1998

State of Utah v. Gary E. Steeley : Reply Brief

Utah Court of Appeals

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Scott L. Wiggins; Arnold & Wiggins; attorneys for defendant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, plaintiff / Appellee, v. GARY E. STEELEY, Defendant / Appellant.	)	Case No. 980358-CA PRIORITY NO. 2 **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Appeal from Judgment of conviction upon a plea of guilty to Sodomy Upon a Child, a first degree felony, a first degree felony, in violation of Utah Code Ann. § 76-5-403.1, and to Distribution of a Controlled Substance, a felony of the first degree, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii), the Honorable Michael G. Allphin presiding.

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DETERMINATIVE AUTHORITY

See cases, etc., cited above. . . . . *in passim*

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO STRICTLY COMPLY WITH RULE 11 IN THE COURSE OF TAKING DEFENDANT'S GUILTY PLEA AND THEREBY ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

In its Brief, the State argues that Defendant waived his claim that the trial court failed to comply with Rule 11 in the course of taking Defendant's guilty pleas. *See* Brief of Appellee, pp. 24-26. The State's argument is fatally flawed because it not only ignores well-settled principles concerning the trial court's obligations in taking a guilty plea, but it ignores critical facts surrounding Defendant's guilty plea in the instant case.

The Utah Supreme Court, in *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987), stated that "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." *Gibbons*, by virtue of subsequent case law, created a "strict compliance" rule requiring the trial court to "personally establish that the defendant's guilty plea is truly knowing and voluntary and establish *on the record* that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime." *State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993); *see also State v. Maguire*, 830 P.2d 216, 217-18 (Utah 1991); *State v. Hoff*, 814 P.2d 1119, 1122 (Utah 1991). The purpose of requiring strict

compliance with Rule 11 is to ensure that a defendant pleads "freely and voluntarily, with full knowledge of the consequences of the plea." *State v. Kay*, 717 P.2d 1294, 1299 (Utah 1986).

In the course of advancing its argument, the State all but fails to recognize that Utah Rule of Criminal Procedure 11(g)(2) requires the trial court to "advise the defendant personally that any recommendation as to sentence is not binding on the court." *See State v. Thurston*, 781 P.2d 1296, 1301 (Utah Ct. App. 1989); *accord Kay*, 717 P.2d at 1299. In fact, the State goes so far as to assert, without any authoritative support whatsoever, that "[t]he absence of any promised sentencing recommendations by the prosecutor made a personal advisement that the court would not be bound by any sentencing recommendations unnecessary." Brief of Appellee, p. 24. The State's misinterpretation of the requirements of Rule 11, by virtue of its argument, flies in the face of the "strict compliance" rule of *Gibbons*. In addition, the plain language of Rule 11(g)(2) directly contradicts the State's argument. Rule 11(g)(2) provides, "If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to the sentence is not binding on the court." At the hearing on the motion to withdraw the guilty plea, Defendant testified that the prosecutor represented that he would recommend, among other things, that the

penalties run concurrent. Contrary to the State's allegation in its Brief that there were no such promises, the prosecuting attorney, who was present at the sentencing hearing, stated the following:

> Mr. Namba (the Deputy Davis County Attorney who negotiated the guilty plea), for whatever reason, at least I do not have anything in the file, did not address the other charge relative to a sentencing recommendation which I understand is also a first degree felony but does not carry a mandatory imprisonment term nor did he choose to address the issue of consecutive. In that respect, Your Honor, we would defer to the Court's judgment on those matters as far as the sentencing of Mr. Steeley.

(R. 145, lines 12-19, Transcript of Sentencing Hearing). Not only does the foregoing quotation contradict the State's argument, it, at the very least, corroborates Defendant's testimony concerning the prosecutor's promise to recommend that the sentences run concurrent. Moreover, the aforementioned quotation, as well as other quotations at the sentencing hearing, establishes that the trial court allowed sentencing recommendations (*see id.* at R. 144-45) and thereby was required by virtue of Rule 11(g)(2) "to advise the defendant personally that any recommendation as to the sentence is not binding on the court." This, as the record clearly indicates, the trial court failed to do.

II. BECAUSE APPOINTED TRIAL COUNSEL'S FAILURE TO OBJECT WAS NOT A "CONSCIOUS DECISION" TO WAIVE THE ISSUE CONCERNING THE TRIAL COURT'S FAILURE TO STRICTLY COMPLY WITH RULE 11 IN THE COURSE OF TAKING DEFENDANT'S GUILTY PLEA, THE DOCTRINE OF INVITED ERROR DOES NOT APPLY TO THE INSTANT CASE.

