

1998

Utah v. James Scott Wallburg : Brief of Appellant

Utah Court of Appeals

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Ms. Gene S. Byrge; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellant,

VS.

JAMES SCOTT WALLBURG
Defendant/Appellee.

7th District Ct. No. 9
Case No.981871-CA

Priority 2

APPELLANT

SUPPLEMENTAL BRIEF OF APPELLEE.

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR UNLAWFUL POSSESSION OF CONTRABAND IN A CORRECTIONAL FACILITY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-8-311.3 (SUPP. 1994), IN THE 7TH DISTRICT COURT FOR EMERY COUNTY, HON. BRUCE K. HALLIDAY PRESIDING.

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FILED

Utah Court of Appeals

JUL 13 2000

Julia D'Alessandro
Clerk of the Court

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This brief is intended to supplement, not supplant, the Brief of Appellant filed heretofore in this matter. Thus all matters relating to jurisdiction, standard of review, statement of the case, and statement of facts remain as stated in Brief of Appellant.

SUMMARY OF SUPPLEMENTARY ARGUMENT

The trial court judge, five weeks prior to denying Appellant's request for court-appointed counsel, approved Appellant's similar request in another case. In addition, in two prior cases approximately five and eight months prior to the instant case, the trial judge and a second district judge determined Appellant to be indigent, based on the same financial information. Despite the lack of specific information regarding debts, on Appellant's applications, the information remained constant from one application to another, and Appellant was found to be indigent, based on that same information, in three cases immediately prior to the instant case.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DETERMINED APPELLANT WAS INDIGENT AND REFUSED TO PROVIDE HIM WITH COURT-APPOINTED COUNSEL, THUS VIOLATING HIS RIGHT TO COURT APPOINTED COUNSEL UNDER UTAH LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On May 16, 1995, Judge Bruce K. Halliday refused Appellant's application for court-

appointed counsel. However, on April 4, 1995, in a 7th District for Carbon County case, no. 951700195FS, and on January 17, 1995, in a 7th District for Carbon County case, no. 951700021FS, Judge Halliday had approved Appellant's applications for court-appointed counsel and ordered the appointment of counsel. In addition, in 7th District for Carbon County case no. 941700516FS, Judge Bryce K. Bryner, in an undated order filed with the Court Clerk on October 13, 1994, ordered that Appellant be provided with court-appointed counsel.

The information provided on each application is as follows:

	Instant case	941700516	951700195FS	951700021FS
Date	5/15/95	(Filed 10/13/94)	4/4/95	1/10/95
Employment status	Unemployed	Employed	Not indicated	Not indicated
Income	\$928	\$280	\$928	\$927/monthly
Employer	Disable	Disable	Disable	None
Marital status	Unmarried	Unmarried	Unmarried	Unmarried
No. Dependents	8	8	7	8
Past 2 yrs gross	Not indicated	\$460	\$22,000	\$20,000
Cash on hand	\$600	\$200	\$928	Not indicated

(No entries are made under "accounts/notes receivable", "investments", "real estate", "automobile", "household goods", and "other personal property/assets", and none made under debt category "debts to banks")

Debts to others	Medical	Not indicated	\$20,000 med & rent and many others	Lots
Debts on real prop	Yes	Not indicated	Not indicated	Not indicated

Other debts	Pharmacy	Past medical bills	Not indicated	Med
Total debts	"More than i get"	"Exceeds more than ernd"	Not indicated	"Unknownd at this time"

Defendant did not answer "any anticipated receivables...."

If one presumes that when he wrote "\$280", he meant "per week", that would approximate the \$928 per month Appellant received from his Social Security pension prior to being sentenced to prison. The information provided by Appellant, with his 6th grade education, is consistent from one application to the next. During the entire eight-month period covered by these applications for court-appointed counsel, his income remained consistent, as did the number of dependents and the comments about his debts. Although he failed to provide concise information about his debts, under the standard set forth in *State v Vincent*, 883 P.2d 278 (Utah 1994), this court can easily conclude that even with a minimal standard of living, after Appellant paid his living costs out of his \$928 per month check, there would be precious little with which to retain an attorney to represent him in a felony trial, even at 1995 attorney prices. Add in the fact that there was a possibility Appellant would have been sentenced to prison, which would result in losing his Social Security check, making it impossible for him to make payments even should he be able to find an attorney willing to consider such an arrangement, and it is obvious that under any standard, Appellant was indigent and should have been provided with court-appointed counsel.

