

1990

# Oliver Benjamin Gerrish, Jr. v. State of Utah : Unknown

Utah Supreme Court

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OFFICE OF  
THE ATTORNEY GENERAL



STATE OF UTAH

900352

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JOSEPH E. TESCH  
CHIEF DEPUTY ATTORNEY GENERAL

July 25, 1990

**FILED**

JUL 25 1990

Clerk, Supreme Court, Utah

Geoffrey J. Butler  
Clerk of the Court  
Utah Supreme Court  
332 State Capitol  
Salt Lake City, Utah 84114

Re: Oliver Benjamin Gerrish, Jr. v. State of Utah,  
Case No. 900352

Dear Mr. Butler:

The respondent, State of Utah, M. Eldon Barnes, Warden, Utah State Prison, hereby waives the right to file a Brief in Opposition to Petition for Writ of Certiorari in the above-referenced case pursuant to Rule 47(d), Rules of the Utah Supreme Court. This waiver does not constitute a stipulation that the petition should be granted, but rather, it is respondent's position that the petition should be denied based upon the legal analysis contained in the memorandum decision of the Utah Court of Appeals and the respondent's memorandum which is attached to this letter. In the event that the Court deems an additional response by the State necessary to its determination, a Brief in Opposition will be provided.

Thank you for your consideration.

Very truly yours,

Handwritten signature of Dan R. Larsen in black ink.

DAN R. LARSEN  
Assistant Attorney General  
Criminal Appeals Division

DRL:bks

cc: Oliver Benjamin Gerrish

Enclosures

FILED

IN THE UTAH COURT OF APPEALS

JUN 14 1990

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*Glenn Stovall*  
Clerk of Court

Oliver Benjamin Gerrish, Jr.,	)	
	)	
Petitioner and Appellant,	)	MEMORANDUM DECISION
	)	(Not for Publication)
v.	)	
	)	Case No. 900188-CA
	)	
The State of Utah, M. Eldon	)	
Barnes, Warden, Utah State	)	
Prison,	)	
	)	
Respondent and Appellee.	)	

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Before Judges Billings, Davidson, and Greenwood. (On Law & Motion).

PER CURIAM:

Petitioner appeals the trial court's dismissal of his petition for writ of habeas corpus. We summarily affirm the trial court's dismissal upon our own motion for summary disposition pursuant to Utah R. App. P. 10(e).

On September 25, 1985, petitioner, Oliver Benjamin Gerrish, pled guilty to aggravated sexual abuse of a child, a first degree felony and was sentenced to a minimum mandatory term of six years to life in the Utah State Prison. On appeal to the Utah Supreme Court, petitioner challenged the minimum mandatory sentencing scheme. The court affirmed the sentence as constitutional. Petitioner also filed a motion with the supreme court seeking dismissal of his conviction-sentencing. The court dismissed the motion without explanation, terming it a petition for writ of habeas corpus. In May 1989, petitioner filed a petition for writ of habeas corpus in the trial court attacking his guilty plea conviction. The court dismissed the petition as successive and procedurally barred. Petitioner appealed and the Utah Supreme Court dismissed the case for lack of prosecution.

In June 1989, petitioner filed a motion to set aside the guilty plea. The court denied the motion, stating that the record as a whole established that petitioner entered his plea knowingly, intelligently and with full understanding of the rights that he was waiving and of the potential consequences of the entry of his plea. Petitioner appealed and the case was

poured over to this court. Petitioner claimed that under State v. Gibbons, 740 P.2d 1309 (Utah 1987), strict compliance with Utah R. Crim. P. 11(e) is required and the trial court erred in applying the "record as a whole" test. This court summarily affirmed the trial court's denial of the motion to withdraw the guilty plea, stating that because the plea was taken in 1985, the "record as a whole test" applies. Accordingly, this court summarily affirmed the trial court's order, finding that the appeal presented no substantial question.

