1998

# State of Utah v. Rodger Vancleave : Brief of Appellant

Utah Court of Appeals


Jan Graham; Utah Attorney General; Counsel for Appellee.
Margaret P. Lindsay; Aldrich, Nelson, Weight and Esplin; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

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

# BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE LYNN W. DAVIS, FROM A CONVICTION OF THREE COUNTS OF RAPE OF A CHILD AND ONE COUNT OF CONSPIRACY TO COMMIT RAPE OF A CHILD, FIRST DEGREE FELONIES

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## JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated Sections 78-2-2(4) and 78-2a-3(2)(j).

## ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Vancleave knowingly, voluntarily and intelligently waived his right to counsel? This issue presents this Court with a question of law that is reviewed "nondeferentially for correctness" with a "reasonable measure of discretion" afforded the trial court when applying this legal question to a given set of facts. *State v. McDonald*, 922 P.2d 776, 781 (Utah App. 1996). This issue was addressed in a pre-trial letter and hearings and at trial (R. 38, 83-84, 360, 363 at 13-16).

## CONTROLLING STATUTORY PROVISIONS

All relevant statutory and constitutional provisions are set forth in the Addenda.

## STATEMENT OF THE CASE

### A. Nature of the Case

Rodger VanCleave appeals from the judgment, sentence and commitment of the Honorable Lynn W. Davis, after a jury trial at which VanCleave was convicted of the following criminal offenses: Possession of a Clandestine Laboratory, a first degree felony; Possession of a Dangerous Weapon by a Restricted Person, a second degree felony; Possession of Drug Paraphernalia, a class B misdemeanor; Loaded Firearm in a Motor Vehicle, a class B misdemeanor; and Speeding, a class C misdemeanor.

### B. Trial Court Proceedings and Disposition

Rodger Vancleave was charged by Information filed in Fourth District Court on or about March 17, 1997, with: Possession of a Clandestine Laboratory, a first degree felony in violation of Utah Code Annotated § 58-37d-4, 5; Possession of a Precursor, a first degree felony, in violation of Utah Code Annotated § 58-37d-4, 5;[1] Possession of a Dangerous Weapon by a Restricted Person, a second degree felony, in violation of Utah Code Annotated § 76-10-503; Possession of Marijuana in a drug-free zone, a class A misdemeanor, in violation of Utah Code Annotated § 58-37-8(2)(a)(i); Possession of Drug Paraphernalia in a drug-free zone, a class B misdemeanor, in violation of Utah Code Annotated § 58-37a-5(1); Loaded Firearm in a Motor Vehicle, a class B

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[1]This charge was subsequently dismissed by Motion of the Utah County Attorney because lab analysis revealed that the suspected substance was not ephedrine or any other listed precursor chemical (R. 50-51).

misdemeanor, in violation of Utah Code Annotated § 76-10-505; and Speeding, a class C misdemeanor, in violation of Utah Code Annotated § 41-6-46, 52 (R. 1-2).

On March 25, 1997, a search warrant was signed by the Honorable John C. Backlund granting police permission to search the vehicle Vancleave was driving when stopped (R. 5-8).

On April 21, 1997, a preliminary hearing wad conducted by the Honorable Guy R. Burningham and Vancleave was bound-over on all charges and "not-guilty" pleas were entered (R. 21-23).

On May 7, 1997, Vancleave, pro se, filed a Motion for a Bill of Particulars (R. 39). On June 11, 1997, the UCPDA filed a similar request (R. 69-71). At a hearing held on June 12, 1997, the State indicated that they filed a response to the request and sent it to defense counsel (R. 360 at 10). However, at this time neither defense counsel nor Vancleave had received a copy of the response (R. 360 at 10-11).

On May 9, 1997, Vancleave, pro se, filed a written demand for a jury trial and for separate trials on each count of the information (R. 46). The trial court denied this motion at the June 12, 1997, hearing (R. 360 at 28).

On June 11, 1997, Vancleave through the UCPDA filed a Motion to Suppress evidence seized from Vancleave's vehicle at the time of his arrest under Article I, § 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution

(R. 55-68). On July 1, 1997 (R. 361), a suppression hearing was held and Judge Davis denied Vancleave's motion (R. 105-06, 114-20, 123-29).

