The Burger Court Opinion Writing Database

Hensley v. Municipal Court, San Jose-Milpitas Judicial District, Santa Clara County

411 U.S. 345 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1973

Re: No. 71-1428 - Hensley v. Municipal Court

Dear Bill:

Please join me in your dissent.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

Dear Bill:

Please join me in your opinion in 71-1428, Hensley v. Municipal Court.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

3

Please join me

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: 2/28/73

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1428

Kirby J. Hensley, Petitioner,
v.
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to determine whether a person released on his own recognizance is "in custody" within the meaning of the federal habeas corpus statute. 28 U. S. C. §§ 2241 (c)(3), 2254 (a). See *Peyton* v. *Rowe*, 391 U. S. 54 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). Petitioner initiated this action in the United States District Court for the Northern District of California, challenging a state court conviction on First and Fourteenth Amendment grounds. The court denied relief, holding that since the petitioner was enlarged on his own recognizance pending execution of sentence, he was not yet "in custody" for purposes of the habeas corpus statute. The Court of Appeals for the Ninth Circuit agreed that release on one's own recognizance is not sufficient custody to confer jurisdiction on the District Court, and affirmed

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 24, 1973

MEMORANDUM TO THE CONFERENCE:

71-1428

Re: Cases Held for Hensley v. Municipal Court

Three cases are held for Hensley, all from the Ninth Circuit and all decided according to the precise decisional rule that we rejected in Hensley. Nevertheless, each case does involve a complication not presented in Hensley.

1. Gunston v. Superior Court of Alameda County, No. 71-6836. Petitioner was convicted by the Municipal Court of Alameda County of a motor vehicle violation, and he was sentenced to a fine of $24 or two days in the county jail. The District Court noted that petitioner "satisfactorily alleges that he has exhausted all available remedies under state law within the meaning of 28 U.S.C. § 2254(b), in that petitioner has previously presented the claims he now presents in appeals to the Superior Court of California, the California Court of Appeal and the California Supreme Court." In its response to the petition for certiorari, the State disputes that finding, contending that he was released on his own recognizance by a state court pending appeal, and that he has not yet exhausted his state remedies. In any event, it appears that petitioner remains at large because of a state court stay of execution, and the District Court denied habeas corpus precisely on the grounds that the petitioner was not "in custody." In support of its holding, the District Court cited the decisions of the Ninth Circuit in Hensley and in Matysek v. United States. The Ninth Circuit affirmed the District Court's order. Since the District Court relied squarely on principles which we have now rejected, I would vacate its judgment and remand for proceedings consistent with our opinion in Hensley. On remand the State may attempt to distinguish Hensley on the grounds that petitioner in this case has the option of paying a fine and thereby avoiding all threat of imprisonment. I see no need for us to consider such an argument at this time. If the petitioner is found to be "in custody," the State can, of course, renew its argument that he has not yet exhausted available state remedies.

3P

2. Choung v. Lowe, No. 71-1562. Petitioner was convicted under a California statute that punishes disruptive presence on school grounds. He was sentenced to 90 days in the county jail and fined $600. Execution of sentence was stayed by the state courts pending appeal, and that stay was extended by the federal court immediately prior to its scheduled expiration. Petitioner remains at large pursuant to the order of the Federal District Court. On the merits, the District Court concluded that petitioner had been convicted without proper notice of the charge against him, and granted the petition for habeas corpus. The Ninth Circuit reversed, relying exclusively on the decisional rule of Hensley and Matysek. In addition to its argument that petitioner is not "in custody"--an argument that our decision in Hensley has now foreclosed--the State maintains that petitioner has failed to name a proper party respondent. Petitioner brought this action against the Sheriff of Sacramento County and the State of California. Hensley, by contrast, named as respondent the Municipal Court in which his conviction was obtained. My own view is that the selection of a respondent is a question without much significance, since the petitioner is clearly in "custody" and since it is the State, in any case, that must defend the conviction. Still, there may be some reason not immediately apparent on the face of the record why petitioner may be unable to name a proper respondent. Accordingly, I would vacate and remand for reconsideration in light of Hensley.

3. Cohen v. Hongisto, No. 72-274. Petitioner was convicted of an obscenity offense in Municipal Court and fined $50. After exhausting state remedies, he sought habeas corpus relief in the District Court. Fifteen minutes before he was to pay his fine, and in an evident attempt to preserve its jurisdiction, the District Court stayed execution of the sentence. Concluding that the state trial court had given an unconstitutional jury instruction, the District Court granted the writ of habeas corpus. The full text of the Ninth Circuit opinion is as follows: "The judgment is vacated and the cause remanded to the district court for consideration of the question of jurisdiction in light of our decisions in Choung v. Misterly, . . . , Matysek v. United States, . . . , and other relevant authority." (Citations omitted.) The State contends that the case is not ripe for review.

WB

While I agree with petitioners that we do have jurisdiction to hear the case, and while I agree that the Ninth Circuit almost certainly intended the District Court to dismiss the petition for want of "custody," I see no reason to set aside the judgment of the Court of Appeals. Petitioner was not sentenced to a term of imprisonment, and the question presented by this case--whether the imposition of a fine can constitute "custody" within the meaning of the habeas corpus statute--is at least arguably distinct from the question resolved in Hensley. By denying we would leave in effect the Ninth Circuit's order remanding the case to the District Court for reconsideration. The District Court is precisely where this case now belongs, and I therefore recommend that course.

