2009

State of Utah v. Kelly Tyson Davis : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS	
STATE OF UTAH, Plaintiff/Appellee, v. KELLY TYSON DAVIS, Defendant/Appellant.	Case No. 20090934

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Retail Theft With Priors, a 3rd degree felony, in violation of Utah Code Ann. § 76-6-602 (2009), in the Second Judicial District Court, State of Utah, the Honorable Scott M. Hadley, Judge, presiding.

MARK L. SHURTLEFF (4666) **UTAH ATTORNEY GENERAL** 160 East 300 South, 6th Floor PO BOX 140854 Salt Lake City, Utah 84114-0854 Attorney for Appellee	SAMUEL P. NEWTON (9935) **Attorney at Law** PO BOX 255 Centerville, UT 84014 Attorney for Appellant

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NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a judgment of conviction for Retail Theft With Priors, a 3rd degree felony, in violation of Utah Code Ann. § 76-6-602 (2009), in the Second Judicial District Court, State of Utah, the Honorable Scott M. Hadley, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF THE ISSUE

Issue I: Whether the trial court committed plain error by failing to find that the prosecutor breached the plea agreement.

STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENT

In evaluating the potential breach of a plea agreement, this court reviews whether for plain error whether the plea agreement complied with due process. See, State v. Smit, 2004 UT App. 222, ¶ 27, fn. 6, 95 P.3d 1203 ("a reviewing court may consider the record of the plea proceedings, including the plea colloquy and plea affidavit or statement ...")

These issues were preserved by Mr. Davis, who filed a motion alleging a breach of the plea agreement. (R. 32.) Even if this Court were to find these issues not preserved, it may still review this matter for plain error. Id. at ¶ 27.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This appeal is governed by U.S. Const. Amend. V and XIV, Utah Const. Art. I § 7; Utah Code Ann. § 76-6-602 (2009).

STATEMENT OF THE CASE

In an Information dated May 27, 2009, the State charged Kelly Davis ("Appellant," "Kelly," "Davis") with Retail Theft With Priors, a 3rd degree felony, in violation of Utah Code Ann. § 76-6-602 (2009).

On August 6, 2009, Mr. Davis entered a guilty plea to the sole count of the information. On September 15, 2009, Mr. Davis was sentenced by the Honorable Judge Scott M. Hadley, Judge to a prison term of 0-5 years. Mr. Davis filed a timely notice of appeal on September 24, 2009.

STATEMENT OF THE FACTS

On May 27, 2009, Mr. Davis was charged with Retail Theft with Priors, a third degree felony, in violation of Utah Code Ann. § 76-6-602. It was alleged that he went into a 7-Eleven, that he took a pair of sunglasses and other items, and left without paying for them. (R. 62:3.) The items' value totaled to $29.28. (R. 63:9.) Mr. Davis had been convicted of theft twice before. (R. 62:3-4.) On August 6, 2009, Mr. Davis entered a guilty plea to count I, the sole charge on the information. Pursuant to a plea agreement, the state agreed to recommend the sentence run concurrently with the defendant's Davis County sentence of one year. (R. 62:2; 63:6-7.) See also, R. 19 ("State agrees sentence may run concurrent with Davis Co. case.")

At sentencing on September 15, 2009, the court discussed with counsel the fact that Mr. Davis had been sentenced by the court previously to three years of probation with a recommendation that he complete drug court. (R. 63:5-6.) Mr. Davis was unable to qualify for drug court because of this offense. (R. 63:5.) Nonetheless, the state indicated that: "we did recommend that it—this run concurrently with Davis County." (R. 63:7.)

The court then indicated its confusion with the probation officer's prison recommendation. In Mr. Davis's Davis County case, two months prior to the sentencing in this case, the same probation officer recommended probation. (R. 63:7.) The state's response was that the defendant's matrix had changed with this new offense. (R. 63:7-8.)

The court replied that the probation agent would have known about this case two months earlier. (R. 63:8.)

