

1999

Jennifer Gwen Austin, Plaintiff and Appellant, vs.
Warden Hank Galetka, Defendant and Appellee :
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JENNIFER GWEN AUSTIN

Plaintiff and Appellant

vs.

WARDEN HANK GALETKA

Defendant and Appellee

Case No. 991021-CA

PRIORITY 3

OPENING BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
TOOELE COUNTY, STATE OF UTAH
HONORABLE DAVID S. YOUNG

Duplicate

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COURT OF APPEALS

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1953, as amended).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

ISSUE #1:

The lower court's granting of Galetka's motion to dismiss on the factual grounds that it was "without opposition" was clearly erroneous, since there is insufficient evidence to support it and because of glaring evidence that there was opposition to the motion.

The Standard of review: The trial court's factual findings shall not be set-aside on appeal unless clearly erroneous. State v. Tyler, 850 P.2d 1250, 1253 (Utah 1993).

Grounds for Seeking Review: Austin preserved this issue for appeal in her Response in Opposition to Respondent's Motion to Dismiss. (R. at 152-163). She also conducted oral argument on the issue of dismissal. (R. at 307-313).

Furthermore, the lower court's error was plain in that the error should have been obvious to the trial court, and the error is harmful. See, State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

ISSUE # 2:

The lower court's dismissal of Austin's Petition as moot, on the grounds that Austin had been released from custody, was incorrect since Austin was actually a

parolee being significantly restrained in the Orange Street Community Correctional Center.

The Standard of review: The lower court's determination that Appellant's Petition was rendered Moot by her release from custody is a conclusion of law that is reviewed for correctness, according no deference to the lower court's conclusions. Gerrish v. Barnes, 844 P.2d 315, 318-19 (Utah 1992).

Grounds for Seeking Review:

Austin preserved the issue of dismissal for appeal in her Response in Opposition to Respondent's Motion to Dismiss. (R. at 152-163). She also conducted oral argument on the issue of dismissal. (R. at 307-313).

Also, Austin had no opportunity to object to this ruling since it dismissed the case. Furthermore, the lower court's error was plain in that the error should have been obvious to the trial court, and the error is harmful. See, State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

ISSUE #3:

The lower court's dismissal of Austin's petition as moot, on the grounds that Austin had been released from custody, was incorrect because Austin is subject to the collateral legal consequences of her conviction.

The Standard of review: The lower court's determination that Appellant's Petition was rendered Moot by her release from custody is a conclusion of law that is reviewed for

correctness, according no deference to the lower court's conclusions. Gerrish v. Barnes, 844 P.2d 315, 318-19 (Utah 1992).

Grounds for Seeking Review:

Austin preserved the issue of dismissal for appeal in her Response in Opposition to Respondent's Motion to Dismiss. (R. at 152-163). She also conducted oral argument on the issue of dismissal. (R. at 307-313).

Also, Austin had no opportunity to object to this ruling since it dismissed the case. Furthermore, the lower court's error was plain in that the error should have been obvious to the trial court, and the error is harmful. See, State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

ISSUE #4

The lower court judge should have disqualified himself before deciding on Galetka's motion to dismiss because in 1997, Austin's attorney had filed a complaint against the lower court judge.

The Standard of Review: In determining whether a trial judge committed error by failing to recuse himself or herself is a question of law, the appellate court reviews such questions for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

Grounds for Seeking Review:

When subsequent to the ending of a case, a party becomes aware of a matter which would have provided grounds for the disqualification of the presiding judge, the

reviewing appellate court must decide on the propriety of the Judge's participation if there is a sufficient basis to decide. See, Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 254 (Utah 1992). Austin's attorney, George L. Wright has provided this appellate court with a copy of the complaint he filed against Judge Young in 1997. (Addendum 2). The complaint provides this court with a sufficient basis to determine whether Judge Young's participation in this case was proper. Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 254 (Utah 1992).

Also, Austin could not have made a timely objection to Judge Young's presiding over this case because Austin did not know that Judge Young had been assigned to her case before receiving his minute order dismissing the case. Therefore, Austin had no chance, prior to the dismissal of the case, to request that Judge Young be disqualified.

Furthermore, it is the duty of the Judge, not of counsel, to disqualify himself when he knows of a basis for disqualification. Regional Sales Agency, Inc. v. Reichert, 830 P.2d at 257 fn. 7 (Utah 1992).

Moreover, the lower court's error was plain in that the error exists, the error should have been obvious to the trial court, and the error is harmful. See, State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

DETERMINATIVE STATUTES

The following rules and statutes are determinative or relevant with respect to some of the issues raised by Austin.

Utah Code Jud. Admin. R. CANON 3E(1)(a) (2000)

E. Disqualification.

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

URCP Rule 65C(i) (2000)

(i) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary

judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

Utah Code Ann. § 78-46-7 (1999)

§ 78-46-7. Persons competent to serve as jurors -- Persons not competent to serve as jurors

(1) A person is competent to serve as a juror if the person is:

(a) a citizen of the United States;

(b) over the age of 18 years;

(c) a resident of the county; and

(d) able to read, speak, and understand the English language.

(2) A person who has been convicted of a felony that has not been expunged is not competent to serve as a juror.

STATEMENT OF THE CASE

a. The Nature of the Case

This case is an appeal from an order dismissing a Petition for Post Conviction relief. The lower court gave two reasons for so ruling: 1) Galetka's motion to dismiss was without opposition and 2) Austin's petition was moot because she had been release from custody. (R. 293-294).

b. The Course of Proceedings

On February 9, 1998 Appellant, Jennifer Austin ("Austin") pled guilty to a second-degree felony (False Evidences of Title and Registration) and three misdemeanors. (R. 64-66).

She signed a plea in abeyance agreement, which held the second-degree felony in abeyance for 36 months if Ms. Austin completed the requirements of her probation. (R. 55).

