1998

State of Utah v. Terry Ray Miller : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
		Case No. 981179-CA
Plaintiff/Appellee,	:	
vs.	:	
		Priority No. 2
TERRY RAY MILLER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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AN APPEAL FROM AN ORDER REVOKING DEFENDANT'S PROBATION AND EXECUTING HIS SENTENCES FOR ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1996), TWO COUNTS OF POSSESSION OF A CONTROLLED SUBSTANCE, THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1996), ONE COUNT OF POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (1996), AND ONE COUNT OF CARRYING A CONCEALED WEAPON, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-10-504 (SUPP. 1995), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Defendant, Terry Ray Miller, appeals from an order revoking his probation and executing his sentences for one count of possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1996), two counts of possession of a controlled substance, third degree felonies, in violation of Utah Code Ann. § 58-37-8 (1996), one count of possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1996), and one count of carrying a concealed weapon, a class B misdemeanor, in violation of Utah Code Ann. § 76-10-504 (Supp. 1995). This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Was defendant's right to have counsel present at his probation violation hearing violated where the trial court informed defendant of his right to counsel and defendant nevertheless decided to waive that right?

STANDARD OF REVIEW: An appellate court reviews the question of whether the right to counsel has been properly waived for correctness, granting the district court a reasonable measure of discretion when applying the law to the facts. State v. Byington, 936 P.2d 1112, 1115 (Utah App. 1997) (citing State v. McDonald, 922 P.2d 776, 780-81 (Utah App. 1996)).

2. Did the district court's failure to serve an order to show cause on defendant prior to his probation violation hearing deprive the court of subject matter jurisdiction?

STANDARD OF REVIEW: Because this issue was not raised or addressed below, no standard of review is applicable.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of all constitutional provisions, statutes, and rules pertinent to the resolution of the issues before this Court is contained in the body of this brief.

STATEMENT OF THE CASE

This is a joint appeal of two district court cases, Second Judicial District Court Nos. 951900423 and 951900659.[1]

On May 15, 1995, defendant Terry Ray Miller was charged by information with two counts of possession of a controlled substance with intent to distribute, one a second degree felony and the other a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1996), and one count of possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1996) (R. I:1-3). On July 19, 1995, defendant pleaded guilty to two counts of possession of a controlled substance, third degree felonies, in violation of Utah Code Ann. § 58-37-8 (1996) (R. I:25-37).

Subsequently, on August 1, 1995, defendant was charged by information with one count of possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1996), one count of possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1996), and two counts of carrying a concealed weapon, class B misdemeanors, in violation of Utah Code Ann. § 76-10-504 (Supp. 1995)(R. II:1-9). After one of the counts of carrying a concealed weapon was not bound over for trial (R. 16), defendant pleaded guilty to one

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[1] The records below are each individually paginated beginning with page one. Because the record in case no. 951900423 is labeled volume I and the record in case no. 951900659 is labeled volume II, this brief will refer to specific pages in each record by the volume number followed the page number. For example, page four of the record in case no. 951900423 will be cited as R. I:4.

count of possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1996), one count of possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1996), and one count of carrying a concealed weapon, a class B misdemeanor, in violation of Utah Code Ann. § 76-10-504 (Supp. 1995) (R. II:21-27).

On August 31, 1995, the district court sentenced defendant in both cases. In case no. 951900423, the court ordered defendant to serve two indeterminate terms of zero-to-five-years in the Utah State Prison (R. I:44-46). In case no. 951900659, the court ordered defendant to serve an indeterminate term of one-to-fifteen years in the Utah State Prison for the second degree felony count and one year in the Weber County Jail for the class B misdemeanor counts (R. II:28-30). However, the court suspended defendant's sentences and placed him on probation subject to certain terms and conditions (id.). The terms of defendant's probation included provisions that defendant submit to probation supervision by the Utah State Department of Adult Probation and Parole, pay for probation supervision fees, and not possess any controlled substances (id.).

On December 12, 1996, Probation Officer Larry Chatterton filed an affidavit in both cases indicating that defendant had violated his probation by possessing a controlled substance (R. I:48-49, II:33-34). A hearing was held in January 1997 and defendant's probation was restarted in both cases with additional conditions (R. I:52-53, II:46-47).

