1967

Donald Wilkerson v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD WILKERSON,
Plaintiff, Appellant,

vs.

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

Case No. 10858

BRIEF OF RESPONDENT

**Appeal from the Judgment of the Third District Court,
Salt Lake County, State of Utah
Honorable Bryant H. Croft, Judge**

CHARLES WELCH, JR.
Attorney for Appellant

PHIL L. HANSEN
Attorney General
LEROY S. AXLAND
Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Respondent

PRINTED BY SALT LAKE TIMES

TABLE OF CONTENTS

Cases Cited

Statutes Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD WILKERSON,
Plaintiff, Appellant,

vs.

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

Case No. 10858

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Donald Wilkerson, was convicted of the crime of third degree burglary in the District Court of the Second Judicial District, Davis County, State of Utah. From this conviction an appeal was taken. The Supreme Court of the State of Utah upheld the conviction. The instant appeal is from a denial of plaintiff's petition for habeas corpus seeking his re-

lease from confinement in the Utah State Prison by reason of the judgment and commitment order as a result of the burglary conviction.

DISPOSITION IN THE LOWER COURT

Appellant filed his petition for writ of habeas corpus in the Third Judicial District, Salt Lake County, State of Utah on October 24, 1966. On December 9, 1966, a hearing was held before the Honorable Bryan H. Croft, District Judge. The court entered its memorandum decision denying appellant's petition on February 9, 1967.

On March 1, 1967, appellant filed a Notice of Appeal from the court's decision.

STATEMENT OF FACTS

Respondent essentially agrees with the statement of facts as presented in appellant's brief, but wishes to point out that the question of whether or not appellant had waived his right to counsel in the interrogation conducted in Jerome, Idaho, is one of the questions to be decided by this appeal.

Therefore, respondent objects to the statement on page 4 of appellant's brief that appellant was questioned "without being properly represented by counsel."

POINT I

APPELLANT WAS IN NO WAY PREJUDICED BY THE REFUSAL OF THE UTAH STATE SUPREME COURT TO APPOINT A SECOND ATTORNEY FOR THE PURPOSE OF ASSISTING HIM IN HIS APPEAL WHEN THE RECORD SHOWS THAT THE ORIGINAL APPOINTED ATTORNEY COULD FIND NO MERITORIOUS GROUNDS FOR APPEAL.

Respondent readily admits that the requirements of the Sixth Amendment can only be satisfied when an accused has been afforded the opportunity to retain counsel to assist him in his defense. In addition to the safeguard of the Sixth Amendment, the Constitution of the State of Utah, art. I, § 12, specifically states that:

> "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel."

It seems clear that the United States Supreme Court has extended this right to include the post-conviction stage as well as preliminary and trial stages in a criminal prosecution. In *Douglas v. California,* 372 U.S. 353 (1963), the United States Supreme Court invalidated a system whereby the intermediate appellate court would examine the merits of a proposed appeal by an indigent convicted of a crime. If the court found some merit to the appeal it would appoint counsel to represent the accused and assist him in his appeal. If

no meritorious points were found the court would refuse appointments of counsel and the accused was allowed to prosecute the appeal pro se. The Supreme Court held that such a system violated the right of an accused to the equal protection guaranteed by the Fourteenth Amendment. Mr. Justice Douglas stated:

> "In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided." Id. at 355-56.

In so stating, the court agreed with the position taken by Justice Traynor of the California Supreme Court who said that:

> "Denial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin v. Illinois*. . . ." *People v. Brown*, 55 Cal.2d 64, 71, 357 P.2d 1072, 1076 (1960) (concurring opinion).

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the United States Supreme Court held that a state may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. The question in issue was the right of an indigent to a free transcript on appeal. In both the *Douglas* case and

the *Griffin* case the evil was the same, discrimination against the indigent.

From these cases it is readily apparent that an indigent is entitled to the same protection as that accorded a defendant of means.

The statutes of Utah and court pronouncements on this subject demonstrate that this state has recognized the right of an accused to counsel at preliminary and trial stages as well as post-conviction proceedings. Utah Code Ann. § 77-15-1 (1953) states:

> "When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense triable, or on information or indictment, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceeding."

