

2009

Utah v. James Benjamin White : Reply Brief

Utah Court of Appeals

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Case No. 20090279-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Appellant/Cross-Appellee,

vs.

James Benjamin White,
Appellee/Cross-Appellant.

State's Reply Brief

Appeal from an order dismissing one count of criminal non-support,
in the Third Judicial District Court of Utah, Salt Lake County, the
Honorable Ann Boyden presiding.

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Oral Argument Not Requested

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UTAH APPELLATE COURT
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IN THE
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ARGUMENT

I.

**THE TRIAL COURT'S COMPETENCY RULING IS NOT BEFORE
THIS COURT**

Defendant first claims that the State cannot appeal from the trial court's initial competency ruling because there is no "pending prosecution." Aplee. Br. 6-7. As noted in the State's opening brief, however, the State is not challenging the trial court's conclusion that Defendant is incompetent. Instead, the State is challenging only the court's decision to dismiss the case with prejudice without first complying with the statutorily mandated competency restoration process. Apl't. Br. 1-10. This Court accordingly need not address Defendant's arguments on this issue.

In addition, though the competency ruling is not addressed in Defendant's brief itself, the State notes that defense counsel has attached a pro se brief on that

point as an addendum to his brief. *See* Aplee. Br. 6 n.1; Aplee. Br., addendum D. On March 2, 2010, however, this Court issued an order specifically denying Defendant's request to file both a pro se brief and a brief from counsel. Addendum A. This Court instead directed defense counsel to either include Defendant's arguments about the competency ruling in the brief itself, or instead file an *Anders* brief. Defense counsel has done neither.

"Pursuant to Rule 24(f), addenda are limited to relevant rules, statutes, regulations, or copies of parts of the record. Addenda should not be used to provide more argument in support of a party's position." *State v. Harry*, 873 P.2d 1149, 1157 n.15 (Utah App. 1994). Thus, it "is improper to use an addendum to incorporate argument by reference that should be included in the body of the brief." *Harris v. IES Assocs. Inc.*, 2003 UT App 112, ¶ 39, 69 P.3d 297 (quotations and citation omitted); *accord Aspenwood L.L.C v. C.A.T., L.L.C.*, 2003 UT App 28, ¶¶ 43-45, 73 P.3d 947.

Absent an order from this Court, the State therefore will not respond to the arguments that Defendant has only made in his addendum.¹

¹ Given Defendant's failure to directly address the competency evaluation in his brief, it does not appear that he has properly raised any new issue as cross-appellant. The State accordingly treats this brief as a reply brief only.

II.

THE STATE'S ARGUMENTS WERE PRESERVED

Defendant next claims that the State did not preserve its argument that the trial court erred in dismissing the charges before initiating competency restoration proceedings. Aplee. Br. 7-9. Defendant advances two claims in support of this position. First, he argues that the State's motion to alter or amend judgment was not properly filed under rule 59 because there was no trial. Aplee. Br. 8. Second, he characterizes the State's motion as a motion to reconsider, and he then argues that motions to reconsider do not preserve claims for appeal. Aplee. Br. 9.

First, Defendant argues that "Rule 59 is a post-trial rule of procedure that has nothing to do with [a] pre-trial order of dismissal." Aplee. Br. 8. But this Court has rejected that interpretation of rule 59. In *Interstate Land Corp. v. Patterson*, 797 P.2d 1101, 1105 (Utah App. 1990), the trial court had similarly "reasoned that a rule 59(a) motion was only intended to follow a full evidentiary trial," and it had therefore concluded that a party could not file a rule 59(a) motion after a grant of summary judgment. This Court reversed, holding that "[r]ule 59 is broad enough to include a rehearing of any matter decided by the court without a jury." *Id.* (quotations and citation omitted). The supreme court recently followed this interpretation in

Cabaness v. Thomas, 2010 UT 23, ¶¶ 49-51, 654 Utah Adv. Rep. 28, wherein it considered a party's rule 59 challenge filed after a grant of summary judgment.

Thus, Defendant is incorrect when he claims that rule 59 cannot be invoked in cases where the dismissal was entered prior to trial.

