1966

James Floyd Workman v. John W. Turner : Brief of Respondent

In The Supreme Court of the State of Utah

JAMES FLOYD WORKMAN,
Petitioner-Appellant,

v.

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

BRIEF OF RESPONDENT

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

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JAMES FLOYD WORKMAN
Pro se

TABLE OF CONTENTS

TABLE OF CONTENTS—(Continued)

Page

Cases Cited

Texts Cited

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Case No. 10615

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant, James Floyd Workman, appeals from a decision of the Third Judicial District Court denying his release on petition of writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

On December 8, 1965, James Floyd Workman filed a petition for writ of habeas corpus in the district court for Salt Lake County attacking his conviction for the crime of second degree burglary. An amended petition for writ of habeas corpus was filed on the 14th day of February, 1966. An answer to the amended petition was filed by the State on

the 17th day of February, 1966, and on March 16, 1966, the matter came on for hearing before the Honorable A. H. Ellett, Judge, who dismissed the petition, finding it without merit.

RELIEF SOUGHT ON APPEAL

The respondent submits the decision of the trial court denying relief by habeas corpus should be affirmed.

STATEMENT OF FACTS

Respondent submits the following statement of facts: The appellant filed a petition and an amended petition for writ of habeas corpus, alleging, (1) that appellant had been deprived of counsel at every stage of the proceedings that resulted in his present commitment, (2) that the appellant had not been advised of his rights at the time of his arrest, and, (3) that at the time the appellant entered a plea of guilty, the district court failed to advise appellant of the possible incarceration that could result from such a plea (R. 1&9). An answer to the amended petition was filed admitting that petitioner was not advised as to the possibility of incarceration at the time the plea of guilty was entered, but alleging that such a failure to advise appellant was not a basis for writ of habeas corpus (R. 8).

At the time of hearing, appellant was the only witness to testify in his behalf. Appellant's testimony may be summarized as follows: that the arresting

officers advised appellant to waive preliminary hearing (R. 29); that when appellant appeared before the Provo City Court, the complaint was read to appellant (R. 30), but nothing was said to appellant concerning his right to counsel (R. 31); that the transcript of the hearing which took place in the district court (Exhibit P-1) was incorrect in stating that the appellant answered "no" to an inquiry by the court as to whether appellant had or desired counsel (R. 32). On cross-examination, appellant testified to serving a prior term in the Utah State Penitentiary for the crime of second degree burglary and that such term commenced around 1956 (R. 34). Appellant further testified that the arresting officers did not threaten or intimidate appellant in any way if he refused to waive preliminary hearing (R. 36), and that the appellant was aware of the penalty for the crime of second degree burglary (R. 40), and the likelihood that the appellant would be returned to the Utah State Prison (R. 41).

The State relied on the testimony of three witnesses to establish, (1) the standard practice of Judge Meservy, of the Provo City Court at the time of appellant's appearance (R. 47), that the appellant was advised in the city court proceedings of his right to counsel (R. 57), that after appellant's arrest, appellant voluntarily gave a statement implicating himself as to the charges against him (R. 50), that the purpose of the introduction of this statement was to illustrate appellant's behavior and conduct as indicating a likelihood of a waiver of the formal judicial matters (R. 50), and that while the appellant was being es-

corted to the Provo City Court, appellant was again advised that the court would appoint counsel (R. 62).

While the appellant's brief is not clear as to the grounds relied on for reversal, respondent submits that the issues involved in this appeal are: (1) whether appellant effectively waived his right to counsel, (2) whether appellant was not advised as to his rights at the time of his arrest and also whether such advice is necessary at the time of his arrest, (3) whether the failure of the court to advise appellant of the possible incarceration that could result from a plea of guilty resulted in prejudicial error to the appellant, or whether this contention affords a proper basis for habeas corpus proceedings.

ARGUMENT

POINT I

THE APPELLANT VOLUNTARILY, INTELLIGENTLY, AND UNDERSTANDINGLY WAIVED HIS RIGHT TO COUNSEL THROUGH ALL STAGES OF THE PROCEEDINGS THAT RESULTED IN APPELLANT'S COMMITMENT.

