1964

Darrell Devere Poulson v. State of Utah : Brief of Respondent

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
William G. Fowler; Attorneys for Appellant;

IN THE SUPREME COURT
OF THE
STATE OF UTAH

DARRELL DEVERE POULSON,
Petitioner-Appellant

— vs. —

STATE OF UTAH,
Respondent.

Case No. 10208

BRIEF OF RESPONDENT

Appeal from the Order of the Fourth Judicial District Court in and for Utah County, State of Utah, Honorable R. L. Tuckett, *Judge*

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General
Attorneys for Respondent

WILLIAM G. FOWLER
1101 Newhouse Building
Salt Lake City, Utah
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

TABLE OF CONTENTS — Continued

IN THE SUPREME COURT
OF THE
STATE OF UTAH

DARRELL DEVERE POULSON,
Petitioner-Appellant

— vs. —

STATE OF UTAH,
Respondent.

Case No. 10208

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Defendant Darrell Devere Poulson was convicted of murder in the first degree in the Fourth Judicial District Court, Utah County, which conviction was affirmed by this court. Subsequently, he petitioned for a writ of coram vobis in the Fourth Judicial District Court, Utah County, and appeals from the dismissal of his petition.

DISPOSITION IN LOWER COURT

On May 8, 1964, the petitioner filed an original writ of coram vobis in the District Court, Utah County, and accompanied the petition by an affidavit of Ija Korner, Ph.D. On May 13, and May 21, 1964, a hearing was held upon the petition and on June 5, 1964, the Honorable R. L. Tuckett, Judge, denied the writ of coram vobis.

RELIEF SOUGHT ON APPEAL

The respondent submits that the petition was properly denied and that the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The respondent adopts the designation of the transcript of original proceedings "T" and the transcript on the petition for extraordinary relief "R" as set forth in the appellant's brief. The respondent will refer to pleadings filed as a part of the petition for writ of coram vobis as "P."

Respondent submits the following statement of facts.

On Saturday, February 16, 1961, the appellant Darrell Devere Poulson, killed and raped Karen Mechling in American Fork, Utah (T. 20, Exhibit 5). The appellant's defense at the time of trial was a claim of insanity. The only evidence tending to support the testimony at the time of trial was offered by Mr. Ija Korner, a psychologist who examined the appellant on one occasion for 2½ hours during which time he gave the appellant a few psychological tests (T. 362, 367, 375). Mr. Korner described the appellant as having "nothing on the ball" (T. 364). He was of the opinion that the appellant was suffering from a mental illness (T. 368). He defined such a mental illness as being where the appellant was unable to control his impulses (T. 365). He did not attempt at any time to ascertain whether the appellant knew the difference between right and wrong (T. 395, 396) and could not say whether the appellant was aware of what he was doing at the time he killed and raped his victim (T. 396). Mr. Korner did not perform a complete I.Q. test on the appellant, but only gave the oral part of the Wechsler Bellvue Test and based upon that, concluded the appellant was feeble minded (T. 364).

A psychologist from the Utah State Mental Hospital testified as to performing a complete I.Q. test and personality integration test. He also gave additional psychological tests to the appellant. He determined the appellant to have an I.Q. on the verbal test of 94 and on the full scale test of 81. He characterized the appellant's condition, based upon his testing, as being one of "mild mental deficiency" (T. 412, 413). Preceding the trial, the court appointed three psychiatrists to examine the appellant. They were Carl H. Kivler, M.D. (R. 7), Louis G. Moench (R. 27) and C. H. Hardin Branch (R. 43). Dr. Kivler was the State's nominee and Drs. Branch and Moench were appointed at the request of the appellant (R. 5). Dr. Kivler and Dr. Moench testified at the trial, but Dr. Branch was not called. Dr. Kivler testified that he examined the appellant on several occasions during the month of November, 1961. He characterized the appellant's mental capabilities as being "mentally retarded in a degree as mild" (T. 421). He was of the opinion that the appellant knew the difference between right and wrong at the time of trial and at the time of the commission of the crime (T. 423). He found no indication of psychosis and was further of the opinion that the appellant knew the nature and quality of his acts and was capable of controlling his emotions (T. 424, 425). Dr. Moench, also a psychiatrist, testified that upon examination of the appellant, he concluded that the appellant's condition was one of "mild mental retardation" (T. 435). He also was of the opinion that the appellant knew the difference between right and wrong, could understand the charges against him, could control his impulses and knew the nature and seriousness of his actions (T. 437, 438). Additional evidence from various lay witnesses was received,

showing the appellant's condition, his background, and his general functioning in the community. Based upon the above evidence, the jury returned a verdict of guilty.

