

2009

William Sherratt v. Utah Board of Pardons : Reply Brief

Utah Court of Appeals

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UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

William Shearn II,
Appellant, prose,

Reply to States
Brief
on Appeal.

v.
Ut. B-D P, et al,
Appellees.

>
> CASE 20090310-CA

Appellant files this reply to the States Brief
on Appeal.

First, Appellant reassents every claim and
issue raised in his brief, and files this
rebuttal to the Respondents contentions:

1- Rule 65 B allows for extraordinary
relief when judicial authority is wrongful
(subsection (d)) when authority is usurped,
intruded into or abused (subsection (c)) and
for wrongful restraint on liberty (subsection
(b)); this relief is available through
various legal means including "permanent
injunction".

Therefore, if "wrongful restraint" appears, relief
is available; 2) if "wrongful use of authority" or
"failure to comply with duty"; "actions by board of
pardons and parole"; 3) "wrongful use or failure to

exercise public authority" occurs, relief is also available even by permanent injunction (which means the cause must end, and relief is appropriate).

Rule 65 B includes instances where an inferior court, administrative agency or officer exercising judicial authority: (Sec (d)(2))

A: has exceeded its jurisdiction or abused its discretion;

B: failed to perform an act required by law as a duty to the office;

C: refused the petitioner the use or enjoyment of a right to which petitioner is entitled;

D: where Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

"Statement of Issues" Rebuttal:

Petitioner alleged wrongful use of authority by an inferior court, which the state admits a "challenge the validity" was raised. The type of validity was wrongful use of judicial authority and jurisdiction of all inferior courts - so relief is available by permanent injunction.

an abuse of discretion was also argued below.

Penniman has alleged a claim that the prison and Board of Pardons, and the lower courts, all have failed to report or investigate a rape confession to 14 papers (2 of which Penniman was convicted) which is an act required by law under 76-5-402; further, they have refused to properly investigate "facts of the individual case" of Penniman - where all of the above apply - prior to using their discretion to decide parole. Had they investigated, their duty would be fulfilled; where they didn't, it wasn't. Under (d)(2)(B) relief is appropriate. This violates a trust placed in them by citizens of Utah. Penniman was refused the right by an inferior court to confront evidence against him through the Starker confession, and refused the right to compel witnesses in his favor to rebut the convictions "facts" when the evidence surfaced below, so that his eligibility for parole, or a pardon, could be achieved. (Whether or not a pardon applies is wholly within the Board of Pardons jurisdiction, and failure to see if it is appropriate is an abuse of jurisdiction and discretion) So, under (d)(2)(C) and (D) both allow relief. See also 62A-4a-403.

Further under (d)(2)(C), Penniman has sworn innocence, and the Board of Pardons has denied parole on the basis of the "denial of guilt". Swearing innocence is

a protected right under constitutional law and
Statutory law, so relief is available through
Rule 65 B as well.

Petitioner alleges the Board of Pardons resented
him using facts not found by a jury, and shown
false by the record before them (multiple years of
rapes - 1993, 94 and 96 - "Refused to program" -
"Removed self from SOTP therapy" - sworn claim
that Stracy admitted to these crimes - and that
Petitioner was not amenable to therapy (all tests
were taken), so relief under Rule 65 B (2)(2)(1)
is appropriate.

Petitioner alleges the Board of Pardons violated U.S.
Supreme Court mandates under Sixth Amendment
Rights, and the inferior court and the Board
both declare they are not required to abide
by the Federal mandates, so relief is proper here.
(as cited in Petition)

Petitioner alleges his due process rights were violated
(Fifth and Fourteenth Amendment) and the record shows
failure to allow confrontation of evidence, notice of
jeopardy, notice of criteria for parole, notice of term
of incarceration or requirements for eligibility for
parole; so relief under (2)(2)(1) is proper.

Petitioner alleges the inferior court abused its authority,
and the evidence was before the court below, so 65B-

That duty was properly done; The order of Judge Lindberg did not follow the 5 steps the Utah Supreme Court required for jurisdiction in a trial by Information per *Cannon v Leary*, 646 P2d 727 (UTAH 1982) so relief is available under Rule 65 B (c)(2)(A) as she usurped authority - to grant authority - where none existed. It can also be argued she violated 65 B (c)(2)(A), 65 B (c)(2)(B) to search the record for jurisdiction, and under (C) denied Petitioner, by allowing wrongful use of authority, his right to not be tried but in a court having jurisdiction (Fifth, Tenth and Sixth Amendments rights) (Utah Const Art I, Sec's 7, 12, 13 and 14)

All of the above violate wrongful restraint on personal liberty, so relief is available under 65 B (b) as well.

