1980

Walter Preston Boggess, Jr v. Lawrence Morris, Warden, Utah State Prison : Brief of Appellant

Utah Supreme Court

ROBERT B. HANSEN, CRAIG L. BARLOW, Attorneys for AppellantDOUGLAS E. WAHLQUIST; Attorney for Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

WALTER PRESTON BOGGESS, JR.,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16894
LAWRENCE MORRIS, Warden, Utah State Prison,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID K. WINDER, JUDGE, PRESIDING

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellant

DOUGLAS E. WAHLQUIST

100 Commercial Club Building
22 Exchange Place
Salt Lake City, Utah 84111

Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The State of Utah is appealing the granting of a writ of habeas corpus which was granted because respondent's (petitioner therein) attorney failed to file a timely appeal.

DISPOSITION IN THE LOWER COURT

The Third Judicial District, the Honorable David K. Winder presiding, ordered that if this Court did not take jurisdiction of respondent's out-of-time appeal by January 6, 1980, he was to be released and his conviction of manslaughter, in violation of Utah Code Ann. § 76-5-205 (1953, as amended), was to be set aside on that date.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the granting of the writ

of habeas corpus and requests that this Court take jurisdiction of an out-of-time appeal by respondent.

STATEMENT OF THE FACTS

Respondent, Walter Boggess, was tried for second degree murder in violation of Utah Code Ann. § 76-5-203 (1953, as amended) on May 18, 1978, before the Honorable J. Robert Bullock of the Fourth Judicial District. The following facts were presented at the hearing on respondent's writ of habeas corpus before the Honorable Ernest F. Baldwin, Jr. of the Third Judicial District on November 30, 1978.

After discussing the various degrees of murder, manslaughter and negligent homicide with respondent, (T. 10,14) appointed counsel, George Mangan, concluded that manslaughter, Utah Code Ann. § 76-5-205 (1953, as amended), was "the only justifiable lesser included offense," (T. 11) and he pursued that theory at trial. Respondent was convicted of manslaughter on May 19, 1978. Prior to sentencing and again at the sentencing hearing, respondent told Mangan that he was satisfied with the jury's verdict and that he did not wish to appeal (T. 12,13). Later, in a letter dated July 10, 1978, respondent requested that Mangan file an appeal in his behalf (T.5). Respondent testified that he first learned of the offense of negligent homicide, Utah Code Ann.§ 76-5-206 (1953, as amended), while in prison, (T.4), and he believed the trial court erred in not

instructing the jury as to this lesser included offense. Mangan testified that he received the letter on July 18, 1978 and that he had sufficient time in which to file an appeal by the July 20, 1978 deadline (T.13).

Mangan informed respondent that there was no merit to an appeal and that he was no longer respondent's attorney. Mangan did not file a notice of appeal. Respondent also wrote to Uintah County to request that a transcript be prepared, (T.7), and he wrote a follow-up letter to Mangan on July 23, 1978 to inform him of this. On August 30, 1978, respondent filed a complaint for a writ of habeas corpus and post conviction relief alleging inter alia, that he had been denied his right to appeal. On November 30, 1978, the Honorable Ernest F. Baldwin, Jr., ruled that respondent had been denied his right to appeal and his right to counsel under the Fourteenth and Sixth Amendments of the United States Constitution. Following a stipulation by the State, Judge Baldwin granted respondent permission to file an out-of-time appeal. On October 16, 1979, this Court refused to take jurisdiction of the appeal based on Utah Code Ann. § 77-39-5 (1953, as amended). State v. Boggess, 601 P.2d 927 (Utah 1979).

On December 6, 1979, the Honorable David K. Winder ordered that if the Utah Supreme Court did not take jurisdiction of the substantive merits of an appeal by respondent within

thirty days, respondent's Petition for a Writ of Habeas Corpus would be granted. On January 6, 1980, the writ was granted, respondent was released from prison and his conviction set aside.

