

1989

# Wade Wagstaff v. Eldon Barnes, Warden, Utah State Prison : Brief of Respondent

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Barbara Bearnson; Assistant Attorney General; Attorneys for Respondent.

Wade Wagstaff; Appellant Pro Se.

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IN THE UTAH COURT OF APPEALS

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CKET NO.

890663-CA

WADE WAGSTAFF,

:

Petitioner/Appellant, :

Case No. 890663-CA

v.

:

ELDON BARNES, WARDEN,  
UTAH STATE PRISON,

:

Priority Three

:

Respondent.

B R I E F O F R E S P O N D E N T

- - - - -

APPEAL FROM A DISMISSAL OF A PETITION FOR  
POSTCONVICTION RELIEF PURSUANT TO RULE  
65B(i), UTAH RULES OF CIVIL PROCEDURE, IN THE  
THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, HONORABLE FRANK G. NOEL,  
JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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Petitioner/Appellant,	:	Case No. 890663-CA
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IN THE UTAH COURT OF APPEALS

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Petitioner/Appellant,	:	Case No. 890663-CA
v.	:	
ELDON BARNES, WARDEN,	:	Priority Three
UTAH STATE PRISON,	:	
Respondent.	:	

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B R I E F   O F   R E S P O N D E N T  
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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a dismissal of a petition for postconviction relief pursuant to Rule 65B(i), Utah Rules of Civil Procedure, which was filed by petitioner in Third District Court and determined by the Honorable Frank G. Noel. This Court has jurisdiction in this case under Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1989) and Rule 65B(i)(10), Utah Rules of Civil Procedure.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether petitioner has supported his allegations with adequate citations to the record and the law, and whether he has adequately preserved the issues for appeal.
2. Whether the trial court was misled by counsel for the respondent which would entitle petitioner to relief from the dismissal of his petition for postconviction relief.
3. Whether the trial court abused its discretion in dismissing petitioner's petition for postconviction relief.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. Civ. P. 65B(i):

**(i) Postconviction hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provide for service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto

affidavits, copies of the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceedings; and if the complainant shall have instituted prior similar proceedings in any court, state of federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceedings except for good cause shown therein.

(5) [Deleted.]

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in



conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to rearraignment, pretrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases.

R. Utah Ct. App. 24(e):

**(e) References in briefs to the record.**  
References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References

to exhibits shall include exhibit numbers. If reference is made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

#### STATEMENT OF THE CASE

Petitioner, Wade Wagstaff, was convicted on June 30, 1987, in First District Court, Cache County, of burglary, a second degree felony, and assault, a class B misdemeanor (R. 57). He subsequently filed a petition for postconviction relief, the subject of this action, in Third District Court, Salt Lake County (R. 2). The warden of the Utah State Prison, represented by Barbara Bearnson, Assistant Attorney General, filed a motion to dismiss (R. 77), to which Petitioner filed a reply (R. 88). The matter was heard on August 14, 1989, before the Honorable Frank G. Noel. Following argument, the matter was taken under advisement, and Judge Noel subsequently granted the warden's motion to dismiss (R. 103). Petitioner now appeals the dismissal of the petition.

#### STATEMENT OF THE FACTS

The procedural aspects of the case set forth in the "Statement of the Case" are incorporated in the Statement of Facts. Petitioner did not make part of the record on appeal the transcript of the August 14, 1989, hearing on the motion to dismiss before Judge Noel.

Additional relevant facts are contained in the transcript of the criminal trial held on June 30, 1987 (R. 14-58). Petitioner failed to appear at trial; he had previously failed to report to his parole officer and the state did not know

his whereabouts (R. 16). Petitioner's attorney, Herm Olson, was present at trial (R. 17) and represented to the court his efforts on five or six occasions to notify petitioner of the trial date; only one the letters was returned (R. 17-19). Petitioner had, in fact, called Mr. Olson to discuss the case sometime between March and May (R. 18). Petitioner was obviously aware that the criminal proceedings were pending; he would have been present during a preliminary hearing and was arraigned in the district court on July 28, 1986, and again on October 27, 1986 (R. 21).

In making its decision to proceed in petitioner's absence, the trial court found that petitioner had previously been in court on the matter and was, therefore, aware of the proceedings, and then discontinued communication with his attorney (R. 26). It also found that petitioner voluntarily failed to maintain required contact with his parole officer (R. 27). It further found that the notices sent to petitioner were either not received or ignored and that petitioner had made no effort to contact either his parole officer or his counsel concerning his next required appearance (R. 27). The court found that his failure to appear was a voluntary act and allowed the state to proceed in his absence (R. 27). His attorney was then allowed to withdraw (R. 27). Following presentation of the evidence, the jury returned verdicts of guilty.

