

1996

Lew Day v. Maxwell Jackson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>LEW DAY,</p> <p>Petitioner/Appellant,</p> <p>v.</p> <p>MAXWELL JACKSON,</p> <p>Respondent/Appellee.</p>	<p>LOCKET NO. <u>960103-CA</u></p> <p><i>Priority No. 3</i></p> <p>Case No. 960103-CA</p>
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BRIEF OF APPELLEE

**DAY APPEALS FROM THE DENIAL AND DISMISSAL OF
HIS PETITION FOR POST-CONVICTION RELIEF, IN THE
SIXTH DISTRICT COURT FOR PIUTE COUNTY, THE
HONORABLE DAVID L. MOWER, PRESIDING**

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ORAL ARGUMENT AND PUBLICATION NOT REQUESTED

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IN THE UTAH COURT OF APPEALS

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v.

MAXWELL JACKSON,

Respondent/Appellee.

Priority No. 3

Case No. 960103-CA

NATURE OF APPEAL AND BASIS OF JURISDICTION

Petitioner appeals from the denial of his post-conviction petition, which challenged his conviction on the grounds of alleged juror bias and that “new” evidence allegedly implicated another person. This Court has jurisdiction over the appeal because petitioner’s challenged conviction was for manslaughter, a second-degree felony (R. 304). Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1995).

ISSUES AND STANDARDS OF REVIEW

1. Whether the post-conviction court’s conclusion that the Lewis Sudweeks’ video would not have changed the result of his criminal trial, even if it had been available, a proper basis for dismissal?

This appeal arises from the granting of the State's motion to dismiss . This Court reviews questions of law for correctness. Stewart v. State ex rel. Deland, 830 P.2d 306, 308 (Utah App. 1992).

2. Is petitioner's claim that his conviction should be vacated because Juror Leland Millett did not inform the court about his relationship to Evan Wiltshire frivolous since the petition admits that this was not a material question asked during voir dire? Whether a petition is frivolous on its face is a question of law that this Court reviews for correctness, without giving deference to the post-conviction court. Lancaster v. Utah Board of Pardons, 869 P.2d 945, 948 (“[a] petition of any nature which fails to state a claim may be dismissed.”). Pursuant to State v. Thomas, 777 P.2d 445, 451 (Utah 1989), a person is entitled to a new trial due to juror untruthfulness only if he can show “(1) that the juror failed to answer honestly a material question on voir dire, and (2) that a correct response would have provided a valid basis for a challenge for cause.” See McDonough Power Equipment Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

RELEVANT PROVISIONS

No constitutional, statutory, or regulatory provisions need to be reproduced for this brief.

STATEMENT OF THE CASE

Procedural History

A jury having convicted petitioner of manslaughter, a second-degree felony, in violation of Utah Code Ann. § 76-5-205 (1995), the criminal trial court imposed an indeterminate prison term of one-to-fifteen years (R. 59). This Court affirmed the conviction, rejecting petitioner's claims that (1) the State's requested manslaughter instruction was improperly given; (2) the criminal trial court should have given a negligent homicide instruction; (3) there was improper jury contact between a juror and a prosecution witness; and (4) the evidence was insufficient. State v. Day, 815 P.2d 1345 (Utah App. 1991).

Petitioner filed this petition on February 13, 1995 claiming, among other things, to have discovered two instances of newly-discovered evidence: (1) a videotape of Lewis Sudweeks, the State's primary witness, made two years after the trial in which he gave a slightly different story but maintained that petitioner committed the murder; and (2) information that juror Leland Millett was a first cousin to Evan Wiltshire, one of the participants in the drinking that preceded the crime (R. 1-11). The post-conviction court dismissed all claims as frivolous except for the one regarding Sudweeks' videotaped statement (R. 281).

