

ORIGINAL

FILED

12/04/2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0524

Cody Wayne Johnston
Montana State Prison
700 Conley Lake Rd
Deer Lodge, MT 59722

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0524

CODY WAYNE JOHNSTON

Petitioner and Appellant,
Pro Se

v.

STATE OF MONTANA,

Respondent and Appellee.

Cause No.: DV:18-108

(Regarding Cause No.: DC-2015-92)

APPEAL OF ORDER OF DISMISSAL
OF DV-18-108

By Hon Judge Bidegaray
MONTANA SEVENTH JUDICIAL DISTRICT
COURT, RICHLAND COUNTY

APPELLANT'S OPENING BRIEF

CODY WAYNE JOHNSTON,
Appellant,

-v-

STATE OF MONTANA,
JAMES SALMONSON,
(Montana State Prison Warden)
Appellee.

FILED

DEC 04 2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Cody Wayne Johnston)

Confined at:)

POST CONVICTION

AO# 3020512)

Montana State Prison)

OF DC-2015-92

Appellant Pro Se)

700 Conley Lake Rd.)

Montana Seventh Judicial
District Court,

Deer Lodge, MT 59722)

Richland County

Opposing Counsel and Appellee contact information:

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November 25, 2018

COVER PAGE

IN THE SUPREME COURT OF THE STATE OF MONTANA

CODY WAYNE JOHNSTON,
Petitioner / Plaintiff,
Appellant Pro Se,

v.

STATE OF MONTANA,
Respondent and Appellee.

Cause No.: DA 18-0524
PETITIONER's BRIEF IN SUPPORT
OF WRIT OF POST CONVICTION
RELIEF (REGARDING CAUSE No.
DC-2015-92)
Appealing ORDER OF DISMISSAL
DV-18-108

Facts

Cody Wayne Johnston, Petitioner and Appellant filed paper work in Montana's Seventh Judicial District Court With Hon Judge Elizabeth Best. Hon. Judge Best filed the paper work as Petition for Post-Conviction Relief. Based on the recent order from the Montana Supreme Court in Hyslop v. State of Montana, DA 17-0078, the Court Orders the Office of the State Public Defender to appoint counsel for Johnston pursuant to §§46-21-201(2), MCA to represent him on his petition. Back on June 22, 2018. On July 12, 2018 Cynthia K. Thornton, Regional Deputy Office of the Public Defender, Region 10, Motioned the Court to rescind appoint of Post-Conviction Counsel ordered by Hon. Judge Best. On July 16, 2018, Hon. Judge Katherine m. Bidegaray, Dismissed by Order of Dismissal, Petitioner Cody Wayne Johnston's Petition for Post Conviction and Hon. Judge Best's Order to Appoint Counsel (Cause No. DV-18-108). Cody Wayne Johnston, Petitioner and Appellant, Appeal this descision to the Supreme Court of the State of Montana.

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AO# 3020512
Appellant Pro Se

| Confined at:
Montana State Prison
700 Conley Lake Rd
Deer lodge, MT 59722

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EXHIBITS

EXHIBIT A - Appellants PETITION FOR POST CONVICTION RELIEF

- Filed after Judge Best ordered Post Conviction and Counsel

EXHIBIT B - New Evidence that the alleged victim is alive as stated by the Affidavit

- Affidavit of Appellants Wife of facts not allowed by State or Counsel
- Affidavit of Wifes Mother with further facts not allowed

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Principle Opening Brief is typed with perportional spacing as best as can be completed in the Montana State Prison typewriters, with the brief being less than 30 pages, not counting this present Page. Spacing is at 1.5 due to the limitations of these machines.


CODY WAYNE JOHNSTON

CERTIFICATE OF SERVICE:

I hereby certify that I have mailed the following Brief prepaid to this court and to the Montana Attorney General to the best of my ability thru the Prison Mail system.

Dated this 25th day of Ocober, 2018.


CODY WAYNE JOHNSTON

ISSUES

Comes now the Appellant, Cody Wayne Johnston, to hereby bring forth the two following issues to the Montana Supreme Court.

- I) Does Judge Katherine Bidegary have jurisdiction to dismiss the Appellants Post Conviction for Relief from the Original cause number in the Seventh Judicial District Court, when Judge Bidegary was recused in the original matter DC-15-92 in the Seventh Judicial District, and Judge Bidegary invited Judge Elizabeth Best to preside Pro Tempe over this matter of the State of Montana vs Cody Wayne Johnston, DC-15-92?
- II) Does this Honorable Court rule in the "Interest of Justice" in a matter of extreme seriousness, of Homicide of another, when the Appellant was convicted on circumstantial evidence only, with the alleged victim being seen and witnessed many times as alive after her alleged demise? Will this Honorable Court rule now in the "Interest of Justice" with all of the attached exculpatory evidence attached that was suppressed by the State, including witness statements and Federal Bureau of Investigation reports and the simple fact that the State did not nor could not produce the alleged victims body?....The Appellant has new further evidence of witnesses who worked with the alleged victim TWO (2) years after her supposed murder.

