1998

Utah v. Rodger Vancleave : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 980210-CA
vs.	:	
	:	Priority No. 2
RODGER VANCLEAVE,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF POSSESSION/TRANSPORTATION OF A CLANDESTINE LABORATORY, A FIRST DEGREE FELONY, AND OTHER CRIMINAL VIOLATIONS BEFORE THE HONORABLE LYNN W. DAVIS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. RODGER VANCLEAVE, Defendant/Appellant.	Case No. 980210-CA Priority No. 2

REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

VANCLEAVE DID NOT MAKE AN INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL BECAUSE THE TRIAL COURT FAILED TO ADVISE HIM OF THE DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION BEFORE IT WAS DETERMINED THAT VANCLEAVE WOULD REPRESENT HIMSELF

The right to counsel delineated in the Sixth Amendment is a fundamental right which must be "jealously protected" and therefore, a "heavy burden" is placed upon the trial judge to determine whether there is an intelligent and competent waiver of that right by the accused. *State v. Heaton*, 958 P.2d 911, 917 (Utah 1998). In addition, there is "a presumption against waiver, and doubts concerning waiver must be resolved in the defendant's favor." *Id.* Furthermore, before a trial court may permit a criminal defendant

to proceed without the assistance of counsel, the court must thoroughly "advise the defendant of the dangers and disadvantages of self-representation 'so that the record will establish that he knows what he is doing and his choice is made with eyes open.'" *Heaton*, 958 P.2d at 918 (citations omitted).

A thorough, on-the-record colloquy between the trial court and the defendant "is the preferred method of determining the validity of a waiver of counsel." *Heaton*, 958 P.2d at 918 (citing *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987)). The State has argued that Vancleave "concedes that the trial court engaged in a colloquy" and that defendant's argument is that the colloquy was insufficient in an of itself to establish an intelligent waiver of counsel (Br. of Appellee at 9). However, Vancleave has not--and does not--concede that any such colloquy took place between the trial court and the defendant. To the contrary on page 21 of appellant's brief, Vancleave argues that "although the trial court during the course of trial encouraged [defendant] to allow [counsel] to represent him and imparted to him the wisdom of such a decision, the trial court never engaged in a colloquy on the record with Vancleave that is similar to that set forth by the Utah Supreme Court in *Frampton*." Moreover, Vancleave has argued--and argues here--that the trial court--at a minimum--failed to sufficiently inform him of the "dangers and disadvantages of self-representation." *Heaton*, 958 P.2d at 919.

The State has argued that Vancleave was "well aware of the risks of self-representation" because the trial court "admonished defendant that self-representation was not a good idea" and because the trial court "told defendant that if he chose to

proceed pro se, he would be the only spokesperson for the defense: he would call, interrogate and cross examine witnesses" and offer opening and closing arguments (Br. of Appellee at 12 (citing R. 363 at 14-16)). However, Vancleave asserts that merely outlining how the trial would proceed should Vancleave represent himself is not the same as ensuring that Vancleave appreciated the dangers and disadvantages of proceeding without counsel. Moreover, the trial court's "cursory recommendation" that defendant rely on counsel--and counsel's expertise and experience--does not equate to an adequate awareness by the defendant of the risks of self-representation. *See Heaton,* 958 P.2d at 919.

In *Heaton*--as in this case--the trial court recommended during trial that defendant allow stand-by counsel to cross examine the State's witnesses. Based on that recommendation by the trial court the State argued on appeal that Heaton "should have been aware of the dangers and disadvantages of self-representation." *Heaton*, 958 P.2d at 919. In relation to this assertion, the Utah Supreme Court stated "While the court's advice was certainly appropriate, it addressed only one of the disadvantages of self-representation--i.e., not having experience and expertise in cross examining witnesses." *Id.*

More importantly in regards to the timing of the trial court's admonishment that the defendant utilize defense counsel on cross examination, the Utah Supreme Court stated that by the time the trial court made such an admonishment it "had already determined that Heaton had decided to represent himself" and that the trial court must

determine whether a competent and intelligent waiver of counsel has occurred *before* it "may permit a defendant to proceed pro se" and not *after*. *Heaton*, 958 P.2d at 919. Accordingly, while Judge Davis may have recommended that Vancleave could "benefit" from "having Mr. Stephen Killpack represent [him] as an attorney, both as to motions, as to objections, as to cross examination", he did so at the end of the first day of trial and during subsequent days of trial *after* a determination had been made that Vancleave would represent himself (R. 363 at 225; 364 at 33-34).

In addition in this case, unlike the defendant in *Heaton*, Vancleave actually asked the trial court about the dangers and disadvantages of self-representation when he inquired on the morning of trial--and before it was determined that he would proceed pro se--as to what effect self-representation would have on his ability to appeal any conviction (R. 363 at 15). However, instead of exercising his duty to inform and advise Vancleave of the risks of proceeding pro se--such as the potential forfeiture of appellate claims because of ignorance of the law and/or the rules of evidence and procedure--Judge Davis refused to answer Vancleave's question indicating that the effect that self-representation could have on appeal was "not for this court to determine" (R. 363 at 15).

Vancleave asserts that like the trial judge in *Heaton*, Judge Davis failed to advise Vancleave of "the dangers and disadvantages of self-representation" before it was determined that Vancleave would represent himself. Therefore, this Court should likewise hold that Vancleave "did not validly waive his right to counsel" and that he is entitled to a new trial. *See Heaton*, 958 P.2d at 919. Similarly this Court should hold

that there are "no extraordinary circumstances in this case which would justify" this Court's examining the record and making a de novo determination as to the constitutional validity of Vancleave's waiver of the right to counsel. *Id.*

CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court failed to advise Vancleave of the "dangers and disadvantages" of self-representation and failed to ensure that Vancleave had an "actual awareness of the risks of proceeding pro se", Vancleave asks that this Court reverse his convictions and hold that his waiver of the right to counsel was not intelligently made.

RESPECTFULLY SUBMITTED this 20 day of November, 2000.

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CERTIFICATE OF MAILING

I hereby certify that I delliered two (2) true and correct copies of the foregoing Brief to Joanne Slotnik, Assistant Attorney General, 160 E. 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 this 20 day of November, 2000.

Because the trial court failed to advise Vancleave of the "dangers and