Petitioner requested the court to reconsider its decision to dismiss the juror issue

because it was not, in fact, dealt with on direct appeal.¹ (R. 368). The post-conviction court never addressed this claim, (R. 412-414), and eventually granted the State's motion to dismiss (R. 391-92).

Statement of Facts

THE MURDER

On August 10, 1989, petitioner, along with David Kile, Lewis Sudweeks, and Evan Wiltshire, went out drinking for the day in Piute County.² By early evening, when they stopped along to side of the road, all were drunk. Petitioner took two rifles from the truck and shot Kile in the head. He then threatened the others by saying, "I'll have all you bastards in a pile before the night's over." Sudweeks fled the scene on foot to a nearby residence. Wiltshire was passed out in the front of the truck. In a state of confusion, fright, as well as intoxication, Sudweeks fled the residence without reporting the crime to police; shortly thereafter, he returned. When the sheriff arrived, they found two spent .22

¹ The State agrees that the post-conviction court mistakenly viewed petitioner's post-conviction claim of juror bias due to blood relationship with the direct appeal claim that a juror had improper contact with a prosecution witness. This mistake is not fatal to the conviction however for reasons discussed in point II.

² The facts in this paragraph are taken from Day, 815 P.2d at 1347.

caliber brass casings close to Kile's body. They eventually found petitioner wandering along the road.

SUDWEEKS' VIDEOTAPED STATEMENT

Two and one-half years after the murder and after petitioner's trial and conviction, Sudweeks, the primary State's witness at the criminal trial, was drinking beer at a friend's home on January 26, 1992 when she asked him to tell her about the murder of David Kile.³ Sudweeks appeared drunk and was drinking a beer when the tape began; during the next 30 minutes, he finished two more. Consequently, his description of the murder was not in narrative fashion, but in a sporadic and loosely connected series of statements. When asked why Lew Day, the petitioner, killed Kile, petitioner first said "the boy blew up and short my buddy." He then expanded on the reason for the killing by telling his friend that petitioner "came unglued cause his old lady told him not to come back [and] so he took it out on all the guys with him."

Later on in the conversation, Sudweeks told his friend that he was telling the truth in court about petitioner's actions. He also stated that after he ran to tell the police, he came back, took the gun away from petitioner "barehanded" and

³ The videotape has not been transcribed nor does the recording show elapsed time; therefore, it is impossible to provide any citation to specific statements. However, the tape was an exhibit at trial and is available from the post-conviction court.

“kicked his ass” even though petitioner threatened to shoot him. Sudweeks never recanted the material testimony he made in court, i.e., that petitioner shot David Kile.

THE ALLEGATION ABOUT JUROR MILLETT

The petition alleges that Juror Leland Millett was Evan Wiltshire’s first cousin (R. 2-3). Mr. Wiltshire was with petitioner, Sudweeks, and the victim throughout the evening of the shooting but was comatose due to overdrinking by the time it occurred (R. 192). He died two days later (R. 51). Although petitioner has reports from an investigator that claim Juror Millett and Mr. Wiltshire were related, there is no evidence in the record from the juror or from anyone under oath, admitting to the relationship.

SUMMARY OF THE ARGUMENT

The post-conviction court properly denied petitioner’s requested reversal of his conviction because Sudweeks’ videotaped recollection of the murder neither contradicts trial testimony nor adds new information about the crime. Throughout the video, Sudweeks maintained his trial position that petitioner committed the murder. Petitioner’s interpretation is merely an attempt to create a conflict when there is none.

The dismissal of petitioner's juror issue as frivolous also is legally valid. Petitioner attaches no documentation or affidavits to support this claim. Therefore, the juror challenge would have been mere speculation and conjecture, contrary to longheld rules about petitioner's responsibility to provide supporting materials to all his claims. Further, because the juror was never asked about the particular relationship in question, he did not lie during voir dire. Thus, the petition was facially invalid as a matter of law.

