

1972

State of Utah v. Lewis Ballard : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Respondent

vs.

CASE NO. 12826

LEWIS BALLARD,

Petitioner,

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Appellant filed a petition for a Writ of Habeas Corpus in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, on the 26th day of November, 1971, (R-27), which petition was supplemented by a motion to vacate and set aside judgment, filed in the Office of the Clerk, Salt Lake County, Utah, February 24, 1972, (R-15).

The matter came on for hearing on the 24th day of February, 1972, before the Honorable Joseph G. Jeppson, the appellant having filed a written motion for change of judge pursuant to 7725-6, Utah Code Annotated, 1953, on the 24th day of February, 1972, which motion was filed by the Appellant per se, and without the assistance of

counsel, although counsel had been appointed to represent the Appellant in the hearing on Petitioner's Petition for Writ of Habeas Corpus, the Court having denied the Appellant's request for change of judge, and having denied the Appellant's request for discharge of the appointed counsel, Margaret Taylor, the Appellant refusing to proceed further with his action, the court held that the Writ of Habeas Corpus was denied for lack of prosecution.

DISPOSITION IN THE LOWER COURT

Appellant's Petition for Writ of Habeas Corpus was denied for lack of prosecution.

RELIEF SOUGHT ON APPEAL

Appellants request this Court to remand this matter to the Third Judicial District Court for a full hearing on the merits of the Petitioner's Writ for Habeas Corpus.

STATEMENT OF FACTS

Appellant's Petition for Writ of Habeas Corpus came on regularly for hearing before the Honorable Judge Joseph G. Jeppson, on the 24th day of february, 1972. The Appellant had petitioned the Court for a change of judge and also for a change of counsel prior to proceeding with the hearings on the merits

of the Petitioner's Writ of Habeas Corpus. Both motions were denied by the Court and upon the Petitioner's failure to proceed with the hearing and failure to be sworn in and examined as a witness in his own behalf, the Court ordered the Petition for Writ of Habeas Corpus to be denied for lack of prosecution.

ARGUMENT
POINT I

THE TRIAL COURT ERRED IN PROCEEDING WITH THE HEARING ON THE APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS AS THE COURT LACKED JURISDICTION TO PROCEED FURTHER UPON TIMELY FILING OF A MOTION PURSUANT TO UTAH CODE ANNOTATED 77-25-6.

Utah Code Annotated 77-25-6 provides as follows:

Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the Judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such Judge shall proceed no further therein except to call in another Judge to hear and determine the matter.

The Court (R-42) upon hearing arguments by the Appellant and Mr. David S. Young, Assistant Attorney General, ruled upon the

Appellant's motion for disqualification of the Judge as follows:

"Your motion to disqualify the Court if denied."

Judge Jeppson's ruling was in opposition to the statutory provisions contained in Utah Code Annotated 77-25-6 as follows:

If the Judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another Judge (naming him) of the same Court or of a Court of like jurisdiction, which Judge shall then pass upon the legal sufficiency of the affidavit.

It is apparent from the reading of the short transcript in this matter that the aforementioned procedure was not followed in the instant matter.

Appellant's motion for change of judge was filed under the criminal procedure Utah Code Annotated 77-36-6, which applies also in civil matters. Rule 66b, Utah Rules of Civil Procedure governs in civil matters which section is identical to Utah Code Annotated 77-25-6.

This Court amended rule 66b of Utah Rules of Civil Procedures on November 13, 1964, in the case of Pons vs. Faux,

16 Utah 2nd 93 396 P 2nd 407 (1964). This Court in Pons vs Faux, stated:

In civil cases, the rule has been construed and such construction in futuro is applicable to criminal cases.

The Court having cited Anderson vs Anderson, 13 Utah 2nd 36 368 P 2nd 264. The Court in Anderson vs Anderson stated:

If the ~~rule~~ means anything at all, it means what is plainly stated to the effect that the Judge against whom the affidavit of bias and prejudice thereafter cannot proceed to hear the issue himself.

Our only conclusion is that any order of judgement based on evidence thereafter taken by him, will be ineffective against the affiviant, if it follows that this case must be remanded for another trial of the issues.

In the instant matter, the Court clearly erred in ruling on the disqualification motion and in continuing with the merits of the case.

POINT 2

THE COURT ERRED IN REFUSING TO ALLOW THE APPELLANT'S MOTION TO CHANGE ATTORNEYS.

Pursuant to rule 78-51-34, Utah Code Annotated, 1953;

The attorney in any action or special proceeding may be changed at any time before judgment or final determination as follows:

(1) Upon his own consent, filed with the clerk or entered upon the minutes.

(2) Upon the order of the Court or Judge thereof upon the application of the client after notice to the attorney.

It is apparant from the record in the District Court case no. 202634, that the appointed counsel had filed no papers in the matter and had failed to assist the Appellant in the proper presentation of supplemental motions and orders subsequent to her appointment to represent Mr. Ballard.

Whether notice was given prior to the commencement of the proceedings had before this District Court to the attorney, Mrs. Margaret Taylor, does not appear from the reading of the transcript, however, it is abundantly clear, that in the commencement of the proceedings (R-38) at line fifteen, the Appellant requested the Court:

I request that I fire this public defender from my case.

And upon the Court's refusal to allow such a request, the Appellant stated at Line 21:

Then I reserve the right to represent myself.

Notwithstanding the notice of final determination, the Court should have allowed the motion of the Appellant for the withdrawal of his trial counsel. Communications between the Utah State Prison for inmates seeking relief on a Petition for a Writ of Habeas Corpus and their appointed trial counsel to represent inmates seeking such constitutional relief creates many problems relative to the adequate presentation and defenses for the relief sought in the petitions. In the preparation of the issues before the Court, the Appellant herein had the burden of proving each and every fact alleged in his petition for the Writ of Habeas Corpus. Defense counsel had called only one witness to the Court for the date set for the hearing of the merits of this matter, Mr. Norman Wade, former defense attorney for the appellant. This witness could have testified as to only one issue set forth in the Appellants Petition of the Writ of Habeas Corpus.

It is apparant that the plaintiff had just cause to request the discharge of the defense counsel and had made such request timely upon discovery of the preparation for this hearing, which discovery could not be made due to the

circumstances of his incarceration prior to the date of the hearing. Appellant therefore submits that the trial Court erred in denying his request to discharge the attorney.

CONCLUSION

The trial Court erred in proceeding further to hear the merits of the Appellant's Petition for a Writ of Habeas Corpus in violation of Utah Code Annotated 77-25-6 and the trial Court further erred in refusing the Appellant's request for the discharge of his attorney, Margaret Taylor, pursuant to Utah Code Annotated 78-51-34, wherefore this Court should reverse and remand the Appellant's Petition for a Writ of Habeas Corpus to the District Court before a Judge other than, Judge Joseph G. Jeppson. The question of withdrawal of trial counsel is now moot. however Appellant prays this Court to clarify the statute pertaining to the withdrawal of trial counsel under circumstances as stated above.

Submitted this 27th day of November,
1972.


MYRNA MAE NEBEKER

I hereby certify that I delivered 10 true and correct copies of the foregoing to the Supreme Court of the State of Utah, and did further deliver two copies of the foregoing Brief of Appellant to Vernon B. Romney, Attorney General, State of Utah, this 27th day of November, 1972.



MYRNA MAE NEBEKER