

2003

Justin Brent Peterson v. Sheriff Aaron D. Kennard,  
Chief Paul Cunningham, Salt Lake County Jail,  
Taylorsville Justice Court : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JUSTIN BRENT PETERSON,

:

Petitioner/Appellant

:

v.

:

SHERIFF AARON D. KENNARD;  
CHIEF PAUL CUNNINGHAM;  
SALT LAKE COUNTY JAIL;  
TAYLORSVILLE JUSTICE COURT,

:

Case No. 20030264-CA

;

:

Respondents/Appellees

Appellant is not incarcerated

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**SUPPLEMENTAL OPENING BRIEF**

Appeal from a denial of a petition for post-conviction relief. Appellant was convicted of possession of a controlled substance in Taylorsville Justice Court and was sentenced to a suspended jail sentence. He subsequently filed a petition for post-conviction relief in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Sandra Peuler, Judge, presiding, which was denied.

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**INTRODUCTION**

On February 23, 2004, Appellant filed his opening brief which contained the statement of the case, facts, and arguments. See Appellant's Opening Brief. On March 31, 2004, the Appellee filed its response brief to Appellant's opening brief. See Appellees' Response Brief. On June 2, 2004, this Court granted Appellant's motion to stay the briefing schedule pending the outcome of the Petition for Writ of Certiorari in Lucero v. Kennard, et.al., 2005 UT 79, 539 Utah Adv. Rep. 21. In response to the Utah Supreme Court's decision in Lucero issued November 15, 2005, this Court ordered supplemental briefing in this case addressing any effect the supreme court's opinion in Lucero had in this matter. As requested by the Court, Appellant limits supplemental briefing to the impact of the Lucero opinion in this case. Appellant will address

appellees' arguments made in its response brief after Appellees have filed a supplemental response brief.

## **ARGUMENT**

### **POINT. UNDER *LUCERO* v. *KENNARD* APPELLANT'S POST-CONVICTION PETITION WAS PROPER UNDER THE UNUSUAL CIRCUMSTANCES EXCEPTION.**

The supreme court's decision in Lucero, clarifies that the post-conviction procedure utilized by Mr. Peterson was proper. In this case, where Mr. Peterson was deprived of his right to counsel and was not represented by an attorney until two years after judgment, unusual circumstances justified filing a petitioner for post-conviction review. Because Mr. Peterson was deprived of his right to counsel in the justice court proceedings, as set forth in Appellant's Opening Brief, and was not represented within the time for filing for a trial de novo appeal, the post-conviction procedure was appropriate and reversal of the district court's order is required.

In Lucero, the supreme court "considered whether the Post-Conviction Remedies Act ("PCRA") allows collateral attacks on a justice court conviction when the defendant has failed to seek a trial de novo."<sup>1</sup> Id. at ¶1. The supreme court concluded that justice court defendants are eligible for post-conviction relief under the PCRA. Id. at ¶¶6, 9. Nevertheless, the court required that a justice court defendant exhaust his legal remedies by seeking a trial de novo "where an appropriate remedy for a constitutional violation

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<sup>1</sup> In this case, the justice court did not argue that Mr. Peterson was barred from obtaining post-conviction relief because he did not seek a trial de novo or that review was not permitted under the unusual circumstances exception.

would be a new trial.” Id. at ¶38. The court concluded that the defendant in Lucero, was procedurally barred from seeking post-conviction relief because he filed a petition for post-conviction relief instead of seeking a trial de novo appeal. Id. at ¶41.

Despite a failure to exhaust legal remedies by filing an appeal, the court determined in Lucero that a defendant may still be eligible to have a petition reviewed if he meets the unusual circumstances exception. Id. at ¶42. The court implicitly recognized that the unusual circumstances test may be met when a defendant is deprived of his constitutional right to counsel. Id. at ¶¶43-45. Considering whether Lucero could have his post-conviction petition for relief reviewed under the unusual circumstances exception, the court concluded that because Lucero was represented by “counsel at the time he decided to pursue post-conviction relief instead of trial de novo” and “filed his petition for post-conviction relief within thirty days of the date that the justice court entered its sentence” the unusual circumstances exception was not met. Id. at ¶46. Therefore, Lucero, was not entitled to review of his petition for post conviction relief. Id. at ¶47. By contrast, in this case, Mr. Peterson is eligible to have his petition for post-conviction relief reviewed under the unusual circumstances exception because at the time he filed his petition he was not statutorily eligible to file for a trial de novo and was not represented by counsel until almost two years after entry of the date of sentence. R. 1-5; 13.

To qualify for the unusual circumstances exception to the procedural bar rules, a petitioner must demonstrate that “an obvious injustice or a substantial and prejudicial denial of a constitutional right” has occurred.” “The unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction on habeas corpus



when the nature of the alleged error was such that it would be unconscionable not to reexamine . . . thereby to assure that substantial justice was done.”

Id. at ¶45 (citations omitted).

