1972

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ARVILLE KENNETH BUTTERFIELD,

Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden, Utah State Prison,

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE JOSEPH G. JEPPSON PRESIDING.

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

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Case No. 12849

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

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

DISPOSITION IN THE 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, State of Utah, alleging that his commitment to the Utah State Prison was invalid. The matter was heard on February 24, 1972, before the Honorable Joseph G. Jeppson, who denied the writ on February 24, 1972.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the denial of the writ made by Judge Jeppson.

STATEMENT OF FACTS

Arville Kenneth Butterfield was tried and convicted by a jury of the crime of incest. He was represented at trial by his retained attorney, Dwight L. King (R. 33, 34).

At the hearing on the petition for a writ of habeas corpus, Mr. Butterfield and Mr. King were the only witnesses called (R. 33, 40). Their testimonies were in substantial disagreement.

Mr. Butterfield testified that he told Mr. King that on the night of the alleged act he (Mr. Butterfield) was with some people, and that Mr. King had been informed of the names of those persons (R. 35). Petitioner further stated that he told Mr. King that he was with one Robert Allen at Utah Trade Technical College on the night of the alleged crime, and that they joined a person named Wayne or Dwayne at the Oriental Cafe and stayed there until 2:00 a.m. (R. 39). Mr. Butterfield could not recall the date the crime allegedly occurred (R. 36).

Mr. King testified that no date was ever established as the date of the occurrence of the alleged incest (R. 41), but that August 15, 1970, was the date specified in the information charging Mr. Butterfield (R. 42). Mr. King believed it to be in the best interest of his client not to establish an exact date of the crime, thereby raising doubt

in the minds of the jury (R. 45). He also believed that unless an exact date were established, the defense of alibi would not be useful, reasoning that it would not make any difference where petitioner was on a particular day if the exact day that the incest occurred were not known (R. 41, 42). Mr. Butterfield accepted this advice (R. 46). Mr. King testified that he had discussed possible alibi witnesses with Mr. Butterfield, but that the only witnesses discussed were persons allegedly having relations with the Butterfield daughters rather than friends of the petitioner who could vouch for his whereabouts on the night in question (R. 40, 41, 43, 44). Mr. King recalled no names of possible alibi witnesses and no such names appeared in his notes (R. 41, 44). Mr. King did not think it possible to establish an alibi under the circumstances, and thus did not investigate any alibi witnesses (R. 43).

ARGUMENT

POINT I.

THE WRIT OF HABEAS CORPUS IS NOT A PROPER REMEDY UNDER THE FACTS OF THIS CASE.

Appellant alleges one ground in his brief for which he seeks review. It is that Dwight L. King, his retained attorney, inadequately defended him. This issue was known to the petitioner at the time of his commitment to the Utah State Prison, yet no appeal from his com-

mitment was made. According to Utah law, the proper procedure should have been to appeal his sentence.

Appellant is trying to use the writ of habeas corpus as a means of appellate review. This is not the purpose for which the writ was established. See *Bryant* v. *Turner*, 19 U. 2d 284, 431 P. 2d 121 (1967), wherein it is stated:

> "The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law, or where some other such circumstance exists that it would be wholly unconscionable not to re-examine the conviction." *Id.* at 286-287, 122-123.

When the same facts alleged in a petition for a writ of habeas corpus are known to the petitioner at the time of his judgment, his proper remedy is not a writ. In *Brown* v. *Turner*, 21 U. 2d 96, 440 P. 2d 968 (1968), the petitioner contended that he was denied the right to counsel, and that he did not understand the consequences of his guilty plea. The Supreme Court of Utah held that the petitioner was not entitled to the habeas corpus remedy:

> "If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular proscribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circum-

> stance as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and limitations of time specified therein would be rendered impotent." *Id.* at 98-99, 969.

In *Jaramillo* v. *Turner*, 24 U. 2d 19, 465 P. 2d 343 (1970), the petitioner charged with the crime of robbery withdrew his plea of not guilty, plead guilty and did not appeal from the judgment and sentence. Instead, he petitioned for a writ of habeas corpus alleging that at the time of his change of plea, he was not advised of the consequences of his plea of guilty, and that his counsel inadequately defended him. The Utah Supreme Court held that the writ of habeas corpus could not be used as a means of appellate review, and affirmed denial of the writ.

In the recent case of *Zumbrunnen* v. *Turner*, Case No. 12754 (May 17, 1972), the defendant plead guilty to burglary upon dismissal of two similar charges. He petitioned for a writ of habeas corpus after his time for appeal from the conviction had expired claiming (1) his plea was involuntary and unintelligent and (2) his counsel was incompetent. This Court held that both points could have been argued on a regular appeal, and that the writ of habeas corpus may not be used as a substitute for such appeal.

