1963

Harold Burleigh v. Warden John W. Turner : Brief of Respondent

Utah Supreme Court

A. Pratt Kesler; Homer F. Wilkinson; Attorneys for Respondent;
Harold Burleigh; Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD BURLEIGH,
Plaintiff and Appellant,

— vs. —

WARDEN JOHN W. TURNER,
Defendant and Respondent.

Case No. 10007

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Fourth District Court for Utah County
Honorable R. L. Tuckett, Judge

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STATEMENT OF NATURE OF THE CASE

The appellant, Harold Burleigh, appeals from a decision of the Honorable R. L. Tuckett, Judge, Fourth Judicial District, State of Utah, denying the appellant's petition for a writ of habeas corpus.

DISPOSITION OF THE CASE BELOW

On September 9, 1963, the appellant, Harold Burleigh, filed a writ of habeas corpus in the Supreme Court of the State of Utah (Case No. 9988). By order of the Chief Justice, on September 9, 1963, the appellant's petition was referred for hearing before the Honorable R. L. Tuckett, Judge, Fourth Judicial District Court, Utah County. The respondent filed an answer to the petition on the 16th day of September, 1963. On September 17 and September 20,

1963, hearing was had before the trial court on the substance of the appellant's petition for habeas corpus. On September 20, 1963, the trial court entered a minute order which was filed on October 8, 1963, denying the appellant's petition for habeas corpus.

RELIEF SOUGHT ON APPEAL

Respondent contends the case is not at the present time properly before the court, and/or that the decision of Judge Tuckett should be affirmed.

STATEMENT OF FACTS

The appellant's petition in this case was filed as an original writ of habeas corpus before the Supreme Court. (R.4). The Chief Justice thereafter referred the matter for hearing before the Fourth Judicial District Court. (R. 3). The appellant alleged in his petition that on the 6th day of November, 1959, he was committed to the Utah State Prison on the charge of issuing a fictitious check, in violation of 76–26–7, U.C.A. 1953. (R. 5). The appellant alleged that the commitment was pursuant to a plea of guilty entered before the court on the 6th day of November, 1959, but that the plea of guilty was the result of an erroneous identification of the appellant as the individual who had issued a fictitious check which was the subject of the information. Further, the appellant alleged that his health was in jeopardy as the result of narcotics withdrawal, hepatitis, etc., and that he entered the plea in order to obtain hospitalization. (R. 5, 6).

Appellant's petition alleged that he had theretofore unsuccessfully sought relief by habeas corpus from the same commitment by a petition and hearing before the Honor-

able Joseph G. Jeppson on December 14, 1961 and January 9, 1962. (R. 6). A copy of the proceedings before the Honorable A. H. Ellett on November 6, 1959, at which time the appellant plead guilty, were attached to and made a part of the record. (R. 20 through 23). These proceedings disclosed that the appellant was represented by counsel, Sumner J. Hatch, Esq.; that he was interrogated by the court and Mr. Hatch relating to the entry of his plea of guilty. (R. 21).

"MR. HATCH: Mr. Burleigh, you understand you have a right for a period of time to enter a plea in this court?

MR. BURLEIGH: That's right.

MR. HATCH: And you have heard the information?

MR. BURLEIGH: Right.

MR. HATCH: And you have discussed the matter with me as to the basis of the minimum and maximum sentence prescribed by law and what it is?

MR. BURLEIGH: I have.

MR. HATCH: And you are also aware that after entering a plea that with the record you have, there is no basis for referring for parole and probation. Is that correct?

MR. BURLEIGH: That's correct.

MR. HATCH: And you are ready to enter a plea at this time?

MR. BURLEIGH: That's correct.

THE COURT: What plea will you enter?

MR. BURLEIGH: Guilty.

THE COURT: Is that your advice to him, Mr. Hatch?

MR. HATCH: That is my advice to him, Your Honor. We further for the record waive the time for sentencing on his statement. At this time — I mean for entering plea. We would also I believe waive time for sentencing. Is that correct, Mr. Burleigh?

MR. BURLEIGH: That's correct."

The record of the proceedings before the Honorable Joseph G. Jeppson was certified as part of the record of

this case on appeal. It appeared that on the 30th day of January, 1962, Judge Jeppson, pursuant to the previous hearing upon the appellant's petition, entered his findings of fact and conclusions of law, and that on the same day entered his judgment denying the appellant's exceptions thereto and the appellant's petition for habeas corpus. The appellant did not perfect an appeal from that decision, but on September 9, 1963, approximately eight months later, filed an original writ before the Supreme Court.

