

1998

Utah v. James Scott Wallburg : Brief of Appellant

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; Attorneys for Appellee.

Ms. Gene S. Byrge; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Utah v. Wallburg*, No. 981871 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1945

This Brief of Appellant 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

THE STATE OF UTAH :
 :
 Plaintiff/Appellee, : 7th District Ct. No. 951701390
 :
 v. : Court of Appeals No. 981871-CA
 :
 JAMES SCOTT WALLBERG, :
 :
 Defendant/Appellant. :
 :

**SECOND SUPPLEMENTAL BRIEF
OF APPELLANT**

**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.**

Ms. Gene S. Byrge - Bar No. 8313
The Judge Building, Suite 740
8 East Broadway
Salt Lake City, Utah 84111-2204
Telephone: 801/363-0940
Facsimile: 801/363-1338
Attorney for Defendant/Appellant

Jeffrey S. Gray
Assistant Attorney General
P.O. Box 140854
Salt Lake City UT 84114-0854
Attorney for Plaintiff/Appellee

FILED
Utah Court of Appeals

FEB 17 2001

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH	:	
	:	7 th District Ct. No. 951701390
Plaintiff/Appellee,	:	
	:	Court of Appeals No. 981871-CA
v.	:	
JAMES SCOTT WALLBERG,	:	
	:	
Defendant/Appellant.	:	

**SECOND SUPPLEMENTAL BRIEF
OF APPELLANT**

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.

Ms. Gene S. Byrge - Bar No. 8313
The Judge Building, Suite 740
8 East Broadway
Salt Lake City, Utah 84111-2204
Telephone: 801/363-0940
Facsimile: 801/363-1338
Attorney for Defendant/Appellant

Jeffrey S. Gray
Assistant Attorney General
P.O. Box 140854
Salt Lake City UT 84114-0854

Attorney for Plaintiff/Appellee

TABLE OF CONTENTS

Table of Authorities ii

Supplementary Argument 1

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.

Conclusion 5

Relief Sought 6

TABLE OF AUTHORITIES

Cases:

State v Vincent, 883 P.2d 278 (Ut. 1994) 4, 5, 6

Kelsey v Hanson, 818 P.2d 590 (Ut. App. 1990) 4, 5, 6

Statutes:

Utah Code Annotated §77-32-202(3)(i) 4

Utah Code Annotated §77-32-202(3)(ii) 4

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

This brief is filed pursuant to this Court's order of December 28, 2000.

SUPPLEMENTARY 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.

The trial court refused to appoint counsel for Defendant Wallberg in the instant case, believing his income was adequate for Defendant to hire his own counsel. Defendant indicated that his income was barely adequate to provide Defendant with food, shelter, and medication for the condition for which he received Social Security Disability income, which cost him three to four hundred dollars per month. (Transcript, Initial Appearance, P8 L9). The Court indicated "Well, a lot of legal counsel will take a lean [*sic*] on—on your check or whatever to—to see that it's paid. There—there's procedures that you can agree to that you can make—that you can make contractual agreements with counsel so that they're—so that they're assured of some payment." (Transcript, Initial Appearance, P14 L19).

First, an attorney, like any other creditor, cannot place a lien against a Social Security check, but can only hope to attach that money after it is deposited into a bank account. If the recipient has no bank account, there can be no attachment of the funds. Secondly, while there are attorneys who will work, on credit, for a criminal client who may probably end up in prison, finding one is another matter. Additionally, under current Federal law, an incarcerated person may lose all Federal benefit

payments during his incarceration. thus even had Defendant been able to persuade an attorney to represent him and take payments, he would likely have lost his sole source of income once imprisoned.

Defendant was also at a disadvantage regarding an attempt to locate an attorney who might have represented him without a retainer, as he was at the time incarcerated, and the Court refused to lower his bail beyond the already-reduced \$2,500.

Thus, with the approximately \$600 on his person when booked into the jail, (Transcript, Initial Appearance, P6, L11-22), Defendant was unable to post bond which would have given him the freedom to query attorneys and agencies who might have provided him with representation, and was unable to hire an attorney from the jail with a mere \$600 to offer as a retainer, which money was in the custody of the jail and unavailable to Defendant in any event. (Note: inmates generally may only make collect calls from within the facility, which makes it virtually impossible to contact offices where they are unknown.)

The trial Court expressed its opinion that, while Mr. Wallberg may have had inadequate funds for basic necessities, “[T]hat’s the same that all of us suffer through . . .” (Transcript, Initial Hearing, P14 L10)

When it was pointed out to the Court that the same Court had appointed the public defender in the past, the Court stated “ I think that I did that as, ah, facilitative and reserved the right to—to assess some or all of the attorneys fees in the event that . . . it’s determined that you are not eligible for 100 percent court-appointed counsel. And I would be willing to do that again, under these circumstances . . .” (Transcript, Initial Hearing, P9 L11)

The Court did not state what the guidelines for appointing counsel were at the time. There is a brief mention, by the Public Defender, Mr. Allred, that “Well it’s still—we’re still two or three–three hundred dollars past the limit on this count . . .” (Transcript, Initial Hearing, P13 L 12) At no time during the hearing did anyone refer to a guideline or clarify the “limit” referred to by the Public Defender.

Interestingly, the Court apparently initially was inclined to appoint counsel for Defendant (Transcript, Initial hearing, P13 L 3) until the Public Defender argued against the appointment and ultimately convinced the Court that Defendant was not entitled to his services. (Transcript, Initial Hearing, P14, L12).

