

2008

Michael A. Bacon v. State of Utah : Brief of Appellee

Utah Court of Appeals

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Case No. 20080212-CA

IN THE

UTAH COURT OF APPEALS

Michael A. Bacon,
Defendant/Appellant,

vs.

State of Utah,
Plaintiff/Appellee.

Brief of Appellee

Consolidated Appeal from the Denial of Defendant's Rule 22(e)
Motion to Correct Sentences Imposed Pursuant to Guilty Pleas to
Four Counts of Burglary, Third Degree Felonies, in Violation of Utah
Code Ann. § 76-6-202 (West 2004), and One Count of Possession of a
Controlled Substance, a Third Degree Felony, in Violation of Utah
Code Ann. § 58-37-8 (West 2004), in the Sixth Judicial District Court,
Sevier County, Judge David L. Mower, Presiding

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Oral Argument Not Requested

)
UTAH APPELLATE COURT

AUG 13 2008

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Case No. 20080212-CA

IN THE
UTAH COURT OF APPEALS

Michael A. Bacon,
Defendant/Appellant,

vs.

State of Utah,
Plaintiff/Respondent.

Brief of Appellee

STATEMENT OF JURISDICTION

This appeal is from the denial of a motion filed pursuant to rule 22(e), Utah Rules of Criminal Procedure, to correct sentences imposed following entry of guilty pleas to four counts of burglary, all third degree felonies, in violation of Utah Code Ann. § 76-6-202 (West 2004), and one count of possession of a controlled substance, also a third degree felony, in violation of Utah Code Ann. § 58-37-8 (West 2004). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUE

Did the trial court properly deny defendant's challenge to the legality of his sentences under rule 22(e), Utah Rules of Criminal Procedure, when the challenge amounted to a collateral attack on his convictions and rested solely on

pre-plea nonjurisdictional claims that were waived by entry of defendant's unconditional guilty pleas?

Whether an illegal sentence is imposed is a question of law reviewed on appeal for correctness. *See State v. Thorkelson*, 2004 UT App 9, ¶ 9, 84 P.3d 854.

STATEMENT OF THE CASE

1. Between January 9 and May 1, 2007, defendant was charged in five separate cases with thirty counts ranging from third degree felonies to Class B misdemeanors.¹ R1-2, 60-61, 120-22, 339-40, 557-60.

2. On May 14, 2007, defendant filed a *pro se* motion to suppress. R24-29.

3. All five cases were globally resolved by a single judge the following day. In a single hearing on May 15, 2007, with defense counsel present, defendant entered guilty pleas to four counts of burglary, and one count of possession of a controlled substance, all third degree felonies. R30-32, 85-87, 142-44, 145-46, 358-60, 361-62, 364-65, 564-65, 566-67. As part of the plea agreement, two of the five cases were entirely dismissed, and the remaining seventeen charges in the last three cases were dismissed. R30-32, 85, 142-44, 358-59, 564-65.

4. Defendant waived the time for sentencing, and the court immediately sentenced him to the maximum statutory sentence permitted for each charge:

¹A statement of the underlying facts is unnecessary to resolution of this appeal.

five concurrent terms of zero-to-five years in the state prison. R143-44, 149-51, 364-65, 564-65.

5. Judgment was entered on May 30, and defendant filed a timely notice of appeal to begin the first of eighteen appeals from these criminal charges (Case No. 20070448-CA).² R149-51, 152, 204, 364-65, 369, 422, 569-71, 574.

6. In the months following entry of the judgment, defendant filed numerous *pro se* post-judgment motions and an application for a certificate of probable cause seeking, among other things, to withdraw his pleas. *See, e.g.*, R373-77, 383-85, 387-94, 408-17, 418-19, 434-35, 441-42, 443-47, 454-62, 597-98. One of those motions, filed July 27, 2007, was a “Motion to Vacate Sentence Pursuant to Ut. R. Crim. P. Rule 22(e).” R43-50, 97-104, 235-42, 454-61, 664-71.