At the time of the hearing before Judge Tuckett, the trial court heard two witnesses who gave evidence as to the appellant's petition. The first was a Mr. Kresh Juretich (R. 182), who testified that he saw the appellant in the County Jail prior to his commitment, and that he was sick and in need of a doctor, and that, in his opinion, he was not guilty. (R. 183–184). Gladys Nieser was called and testified that in 1959 she was a checker at Albertson's Market, Second South and Fourth East, Salt Lake City, Utah (R. 185); that she accepted a fictitious check and at that time identified Mr. Burleigh, the appellant, as the individual who passed the check. (R. 186). However, she is presently of the opinion that it was another individual and not Mr. Burleigh. (R. 186).

The record of the proceeding before Judge Jeppson was apparently considered by the trial court in the hearing before Judge Tuckett. (R. 173). The evidence in this proceeding discloses that upon the appellant's commitment to the State Prison, Dr. William C. Knott, the attending physician at the State Prison, diagnosed the appellant as suffering from withdrawal symptoms attendant to narcotics addiction, hepatitis, and having flesh burns on his chest. (R. 52). He was very sick at that time. (R. 53). However, he

was lucid and not mentally deranged. (R. 55, 56). The appellant, who testified at his previous hearing, indicated that he knew what he was doing at the time he plead guilty (R. 111), and that he had previously discussed the action he took with counsel. (R. 103). Further, he was aware that pleading guilty to a fictitious check charge carried a lesser penalty than a second conviction for narcotics violation, and there were two charges pending against him for narcotics violation. (R. 86, 102).

The evidence offered at that hearing relative to the identity of the appellant having committed the crime showed that Mrs. Nieser had originally identified him as being the individual who had passed the fictitious check at her place of employment. (R. 59–60). Thereafter she identified Mr. Burleigh as the culprit in a police lineup. She indicated that at that time, the time of the hearing before Judge Jeppson, she felt that another individual by the name of Crane was the person who had passed the check, but she admitted that there was no question in her mind at the time of her identification of Mr. Burleigh, that she thought he was the individual who had committed the crime. (R. 76).

Judge Jeppson, in his findings of fact, found that the petitioner's plea of guilty was voluntary, and that at the time he entered the plea, he was in complete control of his mental faculties and entered the plea in an effort to obtain the benefit of not being charged on narcotics offenses. (R. 28). The court felt that there was no clear factual basis warranting relief. (R. 29).

Based upon all the evidence before Judge Tuckett, he orally stated on the 20th day of September, 1963, that the appellant's petition was denied. (R. 188). No order to that effect was ever entered. A minute entry was entered by the

clerk denying the petition on October 8, 1963. (R. 42, rear of page). On the 8th day of October, 1963, the appellant filed a notice of appeal to the Supreme Court from the decision of Judge Tuckett.

ARGUMENT

POINT I.

THE CASE IS NOT PROPERLY BEFORE THE SUPREME COURT ON APPEAL.

The record discloses that no formal order has ever been entered by the trial court denying the appellant's petition for habeas corpus. 78–2–2, U.C.A. 1953, gives the Supreme Court the right to issue an original writ of habeas corpus. The writ in this instance, although directed to the Supreme Court, was made returnable before the District Court. As a consequence, the action of the District Court was not the act of the Supreme Court, nor did it purport to act as a master in taking evidence by referring the matter to the Supreme Court. As a consequence, it is necessary that a final order be entered before the Supreme Court may have appellate jurisdiction. 78–2–2, U.C.A. 1953.

Habeas corpus is a civil remedy and generally governed by the Rules of Civil Procedure. *Winnovich v. Emery,* 33 Utah 345, 93 Pac. 988; *State v. Kelsey*, 64 Utah 377, 231 Pac. 122. In such cases, it is clear that a minute entry is not a final judgment of the trial court from which an appeal may lie. Rule 72(a), Utah Rules of Civil Procedure.

In *Attorney General v. Pomeroy*, 93 Utah 426, 73 P.2d 1277, this court ruled that a minute entry entered by the trial court was not such an order as would be appealable, and thus allow the Supreme Court to take jurisdiction. The court stated:

"And it is well settled in this jurisdiction that an appeal from what constitutes a finding merely as compared to a judgment which actually adjudicates the rights of the parties is not appealable. Thus, an appeal from a verdict where judgment has not been entered. Kourbetis v. National Copper Bank, 71 Utah 232, 264 P. 724. Nor from an order for judgment. Ellinwood v. Bennion, 73 Utah 23–29 563, 276 P. 159. Nor from a minute order dismissing appeal. * * *"

Since no final order has been entered in this matter, it is submitted that this court is without jurisdiction to review the trial court's action until such order is entered.

