

1998

Utah v. Kelly Ray Deboard : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, :

Case No. 980387-CA

v. :

KELLY RAY DEBOARD, :

Priority No. 2

Defendant/Appellant. :

UTAH COURT OF APPEALS
BRIEF

UTAH

DOCUMENT

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DOCKET NO.

980387-CA

BRIEF OF APPELLEE

APPEAL FROM A SENTENCE FOR ATTEMPTED POSSESSION OF
A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR, IN
VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (1998), IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL L.
HUTCHINGS, PRESIDING

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Attorney for Appellant

Attorneys for Appellee

FILED
Utah Court of Appeals

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Defendant appeals from a sentence for attempted possession of a controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

**STATEMENT OF ISSUES
AND STANDARDS OF REVIEW**

Is defendant's claim that he was deprived of the right to counsel at his sentencing hearing moot when he was re-sentenced one month later with his counsel present?

Standard of Review: Whether an issue is moot raises a question of law. See State v. Rivera, 943 P.2d 1344, 1345-46 (Utah 1997). Because the trial court did not rule on this issue, there is no applicable standard of review.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

None.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

After a police officer found methamphetamine in defendant's pocket, defendant was charged with third degree felony unlawful possession of a controlled substance (R. 04-05). Defendant pleaded guilty on December 23, 1997, to class A misdemeanor attempted unlawful possession of a controlled substance (R. 25, 27). Defendant was represented by an attorney with the Salt Lake Legal Defender Association ("LDA") at his plea hearing (R. 10, 25-27).

After taking defendant's plea, the trial court set a sentencing date of February 25, 1998, and referred defendant to Adult Probation and Parole ("AP&P") for preparation of a presentence investigative report (R. 15, 18, 27). Defendant failed to make an appointment with AP&P and did not appear at his sentencing hearing (R. 15, 19). Accordingly, the trial court issued a bench warrant for defendant's arrest (R. 19, 20, 23). The warrant was recalled on March 12, 1998, after defendant posted a \$5,000 bond (R. 23, 28).¹ Sentencing was reset for April 3, 1998 (R. 29). A few days before this hearing, Deborah Kreeck Mendez, an attorney with LDA, filed a Notice of Substitution of Counsel (R. 32).

Defendant again failed to report to AP&P for his presentence report and the April 3rd

¹Defendant later claimed that he missed the February 25th sentencing hearing because of weather conditions (R. 61:4).

hearing was continued to May 13, 1998 (R. 33, 36). The trial court again instructed defendant to report to AP&P (R. 33).²

Defendant appeared without counsel at the May 13, 1998 sentencing hearing (R. 39; 61:3, 5) (a full transcript of that hearing is reproduced in Addendum A). Defendant still had not met with AP&P for a presentence report (R. 36; 61:3). Defendant told the trial court that he did not know who his attorney was and in effect requested another continuance (R. 61:3-5). The trial court expressed reluctance to continue sentencing yet a third time and stated, “What I’m going to do is set another sentencing date but order that you be held in the county jail until I impose sentence. AP&P will come and visit you in the county jail” (R. 61:5). Defendant then asked if he could obtain private counsel (R. 61:5). The trial court told defendant that he could retain private counsel if he liked, but pointed out that he had appointed counsel who had already been in contact with the court clerk (R. 61:5).

Defendant then asserted that he had been “working with law enforcement in some cases,” and that “they [were] supposed to have contacted you guys” (R. 61:6). Defendant encouraged the court to talk to a certain detective about his cooperation (R. 61:6). The court again expressed its reluctance to grant a third continuance, observing that it was “not that

²Because there are no minutes or record of appearances for the April 3, 1998 hearing, it is unknown whether defendant or his attorney attended that hearing. A notice rescheduling the sentencing hearing for May 13, 1998, however, was filed on April 3, 1998, and this notice instructed defendant to report to AP&P (R. 33). The State assumes that defendant received this notice since he appeared at the May 13, 1998 hearing (R. 33). That notice does not indicate whether defense counsel received notice of the May 13, 1998 hearing (R. 33).

tough” for defendant to have met with AP&P to complete a presentence report (R. 61:6). Despite defendant’s protest that he had “really [been] trying to get this thing resolved,” the court announced, “Well, I’m ordering you serve a term of 365 days in jail. I will review the decision which I have made on the 19th of June at 2:00 in the afternoon, I’ll see you back in court on that date and time” (R. 61:7). The court then entered a commitment order that sentenced defendant to serve 365 days in the county jail (R. 38;61:7) (the Commitment Order is reproduced in Addendum B).