Second, Defendant is also incorrect when he recharacterizes the State's rule 59 motion as a motion to reconsider. Aplt. Br. 9. Under rule 59(a)(7), a party can file a motion for a new trial or for an amended judgment where the prior ruling was the result of an "error in law." This is precisely what occurred here. As explained more fully in the State's opening brief, the trial court first complied with the competency evaluation statute and found Defendant to be incompetent to stand trial. R. 1046. After issuing that ruling, however, the court then decided to dismiss the case with prejudice – and it did so without the benefit of competency restoration efforts, or even any argument on the propriety of dismissal from any party. R. 1046-48; 1142: 54-57. Following that *sua sponte* dismissal order, the State filed a motion requesting that the court first comply with the statutorily-mandated competency restoration process, arguing for the first time that the court's failure to do so was legal error. Thus, this motion was not a motion to reconsider at all, but instead fit squarely

within the ambit of rule 59(a)(7). Defendant's argument to the contrary should accordingly be rejected.²

III.

THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO DISREGARD THE MANDATORY COMPETENCY RESTORATION PROCESS SET FORTH IN UTAH CODE ANNOTATED § 77-15-6

As set forth in the State's opening brief, two statutes are relevant for purposes of this appeal. Aplt. Br. 6-10. First, Utah Code Annotated § 77-15-5 (West 2008) (the competency evaluation statute) sets forth the process by which a trial court evaluates a defendant's competency to stand trial. Second, Utah Code Annotated § 77-15-6 (West 2008) (the competency restoration statute) then sets forth the process by which either (1) an incompetent defendant is restored to competency and

² Defendant's reliance on *Gillette v. Price*, 2006 UT 24, 135 P.3d 861, is similarly misplaced. Aplee. Br. 9. The issue in *Gillette* was whether a motion to reconsider tolled the time for filing an appeal. See generally *Gillette*, 2006 UT 24, ¶¶ 6-11. After concluding that there is no basis in the rules to file a motion to reconsider, the supreme court concluded that such motions cannot toll the time for filing an appeal. *Id.* Here, however, the State has not requested extra time to file its notice of appeal. The trial court issued its original competency ruling on March 23, 2009, it ruled on the State's rule 59(a) motion on April 14, 2009, and the State filed its notice of appeal on April 21, 2009. R. 1046, 1123-28, 1129-30. Thus, the State's notice of appeal would have been timely whether it was filed in response to the original competency ruling or the ruling on the motion to amend or alter the judgment. But more importantly, the State's motion was not a motion to reconsider. Thus, *Gillette* does not bar this appeal.

brought to trial, or (2) the charges are dismissed due to the State's inability to restore the defendant's competency.

The trial court followed the procedures outlined in the competency evaluation statute and concluded that Defendant was incompetent to stand trial. The State has not challenged that ruling, but has instead challenged only the trial court's dismissal of the charges without first complying with the competency restoration statute.

In his brief, Defendant advances two arguments in support of the trial court's failure to comply with that statute. First, he argues that the trial court's decision was authorized by Utah Code Annotated § 77-15-6(1). Second, he argues that even if the trial court did err, the error was harmless. Both arguments should be rejected.

A. The trial court did not have the authority to disregard the competency restoration process.

Defendant argues that the trial court's decision was correct under § 77-15-6(1).

Aplee. Br. 20. Section 77-15-6(1) states:

Except as provided in Subsection (5), if after hearing, the person is found to be incompetent to stand trial, the court shall order the defendant committed to the custody of the executive director of the Department of Human Services or his designee for the purpose of treatment intended to restore the defendant to competency. The court may recommend but not order placement of the defendant. The court may, however, order that the defendant be placed in a secure setting rather than a nonsecure setting. The director or his designee shall designate the specific placement of the defendant during the period of evaluation and treatment to restore competency.

(Emphases added).

Defendant argues that this section authorized the trial court to skip the competency restoration process on two levels.

First, Defendant suggests that by allowing the trial court to “recommend but not order placement of the defendant,” section 77-15-6(1) actually allowed the trial court to disregard the competency restoration process entirely. Aplee. Br. 20.

