

2007

Juan Carlos Colin v. The State of Utah : Reply Brief

Utah Court of Appeals

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Juan Carlos Colin; Petitioner/Appellee Pro Se.

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IN THE UTAH COURT OF APPEALS

JUAN CARLOS COLIN,
Petitioner/Appellee,

v.

Case No. 20070211-CA

STATE OF UTAH,
Respondent/Appellant.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF OF APPELLANT

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Petitioner/Appellee in *pro se*.

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L. M. Peterson

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Petitioner/Appellant in *pro se*.

Case No. 20070211-CA

IN THE UTAH COURT OF APPEALS

JUAN CARLOS COLIN, * PETITIONER'S REPLY TO
Petitioner/Appellee * RESPONDENT'S BRIEF OF APPELLANT.

v.

STATE OF UTAH, * APPEAL FROM AN ORDER GRANTING A
Respondent/Appellant. * PETITION FOR POST-CONVICTION RELIEF,
* IN THE THIRD JUDICIAL DISTRICT COURT,
* SALT LAKE COUNTY, UTAH, THE HONORABLE
* JOHN PAUL KENNEDY PRESIDING.

Petitioner hereby submits this reply to Respondent's Brief of Appellant which appeals the granting of a petition for post-conviction relief dated February 27, 2007.

This is a very simple case turning on the question of whether the post-conviction court properly evaluated all avenues of law before ruling on the merits of the petition. The answer is "yes".

For these reason, and further reasons detailed below, Petitioner respectfully asks this Court of Appeals to uphold the well-reasoned decision of the Third Judicial District Court, Honorable John Paul Kennedy Presiding Judge.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Notwithstanding the various arguments advanced by the Respondent, this remain a very simple case. Respondent argues the trial court erred by granting a petition for post-conviction relief at a hearing on the State's motion to dismiss, without giving the State the opportunity to respond to the merits of the petition. (Brief of Appellant at 2).

Assuming arguendo Respondent was not giving the opportunity to answer or otherwise respond on the merits of Petitioner's petition for post-conviction relief, this Court of Appeals must consider first whether the trial court evaluated all avenues before ruling on the question. *See State v. Smith*, 2003 UT App. 52, || 12, 65 P.3d 648 ("We review this claim as a matter of law."); *see also State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992)(an appellate court "determine[s] as a matter of law whether procedural error occurred.").

Furthermore, Respondent argues prejudice by the trial court's denial of evidentiary hearing to present testimony and/or evidence on the merits.

The crux of the appeal, therefore, is whether the post-conviction court properly granted post-conviction relief by ruled that: 1) the petition is timely; 2) it met the interest of justice exception, and; 3) because the testimony of Respondent's witness [Mr. Quinlan former defense counsel of Petitioner] would not add anything more than the Respondent proffer, the evidentiary hearing is not warranted.

Thus, absent the proposed testimony-in-court of Mr. Quinlan, and the court's maximum benefit given to the Respondent proffer, this Court of Appeals should reject the idea that Respondent was prejudiced because he could have obtained further testimony and/or an affidavit from Mr. Quinlan for consideration on the merits.

Because Respondent recognized-in-court that Mr. Quinlan stated him that he does not remember this case specifically, since it's happen ten years ago, and no reason appears why it [the Respondent] could not have introduced sufficient evidence to sustain his burden, Petitioner respectfully asks this Court of Appeals to uphold the well-reasoned decision of the Honorable District Court Judge and to dismiss the Respondent appeal.

II. ARGUMENT

A. THE PETITION IS TIMELY BROUGHT AFTER MR. COLIN BECAME AWARE OF THE LEGAL GROUNDS FOR THE PETITION.

Utah has a myriad of procedures to correcting improperly entered criminal orders; to collaterally challenge a conviction, a criminal defendant need not faithfully comply with the requirements for Post-Conviction Relief under the Utah Rules of Civil Procedure, Rule 65C. First, a litigant in Utah is at liberty as s/he deems fit to style his motion or pleading, including one collaterally attacking a criminal conviction. *See Renn v. Utah Board of Pardon*, 904 P2d 677, 681 (Utah 1995)(“We are not bound, however, by Renn’s characterization of his petition for an extra-ordinary writ.... We will look to the substance of the action and the nature of the relief sought in determining the true nature of the requested relief.”).