ARGUMENT

POINT I

THE GRANTING OF THE WRIT OF HABEAS CORPUS BY THE THIRD JUDICIAL DISTRICT COURT SHOULD BE REVERSED.

A

BY STRICTLY CONSTRUING THE JURISDICTIONAL REQUIREMENT OF UTAH CODE ANN. §77-39-5 (1953, AS AMENDED), THIS COURT DID NOT CONSIDER THE CONSTITUTIONAL RIGHT INVOLVED.

Although there is no inherent or absolute right to appeal a criminal conviction, McKane v. Durston, 153 U.S. 684, 687 (1894), once the state has granted the privilege of appeal, in a proper case, i.e. where the appellant has met the state's requirements for perfecting an appeal, the appeal becomes a "matter of right." Alaska Packer's Ass'n. v. Pillsbury, 301 U.S. 174, 177 (1937). See, Ross v. Moffitt, 417 U.S. 600, 610-611 (1974); Douglas v. California, 372 U.S. 353, 356 (1963) This right for indigent defendants has been more fully defined in recent years. Once appellate review becomes an integral part of a state's criminal system, an indigent is protected

at all stages by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, Griffin v. Illinois, 351 U.S. 12, 18 (1955), and he may not be barred access to any phase of the appellate process. Burns v. Ohio, 360 U.S. 252, 257 (1959).

B

AN INDIGENT'S RIGHT TO APPEAL IS GUARANTEED UNDER ANDERS V. CALIFORNIA.

When a defendant claims that he has been denied his right to appeal he raises two questions. First, did the defendant request that his attorney file an appeal, or, if not, should his attorney have realized that an appeal may have some merit? If the answer to either of the above inquiries is yes, then the second question is why wasn't an appeal filed? Whether a defendant has been denied his constitutional right in such a situation depends on the facts of each case. See, State v. Carter, 551 P.2d 821, 827 (Kan. 1976); Wimberli v. State, 536 P.2d 945, 950 (Okla. 1975); State v. Heath, 27 Utah 2d 13, 16, 492 P.2d 978, 980 (1972).

If the defendant and his attorney made a tactical decision not to appeal, or reached the conclusion that an appeal would be unavailing, and consequently did not file notice of appeal within one month after the entry of the judgment appealed from, Utah Code Ann. § 77-39-5 (1953),

then the defendant has not been denied his right to appeal and he is precluded from substituting a writ of habeas corpus for a timely appeal. In Short v. Smith, 550 P.2d 204 (Utah 1976), the defendant, who had been convicted of forgery, failed to perfect an appeal within the statutory period but later petitioned for a writ of habeas corpus asserting that he should have been convicted only of a misdemeanor and not of a felony. This Court found the appeal from the denial of the writ to be without merit, stating, "he cannot substitute a habeas corpus proceeding for an orderly, statutory appeal." Id. at 204. Accord, Ex parte Dixon, 264 P.2d 513 (Cal. 1953); Mahaffey v. State, 392 P.2d 423, 425 (Idaho 1964).

In the instant case, respondent requested that his attorney file an appeal. No appeal was filed by Mangan because he believed he was no longer respondent's attorney and because he thought it was a waste of time. The duty of appointed counsel in such a situation has been clarified by Anders v. California, 386 U.S. 738 (1967), and its progeny. In Anders, appointed counsel in a letter to the appellate court stated: "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal." Id. at 742. In the instant case, appointed counsel's letter of May 18, 1978 stated: "In good conscience, I cannot prosecute an appeal for you. . . I don't believe there is any basis for an appeal." (Ex. 3-P).

The United States Supreme Court's solution to the dilemma faced by appointed counsel is:

> . . . if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.

Counsel is also required to include any points which defendant wishes to raise. Id. at 744. The court will then examine the points raised and if any are found to have merit, defendant is entitled to have counsel appointed to aid him on appeal. Id. at 744.