Defendant filed a notice of appeal from the commitment order on June 12, 1998 (R. 58). Five days later, on June 19, 1998, the trial court resentenced defendant to a suspended 300 days in jail and three years probation (R. 55) (the Sentence, Judgment, and Order is reproduced in Addendum C). Defendant was represented by counsel at the June 19, 1998 sentencing hearing (R. 53).

SUMMARY OF ARGUMENT

Defendant’s argument that he was denied his federal and state constitutional right to be represented by counsel at the May 13th sentencing hearing is rendered moot by the subsequent June 19th sentencing hearing at which defendant had counsel. Because defendant has already received the relief he seeks, a sentencing hearing at which he was represented by counsel, remanding this case for a new sentencing hearing will not improve defendant’s position. Indeed, a remand will only require the trial court to hold a hearing identical to the one defendant received on June 19, 1998. This Court should therefore affirm defendant’s sentence.

ARGUMENT

POINT I

DEFENDANT’S CLAIM THAT HE WAS DENIED THE RIGHT TO COUNSEL AT SENTENCING IS MOOT BECAUSE HE WAS LATER RESENTENCED AT A HEARING IN WHICH HE WAS REPRESENTED BY COUNSEL.

Contending that he has a federal and state constitutional right to be represented by counsel at sentencing, defendant asserts that his sentence is invalid because his attorney was not present at the May 13, 1998 hearing when the trial court committed him to 365 days in jail. Brief of Appellant [hereinafter “Br. Aplt.”] at 4-7, 21. Defendant asks this court to vacate his sentence and to remand for a new sentencing hearing with counsel present. Br. Aplt. 7-8, 22.

The State agrees with defendant that sentencing is “a critical stage in a criminal proceeding,” at which a defendant has both a federal and state constitutional right to the assistance of counsel. State v. Martinez, 925 P.2d 176, 178 (Utah App. 1996), cert. denied, 934 P.2d 652 (Utah 1997); accord Mempa v. Rhay, 389 U.S. 128, 137, 88 S. Ct. 254, 258 (1967); State v. Casarez, 656 P.2d 1005, 1007 (Utah 1982). The State also does not dispute that defendant was unrepresented at the May 13, 1998 hearing. Nevertheless, defendant’s appeal is moot because he received the relief he now seeks on appeal at the June 19, 1998 hearing.

“An issue on appeal is considered moot when the requested judicial relief cannot

affect the rights of the litigants,”” and, in the case of a criminal conviction, there are no resulting adverse collateral legal consequences. Martinez, 925 P.2d at 177 (quoting State v. Sims, 881 P.2d 840, 841 (Utah 1994)). Here, defendant’s requested relief cannot affect his rights because, as stated, he has already received a sentencing hearing at which he had the assistance of counsel. Moreover, because the original 365-day jail sentence was replaced with a new sentence after a hearing with counsel, defendant cannot show any adverse collateral legal consequences from not having counsel at the May 13th hearing.

This Court addressed the mootness of the right to counsel at sentencing in a nearly identical situation in State v. Martinez, 925 P.2d 176 (Utah App. 1996). In that case, the defendant’s court-appointed counsel successfully moved to withdraw at the beginning of the sentencing hearing. Id. at 177. After allowing defense counsel to withdraw, the trial court committed the defendant to the custody of the Department of Corrections for a 60-day diagnostic evaluation. Id. The court set a new sentencing hearing for two months later. Id. The defendant appeared at the second sentencing hearing with new court-appointed counsel. Id. At that time, both defendant and her attorney addressed the court and both were afforded a full opportunity to present mitigating evidence before imposition of the sentence. Id.

