

1963

Delbert Chris Clark v. Warden John W. Turner : Brief of Appellant

Utah Supreme Court

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A. Pratt Kesler; Attorney for Respondent;
Delbert Chris Clark; Appellant, Prop. Per.;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

APR 16 1964

Clerk, Supreme Court, Utah

DELBERT CHRIS CLARK,
Plaintiff and Appellant.

vs.

WARDEN JOHN W. TURNER,
Defendant and Respondent.

Case. No.
9994

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HON. MERRILL C. FAUX, JUDGE

A. PRATT KESLER
Attorney General
Atty. for Respondent

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Utah

DELBERT CHRIS CLARK
Appellant,
Prop. Per.

Utah State Prison
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IN THE SUPREME COURT
OF THE STATE OF UTAH

DELBERT CHRIS CLARK,
Plaintiff and Appellant.

vs.

WARDEN JOHN W. TURNER,
Defendant and Respondent.

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) Case No.
) 9994
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BRIEF OF APPELLANT

NATURE OF CASE

Appellant appeals from an order of the District Court, Third Judicial District, Honorable Merrill C. Faux, denying his petition for a writ of habeas corpus, No. 144,764, said writ being sought on the ground that failure of Information, No. 17,349, to meet the requirements of proper pro-

cedure in charging and trying appellant as being an habitual criminal rendered said Information fatally defective, null and void, and without force or effect as a legal instrument to prosecute appellant for the crime of Burglary in the Second Degree and as being in the status of Being An Habitual Criminal.

DISPOSITION IN LOWER COURT

August 5, 1963, appellant petitioned the Third District Court, Hon. Merrill C. Faux, for the writ of habeas corpus, No. 144,764.

No return to aforesaid writ was filed by defendant and without hearing thereon, said writ was denied on August 23, 1963.

Appellant filed Notice of Appeal on September 9, 1963.

RELIEF SOUGHT ON APPEAL

Appellant contends the decision of the lower court should be reversed and appellant be ordered discharged from custody.

STATEMENT OF FACTS

The cause or pretense of the unlawful restraint and imprisonment complained of herein is a judgment and commitment, No. 17,349, entered and ordered on the 2nd day of June, 1961, by the Honorable Ray Van Cott, Jr., Judge of the District Court for the Third Judicial District, Salt Lake County, State of Utah, said judgment and commitment ordering as follows, to wit:

" The judgment and sentence of this Court is that you, Delbert Chris Clark, be confined in the Utah State Prison for the indeterminate term as provided by law, for the crime of Burglary in the Second Degree, as charged; and

The Judgment and sentence of this Court is that you, Delbert Chris Clark, be confined in the Utah State Prison for the term of not less than fifteen (15) years for Being A Habitual Criminal, as charged." (See Judgment and Commitment, No. 17,349.)

Aforesaid judgment and commitment resulted from an Information, No. 17,349, said information alleging as follows, to wit:

"

COUNT ONE

"

That on or about the 9th day of February, 1961, at the County of Salt Lake, State of Utah, the said Delbert Chris Clark entered the building of Dan's Drug, a corporation, in the nighttime with intent to commit larceny therein.

COUNT TWO

That the said Delbert Chris Clark has been previously convicted of two felonies prior to February 9, 1961, as follows, to wit: INSUFFICIENT FUNDS CHECK in the State of Utah, where he was sentenced and committed for 0 to 5 years in the Utah State Prison on the 13th day of February, 1957; and GRAND LARCENY in the State of Idaho where he was sentenced and committed for 14 years in the Idaho State Prison on May 18, 1949. " (See Information, No. 17,349.) "

Aforesaid Information, Count One of which alleged the crime of Burglary in the Second Degree and Count Two of which alleged appellant to be in the status of Being AN Habitual Criminal, both counts of said information being contained on one page of the information and all of this signed by Jay E. Banks, District Attorney for the Third Judicial District, Salt Lake County, State of Utah.

STATEMENT OF POINTS

POINT I

Failure of Information, No. 17,349, to meet requirements of proper procedure in charging and trying appellant as being an habitual criminal rendered information null and void and without force or effect as a legal instrument to prosecute appellant for the crime of burglary and being an habitual criminal.

POINT II

Failure of trial court to require prosecuting officer to file proper information in conformance with rule laid down by Utah Supreme Court controlling in such cases denied appellant due process of law and the equal protection of the laws contemplated by the Utah Constitution and Constitution of the United States.

ARGUMENT

POINT I

FAILURE OF INFORMATION, NO. 17,349, TO MEET

REQUIREMENTS OF PROPER PROCEDURE IN CHARGING AND TRYING APPELLANT AS BEING AN HABITUAL CRIMINAL RENDERED INFORMATION NULL AND VOID AND WITHOUT FORCE OR EFFECT AS A LEGAL INSTRUMENT TO PROSECUTE APPELLANT FOR THE CRIME OF BURGLARY AND BEING AN HABITUAL CRIMINAL.