ARGUMENT

I. LEWIS SUDWEEKS' VIDEOTAPED STATEMENT DOES NOT CONTRADICT HIS TRIAL TESTIMONY AND WOULD NOT LEAD TO A DIFFERENT RESULT; THEREFORE, THE POST-CONVICTION COURT'S REFUSAL TO RE-EXAMINE THE CONVICTION WAS PROPER.

A. Petitioner's interpretation of Sudweeks' taped story is unreasonable and incorrect; under the correct interpretation, therefore, the video does not contradict or recant the essential parts of trial testimony.

Petitioner asserts that a videotape made two years after the trial contains "newly discovered evidence" that points to Evan Wiltshire as the murderer. As he claims in the petition:

Lewis Sudweeks is shown on video tape stating that he came back to the truck and kicked the Petitioner's ass and took the guns away from the Petitioner. Petitioner claims that Lewis Sudweeks' statement places him with the guns and raises the question of who's ass did he kick and who did he take the guns from? Petitioner was not 'beat-up', but Evan Wiltshire had been 'beat-up.' Petitioner was the only person that had not been 'beat-up.' Therefore, Petitioner claims that Mr. Sudweeks' statements on the video tape is [sic] new evidence and it points to Evan Wiltshire as the responsible party.

(R. 2-3).⁴ To accept petitioner's interpretation of Sudweeks' video story one would not only need to ignore Sudweeks' actual statements, but also conclude that he intentionally framed petitioner both at trial and in the videotape to "save" a person already dead.

The only support for this theory is petitioner's syllogism: Sudweeks says he "kicked" petitioner; petitioner showed no signs of being kicked; Wiltshire showed signs of being kicked; therefore, Wiltshire was the actual murderer. This syllogism is wrong however, not just for logical reasons but because it does not match up with the evidence. Wiltshire's body showed injuries, but not ones

⁴ Interestingly, this argument betrays petitioner's selective acceptance of Sudweeks' videotaped statement. On one hand, he ignores or disbelieves Sudweeks' consistent reference to "petitioner" as the person whose ass he kicked. On the other hand, he unquestionably accepts Sudweeks' claim that he actually kicked somebody. Additionally, he escalates Sudweeks' use of the potentially metaphorical phrase "kicked his ass" to the more descriptive "beat-up." In fact, Sudweeks never says on the video that he "beat" anybody up.

indicative of a blunt force against the gluteus maximus. When the police found Wiltshire passed out in the front passenger seat of the truck due to intoxication, flesh was torn off his nose and there were scratches on his face (R. 60, 124).

Rather than engage in this elaborate interpretation, it is much more logical to simply accept, as the lower court did, Sudweeks' video story for what it is, i.e., a slightly drunken recollection of a two-year old incident that affirms the essential aspects of his trial testimony. More than once, Sudweeks asserted he was telling the truth in court; more than once, he told his friend that Lew Day killed David Kile. No doubt, his story appears exaggerated in places but these exaggerations do not affect the imprinted picture of petitioner as a cold-blooded murderer.

B. Because the Sudweeks video does not contradict trial testimony, petitioner is not entitled to post-conviction relief.

In Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994), the Utah Supreme Court laid down the fundamental rule of post-conviction relief: it is available only when it would be "unconscionable not to re-examine the conviction." Articulated in various ways, this standard governs all claims in post-conviction relief, including petitioner's newly-discovered evidence challenge. Stewart v. State by and through Deland, 830 P.2d 306, 309 (Utah App. 1992). Seen from this

perspective, petitioner's alleged new evidence misses the mark. The story neither recants trial testimony nor adds new information to facts material to the crime. Thus, it would not, by any possibility, certainly not by a substantial likelihood, change the information upon which the jury based its verdict.