Martinez challenged her sentence on appeal, arguing that she had been denied her constitutional right to the assistance of counsel at the first hearing when the court had ordered the 60-day diagnostic evaluation. Id. Like defendant here, Martinez asked this Court to vacate her sentence and to remand for a new sentencing hearing at which she could be

represented by counsel. Id. This Court refused because Martinez had already received her requested relief when the trial court afforded her a second sentencing hearing with counsel present. Id. The Court recognized that it could not put Martinez in a better position because she had already completed the 60-day evaluation ordered by the trial court at the first hearing and because she was represented by counsel at the second hearing. Id. The Court noted that Martinez had not suffered any adverse collateral legal consequences and observed that if it did remand for a new sentencing hearing, it “would be requiring the court to conduct another hearing identical to the [second] hearing.” Id. The Court therefore concluded that defendant’s claim was moot.³

As in Martinez, granting defendant a remand in this case will not place him in a better position. Although defense counsel was not present when the trial court sentenced defendant

³The Martinez Court also acknowledged that an exception to the mootness doctrine sometimes exists when an issue, although technically moot as to a particular litigant, “is likely to recur in a similar manner, and, because of the brief time any one person is affected, would otherwise likely escape judicial review.” Martinez, 925 P.2d at 177 (quoting Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981)). The Court concluded that this exception did not apply in Martinez because “the unique facts in the instant case present a situation that is unlikely to recur in a similar manner. In addition, it is well settled that sentencing is a critical stage in a criminal proceeding and that defendants have a right to counsel during sentencing.” Id. at 178. Although this case is evidence that these “unique facts” can recur, this case nevertheless presents a sufficiently peculiar situation that makes a common recurrence unlikely. Moreover, as this Court stated in Martinez, the underlying legal issue, that a defendant has a constitutional right to the assistance of counsel at a sentencing hearing, is well settled. Also, the defendants in both Martinez and this case were afforded the relief they sought soon after the alleged constitutional violation and long before their cases were heard on appeal. Under these circumstances, neither could show any prejudice. See id. at 177.

to 365 days in jail, the trial court resentenced defendant only one month later at a hearing in which defense counsel was present (R. 39, 53, 55, 61:3-7). Presumably, both defendant and his counsel were then given an opportunity to present mitigating evidence and to argue for a more lenient sentence.⁴

Significantly, defendant has not alleged on appeal that the trial court abused its discretion in imposing the final sentence of 300 days of suspended jail time and three years probation or that his sentence was otherwise unfair. Indeed, defendant appealed only from the original commitment order and not from the second sentence ordering probation. Defendant also does not explain what better result he could achieve on remand. Thus, if this Court were to vacate defendant's sentence and remand for a new sentencing hearing, it would only be requiring the trial court to hold another hearing identical to the June 19th hearing. See Martinez, 925 P.2d at 177.

In short, defendant simply has not shown how his requested relief would affect his position or that the May 13th hearing resulted in any adverse collateral legal consequences

⁴It is unknown exactly what transpired at the June 19, 1998 hearing as defendant has not provided a transcript of that hearing on appeal. In the absence of record evidence to the contrary, an appellate court presumes the regularity of the proceedings. State v. Linden, 761 P.2d 1386, 1388 (Utah 1988) (per curiam); State v. Robbins, 709 P.2d 771, 773 (Utah 1985). Defendant has not challenged the fairness of the June 19th hearing or asserted that he or his attorney were denied an opportunity to be heard. Indeed, defendant practically ignores the June 19th hearing, referring to it only in passing in his fact statement. Br. Aplt. 4. In any event, given that the trial court imposed a more lenient sentence after the second hearing, it would appear that defendant and his counsel were given an opportunity to fully, and successfully, argue defendant's position.

to him. Defendant's appeal, therefore, is moot.

CONCLUSION

Based on the foregoing, the State respectfully requests the Court to affirm defendant's sentence.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

The State does not believe that oral argument or a published opinion would be helpful because this case does not present any substantial or novel questions and appears to be controlled by this Court's prior opinion in State v. Martinez, 925 P.2d 176 (Utah App. 1996).