The appellant's petition for a writ of coram vobis alleged the appointment of the three physicians (P. 4). The appellant further alleged that prior to trial that Dr. Moench, by letter, suggested that Drs. Branch and Kivler compare their testimony prior to trial to insure uniformity. The appellant argued that the conduct of Dr. Moench in sending the letter to the other doctors was prejudicial and warranted a new trial (T. 5). No claim or allegation was made in the petitioner's complaint that he was denied due process of law. The affidavit of Mr. Korner was attached which was generally in accordance with the petitioner's complaint. Neither the affidavit nor the complaint alleged that there was in fact any collusion between the doctors to reach a result other than that which they in fact believed to be true or that the doctors had consulted with one another prior to trial for the purposes of presenting a united front or, further, that the doctors had not, when they testified, actually believed their testimony. Nor was there any evidence offered at the petitioner's coram vobis hearing which would support such a conclusion. At the coram vobis hearing, Dr. Kivler testified that he had examined the appellant approximately five to six times prior to testifying at the trial (R. 8). He testified that he had received a letter from Dr. Moench, the contents of which he did not particularly recall, but thought it contained Dr. Moench's evaluation of the case (R. 9). He testified that he received Dr. Moench's letter subsequent to his having made his own evaluation and having reached his own decision as to the appellant's condition (R. 9) and that from his recollection Dr. Moench

was generally in agreement with his evaluation (R. 11). Dr. Kivler did not change his opinion subsequent to receiving Dr. Moench's letter and made no changes in his report concerning the appellant's condition. He made no effort or attempt to contact Dr. Moench subsequent to receiving the letter from him, but merely filed what he had received (R. 18). The communication from Dr. Moench had no effect upon his diagnosis (R. 20).

The letter which Dr. Moench sent, which was accompanied by his analysis, was a copy of a clinical note to Dr. Hardin Branch. That letter (defendant's Exhibit "B") was received into evidence at the collateral hearing and merely suggested that Dr. Branch might find his conclusions helpful and that if Dr. Branch had any serious disagreements that Dr. Moench would like to hear from Dr. Branch. No communication of any disagreement was received by Dr. Moench from Dr. Branch. At the coram vobis hearing, Dr. Moench testified that he submitted copies of his report to Dr. Kivler and Dr. Branch and that he received from Dr. Branch a copy of Mr. Korner's psychological evaluation. He testified that the receipt of information from Dr. Branch did not change his opinion nor did it differ substantially from his conclusions (R. 36). He had made his own independent, historical evaluation of the appellant (R. 36). Prior to trial, he had extensive conversation with the defense, but none with the prosecution (R. 38). The only other communications he had with either Drs. Branch or Kivler was the exchange by mail with Dr. Kivler of the report Dr. Kivler had made, which Moench said had no influence on his opinion (R. 40–42). Dr. Moench testified that the only individual who had approached him in an attempt to influence his opinion was Mr. Korner and that

he disagreed with Mr. Korner and told him at the time he did not support Mr. Korner's conclusions (R. 41).

Dr. Hardin Branch testified at the collateral hearing that he did not testify at the original trial, and that the only communication he had with Dr. Moench was the letter from Moench to him on the 30th of October 1961, with the accompanying reports. He testified that he examined the appellant himself and made an independent psychological evaluation (R. 49, 50). He stated that Dr. Korner had done some psychological testing on the appellant at his request. Prior to trial, Dr. Branch had conversations with the defense (R. 53). In response to questions from the appellant's counsel as to whether there was a psychiatric difference between the terms "mild" or "moderate" as they may relate to a mental deficiency, he testified that they had no technical specificity, but were lay terms which may be used in identifying varying degrees of deficiency. He testified that it was common among psychiatrists, when called to testify as experts, to define amongst themselves areas of agreement or disagreement (R. 55).

