

1961

State of Utah v. Brent E. Spiers : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

Plaintiff and Respondent,

vs.

Case No. 9387

BRENT E. SPIERS,

Defendant and Appellant.

FILED

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BRENT E. SPIERS,

Plaintiff and Appellant,

vs.

Case No. 9363

JOHN W. TURNER, Warden of the
Utah State Prison, State of Utah,

Defendant and Respondent.

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BRIEF OF APPELLANT

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PETE N. VLAHOS
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,

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BRENT E. SPIERS.

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vs.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
STATEMENT OF CASE	2
STATEMENT OF FACTS.	2
Facts Represent Both Points Relied On	
STATEMENT OF POINTS	3
POINT I. THAT BRENT SPIERS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS IN HIS CONVICTION AND SENTENCE, BECAUSE HE DID NOT HAVE THE ASSISTANCE OF COUNSEL AT THE TIME OF HIS PLEA AND SENTENCE, AND THAT THE DISTRICT COURTS IN AND FOR WEBER AND SALT LAKE COUNTIES ERRED IN FINDING THAT NO SUCH VIOLATION DID IN FACT EXIST	3
POINT II. THAT THE DISTRICT COURT IN AND FOR WEBER COUNTY ERRED IN THAT IT ABUSED ITS DISCRETION IN REVOKING THE PROBATION OF BRENT SPIERS FOR A VIOLATION OF THE TRAFFIC CODE WHEN THE RECORD IS DEVOID OF ANY INFORMATION OR STATEMENT TO THE EFFECT THAT SAID BRENT SPIERS WAS EVER ADVISED OR INFORMED, BELIEVED OR KNEW THAT SUCH A VIOLATION COULD OR WOULD CAUSE HIS PROBATION TO BE REVOKED. . . .	3,9
ARGUMENT.	9
POINT I	3,9
POINT II.	3,9,27
CONCLUSION	38

TABLE OF CONTENTS--Continued

Page

AUTHORITIES CITED

CASES

Application of Burford McDaniel for Writ of Habeas Corpus, 302 P. 2d 496.	17,18
Caprentier vs. Lainson, 248 Iowa 1275, 84 NW 2d 32, 71 ALR 2d 1151	9
Cassidy vs. State, 201 Ind. 311, 168 NE 18 . . .	12
Christiansen vs. Harris (Utah) 163 P. 2d, 314 . .	31
Ex parte Banks, 122 P. 2d 181	33
Ex parte Carter, 14 NJ Super 591, 82 A. 2d 652 .	13
Ex parte Cook, 183 P. 2d 595	21
Ex parte Follett vs. Severson (Utah) 225 P. 2d 16	32
Jenkins vs. State, 57 NJ Super 93, 154 A. 2d 29 .	24
Moore, Willie B., Petitioner vs. State of Michigan, 78 S.Ct. 191	10
People vs. Adomaitis, 112 NYS 2d 38	13
People vs. Deeb, 132 NYS 2d 439	37,38
State vs. King, 69 SE 2d 123	34
State vs. Lindsey, 231 Ind. 126, 106 NE 2d 230 . .	12
State vs. Oberst, 127 Kan. 412, 273 Pac. 490 . .	16
State vs. Williams ^{Williams} , 259 Pac. 1044 . . .	31

TABLE OF CONTENTS--Continued

	Page
Swan vs. State, 90 A. 2d 620.	36
Thorne vs. Callahan, Sheriff, 234 P. 2d 517 . . .	25
Willey vs. Hudspeth, 162 Kan. 516, 178 P. 2d 246.	14

ANNOTATION

71 ALR 2d 1160, et seq	27
----------------------------------	----

STATUTES

U. C. A. 1953, Section 76-49-1	4,29,30
U. C. A. 1953, Section 76-51-1	4,29,30
U.C.A. 1953, Section 77-35- 17	30

STATEMENT OF CASE

Brent Spiers, a nineteen year old, impecunious defendant, is before the Supreme Court of the State of Utah on appeal from two cases.

The first is the case of State of Utah vs. Brent E. Spiers, Criminal No. 6560 of the files and records of the District Court of Weber County, State of Utah, Appeal No. 9387.

The second case is that of Brent E. Spiers Vs. John W. Turner, Warden of the Utah State Prison of the State of Utah, and bears the number of 9363 of the files and records of the Supreme Court of the State of Utah and the District Court of Salt Lake County, Utah, No. 127427.

Both cases involve common questions of fact and law and by reason of the impecuniosity of the appellant, the brief of said appellant is hereby submitted in identical form for both appeals.