Second, a post-conviction petition in Utah ought not always be brought “within one year after the case of action accrues.” This is because Utah courts are always constitutionally empowered, at any time, to reexamine an unconscionable conviction. *See Julian v. State*, 966 P.2d 249, 258, 1998 Utah Lexis 63, *3, 349 Utah Adv. Rep.

18 (Utah 1998); Renn, 904 P.2d at 682 (“the power of a Utah court to issue a writ [in whatever form] is constitutional in nature and may be exercised when the circumstances of the particular case warrant.....relief.”); *see also* State v. Mohi, 901 P.2d 991, 995 (Utah 1995)(“Utah is free to provide broader constitutional protection for its citizens than required by federal constitution.”).

Third, even under the Utah post-conviction statutes, a defendant asserting ineffective assistance of counsel, for example, could raise his claim at any time. *See* Utah Code Ann. Sections 78-35a-104, 106; then Fernandez v. Cook, 783 P.2d 547 (Utah 1989); Chess v. Smith, 617 P.2d 341 (Utah 1980). Further, the district court may excuse late filing under the statute upon good cause shown. *See* Utah Code Ann. Section 78-35a-107(3).

Moreover, in Utah, once a district court decides a matter on the merit, it is presumed that late filing of a petition or motion was explicitly excused upon good cause show. *See* Julian, 1998 Utah Lexis 63, *3, 349 Utah Adv. Rep. 18. In a criminal post-conviction defendant could successively collaterally challenge a conviction upon showing the existence of any fundamental unfairness in the conviction. *See* Hurst v. Cook, 777 P.2d 1029 (Utah 1989); *see also* Utah Code Ann. Section 78-35a-101 (1998) (authorizing habeas corpus review on ineffectiveness of counsel and other grounds); Utah R. Civ. 65B (authorizing habeas review on any ground); Johnson, 635 P.2d at 38 (holding that writ of *coram nobis* was available in Utah).

In the present case, Petitioner’s post-conviction petition is premised primarily on the fact that his guilty plea was not voluntarily entered, on the equitable relief of

fairness and denial of effective assistance of counsel. Petitioner was misadvised by his counsel that he would not be deported as a result of his guilty plea and conviction.

Petitioner acknowledges that, as today, September 26, 2007, more than a year have passed since the district court sentenced him on April 11, 1997. Petitioner also recognize that he did not file then any motion to withdraw his plea and did not file any direct appeal. On November 13, 2006, however, Petitioner filed his memorandum in support of motion to vacate judgment and withdraw plea on the grounds that the trial court failed to strict compliance with Rule 11(e), Utah R. of Crim. Proc., when he entered his guilty plea and the assistance rendered him by defense counsel was ineffective and thus a violation of his constitutional and statutory rights. (*See* Record in the post-conviction case [which is the matter on appeal] as R1-24). On December 18, 2006, Third District Court Judge Demo Himonas entered a ruling which stated that the motion was in substance a petition for post-conviction relief. Therefore, the motion was filed as a civil petition for post-conviction relief, as case no. 060920152. The same day, the post-conviction court entered an order which directed the State to file a response on or before December 27, 2006.

In its Brief of Appellant, Respondent alleges that the post-conviction court did not provide a copy of the petition as required by Rule 65C(h), Utah R. of Civ. Proc. Respondent argues that without a copy of the petition, the State was unable to respond, or even determine what case petitioner Colin was challenging. And without knowing what case Colin was challenging, the State could not request a copy of the underlying criminal case. Further, Respondent asserts that the state requested a copy

of the petition and filed a motion for enlargement of time to respond to the petition within 30 days after receipt of the petition. *See* Brief of Appellant at 4-5.

