

2007

State of Utah v. Darin Richardson : Reply Brief of Appellant

Utah Court of Appeals

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Ryan D. Tenney; Mark Shurtleff; Utah Attorney General's Office; Attorneys for Plaintiff.

Jennifer K. Gowans; Randall K. Spencer; Fillmore Spencer; LLC; Attorneys for Defendant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff, vs. DARIN RICHARDSON, Defendant.	CASE NO. 20070747-CA APPELLANT IS NOT INCARCERATED
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REPLY BRIEF OF APPELLANT

APPEAL FROM DISTRICT COURT'S JUDGEMENT, SENTENCE, AND ORDER FOR COMMITMENT, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JUDITH S.H. ATHERTON PRESIDING.

Ryan D. Tenney (9866)
Mark Shurtleff (4666)
Utah Attorney General's Office
Appeals Division
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for the State of Utah

Jennifer K. Gowans (7538)
Randall K. Spencer (6992)
Fillmore Spencer, LLC
3301 North University Avenue
Provo, Utah 84604

Attorneys for Darin Richardson

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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160 East 300 South
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Salt Lake City, Utah 84114-0854

Attorneys for the State of Utah

Jennifer K. Gowans (7538)
Randall K. Spencer (6992)
Fillmore Spencer, LLC
3301 North University Avenue
Provo, Utah 84604

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

**I. THIS COURT SHOULD CONSIDER MR. RICHARDSON'S CLAIMS
UNDER THE PLAIN ERROR DOCTRINE AND RULE 22(e) 2**

**II. THE STATE'S CLAIM THAT MR. RICHARDSON ADMITTED HE
WAS IN BREACH OF THE PLEA AGREEMENT IS INCORRECT 7**

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Allen v. Prudential Property & Casualty Ins. Co., 839 P.2d 798 (Utah 1992)..... 8

Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991)..... 4

Santobello v. New York, 404 U.S. 257 (1971)..... 5

State v. Beck, 2007 UT 60..... 3

State v. Brooks, 908 P.2d 856 (Utah 1995)..... 2

State v. Kay, 717 P.2d 1294 (Utah 1986) 4

State v. Wanosik, 31 P.3d 615 (Utah App. 2001), *aff'd*, 79 P.3d 937 (Utah 2003). 2

United States v. Calabrese, 645 F.2d 1379 (10th Cir. 1981)4, 5

Western Properties v. Southern Utah Aviation, 776 P.2d 656 (Utah App. 1989)... 6

Rules

Utah R. Crim. P. 22(e) 1-3, 6, 8

Constitutional Provisions

United States Constitution, Fifth Amendment..... 4

Utah Constitution, Article I, Section 7 4

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STATE OF UTAH, Plaintiff, vs. DARIN RICHARDSON, Defendant.	CASE NO. 20070747-CA
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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

The State's argument that Mr. Richardson's claims are not preserved is without merit. The errors raised by Mr. Richardson resulted in his sentence being imposed in an unlawful manner. Therefore, they may be considered for the first time on appeal under Rule 22(e) of the Utah Rules of Criminal Procedure.

Further, the errors were plain.

The State's contention that Mr. Richardson admitted breaching the plea agreement is unfounded. Mr. Richardson's claims demonstrating that it was impossible or impracticable for him to perform under the plea agreement are defenses to, not admissions of breach. Therefore, the State is not excused in its failure to recommend at sentencing that Mr. Richardson not be incarcerated.

ARGUMENT

I. THIS COURT SHOULD CONSIDER MR. RICHARDSON'S CLAIMS UNDER THE PLAIN ERROR DOCTRINE AND RULE 22(e).

The State argues that Mr. Richardson's claims involving errors that occurred at the time of sentencing and that directly affected the sentence imposed should be dismissed because they were not preserved below. BRIEF OF APPELLEE ("Br. Appe.") at 7-10. This argument is without merit. The State does not address the applicable rule and preservation issues implicated by the fact that the errors Mr. Richardson details in his opening brief occurred at the time of sentencing when the district court issued its final order in this case, while concurrently and immediately ordering Mr. Richardson into custody and precluding his attempts to say anything further or to talk to his attorney. R122:13.

Rule 22 (e) of the Utah Rules of Criminal Procedure provides, "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." This rule permits an appellate court to review errors that occur at the time of sentencing for the first time on appeal. *State v. Brooks*, 908 P.2d 856 (Utah 1995). The appellate court's ability under Rule 22 (e) to consider sentencing errors for the first time on appeal eliminates the need to establish plain error. *State v. Wanosik*, 31 P.3d 615 (Utah App. 2001), *aff'd*, 79 P.3d 937 (Utah 2003).

