

1987

State of Utah v. Steven Fisher : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH, :
 :
 Plaintiff-Respondent, : BRIEF OF APPELLANT
 :
 VS. :
 :
 STEVEN FISHER, : CASE NO. 870569-CA
 :
 Defendant-Appellant. : *Priority II*

BRIEF OF APPELLANT

APPEAL FROM CONVICTION AND DENIAL OF MOTION TO SET
ASIDE PLEA OF GUILT OF THEFT, A THIRD DEGREE FELONY,
IN VIOLATION OF THE UTAH CODE ANNOTATED 76-6-404, IN
THE THIRD DISTRICT COURT OF SUMMIT COUNTY, STATE OF
UTAH, THE HONORABLE HOMER F. WILKINSON, PRESIDING.

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FILED

DEC

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COURT OF APPEALS

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Plaintiff-Respondent, : BRIEF OF APPELLANT
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NATURE OF THE PROCEEDINGS IN THE INFERIOR COURT AND JURISDICTION

This is an appeal from that certain denial of defendant's Motion To Set Aside Guilty Plea rendered by the Honorable Homer F. Wilkinson, on September 21, 1987, in the Summit County District Court, State of Utah, and from judgment of guilt following a plea of negotiation and plea of guilt on June 1, 1987, in the same court.

The above appeal is brought pursuant to Rule 3 of the Utah Rules of Appellant Procedure, Rule 26 of the Utah Rules of Criminal Procedure, and the U.C.A. 78-2-2 (allowing Supreme Court to review all final judgments of the District Court).

Defendant's Notice of Appeal was timely filed on November 16, 1987.

NATURE OF THE PROCEEDINGS IN THE INFERIOR COURT AND JURISDICTION

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Defendant's Notice of Appeal was timely filed on November 16, 1987.

STATEMENT OF ISSUES ON APPEAL

1) Is it an abusive discretion for a trial judge to deny a Motion To Set Aside Guilty Plea when that guilty plea was taken as part of a plea bargain based on the results of a polygraph examination?

2) Is it proper to base a plea bargain necessitating a plea of guilt to a felony on the basis of a polygraph examination?

3) Do the results of the defendants polygraph indicate deception pursuant to the negotiated plea agreement herein?

STATUTES

Utah Code Annotated 77-35-11 (e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:

1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;

2) That plea is voluntarily made;

3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;

4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

STATUTES (cont.)

5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and

6) Whether the tendered plea is a result of a prior plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

Utah Code Annotated 77-13-6. A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

STATEMENT OF FACTS

The defendant was charged with theft, a second degree felony in Summit County where he allegedly embezzled funds while he was employed by a Park City hotel. The defendant and the plaintiff entered into a plea agreement contained in the record at 0011, and entitled "Affidavit of Defendant." That pursuant to said plea agreement defendant was to submit to a polygraph examination. If the results of the said polygraph examination are conclusive in the opinion of the operator that the defendant was involved in a theft, then the plea will stand, but if the polygraph results are conclusive that the defendant was not involved in a theft, then the State will move to dismiss the charges. If the polygraph results are inconclusive as of theft, the defendant shall have the option to move to set aside his guilty plea.

SUMMARY OF ARGUMENT

1. A conditional plea agreement is not voluntary or knowing where a defendant is not advised as to the nature and possible unreliability of the polygraph.
2. A conditional plea agreement should be void where it is based on performance on a polygraph where there is no judicial review of the results and where there is no authority for such an arrangement.
3. It cannot be said that as a matter of law, a defendant failed a polygraph where one examiner graded the results as inconclusive.

ARGUMENT

POINT I

IS IT AN ABUSIVE DISCRETION FOR A TRIAL JUDGE TO DENY A MOTION TO SET ASIDE GUILTY PLEA WHEN THAT GUILTY PLEA WAS TAKEN AS PART OF A PLEA BARGAIN BASED ON THE RESULTS OF A POLYGRAPH EXAMINATION?

As the Affidavit of the defendant (Rule 0011 to 0016) states,

the defendant entered into his plea of guilt to third degree felony theft on the partial basis that his plea would be set aside if his subsequent polygraph examination was conclusive that he was not involved in a theft. (It is unclear from the Affidavit alone what the State's position would be if the polygraph results were inconclusive except that the defendant may make the motion to set aside his plea. Record 0014.

It is the conditioning of the entry of a guilty plea based upon the results of an a posteriori polygraph examination that the defendant claims in error; not because of the inherent unreliability of the device which will be argued below, but because the reliance of the device by the defendant was not properly explained to him, and rendered the plea involuntary.

Utah Code Annotated 77-35-11 (e) states (in relevant part) that the court shall not accept a guilty plea until the court has made a finding that the plea was voluntarily made.

The defendant argues that unless the vagaries of polygraph examinations are adequately explained, basing a plea of guilt on the examination will permit a defendant to successfully argue when he fails the examination that he thought he would pass, the test thusly showing his lack of guilt and vitiating the plea agreement.

In the case at bar, can it be argued by the plaintiff that the plea was voluntarily received when the defendant had the option of nullifying the plea by passing a test that the results of which may be out of control.

