2010

State of Utah v. Scott C. Wadsworth : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
SCOTT C. WADSWORTH,	:	Case No. 20100004-CA
Defendant/Appellant.	:	Appellant is incarcerated

APPELLANT'S REPLY BRIEF

Appeal from a conviction of sexual exploitation of a minor, a second degree felony, in violation of Utah Code Ann. § 76-5a-3 (2001), unlawful sexual activity with a minor, a third degree felony, in violation of Utah Code Ann. § 76-5-401 (1998), and enticing a minor over the internet, a class A misdemeanor, in violation of Utah Code Ann. § 76-4-401(1) (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, presiding.

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SUMMARY

According to the dictates of the Sixth Amendment guarantees and the principles that that flow from that right, the trial court had a duty, once it was informed of the confusion regarding private counsel, to assess Wadsworth's indigency status and inform him of his right to assignment of counsel rather than incorrectly asserting he would be forced to represent himself at trial or be incarcerated pending trial. However, the trial court failed to make such an inquiry to ensure Wadsworth's Sixth Amendment rights were not violated and there was no evidence that Wadsworth was no longer indigent. Instead, the trial court's erroneous declaration forced Wadsworth to believe he had to choose to either proceed to trial with the assistance of an attorney with whom he had lost confidence in or represent himself with facing the possibility of incarceration. Because the trial court violated Wadsworth's Sixth Amendment right to counsel and choice of

counsel, Wadsworth plea was involuntary and the trial court's denial of his motion to withdraw his guilty plea was erroneous.

POINT I. THE TRIAL COURT HAD A DUTY TO INFORM MR. WADSWORTH OF HIS RIGHT TO ASSIGNMENT OF COUNSEL AFTER BEING INFORMED OF THE DIFFICULTIES AND CONFUSION SURROUNDING PRIVATE COUNSEL AND VIOLATED THE SIXTH AMENDMENT BY THREATENING THAT WADSWORTH WOULD REPRESENT HIMSELF UNLESS HE "STRAIGHTENED OUT" THE PROBLEMS WITH PRIVATE COUNSEL.

The issue before this Court is whether the trial court violated the Sixth Amendment when it threatened Mr. Wadsworth that unless he "straightened out" the problems and confusion with his representation by private counsel he would be representing himself at trial where he faced over twenty felony charges and two class A misdemeanors. R1-8. Despite the State's suggestions to the contrary, there is no evidence that Wadsworth did not remain indigent after retaining private counsel. Under the Sixth Amendment, the trial court had a duty to inform Wadsworth regarding his right to the assignment of legal counsel to represent him if he remained indigent. U.S. Const. amend. VI; Utah Code Ann. § 77-32-302(1) (2008) (Utah's Indigency Defense Act ("the Act")). Instead, the trial court erroneously informed Wadsworth that he faced the possibility of representing himself at trial which violated his Sixth Amendment right to counsel and right to choice of counsel. See id. Mr. Wadsworth relied on the trial court's incorrect assertion to his detriment by continuing with private counsel the trial court knew Wadsworth had lost confidence in.

"An accused is entitled to employ counsel of his choice, and if indigent and unable to obtain his own counsel, he is entitled to representation by a court-appointed attorney."

State v. Wulffenstein, 733 P.2d 120, 121 (Utah 1986); Webster v. Jones, 587 P.2d 528, 530 (Utah 1978) (same). In this case, it is undisputed that at Wadsworth's initial appearance in December 22, 2003, the trial court found him indigent and appointed Salt Lake Legal Defenders Association (LDA) to represent him. R10-12, 13-14, 15. On December 30, 2003, Wadsworth retained private counsel and LDA withdrew from representation. The State erroneously argues that "any . . . error in not re-advising Defendant of the right to appointed counsel would be harmless because the record is clear that [he] could afford to retain counsel." Appellee Brief 18-19. However, there are a multitude of reasons that a defendant who has been found indigent may have the ability to hire private counsel but "despite [a defendant's] ability to retain private counsel, he [may still] remain indigent." State v. Parduhn, 2011 UT 55, ¶9, ---P.3d---.

