1969

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

IN THE SUPREME CO
of the
STATE OF

MAX M. JOHNSON,

Petitioner-A

-vs.-

JOHN W. TURN
Utah State Prison,

Defendant

Appeal F
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IN THE SUPREME COURT
of the
STATE OF UTAH

MAX M. JOHNSON,
Petitioner-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,
Defendant-Respondent.

Case No.
11728

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

This is an appeal from a 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 writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

The Honorable Allen B. Sorensen denied the petition on the grounds that the petition was used as a means of appellate review and that this was violative of Utah case law.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmation of the denial made by Judge Sorensen.

STATEMENT OF FACTS

On February 8, 1968, Max M. Johnson was tried and convicted by a jury of the crime of grand larceny. Appearing as his counsel was Leon M. Frazier of Provo, Utah. A motion for a new trial was made and denied. Max Johnson was thereafter sentenced to a term at the Utah State Prison. No appeal from this trial was taken.

Thereafter, Mr. Johnson filed a petition for a writ of habeas corpus on October 16, 1968. The hearing on this matter was on January 20, 1969. LeRoy S. Axland of the Salt Lake County Bar Legal Services, Inc., was assigned to represent Mr. Johnson. The petition was denied by the Honorable Stewart M. Hanson on January 21, 1969. No timely appeal was made.

Again Mr. Johnson brought a petition for writ of habeas corpus. This writ made two allegations which were not included in the prior writ: (1) that the trial

judge deprived Mr. Johnson of his constitutional rights in not allowing one Larry Rupp to give a complete testimony, and (2) that Johnson was denied the right to have witnesses testify on his behalf when the trial judge refused to allow Mr. Kenneth Smith to testify over a hearsay objection (R. 5). This petition was denied by Judge Allen B. Sorensen on the ground that the petition attempted to gain appellate review of matters which should have been appealed (R. 17).

It is from Judge Sorensen's ruling that the present case arises.

POINT I

A CRIMINAL DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO HAVE WITNESSES TESTIFY IN VIOLATION OF THE RULES OF EVIDENCE.

This case arises from a denial of Max Johnson's petition for habeas corpus dated June 26, 1969, and filed July 1, 1969. Only two allegations were made in that writ, and both of those allegations dealt with a related question -- whether a determination on hearsay or materiality, which prevents or hinders a witness from testifying, denies the criminal defendant his constitutional due process and equal protection rights.

The State does not argue with the contention of Max Johnson that due process includes the constitutional right to have compulsory process to compel the attendance of witnesses in his behalf. His claim is not that

the trial court denied him attendance of witnesses, h
that the Sixth Amendment requires the Court to ad
their testimony.

The right to have compulsory process to obtain w
nesses does not supersede the established rules of ev
dence. If the desired testimony is immaterial, then t
criminal defendant has no right to have compulsory pro
cess for obtaining that witness. If the witness obtaine
wishes to invoke a privilege and not testify, the crimina
defendant is not deprived of his rights. *State v. Gropp*
41 Wis.2d 312, 164 N.W.2d 266 (1969); *Bryant v. Sta*
434 P.2d 498 (Okl. Cr. 1967).

In *U.S. v. Maloney*, 241 F. Supp. 49 (W.D. Penn
1965), the Court said that the criminal defendant has
right to have compulsory process to obtain witnesses i
his behalf and, therefore, to have subpoenas issued; how
ever, the determination of whether or not a witness i
allowed to take the stand is a discretionary matter to b
dealt with by the trial judge.

The authority relied on by Mr. Johnson, *Washingto*
v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 19
(1967), does not stand for the proposition that a crim
inal defendant's witnesses must be allowed to testify
else the defendant has been denied due process of law
Th precise issue which *Washington v. Texas* dealt wit
was whether a Texas statute deprived a criminal d
fendant of the Sixth Amendment rights. The Tex

statute prevented persons charged or convicted as co-participants in the same crime from testifying for one another, but allowed them to testify for the State.

The Court then called the Texas rule arbitrary because it prevented whole categories of defense witnesses from testifying. The United States Supreme Court's holding is quoted below:

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor *because the State arbitrarily denied him the right to put on the stand a witness*, who was physically and mentally capable of testifying to events that he had personally observed, and *whose testimony would have been relevant and material to the defense*." (Emphasis added.) 388 U.S. at 23, 18 L.Ed.2d at 1025, 87 S.Ct. at 1925.

A footnote at the bottom of the same page points out that the decision should not be construed as disapproving testimonial privileges or nonarbitrary state rules that disqualify persons who are incapable of observing or testifying about events.

The rules of materiality and of hearsay apply to both prosecutor and defendants. These rules are not arbitrary because they protect the jury from statements which are deemed to be incompetent, unreliable or irrelevant.

The *Washington* case has been noted in several la reviews. The following is taken from one of them.

> "The basis of the decision in *Washington v. Texas* is that the compulsory process clause o the Sixth Amendment gives the defendant a righ to put his co-participant on the stand. The com pulsory process clause, however, cannot be con strued to give the defendant a substantive righ to have the testimony of his witness entered into evidence. It gives the defendant only the righ to have compulsory process to obtain witness in this behalf — to have subpoenas issued fo their appearance in court." 20 Baylor L.Rev. 472 (1968).

A criminal defendant, then, has a right to compel attendance of witnesses, but this right does not supersede nonarbitrary state rules of evidence. Max Johnson was not deprived of his constitutional rights when his witnesses were hindered or prevented from testifying. If the trial court's ruling was incorrect, such ruling should have been appealed.