Defendant misunderstands the meaning of the word “placement” as used in the statute. Contrary to Defendant’s claim, that sentence does not give a court discretion to disregard the competency restoration process. Rather, it refers only to the court’s ability—or lack thereof—to decide which mental health facility a defendant will be treated in, instead placing that decision solely within the discretion of the Department of Human Services. Utah Code Ann. § 77-15-6(1). But this limiting provision contains no language authorizing a trial court to disregard the separate statutory command that Defendant be placed in the custody of DHS.

Second, Defendant claims that § 77-15-6(1)’s reference to “Subsection (5)” also authorizes a trial court to disregard the competency restoration process. Aplee. Br. 20-21. Specifically, Defendant claims that this provision refers to § 77-15-5, and he then suggests that the trial court can disregard the competency restoration process

under § 77-15-5(14). Aplee. Br. 20-21. But Defendant misreads the statute. The plain language of the statute refers to “*Subsection (5)*” — i.e. § 77-15-6(5) — not § 77-15-5, which is another statutory section altogether. Given this, Defendant’s argument regarding § 77-15-5(14) has no bearing on the proper interpretation of § 77-15-6(1).³

In short, the statute plainly required the trial court to commit Defendant to DHS’s custody for competency restoration. It did not do so. This was error.

B. The error was not harmless.

Defendant next argues that even if the trial court failed to comply with the competency restoration statute, the error was harmless because “the State has not shown the likelihood of a different outcome had such a 90 day period taken place.” Aplee Br. 22. Defendant further argues that the error was harmless because the trial judge was already convinced that Defendant could not be restored to competency. Aplee. Br. 22.

As explained above, however, the statute expressly required the trial court to initiate competency restoration proceedings. As part of that statutorily-mandated

³ In any event, even if § 77-15-6(1)’s reference to “*Subsection (5)*” incorporates § 77-15-5(14), Defendant’s argument still fails on its own terms. Section 77-15-5(14) allows a court to issue “reasonable order[s] to insure *compliance* with this section.” (Emphasis added). But the statute says nothing about also allowing a court to issue orders that disregard the section’s mandates as well. Defendant’s interpretation thus turns the statute on its head, ultimately converting an enforcement provision into an avoidance provision. That approach is not supported by the statute.

process, Defendant would have been evaluated and treated by mental health experts, and those experts would have then advised the trial court of Defendant's progress *before* the court made any decision regarding dismissal of the case. *See generally* Utah Code Ann. § 77-15-6(2)-(4).

This process ultimately protects interests on both sides of the adversarial system. It protects the State from being deprived of the opportunity to prosecute criminals on competency grounds, unless the trial court first received expert analysis to guide this decision. And this process also protects citizens like Defendant, who insists that he is innocent of the charged crime and wants vindication at trial, rather than receiving a dismissal via a competency ruling that still leaves his guilt in question. *See generally* Aplee. Br., addendum D.

To protect these interests, this statute does not allow a trial judge to unilaterally decide that a person who has been charged with a crime cannot be restored to competence. Instead, the statute only allows the judge to make that decision after receiving input from mental health experts who have examined and treated the defendant for that very purpose.

Unless and until those mental health experts are given that opportunity in this case, the trial court's opinion about the likely result of that treatment is, at best, speculative—both in terms of what treatments DHS might offer Defendant during

those 90 days, and also in terms of Defendant's possible response to that treatment. The trial court simply did not know whether Defendant would be amenable to treatment, because Defendant has not yet been treated for this purpose. The trial court's decision thus short-circuited a statutorily-mandated process, and it was not harmless error.⁴

IV.

DEFENDANT'S SPEEDY TRIAL RIGHTS WERE NOT VIOLATED

Finally, Defendant asks this Court to affirm the dismissal of this prosecution on alternate grounds that his constitutional right to a speedy trial has been violated. Aplee. Br. 14-19. This claim should be rejected for two reasons.

