

2000

Utah v. Redd : Brief of Appellee

Utah Supreme Court

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Walter F. Bugden, Jr.; Bugden, Collins & Morton; Rod W. Snow; Dixon; Attorneys for Appellee. Joanne C. Slotnik; Assistant Attorney General; Jan Graham; Attorney General; William L. Bengel; San Juan County Attorney, Pro Tem; Attorneys for Appellant.

Recommended Citation

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IN THE UTAH SUPREME COURT

STATE OF UTAH, :

Plaintiff/Appellant, :

v. : Case No. 20000556-CA

JAMES REDD and JEANNE REDD, : Priority No. 2

Defendant/Appellees :

BRIEF OF APPELLEES

- - - - -

STATE'S APPEAL FROM DISMISSAL OF AN INFORMATION CHARGING TWO ALTERNATIVE COUNTS OF ABUSE OR DESECRATION OF A DEAD HUMAN BODY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. SECTION 76-9-704 (1996), IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR SAN JUAN COUNTY, THE HONORABLE MARY L. MANLEY, PRESIDING

ROD W. SNOW, #486
Dixon and Snow, P.C.
425 So. Cherry St., Suite 1000
Denver, Colorado 80246-1236
303-394-2200

Walter F. Bugden, Jr., #480
Bugden, Collins & Morton
623 East 2100 South
Salt Lake City, Utah 84106
801-467-1700

Joanne C. Slotnik, #4414
Jan Graham, #1231
Utah Attorney General's Office
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
801-366-0180

William L. Benge, #0282
San Juan County Attorney, Pro Tem
125 E. Center Street
Moab, Utah 84532
801-259-1324

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR APPELLEES

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UTAH SUPREME COURT
UTAH

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Bugden, Collins & Morton
623 East 2100 South
Salt Lake City, Utah 84106
801-467-1700

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William L. Benge, #0282
San Juan County Attorney, Pro Tem
125 E. Center Street
Moab, Utah 84532
801-259-1324

ATTORNEYS FOR APPELLANT

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BRIEF OF APPELLEES

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

The State has instituted its third appeal in this matter, seeking to overturn the Trial Court's dismissal of the felony charges, and to overturn the Court of Appeal's decision in State v. Morgan, 997 P.2d 910, cert. granted 4 P.3d 1289 (Utah 2000). This matter is before this Court pursuant to a certification by the Court of Appeals under Utah Rules of Appellate Procedure Rule 43(a).

STATEMENT OF THE ISSUE ON APPEAL AND
STANDARD OF APPELLATE REVIEW

Was the District Court correct in its dismissal of the refiled felony counts, based upon State v. Brickey, 714 P.2d 644 (Utah 1986) and State v. Morgan, 997 P.2d 910, cert. granted, 4 P.3d 1989 (Utah 2000)?

The standard of review is one of correctness and clearly erroneous. For statutory interpretation, the correctness standard applies; State v. Larsen, 865 P.2d 1355 (Utah 1993); however,

findings of fact shall not be set aside unless clearly erroneous. Rule 52, Utah Rules of Civil Procedure, Rule 26(7) of the Utah Rules of Criminal Procedure and State v. Walker, 743 P.2d 191 (Utah 1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann 76-9-704 (1996) is at the core of the felony charges; however, this appeal involves the clearly erroneous standard of factual findings and case law interpretation of Brickey, supra, and Morgan, supra.

STATEMENT OF THE CASE

Over four years ago, the defendants were charged with a felony arising from an incident on January 6, 1996. The lower Court has dismissed all or part of the charges three times. The government first appealed to the Utah Court of Appeals, lost, sought rehearing, lost, refiled more charges, lost half of those, appealed to the Court of Appeals, who certified the case because the instant issue was obviously destined for this Supreme Court. The government fought the certification and, ultimately, the matter was remanded to the lower Court who dismissed charges a third time. The government appealed a third time, this time reversing its previous position and seeking certification. The appellees did not resist certification.

The third dismissal was premised upon the only decision in this State defining "good cause," State v. Morgan, supra. Therein the clear, simple ruling is that "Evidence or witnesses previously known, available and unrepresented by the prosecutor without

justification do not constitute good cause." Morgan, supra, p. 912. The instant case has precisely that fact pattern such that unless Morgan is overturned, this is a frivolous appeal.

