1969

Max M. Johnson v. John W. Turner, Warden, Utah State Prison : Brief of Petitioner-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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MAX M. JOHNSON, :

Petitioner-Appellant, : No. 11728

vs. :

JOHN W. TURNER, Warden, Utah State Prison, :

Defendant-Respondent: :

- -

BRIEF OF PETITIONER-APPELLANT

- -

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NATURE OF THE CASE

This is an appeal from the decision of the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Allen B. Sorensen, presiding, which denied the petitioner's application for a Petition for Writ of Habeas Corpus on the grounds that the Petition was repetitive of issues previously considered by the Fourth Judicial District Court and the Third Judicial District Court and that said Petition for the Writ of Habeas Corpus was a means used by the petitioner for seeking review of his conviction which action is contrary to the law of the State of Utah. Petitioner-appellant would contend that this ruling, by failing to consider the merits of his Petition, denied the petitioner consideration of the substantial constitutional

claim presented by said Petition and to which petitioner is entitled by the Constitution and Laws of the State of Utah and by the Constitution of the United States of America. By this appeal, the petitioner requests this Court to consider the constitutional questions raised in his Petition and to grant his application for a Writ of Habeas Corpus.

STATEMENT OF FACTS

As a result of a jury trial held February 8, 1968, in the City and County Building in Provo, Utah, the petitioner was convicted of the crime of grand larceny, to wit: the theft of an electric guitar having a value in excess of $50.00. During the afternoon portion of the trial, the defendant offered testimony from Kenneth Smith that was barred by rulings of the Trial Court on the grounds that it was hearsay evidence. A proffer of proof was made to the effect that the owner of the guitar, Dan Newell, had stated to Kenneth Smith that Max M. Johnson had the permission of said Dan Newell to take the allegedly stolen guitar from Dan Newell's store. On February 13, 1968, the attorney for the petitioner, Leon M. Frazier, Esq., moved the Trial Court for a new trial, said motion being based on the contention that the Trial Court's refusal to admit the proffered testimony of Kenneth Smith prevented the petitioner from having a fair and impartial trial by dint of the fact that he was erroneously prevented from presenting witnesses on his own behalf. The Affidavit of Kenneth Smith was attached to the Motion, describing the testimony he would give if allowed to testify. In essence, he would have testified that Dan Jerald Newell had told Kenneth Smith that he, Dan Newell, had given Max M. Johnson permission to take and raise money with the guitar which had been allegedly stolen by said Max M. Johnson, but that said Dan Newell was dissatisfied with the way Max M. Johnson had disposed of the guitar. This testimony had been proffered by and on behalf of Max M. Johnson during the course of the trial, but it had been barred by the Trial Court (Tr. 56-59). The testimony of Kenneth Smith would have been evidence of a statement which was directly contrary to the testimony given by Dan Newell during the course of the trial, (Tr. 9, 11, 16, 17, 18,

19, 20, 21) as to whether or not Max M. Johnson had permission to take the guitar in question from Dan Newell's store. On March 1, 1968, after hearing the arguments and considering the matter, Judge Sorensen denied the Motion for a New Trial, and sentenced the petitioner for the term of not less than one nor more than ten years to the Utah State Prison. No appeal was taken.

Thereafter, on the 16th day of October, 1968, petitioner filed a Writ for Petition of Habeas Corpus in the District Court in and for Utah County, challenging the aforesaid conviction for grand larceny. On the 9th day of January, 1969, the Honorable Joseph E. Nelson of the Fourth Judicial District Court in and for Utah County, State of Utah, signed an Order effecting the transfer of that Petition for a Writ of Habeas Corpus to the Third Judicial District Court in and for Salt Lake County for further consideration. The matter was there assigned to the Honorable Stewart M. Hanson, who ordered a hearing set on the petitioner's application for the Writ of Habeas Corpus for the 30th day of January, 1969, at 9:00 A.M., and assigned the Salt Lake County Bar Legal Services, Inc. to represent the petitioner. LeRoy S. Axland, Esq., an attorney from that office, represented Mr. Johnson at that hearing and after hearing testimony and considering the matter, Judge Hanson denied the application for the Writ of Habeas Corpus by an Order dated January 31, 1969. Thereafter, on the 14th day of February, 1969, LeRoy S. Axland withdrew as counsel for petitioner. On March 1, 1969, the petitioner attempted to appeal Judge Hanson's decision to this Court, but the time for appeal having run, the appeal was dismissed and the matter remanded by an Order issued March 18, 1969. The issues raised and determined by Judge Hanson are others than those raised in the instant application for a Writ of Habeas Corpus.