For example, in the consolidated appeal of State v. Parduhn, each of the defendants were found to be indigent and appointed a public defender but nevertheless eventually hired private counsel to represent them. Id. In Mr. Parduhn's case, he "received a one-time monetary gift from his grandparents that he used to retain private counsel." Id. ¶ 5. Though the reasons for Mr. Jeffs' and Mr. Davis' ability to retain private counsel are not stated, they, like Parduhn, were found by the trial court to have remained indigent despite their ability to retain private counsel. Id. ¶¶8-9, 11-12. Similarly, despite Wadsworth's ability to retain private counsel, there is no evidence establishing he was no longer indigent, and the trial court had an ongoing duty to make "[a] determination of indigency or continuing indigency" especially in light of the initial finding early on in the proceedings. Utah Code Ann. §77-32-302(1) (2008) ("A

determination of indigency or continuing indigency of any defendant may be made by the court at any stage of the proceedings."); Utah Code Ann. § 77-32-302 (3) ("The court may make a determination of indigency at any time.").

In accordance with the dictates of the Sixth Amendment, Utah's Indigency Defense Act offers additional support for the trial court's duty to assess Wadsworth's indigency status and inform him of his right to assignment of counsel rather than incorrectly asserting Wadsworth would be forced to represent himself at trial. See Patterson v. Patterson, 2011 UT 68, ¶18, ---P.3d --- (Court "unwilling to disregard controlling authority that bears upon the ultimate resolution of a case solely because the parties did not raise it below"). In response to decisions by the United States Supreme Court holding that the "right to counsel includes effective assistance of counsel." State v. Burns, 2000 UT 56, ¶¶23, 24, 4 P.3d 795, the Act was enacted "[t]o ensure compliance with the requirements that indigent defendants receive effective assistance of counsel and 'access . . . to the basic tools of [a] defense'" throughout a criminal proceeding. Parduhn, 2011 UT 55, ¶19.

To ensure compliance with the Sixth Amendment requirements, the Act mandates that defendants who have been found indigent be assigned legal counsel and "access to defense resources necessary for an effective defense" in cases where there is a "substantial probability" that the penalty imposed would be prison. Utah Code Ann. § 77-32-302(1) (2008). Under the Act, the mandate to assign counsel or resources can be accomplished in two ways: (1) "the indigent requests counsel or defense resources, or both; or" (2) "the court on its own motion or otherwise orders counsel, defense resources,

or both and the defendant does not affirmatively waive or reject on the record the opportunity to be represented and provided defense resources." Utah Code Ann. § 77-32-302(1)(a)&(b) (2008); State v. Parduhn, 2011 UT 55, ¶19, ---P.3d--- (same).

Contrary to the State's assertion, "compliance with the requirements [of the Sixth Amendment] that indigent defendants received effective assistance of counsel" including choice of counsel, does not require the defendant to make a request. Parduhn, 2011 UT 55, ¶19; State v. Pursifell, 746 P.2d 270 (Utah Ct. App. 1987); Appellee Brief 12-19. Rather, the trial court can "on its own motion . . . order[] counsel" and a defendant must "affirmatively waive [or reject on the record] the opportunity to be represented and provided defense resources." Parduhn, 2011 UT 55, ¶¶19, 63 (citing the Act). This is not simply a case where defendant did not request the assignment of counsel once problems arose with retained counsel, but a case where the trial court knew of the confusion but affirmatively told Wadsworth that unless he "straightened out" the problems with private counsel's representation he would be "representing [him]self." R192:8. The trial court also threatened that if Wadsworth did not resolve the issue with counsel before trial, it would "just make the determination that Mr. Wadsworth's not cooperating with his attorneys and I'll take him into custody and he'll [sit] in jail until we try the case." R192:9.

By the time of the August 6, 2004 motion hearing, where the State asked for a continuance due to the prosecutor having left the state and the case manager being unable to attend trial, Wadsworth had lost confidence in Mr. Warren's ability to represent him at trial against the serious felony charges. R43-44;115;192. Mr. Warren explained that after

the May 7, 2004 hearing, Wadsworth told him that "it was his intention to as least seek a second opinion and retain other counsel." R192:3. Due to the breakdown in the relationship with Mr. Warren, Wadsworth paid Ms. Susanne Gustin $5,000 to, according to his understanding of the fee agreement, represent him through the remainder of the trial proceedings. R.99, 115-16; 119. The trial court stated that Ms. Gustin told him "she was never retained to represent him in this case." R192:3.