On May 11, 1998, Ms. Austin's probation was revoked due to a probation violation. Ms. Austin was transported to the Utah State Prison for evaluation. She was later sentenced to one to fifteen years in the Utah State Prison. (R. 145).

More than six months after pleading guilty, on July 29, 1998, Ms. Austin, through her present attorney George L. Wright, filed a Notice of Appeal. (R. 148).

Later, upon her attorney's advice, Austin withdrew the appeal because Wright believed that:

- 1) Since Ms. Austin had given up her right to withdraw her guilty plea in the plea and abeyance agreement, the Court of Appeals could not hear her case;
- 2) Ms. Austin had given up her right to appeal pursuant to the plea in abeyance agreement; and
- 3) Ms. Austin's appeal was untimely because the date of the entry of judgment could reasonably be merged to the date of the entry of the plea. (R. 151 and R. 174).

Furthermore, since Ms. Austin's case involved allegations of denial of Constitutional rights, Mr. Wright withdrew the appeal, believing that extraordinary relief was the proper procedure. (R. 174).

On January 8, 1999, Appellant, Jennifer Austin, filed her petition for Post Conviction relief. On March 15, 1999 the court determined that Austin's Petition was not frivolous pursuant to Rule 65 C(g) of the Utah Rules of Civil Procedure. (Addendum 1 at p. 2). The lower court scheduled the case for a hearing on June 7, 1999. *Id.* The lower court also ordered Galetka to respond to Austin's memo by April 15, 1999. (Addendum 1 at p. 2). Nevertheless, Galetka failed to file a timely response to Ms. Austin's Petition as ordered.

Instead, on April 15, 1999, Galetka filed a motion to dismiss the petition for extraordinary relief. (Addendum 1 at p. 2). On May 19, 1999, Austin filed her response in opposition to Galetka's motion to dismiss and also filed a motion to amend the petition

for extraordinary relief. (Addendum 1 at p. 2). On June 7, 1999, the parties conducted oral argument on Galetka's motion to dismiss. (Addendum 1 at p. 3). The court ruled that Austin was to amend its petition and that Austin's attorney, Mr. Wright, could call for a hearing date after he filed for the petition. (Addendum 1 at p. 3). On or about June 8, 1999, Austin's attorney, George L. Wright called Galetka's attorney and left a message informing them that he sent the amended petition to the court and that he was going to call the court for a hearing date as instructed by the judge. The clerk of the court informed Mr. Wright that it could not set a date without a stipulation as to the date between counsels. Mr. Wright called Galetka's attorney, attempting to obtain an agreeable date for the hearing. Galetka's attorney refused to agree, claiming that she must first file a response to the petition before we set a date.

On June 11, 1999, Austin's amended petition for extraordinary relief was filed in the lower court. (R. 168). On June 30, 1999, Galetka filed a motion for enlargement of time to respond to petition. (R. 176). On July 6, 1999, Austin filed her opposition motion to Galetka's request for enlargement of time to respond to petition. (R. 181). On July 14, 1999, Austin filed her Notice to Submit for a Decision pertaining to Galetka's motion for enlargement of time to respond to petition. (R. 185). The court never ruled on Galetka's motion for enlargement of time to respond to petition.

On July 28, 1999, Galetka filed his untimely response to petition for post-conviction relief. (R. 187). In that response, Galetka again requested that the Petition

should be dismissed. (R. 193-197). Austin's attorney again attempted to set a date for hearing on the petition as ordered by Judge Dever. Again, Galetka's attorney failed to cooperate in scheduling a date for hearing. Mr. Wright decided to wait until the Court decided on Galetka's motion for enlargement of time to set the case for hearing.

On October 8, 1999, Galetka filed his motion to submit for a decision on his request for dismissal. (R. 288).

On November 1, 1999, Judge David S. Young granted Galetka's motion to dismiss "without opposition." (R. 293-294). The court also noted that Austin's petition was moot because she had been released from custody. (R. 293-294). The court further indicated that its minute entry would serve as the order of the court. *Id.*

On December 1, 1999, Austin filed her notice of appeal. (R. 299-300).

c. Background

On May 15, 1997, Jennifer Austin's current attorney, George L. Wright, filed a complaint with the Judicial Conduct Commission against Judge David S. Young. (Addendum 2). Later, Mr. Wright represented, Jennifer Austin ("Austin"), during her Petition for Post Conviction Relief, which is the subject of this appeal. Judge Dever had presided over most of the Post Conviction proceedings. (Addendum 1). Unknown to Austin and to her attorney, at some point in time, Judge Young was assigned to Austin's case. (Addendum 1). His first act was to grant the Motion to Dismiss in favor of Galetka. (R. 293-294).

d. Substantive Facts

On January 1, 1998, Appellant, Jennifer Austin drove eastbound on I-80. The car's owner sat in passenger's seat. (R. 35-36). Trooper Rob Bench stopped the vehicle as a possible drunk driver. (R. 35-36). The **passenger**, Mr. Dale Estey, immediately admitted to Bench that the car belonged to him. (R. 35-36). A registration check revealed that the license plate, attached to the car, belonged to another vehicle. (R. 35-36). Since both occupants had outstanding warrants for their arrest, Trooper Bench placed Austin and the passenger in custody. (R. 35-36). While conducting a search Bench discovered a plastic baggie containing a green leafy substance, a pipe, and cigarette papers. (R. 35-36). Both suspects were booked into the Tooele County Jail. (R. 35-36). Austin was charged with: False Evidences of Title and Registration a second-degree felony; License Plate and Registration Card Violations a class-C misdemeanor; **Driving on a Suspended** or Revoked License a class-**B misdemeanor**; Failure to Carry or Exhibit Registration a class C misdemeanor; Possession of a Controlled Substance a class A misdemeanor; Possession of Drug Paraphernalia, a class B misdemeanor; and Failure to wear a Seat Belt a class-C misdemeanor. (R. 44-46).