POINT II.

THE APPELLANT MAY NOT CLAIM RELIEF ON HABEAS CORPUS BECAUSE OF THE FAILURE OF AN APPEAL TO BE TAKEN FROM A PREVIOUS ADVERSE DETERMINATION ON AN APPLICATION FOR WRIT OF HABEAS CORPUS.

The appellant, for the first time on appeal, contends that he should not be precluded or barred by his previous application, and the denial thereof, for a writ of habeas corpus before the Honorable Joseph Jeppson because of failure to appeal. No issue was made at the hearing before the Honorable R. L. Tuckett that he was in anyway prevented from taking an appeal, nor did he protest in anyway the failure of an appeal to be taken in his behalf. Thus, the first time the question has been raised as to whether or not the appellant may have some remedy still available to him on account of the failure of a previous appeal appears in his brief now on file before this court. The appellant contends that it was a failure of counsel to perfect his appeal rather than a failure of any action on his part.

It should be noted, first, that there is no requirement that counsel be furnished to a petitioner seeking relief by habeas corpus . The decision of *Douglas v. California*, 83 S.Ct. 814 (1963) involved only the question of whether or not due

process required that counsel be furnished during the "first appeal" from a criminal conviction. The Supreme Court in that case specifically denied that it was deciding the issue of whether counsel must be provided an indigent seeking a discretionary hearing after his appeal.

In a monograph entitled, "Increased Rights for Defendants in State Criminal Prosecutions," National Association of Attorneys General, page 33, it is noted that at the present time there is no requirement that counsel be provided in collateral proceedings, and that due process has not as yet been extended to encompass such a requirement, even within the federal system.[1] Even so, the motion filed in this case, No. 10007, clearly demonstrates that every effort was made by the court to provide counsel for the accused, and that various counsel who examined the nature of the appellant's petition felt that there was no merit to the position.

Although not a matter of record, but a matter of which this court may take judicial notice, is the fact that Calvin E. Clark, who acted as counsel for the appellant, indicated in the presence of the Chief Justice and a member of the Attorney General's office that he could find no basis to claim relief on appeal. Even so, it is well settled that habeas corpus is not an appropriate remedy to claim relief because of the failure of counsel to perfect an appeal. 19 A.L.R.2d 789. In the previously referred to annotation, at page 794, it is noted:

> "Generally, one convicted of crime in a court having jurisdiction, without violation of any constitutional right, cannot successfully contend in habeas corpus proceedings that he was deprived of the right to appeal by reason merely of some act or omission of his counsel resulting in failure to get it heard in the appellate court."

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[1] Copies of this monograph were supplied to this court by the National Association of Attorneys General.

See also *Moore v. Aderhold*, 108 F.2d 729, 10th Circuit (1939), where the court stated:

> "* * * [It] is not a necessary element of due process of law and is not incumbent upon the trial court to see to it that defendant's attorney perfects an appeal."

See also *Ex Parte Whitson*, 70 Okla. Crim. 79, 104 P.2d 980 (1940).

Consequently, appellant is in no position to claim relief by virtue of an alleged failure of hired or appointed counsel to perfect an appeal. The nature of the case itself is such that a reasonable conclusion arises that counsel could find no meritorious basis for an appeal.

POINT III.

APPELLANT IS ENTITLED TO NO RELIEF BASED UPON THE RECORD NOW BEFORE THE COURT.

The record in the instant case discloses that the appellant knowingly plead guilty to the offense for which he is now being detained. Appellant's plea of guilty was accepted by the court only after full inquiry by both the court and counsel as to whether or not the appellant was fully aware of the act he was undertaking. The appellant, himself, by his testimony before Judge Jeppson, admitted that he knew what he was doing at the time he entered his plea of guilty. (R. 111). It is well settled that a plea of guilty has the effect of admitting each and every element of the crime, including the identity of the accused as being the individual charged in the information, and being the individual who committed the crime. Abbott, Criminal Trial Practice, 4th Ed., Sec. 91, notes:

> "The plea of guilty, unless withdrawn, has the same effect in respect to the subsequent proceedings thereon against the accused as a verdict of guilty."

