1992

Stephen Currier v. Tamara Holden; Carl McClellan v. Tamara Holden : Response to Petition for Rehearing

Utah Court of Appeals

COPY

IN THE UTAH COURT OF APPEALS

STEPHEN CURRIER,	:	
Petitioner and Appellant,	:	Case No. 920467-CA
v.	:	
TAMARA HOLDEN, WARDEN,	:	Priority No. 03
Respondent and Appellee.	:	

CARL McCLELLAN,	:	
Petitioner and Appellant,	:	Case No. 930123-CA
v.	:	
TAMARA HOLDEN,	:	
Respondent and Appellee.	:	

REPLY TO RESPONDENT'S PETITION FOR REHEARING

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KATHRYN D. KENDELL (5398)
Attorney for Currier
American Civil Liberties Union
9 Exchange Place, #715
Salt Lake City, UT 84111

STEVEN AESCHBACHER (4527)
Attorney for McClellan
Ray, Quinney & Nebeker
79 South Main, #400
Salt Lake City, UT 84111

JAN GRAHAM (1231)
Utah Attorney General
ANNINA M. MITCHELL (2274)
ANGELA F. MICKLOS (6229)
JAMES BEADLES (5250)
Assistant Attorneys General
130 State Capitol
Salt Lake City, UT 84114
Attorneys for Appellee

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Assistant Attorneys General
130 State Capitol
Salt Lake City, UT 84114
Attorneys for Appellee

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INTRODUCTION

Respondent seeks a rehearing on this court's opinion invalidating § 78-12-31.1. Respondent's petition raises three entirely new arguments. Raising these arguments at this point is improper, and abusive of the rehearing process. Moreover, respondent's arguments are unfounded and unsupported by Utah law.

ARGUMENT

I. RESPONDENT, HAVING FAILED ON APPEAL TO RAISE THE ISSUES PRESENTED IN HER PETITION FOR REHEARING HAS WAIVED HER RIGHT TO RAISE THESE ISSUES.

In her Petition for Rehearing, respondent, for the first time raises three points in support of her view that this court's

decision was incorrect. None of the arguments raised by respondent were raised on appeal before this court, either in briefs or at oral argument. At no time did respondent challenge or question this court's authority to determine the constitutionality of § 78-12-31.1. Presumably, respondent is displeased with this court's holding that the restrictive statute of limitations set forth in § 78-12-31.1 renders it unconstitutional. Nevertheless, respondent was put on notice that the constitutionality of § 78-12-31.1 was being challenged and that this court was the forum to which the constitutional challenge was presented. Rule 35 of the Utah Rules of Appellate Procedure provides that a rehearing may be sought when a party believes the court "overlooked" or "misapprehended" the argument presented on appeal. Implicit in the Rule is the requirement that a Petition for Rehearing seek court review of arguments presented below when there is a good faith basis for believing the argument was not fully or clearly understood by the court. Respondent subverts the policy underlying a Petition for Rehearing by asking the court to consider new arguments after failing to convince this court of the correctness of her original position. Allowing respondent to raise new arguments at rehearing amounts essentially to a grant of an entirely new hearing, not merely a rehearing of the issues which were addressed and correctly understood by this court.

II. THIS COURT HAS THE POWER AND AUTHORITY TO DECLARE A STATE LAW UNCONSTITUTIONAL.

Respondent invokes Article VIII, section 2 of the Utah

Constitution in support of her view that only the Utah State Supreme Court can declare state laws unconstitutional. However, Article VIII, section 2 was codified years prior to the creation of this court. Moreover, the jurisdiction of this court, set forth at Utah Code Ann. § 78-2a-3 includes "appeals from orders on petitions for extraordinary relief sought by persons who are incarcerated . . . ". Petitioner properly sought review from this court of the dismissal of his writ by the trial court based on his failure to file within the 90-day time period.

