1971

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

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT J. PARENT,
Plaintiff-Appellant,

—v—

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

Case No.

BRIEF OF RESPON

AN APPEAL FROM THE JUD
SECOND JUDICIAL DISTRICT IN A
COUNTY, STATE OF UTAH, TH
PARLEY E. NORSETH, JUDGE, PRE

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CASES CITED

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Case No. 12033

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of the Second Judicial District, Weber County, State of Utah, the Honorable Parley E. Norseth, Judge, presiding, denying appellant's petition for writ of habeas corpus.

DISPOSITION IN LOWER COURT

After a full hearing, the Honorable Parley E. Norseth ordered the denial of the appellant's petition for writ of habeas corpus and remanded the appellant to the custody of the respondent.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the District Court should be affirmed.

STATEMENT OF FACTS

On August 18, 1969, appellant pleaded guilty to a charge of assault with a deadly weapon before the Honorable Parley E. Norseth in the Second Judicial District in and for Weber County, State of Utah (R-78). At this arraignment hearing, appellant was advised by the judge of his rights, including his right to appointed counsel. Appellant waived his rights (R-8) and was thereafter sentenced to a term of zero to five years in the State Penitentiary (R-9).

On January 29, 1970, appellant filed a writ of habeas corpus with the Utah Supreme Court (R-3). On February 16, 1970, the hearing on the writ was held before the District Court of Weber County, the Honorable Parley E. Norseth, Judge, presiding. At this hearing, appellant was represented by court-appointed counsel (R-15). The District Court denied the writ.

ARGUMENT

POINT I.

APPELLANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AT THE PRELIMINARY AND ARRAIGNMENT HEARINGS.

This Court has held that a defendant must be informed of his right to counsel at every stage of the pro-

ceedings, and that a waiver of such right must be made intelligently and knowingly. *State v. Spiers,* 12 Utah 2d 14, 361 P.2d 509 (1961).

In *Carnley v. Cochran,* 369 U.S. 506 (1962), the United States Supreme Court stated that in order for the waiver to be effective, "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." 369 U.S. at 516.

The minute entry shows that at the preliminary hearing appellant was offered counsel but intelligently and knowingly rejected the offer:

> "The Court informed the defendant of his legal right to a preliminary examination and to the aid of counsel at every stage of the proceedings against him, and he is asked by the Court if he desires the aid of counsel, to which he answered that he does not." (R-31)

The record demonstrates that after appellant stated at the arraignment that he understood what he was doing when he waived his rights at the preliminary hearing (R-33), he was offered counsel at the arraignment but intelligently and understandingly refused the offer:

> "The Court: Do you want a lawyer?
>
> "Mr. Parent: No, I don't.
>
> "The Court: Now, this is a felony charge, and carries with it a penitentiary sentence.
>
> "Mr. Parent: Yes, your Honor.
>
> "The Court: Now you know that you are entitled to a trial by jury?

"Mr. Parent: (Nods head.)

"The Court: You don't have to waive any of those rights.

"Mr. Parent: Right." (R-34)

The record clearly manifests that not only was appellant offered counsel, but that he was also advised that he did not have to waive his right to counsel. Such an enumeration by the trial judge of defendant's right of counsel coupled with the defendant's rejection, as presented by the record, constitutes an effective waiver is demonstrated by *Moore v. Michigan,* 355 U.S. 155 (1957). Here the Court held that a waiver of the right of counsel was made intelligently and understandingly where the reviewing Circuit Court found as a matter of fact that the trial judge asked the defendant "whether he had a lawyer and whether he desired to have a lawyer, and that [the petitioner] gave a negative reply to both of the inquiries." 355 U.S. at 158.

Even though the record shows that appellant was offered counsel but intelligently and understandingly rejected the offer, appellant contends that because the trial judge did not specifically tell him that he would appoint an attorney if he could not afford to hire one, appellant's waiver was not effective. (Appellant's Brief at 14). The transcript of the hearing on the writ, however, plainly demonstrates that at the arraignment appellant was fully aware that counsel would be appointed for him if he could not afford one:

"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." (R-12-13)

This Court has held that where the record demonstrates that the petitioner had expressly declined an offer of counsel by the trial court, the petitioner must show by a preponderance of the evidence that his acquiescense was not given with the sufficient understanding and intelligence necessary for a valid waiver. *Maxwell v. Turner,* 20 Utah 2d 163, 453 P.2d 287 (1967). See *Carnley v. Cochran,* 369 U.S. 506, 516 (1962).