Thereafter, on July 1, 1969, the instant Petition for the Writ of Habeas Corpus was filed in the Fourth Judicial District Court in and for Utah County, State of Utah, alleging as grounds for the application for said Writ of Habeas Corpus the denial of a fair trial by reason of Judge Sorensen's ruling which barred the testimony of said Kenneth Smith. This issue had not been raised in the application for the Writ of Habeas Corpus heard by Judge Hanson. By an Order signed on the 2nd day of July, 1969, Judge Allen B. Sorensen of the Fourth Judicial District Court in and for Utah County, State of Utah, dismissed the instant application for the Writ of Habeas Corpus on the grounds that: (1) the matters raised therein were issues that should have been raised on appeal, and (2) the application for a Writ was a repetitive application for a Writ of Habeas Corpus. On July 8th, 1969, the petitioner filed his Notice of Appeal and the record was transmitted to this Court on July 31, 1969.

DISPOSITION IN LOWER COURT

On February 8, 1968, a jury convicted petitioner Max M. Johnson of the crime of grand larceny. On February 13, 1968, the attorney for the petitioner, Leon M. Frazier, Esq., moved the Trial Court for a new trial. After a hearing held March 1, 1969, the Motion for the New Trial was denied and the defendant was sentenced to a sentence of from one to ten years in the Utah State Prison. No appeal was taken from this conviction despite the fact that a Motion for a New Trial had been made and denied. Thereafter, on October 16, 1968, the petitioner filed a Motion for Writ of Habeas Corpus in the District Court in and for Utah County, challenging the aforesaid conviction for grand larceny. On the 9th day of January, 1969, said application for the Writ of Habeas Corpus was transferred from the Fourth Judicial District Court to the Third Judicial District Court and on the 30th day of January, 1969,

a hearing into the merits of that petition was held before the Honorable Stewart M. Hanson, a Judge of the Third Judicial District Court after which the application for the Writ of Habeas Corpus was denied. On March 1, 1969, the petitioner attempted to appeal that denial to this Court, but the time for appeal had run and the appeal was dismissed. Thereafter, on July 1st, 1969, the instant Petition for the Writ of Habeas Corpus was filed in the Fourth Judicial District Court in and for Utah County, State of Utah, alleging as grounds for the application for said Writ of Habeas Corpus grounds that had not been alleged in nor passed upon as part of the proceedings on previous application for the Writ of Habeas Corpus. This application for the Writ of Habeas Corpus was denied by the Honorable Allen B. Sorensen, Judge of said Court, in an Order signed July 2, 1969. This denial and dismissal was made on the grounds that the matters raised in this Petition are issues that should have been raised on appeal and that the application for the Writ of Habeas Corpus was a repetitive application for Writ of Habeas Corpus. On the 8th day of July, 1969, the petitioner filed his Notice of Appeal and the record was transmitted to this Court.

RELIEF SOUGHT ON APPEAL

This Court should find that the petitioner was denied a fair trial as a result of the denial of his constitutional right to present witnesses on his own behalf and grant the petitioner's application for a Writ of Habeas Corpus.

ARGUMENT

POINT I.

THE DENIAL OF DUE PROCESS THAT OCCURRED IN THE PROCEEDINGS IN THIS MATTER PRE-

SENT SUBSTANTIAL CONSTITUTIONAL ISSUES WHICH SHOULD BE EXAMINED BY THIS COURT BY MEANS OF THIS APPLICATION FOR A WRIT OF HABEAS CORPUS.

In the case of Bryant v. Turner, 19 U. 2d 284, 431 P. 2d 121 (1967), this Court articulated the rule governing the situation presented by this appeal:

> ". . . The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other such circumstance exists that it would be wholly unconscionable not to re-examine the conviction." 19 U. 2d at 286-287, 431 P. 2d at 122. (Emphasis added).