While a petition for post-conviction relief may not be appropriately reviewed when a justice court defendant fails to exhaust his remedies by filing for a trial de novo when the alleged violation is the right to counsel, it is reviewable when unusual circumstances exist. Id. at ¶47. In Lucero, the supreme court found that unusual circumstances did not exist because “he filed his petition for post-conviction relief within thirty days of the date that the justice court entered its sentence.” Id. at ¶46. And “[a]t that time, Lucero was still statutorily eligible to file for trial de novo.” Id. In addition, “[t]he record indicat[d] that Lucero was represented by counsel at the time he decided to pursue post-conviction relief instead of a trial de novo. Given these facts, the circumstances surrounding [Lucero’s] case [did] not rise to the level of an obvious injustice or a substantial and prejudicial denial of a constitutional right.” Id. This case is factually distinguishable.

In this case, Mr. Peterson appeared in justice court pro se and pled guilty on July 18, 2000. R. 13. The docket entry shows that he was sentenced to 360 days in jail which was suspended. R. 13. On July 25, 2000, the court found Mr. Peterson in violation of his probation and imposed his original jail sentence. R. 13. On August 30, 2000, the court suspended the balance of his sentence and probation was set. R. 13. On February 13, 2001, due to Mr. Peterson’s failure to appear for his drug review, the court reimposed his 360 day jail sentence with credit for time served for 36 days. R. 16. On August 9, 2002,

more than two years after judgment was entered, the Salt Lake Legal Defender Association filed a petition for post-conviction relief on behalf of Mr. Peterson, who was being held in the Salt Lake County Jail. R. 1-5. Therefore, Mr. Peterson's case differs from Lucero in that he did not obtain the assistance of counsel until over two years after his original sentence was imposed and well past the statutory time frame in which to file for a trial de novo. Because Mr. Peterson could no longer remedy the violation of his right to counsel through a trial de novo, the petition was the only means available to request review of his illegally imposed sentence.

Unusual circumstances justifying collateral review exist when a defendant claims that he was denied the right to counsel at trial. As recognized by the supreme court, "the analysis of whether a defendant is entitled to post-conviction relief is . . . complicated in cases where a defendant raises a deprivation of counsel claim because of the 'special status' conferred upon the constitutional right to counsel." Lucero 2005 UT 79 at ¶25 (citations omitted). For example, in Brown v. Turner, 440 P.2d 968, 970 (Utah 1968), the defendant claimed that he had been denied his right to counsel and was not properly advised regarding the consequences of his plea. Id. Although the court denied Brown's claims, it reviewed those claims on the merits, thereby implicitly acknowledging that the claims constitute unusual circumstances justifying collateral review. Justice Stewart recognized this in his concurring opinion in Codianna v. Morris, 660 P.2d 1101, 1114-16 (Utah 1983) (Stewart, J. concurring)), stating:

In Brown this Court in fact addressed the merits of the habeas petitioner's claims: it did not dismiss them solely on the ground that the alleged errors were known or should have been known at the time of conviction. The

petitioner's claims in that case were that he had been denied his right to counsel and that he was not properly advised of the consequences of his plea of guilty. A reading of the opinion makes clear that the petitioner either knew or should have known at the time of his conviction of those errors that were later asserted in his habeas petition. Although the court ruled that there is no merit to those claims, the critical point here is that the Court deemed it entirely appropriate to address the merits even though petitioner had failed to take a direct appeal.

Id. at 1114 (Stewart, J. concurring).

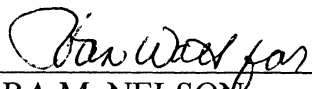
The supreme court has now explicitly reaffirmed this position in Lucero by mandating that even if “a court determines that a defendant is procedurally barred from seeking post-conviction relief, the court must . . . ascertain whether the defendant is nevertheless entitled to have an appellate court review the petition because unusual circumstances exist.” Lucero, 2005 UT 79 at ¶43. Lucero makes clear that absent the ability to file for a trial de novo within the statutory time frame along with the continued absence of the assistance of counsel qualifies as unusual circumstances “ris[ing] to the level of an obvious injustice or a substantial and prejudicial denial of a constitutional right.” Id. at ¶46. When a defendant has been denied the assistance of counsel, it would be “unconscionable not to reexamine . . . thereby [ensuring] that ‘substantial justice [was] done.’” Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994)(citations omitted).

Because Mr. Peterson has demonstrated that unusual circumstances exist in his case, he is entitled to review of his petition for post-conviction relief under the unusual circumstances exception.

## **CONCLUSION**

Based on the reasons set forth herein and in Appellant's Opening Brief, Justin Brent Peterson, respectfully requests this Court to reverse the lower court's decision and order that his jail sentence be vacated.

SUBMITTED this 12<sup>th</sup> day of January, 2006.

  
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DEBRA M. NELSON  
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to George B. Hofmann, Parsons Kinghorn Peters, 111 East Broadway, 11<sup>th</sup> Floor, Salt Lake City, Utah 84111, this 12<sup>th</sup> day of January, 2006.

  
\_\_\_\_\_  
DEBRA M. NELSON

DELIVERED to George B. Hofmann, Parsons Kinghorn Peters, as indicated above this \_\_\_\_ day of January, 2006.

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