Issue I:

The Appellant, Cody Wayne Johnston, was the defendant in DC-15-92, in the Montana Seventh Judicial District Court, in Sidney Montana, charged with Deliberate Homicide of a former girl friend Nicole (Willis) Waller. The State prosecutors claimed that Ms. Waller was killed by the Appellant on February 13, 2013. The State at no time presented a body, death certificate or an autopsy report that the alleged victim was actually dead. In fact the State knew and had exculpatory evidence that Ms Waller was actually alive much after the alleged homicide of Ms. Waller. The State had Multiple sightings and 'CRIME STOPPERS' reports as well as reports by the FBI that Ms. Waller was and still is alive. The Appellant supplied this exculpatory evidence to Judge Elizabeth Best in a letter the Appellant wrote to Judge Best. After Judge Best reviewed the Appellants letter and the exculpatory evidence with the letter, Judge Best immediately ordered that the letter be considered a Post Conviction of Relief Petition, and ordered the appointment of Counsel.

Judge Bidegary, who had been recused of the original matter, and who was not the trial or sentencing Judge Dismissed the Post Conviction Proceedings and the appointment of counsel to the Appellant. This violates rulings of this court,

as clearly held by this court in Jordan v State, 2007 MT 165, 338 Mont. 113 (2007), that this court held that "the sentencing Judge constitutes the Judge with the most familiarity of the underlying criminal action", and that the "sentencing judge should preside over the subsequent post conviction action to avoid delay and the burden that would be imposed...if a judge other than the sentencing judge had to become familiar with the record for purposes of conducting a post conviction evidentiary hearing", Jordan at ¶ 11, quoting this court in Coleman v State, 194 Mont. 428, "to promote efficiency in the administration of Justice" at 628.

Judge Bidegary did not have the Jurisdiction to dismiss this Post Conviction that was ordered by Judge Best, who did have jurisdiction. Judge Best has since dismissed this matter in Post conviction after the attached Post Conviction official Petition was filed with her in the Seventh Judicial District. The Appellant asks that this Court order that the Post Conviction be reinstated in the "INTEREST of JUSTICE" as is dmenaded by law and this court. See attached Post Conviction for relief Petition with its claims, exculpatory evidence suppressed from the court by both the State and the defense counsel, labeled Exhibit A and the new found evidence of a man who worked with the alleged victim, Nicole Waller, at the Helena, Montana Wal-Mart. Ms. Waller was going by the name Nicky Willis, using her maiden name, labeled Exhibit B

The Appellant asks that this court rule on the above issue as it has held previously and disallow Judge Bidegary from assuming jurisdiction on this matter.

Issue II:

The Appellant asks this court to review all of the above documentation in Exhibit A, as well as the record in DC-15-92. The Court will see that the State did not present any Direct evidence that the alleged victim was dead or had been murdered. The State did not have a body, the State did not have a death certificate, the state did not have a autopsy done to verify a death....In fact the State did have eye-witness testimony that the alleged victim was alive and had been seen in another city...had been picked up as a hitch-hiker and identified by the witnesses as Nicole Waller...The Appellant has since learned that the alleged victim has been seen in the same area and in fact worked at Wal-mart in the same area that Ms. Waller was seen previously. That this area is by a Trucker's cafe that she frequented often while working at Wal-mart and hitch-hiked often. She was again identified as Nicole Waller, using the name Nicky Willis, her maiden name. The attached affidavit is from a man that worked with Ms. (Willis) Waller and identified her, who knew of her tatoo's, drug use, and promiscuous sexual behavior with 'Truckers' in that area. This corresponds with earlier sightings of Ms. Waller.

In the underlying DC-15-92 matter of the alleged 'homicide' of Ms. Waller, the State did not present any direct evidence of Ms. Waller's death as is required as an element of the MCA: §45-5-102, Deliberate Homicide Statute. See Claim A in the attached Exhibit A, concerning Actual Innocence. The evidence attached to the Petition was known by both the State and defense counsel (see Claims B and C). Both knew of the evidence that Ms. Waller was alive and the evidence in Exhibit B, the affidavit of a co-worker of Ms. (Willis) Waller who worked with her two years after the alleged victims death should be immediately addressed by this court in the Interest of Justice! The merits of the Appellants Actual Innocence are presented to this court with the evidence that substantiates the Appellants claims.

The Appellant requests that the court note it's ruling in State v Weber, 112 Mont. 284, in the Montana Supreme Court that states the "rule is that in Homicide cases proof in that behalf MUST be by direct evidence, in all others the fact may be established by circumstantial evidence", see page 10 of Exhibit A.

The State did not have direct evidence of a homicide, did not have a body, did not know what county or place in Montana the alleged 'homicide' occurred, did not have evidence of how, when, where or even if a 'Homicide' occurred. The State relied on fabricated supposition and innuendo to try and establish circumstantial evidence of a homicide. This Court does not allow circumstantial evidence of a homicide as ruled in State v Weber and a multitude of other cases. Again see Exhibit A pages 12-14. The Appellant is supplying to the court the suppressed evidence and additional evidence that the Montana State Prosecutor used falsehoods and fabrications of fact and the misinterpretation of statute to convict the Appellant with out any actual evidence.

