ORIGINAL FILED
April 22 2009
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

CASE NO: DA 08-0249

IN THE SUPREME COURT OF THE STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Appellee,

Vs.

JOSH A. ALLEN,

Defendant and Appellant.

FILED
APR 22 2009
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PETITION FOR REHEARING

APPEARANCES BY:

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SUMMARY

Comes now the Appellant Josh A. Allen to enter this Petition for Rehearing in the above entitled case, to wit: Appellant contends that this case qualifies for rehearing under all three reasons that a rehearing would be granted under Rule 20 Petitions for rehearing. With all due respect to the court, it appears to the Appellant that the court is more concerned with protecting the State from a lawsuit, than giving the Appellant equal protection and due process. Appellant realizes that this is a misdemeanor and not a murder case, however he believes that his rights are just as important as if the case where a felony, and should not be taken lightly. In addition the court's reasons for affirming contradict itself within its own decision. These contradictions also relate to or qualify the case for rehearing under rule 20. The court fails to address most questions of law that Appellant has raised, while making sure to affirm all of the reasons, or elements of the crime by which the Appellant should have been convicted. The court cites and upholds decisions from Montana, that are in the state's favor, but refuses to apply Federal decisions and opinions that are in Appellant's favor. The reasons that this case should be reheard under Rule 20 of Montana Rules of Appellate procedure are as follows.

1. There are numerous facts the Court has overlooked that are material to the decision. Many of these facts are not on the record, or are unsubstantiated because of the Appellant being denied the right to testify on his own behalf. First, on page

5-6 of the court's opinion "Allen asserted that he did not provide his name because he was afraid he would be arrested for outstanding speeding tickets. However, this allegation was unsubstantiated, as a criminal history and warrants check run on Allen ***after his arrest***......" This was unsubstantiated because Appellant was not allowed to testify on his own behalf. At the seen of the alleged crime, how was Appellant to know that there were not any warrants out for him? How would Appellant know this before giving his name or before an arrest? The court also ignores U.S. Supreme court cases that were raised addressing this issue.

> "*The privilege afforded not only extends to answers that would in themselves support conviction under a federal criminal statute but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal crime*.....***The claimant is not required to prove the precise danger since by doing so he would be forced to disclose those very facts from which the privilege protects.*** Hoffman v U.S. (CF 341 U.S. 479, 486 ,71 CT.814,818,95 L Ed 1118).

According to the logic of this Court, one first has to supply his name to see if it can be used against him, or if it is the beginning link in a chain of evidence, then if it can be used against him he would have had the right not provide it, after the damage is done.

The United States Supreme Court stated further that all rights and safeguards contained in the first eight amendments to the federal constitution are equally applicable in every state criminal action, "Because a denial of them would be a denial of due process of law." William Malloy vs Patrick J. Hogan, 378 U.S. 1,84 S. Ct. 1489. Argued March5, 1964, decided June, 15, 1964.

It seems to Appellant that the Court has forgotten the U.S. constitution's Supremacy clause as it applies to this case. Further, the Court's own opinion contradicts itself. Page 5 of the Court's opinion cites Hiibel v. Nevada, Humbolt Co., 542 U.S. 177,189,124 (2004), as a name having no reasonable danger of incrimination, then on page 2 paragraph 3 of the Courts opinion, the Court cites, as a finding of fact the reasons for Deputy Matkin wanting Appellant's name, and how it was an obstruction to refuse to identify himself: "he wanted to determine why he was running from him, suspecting that his evasion **might be because of a warrant...or because he had committed an offense in the area"**. Obviously, the appellant's name would be the beginning link in a chain of evidence to connect him to a warrant or an offense, this Court affirms this by upholding the obstruction conviction. Apparently it is ok for a policeman to ask for a suspect's name to look for a warrant, or use it to connect him to a crime because he thinks there might be one, but it is not ok for a suspect to refuse his name because he thinks he might

have a warrant. Appellant has brought up this line of logic with the extreme hypothetical example of Osama Bin Laden being asked his name, and how this would get him arrested or killed on the spot if he answered, (Appellant has no sympathies with Islamic Terrorists, but merely wanted to show an extreme example). The Court refuses to ever squarely address this legal question, as it's own opinion is self contradicting if closely examined. The Appellant raised this question in his Answer to the Complaint in the District court (page 4 paragraph 4), "does a Citizen have a duty to identify himself when he knows or has reason to believe that by identifying himself he will be revealing information that will be used against him in a second unrelated prosecution?" If the Court honestly addressed this question it would obviously be to the Appellant's favor.

2. The Court never addresses the fact that Montana has no compulsory identification law.

3. The Court never addresses the fact that Appellant having handcuffs on and not being free to leave legally meets the definition of an arrest. Regardless of Matkin claiming it was for his own protection.