7. The lower court denied three of defendant’s motions in a July 10 memorandum decision. R204-06, 422-24, 631-33. Defendant filed a notice of appeal from that decision a week later.³ R217-18, 436-37, 648-49.

²The appeal challenged entry of defendant’s guilty pleas and was ultimately dismissed for lack of jurisdiction because defendant had not filed a timely motion to withdraw his pleas. *See State v. Bacon*, 2008 UT App 73U (unpublished memorandum decision) (at R773-75).

³His notice of appeal contained three case numbers, resulting in three appeals which this Court consolidated into one. *See* Appellate Docket (Case No. 20070598-CA). Defendant later filed a motion to dismiss the appeal, which this Court granted on December 21, 2007. R749-50, 771-72.

8. In August, the court appointed new defense counsel and set a hearing for defendant's application for a certificate of probable cause. R248-49, 467-68, 679-80. However, the hearing was continued several times, in part because of negotiations between the prosecution, defense counsel, and the Department of Corrections. R270-71, 280-81, 287-88, 292-93, 294-95, 507-08, 509-10, 514-15, 516-17, 702-03, 704-05, 714-15, 721-22, 723-24, 728-29, 730-31. During the delay, defendant filed a "Motion to Set Aside Sentence and Plea for Breach of Plea Agreement."⁴ R282-86, 502-06, 716-20.

9. The multiple filings prompted the trial court to schedule a hearing on defendant's outstanding motions, which occurred on November 27. R298-300, 521-22, 735-36.⁵ The judge denied the Motion to Set Aside Sentence and Plea for Breach of Plea Agreement, clarified an issue concerning the appointment of counsel for defendant's direct appeal, then denied defendant's application for a certificate of probable cause. R299, 317-18, 522-23, 544-45, 736, 754-55. The court took under advisement defendant's motion to vacate the sentences pursuant to rule 22(e). R320-22, 522.

⁴A month later, defendant filed a petition for relief under the Post-Conviction Remedies Act (Case No. 070600297), which matter is presently before the lower court. Defendant also filed at least one other post-conviction petition which was dismissed on January 25, 2008 (Case No. 080600001).

⁵These minute entries, as well as many others, are not identical.

10. Between announcement of the lower court's rulings and entry of the written decisions, defendant filed a handwritten *pro se* notice of appeal in the trial court on November 30, 2007, seeking to appeal the two verbal rulings.⁶ R301-02, 524-25, 738-39. The trial court entered separate written orders denying both documents on January 25, 2008.⁷ R313-14, 315-14-35, 537-38, 759-70 (certificate of probable cause); R315-16, 539-40, 757-58 (motion to set aside). Defendant thereafter filed another notice of appeal on February 13, seeking to appeal the written decisions.⁸ R55-56, 325-26, 549-50, 765-66.

⁶The State has no information suggesting that an appellate case was opened as a result of this notice of appeal. A call to this Court on July 8, 2008, revealed that the handwritten notice of appeal appears to have been improperly filed directly in this Court and can be found in the Court's files in case numbers 20080214-CA and 20080216-CA.

⁷Defendant filed a petition in each of his three criminal cases on February 5, seeking interlocutory review of the January 25 order denying his motion to set aside his sentence and his plea (Case Nos. 20080105-CA, 20080114-CA, and 20080118-CA), which were denied by this Court on March 19 and May 28. R329-30, 776-77; *see* Appellate Dockets.

Defendant filed three more petitions on March 11, 2008, seeking interlocutory review of the ruling on his application for a certificate of probable cause (Case Nos. 20080245-CA, 20080251-CA, and 20080249-CA), which were denied by this Court on March 31 and April 8. R333-34; *see* Appellate Dockets.