On March 4, 1997, Probation Officer Blake G. Woodring filed an affidavit in case no. 951900423 indicating that defendant had violated his probation by absconding probation supervision (R. I:59-60). On January 12, 1998, Probation Officer Andrew McCain filed an affidavit in case no. 951900659 indicating that defendant had violated his probation by having twice possessed controlled substances and by failing to make probation supervision payments (R. II:48-49). However, no order to show cause appears in either case file. At a hearing on February 2, 1998, defendant waived his right to have counsel present and admitted that he had violated his probation (R. 87:1-3). Following two other hearings on February 23 and March 9, 1998 (R. I:64-65, II:55-56, 88:1-14, 89:1-8), at which defendant was represented by counsel, defendant's probation was revoked and his sentences in both cases were reinstated with the prison terms to run concurrently (R. I:68-69, II:57-58).

Defendant's timely notices of appeal ensued (R. I:74-75, II:67-68).

STATEMENT OF THE FACTS

No statement of facts beyond those set forth above is necessary to resolve the issues presented on appeal.

SUMMARY OF ARGUMENT

Defendant raises two issues on appeal: first, he contends that the trial court erred by permitting him to admit that he violated his probation without having counsel present. Specifically, defendant claims that he was entitled to the extensive admonitions regarding

self-representation as discussed in Faretta v. California, 422 U.S. 806, 835 (1975). However, as this Court has previously held in State v. Byington, 936 P.2d 1112 (Utah App. 1997), the exacting Faretta standard for effecting a proper waiver of counsel applies only to the waiver of a constitutional right to counsel which is not applicable here. Thus, under Byington, the colloquy in this case was sufficient to render defendant's waiver of his statutory right to counsel proper. Second, defendant claims that the district court lacked subject matter jurisdiction because the court failed to serve an order to show cause on him prior to his probation violation hearing. However, failure to serve an order to show cause does not deprive a district court of subject matter jurisdiction. Accordingly, defendant's conviction is entitled to affirmance on appeal.

ARGUMENT

POINT I

DEFENDANT'S RIGHT TO HAVE COUNSEL PRESENT AT HIS PROBATION HEARING WAS NOT VIOLATED BECAUSE HE VALIDLY WAIVED THAT RIGHT.

On appeal, defendant argues that the district court erred by allowing him to admit that he violated the terms of his probation without having counsel present at his probation violation hearing. Aplt. Brief at 10-13. Specifically, defendant claims that under Faretta v. California, 422 U.S. 806, 835 (1975), the district court should have engaged defendant in an extensive colloquy concerning self-representation prior to accepting his waiver.

This Court has previously addressed the very argument raised by defendant here in State v. Byington, 936 P.2d 1112 (Utah App. 1997). In Byington, the Court held that the assistance of counsel at a probation revocation hearing is constitutionally guaranteed only in certain, limited circumstances. Id. at 1115. Specifically, counsel should be provided only in cases where, after being informed of his right to request counsel, the probationer

> "makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present."

Id. (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)). Additionally, in passing on a request for appointment of counsel, the district court should also consider whether the probationer appears to be capable of speaking effectively for himself. Id. at 1115-1116 (citing Gagnon, 411 U.S. at 790-91). Thus, "to protect the constitutional right to counsel, a trial court must 'determine if this waiver is a voluntary one which is knowingly and intelligently made.'" Id. at 1116 (quoting State v. Frampton, 737 P.2d 183, 187 (Utah 1987)) (citing Godinez v. Moran, 509 U.S. 389, 400-04 (1993)).

In this case, defendant did not contest the alleged probation violations, nor did he present any argument regarding why his probation should not have been revoked (R. 87:2-3). As noted by the Scarpelli Court, a probationer's "admission to having

committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided." Scarpelli, 411 U.S. at 791; accord Byington, 936 P.2d at 1116. Therefore, as in Byington, defendant was not constitutionally entitled to counsel at his probation revocation hearing.

