1973

William Pope v. John W. Turner, Warden, Utah State Prison : Brief of Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

WILLIAM POPE, *Plaintiff-Respondent,* vs. STATE OF UTAH, *Defendant-Appellant.*	}	Case No. 13390

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE D. FRANK WILKINS, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellant is appealing from the granting of petitioner's petition for a writ of habeas corpus in the District Court of the Third Judicial District in and for Salt Lake County.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order of the lower court granting the writ of habeas corpus.

STATEMENT OF FACTS

On July 7, 1964, a complaint was filed in the City Court of Salt Lake City, State of Utah, Case No. 41823, charging William Pope and Sandra Joyce Shaw with murder in the first degree. On July 7, 1964, Mr. Pope

appeared in City Court and attorney Phil L. Hansen was appointed counsel for the defendant. On September 15, 1964, on a motion of Phil L. Hansen who was then a candidate for the Office of the Attorney General within the State of Utah, the hearing was continued until November 5, 1964, at 10:00 a.m. On November 5, 1964, the State, on the motion of Richard Dibblee, dismissed as to defendant Shaw and defendant Pope waived a preliminary examination on voluntary manslaughter whereupon the city court judge ordered the defendant Pope bound over to stand trial in the district court for voluntary manslaughter. The case was conveyed to the district court clerk's office whereupon file number 19042 was created to incorporate the city action. However, prior to the filing of an information, the district attorney for Salt Lake County, after reviewing the facts of the case and being of the opinion that there was evidence of premeditation, signed a motion asking the district court to remand the file to Salt Lake City Court with instructions to the county attorney to refile the charges of murder in the first degree and have a preliminary hearing thereon.

On November 25, 1964, Judge Ray Van Cott, Jr., signed an order based upon the motion of the district attorney that the case be remanded to the Salt Lake City Court, and the Salt Lake County Attorney was directed to file a new complaint charging Mr. Pope with the crime of murder in the first degree, and further directed that a preliminary hearing should be had on the charge. On November 25, 1964, defendant Pope appeared with coun-

sel in the city court and the court ordered the preliminary hearing to be held December 8th, which hearing was continued to December 9th, at which time the defendant did appear with his attorney, Jimi Mitsunaga, of the Legal Defender Association, who had been appointed to represent the defendant following the withdrawal of Phil L. Hansen who had been elected Attorney General of the State of Utah. Following the hearing of testimony and the receipt of evidence the city court judge, in case number 42402, ordered the defendant bound over to the district court to stand trial on the charge of first degree murder. The city court case was incorporated into district court case number 19089.

On February 1st, 2nd, 3rd, 5th of 1965, Mr. Pope was tried and convicted in the District Court of Salt Lake County of first degree murder and was thereafter committed to the Utah State Prison. One of the state's witnesses testifying against Mr. Pope was Sandra Joyce Shaw, the codefendant in the original complaint.

No appeal for taken from the conviction and subsequent commitment, however, on April 29, 1966, a petition seeking a writ of habeas corpus was filed alleging that petitioner's attorney, Jimi Mitsunaga, had failed to file an appropriate notice of appeal, and, therefore, the time for appeal had tolled and the petitioner's appeal was not available to him. This case was filed as civil number 165239 but thereatfer through a stipulation of counsel on July 8, 1966, the petition was recalled and dismissed.

The petitioner has since filed two petitions in federal

court, both of which have been considered by the Tenth Circuit Court of Appeals. Following the order of the Tenth Circuit Court of Appeals on June 14, 1972, the federal district court dismissed the petition without prejudice to return to the federal court because the Circuit Court stated: "We think these issues should be presented to the Supreme Court of Utah for that court's consideration." Thereafter, a petition was filed in order that the state court would have the initial opportunity to respond to the issues contained herein relevant to state law.

The Third District Court granted the petition and the state appealed from that ruling.

ARGUMENT

POINT I.

THE COURT ERRED IN GRANTING PETITIONER'S WRIT OF HABEAS CORPUS BECAUSE IT MISCONSTRUED THE ACTION TAKEN BY THE DISTRICT ATTORNEY AND THE DISTRICT COURT.

