

1992

James Edward Clark v. State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES EDWARD CLARK, :
Petitioner-Appellant, :
v. : Case No. 920694-CA
STATE OF UTAH, :
Respondent-Appellee. : Priority No. 3

BRIEF OF APPELLEE
- - - - -

APPEAL FROM A DISMISSAL OF A PETITION FOR WRIT
OF HABEAS CORPUS, IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA,
PRESIDING.

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UTAH COURT OF APPEALS
BRIEF

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FILED
Utah Court of Appeals

AUG 17 1993


Mary T. Noonan
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

JAMES EDWARD CLARK,	:	
Petitioner-Appellant,	:	
v.	:	Case No. 920694-CA
STATE OF UTAH,	:	
Respondent-Appellee.	:	Priority No. 3

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the district court's dismissal of a petition for writ of habeas corpus involving a second degree felony. This court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1993).

**STATEMENT OF ISSUE PRESENTED ON APPEAL AND
STANDARD OF APPELLATE REVIEW**

This case involves the summary dismissal of a petition for writ of habeas corpus. The issue raised on appeal is:

Did the district court properly dismiss the petition as frivolous? In reviewing an appeal from a dismissal of a post-conviction petition, "no deference is accorded the lower court's conclusions of law that underlie the dismissal of the petition. [The appellate court] review[s] those for correctness." Gerrish v. Barnes, 844 P.2d 315, 318-19 (Utah 1992) (citing Fernandez v. Cook, 783 P.2d 547, 549 (Utah 1989)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes or rules pertinent to the resolution of the issue presented is contained in the body of this brief.

STATEMENT OF THE CASE

On January 19, 1983, petitioner was convicted of possession of a dangerous weapon by a restricted person, a second degree felony (R. 3; Addendum A). Petitioner was sentenced to a term of 1 to 15 years at the Utah State Prison (*id.*). Petitioner did not appeal his conviction.

On September 15, 1992, petitioner filed a Petition For Writ Of Habeas Corpus Or Motion to Vacate Set Aside, Or Correct Sentence (hereafter referred to as "petition") (*id.*). Petitioner claimed that his rights were violated because: (1) no weapon was produced as evidence at trial; (2) the evidence was insufficient to support his conviction; (3) the trial court applied the incorrect law; (4) the jury incorrectly determined the facts; and (5) the State's case was based completely on hearsay (*id.* at 4-8). In a signed minute entry dated October 1, 1992, the Honorable James S. Sawaya dismissed the petition as frivolous (R. 22; Addendum B).

On appeal, petitioner claims that: (1) the evidence was insufficient to support his conviction; (2) no weapon was produced at trial; and (3) he was denied his right to a direct appeal due to ineffective assistance of trial counsel (Br. of App. at 2-4).

STATEMENT OF FACTS

A statement of facts beyond those set forth in the above Statement of the Case is not necessary to resolve the issue presented on appeal.

SUMMARY OF THE ARGUMENT

The district court properly dismissed the petition as frivolous; petitioner's claims should have been raised on direct appeal. Furthermore, petitioner has failed to support his allegations with any case law or legal analysis. Therefore, the Court should decline to rule on his claims. Finally, petitioner's claim that he was denied his right to directly appeal due to ineffective assistance of counsel, was not raised in his petition below and thus, should not be considered for the first time on appeal.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE PETITION AS FRIVOLOUS: PETITIONER'S CLAIMS COULD AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

A writ of habeas corpus is not a substitute for direct appeal and cannot be used to fulfill the purpose of regular appellate review. Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983). See also Wagstaff v. Barnes, 802 P.2d 774, 775 (Utah App. 1990); Hurst v. Cook, 777 P.2d 1029, 1035 (Utah 1989). The Utah

Supreme Court has stated:

It is therefore well settled in this state that allegations of error that could have been but were not raised on appeal from a criminal conviction cannot be raised by habeas corpus or postconviction review, except in unusual circumstances.

Codianna, 660 P.2d at 1104. The Court further noted that habeas corpus may be invoked

only when the court had no jurisdiction over the person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction.

Id. at 1105 (emphasis added) (citations omitted). If the alleged error is known or should have been known to the petitioner at the time judgment was entered,

it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstance as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Id. (citations omitted). Accord Gerrish v. Barnes, 844 P.2d 315, 319 (Utah 1992).

Petitioner's claims all involve alleged trial errors which should have been known to petitioner by the time he was sentenced (R. 2-8; Addendum A). Therefore, petitioner should have raised these claims on direct appeal. Petitioner has not demonstrated unusual circumstances warranting his failure to raise

all claims on direct appeal. Since petitioner's claims are not proper for habeas corpus or post-conviction relief, the district court properly dismissed the petition as frivolous.