Appellant submits that aforesaid Information, No. 17,349, Count One of which alleged the crime of Burglary in the Second Degree and Count Two of which alleged appellant to be in the status of Being An Habitual Criminal, both counts of said information being contained on one page of the information and all of this signed by Jay E. Banks, District Attorney of the Third Judicial District, was and is violative of 76-1-18.7 and 76-1-19, Utah Code Annotated 1953, "Procedure in charging and trying a person charged with being an habitual criminal." (Emphasis added.)

Further, appellant submits that aforesaid Information, No. 17,349, alleging the crime of Burglary in the Second Degree in Count One and alleging appellant to be in the status of Being An Habitual Criminal in Count Two, both counts being contained on one page of said information, was and is violative of the rule laid down by this Court in State vs. Stewart, 110 U. 203, 171 P. 2nd 383,

386; following and approving State vs. Ferrone, 96 Conn. 160, 11 Atl. 452, 457 and in State vs. Reilly, 94 Conn. 696, 110 Atl. 550.

In the instant case, trial was had by jury and the trial record shows that appellant elected not to testify in his own behalf, thus not only preserving his right to withhold from the jury any evidence that he had previously been convicted of felony but, by his silence, he precluded and prohibited the prosecuting officer from introducing or presenting to the jury, by impeachment or any other means, evidence that he had previously been convicted of felony. (See Trial Transcript, No. 17,349.)

This Court, in State vs. Stewart, supra, laid down the rule, to wit:

"...the procedure to be followed where prior convictions are alleged in the information, besides the substantive offense, is outlined in State vs. Stewart, supra, which adopts the proper procedure from an English statute and two leading Connecticut cases." (Emphasis added.) (See Volume 8, Utah Code Annotated 1953, on page 234, under (6) 'Information'.)

Explicitly, on the subject of procedure wherein a person is charged and tried as being an habitual criminal, on page 235, Volume 8, Utah Code Annotated 1953, under

(7), "Procedure to be followed where prior convictions alleged", the rule states:

" As a guide for future cases, where there is an allegation of prior convictions, the Supreme Court has outlined the procedure to be followed in the trial courts, which will properly expedite the adjudication of such cases, while at the same time safeguarding the substantial rights of accused persons, and prevent an accused person from being advertised to the jury as one who previously perpetrated a similar type of offense. (Emphasis added.)

" The information should be divided into two parts. In the first, the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part, former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer." (Emphasis added.)

Appellant submits that the foregoing rule is a mandate upon the prosecuting officer and the trial court to be followed.

Appellant respectfully submits that the failure of the prosecuting officer to adhere to the rule laid down by this Court rendered the information null and void and without force or effect as a legal in-

strument to prosecute appellant for the crime of burglary and as being an habitual criminal.

This Court in State vs. Stewart, supra, left no room for doubt in any prosecuting officer's mind what the Court intended wherein a person is being charged and tried as an habitual criminal. In the present instance, the obvious fact is that the prosecuting officer made up his own rule.

Appellant respectfully submits that if the rule and the words are meaningful, the rule and the words should be enforced.

POINT II.

FAILURE OF TRIAL COURT TO REQUIRE PROSECUTING OFFICER TO FILE PROPER INFORMATION IN CONFORMANCE WITH RULE LAID DOWN BY UTAH SUPREME COURT CONTROLLING IN SUCH CASES DENIED APPELLANT DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS CONTEMPLATED BY THE UTAH CONSTITUTION AND CONSTITUTION OF THE UNITED STATES.

In State vs. Stewart, supra, this Court stated:

" As a guide for future cases, where there is an allegation of prior convictions, the Supreme Court has outlined the procedure to be followed in the trial courts

•••"

Appellant submits that the rule laid down by this Court in State vs. Stewart, supra, has been incorporated into and made an inseparable part of the criminal code of the State of Utah. Volume 8, Utah Code Annotated 1953, on page 234, under (6) 'Information' and on page 235, under (7), 'Procedure to be followed where prior convictions alleged' sets forth the rule in plain detail and thus the rule becomes the law.

Appellant respectfully submits that failure of the trial court to enforce the rule and require the prosecuting officer to obey the rule denied appellant due process of law and the equal protection of the laws guaranteed by Article I, Sec't 7 and Article I, Sec't. 3 of the Utah Constitution and Amendment XIV, Sec't. 1 of the Constitution of the United States.

CONCLUSION

In the instant case, due process of law and the equal protection of the laws means that which the law provides. It is appellant's contention that the judgment of the lower court denying his petition for the

writ of habeas corpus should be reversed and
appellant be ordered discharged from custody.

Respectfully submitted,

DELBERT CHRIS CLARK

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