Danks*, 10 U.2d 162, 350 P.2d 146 (1960), the present appellant's case was reviewed by this court and affirmed. The appellant was represented by Mr. Walter R. Ellett. The court found the evidence sufficient as a matter of law to sustain the evidence.[2]

The appellant at the time of his hearing on his petition for writ of habeas corpus was represented by counsel and was given an opportunity to present all the newly discovered evidence he contended would warrant a new trial. The appellant's father was called as a witness, the victim of the robbery, inmates from the Prison, police officers and other persons. In effect, the appellant was granted a complete rehearing on his case. The presentation of the evidence and *the exploration of the issues* on habeas corpus substantially exceeded that which would have been available for determination on a motion for new trial. Appellant, therefore, had available to him at the time of trial in the proceeding from which he now appeals all the opportunity to present evidence that he would have had on his motion for a new trial, and he was represented by able counsel. Consequently, it cannot be said that the denial of counsel at the time of the motion for new trial now warrants relief by habeas corpus.

[2] It is interesting to note that the absence of assigned counsel at the motion for a new trial was not assigned as error on appeal.

In *Myers v. Hadley*, 16 U.2d 405, 402 P.2d 701 (1965), this court held that an individual in an extradition proceeding was not denied his constitutional right to counsel where he appeared before a city court without counsel when on a subsequent district court hearing on petition for writ of habeas corpus he was afforded a full opportunity with the aid of counsel to present all matters concerning his extradition. This court stated:

> "Plaintiff was not denied due process of law because he was not represented by court-appointed counsel at the hearing before the Ogden City Court. The denial of counsel at that stage of the proceedings did not prejudice the plaintiff who had full opportunity to present with the aid of counsel any and all matters relating to his extradition at the hearing in the district court upon his petition for writ of habeas corpus. Affirmed."

In *State v. Burke*, 28 Wis. 2d 195, 136 N.W. 2d 829 (1965), the Wisconsin Supreme Court ruled that where a defendant had not been provided counsel at his mental commitment proceeding in 1959, that granting him counsel at a habeas corpus hearing in which the same matters were presented in 1964, corrected any defect.

Consequently, it is submitted that the habeas corpus proceeding in this case cured any defect by the failure of the appellant to have counsel appointed at his hearing on his motion for a new trial. Especially is this true in view of the fact that this court thoroughly considered the same issues on appeal and found them unmeritorious.

D. It may be that a motion for new trial may become a critical stage in a proceeding and that a defendant may be entitled to counsel, if, because of the nature of the motion for new trial and the issues raised, the necessity of counsel is manifest. *Bland v. Alabama,* ..... F.2d ..... (5th Cir. 12/27/65); 2 Criminal Law Bulletin, p. 39. However, it is submitted that in the nature of this case, where the arguments were merely a rehash of the evidence before the trial court and there are no special legal technicalities involved, that a motion for new trial would not be a critical stage.

Recently, in *Dirring v. United States,* 353 F.2d 519 (1st Cir. 1965), a claim was made that the trial court erred in not appointing counsel to argue the petitioner's motion for a new trial under Rule 33 of the Federal Rules of Civil Procedure. The First Circuit rejected the contention, stating:

> "There remains the question of whether the court erred in failing to appoint counsel to prosecute the motion for new trial. Appellant had counsel 'through appeal,' as required by the Criminal Justice Act, 18 U.S.C. § 3006A(c). We do not construe that phrase to include motions for new trial. Nor do we so interpret the Sixth Amendment. There must be an end. Cf. United States v. Johnson, supra. After final conviction the appointment of counsel must rest in the discretion of the court. We see no abuse of discretion in this case. Cf. United States ex rel. Wissenfeld v. Wilkins, 2 Cir., 1960, 281 F.2d 707.
> Affirmed."

Consequently, it is submited that where in the instant case the appellant had counsel at preliminary hearing, counsel at the time of trial, counsel on appeal, and there was no demonstration that the appelant was not otherwise afforded full opportunity to present his evidence both at the time of his trial and on his petition for writ of habeas corpus, that it cannot be said that there is any basis for reversal because of a failure to have counsel at the time of a motion for new trial.

## CONCLUSION

The instant appeal demonstrates that the appellant is entitled to no relief. The sole contention is that the appellant was not afforded counsel at the time of his motion for new trial. Appellant had counsel at the time of preliminary hearing and discharged him. Appellant had counsel at the time of trial and, thereafter, prior to his motion for new trial, discharged appointed counsel. It was not incumbent upon the trial court to continue to appoint one counsel after another to argue appellant's case when there was no manifest demonstration that the special interests of justice required new counsel. Further, appellant was afforded full opportunity at the time of his habeas corpus hearing to present issues on the question of the sufficiency of the evidence to sustain his conviction and newly discovered evidence. In addition, the appellant had an appeal and counsel represented him on appeal. This court found no merit to any of the contentions on appeal.

It is therefore submitted that there is no basis for reversal and that this court should affirm.

Respectfully submitted

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