On January 6, 1998, Judge Dever appointed an attorney to represent Ms. Austin. (R. 48). The same attorney was appointed to represent the passenger, Mr. Estey, in another case. (R. 57). Counsel for Ms. Austin failed to advise her of the potential conflict of interest arising from the fact that he and his law firm was also representing

the passenger. (R. 82-83). Austin's counsel also failed to advise the trial court of the conflict of interest when counsel discovered that the passenger had confessed that the vehicle belonged to him. (R. 82-83). Although the passenger had admitted that the car belong to him, Austin's counsel advised her to waive her preliminary hearing without explaining to her the chances of dismissing Counts I and II for lack of evidence that Austin knowingly altered the registration sticker and that she knew that the car's license plate was from another vehicle. (R. 82-83).

On February 9, 1998 Ms. Austin pled guilty to the following four offenses: False Evidences of Title and Registration a second-degree felony; Driving on a Suspended or Revoked License a class-B misdemeanor; Possession of a Controlled Substance a class A misdemeanor; and Possession of Drug Paraphernalia, a class B misdemeanor. (R. 229-230). She also signed a plea in abeyance agreement. (R. 244). During that sentencing proceeding, the trial court informed Ms. Austin that she was giving up her right to appeal this matter to a higher court. (R. 229 lines 14-15). Ms. Austin signed a twelve-page plea in abeyance agreement, which stated that by signing the agreement she had thirty days to withdraw her guilty plea. (R. 240).

According to the plea in abeyance agreement, the second-degree felony was to be held in abeyance for 36 months if Ms. Austin completed the requirements of her probation. (R. 242). On May 11, 1998, Ms. Austin's probation was revoked due to a probation violation. (R. 263). Ms. Austin was transported to the Utah State Prison for

evaluation. (R. 263). She was sentenced to one to 15 years in the Utah State Prison. (R. 266).

SUMMARY OF ARGUMENTS

ARGUMENT I.

The lower court's finding that there was no opposition to Galetka's motion to dismiss was clearly erroneous and absolutely unfounded. There are repeated onslaughts of opposition contained in Austin's Opposition to Respondent's Motion to Dismiss and in her oral argument, through counsel on June 7, 1999, in open air.

If, in an effort to give the lower court the benefit of the doubt, one stretches reason to consider Galetka's Response to Austin's Petition as a motion to dismiss, (since it also asks for dismissal), the finding of no opposition still lacks a legal basis. This is true for two reasons: 1) the Response was not properly before the lower court due to it being untimely and 2) Austin was not required to reply the Galetka's Response.

ARGUMENT II.

The lower court also based its dismissal of Austin's Petition on the proposition that, since Austin had been released, her petition was moot. However, as a parolee subject to conditions, which significantly confine and restrain freedom, Austin's release on parole does not render her petition for post conviction relief moot.

ARGUMENT III.

As a convicted felon in Utah Austin would be subject to laws allowing impeaching of a Defendant with a prior conviction, and disqualifying her from serving

on a jury. Since Austin would definitely be subject to collateral legal consequences of her conviction, her Petition is not moot.

ARGUMENT IV.

In 1997, Austin's attorney filed a complaint with the Judicial Conduct Commission against the lower court Judge, (Judge Young), concerning a matter outside of this case. This created, at least, a personal prejudice against Austin's lawyer such that the lower court judge should have disqualified himself, and refrained from deciding on Galetka's motion to dismiss. Since the lower judge did decide on Galetka's motion to dismiss, Austin's right to a fair tribunal has been infringed upon thereby violating due process under the United States Constitution and the Utah Constitution.

Also, Judge Dever, Judge Young's predecessor, had already ordered that a merits hearing on the Petition was to take place. Ignoring that hearing, Judge Young dismissed the Petition upon questionable grounds. Thus, the outcome of the Petition certainly would have had better results for Austin had the lower court judge disqualified himself as required in the Code of Judicial Conduct.

ARGUMENT

I.

THE LOWER COURT’S GRANTING OF GALETKA’S MOTION TO DISMISS ON THE FACTUAL GROUNDS THAT IT WAS “WITHOUT OPPOSITION” WAS CLEARLY ERRONEOUS, SINCE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT IT AND BECAUSE OF GLARING EVIDENCE THAT THERE WAS OPPOSITION TO THE MOTION.

The lower court dismissed Austin’s Petition because Defendant’s Motion to Dismiss was without opposition. (R. 293-294). Thus, the factual basis for dismissing Austin’s Petition was that there was no opposition to the Galetka motion to dismiss. Contrary to that, glaring facts demonstrating that there were oppositions to Galetka’s motion to dismiss are contained in Austin’s Opposition to Respondent’s Motion to Dismiss and in her oral argument through counsel on June 7, 1999. (R. 152- 163 and R. at 302). As to Austin’s Response to Galetka’s Motion to Dismiss, it contains 10 pages containing the following arguments in opposition:

- 1) Argument section I in that brief is entitled, “THE ISSUES IN MS.

AUSTIN’S PETITION COULD NOT HAVE BEEN RAISED ON APPEAL.” (R. 155).

- 2) The title of Section II of the brief’s Argument states, “EVEN IF MS.

AUSTIN COULD HAVE RAISED THE ISSUES OF HER PETITION ON DIRECT APPEAL THE CIRCUMSTANCES OF THIS CASE

CONSTITUTE UNUSUAL CIRCUMSTANCES, WHICH ALLOW THIS COURT TO ADJUDICATE HER PETITION.” (R. 156-157).

