

1997

Gordon E. Johnson v. State of Utah, Jon J. Bunderson, Box Elder County Attorney : Brief of Appellant

Utah Court of Appeals

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Jon J. Bunderson; Attorney for State of Utah .

Gordon E. Johnson; In Propria Persona.

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IN THE SUPREME COURT OF UTAH

GORDON E. JOHNSON,)	
)	
Petitioner/Appellant)	Case No. 970071
)	
vs.)	First District Court
)	No. 960000001
STATE OF UTAH,)	
)	Criminal No. 885000062
JON J. BUNDERSON, BOX ELDER)	
)	Priority No. 16
COUNTY ATTORNEY,)	
)	
Defendants/Appellees.)	

Appeal From The February 27, 1996 Memorandum Decision, And
January 29, 1997 Memorandum Decision And Order Of Dismissal
In The First Judicial District Court In And For Box Elder
County, State Of Utah, The Honorable Gordon J. Low, Presiding

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UTAH

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QUESTIONS PRESENTED

1. Is a petitioner for post conviction relief entitled to an evidentiary hearing by the sentencing court?

2. Is coram nobis proper to challenge deprivation of a constitutional right to a fair trial, including the right to effective assistance of counsel?

3. Is a petitioner for post-conviction relief entitled to the appointment of counsel on a pro bono basis?

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SUMMARY OF THE ARGUMENT

Under Utah statutory and case law petitioner is entitled to an evidentiary hearing, and his complaint should not have been dismissed without an opportunity for a hearing or an opportunity to amend it and prove ineffective assistance by his court-appointed attorney.

ARGUMENT

I

"Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction upon the following grounds: the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; ..." U.C.A. § 78-35a-104(1)(d) (H.B.214 1996)

It is interesting to note the above statute is the exact opposite of a ground given by Mr. Bunderson for dismissal, i.e. a civil suit to set aside a conviction in a criminal case.

In Case No. 950906607, unpublished opinion on file, Petitioner Cosey was given a new trial because his attorney James Valdez didn't introduce into evidence a photograph of a pink woman's sock. "The trial in the original case was held on July 21 through July 28, 1992. Timothy R. Hansen was the judge in that trial." Page 2. He was also judge in the 1996 evidentiary hearing.

"The appropriate remedy in a case such as this is a motion for relief under Utah Rules of Civil Procedure, Rule 65B(i), Postconviction Hearings, which in this case should be brought in the sentencing court. ..." (Emphasis Added) State v. Johnson, 635 P.2d 36, 38 (Utah 1981)

In the instant case Judge Gordon J. Low is in the same court as petitioner's court appointed attorney, Judge Judkins, who was more

1 ineffectve by allowing the introduction of defendant's Medicaid
2 information

3 "Q Did you turn this form over to the police?

4 A Uh huh.

5 Q Or at least a copy of it, excuse me.

6 A Yes. A copy.

7 MR. BUNDERSON: Move for the introduction of Exhibit B,
8 your Honor.

9 THE COURT: Counsel?

10 MR. JUDKINS: Could I voir dire, your Honor?

11 THE COURT: You may.

12 VOIR DIRE EXAMINATION

13 BY MR. JUDKINS:

14 Q Mrs. Smith, you don't actually know who filled this
15 form out?

16 A No.

17 Q You mailed it to a Gordon Johnson?

18 A Uh huh.

19 Q And you received it back and that's all you know about
20 it; is that correct?

21 A That's right.

22 Q And it has never been analyzed by a handwriting expert
23 to see whether or not my client completed that?

24 A No. Not by a handwriting expert.

25 MR. JUDKINS: Your Honor, I would object to the
26 introduction of that document based on foundation, and as to--
27 without some kind of a relationship to my client, Gordon Johnson,"
28 (Criminal No. 885000062, Rptr. Tr. P. 19, lines 1 - 25)

1 "A state plan must provide, under a state statute that
2 imposes legal sanction, safeguards meeting the requirements
3 of this subpart that restrict the use or disclosure of
4 information concerning applicants and recipients to
5 purposes directly connected with the administration of
6 the plan." 42 C.F.R. § 431.301.