⁸The notice of appeal contained three case numbers, resulting in three appeals which this Court consolidated into one (Case No. 20080217-CA) by order entered March 21, 2008. R331-32. On August 7, this Court summarily affirmed the trial court's orders in an unpublished, *per curiam* memorandum decision. *See State v. Bacon*, 2008 UT App 297U.

11. On January 31, the trial court entered a written memorandum decision denying defendant's motion to vacate his sentences pursuant to rule 22(e), Utah Rules of Criminal Procedure, and rejecting his claim that he was unable to enter a knowing or involuntary plea so long as his *pro se*, pre-plea suppression motion had not been decided (ruling attached in **Addendum**). R320-22, 541-43, 751-52. Defendant filed a second notice of appeal in the trial court on February 13, seeking review of this memorandum decision. R327-28, 547-48, 767-68. The notice of appeal contained all five case numbers, resulting in five appeals which this Court consolidated into the instant matter by order entered March 21, 2008. *See Appellate Docket.*

SUMMARY OF ARGUMENT

Defendant challenges the legality of his sentences pursuant to rule 22(e), Utah Rules of Criminal Procedure. He advances several arguments to establish that the lower court's failure to rule on a suppression motion filed by defendant *pro se* the day before he entered his five unconditional guilty pleas, and his trial counsel's failure to insist on a pre-plea ruling or to conduct pre-plea discovery rendered the pleas invalid and his sentences illegal.

Defendant's arguments collaterally challenge his pleas and the resulting conviction and are, therefore, not cognizable under rule 22(e). Further, this Court

is without jurisdiction to reach the plea challenges or his pre-plea claims where defendant entered unconditional pleas and failed to timely move to withdraw them. Hence, the lower court properly denied defendant's rule 22(e) motion.

ARGUMENT

THE LOWER COURT PROPERLY DENIED DEFENDANT'S RULE 22(E) MOTION WHERE HIS CLAIMS ARE NOT COGNIZABLE UNDER THE RULE AND WERE WAIVED BY ENTRY OF HIS UNCONDITIONAL GUILTY PLEAS

Defendant appeals the lower court's denial of his rule 22(e) motion. He claimed below that his sentences were illegal because: (1) the trial court did not rule on the suppression motion before accepting his five guilty pleas; and (2) his counsel rendered ineffective assistance in the handling of the pleas because he failed to conduct discovery or to insist on issuance of a suppression ruling prior to entry of the pleas. *See* R43-50, 97-104, 235-42, 454-61, 664-71.

The trial court denied the motion on two bases. First, the court summarily noted that "Defendant's sentence has not been illegal or imposed in an illegal manner." Add. A. Second, the court rejected defendant's claim that the absence of a ruling on his pre-trial motion to suppress rendered his sentences illegal. *See id.* Instead, the court determined that defendant's guilty pleas "waived all pre-plea constitutional violations." *Id.* (citing *State v. Parsons*, 781 P.2d 1275, 1278

(Utah 1989)). The court then noted that defendant pled guilty knowing that the motion had been filed, “but he chose not to pursue it.” *Id.*

Defendant repeats his arguments on appeal. Although he presents them in the guise of a motion filed pursuant to rule 22(e), Utah Rules of Criminal Procedure, he ultimately seeks withdrawal of his pleas. *See* Apl’t. Br. at 3, 9. His claims depend upon the absence of a ruling on his pre-plea suppression motion and the absence of pre-plea discovery, both of which he argues rendered his guilty pleas unknowing and involuntary in various ways and prevented entry of sentences based on accurate and relevant information. *See id.* at 2-9.

This Court should reject defendant’s arguments and affirm the lower court’s decision because the arguments are not properly raised under rule 22(e) where they represent a collateral challenge to his guilty pleas and involve only pre-plea nonjurisdictional claims which were waived by entry of defendant’s unconditional guilty pleas.

