

1993

Lyle C. Hendricks v. The State of Utah : Reply Brief

Utah Court of Appeals

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BRIEF

IN THE UTAH COURT OF APPEALS

Lyle C. Hendricks,
Petitioner / Appellant,

vs.

The State of Utah,
Respondent / Appellee.

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Case No. 

93-0532-CA

APPELLANT'S REPLY BRIEF

In the matter for review of the Decision Rendered by the Second Judicial Court
of January 12, 1993, on a Petition for Writ of Extraordinary Relief in the County of
Weber, State of Utah, The Honorable Michael J. Glasmann presiding.

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FILED

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UTAH

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IN THE UTAH COURT OF APPEALS

Lyle C. Hendricks,
Petitioner / Appellant,

vs.

The State of Utah,
Respondent / Appellee.

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Appellant's Reply Brief

Case No. 930055-CA

ISSUES OF APPELLANT'S REPLY

Pursuant to the Utah Rules of Appellate Procedure (U.R. App. P.) the Appellant is to limit his reply to new material arising in the appeal. Such circumstances exist in the instant appeal where counsel for the Appellee seems intent on focusing upon the original affidavit of G. Scott Jensen, where in fact it is the subsequent supplemented affidavit of this individual, an officer of the court, that Appellant has introduced as newly discovered evidence meriting a reconsideration of his previously-adjudicated claim.

JURISDICTION

While Appellee has filed a motion to transfer this appeal to the Utah Supreme Court pursuant to Rule 44 U.R. App. P. and Section 78-2a-3 (2) (g) of the Utah Code Annotated, Appellant has filed a response and objection with this Court contending that jurisdiction properly lies with the Utah Court of Appeals. Appellant asks this Court note that Appellee did not motion for a transfer until some six (6) months subsequent to the filing of a notice of appeal. This Court did not, sua sponte, move to grant

certification to the Utah Supreme Court utilizing Rule 43 U.R. App. P. Also, the Utah Supreme Court once transferred jurisdiction upon Appellant's original appeal, before the subsequent second affidavit was obtained, to the Utah Court of Appeals in accordance with Section 78-2-2 (4) of the Utah Code Annotated (as amended).

STANDARD OF APPELLATE REVIEW

Petitioner concedes that this matter has been previously adjudicated upon an appeal before this Court, although this occurred prior to Appellant's diligence and persistence in obtaining the second, expanded Affidavit of G. Scott Jensen, an attorney and officer of the court, regarding possible perjured testimony of Detective Shane Miner and thus constitutes new evidence.

Petitioner / Appellant asserts that under law of the case doctrine, Court adheres to it's own decision at earlier stage of litigation unless there are "cogent" or "compelling" reasons not to, such as an intervening change of controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. Sanders v. Sullivan, 900 F.2d 601, 605 (2nd Cir. 1990) citing Doe v. New York City Dept. of Social Services, 709 F.2d 782, 789 (2nd Cir.), cert. denied sub nom. Catholic Home Bureau v. Doe, 464 U.S. 864, 104 S. Ct. 195, 78 L.Ed.2d 171 (1983) (citations omitted).

The Sanders case, *supra*, presents an interesting scenario and parallel to the instant appeal in that a recanting witness did not come forward until about two years after conviction. In the Appellant's case. Affiant Jensen's memory was not refreshed until Appellant sent him a photograph some nine (9) months after the Utah Court of Appeals entered a decision in his original criminal appeal.

Appellant contends that such exigent circumstances, as in Sanders and the instant appeal of a denial of extraordinary relief, would merit consideration under the standard of review set forth for claims previously adjudicated on appeal in Hurst v. Cook, 777 P.2d 1029 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any constitutional provisions, statutes, or rules necessary for an understanding of the issues of this appeal are either presented within this Reply Brief or are contained within Appellant's original brief before this Court.

STATEMENT OF THE CASE

This is an appeal of a ruling entered on January 12, 1993, by the Honorable Michael J. Glasmann of the Second Judicial District Court, County of Weber, State of Utah, wherein petition for writ of extraordinary relief was dismissed on the grounds that it was frivolous.

The core issue of both the petition and the instant appeal is the existence of a second, supplemental affidavit by G. Scott Jensen. This affidavit (See Appendix "B") was obtained by Appellant Hendricks own diligence and persistence in sending Mr. Jensen photographs of himself and communicating with Mr. Jensen, the attorney who originally stood with Mr. Hendricks during his initial video arraignment, in an attempt to refresh Mr. Jensen's memory as to events that happened at that arraignment. For it is during this time period that one Detective Minor claims Mr. Hendricks "confessed" to him the requisite elements of intent which resulted in Mr. Hendricks' conviction for aggravated robbery. This second affidavit shows that such conversation never

occurred between Detective Minor and Mr. Hendricks, and as such constitutes the necessary new evidence that merits reconsideration of a previously adjudicated claim.

