

1987

Claude A. Bundy v. Gerald Cook, et al. : Reply Brief of Appellant

Utah Supreme Court

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Kimberly Hornak; Assistant Attorney General; Attorney for Respondent.

Philip G. Jones; Attorney for Appellant.

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BRIEF

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IN THE SUPREME COURT

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CLAUDE A. BUNDY,	:	
	:	
Petitioner and Appellant,	:	Case No. 870016
vs.	:	
	:	Classification No. 3
GERALD COOK, et al,	:	
	:	
Respondents.	:	

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REPLY BRIEF OF APPELLANT

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Appeal from a denial of a Petition for Writ of Habeas Corpus by the Hon. Scott Daniels, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on November 8, 1986.

APPEARANCES

Kimberly Hornak
Assistant Attorney General
Attorney for Respondent
236 State Capitol Building
Salt Lake City, Utah 84114

Philip G. Jones
Attorney for Appellant
930 South State Street, #10
Orem, Utah 84058

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Kimberly Hornak
Assistant Attorney General
Attorney for Respondent
236 State Capitol Building
Salt Lake City, Utah 84114

Philip G. Jones
Attorney for Appellant
930 South State Street, #10
Orem, Utah 84058

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STATEMENT OF ISSUES PRESENTED ON APPEAL

Appellant submits that there is no dispute as to the issues on appeal.

STATEMENT OF FACTS

Appellant submits that there is no dispute as to his statement of facts.

SUMMARY OF ARGUMENT

Appellant submits that Respondent unfairly capitalizes on the fact that certain errors of trial and appeal counsel were made and argues that these errors do not allow this matter to be heard on the merits. Appellant would argue that he is entitled to the relief afforded by Habeas Corpus. Further, he would restate his belief that relief should be afforded due to errors associated with the conduct of trial counsel, appeal counsel, the testimony of Officer Scott, the testimony of his spouse and the

conduct of the prosecutor.

ARGUMENT

POINT I PETITIONER IS ENTITLED TO USE THE REMEDY OF HABEAS CORPUS

Respondent argues that Appellant is not entitled to use the remedy of Habeas Corpus. Nonetheless, Appellant contends that he is. He would agree with counsel for respondent that the issues he now raises should have been raised upon appeal. However, since he was unable to raise them on appeal, he feels he should be entitled to do so now. The records will show that he requested counsel to raise these same issues. Counsel refused. The record in this Court as well as respondents brief shows a reliance on the facts that "trial counsel" or "appellate counsel" "failed" to do something, and thus rights were waived or lost. Appellant would argue that it is unconscionable that his "rights" should be lost because of a failure by a third party to do what he asked them to do. Had counsel raised all issues, he would not need a writ of habeas corpus. Had counsel properly made objections, as requested to do, this Court may have reached a different result in Mr. Bundy's original appeal. Therefore, Appellant would allege that there has been substantial prejudice to his case and thus he is entitled to relief.

POINT II THE OPINION TESTIMONY OF OFFICER WELBY WAS INADMISSABLE

Appellant believes that the argument set forth in his

original brief correctly states his position on this matter. He would further argue that Officer Welby's testimony, which was essentially hearsay calculated to discredit his character, substantially prejudiced his chances with the jury.

POINT III THE TESTIMONY BY PETITIONER'S WIFE WAS
IMPROPERLY ADMITTED INTO EVIDENCE

Appellant believes that the argument set forth in his original brief correctly states his position on this matter. However, he would indicate that contrary to the courts assertions his statement did not corroborate the statement of the witness. In truth, the babysitting in question on the dates indicated by his spouse were for her while he was living out of town and she was not working. He testified that the victim had baby sat during periods when his wife was working. Thus two different time periods are being discussed and not one. Had trial counsel obtained the evidence requested this problem would not exist. Further, if Mr. Bundy had been present in chambers the problem would not have existed in the first place. Petitioner believes that this compounding of problems and misunderstanding of facts by the Court (let alone a jury) are highly prejudicial.

POINT IV THE PROSECUTOR'S REMARKS WERE INFLAMMATORY

Respondent again places great weight upon the fact that trial counsel failed to object to the prosecutors statements. First, it should be noted that this is one of appellants

complaints. Second, it is commonly accepted that a prosecutor does not testify and should not place in evidence facts which have not be placed before the court. It is clear from a reading of the record that the prosecutor was involved in a course of conduct clearly calculated to influence the jury, not to prove the truth. Those present at trial if allowed to testify would indicate that the prosecutors comments had profound and visible effects upon the jury. Thus, his conduct should be grounds for reversal.

POINT V PETITIONER WAS DENIED EFFECTIVE COUNSEL

Appellant contents that his original brief effectively states his position on this matter. However, he would like to comment on two matters. First, respondent indicates that appellant must show "unusual circumstances". One wonders if this means that counseis conduct is unusual as compared to himself or others. Further, does this mean that if the general standard of representation is poor, then one is not entitled to a fair trial? Appellant contents that if nothing he has stated indicates circumstances warranting relief, that the failure of counsel to bring even a legal pad to trial is indicative of his care. Second, regarding the alibi defense, Appellant would indicate that he tried to bring such a defense but was prevented from doing so. He attempted to get trial counsel to obtain evidence, but was refused. Further, when he was able to obtain exculpatory

evidence himself the prosecution simply changed the date of the alleged incidents. It is hardly fair at this date to expect the appellant to obtain documentation which he is unable to acquire, but which trial counsel could have timely obtained.

POINT VI THE STATE CITES IMPROPER CASES

As a final matter Mr. Bundy would argue that this Court should not consider those cases cited by Respondent which were decided after the date of Mr. Bundy's original trial. Since those decisions should not have ex post facto application.

CONCLUSION

Based upon the arguments cited in Appellants original brief and in this supplemental brief, Appellant would respectfully request that the court grant judgment in his favor.

Dated this _____ day of December, 1987.

Philip G. Jones
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I hand delivered a copy of the foregoing to Kimberly Hornak, Attorney for Respondents, 236 Capital Building, Salt Lake City, Utah 84114, this _____ day of December, 1987.