In State vs. Vasilacopulos, 84 Utah Adv. Rep. 25, (June 1988) the court found the defendant's guilty plea was not properly received where he was not advised of the possibility of consecutive sentences. Where a defendant was not advised of the fallibility of the polygraph or the fact that he had the right to have the examination conducted according to certain standards, or his right to a hearing and a finding as to if his results fell into which category of the plea agreement, it is urged that the voluntariness of the plea is suspect.

The defendant contends that the burden is to clearly establish that the court has abused its discretion in finding whether or not good cause has been shown in setting aside a plea of guilt. State vs. Mildenhall, 747 P. 2d 422 (Utah 1987).

The defendant believes he can meet his burden by showing that a conditional plea agreement is invalid if the power of the court to approve such an agreement does not exist, or if the condition itself is so arbitrary as to render it mere chance.

POINT II

IS IT PROPER TO BASE A PLEA BARGAIN NECESSITATING A PLEA OF GUILT TO A FELONY ON THE BASIS OF A POLYGRAPH EXAMINATION?

Reference is made to the Record at 0026 which is the report of the polygraph examination of the defendant. It should be noted that according to the report, the defendant was one point over the scale of conclusive versus inconclusive. It should also be noted that the questions asked were formulated in a cumbersome manner because the defendant was a manager. At least one question should have asked if the defendant ever stole money from the company and not the indirect questions asked which covered legitimate activities of employment.

The defendant contends he had an unreviewed examination with no finding that it met even the standards for a stipulated evidentiary admission as in State vs. Rebeterano, 681P. 2d 1265 (Utah 1984).

The Tenth Circuit of the United States and several state courts have disallowed polygraph examinations because of their lack of acceptance in for reliability in the scientific community. United States vs. Hunter, 672 F. 2d 815 (1982); United States vs. Urquidez, (1973, DC CAL) 356 F. Supp. 1363. See also; Polygraphy: Short Circuit to Truth, 29 University of Florida, L. Rev. 286, Winter 1977, and Higleyman, The Deceptive Certainty of the Lie Detector, 10 Hastings L J 47.

Whether or not the polygraph is reliable enough by stipulation to allow into evidence, the plea agreement at issue in effect purports to be the whole judge of guilt or innocence of the defendant, and should be void as against public policy.

Defendant is unable to find a case from this jurisdiction specifically legitimizing an a posteriori conditional plea as being within the jurisdiction of the trial court and can find no authority for a conditional plea on the basis of a polygraph.

POINT III

DO THE RESULTS OF THE DEFENDANTS POLYGRAPH INDICATE DECEPTION PURSUANT TO THE NEGOTIATED PLEA AGREEMENT HEREIN?

The record of the test results indicated that one examiner found the defendant a -3 inconclusive, and one found him -6 or conclusive.

If the court is going to authorize this kind of conditional plea, some procedure should be adopted to question the results in a court or to question the form of questions.

CONCLUSION

The defendant believes this court should overrule the denial of defendant's Motion To Set Aside Plea Of Guilt because he was not effectively advised of the nature of the polygraph or the questions to be asked, and because he was not afforded a hearing on what was his performance of the test.

The defendant also contends that a conditional plea agreement calling for an a posteriori passing of a polygraph should be void as against public policy.

Respectfully Submitted,



John R. Bucher

DELIVERY CERTIFICATE

I delivered a true and correct copy of the foregoing to
David L. Wilkinson, Attorney General, 236 State Capitol, SLC, UT.



ADDENDUM

77-35-11 Rule 11 - Pleas.

(a) Upon arraignment except in case of a probation, a defendant shall be represented by counsel unless the defendant waives counsel in open court and shall not be required to plead until he has a reasonable time to confer with counsel.

(b) A defendant may plead not guilty or no contest, not guilty by reason of insanity and mentally ill. A defendant may plead alternatively not guilty or not guilty by reason of insanity. If a defendant refuses to plead and a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty or no contest, the case shall forthwith be set for trial. Defendant unable to make bail shall be given a preference for an early trial. In non-felony cases the court shall advise the defendant, or his counsel of the defendant's rights for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:

(1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel,

(2) That the plea is voluntarily made;

(3) That the defendant knows he has the right to a trial and to confront and cross-examine the witnesses against him, and that by entering the plea he waives all of those rights,

(4) That the defendant understands the nature and elements of the offense to which he is entering the plea, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements,

(5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of alternative sentences, and

(6) Whether the tendered plea is a result of a plea discussion and plea agreement and what agreement has been reached.

If it appears that the prosecuting attorney or other party has agreed to request or recommend acceptance of a plea to a lesser included offense, the dismissal of other charges, the same shall be approved by the court. If recommendations of sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(f) The judge shall not participate in plea discussions prior to any agreement being made by the prosecuting attorney, but once a tentative plea agreement has been reached which contemplates entry of a plea in the expectation that other charges will be dropped or dismissed, the judge, upon request of the parties, may permit the disclosure to them of such tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition. Thereafter, if the judge decides that final disposition should not be handled in conformity with the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea. 1953

77-13-6 Withdrawal of plea.

A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court. 1953

78-2-2. Jurisdiction - Original and appellate.

The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any district court or judge thereof. In other cases the Supreme Court shall have appellate jurisdiction only; and, in the exercise of such appellate jurisdiction, may review all final judgments of the district court, and all final orders and decrees of the district court in the administration of decedents' estates and in matters of guardianship, and shall have power to issue writs necessary and proper for the exercise of that jurisdiction. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. 1953