A primary consideration is the standard applicable to a finding that the appellant effectively waived his right to counsel throughout the proceedings that resulted in appellant's commitment. It has been suggested that the federal requirements as to an effective waiver of counsel are applicable to state actions. Mazor, **The Right to Be Provided Counsel: Variations on a Familiar Theme,** 9 Utah L. Rev. 50, 75 (1964). Also, see **Malloy v. Hogan,** 378 U.S. 1 (1964).

As stated in **Johnson v. Zerbst,** 304 U.S. 458, 464 (1938):

> The determination of whether there has been an intelligent waiver of the right to counsel must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

See also **Carnley v. Cochran,** 369 U.S. 506 (1962), and **Moore v. Michigan,** 355 U.S. 155 (1957), which seem to establish the federal standard as to waiver of right to counsel as being a waiver that has been intelligently and understandingly effected by the accused.

This court, in **State v. Spiers,** 12 Utah 2d 14, 16, 361 P.2d 509, 510, follows the federal standard. It is therein stated:

> The determining factor of whether appellant was convicted without due process of law is whether there has been an intelligent waiver of his right to counsel.

In determining whether appellant intelligently and understandingly waived his right to counsel, it is proper to consider the appellant's background, experience and conduct. **Johnson v. Zerbst, supra,** and **State v. Spiers, supra.** Appellant testified that he had previously served a term in the Utah State Prison commencing around 1956 (R. 34). As to that charge, appellant admitted that he at first pleaded guilty (R. 34), but that when he was bound over to the district court, the matter was referred back to the city court for the appointment of counsel (R. 35). Ap-

pellant was, therefore, keenly aware of his right to counsel.

It is proper to consider the past criminal record of an accused in determining whether the accused intelligently and understandingly waived his right to counsel. **Johnson v. Zerbst, supra; Verdon v. United States,** 296 F.2d 554 (8th Cir. 1961); **Michener v. United States,** 181 F.2d 911 (8th Cir. 1950); **Lesieau v. United States,** 177 F.2d 919 (8th Cir. 1949).

It is also vital to recognize that, because of appellant's past experience, he was admittedly aware of the penalty for the crime for second degree burglary (R. 40) and also the likelihood that he would be returned to the Utah State Prison (R. 41).

During cross-examination, the following transpired: (R. 38):

Q. Let me ask you, referring to Exhibit P-1, which appears to be a certified transcript by Dale J. Johnson, official court reporter, Fourth Judicial Court, and ask you if this in fact occurred:

The Court: Come forward. Is your name James Floyd Workman?

Mr. Workman: Yes.

The Court: How old are you?

Mr. Workman: Twenty five.

The Court: You are before the court at this time to answer to a charge which has been brought by the District Attorney of the Fourth Judicial District, State of Utah. Are you represented by an attorney?

Mr. Workman: No.

The Court: Do you want an attorney?

Mr. Workman: No.

The Court: You are advised that you have a right to have an attorney if you want one. If you are unable to employ one yourself, the court will appoint one for you. Do you want one?

Mr. Workman: No.

The appellant testified that, while he didn't recall that the above proceedings occurring, they could have in fact occurred (R. 39).

Therefore, it cannot be said that after a proper inquiry by the court, the appellant did not intelligently and understandingly waive his right to counsel. Rather, the exact opposite is established by the record and also by appellant's background, conduct, and experience.

POINT II

THE FAILURE OF THE COURT TO ADVISE THE APPELLANT OF POSSIBLE INCARCERATION AT THE TIME APPELLANT ENTERED A PLEA OF GUILTY DOES NOT AFFORD A BASIS FOR RELIEF BY WRIT OF HABEAS CORPUS, AND SUCH FAILURE DID NOT RESULT IN PREJUDICIAL ERROR TO THE APPELLANT.

