

2002

# The State of Utah v. Blaine D. Casper : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



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.

David L. Wilkinson; Attorney General; Attorney for Respondent.

James C. Bradshaw; Salt Lake Legal Defender Association; Attorney for Appellant.

---

## Recommended Citation

Legal Brief, *Utah v. Casper*, No. 20556.00 (Utah Supreme Court, 2002).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/2029](https://digitalcommons.law.byu.edu/byu_sc2/2029)

This Legal Brief 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.

UTAH  
DOCUMENT  
KFU  
450

IN THE SUPREME COURT OF THE STATE OF UTAH

20556

---

THE STATE OF UTAH, :  
Plaintiff/Respondent :  
vs. :  
BLAINE D. CASPER, : Case No. 20556  
Defendant/Appellant/ :  
Petitioner :

---

PETITION FOR REHEARING

Petition for reconsideration of per curiam decision by the Utah Supreme Court filed February 27, 1986, in an appeal from a guilty plea and conviction of Aggravated Burglary, a felony of the First Degree, and Aggravated Assault, a felony of the Third Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

JAMES C. BRADSHAW  
Salt Lake Legal Defender Assn.  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

DAVID L. WILKINSON  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

**FILED**

**MAR 13 1986**

---

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
Plaintiff/Respondent :  
vs. :  
BLAINE D. CASPER, : Case No. 20556  
Defendant/Appellant/ :  
Petitioner :

---

PETITION FOR REHEARING

Petition for reconsideration of per curiam decision by the Utah Supreme Court filed February 27, 1986, in an appeal from a guilty plea and conviction of Aggravated Burglary, a felony of the First Degree, and Aggravated Assault, a felony of the Third Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

JAMES C. BRADSHAW  
Salt Lake Legal Defender Assn.  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

DAVID L. WILKINSON  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES. . . . .	i
STATEMENT OF THE CASE . . . . .	1
STATEMENT OF FACTS. . . . .	1
ARGUMENT. . . . .	1
CONCLUSION. . . . .	5

TABLE OF AUTHORITIES

<u>Anderson v. Industrial Commission of Utah</u> , 696 P.2d 1219 (Utah 1985) . . . . .	3,4
<u>Greenholtz v. Nebraska Penal Inmates</u> , 442 U.S. (1979) . . . . .	2
<u>State v. Casper</u> , Opinion #20556 (Utah 1986) . . . . .	1,3
<u>State v. Madry</u> , 8 Wash. 2061, 504 P.2d 1150, 1161 (1972) . . . . .	4
<u>Wood Bros. Homes, Inc. v. City of Fort Collins</u> , 670 P.2d 9 (Colo. App. 1983) . . . . .	4

IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE STATE OF UTAH, :  
Plaintiff/Respondent :  
vs. :  
BLAINE D. CASPER, : Case No. 20556  
Defendant/Appellant/ :  
Petitioner :

---

PETITION FOR REHEARING

STATEMENT OF THE CASE

This is a petition for rehearing of a per curiam decision filed by this Court on February 27, 1986. Originally, this case was an appeal from a guilty plea and conviction of Aggravated Burglary, a felony of the First Degree, and Aggravated Assault, a felony of the Third Degree, by Blaine D. Casper. Mr. Casper was sentenced in the Third Judicial District in and for Salt Lake County, before the Honorable Jay E. Banks, Judge, to five years to life on Aggravated Burglary and zero to five years for Aggravated Assault, with sentences running concurrently.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant (Appellant's Brief at 1-3).

ARGUMENT

In its per curiam opinion, State v. Casper, Opinion No. 20556 (Utah 1986), this Court has misapprehended the main contention advanced by Appellant's Brief.

In this case the Court has filed its per curiam opinion before the petitioner had an opportunity to submit a reply brief. Under the Utah Rules of Appellate Procedure, Rule 26, Filing and Service of Briefs (1985), "a reply brief. . . may be served and filed by appellant within thirty (30) days after the filing and service of respondent's brief. . .". The Respondent's Brief here was filed on February 11, 1986, (see respondent's Brief at 8), meaning that by statute the Petitioner had until March 15, 1986, to file a reply. Yet this Court filed its per curiam opinion on February 26, 1986, over two full weeks before the statutory period to reply had expired. Such a situation clearly violates Mr. Casper's Due Process rights. It is not unreasonable to expect this Court to follow the rules of appellate procedure which it writes. Greenholtz v. Nebraska Penal Inmates, 442 U.S. (1979).

Had Mr. Casper been given time to reply he would have availed himself of such an opportunity by contesting the State's claim that there was no legal authority cited in support of the Petitioner's claim of bias and prejudice because those cases given applied to bias and prejudice at trial, not at the preliminary hearing stage. (See Respondent's Brief at 7-8). Such a contention is wholly unsupported by the State and is repugnant in its ultimate conclusion: That while a neutral magistrate is essential at the trial phase, such a guarantee is somehow unnecessary at the preliminary hearing.

The State's position is especially tenuous given this Court's opinion here that, "The preliminary hearing secures to

the accused, before he is brought to trial under an information, the right to be advised of the nature of the accusation against him and to be confronted with and given an opportunity to cross-examine witnesses." State v. Casper, Opinion No. 20556 (Utah, February 26, 1986). In determining if there is probable cause to bind the defendant over for trial, the accused has as much a right to expect the magistrate to be neutral and unbiased as he has to expect a fair trial. See Anderson v. Industrial Commission of Utah, 696 P.2d 1219 (Utah 1985) (extending right to unbiased and impartial judge in administrative hearings).