On August 26-28, 1997. a jury trial was held with Judge Davis presiding (R. 193-202). After deliberation, the jury returned with a verdict of "guilty" on all charges except the possession of marijuana charge (R. 191-92).

On November 10, 1997, Vancleave, pro se, filed a Motion for a New Trial (R. 227-34, 239-50, 251-59). At this time, Vancleave also filed a 402 motion (R. 235-38).

On November 10, 1997, Vancleave was sentenced to concurrent terms in the Utah State Prison to run consecutive to the term he was currently serving (R. 268-70).

On December 30, 1997, a hearing on Vancleave's post-trial motions was held at which time Judge Davis denied all motions (R. 320, 322-32).

On April 29, 1998, Vancleave filed a notice of appeal with the Fourth District Court (R. 338-39). On or about August 11, 1998, the case was transferred from the Utah Supreme Court to the Utah Court of Appeals (R. 349).

Because the Sixth Amendment issue of counsel is of particular importance to this appeal, Vancleave outlines the issue separately here:

**1. Representation**

On May 7, 1997, Vancleave filed a letter with the trial court asking for the appointment of new counsel because of a failure to communicate by the UCPDA (R. 38). On June 12, 1997, a hearing was held where Vancleave again requested the appointment

of new counsel (R. 83-84). At the hearing, Vancleave asserted that the Utah County Public Defenders Association had rendered "insufficient assistance of counsel in this matter," that he and the Public Defender (Steve Killpack) do not "see eye to eye", and that he wanted counsel who was "willing to defend me in this case" (R. 360 at 6).

Vancleave further asserted that Killpack had failed to file motions on his behalf and had failed to send him copies of motions and discovery requests (R. 360 at 7). Judge Davis responded that Killpack "does not have to file motions in your behalf that he believes may not be meritorious" and that Killpack was a "seasoned" attorney who had a great deal of experience in criminal law (R. 360 at 7-8). However, the trial court subsequently ordered defense counsel to provide Vancleave with a copy of the State's response to the request for a Bill of Particulars when it was received (R. 360 at 11). In addition, Killpack was ordered to provide Vancleave with copies of all written responses filed by the State to all motions filed by Vancleave; and that Killpack and Vancleave were to have consultation in respect to all received discovery (R. 360 at 15, 32).

Vancleave next asserted that there was a conflict of interest between himself and Killpack (R. 360 at 8). Judge Davis then asked Vancleave about what his response would be if new counsel believed that his requested motions were not meritorious and Vancleave responded that he would "ask for different counsel" (R. 360 at 8). Judge Davis then told Vancleave that appointed counsel was a "luxury" and that unless he can

"show an actual conflict of interest" then he did not get to select the attorney who would represent him (R. 360 at 8).

Vancleave again asserted that an actual conflict of interest did exist (R. 360 at 9). Vancleave argued that Killpack "doesn't do anything I ask him to do", that he had only had contact with Killpack twice since the previous court hearing and that he could not prepare a defense with such minimal contact (Id.).

After hearing argument from the State, Judge Davis denied Vancleave's request for new counsel (R. 360 at 10). At the close of the hearing, Vancleave requests that the trial court order that defense counsel have personal communication with him concerning motions and proper responses (R. 360 at 33). Vancleave also requested that the trial court provide him with "some subpoena forms" because his counsel refused (R. 360 at 38). The trial court ordered Killpack to provide Vancleave with the forms, however, the trial court clarified that Killpack would "conduct the trial and make a determination, after consulting with [Vancleave], which witnesses would be appropriate to call or how they may present any evidence" or testimony (R. 360 at 38).

In the future Vancleave was ordered to seek leave of court to file any pro se motions; and he was to send a copy of any such motions to the State and to Killpack or indicate to the court that it was to make the copies and forward them (R. 360 at 43).