- 3) Subsection b follows stating that, “The Unusual Circumstances Exception is not Limited to Claims of Ineffective Counsel.” (R. 158).
- 4) The following subsection states, “ The Post-Convictions Remedies Act Cannot Limit the Writ of Habeas Corpus Except As Provided In The Constitution.” (R. 158).
- 5) Finally, the last Section of Austin’s Brief opposing **Galetka’s** motion to dismiss is entitled: “ THE IMPORTANCE OF MS. AUSTIN’S CONSTITUTIONAL RIGHTS AND NOTIONS OF FAIRNESS REQUIRE THAT HER PETITION BE HEARD.” (R.160).

No doubt **Galetka’s** Motion to Dismiss faced opposition from **Austin**.

Furthermore, there is no excuse for the lower court refusing to hold in its knowledge the fact that on June 7, 1999, the parties conducted oral argument on the motion to dismiss. (R. 302). An ordinary reasonable lower court exercising ordinary diligence would have discovered the afore- mentioned oppositions. Furthermore, once an ordinary lower court found the opposition it would not and could not have reasonably concluded that **Galetka’s** motion was without opposition. Therefore, the lower court’s finding regarding this was unfounded.

In order to meet her marshalling requirement, Austin submits the following. Since only one motion to dismiss was filed, and it was definitely opposed. The only evidence the lower court could have utilized to reasonably determined that Galetka's motion to dismiss met no opposition from Austin, is if the lower court considered Galetka's untimely Response To Petition For Post-Conviction Relief as the motion to dismiss that it referred to in its Order. (R. 293-294). The court could have done this because Galetka's Response To Petition For Post-Conviction Relief does argue that the petition should be dismissed. (R. 193). Also supporting this is the fact that Austin did not file a Reply to Galetka's Response (Addendum 1 at p. 3). Even so, such reasoning lacks a legal basis to render it sufficient to support the finding that Galetka's motion to dismiss met no opposition. See, Child v. Gonda, P.2d 425, 433 (Utah 1998).

First, there was no requirement that Austin file a Reply to Galetka's Response To Petition For Post-Conviction Relief. This is true because once a Petition and a Response are filed no other pleading or amendments are permitted unless the court permits. Rule 65C(i) Utah Rules of Civil Procedure. Therefore, Austin was not required to reply to Galetka's Response.

Second, Galetka's Response To Petition For Post-Conviction Relief was untimely and thereby not properly before the lower court. This is so because at the end of the June 7, 1999 hearing on Galetka's motion to dismiss, lower court ordered that the normal times for filing the briefs would apply. (R. at 313). The normal time to

respond to a Petition is thirty days plus time allowed for service. URCP 65C(i). Since Austin filed her Amended Petition on June 11, 1999, Galetka had 30 days plus 3 days (for being served by mail) to file his Response. (R. 168) (URCP 65C(i) and URCP 6(e)). Therefore, Galetka had until July 14, 1999 to file his response. Nevertheless, Galetka filed his Response two weeks late on July 28, 1999¹. (R. at 187). Also note that, although Galetka had filed a motion for an enlargement of time to respond on June 30, 1999, the lower court failed to decide on his time enlargement motion. (Addendum 1 at p. 3). Thus there was no court order to enlarge Galetka's time period to file his response.² (Addendum 1 at p. 3). Therefore, the untimely response cannot be deemed a motion to dismiss because it was not properly before the court. Thus, viewing the foregoing in a light favorable to the lower court's determination, there is absolutely no factual basis for its **finding** that Galetka's Motion to **Dismiss** was without opposition. See, State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). Thus, its factual determination in this regard was clearly erroneous. Id. Austin therefore asks that the dismissal of this case be reversed.

¹ Before the June 7th 1999 hearing, the lower court had also ordered that Galetka file his response by April 15, 1999. (Addendum 1 at p.2). Galetka failed to meet that cut off date also. (Addendum 1 at p.3).

² Austin filed her Opposition to the time enlargement motion and a notice to submit for a decision on the time enlargement motion. (R. 181 and 185).

II.

THE LOWER COURT'S DISMISSAL OF AUSTIN'S PETITION AS MOOT, ON THE GROUNDS THAT AUSTIN HAD BEEN RELEASED FROM CUSTODY, WAS INCORRECT SINCE AUSTIN WAS ACTUALLY A PAROLEE BEING SIGNIFICANTLY RESTRAINED IN THE ORANGE STREET COMMUNITY CORRECTIONAL CENTER.

The lower court also based its dismissal of Austin's Petition on the proposition that, since Austin had been released, her petition was moot. (R. 293-294). However, Austin was a parolee at the time of the lower court's order dismissing her Petition. (See, Addendum 3 (A letter, signed by Ms. Deborah Davidson, Director of Orange Street Community Correctional Center)). Even if the lower court was correct in labeling Austin as "released", Utah courts have adopted the federal rule that "release on parole does not render a petition for habeas corpus moot because parole 'imposes conditions which significantly confine and restrain [a parolee's] freedom.'" Northern v. Barnes, 825 P.2d 696, 698 (Utah App. 1992) (quoting Jones v. Cunningham, 371 U.S. 236, 243, 83 S. Ct. 373, 377, (1963)). When the lower court dismissed her Petition Austin was confined at Orange Street Community Correctional Center. (Addendum 3). This certainly renders Austin's confinement significant. Therefore, Austin's release on parole did not make her Petition moot. Since the lower court's ruling was incorrect in this regard, Austin asks that its dismissal order be reversed.

III.

THE LOWER COURT'S DISMISSAL OF AUSTIN'S PETITION AS MOOT, ON THE GROUNDS THAT AUSTIN HAD BEEN RELEASED FROM CUSTODY, WAS INCORRECT BECAUSE AUSTIN IS SUBJECT TO THE COLLATERAL LEGAL CONSEQUENCES OF HER CONVICTION.

A criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57, 88 S. Ct. 1889 (1968). Such collateral legal consequences may include the use of the conviction to impeach the petitioner's character or as a factor in determining a sentence in a future trial, as well as the petitioner's inability to vote, engage in certain businesses, or serve on a jury. *Id.* In Utah, Austin would be disqualified from serving on a jury due to her felony conviction. See, Utah Code Annotated 78-46-7(2). As a convicted felon in Utah she would also be subject to law allowing the impeaching a defendant, to inquire into the fact and nature of the prior conviction. See State v. Williams, 656 P.2d 450, 453 (Utah 1982); citing State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (Utah 1963). Since Austin would definitely be subject to the possibility of collateral legal consequences of her conviction, her Petition is not moot. Again, the lower court incorrectly dismissed her Petition as moot; Austin asks that its dismissal order be reversed.

IV.

THE LOWER COURT JUDGE SHOULD HAVE DISQUALIFIED HIMSELF BEFORE DECIDING ON GALETKA'S MOTION TO DISMISS BECAUSE IN 1997, APPELLANT'S ATTORNEY HAD FILED A COMPLAINT AGAINST THE LOWER COURT JUDGE.

In 1997, Austin's attorney filed a complaint with the Judicial Conduct Commission against the lower court Judge concerning a matter outside of this case. (Addendum 2). Austin argues that since her attorney, filed a complaint against the lower court judge, his impartiality might reasonably be questioned such that he should have disqualified himself from rendering his decision granting Galetka's motion to dismiss. (See, Addendum 2). Canon 3E (1) of the Utah Code of Judicial Conduct states in part that,

"[a] judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer."

Canon 3E (1) of the Utah Code of Judicial Conduct. (Emphasis added).

Thus, a "judge should recuse himself when his 'impartiality' might reasonably be questioned." State v. Neeley, 748 P.2d 1091, 1094 (Utah), cert. denied, 487 U.S. 1220, 108 S. Ct. 2876 (1988). No doubt, an appearance of bias existed in this case. A judge will certainly appear to be biased against a party's attorney when that attorney had previously filed a complaint against the judge. This is true because the filing of the complaint was a personal matter against that Judge in particular, accusing no other person save him. (See addendum 2). As recently stated by this State's Supreme Court,

“ Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice.”

In re Young, 984 P.2d 997, 1007 (Utah 1999).

Moreover, it is the duty of the Judge, not of counsel, to disqualify himself when the judge knows of a basis for disqualification. Regional Sales Agency, Inc. v. Reichert, 830 P.2d at 257 fn. 7 (Utah 1992). Obviously, Judge Young knew of the Complaint filed against him in 1997. (Addendum 2, at its last page; indicating that the Judge will be provided with information concerning the complaint). He also knew from the lower court's case file that George L. Wright was representing Austin. Therefore, the lower judge had a duty to disqualify himself, since knowledge of the basis of disqualification can reasonably be imputed to him.

Nevertheless, a trial judge's failure to disqualify himself based on the appearance of bias may be grounds for reversal if actual prejudice is shown. See State v. Gardner, 789 P.2d 273, 278 (Utah 1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1837 (1990). Actual prejudice can be shown when there exists a reasonable likelihood that the result would have been more favorable for a party absent the trial judge's appearance of bias. See, State v. Gardner, 789 P.2d at 278. Also, the failure of a trial judge to recuse even where he should have, based on the appearance of possible bias or prejudice, does not require reversal unless the "substantial rights of the party are affected. *Id.* Austin now addresses these requirements pertaining to prejudice.

a. There is a Reasonable Likelihood That The Result of Austin's Petition Would Have Been More Favorable to Her if Judge Young Would Have Disqualified himself.

In general, Galetka's Motion to Dismiss argued that since Austin did not raise the arguments contained in her Post Conviction Petition in her initial appeal, her Petition should be dismissed. (R. 97). Although Judge Young premised the dismissal of Austin's petition upon the claim that it was without opposition, Austin undeniably opposed Galetka's Motion to dismiss in the form of her written Opposition to Galetka's Motion to Dismiss as set forth earlier in this brief's Argument I. (R. 152). Thus, it is more than clear that Austin opposed Galetka's motion to dismiss. A fair and reasonable judge would have simply looked through the court file and determined that Austin's Opposition Brief unequivocally opposed Galetka's motion to dismiss.

Not only so, on June 7, 1999, at the hearing on the motion to dismiss, Austin through counsel argued orally against Galetka's motion to dismiss. (R. 202). From this is it clear that the outcome of this case would have been different if a unbiased Judge had presided over Austin's petition. This is so because a reasonable judge would not have dismissed the case because it was without opposition. In fact, Judge Dever, Judge Young's predecessor had already determined that a hearing was to take place after Austin filed her Amended Petition and Galetka had filed his response. (Addendum 1 at p. 3). Instead of conducting a hearing on the matter in accord with Judge Dever, Judge Young dismissed the Petition upon questionable grounds. Therefore, if Judge Dever

had continued as judge, Austin would have had a hearing on the merits of her Petition.

Prejudice is evident.

Please also note, that in denying Austin's Petition for mootness, Judge Young refused to address the merits of the Petition. This is true because "[w]hen declaring an issue moot, a court specifically declines to address the merits." State v. Sims, 881 P.2d 840, 842 n.5 (Utah 1994). Therefore, the commandeering of her court ordered hearing prejudiced Austin.

b. A Since Austin's Substantial Right to A Fair Hearing has been affected, The Lower Judge's Failure To Disqualify Himself (Based On The Appearance Of Possible Bias Or Prejudice), Requires Reversal.

The failure of a trial judge to recuse even where he should have, based on the appearance of possible bias or prejudice, does not require reversal unless the substantial rights of the party are affected. See, State v. Gardner, 789 P.2d at 278.Id.

A fair hearing necessarily includes an impartial tribunal. See, Marcello v. Bonds, 349 U.S. 302, 315; (1955); (Justices Black and Frankfurter dissenting). In this case, given the afore-mentioned appearance of bias together with the lower courts bizarre rulings as set forth above, it is apparent that Ms. Austin has been denied her right to a fair tribunal relating to her Petition. Since the right to a fair tribunal is essentially a due process right, Austin's due process rights under the United States Constitution and Utah Constitution have also been violated. (U.S CONST. AMEND XIV, § 1; Utah CONST. art. I § 7.).

