

1989

Utah v. Pharris : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James A. Valdez; Elizabeth Holbrook; Salt Lake Legal Defender; Attorneys for Appellant.

R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Utah v. Pharris*, No. 890549 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2175

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU

50

IN THE UTAH COURT OF APPEALS

.A10

DOCKET NO. **890549-CA**

STATE OF UTAH,

Plaintiff/Respondent,

v.

FRANK EDWARD PHARRIS,

Defendant/Appellant.

Case No. 890549-CA

Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for retail theft,
a third degree felony, in violation of Utah Code Ann. section 76-
6-602(1), in the Third Judicial District Court in and for Salt
Lake County, State of Utah, the Honorable Richard H. Moffat,
Judge, presiding.

JAMES A. VALDEZ
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah, 84111

Attorneys for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
DAN R. LARSEN
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah, 84114

Attorneys for Respondent

JUN 7 1990

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	
	:	
FRANK EDWARD PHARRIS,	:	Case No. 890549-CA
	:	Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for retail theft,
a third degree felony, in violation of Utah Code Ann. section 76-
6-602(1), in the Third Judicial District Court in and for Salt
Lake County, State of Utah, the Honorable Richard H. Moffat,
Judge, presiding.

JAMES A. VALDEZ
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah, 84111

Attorneys for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
DAN R. LARSEN
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah, 84114

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	
I. THE TRIAL COURT'S FAILURE TO COMPLY WITH THE TERMS OF RULE 11 RENDERS THE ENTRY OF APPELLANT'S GUILTY PLEA INVALID.	2
II. THE PROSECUTOR'S EFFECTUAL VIOLATION OF THE PLEA AGREEMENT REQUIRES REVERSAL.	5
CONCLUSION.....	7

TABLE OF AUTHORITIES

Page

Cases Cited

<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987).....	2-5
<u>State v. Hickman</u> , 779 P.2d 670 (Utah 1989)	3
<u>State v. Jolivet</u> , 784 P.2d 1148 (Utah 1989).....	3
<u>State v. Thurston</u> , 781 P.2d 1296 (Utah App. 1989).....	4
<u>State v. Valencia</u> , 776 P.2d 1332 (Utah App. 1989).....	4-5
<u>State v. Vasilacopulos</u> , 756 P.2d 92 (Utah App. 1988)....	2-5
<u>United States v. Grandinetti</u> , 564 F.2d 723 (5th Cir. 1977).....	7

Statutes and Constitutional Provisions

Utah Rule of Criminal Procedure 11.....	passim
---	--------

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	
	:	
FRANK EDWARD PHARRIS,	:	Case No. 890549-CA
	:	Priority No. 2
Defendant/Appellant.	:	

INTRODUCTION

Appellant relies on his opening brief, and refers this Court to that brief for the statements of jurisdiction, issues, the case, and the facts.

SUMMARY OF ARGUMENT

This Court's jurisprudence over post-Gibbons guilty pleas is consistent: it calls for strict compliance with Rule 11 in the entry of the plea. Because this is a post-Gibbons guilty plea and the trial court did not comply with the plain requirements of Rule 11, the entry of the plea was improper. This issue may be raised for the first time on appeal.

In twice emphasizing Appellant's criminal record, which was already in the court file, the prosecutor effectively argued against Appellant's motion for diminished sentencing. This issue focuses on a broken contract between the prosecutor and Appellant, rather than the trial court's sentencing decision. Because the prosecutor failed to honor his contractual duty, Appellant is entitled to reversal. This issue may be raised for the first time on appeal.

I.
THE TRIAL COURT'S FAILURE
TO COMPLY WITH THE TERMS OF RULE 11
RENDERS THE ENTRY OF APPELLANT'S GUILTY PLEA
INVALID.

Since the Gibbons decision was written, this Court has consistently maintained the rule that in accepting guilty pleas, trial courts must comply strictly with the Rule 11.¹ As explained by the Gibbons court, the purposes of the strict compliance rule are

to assist trial judges in making the constitutionally required determination that the defendant's plea is truly knowing and voluntary and will tend to discourage, or at least facilitate swift disposition of, post-conviction attacks on the validity of guilty pleas because the trial judge will have produced a clearly adequate record for review.

Id. at 1314.

The State does not attack the policies behind the strict compliance rule, but indicates that this Court should re-evaluate that rule inasmuch as the State perceives inconsistencies in applications of that rule. Appellee's brief at 12-15.

For purposes of clarification, it is helpful to divide the cases discussed by the State into three categories: 1) pre-Gibbons cases applying the "record as a whole" test; 2) post-Gibbons cases applying the strict compliance rule; and 3) post-Gibbons cases applying the "record as a whole" test.