Again in October of 1989, petitioner filed a petition for writ of habeas corpus, claiming he is unconstitutionally confined as a result of the plea agreement which the prosecutor breached. The trial court denied the petition stating that petitioner did not raise the breached plea bargain claim on direct appeal, and due to lack of unusual circumstances petitioner cannot seek postconviction relief for those claims. This appeal followed.

The issue before this court is whether the trial court erred in dismissing the writ. Petitioner claims that because his guilty plea was induced by the prosecutor's promise that petitioner would receive only a three year sentence in exchange for his plea, a manifest injustice has occurred which violates his due process rights.

Rule 65B(i)(4) of the Utah Rules of Civil Procedure provides that "[a]ll 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 proceeding except for good cause shown therein." In addition, "a prior adjudication of the same ground for relief is sufficient to bar relitigation on that ground, absent unusual circumstances." Hurst v. Cook, 777 P.2d 1029, 1037 (Utah 1989). The burden in a second petition is on the petitioner to show that justice would be served by permitting redetermination of the ground for relief. Id.

In this case, petitioner previously filed a petition for writ of habeas corpus attacking his guilty plea. His appeal from that ruling was dismissed due to lack of prosecution. In addition, the trial court denied his motion to withdraw his guilty plea and this court affirmed the trial court's decision. Petitioner has clearly pursued the same ground for relief in a prior adjudication. Moreover, he has not demonstrated unusual circumstances that warrant relitigation of the same ground for relief. We therefore summarily affirm the

trial court's dismissal of the petition for writ of habeas corpus because the appeal presents no substantial question for review.

ALL CONCUR:

*Judith M. Billings*

Judith M. Billings, Judge

*Richard C. Davidson*

Richard C. Davidson, Judge

*Pamela T. Greenwood*

Pamela T. Greenwood, Judge

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IN THE UTAH COURT OF APPEALS

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OLIVER BENJAMIN GERRISH, JR.,	:	APPELLEE'S MEMORANDUM
	:	REGARDING SUMMARY
Petitioner/Appellant,	:	DISPOSITION
v.	:	
STATE OF UTAH, M. ELDON BARNES,	:	Case No. 900188-CA
WARDEN, UTAH STATE PRISON,	:	
Respondent/Appellee.	:	

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Appellee, by and through Dan R. Larsen, Assistant Attorney General, hereby submits the following memorandum regarding summary disposition in response to the Notice of Sua Sponte Consideration by the Court for Summary Disposition.

STATEMENT OF FACTS

Appellant, Oliver Benjamin Gerrish, pled guilty on September 25, 1985, to one count of Aggravated Sexual Abuse of a Child, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1 (Supp. 1985) in exchange for a dismissal of two other counts for the same offense. On October 21, 1985, appellant was sentenced by Judge Timothy R. Hanson to a minimum mandatory term of ten years to life in the Utah State Prison. On

February 18, 1986, the court resentenced appellant to a minimum mandatory term of six years to life.

On appeal to the Utah Supreme Court, appellant argued that the minimum mandatory sentencing scheme was unconstitutionally vague on its face and as applied to appellant. He asserted that the lack of standards regarding aggravating and mitigating sentencing considerations resulted in disproportionate sentencing. Concurrently with his direct appeal, appellant filed in the Utah Supreme Court a Motion Seeking Dismissal of Conviction-Sentencing. On October 19, 1987, the Utah Supreme Court dismissed appellant's Motion without explanation, terming it a Petition for Writ of Habeas Corpus. One month later, on November 19, 1987, the Utah Supreme Court affirmed appellant's sentence as constitutional.

On or about July 16, 1987, appellant filed a Petition for Writ of Habeas Corpus in the Third Judicial District Court before Judge Homer F. Wilkinson. Appellant sought to attack his conviction for Aggravated Sexual Abuse of a Child entered upon his guilty plea in the Third Judicial District Court before Judge Timothy R. Hanson. Judge Wilkinson dismissed the petition in August of 1987 on the ground that appellant had not previously moved to withdraw his guilty plea.