That case involved the issue which must be first determined by this Court; that is, whether or not the issues raised in this application for the Writ of Habeas Corpus will be considered by this Court when they are matters that could have been raised in an appeal of the petitioner's conviction. In the Bryant v. Turner decision, this Court restated the longstanding rule of this Court that the Writ of Habeas Corpus cannot be used as a substitute for an appeal. However, as stated by the Court in the language quoted above, there are exceptions to the rule; that is, where the situation is an extraordinary one and where good conscience requires an examination of the commitment, this Court will examine the proceedings to determine if the commitment is proper. The explanation of this rule

was well articulated by Chief Justice Wolfe in Thompson v. Harris, 106 Utah 32, 144 P. 2d 761 (1943), rehearing denied, 107 Utah 99, 152 P. 2d 91, cert. denied, 324 U. S. 845, 89 L. Ed. 1406, 65 S. Ct. 676:

> "It is often stated that the scope of review on habeas corpus is limited to examination of the jurisdiction of the court whose judgment of conviction is questioned. We must never lose sight, however, of the fact that habeas corpus is the precious safeguard of personal liberty. That jurisdictional questions only are reachable by the writ is not such an inflexible rule as cannot yield to exceptional circumstances. It may be better to say that the rule which apparently limits the scope of the writ to jurisdictional questions is not a rule of limitation, but a rule defining the appropriate spheres in which the power should be exercised. Thus, it has been held that the writ will lie if the petitioner has been deprived of one of his constitutional rights, such as due process of law." 106 Utah at _____, 144 P. 2d at 766.

It is respectfully submitted by petitioner that there are two grounds in the record of this case for consideration of matters in a constitutional sphere in which petitioner was denied those rights encompassed in the phrase "due process of law" as expressed in the Constitution and Laws of the State of Utah and the Constitution of the United States of America as hereinafter set forth:

A. PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS DENIED EFFECTIVE COUNSEL AS GUARANTEED BY SECTION 12 OF ARTICLE I OF THE CONSTITUTION OF THE

STATE OF UTAH AND THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, IN THAT PETITIONER WAS NOT INFORMED OF HIS RIGHT TO APPEAL AND HOW HE HAD TO PROCEED TO PROTECT THAT APPEAL.

The record in this matter shows that the petitioner was convicted of the crime of grand larceny on February 8, 1968. On February 13, 1968, a Motion for a New Trial was filed supported by an Affidavit of Kenneth Smith. The Motion for New Trial was denied on March 1st of 1969. There is no indication in the transcript or any of the record of the proceedings that the petitioner was advised that to preserve the grounds and matters raised in his Motion for New Trial, he must appeal that issue to this Court. His ignorance of what was required to appeal is demonstrated by the subsequentive events of this record. To challenge this conviction on his own, the petitioner filed on the 16th day of October, 1968, a Petition for a Writ of Habeas Corpus in the District Court in and for Utah County.[1] That Petition was denied, after hearing, on the 30th day of January, 1969. The petitioner tried to appeal his conviction, but after the attorney appointed to represent him at the hearing on his Petition withdrew, he did not know the necessary steps to perfect his appeal and as a result his appeal was dismissed for failure to follow the proper procedure. After the denial and dismissal of the instant Petition, petitioner properly perfected his appeal having learned the rules as a result of the prior proceedings. From this,

[1] In challenging his conviction for grand larceny, that Petition did not allege any of the issues raised in the instant Petition or raised in the Motion for New Trial.

it is quite apparent that the petitioner had no knowledge and was not advised as to the proper procedures for appeal. Inasmuch as petitioner had counsel at his trial, who made the proffer of proof and motion for a new trial to protect the record for appeal, but who failed to file a notice of appeal or advise the petitioner to do so, petitioner would contend that he was denied his constitutional right to counsel as guaranteed by Section 12, Article I of the Constitution of the State of Utah and the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

This right was most recently examined by this Court in the case of Alires v. Turner, 22 Utah 2d 118, 449 P. 2d 241 (1969). In that decision, this Court held that by the provisions of Section 12, Article I, of the Utah Constitution and by the Sixth and Fourteenth Amendments to the Constitution of the United States of America, one is entitled to counsel not just in the terms of having somebody physically present, but counsel actively interested in and working for the client:

> ". . . we think the only reasonable conclusion to be drawn therefrom is that if petitioner had had counsel actively interested in protecting his rights, the result may have been more favorable to him."

