

1980

# State of Utah v. Michael McClendon : Brief of Respondent

Utah Supreme Court

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## STATUTES CITED

Utah Code Ann. § 76-6-202 (1953) as amended-----	1
Utah Code Ann. § 76-3-404(1) (1953) as amended-----	3
Utah Code Ann. § 77-35-9 (1953) as amended-----	4
Utah Code Ann. § 78-3a-44 (1953) as amended-----	3

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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:  
STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 16803  
-vs- :  
MICHAEL McCLENDON :  
Defendant-Appellant. :

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:  
-----  
BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with burglary, in violation of Utah Code Ann. § 76-6-202 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant pled guilty to the charge of burglary and was sentenced to serve one to fifteen years in the Utah State Prison by the Honorable VeNoy Christoffersen, Judge of the First Judicial District Court in and for Cache County, State of Utah.

RELIEF SOUGHT ON APPEAL

Respondent seeks to affirm the sentence imposed

by the lower court. Although Appellant's attorney, in harmony with Anders v. California, 386 U.S. 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967), stated that it is her opinion that the issues raised on appeal are not sound and has requested that she be allowed to withdraw, Respondent feels that these issues are worthy of some response and therefore has summarily responded to the issues raised on appeal.

#### STATEMENT OF THE FACTS

Respondent is in agreement with Appellant's statement of the facts and will not reiterate the facts here.

#### ARGUMENT

##### POINT I

THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO SERVE A TERM AT THE UTAH STATE PRISON.

Appellant concedes that the right to be placed on probation is a discretionary right granted or withheld by the sentencing judge, but contends that the judge in his case abused that discretion because he refused to place Appellant on probation.

Appellant specifically argues that the court erred in considering his juvenile court record in

rendering a decision in that juvenile court records are not admissible evidence pursuant to Utah Code Ann. § 78-3a-44 (1953) as amended, which provides, in pertinent part, that:

(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.

Prior to the time set for sentencing, Appellant's counsel requested a presentencing report which was granted by the court. Utah Code Ann. § 76-3-404(1) provides that the division of corrections, in preparing a presentence report, can inquire into such matters:

. . . as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs. . . (Emphasis added.)

Although the provisions of these two statutes appear contradictory or inconsistent, statutes like Utah Code Ann. § 78-3a-44, which provide that the disposition of a child or any evidence given in a juvenile court is not admissible as evidence against the child in any other court, have

generally been construed as not being applicable to the use of a juvenile court record for sentencing purposes. The overwhelming majority of courts which have considered this issue have taken the position that an accused's juvenile court record may be taken into consideration by a judge in sentencing the accused for an adult offense. See Young v. State, 553 P.2d 192 (Okla. Cr. 1976); State v. Dainard, 85 Wash.2d 624, 537 P.2d 760 (Wash. 1975); and State v. Corral, 21 Ariz. App. 520, 521 P.2d 151 (Ariz. 1974).

Respondent contends that the trial judge, in considering the presentence report which included Appellant's juvenile court record, did not abuse his discretion in sentencing Appellant to serve a prison term rather than place Appellant on probation.

## POINT II

THE TRIAL COURT GAVE  
APPELLANT AN ADEQUATE OP-  
PORTUNITY FOR ALLOCUTION  
AS REQUIRED BY UTAH CODE  
ANNOTATED, § 77-35-9.

Appellant argues that unless there is mandatory compliance by the trial court with the provisions of U.C.A. § 77-35-9, which provides the accused with his constitutional right of allocution, his commitment to the Utah State Prison should be reversed.

At the time set for sentencing in this case, the trial court asked Appellant the following question: "Anything you wish to state or your counsel prior to sentencing?" (T.p.8) Appellant's counsel responded in the affirmative and the following four pages of the transcript contain discussions between Appellant's counsel, the prosecutor, and the court as to reasons which might mitigate the sentence to be imposed or provide grounds for probation.

Respondent submits that the case law interpreting the sufficiency of the court's language which gives a defendant the right to allocution prior to imposition of sentence establishes the following: That Appellant's counsel and not appellant responded to the court's inquiry is still compliance with the rule and not a denial of Appellant's right to allocution (State v. Davis, 539 P.2d 897 (Ariz. 1975)); that the record fails to support Appellant's claim in that it establishes that Appellant and his counsel were afforded the opportunity to address the court prior to the imposition of sentence (United States v. Scallion, 533 F.2d 903 (5th Cir. 1976) and Commonwealth v. Knighton, 380 A.2d 789 (Penn. 1977)); that had the trial court, prior to sentencing, failed to



ask Appellant whether he had anything to say would be harmless error in light of the fact that the court considered a presentence report and that defense counsel argued factors in mitigation during the sentencing hearing (People v. Jones, 371 N.E.2d 1150 (Ill. 1977)). Furthermore, a complete omission of the court to permit a defendant to make a statement would be a technical or formal error which would not require reversal (People v. Spiler, 288 Ill. App.3d 178, 328 N.E.2d 201 (Ill. 1975)).

Moreover, this court in State v. Kelbach, 461 P.2d 297 (Utah 1969), stated that:

The failure of the trial court to ask a defendant, represented by an attorney, whether he had anything to say before sentence is imposed (allocution) does not in itself constitute constitutional error. (citation omitted) Id. at 299

Respondent submits that the trial court gave Appellant an adequate opportunity to exercise his constitutional right of allocution and that Appellant's sentence should be affirmed.

#### CONCLUSION

Based on the foregoing arguments and case law, respondent urges this court to affirm the trial court's

imposition of sentence.

Respectfully submitted,

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Assistant Attorney General

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