1972

Arville Kenneth Butterfield v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

In The Supreme C
of the State of U

ARVILLE KENNETH BUT
FIELD,

Plaintiff-A

-vs-

JOHN W. TURNER, W
UTAH STATE PRISO

Defendant-

BRIEF OF

Appeal from a judg
habeas corpus in the Third
Lake County, State of
Jeppson, Judge.

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State Capitol
Salt Lake City, Utah
Attorney for Respondent

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In The Supreme Court of the State of Utah

ARVILLE KENNETH BUTTERFIELD,

Plaintiff-Appellant,

-vs-

JOHN W. TURNER, WARDEN, UTAH STATE PRISON,

Defendant-Respondent.

Case No. 12849

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Arville Kenneth Butterfield, appeals from a decision in Third Judicial District Court denying his petition for a writ of habeas corpus.

DISPOSITION IN LOWER COURT

On December 21, 1971, Arville Kenneth Butterfield filed a petition for a writ of habeas corpus in the Third Judicial District Court, Salt Lake County, alleging that his commitment to the Utah State Prison was invalid. The matter came on for hearing on February

24, 1972, before the Honorable Joseph G. Jeppson, Judge, who denied the writ on February 24, 1972.

RELIEF SOUGHT ON APPEAL

The Appellant, Arville Kenneth Butterfield, seeks a reversal of the decision and judgment below with directions that he be released from the Utah State Prison.

STATEMENT OF FACTS

Arville Kenneth Butterfield stood trial for the crime of incest and was represented at trial by his retained attorney, Dwight L. King. (R. 33, 34) Mr. Butterfield testified at the hearing on his petition for a writ of habeas corpus that he told Mr. King that on the night of the alleged act he (Mr. Butterfield) was with some people, and Mr. King was informed of the names of those persons. (R. 35) Mr. Butterfield told Mr. King that he was at Utah Trade Technical College on the night of the alleged crime with one Robert Allen and they joined a person named Wayne at the Oriental Cafe and stayed there until 2:00 a.m. (R. 39)

Mr. King testified that he had discussed some possible alibi witnesses with Mr. Butterfield but that he recalled no names and no names of witnesses appeared in his notes. (R. 41, 44) Mr. King also stated that he did not investigate any alibi witnesses (R. 43) and part of the reason for this was that no date was ever established as having been the date of the alleged incest. (R. 41) However, Mr. King did testify that August 15

1970, was the date of the alleged act set forth in the information charging Mr. Butterfield. (R. 42) Mr. King believed it in the best interest of his client not to get an exact date of the occurrance of the act. (R. 45) Mr. King ran the defense of insanity even though Mr. Butterfield denied the incest. (R. 41, 46)

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE APPELLANT WAS WITHOUT THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS COMMITMENT AND CONFINEMENT ARE THUS INVALID.

It is clear that if one does not have the effective assistance of counsel at trial, the resulting conviction and judgment can be collaterally attacked. *Alires v. Turner,* 22 Utah2d 118, 449 P.2d 291 (1969). In *Alires,* this court set forth the standard concerning what "effective assistance of counsel" means as follows:

> The requirement [of counsel] is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. The entitlement is to the assistance of a competent

> member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses available under law and ethics of the profession. 22 Utah2d at 121.

This court held in *Alires* that the failure to be provided such counsel resulted in a denial of Due Process. The requirement under Article I, Section 12, of the Utah Constitution and Amendments VI and XIV of the United States Constitution that the accused have the assistance of counsel of course means that one have the "effective" assistance of counsel. See *Alires v. Turner, supra; Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 72 L.Ed. 158 (1932).

Whether one has been denied the effective assistance of counsel is of course a question of degree and judgment, and depends on all of the circumstances of the case. Where an accused is charged with incest, the question is whether or not the act occurred. There is no issue as to whether force was used, there is no question of degree, there is no question of consent, there is no issue as to specific intent. Where a defendant claims as a defense to the charge of incest that he did not do it, counsel clearly is obligated to investigate such a claim on behalf of his client. When the accused says he was with someone somewhere other than the site of the crime when the offense allegedly was committed, alibi witnesses are clearly crucial to that defense. The failure of counsel to investigate and call such witnesses when

information is furnished by the defendant is what appellant alleges is responsible for his conviction without due process of law. Appellant does not allege that trial counsel made a mistake in trial tactics, but alleges that the failure to investigate and call alibi witnesses was the result of lack of preparation and investigation rather than conscious decision based on trial tactics. Not calling alibi witnesses as a trial tactic would clearly not constitute ineffective assistance of counsel. See, e.g., *United States v. Dorn,* 169 F. Supp. 144 (D. D.C. 1959); and generally 74 A.L.R. 2d 1390.

