

1995

Frank R. Hafen v. Utah State Board of Pardons, and Fred Van der Veur : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRANK R. HAFEN,

Petitioner and Appellant,

vs

UTAH STATE BOARD OF
PARDONS,
and FRED VAN DER VEUR,

Respondents and Appellees

No. 950265CA

Lower Docket No. 9409002704C

BRIEF OF APPELLANT

Appeal from the Third District Court, State of Utah
Honorable Kenneth Rigrup, District Judge Presiding

Argument Priority #3

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Jurisdiction

The Court of Appeals has jurisdiction of this appeal pursuant to 78-2a-3(2)(h), Utah Code Ann. (1953), since the case arises from the denial of Appellant's petition for relief challenging the decision of the Board of Pardons and Parole.

Issues on Appeal/Standard of Review

Since the ruling of the District Court was upon motion to dismiss Appellant's petition for extraordinary relief, review as to all issues shall be without deference to the trial court's conclusions of law, but review them for correctness. *Termunde v. Cook*, 786P.2d 1341, 1342 (Utah 1990); *Rawlings v. Holden*, 869 P.2d 959 (Utah App. 1994).

The issues are:

1. Is petitioner entitled to an immediate rehearing before the Board of Pardons and Parole because of deprivation of his due process rights at the original hearing? The due process rights Petitioner asserts include the lack of assistance of

counsel at the hearing, the right to cross examine witnesses, call witnesses and present evidence.

2. Should the petitioner be entitled to the rights provided for in *Neel v. Holden*, 886 P.2d 1097 (Utah 1994)?

Constitutional Provisions and Applicable Rules

Article I, Section 7, Constitution of Utah.

No person shall be deprived of life, liberty or property, without due process of law.

Rule 65B(e) Wrongful use of judicial authority or failure to comply with duty.

(1) **Who may petition.** A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief

(2) **Grounds for relief.** Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

(3) **Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) **Scope of review.** Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

Statement of the Case

Appellant brought a petition for extraordinary relief pursuant to Rule 65B(e) U.R.C.P. seeking a rehearing of his initial hearing before the Board of Pardons and Parole (which occurred September 1, 1993). The basis for the relief requested was petitioner's lack of access to the files examined by the Board and petitioner was not afforded the right of cross examination of witnesses or the right to call witnesses. Further the District Court found he was not entitled to the rights provided for in *Neel*, id.

Facts

This matter was presented and decided upon motion for dismissal filed by respondent. The facts, as shown by the pleading, are as follows:

1. Petitioner was convicted and sentenced as a result of a guilty plea originally December 18, 1992, with the District Court entering a corrected judgment and sentence February 19, 1993 (three counts).

2. Petitioner's initial hearing (the only hearing to date) before the Board of Pardons and Parole occurred September 1, 1993, at which time the Board did not fix a parole date but rescheduled a hearing for September, 1997.

3. In the September, 1993 hearing, petitioner was not afforded the right of representation of counsel nor had he had counsel assist in preparation. He was not afforded the right of cross examination of witnesses or the right to call witnesses.

Summary of Argument

The fixing of parole by the Board of Pardons and Parole is a sentencing function. Because of this sentencing function, Petitioner should be afforded his due process rights under Section 7, Article 1 of the Constitution of Utah.

These due process rights should include right to counsel, for preparation and participation at the hearing before the Board of Pardons and Parole, the right to call witnesses, and the right of cross examination. Because petitioner was not afforded these rights, a rehearing before the Board of Pardons and Parole should be ordered with petitioner being afforded these rights and also the right of examination of his file sufficiently in advance of the hearing to adequately prepare.

Argument

1. Due Process

A. Right to Counsel

A criminal defendant has a right to counsel at sentencing. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Kuehnert v. Turner*, 499 P.2d 839 (Utah 1972);

McConnell v. Rhay, 393 U.S. 2, 4, 89 S.Ct. 32, 21 L.Ed.2d 2, 4 (1968); *United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986).

In *Kuenhert v. Turner*, this Court discussed the importance of an attorney at sentencing:

The foregoing indicates the necessity of the presence of counsel at the time of sentencing; so that there is a real opportunity to present to the court facts in extenuation of the offense or in explanation of the offense or in explanation of the defendant's conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration and enforcement of penal laws.

(footnote omitted).

As the United States Supreme Court has recognized:

[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.

McConnel v. Rhay, 393 U.S. at 4, quoting *Mempa v. Rhay*, 389 U.S. at 135.

For the same reasons, counsel is of critical importance to an inmate appearing before the Board for a parole grant hearing as this court recognized in *Foote v. Utah Board of Pardons*, 808 P.2d 734, the Board "performs a function analogous to that

of a trial judge in jurisdictions that have a determinate sentencing scheme." In order to effectively present his case to the Board when it performs this analogous function, an inmate requires assistance of counsel.

The right to counsel at parole hearings includes the right to effective assistance of counsel, and court appointed counsel for indigent inmates. See *State v. Casarez*, 656 P.2d 270, 272 (Utah App. 1987), citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 796-7, 9 L.Ed.2d 799 (1963) (indigent defendant has right to court appointed counsel).

