

2001

State of Utah v. John Vincent Pritchett : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	APPELLANT'S REPLY
Plaintiff/Appellee,)	BRIEF
)	
vs.)	
)	
JOHN VINCENT PRITCHETT,)	Case No. 20010498-SC
)	Priority No. 2
Defendant/Appellant.)	(Appellant Not Incarcerated)

APPEAL FROM THE JUDGMENT AND CONVICTION FOR AGGRAVATED SEXUAL ABUSE OF A CHILD, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-404.1 (2001), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W. REESE, JUDGE PRESIDING

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ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

This Court should grant Appellant’s motion for a new trial based upon prosecutorial misconduct. Contrary to the State’s argument, Appellant’s argument on appeal is not based upon *Rimmasch*, but on prosecutorial misconduct in eliciting evidence as to the alleged victim’s behavior changes, over the instruction of the trial court. The trial court

indicated that this particular line of questioning had gone far enough, but the prosecutor below did not follow the trial court's instruction.

Further, Appellant submits that this Court should address his constitutional argument with respect to Utah Code Ann. § 76-5-406.5(h), because it has significant public interest and is capable of being repeated. Appellant submits that this Court can remand for consideration of the other statutory requirements, or in the alternative, address this issue that may not be ripe for review based upon its important constitutional implications. Moreover, this Court should find that subsection (h) of § 76-5-406.5 is unconstitutional given the ramifications that a defendant's self-incrimination could have on future proceedings.

ARGUMENT

POINT I

APPELLANT ARGUES FOR A MISTRIAL BASED UPON PROSECUTORIAL MISCONDUCT, AND NOT BASED UPON *RIMMASCH*

The State responds to Appellant's argument that a mistrial should have been granted, by arguing that Blazor's testimony did not violate *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), by commenting on the alleged victim's veracity. However, that was not the only basis for which Appellant sought a mistrial below, and is not the basis upon which Appellant

argues on appeal. Appellant argued below that there was misconduct on the part of the prosecutor by repeatedly attempting to elicit information after the trial court had indicated he should move on from that line of inquiry and not lead the witness.(R.312 at 287).

The prosecutor in the trial court questioned Blazor as to how the alleged victim's conduct changed or how she was different after the allegation of abuse. The trial court did allow several questions and answers in that regard, but after the prosecutor was leading the witness, the trial court attempted to put an end to this line of questioning. The prosecutor, however, continued with questions as to how the alleged victim's behavior was different. This prompted another objection by Appellant's counsel, which was sustained. The basis for the motion for a mistrial was that the prosecutor had attempted elicit evidence improper for the jury's consideration and had ignored the trial court's ruling.

Appellant does not rely upon *Rimmasch* in his argument on appeal, therefore, the State's argument that *Rimmasch* is not applicable is irrelevant. As argued in his Opening Brief, "a prosecutor's comments constitute misconduct when they call the jurors' attention to matters not proper for their consideration and when the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict." *State v. Pearson*, 943 P.2d 1347, 1352 (Utah 1997), *cited in State v. Jimenez*, 2001 UT App 68 at ¶ 9, 21 P.3d

1142. Even though some of the questions from the prosecutor were sustained and no answers were given, by implication and the leading questions, it is natural to assume that the jury did consider evidence of the alleged victim's behavior changes, which the trial court determined were not appropriate.

POINT II

THIS COURT SHOULD ADDRESS THE CONSTITUTIONALITY OF UTAH CODE ANN. § 76-5-406.5(h) BECAUSE IT IS CAPABLE OF BEING REPEATED AND AFFECTS A SIGNIFICANT PUBLIC INTEREST

The State argues that this Court should not address Appellant's constitutional claim because there has not been an adequate showing that he would have been amenable to rehabilitation through treatment or whether he had undergone a psychological evaluation.¹ The State further claims that Appellant has waived any opportunity to remand this issue to the district court. However, the State has failed to recognize that this issue was the central basis for the trial court granting a certificate of probable cause, so that this issue may be addressed on appeal.

¹ Utah Code Ann. § 76-5-406.5 provides in subsection (i) for a finding that rehabilitation through treatment is probable, and under subsection (j) that a defendant has undergone a psychological evaluation, prior to the court considering probation.

This Court may remand this to the trial court to determine whether Appellant has met the requirements under subsections (i) and (j) of the statute, but that precludes one of the central purpose of this appeal and the trial court's decision in granting Appellant's petition for a certificate of probable cause.

In addition, Appellant submits that this Court should address this issue regardless of any remand considerations because this is an issue that is capable of evading review, but being repeated. This issue, as raised by Appellant in his Opening Brief, is critical in light of the issues raised in *State of Utah v. Gino Maestas*, Case No. 20000094-SC, which this Court has yet to rule upon.

This issue of ripeness can be analogized to circumstances where the courts have addressed moot issues. Moot or not yet ripe issues may be considered, "if a case presents an issue that affects the public interest, is likely to recur, and because of the brief time anyone is affected, is capable of evading review." *State v. Wilkensen*, 2000 UT App 383. The issue in the instant case also presents an important aspect of law which affects the public interest and is likely to recur. Although the issue may not necessarily be capable of evading review, Appellant submits that this is such an important issue that affects defendants' constitutional rights, this Court should address the issue. *See also State v. C.A.*, 1999 UT App 390, 995 P.2d 17 (where the court stated it would "reach the merits of this

issue [juvenile court authority in terminating parental rights] because it is of significant public import and is likely to recur”).

Appellant submits that the general exception to the mootness doctrine should apply to reach this important constitutional issue. “Where an exception to the mootness doctrine is present, courts historically have exercised this discretionary authority in ‘class actions, questions of constitutional interpretation, issues as to the validity or construction of a statute, or the propriety of administrative rulings.’” *Reynolds v. Reynolds*, 788 P.2d 1044 (Utah Ct. App. 1990)(citations omitted)(emphasis added). Although this is not necessarily a mootness issue, the theory and principles in addressing it are the same, given that the issue may not yet be ripe for review.

As to the merits of this issue, Appellant submits that the State is incorrect in arguing that such a choice is not punishment. The statute is essentially meaningless if it requires defendants to incriminate themselves, and effectively give up any legitimate appeal rights. Following Appellant’s rationale, if the portion of the statute is upheld, and a defendant must admit guilt to be considered for probation, he may effectively give up any legitimate appeal issues, or benefit of a possible reversal on appeal, because at a new trial, his incriminating statements could be introduced against him. For defendants who maintain their innocence at trial and have meritorious issues on appeal, this section of the statute

thwarts any benefit of a new trial, because admitting guilt post-trial, could be admitted against them in a new proceeding. This issue is not akin to the Federal Sentencing Guidelines and downward departure arguments used by the State. *See* Aplee. Brf. at 34-36. Additionally, the issue in *McKune v. Lile*, 2002 WL 1270605, raised by the State dealt with post-sentencing prison regulations, not pre-sentencing commitment versus probation issues as in the instant case.

Appellant does recognize the strong state interest in treating sex offenders, but that interest is outweighed in this particular circumstance by a defendant's interest in being able to protect his constitutional right against self-incrimination without negative consequences.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court reverse his conviction as to Count II and/or grant him a new trial.

RESPECTFULLY SUBMITTED this ____ day of August, 2002.

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By _____
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CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Reply Brief, postage prepaid, this _____ day of August, 2002, to:

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