On August 26, 1997, at the commencement of the jury trial, the issue of representation was again raised. The trial court reminded Vancleave that he was facing

first degree felonies with complex issues and that accordingly he had required that Vancleave file all motions through appointed counsel (R. 363 at 13). The trial court, upon the urging of the State, then asked Vancleave:

> whether or not you are representing yourself today with Steven Killpack as advisory counsel, or whether he is the one that is going to conduct this trial and represent you and be an advocate for you and speak in your behalf and cross-examine witnesses in your behalf

(R. 363 at 14). The trial court then required that Vancleave make an election between self-representation (with advisory counsel) and representation by Killpack (Id.).

In response to this issue, Vancleave inquired of the trial court whether self-representation would affect any necessary appeal (R. 363 at 15). The trial court responded that he "cannot advise you whether appellate issues would be favorable by your personal representation or by your representation by counsel" (R. 363 at 15).

Vancleave then indicated to the trial court that he wanted to represent himself (R. 363 at 15). The trial court responded to this request as follows:

> Very well. If you choose to represent yourself, you will represent yourself. You will be the only spokesman for the defense. Mr. Killpack will not have the opportunity then to cross examine witnesses. He will not have the ability to call witnesses. He will not have the ability to make opening statements or closing arguments to the jury. But I will give you

leave, during the course of the trial, when necessary, to consult with him on procedural matters and for clarification of matters and for the exhaustion of questions and cross-examination of witnesses. He will be advisory and a consultant to you, and you may proceed to represent yourself.

I don't recommend that. I've told you at all stages of this case that these are serious charges, and that I think your case is best served by having a seasoned expert, a seasoned advocate, a seasoned attorney such as Mr. Killpack to be your advocate in this case. That has been my recommendation at all stages. I don't depart from it now. But you have the right to represent yourself. And to that extent you may elect to do so, but under the conditions that I have stated

(R. 363 at 15-16). Vancleave then responded "okay" and proceeded to represent himself with Killpack acting as advisory counsel (R. 363 at 16). The trial court frequently encouraged Vancleave to have Killpack represent him.

## STATEMENT OF RELEVANT FACTS

### A. Testimony of Deputy David Knowles

David Knowles, a detective with the Utah County Sheriff's Department, testified that on March 7, 1997, he was patrolling in the area of Spanish Fork Canyon where the posted speed limit is 65 miles per hour (R. 363 at 81-82, 85-86).

While patrolling Knowles observed a white Buick headed westbound down the canyon at the Diamond Fork turn-off that he believed was speeding (R. 363 at 87-88). Knowles followed the vehicle in order to get a paced reading of speed before initiating a stop of the vehicle for traveling 75 miles per hour (R. 363 at 88-89).

After the vehicle stopped--exactly 446 feet from the Covered Bridge parking lot (R. 363 at 190-92), Knowles approached the driver, who was identified as Rodger Vancleave from a New Mexico driver's license (R. 363 at 91, 93). Knowles testified that he could smell the odor of marijuana emanating from the passenger compartment of the vehicle (R. 363 at 93).

After running a warrants check on Vancleave, Knowles arrested Vancleave because of two warrants and discovered from Vancleave that there was a firearm underneath the front seat of the vehicle (R. 363 at 94, 121). Knowles checked the vehicle and found an operable handgun that was fully loaded (R. 363 at 96, 97). Knowles also found a small, burnt marijuana cigarette under the seat, some ammunition and a broken vial on the floor, and some zig-zag papers on the front seat (R. 363 at 101-103). Knowles testified that vial's like the one found broken in the vehicle are commonly used to smoke methamphetamine (R. 363 at 104).

In a later search of the vehicle's trunk, Knowles located duffle bags shown in a photograph of the trunk which was admitted as State's Exhibit #14 (R. 363 at

107). In the black duffel bag with the blue zipper (Exhibit #15), Knowles testified that he observed some beakers, a funnel and a black stopper tube or plug, a thermos and a jar containing clear liquid (R. 363 at 107). Knowles testified that these items caused him concern because these items were consistent with the manufacture of methamphetamine (R. 363 at 108). In the other bag (Exhibit #16), Knowles testified that he observed a can of acetone and other glass items (R. 363 at 108). In a third bag (Exhibit #17), Knowles testified that he observed rubber gloves, a partially-visible vacuum pump and some tubing--all items, which according to Knowles, are commonly found in association with a methamphetamine lab (R. 363 at 110). It is unclear from Knowles' testimony as to which bags were partially opened in the trunk when he first observed them and which bags he opened in his exploration (R. 364 at 59-). Knowles testified that he also found a box containing books, letters and papers in the trunk (Exhibit #18). Knowles testified that he was concerned that there might be "dangerous chemicals" in the bags so he contacted Richard Case, a lab certified detective (R. 363 at 112).