First, Defendant's reliance on the alternate grounds doctrine is misplaced. Under that doctrine, "an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record." *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (quotations and citation omitted). This

⁴ Defendant's reference to the possibility of civil commitment proceedings as an alternate remedy is unavailing. Contrary to Defendant's suggestion, the State's purpose in this process is not limited to simply "treating or committing" Defendant. Aplee. Br. 24. Rather, the State's purpose is to criminally prosecute Defendant for chronically failing to pay his child support. Given the trial court's competency ruling, the State can do that only if Defendant is restored to competency. The statutory scheme plainly allows the State to make that attempt before losing its opportunity to prosecute him— regardless of what may also occur in the civil context.

doctrine is “available only in limited circumstances,” however, and is “certainly limited to *affirming* decisions on alternate grounds and does not give appellate courts permission to search the record for alternate grounds to *reverse* a decision.” *Id.* at ¶ 13 n.3 (emphasis in original). When reviewing alternate grounds for affirmance, appellate courts are “limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of a new legal theory or alternate ground.” *Id.* at ¶ 20; accord *Angel Invs., LLC v. Garrity*, 2009 UT 40, ¶ 38, 216 P.3d 944.

Here, Defendant asks this Court to affirm the trial court’s dismissal on the alternate grounds that his speedy trial rights were violated. But Defendant filed several motions to dismiss based on alleged violation of his speedy trial rights, *see, e.g.*, R. 270-73, 315-30, 607-51, and the trial rejected each of those motions. R. 450, 652, 749-50. In one such ruling, the trial court specifically found that “during the time period of 2006 through 2008, every continuance and delay in bringing this matter to trial can be attributed to Defendant.” R. 750. And in another discussion of these issues, the court further concluded that “except for this competency issue, every single one” of the delays in this case was caused by Defendant. R. 1141: 15.

Thus, Defendant is not just asking this Court to affirm the trial court’s ruling on some alternate basis; rather, Defendant is actually asking this Court to use this

doctrine to reverse the trial court on a series of rulings that the court entered on this very issue. This Court should not interpret that doctrine in that manner.

Second, even if available as an alternate ground for relief, Defendant's claim still fails on its merits.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution. Under the analysis set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), four factors should ordinarily be considered in a speedy trial analysis: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.⁵

In his brief, Defendant addresses three of these factors. *See generally* Aplee. Br. 10-19. Specifically, he addresses the length of the delay, his assertion of his speedy trial right, and the alleged prejudice. *See generally* Aplee. Br. 10-19. But Defendant fails to acknowledge, let alone address, the second factor: the reason for the delay. And in this case, an examination of the record shows that the delay is directly attributable to Defendant.

⁵ In his brief, Defendant suggests that "the State on appeal should be saddled with the burden of establishing that these factors do not apply." Aplee Br. 15. Defendant cites to no authority requiring the State to carry any burden in a speedy trial analysis – particularly in a case like this one, where the trial court affirmatively *rejected* the speedy trial claim below. Defendant's claim is therefore unsupported and should not be accepted by this Court.

When examining the reason for a delay, “different weights must be assigned to the varying justifications and reasons.” *State v. Banner*, 717 P.2d 1325, 1328 (Utah 1986). When the record shows “deliberate attempt” by the government “to delay the trial in order to hamper the defense,” the delay is “weighted heavily against the government.” *Barker*, 407 U.S. at 531. But when the record instead shows that the delay was “caused by the defendant,” the delay “will not be counted against the State and will weigh against the Defendant” in a speedy trial analysis. *State v. Trafny*, 799 P.2d 704, 708 n.15 (Utah 1990). This not only includes intentional delays, but also periods in which the defendant “either stipulated to or requested that he be given more time to prepare his case.” *State v. Mejia*, 2007 UT App 337, ¶ 12, 172 P.3d 315.

In *Vermont v. Brillon*, 129 S.Ct. 1283 (2009), the Supreme Court recently considered a case in which the trial was delayed by a number of factors, including both continuances and motions, as well as by the defendant’s conflicts with his lawyers. *Id.* at 1287-89. On appeal, the Supreme Court refused to hold the government accountable for delays that were attributable to “extensions and continuances” to which the defendant or his counsel had stipulated. *Id.* at 1292. And the Court also refused to hold the government accountable for delays that were attributable to defendant’s “strident, aggressive behavior” with respect to his

attorneys — including those periods in which he had moved to dismiss his attorneys and replace them with new ones. *Id.* The Court thus noted that “a defendant’s deliberate attempt to disrupt proceedings” should “be weighted heavily against the defendant.” *Id.*