To this the Utah State Supreme Court has added:

> "The prevailing opinion correctly indicates that the right to have the assistance of counsel at every stage of the proceedings includes the right to counsel at the arraignment, at the preliminary hearing and at all subsequent proceedings." *State v. Braasch,* 119 Utah 450, 464, 229 P.2d 289, 295 (1951) (concurring opinion).

Respondent agrees that the Constitution of the United States as well as the Constitution and case law of the State of Utah extend to an accused the right to counsel in all proceedings as one of the fundamental

rights of all citizens. The case of *State v. Hines*, 6 Utah 2d 126, 307 P.2d 887 (1957) is especially appropriate here. The Utah Supreme Court stated at 6 Utah 2d 131, 307 P.2d 891:

> "The privilege of an accused to the assistance of counsel is one of the fundamental rights. It is more than empty form; it means the right to a *reputable member of the bar* who is willing and in a position to *honestly* and *conscientiously* represent the interests of a defendent and to *present such defenses as are available to him under the law and consistent with the ethics of the profession.*" (Emphasis added.)

Appellant in the instant case had appointed to represent him in his appeal a member of the bar with considerable experience and reputation in handling criminal matters. Nowhere does appellant claim that Mr. Mitsunaga did not honestly and conscientiously represent his interest. The fact is that after a thorough examination of the trial transcript Mr. Mitsunaga could not find any meritorious issues upon which, in his opinion, the case could be reversed. Certainly, an attorney cannot be required to do more. If no defenses are available to him under the law he cannot be required to manufacture such defenses just to please his client. To do so would certainly not be consistent with the ethics of the profession.

Furthermore, the United States Supreme Court in *Ellis v. U.S.*, 356 U.S. 674, 675 (1958), stated in a per curium opinion:

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, the leave to withdraw may be allowed and leave to appeal may be denied."

See also *Hardy v. U.S.*, 375 U.S. 277 (1964).

The instant case bears marked resemblance to *Stanmore v. People*, 157 Colo. 207, 401 P.2d 829 (1965). In that case the conviction of Stanmore for robbery and conspiracy to commit robbery had been affirmed on a pro se appeal. *Stanmore v. People*, 146 Colo. 445, 362 P.2d 1042 (1962), cert. den. 368 U.S. 993 (1962). Stanmore then petitioned for a writ of habeas corpus contending that he had been denied the right to counsel on his appeal. The Supreme Court of Colorado ordered the trial court to appoint counsel for him with the instruction that the appointed counsel be directed to examine the trial record to determine whether any reversible error had occurred during the trial which had not been presented on appeal. Counsel was also directed to examine the briefs to determine if the matters raised on appeal had been adequately presented. He was then to submit a brief in support of any matters not brought before the court in the appeal. After examination of the record and the appeal briefs, counsel concluded that no additional grounds for an appeal were present and that all points had been adequately

presented. In upholding the conviction the court stated at 157 Colo. 209, 401 P.2d 830:

> "The matter having been presented to us in this light by the brief of the competent counsel appointed pursuant to order of this court, we now adhere to our decision as reported in *Stanmore v. People*, supra. It is our firm conviction that while indigent defendants convicted of a crime are certainly entitled to have counsel appointed at State expense to represent them on review, [citing *Douglas v. California*], they are not entitled to require the state to search for counsel until one is found who will contend that there was error in the trial.
>
> "This is in contrast to the rule which demands that everyone be afforded counsel at his trial. At the trial, the issue is guilt or innocence, and the determination of the issues must, by constitutional right, be by a jury. *On review, however, the issue is not guilt or innocence, but whether errors of law have been committed which warrant reversal of the conviction.* When an able lawyer appointed by the state, after conscientious and diligent investigation, determines that no grounds of error exist, the defendant may, of course, continue to prosecute his writ of error, but not, in our view, with counsel paid for by the state." (Emphasis added.)

