

1986

# The State of Utah v. Casey Neal Sweat : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

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

Curtis C. Nessel; Salt Lake Legal Defender Association; attorney for appellant.

David L. Wilkinson; attorney general; Earl F. Dorius; assistant attorney general; attorneys for respondent.

---

## Recommended Citation

Petition for Rehearing, *Utah v. Sweat*, No. 198620718.00 (Utah Supreme Court, 1986).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1378](https://digitalcommons.law.byu.edu/byu_sc1/1378)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
 :  
 Plaintiff-Respondent :  
 :  
 v. :  
 :  
 CASEY NEAL SWEAT, : Case No. 20718  
 :  
 Defendant-Appellant :

---

PETITION FOR REHEARING

Petition for reconsideration of a per curiam decision by the Utah Supreme Court filed April 8, 1986 in an appeal from a guilty plea and conviction of Burglary, a Felony of the Second Degree, in the Third District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, Presiding.

CURTIS C. NESSET  
SALT LAKE LEGAL DEFENDER ASSOC.  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

DAVID WILKINSON  
Attorney General  
EARL F. DORIUS  
Assistant Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

U..

UTAH  
DOCUMENT  
KFU  
45.9  
.S9

DOCKET NO. 20718

**FILED**

APR 2 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH,                   :  
   :  
                  Plaintiff-Respondent

v.                                       :  
   :

CASEY NEAL SWEAT,                   :  
   :  
                  Defendant-Appellant

Case No. 20718

---

PETITION FOR REHEARING

Petition for reconsideration of a per curiam decision by the Utah Supreme Court filed April 8, 1986 in an appeal from a guilty plea and conviction of Burglary, a Felony of the Second Degree, in the Third District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, Presiding.

CURTIS C. NESSET  
SALT LAKE LEGAL DEFENDER ASSOC.  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

DAVID WILKINSON  
Attorney General  
EARL F. DORIUS  
Assistant Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE . . . . .	1
STATEMENT OF FACTS . . . . .	1
ARGUMENT . . . . .	1
CONCLUSION . . . . .	5

TABLE OF AUTHORITIES

	PAGE
<u>Cole v. Arkansas</u> , 333 U.S. 196 (1948) . . . . .	3
<u>Dunn v. United States</u> , 442 U.S. 100 (1979) . . . . .	3
<u>Eaton v. Tulsa</u> , 415 U.S. 697 (1974) . . . . .	3
<u>State v. Gibson</u> , 681 P.2d 1 (Idaho App. 1984) . . . . .	4
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985) . . . . .	4
<u>State v. Lipsky</u> , 608 P.2d 1241 (Utah 1980) . . . . .	4
<u>State v. Martin</u> , 679 P.2d 489 (Ariz. 1984) . . . . .	3
<u>State v. Sweat</u> , 31 Utah Adv. Rep. 29 (Filed April 8, 1986)	1
<u>United States v. Needles</u> , 472 F.2d 652 (2nd Cir. 1973) . . .	4
<u>United States v. Weston</u> , 448 F.2d 626 (9th Cir. 1971) . . .	4

CONSTITUTIONAL PROVISIONS

Utah Const. Art. 1 §12 . . . . .	3
Utah Const. Art. 1 §13 . . . . .	3



prepared subsequent to that evaluation included uncorroborated statements that the defendant sexually assaulted the burglary victim. The allegations of sexual misconduct were never charged and were denied by Mr. Sweat (T. 2-3). The trial court sentenced the defendant on the basis of the report (T. 7). On appeal, Mr. Sweat contested the inclusion of the unsubstantiated allegations in the report which formed the basis for the judge's sentencing decision.

The opinion in this case states: "There is no clear indication in the record that defendant's sentence was based on the alleged sexual misconduct. In fact, the record undermines this statement. Just before imposing sentence, the trial judge stated:

THE COURT: Well, taking all of the considerations, taking everything into consideration I don't see any legal reason why sentencing cannot be imposed at this time. Therefore, I'm going to impose sentence as follows: . . . (T. 7)

The district court relied on the entire 90 day evaluation/presentence report in imposing sentence. That reliance resulted in prejudice to Mr. Sweat.

