1972

W. C. Lamoreaux v. Grand County, Et Al. : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

W. C. LAMOREAUX,
Plaintiff-Appellant,

—vs.—

GRAND COUNTY, et al.,
Defendant-Respondent.

No. 12791

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court for
Grand County, Utah
Honorable Calvin Gould, *District Judge*

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NATURE OF THE CASE

This is an appeal from a summary judgment denying counsel a fee under state law for work done by appointed counsel in a habeas corpus review in the Federal Court involving impecunious prisoners.

DISPOSITION OF LOWER COURT

The trial court granted the motion for Summary Judgment, depriving appointed counsel of a fee on the theory that the Utah Statute does not reach work done in the Federal Courts in defense of impecunious criminals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal so that the county shall pay

fees for a successful reversal under habeas corpus attack in the Federal Courts.

STATEMENT OF THE FACTS

On June 30, 1969, Liberatore and Jackson were arrested in Grand County, Utah, on charges of Grand Larceny; and they being without funds, the City Judge appointed Luke Pappas as counsel and bound them over to the District Court for trial on said felony. (R 19) A trial was had without jury and the Court convicted them on said felony; thereafter they were sentenced and transferred to the Utah State Prison. They had no contact with their appointed attorney after the day of their sentence. (R 12, 8) The prisoners pro se attempted to activate their appointed attorney, Mr. Pappas, to "attack the conviction" (R 39) but to no avail. (R 8) The prisoners, not hearing from their appointed counsel, (R 38) asked the Trial Court to appoint another attorney to represent them in their post-conviction proceedings, but Judge Shea refused, and the Court released Pappas from duties. (R 33, 34, 52)

In this period the Supreme Court of Utah twice rejected the pro se attempts of the prisoners to achieve review. (R 30, 51)

All attempts by the prisoners to get counsel and review failed. They filed their petition for habeas corpus with the United States Court on an impecunious affidavit. (R 14, 26-57) Thereafter, Judge Ritter ordered Appellant to go to the prison, investigate the matter, and

report to him within one week. (R 17) This appointed attorney did as requested, reporting to the Court that the prisoners had probable cause.

A hearing was had before said Federal Court which resulted in a denial of the Writ, whereupon appointed counsel perfected an appeal to the Court of Appeals. This appeal resulted in a remand "to determine if petitioners were advised of their right to counsel on appeal and if they waived that right." (R 9-16) At the subsequent hearing, the Attorney General of Utah stipulated with appointed counsel: "Pappas . . . indicated that in communicating with the petitioners herein, he did not discuss with them their right to appeal." (R 8) Thereupon, the Attorney General of Utah moved the Court for its order granting habeas corpus, releasing the prisoners. (R 7)

Appellant petitioned respondents for a fee under Utah's statute providing minimum standards for impecunious criminals. (77-64-1) Said petition was rejected. (R 1, 2) On suit being filed, respondents admitted 111 hours work at $20 per hour was reasonable compensation but argued on motions for summary judgment the statute did not apply to work done in the federal courts. (R 23, 25, 61, 65, 77) The state court granted respondents' motion to dismiss, hence this appeal. (91-93)

I

THE LOWER COURT ERRED IN REFUSING TO COMPENSATE APPOINTED COUNSEL

Historically, the Utah Lawyer could not be paid for defending impecunious criminals, this because Utah had no statute on the subject.

RUCKENBROD v MULLINS, 133 P2d 325; 144 ALR 839

The Indiana court was one of the leaders in the states to require payment of lawyers defending impecunious criminals.

LANE v BROWN, 372 US 487, 1963

The Utah Constitution guarantees the accused "the right to appear and defend in person and by counsel." Art. I. Sec. 12. It also states "All courts shall be open, and every person, for an injury done to him . . . shall have remedy by due course of law . . . and no person shall be barred from prosecuting or defending before any tribunal in this state . . ." Art. I, Sec. 11.

The United States Constitution, by the Sixth Amendment, guarantees the accused the "assistance of counsel for his defense"; and in 1963 by GIDEON v WAINWRIGHT, 372 US 335; 9 L Ed 2d 799, the U.S. Supreme Court held it obligatory on the states by the 14th Amendment, to see that the accused enjoys counsel at all stages of a criminal proceeding. Many states now passed laws to pay counsel in such cases. At the oral argument, counsel for Defendants stated that all but three states have enacted statutes paying counsel.

