

1997

State of Utah v. Larry Persons : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Utah v. Persons*, No. 970365 (Utah Court of Appeals, 1997).
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**UTAH COURT OF APPEALS
BRIEF**

IN THE UTAH COURT OF APPEALS

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DOCKET NO. 970365-CA

STATE OF UTAH,

Plaintiff/Appellee,

v.

LARRY PERSONS,

Defendant/Appellant.

Priority No. 2

Case No. 970365-CA

BRIEF OF APPELLEE

**DEFENDANT APPEALS HIS CONVICTION FOR DISTRIBUTING
A CONTROLLED SUBSTANCE WITHIN 1000 FEET OF A
PROHIBITED PLACE, A FIRST-DEGREE FELONY UNDER
UTAH CODE ANN. § 58-37-8 (Supp. 1997), IN THE SECOND
JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF
UTAH, THE HONORABLE ROGER S. DUTSON, PRESIDING**

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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v.

LARRY PERSONS,

Defendant/Appellant.

Priority No. 2

Case No. 970365-CA

NATURE OF PROCEEDING AND BASIS OF JURISDICTION

Defendant appeals his conviction for distributing a controlled substance within 1000 feet of a prohibited place, a first-degree felony under Utah Code Ann. § 58-37-8 (Supp. 1997). The Utah Supreme Court, which had direct appellate jurisdiction over this case, transferred it to this Court via its pour-over authority (R. 96).

ISSUES AND STANDARDS OF REVIEW

1. Did defendant waive any appellate issue he may have had regarding a conflict of interest when he acknowledged the potential conflict and agreed to the legal representation on the record. This issue was not before the trial court.

2. When evidence of defendant's guilt consists of recorded conversations that link him to the crime and the statement of an eyewitness, do defendant's claims of ineffective assistance of counsel, even if true, undermine confidence in the verdict?

This issue was not before the trial court; therefore, there is no standard of review applicable.

3. Does defendant's Point Five, questioning whether Utah Code Ann. § 58-37-8 (Supp. 1997) is a prohibited "special law," which contains no case authority or analysis, comply sufficiently with rule 24, Utah Rules of Appellate Procedure, to merit appellate review? No standard of review applies to this issue because it was not before the trial court.

RELEVANT PROVISIONS

All provisions pertinent to the brief are provided in the text.

STATEMENT OF THE CASE

Procedural History

A jury convicted defendant of distributing or arranging to distribute a controlled substance within 1000 feet of a prohibited place (R. 58). This offense is a first-degree felony pursuant to Utah Code Ann. § 58-37-8 (Supp. 1997).

Statement of Facts

In exchange for a lenient disposition on a probation violation, Elracion (Ray) Craig offered to work as a confidential informant for the Weber-Morgan Narcotics Strike Force in the spring of 1996 (R. 141). Consequently, on May 15, 1996, Agent Jamie Garcia of the strike force "wired" Craig with a tape recorder and listening device to arrange a drug buy on the 2800 block of Lincoln Avenue in Ogden (*id.*).

Before going to the location for the purchase, Agent Garcia and Agent Kevin Walser searched Craig and found nothing on him (R. 109). Agent Garcia gave Craig \$50 and then they both went to the Massey Apartments (R. 111). When they entered, Craig introduced himself to defendant by reminding him of a time they had met once before (R. 112). He then asked defendant "if he had anything popping, if anything was popping" (*id.*). Translated from street lingo, this meant "[i]f he [defendant] had any drugs that he was trying to sell or is there anybody that has drugs that's trying to get rid of them" (*id.*). In response, defendant asked Craig how much money he had and then, after hearing \$50, told him to "drive around for a few minutes, and then told him ... to go to the corner house" (*id.*).

Obeying the directions, Craig and Agent Garcia drove to the corner house, 2902 Lincoln Avenue (R.113). After entering, defendant told Craig to have his "people," Agent Garcia, sit down and he and defendant walked into the kitchen (*id.*). Nevertheless, Agent Garcia looked into the kitchen where Craig and the defendant stayed for about a minute (R. 114). According to a statement Craig gave the day of the buy, defendant handed him the drugs in exchange for the money (R. 159).¹ Agent Garcia and Craig then left the house, got in the car, and drove to a pre-arranged meeting place with Agent Walser and Agent Larry Chatterton (R. 117). There, Craig

¹ At trial, Craig, who had by then been sent to the state prison for forgery, changed his testimony and said that a man named Terrell sold him the drugs (R. 146).

gave the agents a bindle of cocaine (*id.*). The agents also searched defendant and could not find the \$50 he had been given earlier (*id.*).

