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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

20556

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 20556
BLAINE D. CASPER,	:	
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

A REPLY TO A PETITION FOR RECONSIDERATION OF A PER CURIAM DECISION BY THE UTAH SUPREME COURT FILED FEBRUARY 27, 1986, IN AN APPEAL FROM A GUILTY PLEA AND CONVICTION OF AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, AND AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, PRESIDING.

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APR 15 1986

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether this Court in its *per curiam* opinion misapprehended the law applicable to defendant's contention on appeal by requiring a showing of actual prejudice resulting from a possibility of bias on the part of the magistrate at preliminary hearing.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 20556
BLAINE D. CASPER,	:	
Defendant-Appellant.	:	

REPLY TO PETITION FOR REHEARING

STATEMENT OF THE CASE

Defendant petitioned this Court for rehearing of a per curiam opinion filed by this Court on February 27, 1986. In the per curiam opinion, defendant's conviction upon a guilty plea to Aggravated Burglary, a first degree felony, and Aggravated Assault, a third degree felony, was affirmed. Defendant was sentenced by the Honorable Jay E. Banks, Judge in the Third District Court, in and for Salt Lake County, to five years to life for Aggravated Burglary and zero to five years for Aggravated Assault, with sentences to run concurrently.

STATEMENT OF FACTS

The facts are set forth in the Brief of Respondent (Respondents' Brief at 2-4).

SUMMARY OF ARGUMENT

This Court in its per curiam opinion clearly recognized defendant's contention of bias at the preliminary hearing stage and properly dismissed defendant's claim for failure to show record evidence of actual bias. Further, defendant waived his

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right to seek review of the bind over order by failing to take an interlocutory appeal.

Defendant has offered insufficient evidence in the record to show that the preliminary hearing judge was even aware that the victim was an employee of the Fifth Circuit Court. Since defendant pleaded guilty to the charges and has failed to support his allegations, he is precluded from consideration of his claim.

ARGUMENT

POINT I

THIS COURT CORRECTLY APPREHENDED THE LAW APPLICABLE TO DEFENDANT'S CLAIM OF BIAS AT PRELIMINARY HEARING.

In its per curiam opinion, State v. Casper, slip op. No. 20556 (Utah, February 27, 1986), this Court affirmed defendant's conviction after a full and fair consideration of defendant's arguments on appeal. This Court clearly recognized defendant's main contention "that the failure to move his preliminary hearing outside the Fifth Circuit Court denied him his right to a fair trial before an impartial magistrate". Id. In dismissing defendant's contention, this Court pointed out that the purpose of a preliminary hearing is to secure to the accused "the right to be advised of the nature of the accusations against him, and to be confronted with and given an opportunity to cross-examine the witnesses testifying on behalf of the State." Id., citing State v. Sommers, 597 P.2d 1346, 1347 (Utah 1979). This Court then noted that the "evidence contained in the record is undisputed," that "[d]efendant was the man who stood accused of

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the offense and [he] did not deny that the incident occurred." State v. Casper, supra. Under these circumstances, this Court concluded that "[n]o more was required to bind defendant over to the district court." Id. Thus, defendant's contention of unfair bias and prejudice was clearly considered and dismissed.

Although the State did not assert the argument in its brief and this Court did not address it, defendant is precluded from claiming error in any event because he failed to take an interlocutory appeal from the bind over order. This Court in State v. Schreuder, 25 Utah Adv. Rep. 13, 16 (December 27, 1985), found that a defendant waives the opportunity to challenge a bind over order by failing to take an interlocutory appeal under Utah Code Ann. § 77-35-26(b)(3) (Supp. 1985). By not allowing the District Court an opportunity to rule on his motion to remand for another preliminary hearing before he changed his plea to guilty, defendant failed to avail himself of this statutory remedy and thereby waived the issue for appeal (R. 130-131).

Defendant, in his rehearing petition, cites Anderson v. Industrial Commission of Utah, 696 P.2d 1219 (Utah 1985), for the proposition that "even the possibility of unfairness" creates bias and prejudice. Id. at 1221. However, the Anderson case is distinguishable from the case at hand. In Anderson, the administrative law judge presiding over the hearing had formerly represented one of the parties to the hearing. Id. at 1220-1221. Therefore, the party claiming bias in Anderson demonstrated that an actual relationship existed between the judge and the opposing party which created the possibility of bias and not merely that

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there was a possibility of a relationship. All that defendant has shown in this case is that there is a possibility that the magistrate knew the victim. Moreover, although demonstration of a possibility of bias may be sufficient to prevail when the magistrate is asked to remove himself from the case, such a showing may be insufficient where the hearing has concluded and the issue is first brought up at trial. At that point, it is more logical to require a showing of actual prejudice in the interest of judicial economy. This is especially true where the party claiming bias failed to raise the issue in the proceeding where the alleged bias occurred.

A case almost factually identical to the one at hand is State v. Valencia, 121 Ariz. 191, 589 P.2d 434 (1979). In Valencia, the trial judge sitting in a first degree murder trial knew the murder victim when she worked for the court administrator's office and had even agreed to perform the wedding ceremony when the victim was to be married. Id. at 437. On appeal, the Arizona Supreme Court found that there was insufficient evidence in the record to show that the trial judge had an interest or prejudice sufficient to disqualify him from hearing the matter. Id. at 438. The court also found that it was not prejudicial to the defendant that the murder victim was known to virtually all court personnel by reason of her previous employment in the court administrator's office and that if defendant was successful in a preemptory challenge the case might be assigned to a judge who could very well have known the murder victim better than did the challenged judge. Id.

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Certainly, the facts in the case at hand are even less compelling than in Valencia. Defendant has failed to support his claim of bias with any record evidence to show that the preliminary hearing magistrate actually knew the victim. In fact, it is unlikely from the record that the magistrate knew Connie Ungricht since even defense counsel was unaware of any suggestion of bias at preliminary hearing (R. 112-113). In addition, the magistrate was new to the Fifth Circuit Court and had never sat in the Salt Lake Department where Connie was employed (R. 113). Under these circumstances, it would be extremely tenuous to conclude that actual bias existed at preliminary hearing, especially where defendant failed to provide a transcript of the preliminary hearing from which this Court could determine whether there was bias.

Another basis upon which defendant is precluded from claiming error is the fact that he pleaded guilty to the charges of aggravated burglary and aggravated assault (R. 139). By pleading guilty, defendant voluntarily relinquished his right to assert on appeal any errors or defects occurring prior to the plea proceedings. State v. Moreno, 134 Ariz. 199, 655 P.2d 213 (Ariz. App. 1982); Cf. State v. Beck, 584 P.2d 870 (Utah 1978).

Further, defendant has continued in his failure to support his alleged grounds for bias with any legal analysis or authority suggesting a standard of review that is relevant to the preliminary hearing stage. In that "[t]he burden of showing error is on the party who seeks to upset the judgment," State v. Jones, 657 P.2d 1263, 1267 (Utah 1982), the State should not be

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put to the task of developing defendant's legal arguments by searching out legal authority to support defendant's allegations.

CONCLUSION

Based upon the foregoing arguments, defendant's petition for rehearing should be denied and his conviction affirmed.

DATED this 15th day of April, 1986.

DAVID L. WILKINSON
Attorney General

SANDRA L. SJOGREN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Reply to Petition for Rehearing, postage prepaid, to James C. Bradshaw, attorney for appellant, Salt lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 15th day of April, 1986.

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