The defendant indicated his remorse to the court:

> I just want you to know I do apologize for not entering the program, I think it would have been a good opportunity for me. A lot has happened since then with these past months in jail, to say the least it's pretty frustrating and I brought this upon myself and I can't blame anyone but myself, but I mean, I've written letters to all my friends, telling them not to write me, don't call my house, I can't continue living that lifestyle, I don't want nothing to do with it, I just (inaudible) that I meant for, just I want to get this over with and get on with my life.

(R. 63:9.)

At this point, the state changed its recommendation.

> Your Honor, we think the recommendation for prison is appropriate. He's been given the change of probation before and was terminated unsuccessfully.
>
> At the time, after he committed the offense that he's apparently on court probation for, he committed this offense, so, he just keeps committing offenses, even when he's been charged and on probation for other offenses.
>
> We think that the--the appropriate recommendation in this case is prison, your Honor.

(R. 63:9-10.) Defense counsel made no objection to this statement except to state that he believed this offense occurred prior to the probation violation case. (R. 63:10.)

At this point, the parties discussed the defendant's prior cases, noting that he had been put on zero tolerance probation in 2007. (R. 63:10.) His probation was also revoked in 2005. (R. 63:11.)

Following this discussion the trial court sentenced the defendant to an indeterminate sentence at the Utah State Prison of 0 to 5 years. On September 24, 2009, the defendant wrote to the district court. (R. 32.) In his letter, he requested an appeal because of a "breach of a plea agreement." Acknowledging that the court did not have to honor the plea agreement, Mr. Davis asserted that the "only reason I had plead [sic] guilty in the first place is that I was lead [sic] to believe by Mr. Ryan Bushell and the prosecuter [sic] that by pleading guilty it would run concurrent with the one year sentence I was already serving here in the Davis County jail." That letter is the basis for this appeal.

SUMMARY OF THE ARGUMENT

When Mr. Davis entered his guilty plea, the prosecutor agreed to recommend a concurrent jail sentence. (R. 17.) At sentencing, the prosecutor initially stuck with that recommendation, telling the court that the state was recommending a concurrent jail sentence. (R. 63:7). Yet midway through sentencing, the prosecutor changed his recommendation and requested the Court sentence Mr. Davis to prison. (R. 63:9-10.)

Mr. Davis contends that this change of recommendations constituted a breach of the plea agreement. This breach was a violation of the defendant's right to due process in plea agreements. See Boykin v. Alabama, 395 U.S. 238 (1969). Additionally, under Santobello v. New York, 404 U.S. 257 (1971) and State v. Smit, 2004 UT App 222, 95 P.3d 1203, this court is should remand the matter to the trial court to either specifically

enforce the plea agreement or to allow Mr. Davis the opportunity to file a motion to properly withdraw his plea.

ARGUMENT

I. UNDER A PLAIN ERROR ANALYSIS, THE PROSECUTOR BREACHED THE PLEA AGREEMENT AND AS SUCH, THE DEFENDANT IS ENTITLED TO EITHER SPECIFIC PERFORMANCE OF THE AGREEMENT OR TO HAVE HIS GUILTY PLEA WITHDRAWN.

The defendant raised this issue at the trial court in the letter written to the court about a week after sentencing and prior to his filing of a formal notice of appeal. The defendant contends that this letter preserved the issue in the trial court, not unlike a motion for new trial. In fact, the letter specifically mentions the breach of the plea agreement. (R. 32.) And although the issue was filed after the court imposed its sentence, the defendant contends that he would not be able to timely file a motion to withdraw the plea because of the prosecutor's breach. The defendant contends that his letter preserved the issue for appellate review and that the trial court erred in failing to make findings as to the prosecutor's breach of the plea agreement.

Nonetheless, the defendant did not raise this issue at the time of the prosecutor's breach. As such, he is normally prohibited from addressing this issue, absent a showing of either plain error or of ineffective assistance of counsel. See State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996). Defendant contends that he may meet both showings and that

this court may conclude that the prosecutor's breach of the plea agreement constituted plain error.

