

1989

George W. Elwood v. Tamara Holden, Warden Y.A.O.P Utah State Prison : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

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

R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorney for Defendant-Respondent.

George W. Elwood; Attorney Pro-Se.

Recommended Citation

Brief of Respondent, *Elwood v. Holden*, No. 890609 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2262

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH

DOCKET NO.

KFU

50

.A10

DOCKET NO.

IN THE UTAH COURT OF APPEALS

890609

GEORGE W. ELWOOD,

:

Petitioner/Appellant,

:

Case No. 890609-CA

v.

:

TAMARA HOLDEN, WARDEN Y.A.O.P.

:

UTAH STATE PRISON,

:

Priority No. 3

Respondent/Appellee

BRIEF OF RESPONDENT

- - - - -

THIS IS AN APPEAL FROM A DENIAL OF A PETITION
FOR WRIT OF HABEAS CORPUS IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE FRANK G.
NOEL, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

GEORGE W. ELWOOD
P.O. Box 250
Draper, Utah 84020

Petitioner Pro Se

FILED

18 1990

MAILED
Clerk of Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GEORGE W. ELWOOD, :
Petitioner/Appellant, : Case No. 890609-CA
v. :
TAMARA HOLDEN, WARDEN Y.A.O.P. :
UTAH STATE PRISON, : Priority No. 3
Respondent/Appellee :

BRIEF OF RESPONDENT

- - - - -

THIS IS AN APPEAL FROM A DENIAL OF A PETITION
FOR WRIT OF HABEAS CORPUS IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE FRANK G.
NOEL, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

GEORGE W. ELWOOD
P.O. Box 250
Draper, Utah 84020

Petitioner Pro Se

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT.....	3
ARGUMENT	
THE LOWER COURT PROPERLY RULED THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE PROSECUTOR'S FAILURE TO COMPLY WITH THE TECHNICAL OATH REQUIREMENTS.....	3
CONCLUSION.....	6

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Friesbie v. United States</u> , 157 U.S. 160 (1895).....	5
<u>Hussey v. Smith</u> , 99 U.S. 20 (1878).....	4
<u>In re Williams</u> , 341 P.2d 652 (Okla. App. 1959) <u>cert.</u> <u>denied</u> 361 U.S. 968 (1960).....	5
<u>Page v. McAfee</u> , 26 Utah 2d 208, 487 P.2d 861 (1971).....	5
<u>State ex. rel Cannon v. Leary</u> , 646 P.2d 727 (Utah 1982).	5
<u>State v. Hutchinson</u> , 655 P.2d 635 (Utah 1982).....	6
<u>State v. Steggell</u> , 660 P.2d 252 (Utah 1983).....	6
<u>Vance v. Fordham</u> , 671 P.2d 124 (Utah 1983) <u>cert.</u> <u>denied</u> 465 U.S. 1025 (1984).....	4-5

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. amend. V.....	1, 3
U.S. Const. amend. XIV.....	1, 3
Utah Const. art. IV, § 10.....	2, 4
Utah Code Ann. § 17-16-7 (Supp. 1989).....	4
Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1988).....	1
Utah Code Ann. § 78-3-4(1) (Supp. 1989).....	6
Utah R. Crim. P. 30(a).....	5

IN THE UTAH COURT OF APPEALS

GEORGE W. ELWOOD, :
Petitioner/Appellant, : Case No. 890609-CA
v. :
TAMARA HOLDEN, WARDEN Y.A.O.P. :
UTAH STATE PRISON, : Priority No. 3
Respondent/Appellee. :

BRIEF OF RESPONDENT
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a denial of a Petition for Writ of Habeas Corpus in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1988).

STATEMENT OF ISSUE PRESENTED ON APPEAL

1. Whether petitioner's constitutional rights were violated by the prosecuting attorney's failure to take an oath of office?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. XIV, § 1:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Const. art. IV, § 10:

All officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation. "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.["]

STATEMENT OF THE CASE

Petitioner pled guilty to two counts of sexual abuse of a child, both second degree felonies, in the First Judicial District Court, in and for Cache County, State of Utah, the Honorable Venoy Christoffersen, presiding. (R. 2-3). Petitioner was sentenced by Judge Christoffersen on May 21, 1989, to a term of one to fifteen years in the Utah State Prison on each offense, the terms to run concurrently (R. 3). Petitioner did not appeal his conviction and sentence.

On August 3, 1989, petitioner filed a "Petition and Complaint Seeking a Writ of Habeas Corpus" in the Third Judicial

District Court (R. 2). Judge Frank G. Noel granted respondent's Motion for Summary Judgment on September 13, 1989 (R. 21-23) (See Addendum "A"; Memorandum Decision).

STATEMENT OF FACTS

The only relevant fact to petitioner's claim is that James C. Jenkins, Deputy Cache County Attorney, failed to file an oath of office prior to petitioner's guilty plea.

SUMMARY OF ARGUMENT

The prosecutor's failure to take an oath of office was a mere procedural failure which did not affect the substantial rights of petitioner. The prosecutor was an officer in fact and his actions must not be voided due to a ministerial failure. No prejudice occurred where petitioner does not claim his plea was involuntary. Finally, petitioner cannot raise an ineffective assistance of trial counsel claim for the first time on appeal.

ARGUMENT

THE LOWER COURT PROPERLY RULED THAT
PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT
VIOLATED BY THE PROSECUTOR'S FAILURE TO
COMPLY WITH THE TECHNICAL OATH REQUIREMENTS.

