

1998

Utah v. James Scott Wallburg : Brief of Appellee

Utah Court of Appeals

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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

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

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Clerk of the Court

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SUPPLEMENTAL BRIEF OF APPELLEE

Pursuant to the letter of this Court dated July 6, 2000, the State submits this Supplemental Brief in response to defendant's supplemental brief filed on July 13, 2000. This brief supplements the Brief of Appellee.

ARGUMENT

**CONSIDERATION OF OTHER ORDERS APPOINTING COUNSEL
FOR DEFENDANT IS NOT APPROPRIATE IN REVIEWING THE
TRIAL COURT'S REFUSAL TO APPOINT COUNSEL IN THIS CASE**

In his supplemental brief, defendant argues that because the trial court appointed counsel in three other cases, the trial court committed error by not appointing counsel in this case. Supplemental Brief of Appellant ("Supp. Brief") at 2-5. In support of his argument, defendant has attached copies of the Application and Order for Court Appointed Counsel ("Applications") in Addenda 1, 2, and 3. However, consideration of the facts and orders in these three cases is not appropriate in the Court's review of this case.

The law is well-settled that “[a]n appellate court’s ‘review is . . . limited to the evidence contained in the record on appeal.’” *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (quoting *Wilderness Bldg. Sys., Inc. v. Chapman*, 699 P.2d 766, 768 (Utah 1985)). The appellate court “will not [therefore] consider evidence which is not part of the record.” *Id.* Here, the record on appeal does not include the Applications in the other three cases. Nor can defendant make the Applications in the three other cases part of the record by including them in the addendum. As observed by the Utah Supreme Court in *Pliego*, “[a]lthough the record may be supplemented if anything material is omitted, it may not be done by simply including the omitted material in the party’s addendum.” *Id.* (citing Utah R. App. P. 11(h)). Therefore, this Court should strike the Applications as extraneous evidence and refuse to consider them on appeal in this case. *See id.*

Moreover, nothing in the record suggests that the trial court in this case considered the Applications in the three other cases. Utah appellate courts have long-recognized the general rule they will not consider evidence and issues not before the trial court. *See Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) (holding that “issues not raised at trial cannot be argued for the first time on appeal”). Even if this Court could properly consider the three prior applications, they have no relevance to defendant’s financial status at the time he applied for appointment of counsel in this case because seven months had passed since the first application, four months since the second application, and more than a month since the third application. *See* Defendant’s Supplemental Brief, Addenda 1-4. As noted in the State’s initial brief, a hearing on defendant’s request for appointment of counsel was held on May


16, 1995. Brief of Appellee at 3 (*citing* R. 008). Because the transcript of the indigency hearing was not made part of the record on appeal, this Court must “presume that the trial court made the appropriate findings on the record” to support its determination that defendant was not entitled to court-appointed counsel. *See State v. Snyder*, 932 P.2d 120,131 (Utah App. 1997); *see also* Brief of Appellee at 12.¹

CONCLUSION

For the reasons set forth above and in the Brief of Appellee, the State respectfully requests that the Court strike the extraneous evidence cited in defendant’s brief, including the Applications in Addenda 1, 2, and 3 of defendant’s supplemental brief, and affirm the conviction.

Respectfully submitted this 14th day of August, 2000.

JAN GRAHAM
UTAH ATTORNEY GENERAL



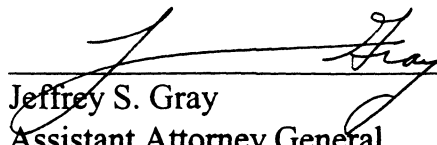
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Attorneys for Appellee, State of Utah

¹Without citing any authority, defendant also claims he would no longer receive his monthly social security check if he was sentenced to prison. Defendant’s Supplemental Brief, p. 3. However, defendant makes no claim that he would not receive the monthly social security check before conviction and sentence. Therefore, defendant would presumably receive the check through trial, and as a result, the trial court may have properly considered the check in assessing defendant’s indigency.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2000, I caused to be served two copies of the attached 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
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