During the search of the vehicle, Vancleave was seated in Knowles' patrol car (R. 363 at 113). Afterwards Knowles testified that he read Vancleave his Miranda rights and then questioned him about the methamphetamine lab (R. 363 at

113). Knowles testified that Vancleave informed him that he had used methamphetamine before he left on his trip and that he was transporting the lab to Ogden in exchange for $10,000 (R. 363 at 114).

Vancleave was later transported to the Utah County Jail and the vehicle was driven to a vehicle storage facility at the old jail (R. 363 at 114). Knowles testified that he turned all items of evidence over to Sergeant Case when he assumed his duties as case officer (R. 364 at 23). Knowles testified that the duffel bags found in the trunk of Vancleave's vehicle were "destroyed in accordance with policies and procedures for crime labs" which is why the jury was presented only with photographs of the bags (R. 364 at 57).

**B. Testimony of Deputy Richard Case**

Richard Case of the Utah County Sheriff's Department testified that he has been certified by the DEA in regards to clandestine laboratories (R. 364 at 110-11). During this certification process, Case was taught how to identify, disassemble and destroy such labs (R. 364 at 111). Case also testified that the DEA has promulgated special policies and procedures as to the handling of lab evidence (R. 364 at 112). When a discovery of a possible lab is made, Case testified that he has been instructed to contact the State Lab Team from the Utah Department of Investigations in order that certified personnel can respond to the

site to disassemble and destroy the lab (R. 364 at 112). Case testified that the lab evidence is viewed and then destroyed because of "environmental hazards that the items pose in themselves, along with the chemicals associated with the manufacturing of illicit street drugs" (R. 364 at 113, 364 at 145-48).

Case testified that on March 7, 1997, he responded to the Utah County Jail to an investigation regarding Vancleave (R. 364 at 113-14). Case testified that immediately upon meeting Knowles at the the jail he recovered "all of the items from the lab--the vehicle" and that later in the evening he picked up other items--such as the gun and holster--from Knowles' residence (R. 364 at 114-15).

Later Case searched the vehicle pursuant to a search warrant (R. 364 at 118). At trial, Case identified Exhibits 15-17 as photographs of the bags that were turned over to him by Knowles and which had been in his vehicle (R. 364 at 119, 128). Case further indicated that the items in the bags were destroyed at the Utah County Jail parking lot by the clandestine drug lab team (R. 364 at 134). Case also testified that Exhibit 21 was the original evidence receipt and property report that was provided by the State Lab Team when they disposed of "the lab" (R. 364 at 119). Case testified that he was present when the document was prepared and that he observed as each of the items listed on the report was located from the evidence--from the bags pictured in Exhibits 15-17 (R. 364 at 120). Case testified

that based on his experience, he observed items in the bag that could or would be used to manufacture methamphetamine (R. 364 at 120). Case, likewise, testified that those items were destroyed (R. 364 at 120).

Case testified that he spoke with Vancleave at the jail while he was seated in the passenger seat of Deputy Buffon's patrol vehicle (R. 364 at 122). According to Case, Vancleave told him that his fingerprints would not be on any of the seized items, that he had been involved in a "meth cook" approximately four weeks (or four months) prior to his arrest, and that he was transporting the lab from Texas to Ogden (R. 364 at 122-124).

### C. Testimony of Sergeant Denton Johnson

Denton Johnson, a sergeant with the Orem Police Department, testified that, pursuant to a search warrant, he performed a search of Vancleave's car at the Pleasant Grove Police Department (R. 364 at 157-58). During the search, Johnson testified that he found several items of drug paraphernalia (R. 364 at 158-63). In addition, Johnson testified that he found correspondence addressed to Vancleave and a "recipe" in the visor above the driver's seat (Exhibit 27) (R. 364 at 164, 191).