Petitioner maintains that James C. Jenkins, Deputy Cache County Attorney, was not appointed in writing by the Cache County Attorney nor had he filed an oath of office at the time of petitioner's guilty plea. Petitioner argues that because of these technical deficiencies, the trial court was without jurisdiction to accept his guilty plea and to subsequently sentence him (Br. of App. at 10). He thus claims that his rights

to due process and equal protection under the United States Constitution were violated. See U.S. Const. amendments V and XIV.

Utah Const. art. IV, § 10 requires that an oath of office be made by "all officers made elective or appointed by this Constitution or by the law made in pursuance thereof." While the county attorney is elected, a deputy county attorney is appointed. Utah Code Ann. § 17-16-7 (Supp. 1989). Until the appointment of a deputy is made in writing and an oath taken, a deputy is "not a deputy." Id. However, the statute does not affect the attorney's status as a county employee.

The State asserts that even if Mr. Jenkins failed to meet the technical requirements of his appointed office, he was still a "de facto officer," that is an otherwise proper officer who has failed to perform some precedent requirement such as oath taking. Hussey v. Smith, 99 U.S. 20, 24 (1878) (a case appealed from the Utah Territory). The public good requires that the acts of "de facto officials" not be invalidated. Vance v. Fordham, 671 P.2d 124, 130-31 (Utah 1983), cert. denied 465 U.S. 1025 (1984). In Vance, the Utah Supreme Court explained:

An officer de facto is not a mere usurper, nor yet within the sanction of law, but one who colore officii, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. Judicial as well as ministerial officers may be in this position. . . . The acts of such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils."

Vance v. Fordham, 671 P.2d at 130-31.

Petitioner concedes in his petition that Mr. Jenkins was at least "de facto official." (R. 4). Nevertheless, he argues that any acts performed by a de facto official are invalid. Petitioner relies on Page v. McAfee, 26 Utah 2d 208, 487 P.2d 861 (1971), in which the Utah Supreme Court concluded that the sale of real property requires that all conditions precedent be strictly construed. The Page case did not address the issue of the general validity of acts of de facto officials, an issue later discussed in Vance v. Fordham, 671 P.2d at 130-31 quoted above.

Petitioner further claims that the trial court lacked jurisdiction due to the prosecutor's de facto status. The law does not agree. State ex. rel Cannon v. Leary, 646 P.2d 727, 731 (Utah 1982) (objection to signature on information is only a technical requirement and cannot defeat the jurisdiction of the court); Friesbie v. United States, 157 U.S. 160, 163 (1895) (lack of endorsement on information is not jurisdictional); In re Williams, 341 P.2d 652, 656 (Okla. App. 1959), cert. denied 361 U.S. 968 (1960) (signature of prosecutor is not necessary for subject matter jurisdiction).

The prosecutor's failure to comply with the technical requirements of his position was merely procedural, not jurisdictional or constitutional. The law requires that any "error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah R. Crim. P. 30(a). A substantial and prejudicial error is one that creates a reasonable likelihood that in its absence there would

have been a different result. State v. Hutchinson, 655 P.2d 635, 636 (Utah 1982).

In the present case, petitioner pled guilty to two counts of sexual abuse of a child. The trial court had subject matter jurisdiction to accept petitioner's guilty plea. See Utah Code Ann. § 78-3-4(1) (Supp. 1989). The prosecutor's status as a "de facto officer" could not have affected petitioner's otherwise knowing and voluntary guilty plea. Thus, the trial court properly granted summary judgment on the basis that even assuming the facts alleged, petitioner failed to establish a substantial denial of a constitutional right as required by Utah R. Civ. P. 65B(i)(1).

Lastly, petitioner claims that his trial counsel was ineffective for leading him to believe that he would receive a prison term of approximately 12 months (Br. of App. at 12). However, because petitioner did not raise this issue in the lower court, this Court should not consider the issue for the first time on appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983).

CONCLUSION

Based upon the foregoing, the State requests that the trial court's denial of the Petition for Writ of Habeas Corpus be affirmed.

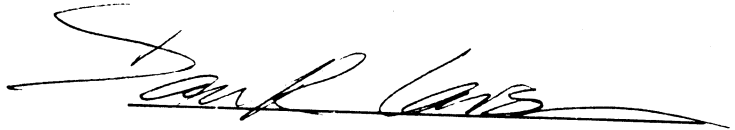
DATED this 28th day of February, 1990.

R. PAUL VAN DAM
Attorney General


DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Respondent, was mailed, postage prepaid, to George W. Elwood, pro se, P.O. Box 250, Draper, Utah 84020, this 26 day of February, 1990.



ADDENDUM

DR C

RECEIVED

SEP 15 1997

**OFFICE OF
ATTORNEY GENERAL**

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH


GEORGE W. ELWOOD	:	MEMORANDUM DECISION
Petitioner,	:	Civil No. 890904686
vs.	:	
TAMARA HOLDEN, WARDEN,	:	
(YAOP) UTAH STATE PRISON,	:	
Respondent.	:	

Now before the Court is defendant's Motion for Summary Judgment and after reviewing the file together with the Memoranda filed in support of the motion the Court now rules as follows:

The Court is of the opinion that where the Deputy County Attorney in this case failed to properly comply with the technical oath requirements, he is still a "de facto officer" who has claimed and assumed to exercise official authority, is reputed to have it, and that the community has acquiesced in that authority, and that accordingly the acts of said officer are valid and binding.

Accordingly respondent's Motion for Summary Judgment is granted. Counsel for respondent is to prepare an order consistent with this ruling and submit it to the Court for the Court's signature.

Dated this 13 day of September, 1989.



Frank G. Noel
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this _____ day of September, 1989:

R. PAUL VAN DAM
Attorney General
DAN R. LARSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

George W. Elwood
P.O. Box 250
Draper, Utah 84020