III. THIS COURT WAS MANIFESTLY CORRECT IN CONCLUDING THAT ARTICLE I, SECTION 5 OF THE UTAH CONSTITUTION PROVIDED PETITIONER A CONSTITUTIONALLY PROTECTED REMEDY FOR CHALLENGING THE LEGALITY OF HIS CONVICTION.

a. <u>The remedy of writ of habeas corpus is not limited to jurisdictional challenges.</u>

Respondent scolds this court for it's conclusion that Article I, section 5 of the Utah Constitution provides appellant the right to collaterally attack his conviction by way of a Petition For Writ of Habeas Corpus. In support of this claim, respondent relies on turn-of-the-century case law. Respondent also refers to the Utah Supreme Court case of <u>Hurst v. Cook</u>, 777 P.2d 1029 (Utah 1989) as supporting the proposition that writs of habeas corpus were limited to challenging only jurisdiction. Even a cursory reading of <u>Hurst</u> demonstrates that it stands first and foremost for the proposition that "habeas corpus has become a procedure for assuring that one is not deprived of life or liberty in derogation of a constitutional right, irrespective of whether the error was categorized as jurisdictional or non-

jurisdictional." Id. at 1034. The Hurst opinion is laden with language highlighting the significant importance of the writ of habeas corpus to American constitutional protections. "[T]he writ of habeas corpus is one of the most important of all judicial tools for the protection of individual liberty." Id. The Hurst opinion makes abundantly clear that in Utah, post-conviction relief and the writ of habeas corpus' are not separate procedures, but rather "the writ of habeas corpus has, over the years, absorbed the post-conviction relief remedy to form a single constitutional remedy." Id. at 1033.

The import of the Hurst opinion could not be more clear: "The function of a writ of habeas corpus as a post-conviction remedy is to provide a means for collaterally attacking convictions when they are so constitutionally flawed that they result in fundamental unfairness and to provide for collateral attack of sentences not authorized by law." Id. at 1035. Respondent's citing to Hurst for the proposition that writs of habeas corpus are limited to challenging jurisdiction borders on misrepresentation. Moreover, the Hurst opinion cited as precedent Thompson v. Harris, 106 Utah 32, 144 P.2d 761 (1943) which recognized that the writ of habeas corpus is not to be regarded woodenly, but rather, that this "precious safeguard of personal liberty" should not be limited to only jurisdictional questions. Id. at 766.

The inanity of respondent's restrictive interpretation of the purpose of the writ of habeas corpus remedy is demonstrated

by application of her analysis to § 78-12-31.1. If in fact the statute of limitations embodied in that section is interpreted as respondent now suggests, then the 90-day limitation period would only apply to those writs based on jurisdictional challenges and not to post-conviction relief or petitions misidentified as writs of habeas corpus which challenge convictions on bases other than jurisdiction. Certainly, given the legislative debate surrounding § 78-12-31.1, it cannot legitimately be argued that the legislature intended anything other than application of the limitations period to all post-conviction writs and not to those which challenged only jurisdiction. Respondent's argument falls flat in the face of clearly delineated legislative intent and purpose.

b. Section 78-12-31.1 is so restrictive as to amount to suspension of the writ of habeas corpus in violation of Article I, section 5.

Respondent relies on the authority of two out-of-state cases in arguing that § 78-12-31.1 does not violate Utah's anti-suspension clause. Both of these cases are so factually and analytically inapposite as to provide virtually no support for respondent's assertion. In In Re Petition of Runyan, 121 Wash. 2d 432, 853 P.2d 424 (1993) the Washington Supreme Court addressed a challenge to a one-year statute of limitations for post-conviction, collateral relief. Petitioners in Runyan were arguing that this time limit suspended the writ of habeas corpus in violation of the Washington Constitution. The challenged statute in Washington was not limited to writs of habeas corpus,

but applied to all post-conviction petitions. The Court, in upholding the limitations provision noted throughout its opinion that the challenged statute provided for numerous safeguards. Also noteworthy to the Court was the fact that the statute contained numerous exceptions, including, the discovery of new evidence or convictions obtained with insufficient evidence. Id. at 431. In fact, the Runyan court specifically stated that "a strict statute of limitations on all habeas petitions would be a derogation of the common law writ of habeas corpus and hence, an unconstitutional suspension of the writ." Id.

