

1998

State of Utah v. Bruce Elliot Johnson : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Utah Attorney General; Attorney for Respondent.

Dale W. Sessions, Esq.; Public Defender Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

v.

BRUCE ELLIOT JOHNSON,

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 981705-CA
CLASSIFICATION PRIORITY "2"

BRIEF OF APPELLANT

Appeal from a Judgment, Sentence and Commitment of the Fifth Judicial District Court, in and for Iron County, State of Utah, after jury trial, the Honorable Robert T. Braithwaite, District Judge, presiding.

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FILED

Utah Court of Appeals

APR 23 1999

Julia D'Alesandro
of the Court

FILED

APR 14 1999

FILED

APR 23 1999

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

<p>STATE OF UTAH, Plaintiff/Respondent, v. BRUCE ELLIOT JOHNSON, Defendant/Appellant.</p>	<p>STATEMENT THAT NO ADDENDUM IS REQUIRED IN THIS APPEAL</p> <p>Case No. 981705-CA CLASSIFICATION PRIORITY "2"</p>
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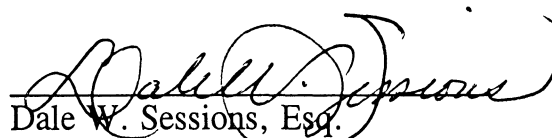
COMES NOW Defendant/Appellant, by and through counsel and states that in this appeal, no Addendum is required.

Dated this 22ND day of April, 1999.


Dale W. Sessions, Esq.

MAILING CERTIFICATE

I hereby certify that on the 22ND day of April, 1999, a copy of the foregoing STATEMENT THAT NO ADDENDUM IS REQUIRED IN THIS APPEAL was mailed to the following: Jan Graham, Utah Attorney General, 236 State Capitol, Salt Lake City, UT 84111.


Dale W. Sessions, Esq.

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IN THE UTAH COURT OF APPEALS

<p>STATE OF UTAH, Plaintiff/Respondent, v. BRUCE ELLIOT JOHNSON, Defendant/Appellant.</p>	<p>BRIEF OF APPELLANT</p> <p>Case No. 981705-CA CLASSIFICATION PRIORITY "2"</p>
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BRIEF OF APPELLANT

Appeal from a Judgment, Sentence and Commitment of the Fifth Judicial District Court, in and for Iron County, State of Utah, after jury trial, the Honorable Robert T. Braithwaite, District Judge, presiding.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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BRUCE ELLIOT JOHNSON,

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 981705-CA
CLASSIFICATION PRIORITY "2"

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction of this matter because this case is an appeal from a court of record in a criminal case not involving a conviction of a first-degree or capital felony. Utah Code Ann. § 78-2a-3(2)(e)(1998).

ISSUES FOR DETERMINATION

In the Court below, Defendant/Appellant filed his own docketing statement and identified his own issues for appeal. Present counsel will address those issues as follows:

ISSUE 1: Was Defendant illegally bound over for trial in the District Court?

ISSUE 2: Were Defendant's 6th Amendment Rights violated when Defendant was located 200 miles from the trial judge, the county attorney or the public defender?

ISSUE 3: Did the Court err in permitting a continuance by Defendant's counsel when the continuance was not approved by the Defendant?

ISSUE 4: Was possible failure to investigate prospective witnesses on the

part of Defense Counsel ineffective assistance of counsel?

The standard of review for Issue 1: Question of Law

The standard of review for Issue 2: Question of Law

The standard of review for Issue 3: Abuse of discretion

The standard of review for Issue 4: Question of Fact and Law

TEXT OF AUTHORITIES

In *State v. Templin*, 805 P.2d 182, the court followed the analysis and decision result in *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. In *Strickland*, the Court set out a two part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal action against Defendant for two counts of Distribution of a Controlled Substance, a second-degree felony.

B. Course of the Proceedings

Trial of the above-referenced matter was conducted on September 3, 1998 for the instant charges. At the arraignment Defendant's counsel entered plea of not guilty

for the Defendant. At the Preliminary Hearing the evidence was presented and the Defendant was bound over. Trial, by jury, was then held on the above mentioned date.

C. Disposition at Trial Court

Judgment, according to the jury verdict, was then entered against Defendant and he was committed to the Utah State Prison.