¹ E.g. State v. Vasilacopulos, 756 P.2d 92 (Utah Ct.App.); cert. denied, 765 P.2d 1278 (Utah 1988).

In the first category of cases, the pre-Gibbons cases applying the "record as a whole" test, the court behaved in a manner paralleling the State's argument in this case, evaluating the voluntariness of plea entries with all available factors (plea affidavits, representation by counsel, intelligence of the defendant, prior experience in the criminal justice system, etc.).²

In the second category of cases, the post-Gibbons cases applying the strict compliance rule, are cases such as State v. Vasilacopulos, 756 P.2d 92 (Utah Ct.App.); cert. denied, 765 P.2d 1278 (Utah 1988), and State v. Valencia, 776 P.2d 1332 (Utah App. 1989). These cases, like Gibbons, indicate that relying on a

² See State v. Jolivet, 784 P.2d 1148, 1149 (Utah August 22, 1989)(Mr. Jolivet's convictions and sentences were affirmed in 1986 (before Gibbons); court applied "record as a whole test").

The court's failure to point out the date of Mr. Jolivet's convictions in light of its decision to apply the record as a whole test is not an indication that the court was abandoning Gibbons. See State v. Vasilacopulos, 765 P.2d 1278 (Utah 1988)(denying petition for writ of certiorari); State v. Hickman, 779 P.2d 670, 672 n.1 (Utah August 17, 1989)(per curiam, with Justice Stewart concurring in the result)(characterizing Gibbons as a "clear break with the past", and declining to apply it retroactively).

Apparently, the Hickman court accepted the State's argument presented in its brief in that case (No. 880362):

Prior to Gibbons, this Court had always applied the Brooks-Warner record as a whole test. This Court should adopt the position taken by the Court of Appeals in State v. Vasilacopulos, 756 P.2d 92 (Utah Ct.App. 1988), rehearing denied, 91 Utah Adv. Rep. 17 (1988), cert. denied 98 Utah Adv. Rep. 3 (1988); that Gibbons represents a clear break with the past in application of a procedural rule and that it will not be retroactively applied.

State's Hickman brief at 7, included in Appendix 1 of this brief.

defendant's representation by an attorney and on a plea affidavit are not sufficient to satisfy Rule 11, but that the trial court must make a thorough personal inquiry of the defendant at the time the plea is entered.³

The third category of cases, the post-Gibbons cases applying the "record as a whole" test, contains opinions such as this Court's decision in State v. Thurston, 781 P.2d 1296 (Utah App. 1989). The reason this opinion does not apply the Rule 11 strict compliance rule, or rely on Gibbons, Vasilacopulos, or Valencia is that the issue raised by Mr. Thurston was that he had misunderstood the plea bargain;⁴ it did not pertain to the trial court's conduct during the plea hearing.⁵

Appellant's issue addressed in Point II of Appellant's opening and reply briefs, concerning the prosecutor's failure to honor the plea agreement, is yet another example of an issue justifying withdrawal of the guilty plea that is unrelated to the

³ See State v. Gibbons, 740 P.2d 1309, 1313-1314 (Utah 1987); State v. Vasilacopulos, 756 P.2d 92, 94 (Utah App. 1988); State v. Valencia, 776 P.2d 1332, 1334-1335 (Utah App. 1989).

⁴ Mr. Thurston thought when the prosecution agreed to recommend probation, the agreement was binding on all state agencies, including Adult Probation and Parole. Id. at 1298.

⁵ Indeed, it appears that the trial court complied with Rule 11. This Court explained,

The record here establishes that defendant was fully informed of his rights and the consequences of his guilty plea. The judge, pursuant to Rule 11, informed defendant of his rights to trial and against self-incrimination, and related to him the potential consequences of his guilty plea.

Id. at 1302.

Rule 11 strict compliance test set forth in Gibbons. In short, Thurston neither relates to, nor calls into question Gibbons, Vasilacopulos or Valencia.

Because the record in this post-Gibbons Rule 11 case demonstrates that the trial court failed to meet its burden under Rule 11, Appellant may raise this issue for the first time on appeal, and is entitled to relief. See Valencia, 776 P.2d 1332, 1334 (Utah App. 1989)('Although the issue here was first raised on appeal by appellant, in certain cases we may consider the failure to comply with Rule 11(5) and Gibbons as error sufficiently manifest and fundamental to be first raised on appeal to this court. Cf. Boykin v. Alabama, 395 U.S. 238, 241-42 , 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969)('It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.')).

II.
THE PROSECUTOR'S EFFECTUAL
VIOLATION OF THE PLEA AGREEMENT
REQUIRES REVERSAL.

In response to Appellant's argument that the prosecutor, in twice emphasizing Appellant's criminal record, which was already in the trial court's file, effectually violated the plea agreement (which bound the prosecutor to refrain from opposing Appellant's motion for a diminished sentence), the State argues that there was no violation of the plea agreement, and that if there were, Appellant should have given the trial court the opportunity to fashion a remedy.