7 "The Department of Human Services must safeguard or restrict
8 access to any information we have on specific clients. It
9 does not matter whether this information is kept in the
10 case record, in the computer system or somewhere else. It
11 can be shared only as described in Sections 115-1 and 115-3.
12 Any person who fails to safeguard information is subject to
13 both civil and criminal penalties." (Emphasis Added)

14 BULLETIN OFS-IIIF-92-02, Page 109-1.

15 II

16 "... Thus, coram nobis could be used, in carefully
17 limited circumstances, to modify or vacate a judgment
18 where extra-record facts showed that the defendant had
19 been deprived of constitutional right to a fair trial,
20 including the right to the assistance of counsel. 24
21 C.J.S. Criminal Law § 1606(2) and (13)." State v.
22 Johnson, 635 P.2d @ 38 (Utah 1981)

23 "Notwithstanding Subsection (1)(c), a person may be
24 eligible for relief on a basis that the ground could have
25 been but was not raised at trial or on appeal, if the
26 failure to raise that ground was due to ineffective
27 assistance of counsel." (Emphasis Added) U.C.A 78-35a-106(2).

28 In United States v. Morgan, 346 U.S. 502 (1954) defendant's
conviction was vacated even after the expiration of the full term
of service.

"By a proceeding in the nature of coram nobis, respondent
sought to have a Federal District Court set aside his
conviction and sentence in that court for a federal crime,
though he had served the full term for which he had been
sentenced. ..." Id. @ 502.

III

Petitioner made a Motion To Appoint Counsel before the final
Order of Dismissal was signed under U.C.A. § 78-35a-109. The finding
"... a document was admitted into evidence which, by State law,
should have been unavailable for that purpose." justified counsel.

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Dated February 15, 1997 at Brigham City, Utah

Gordon E. Johnson
Gordon E. Johnson

I hereby certify or declare under penalty of perjury that on
 ry , 1997 I mailed, postage prepaid, two copies of the
 ing Appellant's Opening Brief to B.E. County Attorney Jon J.
 son at 45 North 100 East, Brigham City, Utah 84302.

IN THE FIRST DISTRICT COURT, COUNTY OF BOX ELDER

STATE OF UTAH

GORDON E. JOHNSON,

Plaintiff,

vs.

STATE OF UTAH and BOX ELDER
ATTORNEY, JON J. BUNDERSON

Defendants.

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MEMORANDUM DECISION

Case No. 960000001

THIS MATTER IS BEFORE THE COURT upon a Motion for Writ Coram Nobis brought by the Plaintiff and a Motion to Dismiss brought by the Defendant, Jon J. Bunderson, and by the State of Utah.

The Motion for Writ Coram Nobis is improperly pled. Writ of error *coram nobis* is a method or vehicle used to bring matters of fact before the court which if known at the time of judgment would have rendered the judgment moot or at least prevented its rendition or entry.

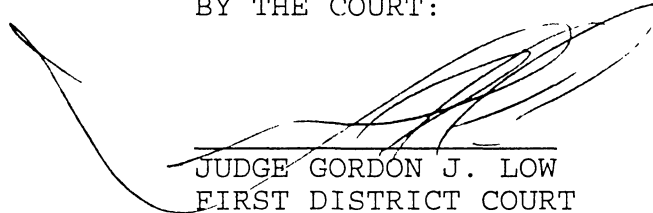
The Complaint raised here by the Plaintiff is that a document was admitted into evidence which, by State law, should have been unavailable for that purpose. That assertion is not supported by the record and the Court is unaware, by the record, whether the document was received pursuant to court order or obtained pursuant to court order but was certainly received pursuant to court order as an item of evidence. Overall, the request for *coram nobis* treatment is misplaced.

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#960000001
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The Defendant Jon Bunderson's Motion to Dismiss is granted for the reasons stated therein as is the State of Utah's Motion to Dismiss for the reasons stated therein. Defendant, Mr. Bunderson, is directed to prepare a formal Order in conformance herewith.

DATED this 27 day of February, 1996.

BY THE COURT:



JUDGE GORDON J. LOW
FIRST DISTRICT COURT

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final Order simply referencing the February 27, 1996 Memorandum Decision wherein the case was dismissed and references earlier denials of motions for supplement relief.

DATED this 29 day of January, 1997.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'G. J. Low', written over a horizontal line.

JUDGE GORDON J. LOW
FIRST DISTRICT COURT