In this sole point, Petitioner refer this Court of Appeals to review the record of the criminal case [docket in case # 971900070] filed by Respondent as Addendum “D” which did not reveals any submission by the Respondent in the matter of enlargement of time to respond to the petition. Therefore, Petitioner asks this Court of Appeals to reject the Respondent’s argument that he filed a motion for enlargement of time to respond to the petition within 30 days after receipt of the petition and therefore the motion to dismiss could not state the facts of the criminal case, and could not respond in full to the merits of the issues raised in the petition. *See* Brief of Appellant at 5.

As addressed above, the petition is timely brought after Petitioner became aware of the legal grounds for the petition. The law provides that any delay on defendant’s part is measured from the time he became aware that the actual imposition of immigration consequences was imminent. In other words, a post-conviction petition in Utah ought not always be brought “within one year after the case of action accrues.” This is because Utah courts are always constitutionally empowered, at any time, to reexamine an unconscionable conviction. *See Julian v. State*, 966 P.2d 249, 258, 1998 Utah Lexis 63, *3, 349 Utah Adv. Rep. 18 (Utah 1998); *Renn*, 904 P.2d at 682 (“the power of a Utah court to issue a writ [in whatever form] is constitutional in nature and may be exercised when the circumstances of a particular case warrant....relief.”).

The Supreme Court of California ruled in one case exactly similar to the present circumstances. *See People v. Superior Court (Zamudio)* (2000) 23 Cal. 4th 183. In

Zamudio, the Supreme Court held timely a motion filed March 10, 1998 attacking convictions from 1992 and 1997, since it was not until 1997 that the defendant was on notice of the actual danger that the “INS” would move to impose immigration consequences. In other words, the Court in Zamudio held timely a motion to withdraw plea filed six years after the plea had been entered, since it was not until a year before that the INS actually began to move against the defendant. (“[A] motion is timely if brought within a reasonable time after the conviction actually “may have” such [immigration] consequences.”) Zamudio, supra.

Here, the plea was entered on February 28, 1997, ten years ago. However, the true actual immigration consequences of the plea, of which Petitioner was misadvised by counsel prior to plea, were that the plea would force the “INS” [actually ICE] to strip away his lawful permanent resident status forever, and he would certainly be deported away from his children, family, friends, home of more than 17 years, employment, and property, never to return. *See* Petitioner’s testimony-in-motion to dismiss transcript pages 4-5 (“My counsel—he told me I would not get deported...he says he know—I know [you are an]immigrant [alien]... I—I don’t want to get deported...I want to make sure that [what] the consequences about the future when I try to be a [U.S.] citizen...or in case they [INS] take my papers away...he told me...there’s not going to be any problem....you know, my home, my family are here, my kids and wife. [emphasis supplied] Further, Petitioner stated that “at one point, the agreement [prior to plea] on it...[his counsel said] take this, it is a good deal, it’s not going to be affected with your nationality, it will not be affected [your immigration status]...it’s a good deal. *See* Petitioner’s testimony-in-motion to dismiss

transcript pages 5-6 attached to Respondent's Brief of Appellant as Addendum "E"
[emphasis supplied].

From April 11, 1997 when Petitioner was sentenced for violation of Utah Code Ann. Section 76-5-404 until May 24, 2006 when he was ordered deported from the United States as a result of this conviction, Petitioner have no knowledge of the extreme and harsh immigration consequences that will flow from a plea negotiated in ignorance of these consequences. Thus, the facts supporting the Petitioner's petition comes from May 24, 2006 date on which he learned of applicable immigration consequences to his April 11, 1997 conviction. Petitioner is not responsible for any unreasonable delay after his conviction to prepare and file his post-conviction petition because all these time he was in ignorance of these consequences.