This case is unlike Stewart, where the lower court granted post-conviction relief because the new evidence was a direct recantation of the most damaging item of trial testimony, i.e., that Stewart was seen with a knife in his hand. Stewart, 830 P.2d at 307-308. Under these circumstances, the court correctly ruled that the recanted testimony would have been substantially likely to change the outcome and, therefore, failure to re-examine the conviction would be unconscionable. Id. at 309. Here, given Sudweeks' falsities in the video that he and Wiltshire were shot and his overall drunken demeanor, the videotape may, at most, bear on credibility. However, evidence that relates solely to witness credibility does not compel a new trial. State v. Becker, 803 P.2d 1290, 1294 (Utah App. 1990) ("[w]hen 'new' evidence merely tends to impeach or discredit

the testimony of a witness ... a new trial need not be granted.”).⁵ Because there is no newly-discovered evidence, confidence in the verdict can remain unshaken.

II. PETITIONER’S CHARGE THAT A JUROR WAS RELATED TO EVAN WILTSHIRE WAS CORRECTLY DISMISSED WITHOUT A RESPONSE AS FRIVOLOUS.

Petitioner further claims his conviction is illegal because one of the jurors was related to a person who had been partying with the group before the shooting. Brief of Petitioner at 4. The post-conviction court dismissed this challenge on the grounds that it was frivolous pursuant to rule 65B(b)(7), Utah Rules of Civil Procedure. Therefore, the State never formally responded to it.⁶

The question on appeal is the propriety of the court’s decision to dismiss the claim as frivolous. In its initial order, the court concluded that the issue was procedurally barred, on the grounds that the supreme court had ruled on it during the direct appeal (R. 281). However, contrary to the post-conviction court’s

⁵ By using the words “need not,” it appears that a trial court may grant a new trial in the exercise of its discretion, but is not compelled to do so. This practice gives courts power to order a new trial in close cases where “new” evidence might be so significant to a witness’ credibility that it may have changed the outcome. Because Sudweeks cast no doubt on the validity of his trial testimony and his other comments were made under the obvious influence of alcohol, this case is not the hypothetical “close” case.

⁶ After petitioner filed his motion for reconsideration, however, the State did file an opposition that dealt with the merits of this jury claim (R. 379). The post-conviction court never ruled on this motion specifically.

impression, the supreme court opinion did not address this precise issue. It discussed whether improper contact between a prosecution witness and a juror led to impermissible bias. Day, 815 P.2d at 1349. Dismissal was incorrect on this ground.

That conclusion does not mean the overall ruling of frivolousness was incorrect. Although it might have missed the precise reason, the conclusion that the issue was frivolous was right. Therefore, this Court can affirm the judgment on alternative grounds. State v. Gallegos, 712 P.2d 207, 208-09 (Utah 1985). First, contrary to long-held legal requirements for post-conviction pleading practice, Day presents only “bald assertions and conclusory allegations.” These speculative assertions do not support the holding of a hearing. Lancaster, 869 P.2d at 948. Thus, a post-conviction court may summarily dismiss the claim. People v. Duvall, 886 P.2d 1252, 1258 (Cal 1995); In re Rice, 828 P.2d 1086, 1092 (Wash. 1992). A petitioner must “demonstrate that he has competent, admissible evidence to establish the [alleged] facts. ... He may not simply state what he thinks others would say, but must present their affidavits or other corroborative evidence. ... In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.” Rice, 828 P.2d at 1092-93; cf. State v. Tyler, 850 P.2d

1250, 1258 (Utah 1993) (in ineffective assistance claim, defendant must show “actual” unreasonable representation and prejudice).