The government, despite three dismissals, three appeals, four years of litigation, and the clear controlling ruling of Morgan, as well as State v. Brickey, 714 P.2d 644 (Utah 1986), argues there has been no prosecutorial abuse and Mr. and Mrs. Redd's right to due process is not implicated.

STATEMENT OF THE FACTS

The government sets forth some of the testimony elicited at the two Preliminary Hearings. The key focus is their argument regarding the initially omitted but available testimony that "Ethnographic sources [say]:

that very often burials take place in that midden area, because, first of all, it's easy to dig and especially with punitive tools ... areas that are soft and easy to dig are very often the places - of repose for - humans. The second part being that very often deaths, of course, take place in the winter time when lots of the available ground is frozen and even harder to dig, so those soft areas in the midden are very much utilized as burials. Citing "Case #2; Tr. 164; 9, 10".

Omitted by the State in their recitation of facts are the

following questions by counsel for the defendants and answers by their expert:

Q. But, there was nothing here of a grave good nature, is that correct?

A. No, not that I saw.

Q. Okay, now, as I understand it, you concluded this was a grave because the bones were nearby, period?

A. That and the very frequent association of burials, of graves in the midden area.

Q. Okay. But that is a generic statement for the Southwest; is that correct?

A. That would be correct; yes.

Q. Has nothing to do with this particular spot because there's no grave goods in order for you to tell what went on there?

A. Except to say it is in the Southwest, yeah.

skipping a few lines-

Q. Do you even know if this is one versus five individuals with either a toe, a finger, an arm, that sort of thing?

A. No, we haven't analyzed the human remains to that extent.

Case #2; Tr. pages 16-17. (emphasis of underlining added)

This Court, in State v. Redd, 992 P.2d 986, 991 (1999), appropriately addressed "the broader public policy our interpretation advances" and, through footnotes, referenced to articles from the Salt Lake Tribune and Deseret News, regarding older burial sites. Factually, in the instant case, the transcript of the government's expert points distinctly away from a burial site and by admission the generalities have no connection to the instant case other than the fact the situs is in the Southwestern United States. The Salt Lake Tribune, December 10, 1998 "Cannibals of the Corners"; Ogden Standard-Examiner, September 7, 2000, "Tests show cannibalism among ancient Anasazi Indians"; The Denver Post, September 7, 2000, "Indian Cannibal Evidence Surfaces"; and Denver Rocky Mountain News, September 7, 2000, Associated Press, finds "Cannibalism Evidence At Anasazi Site"; all show, factually, an equal if not greater explanation as to what occurred in the instant case. There simply is a void of evidence supporting a burial and a plethora of alternative explanations, including cannibalism.

SUMMARY OF ARGUMENT

The government and defendants agree that the focus of this appeal is the viability of the refiled felony charges in the instant case.

Clearly the government had the power, as set forth in the footnote of the Court of Appeals decision denying rehearing, to refile the charges. The question is whether the holdings of State v. Brickey, 714 P.2d 644 (Utah 1986) and State v. Morgan, 997 P.2d 910, cert. granted, 4 P.3d 1289 (Utah 2000), combine to mandate the

dismissal of the newly filed charges.

The government concedes, at page 13 of their opening brief, that "... the instant case does not involve new or previously unavailable evidence ...?"

The government argues that "Specifically, where the State innocently miscalculated the amount of evidence necessary for a bindover, and where a changed circumstance - the articulation of new law by an appellate court - arose directly from the dismissal, and where defendants' due process rights are not implicated, neither the Brickey rule nor the due process rationale underlying it present a bar to refiling."

The defendants respond that there is no bar to refiling, but rather a bar to proceeding in lieu of "other good cause" and that "other good cause" does not include "evidence or witnesses previously known, available and unrepresented by the prosecutor without justification." Morgan, supra, p. 912.

The government rests its argument as to good cause to refile, on page 16 of their brief, upon an excerpt of a footnote in Brickey, which refers to Harper v. Dist. Ct., 484 P.2d 891 (Okla. 1971). The language quoted by the State, which is the water upon which the government's theory floats, is "when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover." However, materially and painfully harmful for the government's position, is the missing preceding language in the partially quoted footnote - "holding that good cause to continue a preliminary hearing for further investigation might exist"

(emphasis added) There is more. Contrary to the quote on page 16 of the government's brief, their vaunted quote not only has a beginning which sets it apart from this case, it also has an end which qualifies it as being different from this case. That ending language, after the word "bindover" is ... and further investigation clearly would not be dilatory." (emphasis added) The operative language of Harper, supra, 895, is that to allow the prosecutor unbridled discretion to refile dismissed charges "tends to make a mockery of the meaning of 'due process of law' and appears to place the District Attorney in a dictatorial position, in relation to the judiciary."