> "The right of an accused to have counsel as assured by Sec. 12, Art. I, Utah Constitution, and by the VI and XIV Amendments to the U. S. Constitution is one of those rights 'rooted in the traditions and conscience of our people,' as essential to the protection of individual liberties and therefore included in our concept of due process of law. The requirement is not satisfied

by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. The entitlement is to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law as consistent with the ethics of the profession. "

"The failure of such representation for the petitioner herein is a departure from due process of law. This has been recognized as one of the exceptions from the finality of judgments and which may therefore be attacked collaterally under habeas corpus. " 22 Utah 2d at 21, 449 P. 2d at 243.

In the instant case, examination of the trial record shows that competent counsel assisted petitioner in the trial of the case. There is no question about this. However, the issue now presented to this Court is that of competent counsel in regard to the right to appeal.

While this Court has not had an occasion to consider this question, it has been the subject of several opinions by the Supreme Court of the United States of America. In Douglas v. California, 372 U. S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), it was held that an indigent appellant was entitled to counsel in appealing his conviction. This was expanded by Anders v. California, 386 U. S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) reh. den. 388 U. S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094 (1967), which held that appointed counsel could withdraw only under certain specified conditions. In Swenson v. Bosler, 386 U. S. 258, 18 L. Ed. 2d 33, 87 S. Ct. 996 (1967), it was held that failure of a State to appoint counsel to an indigent accused to appeal his conviction

constituted a denial of his right to counsel and Due Process of Law. The decisions in Hardy v. United States, 375 U. S. 277, 11 L. Ed. 2d 331, 84 S. Ct. 424 (1964), motion for modif. den. 376 U. S. 936, 11 L. Ed. 2d 657, 84 S. Ct. 790, Douglas v. Green, 363 U. S. 192, 4 L. Ed. 2d 1142, 80 S. Ct. 1048 (1960), and Burns v. Ohio, 360 U. S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959), held that an indigent appellant was entitled to a free copy of the transcript and record for appeal and Smith v. Bennett, 365 U. S. 708, 6 L. Ed. 2d 39, 81 S. Ct. 895 (1962), Douglas v. Green, supra, and Burns v. Ohio, supra, held that requiring payment of filing fees of indigent defendants could not be upheld as being in accord with a due process right to appeal. It would therefore be submitted by petitioner that Due Process and the constitutional requirements of counsel would require that either the Trial Court or counsel must be required to advise an accused that he has a right to appeal and must further advise him how to protect that right or the accused has effectively been denied his right to counsel on appeal as well as his right to appeal itself. This is obviously true in any jurisdiction that has a rule such as does the State of Utah that will not allow an application for a Writ of Habeas Corpus to raise issues other than extraordinary issues, which could have or should have been raised on appeal. Failure to inform and protect this right of appeal is a denial of Due Process of Law.

B. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW IN THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO HAVE WITNESSES TESTIFY ON HIS BEHALF.

One of the procedural protections encompassed by the phrase, Due Process of Law secured to those accused of crimes in the State of Utah by Article I, Section 12, of the Constitution of the State of Utah, as enacted into law by Section 77-1-8(5), Utah Code Annotated 1953, and further

secured by the Sixth Amendment to the Constitution of the United States of America as applied to the states by the Fourteenth Amendment to the Constitution of the United States of America, is the right:

> ". . . to have compulsory process to compel the attendance of witnesses in his own behalf." Article I, Section 12, Constitution of the State of Utah.

This is enacted into the laws of Utah by subsection (5) of Section 77-1-8, Utah Code Annotated 1953:

> ". . . to have process to compel the attendance of witnesses in his own behalf."

and into the Constitution of the United States of America the Sixth Amendment, which provides:

> ". . . to have compulsory process for obtaining witnesses in his favor, . . ."

and is applied to the States by the Fourteenth Amendment. Washington v. Texas, 388 U. S. 14, 18 L. Ed. 2d 1019, 87 S.Ct. 1920 (1967). The similarity of the wording and meaning of these provisions is obvious. Each of them is intended to convey the same meaning, protect the same right, and effectuate the same protection. However, while this wording of Article I, Section 12, of the Utah Constitution and Section 77-1-8, Utah Code Annotated 1953, has not been construed by this Court, this provision of the Sixth Amendment to the Constitution of the United States of America was construed and held to apply to the states by the Fourteenth Amendment to the Constitution of the United States of America in the case of Washington v. Texas, 388 U. S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967). In that decision,

the Court first held that the enumerated right of an accused to have compulsory process for obtaining witnesses in his favor is so fundamental to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment. The Court then went on to state what was meant by this phrase:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law." 388 U. S. at 19, 18 L. Ed. at 1023, 89 S. Ct. at ___.

