1998

State of Utah v. Lethron D. Tate : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LETHRON D. TATE,	:	Case No. 981793-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Robbery, a third degree felony, in violation of Utah Code Ann. §§ 76-6-301 (Supp. 1998) and 76-4-101 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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SUMMARY OF ARGUMENT

Given the state's concession that (1) the revocation was based solely on hearsay, (2) the judge did not make a finding of good cause, and (3) nothing in the record supports good cause, the only issue for this Court is whether the order revoking probation should be vacated. Controlling case law from Utah appellate courts requires that the order revoking probation be vacated.

ARGUMENT

POINT. THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE AT THE PROBATION REVOCATION HEARING REQUIRES THAT THE ORDER REVOKING PROBATION BE VACATED.

The state concedes that the revocation in this case was based solely on hearsay, and that the trial judge did not make a finding that good cause justified the use of hearsay. State's brief ("S.B.") at 5-6. The state further concedes that nothing in the record supports a finding that good cause existed which justified the use of the hearsay evidence. S.B. at 5-6.

Despite these concessions, the state insists that it ought to be given a second bite of the apple, asking that this Court

remand the matter "to the trial court for findings as to the existence of good cause for the use of hearsay evidence, or to allow defendant to cross-examine the witnesses upon which the State relies." S.B. at 9. The state apparently bases its claim regarding the remedy on the following factors: (1) if the case were remanded, the state might be able to establish good cause because "[a] finding of good cause requires the trial court to balance the defendant's interest in cross-examining a witness against the State's need to use a particular hearsay statement" (S.B. at 6) and a co-conspirator's hearsay statement might be admissible in a probation revocation hearing if the state offered "'a reasonably satisfactory explanation' for not bringing [the co-conspirator] in as a witness" (S.B. at 6-7); (2) the state's erroneous claim that the evidence supporting the aggravated assault is not affected by the unreliability of a co-defendant's statement and "was based essentially on the officers' non-hearsay testimony regarding the nature of the victim's injuries and a photo line-up identification of defendant by the victim" (S.B. at 7); (3) "[a] probation revocation may be based solely upon hearsay" (S.B. at 8); and (4) case law from other jurisdictions which the state claims supports a remand rather than vacation of the probation order (S.B. at 8-9).

The rationale offered by the state for remanding the case for a finding of good cause is not compelling when scrutinized. Moreover, the remedy requested by the state is contrary to controlling case law. See e.g. Layton City v. Peronek, 803 P.2d

1294, 1300 (Utah App. 1990)(vacating order violating probation where revocation based on hearsay); State v. Ramirez, 817 P.2d 774, 788 (Utah 1991)(failure to make findings which were prerequisite to admission of evidence requires reversal of conviction).

In Peronek, this Court held that the defendant's probation was revoked in violation of due process where the revocation was based solely on hearsay, the trial judge did not make a finding of good cause, and "nothing in the record suggests good cause for denying the defendant this fundamental right [of confrontation]." Peronek, 803 P.2d at 1299. This Court further held that the appropriate remedy where the probation violation was based on unreliable hearsay and the record failed to suggest good cause for depriving the defendant of his right to confrontation is to vacate the order revoking probation. Peronek, 803 P.2d at 1300. The Peronek holding that the probation revocation order must be vacated where the revocation is based on hearsay and the record fails to suggest good cause for denying the right to confrontation resolves the issue as to remedy in this case.

Additionally, case law from the Utah Supreme Court and this Court requires that an order be vacated where the trial judge failed to make findings which were a prerequisite to admission of evidence. See e.g. Ramirez, 817 P.2d at 788; State v. Nelson, 950 P.2d 940, 944 (Utah App. 1997). In Ramirez, the Utah Supreme Court refused to remand the case for factual findings as to the admissibility of eyewitness identification testimony. Instead,

the Court stated:

> However, in the present case the failure to make findings is not a mere technical oversight that makes it difficult for us to adequately review the trial court's ruling. [citation omitted] Instead, we have a failure of the judge to address the factual questions and to make the legal determinations that were a prerequisite to the admission of the eyewitness identification essential to the conviction. To ask the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence. Such a mode of proceeding holds too much potential for abuse. The only fair way to proceed is to vacate defendant's conviction and remand the matter for retrial.

Ramirez, 817 P.2d at 788; see also Nelson, 950 P.2d at 944 (vacating conviction where trial judge failed to make findings or conclusions regarding admissibility of eyewitness identification testimony); see also State v. Bakalov, 862 P.2d 1354, 1355 (Utah 1993)(vacating conviction where defendant never advised of dangers and disadvantages of self-representation since trial judge "could not then or now assess [defendant's] responses to that advice").

Although the state ignores the remedies in Peronek, Ramirez, Bakalov, and Nelson, these cases nevertheless demonstrate that the order revoking probation should be vacated. As was the case in Ramirez, the trial judge in this case did not make findings which were a prerequisite to admission of the evidence. See Appellant's opening brief at 16-17, citing cases requiring a finding of good cause as a prerequisite for admission of hearsay. To ask the trial court to resolve the good cause issue at this juncture "would be to tempt it to reach a post hoc

rationalization for the admission of this pivotal evidence." Ramirez, 817 P.2d at 789. Such a mode of proceeding was rejected in Ramirez in the context of admission of eyewitness identification at trial. Although the instant case involves the admission of hearsay evidence in a probation violation hearing, the rationale nevertheless applies, and requires that this Court vacate the revocation order.

Moreover, as the state concedes, nothing in the record supports a good cause determination. Hence, the remand requested by the state exceeds the remand rejected in Ramirez since the state is also seeking the ability to put on further evidence. Since the state failed to introduce evidence demonstrating that the good cause prerequisite was met, the probation order must be vacated.