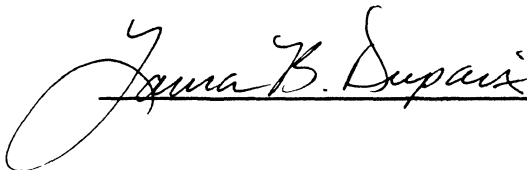
RESPECTFULLY SUBMITTED this 14th day of January, 1999.

JAN GRAHAM
ATTORNEY GENERAL


LAURA B. DUPAIX
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 14th day of January, 1999, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to Catherine L. Begic, Attorney for Appellant, at Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.


LAURA B. DUPAIX

ADDENDUM A

Transcript of May 13, 1998 Sentencing Hearing

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

DEFENDANT.

2. Suzy Carlson
Deputy Clerk

SENTENCING

* * * * *

SALT LAKE CITY, UTAH 84111

MAY 13, 1998

FILED

Utah Court of Appeals

SEP 02 1998

Julia D'Alesandro
Clerk of the Court

ORIGINAL

FILED

Utah Court of Appeals

~~AUG 4~~ 1998

Julia D'Alesandro
Clerk of the Court

000061

981387-VA

P R O C E E D I N G S

THE COURT: Mr. Deboard? If Mr. Deboard is present, would you come forward?

Mr. Deboard, we were to impose sentence here today and I've received a note that you have not gone over for a presentence report.

THE DEFENDANT: I was -- went down and got the papers last time I left court, they said to call the number that was on the presentence report or I could just mail it in. It's supposed to be handled by Wade Smith. And I don't know who my attorney is because my other one I guess she had her last day right before my last court date, they told me that day that it was Debbie or something.

THE COURT: Are you still out on bond?

THE DEFENDANT: Yes, I am.

THE COURT: With Statewide?

THE DEFENDANT: Yes, and Hy & Mike's also.

THE COURT: Have you had some new arrests?

THE DEFENDANT: No, I haven't.

THE COURT: I think this is about the second time we've continued your sentencing; is that right?

THE DEFENDANT: This is correct.

THE COURT: So have we already continued it

1 twice?

2 THE DEFENDANT: No, this --

3 THE COURT: This will be the second one?

4 THE DEFENDANT: Yes.

5 THE COURT: Let's see, so you entered a
6 plea on --

7 THE DEFENDANT: December 23rd.

8 THE COURT: Yeah, and failed to appear on
9 the 25th of February.

10 THE DEFENDANT: Yeah, that's when we got
11 snowed in up in the canyon. And I had called the
12 courts and was supposed to come in and get a court
13 date and I thought they were going to mail me a court
14 date.

15 THE COURT: And you came in on the 17th of
16 March and cleared that warrant?

17 THE DEFENDANT: Yes.

18 THE COURT: And we set the sentencing over
19 to --

20 THE DEFENDANT: Last month on the 3rd.

21 THE COURT: The 3rd of April and you didn't
22 report for the presentence report?

23 THE DEFENDANT: I had no idea that I was
24 supposed to.

25 THE COURT: So this would be our third

1 continuance if we did that today?

2 THE DEFENDANT: It would.

3 THE COURT: Yeah, I'm hesitant to do that.
4 What I'm going to do is set another sentencing date
5 but order that you be held in the county jail until I
6 impose sentence. AP&P will come and visit you in the
7 county jail.

8 THE DEFENDANT: I -- is there a -- can I
9 get private counsel?

10 THE COURT: You can hire your own lawyer if
11 you like.

12 THE DEFENDANT: Could I --

13 THE COURT: But we have a legal defender
14 who will represent you in the case --

15 THE DEFENDANT: Could I --

16 THE COURT: -- who has already contacted
17 the clerk of the court.

18 THE DEFENDANT: Could I speak with you
19 about these in private?

20 THE COURT: I can't speak with you in
21 private. If you want to speak here on the record
22 here in court.

23 THE DEFENDANT: Okay.

24 THE COURT: But I've got these rules that
25 I've obviously got to follow.

1 THE DEFENDANT: I've been working with law
2 enforcement in some cases, they are supposed to have
3 contacted you guys. I've been trying to get these
4 matters resolved for a long time now and they have --
5 you know, I don't know what's going on with --

6 THE COURT: Well, all I know is I haven't
7 been contacted recently by law enforcement.

8 THE DEFENDANT: You can talk to Detective
9 Odor.

10 THE COURT: But nonetheless, I mean this is
11 the third time around for us. I just don't think we
12 can do that anymore. We need to get this case
13 resolved.