Rule 22(e) provides that “[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.” Utah R. Crim. P. 22(e). This rule allows correction of sentences that are patently or manifestly illegal. *See State v. Candedo*, 2008 UT App 4, ¶ 6, 176 P.3d 459; *State v. Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854. A “patently” or “manifestly” illegal sentence is once in

which either: (1) “the sentencing court has no jurisdiction[;]” or (2) “the sentence is beyond the authorized statutory range.” *Thorkelson*, 2004 UT App 9, ¶15; *see also Candedo*, 2008 UT App 4, ¶ 6.

“A request to correct an illegal sentence under rule 22(e) presupposes a valid conviction.” *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995). Accordingly, “rule 22(e) does not allow a court to review a claim of an illegal sentence when the substance of the claim is a challenge to the underlying conviction.” *Id.* at 860-61; *see also State v. Nicholls*, 2006 UT 76, ¶ 5, 148 P.3d 990. Additionally, the rule does not permit review when the “conviction” derives from a guilty plea which defendant attempts to withdraw using rule 22(e). *See Nicholls*, 2006 UT 76, ¶ 5; *State v. Reyes*, 2002 UT 13, ¶ 3, 40 P.3d 630.

In this case, the substance of defendant’s rule 22(e) sentencing challenge is actually a collateral challenge to his guilty pleas and the convictions resulting therefrom. Defendant claims that his sentences are illegal because: (1) they were rendered, in part, on evidence which should have been suppressed pursuant to his pre-plea suppression motion; and (2) they are based on pleas rendered invalid because “a constitutional motion [wa]s pending” when the pleas were entered. *See* Aplt. Br. at 6, 7. He also faults his counsel for the state of affairs that supposedly rendered his sentences illegal because counsel failed to insist on

a pre-plea suppression ruling and failed to conduct pre-plea discovery. *See id.* at 9. He presents no other challenge to his sentences and does not request re-sentencing. Therefore, his is not a proper rule 22(e) claim and was correctly rejected by the trial court. *See Nicholls*, 2006 UT 76, ¶ 5.

Furthermore, defendant's claims are all waived by entry of his guilty pleas. "[A] voluntary guilty plea is a waiver of the right to appeal all nonjurisdictional issues, including pre-plea constitutional violations." *State v. Jennings*, 875 P.2d 566, 567 n.1 (Utah App. 1994), *distinguished on other gnds by State v. Bujan*, 2006 UT App 832, 142 P.3d 581; *State v. Smith*, 833 P.2d 371, 372 (Utah App. 1992) (waiver of review of the denial of a suppression motion); *accord Parsons*, 781 P.2d at 1278. After entering an unconditional plea, a defendant may only appeal the voluntary and intelligent nature of the plea. *See Parsons*, 781 P.2d at 1277-78. To do so, however, he must present his issue in a timely-filed motion to withdraw the plea. *See Utah Code Ann. § 77-13-6* (West 2004); *see also State v. Grimmett*, 2007 UT 11, ¶25, 152 P.3d 306; *State v. Briggs*, 2006 UT App 448, ¶ 6, 147 P.3d 969. Absent a timely motion to withdraw a guilty plea, the appellate court lacks jurisdiction to review the plea, "even on the basis of ineffective assistance of counsel." *Briggs*, 2006 UT App 448, ¶ 6.

In this case, defendant must either have expressly preserved his pre-plea nonjurisdictional claims by entry of conditional pleas, or he must have timely move to withdraw his pleas. *See* Utah R. Crim. P. 11(j); *see also* *Grimmett*, 2007 UT 11, ¶ 25 (rejecting challenge to entry of guilty pleas absent a timely motion to withdraw the pleas); *State v. Sery*, 758 P.2d 935, 938 (Utah App. 1988) (allowing review of rulings on pre-plea motions to suppress when they are preserved in a conditional plea, agreed to by both parties, and approved by the trial court). He did neither in this case. The day after defendant filed his motion to suppress, he appeared in court, entered five unconditional guilty pleas, and waived the time for sentencing. *See* Statement of Procedural History, ¶¶ 1-4, *supra*. Thereafter, he failed to file a timely motion to withdraw his pleas. *See* *State v. Bacon*, 2008 UT App 73U (unpublished memorandum decision) (at R773-75). As a consequence, his pre-plea challenges did not survive entry of his pleas and do not provide a basis upon which to challenge his statutorily-appropriate sentences. *See, e.g., Jennings*, 875 P.2d at 567, n.1.

