1996

State Utah v. Vao Boyd Hunsaker : Reply Brief

Utah Court of Appeals

Kris C. Leonard; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorney for Appellee.
Michael D. Bouwhuis; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 960234-CA
vs.	:	
VAO BOYD HUNSAKER,	:	
Defendant/Appellant.	:	Priority No. 2

REPLY BRIEF OF APPELLANT

APPEAL FROM SENTENCING ON A PLEA IN ABEYANCE FOR AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, A VIOLATION OF UTAH CODE ANN. SEC. 76-5-103, IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH, THE HONORABLE BEN H. HADFIELD PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

Utah Code Annotated

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ARGUMENT

I. THE PLEA IN ABEYANCE AGREEMENT WAS ENTERED INTO AND ACCEPTED BY THE TRIAL COURT AND SHOULD THEREFORE BE ENFORCED PURSUANT TO THE PLEA IN ABEYANCE STATUTE.

Appellee argues that if the defendant was not happy with the sentencing he was free to withdraw his guilty plea, but made no effort to do so. While it is true that defendant could have moved to withdraw his plea, it is also true that a plea in abeyance agreement had been entered into and accepted by the trial court. It is submitted that defendant was also free to stand by the plea in abeyance agreement and have it enforced pursuant to the plea in abeyance statute. This is in fact what the defendant has attempted to do. The trial court, on the other hand, was not free to ignore the statute.

II. WHILE DEFENDANT'S REQUEST TO TREAT HIS APPEAL AS INTERLOCUTORY MAY BE UNUSUAL, THIS COURT HAS PREVIOUSLY DEALT WITH UNUSUAL SITUATIONS BY MAKING UNUSUAL DISPOSITIONS.

It is true that defendant's request to this Court, to treat his appeal as interlocutory if it determines that the trial court's order was not final, is unusual. However, this Court has dealt with unusual cases before. In the case of State v. Dietz, (unpublished memorandum decision, September 6, 1996, Case No. 950769-CA), this Court stated that

> the unusual posture of this case prompts us to make an unusual disposition, but one that is appropriate under the circumstances. Cf. State v. Ford, 793 P.2d 397, 405 (Utah App. 1990) ("Given this imperfect state of affairs and the highly unusual posture of this case, we believe justice requires a remedy which is itself unusual.").

This case is indeed unusual. It would be a surprise if we were to find a case in Utah where a defendant has been lawfully incarcerated pursuant to a plea in abeyance agreement whereby the charge would ultimately be dismissed if the defendant complied with all conditions.

Defendant filed a notice of appeal twenty three days after entry of the trial court's order, not thirty five days after and not eight months after, as appellee has attempted to argue. Defendant was only three days late for filing a petition for permission to appeal an interlocutory order. The interests of justice would not be served in this case if this court refused to examine this case on its merits merely because the notice of appeal, while filed within the time limit for appeals of final

orders, was filed a mere three days late for an interlocutory appeal.

The unusual posture of this case and the interests of justice warrant this Court making an unusual disposition.

III. IMPOSITION OF A FINE WAS PLAIN ERROR.

Concerning imposition of the fine on defendant, apparently there was a miscommunication between counsel and the trial court at the sentencing hearing. However, there can be no doubt that if the trial court had given even a cursory look at the statute it would have been plain that a fine was not allowed under the statute. It is therefore submitted that it was plain error for the trial court to impose a fine upon defendant, no matter what counsel may or may not have said in court. While the amount of the administrative fee levied on the defendant can legally be the same amount as any fine that could have been imposed, the defendant cannot be fined. The court can only impose an administrative fee. While this error could have been corrected simply by calling it an administrative fee, the exchange between counsel and the trial court illustrates the court's lack of understanding of, or even the desire to understand the plea in abeyance statute. Imposing a fine on defendant was plain error.

IV. THE TERM "SENTENCE" DOES NOT REFER TO "PRISON SENTENCE," AS THE STATUTE DOES NOT DISTINGUISH BETWEEN FELONIES AND MISDEMEANORS CONCERNING SENTENCING.

Appellee argues, inter alia, that the trial court didn't sentence defendant because it did not send him to prison. The trial court attempted to make this argument below, but evidently believed the argument to be weak, as indicated by its lack of response to counsel's retort. Counsel argued:

> If we construe this subsection E as liberally as I think the State would have the court do, then the court could do what the State says here, impose any conditions upon imposition of sentencing. The reason that doesn't make sense to me is because if you can impose anything you can do upon a conviction and sentencing, then it is sentencing. We just call it something else.
>
> THE COURT: Except as a condition of probation. In other words, one of the things you can't do is send someone to prison.
>
> MR. BOUWHUIS: That's correct. However, if we read the statute carefully, the statute doesn't distinguish between misdemeanors and felonies.

(R. at 40) In fact the legislature demonstrated in the statute that it is cognizant of the difference between felonies and misdemeanors by according some differing treatment to each. For example, section 77-2a-2(4)(b) requires that for felonies the plea in abeyance must be in writing. Further, section 77-2a-2(5) states:

> A plea shall not be held in abeyance for a period longer than 18 months if the plea was to any class of misdemeanor or longer than three years if the plea was to any degree of felony or to any combination of misdemeanors and felonies.

Those are the only two portions of the statute which address any distinction between misdemeanors and felonies, and nowhere does it state that "sentencing" means "prison." Clearly, a defendant who enters a plea of guilty to a misdemeanor charge (pursuant to a plea in abeyance agreement or otherwise) could never be sent to prison, though he could be sent to jail if he violated the agreement. The statute states that there is to be no conviction and no sentencing, and does not distinguish between felonies and misdemeanors. The argument was specious below and it remains so here.

No matter how the State chooses to label it, the trial court sentenced the defendant, in violation of the plea in abeyance statute.

CONCLUSION

The plea in abeyance agreement in this case was entered into and accepted by the trial court, and should therefore be enforced pursuant to the plea in abeyance statute. While the defendant should not have been sentenced, the imposition of a fine and incarceration did in fact constitute a sentence, regardless of the label the State chooses to put on it. The fact that the trial court did not sentence defendant to prison is of no consequence, as the term "sentence" does not mean "prison sentence." The plea in abeyance statute *does not distinguish between felonies and* misdemeanors regarding sentencing.

Wherefore, defendant respectfully prays that this Court will

remand his case for the proper imposition of conditions in accordance with the law.

RESPECTFULLY SUBMITTED this 4 day of January 1997.

MICHAEL D. BOUWHUIS
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I mailed or hand-delivered a true and correct copy of the foregoing, with postage prepaid, to Kris C. Leonard, Assistant Attorney General, Attorney for Appellee, 160 East 300 South, 6th Fl., PO Box 140854, SLC UT 84114-0854, this 4 day of January 1997.

Attorney at Law