The state's apparent argument that it might be able to establish good cause because a good cause determination is based on a balancing of the defendant's right to cross-examination with the state's need for the hearsay (S.B. at 6) adds nothing to the analysis of whether the state ought to be given the opportunity at this late date to put on evidence regarding good cause. Nor does the state's claim that a co-conspirator's statements might come in at a probation violation hearing affect the issue of whether the state ought to be given a chance to show good cause at this juncture. Regardless of whether good cause for allowing a co-conspirator's hearsay statement might exist in some circumstances, in the present case, the state did not demonstrate

good cause for the admission of such statements.

In addition, in cases where the admission of a co-conspirator's statement has been upheld, the trial judge made a finding of reliability which was supported by the record. See e.g. United States v. Zentgraf, 20 F. 3d 906, 910 (8th Cir. 1994) (cited in S.B. at 7). In the present case, no such finding was made and, as set forth in Appellant's opening brief at 19-35, the statements were not reliable. Moreover, courts which have admitted hearsay statements of co-conspirators have recognized that ordinarily such statements are not reliable. See id. at 910. For example, in Zentgraf, the court relied on Bruton v. United States, 931 U.S. 123 (1968) and Lee v. Illinois, 476 U.S. 530 (1986) for the proposition that "[o]rdinarily, the reliability of an accomplice's confession implicating the accused is viewed with 'special suspicion.'" Zentgraf, 20 F. 3d at 910.

The state's suggestion that the probation violation should be upheld because the finding that Tate committed an aggravated assault was not based on hearsay (S.B. at 7) is incorrect. Officer Kent testified regarding Josh Wagstaff's statements to her about Hanson's injuries as well as Hanson's statements to her about his injuries. R. 88:35-36. This testimony was hearsay which did not fit any exceptions. Indeed, the state has not claimed that the testimony fit any exceptions or otherwise briefed its rationale for the claim that Officer Kent's testimony regarding the statements of others which were offered for the

truth of the matter asserted was not hearsay.[1]

Additionally, Officer Kent's testimony that Hanson selected Tate from a photo spread was hearsay. While Hanson could have testified to such a selection, Officer Kent's testimony was the statement of another, Hanson's selection of Appellant, which was offered for the truth of the matter asserted. Again, the state merely makes a bald assertion that this was not hearsay, and makes no claim that the evidence fit within a hearsay exception. Moreover, the state later refers to the "hearsay witness identifications," thereby undercutting its claim that this testimony was not hearsay. See S.B. at 8.

The state made no attempt to establish good cause for the use of the hearsay testimony that Hanson selected Appellant from a photo lineup. In addition, the hearsay was not reliable given the problems with eyewitness identification, the vagueness of Hanson's report, and the state's apparent inability to obtain Hanson as a witness. See Appellant's opening brief at 34.

Officer Salazar testified regarding the injuries he saw when he arrived at the restaurant and located an injured man. R. 88:29. While this testimony was not hearsay, it also did not

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[1] The state does not cite to the portions of the record it relies on for its claim that the aggravated assault "was based essentially on the officers' non-hearsay testimony regarding the nature of the victim's injuries and a photo line-up identification of defendant by the victim." S.B. at 7. The state's bald assertion without reference to the hearsay rules or exceptions coupled with the lack of record cites fails to meet the briefing requirements of Rule 24(a)(9), Utah Rules of Appellate Procedure. This Court should decline to review this aspect of the state's argument.

implicate Tate or demonstrate that an assault rather than a fight occurred. This non-hearsay testimony established only that Hanson was injured and was not sufficient to sustain the finding that Tate committed an aggravated assault.

The state also appears to argue that a remand rather than vacation of the revocation order is appropriate because "[a] probation revocation may be based solely upon hearsay." S.B. at 8. While the state is correct that some courts have held that probation may be revoked based solely on reliable hearsay (see State v. Miller, 888 P.2d 399 (Kan. App. 1995), cited in S.B. at 8), other courts have held otherwise. See Miller, 888 P.2d at 406-07, citing cases that have held that probation violation cannot be based solely on reliable hearsay; see also cases cited in Appellant's opening brief at 20. Regardless of whether a probation violation can be based solely on reliable hearsay, in this case, the hearsay was not reliable and not properly admitted as set forth in Appellant's opening brief at 14-35.

Finally, the state relies on decisions from other states remanding for further proceedings rather than revoking probation. As previously outlined, Peronek and Ramirez, case law from Utah appellate courts, control this issue. Additionally, Zentgraf is distinguishable because there was other evidence which by itself would have been legally sufficient for the trial court to revoke Zentgraf's probation. Zentgraf, 20 F. 3d at 910. Because it was undisputed in Zentgraf that the defendant violated probation by associating with a convicted felon, there was sufficient evidence

for a probation violation without the hearsay. A question remained, however, as to whether the trial court would have found that Zentgraf committed a burglary without the hearsay or how the trial court would have disposed of the violation if association were the only violation. Remand for further proceedings was therefore appropriate. The rationale in Zentgraf does not therefore apply to this case.

CONCLUSION

Appellant's rights to due process and confrontation were violated when the trial court revoked his probation based on hearsay and multiple hearsay where the trial court did not make a preliminary finding that good cause existed for the use of hearsay, the record does not demonstrate good cause, and the hearsay evidence was not reliable. The proper remedy for such violation is vacation of the order revoking probation.

SUBMITTED this 23rd day of August, 1999.

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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of August, 1999.

Joan C. Watt
JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of August, 1999.

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