C

RESPONDENT BELIEVED THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF NEGLIGENT HOMICIDE. THIS ERROR MAY ONLY BE RAISED ON APPEAL.

The difference between habeas corpus and appeal is clear. The remedy for any claimed error or irregularity at trial, is to seek review and correction on appeal. Generally, habeas corpus is designed to provide speedy release from illegal incarceration and may not be used to review a conviction in lieu of an appeal.

> 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 prescribed procedure, or the judgment becomes final and is not subject to further attack, . . . Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Brown v. Turner, 21 Utah 2d 96, 98, 440 P.2d 968, 969 (1968). Accord, Andrews v. Morris, 607 P.2d 816, 819 (Utah 1980); Bennett v. Smith, 547 P.2d 696, 697 (Utah 1976); Maguire v. Smith, 547 P.2d 697, 698 (Utah 1976).

This Court has stated, however, that a final judgment may be subject to habeas corpus attack under the "most unusual circumstances," such as where "there has been substantial failure to accord the accused due process of law; . . . or some other such circumstance that it would be wholly unconscionable not to re-examine the conviction." Gallegos v. Turner, 17 Utah 2d 273, 275, 409 P.2d 386, 387 (1965), (following full appellant review); Brown v. Turner, 21 Utah 2d 96, 98, 440 P.2d 968, 969 (1968), (where defendant failed to appeal within the statutory period).

In the instant case, respondent claims that the trial court erred in failing to instruct the jury on the lesser included offense of negligent homicide. Utah Code Ann. § 77-37 (1953) states, ". . . Exceptions to instructions to the jury shall be taken and preserved as in civil cases." Generally,

Utah R. Civ. P. 51 requires that the complaining party object to the instruction at the trial level, or he will be precluded from raising the objection on appeal. DeBry and Hilton Travel v. Capitol Intern. Airways, 583 P.2d 1181, 1185 (Utah 1978); Cordner v. Clinger's Incorporated, 15 Utah 2d 85, 87, 387 P.2d 685, 686 (1963).

Since Rule 51 requires that an exception be made to the instruction at trial, it follows that the claimed error "is something which is known or should be known" at the time of trial, and therefore must be reviewed on appeal and may not be collaterally attacked through a writ of habeas corpus. Rule 51, also gives the appellate court discretion to hear the objection, raised first on appeal, in the interests of justice. Morgan v. Pistone, 25 Utah 2d 63, 64, 475 P.2d 839, 840 (1970); Williams v. Lloyd, 16 Utah 2d 427 429, 403 P.2d 166, 167 (1965). This Court has applied this same standard in criminal cases. State v. Villiard, 27 Utah 2d 204, 205, 494 P.2d 285, 286 (1972).

The unusual circumstances, in the instant case, which urge review of the error initially asserted on appeal, is the claim of ineffective assistance of counsel.

Respondent claims that Mangan negligently failed to request an instruction regarding negligent homicide. Ineffective assistance of counsel may explain why no exception

was taken at trial and compel the appellate court, in the interests of justice, to hear an objection that is first raised on appeal. Utah R. Civ. P. 51. Even though ineffectiv assistance of counsel warrants review of the alleged error on appeal, it does not necessarily justify resort to a writ of habeas corpus by respondent. Where ineffective representation reaches constitutional proportions, resort to habeas corpus may be warranted. The old standard for resort to habeas corpus was that counsel must be so ineffective that the trial is reduced to a sham and a mockery of justice. E.g., Barron v. State, 437 P.2d 975, 977 (Ariz. 1968); State v. King, 142 S.E.2d 880, 882 (W.Va. 1965). Recent cases have adopted the stricter standard of reasonably competent assistance. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980); People v. Frierson, 599 P.2d 587 (Cal. 1979). This Court has addressed the question in several recent cases. In State v. McNicol, 554 P.2d 203 (Utah 1976), the Court required that the attorney provide competent assistance, Id. at 204, but held in that case that the trial had not been reduced to "a farce, or a sham." Id. at 205. And in State v. Gray, 601 P.2d 918 (Utah 1979), the Court moved closer to the stricter standard when it stated:

> We do not mean to be understood as saying that a defendant can only succeed in showing that he was

> deprived of counsel by showing that his attorney's failures reduced his trial to "a farce or a mockery of justice."

