

1998

Utah v. James Scott Wallburg : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeffrey S. Gray; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.
Gene S. Byrge; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Utah v. Wallburg*, No. 981871 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1943

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

JAMES SCOTT WALLBERG,

Defendant and Appellant.

Case No. 981871-CA

Priority No. 2

SECOND 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 SEVENTH JUDICIAL DISTRICT COURT OF UTAH FOR EMERY COUNTY, THE HONORABLE BRUCE K. HALLIDAY PRESIDING

JEFFREY S. GRAY, Bar No. 5852
Assistant Attorney General
JAN GRAHAM, Bar No. 1231
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114
Telephone: (801) 366-0180

Attorneys for Appellee

GENE S. BYRGE
157 South Main Street
Helper, UT 84526

Attorney for Appellant

2

FILED
Utah Court of Appeals
MAR 01 2001
Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

JAMES SCOTT WALLBERG,

Defendant and Appellant.

Case No. 981871-CA

Priority No. 2

SECOND 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 SEVENTH JUDICIAL DISTRICT COURT OF UTAH FOR EMERY COUNTY, THE HONORABLE BRUCE K. HALLIDAY PRESIDING

JEFFREY S. GRAY, Bar No. 5852
Assistant Attorney General
JAN GRAHAM, Bar No. 1231
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114
Telephone: (801) 366-0180

Attorneys for Appellee

GENE S. BYRGE
157 South Main Street
Helper, UT 84526

Attorney for Appellant

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

THE TRIAL COURT PROPERLY DENIED DEFENDANT’S REQUEST FOR
COURT-APPOINTED COUNSEL 1

CONCLUSION 6

NO ADDENDA NECESSARY

TABLE OF AUTHORITIES

CASES

State v. Vincent, 883 P.2d 278 (Utah 1994) 1, 2, 5, 6

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

42 U.S.C. § 402 (1991 & Supp. II 1994) 3

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

JAMES SCOTT WALLBERG,

Defendant and Appellant.

Case No. 981871-CA

Priority No. 2

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

Pursuant to order of this Court dated December 28, 2000, the State submits this Second Supplemental Brief in response to the Second Supplemental Brief of Appellant.

ARGUMENT

**THE TRIAL COURT PROPERLY DENIED DEFENDANT'S
REQUEST FOR COURT-APPOINTED COUNSEL**

In *State v. Vincent*, 883 P.2d 278, 282 (Utah 1994), the Utah Supreme Court held that the trial court should appoint counsel and provide necessary transcripts if payment of such by a defendant "would place an undue hardship on the defendant's ability to provide the basic necessities of life for the defendant and the defendant's family." The court in *Vincent* held that in making that determination, trial courts should consider:

"employment status and earning capacity; financial aid from family or friends, financial assistance from state and federal programs; [the defendant's] necessary living expenses and liabilities; [the defendant's] unencumbered assets, or any disposition thereof; and, the relative amount of court costs to be waived."

Id. at 283-84 (quoting *Kelsey v. Hanson*, 818 P.2d 590, 591-92 (Utah App. 1991)) (brackets in original and footnotes omitted). The Supreme Court refused to further define indigency, deeming it “unwise to rush to factual specificity as to what constitutes legal ‘indigency.’” *Id.* at 282. In “loosely defin[ing] indigency,” the high court “creat[ed], in the terms of the metaphor used in *Pena*, a rather broad pasture for trial judges applying the law of indigency to the facts before them.” *Id.* A review of the facts before the trial court here reveals that its decision was well within that “rather broad pasture.”

The trial court here learned that as a result of a disability, defendant received a social security check for \$928 each month. R. 09; R. 174: 5-6. Defendant listed eight dependents in his application for court-appointed counsel. R. 09. Upon inquiry at the hearing, the court learned that the eight dependents included seven children and defendant. R. 174: 5. When the court asked defendant whether he was currently paying for the support of those children, defendant responded in the affirmative. R. 174: 5. Upon further inquiry, however, and after the prosecutor stated her belief that some, if not all, of the children were in the State’s custody, defendant conceded that his children were in fact receiving separate payments from the federal government under his disability benefits for their support. *See* R. 174: 7-8.

In the Second Supplemental Brief of Appellant (Supp.2d), defendant contends that under federal law, “an incarcerated person may lose all Federal benefit payments during his incarceration, [and] thus even had [he] been able to persuade an attorney to represent him and take payments, he would likely have lost his sole source of income once imprisoned.” Supp.2d at 1-2. Defendant fails to cite any authority supporting that proposition, nor is there

any evidence in the record suggesting that he did not continue to receive those benefits through trial and beyond. *See* Supp.2d at 1-2. Federal law in fact provides that a social security recipient loses his eligibility for monthly disability benefits *only if* he is incarcerated or imprisoned as a result of a *conviction* or if he is otherwise confined after being adjudged incompetent to stand trial. 42 U.S.C. § 402(x)(1)(A) (1991 & Supp. II 1994). Accordingly, defendant would have been eligible to receive *at least* five more monthly disability payments benefits. *See* R. 73-74.¹

The court also considered the cash available to defendant at the time. In his application for court-appointed counsel, defendant listed \$600 as cash on hand or in banks. R. 09. However, at the indigency hearing on May 16, 1995, the prosecutor advised the court that jail personnel had informed her they had inventoried more than \$800 in cash from his wallet at the time of his arrest. *See* R. 174: 6. When questioned about the discrepancy, defendant conceded that “[i]t could have been approximately that” because he received his disability checks on the third day of the month. R. 174: 6.

