

1987

Michael A. Fajen v. Gary Deland : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael A. Fajen; Pro Se.

David L. Wilkinson; Attorney General; David B. Thompson; Assistant Attorney General; Attorneys for Respondents.

Recommended Citation

Brief of Respondent, *Fajen v. Deland*, No. 870467 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/661

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU

IN THE UTAH COURT OF APPEALS

50

.A10

DOCKET NO.

870467

MICHAEL A. FAJEN,

:

Petitioner-Appellant,

:

Case No. 870467-CA

v.

:

GARY DELAND, Director, Utah
State Department of
Corrections, et al.,

:

Category No. 3

:

Respondents.

:

BRIEF OF RESPONDENTS

APPEAL FROM A DISMISSAL OF A PETITION FOR A
WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA,
JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
DAVID B. THOMPSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondents

MICHAEL A. FAJEN
Pro Se
P.O. Box 250
Draper, Utah 84020

IN THE UTAH COURT OF APPEALS

MICHAEL A. FAJEN, :
Petitioner-Appellant, : Case No. 870467-CA
v. :
GARY DELAND, Director, Utah : Category No. 3
State Department of :
Corrections, et al., :
Respondents. :

BRIEF OF RESPONDENTS

APPEAL FROM A DISMISSAL OF A PETITION FOR A
WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA,
JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
DAVID B. THOMPSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondents

MICHAEL A. FAJEN
Pro Se
P.O. Box 250
Draper, Utah 84020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT	
POINT I THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S PETITION WITHOUT A HEARING ON THE GROUNDS ARGUED IN RESPONDENTS' MOTION TO DISMISS.....	3
CONCLUSION.....	5

TABLE OF AUTHORITIES

CASES CITED

<u>Connecticut Board of Pardons v. Dumschat</u> , 452 U.S. 458 (1981).....	5
<u>Dock v. Latimer</u> , 729 F.2d 1287 (10th Cir.), cert. denied, 469 U.S. 885 (1984).....	5
<u>Greenholtz v. Nebraska Penal Inmates</u> , 442 U.S. 1 (1979).....	5
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987).....	4

STATUTES AND RULES

Third Dist. Ct. R. 3(b).....	5
UTAH CODE ANN. § 77-13-6 (1982).....	2, 3, 4
UTAH CODE ANN. § 77-27-5(2) (Supp. 1987).....	3, 4
UTAH CODE ANN. § 78-2a-3(2)(f) (1987).....	1
Utah R. Civ. P. 65B(i).....	3, 4
Utah R. Civ. P. 65B(i)(1).....	3
Utah R. Civ. P. 65B(i)(7).....	5

IN THE UTAH COURT OF APPEALS

MICHAEL A. FAJEN,	:	
Petitioner-Appellant,	:	Case No. 870467-CA
v.	:	
GARY DELAND, Director, Utah	:	Category No. 3
State Department of	:	
Corrections, et al.,	:	
Respondents.	:	

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from the district court's order dismissing petitioner's petition for a writ of habeas corpus. This Court has jurisdiction to hear the appeal under UTAH CODE ANN. § 78-2a-3(2)(f) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue on appeal is whether the district court correctly dismissed petitioner's petition on the grounds that petitioner had not presented a motion to withdraw his guilty plea in the court in which it was entered and that the decision of the Board of Pardons was not reviewable.

STATEMENT OF THE CASE

Petitioner, Michael A. Fajen, filed a petition for a writ of habeas corpus in the Third District Court (R. 2-9).¹ Upon the filing of a motion to dismiss by respondents, the district court dismissed the petition (R. 42). After filing a

¹ Although petitioner titled his petition as one for a writ of habeas corpus, it technically was a petition for postconviction relief under Utah R. Civ. P. 65B(i). Cf. Utah R. Civ. P. 65B(f).

notice of appeal from the order of dismissal, petitioner filed in the district court a motion for relief from that order (R. 57). That was denied in an unsigned minute entry dated November 24, 1987 (R. 59).²

STATEMENT OF FACTS

The following facts are relevant to petitioner's appeal.

