

1986

Utah v. Sanwick : Petition for Rehearing

Utah Supreme Court

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1986-0176

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
 :
 Plaintiff-Respondent :
 :
 v. :
 :
 PAUL TRAVIS REESE SANWICK, : Case No. 20176
 :
 Defendant-Appellant-Petitioner, :

PETITION FOR REHEARING

Petition for reconsideration of a per curiam decision by the Utah Supreme Court filed August 15, 1985 in an appeal from a guilty plea and conviction of Rape, a First Degree Felony, in the Third Judicial District, Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

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STATUTES CITED

Utah Code Ann. §77-18-1(2) (1953 as amended) 2
Utah Code Ann. §77-18-1(4) (1953 as amended) 2,4

and Appellant's opportunity to rebut the hearsay. Appellant conceded that the Rules of Evidence are not applicable to sentencing proceedings (Appellant's Brief at 5) and now concedes that hearsay statements may be included in presentence reports. However, the point not addressed by this Court in its opinion is the Appellant's contention that the sentencing judge clearly violated statutory requirements in the sentencing process (Appellant's Brief at 4).

Utah Code Ann. §77-18-1(4) (previously §77-18-1(2)) (1953 as amended) states:

(4) Prior to imposition of any sentence for an offense for which probation may be granted, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a pre-sentence report or information from other sources on the defendant. The report shall be prepared by the adult probation and parole section of the Department of Corrections. The report shall include a specific statement of pecuniary damages, accompanied by a recommendation from Adult Probation and Parole regarding the payment of restitution by the defendant. The contents of the report shall be confidential. The court may disclose all or parts of the report to the defendant or his counsel as the interest of justice requires. At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney may wish to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant. (Emphasis added)

This code section is neither vague nor ambiguous in its statement that a trial judge "shall" hear "any" evidence which a defendant wishes to present at a sentencing proceeding. The section clearly

requires that a defendant be allowed to present any evidence concerning the sentence. The judge is left with no discretion in the matter.

In the present case, defense counsel moved the trial court for an order requiring the prosecutor to produce two witnesses in the case, Tamara and Andara Sanwick, whose whereabouts were apparently unknown to defense counsel (R. 33). The prosecutor in the case had previously refused to voluntarily comply with such a request (R. 60). The defendant's attorney wanted the witnesses to be available either for an informal interview or to present testimony at the sentencing proceeding (R. 60). The witnesses were vital to the defense to refute allegations of violence during the crime. The trial judge heard the defense motion four days prior to the sentencing and summarily denied the motion even though no opposition was presented by the prosecutor (R. 60).

It is this failure to follow the statutory requirements which was raised in Appellant's Brief (p. 4) which this Court failed to address in its opinion. The failure to address this issue led to some erroneous conclusions in the Court's opinion. First, the opinion noted: "To begin with, the trial court made it clear in pronouncing sentence that the accusations of violence did not form the exclusive basis for sending defendant to prison," Id. at 2. (Emphasis added) However, if the accusations of violence were false (which only the two witnesses in question could have confirmed), then these accusations should have played no part in the judge's sentencing decision.

Further, this Court's opinion stated: "At the time of sentencing, the court heard testimony defendant wanted to present

concerning the appropriate sentence." Id. Finally, the opinion said, "Defendant had every chance to examine fully and controvert any prejudicial information that he claimed played a part in the sentencing procedure." Id. at 3. In fact, the trial judge's refusal to allow Mr. Sanwick to present or even interview two vital witnesses makes both of these statements nonsequiturs. At the time of sentencing, the court did not hear testimony which the defendant wanted to present. Furthermore, the defendant did not have a chance to controvert prejudicial information in the sentencing procedure.

Procedural fairness is as important at the sentencing phase as at the guilt phase of a criminal proceeding, State v. Casarez, 656 P.2d 1005 (Utah 1982), and further, the sentencing procedure must fulfill the requirements of due process, State v. Lipsky, 608 P.2d 1241 (Utah 1980). According to Utah Code Ann. §77-18-1(4), supra, the Appellant should have been able to present any testimony concerning his sentence. However, a clearly erroneous ruling by the trial court prevented Mr. Sanwick from presenting such testimony. The ruling, which is as yet uncorrected, effectively denied Mr. Sanwick due process of law.

CONCLUSION

Because this Court either misapprehended or overlooked Appellant's primary contention in its decision in this case, the Appellant respectfully petitions this Court to reconsider that

decision and reverse and remand his sentence for redetermination.

RESPECTFULLY SUBMITTED this _____ day of August, 1985.

CURTIS NESSET
Attorney for Petitioner

I hereby certify that I delivered ___ copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this _____ day of August, 1985.

CERTIFICATION

I, CURTIS NESSET, do hereby certify the following:

(1) I am the attorney for Appellant/Petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

RESPECTFULLY SUBMITTED this _____ day of August, 1985.