On or about January 24, 1988, appellant filed a Notice of Appeal in the Third Judicial District Court and a Petition for

Interlocutory Appeal in the Utah Supreme Court. On February 23, 1988, the Utah Supreme Court denied the Petition for Interlocutory Appeal. Appellant's direct appeal was dismissed by the Utah Supreme Court on October 19, 1988 because the appeal was not timely filed and the court therefore lacked jurisdiction

On May 30, 1989, appellant filed a Petition for Writ of Habeas Corpus in the Third Judicial District Court before Judge John A. Rokich attacking his guilty plea conviction. After a hearing held on August 7, 1989, Judge Rokich dismissed the Petition as successive and procedurally barred. On appeal, the Utah Supreme Court dismissed the case for lack of prosecution.

On June 13, 1989, appellant filed a Motion to Set Aside Plea before Judge Timothy R. Hanson. After an evidentiary hearing held on September 29, 1989, Judge Hanson denied appellant's motion. On appeal, the Utah Supreme Court poured-over the matter to this Court. In a Memorandum Decision issued March 30, 1990, this Court summarily affirmed Judge Hanson's refusal to set aside appellant's guilty plea.

Appellant filed the present Petition for Writ of Habeas Corpus on October 19, 1990 in the Third District Court. Judge Michael R. Murphy dismissed the petition as successive and procedurally barred where appellant had failed to raise his claims on direct appeal, appellant had filed successive postconviction petitions, and appellant's motion to withdraw his

guilty plea had been denied by Judge Hanson after an evidentiary hearing. Judge Murphy specifically found that appellant did not allege "unusual circumstances" or "good cause" justifying postconviction review.

#### ARGUMENT

In his docketing statement, Appellant raises several issues attacking Judge Murphy's summary refusal to review the validity of appellant's guilty plea. Appellant's claims should be summarily rejected and Judge Murphy's ruling should be summarily affirmed.

As provided by Rule 10(e) of the Utah Rules of Appellate Procedure, this Court may summarily affirm the decision of the trial court if it plainly appears that no substantial question is presented on appeal. A summary affirmance is a determination of the appeal on the merits and does not deny an appellant his right of appeal. Hernandez v. Hayward, 764 P.2d 993 (Utah Ct. App. 1988).

The law applicable to the present case was set forth by this Court in Summers v. Cook, 759 P.2d 341, 344-45 (Utah Ct. App. 1988). In sum, a denial of a motion to withdraw a guilty plea is conclusive unless the order of denial is not appealed due to counsel's omissions or other good cause. Id. at 345. If a collateral attack is made on a guilty plea by means of postconviction relief, an evidentiary hearing need not be held if

the record of a prior hearing shows the petitioner is clearly not entitled to relief as a matter of law. Id.

In the present case, Judge Hanson's denial of appellant's motion to withdraw his guilty was appealed to this Court and summarily affirmed. See State v. Gerrish, Case No. 900089-CA. Appellant's claims regarding his guilty plea were fully considered and rejected. Accordingly, Judge Murphy correctly ruled that appellant was precluded from collaterally attacking his guilty plea.

Additionally, Judge Murphy was correct in ruling that appellant's claims could and should have been raised on direct appeal and that the petition was successive without good cause. See Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983); Rule 65B(i)(4), Utah Rule of Civil Procedure. No "unusual circumstances" or other "good cause" were alleged by appellant to justify a successive collateral attack.

CONCLUSION

Based upon the foregoing, appellee requests that the lower court's order be summarily affirmed.

DATED this 4th day of June, 1990.

R. PAUL VAN DAM  
Attorney General



DAN R. LARSEN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that true and accurate copies of the foregoing Appellee's Memorandum Regarding Summary Disposition was mailed, postage prepaid, to Oliver B. Gerrish, P.O. Box 250, Draper, Utah 84020, this \_\_\_\_\_ day of June, 1990.

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