1972

Lewis Ballard v. John W. Turner, Warden, Utah State Prison : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LEWIS BALLARD,
Plaintiff-Appellant,

vs.

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

Case No.

BRIEF OF RESPONDENT

AN APPEAL FROM THE DENIAL OF APPELLANTS PETITION FOR A WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH G. JEPPSON, PRESIDING.

VERNON B. ROMNEY,
Attorney General
DAVID S. YOUNG
Chief Assistant Attorney General
KENT LEWIS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

MYRNA MAE NEBEKER
212 Phillips Petroleum Building
Salt Lake City, Utah 84101
Attorney for Appellant

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LEWIS BALLARD,
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Defendant-Respondent.

Case No. 12862

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

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

DISPOSITION IN THE LOWER COURT

Lewis Ballard 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. Said petition was supplemented by a motion to vacate and set aside judgment, a motion for change of judge, and a request that petitioner's appointed counsel be discharged. The matter was heard on

February 24, 1972, before Judge Joseph G. Jeppson who denied both motions, the request for discharge of counsel, and the writ itself for lack of prosecution.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the lower court's decision.

STATEMENT OF FACTS

Mr. Ballard's petition for a writ of habeas corpus was heard on February 24, 1972. At the hearing, petitioner submitted a motion for a change of judge (R. 17). The motion, alleging no fact, recited only the following conclusion:

> "The petitioner, while acting in good faith and with sincerity do [sic] hereby declare that because of bias and/or prejudice, he does not feel that he can receive a fair hearing before the said Judge" (R. 17).

Judge Jeppson denied the motion for failure to state sufficient facts to give rise to a conclusion in petitioner's favor (R. 7, 8).

Petitioner's appointed counsel was present and prepared to proceed with the hearing (R. 38, 41, 43), yet petitioner requested at the hearing that his counsel be discharged (R. 38). This request was denied by Judge Jeppson (R. 38), as was petitioner's request for a continuance (R. 43). Petitioner thereafter refused to proceed with or recognize the hearing (R. 43), and the judge, therefore, denied the petition for a writ of habeas corpus for lack of prosecution (R. 43).

ARGUMENT

POINT I.

THE COURT BELOW PROPERLY RULED ON APPELLANT'S MOTION FOR CHANGE OF JUDGE, AND THUS POSSESSED JURISDICTION TO DENY THE WRIT OF HABEAS CORPUS FOR LACK OF PROSECUTION.

Appellant filed his motion for change of judge pursuant to Utah Code Ann. § 77-25-6 (Supp. 1971), (Rule 63(b), Utah Rules of Civil Procedure is identical) which provides in part 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 statute continues as follows:

> "Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known . . . no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

Aside from the fact that appellant did not file an "affidavit" as required by the statute, but instead filed a "motion" which was not accompanied by an affidavit, the appellant's motion was totally void of any facts and reasoning to support his allegations of bias or prejudice. Furthermore, there was no accompanying certificate of counsel that the "motion" (affidavit) and application were made in good faith. Therefore, as the procedural requirements of the statute and Rule were not properly followed by appellant, Judge Jeppson denied the motion.

Appellant argues that Judge Jeppson was foreclosed from ruling on the motion because of a further provision of the Section 77-25-6, *supra*, which reads:

> "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."

Respondent submits that appellant's interpretation of the application of the above provision is overly broad and erroneous. This provision was enacted to prevent a judge who is accused of being biased or prejudiced from ruling on the sufficiency of the facts and reasons alleged against him in the affidavit, and, thus, he is relieved from the delicate and trying duty of deciding the question of his own disqualification. Such was not the case here since appellant failed to state any facts and reasons to support his allegations. No ruling could be made on the suffi-

ciency of the motion since without facts or reasons upon which to base a decision. Instead, the lower court ruled on the "procedural" sufficiency of the motion (i.e., whether the basic statutory requirements of the affidavit were adhered to.) The right of the lower court to make such a ruling is supported by this court's decision in *Christensen* v. *Christensen*, 18 Utah 2d 315, 422 P. 2d 534 (1967) where the wife in a divorce action filed an affidavit of prejudice which simply alleged that the judge "was personally acquainted with the plaintiff and had knowledge of her business transactions and her past personal life." The court held that the trial court did not err when it chose not to transfer the case to a different judge there were no "reasonable reasons" alleged in the affidavit of the wife that would comply with the provision of Rule 63(b), *supra*, which requires that "every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists." At least in the *Christensen* case, the complaining party attempted to assert facts and reasons to support her affidavit even though they were held to be "unreasonable." Mr. Ballard failed to do even that. Thus, based on *Christensen*, *supra*, Judge Jeppson was authorized, in the interest of judicial time and efficiency, to rule on the procedural sufficiency of appellant's motion without transferring it to another judge.

It may further be noted that Utah's recusal statute was taken from the Federal statute, 28 U. S. C. A. § 25 (now § 144), which provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists. . . ."