In *Twiford v. Peyton,* 372 P.2d 670 (4th Cir. 1967) the court decided the question of whether the defendant was denied the effective assistance of counsel because the court appointed counsel shortly before trial and a continuance to prepare was denied. The plaintiff there sought a writ of habeas corpus which the district court denied. The Court of Appeals for the Fourth Circuit reversed. In that case the court appointed an attorney the day before trial and then denied a continuance on defense counsel's motion for further time to prepare. The court said that a late appointment of counsel is inherently prejudicial and a mere showing constitutes a prima facie case of denial of effective assistance of counsel so that the burden of proving lack of prejudice is shifted to the State. See for the same rule as to the shifting of the burden, *United States, ex. rel. Mathis v. Rundle,* 394 F.2d 748 (3rd Cir. 1969).

While it is true that appellant's case is not factually similar to the *Twiford* case, appellant contends if

counsel does not properly investigate witnesses the defendant is in no better position than if counsel is appointed the day before trial and thus does not have adequate time to properly investigate the case. The criminal defendant does not have any more effective assistance of counsel if his counsel fails to investigate than if counsel fails to investigate because he was appointed late and had no opportunity to investigate. As such, once the failure to properly investigate is shown, the burden, as the court in *Twiford* held, shifts to the state to show lack of prejudice.

In *Wilson v. Phend,* 417 F.2d 1197 (7th Cir. 1969), the defendant's family hired an attorney to defend him. This attorney owned the local newspaper which carried much pre-trial publicity on the defendant and the crime of which he was accused. The attorney failed to move for a change of venue. The retained attorney also changed the defendant's plea from "not guilty" to "not guilty by reason of unsound mind" without consulting with the defendant. He also failed to present alibi witnesses and did not follow upon leads that the defendant claimed would have been exculpatory. The court held that taken together these facts indicated that the defendant was convicted without the effective assistance of counsel. The court reversed the denial of a writ of habeas corpus and said:

> The failure of an attorney to present a defense or otherwise bring forth important evidence can be as deleterious in its effects on the fair-

ness of a trial as any behavior during the actual litigation. 417 F.2d at 1200.

The court in *Jones v. Huff,* 152 F.2d 14 (D.C. Cir. 1946) announced the usual rule that to show ineffective assistance of counsel it must be shown that the trial was a farce and a mockery of justice, and then went on to hold that under the facts of that case, the defendant did not have a "trial" as that term is usually used. The defendant had given names and addresses of witnesses to his attorney. These witnesses, defendant said, could have said that the defendant was not guilty of forgery as he was charged. The attorney refused to call these witnesses. He also failed to object to a coerced statement that was introduced at trial and did not see to it that the jury was given the opportunity of comparing handwriting specimens after a juror had requested such. The court said that the attorney was not merely mistaken, but had failed to present the defendant's case in any fundamental respect.

Where the attorney did not request a pre-trial motion to suppress evidence of an illegal search and seizure (though he objected at trial), did not subpoena witnesses whom he was told about by the defendant (and apparently did not even investigate them), and did not appeal, the court held that these facts required a finding that the defendant was without the effective assistance of counsel, and held the confinement and commitment illegal. *Application of Tobisch,* 221 F.Supp. 500 (D. Mont. 1963).

The fact that appellant retained his own counsel in this case is not fatal to his claim. As the court in *Wilson v. Phend, supra,* said, even though the defendant retains his own counsel, the State has obtained a conviction under such unfair circumstances as to cast doubt on the factual basis upon which the conviction rests. See also, for the same rule that even though counsel is retained and not court appointed the defendant is entitled to relief if counsel was ineffective, *Lunce v. Overlade,* 244 F.2d 108 (7th Cir. 1957); *Porter v. United States,* 298 F.2d 461 (5th Cir. 1962); *Craig v. United States,* 217 F.2d 355 (6th Cir. 1954). These cases are based on the reasoning best stated by Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 N.W.L. Rev. 289 (1964), at 299-300:

> It cannot be persuasively suggested of the Fourteenth Amendment that it is violated where the trial court has been utterly inactive in that it failed to provide defense counsel to an indigent person accused of a felony but is not infringed where retained counsel's intrinsic ineffectiveness placed the accused in a situation as bad or worse than he would have confronted had he appeared *pro se.* The requisite state action is precisely the same in both instances: convicting the accused and carrying his sentence into execution—depriving him of his life or liberty—on the basis of a trial so

lacking in fundamental fairness as to fail of qualification of due process.

Thus, appellant contends that he was denied the effective assistance of counsel at his trial and so the judgment of conviction should be set aside as invalid.

CONCLUSION

For the reasons above stated, that appellant was without the effective assistance of counsel at his trial, appellant respectfully submits that the judgment of the court below be reversed with the direction that appellant be granted a writ of habeas corpus and be released from the custody of respondent.

Respectfully submitted,

BRUCE C. LUBECK

Attorney for Appellant.