

1986

Fredrick George Olsen v. Gary Delund, David Franchina, Fred Hurst, Gerald Cook, Warden, Utah State Prison :Unknown

Utah Supreme Court

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Recommended Citation

Legal Brief, *Utah v. Olsen*, No. 860272.00 (Utah Supreme Court, 1986).
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IN THE SUPREME COURT OF THE STATE OF UTAH

FREDRICK GEORGE OLSEN,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 860272
v	:	
	:	
GARY DELAND, Director, Utah	:	
State Dept. of Corrections;	:	
DAVID FRANCHINA, Superinten-	:	
dent, Utah Correctional	:	
Institutions; FRED HURST,	:	Priority No. 3
Director, Minimum Security,	:	
Utah State Prison; and GERALD	:	
COOK, Warden, Utah State	:	
Prison, et al.,	:	
	:	
Defendant-Respondents.	:	

APPEAL FROM DENIAL OF PETITION FOR HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE SCOTT DANIELS, PRESIDING.

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Appellant, pro se

FILED
JUL 21 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

FREDRICK GEORGE OLSEN, :
 :
 Plaintiff-Appellant, : Case No. 860272
 :
 v :
 :
 GARY DELAND, Director, Utah :
 State Dept. of Corrections; :
 DAVID FRANCHINA, Superinten- :
 dent, Utah Correctional :
 Institutions; FRED HURST, : Priority No. 3
 Director, Minimum Security, :
 Utah State Prison; and GERALD :
 COOK, Warden, Utah State :
 Prison, et al., :
 :
 Defendant-Respondents. :

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State v. Steggell, 660 P.2d 252 (Utah 1983).....1

IN THE SUPREME COURT OF THE STATE OF UTAH

FREDRICK GEORGE OLSEN, :
 :
 Plaintiff-Appellant, :
 : Case No. 8602/2
 v. :
 :
 GARY DELAND, Director, Utah :
 State Dept. of Corrections; :
 DAVID FRANCHINA, Superinten- :
 dent, Utah Correctional :
 Institutions; FRED HURST, : Priority No. 3
 Director, Minimum Security, :
 Utah State Prison; and GERALD :
 COOK, Warden, Utah State :
 Prison, et al., :
 :
 Defendant-Respondents. :

ARGUMENT

POINT I

THE ISSUE RAISED BY PETITIONER IN HIS SUPPLEMENTAL BRIEF WAS NOT RAISED IN THE LOWER COURT AND SHOULD NOT BE CONSIDERED ON APPEAL.

For the first time in this case, petitioner has raised through a supplemental brief an argument that Judge Bunnell should have recused himself from petitioner's criminal case. Apparently, this issue was not even raised before Judge Bunnell. This Court has repeatedly held that issues raised for the first time on appeal will not be considered. State v. Steggell, 660 P.2d 252 (Utah 1983); State v. Barella, 714 P.2d 287 (Utah 1986).

This Court has occasionally considered issues raised for the first time on appeal where there appears to be manifest error. E.g. State v. Cook, 714 P.2d 296 (Utah 1986). In this

case, however, this Court is without any record to review for such error since petitioner provided no trial court record nor evidence at the habeas corpus hearing to support his claim of bias. Petitioner submits only a self-serving affidavit dated January 26, 1987, over 2 years after he pled guilty and nearly a year after the habeas corpus hearing. This Court should require petitioner to raise this issue in the trial court in the form of a motion to withdraw his guilty plea so that the trial court has an opportunity to consider the issue and make a record of its decision. C.f. State v. Gibbons, 60 Utah Adv. Rep. 36 (filed June 30, 1987).

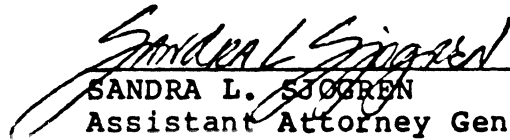
Petitioner also cites, through a second supplemental brief, this Court's recent decision in State v. Gibbons as support for his claim that the habeas court should have overturned his guilty plea. On the contrary, however, this case supports that the trial court should have been given the first opportunity to consider petitioner's challenge to his guilty plea and not this Court nor the Third District Court in a habeas corpus proceeding. It does not support petitioner's claim that he should have prevailed below. Rather, Judge Daniels could have dismissed the petition without an evidentiary hearing and required petitioner to raise his claims first in the trial court through a motion to withdraw his guilty plea.

CONCLUSION

Respondent requests this Court to deny petitioner's request for a rehearing and to affirm its original ruling affirming the lower court's decision.

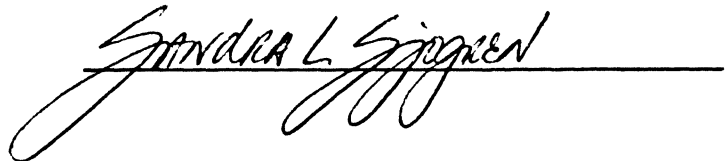
DATED this 21st day of July, 1987.

DAVID L. WILKINSON
Attorney General


SANDRA L. SOOBREN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 21st day of July, 1987, I caused to be mailed, postage prepaid, a true and exact copy of the above and foregoing Reply to Petition for Rehearing to Fredrick G. Olsen, pro se, P.O. Box 250, Draper, Utah 84020.

A handwritten signature in cursive script, reading "Sandra L. Sjogren", is written over a solid horizontal line.