On the above grounds evidence and merits the Appellant asks that this court review the above merits justly and find for the Appellant by granting the following relief.

In 2004 the United States Congress passed the Innocence Protection Act (2004), statuted as 18 USC §3600. Through this Act, federal law mandates, "the revisiting of mistaken convictions" when evidence exists that "exonerates the wrongfully convicted." 18 USC §3600 states:

- "(1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of,
 - (B)...a State offense, if,
 - (ii) in the case of State offense,
- (6) The applicant identifies a theory of defense that,
 - (B) would establish the Actual Innocence of the Applicant of State offense.

The Appellant stands on the above federal statute and caselaw herein and in Exhibit A that supports the Petitioners claims with exculpatory proof of the Appellants ACTUAL INNOCENCE.

This court and all courts in the United States follow the principles of Common law as set dow in Blackstone's Principles (William Blackstone, 4 Commentaries, 358), that "It is better that ten guilty person's escape than one innocent man suffer", This court and many others has quoted this in their rulings....as well as..... "It is critical that the moral force of criminal law not be diluted by a Standard of Proof that leaves people in doubt whether innocent men are being condemned." Based on these Principles the Appellant asks the court to grant the following relief.

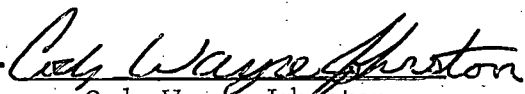
The U.S. Supreme Court held in Franks v Delaware, 438 US 154, 57 L.Ed.2d 667, 98 S.Ct. 2674, that "(1) where a defendent has made a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in his affidavit for a search warrant, or if the alleged false statement was necessary to the finding of probable cause, the Fourth Amendment required that a hearing be held at the defendents request so he might challenge the truthfullness of factual statements made by the affidavit, and (2) if at such hearing the defendent establishes by preponderance of the evidence the allegations of perjury or reckless disregard, and, with the affidavits false material set to one side, the affidavit's remaining content was insufficient to establish probable cause."

The Appellant stands on the above Franks judicial statute and dmands that in the Interest of Justice that this court order the lower court to hold the required evidentiary hearing and that the State's Affidavit for Information to Charge the Appelleant be reviewed as false and a total disregard for the truth as is demanded by all United States and Montana Courts, as established by law.

RELIEF

The Appellant has presented evidence of his Actual Innocence in this document and its attachements. The Petitioner asks that this Court order the immediate release fom incarceration based on the merits contained herein or order this matter to be presented at the District Court level and heard by Judge Best with a independent counsel appointe to represent the Appellant during an evidentiary hearing ordered by this court. In the 'INTEREST OF JUSTICE' the Appellant prays that this court review the evidence and judicial statute and rule favororably and correct this injustice and wrongful incarceration.

Dated this 25th day of October, 2018.


Cody Wayne Johnston

SUMMARY OF BRIEF

On June 22, 2018 Hon. Judge Elizabeth Best filed Petitioner's Petition for Post-Conviction Relief and made Order to OPD to appoint Counsel, based on recent order from the Montana Supreme Court in *Hyslop v. State of Montana*, DA 17-0078. On July 12, 2018 Office of the Public Defender, Region 10 Deputy, Cynthia K. Thornton Motion' to Rescind Appointment of Post Conviction Counsel, in Montana Seventh Judicial District Court, Richland County. On July 16, 2018 Hon. Judge Katherine M. Bidegaray answers the Public Defender and earlier on July 13, 2018 makes Order to Rescind appointment. The dismissal on 7-16-2018 and the Order Rescinding Appointment, both made by Hon. Judge Bidegaray were done without Jurisdiction. On August 9, 2016 Hon. Judge Bidegaray made motion of ORDER CALLING IN JUDGE, Elizabeth Best, and gave up Jurisdiction. As clearly shown by *Jordan v. State*, 2007 MT 165, 338 Mont. 113 (2007), "The sentencing Judge with the most familiarity of the underlying criminal action... should preside over the subsequent post conviction action to avoid delay and the burden that would be imposed... if a judge other than the sentencing judge had to become familiar with the record for purposes of conducting post-conviction evidentiary hearing". Judge Bidegaray did not have jurisdiction or familiarity with this case, as Hon. Judge Best was the Trial judge.

Since Appellant has sworn to his actual innocence in the matter of DC-2015-92 by affidavit and Hon. Judge Best of the Seventh Judicial District, Richland County, Opened the proceeding of Post-Conviction and ordered Appointment of Counsel in the interest of Justice, Appellant Appeals the Motion to Dismiss by Hon. Judge Bidegaray on July, 16, 2018, and the Order Rescinding Appointment on July 13, 2018. Along with the Franks Judicial Standard showing that a false statements were intentionally made and can be shown by evidence in this Post-Conviction of cause no.DV18-108 regarding DC-2015-92, and other listed reasons of the original Writ shown to be probable, showing the Actual Innocence of the Petitioner, The Petitioner's original writ opened by Hon. Judge Best should not be dismissed and counsel should be appointed to help Petitioner finish and present his Pos-Conviction at an evidentiary hearing.