The action taken by the district court in sending the matter back to the city court for further action was within the power of the court: As pointed out in the Constitution as well as by statute the district courts have "supervisory" as well as a "general" control over inferior courts within their jurisdiction.

Sec. 7. [Jurisdiction of district courts.]

> The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a *supervisory control* of the same. The District Courts or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a *general control* over inferior courts and tribunals within their respective jurisdictions. (Emphasis added.) Art. VIII, Constitution of Utah.

(Utah Code Ann. § 78-3-4 (1953) is essentially the same.)

The lower court held that the district court had no power to remand the case back to the city court and direct the county attorney to file a new complaint. For an example of a district court exercising this supervisory power over a city court and a county attorney, see *Hartman* v. *Weggeland*, 19 Utah 2d 229, 429 P. 2d 978 (1967). *Cr. Thompson* v. *Adair*, 36 Idaho 790, 214 P. 214 (1923).

Although this case is not identical it does show that the district court has more than mere administrative control over lower courts. It also is an example of an order to a county attorney.

In the instant case, the district attorney filed a motion with the court which set forth his reasons for not

filing an information based on the complaint which was filed on November 5, 1964:

> "That a complaint in the above-entitled cause against William Pope was issued in the Salt Lake City Court charging him with Murder in the First Degree. That on November 5, 1964 said matter came on before the Honorable Maurice Jones, one of the Judges of the Salt Lake City Court, for preliminary hearing and based upon the motion of Richard C. Dibblee, Chief Criminal Deputy Salt Lake County Attorney, the defendant waived preliminary hearing on the included offense of Voluntary Manslaughter and bound over to the District Court on said charge. That thereafter the undersigned made an independent investigation of the facts involved in the case and found that there is evidence of premeditation, deliberation and intent to kill John Wesley Wallace on or about the 6th day of July 1964 by the said William Pope.
>
> Based thereon the undersigned moves the Court to remand the file in the above-entitled cause to the Salt Lake City Court with instructions to the County Attorney to refile the charge of Murder in the First Degree and have a preliminary hearing thereon." (Plaintiff's Exhibit No. 1.)

The only reason that the district attorney asked for the remand was because he did not want to let the defendant out of custody. At the same time, the county attorney, acting quickly because the defendant had committed a major crime and the district attorney would

not prosecute on a lesser offense, filed a complaint charging the defendant with the original crime. In actuality, the first degree murder charge was still pending in the magistrate's court, the only difference being that the magistrate had bound defendant over on voluntary manslaughter.

The county attorney was not acting under compulsion from the so-called order which may or may not have force or effect. He was acting because the district attorney could have filed a new charge in the district court regardless of what the county attorney did. Since the policy was to keep from clogging the district court calendar, the county attorney went ahead and filed the original charge in the city court.

It is clear that the district attorney could have filed a complaint in the role of a prosecutor in the city court or in the district court acting as a magistrate. The district attorney could have assumed his rule under Utah Code Ann. § 67-7-4 (1953):

> ". . . All the duties and powers of public prosecutor shall be assumed and discharged by the district attorney, except in cases of prosecutions for misdemeanors and preliminary examinations before justices of the peace, but the district attorney may, whenever he deems it necessary, appear and prosecute for misdemeanors, and in preliminary examinations before justices of the peace and other magistrates."

The district court is classified as a magistrate:

> "[1] Under Article VIII, sec. 21 of our constitution, the district courts of the state 'may hold preliminary examinations in cases of felony.'" *Pons* v. *Faux*, 16 Utah 2d 93, 396 P. 2d 407 (1964).

The statement filed by the district attorney in the form of a motion actually conforms to the requirements set forth in Utah Code Ann. § 77-17-2:

> "If the district attorney determines that an information ought not to be filed in any case, he must make, subscribe and file with the clerk of the district court of the county a statement in writing setting forth his reasons of fact and law for not filing such information, and such statement must be filed during the term of court at which the defendant is held to appear for trial. The court must thereupon examine such statement, together with the evidence filed in the case, and if upon such examination the court is not satisfied with such statement, the district attorney must be directed and required by the court to file the proper information and bring the case to trial. But if the court does not require the information to be filed, and the defendant is not held or wanted to answer for any other public offense, he shall be discharged, his bail exonerated and his money refunded to him."