In *State v. Burrell*, 96 Ariz. 233, 393 P.2d 921 (1964), defendant, after having been convicted of escape and robbery, requested appointment of counsel to assist him in his appeal. Counsel was appointed and after searching the record reported to the Arizona Supreme Court that he was unable to find grounds for

appeal. In accordance with an Arizona statute which requires the court to search the record for fundamental error in all criminal appeals, the court ordered the record submitted. After reviewing the record, the court affirmed the conviction stating at 96 Ariz. 235, 393 P.2d 923:

> "The counsel appointed by the court has acted as an advocate for the defendant, and not as amicus curiae. We are satisfied that he has made a conscientious investigation, and agree with his conclusion that there are no grounds for a successful appeal."

See also, *People v. Tabb,* 156 Cal. App.2d 467, 319 P.2d 656 (1957); *State v. Ortiz,* 98 Ariz. 65, 402 P.2d 14 (1965); *Richardson v. Willard,* 241 Ore. 376, 406 P.2d 156 (1965).

The similarities between the instant case and the *Burrell* case are readily apparent. In both cases a competent and experienced attorney was appointed to represent the appellant. In both cases the attorney could find no meritorious points for appeal and communicated his conclusion to the court. Finally, in both cases the court had an opportunity to review the record. In the instant case that opportunity was afforded by appellant's pro se appeal. *State v. Wilkerson,* 17 Utah 2d 353, 412 P.2d 312 (1966). The Utah Supreme Court after examining the brief submitted by appellant and studying the record found the appeal to be without merit and affirmed appellant's conviction.

Respondent, therefore, submits that appellant had adequate counsel to aid in his appeal and that it was not the duty of counsel to manufacture points to be submitted for appeal. Appellant was in no way prejudiced by the Utah Supreme Court's refusal to appoint subsequent counsel.

POINT II

APPELLANT WAS ADEQUATELY INFORMED OF HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION AND NO PREJUDICE RESULTED FROM THE ADMISSION OF TESTIMONY OF THE CHIEF OF POLICE OF JEROME, IDAHO.

The Supreme Court of the United States has seen fit to limit the effect of *Miranda v. Arizona,* 384 U.S. 436 (1966), to cases in which the trial began after June 13, 1966. The constitutional requirements set forth in *Escobedo v. Illinois,* 378 U.S. 478 (1964), are to be effective in trials beginning after June 22, 1964. *Johnson v. New Jersey,* 384 U.S. 719 (1966). Therefore, the effect of the *Miranda* decision has no bearing on the arrest and interrogation of appellant and discussion of the constitutional requirements of *Miranda* are unnecessary to the decision of the instant case.

The constitutional requirements of *Escobedo,* however, are applicable to the arrest and interrogation of appellant and if the admissions of appellant made to

the Jerome City Police Chief are to be considered admissable in appellant's trial, the constitutional requirements of *Escobedo* must have been met.

In *Escobedo* the Supreme Court said at 378 U.S. 490:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The crucial question in the instant case is whether or not the principles set out in *Escobedo* were met at the interrogation of appellant. It is clear that when appellant was taken into custody and before any questioning was attempted, he was informed that he did not have to make any statement and that anything he did say could be used against him. He was also told that he had the right to consult an attorney. During his trial the following exchange took place between appel-

lant's attorney and Chief Yingst of the Jerome, Idaho Police Department:

> "Q. [By Mr. Stratford] When you went up in the jail, when you were there and talked to him, did you tell him he had the right to give you no statement whatever?
>
> A. Yes, I did.
>
> Q. Did you tell him he had the right to consult an attorney?
>
> A. Yes, I did. And I told him right there.
>
> Q. And you also told him, did you not, that any statement he gave, of course, you could use against him?
>
> A. That's right, I did.
>
> Q. Do you know if he had an opportunity to obtain counsel?
>
> A. I don't know. He said, 'I don't want an attorney' the day I talked to him.
>
> Q. He didn't want an attorney?
>
> A. That's right."
> (Ex. P-9 at 57).