What this court was faced with on appeal was the definitive strict statute of limitations on all habeas petitions, not the relaxed and broadly exemptive provision challenged in Washington. Moreover, as respondent neglects to note, the statute challenged in Washington was a one-year statute of limitations as opposed to the strikingly restrictive 90-day statute which this court legitimately invalidated.

In Potts v. State, 833 S.W.2d 60 (Tenn. 1992), also relied on by respondent, the Tennessee Supreme Court addressed petitioner's challenge to a three-year statute of limitations for post-conviction relief. Again, the statute challenged in Tennessee addressed petitions for post-conviction relief and not specifically writs of habeas corpus. This critical distinction is ignored by respondent. The Tennessee Supreme Court held that the statute of limitations on the filing of post-conviction petitions was inapplicable to habeas corpus proceedings. The

Court went on to note a theoretical and statutory distinction in Tennessee between writs of habeas corpus and post-conviction petitions. This distinction was explicitly rejected by the Utah Supreme Court in Hurst. The Tennessee court said that the statute of limitations provision would not effect the filing of writs of habeas corpus except to the extent that the habeas petitions were properly treated by courts as post-conviction petitions. "Habeas corpus has no statutory time limit." Id. at 62. Again, it is worth noting that the statute challenged in Tennessee was a comparatively generous three-year statute of limitations.

Unlike the Washington and Tennessee statutes, the Utah statute of limitations specifically names and singles out for limitation all writs of habeas corpus. The statute was meant to apply to all writs collaterally attacking a conviction. The breadth and scope of the statute coupled with a lack of any safeguards violates the anti-suspension clause of our State Constitution. An analysis of the cases relied on by respondent demonstrates the correctness of this conclusion.

IV. BECAUSE ARTICLE I, SECTION 5 PROVIDES PETITIONER WITH A CONSTITUTIONALLY PROTECTED REMEDY, THIS COURT WAS CORRECT IN REQUIRING RESPONDENT TO DEMONSTRATE THE CONSTITUTIONALITY OF § 78-12-31.1.

Because this court correctly concluded that Article I, section 5 gave appellant a constitutionally guaranteed civil remedy protected from infringement by Article I, section 11 of the Utah Constitution, application of the two-part test set out in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670

(Utah 1985) was entirely correct. Of course, respondent asserts she was not required to defend the constitutionality of § 78-12-31.1 and makes no defense of the constitutionality of that statute in her petition. However, because the writ of habeas corpus is considered a post-conviction remedy entitled to Article I, section 11 protection, this court conducted the analysis required by Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989). Respondent simply refuses to assume her burden. Respondent's position is understandable, the statute is indefensible. Unfortunately, rather than conceding the manifest unconstitutionality of the 90-day limitation, respondent unjustifiably seeks rehearing, further delaying petitioner a right to be heard by the trial court on the merits of his writ.

CONCLUSION

Respondent's Petition for Rehearing is without merit. Presenting new arguments for this court's consideration at rehearing is improper. This court is specifically granted authority to review petitioner's appeal. This court was correct in finding that the writ of habeas corpus remedy in Utah is regarded as a significant constitutional protection. The severe limitation placed on this remedy by § 78-12-31.1 amounts to suspension of the writ of habeas corpus in violation of Article I, section 5. Respondent has failed to convince this court of the constitutionality of § 78-12-31.1 as required when this court finds a violation of Article I, section 11. This court's opinion striking down the 90-day statute of limitations was correct and

fully supported by Utah law. Respondent's Petition for Rehearing should be denied.

Respectfully submitted this 26th day of October, 1993.

KATHRYN D. KENDELL (5398)
Attorney for Currier
American Civil Liberties Union
9 Exchange Place, #715
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing REPLY TO RESPONDENT'S PETITION FOR REHEARING to be mailed, with first-class postage prepaid, to the following this 26th day of October, 1993:

Steven Aeschbacher
Ray, Quinney & Nebeker
79 South Main
Suite 400
Salt Lake City, UT 84111

Jan Graham
Utah Attorney General
Annina M. Mitchell
Angela F. Micklos
James Beadles
Assistant Attorneys General
130 State Capitol
Salt Lake City, UT 84114

Cheryl D. Armes