Consequently, when the appellant entered his plea, knowing full well the consequences of the plea and the nature of the act he was doing, he cannot now be heard to complain. There is no contention that his will was overborne by the prosecution or the court, and Judge Jeppson expressly found that the appellant was in complete control of his mental faculties at the time he entered his plea, and that he did so, in part, to obtain the benefits of reduced action against him on other pending narcotics charges. Although there is nothing express in the record which would indicate that a direct promise was made that the narcotics charges would be dropped, there is substantial evidence to indicate that the appellant was aware that his commitment on the fictitious check charge may have deterred the prosecution on the narcotics charge. Further, there is no evidence that the narcotics charges have in fact been pressed. Therefore, it must be concluded that there is no merit to the appellant's contention that his plea of guilty was not voluntarily entered, and that he now may seek some relief to void that plea.

Although the appellant contends that he was not the individual who committed the crime, he does not deny that he was the individual in fact who was charged with the crime. It is well settled that the question of guilt or innocence is not a proper matter for inquiry on habeas corpus.

Most recently, the Colorado Supreme Court, in the case of *Specht v. Tinsley*, 385 P.2d 423 (Colo. 1963), stated:

> "Habeas corpus is not intended to take the place of review by writ of error, and the fact that one may be improperly or unlawfully confined 'for any criminal or supposed criminal matter' does not, ipso facto, entitle him to be 'discharged' or 'admitted to bail' or in 'any other manner relieved' through the use of habeas corpus. * * *"

In 39 C.J.S., *Habeas Corpus,* Sec. 13, it is stated:

> "The right of a person to the writ of habeas corpus depends on the legality or illegality of his detention, and this in turn depends on whether the fundamental requirements of law have been complied with, and not at all on the guilt or innocence of the prisoner, or the justice or injustice of his detention on the merits. * * *"

See also *Ex Parte Yahne*, 193 Cal. 386, 224 Pac. 542.

The appellant cites several cases in his brief for the proposition that identity is a factor subject to inquiry by habeas corpus. It must be noted that the identity discussed in the cases cited by the appellant does not relate to the factual question of whether the accused was or was not the person who committed the crime; rather, the issue decided by those cases is (1) whether the individual being held is in fact the person charged; (2) whether or not there has been an impersonation of the person charged, *Foster v. Perry,* 71 Fla. 155, 70 So. 1007; and (3), whether or not the individual sought to be extradited is in fact the person charged with the crime, or whether he was within the jurisdiction to which he is sought to be returned. Scott and Roe, *Habeas Corpus,* pp. 15, 392, 407, 412.

Consequently, since the appellant's claim of lack of identity goes only to a factual determination as to his guilt or innocence, it is not a matter properly the subject of inquiry by habeas corpus.

In spite of this, the particular issue must be resolved against the appellant's since, first, he admitted his identity with his plea of guilty. Secondly, the appellant was the individual identified by at least one witness at the time of the occurrence although some time later the witness retracted her identification of the appellant. Further, appellant was identified during a police lineup as the culprit. Both trial judges made determinations against him relative to whether

or not the factual identity was sufficient to sustain the conviction. At best, the appellant's contentions go to issues of fact which, when analyzed against his plea of guilty, afford him no relief by habeas corpus. Further, the previous determination of one court (Judge Jeppson), after full hearing, that there was no merit to the appellant's petition, and the subsequent similar determination before another court (Judge Tuckett) warrants rejection of any relief on appeal. 39 C.J.S., *Habeas Corpus*, Sec. 105, pp. 698 and 700.

POINT IV.

THE APPELLANT IS ESTOPPED TO CLAIM RELIEF BY HABEAS CORPUS.

It is submitted that the appellant in the instant case is clearly estopped to claim relief by habeas corpus from his present commitment. The evidence of record discloses that the appellant, with eyes wide open, entered his plea of guilty. Judge Jeppson made a finding of fact to the effect that the appellant received the benefit of arrested prosecution on other charges by entering his plea to the instant offense, and that the other charges were of a substantially more serious nature. To allow the appellant to wait some two years from the time of his commitment before seeking any judicial relief, where the appellant had full knowledge of the facts at the time he entered his plea, would allow the appellant to play games with the law. The statute of limitations may well have run against the narcotics offenses or the prosecution's evidence may no longer be available. Having elected the course to follow, the appellant may not now, at this late date, request consideration from this court. Any error that may exist in the appellant's case was self-induced and he is, therefore, estopped to request relief. 58 A.L.R. 1286; 62 A.L.R.2d 432; *People v. Vernon*, 9 Cal. App. 2d 138, 49 P.2d 326.

CONCLUSION

An analysis of the record in this case clearly demonstrates that there is no legal nor factual basis for appellant to obtain the relief of this court The court does not have jurisdiction over the matter, habeas corpus is an inappropriate remedy, the record evidences no factual basis for relief, and the equities that may be existent in this case are unfavorable to the appellant by virtue of his action in precipitating the condition he now finds himself in.

Respectfully submitted

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