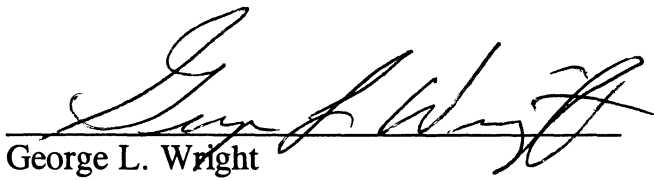
Also note that the lower court also based its dismissal on the claim that the matter was moot since Austin was released. As stated, Austin was on parole when her Petition was dismissed. Release on parole does not render a petition for habeas corpus moot because parole 'imposes conditions which significantly confine and restrain freedom." Northern v. Barnes, 825 P.2d 696, 698 (Utah App. 1992) (quoting Jones v. Cunningham, 371 U.S. 236, 243, 83 S. Ct. 373, 377, (1963)). Furthermore, a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57, 88 S. Ct. 1889. Since Austin would definitely be subject to the possibility of collateral legal consequences of her conviction, her Petition is not moot.

Therefore, by the lower court's incorrect and adverse ruling Austin has been prejudiced, having been denied a substantial right, the right to a fair tribunal. See, Marcello v. Bonds, 349 U.S. 302, 315; (1955); (Justices Black and Frankfurter dissenting).

CONCLUSION

Ms. Austin, based on the foregoing, requests that the dismissal of her Petition be reversed with an Order prohibiting Judge Young from presiding over this case in any manner.

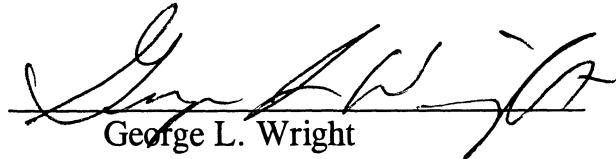
RESPECTFULLY SUBMITTED this 26th day of April, 2000.


George L. Wright
Attorney for Appellant

MAILING CERTIFICATE

This is to certify that on this the 26th day of April, 2000, I caused a true and copies of the foregoing document to be delivered to the court and mailed to the persons named below, overnight FEDEX:

Catherine Johnson
Utah Attorney General
Criminal Appeals Division
160 East 300 South, 6th Floor
Salt Lake City, UT 84114



George L. Wright

ADDENDUM 1

THIRD DISTRICT COURT - TOOELE
TOOELE COUNTY, STATE OF UTAH

JENNIFER GWEN AUSTIN vs. HANK GALETKA

CASE NUMBER 990300028 Post Conv Rel NonCap

CURRENT ASSIGNED JUDGE
L. A. DEVER

PARTIES

Petitioner - JENNIFER GWEN AUSTIN
Represented by: GEORGE WRIGHT

Respondent - HANK GALETKA
Represented by: ERIN RILEY

CASE SUMMARY

CASE NOTE

PROCEEDINGS

01-08-99 Filed: Petition For Extraordinary Relief roenag
01-08-99 Filed: Memorandum Supporting Petition For Extraordinary Relief roenag
01-08-99 Filed: Affidavit Of Jennifer Gwen Austin In Support Of Her
Petition For Extraordinary Relief roenag
01-11-99 Case filed by roenag roenag
01-11-99 Judge DEVER assigned. roenag
02-18-99 TELEPHONE CONFERENCE scheduled on March 15, 1999 at 11:00 AM in
Room 321 with Judge DEVER. roenag
02-18-99 Notice - NOTICE for Case 990300028 ID 590772 roenag
TELEPHONE CONFERENCE.
Date: 3/15/99
Time: 11:00 a.m.
Location: Room 321
TOOELE COUNTY COURTHOUSE
47 SOUTH MAIN
TOOELE, UT 84074
before Judge L. A. DEVER
The reason for the change is Clerk error.
02-26-99 TELEPHONE CONFERENCE Cancelled. roenag
Reason: Clerk error.
02-26-99 TELEPHONE CONFERENCE scheduled on March 15, 1999 at 11:00 AM in
Room 321 with Judge DEVER. roenag
02-26-99 Notice - NOTICE for Case 990300028 ID 594463 roenag
TELEPHONE CONFERENCE.

Date: 3/15/99
Time: 11:00 a.m.
Location: Room 321
TOOELE COUNTY COURTHOUSE
47 SOUTH MAIN
TOOELE, UT 84074

before Judge L. A. DEVER

The reason for the change is Clerk error.

3-15-99 HEARING scheduled on June 07, 1999 at 02:00 PM in Room 321 with
Judge DEVER.

juliek

3-15-99 Minute Entry - Minutes for Post Conv Rel NonCap

juliek

Judge: L. A. DEVER

Clerk: juliek

Video

Tape Count: 11:32

George Wright and Jeff Gray are available by telephone for a conference with the court. The respondent represents a Motion to Dismiss is forthcoming. The court orders Attorney General to respond to petitioner's memo by 4/15/99. Mr. Wright to answer by 5/17/99. A hearing is set 6/7/99 at 2:00 p.m. A copy of this file and criminal file on petitioner is to be provided to Mr. Gray. HEARING is scheduled.

Date: 06/07/1999

Time: 02:00 p.m.

Location: Room 321

TOOELE COUNTY COURTHOUSE

47 SOUTH MAIN

TOOELE, UT 84074

before Judge L. A. DEVER

03-16-99 Notice - NOTICE for Case 990300028 ID 602726

juliek

HEARING.

Date: 6/7/99

Time: 02:00 p.m.