According to the petition petitioner filed in district court, he is currently confined at the Utah State Prison for a conviction of forcible sexual abuse after the entry of a plea of guilty (R. 4). Although petitioner raised a connected issue of ineffective assistance of counsel, his central claim was that his guilty plea was involuntarily entered. He also claimed that the decision of the Board of Pardons to rehear his case in August 1987, rather than at some earlier date, violated his constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment (R. 4-8).

Respondents filed a motion to dismiss the petition, arguing that petitioner's claims for relief were not properly before the court because he had not filed a motion to withdraw his guilty plea under UTAH CODE ANN. § 77-13-6 (1982) and the decision of the Board of Pardons was not reviewable under UTAH

² Given that the record contains only an unsigned minute entry with respect to petitioner's motion for relief, there may be some question as to whether his appeal is properly before this Court. See *South Salt Lake v. Burton*, 718 P.2d 405, 406 (Utah 1986) (unsigned minute entry does not constitute final appealable order). Nevertheless, respondents will address petitioner's issue on appeal.

CODE ANN. § 77-27-5(2) (Supp. 1987) or the pertinent federal case law (R. 21-25). The court granted that motion without a hearing (R. 42).

SUMMARY OF ARGUMENT

Because petitioner had not filed a motion to withdraw his guilty plea before seeking relief under Utah R. Civ. P. 65B(i), and because the decision of the Board of Pardons to rehear petitioner's case in August 1987, rather than at some earlier date, was not reviewable, the district court correctly dismissed petitioner's petition without a hearing.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S PETITION WITHOUT A HEARING ON THE GROUNDS ARGUED IN RESPONDENTS' MOTION TO DISMISS.

On appeal, petitioner argues that the district court improperly dismissed his petition. This argument is without merit.

Although, at first blush, petitioner's claim that his guilty plea was involuntarily entered would appear to be appropriately brought under Utah R. Civ. P. 65B(i)(1) in a proceeding for postconviction relief, a review of the applicable provision in the code of criminal procedure indicates that it is not.

UTAH CODE ANN. § 77-13-6 (1982) states:

A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

This statutory provision governing the withdrawal of a guilty plea--the relief petitioner apparently seeks--sets no time limit for filing a motion to withdraw the plea. Therefore, the proper procedure is for petitioner first to move to withdraw his guilty plea pursuant to § 77-13-6 in the court in which it was entered, before seeking extraordinary relief under Rule 65B(i). See State v. Gibbons, 740 P.2d 1309, 1311-12 (Utah 1987). For the same reasons that the Supreme Court required the defendant in Gibbons to file a motion to withdraw in the trial court before attacking his guilty plea on appeal, the district court correctly ruled that petitioner had to present his claim to the court in which he was convicted before seeking collateral postconviction relief. In that petitioner's ineffective assistance of counsel claim was inextricably linked to the guilty plea issue, it also was not properly before the district court.

Petitioner's additional claim concerning the Board of Pardons may be disposed of summarily. UTAH CODE ANN. § 77-27-5(2) (Supp. 1987) provides:

The determinations and decisions of the Board of Pardons in cases involving approval or denial of any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures, and restitution, are final and are not subject to judicial review. . . .
[Emphasis added.]

Under this provision, the district court lacked the authority to review the board's decision to rehear petitioner's case in August 1987, rather than at an earlier date. Moreover, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid

sentence." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979). See also Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463-64 (1981); Dock v. Latimer, 729 F.2d 1287, 1290 (10th Cir.), cert. denied, 469 U.S. 885 (1984). Based upon this authority, petitioner cannot validly claim that the board denied him due process and equal protection or violated the eight amendment's proscription of cruel and unusual punishment by setting his parole rehearing date further into the future than he hoped.

Finally, that the district court granted respondents' motion to dismiss without a hearing, see Third Dist. Ct. R. 3(b), did not deny petitioner due process. Prior to the court's ruling, petitioner filed a written response to respondents' motion which fully argued petitioner's position (R. 14-18). A hearing on respondents' motion was neither necessary nor required. Cf. Utah R. Civ. P. 65B(i)(7).

CONCLUSION

Based upon the foregoing arguments, the district court's order dismissing petitioner's petition should be affirmed.

DATED this 31st day of December, 1987.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing brief of respondents were mailed, postage prepaid, to Michael A. Fajen, P.O. Box 250, Draper, Utah, 84020, this 31st day of December, 1987.

David B. Thompson