STATEMENT OF FACTS

The facts are as follows:

The appellant was arraigned in the City Court of Ogden City, Weber County, Utah, on a Complaint charging

him with burglary in the second degree. (R-1 File 9387) He waived his preliminary hearing on July 28, 1960. (R-2, 3 File 9387) He was thereafter brought before the District Court of the Second Judicial District in and for the State of Utah on August 15, 1960, and at said time entered his plea of guilty to the offense charged. (R-6 File 9387) Honorable Parley E. Norseth, District Judge, referred the appellant to the Adult Probation Department for a report and the case was continued until August 29, 1960, at 11:00 o'clock A.M., at which time the appellant was placed on probation with the Adult Probation and Parole Department where he signed the usual probation agreement. (R-7 File 9387)

On September 6, 1960, approximately one week after being placed on probation he was again brought before the Honorable John F. Wahlquist, Judge of the Second Judicial District, on a claim of probation violation; charging that the appellant had pled guilty to a charge of reckless driving in the City Court of Ogden City, Utah. (R-8,9 File 9387) The facts of the reckless driving were that he allegedly drove ninety five miles an hour north on Wall

Avenue which is a forty mile per hour street in Ogden City, Utah. The appellant denied driving so fast but did concede that he was driving considerably in excess of the speed limit and that he had done some weaving in and out of traffic. (R-17 File 9387)

Judge Wahlquist revoked his probation stating, contrary to the provisions of the State statutes, that reckless driving is a more serious offense than robbery of a gasoline station. (U.C.A. 1953 76-51-1) (U.C.A. 1953 76-49-1) (R-20 File 9387)

The evidence at that hearing further indicated that there had been certain juvenile offenses in which the appellant was involved as a defendant. The record does not disclose whether the Juvenile Court had a trial or not, or whether or not the appellant was at anytime represented by counsel. The record is further confused because there is some indication that he was found not guilty of the more serious Juvenile Court charges. (R-20, 21, 22, 23 File 9387) However, there was ample evidence to the effect that he had previous Juvenile record of careless driving. (R-21, 22

File 9387)

The Court remanded him immediately to the Warden of the State Penitentiary and he was taken into custody of the Sheriff of Weber County at once. (R-10 File 9387) The Court refused to permit him to remain on bail pending an appeal. (R-25,28 File 9387) Thereafter, appellant filed his Complaint seeking Writ of Habeas Corpus in the Third Judicial District Court in and for Salt Lake County. (R-1, 2,3 File 9363) This matter came on for hearing before the Honorable A.H. Ellett, District Judge, on the 26th day of September, 1960, and for the first time the appellant was represented by Counsel. (R-10 File 9363) The Court solely upon the basis that the appellant was a high school graduate and without considering other evidence relative to his mental capacity denied the relief sought in the proceeding in Habeas Corpus. (R-29 File 9363) From this ruling the appellant, Brent E. Spiers, has likewise appealed. (R-30 File 9363)

The evidence before Judge Wahlquist and Judge Ellett appears to be uncontradicted, and it would appear, that at no time in any of his appearances before the City

Court or the District Court, relative to the charge of burglary in the second degree, was the appellant represented by counsel, (R-2,3,6 File 9387) nor at the hearing for revocation of his probation. (R-18, 19 File 9387) At the hearing for revocation of probation his mother was present but the records would indicate that the appellant had had no opportunity to talk to her nor to anyone else prior to or during said hearing. (R-19 File 9387)

Brent Spiers, at the time of conviction, was nineteen years of age and had an IQ rating of 75. (R-14, 15 File 9363) The testimony indicated that this made him a border line feeble minded person, which is confirmed by an examination of his high school grades. (R-15,16 File 9363) In the tenth grade he was able to obtain a C in Physical Education a C- in English and a C in band. Every other grade which he received in the tenth grade of which would be a normal fifteen year old grade was below the average of C. No grades were available in the record for the eleventh grade but testimony by Joseph Tite, the investigating probation officer, indicates that they were similar; further the record in the 12th grade indicates that in that year he

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received no grade above D. (R-15, 16 File 9363) While it is true that the appellant graduated from high school, (R-16 File 9363), it is difficult to see how this achievement was obtained in view of his obvious scholastic deficiency. Testimony further indicated that he was obviously immature to a point that he was between three and four years behind the average nineteen year old child in comprehension. (R-24 File 9363) Yet this was the boy who was permitted to enter a plea of guilty to a penitentiary offense and who had his probation revoked all without benefit of Counsel and in fact without even the benefit of counseling from his parents. (R-6, 18, 19 File 9387)

It is significant to note that at the time appellant entered his plea of guilty he was not advised that the offense with which he was charged was in fact a felony and that the penalty therefore could mean imprisonment in the penitentiary. (R-11, 14 File 9387) This information was held from him until such time as he was referred to the Adult Probation and Parole Department.