The 1965 Utah Legislature enacted 77-64-1 which for the first time set up minimum standards to be pro-

vided by the several counties of Utah for impecunious persons involved in crime who face "the possibility of the deprivation of his liberty or other serious criminal sanction." Thus the vacuum created for the nonpayment of counsel in Ruckenbrod v Mullins above was once and for all remedied by a strong, integrated statute that has few limitations on payment of counsel. Said staute was enacted following an important cluster of U.S. Supreme Court cases, including the following:

GRIFFIN v ILLINOIS, 351 US 12; 55 ALR2d 1055
DOUGLAS v CALIFORNIA, 372 US 353; 9 L Ed 2d 811
ESKRIDGE v WASHINGTON, 357 US 214, 1958
SMITH v BENNETT, 365 US 708, 1971
JOHNSON v ZERBST, 304 US 458
ANDERS v CALIFORNIA, 386 US 738; 18 L Ed 493

In the decision by the District Court, (R 90) reference is made that the "judicial power of the state shall be vested in a Supreme Court, in District Courts," etc. Art. VIII, Sec. 1. Let this Court square such a concept with Art. I, Sec. 3:

> "The state of Utah is an inseparable part of the Federal Union and the Constitution of the United States is *the supreme law of the land.*"

The Utah Statute setting up such minimum standards as aforesaid, has been construed by the Utah Supreme Court, including:

WASHINGTON COUNTY v DAY, 22 Utah 2d 6; 447 P2d 189

STATE v DIXON, 448 P2d 716; 22 Utah 2d 58
BENNETT v DAVIS COUNTY, 1971, No. 12311

These Utah cases hold that appointed counsel shall be paid by the county.

In Washington County v Day, the Utah court said:

> ". . . it must not be misunderstood that lawyers alone among all the professions can be compelled by the legislative authority to undertake free services for impecunious people . . . We think a wise legislature intended to and did remove the burden of affording counsel for impecunious defendants in criminal cases from the tired shoulders of the legal profession and placed it upon society, where it has always rightfully belonged. . . It seems clear to us that the County is by Section 1, obligated to furnish the minimum standards. . . . We hold that where a county makes no arrangements for representation of indigent defendants in criminal cases, the court is authorized to appoint counsel for the defendant."

In State v Dixon, the Utah Court reiterated the above Day spirit, and held:

> "The contention of Weber County in the Dixon case that it should not be responsible for the fees on appeal because appointment was made by *this Court* is without merit."

In Bennett v Davis County, the Utah High Court said of this new legislation:

> "The objective of this corrective legislation was to ameliorate the prior condition, wherein an officer of the Court was compelled to contribute his time and efforts gratuitously."

The question to be decided in this proceeding stems from appointed counsel's vindication in the Federal Courts of Sixth Amendment rights deprived to the accused in a state proceeding. The defendants in the criminal case involved in this proceeding did not have the advise of counsel in their post-conviction attempts to get appeal and other incidental rights. (R 8) The 10th Circuit remanded in JACKSON & LIBERATORE v TURNER, 442 F 2d 1303, 1971. By reason of said decision and the constitutional questions raised, the Attorney General of Utah stipulated the prisoners had not been afforded minimum constitutional rights to counsel, and the Court freed them. Thus, this is not the case of prisoners attempting to trump up baseless claims! Will this Court assume the Court of Appeals and the Attorney General of Utah failed to compass the appeal of the prisoners in terms of the "fundamental principles, essential to the security of individual rights and the perpetuity of free government?" (Art. I, Sec. 27, Utah Constitution)

This Court, in BEAL v TURNER, 22 U2d 418, 454 P2d 624, closed its opinion with words that will ring toward a reversal of the trial judge herein, completely closing the question of exclusions from compensation under the Utah statute:

> "We hold that the intention of the legislature in passing this statute was to limit the right of counsel in matters subsequent to conviction and sentence to appeals, applications for writs of habeas corpus, and for writs of corum nobis, matters affecting guilt or innocence and the

fairness of the trials by which those ends are accomplished. It does not refer to revocation of paroles."

The Utah Supreme Court twice closed its door to the pro se prisoners, acting without counsel because the trial court would not give them post-conviction attention. (R 51, 30, 14) The appeal to the 10th Circuit resulted in such a penetrating exposure of lack of procedural *fairness* that the Utah Attorney General chose to move that the writ of habeas corpus issue. (R 11, 7, 8)

Appointed counsel had no further access to the Utah Supreme Court. The time to appeal had run during a period when the prisoners were without counsel. Will this Court rule that appointed counsel would have been paid had he pursued further remedies before this Court? Let us not be coy. While there are jurists who do not like the past twenty year's decisions of the U.S. Supreme Court, that Court is the supreme arbiter of ultimate constitutional rights. The Utah legislature bowed to that Court in enacting the current statute to be construed.

