2001

Utah v. Christopher Jones : Reply Brief

Utah Supreme Court

J. Frederic Voros, Jr.; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Attorneys for Appellee.
Catherine E. Lilly, Ronald S. Fujino; Salt Lake Legal Defender Association; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CHRISTOPHER JONES,	:	Case No. 20010872-SC
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Sodomy on a Child, a first degree felony, in violation of Utah Code Ann. §§ 76-5-403.1 (1999), 76-4-101 (1999) and 76-4-102 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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ARGUMENT

I. JONES' CHALLENGE TO THE CONSTITUTIONALITY OF § 76-5-406.5(1)(h) IS NOT MOOT.

The State does not address the merits of Appellant Christopher Jones' ("Jones") challenge to the constitutionality of Utah Code Ann. § 76-5-406.5(1)(h) (1999) (acceptance into a residential treatment center) ("probation statute"). Rather, it merely asserts that the issue is moot, contending that Jones is disqualified under subsection (1)(f) of the probation statute (offense not committed in the presence of another person). See State's Brief ("SB") at p.7-8.

The State's argument is without merit. First, Jones has not had a proper hearing conducted in accord with due process for the purpose of determining his eligibility under the other factors set forth in § 76-5-406.5(1). See Appellant's Brief ("AB") Point B. The only hearing held concerned the constitutionality of subsection (1)(h) as applied to Jones' case. R.418. In fact, the prosecutor had the same understanding of the purpose of the hearing as Jones, to wit, that the hearing was only to decide the constitutionality of

subsection (1)(h). R.418[17]. In that vein, the prosecutor stated to the court, "[t]he defendant has indicated that he can't get into Fremont, because AP&P has made certain findings. It seems to me that the way to overcome those findings is to *have a court hearing*...." Id. Since the hearing was limited in scope to that issue, no other evidence or witnesses were presented on any of the other eligibility criteria of the probation statute. R.418. Nonetheless, the trial court made a finding that Jones was disqualified under subsection (1)(f) notwithstanding the constitutional challenge. R.418[21].

Although the trial court made this finding, it is not a sound one for purposes of the State's mootness argument. Since sentencing is a critical stage of a criminal proceeding, due process requires that a punishment meted out by the court must be based on reliable and accurate information. See State v. Gomez, 887 P.2d 853, 854 (Utah 1994); see also U.S. Const. amend. XIV; Utah Const. art. I, § 7. In order to ensure reliability and accuracy, all parties must be able to examine and challenge the evidence. Id.

Yet, Jones did not have the opportunity to present any evidence concerning his eligibility under subsection (1)(f) at the hearing on the constitutionality of subsection (1)(h). See generally R.418. The State did not present any evidence as to that issue either. R.418[16-19]. In fact, the only comment made by the State regarding Jones' eligibility under subsection (1)(f) was to illustrate the need for a hearing on the eligibility criteria. R.418[17]. Without the presentation of the requisite reliable and accurate information, the trial court could not and did not make a competent decision regarding

his eligibility. See Gomez, 887 P.2d at 854.

Since the trial court did not make a sound decision regarding his eligibility under subsection (1)(f), the State's allegation of mootness is without merit. Rather, this Court should address the constitutionality of subsection (1)(h) since it is critical to a resolution of Jones' appeal. See Hoyle v. Monson, 606 P.2d 240, 242 (Utah 1980). Indeed, it is the preliminary and "essential" question that must be addressed before a hearing on the eligibility factors can be held. Id.

II. JONES HAS A DUE PROCESS RIGHT TO A HEARING ON THE ELIGIBILITY CRITERIA.

The State concedes that Jones requested to be sentenced under the probation statute. See SB 10. The State also concedes that "every criminal defendant convicted of attempted sodomy upon a child who invokes this statute has a due process right to present evidence showing that he meets the statute's twelve qualifications." Id. (citing Gomez, 887 P.2d at 855; State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993)).

Nonetheless, the State contends that Jones' is not entitled to his due process rights at sentencing. See SB 10-14. It reasons that the trial court found Jones' ineligible under subsection (1)(f), which renders the need for an eligibility hearing on the other factors moot since a judge is obliged to deny a defendant probation if he does not meet all the criteria of the probation statute. The State also suggests that Jones' waived his right to a sentencing hearing, contending that Jones admitted to the court that he would be ineligible for probation if the trial court ruled against him on his constitutional challenge

to subsection (1)(h).