(R-14 File 9387) Further, the record does not indicate that at any place as a part of his probation and parole was he advised that he was unable to drive a vehicle or that a traffic violation of any kind would be sufficient to cause his probation to be revoked, except as would be implied from his contractual provision stating that he was not permitted to violate the Law. (R-7 File 9387) A violation which could be made by the simple act of expectorating upon the sidewalk if carried to its logical conclusion.

STATEMENT OF POINTS

POINT I.

That Brent Spiers was deprived of his constitutional rights in his conviction and sentence, because he did not have the assistance of counsel at the time of his plea and sentence, and that the District Courts in and for Weber and Salt Lake Counties erred in finding that no such violation did in fact exist.

POINT II.

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~~That the District Court in and for Weber~~

County erred in that it abused its discretion in revoking the probation of Brent Spiers for a violation of the traffic code when the record is devoid of any information or statement to the effect that said Brent Spiers was ever advised or informed, belived or knew that such a violation could or would cause his probation to be revoked.

ARGUMENT

POINT I.

Carpentier vs. Lainson, 248 Iowa 1275, 84 NW 2d 32, 71 ALR 2d 1151 has best expressed this problem when it states at p. 1157 of 71 ALR 2d:

"Should any minor charged with a crime involving life or liberty be permitted to waive his right to counsel, or must the Court appoint counsel for him regardless of his wishes, express or implied?"

It is submitted that upon the facts set forth in this case the authority throughout the United States is

uniform in holding an emphatic "No".

Although this is a problem that the Supreme Court of Utah has not as yet decided, The Supreme Court of the United States has had this problem before it upon various occasions the most recent decision being that of Willie B. Moore, Petitioner vs. State of Michigan, 78 S. Ct. 191: The appellant a seventeen year old negro boy had been charged with murder. The Court found that the trial Judge had asked him as to:

"Whether he had a lawyer and whether he desired to have one and that (the petitioner) gave a negative reply to both of these inquiries , and stated that he wanted to get the matter over with." (78 S. Ct. 193)

The Court further found as facts that the appellant at the time was emotionally upset because of the implied threat of racial or mob violence and plus the fact that the appellant had but a seventh grade education. There was no showing as far as the decision recits that the fact that the failure to go further than the seventh grade was

occasioned by lack of intelligence, as distinguished from lack of opportunity. The record is further devoid of any suggestion that the appellant was in any way immature or that he lacked normal intelligence other than the normal intelligence of a seventeen year old person. Subsequent to his conviction and confinement in the State Penitentiary the appellant filed a delayed motion for a new trial which was again denied, from which an appeal was taken to the Supreme Court of Michigan which affirmed the trial court's decision. The Supreme Court of the United States reversed and remanded the matter for trial, stating, in part, that the age and possible or probable fear was sufficient to prevent the appellant from exercising an intelligent waiver.

While it cannot be contended that Spiers was under fear, nevertheless, it is significant that Spiers was a person of an age younger than Moore in maturity with an obvious mental deficiency as indicated by his intelligence quotient, who was not advised at the time of his plea of guilty could result in a sentence to

the State Penitentiary. (R-11,13 File 9387) If a seventeen year old negro boy could not waive his constitutional rights to counsel, how could a nineteen year old mentally deficient boy, who had an intelligence of a borderline feeble minded person and who acted as would a fifteen or sixteen year old person, be able to intelligently waive his constitutional right to counsel. It is submitted that the obvious answer to this question is that it would be impossible, and that it was in fact, impossible for Spiers to intelligently waive his rights. The rule heretofore laid down has found considerable approval throughout the various States. Thus, in *Cassidy vs. State* (1929), 201 Indiana 311, 168 NE 18, 71 ALR 2d 1163, the Court held that a youth who is below average in intelligence or otherwise incapable of understanding his rights did not waive his right to have counsel.

Similarly the Supreme Court of Indiana in *State vs. Lindsey* (1952), 231 Ind. 126, 106 NE 2d 230, 71 ALR 2d 1163, the Court held that a young man 18 years

of age with a fifth grade education, who was convicted of the crime of rape, without benefit of counsel, and upon his plea, when he did not know the penalty which might be imposed upon him and had not been so advised, did not waive.