Mr. Korner did not testify at the collateral hearing, nor is there any evidence that his affidavit was received by the court. It is noteworthy that Mr. Korner in his affidavit indicates that the letter from Dr. Moench had been exhibited to Father Roger Wood of St. Mary's Episcopal Church of Provo, Utah.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE PETITION FOR CORAM VOBIS SINCE:

A. THE EVIDENCE DOES NOT SHOW THAT ANY OF THE PSYCHIATRISTS WHO EXAMINED THE PETITIONER WERE OF ANY DIFFERENT OPINION THAN THAT GIVEN AT THE TIME OF THE ORIGINAL TRIAL NOR WAS THERE ANY SHOWING OF PERJURY, COLLUSION OR MISCONDUCT.

B. THE PROVISIONS OF 77–24–17, UTAH CODE ANNOTATED 1953, WERE COMPLIED WITH AT THE ORIGINAL TRIAL.

C. THERE IS NO SHOWING OF NEWLY DISCOVERED EVIDENCE WHICH WOULD WARRANT THE COURT GRANTING A NEW TRIAL.

D. THE EVIDENCE WAS NOT NEWLY DISCOVERED SO AS TO WARRANT RELIEF BY CORAM VOBIS.

A. The evidence offered at the petitioner's hearing for relief from the original judgment in no way demonstrated that either Dr. Carl H. Kivler or Dr. Louis G. Moench, the psychiatrists who testified at the appellant's trial, gave any perjured testimony, acted in collusion or otherwise testified contrary to their actual findings. Dr. Kivler, who made the most extensive examination of the appellant (R. 8), had reached his own decision evaluating the appellant's case prior to the time he received a copy of a letter from Dr. Moench to Dr. Branch or any information as to Dr. Moench's evaluation (R. 9). He indicated that he did not change his opinion after he received Dr. Moench's letter and that his diagnosis generally was in agreement with Dr. Moench (R. 11, 14). He further testified that he made no changes in his report, nor did he attempt to contact Dr. Moench. The evidence demonstrates that Dr. Kivler made an independent evaluation and did not engage in any im-

proper activity. The testimony of Dr. Moench was similar in that he indicated that he did not change his evaluation or opinion as a result of communications with Dr. Branch and that Dr. Branch's conclusions did not differ substantially from his (R. 35, 36). Further, Dr. Branch and Dr. Moench communicated extensively with the defense counsel and, therefore, there was no attempt to suppress or hide any evidence. The only person who attempted to influence any of the opinions of any of the doctors was Mr. Ija Korner who, by virtue of his own affidavit and disclosure of the letter from Dr. Moench to Dr. Branch, to an Episcopalian minister, appears to be more than professionally involved in the case. It would appear that Mr. Korner has gone beyond the realm of psychology and has concerned himself with the political and social consequences of the situation to the point that he has lost any objectivity. Finally, Dr. Branch testified that it was not uncommon for psychiatrists to define terms and communicate among themselves in an effort to better understand the problem. The appellant's argument that this somehow is improper, is ridiculous. It would be like advocating that each member of the Supreme Court should write a separate opinion without ever having discussed the case with any other member of the Supreme Court for fear that there might be some exchange of ideas.

The appellant argues that an independent psychiatric evaluation is essential to due process. It is worth noting that the appellant's original petition in the trial court did not recite due process as any grounds for relief. However, a number of states adopt procedures which contemplate the use of psychiatric teams or batteries. In *People v. Pearson,* 41 Cal. App. 2d 614, 107 P.2d 463, the court apparently approved a joint psychiatric report signed by appointed alienists. Many state procedures involve hospitalization and