Petitioner appealed his subsequently filed motion for new trial and arrest of judgment to this Court. In State of Utah v. Wade Wagstaff, 772 P.2d 987 (Utah Ct. App. 1989), this Court affirmed the trial court's judgment. On appeal, petitioner

claimed that he was not voluntarily absent from trial as the result of a "leak" from the county attorney's office regarding his agreement to provide information; he claimed this leak resulted in his being in fear for his personal safety and, therefore, he left the area. He also claimed that he did not get actual notice of the trial. This Court noted petitioner's trial counsel's attempt to withdraw from representation on March 16, 1987, because of petitioner's failure to maintain contact with him. This Court also discussed trial counsel's numerous attempts to notify petitioner of the court dates. This Court further noted petitioner's failure to appear for the June 30, 1987 trial, although his court-appointed attorney was present. This Court held that petitioner failed in his duty to maintain contact with his attorney and could not benefit from his claim that he was voluntarily absent from his trial. This Court also found petitioner's claim that he did not have actual notice to be without merit, as Rule 3(b), Utah Rules of Criminal Procedure, provides for service upon an attorney representing a party, and petitioner had failed in his duty to maintain contact with his attorney.

When dismissing petitioner's petition for postconviction relief, Judge Noel found that petitioner was represented by counsel up until his trial date when, because of petitioner's failure to cooperate, counsel was allowed to withdraw. The court also found that petitioner had voluntarily absented himself from trial. The court found that petitioner had raised the issues in his direct appeal that he raised in his

petition for postconviction relief. Specifically, petitioner submitted a four-page letter to this Court in which he raised the claim that he was denied the right to counsel at trial and that appellate counsel was ineffective for failing to raise the issue on appeal. Judge Noel concluded that petitioner's failure to appear at trial was voluntary, and that by voluntarily absenting himself from the trial and thereby not being available to assist counsel in his defense, he could not be heard to complain that he was denied counsel. (R. 103, 109-111.)

Petitioner now claims in his appeal from the dismissal of his action that counsel for the state made fraudulent misrepresentations to the court and "amended" his cause of action. He also claims that the trial court failed to adequately examine the record and dismissed his petition in the face of constitutional violations. He further claims that the trial court erred in dismissing the action on "collateral estoppel" grounds. Finally, petitioner claims these errors deprived him of equal protection and due process.

#### SUMMARY OF THE ARGUMENT

Petitioner has failed to properly cite to the record and to adequately cite legal authority to support his claims, and has failed to preserve the issues for appeal.

The trial court was adequately informed of the facts at trial and was not misled by counsel for the respondent. The court had all relevant information at hand when it made its decision to dismiss the petition for postconviction relief.

The trial court did not abuse its discretion in dismissing the petition for postconviction relief and petitioner's claims are not supported by the record.

ARGUMENT

POINT I

PETITIONER'S CLAIMS ARE NOT SUPPORTED BY THE RECORD AND WERE NOT PRESERVED FOR APPELLATE REVIEW AND ARE, THEREFORE, NOT PROPERLY BEFORE THIS COURT.

Petitioner's statement of the facts, which is contained in the statement of the case section of his brief, does not contain a single reference to the record. Not only does he fail to cite to the record in support of his contentions, there are numerous misrepresentations of fact and references to alleged facts that were never made part of the record.<sup>1</sup> As a result of petitioner's failures to adequately cite to the record, not to mention his misrepresentations of the record, this Court should assume the correctness of the judgment of the trial court. R. Utah Ct. App. 24(e); Koulis v. Standard Oil Co. of California, 746 P.2d 1182 (Utah Ct. App. 1987).

Further, in order to preserve the issue for appeal, petitioner must have lodged an objection before the trial court and state specific grounds for the objection. Petitioner failed

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<sup>1</sup> For example, petitioner claims that his appellate counsel made an argument before this Court that "misdirected" the court regarding his representation at trial by an attorney. Petitioner's Opening Brief at 5. He also claims that counsel for the state failed to explain the facts to the trial court during the hearing on the motion to dismiss. Petitioner's Opening Brief at 6. There is nothing in the record to support this claim as petitioner did not make the transcript of the hearing part of the record on appeal.

to object on any ground which he now claims entitles him to reversal on appeal. Consequently, this Court should disregard his claims and summarily affirm the trial court. Utah R. Evid. 103; State v. Schreuder, 726 P.2d 1215 (Utah 1986).