As noted supra Point I, the trial court did not make a competent finding regarding subsection (1)(f) since no evidence at all was presented on that point at the hearing on the constitutionality of subsection (1)(h). Hence, contrary to the State's position, a hearing is necessary to get all the accurate and reliable evidence before the court so that it can make a competent decision as to (1)(f) and the rest of the eligibility criteria.

Moreover, the State's waiver argument is meritless. The State cites defense counsel out of context. Defense counsel was attempting to explain to the court why he was not waiving his right to a hearing when he stated, "I didn't feel like it was a productive use of this Court's time to go through (a) through (k) minus (h), and then at the end say we can't do (h). That didn't make a lot of judicial sense. Instead, I felt the better, more appropriate way was to acknowledge the shortcomings, acknowledge that we didn't have (h), and ask the Court to consider a challenge to the constitutional application of it." R.418[78].

Hence, so long as an issue as to the constitutionality of subsection (h) remains on appeal, there is no waiver of the right to the hearing. In fact, Jones expressly stated on the record that he did not waive an evidentiary hearing on the eligibility factors and that the trial court incorrectly interpreted that he had. R.418[13-14]. He further contested the trial court's conclusion about waiving the hearing when he refused to approve the court's written findings and conclusions as to form and withholding his signature from them.

R.413. The record similarly lacks any evidence of a formal waiver, either written or through a colloquy between the judge and Jones. Indeed, it is difficult to imagine why any defendant in Jones' position would waive a sentencing hearing when it might mean the difference between incarceration and placement in a residential treatment center, a far better option.

Where the evidence of the alleged waiver is ambiguous if not lacking altogether, waiver cannot be presumed. See State v. Hansen, 2002 UT 125, ¶55, 463 Utah Adv. Rep. 5; State v. Arguelles, 2003 UT 1, ¶ 70. As noted by this Court, "every reasonable presumption against the waiver of [Jones'] fundamental constitutional rights [at sentencing must be indulged absent] convincing evidence that such rights were waived." Hansen, 2002 UT 125 at ¶55.

In light of the foregoing, Jones' statement is merely an explanation of the procedural tack he took to address this discreet constitutional issue and not a waiver of the hearing. Indeed, there is still an argument to be made under subsection (1)(h), even if Jones does not prevail on the constitutional challenge. He can still contest AP&P's conclusion, cross-examine the person who prepared the AP&P report, and present Dr. Ririe on his own behalf as well as other witnesses who can attest to his suitability for an in-patient residential treatment program. Although this task would be made easier if he prevailed on the constitutional issue, it is by no means impossible if not. Consequently, where critical sentencing issues remain, a hearing is required by due process. See

Gomez, 887 P.2d at 854.

As a final matter, the State presumes that this Court will affirm the trial court regarding subsection (1)(h) and therefore seeks as a remedy only vacation of the court's findings on the other eligibility factors if this Court finds them erroneous. See SB 14. As noted above, a hearing will still be required under subsection (1)(h) even if Jones' does not prevail on the constitutional challenge so that he will have the opportunity to contest AP&P's recommendation regarding placement in a residential abuse treatment center. Consequently, the State's proposed remedy is not adequate under the circumstances.

III. THE STATE'S INVITED ERROR CLAIM IS WITHOUT MERIT.

The State, in a footnote, suggests that Jones' appeal, at least as far as the court's findings regarding subsection (1)(f), should not be addressed under the invited error doctrine. See SB n.1. The State contends that Jones lulled the court into making this finding when he stated that there was some evidence that could support an ineligibility finding it if the court chose to believe it. Id.; see also R.418[15].

The State's argument is without merit because Jones' comment was not a concession as to ineligibility under (1)(f). Rather, Jones made the statement to illustrate that there was a dispute on that issue; while the court may believe the State's allegation that there a third person present when the offense occurred, Jones himself intended to dispute such evidence at a sentencing hearing. R.418[15]. Considering Jones' position

during the entire hearing, emphasizing that he did not waive a sentencing hearing regarding eligibility under the probation statute, the State's invited error claim is untenable. See supra Point II.

CONCLUSION

In light of the foregoing and for the reasons set forth in his opening brief, Jones respectfully requests this Court to vacate his sentence and to remand his case tot the trial court for a sentencing hearing as required by due process and § 76-5-406.5.

RESPECTFULLY submitted this 30th day of January, 2003.

Catherine E. Lilly

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Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered ten copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 30th day of January, 2003.

Catherine E Lilly
CATHERINE E. LILLY

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this ____ day of January, 2003.