However, Mr. Warren explained to the court that it was also his understanding, after talking with Ms. Gustin that she had been retained to represent Wadsworth. R192:3-4. Later Mr. Warren received a telephone call from Ms. Gustin telling him that she had been unsuccessful in contacting Wadsworth. R192:4. Although Mr. Warren had not been in contact with Wadsworth since early May, he wrote to Wadsworth asking him to let him "know what was going on" because "[i]t was [Mr. Warren's] understanding that [he] was going to be replaced as [Wadsworth's] attorney." R192:4. Mr. Warren repeated again to the court that this was his understanding about Ms. Gustin. R192:5.

Although Mr. Warren expressed his belief that Ms. Gustin had been hired to replace him and that he had no contact with Wadsworth until 36 hours before the August 6th hearing, Mr. Warren entered a stipulated motion to continue on July 20th stating a different purpose for Wadsworth hiring of Ms. Gustin. R43-44; 192:4. Wadsworth explained to the court that he retained Ms. Gustin for $5,000, in late May and had signed a retainer agreement. R192:5; 115-16; 119-20. The trial court asked Wadsworth "[w]here is she?" "If she's representing you, I don't see her here." R192:5. Wadsworth explained the discrepancy in Ms. Gustin's representation stating that Ms. Gustin told him a month

earlier that because of her pregnancy she would not "be able to go to trial" on the date it was scheduled. R192:6. Wadsworth stated he was not originally aware that Ms. Gustin was pregnant and asked her "why didn't you tell me that to begin with?" R192:6. Wadsworth asked "what am I going to do?" R192:6.

Ms. Gustin then told Wadsworth she would not be able to represent him but she would give him the names of her associates, but she never called Wadsworth back. R192:6. Wadsworth stated he talked with Ms. Gustin a day or so after receiving her June 17th letter and asked to "see the evidence" against him. R192:7. Ms. Gustin told him that she had to get a hold of the prosecutor but "that was the last that I heard from her." R192:7. Wadsworth waited for Ms. Gustin to call him because "that's what we were going to do and as the time grew near" he contacted her again. R192:7. Several days before the August 6th hearing, Wadworth called Ms. Gustin and told her that court was in a few days and wanted to know what they were going to do. R192:6. Wadsworth stated "I'm kind of left hanging here and really I paid her a hefty fee and retained her for things that we had agreed upon and she was supposed to contact [the prosecutor] . . .over a month ago because I wanted to look at some evidence . . . against me, and she never called me back again after that point." R192:6.

Wadsworth expressed confusion over the situation stating "I don't know why she's saying I haven't retained her. She's been paid in full." R192:7-8. The court then told Wadsworth "I don't know, but you better get it straightened out." R192:8. Wadsworth stated that he wanted to and Ms. Gustin was supposed to call him back. R192:8. The court then threatened "You better do more than want to or you'll be here

representing yourself." R192:8. Wadsworth told the court "I don't want to do that." R192:8. The court then granted the State's continuance and reset the trial date to October 26, 2004. R192:8

At the end of the hearing, Mr. Warren made a motion for leave to withdraw as Wadsworth's counsel. R192:8. The trial court denied the motion stating:

> Mr. Wadsworth had some arrangement in this case and I'm not letting you out of this case until Ms. Gustin or somebody else makes an appearance because I'm not continuing this [inaudible] but anybody down here on the 22nd or the week before so I know we can't try this because I don't have a lawyer. Or if that's the case, I'll just make the determination that Mr. Wadsworth's not cooperating with his attorneys and I'll take him into custody and he'll set [sic] in jail until we try the case. Do I make myself clear?

R192:9 (emphasis added).