This newly apparent evidence allows Appellant to raise collateral claims. His claim of ineffectiveness regarding counsel Stephen Laker's being charged by the trial Court with interviewing G. Scott Jensen and producing him before the court in order to establish the veracity of the Detective's testimony. (See trial transcripts, page 122) This omission by Mr. Laker merely adds to the manifest inefficiency with which he handled Mr. Hendricks defense.

At this juncture, Appellant must call this Court's attention to the existence of two separate affidavits by G. Scott Jensen, This first (See Appendix "A") dated December 6, 1988, where it is clear, through phone and mail communication with Mr. Hendricks, that this officer of the court due to the large number of cases he handles and the brevity of their encounter, does not quite recall the circumstances of the incident.

While the second affidavit (See Appendix "B") dated November 12, 1990, reflects that Counselor Jensen, now having been provided a photograph of Mr. Hendricks, clearly recalls the video arraignment and circumstances of it's occurrence.

STATEMENT OF THE FACTS

Appellant asserts that any facts beyond those originally stated in the Appellant's Brief (See Brief, Page 2,3,4 and 5), Appellee's Brief and the Statement of the case as above, with the exception of the fact of the existence of the two (2)

affidavits of G. Scott Jensen, are unnecessary for an understanding of the issues presented by this appeal. No objection is raised towards the Appellee's motion to expand the record as this addition should serve to further illustrate counsel's, Mr. Stephen Laker's ineffectiveness during the trial phase.

SUMMARY OF THE ARGUMENT

The Second Judicial District Court, Honorable Michael J. Glasmann presiding, improperly dismissed petition for extraordinary writ as frivolous. Although Petitioner's allegations have been previously raised and adjudicated, new evidence of expanded affidavit of G. Scott Jensen constitutes requisite new material necessary for denial of due process claim allowing re-litigation as "ends of justice" may require. Further, to time-bar meritorious constitutional claims from habeas corpus (extraordinary relief) review runs afoul of both the United States Constitution and the Constitution of Utah.

ARGUMENT

POINT I

PETITIONER'S CLAIMS ALTHOUGH PREVIOUSLY RAISED OR ADJUDICATED MERIT RECONSIDERATION DUE TO NEW EVIDENCE.

The Second District Court, Judge Michael J. Glasmann presiding, dismissed petition for writ of extraordinary relief on the ground it was frivolous. A position which the Appellees, in their brief, would have this Court affirm. See State v. Romano, 29 Utah 2d 237, 507 P.2d 1025 (1973) ("Frivolous" is defined as "having no basis in fact or law"). However, Appellee's brief fails to objectively demonstrate how in fact the claims are frivolous. The Appellees consistently overlook the second, refreshed affidavit of G. Scott Jensen and instead focus on his first affidavit. The difference of

these two (2) affidavits is manifest. (See Appendix "A" and "B"). For the later statement by Affiant Jensen completely refutes the testimony of Detective Minor. Testimony which was used to form the intent necessary to gain a conviction of aggravated robbery against Mr. Hendricks. (See Appendix "B" nos. 4 and 5).

The second affidavit of G. Scott Jensen is newly discovered evidence. Appellant Hendricks asks that accord be given the dates of the affidavits (Affidavit "A" dated December 6, 1988) and (Affidavit "B" dated November 12, 1990). Clearly, the merits of the second affidavit and it's resultant claims were not reached on the original appeal, as the Utah Court of Appeals filed it's opinion in Mr. Hendricks criminal appeal on February 5, 1990, some nine (9) months prior to Mr. Hendricks even obtaining the second affidavit of G. Scott Jensen.

Apparently there has been some confusion regarding the existence of two (2) separate affidavits by the same individual, G. Scott Jensen. This confusion persists in that even to this date Appellees only mention the first affidavit in their reply brief to the instant appeal.

In reviewing a dismissal of a habeas corpus petition, the appellate court examines the record "in the light most favorable to the findings and judgment . . . and will not reverse if there is a reasonable basis in the record to support the trial court's denial of the writ." Hall v. Utah Board of Pardons, 806 P2d 217 (Utah App. 1991) (citations omitted). As shown by Affiant Jensen's statement (See Appendix "B" no. 7) the testimony of Detective Minor at Mr. Hendricks trial was false. In White v. Ragen, 324 U.S. 760 (1953), the United States Supreme Court has held that a conviction secured by the use of perjured testimony is lacking due process. In Sanders v. Sullivan, 863 F.2d 218 (2nd Cir. 1988) the court reasoned :

"[I]t has long been axiomatic that due process requires us "to observe that fundamental fairness essential to the very concept of justice." It is simply intolerable, in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies."

Sanders 863 F.2d at 224, quoting Lisenba v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L.Ed. 166 (1941).

However, due process notwithstanding, the appellate court need only review the correctness of the dismissal, which is plainly incorrect for failure to encompass the second affidavit of Affiant Jensen. A situation which has occurred throughout post-conviction proceedings in Mr. Hendricks case. See U.S. v. Rivera, 900 F.2d 1462, 1469 (10th. Cir. 1990) (The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error).