D. Statement of Facts

Defendant was initially charge with two counts of Distribution of a Controlled Substance, a second degree felony. After testimony in the Preliminary Hearing Defendant was bound over for trial in the District Court. In the trial on September 3, 1998, Defendant was found guilty of the instant charges.

SUMMARY OF ARGUMENT

ISSUE I: In good faith counsel cannot identify a basis in the record for Defendants contention on this issue.

ISSUE II: In good faith counsel cannot identify a basis in the record for Defendant's contention on this issue. Nothing in the Sixth Amendment prohibits Defendant from being moved to or warehoused in a jail at any particular location. The record is void of any reference to such an issue being preserved at the trial level.

ISSUE III: There is no reference in the record to any objection to continuance. This issue was not preserved at the trial court level. In any event, it is doubtful such a continuance had any particular effect on the outcome of the trial itself or upon

sentencing.

ISSUE IV: The record contains no objection preserving the issue for appeal concerning ineffective assistance of counsel. Defendant's allegations, if considered within the context of this appeal, cannot demonstrate a different outcome of the proceedings.

Defendant maintains that counsel failed to investigate the potential witnesses in connection with the trial proceeding. There is no reference in the record to this issue. His belated allegation may be too late to consider.

However, this point may be sufficiently persuasive to the Court to reverse his conviction and remand for new trial.

ARGUMENT

ISSUE I

There is no basis in the record, nor under law to consider the merit of this contention. Thus, there is no argument advanced in this Appeal.

ISSUE II

There is no basis in the record, nor under law to consider the merit of this contention. Thus, there is no argument advanced in this Appeal.

ISSUE III

There is no basis in the record, nor under law to consider the merit of this contention. Thus, there is no argument advanced in this Appeal.

ISSUE IV

IF DEFENDANT'S COUNSEL FAILED TO INVESTIGATE PROSPECTIVE WITNESSES, SUCH CONDUCT MAY SUPPORT A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

If counsel does not adequately investigate underlying facts of case, including availability of prospective defense witnesses, counsel's performance cannot fall within wide range of reasonably professional assistance, since decision not to investigate cannot be considered a tactical decision. *State v. Templin*, 805 P.2d 182. In *Templin*, the court followed the United States Supreme Court's case of *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct at 2064. In *Strickland*, the Court set out a two part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In order to meet the first part of the test a defendant must identify the acts or omissions which, under the circumstances show that counsel's performance fell below an objective standard of reasonableness. In the instant case shortly after the arrest of the Defendant/Appellant, the Defendant/Appellant alleges that he notified the public defender of a prospective witness who could impeach one of the states witnesses. The witness, Mr. McAlmond, could have offered testimony claiming that State's witness, Dallas Lowry, had in fact used drugs after said time of Dallas Lowry's testimony. (5-8-98 Prelim Tr. 39). If believed by a jury it is possible that the outcome may have been different as to the weight of one witness. However, it is not clear that this one possible defect even if proven could have changed the ultimate outcome.

Case law supports the Defendant/Appellant contention that if counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel performance cannot fall with the “wide range of reasonable professional assistance.” Id. At 686, 104 S.Ct. At 2064. This because a decision no to investigate cannot be considered a tactical decision. It is only after adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

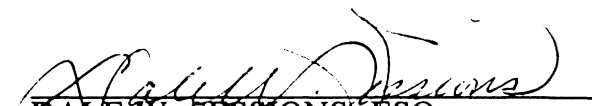
The record does not address attorney/client work product or procedures and is not preserved on the record.

As for the second part of the *Strickland* test, if Mr. McAlmond had been called to testify he could have impeached the credibility of the State’s witness. However the effect of such impeachment remains speculative. Perhaps the resolution could be made through new trial.

CONCLUSION

Based upon the above discussion, this Court should reverse the Judgment, Sentence and Commitment of the lower Court and remand for new trial.


RESPECTFULLY SUBMITTED this 14th day of April, 1999.


DALE W. SESSIONS, ESQ.
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that on this 14th day of April, 1999, I mailed, first class, postage prepaid, two (2) true and correct copies of the above and foregoing BRIEF OF APPELLANT to:

Ms. Jan Graham
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