In this case, this record is replete with evidence that Defendant’s “strident, aggressive” behavior has contributed to the delay in bringing this case to trial. The State originally filed charges on January 18, 2001. R. 3. In February 2001, the trial court appointed Clayton Simms to represent him. R. 19. Defendant subsequently filed a motion for a different attorney, demanding one who was “not prejudice[d] towards” him. R. 29-34. In July 2001, John O’Connell was appointed in his stead. R. 38. Defendant subsequently objected to O’Connell as well, demanding an attorney who had never worked for the State, R. 43-55, and O’Connell subsequently moved to withdraw, citing conflict with Defendant. R. 108. Following O’Connell’s withdrawal, Ed Wall was appointed. R. 118-19. But Ed Wall subsequently withdrew as well. R. 178. Heidi Buchi was then appointed, but she, too, withdrew following conflicts with Defendant. R. 249, 260-61. Following Buchi, Ed Wall was reappointed, but he withdrew again, R. 256, 267, and this was followed by periods of representation by, among others, Barton Warren (R. 331, 336), Patrick Anderson

(R. 366, 395), Delbert Walker (R. 367, 457), Heidi Buchi (R. 573, 576-77), Robin Ljunberg (R. 585), and Susan Denhardt (R. 585, 946-49).

In addition to the delay caused by Defendant's conflicts with counsel, the record is replete with time-consuming and repetitive pro se motions filed by Defendant throughout these proceedings. Among others, Defendant has filed motions to continue (R. 22, 26), a motion for a personal recognizance bond (R. 208-30), several motions to dismiss (R. 29-34, 43-55, 116-20, 152-53, 201-29, 607-19), several motions for a bill of particulars (R. 29-34, 43-55, 61-68, 72-74, 284-300, 302-07), several motions to declare the criminal non-support statute unconstitutional (R. 42-55, 76-104), a request for a 120-day disposition (R. 70-74), several motions under the IAD, as well as interlocutory appeals from the denials of those motions (R. 132-51, 167-68, 175-77, 184-87, 201-07), several petitions for a writ of habeas corpus (R. 233-38, 270-84, 338-66), a jurisdictional motion (R. 315-30), a motion to declare these proceedings unconstitutional because of "today's unconstitutional government and modernized state . . . after the 2002 Olympics" (R. 404-19), several motions to disqualify the trial judge (R. 452-58, 553-59, 665-739), and civil lawsuits against his attorneys and the trial judge (R. 673-84). As it currently stands, the record in this case is over 1100 pages long.

As noted, Defendant ultimately raises this speedy trial claim in the context of the alternate grounds for affirmance doctrine. But when reviewing alternate grounds under this doctrine, appellate courts are “limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of a new legal theory or alternate ground.” *Bailey*, 2002 UT 58, ¶ 20. And here, the trial court specifically noted that Defendant had “filed hundreds of pages of rambling, nonsensical pro se filings” throughout the course of these proceedings. R. 1141: 40. In early 2009, the court entered a written ruling denying one of Defendant’s speedy trial motions in which the court specifically found that “during the time period of 2006 through 2008, every continuance and delay in bringing this matter to trial can be attributed to Defendant.” R. 750. And from the bench, the court subsequently concluded that, “except for this competency issue, every single one” of the delays in this case was caused by Defendant. R. 1141: 15; *cf. State v. Woodland*, 945 P.2d 665, 670 (Utah 1997) (“time spent evaluating competency may not be considered in the speedy trial analysis”).

Given these findings and the support found in the record, it is clear that nothing remotely “oppressive or persecutorial” has occurred here. *State v. Archuletta*, 577 P.2d 547, 548 (Utah 1978). Instead, the delay in bringing this case to trial has been the result of Defendant’s repeated abuse of the legal system, not any

“deliberate attempt to delay the trial in order to hamper the defense.” *Barker*, 407 U.S. at 531. Defendant’s speedy trial claim is frivolous, and it should accordingly be rejected.

V.

DEFENDANT IS NOT ENTITLED TO RELIEF UNDER RULE 25(B)(1)

Finally, Defendant suggests that dismissal was appropriate under rule 25(b)(1), Utah Rules of Criminal Procedure, which allows for dismissal where there has been an “unreasonable or unconstitutional delay in bringing defendant to trial.” Aplt. Br. 11.