The Court in its per curiam opinion here questions the failure of the Petitioner to supply a copy of the preliminary hearing transcript. Without such transcripts, the Court presumed "regularity of the proceedings below." State v. Casper, supra.

Initially, the Petitioner notes that the Supreme Court was supplied with a full transcript from all proceedings at the District Court level. These transcripts provide the Court with all factual information necessary to render a decision, including the vital fact that the victim was a well-known employee in the circuit where the preliminary hearing took place (see Appellant's Brief at 1-3). The value of the District Court transcripts becomes especially important since that is where the claim of bias and prejudice is submitted and argued (R.41) (see Appellant's Brief, Addendum A).

In addition, the claim presented on appeal, that the preliminary hearing should have been held before a magistrate

other than one from the circuit where the victim worked as a clerk, can be sustained by the mere appearance of bias or prejudice. There need not be a specific allegation set forth, making a preliminary hearing transcript unnecessary.

This Court has had opportunity recently to define when disqualification of a judge should occur. In Anderson V. Industrial Commission of Utah, supra, this Court stated that, "[O]ne of the fundamental principles of due process is that all parties to a case are entitled to an unbiased, impartial judge." In addition, this Court added, "[F]airness requires not only an absence of actual bias, but endeavors to prevent even the possibility of unfairness." Id. at 1221 (emphasis added).

The Washington Supreme Court in State v. Madry, 8 Wash. 2061, 504 P.2d 1150, 1161 (1972), ruled that a judge must not only be impartial, but must also have the appearance of impartiality. The reason is that "[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." Id. at 1161.

The Colorado Court of Appeals has followed the well-reasoned rule that a judge should be disqualified for even the appearance of a lack of impartiality. In Wood Bro. Homes, Inc. v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983), the trial judge, prior to his appointment to the bench, had sat on the Planning and Zoning Commission which considered and reviewed the plot of land that formed the basis for the dispute. The motion to disqualify was denied by the judge on the basis that he had no recollection of plaintiff's matter before the Commission.

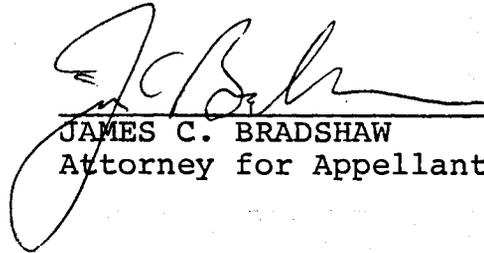
The Court of Appeals stated, "While we find no evidence of partiality, we conclude that because of the trial judge's prior association with the Commission, one might reasonably question his impartiality so as to render it improper for him to have presided over the trial in this case." Id. at 10. The court ruled that the judge's position on the Planning Commission disqualified him from the case, even if the judge had said that he had no recollection of the prior matter. The court continued by saying, "Even if the judge's impartiality could not be reasonably questioned, we still have a situation which created the appearance of impropriety, which precludes the judge from sitting on this case." Id. at 10.

The law, as it has been set forth by this Court, mandates that the Petitioner be allowed to submit a reply to the Respondent's Brief. In addition, even absent a showing of actual prejudice, the Petitioner's showing of possible judicial partiality necessitates a remand for a new preliminary hearing.

#### CONCLUSION

Because this Court misapprehended the Appellant's primary contention in its decision in this case and because the Petitioner was denied an opportunity to submit a reply brief, Mr. Casper respectfully petitions this Court to withdraw its opinion and allow a new thirty (30) day period to submit a reply brief or in the alternative, reconsider its decision and reverse the conviction and remand the case for further proceedings.

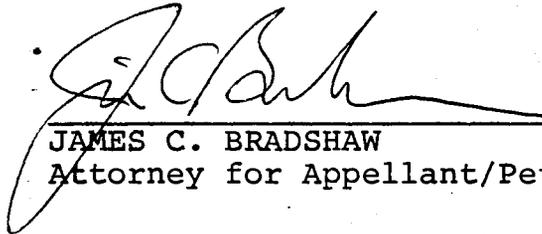
Respectfully submitted this 13<sup>th</sup> day of March, 1986.



JAMES C. BRADSHAW  
Attorney for Appellant/Petitioner

CERTIFICATE OF DELIVERY

I, JAMES C. BRADSHAW, hereby certify that four copies of the foregoing were delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 13<sup>th</sup> day of March, 1986.



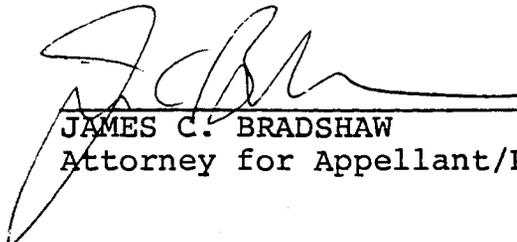
JAMES C. BRADSHAW  
Attorney for Appellant/Petitioner

CERTIFICATION

I, JAMES C. BRADSHAW, 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 13<sup>th</sup> day of March, 1986.



JAMES C. BRADSHAW  
Attorney for Appellant/Petitioner