Although the current policies of the Board afford an inmate a right to an attorney at Parole revocation hearings, inmates are not afforded the right to counsel during parole grant hearings. Without an attorney, an inmate has little chance of effectively presenting his case to the Board. The policy of the board in denying inmates a right to counsel at parole hearings violates due process under Article I, Section 7, Constitution of Utah.

B. Right of Confrontation.

In *Douglas v. Alabama*, 380 U.S. 415, 418-9, 85 S.Ct. 1074, 1076, 13

L.Ed.2d 934 (1965), the Court stated:

The primary object of the [confrontation clause] was to prevent depositions of ex parte affidavits...[from being used against the prisoner in lieu of a personal examination of the witness and cross-examination in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

The right to confrontation is a fundamental aspect of due process which "has been placed on a par with the right to notice and an opportunity to be heard and the right to counsel." *Proffitt v. Wainwright*, 685 F.2d 1227, 1251 (modified, 706 F.2d 311 (11th Cir.)), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), citing *Chambers v. Mississippi*, 410 U.S. 284, 294-5, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973).

Although the United States Supreme Court has not held that the right to confrontation applies to sentencing, a number of courts have recognized that the right to confrontation applies to the penalty phase of a capital trial. See, e.g., *Walton v. State*, 481 So.2d 1197, 1200 (Fla. 1986); *Proffitt v. Wainwright*, 685 F.2d 1227; *Moore v. Zant*, 885 F.2d 1497, 1511 (11th Cir. 1989); *Lanier v. State*, 533 So.2d 473, 488-9 (Miss. 1988); *Beltran v. Texas*, 728 S.W.2d 382, 387 (Tex. Cr. App. 1987). See also, *State v. Glenn*, 504 N.E.2d 701, 710 (Ohio 1986).

The role of confrontation in a non-capital sentencing is less clear, but the need for accuracy and reliability would suggest that, at least in some situations, due process requires that an inmate be given the opportunity to confront the witnesses against him.

In *Lipsky*, this court indicated that

"the trial court may receive information concerning the defendant in the form of a presentence report without the author of the report necessarily personally appearing and testifying in open court...."

Lipsky, 608 P.2d at 1244. However, "[i]f the defendant thinks the report inaccurate, he should then have the opportunity to bring such inaccuracies to the court's

attention." It seems that where a defendant challenges the accuracy of a report, his ability to confront the witnesses becomes of paramount importance. See *United States v. Bass*, 535 F.2d 110, 121 (D.C. 1976); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978); *Howell*, *id* at 118.

The right to confrontation should apply to any witness who appears before the Board of who gives evidence. Utah Code Ann. Section 77-27-9(3) gives the Board the power to "issue subpoenas to compel the attendance of witnesses...." Unlike sentencing proceedings, victims are actively courted for their input. Fairness requires that inmates be given the opportunity to confront such witnesses.

The importance of accuracy and reliability at Board hearings suggests that due process requires that inmates have a right to confront witnesses against them whenever the Board reviews information the accuracy of which the inmate challenges.

2. The District Court erred in determining that *Neel v. Holden*, 886 P.2d 1015 (Utah 1994) was not applicable in establishing due process rights in this case. "For the following reasons, the Court concludes Petitioner's claims fall outside the

protections given in both *Neel* and *Labrum v. Utah State Board of Pardons*, 870 P.2d 902 (Utah 1993):" See the second paragraph of the Conclusions of Law of the final order from which this appeal has been taken.

No claim is made that the petitioner has the right to assert rights under *Labrum* since this case was not pending when the decision was rendered. However, this case was pending before the District Court on December 7, 1994, when *Neel*, *id*, was decided. The District Court concluded that the petitioner would receive no rights, benefits or protections from the *Neel* holding, apparently since *Neel* was the product of a parole revocation as opposed to an original parole hearing. This is contrary to the holding in *Neel*. Specifically, "This rationale guides our decision in the present case. We hold that an inmate is entitled to access psychological records to be considered by the Board in hearings at which the inmates released date may be fixed or extended." *Neel*, *id* at 1103. The Supreme Court speaks specifically whether to make its' ruling retroactive about the impact of reopening "every parole hearing at which it established an inmates release date". *Neel*, *id* at 1105. It did not limit its' remarks to hearings following parole revocations. Further, it indicated

"...accordingly, today's decision applies only to those parole grant hearings held on or after the date of this decision. We extend the benefits of this decision to David Neel and to any inmate who currently has a similar claim pending in the District Court or on appeal before this Court or the Court of Appeals." *id* at 1105. This case was pending in the District Court on the date of the *Neel* decision, December 7, 1994. Petitioner should have been afforded all rights contained therein, which was specifically not adopted by the District Court.

Conclusion

Petitioner should have been afforded the additional due process rights at the initial hearing before the Board of Pardons and Parole, including the right of counsel in the preparation and participation in the hearing, the rights relating to confrontation including cross-examination, calling witnesses and introducing evidence.

Additionally, Petitioner should have had the rights provided in *Neel*, *id* which specifically were denied by the District Court in reaching its decision.

The judgment below must be reversed.

No addendum is necessary.

Dated this 10 day of August, 1995.

A handwritten signature in black ink, appearing to read 'D. Anderson', written over a horizontal line.

David C. Anderson
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 1995, four true and correct copies of the foregoing Appellant's Brief were mailed, postage prepaid, to the following:

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David C. Anderson