The presentence report investigator recommended commitment to the Utah State Prison. (Appellant's Brief, Addendum A at 9). Immediately preceding this recommendation is a discussion of the defendant's "sexual attacks upon the elderly woman." Id. On the other hand, a psychologist, who had no knowledge of the sexual misconduct allegations, recommended that the defendant be placed in a substance abuse treatment facility. (Appellant's Brief, Addendum D at 2). Clearly, the judge's reliance on the erroneous allegations led him to the conclusion of the presentence report investigator

rather than the conclusion of the psychologist. The Appellant was obviously harmed by such a conclusion.

The per curiam opinion in this case states that "so long as basic constitutional safeguards of due process and procedural fairness are afforded, the trial court has broad discretion in considering 'any and all information that reasonably may bear on the proper sentence.'" Id. (citations omitted). In other words, sentencing proceedings are subject to the requirements of due process. However, the process in this case violated one of the most fundamental tenets of due process which the opinion completely ignored.

A criminal defendant may not be convicted of a crime for which he is not charged. Indeed, this principle was recognized by the Supreme Court in Cole v. Arkansas, 333 U.S. 196, 201 (1948). The Court stated, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." See, also, Dunn v. United States, 442 U.S. 100 (1979); Eaton v. Tulsa, 415 U.S. 697 (1974); and State v. Martin, 679 P.2d 489 (Ariz. 1984).

The Utah Constitution sets out certain rights of the accused in criminal prosecutions. Article I, Section 12 states:

In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof . . .

Further, Article I, Section 13 states:

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate  
. . . .

No person can be tried and punished without first being charged. In this case, the trial judge determined punishment for the defendant after considering uncharged, unsubstantiated allegations. This is clearly at odds with any notion of due process.

In his opening brief, the Appellant contended that an accused is entitled to have a judge rely on accurate information in imposing sentence. (Appellant's Brief at 4) Indeed, in State v. Lipsky, 608 P.2d 1241, 1249 (Utah 1980), this Court stated: "The fair administration of justice at the least requires that the information upon which the judge relies in imposing punishment is accurate." This position was reaffirmed in State v. Howell, 707 P.2d 115, 118 (Utah 1985), in which this Court stated: "The due process clause of Article I, Section 7 of the Utah Constitution, requires that sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing sentence." Any sentence which is based, in part, on unreliable information must be remanded. United States v. Needles, 472 F.2d 652 (2nd Cir. 1973); United States v. Weston, 448 F.2d 626 (9th Cir. 1971); State v. Gibson, 681 P.2d 1 (Idaho App. 1984).

In this case, the presentence report contained allegations of significant sexual misconduct on the part of Mr. Sweat. However, the allegations were in the form of unsubstantiated, second hand reports from the victim who took several days to report the alleged sexual misconduct. The allegations were apparently insufficient to support the instigation of criminal charges. (Appellant's Brief at 5-7). Such unsubstantiated claims are far from the "accurate information" envisioned by Lipsky and Howell.

Sentencing in felony cases in this state can result in the second-most severe penalty that a state can impose--deprivation of an individual's liberty for a significant length of time. Only the penalty of death is more severe. In light of the severity of the penalty, the issue in this case is simple: Should this Court require a sentencing judge to act only on information that is accurate, reliable, and trustworthy? The alternative is to allow a judge to impose sentence based on innuendo, rumor, and falsehood. To allow the latter would gut the notion of due process at the sentencing phase of a criminal proceeding.

CONCLUSION

Because this court either misapprehended or overlooked appellant's primary contention in its decision in this case, the appellant respectfully petitions this Court to reconsider that decision and reverse and remand his sentence for redetermination.

Respectfully submitted this 22<sup>nd</sup> day of April, 1986.

*Curtis C. Nesset*

\_\_\_\_\_  
CURTIS C. NESSET  
Attorney for Petitioner

I hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this \_\_\_ day of April, 1986.

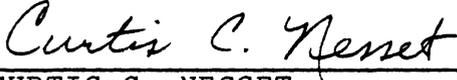
CERTIFICATION

I, CURTIS C. NESSET, do hereby certify the following:

(1) I am the attorney for appellant/petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 22<sup>ND</sup> day of April, 1986.

  
\_\_\_\_\_  
CURTIS C. NESSET  
Attorney for Appellant/Petitioner