The prosecutor violated the plain terms of the plea agreement when he changed his recommendation mid-sentence to prison. Courts interpret plea agreements favorably to defendants to guard against the unknowing and involuntary waiver of fundamental rights.

A. The Plain Meaning of the Plea Agreement Required the Prosecutor to Recommend a Concurrent Sentence to Mr. Davis's Davis County Case

Concern for protecting criminal defendants' constitutional rights demands liberal construction of plea agreements to benefit defendants. "Because a defendant pleading guilty pursuant to a plea agreement waives a number of fundamental rights, see Boykin v. Alabama, 395 U.S. 238, 243 (1969), the circumstances surrounding the plea agreement must comport with due process to ensure a defendant's understanding." Spence v. Superintendent, 219 F.3d 162, 167 (2nd Cir. 2000). As this Court has ruled, "'both constitutional and supervisory concerns require holding the government to a greater deal of responsibility than the defendant'" in interpreting plea agreements. State v. Patience, 944 P.2d 381, 387 (Utah Ct. App. 1997) (quoting United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993)). "Thus, the state bears the primary responsibility for insuring precision and unambiguity in a plea agreement because of the significant constitutional rights the defendant waives by entering a guilty plea." State v. Kaufman, 404 S.E.2d 763, 768 (W.V. 1991).

1. The Prosecutor's Breach Constituted Plain Error

The Tenth Circuit, along with several other circuits, "has held that a defendant does not waive his right to appeal a claim that the government has breached a plea agreement when he fails to object to the breach before the district court." United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000).

This Court has jurisdiction to review the issue for plain error. State v. Smit, 2004 UT App 222, ¶ 26, 95 P.3d 1203. "To demonstrate plain error, a defendant has the burden of showing (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." Id. at ¶ 28.

First, the plea agreement was clear and unambiguous. In the statement in support of the guilty plea, which the state signed, it indicated that "the State agrees sentence may run concurrent with Davis Co. case." (R. 17.) At sentencing, the prosecutor reiterated this recommendation when he stated that "we did recommend that it—this run concurrently with Davis County." (R. 63:7.)

Unexpectedly and clearly in breach of the state's agreement, the prosecutor changed his mind mid-sentencing and recommended prison. (R. 63:9-10.) Although the prosecutor initially mentioned the promise to recommend probation, his later comments urged the sentencing judge to "impose a more severe sentence than the sentence contemplated by the plea bargain." Wolf v. State, 794 P.2d 721, 722 (Nev. 1990).

The prosecutor's comments and this case are similar to those in Wolf where the prosecutor agreed to recommend concurrent sentences and a prison term of no more than five years. Id. At sentencing, the prosecutor acknowledged the sentencing recommendation, but, also noted the defendant's extensive criminal history and agreed with the presentence report that "severe sanctions" were appropriate. Id. The report recommended consecutive sentencing and a prison term of nine years. Id. The Nevada Supreme Court ruled that the prosecutor's comments "were clearly intended to persuade the district court" to impose a more sever sentence than outlined in the plea agreement. Id. That court remanded the case for resentencing because the prosecutor "violated the spirit of the plea agreement." Id. at 723. The prosecutor's change of recommendation during the sentencing proceeding similarly undermined the plea agreement. (R. 63:7-10.)

This is clearly the type of case that constitutes plain error. In Santobello v. New York, 404 U.S. 257 (1971), the Supreme Court recognized that a defendant who enters into a plea bargain with the State has a constitutional right to a remedy when that plea agreement is broken. Id. at 262.

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, ***such promise must be fulfilled***.

Id. (emphasis added).

This type of error should have been obvious to the trial court. The defendant has a due process right regarding his guilty plea. See Boykin v. Alabama, 395 U.S. 238, 243 (1969). If the prosecutor breaches his end of the agreement on the record, the court should have been aware that this change constituted a due process violation. The defendant was clearly harmed, since in his own words, the only reason he entered the guilty plea was based on the prosecutor's recommendation of concurrent jail time. (R. 32.)