"When a defendant is forced to stand trial 'with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict,' he is deprived of the 'effective assistance of any counsel whatsoever' and his Sixth Amendment right to counsel is violated." State v. Pursifell, 746 P.2d 270, 274 (Utah Ct. App. 1987). Rather than the trial court making threats that Wadsworth would have to represent himself at trial or be locked up in jail until the case is tried, it had a duty to inquire about the dissatisfaction that Wadsworth expressed regarding Mr. Warren's representation and whether the situation required the court's assistance in procuring substitution of counsel to ensure the Sixth Amendment right to counsel was not violated. Id. at 273. When addressing a trial court's duty regarding the substitution of appointed counsel, this Court has stated:

> [W]hen dissatisfaction is expressed, the court must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right to counsel would be violated but for substitution. Even when the trial judge suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial, perfunctory questioning is not sufficient.

Id. (citing United States v. Weltry, 674 F.2d 185, 187 (3d. Cir. 1982)).

The trial court never made such an inquiry here to ensure Wadsworth's Sixth Amendment right to counsel and choice of counsel were not violated by being forced to continue to trial with Mr. Warren after it had been made clear to the court that Wadsworth had lost confidence in his ability. R115-16; 168:14; 192:3-4; State v. Arguelles, 2003 UT 1, ¶74, 63 P.3d 731 (holding that "'[a] defendant cannot be forced to proceed with incompetent counsel'" (citation omitted)). In fact the trial court acknowledges that there was "confusion" regarding the scope of representation Ms. Gustin agreed to and its refusal to allow Mr. Warren to withdraw as counsel "unless new counsel appeared." R125. The trial court's memorandum decision also notes that it put the onus on Wadsworth to "resolve his concerns regarding representation before the October trial setting, because the Court would not be inclined to continue the matter once again." R125.

The State concedes that the record is clear that Wadsworth did not want to represent himself against these serious charges at trial. Appellee Br. 15. Despite being informed of Wadworth's desire to be represented by counsel and the court's awareness of

the confusion and problems that existed with private counsel, the trial court issued Wadsworth an ultimatum rather than inform him of his right to assignment of counsel. The record supports that Wadsworth in good faith believed he had paid for Ms. Gustin to represent him during the trial proceedings. Not only did Wadsworth believe Ms. Gustin represented him but Mr. Warren expressed his belief that Ms. Gustin had taken over the case and Mr. Warren sought to withdraw. Despite the confusion regarding the scope of Ms. Gustin's representation, it is clear that Wadsworth no longer desired to have Mr. Warren represent him against these charges.

However, due to this confusion and the trial court's ultimatum to either resolve the concerns regarding private counsel before the October trial or Wadsworth would be representing himself and faced the possibility of being held in custody, Wadsworth was left with the impression that Mr. Warren must continue to represent him if he desired counsel. After paying Ms. Gustin $5,000, Wadsworth did not have the funds to retain alternative counsel. R168:13. The trial court never made any effort to inform Wadsworth of his right to assignment of counsel and there is no evidence that Wadsworth was no longer indigent. The trial court's erroneous declaration in violation of the Sixth Amendment forced Wadsworth to believe he had to choose to either proceed to trial with the assistance of an attorney with whom he had lost confidence in or represent himself while facing the possibility of being incarcerated. State v. Pursifell, 746 P.2d 270, 274 (Utah Ct. App. 1987).

POINT II. THE TRIAL COURT ERRED IN DENYING WADSWORTH'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE IT WAS SHOWN THAT HIS PLEA WAS INVOLUNTARY UNDER UTAH CODE ANN. §77-13-6 AND RULE 11, UTAH RULES OF CRIMINAL PROCEDURE, BECAUSE THE TRIAL COURT VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The trial court's denial of Wadsworth motion to withdraw his guilty plea was erroneous where it was shown that his plea was not voluntarily made because Wadsworth was led to believe that he must either go to trial represented by an attorney with whom he had lost confidence in or represent himself against the serious felony charges. Appellant OB 43-47. The trial court was aware that Wadsworth had lost confidence in Mr. Warren's ability to represent him and confusion existed on who would represent him at trial, yet the trial court did not make any reasonable efforts to determine whether the confusion and Wadsworth's relationship with counsel had been resolved and he was entering his plea voluntarily in accordance with Rule 11(e) and Utah Code Ann. §77-13-6 (2008). Based on the violation of the Sixth Amendment, Rule 11 and the statutory provision, this Court should reverse the trial court's denial of Wadsworth motion to withdraw his guilty plea.