On November 13, 2006, 6 months after Petitioner was ordered deported, he filed his memorandum in support of motion to vacate judgment and withdraw of plea. On December 18, 2006, Third District Court Judge Deno Himonas entered a ruling which stated that the motion was in substance a petition for post-conviction relief and was filed as a civil petition for post-conviction relief. On February 27, 2007, the post-conviction court ruled that the petition was timely and then granted the petition and vacated Petitioner's guilty plea. Thus, the latest event supporting the petition [May 24, 2006] is "within one year after the case of action accrues." *See Julian*, 1998 Utah Lexis at *3 (stating that one year limitation period to file habeas is suspect under Utah Constitution); *see also Utah Code Ann. Sections 78-35a-104, 106* ("Under the Utah post-conviction statutes, a defendant asserting ineffective assistance of counsel, for example, could raise a claim at any time.") [emphasis supplied].

In his petition, Petitioner did not learn the ineffective assistance rendered to him at the time of plea until May 24, 2006, when he was ordered deported from the United States as a result of the negotiated plea and conviction entered in ignorance of these [deportation, exclusion from admission, and denial of naturalization] consequences.

Thus, Petitioner's petition –coming less than 6 months after he learned the extreme and harsh consequences flowed from his plea of guilty induced by his defense counsel's misadvice -- **is not untimely, and therefore it met the interest of justice exception.**

B. THE POST-CONVICTION COURT CORRECTLY EVALUATED THE RESPONDENT'S PROFFER AND THE PETITIONER'S TESTIMONY

In its Brief, Respondent argues that the post-conviction court should not have proceeded based solely on the State's attorney proffer and petitioner's confusing, unsworn statement over the telephone. Further, Respondent alleges the credibility of petitioner's claim that he would not have pled guilty if he had known he would be deported. *See* Respondent's Brief of Appellant at 21.

Petitioner contends he was denied his Sixth Amendment right to effective assistance of counsel because his counsel misadvised him regarding the immigration consequences of his guilty plea and conviction.

In deciding this claim of ineffective assistance of counsel, the post-conviction court beliefs on the test set out in Strickland v. Washington, 466 U.S. 668, 697, 104, S.Ct. 2052, 2069 (1984). Under the Strickland test, an individual has been denied the effective assistance of counsel if: 1) counsel's performance was

deficient below an objective standard of reasonable professional judgment, and 2) counsel's performance prejudiced the defendant. *Id.* *See e.g., State v. Martinez*, 2001 UT 12, || 16, 26 P.3d 203.

This Court of Appeals has held that deportation is a "collateral consequence" of conviction. *State v. McFadden*, 884, P.2d 1303, 1304-05 (Utah Ct. App. 1994). Thus, "an attorney's failure to inform a client of the deportation consequences of a guilty plea, without more, does not fall below an objective standard of reasonableness." *United States v. Cuoto*, 311 F.3d 179, 187 (2nd Cir. 2002) [emphasis added]; *see McFadden*, 884 P.2d at 1305.

However, a commonly recognized exception to this rule exists when an attorney affirmatively misrepresents deportation consequences to his or her client. *See McFadden*, 884 P.2d at 1305 n.3 (noting exception exists but finding it inapplicable where attorney entirely failed to advise client on the subject of deportation); *People v. Soriano*, 240 Cal. Rptr. 328, 336 (Cal. Ct. App. 1987) (finding counsel ineffective where counsel merely warned defendant there "might be immigration consequences to his guilty plea.") [emphasis added]; *see also Roberti v. State*, 782 So. 2d 919, 920 (Fla. Ct. App. 2001) ("Affirmative misadvice about even a collateral consequence of a plea constitute ineffective assistance of counsel and provides a basis on which to withdraw the plea."). Under this exception, this Court has been concluded that "an affirmative misrepresentation by counsel as to deportation consequences of a guilty plea is today objectively unreasonable." *Cuoto*, 311 F.3d at 188.

Here, the post-conviction court found that “ the petition was timely in that was brought within one year of the time that he [petitioner] discovered the problem; namely, this issue with respect to the advice he [petitioner] received or didn’t receive with respect to deportation. So, I think it’s a timely – it’s a timely petition in that sense.” *See* Reporters Transcript to Motion to Dismiss page 13 attached to Respondent’s Brief as Addendum “E”.