This Court gave good attention to basic principles here involved in BEAL v TURNER, 22 U2d 418, 454 P2d 624, in its rationalization of the Mempa case. This Court recognized there the right of counsel in the post-conviction period; and determined that where counsel had not been present *after "the critical stages of the proceedings are over,"* no constitutional error had been committed in denying counsel in a parole violation. In the case at bar, the critical stages involving appeal, collateral attack, had not passed, and the prisoners were denied counsel!

It was not the Federal trial judge who found in favor of the prisoners. That Court has been criticized by this Court for letting too many prisoners free on habeas proceedings. It was the Circuit Court on review that gave the fundamental error its focus, remanding for further review. It was the Attorney General of Utah who confessed the wrong, without further evidence. (R 8)

This Court cannot say that counsel in the case at bar was as "useless" as the attorney was said to be in BEAL in a parole violation!

This Court recognized appeal rights during the "*contentious*" period of his case in BEAL above. Let this Court not slide over a basic constiutional issue. If the imprisoned are to have counsel during the "contentious," "critical" periods, why say that counsel will be paid only for work done in the state courts? If the U.S. Supreme Court determines the "supreme law of the land" and the Utah legislature bowed to its mandate for counsel at "every stage of the procedeing" including review, appeal, habeas corpus, with encouragement to counsel to prosecute "other remedies" and gives him hope he may one day be paid, why derogate from a highly remedial statute? Was it not enacted for the benefit of counsel, as well as the prisoner? Because Congress has since enacted protection for 6th Amendment lawyers, no expensive precedent will be set for vindicating the work done in the case at bar. (See point II)

The Utah Statute puts the burden on the county to see that the accused were "fully advised" at a sufficiently

early stage. "Full advice" and "a complete defense" must include knowledge of and access to constitutional guarantees available in the Federal Court if the state courts do not honor basic rights and principles. Any lesser construction will rob the Utah statute of its necessary and obvious force. Appointed counsel must bring to bear "the taking of appeals and the prosecution of *other remedies* before and after a conviction. . ." The accused and incarcerated must have "experienced, competent and zealous" counsel "*at every stage of the proceedings.*" This does not sound in cutting off any or all federal guarantees or procedures! Appointed counsel shall "Prosecute any appeals *or other remedies* before or *after conviction* that *he considers to be in the interest of justice*. The purpose of this section is to give counsel broad powers to represent the indigent defendant . . . in *any* criminal or quasicriminal proceeding . . . including *juvenile courts* as well as the *other courts* of this state which are presently created or which may be created in the future . . . habeas corpus, corum nobis proceedings and other like proceedings that are not civil in nature."

77-64-1(1) UCA sets the scope in mandating that the court shall provide counsel "for *every* indigent person . . . who faces the possibility of the deprivation of his liberty or other serious criminal sanction." The only derogation of power is in 77-64-2 which requires a penalty of six months confinement. Counsel will argue that the use of the word "*of*" in 77-64-1 restricts application of the statute to proceedings only "of the state of Utah." The court can adopt this view; but in terms of the broad

mandate of the statute, we submit such interpretation is sniveling. How will the Utah courts otherwise deal with (4) "Come into operation at a sufficiently early stage . . . *as to fully advise* and protect the defendant?"

In BEDFORD v SALT LAKE COUNTY, 22 U2d 12, 447 P2d 193, this court well stated: "The assignment has been assumed by the lawyer out of respect for the court in which he serves and out of a sense of responsibility which lawyers feel towards humanity in general." The court had cited Pardee v Salt Lake County, 118 P 122, to show why the county should not at that date be required to pay appointed counsel, but it said ". . . that in the absence of an *express statute* to the contrary an attorney . . . was not entitled to payment from the county." Is not the current statute sufficiently "express" to give meaning to the court's talk of "the tired shoulders" of appointed counsel?

In STATE v GRIFFIN, 135 N.W.2, 77 the Iowa court held:

> "In cases such as this where court appointed counsel handling the appeal is other than court appointed trial counsel, the trial court on proper showing being made, is directed to allow counsel fees for all of the appellate services as provided in Section 775.5, Code of Iowa, 1962, I.C.A. Such fees are payable in the same manner as fees for court appointed trial counsel."

The U.S. Supreme Court stated in BURNS v OHIO 360 US 252 at 257, that

> ". . . once the state chooses to establish appellate

review in criminal cases, it may not *foreclose indigents from access to any phase of that procedure* because of their poverty."