The precise issue of Washington v. Texas, supra, was that a statute of the State of Texas prohibited testimony for any defendant from any persons charged or convicted as co-participants in the same crime as the defendant; however, such person could testify for the State. It was held that, as quoted above, this was an unconstitutional denial of the Sixth Amendment right to offer the testimony of a witness on behalf of the defendant.

In Part II of the Decision in Washington v. Texas, supra the United States Supreme Court carefully outlined the history of the gradual evolution by Common Law Courts of rules allowing parties to testify. It was carefully pointed out that this evolution was based on the idea that the evidence should be presented, and the jury or court should then be allowed to consider the credibility and weight of such testimor

In the instant case, the erroneous rulings of the Trial Court as described in Point II of this Brief during the trial and in denying the petitioner's Motion for a New Trial denied the petitioner his right to offer the testimony of his witnesses as guaranteed by the Constitution and Laws of the State of Utah and the Constitution of the United States of America as heretofore described.

On the basis of either or both of the denials to the petitioner of Due Process of Law as heretofore set forth, this Court should consider this Petition for the Writ of Habeas Corpus and issue the Writ to correct the errors that occurred in the proceedings that resulted in the erroneous conviction of the petitioner, Max M. Johnson.

POINT II.

IN HIS TRIAL ON FEBRUARY 8, 1968, THE PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL ON THE GROUNDS THAT THE DEFENDANT WAS NOT PERMITTED TO HAVE TESTIMONY FROM WITNESSES ON HIS BEHALF CONTRARY TO THE CONSTITUTION AND LAWS OF THE STATE OF UTAH AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

As may be readily determined by examination of pages 56 through 59 of the transcript, the proffered testimony of Kenneth Smith was ruled inadmissible by the Trial Court on the grounds that it was hearsay evidence. It is respectfully submitted by petitioner that the evidence offered was not properly excluded evidence and this erroneous ruling deprived the petitioner of his constitutionally protected right of presenting witnesses for his defense. Had Kenneth Smith been permitted to testify, he would have testified that Dan Newell had told him that Dan Newell had given Max M.

Johnson permission to take the guitar from his store to raise money (Tr. 56-58, Affidavit and Motion for New Trial). This statement was contrary to the testimony of Dan Newell during the course of the trial (Tr. 9, 11, 16, 17, 18, 19, 20, 21) and was of major importance to the defense once it had been discovered. The testimony of Dan Newell on cross-examination admitted that he was a conspirator in a plan to raise money by issuing bad checks (Tr. 12-20) and this was confirmed by the testimony of Larry Rudd (Tr. 46-48, 50-52). This conspiracy had gone sour and Dan Newell wanted out (Tr. 9, 11, 16, 17, 18, 19, 20, 21, 46-48, 50-52). The vital question for Max M. Johnson was then what were the terms of the conspiracy agreement (Tr. 12-20, 21, 47, 49-51). It was admitted that to get the "plan" going, there was an initial need for $300.00 (Tr. 14, 15, 18, 47, 50, 51), and that Dan Newell gave Max M. Johnson the key to his shop (Tr. 7-8, 14, 15-16, 24, 51) so the question about which revolved his conviction was whether or not he had permission to take the guitar from the shop. Since it was the testimony of Dan Newell that Max M. Johnson had stolen his guitar, evidence of Newell's statement that the petitioner had his permission to take the guitar was of vital importance to the defense.

