1986

The State of Utah v. Michael Lynn Shelby : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Attorney General; Attorney for Respondent.
Bryce K. Bryner; Attorney for Appellant.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

-vs-

MICHAEL LYNN SHELBY,

Defendant-Appellant

Case No. 860299
Priority #2

BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Boyd Bunnell, Presiding

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BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The Appellant has requested that counsel raise the following issues on appeal:

1. Did the Trial Court err in signing the Judgment which provided for consecutive sentences when the defendant was of the understanding that the Court announced from the bench that the two sentences would run concurrently?

2. Did the Trial Court err in denying defendant's motion for additional time before sentencing within which to explore an inpatient drug treatment program as an alternative to prison?

STATEMENT OF THE CASE AND RELEVANT FACTS

This brief is in the form of an "Anders Brief" as designated in the case decided by the Supreme Court of Utah in State v. White, 639 P. 2d 168 (Utah 1981). Counsel was appointed by the Eleventh Circuit Court in Carbon County to

represent the defendant in two separate and unrelated criminal cases. In Criminal No. 2339 the defendant was initially charged with Burglary of a Non-Dwelling, a third degree felony, and Theft of a Firearm, a second degree felony. As a result of plea negotiation, the defendant entered a plea of guilty to the Burglary charge and the Theft of Firearm was dismissed.

In the second case, Criminal No. 2319, the defendant was originally charged with two counts of Distribution of a Controlled Substance for Value, third degree felonies. Through plea negotiations the charges were amended to Arranging for Distribution of a Controlled Substance for Value, third degree felonies, but carrying one-half the prison sentence. The defendant eventually entered a plea of guilty to one count and the other was dismissed.

Both cases came on for sentencing on April 17, 1986. The Court sentenced the defendant to serve a term in the Utah State Prison of not to exceed five years in Criminal No. 2339 and not to exceed 2 1/2 years in Criminal No. 2319, both terms to run consecutively.

SUMMARY OF ARGUMENT

Counsel has researched the record and the law and is unable to find any case law which would support defendant's claim of error.

ARGUMENT

DEFENDANT'S FIRST CLAIMED ERROR: THE TRIAL COURT ERRED IN SIGNING THE JUDGMENT WHICH PROVIDED FOR CONSECUTIVE SENTENCES.

At the conclusion of the sentencing hearing on April 17, 1986, the defendant contended that the Court had announced from the bench that the two sentences were to run concurrently. Counsel has examined the transcript of the hearing at page 25 which clearly states that the two sentences are to run consecutively:

> "And those sentences will run consecutively. In other words, the one sentence will begin as soon as the other one ends. They will not run concurrently." (Transcript at P. 25, line 11)

DEFENDANT'S SECOND CLAIMED ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR ADDITIONAL TIME BEFORE SENTENCING WITHIN WHICH TO EXPLORE AN INPATIENT DRUG TREATMENT PROGRAM AS AN ALTERNATIVE TO PRISON.

Immediately prior to sentencing, the defendant requested the Court to grant him a continuance of ten days for the purpose of determining whether he would qualify for admittance to a residential drug treatment program as an alternative to prison. (Transcript at p. 2). The Court denied the motion. (Transcript at p. 2).

The Supreme Court of Utah in State v. Gerrard 584 P. 2d 885 (Utah 1978), has held that sentencing procedures are discretionary with the trial court:

> "The sentencing procedures, including the use of an evaluation, are clearly discretionary with the trial court." 584 P.2d at 886.

The trial Court's refusal in Gerrard to grant a 90 day evaluation prior to sentencing appears to be analogous to the refusal of the trial court in the instant case to grant the defendant time to obtain an evaluation as to his fitness for a drug treatment program.

The trial court, of course, is imbued with statutory authority to place the defendant on probation:

> (1) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of sentences:
> (a) to pay a fine;
> (b) to removal from or disqualificationn of public or private office;
> (c) To probation unless otherwise specifically provided by law;
> (d) to imprisonment; or
> (e) to death.
> Section 76-3-201 Utah Code Annotated

However, the use of the word "may" would seem to clothe the court with the discretion to order probation, and its conditions, when it deemed it appropriate.

The Supreme Court of Utah has also stated that it will not disturb a sentence "...unless it is clearly excessive or unless the trial court abused its discretion." Gerrard at 887. It does not appear that the Court abused its discretion in denying defendant's request for additional time in view of the reason stated by the Court for the denial:

"Well, of course, the application is denied, Mr. Bryner. Mr. Shelby's record is such, that when I *put him on probation for 2319, it was extremely* marginal whether I thought he was qualified at that time. Then to have him come into this Court back-- for an additional felony and -- when he was on probation -- in other words, the Court doesn't feel he's made any significant changes that he would have to make in his life. And in view of his prior record which shows he's been in prison once before, I just don't see any reason why the Correction system should spend any more time on Mr. Shelby, until he demonstrates he's willing to change. (Transcript at p. 2)

CONCLUSION

Counsel should be permitted to withdraw as counsel in this matter for the reason that he has been unable to identify any issues which are arguable on appeal.

DATED this 25th day of September, 1986.

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CERTIFICATE OF MAILING COPY OF BRIEF TO APPELLANT

I hereby certify that on the 25th day of September, 1986 I mailed to Michael Lynn Shelby a copy of Appellant's Brief, postage prepaid, addressed to P.O. Box 250 Draper, Utah 84020, and that I raised in the Brief the points requested by Appellant.

Bryce K. Bryner
Attorney for Appellant

CERTIFICATE OF SERVICE

I, BRYCE K. BRYNER, hereby certify I personally served four (4) copies of the above and foregoing BRIEF OF APPELLANT upon David L. Wilkinson, Attorney General of the State of Utah, by personally delivering said copies to the Office of the Attorney General at 236 State Capitol, Salt Lake City, Utah this 26th day of September, 1986.

Bryce K. Bryner