In a perfect world, Defendant would indeed have been able to locate an attorney who would represent him at trial on a felony criminal charge, for little or no money up front, and a promise of payments, even in a rural area with few attorneys. However the reality was then, and is now, that such attorneys are practically non-existent unless one has a sensational case in which an organization such as the ACLU is interested.

State v Vincent, 883 P.2d 278 (Ut. 1994) was the standard for determining indigency at the time the instant case was before the District Court, in which the Court determined that the trial court’s decision as to whether or not the facts qualify a defendant as indigent, is reviewable for correctness.. The Utah Supreme Court in *Vincent* set forth a list of factors that should be considered in deciding indigency matters, which had been listed earlier in *Kelsey v Hanson*, 818 P.2d 590 (Ut. App. 1990) which included:

1. Employment status and earning capacity;

2. Financial aid from family or friends;
3. Financial assistance from state and federal programs;
4. A defendant's necessary living expenses and liabilities;
5. A defendant's unencumbered assets or disposition thereof; and
6. The borrowing capacity of a Defendant.

At Appellant's initial appearance, the Court merely inquired, first as to when Appellant was last employed (Transcript, Initial Hearing, P5 L7), and then as to whether or not Appellant was supporting his children from his Social Security payment of \$928 per month (Transcript, Initial Hearing, P5 L17; P7, L6-25; P8, L1-8). Once the Court determined that the children received separate payments, the Court refused to appoint counsel for Appellant.

Utah Code Annotated §77-32-202(3)(ii) defines indigency as having an income level at or below 150% of the United States poverty level. Subparagraph (i) defines indigency as when a person lacks sufficient means to provide for the payment of legal counsel and all other necessary expenses of representation *without depriving himself of food, shelter, clothing, and other necessities*.

The 1995 the United States poverty level for one individual was \$7470. 150% of that amount is \$11,205. Appellant's income at that time was \$928 per month, or \$11,136. Had the statute been in place at the time of Appellant's hearing, the Court would have been obligated to provide him with counsel, even without an inquiry into other matters.

Although *Vincent* concerned the right to counsel on appeal, the standards for determining indigency set forth therein can certainly be extended to the right to counsel at trial. The Utah Supreme Court, although reversing *Vincent*, agreed that the factors first set forth in *Kelsey* and then

used in *Vincent* were useful in evaluating indigency.

The trial Court failed to inquire about Appellant's situation beyond the amount of his monthly Social Security check and whether he was supporting his children on his \$928 monthly check.

It appears from the initial hearing that both the Court and the Public Defender simply did not want to deal with Appellant. The prosecutor, the Public Defender and the Court focused on the number of Appellant's children, where they lived, and whether Appellant's monthly income was being used to support them. When Appellant advised the Court that he had three to four hundred dollars per month expenses for medications, (Transcript, Initial Hearing, P8 L16), the Court brushed it aside with a comment that the Court believed Appellant's income precluded appointment of counsel. (Transcript, Initial Hearing, P8 L16)

At no time during the hearing did the Court, the prosecutor, or the Public Defender make reference to any standards for determining indigency. The sole inquiry, aside from the query regarding how Appellant's children were supported, was when Appellant was last employed. (Transcript, Initial Hearing, P5 L7). No inquiry was made as to living costs for Appellant, his living situation *vis a vis* whether he paid rent or lived with someone, what he paid - or did not pay - for utilities, what his monthly medical costs were. When Appellant tried to provide this information to the Court (Transcript, Initial Hearing, P14 L7), the Court's response was "[T]hat's the same that all of us suffer through" (Transcript, Initial Hearing, P14 L10).

CONCLUSION

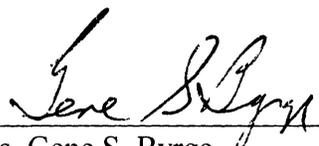
The standard of review for conclusions as to whether empirical facts qualify a defendant as

indigent, is reviewable for correctness pursuant to *State v Vincent*, 883 P.2d 278 (Ut. 1994). The trial court's denial of counsel to Appellant was clearly error in that the factors set forth in *Vincent* and later in *Kelsey* were largely ignored by the Court, and the Court failed to make findings as to why it denied counsel to appellant other than a vague reference to the Court's belief that Appellant was not entitled to counsel.

RELIEF SOUGHT

For the foregoing reasons, Appellant's conviction should be set aside, counsel should be appointed to represent Appellant, and a new trial should be granted.

DATED February 9, 2001.



Ms. Gene S. Byrge
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

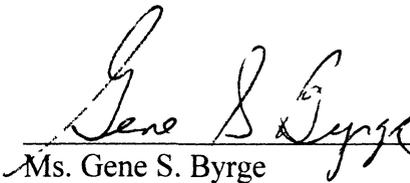
THE STATE OF UTAH :
 :
 Plaintiff/Appellee, : 7th District Ct. No. 951701390
 :
 v. : Court of Appeals No. 981871-CA
 :
 JAMES SCOTT WALLBERG, :
 :
 Defendant/Appellant. :

**SECOND SUPPLEMENTAL BRIEF
OF APPELLANT**

CERTIFICATE OF SERVICE

I certify that I caused to be delivered, on February 14, 2001, two true and correct copies of the foregoing SECOND SUPPLEMENTAL BRIEF OF APPELLANT to the following address:

Jeffrey S. Gray, Bar No. 5852
Assistant Attorney General
Office of the Attorney General
160 East 300 South, 6th Floor.
P. O. Box 140854
Salt Lake City UT 84114



Ms. Gene S. Byrge
Attorney for Appellant