The above-quoted testimony at the hearing on the writ, and the other statements by appellant at his arraignment (R-34), show that appellant obviously knew at the time of both the preliminary and arraignment that counsel would be appointed if he could not afford it. Appellant contends that he did not know that the Court would have appointed counsel if he could not accorded it. The only evidence offered by appellant to uphold this contention is a statement made by appellant at the hearing on the writ to the effect that if the trial judge had told him that counsel would be appointed even if he could not afford it, he would have asked for counsel. (Appellant's Brief at 7).

Plainly such a self-serving statement, completely at odds with his previous statements and testimony, does not meet the preponderance of evidence test of *Maxwell, supra.* See *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968, 970, footnote 7 (1968).

The Court has stated that on appeal the record is surveyed in a light most favorable to the findings and judgment of the lower court, and it will not reverse if there is a reasonable basis therein to support the trial court's decision. *Velasquez v. Pratt,* 21 Utah 2d 229, 443 P.2d 1020 (1968). *State v. Knepper,* 18 Utah 2d 215, 418 P.2d 780 (1966).

Respondent submits that there is clearly reasonable basis in the record to support the trial court's decision that it went far beyond the ordinary procedure to impress upon appellant his rights (R-37); that at the time appellant entered his plea of guilty he understood very thoroughly each and all of his rights (R-36); and that appellant waived each and all of those rights. (R-36)

POINT II.

THE *VON MOLTKE* GUIDELINES DO NOT GOVERN THE DISPOSITION OF THIS APPEAL.

Although appellant was informed at the arraignment by the trial court that he was charged with a felony that carried a penitentiary sentence, and although appellant was there also informed of his rights of counsel, jury trial, and self-incrimination, which rights appellant waived (R-34), appellant asserts that his waiver of right to counsel was not effective because the trial court failed to inform him of the so-called *Von Moltke* standards. (Appellant's Brief at 13). Appellant contends that the asserted standards of *Von Moltke* require a trial

judge to inform the defendant of the range of statutory offenses included within the charge; the range of allowable punishments for such offenses, possible defenses, and mitigating circumstances. (Appellant's Brief at 12)

Respondent would submit that not only do the asserted standards not apply to the effectiveness of waiver of right to counsel in state proceedings, but also that the asserted standards are mere guidelines, not constitutional mandates upon the federal and state courts.

Von Moltke v. Gillies, 332 U.S. 708 (1948), enumerated the responsibilities of federal trial judges, in cases of federal offenses, to insure that a waiver of counsel was understandingly and intelligently made. 332 U.S. at 723. *Von Moltke* was decided prior to the *Gideon v. Wainwright,* 372 U.S. 335 (1963), decision that expanded the right of counsel to include trial courts in state proceedings. While the *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938), principle that the determination of whether there has been an effective waiver of the right to counsel depends upon the particular facts and circumstances of each case has been made applicable to waiver of right of counsel in state criminal proceedings, *Carnley v. Cochran,* 396 U.S. 506, 515 (1962); and while the *Cochran* principle that the record must show, or an allegation and evidence which show, that the accused was offered counsel by intelligently and understandingly rejected the offer has been made applicable to state criminal proceedings, *Cochran,* 369 U.S. at 516. The Supreme Court has not even intimated that

the guidelines stated in *Von Moltke* are constitutional principles applicable to state proceedings. Indeed, there is no subsequent case in which the Court has even applied the *Von Moltke* guidelines to federal waiver of counsel.

The *Von Moltke* guidelines and federal decisions thereunder were reviewed in *Spanbauer v. Burke,* 374 F.2d 67 (7th Cir. 1966). The study concluded that such application as there has been of *Von Moltke* to state proceedings have not relied upon the literal language or application of the *Von Moltke* standards, but upon the proposition that the state trial judge has a duty to make an investigation into the circumstances to determine whether the petitioner has intelligently and competently waived his right to counsel. 374 F.2d at 71.

Another federal decision, *White v. Burke,* 281 F. Supp. 300 (W.D. Wis. 1968) which carefully analyzed the applicability of *Von Moltke* to state criminal proceedings, stated that the *Von Moltke* duties were not constitutional staples to be strictly applied, but rather that they were merely suggested guidelines for the trial judges. 281 F. Supp. at 302.

As shown under respondent's first point, Judge Norseth, both at the arraignment and at the hearing on the writ, adequately investigated into the facts and circumstances of appellant's waiver to determine if it was made intelligently and understandingly.

CONCLUSION

Since the record clearly indicates a knowing, intelligent waiver, respondent asks the decision of the District Court be affirmed.

Respectfully submitted,

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