The United States Supreme Court in the leading case of *Berger* v. *United States*, 255 U. S. 22 (1921), interpreted the meaning of the above statute and adopted the same view we have asserted concerning a judge's authority to rule on the sufficiency of the affidavit. The Court held that:

> "A mere charge of bias and prejudice is a mere expression of an opinion. Bias or prejudice is a state of mind which can be proved only by facts and declarations from which it can be inferred. The act therefore requires that the facts and the reasons for the litigant's belief shall be stated. Whether the judge is disqualified depends, then, not upon the mere fact that prejudice has been charged, but upon the facts which it is alleged tend to show such prejudice. Unless the facts so alleged were intended to be considered and decided, by some authority, to have a tendency to prove prejudice, the requirement that they should be stated was an idle ceremony. Congress having excluded every other judge from doing so, the judge against whom the charge is made must pass upon the sufficiency of the affidavit before he retires from the case." *Id.* at 24.

The Court not only affirmed the judge's "right" to rule on the sufficiency of the affidavit, but also declared that "there is imposed upon the judge the *duty* of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency."

In conclusion, respondent submits that it is in the best interest of the judicial system to permit a judge who is accused of bias and prejudice to rule on the procedural sufficiency of the affidavit filed against him to insure that such accusations are not frivolous, conclusionary or lacking factual support. Otherwise, the recusal or disqualification procedure might increasingly be abused by untrustworthy litigants for the purposes of trial delay or of obtaining favorable judges, or for other improper motives. Since appellant listed no facts or reasons to support his allegations of bias and prejudice, Judge Jeppson correctly dismissed the motion for change of judge and, therefore, maintained jurisdiction to rule on appellant's petition for a writ of habeas corpus.

POINT II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR CHANGE OF ATTORNEYS.

The right of a party to change his attorney is expressed in Utah Code Ann. § 78-51-34 (1953), as follows:

> "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."

The above Section is supplemented by Utah Code Ann. § 77-51-35 (1953), which provides:

> "When an attorney is changed as provided in [§ 78-51-34], written notice of the change and of the substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; until then he must recognize the former attorney."

Although most jurisdictions recognize that a client has the right to make a change of attorneys at any stage of the proceedings, either with or without cause, it is also widely recognized that this right is not absolute since its exercise may be denied where it will unduly prejudice the other party or interfere with the administration of justice. See 7 C. J. S. *Attorney and Client* § 119. The careful wording of Section 78-51-34, supra, supports this limitation on the right by stating that the right to change attorneys must be accomplished "*as follows.*" The statute then lists the procedures which must be followed to insure fair and orderly administration of justice. The client may receive a change of attorney if both he and his attorney consent to the change and such consent is either filed with the clerk or entered upon the minutes. However, if the client and attorney do not consent, the change may be effected only by an order of substitution obtained on proper application to the court in which the proceed-

ing is pending "*after*" notice of the intended discharge has been given to the original attorney. Section 78-51-35, *supra*, further provides that the change of attorneys will not be effective as to the adverse party until he has also also been notified thereof either by written notice or the appearance of the party in person. Respondent submits that unless these minimal Code requirements are followed, the court can refuse to issue an order for change of attorney. California takes this position in *Davis* v. *Rudolph*, 80 Cal. 2d 397, 181 P. 2d 765 (1947). A review of the record clearly shows that appellant has failed to follow the aforementioned requirements.

Appellant's appointed counsel, Margaret Taylor, was present and prepared to proceed with the habeas corpus hearing when suddenly appellant, for the first time, informed the court, his own counsel, and the opposing party that he wished to "fire this public defender from my case" (R. 38). The record gives no indication that appellant had previously notified anyone of his intent to discharge his counsel and defend himself. Thus, his attorney had no opportunity to disagree with or consent to her disqualification, and she clearly had no notice of the intended change. Appellant distorts the meaning of the term "notice" by alleging that his sudden announcement in court was sufficient notice to all concerned. The notice requirement is elaborated upon in 7 C. J. S. *Attorney and Client*, § 121 (1937), as follows:

> ". . . a party making application for an order substituting an attorney must, ordinarily, give notice thereof to his attorney of record, although no

> special method of giving notice is required as long as a *reasonable notice* is given." (Emphasis added.)

See also *Schultheis* v. *Nash*, 27 Wash. 250, 67 P. 707 (1902).

We submit that appellant's in-court declaration that he was firing his attorney was far from "reasonable" and should not be considered as adequate notice under Section 78-51-34, *supra*. Respondent further contends that under the wording of Section 78-51-34, *supra*, appellant's "application" to the court must be made "*after* notice to the attorney."

Since no such notice was ever given, appellant's application to the court must fail as being premature. We, therefore, conclude that the trial court committed no error when it denied appellant's request for a change of attorney.

CONCLUSION

Respondent submits that based on the foregoing, the lower court properly ruled on appellant's motion for change of judge, thus maintaining jurisdiction to deny the writ of habeas corpus for lack of prosecution; and also properly denied appellant's request for a change of attorney.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General
DAVID S. YOUNG
Chief Assistant Attorney General
KENT LEWIS
Assistant Attorney General
Attorneys for Respondent