Nor was defendant denied his statutory right to counsel under the circumstances of this case. Although defendant was entitled to counsel at the probation revocation hearing under Utah Code Ann. § 77-18-1(12)(c)(iii) (Supp. 1996), this Court held in Byington that "the strict Frampton standards for safeguarding the constitutional right to counsel do not apply where the right to counsel is provided for by statute because procedural rights do not generally warrant the same protections as do constitutional rights." Id. (citing People v. Clark, 510 N.E.2d 1256, 1257-58 (Ill. App. Ct. 1987); Jester v. Board of Probation & Parole, 595 A.2d 748, 751 (Pa. Commw. Ct. 1991); State v. Conlin, 744 P.2d 1094, 1096 (Wash. Ct. App. 1987)); cf. Neel v. Holden, 886 P.2d 1097, 1104 (Utah 1994) (explaining analytical distinction between statutory and constitutional right to counsel). Instead, "waiver of a statutory right to counsel is proper as long as the record as a whole reflects the probationer's reasonable understanding of the proceedings and awareness of the right to counsel." Byington, 936 P.2d at 1117 (citing Coon v. State, 675 So. 2d 94, 96-97 (Ala. Crim. App. 1995); Clark, 510 N.E.2d at 1258; Jester, 595 A.2d at 751; Conlin, 744 P.2d at 1096). As with the standard for waiving the constitutional right to counsel, there is no bright-line test for determining whether the probationer has properly waived

his statutory right to counsel; instead, it will depend upon "' the particular facts and circumstances surrounding each case.'" Id. (quoting Frampton, 737 P.2d at 188).

In this case, the following colloquy took place at a hearing on February 2, 1998:

> THE COURT: Yeah. You understand that you've been vio--or charged with violating your probation, Mr. Miller.
>
> MR. MILLER: Yes.
>
> THE COURT: Two different cases.
>
> MR. MILLER: Yes.
>
> THE COURT: You understand that you're entitled to be represented by an attorney. If you can't afford one, we'll provide one.
>
> MR. MILLER: Yes.
>
> THE COURT: Did you want to talk to an attorney about this?
>
> MR. MILLER: No.
>
> THE COURT: You understand that you're entitled to deny the affidavit and have a hearing on the issue of whether you did or didn't violate your probation.
>
> MR. MILLER: Yes.
>
> THE COURT: Is that--what--what would you like to do?
>
> MR. MILLER: I'll just--I just want to plead to it.
>
> THE COURT: All right. To the charge of having violated your probation as outlined in the affidavit on the two cases, do you admit that or deny it, Mr. Miller?
>
> MR. MILLER: To one and two?

THE COURT: Yeah.

MR. MILLER: I admit it.

THE COURT: All right. We'll refer the thing back to probation for an updated report. What we'd like you to do is talk to Mr. Woodring there. What, the 23rd maybe?

MR. WOODRING: Yeah.

THE COURT: All right. We'll want you back here on the 23rd of February at two o'clock in the afternoon for sentencing.

MR. MILLER: Okay.

(R. 87:2-3).

It is readily apparent from this colloquy that the defendant was specifically informed of the allegations against him and told that counsel would be appointed if he requested. Furthermore, the district court made defendant aware of the consequences of his probation being revoked by informing him that he had to return on February 23 for sentencing. Thus, the district court did not err in accepting defendant's waiver of his statutory right to counsel in this case.[2]

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[2] Moreover, even if the district court had erred by allowing defendant to admit to violating his probation without counsel present, any alleged error was corrected by the fact that defendant did have counsel at two other hearings prior to his being sentenced as a result of his probation violation (R. 88:1-14, 89:1-8). If defendant had any basis for objecting to his probation being revoked, defense counsel undoubtedly would have raised such an objection at the subsequent hearings. He did not.

POINT II

THE DISTRICT COURT'S FAILURE TO SERVE AN ORDER TO SHOW CAUSE UPON DEFENDANT PRIOR TO HIS PROBATION REVOCATION HEARING DID NOT DEPRIVE THE COURT OF SUBJECT MATTER JURISDICTION.