Mr. Richardson's sentence was imposed in an illegal manner because the district court found him in breach of the plea agreement based on the State's unilateral representations and without a hearing. *See*, Br. Appt., 7-13. Based on

its finding of breach that disregarded Mr. Richardson's defenses and only relied upon the prosecution's unilateral representations, the district court declined to follow the plea agreement's recommendation for no jail time and sentenced Mr. Richardson to 180 days in jail with credit for 51 days served. R122:11-13.

Mr. Richardson's liberty was taken away without affording him an adequate opportunity to present evidence of his compliance with the plea agreement in his own defense. In other words and as he argues in his opening brief, at the sentencing hearing Mr. Richardson was deprived of his liberty without due process of law such that his sentence was imposed in an illegal manner. Utah R. Crim. P. 22(e). Because Rule 22(e) applies, the State's argument that Mr. Richardson's claims are not preserved has no merit and this Court should consider his claims brought for the first time on appeal.

Moreover, Mr. Richardson argues in his opening brief that "the district court's failure to [] afford him the chance to defend himself was plain error." BRIEF OF APPELLANT ("Br. Appt.") at 13. A plain error is one that occurred, is harmful and should have been obvious to the trial court. *State v. Beck*, 2007 UT 60, ¶10. An error is harmful if "absent the error there is a reasonable likelihood of a more favorable outcome for the defendant." *Id.*

As he argues in his opening brief, it was a violation of Mr. Richardson's right to due process of law and thus error for the trial court to make a finding of breach based on the State's unilateral representations. Br. Appt. at 7-9. This error should have been obvious to the trial court. The due process clauses of both the

state and federal constitutions provide that no person may be deprived of liberty without due process of law. United States Constitution, Fifth Amend.; Utah Constitution, Article I, Section 7. It is also established under Utah law that plea agreements “are binding on the parties and the court once the plea is entered and accepted.” *State v. Kay*, 717 P.2d 1294, 1304 (Utah 1986).

Because the issue of material breach is a question of fact, whether the proceeding is civil or criminal both parties must be afforded an adequate opportunity to present evidence on the question. *See*, Br. Appt. at 13. Breach cannot be determined upon the unilateral representations of one party. Due process requires that a defendant be afforded the right to a hearing including the right to present evidence before a finding of breach can be made, particularly in a criminal case where a defendant’s personal liberty is at stake. *See, Foote v. Board of Pardons*, 808 P.2d 734 (Utah 1991) (holding that inmates have a right to due process at Board of Pardons hearings).

The State incorrectly asserts Mr. Richardson “does not cite to a single case interpreting the right [to have an evidentiary hearing to determine breach of the plea agreement].” Br. Appe. at 16. However, Mr. Richardson quotes at length from the 10th Circuit’s opinion in *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981) wherein the court specifically holds that a defendant is entitled to an evidentiary hearing to determine whether a plea agreement has been breached because “[t]he question of a defendant’s breach is not an issue to be finally determined unilaterally by the government.” *Id.* at 1390 (Br. Appt. at 10).

Mr. Richardson also cites *Santobello v. New York*, 404 U.S. 257 (1971), which *Calabrese* relies upon, wherein the Supreme Court's holding centers around the important due process rights involved in the context of plea agreements and requires "safeguards to insure the defendant what is reasonably due under the circumstances." *Id.* at 262 (Br. Appt. at 10).

This legal precedent can hardly be described as a failure to "cite to a single case" in support of Mr. Richardson's claim that due process requires an evidentiary hearing on the question before breach of the plea agreement can be found. *Santobello* was decided more than thirty years ago and *Calabrese* more than twenty. That due process principles apply in the context of plea agreements is not new or obscure law but is well-settled. Thus, it should have been obvious to the trial court that due process requires giving Mr. Richardson an adequate opportunity to present evidence in his own defense before a determination of breach can be made.

Further, the trial court's error is harmful to Mr. Richardson in that there is a reasonable likelihood of a more favorable outcome had he been given the opportunity to present evidence in his own defense. Mr. Richardson explained to the trial court how he lost a business client because his sentencing was continued the first time, which reduced his income and made him unable to make full payments, although he had continued to make monthly payments. R122:, 7-8, 11. The fact that Mr. Richardson was current in his obligations when the sentencing was first scheduled corroborates this claim. R122:2-6, 10-11.