evaluation by a team. See 23 C.J.S. *Criminal Law,* Section 940(5); *United States v. Everett,* 146 Fed. Supp. 54. Present federal procedure in the District of Columbia may, in the case of an indigent criminal, involve a 90-day mental observation procedure at St. Elizabeth's Hospital. Shadoen, *Law and Tactics in Federal Criminal Cases* (1964), page 245. Shadoen notes that at St. Elizabeth's Hospital, a staff conference is held sometime during the final two to three weeks of the accused's stay which is "the primary diagnostic tool utilized by the hospital." Davidson, *Forensic Psychiatry* (1952), page 35, also notes that a period of hospital observation may be helpful in doubtful cases in determining criminal responsibility. Since this is commonly a team procedure, it can hardly be claimed that it denied due process of law. Psychiatrists are primarily attempting to determine the mental condition of the appellant under admittedly difficult circumstances. The use of a variety of techniques, analyses and disciplines is probably most helpful in attempting to understand the true condition of an accused. Hardman, *The Case for Eclecticism,* 10 Crime and Delinquency 201 (1964). It would be absurd to say that due process required that standard diagnostic techniques and practices not be used when the primary purpose for their use is to determine the mental condition of an individual.

Persuasive of the fact that comparing notes and using other disciplines does not violate due process is the fact that the President has provided in the *Manual for Courts-Martial,* 1951 for just such a form of psychiatric evaluation of an accused charged with an offense triable by court-martial. MCM, 1951, p. 200–223; Executive Order 10214 (1951) Truman. There is no merit, based on the evidence of this case, to the appellant's petition.

B. It is submitted that contrary to the appellant's contention, the provisions of 77–24–17, Utah Code Annotated 1953, were complied with and that there was no variance from the statutory requirements which would warrant the relief sought. 77–24–17 provides that upon notice of the defense of insanity, the court must appoint and select "two alienists" to examine the defendant and investigate his sanity. The statute further provides:

> "It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify whenever summoned, in any proceeding in which the sanity of the defendant is in question."

The statute further provides that any alienist appointed may be called by either party or by the court. In the insant case, the trial court appointed three alienists to examine the appellant. Nothing in the statute prohibits the alienists which are appointed from examining the defendant jointly, considering the findings of each other, or otherwise using the benefit of diagnosis and conclusions of other experts. In fact, the statute would seem to contemplate just such action. The statute uses the plural "alienists" and indicates it is their duty to "examine the defendant *and investigate* his sanity." The investigation of insanity may well involve the obtaining of historical information, the consultation with other physicians and the use of any other appropriate discipline which may enable the alienists to arrive at a conclusion. Contrary to the assertions of the appellant, the statute does neither expressly nor impliedly contemplate that an appointed alienist must, independent of his fellow appointees and without the right of consultation or discussion, examine and reach a conclusion. This Act was passed in 1935 and was based upon the *American Law Institute's*

Code of Criminal Procedure. Laws of Utah 1935, Chapter 122, Section 1. See *American Law Institute Code of Criminal Procedure* (1930); IV and V Utah Bar Bulletin (1935). There is nothing in the legislative history of the Act or in the archives of the American Law Institute which would lead to the conclusion that the framers contemplated that appointed alienists would not be free to consult with one another, use one another's discoveries and endeavor to iron out any differences between one another which would lead to a correct determination of an accused's mental state. Indeed, many states and the federal government were using methods of a similar nature to that followed in the instant situation. It must be concluded that the major premise upon which the appellant bases his claim for relief is faulty and that 77–24–17 was in fact complied with.

C. The testimony offered at the hearing on the petition for a writ of corum vobis demonstrated that each of the doctors who were appointed to examine the appellant testified at the trial as to their personal beliefs based upon a thorough professional investigation. The only evidence which could be deemed newly discovered would be the letter from Dr. Moench to Dr. Branch and the possible knowledge that some of the examining physicians had access to reports and conclusions of the other physicians. It is clear that this is not sufficient evidence as will support a writ of coram nobis or coram vobis.[1]

---

[1] The writ of coram nobis and coram vobis are in fact the same writ. The distinction at common law was dependent upon the jurisdiction of the court issuing the writ. The writ of coram nobis was issued by the King's Bench, whereas the writ of coram vobis was issued by the Court of Common Pleas. See Frank, *Corum Nobis*, Section 1.02 (1953); Rolle, Henry-Abridgement (1668) 746, 747. The correct designation in Utah is writ of coram nobis. *Neal v. Beckstead*, 3 U.2d 403, 285 P.2d 129 (1955); *State v. Woodard*, 108 U. 390, 160 P.2d 432 (1945).

