1964

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

Utah Supreme Court


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

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

DELBERT CHRIS CLARK,
*Plaintiff and Appellant,*

vs.

WARDEN JOHN W. TURNER,
*Defendant and Respondent.*

Case No.
10233



## BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. A. H. Ellett, Judge



A. PRATT KESLER,
Attorney General,
RONALD N. BOYCE,
Chief Assistant
Attorney General,
State Capitol,
Salt Lake City, Utah,
*Attorneys for Respondent.*

DELBERT CHRIS CLARK,
Box 250,
Draper, Utah.

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## BRIEF OF RESPONDENT

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## STATEMENT OF THE NATURE OF CASE

The appellant, Delbert Chris Clark, has appealed from the denial of his petition for writ of Habeas Corpus by the Third Judicial District Court, Salt Lake County.

## DISPOSITION IN THE LOWER COURT

On July 9, 1964, the appellant's petition for a writ of habeas corpus was filed in the District Court. Counsel was appointed to represent the petitioner and on August 21,

1964, the State filed a motion to dismiss the appellant's petition. On September 1, a hearing was held before the Honorable A. H. Ellett and on September 3, 1964, the court entered judgment dismissing the appellant's petition.

## RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the trial court should be affirmed.

## STATEMENT OF FACTS

Respondent submits the following statement of facts:

The appellant filed his petition for writ of habeas corpus alleging that he was presently confined in the Utah State Prison pursuant to a judgment and commitment of the Third District Court entered on the 2nd day of June, 1961 (R. 1). The petition alleged that the appellant was convicted of the crime of second degree burglary and further of the crime of being an habitual criminal (R. 2). The appellant further alleged that his habitual criminal conviction was based upon two previous felony convictions, one in the State of Idaho for grand larceny in May, 1949 and one in the State of Utah for uttering an insufficient funds check in February, 1961. The appellant alleged in his petition that at the time of his conviction to the offense of grand larceny in the State of Idaho, that he was denied the assistance of counsel and that as a consequence, the conviction could not be used as a basis for his Utah conviction of being an habitual criminal (R. 3). The evidence disclosed at the hearing showed that the appellant is a 41

year old convict confined in the Utah State Prison (T. 6). He was originally sentenced to the Utah State Prison for the crimes of second degree burglary and being an habitual criminal, the sentences to run consecutively. Subsequently, the conviction of being an habitual criminal was commuted by the Board of Pardons to run concurrently with the crime of second degree burglary (T. 10).

Prior to the time the appellant was convicted of the crime of grand larceny in the State of Idaho in 1949, he had been convicted of two prior felonies in state and federal courts (T. 7, 8). At both times he was provided with counsel. The court received into evidence a certified copy of the District Court Minutes for the 16th day of May, 1949 for the Twelfth Judicial District, Bannock County, State of Idaho. The minutes reflect:

> "The defendant appeared in court at this time for arraignment. Henry McQuade, Prosecuting Attorney, appeared for and on behalf of the State and no one appearing for the defendant. The defendant informed the Court that his true name is Delbert Clark. *The defendant informed the Court that he didn't desire counsel to represent him.* The Information was read to the defendant and the defendant waived the statutory time for entry of plea was waived and the defendant entered a plea of guilty as charged and asked that sentence be passed at this time.
>
> "The Court ordered that the defendant be taken by the Sheriff of Bannock County, and there held until the arrival of a guard from the State, to be taken by said guard to The State Penitentiary and be there confined, at hard, labor, for an INDE-

> TERMINATE Term not to exceed 14 years. Sentence to commence upon defendant's arrival at said Penitentiary." (Defendant's Exhibit 1.)

A letter from Hugh C. McGuire, Jr., Prosecuting Attorney, Bannock County, Idaho dated August 7, 1964, was received as part of defendant's Exhibit 1 which stated that the District Judge who had originally taken the appellant's plea in Idaho was now dead. The appellant testified with respect to being advised of his right to have counsel (T. 6).

> "Q. Were you at any time ever advised that counsel was available even though you were not able to pay for same?
>
> "A. Not to my knowledge. Now, that's been fifteen years ago, and to my knowledge I was never even asked."

Appellant denied making the statement reflected in the certified minutes of the Idaho District Court that he waived counsel.

It appears that at no time during the appellant's confinement in the Idaho State Prison did he seek judicial relief from his conviction nor has he at any time attempted to set aside the previous Idaho judgment (T. 8, 9). Since the appellant's conviction on the instant offenses, he has filed two petitions for relief by habeas corpus which have been passed upon by this court, *Clark* v. *Turner*, 14 U. 2d 235, 381 P. 2d 724 (1963); *Clark* v. *Turner*, 15 U. 2d 83, 387 P. 2d 557 (1963). Neither of these petitions raised the issue presented in the present petition.

