

1989

The State of Utah v. Frank David Gentry : Reply Brief of Appellant

Utah Court of Appeals

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BRIEF

**UTAH
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DOCKET NO.

890145-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff/Respondent,)	REPLY OF APPELLANT
)	
vs.)	
)	Case No. 890145-CA
FRANK DAVID GENTRY,)	
)	
Defendant/Appellant.)	
)	

Appeal from a conviction and judgment of theft, a felony of the third degree, in the Fifth District Court, in and for Iron County, State of Utah, the Honorable J. Philip Eves, Judge, presiding.

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STATEMENT OF ISSUES

1. Is there an additional requirement under Utah Code Ann. §77-35-29(c) to file an objection if the trial judge fails to dispose of a motion to disqualify the judge before proceeding?
2. Did the defendant waive his right to move the trial court for a new trial?
3. Does the "whole record test" adequately demonstrate that the trial judge strictly complied with Rule 11 and the existing case law before accepting the defendant's guilty plea?

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of statutes and rules cited herein have been set out in defendant's brief.

The "whole record test" does not support the finding that the defendant entered his plea knowingly, voluntarily and intelligently. In addition, the trial court must strictly comply with Rule 11, Utah Rules of Criminal Procedure, to determine that the defendant fully understands the facts and elements he is pleading to. The "whole record test" is insufficient to comply with Rule 11 and the constitutional safeguards which have been established through case law to ensure at the time the defendant enters his plea, he fully understands what he is doing and the consequences.

ARGUMENT

POINT I

DEFENDANT DID NOT WAIVE HIS CLAIM THAT
THE TRIAL JUDGE SHOULD BE DISQUALIFIED.

Defendant should not be prejudiced by his trial counsel's ineffective assistance. Trial counsel, among other things, should have moved to disqualify the trial judge. Present counsel so moved upon verification of supporting facts.

Utah Code Ann. §77-35-29(c) specifically requires that the judge proceed no further until the challenge is disposed of. The statute is clear and no objection is required.

The situation is not analogous to objections at trial or a motion for a new trial. The statute requires the challenged

judge to proceed no further. It would be nonsensical to file a motion with the court to remind the court or point out to the court not to forget to rule on defendant's motion and affidavit to disqualify the trial judge. Given the sensitive nature of these motions, defendant would submit that the clerk, if not seen by the trial judge, would certainly bring this type of motion to the attention of the court. Filing a second motion or objection does not provide any assurance that the court or clerk would view that motion or objection. Therefore, respondent's position that counsel failed to object is not well taken and not a prerequisite for the trial judge to proceed no further.

Defendant's motion was timely filed and not waived. Accordingly, the trial judge erred in not disposing of the challenge before proceeding.

POINT II

DEFENDANT DID NOT WAIVE CONSIDERATION OF HIS MOTION FOR A NEW TRIAL.

The position asserted by the State that defendant's motion for a new trial is waived for failing to seek a ruling from the trial court is misplaced because of what transpired at the first hearing before the trial court on May 1, 1989.

On May 1, 1989, defendant's motion to withdraw his plea was heard. Current counsel informed the trial judge that defen-

dant has numerous motions to be made now and later. It was decided that defendant's motion to withdraw his plea would be decided before any other motions were presented. At first, the trial judge indicated defendant's motion would take ten minutes. After hearing argument of counsel, the trial judge continued the matter to give the State an opportunity to review the record and respond. Thereafter, the defendant would be able to respond to the State.

The trial court continued the hearing until June 5, 1989, over the defendant's objection. The State never filed any additional response. On Thursday, June 1, 1989, current counsel called the prosecutor to see if the parties could resolve the issues. Negotiations were unsuccessful, and both counsel concurred the matter would be argued on Monday, June 5, 1989. Defendant and counsel appeared in Parowan on June 5, 1989. The trial judge and the prosecutor were not present.¹

Current counsel raised each issue as soon as facts, issues and information were obtained and verified. Having not tried the case, current counsel needed the trial transcript and copies of other relevant documents to review before raising each issue. Meanwhile, this court temporarily stayed the appeal to

¹Current counsel was informed that the Clerk forgot to put the matter on the trial Judge's calendar.

have the trial court rule on the defendant's motion to withdraw his plea and instructed counsel to notify this court as soon as the trial court ruled. Wherefore, defendant did not waive his right to move for a new trial. Moreover, the State failed to respond to defendant's motion which now stands unopposed.

