1971

Robert J. Parent v. John W. Turner, Warden, Utah State Prison : Appellant's Brief

IN THE SUPREME COURT

of the

STATE OF UTAH

ROBERT J. PARENT, Plaintiff and Appellant, v. JOHN W. TURNER, Warden, Utah State Prison, Defendant and Respondent.	)	Case No. 12033

APPELLANT'S BRIEF

Appeal from the District Court
of the Second Judicial District
In and For Weber County
State of Utah

Honorable Parley E. Norseth, Judge

John S. Boyden, Jr. of
WORSLEY, SNOW & CHRISTENSEN
701 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorneys for Appellant

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

INDEX

CONSTITUTIONAL PROVISIONS CITED

CASES CITED

INDEX CONTINUED

IN THE SUPREME COURT OF THE

STATE OF UTAH

ROBERT J. PARENT,)

Plaintiff and)
Appellant,)

-vs- Case No. 12033

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

Defendant and)
Respondent.

APPELLANT'S BRIEF

NATURE OF THE CASE

Robert J. Parent, an inmate of the Utah State Prison, brought a petition for a Writ of Habeas Corpus upon the ground that

during his arraignment he was denied his right to court-appointed counsel.

DISPOSITION IN THE LOWER COURT

Mr. Parent initiated this action by petition to the Utah Supreme Court (R-3). The petition was assigned for hearing to the District Court of Weber County. The District Court denied the Writ and remanded Mr. Parent to the Sheriff of Weber County to be reincarcerated in the Utah State Prison (R-10).

RELIEF SOUGHT

Mr. Parent prays the court to grant the Writ of Habeas Corpus and to Order that he be discharged forthwith from the custody of defendant-respondent and that the Judgment of the District Court of Weber County, State of Utah entered

August 18, 1969, sentencing him to a term of zero to five years in the Utah State Penitentiary, be vacated.

STATEMENT OF FACTS

Robert J. Parent was arraigned on a charge of assault with a deadly weapon before the District Court of Weber County on August 18, 1969 (R-7). He appeared without counsel. The Court asked him if he had an attorney at the preliminary hearing and if he had any money, to which he replied, "No" (R-7). He was asked if he wanted a lawyer and he said, "No, I don't" (R-8). He was not asked if he wanted the Court to appoint an attorney without cost to him. He was told that ". . . this is a felony charge,

and carries with it a penitentiary sentence" (R-8). The Court did not mention the potential duration of the sentence until it was pronounced. There was no discussion of possible lesser statutory offenses included within the conduct of which he was accused or the range of allowable punishments for those offenses. No inquiry was made with regard to possible defenses or mitigating circumstances.

Mr. Parent pleaded guilty to the charge of assault with a deadly weapon (R-8). He was sentenced to a term of zero to five years in the State Penitentiary (R-9).

Mr. Parent filed a Writ of Habeas

Corpus with the Utah Supreme Court January 29, 1970 (R-3). The hearing on the Writ was held February 16, 1970 before the District Court of Weber County. Mr. Parent was represented by L. G. Bingham, Esq., appointed by the court to represent him at the hearing on the Writ. Defendant-respondent was represented by Gary Gale, Esq., Assistant District Attorney.

During the hearing on the Writ, Mr. Parent, referring to his arraignment, testified as follows (R-25, 26):

Q. (By Mr. Gale) And you were advised that you had a right to a jury trial, do you recall that?

A. No, I don't.

Q. Do you recall waiving that right?

A. I remember that I waived obtaining counsel.

Q. All right. And that was both at the preliminary and at the arraignment in District Court?

A. Yes, but at that time I was on welfare and I couldn't afford counsel.

Q. Well, you were advised if you couldn't afford counsel one would be appointed for you?

MR. BINGHAM: Pardon me, which time?

Q. Speaking of the City Court.

A. The City Court, yes.

Q. All right. So you knew that if you couldn't afford counsel, one would be appointed?

A. Right. I figured it would be appointed in here.

. . .

Q. (By Mr. Bingham) If the Court had indicated to you counsel would have been provided for you, no charge to you if you could not afford one, would you have asked for counsel?

A. Yes (R-30).

ARGUMENT

ROBERT J. PARENT WAS DENIED HIS RIGHT TO COURT-APPOINTED COUNSEL WITHOUT COST TO HIM IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The circumstances under which Mr. Parent said he did not want a lawyer did not satisfy the basic requirements for a valid waiver of counsel as set forth by the Supreme Court of the United States. In addition, there was no valid waiver because court-appointed counsel was not clearly or specifically offered to him even though the court was informed of his inability to pay for an attorney.

