

1980

State of Utah v. Michael McClendon : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

*

Plaintiff-Respondent, *

vs.

*

MICHAEL MCCLENDON,

*

CASE NO. 16803

Defendant-Appellant. *

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	2
POINT I. APPELLANT IS ENTITLED TO A REVERSAL OF HIS COMMITMENT TO THE UTAH STATE PRISON BECAUSE THE TRIAL COURT JUDGE IN REFUSING TO GRANT APPELLANT PROBATION ABUSED HIS DISCRETION.	2
POINT II. APPELLANT IS ENTITLED TO A REVERSAL OF HIS COMMITMENT TO THE UTAH STATE PRISON BECAUSE OF THE TRIAL JUDGE'S FAILURE TO COMPLY WITH SECTION 77-35-9, UTAH CODE ANNOTATED (1953), AS AMENDED	4
CONCLUSION	5

CASES CITED

<u>Anders v. California</u> , 386 U.S. 738 (1967)	1
<u>Demmick v. Harris</u> , 107 U. 471, 155 P.2d 170 (1945).	2
<u>State v. Chambers</u> , 533 P.2d 876 (Utah, 1975).	3
<u>State v. Sibert</u> , 6 U.2d 198, 310 P.2d 388 (1957).	2, 3
<u>William v. Harris</u> , 106 U. 387, 149 P.2d 640 (1944).	2

STATUTES CITED

§77-35-9, Utah Code Annotated (1953), as amended.	4
§77-35-17, Utah Code Annotated (1953), as amended	2
§78-3a-44, Utah Code Annotated (1953), as amended	3

STATEMENT OF NATURE OF THE CASE

The appellant, Michael McClendon, appeals from conviction upon a plea of guilty to Burglary of a Dwelling in the First Judicial District Court, Cache County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Michael McClendon, plead guilty to Burglary of a Dwelling and thereafter sentenced by the Honorable VeNoy Christoffersen to one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his commitment to the Utah State Prison. Counsel on appeal requests permission to withdraw from the appeal and submits this brief in compliance with Anders v. California, 386 U.S. 738 (1967).

STATEMENT OF FACTS

The appellant was found guilty of the crime of Burglary of a Dwelling, a 2nd Degree Felony, by the Honorable VeNoy Christoffersen upon a plea of guilty on October 1, 1979. Following entry of the plea and acceptance by the Court of the same, counsel for appellant requested on the appellant's behalf that sentencing be continued for the purposes of obtaining a presentence report.

On November 5, 1979, the time set for sentencing, the Court instructed appellant as follows: "Mr. McClendon, you previously had appeared before this court, the matter was continued at your request for the purposes of presentence report, to this time for sentencing. Anything you wish to state of your counsel prior to sentencing?" (T-P. 8) Appellant's counsel then presented information and

arguments on behalf of appellant requesting that appellant be placed on probation and later in the alternative, that appellant prior to the Court passing sentence be sent to St. Mark's Hospital for a ninety-day evaluation. Counsel for the State presented his argument in which he referred to appellant's extensive juvenile record. (T-P. 9)

The Court, citing aggravating circumstances such as a verified instances of criminal conduct and appellant's past attitude being not conducive to supervision, sentenced appellant to one to fifteen years in the Utah State Prison, (T-P. 12)

ARGUMENT

POINT I

APPELLANT IS ENTITLED TO A REVERSAL OF HIS COMMITMENT TO THE UTAH STATE PRISON BECAUSE THE TRIAL COURT JUDGE IN REFUSING TO GRANT APPELLANT PROBATION ABUSED HIS DISCRETION.

Section 77-35-17, Utah Code Annotated (1953), as amended, provides that

Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or execution of sentence and may place defendant on probation for such period of time as the court shall determine.

This Court has recognized that whether one convicted of a crime and subject to punishment should be placed on probation is a matter in the sentence court's discretion. In short, the right to be placed on probation is a discretionary right. See Demmick v. Harris, 107 U. 471, 155 P.2d 170 (1945), State v. Sibert, 6 U.2d 198, 310 P.2d 388 (1957), and William v. Harris, 106 U. 387, 149 P.2d 640 (1944).

Concerning the granting or withholding of probation, and review of the exercise of this discretionary power, this Court has state that:

The granting or withholding of probation involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling. These matters are to be considered in connection with the prior record of the accused, are of such nature that the problem of probation must of necessity rest within the discretion of the judge who hears the case. This is not to say that if were clearly shown that the trial judge would have granted probation except for some wholly irrelevant, improper or inconsequential consideration such refusal might be so capricious and arbitrary to warrant the conclusion that he did not in fact exercise his discretion and justify a review of his action. State v. Sibert, 6 U.2d 198, 310 P.2d 388 (1957). See also State v. Chambers, 533 P.2d 876 (Utah, 1975).

Finally, Section 78-3a-44, Utah Code Annotated (1953), as amended, provides that:

- (1) Proceedings in children's cases shall be regarded as civil proceedings, with the court exercising equitable powers.
- (2) An adjudication by a juvenile court under Section 78-3a-16 shall not be deemed a conviction of a crime, except in cases involving traffic violations.
- (3) Neither the record in juvenile Court nor any evidence given in juvenile court shall be admissible as evidence against the child in any proceedings in any other court, with the exception of cases involving traffic violations.

In the present case, the trial court, citing as aggravated circumstances past verified instances of criminal conduct, sentenced appellant to one to fifteen years in the Utah State Prison. (T-P. 12) The instances of conduct erroneously labeled by the court as criminal were the appellant's juvenile record, which in accordance to Section 78-3a-44 (1) and (2), Utah Code Annotated (1953), as amended, is deemed to be a civil proceeding and not deemed a conviction of a crime. Further, Section 78-3a-44(3), Utah Code Annotated (1953), as amended, provides that the record in juvenile court shall not be admissible against the child in any proceedings in any other court, with the exception for traffic violations.

Appellant contends that the trial court abused its discretion in denying appellant probation by improperly using, relying on and weighing the

significance of appellant's juvenile record. Therefore, appellant request a reversal of his commitment to the Utah State Prison.

POINT II

APPELLANT IS ENTITLED TO A REVERSAL OF HIS COMMITMENT TO THE UTAH STATE PRISON BECAUSE OF THE TRIAL JUDGE'S FAILURE TO COMPLY WITH SECTION 77-35-9, UTAH CODE ANNOTATED (1953), AS AMENDED.

Section 77-35-9, Utah Code Annotated (1953), as amended provides

that:

When the defendant appears for judgment he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.


In the present case, the trial court instructed appellant at the time he appeared for judgment as follows: "Mr. McClendon, you previously had appeared before this court, the matter was continued at your request for the purposes of presentence report, to this time for sentencing. Anything you wish to state or your counsel prior to sentencing?" (T-P. 8)

This instruction clearly did not comply with Section 77-35-9, Utah Code Annotated (1953), as amended. Appellant contends that compliance with said section is mandatory, and that the trial court's failure to comply by not informing the appellant of the nature of the charge, his plea and asking whether he had any cause to show why judgment should not be pronounced against him entitles the appellant to a reversal of his commitment to the Utah State Prison.

CONCLUSION

Counsel for appellant respectfully requests permission to withdraw, believing the appeal is without meritorious grounds. The foregoing brief discusses the law applicable to the only points that could arguably be presented on appeal.

Respectfully submitted,

A handwritten signature in cursive script, reading "Cheryl A. Russell", is written over a horizontal line.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to Robert Hansen, Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84111, and one copy to the appellant, Michael McClendon at Box 250, Draper, Utah 84020, on the 8th day of February, 1980.

Cheryl A Russell