Sincerely,

W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 5, 1973

No. 71-1428, Hensley v. Municipal Court

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1973

Re: No. 71-1428 - Hensley v. Municipal Court

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 1, 1973

Re: No. 71-1428 - Hensley v. Municipal Court

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1428

Kirby J. Hensley, Petitioner,
v.
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1973]

MR. JUSTICE BLACKMUN, concurring in the result.

I emphasize again, as I did in my separate concurrence in *Braden* v. *30th Judicial Court of Kentucky*, —— U. S. ——, —— (1973), that the Court has wandered a long way down the road in expanding traditional notions of habeas corpus. Indeed, the Court now concedes this. *Ante*, p. 5. The present case is yet another step. Although recognizing that the custody requirement is designed to preserve the writ as a remedy for *severe* restraints on individual liberty, *ante*, p. 6, the Court seems now to equate custody with almost any restraint, however tenuous. One wonders where the end is. Nevertheless, in the light of cases already decided by the Court, I feel compelled to go along and therefore concur in the result.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 2, 1973

No. 71-1428 - Hensley v. Municipal Court

Dear Bill:

As I voted to affirm in this case, I will await a dissenting opinion.

Sincerely,

Lewis

Mr. Justice Brennan

cc: The Conference

March 2, 1973

No. 71-1428 - Hensley v. Municipal Court

Dear Bill:

As I voted to affirm in this case, I will await a dissenting opinion.

Sincerely,

Mr. Justice Brennan

cc: The Conference

Note to be typed on bottom of xerox copy going to Justice Rehnquist:

Bill:

OK

Although the logic of numbers would suggest that I write the dissent, the logic of wisdom and experience points toward you. What would you think of an extremely brief dissent which emphasizes primarily the facts, refuting the impression conveyed by the Court's opinion that petitioner actually was under severe restraint (p. 7)? My recollection of the oral argument is that petitioner's location was unknown, that he had been traveling abroad, that he was not required to report to anyone, and indeed was under ~~xxx~~ no restraint of any kind. The truth is that Justices of this Court are a good deal closer to being "in custody" than this happy fellow who has managed to evade the law for two or three years.

March 16, 1973

Re: No. 71-1428 Hensley v. Municipal Court

Dear Bill:

I will be happy to join your dissent in its present form.

It occurs to me that it might be a bit more self sufficient if you added an introductory paragraph.

The enclosed draft of such a paragraph may be a bit too strong, and you may well wish to tone it down or eliminate it entirely. I must say that my patience becomes a little frayed with the way the Court continues to rewrite - as I view it - the law of habeas corpus.

If you decide to make a change, I will hold my "join" note until your second draft. Otherwise, I will join you now.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

March 16, 1972

Re: No. 71-1428 Hensley v. Municipal Court

Dear Bill:

I'd be happy to join your dissent in its present form.

It occurs to me that it might be more self sufficient if you added at the end the following paragraph:

The enclosed draft of such a paragraph may be a bit too strong and you may well wish to tone it down or eliminate it entirely. I must say that my patience becomes a little frayed with the way the Court continues to rewrite - as I view it - the law of habeas corpus.

If you decide to make a change, I will hold my "join" note until your second draft. Otherwise, I will join you now.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 19, 1973

Re: No. 71-1428 Hensley v. Municipal Court

Dear Bill:

Please join me in your dissent.

Sincerely,

L. F. P.

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

No. 71–1428

Circulated: 3/16/73

Recirculated:

Kirby J. Hensley, Petitioner,
v.
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

Petitioner has been free on his own recognizance since his conviction and the imposition of sentence in the summer of 1969. The California statute authorizing his release imposes no territorial or supervisory limitations and he has been subject to none. He has not been required to post any kind of security for his appearance. At the time of the filing of his federal habeas petition, the only conceivable restraint on him was that at the time of the expiration of the stay granted by the state court, petitioner would have had to surrender himself to the custody of the sheriff. The record shows that for the three and one-half years since his conviction, petitioner has utilized his freedom to travel both within and without the State of California for business purposes.

Petitioner was under no greater restriction than one who had been subpoenaed to testify in court as a witness. This is simply not "custody" in any known sense of the word, and it surely is not what was meant by Congress when it enacted 28 U. S. C. § 2241. The Court apparently feels, like Faust, that it has in its previous decisions already made its bargain with the devil, and it does not shy from this final step in the re-writing of the statute. I cannot agree, and I therefore dissent.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

No. 71-1428

Circulated: _____

Recirculated: 3/19/73

Kirby J. Hensley, Petitioner,
v.
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The issue in this case is whether petitioner was in "custody," within the meaning of 28 U. S. C. § 2241, entitling him to the benefit of the extraordinary writ of habeas corpus. The Court of Appeals for the Ninth Circuit unanimously held that he was neither in actual nor constructive custody. If there is any vestige left of the obvious and the original meaning of "custody" the court below was right and the majority opinion of this Court today has further stretched both the letter and the rationale of the statute.

Petitioner has been free on his own recognizance since his conviction and the imposition of sentence in the summer of 1969. The California statute authorizing his release imposes no territorial or supervisory limitations and he has been subject to none. He has not been required to post any kind of security for his appearance. At the time of the filing of his federal habeas petition, the only conceivable restraint on him was that at the time of the expiration of the stay granted by the state court, petitioner would have had to surrender himself to the custody of the sheriff. The record shows that for the three and one-half years since his conviction, peti-