

1988

Wulffenstein v. Morris : Brief of Respondent

Utah Supreme Court

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 880079
JOHN O. WULFFENSTEIN,

:

Petitioner-Appellant, : Case No. 870328-CA

v.

:

LARRY MORRIS,

:

Category No.

Respondent.

:

BRIEF OF RESPONDENT

APPEAL FROM THE 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 DOUGLAS L.
CORNABY, JUDGE, PRESIDING.

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Court of Appeals

FILED

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March 3, 1988

Mr. Geoffrey J. Butler
Clerk of the Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: Wulffenstein v. Morris, Case No. 870328-CA
(transferred from the Utah Court of Appeals)

Dear Mr. Butler:

I wish to make a correction in the State's brief filed in the Wulffenstein v. Morris case, which was recently transferred to the Supreme Court from the Utah Court of Appeals. On page 2 at the end of the second full paragraph, the following citation should appear after the one to State v. Wulffenstein, 657 P.2d 289 (Utah 1982), cert. denied, 460 U.S. 1044 (1983):

State v. Wulffenstein, 733 P.2d 120 (Utah 1986)

I apologize for the omission.

Sincerely,

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

DBT:bks

cc: John O. Wulffenstein

JOHN O. WULFFENSTEIN, :
 Petitioner-Appellant, : Case No. 870328-CA
 v. :
 LARRY MORRIS, : Category No.
 Respondent. :

APPEAL FROM THE 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 DOUGLAS L. CORNABY, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

JOHN O. WULFFENSTEIN, :
Petitioner-Appellant, : Case No. 870328-CA
v. :
LARRY MORRIS, : Category No.
Respondent. :

JURISDICTION

This appeal is from the district court's order dismissing petitioner's petition for a writ of habeas corpus. This Court does not appear to have jurisdiction to hear the appeal, in that it is an appeal from an order on a petition for an extraordinary writ which involved a first degree felony conviction. See UTAH CODE ANN. § 78-2a-3(2)(f) (1987). Therefore, the case should be transferred to the Utah Supreme Court.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue on appeal is whether the district court correctly dismissed petitioner's habeas petition based either on waiver or on the merits.

STATEMENT OF THE CASE

Petitioner, John O. Wulffenstein, filed a petition for a writ of habeas corpus in the Third District Court in December 1981 (R. 2-5). Respondent, Larry Morris (the warden of the Utah State Prison), filed a motion to dismiss the petition on May 29, 1987 (R. 16-21). After a hearing, the district court dismissed the petition (R. 30).

STATEMENT OF FACTS

Petitioner's habeas petition sought relief from an alleged denial of law books to petitioner by the Utah State Prison. He argued that he needed the law books to prepare for his defense in a trial on an aggravated robbery charge in Second District Court, and that the denial of access to the books was unconstitutional (R. 2-5).

The warden's response to the petition argued that the prison had met the constitutional requirements for providing access to the courts to prisoners (R. 18-21). The district court, citing Lopez v. Shulsen, 716 P.2d 787 (Utah 1986), ruled that petitioner's failure to raise the issue in his direct appeal to the Utah Supreme Court precluded him from raising the issue on habeas corpus. Petitioner's conviction of aggravated robbery in Second District Court was reviewed twice by the Utah Supreme Court. See State v. Wulffenstein, 657 P.2d 289 (Utah 1982); cert. denied, 460 U.S. 1044 (1983).

SUMMARY OF ARGUMENT

The district court's ruling is sustainable on Waiver grounds.

ARGUMENT

POINT I

THE DISTRICT COURT'S RULING IS
SUSTAINABLE ON WAIVER GROUNDS.

It is well settled that a habeas petitioner "cannot raise issues in post-conviction proceedings which could or should have been brought on direct appeal, except in unusual circumstances." Robbins v. Cook, 737 P.2d 225 (Utah 1987)

(citing Codianna v. Morris, 660 P.2d 1101 (Utah 1983)). See also Andrews v. Morris, 607 P.2d 816, 819 (Utah), cert. denied, 449 U.S. 891 (1980). Petitioner could or should have raised the constitutional issue concerning law books in his direct appeals of his aggravated robbery conviction to the Utah Supreme Court. The unusual circumstances that allows a petitioner to avoid this strict waiver rule (which have been discussed by the Supreme Court--see e.g., Chess v. Smith, 617 P.2d 341, 343 (Utah 1980); Brown v. Turner, 21 Utah 2d 96, 98, 440 P.2d 968, 969 (1968)) are not present here.

CONCLUSION

Based upon the foregoing argument, the district court's dismissal should be affirmed.

DATED this 27th day of November, 1987.

DAVID L. WILKINSON
Attorney General

David B. Thompson
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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to John O. Wulffenstein, P.O. Box 250, Draper, Utah 84020, this 27th day of ^{November} ~~October~~, 1987.

David L. Spagari