POINT II

UNDER UTAH LAW IT IS CLEAR THAT ISSUES WHICH SHOULD HAVE BEEN RAISED ON APPEAL CANNOT BE RAISED BY SUBSEQUENT HABEAS CORPUS PETITIONS.

Leon M. Frazier, counsel for Mr. Johnson in the lower court, made a motion for a new trial on February 13, 1968. This motion was heard on March 1, 1968, and

denied. The motion alleged that when the trial judge denied the testimony of Kenneth Smith, the defendant Johnson was prevented from having a fair and impartial trial. No appeal was taken from this denial.

Max Johnson now brings this action alleging basically the same point in his petition for habeas corpus. By so doing, he attempts to use the writ of habeas corpus as a means of appellate review. This is not the purpose for which the writ was established, and cannot be done. *Jaramillo v. Turner,* Case No. 11634, filed January 27, 1970.

When the same facts alleged in a petition for writ of habeas corpus were known to the petitioner at the time of his judgment, his proper remedy is not a writ. In the recent case of *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (1968), the petitioner contended that he was denied a right to counsel and that he did not understand the consequences of his guilty plea. The Supreme Court of Utah held that the petitioner was not entitled to habeas corpus remedies. The court correctly pointed out the following:

> ". . . If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circum-

> stance as we have mentioned above. Were otherwise, the regular rules of procedure governing appeals and limitations of time specified therein would be rendered impotent." *Id.*, 21 Utah 2d at 98-99, 440 P.2d at 969.

POINT III

MAX JOHNSON HAS NOT BEEN DENIED HIS RIGHT TO COUNSEL NOR HIS RIGHT TO APPEAL.

Mr. Johnson was represented by Leon Frazier during his trial. There was no appeal taken from this trial. Nowhere in the complaint is there a challenge made to counsel competency as applied to the appeal. Mr. Johnson was represented by LeRoy S. Axland at the hearing of his earlier petition for writ of habeas corpus. When that writ was denied no appeal was taken. Nowhere in the complaint is there a challenge made to a denial of the right to appeal this decision.

Utah has passed on this issue before. In the case of *Burleigh v. Turner*, 15 Utah 2d 118, 388 P.2d 412 (1964), the petitioner made the same legal move as Mr. Johnson. The court expressed the law in this manner:

> "Appellant contends in his brief that the failure to appeal the Third District Court's judgment was due to the failure of counsel, appointed by this court, to prosecute the appeal. This matter was not presented in the pleadings or the hearing before the Fourth District Court. It is raised for the first time upon this appeal. Habeas corpus being a civil remedy it is not necessary for this

court to consider this point." *Id.* 15 Utah 2d at 120, 388 P.2d at 414.

It would therefore follow that the court need not consider the issue of competency as to counsel, since it was not challenged in Max Johnson's complaint and was not an issue before Judge Sorensen. Since habeas corpus is not a criminal remedy, some criminal rights do not apply.

There have been no findings of fact on this issue. No testimony has been received by any prior proceedings. The only information the court has on this subject is the appellant's statement of facts. The court is not compelled to believe self-interested witnesses. *State v. Knepper*, 18 Utah 2d 215, 418 P.2d 780 (1966); *Aagard v. Dayton & Miller Red-E-Mix Concrete Co.*, 12 Utah 2d 34, 361 P.2d 522 (1961). The competency of counsel is therefore not ripe for review.

Even if the court were to review the issue, the court would still have to find for the respondent.

In order to justify habeas corpus relief on the ground that the appointed counsel was inadequate, California requires the petitioner to show that the trial was reduced to a farce or sham. *In Re Beaty*, 54 Cal. 2d 760, 414 P.2d 812, 51 Cal.Rptr. 521 (1966).

In Arizona, the court allows a contention of depri-

vation of right to counsel to be asserted in habeas corpus proceedings only in extreme cases. If the appellant sets forth no facts which indicate the appointed attorney's performance was so substandard as to render the trial a farce or sham, the petition is properly denied. *Burton v. State*, 7 Ariz.App. 223, 437 P.2d 975 (Ariz.App. 1968).

The Utah standard is a little different. In Utah, a habeas corpus remedy is allowed only if the circumstances indicate that it would be wholly unconscionable not to reexamine the petitioner's conviction. *Bryant v. Turner*, 19 Utah 2d 284, 431 P.2d 121 (1967). The method the Utah court uses in deciding this issue is to look at the record.

Note the last sentence in the *Burleigh v. Turner*, 15 Utah 2d 118, 388 P.2d 412 (1964), case. There the opinion writer makes a statement as to the guidelines the Court might follow in future cases. He said:

> "However, we might note that even in a criminal case it is not a denial of due process for a defendant's attorney to fail to perfect an appeal." *Id.* at 120, 388 P.2d at 414.

The Supreme Court of Arizona made the following statement:

> "We hold that, as in this case, a convicted felon may acquiesce in the advice and decision of counsel not to appeal, so as to make that decision his. We will not recognize the claim that the decision

> of counsel in which he acquiesced deprived him of the right to counsel within the meaning of the Sixth Amendment to the Constitution of the United States so as to permit a collateral attack on the judgment of conviction by habeas corpus or to permit it to be asesrted as the basis of good cause for a delayed appeal." *State v. Montez*, 102 Ariz. 444, 432 P.2d 456 at 459 (1967).

Since the record is devoid of any suggestion of bad faith, absent a showing that the proceedings were reduced to a farce or sham, and in light of the fact that Mr. Johnson had counsel, this Court must affirm Judge Sorensen's denial.

CONCLUSION

For the reasons submitted, the Respondent urges this Honorable Court to affirm the decision of Judge Sorensen and deny the petition for writ of habeas corpus.

Respectfully submitted,

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