14 THE DEFENDANT: If you want to go with --

15 THE COURT: Well, you haven't gone over for
16 the presentence reports. I've ordered you to do
17 things that you have not done and we're in a
18 situation here where I've got to impose sentence and
19 I have incomplete information here. Yes, you have
20 appeared today --

21 THE DEFENDANT: I've really been trying to
22 do --

23 THE COURT: It's not that tough. All you
24 have to do is go over to the presentence office and
25 say Judge Hutchings has given me this and then

1 they'll tell you a time to come back and sit down and
2 talk with them.

3 THE DEFENDANT: They told me that I could
4 mail my presentence report to them. I've talked to
5 Mr. Witchman over at AP&P, he's been involved with
6 Odor and myself and several others. I've been really
7 trying to get this thing resolved.

8 THE COURT: Well, I'm ordering you serve a
9 term of 365 days in jail. I will review the decision
10 which I have made on the 19th of June at 2:00 in the
11 afternoon, I'll see you back in court on that date
12 and time. Thank you.

13 (Whereupon the matter was concluded.)
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ADDENDUM B

Commitment Order from May 13, 1998 Hearing

Third Circuit Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

State of Utah
Plaintiff

vs

Kelly Deboard

Address

DOB

Defendant

COMMITMENT

After Judgment

Case No.

971922472

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE STATE OF UTAH:

On the 13 day of may, 1998, the above named defendant was brought before a judge of the Circuit Court, Salt Lake County, State of Utah, charged with having committed the crime of Att pass C/S.

The defendant was found guilty and was sentenced to pay a fine of \$ — and to serve 35 days in the County Jail with — days in the jail to be suspended upon payment of the fine on or before FW;

The fine has not been paid, nor secured, nor has an appeal been taken;

You are hereby commanded to take said defendant into custody and safely keep until he/she shall serve out the above-named term of imprisonment or shall pay \$ — not to exceed one day for each — of fine.

Dated may 13, 1998

Michael J. Hatching

by

Circuit Judge/Commissioner

STATE OF UTAH DEPARTMENT OF JUSTICE

ADDENDUM C

Sentence, Judgment, and Order from June 19, 1998 Hearing

Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/ORDER Criminal/Traffic

TY/STATE F
-VS-

Plaintiff

Case Number 971922472

Tape number _____ C # _____

Date 4/19/98 Time _____

Judge/Comm MLH

Clerk JB

Kelly Deboard
Defendant

OB: ____/____/____

terpreter _____

HARGES _____

Plaintiff Counsel _____

Defense Counsel _____

Amended _____

Amended _____

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

1) Jail 300 days Suspended all
Defendant to Commence Serving Jail Sentence _____

2) Fine Amt. \$ _____ Susp. \$ _____ Fee \$ _____ Fine Bal \$ _____

TOTAL FINE(S) DUE \$

Payment Schedule: Pay \$ _____ per month/1st Pmt. Due _____ Last Pmt. Due _____

3) Court Costs \$ _____

4) Community Service/WP _____ through _____

5) Restitution \$ _____ Pay to: ☐ Court ☐ Victim ☐ Show Proof to Court

Attorney Fees \$ _____

6) Probation 3 yrs ☐ Good Behavior ☐ AP&P ☒ ACEC ☐ Other

(7) Terms of probation:

☒ No Further Violations

☐ AA Meetings _____ / wk _____ / month

☒ Follow Program report regularly

☐ No Alcohol

☐ Antibuse

☐ Employment _____

☐ Proof of _____

☒ Counseling thru ACEC

☐ Classes _____

☐ In/Out Treatment _____

☒ Health Testing LIA's 1 every 2 wks

☐ Crime Lab Procedure

☒ no association w/ anyone w/

☒ uses drugs or places

(8) Plea in Abeyance Diversion _____

(9) Review ____/____/____ at _____

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

District Court Judge _____