Continuing with the post-conviction court ruling, the judge stated: “even if it weren’t, under Adams, the court was supposed to consider the interest of justice and try to determine whether there’s merit to the petition. It seems to me that the argument that he’s [petitioner] making is ineffective assistance of counsel, which really does, in essence, raise a Constitutional issues; so, the question then comes down to whether the cases support the contention that he was denied effective assistance. And as I understand those cases, they turn on the question of whether he [petitioner] was mis-advised or just not advised. If he [counsel] is told nothing about deportation, then he [petitioner] cannot claim that he was given ineffective assistance. On the other hand, if he [counsel] was given mis-advise and told, don’t worry, you won’t be deported, then that would fall into the mis-advice category and would constitute ineffective assistance. *See* Reporters Transcript pages 13-14.

Following with the post-conviction court reasoning the record reflect: “In this case, the State has made a proffer that Mr. Quinlan, if called to testify, would testify that he does not remember the specific facts of this case, but that his practice would be normally to adhere to the requirements of good counsel.

Accepting that proffer and giving it the maximum force that I think it could be given, I still don't think it would go to extent of contradicting what I hear over the phone, as Mr. Colin's specific recollection of the event and his specific recollection of the event is that he was told he would not be deported and he based his plea on that advice and he would not have pled otherwise, if he or he would not have pled guilty if he had been instructed that there might be immigration consequences, which could lead to his deportation. So, given all of that, I find that the petition has merit and as a result, I'm going to grant his petition and I'm going to vacate his plea of guilty and leave it to the state as to whether or not they wish to re-file the Information against him and bring the charges anew. *See* Reporters Transcript at pages 13-14.

The record reveals that the post-conviction court stated that "counsel did not remember the specific facts of this case but that his practice would be normally to adhere to the requirements of good counsel." However, Petitioner was induced to pled guilty to Attempted forcible sexual abuse, a third degree felony in violation of Utah Code Ann. Section 76-5-404. Petitioner's counsel was aware that Petitioner was not a U.S. citizen, had lawful status in the United States and was concerned about the potentially adverse immigration consequences he might face because of the criminal case. In spite of this awareness, defense counsel failed to investigate the immigration consequences of his proposed plea and misadvised his client about those consequences would be. In fact, Petitioner's counsel assured him that in front he had a "good deal" and he would not be deported by accepting such plea. Thus, Petitioner was led to enter his plea without any knowledge

whatsoever that the conviction would be fatal to his hopes of remaining in the United States with his family. Clearly, Petitioner's counsel failed to make the most minimal effort to research the immigration consequences his client would most certainly suffer from, even though information concerning these consequences was readily available then. Rather than consult an immigration attorney or any of the written resources of law available concerning the adverse immigration consequences, Petitioner's counsel blindly led his client down a dangerous legal path from where, as today, Petitioner continues his fighting to remain in the United States with his family. Clearly, Mr. Quinlan breached his most fundamental duty of "good counsel" to Mr. Colin's expectations. *See* Petitioner's Declaration in support of petition attached to Respondent's Brief as Addendum "F".

Petitioner was convicted by guilty plea of attempted forcible sexual abuse, a third degree felony, and the alleged victim was a minor. *See* Respondent's Brief at pages # 2 "Statement of the case", and #7 "Statement of the facts".

This crime is considered an "aggravated felony" for immigration purposes. *See* 8 U.S.C. section 1101(a)(43)(A); *see also* United States v. Padilla-Reyes, 247 F.3d 1158, 1162-63 (11th Cir. 2001) (concluding "sexual abuse of a minor", which is an "aggravated felony" "includes acts that involve physical contact between the perpetrator and the victim as well as acts that do not".) Thus, any crime punishable as an "aggravated felony" has the most severe consequences under immigration law.

Furthermore, the 1996 amendments to the Immigration and Nationality Act (“INA”) eliminated all discretion of the immigration courts and enforced their powers to deportation of non-citizens convicted of aggravated felonies.