Location: Room 321

TOOELE COUNTY COURTHOUSE

47 SOUTH MAIN

TOOELE, UT 84074

before Judge L. A. DEVER

The reason for the change is Court Ordered

03-16-99 HEARING scheduled on June 07, 1999 at 02:00 PM in Room 321 with
Judge DEVER.

juliek

03-16-99 HEARING Cancelled.

04-15-99 Filed: Motion To Dismiss

roenag

04-15-99 Filed: REspondent's Memorandum Of Points And Authoritties In
Support Of Motion To Dismiss

roenag

05-19-99 Filed: Petitioner's Response in Opposition to Respondent's

Motion to Dismiss and Motion to Amend Petition for
Extraordinary Relief

marlynr

5-07-99 Filed: Notice OF Substitution

roenag

5-07-99 Minute Entry - Minutes for Law & Motion

juliek

Judge: L. A. DEVER

Clerk: juliek

PRESENT

Petitioner's Attorney: GEORGE WRIGHT

Petitioner(s): JENNIFER GWEN AUSTIN

Attorney for the Respondent: ERIN RILEY

Video

Tape Count: 4:20

HEARING

Oral argument is heard on State's motion to dismiss. Court allows plaintiff to file an amended petition. Mr. Wright may call for a hearing date after he files the petition.

05-11-99 Filed: Amended Petition For Extraordinary Relief

roenag

07-06-99 Filed: Petitioner's Opposition to Respondent's Motion for
Enlargement of Time To Respond to Petition

marlynr

07-28-99 Filed: Response to Petition for Post-Conviction Relief

sharonc

10-08-99 Filed: Notice to Submit for Decision

sharonc

11-01-99 Minute Entry - Minutes for MINUTE ENTRY-ORDER

uman

Judge: DAVID YOUNG

Clerk: uman

Video

HEARING

The Court grants Defendant's Motion to Dismiss without opposition. In addition, the Court notes that Petitioner has been released, thereby making her petition moot.

This signed minute entry shall serve as the order of the court.
C.C. to Counsel.

11-23-99 Filed: Request for Transcript

marlynr

11-23-99 Filed: Order for Transcript

marlynr

12-01-99 Filed: Notice Of Appeal (ccpy of appeal forwarded to court of
appeals this date)

roenag

12-01-99 Filed: Request For Transcripts

roenag

12-06-99 Filed: Letter from Utah Court Of Appeals

roenag

12-09-99 Filed: Transcript (Motion To Dismiss)

roenag

ADDENDUM 2



State of Utah

JUDICIAL CONDUCT COMMISSION

Steven H. Stewart
Executive Director

645 South 200 East #104
Salt Lake City, Utah 84111
801/533-3200
FAX 801/533-3208

George L. Wright

Name

243 East 400 South, #301

Address

Salt Lake City, Utah 84111

City/State/Zip Code

(801) 575-6610

Telephone Number

REQUEST FOR INVESTIGATION OF COMPLAINT

TO: JUDICIAL CONDUCT COMMISSION

I request that the Utah Judicial Conduct Commission undertake an investigation of

Judge David S. Young, a member of the judiciary of the State
of Utah.

(Please provide a full factual statement upon which the complaint is based, together with the title of the case and case number, if known. Also, include the names, addresses and telephone numbers of other persons who can substantiate your complaint. If the complaint is documented or if you have documents supporting your contention you should supply copies of these documents to us with your complaint.)

This complaint flows from the actions of Judge Young in the case of Jan DeBry v. Robert DeBry, Case No. 960903322

PLEASE COMPLETE YOUR COMPLAINT ON REVERSE SIDE

See "FACTS" attached

(If space is not sufficient, you should attach additional pages. Also attach any Exhibits you wish us to consider.)

George L. Wright
Complainant

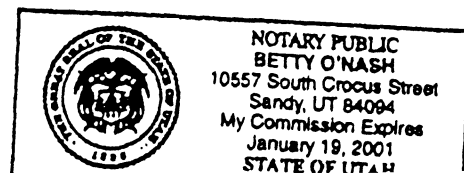
STATE OF UTAH)

County of Salt Lake)

On the _____ day of May, 1997, personally appeared before me George L. Wright the signer of the above document, who being first duly sworn did say that the matters and things stated therein are true to the best of his/her knowledge, information and belief.

Betty O'Nash
NOTARY PUBLIC

My commission expires:



FACTS

Because of rulings that I believed to be unfair against my client, Jan DeBry, in the case of DeBry v. DeBry (a tort action), I decided to investigate whether or not there was a relationship between Judge Young and Robert DeBry, of any of the law firms representing him.

In my investigation I discovered that Judge Young's committee (the Committee for Judicial Excellence) received re-election contributions from the firm of Berman, Gauvin, Tomsic, and Savage. The publication of that firm's name and donation violated the Code of Judicial Conduct.

After investigation I have concluded that Judge Young violated the Code of Judicial Conduct in his struggle to retain the bench in last November's election.

Canon 5 (c) (1) of the Code of Judicial Conduct states that a candidate shall not make pledges or promise of conduct in office other than faithful and impartial performance of the duties of the office. A picture of Judge Young appeared on the Salt Lake Tribune several days before last November's election. Under his picture were the words "David S Young, A Tough Judge." Although no verbal promise was directly made by Judge Young, his picture, taken together with those words conveys a message that if Judge Young is re-elected, he will be tough, conservative, and traditional, rather than sensitive, liberal and progressive. This advertisement conveys partially towards the politically conservative.

Canon 5(c)(2) states that a candidate shall not "... Solicit publicly stated support..." The advertisement listed names of attorneys who supported Judge Young. By allowing his picture to appear on the advertisement Judge Young solicited publicly the

stated support on the attorneys listed. The language of Canon 5(c)(2) indicates that indirect solicitation of publicly stated support is not permitted

Either Judge Young knowingly allowed his committee to use his picture along with publicly stated endorsement, or his committee used his picture negligently. In either case, that advertisement, due to the picture and the endorsements, brings the judicial office into disrepute because of the prejudice it conveys.