Id. at 920 n.5.

But where the actions of the attorney involve elements of discretion or judgement, they will not consitute ineffective assistance sufficient to sustain habeas corpus relief. E.g., Landers v. State, 437 P.2d 681, 682 (Ariz. 1968); Thomas v. Rhay, 472 P.2d 606, 607 (Wash. 1970).

In the instant case, prior to trial, Mangan discussed the various degrees of murder, manslaughter and negligent homicide with respondent at length. After hearing respondent's statement of facts, Mangan exercised his judgment, and concluded that the only lesser included offense which could be justified was manslaughter. Comparing the facts of a case to the elements of an offense, clearly calls upon an attorney to exercise this kind of judgment. Additionally, Mangan, at respondent's request, attempted to arrange for a guilty plea to a reduced change of manslaughter. (T.10). Mangan's representation of respondent was neither perfunctory nor ineffective.

The facts in this case do not support the conclusion that respondent was denied reasonably competent assistance of counsel or that his trial was a sham and a mockery of

justice, therefore defendant may not resort to a writ of habeas corpus in order to have his claimed error reviewed. However, Utah R. Civ. P. 51, allows for review of that same error on appeal "in the interests of justice." The standard on appeal is simply what the appellate court considers to be fair, while for a writ of habeas corpus respondent must prove that counsel was not reasonably competent and that if he had been, there was a "reasonable likelihood of a different result." State v. Gray, 601 P.2d 918, 920 (Utah 197

D

RELEASING DEFENDANT AND SETTING ASIDE HIS CONVICTION, IS NOT THE PROPER REMEDY.

Respondent desired to appeal his conviction, he had an issue which could only be properly raised on appeal and no appeal was filed by his appointed counsel. Respondent's right to appeal has not been denied through any fault of the State. Upon learning the facts of this case, the State attempted to aid respondent and the interest of justice by stipulating to a late appeal. The result in this case, releasing respondent and setting aside his conviction, is wholly untenable. Granting defendants a second day in court, where they and their counsel are solely responsible for any constitutional defects in the conviction, places an unreasonabl

strain on the prosecutorial resources of the state. The constitutional defect can arise from an honest mistake or miscommunication between respondent and his attorney. For example:

1) Even if we assume that all appointed attorneys will understand the duty imposed on them by Anders v. California, a delay may still occur, as it did here, where the attorney believed his representation to be at an end.

2) If Mangan had been out of town on July 18, 1978 and had not returned until after the one month period had run, respondent would have been denied his right to appeal.

3) A similar result would occur if the attorney became suddenly ill, or if the notice of appeal was simply misplaced in his office. Effective and efficient law enforcement dictates the need for some alternative to a full retrial of the defendant in such situations.

The result in this case allows for subterfuge by future defendants.

4) A defendant may vacillate in his requests for an appeal to such a degree that his attorney may conclude that the defendant did not want to appeal. After the one month period has expired, the defendant may claim he did wish to appeal and that he had so instructed his attorney.

5) At the time of sentencing, a defendant can inform

the court that he intends to appeal and later allow counsel to convince him that an appeal is pointless. Once the statutory period runs, the defendant can point to his statement in the record and allege that his attorney was negligent.

6) A defendant and his unscrupulous attorney, or his simply over-zealous attorney who honestly believes in the innocence of his client, can agree that the attorney will admit to negligently failing to file the requested notice of appeal in order to give the defendant a second chance at trial.

In any of these factual settings, the defendant will be undermining the efficiency of and respect for the legal system. Through no fault of the State, prosecutorial resources will be wasted in seeking a second conviction. That portion of the public which is aware of the defendant's crime and conviction, will lose respect for and faith in our legal system when they observe, as we have here, a convicted killer back on the street so soon after his conviction.