## D. Testimony of Jennifer McNair

Jennifer McNair, an analyst of suspected controlled substances at the Utah State Crime Laboratory, testified that she was familiar with equipment and supplies--including recipes--used in the production of methamphetamine (R. 364 at 188). McNair testified that she has responded to the scene of approximately 40 clandestine methamphetamine labs (R. 364 at 188). McNair testified that she examined the recipe found with the correspondence addressed to Vancleave (Exhibit 27) and found it to be "very similar to a recipe I've used in the laboratory to produce methamphetamine" (R. 364 at 191-92).

McNair also testified that Exhibit 21 is an evidence property report used by the Utah Department of Investigations at clandestine laboratory scenes (R. 364 at 192). McNair testified that all equipment connected with suspected clandestine laboratory sites are considered by policy to be hazardous, per se, and are therefore, by policy, destroyed as soon as they are identified and noted (R. 364 at 193). McNair testified that she examined the list (Exhibit 21)[2] and that it includes equipment which would be or could be used in the production of

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[2]During trial, the State and Vancleave stipulated that Vancleave's fingerprints would not have been found on any of the items located in the bags in the trunk of the vehicle driven by Vancleave and identified and listed in Exhibit 21 (R. 364 at 210).

methamphetamine and that the items inventoried there are consistent with what could be found at a methamphetamine lab site (R. 364 at 193).

McNair testified that the three main chemicals used for the manufacture of methamphetamine are ephedrine/pseudoephedrine, iodine and red phosphorous (R. 364 at 196).[3] In order to make the form of methamphetamine that is most widely used in Utah, all three chemicals must be present (R. 364 at 196-97).

McNair also analyzed the suspected marijuana cigarette (Exhibit 10) and that it tested positive (R. 364 at 189-91). In addition to the cigarette, McNair tested a powder substance from which no controlled substances were identified (R. 364 at 198-99). The substance was identified as "4-methyl-amino-phenol"--a sumstance that McNair was unsure of whether it was hazardous or explosive (R. 364 at 200).

**E. Testimony of Mary Brockbader**

Mary Brockbader, sergeant of records and identification for the Department of Corrections, testified that she brought exhibits 19-20 to the trial court from the Department of Corrections (R. 363 at 139-42). She also testified that she received

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[3]The State also stipulated that had all of the items seized from the vehicle been tested, none of them would have tested positive for red phosphorous (R. 364 242).

a demand for a 120-day disposition from Vancleave and that she is the authorized records authority at the Utah State Prison (R. 363 at 144).

Brockbader further testified that on March 7, 1997, Vancleave was on parole in the State of Utah (R. 364 at 90). In addition, Brockbader testified that on one release date Vancleave was released to the State of New Mexico but that she could find nothing in his file which refers to a "compact" to New Mexico (R. 364 at 95).

**F. Testimony of Rodger Vancleave**

Vancleave testified that the vehicle he was driving at the time of his arrested did not belong to him but was borrowed from a fellow New Mexico resident who had been staying at his residence in Alamogordo (R. 364 at 265-66). Vancleave testified that he did not have knowledge of what was inside the bags which were in the vehicle when he borrowed the vehicle (R. 364 at 266). Vancleave also testified that he did not know that there was a firearm in the vehicle until shortly before his arrest (R. 364 at 267). In addition, Vancleave testified that he was no longer on parole in New Mexico because it had been terminated (R. 364 at 267, 271). Finally, Vancleave testified that he did not have any intent to manufacture any type of controlled substance (R. 364 at 268); and he denied ever admitting to the police that he was transporting lab equipment to Ogden (R. 364 at 281).

