

Justices to review case where arrested man was denied lawyer

By MICHAEL GRACZYK, Associated Press
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LLANO, Texas — Three weeks after Walter Rothgery arrived from Arizona to manage an RV park in the Texas Hill Country, the work offer evaporated. He lost not only his job but the place at the park where he and his wife were to live.

Then things got ugly.

The next day, Rothgery was arrested for carrying a gun as a convicted felon, based on a background check that erroneously showed a felony drug conviction in California. His wife used their last \$500 to post bail. No lawyer was provided at his initial hearing.

"I grew up kind of being an idealist American" said Rothgery, 57, and a former West Point cadet. "I never thought something like this could happen to me."

Now he will argue before the Supreme Court on Monday that Texas should provide a defense lawyer for indigent clients once they've made a first appearance before a magistrate. Had Rothgery had one, the erroneous report of a previous conviction would have been disproven, eliminating the reason he was arrested in the first place.

Rothgery waived his right to have a lawyer at that first jailhouse court appearance, but said he did only for that appearance so bond could be set and he could be released.

Rothgery spent the next six months in legal limbo: unable to get a full-time job because of the report of a conviction hanging over him and unable to afford a lawyer. He was indicted, re-arrested, had his bail tripled and moved to a county jail more than 100 miles from his home.

A sympathetic warden there helped him find a lawyer, who obtained documentation proving he had no felony record.

Three weeks later, Rothgery was released again on bail, and Gillespie County prosecutors ultimately dropped the charge. He was a free man.

"I guess everybody who gets arrested says they're innocent," Rothgery said. "Sometimes they are."

Rothgery's case caught the attention of Andrea Marsh, a rookie civil liberties lawyer who filed the first lawsuit of her career on his behalf against the county in 2004 alleging his Sixth Amendment right to an attorney was violated.

If a lawyer had been appointed, the mistake underlying his arrest would have been discovered and he wouldn't have been subjected to bond for a lengthy period and wrongfully jailed, she argued.

"I always thought once you ask for a lawyer you get a lawyer," Rothgery said.

Not necessarily so, according to Texas legal procedures upheld by a federal judge who summarily dismissed Rothgery's case. The 5th U.S. Circuit Court of Appeals upheld that decision.

The Supreme Court was to hear arguments Monday in Rothgery's suit, with his attorneys insisting the procedure followed by Gillespie County allows defendants to be jailed for long periods without any access to counsel, a situation inconsistent with Sixth Amendment protections.

"We don't have anything the defendant has to do that would actually cause him jeopardy," counters Charles Frigerio, an attorney for Gillespie County.

"It would almost be ridiculous," Frigerio said. "Our position is you would almost have to have a police officer giving him a list of attorneys to call at the time when they're arresting an individual.

"I think obviously, that's taking it a little too far to the opposite end."

Under Texas law, the preliminary initial appearance is not a stage in the proceeding where someone arrested is subjected to a formal charge, indictment, information or arraignment. The 5th Circuit said because no prosecutor was involved at that point, Sixth Amendment protections did not apply.

Rothgery's attorneys said the New Orleans-based 5th Circuit "was in a small minority of courts" holding that position.

"I think a ruling in our favor would be hugely important in Texas," Marsh said. "It could affect thousands of defendants who are in this position. I don't think it's going to have a lot of national impact if we win, for the reason most other states are doing the right thing."

Frigerio said Rothgery's initial lawsuit was intended solely to win monetary damages from Gillespie County. Marsh doesn't deny seeking money.

"Certainly the length of how long charges were pending really affected his income and his ability to get work at the same level before this was hanging over his head," she said. "Everything that happened to him, it didn't go away until six or eight months later."

Marsh said justices will be asked to "follow the precedents they've set."

"When people are brought before a court and they ask for a lawyer, they get a lawyer," Marsh added. "I think it's common sense."

"Maybe that's naive," said Rothgery, who finally found work managing a rental equipment store in Llano County, just north of Gillespie County. "But I always felt that's the way the country should work."

Case is No. 07-440, Walter Allen Rothgery v. Gillespie County, Texas

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