Again in *People vs. Adomaitis* (1952), 112 NYS 2d 38, 71 ALR 2d 1164, the defendant, sixteen years of age, was arraigned on an offense of first degree larceny. He was told of his right to counsel, but he waived such. Upon appeal it was held that in view of the defendant's immature age the defendant could not intelligently and competently waive his right.

Again in *Ex parte Carter* (1957), 14 NJ Super 591, 82 A. 2d 652, the court had before it an eighteen year old defendant who had a moron level of intelligence. In this case also the defendant was advised of his right to counsel and was permitted to sign a waiver. However, on appeal it was held that he could not do so competently.

If an eighteen year old negro, who had a moron

level of intelligence, cannot waive, can it be said that

a nineteen year old person with a moron level of intelligence effectively waive? The test is the person's ability to understand and to comprehend, by his intelligence and not by his chronological age.

Again in the case of Willey vs. Hudspeth, 162 Kan. 516, 178 P. 2d 246, the case is similar to the one in question. It appeared from the record that the plaintiff and petitioner, James Willey, a seventeen year old boy, was charged with breaking into and entering in the night time a grocery store in Pittsburg, Kansas. The Information charged the petitioner with two counts: First, burglary in the second degree and secondly grand larceny; that shortly thereafter the petitioner pled guilty to both crimes. The petitioner filed an original Writ of Habeas Corpus in the Supreme Court, alleging he was denied his constitutional rights to have the assistance of counsel.

The Supreme Court of Kansas stated this problem to be of great importance and said that the problem to be considered is as follows, as stated by the Court at p. 248 of 178 P. 2d:

"The foregoing brings us to consideration of the serious question involved in the case—should this 17-year-old boy have been given the benefit of counsel before he was permitted to enter his plea of guilty to the felony charges filed against him? We are not concerned with the career of crime which the petitioner may have followed since he was first sent to the reformatory by the State of Kansas. We are gravely concerned, however, with the perplexing problem presented as to whether a 17-year-old boy should be permitted to enter a plea of guilty in a felony case without being required to confer with counsel."

Counsel for the respondent called to the Court's attention the fact that a Court was not required to assign counsel for the accused unless he so requested counsel to be afforded him. The court in deliberating upon this problem stated as follows at p. 249 of the cited opinion:

"When the petitioner, as a boy only 17-years-old stood before the court, under the laws of this state he could not have entered into a valid contract obligating himself; he could not have voted; he could not have married without the consent of a parent; he could not alone, without a guardian or next friend, have been heard to say anything in the court room in a civil action which would have been binding him. Should we say, in such circumstances, that about the only thing

he could have done alone, with legal significance, was to have pleaded guilty to a felony in a Court of Law?

The Court further quoted from State vs. Oberst,

127 Kan. 412, 419, 273 Pac. 490, 492:

" In the case before us the defendant was a 17-year-old boy * * * The one thing this youngster needed more than anything else before pleading guilty to such a horrifying accusation was consultation with and the advice of a good lawyer, * * *."

The Court further stated at page 251 of the cited

case:

"The record in the present case is silent as to the degree of intelligence which the petitioner may have possessed when he stood before the court. We can not gather therefrom any knowledge pertaining to his educational attainments, general mental alertness or lack thereof. We assume, therefore, that he possessed average intelligence for a boy of his age. Upon such an assumption we reach the conclusion that ordinarily a 17-year-old boy is not possessed of sufficient comprehension of his constitutional rights in a felony case to waive them and that he should be given the benefit of consultation with counsel. We are of the opinion, also, that the possible presence of his father in the courtroom did not assure the

petitioner of his constitutional rights Since the failure to appoint counsel for the petitioner in the present case and to require that the petitioner consult with such counsel deprived the court of jurisdiction to render judgment, it follows that the judgment entered upon the plea of guilty was void."

It is further of great interest that in this Kansas case the petitioner and appellant had had a long previous record of misdemeanor offenses as a juvenile, and had appeared before the Court on numerous occasions, and had in fact been declared a delinquent. It would follow, therefore, that Brent Spiers, a nineteen year old boy possessing a mentality of a feeble minded person, and also immature to the age of fifteen or sixteen, cannot be said to have intelligently waived his constitutional right of counsel, and that as such the sentence and judgment as rendered by the Court would appear to also be void. It must be further noted that a very similar case both as to facts and circumstances was found in the most recent Oklahoma case, In The Matter of the Application of Burford McDaniel for Writ of

Habeas Corpus, (Oklahoma, 1956), 302 P.2d 496.