The statement set forth his reasons for not wanting to file an information on this complaint. The court examined the situation and granted the motion. That same day, the county attorney filed a new complaint, charging first degree murder. At that point in time a

new process began. A preliminary hearing was held with counsel and defendant present and defendant was bound over to stand trial for first degree murder. Apparently the lower court decided that defendant's counsel should have been present when the district attorney filed his statement, which, in effect, was a *nolle prosequi*. Utah Code Ann. § 77-17-2 (1953) makes no provision for arguments by defendant at that stage of a criminal proceeding. It is intended to be between the district attorney and the district court.

It is apparent that the procedure followed in this case was permissible. There is an indication that because of the district court's supervisory and general control of lower courts within its jurisdiction that an order such as the one signed in this case would have been valid. However, that is not a critical question. What is critical is whether or not the defendant was given procedural due process during the time it took to get him bound over on first degree murder.

It is clear from an examination of the facts in this case that what in effect happened was that the district attorney filed a *nolle prosequi* with respect to the voluntary manslaughter charge and that the county attorney, acting on his own discretion, filed a complaint against the defendant for first degree murder. If, in fact, the court had no power to remand the case with orders to the county attorney the defendant was discharged and could have gone free had not the county attorney filed a new complaint. All of this conforms to the statutory require-

ments of Utah Code Ann. § 77-17-1 and § 77-17-2. The defendant was convicted properly of first degree murder which was based on a proper information.

POINT II.

THE LOWER COURT ERRED IN GRANTING A WRIT OF HABEAS CORPUS BECAUSE IF ANY ERROR WERE COMMITTED BY THE THIRD DISTRICT COURT, IT WAS HARMLESS ERROR AND NOT PREJUDICIAL.

As discussed above, the only possible error which could be alleged was the granting of an *ex parte* order by the district court directing the county prosecutor to refile the complaint. Even if this did exceed the power of the court in this instance the defendant was not prejudiced by it. The lower court seemed to think that defendant should have been present, but defendant is not required to be present when the district attorney files a *nolle prosequi* and the District Attorney, pursuant to § 67-7-4 (*supra*, Point I) could have handled all of the prosecution without using the County Attorney at all. The defendant was afforded all of the elements of due process from the time that the complaint of first degree murder was filed on November 25, 1964 through his conviction on that particular charge. There is no allegation that anything happening subsequent to November 25th in any way violated defendant's rights.

This is a prime example of the reason Utah Code Ann. § 77-42-1 (1953) the so-called harmless error rule, was enacted:

> "After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties . . ."

The substantial rights of the defendant were not in any way affected by the procedure followed in this case. The United States Supreme Court has stated the purpose for the harmless error rules:

> "[t]o substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary actions and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record." *Kotteakos* v. *United States*, 328 U. S. 750 (1946).

This seems to be the situation in our case. The defendant in this case was fairly convicted of a crime and should not be granted a writ of habeas corpus because the wording of a motion was not exactly correct, or because an unusual procedure was followed to accomplish what could have been done by other means.

This court has stated its position in respect to the

harmless error rule many times. Statements from two recent cases seem particularly appropriate here:

> "In our system of justice there are numerous and adequate protections of the personal rights and liberties of one accused of crime and safeguards against conviction of the innocent. This is the purpose of restrictions upon making arrests; search and seizure; the assurance of adequate counsel; of being informed of the specific accusation; of trial by jury; of confrontation of witness against him; of having witnesses in his own behalf; the privilege against self-incrimination and against testimony from certain other persons in confidential relationship to him; the presumption of innocence; and the requirement of proof of guilt beyond a reasonable doubt.
>
> When there has been due observance of all of these safeguards . . . and the whole procedure has been subjected to careful scrutiny on appeal; that fulfills the objective of the law in assuring a fair trial. When this has been accomplished all presumptions are in favor of the validity of the judgment and it should be regarded as having some solidarity and finality." *Gallegos* v. *Turner*, 17 Utah 2d 273, 409 P. 2d 386 (1965).
>
> ". . . it is the policy of our law, established both by statute and decision, that we do not reverse for mere error or irregularity, but only where it is substantial and prejudicial. That is, not unless the error is of sufficient importance that it might have had some effect upon the result." *Alires* v. *Turner*, 22 Utah 2d 118, 339 P. 2d 241 (1969).