Because "'[t]he entry of a guilty plea involves the waiver of several important constitutional rights' and 'because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted." State v. Ruiz, 2009 UT App 121, ¶11, 210 P.3d 955. Although "[t]he State maintains that this 'liberal' standard for guilty pleas is no longer valid," this Court was not persuaded by the State's arguments asking the Court to remove the "liberally granted" language for its opinion in its petition for rehearing. Id., ¶¶16-23. In this case, Wadsworth made a timely motion to withdraw

his guilty plea based on the Sixth Amendment violation and the State admitted they would suffer little if any prejudice if the trial court granted Wadsworth motion, therefore the trial court erred in failing to liberally grant his motion. R168:29.

"The purpose of rule 11 is to ensure that defendants know their rights and understand the basic consequences of their decision to plead guilty." State v. Dean, 2004 UT 63, ¶9, 95 P.3d 276. Rule 11 provides one procedural mechanism to support a plea was knowingly and voluntarily made as required under Utah Code Ann. § 77-13-6 (2008) by requiring the trial court to find the "detailed and specific criteria have been fulfilled." State v. Maguire, 830 P.2d 216, 218 (Utah 1991). But even if this Court were to find that rule 11 was strictly complied with, the violation of Wadsworth's Sixth Amendment right to counsel and choice of counsel prohibits a finding that his plea was voluntary under the controlling statute. See Patterson, 2011 UT 68, ¶18 (court "unwilling to disregard controlling authority that bears upon the ultimate resolution of a case").

"To be valid, a guilty plea must be a 'knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences.'" United States v. Smith, 640 F.3d 580, 592 (4th Cir. 2011) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). Where a defendant has pled guilty after being denied his right to choice of counsel, he may have been provided constitutionally inadequate counsel for entry of a voluntary plea. See Strickland v. Washington, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); Brady, 397 U.S. at 748 n.6 ("an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of

[counsel] . . . a guilty plea to a felony charge entered without counsel and without waiver of counsel is invalid."); Utah R. Crim. P. 11(e)(1).

In Brady, the Supreme Court upheld the defendant's guilty plea as voluntary "even though the law promised him a lesser maximum penalty if he did not go to trial" reasoning "the possibly coercive impact of a promise of leniency could . . .be dissipated by the presence and advice of counsel." Brady, 397 U.S. at 754. Comparing the case to Miranda, it held "'[t]he presence of counsel'" is "'the adequate protective device necessary' to counteract the coerciveness of 'police interrogations.'" Smith, 640 F.3d at 592 (quoting Brady, 397 U.S. at 754 n.12). "Where there has been a breakdown in communication between defendant and defense counsel such that the mounting of an adequate defense would be impossible, this 'protective device' is absent." Smith, 640 F.3d at 592.

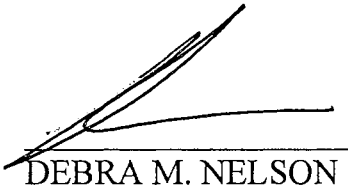
"An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. Faretta v. California, 422 U.S. 806, 821 (1975) (emphasis added); U.S. v. Smith, 640 F.3d 580, 590 (4th Cir. 2011) ("[T]o compel one charged with grievous crime to undergo trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.")(citation omitted)). Under these circumstances, the plea would not be voluntary.

Because Wadsworth was denied his Sixth Amendment right to counsel and right to choice of counsel by the trial court erroneously informing him that he would have to represent himself at trial if he did not get the problems with private counsel straightened out, or face incarceration, his guilty plea was rendered involuntarily and this Court should reverse. See Point I.

CONCLUSION

As more fully set forth in the Opening Brief, Appellant, Scott C. Wadsworth, respectfully requests that this Court reverse the trial court's denial of his motion to withdraw his guilty plea.

SUBMITTED this 10 day of January, 2012.



DEBRA M. NELSON
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CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 10 day of January, 2012.

DEBRA M. NELSON