The facts in this case are that Burford McDaniel, sixteen year old minor, along with three other minors was charged with second degree burglary. A plea of guilty was entered on the arraignment and the petitioner was bound over to the District Court. The petitioner was released on bond, signed by his mother and a Miss Lizzi Thomas, in order to satisfy the filing of the bond. That two days later the petitioner entered his plea of guilty to the charge and was sentenced by the Court to serve five years in the penitentiary, but the sentence was suspended for and during the time of petitioner's good behavior. The facts further show that at the time petitioner was arraigned in the District Court his mother was present, and that prior to entry of plea, he and the County Attorney conferred with the mother and advised her that she was entitled to have an attorney but that she, in substance, said that she did not want an attorney if her son got a suspended sentence. The minutes of the trial Court failed to show that the Court advised the

petitioner prior to accepting his plea that he was entitled to be represented by counsel, and that if he was unable to employ an attorney that the Court would appoint one to represent him. The respondent claimed, since in this matter the mother had acquiesced in everything that was done, that the petitioner effectively waived his right to counsel and to be tried before a jury. The Court stated at p. 501 of the cited case:

"But the outstanding feature of the case is that on arraignment the minutes of the court clerk failed to show, and there is no evidence on the part of the State to show, that the trial court advised the defendant and his mother, then present, that the defendant was entitled to consult with an attorney before entering his plea to the charge. There was no inquiry as to the financial ability of the mother to procure an attorney to advise with the minor and herself. The court did not, so far as the record shows, advise the mother in case he was satisfied that she was unable to procure an attorney, that he would appoint an attorney without charge to her, to represent the minor. If the record had reflected that the Court at arraignment had made inquiry as to the financial ability of the mother to employ counsel to advise with her and the son, and if she was not able to employ counsel, had offered to appoint counsel without

cost to her, and she and the minor in the face of that had refused counsel and stated that defendant wanted to enter a plea of guilty, the situation would be vastly different than it is, as disclosed by the record, and would have compelled affirmance, but by reason of the matter shown and failed to be shown, the writ must be granted."

Therefore, the Court will see from the situation set forth in the McDaniel case, and the facts as presented in this case, that no inquiry was made by either Judge Norseth or Judge Wahlquist as to the defendant's ability to employ an attorney to represent him and in fact the appellant when asked by Judge Wahlquist:

"Do you want to talk to a lawyer about this thing?"

Mr. Spiers: "No. I am not able to afford one."

(R-18 File 9387) Further, the record shows that no question was asked of Mrs. Spiers, appellant's mother, when she appeared in Court with her son, whether she had financial ability to have her son represented by counsel, and in fact the records indicate that the appellant didn't even have an opportunity to talk to

his mother. (R-19 File 9387)

In a similar case, Ex parte Cook (Oklahoma), 193 P. 2d 595, it appeared from the record that John R. Cook, a minor of the age of seventeen years, was confined to the penitentiary for the crime of burglary in the second degree. That the petitioner did in fact plead guilty before the Justice of the Peace and shortly thereafter was taken over to the District Court Judge and entered his plea of guilty to an Information which was filed against him. The facts further show that the officers who had charged the petitioner were in such a hurry to get petitioner into the penitentiary that the transcript of the Justice of the Peace was not certified before filing in the District Court. That after petitioner was placed in jail he was denied the right to call his parents or communicate with any of his friends. The only persons he was permitted to talk to were officers and the owner of the store he was alleged to have burglarized, who advised him to go ahead and plead

guilty and it would be easier on him to do so. The facts further show that the petitioner had never been convicted of any crime and was wholly ignorant of his rights, and by reason of his youthfulness and ignorance, he did not understand the nature and consequence of his plea.

The Court held at p. 601 of the cited case:

"It is our conclusion that because of the youthfulness, illiteracy and inexperience of the petitioner, and the fact he was charged with a serious crime was sufficient to require the court as a necessary requisite of due process of law to appoint counsel for him, even though petitioner did not ask for aid of counsel. Although a trial court upon arraignment of one accused of crime might tell the defendant of his various rights under the law, such talk is meaningless if the person accused is so youthful, ignorant and inexperienced in court proceedings that he does not understand all the court means or the nature and consequences of the proceedings through which he is passing. In Oklahoma, a person may not in civil suit take a judgment against a minor without the appointment of a guardian ad litem. Certainly, if the law protects the accused in his property rights in a civil case to that extent, then as

equally a solemn duty should be imposed upon the court when a minor defendant is brought before him accused of a felony where his life and liberty are likely to be taken." . . . "It is therefore ordered that the judgment and sentence filed against the petitioner, John R. Cook, in Case No. 3765 in the District Court of Pontotoc County, and all other proceedings in said court in said cause subsequent to the filing of the information therein, be and the same are hereby vacated and set aside.