Canon 5(c)(2) allows committees established by a judge to solicit campaign contributions and support from lawyers. Also, the lawyers must be told that their contributions will not be known to the judge or the candidate. Judge Young's committee, the Committee for Judicial Excellence, made public the names of attorneys who contributed and the amounts they donated. Due to this disclosure, on November 4, 1996, the Salt Lake Tribune published an article that named two law firms that made contributions to Judge Young's committee and amounts given. Those law firms are Ray, Quinney & Nebeker and Berman, Gaufin, Tomsic and Savage. (See, Salt Lake Tribune article attached hereto as exhibit A). One of these law firms, Berman, Gaufin, Tomsic and Savage, is representing Robert DeBry against Jan DeBry. The Salt Lake Tribune stated that this firm was one of the two largest contributors to Judge Young's struggle to retain the bench. During that time the Judge's committee continued to advertise in the Salt Lake Tribune. Therefore it is very likely that the Judge knew about the contributions of Berman, Gaufin, Tomsic and Savage.

In accordance with Section 78-7-28(1) "A justice, judge, or justice court judge of any court of this state in accordance with the procedure prescribed in this section, may be removed from office, suspended, censured, involuntarily retired, or publicly or privately

reprimanded for . . . (e) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.”

I believe that Judge Young has demonstrated conduct prejudicial to the administration of justice in the tort case of DeBry v. DeBry.

The first occasion occurred when Judge Young, after exhibiting a hostile attitude towards Ms. Van Dijk, Jan DeBry’s current divorce attorney, and refusing to allow her to complete her argument, ruled that Dr. Noel Gardner be permitted to perform an IME on Jan DeBry. Dr. Gardner had previously filed an affidavit for the Defendant which demonstrated that he (Gardner) had already formed an opinion about Jan DeBry, and was not therefore qualified to perform an unbiased, unprejudiced IME.

The second occasion occurred when Judge Young allowed an expedited telephonic argument (without having received a Motion for Expedited Hearing) on a Motion for Protective Order brought by Mr. DeBry’s counsel, Sid Baucom. This telephonic argument occurred within 24 hours after the filing of the Motion for Protective Order, and Plaintiff’s counsel was not given an opportunity to research the motion or to reply to the motion in writing, but was forced to argue the motion without the benefit of research. Judge Young then ruled in favor of the Defendant. Defendant’s counsel prepared a written Order, and presented the same to the Judge for signature. Judge Young signed the order the same day, and failed to allow the required five days for me to object to the Order in accordance with Rule 4-504, Utah Code of Judicial Administration.

I believe that the conduct of Judge Young warrants investigation by the Judicial Conduct Committee.



Steven H. Stewart
Executive Director

State of Utah

JUDICIAL CONDUCT COMMISSION

645 South 200 East #104
Salt Lake City, Utah 84111
801/533-3200
FAX 801/533-3208


RELEASE

WHEREAS, I have filed a complaint with the Judicial Conduct Commission of the State of Utah, against a member of the Judiciary, and

WHEREAS, it will be necessary in the investigation of said matter, by the Commission or its Investigator, that the Judge be provided information concerning the complaint and/or a copy of that complaint.

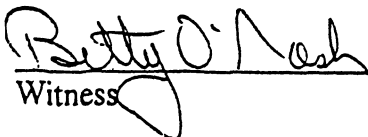
NOW THEREFORE, I do hereby authorize the Judicial Conduct Commission to -communicate my complaint to the Judge of whom I have complained, and to exhibit said written complaint to said Judge, and to discuss the same with the Judge or other court personnel, or other persons having knowledge of the matter.

DATED this 15th day of May, 1997



Signature of Complainant

George L. Wright
Please type or print name in full



Witness



ADDENDUM 3



Michael O. Leavitt
Governor
H. L. Haun
Executive Director

State of Utah

DEPARTMENT OF CORRECTIONS

Orange Street Community
Correctional Center
80 South Orange Street
Salt Lake City, Utah 84116

Mr. George Wright, Esq.
1600 Dove Street
Suite 130
Newport Beach, CA 92660

November 16, 1999

Dear Mr. Wright,

As per our telephone conversation yesterday, I am writing to confirm the dates parolee Jennifer Austin has been a resident of the Orange Street Community Correctional Center (OSCCC).

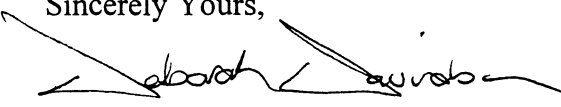
Ms. Austin arrived here on July 6, 1999. In August, she transferred from the OSCCC women's program into the OSCCC mentally ill offender program.

Ms. Austin has made satisfactory progress in the mentally ill offender program. She is scheduled for release on November 23, 1999.

In summary, Ms. Austin has resided at OSCCC from July 6, 1999 to the present.

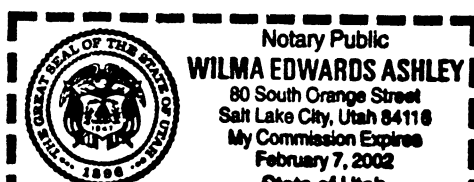
Please feel free to contact me at (801) 596-6316 if you have any other questions.

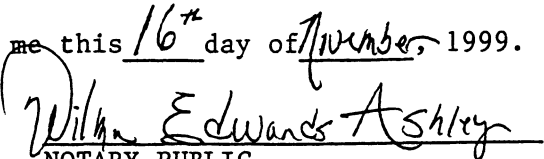
Sincerely Yours,


Deborah Davidson, Director
Orange Street Community Correctional Center

cc: Jennifer Austin

Subscribed and sworn to before me this 16th day of November, 1999.




NOTARY PUBLIC
Residing in Salt Lake County, Utah
Expires: 2-7-2002