The Utah Supreme Court, in *State v Vincent*, 883 P.2d 278 (Utah 1994), discussed

at length what constituted indigency when determining whether a defendant should be entitled to court-appointed counsel:

“Generally speaking, a person is indigent . . . if payments for counsel or transcripts would place an undue hardship on the defendant’s ability to provide the basic necessities of life for the defendant and defendant’s family.” *Vincent*, 845 P.2d at 259; see *Potter*, 547 A.2d at 599 (A defendant is considered indigent when he is unable to retain legal counsel without impairing his financial ability to provide economic necessities of life for himself and his family.”); *State v Masilko*, 226 Neb.45, 409 N.W.2d 322, 324 (1987) (defining indigence as “inability to retain legal counsel without prejudicing one’s financial ability to provide the economic necessities for one’s self or one’s family”); *State v Freeman*, 96 OR. App. ;700, 771 P.2d 304, 305 (1989) (“Defendant is entitled to appointed counsel if he would be unable to retain adequate representation without substantial hardship in providing necessities to himself and his family.”). This definition is consistent with article I, section 12 of the Utah Constitution and with our decision in *Webster*.”

Despite the lack of specific expenses on Appellant’s applications, it is inconceivable that a reasonable person could conclude by any stretch of the imagination that Appellant could stretch his \$928 per month to cover shelter, food, clothing, medications, and the costs of retaining an attorney for defending him on a felony charge.

The same judge who presided over the instant case found Appellant indigent on two earlier occasions, January 17, 1995 and April 4, 1995, as did a second judge in October,

1994, based on substantially identical information. In fact, the April 4, 1995 application and the instant application of May 15, 1995 (Record 009) contained substantially the same information: \$928 income, 7 or 8 dependents, cash in bank \$928 (his check arrived the day prior, April 3) and \$600 on May 15. In a matter of about five weeks, the same judge, based on the same information, made two diametrically opposite decisions, first that Appellant WAS indigent, and five weeks later, that he was NOT indigent.


Even absent the guidelines which were subsequently adopted in this state, the intent of the laws which guarantee the right of an accused to appointed counsel in the event he cannot afford counsel was that there should be some consistency in determining indigency. Thus the factors set forth in *Kelsey v Hanson*, 818 P.2d 590 (Utah App. 1992), and refined in *Vincent*, Id. (and argued in Appellant's initial brief) were approved by this Court as guidelines.

Based on these guidelines, and the inconsistency of the trial judge in applying those factors to the information contained in the several applications made by Appellant less than five weeks apart, this Court should find that the trial court's denial of court-appointed counsel was in error.

CONCLUSION

Based on the foregoing, Appellant requests the Court to reverse his conviction and to remand the matter to the District Court for a determination of Appellant's indigency based on current standards.

July 8, 2000



Ms. Gene S. Byrge, Attorney for
Appellant James Wallburg

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellant,

vs.

JAMES SCOTT WALLBURG,

Defendant/Appellee.

7th District Ct. No. 9

Case No.981871-CA


Priority 2

SUPPLEMENTAL BRIEF OF APPELLEE

CERTIFICATE OF SERVICE

I certify that I caused to be delivered, on July 13, 2000, two true and correct copies of the foregoing SUPPLEMENTAL BRIEF OF APPELLANT to the following address:

Jeffrey S. Gray, 5852
Assistant Attorney General
JAN GRAHAM, 1231
Utah Attorney General
160 East 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City UT 84114



GENE S. BYRGE
Attorney for Appellant

ADDENDUM 1

FILED

OCT 13 94

SEVENTH DISTRICT COURT
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY

STATE OF UTAH

St of Utah

Plaintiff

vs

James Scott Wallberg

Defendant

APPLICATION AND ORDER
FOR COURT APPOINTED COUNSEL

Case No. 941700516 FS

APPLICATION

1. I am financially unable to hire counsel to represent me in this matter and desire to have an attorney appointed to represent me.