In **State v. Banford,** 13 Utah 2d 63, 368 P.2d 473 (1962), collateral relief was sought because of the trial court's failure to advise the accused of the consequences of a plea of guilty. It is submitted that habeas corpus is not a substitute for appeal. In **Thompson v. Harris,** 107 Utah 99, 152 P.2d 91 (1944),

this court indicated that habeas corpus is much narrower in scope than direct appeal and is limited to those instances where there has been a substantial departure from due process. This court stated, 107 Utah at 102, 152 P.2d at 94:

> The writ of habeas corpus must not be used to discover and correct all errors which might creep into a criminal trial. The time for taking an appeal has wisely been limited by law. If the writ of habeas corpus were to be used to reach all defects in the trial which could be raised by a timely appeal, no conviction could become final. We recognize that some errors are more prejudicial to a defendant than are others, but if habeas corpus is to be used to correct error, where can we draw the line? Should we leave the determination as to when there has been and has not been sufficient error to warrant interference by the use of a writ of habeas corpus entirely to the discretion of each judge based on standards which he may invoke from his own mind? We believe that the only sound line that can be drawn is to restrict the use of the writ of habeas corpus to the correction of jurisdictional errors and to errors so gross as to in effect deprive the defendant of his constitutional substantive or procedural rights. Anything short of that must be corrected on appeal or by the board of pardons. And this of course is true whether the constitutional right is granted by the state constitution or by the federal constitution through the absorpion in the Fourteenth Amendment.

Recently in **Gallegos v. Turner,** 17 Utah 2d 273, 400 P.2d 386 (1965), this court again acknowledged the application of the principle in the **Thompson** case. This court further stated in reference to the validity of judgments, 17 Utah 2d at 275, 400 P.2d at 388:

> It is then not subject to attack under habeas corpus or any other collateral proceeding except in the most unusual circumstances: where the court was without jurisdiction; or there has been a substantial failure to accord the accused due process of law; or perhaps for example where it is indisputably shown that here is a mistaken identity; or that there has been a knowing and wilful falsification of the evidence by the prosecutor; or some other such circumstance that it would be wholly unconscionable not to reexamine the conviction.

Consequently, it is submitted that there is no basis for habeas corpus because of a technical failure to intensively advise the defendant pleading guilty as to all the consequences of his plea unless it is apparent that there was substantial likelihood, from what actually occurred, that the defendant would not have understood the consequences of his plea or his rights would have been otherwise inadequately protected. In the instant case, the record unquestionably shows the appellant, because of his past experience, realized the penalty of second degree burglary (R. 40) and also the likelihood that he would be returned to the Utah State Prison (R. 41).

It is, therefore, submitted that because of the nature of the proceedings in habeas corpus and also because of the undisputed facts in the instant case, the failure of the court to advise appellant of the possible consequences of a plea of guilty is not a proper basis for habeas corpus and no prejudicial error resulted to the appellant.

POINT III

APPELLANT'S CONTENTION THAT AT THE TIME OF HIS ARREST HE WAS NOT ADEQUATELY APPRAISED OF HIS RIGHTS IS NOT SUPPORTED BY THE EVIDENCE AND FURTHER, EVEN IN THE ABSENCE OF SUCH AN APPRAISAL, THERE WOULD NOT BE REVERSIBLE ERROR.

At the hearing, the state introduced the testimony of Kenneth Forshee, a lieutenant in the Provo City Police Department and also the arresting officer, to establish that subsequent to appellant's arrest, appellant voluntarily gave a statement implicating himself and confessing his guilt as to the charge of second degree burglary (R. 49-61). The statements were introduced into evidence as Exhibits D-2 and D-3 and specifically state, "I have been advised that I have the right to an attorney and that this statement may be used for or against me in any court or trial I might stand." The validity of the statements is borne out by the testimony of the officer.

However, it is also submitted that the reference by the appellant to **Miranda v. Arizona,** 16 L. Ed. 2d 694 (1966), is not appropriate inasmuch as the standards established by that decision are not to be retroactively applied to proceedings that transpired in 1962.

CONCLUSION

The record in the instant case clearly supports the findings of fact and conclusion of law made by the trial court. The appellant indisputably, intelli-

gently, and understandingly waived his right to counsel throughout all stages of the proceedings that resulted in his commitment. The fact that the district court did not advise appellant of the possible consequences of his plea of guilty are not properly subject to review by writ of habeas corpus and also, because of the appellant's background and past experience, such advice was unnecessary because it would simply have been repeating what the appellant was admittedly aware of. The record does not support appellant's contention that he was not appraised of his rights at the time of his arrest, but even if this was the established case, there was no reversible error committed because the standards established by the United Supreme Court in the case of **Miranda v. Arizona, supra**, are not to be retroactively applied to procedures culminated in 1962.

This court should affirm.

Respectfully submitted,

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