1981

State of Utah v. Caral Lee Owens and Rudell Owens : Petition for Rehearing and Brief

Utah Supreme Court

Noall T. Wootton; Steven B. Killpack; Attorneys for State;
Shelden Carter; Gregory M. Warner; Attorneys for Respondents;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Appellant,

-vs-

CARAL LEE OWENS and
RUDELL OWENS,

Defendants-Respondents.

Case No.
17038

PETITION FOR REHEARING AND
BRIEF

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

STEVEN B. KILLPACK
Deputy Utah County Attorney

Room 107 County Building
Provo, Utah 84601

Attorneys for Appellant

SHELDEN R. CARTER

350 East Center
Provo, Utah 84601

Attorney for Respondents

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Appellant,

-vs-

CARAL LEE OWENS and
RUDELL OWENS,

Defendants-Respondents.

Case No.
17038

PETITION FOR REHEARING AND
BRIEF

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

STEVEN B. KILLPACK
Deputy Utah County Attorney

Room 107 County Building
Provo, Utah 84601

Attorneys for Appellant

SHELDEN R. CARTER

350 East Center
Provo, Utah 84601

Attorney for Respondents

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-vs-	:	Case No. 17038
CARAL LEE OWENS and RUDELL OWENS,	:	
Defendants-Respondents.	:	

PETITION FOR REHEARING

The Plaintiff-Appellant petitions this Honorable Court for rehearing in the above entitled case pursuant to Utah Rules of Civil Procedure, Rule 76(e), and Utah Rules of Criminal Procedure, Rule 78(c), Utah Code Ann. § 77-35-28(c) (Supp. 1980), for the reason that the Court has misapprehended the facts upon which it based its decision.

Respectfully submitted,

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

STEVEN B. KILLPACK
Deputy Utah County Attorney

Attorneys for Appellant

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

PETITION FOR REHEARING IS PROPERLY BEFORE THE COURT UNDER THE FACTS OF THIS CASE.

This Court has previously recognized that to make an application for a rehearing is a matter of right. Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913). Nevertheless, plaintiff-appellant recognizes that this right is not absolute and that a petition for rehearing should not be utilized to challenge areas of the Court's decision which appellant merely disagrees with or considers unsatisfactory. Nor should the rehearing be used to reargue grounds originally presented. Cummings v. Nielson, supra; Beaver County v. Home Indemnity Co., 88 Utah 1, 52 P.2d 435 (1935). The standard established by this Court in determining whether a petition for rehearing is proper was expressed long ago in Brown v. Pichard, 4 Utah 292 11 P. 512, reh. den., 4 Utah 292, 11 P. 573 (1886):

> To justify a court in granting a rehearing it must be convinced that there has been a failure to consider some material point in the case; that there has been error in the conclusions heretofore arrived at; or that some matter has been discovered unknown at the time of the hearing.

See also Cummings v. Nielson, supra, at 624, wherein the Court stated the following:

> When this court . . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . If there are some reasons . . . such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed. . . . (Emphasis added.)

The remaining point of this brief will show that this petition for rehearing is properly before this Court on the ground that the court misconstrued or misapprehended certain material facts of this case in reaching its decision, and overlooked something which materially affects the result.

POINT II

> THIS COURT'S CONCLUSION THAT THIS CASE SHOULD BE DISMISSED BECAUSE THE RECORD ALLEGEDLY REVEALS THE APPEAL WAS EXCLUSIVELY TAKEN BY THE COUNTY ATTORNEY IN THE NAME OF THE STATE AND NOT AT THE REQUEST OF THE ATTORNEY GENERAL IN VIOLATION OF STATE V. LODDY, UTAH, 618 P.2d 60 (1980), IS A MISTAKE OF FACT.

This Court issued a one paragraph decision in the instant case on March 10, 1981, which reads as follows:

> The Utah County Attorney brings this appeal from the District Court's granting of the defendants' motion to quash the information. The record reveals the appeal was exclusively taken by the County Attorney in the name of the State and does not indicate that he was rendering assistance as requested by the Attorney General in relation to the appeal. In our recent decision in State v. Loddy, Utah, 618 P.2d 60 (1980), we concluded such actions to be beyond the authority of the County Attorney. Following that decision the present appeal is dismissed.

In fact, the Attorney General did request the assistance of the Utah County Attorney in pursuing this appeal by the State. This is verified by the fact that the Court's file contains a document entitled "Appearance of Co-Counsel" jointly signed by Earl F. Dorius, Assistant Attorney General, and Steven B. Killpack, Deputy Utah County Attorney, which was dated January 9, 1981, and filed with the Court on January 19, 1981, almost one month prior to the hearing of the case on February 13, 1981. This document was necessitated by the fact that the name of the Attorney General had inadvertently been left off of the State's brief when it was filed, despite the fact that that office was working with Mr. Killpack on the appeal. The document further reflects that agents of both offices of the State were fully aware of the implications of the Loddy case and wished to make clear to the Court that

this appeal was being pursued jointly with the involvement of the Attorney General's Office. The document reads as follows:

> Comes now the State of Utah, in compliance with State v. Loddy, 618 P.2d 60 (Utah 1980), and pursuant to Sections 78-51-34 and 35, Utah Code Annotated, as amended, and enters the appearance of Earl F. Dorius, Assistant Attorney General, of the Utah Attorney General's Office, as co-counsel of record with Steven B. Killpack, Deputy Utah County Attorney, Utah County Attorney's Office, for purposes of this appeal.

Finally, appellant submits that although each and every communication between the Utah County Attorney's Office and the Attorney General's Office in the preparation of this appeal was understandably not made a matter of court record, the Attorney General's Office, by and through Earl F. Dorius, would proffer to the Court that those discussions did occur, and that Mr. Dorius, and Mr. Killpack discussed the viability of the appeal by the State under the facts of the case, and that Mr. Dorius requested the assistance of Mr. Killpack in the preparation of the State's brief because of a backlog of criminal appeals facing the Attorney General's Office. Moreover, on December 18, 1980, Mr. Killpack phoned Mr. Dorius to advise him that he had inadvertently left the name of the Attorney General off of the brief. Mr. Dorius

then suggested that a notice of appearance of co-counsel be drafted to make clear to the Court that the Attorney General's Office was involved with the appeal. After signing the document, Mr. Dorius personally filed it with the Court.

CONCLUSION

Because this Court, in reaching its decision, misapprehended certain material facts surrounding the case, it is urged that the case should be reheard, reconsidered and the decision of March 10, 1981, be vacated.

Respectfully submitted,

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

STEVEN B. KILLPACK
Deputy Utah County Attorney

Attorneys for Appellant

CERTIFICATE OF MAILING

Mailed three copies of the foregoing Petition for Rehearing and Brief to Mr. Shelden R. Carter, Attorney for Respondents, 350 East Center, Provo, Utah 84601, this 17 day of March, 1981.

Earl F. Dorius