One logical reason exists for this type of review. Defendants cannot comply with the requirements of Rule 11 and move to withdraw their pleas *prior to* sentencing if the plea agreement is breached *at* sentencing. The defendant should not be penalized for failing to pursue the required remedy at law because of the prosecutor's breach.

2. The Matter Should Be Remanded to the Trial Court to Determine the Appropriate Remedy.

The Supreme Court left the question of whether that remedy should be withdrawal of the guilty plea or specific performance of the plea agreement to the state courts to decide:

> [W]e conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i. e., the opportunity to withdraw his plea of guilty.

Santobello. 404 U.S. at 263.

In Utah, there is no bright line rule as to what the proper remedy is. See, State v. Smit, 2004 UT App 222, ¶ 9, 95 P.2d 1203. "In dicta, the Utah Supreme Court in State v. Garfield, 552 P.2d 129 (Utah 1976), seems to leave discretion in the hands of the trial judge as to the appropriate remedy for breach of a plea agreement." Id. at ¶ 10.

> "[W]hen a plea agreement is breached by the prosecutor, the proper remedy is either specific performance of the plea agreement or withdrawal of the guilty plea both at the discretion of the trial judge. Accordingly, if the prosecutor in the instant case had breached the plea agreement, we would remand to the trial court for a determination of the appropriate remedy."

Id. at ¶ 17. This case should therefore be remanded to the trial court for a determination of the appropriate remedy.

If it is determined that specific performance is the appropriate remedy, the Defendant would request that he be resentenced by a different judge. "We note that if the trial court determines that specific performance of the plea agreement is the proper remedy for the State's breach, the State's recommendation and Defendant's resentencing should take place before a different judge." State v. Hale, 2005 UT App 305, fn. 4, citing Santobello v. New York, 404 U.S. 257, 263 (1971).

CONCLUSION

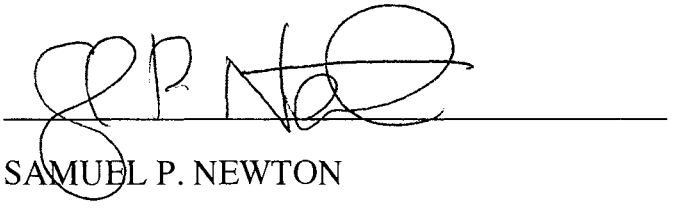
Based on the foregoing, Mr. Davis asks this court find that the prosecutor's breach of the plea agreement constituted plain error and as such, this case should be remanded to the trial court to determine the appropriate remedy.

RESPECTFULLY SUBMITTED this 6 day of APRIL, 2010.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

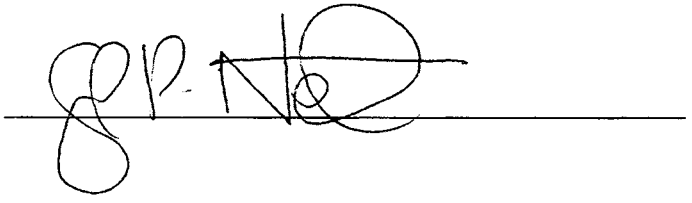
CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two 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 6 day of April, 2010.



SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 6 day of April, 2010.



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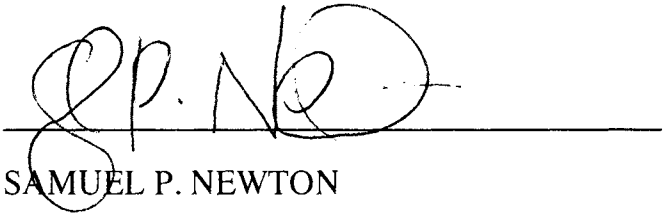
ADDENDUM

Pursuant to Rule 24(a)(11) of the Rules of Appellate Procedure, the appellant does not believe that an addendum need be filed in this matter.

SAMUEL P. NEWTON
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be hand delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two 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 15 day of April, 2010.



SAMUEL P. NEWTON

DELIVERED a true and correct copy of the foregoing to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 15 day of April, 2010.