In *State v. Woodard*, this court stated:

> "A writ of coram nobis, where available, seeks to obtain a review of a judgment on the ground that certain mistakes of fact have occurred which were unknown to the court and to the parties affected, and that but for such mistakes the judgment would not have been rendered. 31 Am. Jur. on Judgments, Sec. 802; *State v. Richardson*, 291 Mo. 566, 237 S. W. 765; *Alexander v. State*, 20 Wyo. 241, 123 P. 68, Ann. Cas. 1915A, 1282. * * *"

In *Ward v. Turner,* 12 U.2d 310, 366 P.2d 72 (1961), the petitioner sought a special writ from the Third District Court. The court in rejecting the petition stated:

> "We conclude that the judgment must be reversed for lack of substantial evidence which would reasonably indicate that had the evidence * * * been disclosed to defendant before trial, he would probably have been acquitted."

The applicable standard appears to be that a writ of coram nobis will lie if the evidence which is claimed to be newly discovered is of sufficient consequence that it would be highly probable that had the evidence been disclosed, the jury would not have returned the same verdict. An analysis of the evidence in the instant case shows that it is far below the standard required for relief by coram nobis. The evidence in no way would have affected the result among reasonable men. The evidence did not tend to support the appellant's contention at trial and could have had little effect, if any, on the conduct of the trial itself.

D. It is a well established rule that a writ of coram nobis will not lie if the so-called newly discovered evidence could have been discovered by the use of reasonable diligence. In the insant case, defense counsel had numerous contacts

with the psychiatrists involved (defendant's Exhibit "A"). Appellant could, if he had so desired, called Dr. Branch at his original trial. The evidence relating to the communications between the examining physicians was readily available and a few questions more or less could easily have elicited the information. Thus, in State v. Woodard, 108 U. 390, 160 P.2d 432 (1945), this court observed:

> "* * * However, for a party to be entitled to this writ it must appear that the failure to present the facts to the court was not due to any negligence or fault of the party seeking the writ. As stated in 31 Am. Jur. on Judgments, Sec. 806:
>
> > 'It is essential to the availability of the remedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by the exercise of reasonable diligence have been discovered by him in time to have been presented to the court, unless he was prevented from so doing by duress, fear, or other sufficient cause, so that it was by no negligence or other fault of his that the matter was not made to appear at the former trial. * * *'
>
> See also *State v. Richardson,* supra; *Alexander v. State,* supra; *State v. Boyd,* 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1283.
>
> "In the instant case the mistake of fact upon which the appellant relies is the value of the property stolen. The articles stolen were one Seiberling 6-ply heavy duty 625-16 air cushion tire, rim and tube and two Gates Valee tires, 6-ply heavy duty 625-16 rims and tires. It is apparent that these articles are of the type the value of which was readily ascertainable. The value of these articles at the time they were stolen could have been discovered with very little effort on the part of the defendant. His failure to do so and to call the court's attention to the fact that their value

> was less than $50, if that were so at that time, was clearly negligence and therefore the court did not err in refusing to grant the writ."

The same rule is applicable in the instant case since with very little effort the information which the appellant contends is newly discovered could have been discovered at trial. The evidence was in existence at the time of trial, was within knowledge of persons who testified at the trial or within the possession of persons with whom the appellant's counsel had discussed the case. Consequently, it does not appear that the so-called newly discovered evidence was in fact evidence which could not have been discovered with the use of reasonable diligence. The petition for coram nobis was properly denied.

CONCLUSION

The appellant was given every consideration at the time of trial, was afforded a full review on appeal by this court, and certiorari has been denied by the United States Supreme Court. The petition for extraordinary relief now before this court on appeal is merely the common delaying tactic normally associated with cases where the capital penalty has been imposed. There is no merit to the appeal. This court should affirm.

Respectfully submitted,

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General
Attorneys for Respondent