From this it can be seen that appellant was informed of his rights at the time of his arrest and was afforded an opportunity to obtain counsel, which he rejected, choosing instead to make an admission of the burglaries in Idaho and Utah in order that he might be returned to Utah for trial. (Ex. P-9 at 49). It is true that appellant later secured the services of an attorney and before his questioning in the Jerome Jail requested that his attorney be present. His attorney stated that

he did "not necessarily" wish to be present at the questioning. (Ex. P-9 at 62-63). Appellant had already made statements implicating himself in both the Utah and Idaho burglaries after being informed of his constitutional rights. When told that his attorney did not wish to be present he knew at that time from the previous statements by the interrogating officers that he did not have to make any further statements and that he could insist that his attorney be present or could obtain another counsel. Appellant voluntarily chose to continue and make further admissions; in so doing, he waived his right to object to the absence of counsel.

Respondent, therefore, submits that appellant was adequately informed of his rights at the time of his arrest and that he knew of his rights at the subsequent questioning that took place in the Jerome City Jail. His failure to insist that his counsel be present was a valid voluntary waiver of his right to counsel. All of the requirements of *Escobedo* were met and appellant was afforded all of his constitutional rights.

POINT III

APPELLANT VIOLATED THE CONDITIONS OF HIS CONDITIONAL TERMINATION BY REMAINING IN UTAH AFTER HIS RELEASE FROM PRISON AND PARTICIPATING IN A BURGLARY AND HIS RETURN TO UTAH TO FACE CHRGES WAS A VOLUNTARY DECISION.

The Board of Pardons has been invested with the duty to determine the conditions under which inmates may be released from prison on parole or have their sentences terminated. Utah Code Ann. § 77-62-3 (1953). It has been held by the Utah Supreme Court that the Board of Pardons has plenary power to set the conditions under which a termination of sentence may be granted and terminating a sentence upon condition that prisoner agree to leave the state is not unconstitutional as amounting to a banishment. *Mansell v. Turner,* 14 Utah 2d 352, 384 P.2d 294 (1963). See also, *In re Cammarata,* 341 Mich. 528, 67 N.W.2d 677 (1954), cert. den. 349 U.S. 953 (1955).

All prisoners released on parole remain in legal custody and are subject at any time to being returned to the prison and their release voided until such time as sentence is terminated. The Board of Pardons is given full power to retake and reimprison any convict on parole. Utah Code Ann. § 77-62-16 (1953). In *McCoy v. Harris,* 108 Utah 407, 160 P.2d 721 (1945), the Utah Supreme Court held that a parolee is still in legal custody and control of the Board of Pardons even though outside the prison walls and the Board has the power to revoke parole without affording the prisoner any hearing.

The terms of appellant's release required that he depart immediately from the State and not return for any purpose. (Ex. P-1) Appellant was released on November 10, 1964, but chose to ignore the conditions

of his release and remained in Utah at least long enough to participate in a burglary on November 22, 1964. Remaining in Utah for that length of time constituted a violation of his release agreement wherein he agreed to leave Utah immediately. This violation was sufficient to warant the revocation of conditional termination even in the absence of any other violations.

Furthermore, appellant's return to Utah was voluntary. It is true he faced charges in Idaho, but he voluntarily chose to return to Utah to face the charges made against him here. He knew that in returning he violated his conditional termination. He could have avoided the possibility of revocation by remaining in Idaho and facing the charges made against him there. Whether the revocation of his conditional termination was based upon his failure to leave the state immediately after his release or upon his return to the state to face criminal charges is immaterial. Under the power given to the Board of Pardons to set conditions for termination of sentence and the power to retain custody over a released prisoner, the Board could have validly revoked the termination order for either reason.

It is submitted, therefore, that appellant violated the terms of his conditional release and the Board acted within its statutory powers in revoking appellant's conditional termination of sentence.

CONCLUSION

Appellant's contentions on appeal are totally without merit. No case exists for reversal or discharge of appeallant from incarceration. Therefore, respondent submits that the judgment of the District Court denying appellant's petition for writ of habeas corpus be affirmed.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

LEROY S. AXLAND
Assistant Attorney General

Attorneys for Respondent

236 State Capitol
Salt Lake City, Utah 84114