In the decision of State v. Siebert, 6 Utah 2d 198, 310 P.2d 388 (1957), this Court, speaking through Justice Crockett, stated:

> "The term hearsay is applied to testimony offered to prove facts of which the witness has no personal knowledge, but which have been told to him by others. He is thus not testifying from his own knowledge or observation, but is acting as a conduit to relay that of others. The general rule, to which there are admittedly many exceptions, is that such testimony is not admissible on the grounds that it lacks trustworthiness for two basic reasons:

(1) the person who purports to know the facts is not stating them under oath; (2) he is not present for cross-examination. Other reasons assigned for its unreliability are the danger of inaccuracy in the witness relaying what he has been told, and the fact that the jury does not have the opportunity to see the person whose declarations are offered as evidence. However, it is not every instance in which a witness relates what he heard someone else say that he is purporting to represent that the statement he heard is true. The purpose of his testimony may be simply to prove that someone else made a statement without regard to whether it be true or false. Testimony of this nature does not violate the hearsay rule, since the witness is asserting under oath a fact he personally knows, that is, that the statement was made and he is subject to cross-examination concerning such fact." 6 Utah 2d at 201-202, 310 P. 2d at 390-391.

Examining the proffered testimony of Kenneth Smith, it is observed that it is capable of two possible characterizations. The first is that he would have testified as to matters within his own knowledge or observation; that is, the statements made by Dan Newell. His testimony was not, in this view, proffered as to whether or not the statements made by Newell were true, but only that they were made by him. As this Court stated in the Siebert decision about this type of evidence:

> ". . . Testimony of this nature does not violate the hearsay rule, since the witness is asserting under oath a fact he personally knows, that is, that the statement was made and he is subject to cross-examination concerning such fact." 6 Utah 2d at 202, 310 P. 2d at 391.

Testing the proffered evidence against the quoted rule, it is clear that the basis for objection is not present in this case. The rule excluding hearsay evidence is based on the factors that the person purporting to state the facts did not state them under oath and is not present for cross-examination. Neither of these factors exist as valid objections in the instant case. As is clear from the record, both Dan Newell and Kenneth Smith were present in the courtroom. Each could be placed under oath to testify and was subject to cross-examination about the conversation. This is made even more clear by examining the two leading cases on this point in Utah. The first is State v. Siebert, supra, and the second is Hawkins v. Perry, 123 Utah 16, 253 P. 2d 372 (1953). An examination of these cases indicates how this rule should be applied.

In Hawkins v. Perry, supra, a witness was permitted to testify about hearing the purchaser of some property promise that the property would be taken in the purchaser's name until the plaintiff became of age, at which time the title to the property would be turned over to the plaintiff. It was held that this was properly admitted, since it was the fact of the statement not the truth or falsity of the statement that was involved. The situation is even more clearly demonstrated in the case of State v. Siebert, supra, where a police officer was allowed to testify over a hearsay objection that the victim of the robbery had described the defendant's automobile in a certain way. A question had been raised about inconsistent statements having been made by the victim's giving a different description at another time. This Court held that the police officer was properly allowed to testify about the original description given to him by the victim of the robbery. He was held to be testifying merely that the statement had been made. However, this Court went on to hold that it was error for the trial court to have allowed additional testimony whereby the officer was permitted to

testify as to statements given to him by the victim of the robbery describing the robbery, the license number of the car, and the conversation between the victim and the robber. The rationale of this decision was stated to be that since a question had been raised as to inconsistent statements describing the car, the officer could properly testify as to that because he was testifying as to the fact that a statement had been made to him, but when he went beyond that, he was acting as a conduit passing the victim's description onto the jury and that was hearsay. A new trial was ordered. For further application of these principles, see Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P. 2d 1011 (1959), and Wilson v. Oldroyd, 1 Utah 2d 362, 267 P. 2d 759 (1954).

Applying these principles to the instant case, it is clear that the testimony of Kenneth Smith, thus characterized, was proffered (Tr. 57-58) to prove the statement of Mr. Newell and its exclusion was not merely error, it deprived the petitioner of his constitutional right to present the evidence of his witnesses.