Petitioner was not given UTAH Constitutional due process as argued above, so relief is also available under Rule 65 B.

Petitioner was not given notice of "what will be used", only what may be used, to determine parole eligibility. The Board never identifies what will be used, and never stated what was used from his "Board Packet", so that assertion by Respondent's facts. Pg 2 1st para, ~~By~~ Brief of State. Further, as argued, Petitioner

Constitutional rights were violated, requiring a "result" review here. See Lancaster vs. Utah B.O.P., 869 P2d 995 (Ut 1994)

Labrum v BOP, 870 P2d 902 (Ut 1993) clearly states that the matrix is to be used to determine the sentence unless the court finds aggravators justifying a higher sentence - which the trial court did not find - therefore Utah law set the term at 66 months. Labrum sets the standard for "normal parole processes".

Further Matk v. Hann, 20 F3d 1013 (10th Cir 1994) did not mirror the complaints here, so it is inapposite and not on point.

Following Labrum, Utah Board of Pardons ^{should} set the term for incarceration at the first hearing, consistent with Constitutional mandate that the Board sets "the term of incarceration". Nowhere does it state "terms" or rehearing past "the term". These practices are clear stretching of the powers granted the Board and thus qualify for correction per 65B. See McPae & Delano v. Felth, 669 P2d 404 (Utah 1983):

"The appropriate procedure for challenging a criminal court's jurisdiction is not a declaratory action, but a petition for extraordinary relief". Id.

a 65 B Petition.

See also Dean v. Henroid, 975 P2d 946 (Ut. Ct. App. 1999)

The Prison & the Board of Pardons and Parole violated a trust to investigate a "rape" confession to multiple rapes, to leave petition incarcerated for two of those crimes; the trust placed in them was to investigate the "individual case circumstances" and apply fundamental fairness in the process due. None of that happened. See Dean, *supra*. See also 02A-49-403.

The Board of Pardons and the Prison have used false materials and documents in petitioners hearing, showing bad faith to allow the false documents to remain (multiple sentencing matrix sheets, false commitment orders and false P.S.I. declarations of "FACTS") shown false by documents also in packet - Motion to Dismiss and correct commitment papers.

Therefore review must occur here, and the trial court failed in duty and abused discretion by not holding a hearing to prove or perfect the record.

Cope v. Toronto, 332 P2d 977 (Utah 1958); See also Reyn v. BOP, 904 P2d 677 (Utah 1995).

Finally, under Hurst v. Cook, 222 P2d 1029 (Utah 1959).

The Utah Supreme Court stated claims of a new Law establishing constitutional rights (U.S. Supreme Court Sixth Amendment cases cited in petition & Brief); ² new facts - Starkey confession, bishop's report of false confession, 3) existence of fundamental unfairness in conviction or process, ~~and~~ 4) illegality of a sentence and 5) a claim overlooked in good faith with no intent to abuse the writ of all of which filing of successive petitions. Here, Starkey's confession, false bishop's report, false P.S.I. info, false prison reports of actual conduct of Petitioner, U.S. Supreme Court holdings since 2000 on Sixth Amendment requirements for "the determinative sentencing judge (which Utahs Board of Pardons is), illegally resentencing and resending of the matrix at which (not using jury found facts) and denying due process (Utah Const. Art. 1, Sec. 2; U.S. Const. Amend. 5, 14), and requiring confession of guilt to be eligible for SOTP and release, all violate Petitioner's rights.

Petitioner prays for all relief available by law, as argued in the petition and here, is the authority, "lies in all Utah courts to issue extraordinary writs, which are constitutional in nature." Reed, Supra. Respondents know Petitioner was denied SOTP, and others, are allowed release without it, so denying parole violates equal treatment. Utah Const. Art. 1, Sec. 2; and has the right to redress of wrongful government acts. Art. 1, Sec. 1, Utah Const.

Extraordinary Writ should issue, and hearing to perfect the record must happen. Oral Argument is requested again. Rule 65D

Respectfully,
W. W. Shumaker

Notice of Mailing

I clearly E mailed a copy of this Reply to Brent Bennett, Atty, at 160 E. 300S Fifth Fl. S.L.C., UT 84114 This 2nd day of ~~September~~ ^{October}, 2009, by first class mail.

W. W. Shumaker