The State further argues, by virtue of the doctrine of invited error, that "[t]his Court should decline to address defendant's rule 11 issue because he affirmatively waived that claim below, thereby rendering the plain error doctrine inapplicable." *See* Brief of Appellee, 24-26. In *State v. Bullock*, 791 P.2d 155 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 62 (1990), the Utah Supreme Court, in addressing the invited error doctrine, stated:

> [W]e do not appraise all rulings objected to for the first time on appeal under the plain error doctrine . . . . [I]f a party through counsel has made a *conscious decision* to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error. . . .

Id. at 158 (Emphasis added).[1]

The State is simply inaccurate by arguing that appointed trial counsel made a "conscious decision" not to raise the trial court's failure to strictly comply with Rule 11 in the hearing on the

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[1]The Utah Supreme Court also stated, "If the decision was conscious *and did not amount to ineffective assistance of counsel*, this Court should refuse to consider the merits of the trial court's ruling." *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 62 (1990) (Emphasis added). Therefore, not only must the decision by trial counsel be a consciously made decision, it must be one that does not constitute ineffective assistance of counsel.

motion to withdraw the guilty plea. In fact, it stretches credulity beyond the bounds of reasonability to think that appointed trial counsel, if she had been aware of the failure by the trial court to strictly comply with Rule 11 in the taking Defendant's plea, would consciously decide not to raise this issue. Further, it is equally implausible how appointed trial counsel could think this may benefit Defendant in such a manner so as to attempt to "have-her-cake-and-eat-it-to." *See State v. Cook*, 881 P.2d 913, 915 n.3 (Utah Ct. App. 1994). Other than the State's implausible bare assertions, the record is bereft of any indication as to why appointed trial counsel did not raise the trial court's failure to comply with Rule 11.

III. CONTRARY TO THE STATE'S ARGUMENT, DEFENDANT'S PRESENTENCE INVESTIGATION REPORT DOES NOT CONTAIN ALL OF THE ALLEGATIONS SET FORTH IN THE LETTER SENT FROM DEFENDANT'S EX-SPOUSE TO THE TRIAL COURT PRIOR TO SENTENCING.

The State argues that Defendant's constitutional right to due process was not violated by the failure to provide Defendant with the opportunity to examine and to respond to the allegations contained in the letter sent by Defendant's ex-spouse to the trial court prior to sentencing. *See* Brief of Appellee, pp. 31-34. While some of the allegations contained in the letter sent from Defendant's ex-spouse to the trial court were contained in

Defendant's Presentence Investigation Report, the State fails to acknowledge that at least two of the allegations were not contained in the Presentence Investigation Report.

In the letter sent from Defendant's ex-spouse to the trial court prior to sentencing, Defendant's ex-spouse alleges, among other things, that Defendant had refused to pay debts for which he was responsible, *i.e.*, a $4500.00 debt for a vehicle loan, that Defendant had defaulted on payments under a Chapter 13 bankruptcy filing in 1995, and that Defendant had failed to pay two years of property taxes on their house, which he had previously, and apparently fraudulently, claimed in his tax returns. (R. 150-51, Letter from Ms. Sally D. Jensen to Judge Michael G. Allphin, dated October 6, 1997, and filed October 15, 1997; a true and correct copy of the 10/06/97 Letter from Ms. Sally D. Jensen to Judge Michael G. Allphin is attached to the previously filed Brief of Appellant as Addenda B). Contrary to the State's assertions, nowhere in the Presentence Investigation Report are the aforementioned allegations of Defendant's ex-spouse contained.

CONCLUSION

Based on the foregoing, as well as that contained in the previously filed Brief of Appellant, Defendant respectfully requests that this Court reverse the trial court's denial of the

motion to withdraw his guilty plea and remand the case for further proceedings consistent with this Court's instructions as stated in its opinion.

STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant and novel issues in the instant appeal dealing with strict compliance with Rule 11 and the voluntariness of guilty pleas, ineffective assistance of counsel, and due process in the course of sentencing, which, based on the facts of the instant appeal, involve issues requiring further development in these areas of criminal law for the benefit of bar and public. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value and direction in future cases.

RESPECTFULLY SUBMITTED this 11th day of February, 1999.

ARNOLD & WIGGINS, P.C.

Scott L Wiggins
Attorneys for Appellant

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 11th day of February, 1999:

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ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).