"It is further ordered that the writ of habeas corpus be issued and the Warden of the State Penitentiary at McAlester is hereby commanded forthwith to deliver the petitioner, John R. Cook, to the custody of the Sheriff of Pontotoc County."

It would therefore appear that the courts must and should do everything within their power to see that a young inexperienced boy or girl should have counsel appointed so that their rights may be protected, and in the case at bar it would indicate that although we have a nineteen year old boy, we further find that he is low in intelligence, his school grades are such that it would appear that he does not comprehend or understand

to any great extent, and in fact his IQ shows a feeble minded person, and in addition the facts further show that the appellant's rights were not protected so as to enable Brent Spiers to receive due process of Law as required under the Constitution of the United States and under the Constitution of the State of Utah.

A similar conclusion was reached by the New Jersey Superior Court in Jenkins vs. State (1959), 57 N.J. Super 93, 154 A. 2d 29, 71 ALR 2d 1164.

In this case a minor 19-years of age who was new to the Courts, low in intelligence, defective in verbal abilities, although he appeared to understand sentences but who was found to be basically inadequate, unstable and immature, in this case, (as in the case at bar) the defendant, entered his plea of guilty, waived his right to counsel, he later requested his freedom on a Writ of Habeas Corpus, alleging denial of his right to counsel. The Court granted the Writ holding that under these facts the accused did not waive his right to counsel at the time of

sentencing. The court further pointed out

that New Jersey Courts will not indulge in the fiction of constructive waiver. The court said that a waiver of the right of counsel at time of sentencing could not reasonably be inferred from his negative answer to the question as to whether he would wish a lawyer assigned to him before pleading to the accusations brought against him.

A similar conclusion was reached by the Supreme Court of Washington, in Thorne vs. Callahan, Sheriff, 234 P. 2d 517. In this case the facts of the decision did not rest upon the age of the petitioner, on the contrary, the petitioner was a man of some thirty two years of age. In this case the Writ of Habeas Corpus was found to have been wrongfully denied upon the basis that the defendant was not advised as to the true significance of the offense charged and of the penalty connected therewith. The facts showed that the defendant, an apparently normal person, was charged with the offense of carnal knowledge of a nine year old child. He was advised by his mother and his wife and daughter and the prosecuting attorney that in the event he entered

a plea of guilty he might not have to serve more than one year and that there was a very real possibility of parole clemency, when in fact the penalty for a conviction of the offense with which he was charged was life imprisonment. The Court in granting the Writ of Habeas Corpus said at page 525 of cited case:

"We are convinced that Thorne would not have waived his right to counsel and pleaded guilty if he had known that he would have to spend the rest of his life in a penitentiary without hope of relief from the board of prison terms and paroles. Nor would he have done so if he had known that neither he nor his wife could have testified at his trial unless he consented thereto. . . . Here we have a man thirty-two years of age condemned to penal servitude for the balance of his life (possibly for forty or fifty years) because he was induced by law enforcement officers to believe that he would have to serve only a few years if he pleaded guilty."

The Court specifically found that he was not advised by the Court that the penalty for the crime to which the right to counsel was waived and entered a guilty plea, did in fact carry life imprisonment and that there

was no parole available therefrom.

It is submitted that the records in this case specifically showed and it cannot be successfully controverted that Brent Spiers was at no time, prior to the entering of his plea and certainly not at the time he waived counsel, advised that he was faced with a penitentiary offense and that as an inevitable result therefrom he could be confined in the State penitentiary. (R-11, 13 File 9387)

That other jurisdictions agree and uniformly hold as to the above cited cases may be seen by an examination of the annotation found at 71 ALR 2d 1160.

POINT II

The District Court in and for Weber County, Utah, committed error when it revoked the probation of Brent Spiers on the information charging him, the appellant herein, with second degree burglary, which was filed with the Clerk of the District Court of Weber County on the 8th day of August, 1960. He was arraigned August 15, 1960, before the Honorable Parley

E. Norseth and at that time entered a plea of guilty. The Court referred Spiers to the Adult Probation Department and the imposition of sentence and report of the Court was continued until August 29, 1960. At that later date the appellant was placed upon probation by Judge Norseth and imposition of sentence and report was continued until October 3, 1960, at 11:00 A.M. (R-4,6,7 File 9387) On September 6, 1960, an Affidavit was filed by Joseph Tite of the Adult Probation and Parole Department requesting the probation be revoked, on the grounds and for the reason that appellant herein did operate a motor vehicle in a reckless manner on or about August 31, 1960. At the time of the revocation of the appellant's probation the Court made the following statement through Judge Wahlquist:

The Court: 80 miles an hour in city traffic is a more serious matter than if he had robbed a gas station. It's more dangerous. It threatens more people. Do you have anything else you want to tell me about this? Do you have

any reason why I shouldn't put you in prison?

