

1996

State of Utah v. Scott Logan Gollaher : Petition for Rehearing

Utah Court of Appeals

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Kenneth A. Bronston; Assistant Attorney General.

Brent D. Ward; James K. Tracy; Parry Lawrence & Ward; Attorneys for Defendant/Appellant.

Salt Lake City, UT BRENT D. WARD (#3377) JAMES K. TRACY (#6668) PARRY LAWRENCE & WARD 1270 Eagle Gate Tower 60 East South Temple 84111 Telephone: (801) 521-3434

Attorneys for Defendant/Appellant

KENNETH A. BRONSTON Assistant Attorney General 124 State Capital Salt Lake City, UT 84114 Telephone: (801) 366-0180 Attorney for Plaintiff/Appellee

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 960618-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,
vs.
SCOTT LOGAN GOLLAHER,
Defendant/Appellant.

Case No. 960618-CA
Priority No. 2

PETITION FOR REHEARING

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPT.

DIVISION I, JUDGE TIMOTHY R. HANSON

KENNETH A. BRONSTON
Assistant Attorney General
124 State Capital
Salt Lake City, UT 84114
Telephone: (801) 366-0180
Attorney for Plaintiff/Appellee

BRENT D. WARD (#3377)
JAMES K. TRACY (#6668)
PARRY LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 521-3434
Attorneys for Defendant/Appellant

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KENNETH A. BRONSTON
Assistant Attorney General
124 State Capital
Salt Lake City, UT 84114
Telephone: (801) 366-0180
Attorney for Plaintiff/Appellee

BRENT D. WARD (#3377)
JAMES K. TRACY (#6668)
PARRY LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 521-3434
Attorneys for Defendant/Appellant

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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, the Defendant/Appellant Scott Logan Gollaher submits the following petition for rehearing.

ARGUMENT

Rule 35 of the Utah Rules of Appellate Procedure provides that a petitioner may file a petition for rehearing when it appears that the Court has "overlooked or misapprehended" "points of law or fact." Utah R. App. P. 35. In this case, a petition for rehearing should be granted for the following reasons.

I. The Court Fails to Address Gollaher's Argument that He Was Deprived of His Sixth Amendment Right to Effective Assistance of Counsel by Reason of His Attorney's Failure to Object to the Improper Remarks of the Prosecutor During Closing Argument

Gollaher alleges four improper remarks or statements constituting prosecutorial misconduct in closing argument. As this Court noted in its Memorandum Decision, Gollaher's trial counsel did not object to two of the statements, (1) the statement that "he remembered it was rubbing," and (2) the argument that the touching was "prolonged" and lasted "six to nine seconds." This Court refused to consider these statements because it felt that an adequate plain error argument was not presented. Memorandum Decision at 3.

However, Gollaher's fourth issue for review was whether Gollaher was deprived of his Sixth Amended right to effective assistance of counsel "by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument" Brief of Appellant at 2. As explained in Gollaher's briefing, this Court has previously held that the failure to object "likely fails to meet the standard of reasonable representation, . . . thus satisfying the first prong of Strickland." State v. Callahan, 866 P.2d 590, 595 (Utah Ct. App. 1993).

This Court failed to address in its Memorandum Decision the issue of ineffective assistance of counsel concerning the failure to object to the prosecutor's improper remarks in closing arguments raised by Gollaher in this appeal.

II. Gollaher Presented an Adequate Plain Error Argument with Regard to the Improper Remarks of the Prosecutor

The Court refused to consider the improper remarks of the prosecutor in closing argument that were not objected to because it felt that "Gollaher does not present us with an adequate plain error argument." Memorandum Decision at 3. In so ruling, this Court

relied on Rule 24(a)(9) of the Utah Rules of Appellate Procedure (requiring that briefs contain arguments with respect to the issues presented) and State v. Blubaugh, 904 P.2d 688, 702 (Utah Ct. App. 1995).

In State v. Blubaugh, this Court refused to consider the effect of improper remarks made by a prosecutor during closing argument because there was no objection at trial and "defendant has not alleged on appeal that the prosecutor's remarks reached the level of plain error." Id. at 702.

Unlike the defendant in Blubaugh, Gollaher clearly alleged in this appeal that the prosecutor's remarks in closing argument constituted plain error. First, in the Statement of Issues Presented for Review, Gollaher states as follows:

There is no record of any objection to the misstatement of the evidence by the prosecutor. However, these remarks may be reviewed by the appellate court despite the lack of objection under the plain error standard. State v. Palmer, 860 P.2d 339, 342 (Utah Ct. App.), cert. denied, 868 P.2d 95 (Utah 1993).

Brief of Appellant at 2.

In the Statement of Facts, Gollaher details the actual evidence at trial and the improper remarks of the

prosecutor misrepresenting the evidence during closing argument. Brief of Appellant at 19-20. In his argument, Gollaher restates the comparison of the actual evidence with the improper remarks of the prosecutor. Id. at 43-45. Gollaher then argues as follows:

It was error for the court to deny the motion for a mistrial based on the improper remarks that were objected to by trial counsel. The other improper remarks were clearly contradictory to the evidence in the case, and constitute plain error that justifies reversal of the conviction.

Id. at 47 (emphasis added).

Gollaher had previously detailed the standard for finding plain error, citing State v. Eldredge, 773 P.2d 29, 35 (Utah), cert denied, 493 U.S. 814 (1989) (to find plain error, it must appear from an examination of the record "that it should have been obvious to a trial court that it was committing error."), and State v. Verde, 770 P.2d 116, 122 n.11 (Utah 1989) ("the trial court should have been aware that an error was being committed at the time."). Appellant's Brief at 35.