The second possible characterization of the proffered testimony is to consider it to be an admission by Dan Newell that Max M. Johnson did have his permission to take the guitar. If this proffered evidence is characterized as being evidence of an admission, it would have the character as described in Jones on Evidence, Fifth Edition, Vol. II, Section 334:

> "When an out-of-court statement is offered in evidence against a party for the purpose of proving the truth of the facts asserted in the statement, it is readily apparent that the hearsay rule is involved and the statement is thus exceptionally admitted. Some authorities have treated admissions as non-hearsay in character and out-

side the rule. But it is relatively unimportant whether we accept one theory or another, as the underlying basis for admissibility. The fact of admissibility (on a broad base but with a definite limitation that the statement may be used only against the party making it) is the important thing."

"It is really not necessary to say that the statement must be against some interest of the party, although it usually is. The real test is whether the statement is helpful to the adversary offering it in evidence. If it does not help the cause of the adversary or hurt the cause of the declarant in the action, it is barred from use, as irrelevant, as only the adversary may offer it."
p. 630

If the statements of Newell are viewed as admissions, their effect on the instant case would be as this Court set out in the case of Peterson v. Richards, 73 Utah 59, 272 Pac. 229 (1928):

" . . . The evidence which the plaintiff adduced as to the admissions of the defendant was not adduced nor received to impeach the defendant, nor to discredit him, nor merely to affect his credibility. It was adduced and received quite to the contrary, and as all admissions of a litigant as to a material fact are adduced and received for the purpose of establishing the truth of the statements made or the existence of a fact to which they relate, and on the theory that what a party, as to a matter of fact, has voluntarily admitted to be true, may reasonably be taken as true, especially as to a matter adverse to him, for presumptively a party ordinarily does not admit as true that which is against him unless

it is true. And of such probative effect are admissions of matters of fact of a party generally regarded when adverse or disserving and voluntarily made, as to make a prima facie case to the extent of a subject-matter of the admission, and to dispense with other proof of the fact so submitted, and is sufficient to support a finding of fact resting alone upon such extrajudicial admission of a party. . . ." 270 Pac. at 235 and 236

While application of this rule would require dismissal of the action against the petitioner if uncontroverted, it could have been subject to rebuttal testimony by Mr. Newell. If he denied that he made those admissions, the evidence and his denial thereof are proper for submission to the jury, which in turn is then free to determine which to believe in their determination of the facts. Reid v. Owens, 92 Utah 432, 69 P. 2d 265 (1937), and 98 Utah 50, 93 P. 2d 680 (1939).

The main question presented to the Court if the proffered evidence is considered as constituting an admission is whether or not Mr. Newell had an interest in the action sufficient enough to justify its admission. The Trial Court apparently felt that since Mr. Newell was not a nominal party to the case, the evidence of his admissions could not be admitted under the hearsay rule (Tr. 52). As is pointed out in the quoted language from Jones commentary on Evidence above, the admission of a party is an exception to the hearsay rule. However, Jones also states in dealing with the question of whether or not one must be a party in order for an admission to be considered as admissible evidence:

"Statements by one who is not a party to the record may be admitted in evidence on proof that the declarant has a substantial interest in

the results of the litigation." Jones on Evidence, Fifth Edition, Vol. II, Section 338, p. 638. Cited among authorities is the Utah case of Workman v. Henrie, 71 Utah 400, 266 Pac. 1033, 58 A. L. R. 1346 (1928).

Both in Workman v. Henrie, supra, and in In Re Miller's Estate, 31 Utah 415, 88 Pac. 338 (1906), evidence of admissions of persons not nominal parties, but people with substantial interest in the litigation were held to be admissible evidence.

Applying this rule to the instant case, it is apparent that Mr. Newell, the person claiming that the petitioner stole his property had a substantial interest in the matter. As such, his admission, should the proffered evidence be so characterized, is admissible, and the erroneous rulings of the Trial Court effectively denied the petitioner his right to present witnesses on his own behalf, a right guaranteed by the Constitutions of the State of Utah and the United States of America; a right so fundamental that its violation constitutes a denial of Due Process of Law.

CONCLUSION

The erroneous rulings by the Trial Court in this matter had the effect of depriving the petitioner of the testimony of a witness vital to his defense. This action was contrary to the provisions of Section 12, Article I, of the Utah State Constitution and the Sixth and Fourteenth Amendments to the Constitution of the United States of America and denied the petitioner his Right to Due Process of Law. Accord-

ingly, this Court should grant the petitioner, Max M. Johnson, a Writ of Habeas Corpus.

Respectfully submitted,

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