Finally, this Court should summarily affirm the trial court's order of dismissal as petitioner's brief is not "concise, presented with accuracy . . . and is not free from burdensome, irrelevant, immaterial, or scandalous matters." R. Utah Ct. App. 24(k). His arguments are unintelligible and are not supported by relevant legal support. As a result, this Court should disregard his claims. Koulis v. Standard Oil Co. of California, 746 P.2d 1182 (Utah Ct. App. 1987).

#### POINT II

THE TRIAL COURT HAD ALL RELEVANT INFORMATION  
BEFORE IT AND THE RECORD DOES NOT SUPPORT A  
CONCLUSION THAT IT WAS MISLED BY RESPONDENT.

Petitioner claims in Point I on his brief that counsel  
for respondent

Misconstrued the Actual Cause of Action that  
Petitioner was Denied trial Counsel  
Representation (Simply One Contention), and  
By Fraudulent Mean's [sic] Amended three  
Additional Contentions that, 1, the Court of  
Appeal's [sic] Failed to Address this Issue;  
2, that his Appellate Counsel Was Ineffective  
For his Refusal to Raise this Issue on Direct  
Appeal; and 3, that Petitioner was Denied Due  
Process and Equal Protection of the Law;  
Which She is Simply not at Liberty do Do  
Without Adverse Party Consent.

Petitioner's Opening Brief at 8-9. He also claims that counsel  
for respondent "Misdirected the Court that Petitioner's Claim was  
Barred By Collateral Estoppel Pre-requisites [sic]." Id. at 9.  
Petitioner provides no citations to the record in support of his

claim, and his only legal support<sup>2</sup> does not support his argument.

First, there is no dispute that petitioner was absent at trial and that his counsel was allowed to withdraw after making an appearance but before evidence was presented by the state. In the postconviction proceeding, the trial court was informed of this situation and had before it not only respondent's motion to dismiss and memorandum in support of the motion, but many other documents upon which it based its conclusion. These documents included all information filed by petitioner. For example, the trial court had before it petitioner's original petition for postconviction relief and his reply to the motion to dismiss (R. 2, 88). Additionally the trial court had the transcript of the trial which unequivocally establishes the events at trial, including the fact that petitioner's counsel was allowed to withdraw (R. 15-58). The court also had before it petitioner's letter to this Court in which he briefed the lack of trial counsel issue, which this Court considered on appeal (R. 64-68), and a copy of this Court's opinion in the original appeal (R. 69-75).

Respondent's motion in support of his motion to dismiss was fully supported by the record, case law, and legal argument. Given the adequacy of the record the trial court had before it, petitioner's unsupported claim that respondent somehow misled or committed a fraud upon the court is totally without merit.

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<sup>2</sup> McGarien v. McGarien, 27 Utah 2d 200, 494 P.2d 283 (1972) and Boyce v. Boyce, 609 P.2d 928 (Utah 1980).



### POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
IN DISMISSING THE PETITION FOR POSTCONVICTION  
RELIEF.

Petitioner claims in Point II of his brief that the trial court abused its discretion by dismissing the petition for postconviction relief by: 1) allowing counsel for respondent to commit fraud upon the court as alleged in point I, 2) failing to examine the evidence presented by petitioner, 3) dismissing the petition for postconviction relief even though there had been substantial violations of state and federal constitutional provisions, and 4) dismissing the petition "on the grounds of a factually erroneous collateral estoppel defense." Appellant's Opening Brief at 11-19.

Petitioner's first assertion can be summarily disposed of based upon the argument in Point II of this brief. Petitioner has failed to show fraud by respondent.

Petitioner's second and third assertions can be condensed into one for sake of effective argument, since both arguments are based upon the erroneous assumption that the trial court failed to adequately scrutinize petitioner's position. His position appears to be that the only possible explanation for the trial court's denial of the petition is that the trial court failed to consider his evidence. In reviewing a denial of postconviction relief, the Utah Supreme Court has held,

[W]e survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." Velasquez v. Pratt, 21 Utah 2d

229, 232, 443 P.2d 1020, 1022 (1967); see  
also Richardson v. Sullivan, 700 P.2d 534,  
537 (Colo. 1985); Schad v. Turner, 27 Utah 2d  
345, 347, 496 P.2d 263, 264-65 (1972);  
Maxwell v. Turner, 20 Utah 2d 163, 165, 435  
P.2d 287, 288 (1967). . . .