Mr. Spiers: I just got panicky.

The Court: Judge Norseth promised you he would put you in prison if you did this kind of thing. He promised you three days before, if you did this, that he would put you in prison. (R-20 File 9387)

It is respectfully submitted that the Court erred in two statements. In the first place Brent was driving fast, and although a serious traffic violation, is not more serious than robbery. (U.C.A. 1953 76-49-1 76-51-1)

In the second place Judge Norseth did not make any such statements. The record further is devoid of any incidents that the appellant was at anytime enjoined from using a motor vehicle or advised that in the event he committed a violation of the traffic laws of the State of Utah or Ogden City that such a violation would constitute an automatic cancellation of his probation.

Under these conditions it is submitted that the Court was in fact arbitrary and capricious in sentencing

this man to an undetermined time in the Utah State penitentiary. The penalty for a conviction for burglary in the second degree is an undetermined term in the penitentiary of not less than one year nor more than twenty. (U.C.A. 1953 76-9-4) The penalty for reckless driving, the offense of which the appellant pleaded guilty without benefit of counsel, is that of a misdemeanor and is so defined not only by the statutes of the State of Utah but by the ordinance of Ogden City. (U.C.A. 1953 76-49-1)

The authority vested in the District Court upon a plea of guilty or conviction of any crime or offense is set forth in U.C.A. 1953 77-35-17. There can be no question that under the terms of such a statute the Court may modify or revoke any condition of probation just as it may increase or decrease a probationary period. However, the statute does not say that this may be done with affidavit or without counsel and that the statute has been so interpreted by this Court upon many occasions.

The first time that this Court had occasion to

examine this particular statute was in the case of State vs. Zolantakis, Utah, 259 Pac. 1044. In that case the Court found: That the purpose of this statute was to provide an opportunity for reformation and that when in the imposition of sentence, the probation has been suspended or commitment might be issued without a proper determination that there has been such a lack of behaviour as to warrant revocation; that the probation or suspension could not be revoked arbitrarily or capriciously, but only for cause shown and that such cause of revocation must constitute a violation of the terms and conditions of probation and suspension of the execution sentence.

There have been many cases after the above cited case involving this question. In Christiansen vs. Harris (Utah) 163 P. 2d, 314, the probation period was revoked when the petitioner admitted in open court that his conduct had not been favorable; that he had pleaded guilty to the offense of intoxication and that he had knowingly issued several checks without sufficient funds ~~which at the time of the offense under the~~

statutory laws of the State of Utah constituted a felony. Certainly no one could quarrel with the revocation which the petitioner himself admitted to be just.

Similarly, in Ex parte Follett vs. Severson (Utah) 225 P. 2d 16, the probation of a defendant was revoked. In that case, the defendant was required to sign a probation agreement under the terms of which he was to make a monthly report to the probation department as to his activities and whereabouts; he failed to do so and removed himself not only from the jurisdiction of the court but from the Adult Probation and Parole Department for the period of eight years at which time he was incarcerated at Logan, Utah, and then taken without a hearing to the Utah State Prison. The Court held that there was no error in committing the appellant to the Utah State Prison without a hearing because there could be no question that the probationer had, without any excuse or justifiable reason, failed to abide by either the

Court or the terms of probation. Thus it will be seen

that the Utah Supreme Court has held that a man's probation may be revoked in the event he commits another or like felony or in the event he refuses or fails to comply with the specific direction of the Court, or of the specific direction of his probation agreement.

Here, however, it is contended that the defendant or appellant had not committed another felony violation, on the contrary, the sole justification is that he committed a traffic violation, a misdemeanor, that was supposedly more serious than a robbery. It is contended that appellant was not specifically enjoined from driving a motor vehicle or specifically enjoined from violating a traffic ordinance prior to his probation being suspended.

