

1998

# Utah v. Kelly Ray Deboard : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
KELLY RAY DEBOARD,	:	Case No. 980387-CA
Defendant/Appellant.	:	Priority No. 2

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**REPLY BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Attempted Possession of a Controlled substance, a class A misdemeanor in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael L. Hutchings, Judge, presiding.

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**UTAH COURT OF APPEALS  
BRIEF**

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MAR 15 1999

Julia D'Alesandro  
Clerk of the Court

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**ARGUMENT**

DEBOARD'S APPEAL IS NOT MOOT SINCE THE ISSUE AFFECTS THE PUBLIC INTEREST, IS LIKELY TO RECUR, AND IS CAPABLE OF EVADING REVIEW GIVEN THE BRIEF TIME THAT DEBOARD AND SIMILARLY SITUATED INDIVIDUALS MAY BE AFFECTED.

The State concedes that sentencing is a critical stage of a criminal proceeding wherein a defendant is entitled to counsel and that Deboard was "unrepresented at the May 13, 1998 hearing." See State's Brief ("S.B.") at 5; see United States Const. amend. VI (guaranteeing the right to counsel); Utah Const. Art. I, § 12 (Supp. 1998) (same); see also Utah Code Ann. § 77-1-6 (1995) (providing that defendant is entitled to counsel in criminal prosecutions).

Nonetheless, the State asserts that Deboard's claim on appeal is moot. S.B.5-9. The State contends that the judicial relief requested by Deboard would not affect his rights and, furthermore, there are no other collateral legal consequences that merit review of his case. S.B.5-6. The State bases its argument on the fact that Deboard had a second sentencing hearing on June 19, 1998 at which time the judge suspended 300 days of the original 365 day sentence. S.B.6.

Contrary to the State's assertion, Deboard's issue on appeal is not moot because it fits within an exception to the mootness doctrine. In State v. Fife, 911 P.2d 989, 991 (Utah App. 1996), this Court discussed the mootness doctrine and outlined one of the exceptions thereto. The Court noted that as a "general rule . . . appellate courts 'refrain from adjudicating issues when the underlying case is moot.'" Id. (quoting Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989)).

The exception to the general rule occurs when three elements have been met: (1) the case presents an issue that affects the public interest; (2) the issue is likely to recur; and (3) because of the brief time that any one litigant is affected, the issue is capable of evading review.

Id. (citations omitted).

The present case falls within the Fife exception to the mootness doctrine. First, as a matter of public interest, a sentencing court should not be allowed to sentence defendants outside the presence of their attorneys. The Utah and federal constitutions both enshrine a defendant's right to counsel at sentencing because of the particular impact and complexities that sentencing presents to defendants standing alone before a court. See U.S. Const. amend. VI; Utah Const. Art. I, § 12; see also Appellant's Brief ("A.B.") at 5-9 (discussing the pitfalls faced by defendants at sentencing necessitating the right to counsel). In honoring a defendant's right to counsel at sentencing, courts both further the ends of justice and judicial economy to the extent that preventable rehearing of issues is avoided. Consequently, a sentencing court like the one involved here should not be able to

circumvent such a fundamental right in the mere interest of expediency without establishing a valid waiver. A.B.4-22.

In addition, Deboard's appeal merits review because "it is likely to recur" in the future to similarly situated defendants. Fife, 911 P.2d at 989. Specifically, defendants like Deboard may be sentenced to the maximum time allowed by law for their offense (as the court did here) on the premise that the court is merely trying to secure their presence for their "real" sentencing hearing to be held at a later date. Then, the defendant could theoretically serve almost his entire sentence before the rehearing is set. Hence, the court thereby effectively denies the defendant a "real opportunity to present to the court facts in extenuation of [his] offense or in explanation of [his] conduct, as well as to correct any errors or mistakes in [pertinent pre-sentence] reports" that may have resulted in a more lenient or different sentence than the one actually served. Kuehnert v. Turner, 499 P.2d 839, 840-41 (Utah 1972); see also A.B. Moreover, the court effectively denies the defendant the opportunity to post bail instead of jail time in the interim between conviction and sentencing. See Utah Code Ann. § 77-20-8 (1995) (providing for alternatives to incarceration after conviction but prior to sentencing as set forth in Utah Code Ann. § 77-20-10(2) (1995)); Utah Code Ann. § 77-20-10(2)(a) (providing for bail in lieu of incarceration).

In this manner, the instant case is distinguishable from State v. Martinez, 925 P.2d 176 (Utah App. 1996), upon which the State predominantly relies for its mootness argument. S.B.5-9. The



defendant in Martinez was sentenced to a sixty day evaluation in the interim period between the withdrawal of her original attorney and the appearance of new counsel. Id. at 176. At the end of the court-imposed sixty day evaluation period, defendant appeared before the court again with her new attorney and was sentenced to a term of five-to-life imprisonment. Id. This Court ruled that defendant's claim that she was denied counsel when the court sentenced her to the sixty day evaluation was moot in part because "the unique facts of [that] case present[ed] a situation that is *unlikely to recur* in a similar manner." Id. at 177 (emphasis added).

For the reasons stated above, the particular facts of this case present a situation that is likely to recur to other similarly situated individuals who, like Deboard, are "temporarily sentenced" pending the "real" sentencing hearing. Consequently, the "unlikely to recur" rationale in Martinez does not apply here and should not serve to render Deboard's appeal "moot."

As a final matter, Deboard's issue on appeal merits review given that he and other defendants like him are affected for a relatively "brief time" and therefore "the issue is capable of evading review." Fife, 911 P.2d at 991. In Deboard's case, he served sixty-five days of a sentence imposed without benefit of counsel in violation of his constitutional rights. R.61[6-7]. He was then re-sentenced with counsel present before he had time to appeal, let alone before his appeal could be perfected. Id. In a more general sense, the sentence of a similarly situated defendant

may lapse before he gets a rehearing. By the time he files for appeal or his appeal is perfected, his sentence, and hence any legal remedy, expires. In this manner, the legitimate constitutional claims of Deboard and similarly situated individuals "evad[e] review." Id.

In light of the foregoing, Deboard's issue on appeal is not moot. Rather, it falls within an exception to the mootness doctrine recognized by this Court in Fife, 911 P.2d at 991. Accordingly, Deboard respectfully requests this Court to review his case on appeal.

#### **CONCLUSION**

Based on the foregoing, Deboard respectfully requests this Court to vacate his sentence and remand for a new sentencing hearing.

#### **ORAL ARGUMENT**

Deboard requests oral argument and a published decision which clarifies that the procedure utilized by the sentencing judge in this case violates the Sixth Amendment to the U.S. Constitution and Article I, § 12 of the Utah Constitution.

SUBMITTED this 15<sup>th</sup> day of March, 1999.

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CERTIFICATE OF DELIVERY

I, CATHERINE L. BEGIC, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of March, 1999.

Catherine L. Begic  
CATHERINE L. BEGIC

DELIVERED this \_\_\_\_\_ day of March, 1999.

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