The government also urges that "the articulation of new law by an appellate court" is a "changed circumstance" which permits a sustaining of a refiling. However, the statutory interpretation in State v. Redd, 954 P.2d 230 (Utah Ct. App. 1998), is not new law but a straight forward interpretation of an old law. The Court of Appeals went to great length in discussing statutory construction, citing Deland v. Uintah County, 945 P.2d 172 (Utah Ct. App. 1997); Nixon v. Salt Lake City Corp., 898 P.2d 265 (Utah 1995); State v. Scieszka, 897 P.2d 1224 (Utah Ct. App. 1995), and others in reaching its conclusion that the State must prove three elements - elements being defined in Webster's Third New International Dictionary, p. 734 as, among others, "one of the constitutional parts, principles, materials or traits of anything: one of the relatively simple forms or units that enter variously into a complex substance." Identification and enunciation of simple

elements cannot be labelled "articulation of new law," and there is neither statutory nor case law support for that premise.

Finally, the State argues that State v. Fisk, 966 P.2d 860 (Utah App. 1998) "represents a better model from which to seek guidance." Fisk is a case dismissed for lack of jurisdiction. It is also one that speaks to "new evidence" and specifically sets forth ... "we do not address defendants' arguments that the 'other good cause' prong of the Brickey test was not satisfied ..." Fisk, supra, p. 863. (emphasis added) The Fisk case shows evidence that the government developed their new evidence after a separate hearing in a separate forum. In the instant case, the record is void of any evidence as to why the government should be able to put the defendants through three dismissals and three appeals.

The key is Brickey language - "unless the prosecutor can show other good cause." Brickey, supra, p. 647. In the instant case, the prosecutor has tendered nothing while the Attorney General's Office seeks to shift the burden to the defense. It is not the burden of the defense to prove a negative. It is the burden of the prosecutor to prove "other good cause."

Brickey prohibits a continuation of these charges. Morgan prohibits a continuation of these charges. Due process and common sense prohibit a continuation of these charges.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN ITS THIRD DISMISSAL OF FELONY CHARGES

Addendum F of the government's brief contains a reproduction of the Order by the Trial Court sought by the appellant to be

overturned.

That Order contains the following factual finding by the Trial Court, labelling as "accurate observation" the magistrate's findings:

Brickey does suggest that a prosecutor's initial miscalculation of the quantum of evidence might justify refiling. Here, however, it is not the quantum of evidence that was miscalculated, but the nature of the evidence. The State did not fail to present enough evidence on March 20, 1997, to prove a dead body had been buried; it presented none. (emphasis added) (Addendum F, p. 2)

The Court then went on to hold, legally:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that Brickey and Morgan together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the State sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan, this Court is

compelled to grant the defendants' motion.

State v. Brickey, supra, was a case of first impression in Utah: what are the limits on the state's ability to refile criminal charges when those charges have been previously dismissed for insufficient evidence? The Utah Supreme Court found that the State is not free to refile criminal charges under all circumstances. "For if this were the case, the State could easily harass defendants by refiling criminal charges which had previously been dismissed for insufficient evidence. Consideration of fundamental fairness preclude vesting the State with such unbridled discretion." Brickey, supra, p. 647.

Thus, implicitly, continuing to pursue refiled criminal charges which have been previously dismissed for insufficient evidence is harassment unless there is an exception to the rule. In the instant case, the factual finding, viewed under the clearly erroneous standard is that the State produced no evidence to prove a basic element. Thus, the factual rule in this case is that the State failed to go forward both as to a key element and failed to offer any explanation or "other good cause."

The Utah Supreme Court then went on to "find merit in the approach taken by the Oklahoma courts." Brickey, supra, 647. The case followed by Utah is Jones v. State, 481 P.2d 169 (Okla. Crim. App. 1971). In Jones, the prosecutor must show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling. The burden is on the prosecutor. In the instant case, contrary to State v. Fisk, 966 P.2d 860 (Utah App.