4. The Court never addresses the issues raised by Appellant of the legal language in M.C.A 46-5-401. Investigative stop and frisk. Even assuming, *arguendo* that this was a detention and not an arrest, then the factual circumstances

of this case fall under the law of a Terry Stop, known in Montana as Investigative stop and frisk. M.C.A. 46-5-401. This statute uses the word demand in the case of a vehicular stop, and the word request in the case of a stop on foot. Appellant agrees that the word demand is appropriate in the case of a traffic stop, as a driver's license creates a contractual, legal obligation to supply that which is demanded. The legislatures who wrote the law used the word request in relationship to identifying oneself when on foot. The word request is voluntary in nature. The Court ignores this legal question, just as if Appellant had plead into a fiction of law, and never raised it. The Court wants to call this an Investigative stop and frisk under M.C.A 46-5-401, but then refuses to address the legal language as it pertains to the procedural relationship between a policeman and a person under such a stop. If the Court would get out a legal dictionary and look up the words request and demand, they would see that Appellant is correct that there is no legal obligation to supply a name. This question was answered by the U.S. Supreme Court, agreeing with Appellant.

"The Officer may ask the terry detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond" Berkemer v. McCarty, 468 U.S. 420, 439 (1984). If this Court would answer this question, this issue alone would easily be enough to reverse as it would show that wording of

M.C.A. 46-5-401 and the intent of Montana lawmakers agrees with the decision in Berkemer v. McCarty.

5. The Court fails to answer the questions raised in regard to the possibilities of M.C.A. 45-7-302 Obstructing a peace officer or other public servant, conflicting with constitutional rights. Appellant touches on this in his Answer to the Complaint, then after not being allowed speak in court, further expounds upon it in his Apppellant's brief to this court. The Appellant makes the example of one of the functions of a peace officer is to question suspects of a crime. If the person is guilty and refuses to answer by maintaining his right to silence and not confessing to a crime because he doesn't want to lie to the officer, can the officer charge him with obstruction for not confessing? This is a question of law directly related to a person refusing to identify himself, which this court refuses to answer. If the court would identify the boundaries of M.C.A 45-7-302, in relationship to the constitutional rights raised in this case, it would be an easy conclusion to reach that Appellant's name could fall under fifth amendment protection.

6. The next question of law that the Court refuses to address is that of intent. As Appellant has stated in the pleadings, he was aware of Miranda v. Arizona, Brown v. Texas, Terry v. Ohio, Kolender v. Lawson and numerous other cases similar to the Appellant's, before this case came up. While not knowing every

exact word of each case, Appellant was familiar with what the various justices had to say in regards to having the right to remain silent in a Terry stop or an arrest. The Court says that Appellant was notified by Matkin that he would be charged with obstruction for not Identifying himself, and thus Appellant knowingly obstructed Matkin because he was warned ahead of time. The Court should be aware that police lie to people all the time in order to gain confessions or otherwise enforce the law. At the seen of the alleged crime, Appellant was relying on U.S. Supreme Court justice's opinions, and not the opinion of a deputy sheriff. Thus, under M.C.A. 45-2-103. General requirements of criminal act and mental state……

(6) A person's reasonable belief that the person's conduct does not constitute an offense is a defense if: (c) the person acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or….

Appellant's reliance upon the cases cited from the U.S. Supreme Court easily qualify him for protection under M.C.A. 45-2-103. This Court's decision conflicts with this statute, and was not addressed by the Court, to Appellant's disadvantage.

7. The next question of Law that the Court has mentioned, but not answered is the Appellant's denial of equal protection and due process. Appellant feels that

he should not even have to mention this, as it is a basic, fundamental tenet of law and the justice system. Appellant has the right to face, confront, question, and cross examine witnesses in his own case. The Appellant was the chief witness in his own defense, and he was not allowed to testify on his own behalf, because due to his religious beliefs he wouldn't take the oath or affirm. Appellant should probably mention that this is protected by the First Amendment. Appellant cites the biblical verses in the notice of refusal to take an oath, and again in his brief to this court. As mentioned in the Appellant's brief, Appellant put in the notice of refusal to take an oath about one month in advance of the trial, and Judge Rice didn't even bother to read it. This court states that Appellant cites no legal authority for not taking the oath or affirmation. Yet Appellant cites *Gordon v. Idaho*, 778 F2d 1397. 1985. This was decided in the 9th Federal Circuit court of Appeals. The court in this case, which is superior to the Montana State Supreme Court, agrees that an oath and an affirmation are the same thing. It also says that a Defendant doesn't have to take an oath or affirm in order to testify on his own behalf. If Appellant was a Christian, and took the oath, or affirmed, contrary to what the bible teaches, then he would have been allowed to testify. Because he followed his religious beliefs under the first amendment, and refused to take the oath, he was not allowed to create any contested issues of fact in his defense. This Court never explains or addresses how Appellant's due process was denied, it just