The law set forth by the Supreme Court of the United States regarding an accused's right to court-appointed counsel and waiver thereof is summarized by the Tenth Circuit Court of Appeals in the case of Shawan vs. Cox, 350 F. 2d 909 at page 912:

> It is now settled law that the Fourteenth Amendment makes obligatory on the states the provision of the Sixth Amendment requiring that the accused in all criminal prosecutions be afforded the right to have the assistance of counsel for his defense, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. Also, a defendant who pleads guilty is entitled to the benefit of counsel, and a request for the same is not necessary. Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367. If an accused is incapable of adequately conduct-

ing his own defense, is unable to procure his own counsel and does not intelligently and understandingly waive the right to counsel, it is the duty of the court to provide counsel for him. Rice v. Olson, supra. The trial judge before whom an accused, charged with a felony, appears without counsel, must make a thorough inquiry to determine whether there is an understanding and intelligent waiver of counsel. He must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof and explain all other facts of the case essential for the accused to have a complete understanding. Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158. To constitute a valid waiver there must be an intentional relinquishment or abandonment of the right, or in the words of Justice Brennan in Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70, "The record must show, or there must be

> an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (Emphasis added.)

There is no evidence in the record tending to show that Mr. Parent understood the gravity of his situation prior to sentencing. Indeed, only one of six vital elements of a valid waiver was even discussed. The elements of a valid waiver of counsel are set forth in the Powell case, supra, and in VonMoltke v. Gillies, 332 U.S. 708, 723; 92 L.Ed. 309, 320; 68 S.Ct. 316. In these cases the Supreme Court of the United States stated that the fact that an accused may tell the Court that he is informed of his right

to counsel and desires to waive this right does not automatically end the Judge's responsibility. The VonMoltke case holds that in order to be valid, such a waiver must be made with an apprehension of:

1. The nature of the charges;
2. The range of statutory offenses included within the charges;
3. The range of allowable punishments for such offenses;
4. Possible defenses to the charges;
5. Mitigating circumstances;
6. All other facts essential to a broad understanding of the whole matter.

other, possibly lesser offenses included within the conduct of which he was accused.

Possible defenses to the charges were not explored. The Court did not advise Mr. Parent that counsel could be valuable in finding and preparing possible defenses, in evaluating the evidence against him and in advising him of his chances for acquittal or conviction on a lesser charge should the case go to trial.

No inquiry was made regarding mitigating circumstances or their possible effect upon the severity of the sentence.

Although the court was informed of Mr. Parent's inability to pay for an attorney, no clear and specific offer of court-

appointed counsel was made. The question, "Do you want a lawyer?" does not specify whether the court is referring to an attorney retained at the expense of the accused or to court-appointed counsel or both. The sophisticated defendant could resolve this uncertainty by answering "Yes, but I can't afford one." However, it is unreasonable to expect every accused to resort to this magic phrase. It is just as likely that an accused would answer in the negative, bearing in mind his inability to pay and his uncertainty as to whether the Court was referring to retained counsel or appointed counsel. The intimidating

atmosphere of a criminal courtroom does not encourage an accused to ask the Court to clarify its statements.

Mr. Parent's understanding of the meaning of the court's question is illustrated by his testimony at the hearing on the Writ wherein he stated that he thought he had waived his "right to obtain counsel" (R-25) (emphasis added). In other words, he understood the Court's question as to whether he wanted an attorney to mean, "Do you wish to obtain an attorney at your own expense?" He further explained that he did not obtain counsel because he was on welfare and could not afford an attorney (R-26).

Mr. Parent's testimony also indicates that he expected the trial court to appoint an attorney for him after he had waived his right to obtain counsel (R-26). No such appointment was offered or made. This testimony further illustrates Mr. Parent's misunderstanding of his position and of court procedure.

It may be argued that if Mr. Parent truly expected counsel to be appointed by the trial court he would have insisted upon appointment of counsel before entering his plea. But such an argument places the responsibility on the accused to initiate appointment of counsel by his insistence. Giving the accused the respon-

sibility to take the initiative would operate to the detriment of the unintelligent, the unlearned and the timid. The accused may fail to insist because he mistakenly thinks that the trial court has discretion to deny appointed counsel to an indigent charged with a felony. The accused may not insist because he is not brash enough to assert himself in a courtroom setting. For an accused to satisfactorily protect himself he would have to possess a degree of legal expertise and a capacity for self-assertion not commonly found among the general population.

The sixth and fourteenth amendments to the federal constitution guarantee that

an accused shall not be required to shoulder such an ominous burden. Instead, the responsibility is placed squarely on the trial court to see to it that an accused's right to appointed counsel is intelligently and understandingly waived. The issue in this case is not whether Mr. Parent made timely insistence, but whether the court made adequate inquiry to satisfy the minimum requirements for valid waiver.

CONCLUSION

The trial court's failure to explore the basic elements of a valid waiver of counsel and its further failure to specifically and clearly offer appointed counsel

substantially deprived Mr. Parent of his right to court-appointed counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The Writ of Habeas Corpus ought to be granted. Mr. Parent ought to be discharged forthwith from custody and the judgment of the trial court ought to be vacated.