The Utah statute gives full appellate rights in any forum. Just because the rights were vindicated in the Federal forum is no reason to deprive counsel of his hire.

Section 12 of Article I of the Utah Constitution affords the right of appeal to all criminals "in all cases." Does this mean appeal only to the Utah established court?

If this court takes the position respondents' argued for on page 73 to the effect that compensation covers only representation of prisoners in courts "of the state of Utah" no violence is done to the statute when the further language therein is given a reasonable application. Under the Utah statute the compass is as wide as the wit of counsel to use it.

The lawyer appointed to represent an impecunious accused or prisoner is admonished under the Utah statute to be "competent and zealous"; give him a "complete defense"; to "fully advise" and must contemplate "the taking of appeals and the prosecuting of *other* remedies before and after conviction considered by the defending counsel to be in the interest of justice." (Why the legislature repeated this language in 77-64-3 is for the Court to decide.) The statute insists that counsel employ "*broad powers* to represent the indigent . . . in juvenile courts as well as the other courts of this state," and habeas corpus is specifically listed as an avenue of travel. Imagine the appointment of the defense attorney, ad-

monishing him that he cannot employ the rights, guarantees of the Federal Constitution and Courts in implementing the defense after state remedies have been exhausted and still be paid!

Even though members of this Court may not care for the recent decisions of the U.S. Supreme Court, the Legislature of Utah spoke *after* these fundamental, minimum rights were enunciated by that Court.

In sum, if this Court meant what it said in the concluding paragraph of Beal v Turner, supra, the only issue of law concerns the *fairness* of the Courts involved in the post-conviction perid. Even this Court said to the prisoners acting without counsel "File Closed." (R 51) Appellant did what the Court having jurisdiction told him to do. He looked into the procedure employed and attacked with the weapons of the law. He did not do this just for a fee. That the legislature had passed such a far-reaching statute encouraged him to do his best and to spare no time. It was not a question of the guilt or innocence of the prisoners, but of constitutional rights, and procedural "fairness." That it took resort to the Federal Courts, including the Circuit, should not deprive him of compensation mandated by the Utah statute. Like any other lawyer, appellant would do it again if requested by and in *any* court!

II

A REVERSAL WILL NOT SET A BAD OR EXPENSIVE PRECEDENT

Under the terms of Title 18, 3006A, U.S.C.A., there can be little question that Appellant could be compensated now by federal moneys for work herein:

> "Each United States District Court, with the approval of the judicial counsel of the circuit shall place in operation . . . a plan for furnishing representation for any person financially unable to obtain adequate representation . . . (4) for whom the *Sixth Amendment* to the Constitution requires the appointment of counsel. . . ."

The difficulty is that this statute did not take effect until February 12, 1971. Reference to Pages 3 to 6 of the record will show that 90% of the work by Appellant was done prior to the effective date of said federal enabling statute. The former Act of 1965, covering fees for lawyers representing impecunious persons accused of crime did not reach the Sixth Amendment cases, hence the amendment above.

This case involves only an "in-between" situation. Were Appellant to do today that which was recorded in his time record (R 6) there is no doubt that the Federal Act, and federal money would compensate him. He was doing his duty at a time when Congress had not acted on 6th Amendment type cases, but a fair interpretation of the Utah statute would say that Utah believes in compensation of appointed counsel in the use of *all* of the tools of the law, not just some of them.

Respondent's belief, as expressed at the bottom of Page 71 of the record, will ring a little hollow in terms of the wide arms of the Utah statute. To accomplish real

due process, and procedural fairness, no harm will be done to the counties of Utah by holding to the higher standard permitted by the Utah Minimum Requirements Act.

Because the Congress has now set up the statute to pay Sixth Amendment counsel, the decision of this Court to require Grand County to pay will not set an expensive precedent. It will simply make a sensible interpretation of the statute and give due process and equal protection to a lawyer who did his duty.

This Court articulated basic principles of the taking of the lawyer's property without just compensation, due process, and equal protection, in Bedford v Salt Lake County, supra. This Court should vindicate the conscientious work of counsel and hold that the statute sufficiently embraces the work done. It is not the amount of compensation here contended for; it is the principle. Counsel will be fair; he will be glad to submit to a lower figure if the conscience of the Court will weigh in favor of "some" compensation.

CONCLUSION

No question has been raised as to reasonableness of the time expended, the amount charged. It is solely an interpretation of the Utah statute. No real mischief will result from a holding in Appellant's favor. To decide to the contrary will raise constitutional 14th Amendment and equal protection arguments unworthy of the bench and bar of Utah.

Respectfully submitted

W. C. LAMOREAUX