The trial court found as a matter of fact that when the appellant appeared in the District Court of Bannock County, Idaho for his arraignment, that he was informed of his right to counsel pursuant to Idaho law and that he advised the court that he didn't desire the appointment of counsel (R. 16). In his oral conclusions at the time of the hearing (T. 14), the trial judge stated:

> "* * * I have to find, though, that he was advised of counsel and that he waived it, that he voluntarily waived it. It was his third loss, and I believe he had knowledge of what was taking place and, therefore, will here deny the writ of habeas corpus * * *."

Based upon the above evidence, it is submitted the trial court correctly decided the issue.

## ARGUMENT

### POINT I.

### THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S PETITION FOR HABEAS CORPUS SINCE THE EVIDENCE SUPPORTS A FINDING THAT THE APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO COUNSEL AT THE TIME OF HIS CONVICTION OF THE CRIME OF GRAND LARCENY IN THE STATE OF IDAHO.

At the time of hearing on the appellant's petition, the State took the position that as a matter of fact the case should be determined against the appellant (T. 4). The

State felt it was unnecessary to decide whether or not the decision of *Gideon* v. *Wainwright,* 372 U. S. 335 (1963) should be applied retroactively to vitiate convictions for habitual criminal sentences based upon prior uncontested convictions where counsel had not been provided. It is the position of the respondent that the facts in the instant case clearly support the trial court's finding that the appellant waived his right to counsel.

The evidence in this regard shows that the official records of the District Court of Idaho disclose that the appellant advised the court that he did not desire the services of an attorney. Additionally, appellant's own testimony is less than positive of the position that he was denied counsel. At no time during the appellant's period of incarceration in Idaho was an action brought to challenge the basis of his detention although, as will be seen later, it appears that under Idaho law appellant would have been entitled to his release in Idaho had he not been given the opportunity to have the assistance of counsel. Additionally, it should be noted that the appellant had two previous felony convictions at the time of his appearance before the Idaho court. In both of those instances, he had the assistance of counsel. Undoubtedly appellant, by virtue of his experience, was acquainted with criminal procedures and certainly must have been aware of his right to counsel.

Article I, Section 13 of the Idaho Constitution, affirmatively grants a defendant charged with a crime, the right to have counsel. 19-1512, Idaho Code Annotated, provides:

> "If the defendant appears for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel the court must assign counsel to defend him."

Further, 19-1513, Idaho Code Annotated, also provides:

> "Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the court that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which service such counsel must be paid out of the county treasury, upon order of the judge of the court, such sum as the court may deem reasonable for the services rendered."

In *State* v. *Montroy,* 37 Ida. 684, 217 P. 611, the Idaho Supreme Court expressed the opinion that it was the policy of the State of Idaho to afford every defendant full opportunity to prepare his defense, including the right to counsel. See also *State* v. *Poglianich,* 43 Ida. 409, 252 P. 177. The Idaho Supreme Court in *State* v. *Thurlow,* 85 Ida. 96, 375 P. 2d 996, indicated that an accused must be informed of the statutory right to be provided with counsel. See also *State* v. *Eikelberger,* 70 Ida. 271, 215 P. 2d 996; *Cobas* v. *Clapp,* 79 Idaho 419, 319 P. 2d 475; *State* v. *Stafford,* 26 Ida. 381, 143 P. 528. Consequently, it would appear that it is standard practice in the State of Idaho to advise an accused of his right to have the services of counsel, even

though indigent, and to be provided with counsel if he desires. This practice, when compared to the minute entry showing that the accused indicated he did not desire counsel, is sufficient to support a finding that the appellant waived his right to counsel. Further, it is submitted that the court record and official minutes of what transpired creates a presumption of verity. In *In re Chester,* 52 Cal. 2d 87, 338 P. 2d 431, a writ of habeas corpus was brought by the petitioner alleging a denial of the right of counsel. Relying on the case of *In re Connor,* 16 Cal. 2d 701, 108 P. 2d 10, the court indicated that since the minute entry on the magistrate's docket showed the petitioner had been informed of his right to counsel and waived the same, that there was no basis for the writ. Finally, since the appellant has been convicted of five felonies, several of which are of a nature which tend to impeach his veracity, the trial court was well within its discretion in disclaiming the appellant's attempt to impeach the official records of the Idaho court.