2. Employment status:

a. Employed (☒); Unemployed (); Self-Employed ()

b. My weekly/monthly income is: 280⁰⁰

c. My place of employment/business is: Disabile

3. Marital status:

a. () Married (☒ Unmarried

b. Number of Dependents: 8

c. My spouse is working(); Unemployed(); Self-Employed ()

d. If spouse is working weekly/monthly income: _____

e. Spouse's place of employment/business is: _____

4. My gross income for the past two years is: 460⁰⁰

5. That the following amounts accurately represents my ASSETS (including joint assets):

Cash on hand and in banks

\$ 200⁰⁰

Accounts and notes receivable \$ _____
Investments (bonds, stocks, etc) \$ _____
Real Estate (property owned) \$ _____
Automobile \$ _____
 Make & Year _____
Household goods \$ _____
Other personal property/assets \$ _____
TOTAL ASSETS \$ _____

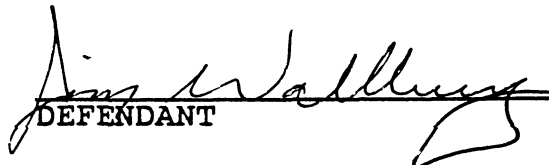
6. That the following amounts accurately represent my debts (including joint debts):

Debts to banks \$ _____
Debts to others \$ _____
Debts on real estate/property \$ _____
Other debts \$ Past med - Bills
TOTAL DEBTS \$ Exceeds more
Than earned

7. Any anticipated receivables, such as land sales, gifts, inheritances, allotments, etc. \$ _____

8. Under oath and subject to the penalties of perjury, I state that I have no other assets of any kind or nature, other than as stated above.

DATED:


DEFENDANT

Subscribed and sworn to on the date of:

CLERK/DEPUTY CLERK

ORDER

Upon reading the above application and the Court being satisfied that the defendant is indigent and financially unable to obtain counsel, it is

ORDERED THAT: David Allred being a member of the Bar, is hereby appointed to represent the defendant in all matters pertaining to this action unless or until relieved by this Court.

DATED:

Bryce K. Crayton
DISTRICT COURT JUDGE

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

COUNSEL.APT

ADDENDUM 2

FILED

JAN 18 95

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR SEVENTH DISTRICT COURT
CARBON COUNTY

STATE OF UTAH

St of Utah,

Plaintiff

vs

James Wallberg,

Defendant

APPLICATION AND ORDER
FOR COURT APPOINTED COUNSEL

Case No. 9517DDD21 FS

APPLICATION

1. I am financially unable to hire counsel to represent me in this matter and desire to have an attorney appointed to represent me.

2. Employment status:

a. Employed (); Unemployed (); Self-Employed ()

b. My weekly/monthly income is: 927~~88~~

c. My place of employment/business is: None

3. Marital status:

a. ☒ Married () Unmarried

b. Number of Dependents: 8

c. My spouse is working(); Unemployed(); Self-Employed ()

d. If spouse is working weekly/monthly income: _____

e. Spouse's place of employment/business is: _____

4. My gross income for the past two years is: 20,000

5. That the following amounts accurately represents my ASSETS (including joint assets):

Cash on hand and in banks

\$ _____

Accounts and notes receivable \$ _____
Investments (bonds, stocks, etc) \$ _____
Real Estate (property owned) \$ _____
Automobile \$ _____
Make & Year None
Household goods \$ _____
Other personal property/assets \$ _____
TOTAL ASSETS \$ _____

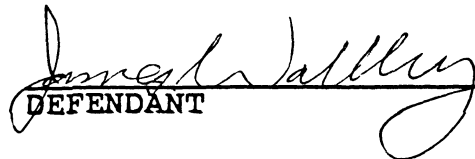
6. That the following amounts accurately represent my debts (including joint debts):

Debts to banks \$ _____
Debts to others \$ 20,000 med +
Debts on real estate/property \$ rent and many other,
Other debts \$ _____
TOTAL DEBTS \$ _____


7. Any anticipated receivables, such as land sales, gifts, inheritances, allotments, etc. \$ _____

8. Under oath and subject to the penalties of perjury, I state that I have no other assets of any kind or nature, other than as stated above.

DATED: 1-10-95


DEFENDANT

Subscribed and sworn to on the date of: 1-10-95


CLERK/DEPUTY CLERK

ORDER

Upon reading the above application and the Court being satisfied that the defendant is indigent and financially unable to obtain counsel, it is

ORDERED THAT: David Allred being a member of the Bar, is hereby appointed to represent the defendant in all matters pertaining to this action unless or until relieved by this Court.