Petitioner’s allegations are of this speculative sort: “Petitioner complains that a member of the jury was a relative ... of a party. ... Petitioner claims that Evan Wiltshire is a first cousin to a jury member, Leland Millett. ...” (R. 2, 3). Nowhere does petitioner present any support for this claim. The letter he attached to the petition from a private investigator does not constitute “corroborative evidence” (R. 49-54). Though the investigator claims jurors had blood relationships, he also admits that he only interviewed petitioner and his original trial attorney (R. 50). Thus, his statement is based on petitioner’s own speculative assertions and is also objectionable. To his brief, petitioner attaches an affidavit that an attorney prepared for Juror Millett’s signature. This affidavit includes an unsigned paragraph admitting the relationship with Mr. Wiltshire and stating that he believes it may have had an influence in his vote. Nevertheless, Juror Millett never signed it. Because of this lack of supporting documentation, the post-conviction court properly dismissed the challenge without ordering a hearing. As the Washington Supreme Court stated in Rice, “[t]he purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations.” Because

petitioner provided no support for his allegations, they were properly dismissed as frivolous. Lancaster, 869 P.2d at 948.

Additional support for dismissing this claim at the pre-response stage lies in its facial legal inadequacy. In Lancaster, the supreme court ruled that “a petition of any nature which fails to state a claim may be dismissed” as frivolous. Id. The standard for finding a post-conviction claim frivolous, therefore, is the same standard used to determine whether a complaint should be dismissed pursuant to rule 12(b)(6), Utah Rules of Civil Procedure: “A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff’s right to relief based on those facts.” Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995); see also People v. Duvall, 886 P.2d 1252, 1258 (Cal 1995) (if post-conviction petitioner would not be entitled to relief, despite the assumed truth of allegations, summary dismissal appropriate); Tuller v. Neal, 886 P.2d 279, 280 (Colo. 1994) (“[i]f it appears from the face of a post-conviction petitioner that the petitioner is not entitled to ... relief, it may properly be denied without a hearing.”). The equivalence of these standards gives the court, on post-conviction review, broad screening power.

Petitioner's brief shows the legal frivolousness of this challenge:

Judge Tibbs asked numerous questions of the jury members about any relations they may have with the defendant, his attorneys and the prosecution. At no time did Judge Tibbs ask the jury members if any of them were related to David Kile the victim or Evan Wiltshire who was present at the time of the shooting.

Brief of Petitioner at 4. By admitting the criminal trial court did not ask about relationships with Evan Wiltshire, or anyone but Day and his attorneys, petitioner establishes his inability to prevail under the relevant law, which the Utah Supreme Court announced in State v. Thomas, 777 P.2d 445, 451 (Utah 1989). There, the supreme court decided that for a person to obtain a new trial due to juror dishonesty during voir dire, she or he must establish "(1) that the juror failed to answer honestly a material question on voir dire, and (2) that a correct response would have provided a valid basis for a challenge for cause." Id. By no measure did Juror Millett fail to answer honestly a material question at voir dire, because the relevant question was not asked.

Further, petitioner's claim that Juror Millett "had to find the Petitioner guilty of said shooting or his alleged cousin would be charged with the crime" is a spurious attempt to create a motivation for Juror Millett's guilty verdict. Mr.

Wiltshire died two days after the shooting and several months before the criminal trial; therefore, he could never have been charged with the crime.

CONCLUSION

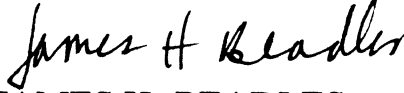
This Court should affirm the denial of relief and dismissal of the petition.

ORAL ARGUMENT AND PUBLICATION NOT REQUESTED

The State does not believe this case presents a complex set of factual or legal questions; therefore, oral argument would not significantly aid the decisionmaking process. Additionally, publication would not substantially benefit courts or practitioners since case law precedent already exists for the issues present.

RESPECTFULLY SUBMITTED THIS 5th day of ^{July}~~June~~ 1996.

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Criminal Appeals Division

CERTIFICATE OF MAILING

I certify that on 5th July 1996, I mailed, by U.S. Mail, postage prepaid,
two copies of this ***BRIEF OF APPELLEE*** to:

LEW DAY
Kane County Jail
76 North Main
Kanab, Utah 84741

A handwritten signature in cursive script, appearing to read "J. Beadler", is written over a horizontal line.