Bundy v. DeLand, 763 P.2d 803, 805 (Utah 1988). Likewise, this Court in Gomm v. Cook, 754 P.2d 1226, 1228 (Utah Ct. App. 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987), held that "In reviewing a challenge to a trial court's factual findings, we apply a 'clearly erroneous' standard. That standard requires that 'if the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings . . . will be set aside.'"

The trial court determined that the petition should be dismissed and based its decision upon the following findings: 1) Petitioner was represented by counsel up to the date of trial when, because of petitioner's lack of cooperation, trial counsel was allowed to withdraw, 2) petitioner voluntarily absented himself from trial, 3) though appellate counsel did not brief the issue of lack of trial counsel, petitioner supplemented the brief with a four page letter to the Court of Appeals in which he presented legal argument and support for his contention of error, and 4) the Court of Appeals found that petitioner was represented by counsel but voluntarily absented himself from trial and was, therefore, properly tried in absentia (R. 109). The trial court also found that by voluntarily absenting himself from trial, and thereby not being available to assist counsel in his defense, petitioner was not in a position to complain that he was denied

the assistance of counsel (R. 110). The record fully supports the trial court's dismissal of the petition. Petitioner has failed to establish that there was no reasonable basis for the trial court's determination or that the decision was "clearly erroneous."

Petitioner's final claim in Point II of his brief is that "the Court's Reliance Upon Erroneous Information in Supporting A Collateral Estoppel Bar, and Dismissal was 'manifest Error' mandating Reversal. . . ." Appellant's Opening Brief at 19. He, again, asserts that misrepresentations were made to this Court at oral argument in the initial appeal, and by counsel for respondent during argument on the motion to dismiss the postconviction petition. Again, petitioner makes no attempt to provide record support for his claim and, in fact, there is none. And, again, the issue was not preserved below. As previously argued, this, alone, should result in summary denial of his claim.

Regardless, petitioner's argument is unintelligible. Perhaps his argument is that the trial court erred in dismissing his petition on the grounds that the issues had been raised on direct appeal and were, therefore, barred from review in a postconviction proceeding. The trial court did not make this specific finding in its decision to dismiss the petition. However, such a finding would be legally correct. It is well established that postconviction proceedings cannot perform the function of regular appellate review. See, e.g., Codianna v. Morris, 660 P.2d 1101 (Utah 1983); Andrews v. Morris, 607 P.2d 816 (Utah), cert. denied, 449 U.S. 891 (1980); Rammel v. Smith, 560 P.2d 1108 (Utah 1977).

In petitioner's final argument, set forth in Point III of his brief, he essentially restates the arguments made in Points I and II and claims that the errors establish a violation of his rights to due process and equal protection. The trial court found that petitioner's constitutional rights were not violated. Petitioner has not established that the trial court's findings of fact were clearly erroneous, Gomm v. Cook, 745 P.2d 1226, 1228 (Utah Ct. App, 1988), or that it abused its discretion in dismissing the petition. Bundy v. DeLand, 763 P.2d 803, 805 (Utah 1988). Petitioner was not denied due process or equal protection, and this Court should affirm the decision of the trial court.

#### CONCLUSION

The trial court correctly dismissed the petition for postconviction relief filed by Wade Wagstaff. For the reasons discussed above, and any additional reasons advanced at oral argument, the respondent requests that this Court affirm the decision of the trial court.

RESPECTFULLY submitted this 20th day of March, 1990.

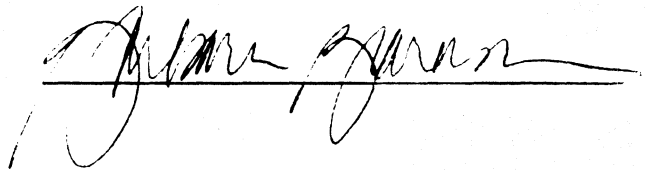
R. PAUL VAN DAM  
Attorney General



BARBARA BEARNSON  
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 Wade Wagstaff, pro se, P. O. Box 250, Draper, Utah 84020 on this 27<sup>th</sup> day of March, 1990.

A handwritten signature in cursive script, appearing to read "James Gurnon", is written over a horizontal line.