1998), the prosecutor has not introduced a scintilla of evidence of his good faith, leaving open all options, including the possibility that this refiling is politically driven by the government, not the prosecutor, by the huge amount of press and not by the principles of due process. At the lowest base fact, there is a void of effort by the prosecutor to produce evidence of "other good cause," contrary to the mandate of Jones, supra, and this Supreme Court in Brickey, as well as demonstrated in Fisk, supra.

In Brickey, which adopts the Jones rationale, the reviewing magistrate or Court must look "at the facts to determine whether the new evidence (none claimed by the prosecutor here) or changed circumstances (none argued by the prosecutor) are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." Brickey, supra, 647.

The appellant takes from context, a part of footnote 5 in Brickey. The case cited is Harper v. Dist. Ct., 484 P.2d 891 (1971), an Oklahoma case issued the same year, but after, Jones, supra. Harper involved a District Court interfering with a magistrate's decision as to a bindover of a preliminary hearing. Harper repeats the prohibition against another filing "unless the State makes an offer of additional evidence or proves other good cause to justify another preliminary examination." Harper, supra, 897. (emphasis added) Again, "In short, for good cause shown ..." Harper, supra, 897. Equally importantly, the footnote in Brickey, quoted by the State, refers to a continuance of a preliminary hearing when the prosecutor miscalculates the quantum of evidence,

and further investigation would not be dilatory - not to the refiling good cause that must be shown by the prosecutor.

State v. Morgan, supra, is a drug case, involving possession of methamphetamine with intent to distribute. At the preliminary hearing, the prosecutor chose to only call one witness, despite the availability of the second witness. There was a failure to show one element, intent to distribute. Morgan also repeats the clear error standard as to factual findings, citing State v. Parra, 972 P.2d 924 (Utah Ct. App. 1998) for the mandatory presumption that the factual findings underlying the determination as to due process violation are correct.

In Morgan, as well as Brickey, the prosecutor was prohibited from proceeding on the refiled charges. In Brickey, the prosecutor failed to introduce any evidence of an element of the forcible sexual assault. In the instant case, the factual finding is the same - the prosecutor failed to introduce any evidence of an element of the charge. In Morgan, the testimony of the second witness "contained no suggestion of new or previously unavailable evidence." Morgan, supra, p. 912. Such is uncontested in the instant case.

Morgan repeats the mandate - there is a prohibition "unless the prosecutor can show that either (1) new or previously unavailable evidence has surfaced, or (2) that other good cause exists to justify refiling." Morgan, supra, 912. (emphasis added) Clearly the burden is on the prosecutor. In the instant case, there was no attempt, no scintilla of evidence produced by the

prosecutor.

The holding in Morgan, supra, 917, is "Other good cause, as described in Brickey, must at a minimum, be something beyond the introduction of a witness who was present in the courtroom, sworn, and ready to testify at the first preliminary hearing, whose testimony is known at the time and does not change in any material way after the initial bindover is dismissed." "Evidence or witnesses previously known, available and unrepresented by the prosecutor without justification do not constitute good cause." Morgan, supra, p. 913.

In the instant case, the government's expert, Dale Davidson, was called at the first hearing, which resulted in the dismissal and recalled at the second hearing "for some additional issues." Case #2, Tr., p. 5. Parenthetically, there was a stipulation that the vehicle of the looters seen at the scene earlier in the fall was not that of the defendants. Case #2, Tr., p. 6-7. Nowhere in the transcript of the second hearing does the prosecutor proffer even an excuse, much less a scintilla of evidence as is mandated by Jones, Harper, Brickey, Morgan, and demonstrated in Fisk, that the new Davidson testimony was somehow unavailable previously.

The appellant argues, using an extraction of Fisk, that, on page 17, the Brickey rule "ensures that the defendant is not harassed by repeated charges on tenuous grounds." In the instant case, the testimony by the government witness is that "there was nothing here of a grave good nature, ... is that correct?" Answer, "No, not that I saw." Case #2, Tr. p. 16. His clear testimony is

that he only concluded this was a grave (a place of intentional interment) because of the bones nearby and the frequent association of burials, of graves in the midden area. But, this "is a generic statement for the Southwest, is that correct? That would be correct, yes." Case #2, Tr. p. 17.

How more tenuous can the evidence be of interment than "a generic statement" of the entire Southwestern region of the United States? There are no grave goods - a void of evidence of a grave. More importantly, science now sees ample evidence of cannibalism among the Anasazi (as set forth in the Summary of Argument). The unalterable fact is that this was not a grave.