## SUMMARY OF ARGUMENT

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be represented by counsel and the right to self-representation if a knowing, voluntary and intelligent waiver is made of the right to counsel. For such a waiver to be constitutionally permissible, the trial court must assure that the defendant understands the "dangers and disadvantages of self-representation". In accordance with this duty, Utah appellate courts have instructed trial courts to engage in an on the record colloquy in order to ascertain the validity of the waiver of counsel. At the very least it must be apparent from the trial court record that the defendant understood the seriousness of the charges against him, knew the maximum penalty, and had an actual awareness of the risks of proceeding pro se. Vancleave asserts that the trial court did not act in accordance with his duty to ensure that any waiver of the right to counsel is in line with the requirements of Utah courts and the constitution. The trial court did not engage in a sufficient colloquy with Vancleave. The trial court did not ensure that Vancleave understood the seriousness of the charges against him nor that he knew the maximum penalty he could face if convicted. In addition, the trial court did not assure that Vancleave had an actual awareness of the risks of self-representation. Accordingly, Vancleave requests that this Court reverse his conviction because his waiver of the right to counsel was not knowingly, voluntarily or intelligently made.

## ARGUMENT

## POINT I

### VANCLEAVE'S WAIVER OF THE RIGHT TO COUNSEL WAS NOT MADE KNOWINGLY, VOLUNTARILY OR INTELLIGENTLY

The Sixth Amendment to the United States Constitution guarantees the criminally accused the right to competent legal counsel and the right to self-representation. *McDonald*, 922 P.2d at 778-79 (citations omitted). However, for a defendant to constitutionally represent himself, he must knowingly, intelligently, and voluntarily "forgo the benefits" associated with the right to counsel. *Faretta v. California*, 422 U.S. 806, 832-33, 95 S.Ct. 2525, 2540 (1975); *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987); *McDonald*, 922 P.2d at 779.

Moreover, while Vancleave has "the burden of showing by a preponderance of evidence that he did not so waive this right", the trial court has the "duty to determine whether a defendant's waiver of the right to counsel was knowing and intelligent." *State v. Bakalov*, 1999 UT 45, ¶ 22-23, 979 P.2d 799, 810. Accordingly, Utah courts have repeatedly recommended that the trial court conduct an on-the-record colloquy with the accused in which "the court should fully inform the accused 'of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with eyes open.'" *Bakalov*, 1999 UT 45 at ¶ 23, 922 P.2d at 810 (quoting and citing *Frampton*, 737 P.2d at 187). In addition, the trial court "should also carefully evaluate the accused's background, experience, and

conduct insofar as they indicate what the accused understands in attempting to waive the right to counsel. *Bakalov* 1999 UT 45 at ¶ 23.

As a guide to the trial courts, the Utah Supreme Court in *Frampton* cited, in its entirety, the colloquy set forth in the Bench Book for United States District Court Judges to be utilized when a defendant states a desire to represent himself. 737 P.2d at 187, n. 12. In fact, the Utah Supreme Court in *Frampton* stated that such "a colloquy on the record between the court and the accused is the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation." 922 P.2d at 187.

In this case, the trial court did not engage in such a colloquy with Vancleave. Although the issue of Vancleave's dissatisfaction with appointed counsel had been addressed prior to trial (R. 38, 83-84, 360), the question of self-representation did not become at issue until the morning of trial. On the morning of trial, the issue of Vancleave's request for a 120-day disposition was again raised and Vancleave spoke spoke of motions and a form that he had prepared and sent to the court and the State (R. 363 at 9, 13). During this discussion, the trial court reminded Vancleave that he was to file all motions through his counsel in order to avoid confusion because first degree felonies are involved (R. 363 at 13). The State then suggested that the trial court address the issue of representation and the following discussion ensued:

The trial court asked Vancleave:

whether or not you are representing yourself today with Steven Killpack as advisory counsel, or whether he is the one that is going to conduct this trial and represent you and be an advocate for you and speak in your behalf and cross-examine witnesses in your behalf

(R. 363 at 14). The trial court then required that Vancleave make an election between self-representation (with advisory counsel) and representation by Killpack (Id.).

In response to this issue, Vancleave inquired of the trial court whether self-representation would affect any appellate litigation that might prove necessary should he be convicted (R. 363 at 15). The trial court responded that he could not "advise [Vancleave] whether appellate issues would be favorable by [his] personal representation or by [his] representation by counsel" (R. 363 at 15).