Moreover, defendant's inaction leaves this Court without jurisdiction to review his challenges to the absence of a ruling on his suppression motion, its impact on either his pleas or his sentencing, the sufficiency of the plea colloquy, or the effectiveness of his counsel's performance as it relates to entry of the pleas.

See Grimmer, 2007 UT 11, ¶¶ 25-27 (rejecting attack on validity of pleas absent a timely motion to withdraw them); *Reyes*, 2002 UT 13, ¶ 3; *Briggs*, 2006 UT App 448, ¶ 6 (expressly rejecting ineffective assistance claims absent a timely motion to withdraw the plea); *Jennings*, 875 P.2d at 567 n.1 (an unconditional plea waives all nonjurisdictional issues, including pre-plea constitutional violations); *Smith*, 833 P.2d at 372 (involving motion to suppress); *Sery*, 758 P.2d at 939. The only available challenge to the validity of defendant's pleas is through the Post-Conviction Remedies Act and rule 65C, Utah Rules of Civil Procedure. *See* Utah Code Ann. § 77-13-6(2)(c); *see also Nicholls*, 2006 UT 76, ¶ 6.

Defendant argues that the suppression motion survived entry of his guilty pleas and remains pending before the trial court because the trial court "request[ed]" it, and because it was preserved in the same manner as a pre-arraignment defect under rule 10(c), Utah Rules of Criminal Procedure, and as a pre-trial motion, request, defense, or objection under rule 12(e) and (f), Utah Rules of Criminal Procedure. *See* Aplt. Br. at 2-5. His arguments fail because this is a matter of jurisdiction, not preservation, and this Court may not review an issue over which it has no jurisdiction. *See Reyes*, 2002 UT 13, ¶ 4.

Defendant's attempts to shoehorn his claims into rule 22(e) are unpersuasive, ineffectual, and unsupported. He makes no mention of any

jurisdictional defect in sentencing and provides no other challenge to the legality of his sentences independent of his guilty pleas. *See* Aplt. Br. *passim*.

Because defendant's sentencing challenge represents a collateral attack on his guilty pleas, his claims are not reviewable under rule 22(e). *See Brooks*, 908 P.2d at 860. Where defendant filed unconditional guilty pleas and failed to timely move to withdraw his pleas, this Court is without jurisdiction to review the pleas or the pre-plea claims. *See Reyes*, 2002 UT 13, ¶ 3. Accordingly, this Court should affirm the lower court's denial of defendant's rule 22(e) motion.⁹

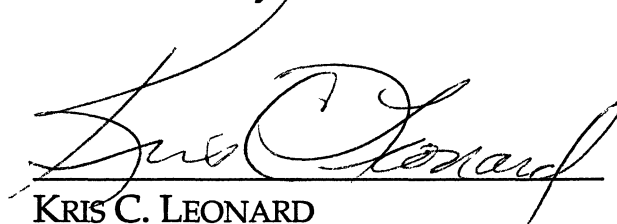
⁹In an apparent effort to establish record support for his arguments, defendant recently filed a self-serving affidavit addressing the events of the May 1, 2007, hearing at which the trial court held a bail hearing at defendant's request, and the May 15 change-of-plea hearing. *See* R561-65. The State requests that the affidavit be stricken on two bases. First, it is not relevant to the appeal in light of the State's arguments herein. Second, it was not before the trial court and is not part of the appellate record. *See* Utah R. App. P. 11(a); *State v. Pliego*, 1999 UT 8, ¶7, 974 P.2d 279 (this court "will not consider evidence which is not part of the record"). If a party perceives a gap in the record on appeal, it may not create and submit a summary of the missing information directly to the appellate court, but must follow the procedures outlined in rule 11(g), Utah Rules of Appellate Procedure.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's denial of defendant's motion to vacate his sentences pursuant to rule 22(e), Utah Rules of Criminal Procedure.