In support of his application, defendant advised the court that he had to pay for food and rent and that he was required “to travel to California and to medical physicians for [his] disability.” R. 174: 8-9. He also asserted that he was required to pay his own prescription drugs which “sometimes” cost him three to four hundred dollars a month. R. 174: 8. Defendant did not, however, assert that he was required to pay that amount at that time, nor

¹In fact, defendant was not sentenced to prison until some three years later because he absconded from the initial sentencing. R. 73-74, 77.

did he identify any other immediate expenses. *See* R. 174: 8. Nevertheless, and apparently still uncertain as to defendant's financial responsibilities to his children, the trial court was prepared to appoint counsel. *See* R. 174: 13.

As the trial judge began to appoint counsel, however, a public defender present at the hearing, who had represented defendant in the past and who was aware of his financial situation, intervened. R. 174: 13. The public defender stated that defendant had a Medicaid card for medical expenses. R. 174: 14. He also confirmed that defendant's monthly disability check was not used for child support and he represented that defendant has "always had income." R. 174: 13. Defendant countered, volunteering for the first time that Medicare paid for 85 percent of doctors visits and the "hospital co-charges." R. 174: 14.

After hearing from the public defender, the trial court concluded that defendant was not entitled to court-appointed counsel. R. 174: 14. When defendant protested, the court observed that appropriate arrangements could be made with an attorney for payment. R. 174: 14. Defendant now contends that the court's decision was improper because the trial court incorrectly stated that an attorney could place a lien on defendant's social security check. Supp.2d at 1. Defendant cites to no authority supporting that proposition. *See* Supp.2d at 1. In any event, the court's reference to such a lien was merely used as an example for the court's general observation that procedures existed to assure attorneys of payment. *See* R. 174: 14.

Defendant also complains that it would have been difficult for him to locate an attorney while he was incarcerated. Supp.2d at 1-2. That claim is not substantiated by any

record evidence and has never been considered as a factor in determining indigency. Indeed, the difficulty in locating counsel because a defendant is incarcerated is irrelevant to defendant's ability to pay for counsel. Moreover, while incarceration may hamper a defendant's ability to secure an attorney, it does not prevent him from doing so, nor does it preclude him from securing an attorney with the assistance of friends or family.

Finally, defendant observes that the monthly disability check fell below 150% of the United States poverty level referenced in Utah Code Ann. § 77-32-202(3)(ii) (1999). Supp.2d at 4. That statute, however, was not in effect at the time of the hearing and therefore has no application. Moreover, based on defendant's figures, his annual disability benefits were only \$70 shy of exceeding 150% of the poverty level. *See* Supp.2d at 4.

* * *

Given defendant's monthly income of \$928, his available cash on hand of \$800, and his failure to substantiate any current expenses of an extraordinary nature, the trial court correctly navigated the "rather broad pasture" in "applying the law of indigency to the facts." *Vincent*, 883 P.2d at 282. As noted above, the expenses identified by defendant were vague and unsubstantiated. Defendant also failed to provide the information that was fatal in *Vincent*, conceding that he "d[id] [not] know how much counsel costs." R. 174: 14. As observed in *Vincent*, where no evidence is introduced showing the cost of counsel, "it is impossible to determine a defendant's ability to pay those expenses." *Vincent*, 883 P.2d at 284. Accordingly, defendant failed to meet his burden in establishing indigency, and absent

that evidence, the reviewing court cannot assume defendant was unable to pay for counsel.

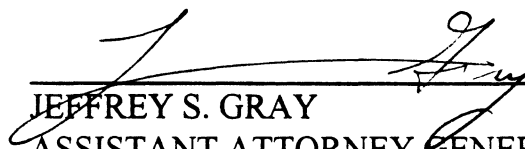
See id. at 283-84.²

CONCLUSION

For the reasons set forth above and in the State's other briefs, the State respectfully requests that the Court affirm the conviction.

Respectfully submitted this 1st day of March, 2001.

JAN GRAHAM
UTAH ATTORNEY GENERAL



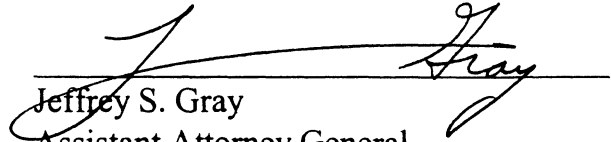
JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorneys for Appellee, State of Utah

²We also learn from the transcript of the indigency hearing that the trial court's previous appointments of counsel were subject to an assessment for attorneys fees if the court determined later that defendant was able to pay for counsel. *See* R. 174: 9.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2001, I caused to be served two copies of the attached Second Supplemental Brief of Appellee upon defendant by causing the same to be mailed, via first class mail, postage prepaid, to his counsel of record as follows:

Gene S. Byrge
The Judge Building, Ste. 740
8 East Broadway
Salt Lake City, UT 84111-2204



Jeffrey S. Gray
Assistant Attorney General