Vancleave then indicated to the trial court that he wanted to represent himself (R. 363 at 15). The trial court responded to this request as follows:

> Very well. If you choose to represent yourself, you will represent yourself. You will be the only spokesman for the defense. Mr. Killpack will not have the opportunity then to cross examine witnesses. He will not have the ability to call witnesses. He will not have the ability to make opening statements or closing arguments to the jury. But I will give you leave, during the course of the trial, when necessary, to consult with him on procedural matters and for clarification of matters and for the

exhaustion of questions and cross-examination of witnesses. He will be advisory and a consultant to you, and you may proceed to represent yourself.

I don't recommend that. I've told you at all stages of this case that these are serious charges, and that I think your case is best served by having a seasoned expert, a seasoned advocate, a seasoned attorney such as Mr. Killpack to be your advocate in this case. That has been my recommendation at all stages. I don't depart from it now. But you have the right to represent yourself. And to that extent you may elect to do so, but under the conditions that I have stated

(R. 363 at 15-16). Vancleave then responded "okay" (R. 363 at 16) and proceeded to represent himself with Killpack acting as advisory counsel.

Although the trial court during the course of the trial encouraged Vancleave to allow Killpack 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*. For example, the trial court did not ascertain whether Vancleave had studied law in the past or represented himself in any other criminal action. The trial court did not enquire whether Vancleave was familiar with the Rules of Evidence or Criminal Procedure. In addition, the trial court did not set forth the crimes of which Vancleave was charged (although he did allude to

first degree felonies) nor did the trial court set forth the potential penalties that could result from conviction. Finally, the trial court did not inquire as to the voluntariness of Vancleave's decision. *See, Frampton*, 737 P.2d at n.12. *Cf., Bakalov*, 1999 UT 45 at ¶ 23-26 (Trial court attempted several times to engage in *Frampton* colloquy with defendant before finally engaging in successful colloquy; *McDonald*, 922 P.2d at 782 (Court inquired of defendant number of trials he had been involved in, whether he had knowledge of rules of evidence, what education he had, and whether he understood the seriousness of the charges).

While the Utah Supreme Court acknowledged that the failure to conduct such a colloquy would not warrant automatic reversal and that the Court would "look at any evidence in the record which shows a defendant's actual awareness of the risks of proceeding pro se," the Court also stated that "[i]n the absence of a colloquy, the record must somehow otherwise show that the defendant understood the seriousness of the charges and knew the possible maximum penalty." *Frampton*, 737 P.2d at 188. Vancleave asserts that the trial court failed to inform him of the possible maximum penalty during their discussion on the issue of self-representation. Moreover, other than a vague reference to "first degree felonies" the trial court did not impart the seriousness of the charges to Vancleave.

Finally, Vancleave asserts that he was not advised by the trial court of the "actual risks of proceeding pro se." In fact, Vancleave sought to ascertain these actual

risks of self-representation when he inquired as to what affect self-representation would have on his ability to appeal any conviction (R. 363 at 15). However, instead of educating Vancleave on the appellate rules concerning adequate preservation of issues and the effect that ignorance of the law and rules of procedure and evidence could have on appeal--or at least informing Vancleave that if he represented himself that he waived any right to challenge the competency of counsel--the trial court simply informed Vancleave that he could not advise Vancleave as to "whether appellate issues would be [more] favorable by [his] personal representation or by [his] representation by counsel. That's not for this court to determine" (R. 363 at 15). Vancleave asserts that potential forfeiture of appellate claims because of ignorance of the law and/or rules of evidence and procedure is an "actual risk" of self-representation to which he should have been advised by the trial court.

Accordingly, Vancleave asserts that he did not voluntarily, intelligently, and knowingly waive his right to counsel because of the trial court's failure to engage in a sufficient on the record colloquy with Vancleave concerning "the dangers and disadvantages of self-representation" and because of the trial court's failure--at the very least--to impart to him the seriousness of the charges, the possible maximum penalty that could result from conviction, and the "actual risks" of proceeding pro se. Vancleave further asserts that these constitutional infirmities require reversal of his convictions.

## CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court failed to advise Vancleave of the "dangers and disadvantages" of self-representation, failed to ensure that Vancleave understood the seriousness of the charges against him and the possible maximum penalties, 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 trial counsel was not knowingly, voluntarily and intelligently made.

RESPECTFULLY SUBMITTED this 11 day of July, 2000.