For the above reasons, the petition for a writ of habeas corpus in this case is an improper remedy, and the decision below should be affirmed.

POINT II.

THE PETITIONER RECEIVED ADEQUATE ASSISTANCE OF COMPETENT COUNSEL.

The right to effective or adequate assistance of counsel was first enunciated by the United States Supreme Court in *Powell* v. *Alabama*, 287 U. S. 45, 72 L. Ed. 158, 53 S. Ct. 55 (1932), which held that failure to make an effective appointment of counsel violates the Sixth Amendment right to counsel and is a denial of due process under the Fourteenth Amendment.

Utah adopted this view in *State* v. *Hines*, 6 U. 2d 126, 307 P. 2d 887 (1957), holding that the privilege of an accused to the assistance of counsel is one of the fundamental rights, meaning the assistance of a reputable member of the bar who is willing and in a position to honestly and conscientiously represent the interests of the defendant. In *Alires* v. *Turner*, 22 U. 2d 118, 449 P. 2d 241 (1969), the Court held that a failure to be provided effective assistance of counsel results in a denial of due process. See Article I, Sections 7 and 12 of the Utah Constitution.

The United States Supreme Court has left to the state and lower courts the task of setting standards of trial attorney effectiveness. If the standard be too strict, the defendant could be denied due process, but if too liberal, there is the threat of a stampede of prisoners claiming that their attorneys were not effective merely because they were not acquitted.

California's standard of legal competency requires the petitioner to show that the trial was reduced to a farce or sham through the attorney's lack of competence, diligence or knowledge of the law. See *In re Beaty*, 64 Cal. 2d 760, 414 P. 2d 817, 51 Cal. Rptr. 521 (1966).

In Arizona, the Court allows a contention of deprivation of right to counsel to be asserted in habeas corpus proceedings only in extreme cases. If a petitioner sets forth no facts which indicate that the attorney's performance was so substandard as to render the trial a farce or sham, the petition is properly denied. See *Barron* v. *State*, 7 Ariz. App. 223, 437 P. 2d 975 (Ariz. Ct. App. 1968).

Kansas has adopted an extremely strict standard. In *McGee* v. *Crouse*, 190 Kan. 615, 376 P. 2d 792 (1962), the Court said:

> ". . . the burden is cast upon the petitioner to show that his counsel was so incompetent and inadequate in representing him that the total effect was that of a complete absence of counsel." *Id.* at 618, 795.

The Utah standard is slightly different. In *Bryant* v. *Turner*, *supra*, this Court said that a habeas corpus remedy is allowed only if the circumstances indicate that it would be wholly unconscionable not to re-examine the petitioner's conviction. The method the Utah Court uses in deciding this issue is to examine the record. In *Washington* v. *Turner*, 17 U. 2d 361, 412 P. 2d 449 (1966), the Court looked to the record for suggestions of "bad faith conduct" on the part of the attorney. This concept of

"bad faith" was defined in *Alires* v. *Turner*, *supra*, as follows:

> "The [due process] 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." (Emphasis added.) *Id.* at 121, 243.

The above stated standard should be relied upon in examining the actions of Dwight L. King to determine whether such actions amounted to a sham, a pretense or a bad faith display of a lack of concern for his client. A preliminary fact question must be resolved first. Mr. King testified that he did not investigate any alibi witnesses because no specific date of the occurrence of the alleged incest was established. He further testified that the only alibi witnesses mentioned by Mr. Butterfield had nothing to do with proving (Mr. Butterfield's) whereabouts when the alleged incest occurred. If these facts are accepted, the inadequacy of counsel question should not even be raised since there would be no alibi witnesses for Mr. King to investigate.

However, Mr. Butterfield insists that he discussed with Mr. King certain named alibi witnesses who could prove his whereabouts, and that Mr. King's failure to investigate those witnesses is prima facie evidence of inadequate counsel. If these facts be assumed true, the aforementioned standard may be applied to determine whether failure to investigate alleged alibi witnesses amounts to a showing of inadequate counsel.

In *Thomas* v. *Rhay*, 2 Wash. App. 843, 472 P. 2d 606 (1970), the petitioner alleged incompetency of counsel for failure to call certain witnesses and the Court of Appeals of Washington held:

> "Mistakes or errors of judgment on the part of counsel and his client do not establish the violation of constitutional rights. The mere failure to call certain witnesses who appellant now claims would have established an alibi constitutes an exercise of trial judgment on the part of counsel and presents no constitutional issue." *Id.* at 844, 607.