It is respectfully submitted that a violation of an ordinance is not sufficient justification for the revocation of this petitioner or any other petitioner's probation, save and except in such a case as where the person was paroled from a misdemeanor offense.

imprisonment in the County jail for one year together with the payment of costs. The trial court suspended execution of the sentence but ten days prior to the expiration of the sentence revoked the probation on the grounds, and for the reason, that he had failed to pay the costs ordered by the court to be paid at the time of the original suspension. The Oklahoma Court of appeals reversed the order revoking probation stating:

"The purpose of the granting of a suspended sentence is to aid in the reformation of the prisoner and to rehabilitate him so that he may make a useful citizen. To extend the terms of the statute so as to confer authority on the court to revoke a suspended sentence upon the failure of the accused to pay costs would place an unfair penalty upon a poor person. It would deprive a pauper of the equal protection of our laws and would punish him because of his poverty. It is our conclusion that the order of the court revoking the suspended sentence granted to the petitioner, upon the sole grounds that the petitioner had failed to pay costs of the prosecution, was arbitrary and constituted an abuse of judicial discretion."

Similarly in State vs. King, (South Carolina), 69

SE 2d 123, the appellant had pleaded guilty to three

~~indictments~~ ~~convicting him with entering a house to commit~~

a crime, and on separate charges of assault and battery of a high and aggravated nature. He was sentenced in the first case to six months and in the second case for the term of two years. All sentences were suspended and the appellant was placed upon probation for a period of five years. Three years later the appellant was brought before the Court on proceedings to determine whether or not there had been a violation of the general conditions of his probation. The court found that there had been not one, but seven separate and assorted misdemeanor violations. In sustaining the order of revocation the Court said at page 126:

"The revocation is not based upon one instance of violation, but, as already observed, there were at least seven. It then became the sole inquiry of the Court of General Sessions to determine whether the sentences imposed and held in suspension by probation should be executed because of the appellant's breach of the conditions."

It will be noted that the Court used the plural, and the plain import of the Court's language is that one misdemeanor violation was not and would not have been sufficient grounds for revocation.

This view finds support in the case of Swan vs. State, Maryland, 90 Atlantic 2nd, 690. In that case the appellant was one of several members of a political party who were convicted in 1948 of a conspiracy to disturb the peace. He was sentenced to three months in the Maryland house of corrections and ordered to pay a fine of \$10.00. However, the sentence was suspended for two years and he was released on probation, in the custody of the probation department of the supreme bench. Two years after placing the man on probation, a warrant was issued for the appellant for a violation of probation in that he was accused of a violation of law, in that, he illegally posted a public sign and had been convicted and fined by the Magistrate sitting in the Eastern Police Court of Baltimore City. As a result of this violation, the initial probation was revoked and appellant remanded to jail. The Court held that the committing Magistrate had acted arbitrarily and capriciously stated on pages 693, 694 and 695 of cited case:

"What we have before us is whether the commission of an offense such as this is sufficient to justify a Court in holding that the appellant has not been conducting

himself in a law-abiding manner
There are many offenses which subject people to fines, and yet which do not indicate that those committing them are necessarily not law-abiding, -for instance, the violation of parking regulations in a city is an offense against the law, yet, if freedom from ever having committed such an offense is the test of a law-abiding person, few of us can lay claim to the title. All we are holding in this particular case is that under the circumstances under which the statute was violated, we cannot find that the appellant had thereby ceased to be a law-abiding citizen. A Parolee is not expected or required at once to achieve perfection. If his conduct is that of the ordinary well-behaved person, with no more lapses than all people have, with no serious offenses charged against him, and with no indication that he intends in the future to pursue the course which led to his original conviction, the courts and probation officers should not seek for unusual and irrelevant grounds upon which to deprive him of his freedom."

Certainly, there is no similarity between the offense of second degree burglary, with moral turpitude, and that of a traffic violation, caused by a person who was motivated solely by fear.

The true test is that stated in *People vs. Deeb*

(New York), 132 N.Y.S. 2d 439, at page 442.

"The facts which will lead a court to revoke a suspension of sentence and impose a sentence within the time allowed by Code of Criminal Procedure, 470-A, depend ultimately on the sound judgment and discretion of the Judge. His determination in this respect is to be governed generally by the same considerations of justice and fairness that will guide his judgment in imposing or suspending a sentence in the first instance."

Obviously the court in revoking the probation of this appellant did not act in accordance with the rules laid down by the Supreme Court of the State of Utah or the test of fairness and reasonableness laid down by the New York Courts.

CONCLUSION

It is respectfully submitted that:

I. The District Court in and for Weber County erred in not causing this appellant to be represented by counsel, and that the District Court in and for Salt Lake County erred in not granting the Writ of Habeas Corpus thereafter requested by the appellant.

II. It is further urged that the District Court in and for Weber County erred in that it arbitrarily and capriciously acted in revoking the probation of the appellant, Brent Spiers, without just cause.

Respectfully submitted,

PETE N. VLAHOS

Attorney for Appellant