An examination of the facts in this case, coupled

with the policy stated above, will show that any irregularity in the procedure leading to defendant's conviction was harmless error and not prejudicial to defendant.

POINT III.

THE LOWER COURT ERRED IN GRANTING PETITIONER'S WRIT OF HABEAS CORPUS BECAUSE BY PLEADING TO THE CHARGE OF FIRST DEGREE MURDER, HE WAIVED HIS RIGHT TO OBJECT TO ANY IRREGULARITY IN THE INFORMATION.

The objection, if any, to the proceedings leading up to the filing of an information on the first degree murder charge, should have been made before the defendant pleaded to the charge:

> "No defect or irregularity in or want or absence of any proceeding or statutory requirement, prior to the filing of an information or indictment, including the preliminary hearing, shall constitute prejudicial error and the defendant shall be conclusively presumed to have waived any such defeat, irregularity, want or absence of proceeding or statutory requirement, unless he shall before pleading to the information or indictment specifically and expressly object to the information or indictment on such ground. Whenever the consent of the state to any waiver by the defendant is required, such consent shall be conclusively presumed, unless the state be-

fore or at the time the defendant pleads to the information or indictment expressly objects to such waiver." Utah Code Ann. § 77-16-2 (1953).

It is clear even though the defendant was represented by different counsel at the time he plead not guilty to the information, that his attorney at that time was aware of the facts surrounding the previous charge of voluntary manslaughter. He still did not object:

"Q. (By Mr. Young) Did you talk to Mr. Jimi Mitsunaga about being bound over on voluntary manslaughter previous to his representation?

THE COURT: Previous to what?

MR. YOUNG: His representation of you? In other words, prior to Jimi Mitsunaga being involved in the case, you were bound over on voluntary, is that right?

THE WITNESS: Yes.

Q. (By Mr. Young) Did you tell Mr. Mitsunaga about that?

A. Like I explained to the court a few minutes ago, when he came into the case, he was already aware of this, and like I just stated, he told me that the court was in error and that they could not do this and that I could stop the proceedings any time during first degree murder and enter a plea to manslaughter, which was supposed to be the only legal charge against me at that time.

Q. And that discussion you had with Mr. Mitsunaga?

A. Yes.

. . .

Q. Now, did Mr. Mitsunaga say to you, or in the conversation you had with Mr. Mitsunaga as you recall it, you did discuss the voluntary manslaughter charge?

A. Yes.

Q. And you did discuss with him the proceedings that occurred prior to Mr. Mitsunaga being involved in the case?

A. Yes, just like I explained to the court a few minutes ago" (R. 123, 124).

The lower court apparently felt that Utah Code Ann. § 77-16-2 (1953) *supra*, providing for waiver of defects, did not apply because this case involved a question of jurisdiction and did not have to do only with the information, *per se*. Petitioner alleged at the hearing that since another charge was pending the court did not have jurisdiction to entertain a new motion. First of all, that objection should have been made at that time, and secondly the only information that was ever filed was for first degree murder. The district court did not have another action pending at this time, because the jurisdiction of the district court does not attach until the information is filed. *State* v. *Trujillo*, 117 Utah 237, 214 P. 2d 626 (1950). Therefore, until the information was filed by the district attorney on the first degree murder charge there was no other action pending in the district court in respect to the defendant that would amount to a jurisdictional bar. Therefore, having pleaded, with-

out objection, to the information, any alleged defect was waived.

CONCLUSION

The facts in this case show that petitioner is not entitled to a writ of habeas corpus arising out of alleged deficiencies in the procedure followed to bring him to trial on a first degree murder charge. On the contrary, the court acted within its powers to instruct a lower court in respect to a preliminary hearing on a complaint. If there were any irregularity at all it was harmless error, and petitioner waived any right he had to object to the information at the time he pleaded. The lower court's decision to grant petitioner's writ of habeas corpus should be overturned.

Respectfully submitted,

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