Landers v. *State, ex rel. Eyman*, 7 Ariz. App. 197, 437 P. 2d 681 (1968), also held that defense counsel's not producing witnesses in his client's behalf at the preliminary hearing constitutes no more than error of judgment and does not entitle the prisoner to habeas corpus relief on the theory of denial of effective assistance of counsel.

It should be noted that every case cited by appellant wherein the attorney's actions were held to be a sham, farce, pretense, etc., the failure to call certain witnesses was but one in a series of courtroom abuses and errors made by the defense attorney; however, in the present case, the failure to investigate witnesses is the only issue. The state contends that unless this one factor be part of a series of errors, the attorney should not be deemed incompetent. In *Hayes* v. *Hudspeth*, 169 Kan. 248, 217 P. 2d 904 (1950), cert. den., 340 U. S. 835, 95 L. Ed. 613, 71 S. Ct. 17 (1950), the court held as follows:

> "A statement by petitioner that his counsel in the criminal case in which he was convicted failed to subpoena certain witnesses in petitioner's behalf *does not in itself* constitute proof of professional incompetency or justify the granting of a writ of habeas corpus." *Id.* at 255, 905.

Also, in *People* v. *Hartridge*, 134 C. A. 2d 659, 286 P. 2d 72 (1955), the California Third District Court of Appeals went further and described a series of errors that still would not constitute incompetent representation on the part of the attorney:

> "Allegations of mistakes on the part of trial counsel such as that he failed to have a defendant testify or offer testimony on his own behalf, *or that he failed to obtain available evidence* or to ask for a continuance are not recognized as grounds for habeas corpus. . . ." (Emphasis added.) *Id.* at 667, 77.

Inasmuch as the record is devoid of any suggestion of bad faith, the calculated decision not to investigate alibi witnesses did not reduce the trial to a "sham or pretense" and the appellant's petition for a writ of habeas corpus was properly denied.

Respondent also contends that the fact petitioner retained his own counsel ought to be fatal to his claim. Courts have often attached some significance to whether the attorney was privately retained or court-appointed in determining whether relief should be granted. In *Snead* v. *Smyth*, 273 F. 2d 838 (4th Cir. 1959), the court said:

> "It has been repeatedly held that in case of counsel selected by the defendant the commission

> of what retroactively may appear to be errors of judgment on the part of the attorney does not constitute a constitutional lack of due process. . . ." *Id.* at 842.

In *Popeko* v. *United States*, 294 F. 2d 168 (5th Cir. 1961), cert. den., 374 U. S. 835, 10 L. Ed. 1056, 83 S. Ct. 1883 (1963), the privately retained trial attorney failed to call defendant's witnesses and the court said:

> ". . . we think it basic to the claim of relief, since defendants were represented by their own employed trial counsel, that they may not assign as error that the mistakes or errors of their counsel constituted an unfair trial. . . ." *Id.* at 171.

Some courts further argue that under an agency relationship the acts of the attorney are imputed to the client who has retained him. See *State* v. *Montez*, 102 Ariz. 444, 432 P. 2d 456, 459 (1967).

Respondent contends that on review of a habeas corpus proceeding, the Court should take cognizance of the presumption that the prisoner's rights were safeguarded by the trial court, and that the defense counsel faithfully performed his duty to protect the defendant's rights. See *Busby* v. *Holman*, 356 F. 2d 75 (5th Cir. 1966). It then becomes incumbent upon the petitioner to prove his right to relief by showing the incompetency of his counsel. Such a burden is a heavy one and relief is granted only in extreme cases where counsel has been so grossly ineffective as to constitute no representation at all, or farce, sham, pretense, etc. Respondent contends that this burden of proof has not been met

by appellant, and that Dwight L. King's decision not to investigate alibi witnesses was made in good faith with the best interest of his client in mind, and upon rational consideration of critical facts as they appeared at the time.

This Court warned in *Jaramillo* v. *Turner*, *supra*:

> ". . . in order to prevent further erosion of the meaning of the Constitution of the United States and to revive the memory of what was originally intended by the Sixth Amendment thereto, we wish to address a few remarks to the new claim of inadequate representation by his lawyer.
>
> "To begin with, this is usually but a loophole through which guilty men hope to escape from the debts which they owe to society for past criminal behavior. It is a loophole through which other guilty men have escaped from their just desserts under the law, and it is a loophole through which guilty men will be released to prey upon law-abiding citizens unless courts look more carefully at the requirements of the Constitution as set forth therein." *Id.* at 21, 344.

CONCLUSION

Respondent contends that based upon the foregoing reasons, appellant should not be permitted to use habeas corpus proceedings as a substitute for appellate review, that appellant was represented by competent, adequate,

and effective counsel, and that the denial of appellant's petition for a writ of habeas corpus ought to be affirmed.

Respectfully submitted,

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