POINT II

PETITIONER'S FAILURE TO SUPPORT HIS CLAIMS WITH LEGAL AUTHORITY OR ANALYSIS RENDERS THEM INAPPROPRIATE FOR APPELLATE REVIEW.

Rule 24 of the Utah Rules of Appellate Procedure requires an appellant's opening brief to contain "the contentions and reasons of the appellant, with respect to the issues presented, with citations to the authorities, statutes and parts of the record relied on." Utah R. App. P. 24(a)(9). Accordingly, Utah appellate courts have consistently refused to reach the merits of issues on appeal due to inadequate legal analysis. See State v. Price, 827 P.2d 247, 249 (Utah App. 1992); State v. Day, 815 P.2d 1345, 1351 (Utah App. 1991); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

Petitioner's claims are completely devoid of legal citation or analysis. Since petitioner's brief fails to comply with the Utah Rules of Appellate Procedure, the Court should assume the correctness of the trial court's judgment. See Day, 815 P.2d at 1351; West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 n.1 (Utah App. 1991) (the appellate court has the prerogative to affirm the lower court's decision solely on the basis of appellant's failure to comply with the Utah Rules of Appellate Procedure).

POINT III

PETITIONER RAISES FOR THE FIRST TIME ON APPEAL, HIS CLAIM THAT HE WAS DENIED HIS RIGHT TO APPEAL DUE TO INEFFECTIVE COUNSEL.

Petitioner suggests, for the first time on appeal, that he was denied his right to appeal his conviction due to ineffective assistance of counsel (Br. of App. at 3-4). Although petitioner fails to explicitly state that he received ineffective assistance of counsel, he implies that this is the basis for his failure to challenge his conviction on direct appeal.

Generally, a petitioner "who fails to bring an issue before the trial court is barred from asserting it initially on appeal." State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991) (citations omitted). However, an appellate court "may address a constitutional issue for the first time on appeal if: (1) the trial court committed 'plain error,' or (2) there are exceptional circumstances." Id. See also State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987); State v. Webb, 790 P.2d 65, 78 (Utah App. 1990).

Petitioner fails to claim a specific violation of his constitutional rights in relation to his failure to appeal his conviction (Br. of App. at 3-4). However, even assuming petitioner has alleged a violation of his constitutional rights, he has failed to demonstrate either plain error or exceptional circumstances. Therefore, the Court should not consider this claim.

CONCLUSION

Based on the foregoing, this Court should affirm the district court's dismissal of the petition for habeas corpus relief as frivolous.

RESPECTFULLY submitted this 17th day of August, 1993.

Angela F. Micklos
ANGELA F. MICKLOS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, this 17th day of August, 1993 to:

James Edward Clark, #02892-081
Appellant Pro Se
P.O. Box 4200
Three Rivers, Texas 78071-4200

Angela F. Micklos

A D D E N D A

A D D E N D U M A

FILED DISTRICT COURT
Third Judicial District

SEP 15 1992

SALT LAKE COUNTY
By 
DEPUTY CLERK

James Edward Clark
Prision No. 02892-081
P.O. Box 4200
Three Riviers Texas
78071-4200

In The District Court Of The
Third District, In And For Salt
Lake County, State Of Utah

James Edward Clark	:	Petition For Writ Of
Plaintiff / Petitioner ,	:	Habeas Corpus (OR
Vs.	:	MOTION TO VACATE
The State Of Utah	:	SET ASIDE, OR CORR
Defendant / Respondent .	:	ECT SENTENCE.)
-----: Case No. 920905133 HZ		
-----Judge Pokich		
Comes Now The Petitioner James E.		

follows:

1. A commitment order was issued on the twenty second day of January 1982 by the Honorable Judge James S. Sawaya, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah, in a criminal complaint which had charged Petitioner with Criminal Homicide and Possession of a Weapon by a Restricted Person to wit: That Did Commit The Homicide, a second degree felony.

2. The Petitioner was sentenced to a term of 1 to 15 years, at the Utah State Prison.

3. That Petitioner is currently located at the

Texas , P. O. Box 4200 Three Rivers
Texas, 78071-4200 .

4. That Petitioner's restraint is unlawful and unconstitutional in that Petitioner entered a plea of Not Guilty :

(a) That Petitioner was tried by a Jury and found not guilty of the Homicide and guilty of Possession of Weapon by Restricted Person to wit : that did commit the Homicide.

b) The weapon was never produced at trial as evidence .

5. Whether the evidence was sufficient to convict Petitioner of Possession of a Weapon By a Restricted Person .

. Whether Petitioner could be convicted for

Possession of Weapon By a Restricted Person .

Where the weapon was never produced as evidence to corroborate charge .