In *United States* v. *LaVallee,* 330 F. 2d 303 (2nd Cir. 1964), the Second Circuit Court of Appeals ruled that it was permissible for a defendant to attack a state court's conviction for being an habitual criminal by filing a petition for habeas corpus in a federal court on the grounds that one of the convictions used in determining habitual criminality was without the assistance of counsel in violation of his constitutional rights and, therefore, the conviction for being an habitual criminal could be set aside for lack of due process of law. In doing so, however, the court pointed out that the mere allegation by a prisoner that he was denied his right to counsel would not necessarily warrant his release. The court stated:

> "On remand, the District Courts will, of course, hardly be compelled to accept the petitioners' allegations as true. Gideon has changed a rule of law, but it has not abrogated the traditional responsibility of the District Courts accurately to determine the factual patterns upon which that law is to be applied. While issues of 'fundamental fairness' have been removed from their consideration, the District Courts will now be confronted with factual determinations as to whether each appellant was, in fact, advised of his right to counsel, whether he waived that right, and if not, and if indigent, whether he was afforded court-appointed counsel. In resolving such questions, there is no reason to suppose that the Courts will not employ the methods and techniques which have long been familiar to our judicial system. Thus, they will undoubtedly consider the appellant's credibility; available court records; the prevailing practices of a particular state; any evidence which the State might choose to offer; and all other relevant considerations. In short, though on occasion difficult, there is no reason to believe that the determinations required by Gideon will be any more incapable of resolution than those required by Betts, and, indeed, the elimination of the search for 'fundamental fairness' would indicate that the task of the District Courts has been greatly simplified. No more than before will the Courts be required to treat bare allegations of the denial of constitutional rights as tantamount to conclusive proof that these rights were, in fact, denied."

Looking at the factors which the court determined relevant in *LaVallee,* it is apparent that appellant is without a basis for relief on his claim. The appellant's credibility is open to dispute. Available court records are contrary

to his position. The prevailing practices in the State of Idaho are against his assertion. Other relevant considerations, including his age, experience and familiarity with criminal process, lead to the conclusion that the appellant's assertion must be rejected.

## POINT II.

### THE APPELLANT WOULD NOT BE ENTITLED TO RELEASE ON PETITION FOR HABEAS CORPUS EVEN WERE HIS HABITUAL CRIMINAL CONVICTION INVALID SINCE HE WAS CONVICTED FOR THE CRIME OF SECOND DEGREE BURGLARY WHICH CONVICTION IS VALID AND UNASSAILED BY THE APPELLANT.

In Point III of the appellant's brief, he contends that if the trial court erred in determining that his habitual criminal conviction should not be set aside, that he should be released from confinement. The facts show that the appellant was convicted of the crime of second degree burglary prior to his conviction for being an habitual criminal in violation of 76-1-18, Utah Code Annotated 1953 (R. 1). The sentences given by the court were to run consecutively. Subsequently, the Board of Pardons on June 8, 1962 denied the appellant's petition for parole or termination, gave him a rehearing date of June, 1972 and ordered that his sentences be commuted to run concurrently (R. 7). The Board in no way took any action as respects the sentence for second degree burglary. The sentence was lawful when

imposed and the Board of Pardons has not in any way commuted that sentence. Its sole action was to provide that both sentences would run concurrently.

If one of two sentences is invalid, the petitioner is not entitled to release so long as there is a valid sentence in effect. Thus, in 15 Am. Jur., *Criminal Law*, Section 451, it is stated:

> "Unless otherwise provided by statute, a defendant who pleads guilty or is convicted under an indictment charging two distinct offenses may be punished for both. * * *"

See also *Wilkinson* v. *Harris*, 109 U. 76, 163 P. 2d 1023 (1945) where the court denied a writ of habeas corpus attacking one sentence where another sentence was valid and outstanding. The Tenth Circuit Court of Appeals in *Browning* v. *Crouse*, 327 F. 2d 529 (10th Cir. 1964), was faced with a claim by a prisoner similar to the instant one. The appellant there contended that his habitual criminal sentence was improper as being in violation of his constitutional right to have the assistance of counsel. He was, however, at the time of the petition, serving a valid sentence running concurrently with his habitual criminal sentence. The Tenth Circuit refused to grant relief noting:

> "* * * The present detention under the sentence on the robbery counts is valid. The sentence as an habitual criminal is separable. * * *"

Consequently, since the burglary conviction of the appellant was separate from his habitual criminal conviction and since the sentences are distinct for each offense,

should the habitual criminal conviction be set aside, the appellant's release would have to await termination of his sentence for burglary.

## CONCLUSION

An examination of the record and contentions of the appellant discloses that he is not entitled to relief by habeas corpus. This court should affirm.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

RONALD N. BOYCE,
Chief Assistant
Attorney General,

State Capitol,
Salt Lake City, Utah,

*Attorneys for Respondent.*