says it wasn't. If the Court honestly answered this question, this issue alone would be enough to reverse on. Perhaps the question is better posed inversely: Does Gordon v. Idaho prohibit a person from testifying for not taking the oath or affirming? By not being allowed to testify, Defendant was denied the right to refute an adverse witness's testimony. By not being allowed to testify, there were no contested issues of fact. If Appellant was allowed to testify, contested issues of fact would have been created, which would have taken away the deputy's reasonable suspicion for the stop to begin with, which in turn would have taken away his alleged right to Appellant's name. Appellant's version of the fact's, combined with the law, would have put the case squarely under Brown v. Texas. Appellant cites the bible in conjunction with his first amendment right to religious free exercise, the right to equal protection and due process, and Gordon v. Idaho. All of these combined are more than enough legal authority to override M.R.Evid. 603.

8. The last question that the Court fails to answer is the question raised on page 6 of Appellant's Answer to the Complaint. "Does a Citizen have a duty to make himself available to a policeman for an investigation if he can reasonably avoid it? If the Court's answer to this question is no, then Appellant was justified in avoiding Deputy Matkin. It would then follow that Appellant was justified in not giving his name either.

CONCLUSION

Based upon the reasons mentioned above, the court should rehear and reverse the conviction of Appellant.

RESPECTFULLY SUBMITTED this 21st day of April, 2009

Josh A. Allen pro se

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing Petition for Rehearing, by U.S. postal service, guaranteed next day, postage paid on the 21st day of April, 2009 to the following:

Lindsay A. Osbourne.
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Havre, MT 59501
Delivered by Hand

Ed Smith Clerk of Supreme Court
P.O Box 203003
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Mark W. Mattioli
Attorney General's Office
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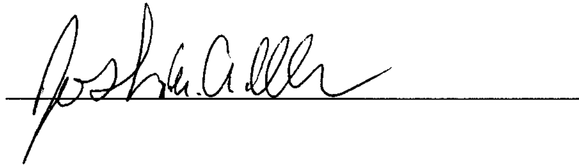
DATED this 21st day of APRIL 2009

Josh. A. Allen

CERTIFICATE OF COMPLIANCE

Pursuant to rule 20 of the Montana Rules of Appellate Procedure, I certify that the Petition for Rehearing of Josh A. Allen is printed with a proportionately spaced Times New Roman typeface of 14 point, is double spaced; and the word count is less than 2500 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

Dated this 21st Day of April, 2009



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DENA TIPPETS
CLERK OF DISTRICT COURT
2008 FEB 29 P 2: 32
FILED

DEPUTY

MONTANA TWELFTH JUDICIAL DISTRICT, HILL COUNTY
HONORABLE DAVID G. RICE DISTRICT JUDGE
HILL COUNTY COURTHOUSE HAVRE, MONTANA

THE STATE OF MONTANA	)	
	)	CAUSE NO. DC-07-110
PLAINTIFF,	)	
	)	
VS	)	NOTICE OF REFUSAL TO SWEAR
	)	OR AFFIRM OR TAKE AN OATH
Josh A. Allen	)	
	)	
DEFENDANT	)	
	)	
______________________________	)	

COMES NOW the Defendant, Josh A. Allen, to enter a NOTICE OF REFUSAL TO SWEAR OR TAKE AN OATH, to wit: According to the Defendant's truly and sincerely held religious beliefs from the bible, the Defendant cannot swear or take an oath. The Defendant cannot Affirm either, as this is synonymous with swearing, this issue was taken before the court in Gordon v. Idaho. The Defendant would ask the court to accept this as dicta, and respect the Defendant's religious beliefs in this preliminary hearing and trial.

The bible instructs in the book of James, 5:12 "But above all, my brethren, do not swear, either by heaven or by earth or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation". This instruction is repeated at Matthew 5:33-5:37 "Again you have heard that it was said of the men of old, 'you shall not swear falsely, but shall perform to the Lord what you have sworn.' But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for your cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil."

The Defendant does agree to tell the truth, and it should be pointed out that swearing to tell the truth, or taking an oath hasn't stopped anyone from lying anyway.

GORDON V. IDAHO
PAGE 1397

Dated this 29th day of FEBRUARY 2008

Respectfully Submitted,

[signature]
Pro Se

CERTIFICATE OF SERVICE

I, the Undersigned, do hereby certify that I did deliver a true and correct copy of the foregoing document, NOTICE OF REFUSAL TO SWEAR OR AFFIRM OR TAKE AN OATH, on this 29th day of FEBRUARY, 2008 either by hand or depositing a copy thereof in the United States Mail, postage prepaid, in and envelope addressed to:

MONTANA TWELFTH JUDICIAL DISTRICT, HILL COUNTY
LINDSAY A. OSBORNE, DEPUTY HILL COUNTY ATTORNY, HAVRE MONTANA

[signature]
Signature PRO. SE