Contrary to Defendant’s claim, however, rule 25 is not at issue. Not only did the trial court never invoke this rule, but it also repeatedly refused to dismiss this prosecution on speedy trial grounds when it was raised below. R. 450, 652, 749-50. And while the trial court did ultimately cite to the delays as a reason for its dismissal, it expressly refused to hold the State responsible for those delays. Rather, as discussed above, the trial court determined that Defendant was responsible for the non-competency delays in this case. R. 1141: 15.

Thus, Defendant’s interpretation of rule 25 would allow an obstreperous or even insane defendant to force a dismissal of a criminal prosecution based on

nothing more than his dilatory tactics. This Court should not interpret this rule in this manner.

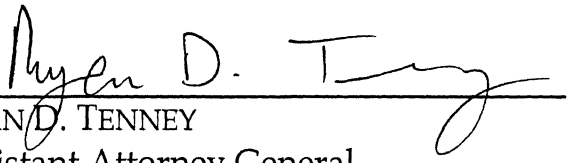
In any event, even if applicable, rule 25 has not been satisfied. As noted, the rule allows for dismissal where a delay has been either “unconstitutional” or “unreasonable.” As noted above, however, the delay in this case was not unconstitutional under the principles set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). And it was not unreasonable either, given that it was caused by Defendant’s own conduct. But if this Court concludes that the delay was unreasonable, the State notes that it would be entitled to “further prosecution for the offense” under rule 25(d). Thus, if Defendant prevails on his claim of unreasonable delay, this Court should reverse the dismissal with prejudice and allow the State to “fil[e] new charges” as required by Utah R. Crim. P. 25(d).

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court’s dismissal with prejudice and remand for initiation of the competency restoration process.

Respectfully submitted July 7, 2010.

MARK L. SHURTLEFF
Utah Attorney General



RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I certify that on July 7, 2010, two copies of the foregoing brief were ☒ mailed

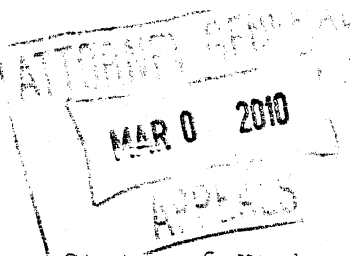
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A digital copy of the brief was also included: ☒ Yes ☐ No

Melina Greer

Addendum A



UTAH APPELLATE COURTS
MAR 03 2010

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,

Plaintiff, Appellant, and
Cross-Appellee,

v.

James Benjamin White,

Defendant, Appellee, and
Cross-Appellant.

ORDER

Case No. 20090279-CA

This matter is before the court on James Benjamin White's motion to sever or motion to file an oversized brief.

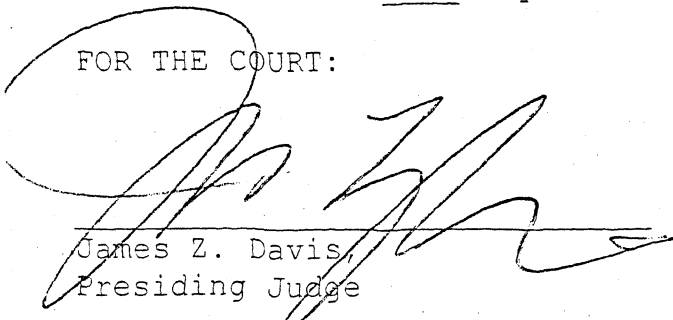
To the extent that White's counsel suggests that he will file a brief and an additional pro se brief, this court will not accept a pro se brief when the party is represented by counsel. See State v. Wareham, 2006 UT App 327, ¶ 33, 143 P.3d 302.

White's counsel also asserts that he is required to assert divergent and irreconcilable positions. Specifically, White's counsel asserts that he must seek to affirm the district court's order, whereas White seeks to challenge certain aspects of the district court's order. If White's counsel should determine that White's challenges to the district court's order may be moot or frivolous, White's counsel may file an Anders brief with respect to those issues.

Accordingly, IT IS HEREBY ORDERED that White's motion to sever is denied. IT IS FURTHER ORDERED that White's motion to file an overlength brief is denied. IT IS FURTHER ORDERED that White's brief is due on or before March 15, 2010. White should anticipate that no further extensions of time will be granted.

Dated this 2 day of March, 2010.

FOR THE COURT:


James Z. Davis
Presiding Judge