As the cases cited in footnote 9 of Appellant's opening brief indicate, the fact that a prosecutor is indirect in violating a plea bargain does not make the violation any more acceptable. Even if the violation of the agreement was accidental, the result of the violation is the invalidation of the plea agreement. State v. Garfield, 552 P.2d 129 (Utah 1976).

The record in the instant case demonstrates the prosecutor's violation of the plea agreement, and clarifies the State characterization of the prosecutor's two redundant summaries of Appellant's criminal record as "innocuous statements", made "in response to questions by the judge", "not rising to the level of argument or advocacy". Appellee's brief at 7, 23.

The first "question" asked by the trial court to evoke the "innocuous" summary of Appellant's criminal record was as follows:

THE COURT: Well, the drug crimes are just horrendous.

(T. 7). The prosecutor's second summary of Appellant's criminal record, came in response to the question, "Mr. Ellett, do you wish to be heard?" (T. 17).

The State's argument that sentencing decisions should be well-informed is well taken. However, inasmuch as Appellant's criminal record was already in the court's file, the prosecutor's summaries of Appellant's criminal record did not provide any evidence necessary for sentencing. Rather, they constituted a violation of the plea agreement not to oppose Appellant's motion

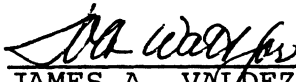
for diminished sentencing.

The waiver cases and argument presented by the State do not apply to this issue because when the issue arose, it was already beyond the trial court's power to remedy. When the prosecutor made the improper arguments, he violated the plea bargain, invalidating it. E.g. United States v. Grandinetti, 564 F.2d 723 (5th Cir. 1977)("[T]he sentence must ... be vacated if the agreement was not kept because the defendant offers his plea not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court.").


CONCLUSION

This Court should vacate Appellant's conviction and sentence, and remand this case to the trial court so that Appellant can withdraw his plea.

Respectfully submitted this 7th day of June, 1990.



JAMES A. VALDEZ
Attorney for Appellant

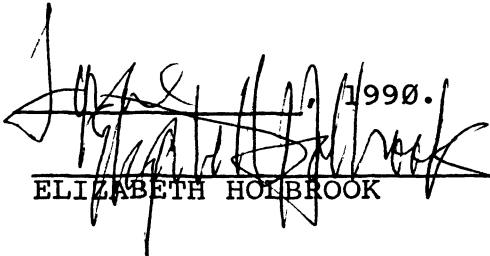


ELIZABETH HOLBROOK
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that 8 copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City,

Utah, 84114, this 1 day of September, 1990.


ELIZABETH HOLBROOK

DELIVERED by _____ this _____
day of _____, 1990.

APPENDIX 1

Page 7 of State's Hickman Brief

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent, v. CASE No. 880362

DEAN KEITH HICKMAN, v. Petitioner No. 2

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF A FIRST DEGREE
FELONY IN THE THIRD DISTRICT COURT, IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH: THE
HONORABLE SCOTT DANIELS, JUDGE, PRESIDING

R. PAUL VAN DEN
Attorney General
SANDRA L. STORER
Assistant Attorney General
286 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

DEAN KEITH HICKMAN
P.O. Box 250
Draper, Utah 84020
Attorney pro se

FILED

MAR 3 1989

Clerk, Supreme Court, Utah

circumstances as a whole support Judge Daniels' finding that the plea was voluntary. See Warner v. Morris, 709 P.2d 309 (Utah 1985), and Brooks v. Morris, 709 P.2d 310 (Utah 1985). Judge Daniels received a full explanation of the plea agreement in open court (R. 238 at 2-3). He also established that defendant pled guilty because he was guilty (R. 238 at 7); leading to a logical inference that defendant was not pleading guilty due to threats or inducements. Finally, defendant executed an affidavit in open court that specifically states that "[n]o promises or threats of any kind have been made to induce me to plead guilty." (R. 21).

Defendant cites State v. Gibbons, 740 P.2d 1309 (Utah 1987) for the proposition that the trial judge was required to question defendant on the record about promises or threats. Gibbons was decided three years after defendant pled guilty. Prior to Gibbons, this Court had always applied the Brooks-Warner record as a whole test. This Court should adopt the position taken by the Court of Appeals in State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App. 1988), rehearing denied, 91 Utah Adv. Rep. 17 (1988), cert. denied 98 Utah Adv. Rep. 3 (1988); that Gibbons represents a clear break with the past in application of a procedural rule and that it will not be retroactively applied.