On appeal, defendant contends that the district court's failure to serve an order to show cause on him prior to his probation violation hearing deprived the court of subject matter jurisdiction. Aplt. Brief at 13-16. However, in support of the merits of this argument, defendant cites only one case, State v. Grate, 947 P.2d 1161 (Utah App. 1997), which is inapposite to the present case. Grate involved the question of whether the district court had jurisdiction to revoke Grate's probation where he was not charged with a probation violation until after his original probation term expired. Id. at 1163. Here, it is undisputed that all relevant events occurred within defendant's probationary period. In fact, defendant has not, and indeed cannot, argue that the district court acted after his probation expired because his probation does not expire until January 2000 (R. I:52-53, II:46-47). Moreover, Grate concerned the district court's *personal* jurisdiction over Grate, not its *subject matter* jurisdiction. See id. at 1166 ("our supreme court [has] identified the procedures a trial court must complete to retain jurisdiction *over a probationer* after the expiration of that probationer's initial term") (emphasis added) (citing Smith v. Cook, 803 P.2d 788 (Utah 1990)). Thus, Grate is not relevant here. Nor does the statute at issue, Utah Code Ann. § 77-18-1 (Supp. 1996), address subject matter jurisdiction under

the circumstances of this case. In short, defendant has failed to cite, and the State has been unable to find, *any* authority for the proposition that failure to serve an order to show cause upon a defendant prior to his probation violation hearing deprives a district court of subject matter jurisdiction. Because an appellant's failure to adequately brief an issue is fatal to consideration of that issue on appeal, see State v. Thomas, 961 P.2d 299, 304-05 (Utah 1998), defendant's subject matter jurisdiction argument fails.[3]

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[3] Moreover, even if this Court recasts defendant's argument as a due process claim (lack of notice), which it more properly is, see State v. Rawlings, 893 P.2d 1063, 1067 (Utah App. 1995), it is still of no avail to defendant for several reasons. First, defendant did not preserve this argument below. It is well settled that "a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claims on appeal." State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) (quoting State v. Tillman, 750 P.2d 546, 551 (Utah 1987)). The reason for this rule is to allow the trial court a fair opportunity to address and, if appropriate, cure the claimed error. State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991). Here, defendant did not object to the lack of an order to show cause at any of the three hearings regarding the revocation of his probation (R. 87:1-3, 88:1-14, 89:1-8); thus, the district court was never given the opportunity to ensure that an order to show cause was made part of the record. Second, on appeal defendant does not rely on plain error or exceptional circumstances to circumvent the preservation requirement. See State v. Dunn, 850 P.2d 1201, 1208 09 (Utah 1993) (stating elements of plain error); State v. Irwin, 924 P.2d 5, 7, 11 (Utah App. 1996) (limiting "exceptional circumstances" to "rare procedural anomalies"), cert. denied, 931 P.2d 146 (Utah 1997). This omission is fatal to defendant's claim. Merely briefing an unpreserved issue on appeal is insufficient to satisfy the preservation requirement. Where an appellant "does not argue that 'exceptional circumstances' or 'plain error' justifies a review of the issue, [this Court will] decline to consider it on appeal." State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995) (citation omitted); accord State v. Jennings, 875 P.2d 566, 570 (Utah App. 1994) (declining to address issue where defendant briefed it on appeal, but did not assert either exceptional circumstances or plain error). Lastly, the district court's failure to serve an order to show cause on defendant prior to his probation revocation hearing did not violate his due process rights because defendant has not shown how receipt of an order to show cause would have "'substantially further[ed] the accuracy and reliability of the . . . fact finding process.'" State v. Byington, 936 P.2d 1112, 1117 (Utah App. 1997) (quoting Neel v. Holden, 886 P.2d 1097, 1103 (Utah 1994)). This is especially true here where defendant was informed of the time and place of the hearing and of his right to be represented by counsel and present evidence. Thus, the purposes of the order to show cause, see Utah Code Ann. § 77-18-1(12)(c) (Supp. 1996), were met in this case.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction.

ORAL ARGUMENT and PUBLISHED OPINION NOT REQUESTED

Oral argument would not significantly aid the Court in deciding this case. Moreover, because this case raises no novel question of law, a published opinion would add nothing to the body of Utah law.

RESPECTFULLY SUBMITTED this 25th day of March, 1999.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed by first class mail this 25th day of March, 1999, to the following:

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