The premise of Brickey is that it is harassing to refile criminal charges when they have been dismissed for insufficient evidence. ONLY when the prosecutor can show, can prove, "other good cause," can the harassment be overcome. With a void of effort in the transcript, there is nothing that argument can substitute, for argument is just that - argument. The evidence is in the transcript - or, in this case, the lack of evidence or effort. One has but to read Fisk, to see enormous distinctions with a difference in the position of the prosecutors in Fisk versus the instant case.

The government poses the argument that at the first hearing, neither the Court nor the defense addressed the missing element. Thankfully our system is one of an adversarial nature. It is the prosecutor's burden, light that it is, to put on some evidence of the basic elements. As the Trial Court observed and as quoted

already from appellant's Addendum F, p. 2, the State did not fail to present enough evidence on March 20, 1997, to prove a dead body had been buried, it presented none. (emphasis added)

The State persists in arguing that unless there is forum-shopping or purposeful obfuscation of evidence through sandbagging, there is no harassment. That is NOT the premise of Brickey and that is not the reality of two Utah citizens and their five children who have endured, economically and emotionally, three government appeals and repeated filings.

The State, using repeated metaphors of ships - "adrift," "anchor," "casts a net," argues that Morgan undermines the essential guiding principle of the Brickey rule. The State seeks solace in its appellation of "Brickey's suggestion" that an innocent miscalculation of the quantum of evidence necessary for a bindover may in and of itself suffice as "another subcategory" of "good cause." The simple fact is that this is a Court of law, not a Court of "suggestions." The simple fact is that the State ignores the mandate that the prosecutor must prove good cause - and such was not even argued at the hearing. Even their argument, on page 25, is that "the State plainly had sufficient evidence for at least a bindover." (emphasis added) Hopefully the State is never the recipient of such an unrelenting assault. "at least a bindover?" Such statement epitomizes the refiling of a tenuous case!

The ship of the State floats upon the premise that when the prosecutor innocently miscalculates the quantum of evidence

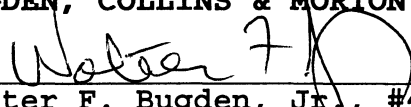
necessary for a bindover, they are able to attack again. This subjective argument is supported by nothing. In Fisk, the entire history of the case was presented. Not so here. The factual finding of no evidence stands. It is equally possible that the driving force for the refiling is NOT the prosecutor, for there is no record of why this all occurred. Fisk hurts the State by showing steps taken by the State as to new evidence versus the void in the instant case. Brickey and Morgan torpedo the ship of the State.

CONCLUSION

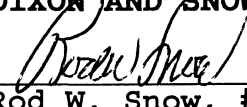
The facts as found by the Court, the law of Jones, Harper, Brickey, and Morgan, due process, and common sense, join together to overwhelm the void of effort of the prosecutor to show "other good cause." This is not an Empty Grave, it is NOT a grave. Generic statements are insufficient to subject Utah citizens to the rigors of trial on a case described by the State's best advocate as "at least a bindover." Failing to put on any evidence of a basic element is not "good cause." Morgan is good law. The facts here are undisputed. The Trial Court's dismissal should not be overturned!

Respectfully submitted,

BUGDEN, COLLINS & MORTON


Walter F. Bugden, Jr., #480
623 East 2100 South
Salt Lake City, Utah 84106
801-467-1700

DIXON AND SNOW, P.C.


Rod W. Snow, #486
425 So. Cherry St., Suite 1000
Denver, Colorado 80246-1236
303-394-2200

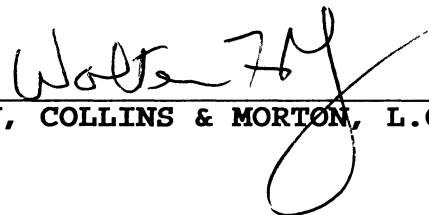
ATTORNEYS FOR DEFENDANTS/APPELLEES

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of November, 2000, two true and complete copies of the foregoing BRIEF OF APPELLEES were placed in the U. S. mails, postage prepaid, addressed to:

Joanne C. Slotnik, Esq.
Assistant Attorney General
Jan Graham, Esq.
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114

William L. Bengé, Esq.
San Juan County Attorney, Pro Tem
125 E. Center Street
Moab, Utah 84532


BUGDEN, COLLINS & MORTON, L.C.