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Utah Supreme Court

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Delbert Chris Clark; Appellant, Pro Se;
A. Pratt Kesler; Attorney for Respondent;

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IN THE SUPREME COURT

OF THE STATE OF UTAH

UNIVERSITY OF UTAH

MAY 3 - 1965

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DELBERT CHRIS CLARK,	)	
Plaintiff and Appellant	)	
	)	Case No.
vs.	)	
	)	10233
WARDEN JOHN W. TURNER	)	
	)	
Defendant and Respondent	)	
	)	

FILED

NOV 30 1964

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

APPEAL FROM THE JUDGEMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, HONORABLE A. H. ELLETT, JUDGE

A. PRATT KESLER
Attorney General
Attorney for Respondent

State Capitol Building
Salt Lake City,
Utah

DELBERT CHRIS CLARK
Appellant,
Prop. Per.

Utah State Prison
Box 250,
Draper, Utah

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Utah State Prison, and, on the same day he was sentenced on the habitual criminal conviction to a term not less that 15 years in the Utah State Prison, (See Criminal File No. 17349, Commitment).

The habitual criminal charge upon which petitioner was convicted and sentenced was bases upon two prior convictions, one on February 13, 1957 for issuing a check against insufficient funds on which there was imposed a sentence of imprisonment in the Utah State Prison for a term of 0 to 5 years, and the other on May 16, 1949 for grand larceny on which a sentence of imprisonment in the Idaho State Prison was imposed for a term not to exceed 14 years.

ARGUEMENT

Point I.

THE LOWER COURT ERRORED IN DENYING PLAINTIFF'S PETITION FOR A WRIT OF HABEAS CORPUS, AND IN REFUSING TO VACATE AND DECLARE VOID PLAINTIFF'S CONVICTION OF BEING AN HABITUAL CRIMINAL.

The premises upon which appellant's petition is founded is that his prior (1949) Idaho conviction was obtained in violation of due process of law and thus may not be used to enhance the punishment for a sub-

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[illegible]

Court of the Fifth Judicial D istrict, in and for the County of Bannock, State of Idaho, advised of his guarantee right to have Court-Appointed Counsel in his defense, and;

Plaintiff contends that the failure of the trial court to advise him, an indigent defendant, of his right to have Court-Appointed Counsel repersent him was violative of his State and Federal Constitutional guarantees, and;

Plaintiff was convicted upon his plea of guilty and sentenced to the Idaho State Prison without legal counsel, and without being at any time advised of his right to have counsel appointed by the court, in violation of his Constitutional Right as guaranteed by the Constitution of the United Statesof America. And the Supreme Court of the United Stateshas imposed an absolute requirement upon the State Courtds that indigent defendants be afforded Court-Appointed Counsel/ And, further, absent an express waiver of the right to be repersented by counsel, the failure of the Trial Cotuet to offer the assistance of counsel, is sufficient to invalidate a conviction under the due process clause of the Fourteenth Amendment of the Constitution of the United States of America. It was apparently a case such as this that the United States

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District Court was referring to when it held in U.S.—

U.S. ex rel. Savini v. Jackson, C.A.N.Y., 184 F. Supp. 384. 387, that:

> "Constitutional guarantees should not be shorn of their vitality merely to facilitate the administration of a penal policy whereby the sentence of one conviction depends in part on a prior conviction."

Plaintiff contends that his 1949 Idaho conviction can no longer be used as grounds to substantiate a conviction of being an habitual criminal, in that the Idaho conviction cannot stand under the law as laid down in Gideon v. Wainwright, (372 U.S. 335).

POINT II.

THE LOWER COURT ERRORED IN REFUSING TO APPLY THE GIDEON LAW, SUPRA, RETROACTIVELY.

The lower court errored in refusing to apply the GIDEON law retroactively to appellant's 1949 Idaho Conviction when the United States Supreme Court has ruled in U.S. ex rel. Brown v. Murphy, (D.C.N.D.N.Y., 212 F. Supp. 926. Reversed and Remanded), that:

> "Thus, it is significant that no court save one has held GIDEON prospective only, and that in the one the holding was without visible reasoning or support."

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And:

"We have thus concluded that the force of Gideon v. Wainwright, supra, is in no way lessened in these cases merely because the appellants pleaded guilty and failed to request the assistance of counsel" * *."

AND:

"Well before [The Doughty v. Maxwell, —U.S.— (32 U.S.L. Week 3297, February 25, 1964)] case, the Supreme Court had made it clear that a defendant otherwise entitled to the assistance of counsel does not lose that right by his failure to request an attorney at the time of his conviction. In the words of Mr. Justice Brennan, writing for the Court in Carnely v. Cochran, 269 U.S. 506, 513 (1962), 'It is settled that where the assistance of counsel is a constitutional requisit, the right to be furnished counsel does not depend on a request.'" (Brown v. Murphy, supra). (Esp App.)

And: And:

"* * *we feel constrained to hold that State convictions, when founded on a plea of guilty by a defendant unaware of his right to counsel, similarly cannot stand." (Brown v. Murphy, supra).

Thus the question raised by the present appeal is whether the 1949 Idaho conviction, which cannot now stand under the GIDEON law, may now by properly used to support the present conviction and commitment as an habitual criminal.

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POINT III.

THE LOWER COURT ERRORED IN DENYING PETITION FOR WRIT OF HABEAS CORPUS AND IN REFUSING TO ORDER PLAINTIFF'S RELEASE FROM CONFINEMENT ON HIS SENTENCE AND COMMITMENT FOR THE CRIME OF BURGLARY IN THE SECOND DEGREE.

The lower court errored in denying plaintiff's petition for the writ of habeas corpus, and in refusing to order plaintiff's release from the Utah State Prison, and by so doing, refused to recognize the power and authority of the Utah State Board of Pardons, and their power to commute plaintiff's sentence to run concurrently.

Appellant was committed to the Utah State Prison on the 2nd day of June, 1961, and having served one year as required by the rules of the Board of Pardons, appellant was given a public hearing before said Board, and it was ordered, on the 6th day of June, 1962, that appellant's two sentences by commuted to run concurrently as of June 6, 1962, (R. -7), (See: Act of 1951. S.B. 124 Section 67-0-4,—Powers and Duties).

Appellant submits on this point that since his sentence of Not Less Than Fifteen Years cannot stand under the authorities cited heretofore, and therefore he cannot be deemed an habitual criminal as defined

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by Section 76-1-18, Utah Code Annotated 1953. And that from the foregoing it is plainly obvious that the conviction complained of herein is null and void and without force or effect to be used as a prior conviction upon which to confine appellant as an habitual criminal, and it follows therefore that any sentence committed to run concurrently therewith is without legal force of effect and, consequently, null and void.

CONCLUSION

It is submitted that under the authorties above cited plaintiff's 1949 conviction in Idaho is being improperly used by the lower court as the basis of appellant's conviction under the habitual criminal statute. It follows, therefore, that the habitual criminal conviction cannot stand and this Court should overrule the lower court's ruling and order this appellant discharged from the custody of respondent. Or, that the habitual criminal conviction and sentence should be vacated and the plaintiff should be required to serve only that portion of his sentence not related to the habitual criminal charge and conviction.

Respectfully submitted,

Delbert Clark

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