Mr. Richardson's ability to pay was also adversely affected by his prior incarceration but he represented he had made monthly payments subsequent to his arraignment totaling \$2,560. R122:6, 10. Mr. Richardson claimed he had made diligent efforts and had done everything he could have been expected to do; he also indicated he was developing his business and had an opportunity to take additional clients and thereby raise his income substantially. R122:6-7, 9. Mr. Richardson also explained that he had experienced serious medical problems just prior to sentencing in August 2007. R122:9. Mr. Richardson was seeking to procure health insurance both for himself and for his children. R122:9.

Had Mr. Richardson been afforded the opportunity to present evidence supporting his claims, there is a reasonable likelihood he would have been excused from full performance under the plea agreement on the basis that his full performance was impossible or highly impracticable. *Western Properties v. Southern Utah Aviation*, 776 P.2d 656, 658 (Utah App. 1989). Thus it was plain and harmful error for the trial court to make a finding of breach and consequently incarcerate Mr. Richardson without affording him due process of law.

The State's argument that Mr. Richardson's claims are not preserved lack merit because the district court's errors occurred at the time of sentencing and resulted in Mr. Richardson being sentenced without due process of law and in an unlawful manner. Therefore, Rule 22(e) of the Utah Rules of Civil Procedure allows this Court to consider his claims for the first time on appeal. Further, the

district court committed plain error when it found Mr. Richardson in breach of the plea agreement.

II. THE STATE'S CLAIM THAT MR. RICHARDSON ADMITTED HE WAS IN BREACH OF THE PLEA AGREEMENT IS INCORRECT

The State argues the prosecution was excused from its obligation to recommend no jail time because Mr. Richardson admitted he had breached the plea agreement. Br. Appe. at 10-14. This factual representation is incorrect and not supported by the record wherein Mr. Richardson asserted he was unable to fully perform but never admitted to breaching the plea agreement. R122. In fact, the word "breach" cannot be found in any of Mr. Richardson's representations. *Id.*

As detailed both in the previous section and in Mr. Richardson's opening brief, he claimed he was unable to meet his payment obligations between May 11, 2007 (when he was current), and his sentencing in August 2007. The State acknowledges Mr. Richardson was in compliance with the plea agreement on May 11, 2007 when he was supposed to be sentenced. Br. Appe. at 11. The apparent fact that Adult Probation and Parole did not timely provide the district court with the presentence investigation report is not Mr. Richardson's fault. R134; Br. Appe. at 13.¹

¹Mr. Richardson's counsel did not have the transcript from the hearing on May 11, 2007 when the opening brief was prepared but relied instead on the minute entry that suggests the presentence investigation report was not completed at that time. In any event, Mr. Richardson was prejudiced by the delay because he was current in his payment obligations on May 11, 2007. R99-100;R122:2-6, 10-11; R134.

The State liberally and incorrectly construes Mr. Richardson's explanations for why he was unable to meet his obligations between May and August 2007 as an admission that he was in breach of the plea agreement. However, explaining that one is unable to perform one's contractual obligations is a defense that excuses performance, not an admission of breach. *See, Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 815 (Utah 1992) (explaining impossibility or impracticability excuse contract performance).

The State is simply making the same error the district court made when it refused to accept Mr. Richardson's claims of impossibility or impracticability as valid defenses to breach. The State's argument that these defenses are not preserved because they were not explicitly mentioned during the sentencing hearing (Br. Appe. at 14) is defeated under Rule 22(e). Further, the fact that Mr. Richardson and his counsel argued at length that his performance was impossible or impracticable, without using those precise terms, further defeats the State's argument. *See*, R122:6-11.

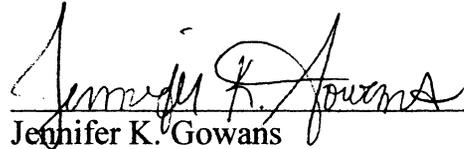
CONCLUSION

Mr. Richardson agrees with the State's observation that if he prevails on the issues raised in this appeal, the appropriate remedy is to remand this matter to the district court for an evidentiary hearing on the question of breach. In the event the evidence demonstrates Mr. Richardson's performance was excused by the

Thus the State would have presumably recommended no incarceration pursuant to the plea agreement.

doctrines of impossibility or impracticability, the State's failure to comply with the plea agreement should be construed as a material breach and Mr. Richardson should be permitted to withdraw his plea.

Respectfully submitted this 4th day of August, 2008.


Jennifer K. Gowans
Attorney for Mr. Richardson

CERTIFICATE OF DELIVERY

I hereby certify that on this 4th day of August, 2008, I caused to be hand-delivered two (2) true and correct copies of the foregoing Reply Brief of Appellant to the following:

Ryan D. Tenney
Utah Attorney General's Office
Appeals Division
160 East 300 South
6th Floor
PO Box 140854
Salt Lake City, Utah 84114-0854