Respectfully submitted August 13th, 2008.

MARK L. SHURTLEFF
Utah Attorney General

A handwritten signature in black ink, appearing to read "Kris C. Leonard", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2008, two copies of the foregoing brief were ~~✗~~ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ~~✗~~ Yes ☐ No

Melissa Freyer

ADDENDUM

MEMORANDUM DECISION ON
MOTION TO VACATE SENTENCE
PURSUANT TO
UTAH RULES OF CRIMINAL PROCEDURE
RULE 22(e)

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STATE OF UTAH,

Plaintiff,

vs.

MICHAEL A. BACON,

Defendant.

**MEMORANDUM DECISION ON
MOTION TO VACATE SENTENCE
PURSUANT TO UTAH RULES OF
CRIMINAL PROCEDURE RULE
22(e)**

Case No. 071600082
Case No. 071600112
Case No. 071600133

Assigned Judge: DAVID L. MOWER

On July 27, 2007, Defendant filed a Motion to Vacate Sentence Pursuant to Utah Rules of Criminal Procedure Rule 22(e). This Motion was taken under advisement on November 27, 2007. The State was given a deadline to file its memorandum in opposition. State has filed its Memorandum in Opposition on December 7, 2007. The Motion is now ready for a decision.

Prior to entering his guilty plea, Defendant filed a Motion to Suppress in case number 071600015 in this Court. The Motion also covered facts, events, and evidence in the present cases. It was filed on May 14, 2007. Case number 071600015 was dismissed pursuant to the plea bargain agreement. The Motion to Suppress was never resolved.

Defendant argues that failure to rule on the Motion to Suppress constitutes harmful error. Defendant relies on *State v. Ramirez*, 817 P.2d 774 (Utah 1991). Defendant concludes that his sentence should be vacated because the Court lacked jurisdiction to accept his guilty plea.

Memorandum Decision on Motion to Vacate Sentence



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MEMORANDUM DECISION ON MOTION TO VACATE SENTENCE PURSUANT TO
UTAH RULES OF CRIMINAL PROCEDURE RULE 22(e), Case numbers 071600082,
071600112, 071600133,

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Defendant's Motion to Vacate Sentence Pursuant to Utah Rules of Criminal Procedure, Rule 22(e) should be denied.

Utah Rules of Criminal Procedure, Rule 22(e) allows the Court to "correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Defendant's sentence has not been illegal or imposed in an illegal manner.

Ramirez case is inapplicable in this case because in *Ramirez* defendant did not plead guilty. Instead, the defendant went to trial, and the jury heard the evidence that was the subject of the pre-trial motion to suppress. The Supreme Court concluded that the trial court should have ruled on the suppression issues prior to trial. *Ramirez*, 817 P.2d at 787. The sentence was vacated and the case was remanded for a new trial. *Id.* at 789.

In this case, Defendant pled guilty. By choosing to plead guilty, Defendant waived all pre-plea constitutional violations. *State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989). In addition, at the time he pled guilty, Defendant was aware of his Motion to Suppress but he chose not to pursue it.

Defendant's Motion to Vacate Sentence Pursuant to Utah Rules of Criminal Procedure Rule 22(e) is denied.

MEMORANDUM DECISION ON MOTION TO VACATE SENTENCE PURSUANT TO
UTAH RULES OF CRIMINAL PROCEDURE RULE 22(e), Case numbers 071600082,
071600112, 071600133,
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Mower

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District Court Judge

Certificate of Notification

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