Gollaher laid out the record showing the actual testimony and the prosecutor's misrepresentation of the actual testimony. He argued that the "improper remarks were clearly contradictory to the evidence in the case"

and thus constituted plain error. Unlike the situation in Blubaugh where there was no allegation that the prosecutor's remarks constituted plain error, Gollaher has presented an adequate plain error argument with regard to the improper remarks of the prosecutor during closing argument that were not objected to and this Court should address this issue.

III. The Court Improperly Finds that "Allocation of Pretrial Resources" Was a Factor in Trial Counsel's Failure to Locate the Television Program Transcript

Gollaher also argued that his trial counsel was ineffective in failing to investigate and present evidence of the transcript of the television program that Sarah Call watched that prompted her disclosure of the alleged abuse. Evidence of this program would have provided a motive for Sarah making her allegations (the accolades received by the girl in the television program) and cast doubt on her credibility (because of the striking similarities in her story and television program). This Court rejected this argument on the ground that the Court gives "great deference" to trial counsel's decisions allocating "pretrial resources." Memorandum Decision at 2 (citing State v. Huggins, 920 P.2d 1195, 1199 (Utah Ct. App. 1996)).

It is inappropriate for this Court to make any ruling based on allocation of pretrial resources because there were no factual findings in the court below regarding this issue. There was no evidence that trial counsel did not investigate the television program because of a tactical decision concerning allocation of pretrial resources. Indeed, in this case, the defendant specifically requested that his trial counsel investigate the date of the television program watched by Sarah Call and obtain a transcript. (R. 633). Gollaher stood ready, willing, and able to pay for this investigation. Trial counsel simply failed to conduct any investigation. After the trial, the defendant himself conducted an investigation and obtained a copy of the transcript. (R. 645). Trial counsel never argued that this evidence was not investigated because of a decision as to "allocation of pretrial resources." To the contrary, trial counsel admitted that no investigation was conducted, that he was unaware of the program, but that the evidence would have been helpful. (R. 266-69; 679). There is no evidence concerning allocation of resources and it is improper for this Court to base its decision on this ground.

Further, the situation in the Huggins case relied on by this Court and the circumstances of this case are completely different. At issue in Huggins was trial counsel's decision to not call a particular witness as a defense witness. Unlike the situation in this case, the trial counsel in Huggins had conducted some investigation, looking into the potential use of the witness. Trial counsel reviewed police reports regarding the potential witness. Trial counsel talked to officers who had interviewed the potential witness. The Court of Appeals determined that on the basis of trial counsel's investigation, trial counsel reasonably concluded the potential witness had no value and stopped investigation. Id. at 1198-99.

In this case, however, there was absolutely no investigation to begin with. As explained in State v. Templin, 805 P.2d 182 (Utah 1990),

If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision

to call or not to call particular witnesses for tactical reasons. Therefore, because defendant's trial counsel did not make a reasonable investigation into the possibility of procuring prospective defense witnesses, the first part of the Strickland test has been met.

Id. at 188.

The undisputed facts in the record establish that Gollaher requested his counsel to locate the television program and that trial counsel failed to conduct any investigation whatsoever. Allocation of pretrial resources is not an issue supported by any facts presented in the court below.

IV. All of the Errors in this Case Were Harmful

This appeal must be considered in the context of the weakness of the State's case against Gollaher. See State v. Olsen, 869 P.2d 1004, 1011 (Utah Ct. App. 1994) (in evaluating harm, the court looks at "a host of factors, including . . . the overall strength of the state's case."). This was a one witness case. There was a total absence of any physical proof that the offense occurred. The State's only witness, Sarah Call, was 10 years old when the incident took place and only 13 years old when she testified. (R. 764).

Sarah did not remember how long the incident on the trampoline lasted (R. 937). By any account, the entire incident was only a matter of seconds. (See discussion below). Sarah's testimony was inherently suspect because her initial memory of the incident was, by her own voluntary statements, that it was nothing more than a dream. (R. 969, 976). When Sarah first reported the incident to her mother over six months later, she voiced self doubt, saying that she did not know whether it really happened or whether it was a dream. (R. 1021). According to Sarah's testimony, the brief incident on the trampoline occurred while she was awakening from a state of sleep, thus suggesting a state of altered mental awareness. (R. 937). Gollaher denied touching Sarah on the trampoline. (R. 1260, 1233). Sarah's credibility was in question, as four different witnesses established that Sarah visited the Gollaher residence numerous times after the incident, belying her statement that she tried to stay away from the Gollaher residence. (R. 1186-87, 1107, 1218, 1260-63). In fact, the State admits that Sarah did go to Gollaher's home a number of times following the trampoline incident. State's Brief at 36.

The State concedes that the overall evidence in this case was "limited." State's Brief at 35. In light of the "limited" evidence, all of the errors complained of in this appeal are prejudicial, i.e., there is a reasonable likelihood that in the absence of those errors, there would have been a more favorable result for the defendant. State v. Doporto, 935 P.2d 484, 493-94 (Utah 1997).

CONCLUSION

For these reasons, Gollaher petitions the Court for rehearing.

DATED this 12th day of March, 1998.

PARRY LAWRENCE & WARD

By 

~~BRENT D. WARD, Esq.
JAMES K. TRACY, Esq.~~
Attorneys for
Defendant/Appellant
Scott Logan Gollaher

RULE 35 CERTIFICATION

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.


JAMES K. TRACY, Esq

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR REHEARING was hand delivered this 12th day of March, 1998, to the following:

Kenneth A. Bronston
Assistant Attorney General
124 State Capitol
Salt Lake City, UT 84114