POINT II

PETITIONER'S CLAIMS ARE NOT TIME-BARRED AS THEY RAISE MERITORIOUS CONSTITUTIONAL ISSUES

Appellees contend that any habeas corpus action is barred by Section 78-12-31.1 of the Utah Code Annotated (as amended) which requires that a habeas corpus action must be commenced within three (3) months from the time petitioner knew of grounds for relief or should have know of such grounds. If this statute is deemed applicable to this litigation, then the statute itself must be held to be unconstitutional. Both the United States Constitution and the Utah Constitution provide that the "Privilege of the writ of habeas corpus shall not be suspended." Article I, Section 9; Article I. Section 5, respectively.

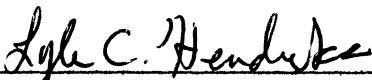
The statute relied upon by the Appellees would clearly suspend the writ of habeas corpus, and its successor the writ of extraordinary relief, after the three month period had expired even though a petitioner has a meritorious constitutional claim. Thus, the state's (Appellees) effort to procedurally eliminate this petition and appeal must fail.

CONCLUSION

Based upon the foregoing, it is shown that the Second District Court Judge Michael J. Glasmann's dismissal of petition was improper. Accordingly, Appellant prays this Court vacate the dismissal, remand the case for an evidentiary hearing on the merits where upon vindication of the claims the relief prayed for in the petition may be granted.

Dated this 27th day of July, 1993.

Respectfully submitted,



Lyle C. Hendricks
Attorney, Pro Se
Utah State Prison
P.O. Box 250
Draper, Utah 84020

CERTIFICATE OF MAILING

I do hereby certify that on the 22th day of July, 1993, I mailed, postage pre-paid, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to:

Angela F. Micklos, Esq.
Assistant Attorney General
Attorney for Appellee-Respondent
330 South 300 East
Salt Lake City, Utah 84111

Lyle C. Hendrick

APPENDIX "A"

AFFIDAVIT OF G. SCOTT JENSEN

I, G. SCOTT JENSEN, being first duly sworn upon oath, depose and say as follows:

1. That I am an attorney licensed to practice law in the State of Utah.

2. That on December 9, 1987 I worked on a part-time basis with the Weber County Public Defender Association.


3. It is possible on December 9, 1987 I stood with Mr. Lyle C. Hendricks for an arraignment.

4. After discussing the matter with Martin Gravis, the history of the case sounded vaguely familiar and I might have been the one who stood up with Lyle during his arraignment.

5. I do not remember having an conversation with Stephen Laker regarding Mr. Lyle Hendricks.

6. If I was the attorney who was present with Mr. Hendricks during his arraignment, I have no recollection of what took place at the arraignment, or of any conversation with Stephen Laker.

DATED this 6 day of December, 1988.

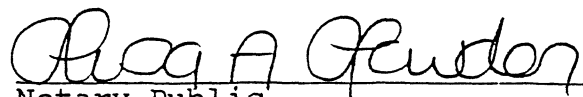


G. SCOTT JENSEN
Attorney at Law

SUBSCRIBED AND SWORN to before me this 6 day of December, 1988.

My Commission Expires:

9/18/91



Notary Public
Residing at: Harrisonville, Utah

APPENDIX "B"


AFFIDAVIT of E. Scott Jensen

I, E. Scott Jensen, Being first duly sworn upon oath,
depose and say as follows:

1. That I am an Attorney Licensed to practice law in the State of Utah.
2. THAT on Dec 9, 1987 I worked on a part time Basis with the Weber County Public Defender Association.
3. It is possible on Dec 9, 1987 I stood with MR. Lyle C. Hendricks for an arraignment.
4. After discussing the Matter with Martin Gravis, the history of the Case sounded vaguely familiar And I might have been the one who stood up with Lyle during his Arraignment.
5. At no time was I or MR. Hendricks in a interview Room with "Detective Miner" on the Morning of Dec. 9, 1987, where I left on Any occasion, where MR. Hendricks was with "Detective Miner" alone.
6. MR. Hendricks did stop "Detective Miner" in the hall-way by the Video arraignment room and asked why he was being charged with a 1st degree felony, where "Det. Miner" stated "Cause a Gun was involved" where upon MR. Hendricks went into the Video arraignment and waived his preliminary hearing and asked to be sentenced.
7. I do remember a phone call from Stephen L. Baker on Jan 20, 1988 asking about MR. Hendricks, but at the time I could not recollect who MR. Hendricks was, I was not asked about the facts concerning me or MR. Hendricks being in an interview room with "Det. Miner" or I would have testified to the facts which would have been inconsistent with "Det. Miner" testimony concerning MR. Hendricks' alleged confession.

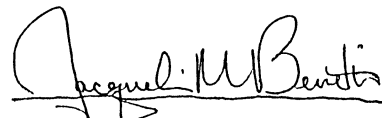
I Hereby certify this is true and correct to the best
of my knowledge and belief.

Dated this 12 day of November, 1990


Scott Jensen
Attorney at Law

Subscribed And Sworn to me before this 12 day of
November, 1990

My Commission Expires
3/12/92


Jacquelin M. Beretti
Notary Public
Residing at: Opden