DATED: January 17, 1995

Bruce L. Keller
DISTRICT COURT JUDGE

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

COUNSEL.APT

ADDENDUM 3

NEXT

17R-4 95

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY

SEVENTH JUDICIAL DISTRICT COURT
CARBON COUNTY, UTAH

STATE OF UTAH

State

Plaintiff

vs

James H. Kelley

Defendant

APPLICATION AND ORDER
FOR COURT APPOINTED COUNSEL

Case No. *951700185 FS*

APPLICATION

1. I am financially unable to hire counsel to represent me in this matter and desire to have an attorney appointed to represent me.

2. Employment status:

a. Employed (); Unemployed (); Self-Employed ()

b. My weekly/monthly income is: *928.98*

c. My place of employment/business is: *Exaleh*

3. Marital status:

a. () Married ☒ Unmarried

b. Number of Dependents: *TOLD COURT ON RECORD: SEVEN(7)*

c. My spouse is working(); Unemployed(); Self-Employed ()

d. If spouse is working weekly/monthly income: _____

e. Spouse's place of employment/business is: _____

4. My gross income for the past two years is: *22,000.00*

5. That the following amounts accurately represents my ASSETS (including joint assets):

Cash on hand and in banks

\$ 928.00

6. That the following amounts accurately represent my debts (including joint debts):

7. Any anticipated receivables, such as land sales, gifts, inheritances, allotments, etc. \$

DATED: *apr 4 1995*

Subscribed and sworn to on the date of:

-2-

ORDER

Upon reading the above application and the Court being satisfied that the defendant is indigent and financially unable to obtain counsel, it is

ORDERED THAT: David Alred being a member of the Bar, is hereby appointed to represent the defendant in all matters pertaining to this action unless or until relieved by this Court.

DATED: 4/4/95

Wm H. H. H. H.
DISTRICT COURT JUDGE

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

ADDENDUM 4

at Plaintiff

-VS-

James Wallberg
Defendant

APPLICATION AND ORDER **FILED**
FOR COURT APPOINTED
COUNSEL OF THE SEVENTH JUDICIAL DISTRICT COURT
OF THE COUNTY

MAY 16 1995

CHRISTOPHER C. FUNK - Clerk

Case No: *1390* By _____ Deputy

A P P L I C A T I O N

1. I am financially unable to hire counsel to represent me in this matter and desire to have an attorney appointed to represent me.

2. Employment status:

a. Employed (); Unemployed (☒); Self-Employed ()

b. My weekly/monthly income is: *928.⁰⁰*

c. My place of employment/business is: *Disable*

3. Marital status:

a. () Married (☒ Unmarried

b. Number of Dependents: *8 Dependents*

c. My spouse is working (); Unemployed (); Self-Employed ()

d. If spouse is working weekly/monthly income: _____

e. Spouses place of employment/business is: _____

4. My gross income for the past two years was: _____

5. That the following amounts accurately represent my ASSETS (including joint assets).

Cash on hand and in banks

\$ *600.⁰⁰*

Accounts and notes receivable

\$ _____

Investments (bonds, stocks, etc)

\$ _____

Real estate (property owned)

\$ _____

Automobile

\$ _____

Make & Year _____

Household goods

\$ _____

Other personal property/assets

\$ _____

TOTAL ASSETS

6. That the following amounts accurately represent my debts
(including joint debts)

Debts to banks \$ _____
Debts to others \$ Medical
Debts on real estate/property \$ yes
Other debts \$ Pharmacy
TOTAL DEBTS \$ More than i get

7. Any anticipated receivables, such as land sales, gifts,
inheritances, allotments, etc: \$ _____

8. Under oath and subject to the penalties of perjury, I state that
I have no other assets of any kind or nature, other than as stated
above.

DATED:

James Wallberg
DEFENDANT

Subscribed and sworn to on the date of: 5/15/95

CLERK/DEPUTY CLERK

O R D E R

Upon reading the above application and the Court being satisfied
that the defendant is indigent and financially unable to obtain
counsel, it is

ORDERED THAT: _____
being a member of the Bar, is hereby appointed to represent the
defendant in all matters pertaining to this action unless or until
relieved by this Court.

DATED:

Judge Halliday denied application
5-16-95 in open
Court. W.D.

DISTRICT COURT JUDGE