SUMMARY OF THE ARGUMENT

Conflict of interest: Defendant alleges on appeal that his trial counsel had a conflict of interest because he had represented Craig, the informant, in unrelated forgery charges. However, defendant waived this claim when he knowingly waived the potential conflict on the record.

Ineffective assistance: Defendant claims that his trial counsel provided inadequate assistance. However, because of the strength of the evidence against him, it is not reasonably probable that the outcome would have been different even if trial counsel had not committed any of the alleged errors. Consequently, defendant cannot establish ineffective assistance.

Insufficient argument: Defendant's Point Five does not comply with rule 24, Utah Rules of Appellate Procedure, regarding the need for legal argument, citation, and analysis. It should not be reviewed on appeal.

ARGUMENT

I. BECAUSE DEFENDANT CONSENTED TO TRIAL COUNSEL'S REPRESENTATION, HE HAS WAIVED ANY CLAIM OF A CONFLICT OF INTEREST.²

On appeal, defendant claims that his trial counsel had a conflict of interest because he had represented Craig, the informant, in unrelated forgery charges (R. 187). On the record, trial counsel informed both the trial court and defendant of the situation (*id.*). Defendant then consented to trial counsel's continued representation. This on-the-record waiver erased any appellate challenge defendant might have had on this issue. *See State v. Newman*, 928 P.2d 1040, 1044 n.2 (Utah App. 1996); *see also* Fed R. Crim.P. 44(c) (requiring consents on the record before potentially conflicted counsel can represent defendant).

II. EVEN IF TRUE, THE CLAIMED INSTANCES OF INEFFECTIVE ASSISTANCE DO NOT UNDERMINE CONFIDENCE IN THE VERDICT; THEREFORE, THE CONVICTION SHOULD NOT BE REVERSED.³

Defendant alleges that his trial counsel gave him constitutionally inadequate assistance. To prevail in this claim, defendant must satisfy both prongs of the *Strickland v. Washington*, i.e., (1) conduct below that of the reasonably prudent

² This point relates to defendant's Point I, which is found on page 22 of his brief.

³ This point corresponds to defendant's points II, III, IV, and VI. In those points, defendant claims his counsel erred by not objecting to the information, the constitutionality of the section 58-37-8 as regards the "one-subject" rule, the purported lack of a "penalty" in the statute, and the wording of a jury instruction.

attorney; and (2) resulting prejudice to defendant's case. 466 U.S. 466 U.S. 668, 694 (1984). As the United States Supreme Court foresaw, however, this is one of those many cases that can be resolved by analyzing the prejudice prong only, safely ignoring the first. *Id.* at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Defendant cannot show that, "but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. After Craig told defendant he had \$50 to buy drugs, defendant was caught on tape and heard and seen telling Craig to go to drive around for a little while and then go to the "corner house."⁴ Agent Walser read a statement that he took from Craig the day of the drug buy. In that statement, Craig stated that defendant had given him the bindle of cocaine in exchange for the money.

III. DEFENDANT HAS NOT PROVIDED SUFFICIENT ARGUMENT OR ANALYSIS TO MERIT APPELLATE REVIEW ON HIS POINT V.

Defendant gives a barely legible paragraph to his assertion that the 1000-foot element of Utah Code Ann. § 58-37-8 (Supp. 1997) is a special law. He does not discuss any cases about special laws; he does not even define the term or relate it to the facts of this case. Because of this lack of analysis, the Court should refuse to review

⁴ See Statement of Facts, *supra*.


the issue on appeal. *State v. Price*, 827 P.2d 247, 249 (Utah App. 1992); *English v. Standard Optical Co.*, 814 P.2d 613, 618-19 (Utah App. 1991) ("the assertive analysis is not meaningful.").

CONCLUSION

Defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED THIS 21 November 1997.

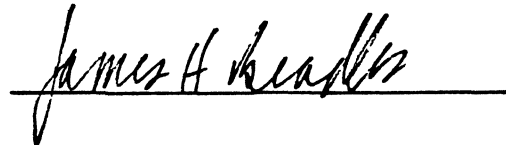
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CERTIFICATE OF MAILING

On 21 November 1997, I mailed, by U.S. Mail, postage prepaid, two copies of
this **BRIEF OF APPELLEE** to:

LARRY PERSONS
P.O. Box 250
Draper, Utah 84020

A handwritten signature in cursive script, reading "James H. Headley", is written over a solid horizontal line.