Some alternative, to releasing respondent and setting aside his conviction, which will protect both his constitutional rights and the interests of the State must be found.

POINT II

THIS COURT SHOULD ADOPT THE PRINCIPLE OF CONSTRUCTIVE FILING OF NOTICE OF APPEAL IN ORDER TO TAKE JURISDICTION OF LATE APPEALS IN THE INTERESTS OF JUSTICE.

In Utah, perfection of an appeal is jurisdictional. State v. Boggess, 601 P.2d 927, 929 (Utah 1979); Sullivan v. District Court, 65 Utah 400, 404, 237 P. 516, 518 (1925). Generally, courts have no inherent power to extend the time for taking an appeal, Blackwelder v. Naylor, 439 P.2d 202, 203 (Okla. 1967), (a civil case), but that power may be conferred upon the court by statute. E.g., People v. Krebs, 400 P.2d 323, 323 (Cal. 1965), (in which the California Rules of Court, at that time, allowed for "relief from default in a proper case."); City of Goldendale v. Graves, 562 P.2d 1272, 1276 (Wash. 1977), (in which the statute allowed the court to take jurisdiction where failure to file a timely appeal was due to "excusable neglect.").

Where no such statutory power exists, a potential solution lies in the principle of constructive filing of notice of appeal. This principle had its beginning in People v. Slobodion, 181 P.2d 868 (Cal. 1947), in which an incarcerated defendant delivered his notice of appeal to prison authorities for mailing to the clerk of the court, six days prior to the last day of the statutory period for filing. Due to the neglect of prison officials, the notice was not received by the clerk until five days after the period had run. The principle was based on a notion of estoppel. "It would be absurd to hold in a criminal case that the state may extend

the right of appeal contingent upon timely pursuit thereof and then deny such fundamental right because the state's employees were remiss in complying with the state's law." Id. at 871. The court said that both justice and reason require that the appellant not be deprived of his right to appeal where he had taken all steps he was individually able to, and where the delay was not due to any fault of his. Appellant's actions under such circumstances constituted constructive filing of notice of appeal. Id. at 871.

The principle was expanded in People v. Dailey, 345 P.2d 558 (Cal. 1959), to include the situation where an incarcerated appellant delivers his notice of appeal to prison officials on the last day on which the appeal may be filed, even though it would necessarily reach the clerk of the court after the period had run. This was to assure that an incarcerated appellant had the same ten day appeal period as did an individual who was not in prison.

The principle was applied to a factual situation similar to that of the instant case in Re Benoit, 514 P.2d 47 (Cal. 1973). In that case, the court acknowledged that under California law, appellate review is jurisdictional and that California statutes do not expressly allow consideration of late appeals. Further, the court noted that, the statutory period for appeal had recently been changed from ten to sixty

days, and Rule 250, California Rules of Court, which requires the judge at the time of sentencing "to advise defendant of his right to appeal, of the time and necessary steps for taking an appeal, and of the right of an indigent appellant to have counsel appointed for him . . .," had recently been adopted. These changes were expressly designed to eliminate the causes of late appeals. Id. at 105. Nevertheless, these alterations did not preclude the use of the principle of constructive filing which "embodies nothing more than a basis for judicial acceptance of an excuse for the appellant's delay in order to do justice." Id. at 104. In Benoit, the appellant requested that his appointed counsel file an appeal following his first conviction. No timely appeal was made due to the confusion generated by appellant being immediately removed to a second county where he was represented by different appointed counsel and tried for an unrelated felony. The court found earlier cases to be distinguishable in that each involved state action through prison employees who either prevented the appellant from filing a timely appeal or induced the appellant to rely upon their representations of assistance and lulled him into a false sense of security. Id. at 106. Also, in each case, the delay was not substantially due to any fault of appellant. In Benoit, the delay was not through any fault of the state, but resulted from a lack of