Margaret P. Lindsay
Counsel for Vancleave

## CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 11 day of July, 2000.

# ADDENDUM

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

SEP 3 [illegible] AM '99

| | |
|---|---|
| STATE OF UTAH, Plaintiff, | |
| VS. | CASE NO. 971400387 |
| RODGER VANCLEAVE | Jury Trial |
| Defendant. | Volume I |

ORIGINAL

BEFORE THE HONORABLE LYNN W. DAVIS

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 26, 1997



REPORTED BY: Creed Barker, CSR







980210-CA

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a matter of record.

MR. VANCLEAVE: At that time, your Honor, first appearance, I asked the court to allow me my right to a quick and -- a speedy and public trial, which the court did grant to me.

THE COURT: Yes, sir.

MR. VANCLEAVE: I provided the court also with a written -- a handwritten demand for these charges to be expeditioned way back in the same month, which is April, your Honor. And I've been arguing the fact with the court ever since that my sixth amendment right is being violated here, sir, because the court grants me the right to the speedy trial, but then takes numerous months to even get me into trial. And I've followed all the proper procedures in filing my disposition. I have a written motion here --

THE COURT: You will recall, Mr. Vancleave, that I asked you and requested specifically, rather than to have -- because there are first degree felonies involved and the complexities involved, I asked you to file motions in connection with appointed counsel so it would resolve these very confusions. I suspect you'll recall that. I wanted those to be in proper form, and I wanted those filed by appointed legal counsel rather than sort of hen-scratched letters to the court, since

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you had the benefit of appointed counsel.

I'll tell you what I'm going to do. Does the State --

MR. TAYLOR: I think what we ought to resolve with reasonable dispatch. And that is Mr. Killpack's position. We need to determine whether Mr. Vancleave is representing himself at this juncture or whether Mr. Killpack is his counsel.

THE COURT: That's the next issue.

I will reserve on the issue of the 120 day disposition.

MR. VANCLEAVE: I would like to --

THE COURT: Now the next issue before the court -- and I will direct this, sir -- is whether or not you are representing yourself today with Stephen Killpack as advisory counsel, or whether he is the one that is going to conduct this trial and represent you and be an advocate for you and speak in your behalf and have opening argument in your behalf and cross-examine witnesses in your behalf. I will not allow both. I will allow you to make an election now, sir. You'll either represent yourself with Mr. Killpack being advisory counsel so you can ask him questions and ask

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trial, or in the alternative he will represent you, and he will be the one that will be your advocate, speak in your behalf, make an opening statement in your behalf, make closing arguments in your behalf, and conduct the interrogation and cross-examination of witnesses. That is a critical issue before we proceed. And the defense may be heard relative to that issue.

MR. VANCLEAVE: Sir, I would like the opportunity to -- if I do represent myself, which I would like to do at this point, will that affect my appeal if this trial was to go against me?

THE COURT: I cannot advise you of that. You may be so inept as it relates to knowledge of procedure, you may individually be very bright and able and articulate and persuasive, and it may be in your best interests or it may not be in your best interests. I cannot advise you whether appellate issues would be favorable by your personal representation or by your representation by counsel. That's not for this court to determine. That's an individual choice.

MR. VANCLEAVE: I would like to represent myself, your Honor.

THE COURT: Very well. If you choose to represent yourself, you will represent yourself. You will be the only spokesman for the defense.

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Mr. Killpack will not have the opportunity then to cross examine witnesses. He will not have the ability to call witnesses. He will not have the ability to make opening statements or closing arguments to this jury. But I will give you leave, during the course of the trial, when necessary, to consult with him on procedural matters and for clarification of matters and for the exhaustion of questions and cross-examination of witnesses. He will be advisory and a consultant to you, and you may proceed to represent yourself.

I don't recommend that. I've told you at all stages of this case that these are serious charges, and that I think your case is best served by having a seasoned expert, a seasoned advocate, a seasoned attorney such as Mr. Killpack to be your advocate in this case. That has been my recommendation at all stages. I don't depart from it now. But you have the right to represent yourself. And to that extent you may elect to do so, but under the conditions that I have stated.

MR. VANCLEAVE: Okay.

THE COURT: Does either side wish to be heard relative to that issue?

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

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

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