

1986

Utah v. Sanwick : Petition for Rehearing

Utah Supreme Court

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

Petition for reconsideration of an amended per curiam decision by the Utah Supreme Court filed January 30, 1986 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, Judge, presiding.

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Clerk Supreme Court Utah

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TABLE OF CONTENTS

	Page
Table of Authorities.	ii
Statement of the Case	1
Statement of Facts	1
Argument.	1
Conclusion.	4
Addendum.	6

TABLE OF AUTHORITIES

Page

CASES CITED

<u>State v. Casarez</u> , 656 P.2d 1005 (Utah 1982)	3
<u>State v. Lipsky</u> , 608 P.2d 1241 (Utah 1980).	4
<u>State v. Sanwick</u> , Opinion No. 20176 (Utah 1986) . .	1,3,4

STATUTES CITED

Utah Code Ann. §77-18-1(4) (1953) as amended) . . .	2,4
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THE STATE OF UTAH, :

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Defendant/Appellant/ :
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STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

In its amended per curiam opinion, State v. Sanwick, Opinion No. 20176 (Utah 1986), this Court has either overlooked or misapprehended the main contention advanced by Appellant's Brief.

In this case a district court judge clearly ignored the plain requirement of a state statute. 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 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).

Utah Code Ann. §77-18-1(4) (1953 as amended) (Addendum A) clearly states that a sentencing court "shall hear any testimony. . . the defendant . . . may wish to present concerning the appropriate sentence." (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 plainly requires that a defendant be allowed to present any evidence concerning the sentence. The judge is left with no discretion in the matter.

In this case, the trial judge ignored the dictates of the statute. The judge did not hear evidence which the defendant wished to present. This Court's opinion stated: "At the time

of sentencing, the court heard testimony defendant wanted to present concerning the appropriate sentence." State v. Sanwick, Opinion No. 20176 at 2 (Utah 1986). Further, 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 4. These statements are erroneous. 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 through essential testimony.

The opinion in this case seems to focus on the use of hearsay in the presentence report. However, this was not the issue presented on appeal. Further, the opinion expresses a concern that the evidence which Mr. Sanwick wished to present at the sentencing hearing was tantamount to a withdrawal of his guilty plea. Id. at 3. The record does not support this concern and this, also, was not the issue presented on appeal. However, the point not addressed by this Court in its opinion is the contention which is the issue in this case--the Appellant's claim that the sentencing judge violated statutory requirements in the sentencing process. (Appellant's Brief at 4.)

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), the appellant should have been able to present any testimony concerning his sentence. However, an 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 February, 1986.

CURTIS C. NESSET
Attorney for Petitioner

I hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this ____ day of February, 1986.

CERTIFICATION

I, CURTIS C. 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 February, 1986.

CURTIS C. NESSET
Attorney for Appellant/Petitioner

ADDENDUM A

Utah Code Ann. §77-18-1(4)

(4) ~~(a)~~ 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 Department of Adult Probation and Parole]~~ 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.