communication between appellant and his first appointed counsel, who said he would file the appeal and later mistakenly believed that appellant's second appointed counsel would perfect the appeal. The court said that appellant was even more justified in relying on the statements of his own attorney than were earlier appellants in relying on prison officials, since his own attorney was better acquainted with the law and more likely to be concerned with the appellant's cause. Id. at 106. The court further required that appellant explain any delay in requesting an appeal and that he diligently pursue the appeal once the request had been made of his attorney. Id. at 107. Accord, People v. Leftwich, 158 Cal. Rptr. 758, 97 Cal. App. 3d Supp. 6 (1979).

In the instant case, Mangan, received a written request from respondent that an appeal be filed. Mangan testified that he had time to file an appeal before the July 20th deadline. Due to a misunderstanding regarding his continued role as respondent's attorney, no appeal was filed within the statutory period. The District Court accepted respondent's explanation that the delay in requesting an appeal was due to respondent's lack of knowledge of the offense of negligent homicide. Once respondent had made a timely request of his attorney, he diligently pursued the

appeal by immediately requesting a copy of his transcript and by writing a followup letter to Mangan to inform him of this.

Appellant respectfully requests that this Court adopt the principle of constructive filing of notice of appeal. This will not entail a significant departure from the statutory one month period in which an appeal must be filed. An appellant is still required to request that his attorney file an appeal early enough to allow the attorney time to file within the statutory period. Nor will this encourage laxity on the part of appellant and his counsel since appellant must explain any delay and exercise reasonable diligence in perfecting the appeal once he has requested it. In fact, this will encourage prompt filing since an appellant will no longer profit by failing to file, whether due to mistake or subterfuge, and seeking a writ of habeas corpus claiming he was denied the right to appeal.

Respondent, herein, over the advise of counsel, decided to take an appeal. He was able to explain the delay and demonstrate his diligence to the satisfaction of the district court. He did all he was individually capable of doing and then relied on his appointed counsel to complete his assigned duties. It would not only be unjust to hold defendant accountable for the negligence of his appointed

attorney, it might very well violate his constitutional rights.

By adopting the principle of constructive filing of notice of appeal and accepting an out-of-time appeal under the proper circumstances, this Court would not be expanding the constitutional rights of appellants. More correctly, this Court would be guaranteeing that the rights of an indigent appellant will not be compromised by the negligence or misunderstanding of his appointed counsel.

The principle of constructive filing will also be of benefit to the state. In light of this Court's prior decision not to take jurisdiction of an out-of-time appeal, State v. Boggess, 601 P.2d 927 (Utah 1979), the state is given the choice of acquiescing in the freedom of a convicted killer or incurring the time and expense of a second trial. This would also eliminate the potential for subterfuge by a defendant seeking a second opportunity for acquittal.

CONCLUSION

Defendant's right to appeal is not controlled solely by jurisdictional considerations, but also involves constitutic issues. Under Anders v. California, appointed counsel must aid an indigent with his appeal, even if counsel believes the appeal to be without merit. Mr. Boggess, an indigent defendant desired and requested that his conviction be

appealed. He has raised an issue from his trial that can only be properly heard on appeal, and not in a petition for a writ of habeas corpus. Appointed counsel's failure to file a appeal has denied defendant his constitutional rights. Where this has occurred through no fault of the state, some remedy must be fashioned which will protect the rights of the defendant as well as the interests of the state.

The principle of constructive filing of notice of appeal is such a remedy. The defendant is still bound to file within one month of the judgment appealed from, but where something delays or prevents the attorney from carrying out the instructions of his client, the defendant will be deemed to have filed within the statutory period, as long as he, 1) adequately explains the delay, 2) demonstrates his diligence in pursuing the appeal through his appointed counsel and 3) gives his attorney sufficient time to file notice of appeal after the request is made.

Both the State and future defendants will benefit from the adoption of this principle.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Appellant