POINT III

THE WHOLE RECORD TEST FAILS TO SUPPORT THE
TRIAL COURT'S FINDINGS THAT THE DEFENDANT
KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED
HIS GUILTY PLEA AND SHOULD NOT BE ADOPTED.

In Point III of the State's brief, it asserts that this court should not require strict compliance with Rule 11, Utah Rules of Criminal Procedures, and existing case law, all of which requires the trial court to explain the facts and elements of the crime the defendant is pleading to so that the defendant clearly understands what he is pleading to when he admits his guilt. The "whole record test" asserted by the State is a dangerous, confusing, and an inadequate substitute. Moreover, this test will be forever cumbersome to the appellate courts when called upon to review voluminous pages of trial transcripts, entry of plea transcripts, and preliminary hearing transcripts.

The State overlooks the serious nature of pleading to a crime and the constitutional safeguards that must be followed.

The "whole record test" is not an adequate substitute for the trial courts to fall back on when compliance with Rule 11 has been overlooked for whatever reason.

The trial courts must be required, as part of accepting a defendant's plea of guilty to a crime, to explain the elements of the crime that the State must prove beyond a reasonable doubt and ask the defendant if he understands those elements. Next, the trial court must explain to the defendant the facts of the crime as they relate to the elements the State is alleging the defendant committed. The trial court must establish on the record that the defendant understands the facts as they relate to the elements. Of equal importance, the trial court must ask the defendant if he has done that which he is accused of and how he wishes to plead.

This line of questions, which usually takes five to ten minutes, must be done at the time the defendant is entering his guilty plea.

It is interesting to note that the trial court required an affidavit² to be completed when the defendant plead not

²Defendant submitted a sample affidavit (which has now been modified) to the trial court (See R. 252). Without exception, the Third District Court requires defense counsel to properly prepare the defendant's affidavit, which contains the elements and facts and all of the defendant's rights he gives up when a guilty plea is made, and the affidavit requires defense counsel and the prosecutor to review and sign prior to a plea being

guilty, but failed to adhere to this requirement when the defendant was called on to plead guilty.

In its response, the State dances around the existing case law and suggests that the "whole record test" should be adopted and followed as the norm. Then the State points out that sometimes the judge overlooks parts of Rule 11. In the instant case, the trial court overlooked the very core and purpose of Rule 11 and the existing case law which demands that a defendant, on the record, understands the elements of the crime he is pleading to and the facts he is accused of committing as they relate to the elements. McCarthy v. United States, 394 U.S. 459 (1969).

Defendant submits that there is no adequate substitute for demonstrating on the record at the time the plea is entered the defendant's understanding of the elements and facts to which he is pleading. Id. at 466, 467, 470. Strict compliance with Rule 11 is necessary and essential for the trial court to meet its burden of ensuring that constitutional requirements are

entered. The trial court then goes through all the facts and elements with the defendant to make sure the defendant fully understands the facts and elements on the record. It is not uncommon for the trial court to stop the pleading process if the affidavit incorrectly states the elements and/or the facts do not support the crime alleged. After the trial court determines that the defendant fully understands the facts and elements, all of the rights he is waiving, and the defendant still wishes to plead guilty and is doing so voluntarily, knowingly, and intelligently, the trial court requests that the defendant sign the affidavit and state how he pleads.

complied with when a guilty plea is entered. State v. Gibbons,
740 P.2d 1309, 1313 (Utah 1987).

RESPECTFULLY SUBMITTED this 6 day of April, 1990.

George T. Waddoups
GEORGE T. WADDOUPS

Attorney for Appellant

CERTIFICATE OF SERVICE

I, George Waddoups, hereby certify that seven copies of
the foregoing were hand delivered to the Utah Court of Appeals,
230 South 500 East, #400, Salt Lake City, Utah, 84102, and four
copies were hand delivered to the Attorney General's Office, R.
Paul Van Dam and Sandra Sjogren, 236 State Capitol, Salt Lake
City, Utah, 84114, this 6 day of April, 1990.

Delivered by George Waddoups this 9 day of April, 1990.

George T. Waddoups