Under current immigration laws, and considering all the circumstances, Petitioner’s guilty plea unequivocal constitutes an unavoidable deportation and a permanent exclusion from admission to the United States. *See United States v. Amador-Leal*, 276 F.3d 511, 516 (9th Cir. 2002) (“[I]t is now virtually certain that an aggravated felon will be [deported].”); 8 U.S.C. section 1182(a)(6)(B).

Therefore, by advising Petitioner he “not be deported” and forced him to take it’s “good deal”, Petitioner’s counsel affirmatively misrepresented the unavoidable deportation consequences of petitioner’s plea, and thus Mr. Quinlan’s “performance was deficient below an objective standard of reasonable professional judgment.” *See State v. Martinez*, 2001 UT 12 at || 16.

Petitioner must also meet the prejudice prong of the Strickland test, which requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

Petitioner stated on his declaration in support of his petition for post-conviction relief that: “I did not know the immigration consequences until the DHS commenced deportation proceedings against me based on my conviction...if I had known about the consequences of my plea, I would have never agreed to enter it since there are much serious consequences than actual penal consequences. I would have willing to accept a plea agreement subjecting me to additional time in custody if it would protected my legal status and the privilege to remain in the

United States with my family or I would have taken my case to trial since I felt and the record corroborate that I had a triable case from the beginning. *See* Petitioner's Declaration attached to Respondent's Brief as Addendum "F".

Clearly, the Petitioner's declaration support his petition for post-conviction relief and did not is confusing or contradictory in essence. Petitioner stated that "he not have pleaded guilty" had he know "he would be deported". Instead, he asserted that he "would have have taken his case to trial since he feltthat he had a triable case from the beginning".

In sum, this Court of Appeals must conclude that: 1) Petitioner's petition is timely, 2) it met the interest of justice exception, and 3) due to the maximum benefit given to Respondent's proffer, the post-conviction court properly adjudicated the State's claims and merits in this case.

Because both litigants received due process of law, and the case was resolved in the merits of the petition, the interest of justice will survive over the Respondent's allegations.

APR 03 2007

SALT LAKE COUNTY

By [Signature] Deputy Clerk

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

JUAN CARLOS COLIN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

FINAL ORDER

Case No. 060920152

Judge John Paul Kennedy

ORDER

This Court hereby ORDERS:

- 1) That the petition for post-conviction relief filed by petitioner Juan Carlos Colin is Granted, for the reasons, facts, and conclusions set forth in the Order Granting the Petition.
- 2) Under the Post-Conviction Remedies Act, “[a]ny party may appeal from the trial court’s final judgment on a petition for post-conviction relief to the appellate court having jurisdiction.” Utah Code Ann. § 78-35a-110.
- 3) The Court Orders that the State promptly take any necessary action to notify I.C.E. and cooperate in releasing the Petitioner.

DATED this 2 day of April, 2007.

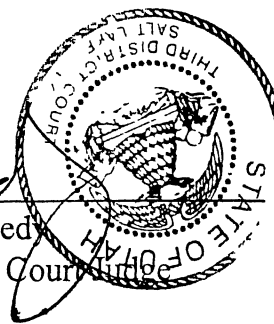
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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY STATE OF UTAH
DATE 4/3/07

DEPUTY COURT CLERK



BY THE COURT:

[Signature]
Judge John Paul Kennedy
Third Judicial District Court



III. CONCLUSION

For the foregoing reasons, this Court of appeals should affirm the decision of the post-conviction court and uphold the well-reasoned determination of the Third District Judge Honorable John Paul Kennedy Presiding.

Respectfully Submitted, this 25th Day of September, 2007.

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Petitioner/Appelle in *pto se.*

CERTIFICATE OF SERVICE

I, Juan Carlos Colin, hereby certify that one (1) true and correct copy of the attached PETITIONER'S REPLY TO RESPONDENT'S BRIEF OF APPELLANT in the case of JUAN CARLOS COLIN v. STATE OF UTAH, Case No. 20070211-CA was served/delivered upon the Attorney General via U.S. Mail with postage prepaid on this 25th Day of September, 2007 as follows:

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Respectfully Submitted, this 25th Day of September, 2007.

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