7. That Petitioner states that the above matters have not been previously ruled upon .

8. Summary of Petitioners Argument is as follows:

(a) The States case was that on January 18, 1982, at 240 West South Temple, Apartment # 30, in Salt Lake City, Utah, Thomas Bazell alleges he saw Petitioner carry a gun up to his apartment and heard Petitioner say "I'm sick and tired of you guys ripping me off. I

after a shot was fired. Mr. Bazell then saw four people including Petitioner run down the stairs from the apartment. Mr. Bazell then went to the apartment and discovered the body of Larry Chance, shot and killed with a bullet wound to the head. Petitioner was acquitted of the charge of Criminal Homicide; however Petitioner was convicted of Possession of a Weapon by Restricted Person. The State's case relies solely on Mr. Bazell's testimony that he allegedly saw Petitioner carrying a gun to the apartment; Mr. Bazell further alleges he specifically heard Petitioner make the above statement.

Court applied the wrong law. The Court should have applied the law of Possession.

10. The District Court incorrectly decided the facts. It was never determined what was in the brown paper bag and if in fact, that Petitioner had knowledge of what the content of that brown paper bag was that he had carried.

11. The District Court failed to consider important facts in the case:

(a) The fact that the Petitioner was found not guilty of the Criminal Homicide

(b) In no way could Petitioner be guilty of Possession of a Weapon by a Restricted Person to wit; that did commit the Homicide, in

fact, when Petitioner is not guilty of Homricide and there is no weapon.

(c) The District Court should have issued a Direct Verdict of Acquittal in this case.

12. The District Court made wrong Judgment, based its findings solely on hearsay and no tangible evidence.

13. Petitioner ask the Court to take action in his case and Reverse the conviction on the charge of possession of a weapon by a restricted person.

Wherefore, Petitioner prays that this Court:

1. Schedule a hearing at which time Petitioner may be present and represented

2. Permit Petitioner, who remains indigent, to proceed without prepayment of costs, fees or other assessments.

3. Grant Petitioner the authority to obtain subpoenas in Forma Pauperis, for witnesses and documents necessary to assist in the proof of the facts alleged in the petition as stated above.

4. Issue a Petition for Post Conviction Relief to have the Petitioner brought before it, to the end that he may be discharged from the illegal and unconstitutional confinement and restraint.

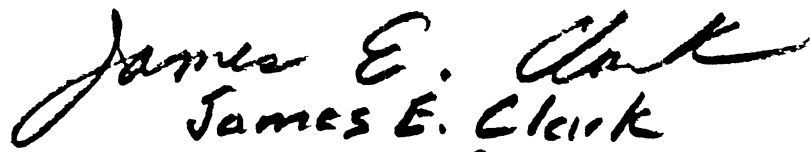
Date this 31st day of August 1992

Declaration Under Penalty of Perjury

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct.

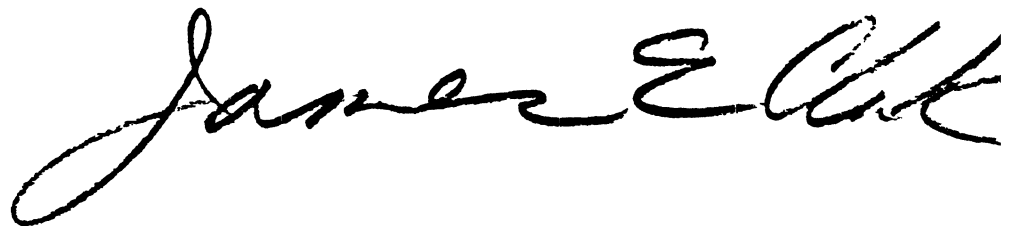
Executed at F.C.I. Three Rivers Texas 8-31-1999

James E. Clark


James E. Clark
Attorney Pro Se

Certificate of Mailing

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Post Conviction Relief, postage prepaid, to the Utah Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 31st day of August 1992



A D D E N D U M

B

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

CLARK, JAMES EDWARD	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 920905133 HC
	:	DATE 10/01/92
VS	:	HONORABLE JAMES S. SAWAYA
	:	COURT REPORTER
STATE OF UTAH	:	COURT CLERK STH
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

THE PETITION IN THIS CASE HAS BEEN ASSIGNED TO THE
UNDERSIGNED AS THE JUDGE WHO ISSUED THE COMMITMENT BY THE
PRESIDING JUDGE PURSUANT TO RULE 65B (B) (6), UTAH RULES OF
CIVIL PROCEDURE. THE COURT HAVING REVIEWED THE PETITION NOW
DETERMINES AND RULES THAT THE PETITION APPEARS FRIVOLOUS ON ITS
FACE AND HEREBY ORDERS PURSUANT TO RULE 65B (B) (7) THAT SAID
PETITION BE AND THE SAME IS HEREBY DISMISSED.

