

1989

## State of Utah v. Alex Baca : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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DOCKET NO. 89-580 CA

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
v. :  
ALEX BACA, : Case No. 890580-CA  
Defendant-Appellant. :

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BRIEF OF RESPONDENT

Appeal from a Judgment and Conviction for Negligent Homicide, a Class "A" Misdemeanor, in violation of Utah Code Ann. Section 76-5-206 (1953, as amended) in the Third Judicial Circuit Court in and for Salt Lake County, State of Utah the Honorable Robin W. Reese, Judge, presiding.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated, Section 77-35-26(b)(1) (1953 as amended), and Utah Code Annotated Section 78-29-3(c) (1953 as amended) whereby a Defendant in a Circuit Court criminal action may take an appeal to the Court of Appeals. In this case, the appelland entered a conditional plea of guilty to the charge of Negligent Homicide, a Class "A" Misdemeanor, preserving his right to appeal the denial of appelland's motion to continue his jury trial.

STATEMENT OF THE ISSUE

Did the trial Court reversibly err in denying Mr. Baca's Motion to Continue his jury trial to allow his new attorney time to prepare his defense?

TEXT OF CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation,; to be confronted with the witnesses against him; to have compulsory assistance of counsel for his defense.

CONSTITUTION OF UTAH

Sec. 12. (Rights of accused persons).

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own half, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgement, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to testify against her husband, nor a husband against his wife, nor shall ny person be twice put in jeopardy for the same offense.



TEXT OF ORDINANCES

76-5-206. Negligent Homicide. - (1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent Homicide is a Class "A" Misdemeanor.

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STATEMENT OF THE CASE

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STATEMENT OF THE FACTS

On November 11, 1988, Mr. Alex Baca was arraigned in Third Circuit Court before Judge Robin W. Reese on charges of Negligent Homicide and Failure to Remain at the Scene of an Accident. (Court Docket 1). Judge Reese determined Mr. Baca qualified for court appointed counsel and Mr. Kerry Egan and Ms. Vernice S. Ah Ching of the Public Defender's Office filed Notices of Appearance as Mr. Baca's attorneys. (Court Docket 1).

Since the appointment of counsel, the matter had been first set for trial the 21st of February, than the 17th of March, then the 12th of April, and finally June 7, 1989. (Tr. 7, 8).

Prior to June 7, 1989, the State made numerous attempts to verify that David Reid, a transient individual would be available for trial. These efforts included the prosecutors making two trips on June 6, 1989, to the trailer Park where the witness was said to live as well as sending investigators out to locate and make contact with this witness who had been with the defendant in the van immediately before and during the accident. The State had no communications from this witness despite numerous requests that he call the office and verify he would be at the trial.

Mr. Baca testified that prior to his jury trial, he met with Mr. Egan on several occasions to discuss tactics and other matters pertaining to his defense. (Tr. 6). As a result of this Mr. Baca developed trust and confidence in Mr. Egan. (Tr. 6).

On the Friday night, June 2, 1989, five days before his jury trial, which had been scheduled for June 7, 1989, Mr. Baca learned that Mr. Egan was no longer handling his case because he had moved out of the state. (Tr. 2, 7).

On Monday, June 5, 1989, Mr. Baca contacted Ms. Ah Ching, at Public Defenders Office and informed her that he had retained private counsel, Mr. Phil Hansen. (Tr. 3, 6).

Ms. Ah Ching contacted both the attorney for the State and Judge Reese requesting a continuance to allow Mr. Baca's appointed counsel to withdraw and his new attorney to prepare his defense. (Tr. 3). Mr. Phil Hansen also contacted the court for a continuance on the defendant's behalf. (Tr. 3). These requests were denied.

On June 7, 1989, the day of the jury trial, Ms. Ah Ching, again renewed defendant's motion for a continuance which was again denied.

Mr. Baca then entered a conditional plea of guilty to the charge of Negligent Homicide preserving his right to appeal the denial of his motion to continue. (Tr. 13, 20). The charge of Failure to Remain at the Scene of an Accident was dismissed. (Tr. 13, 20).

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SUMMARY OF ARGUMENT

The trial court judge did not abuse his discretion in denying the defendant's motion to continue the jury trial. Further, the defendant's right to effective assistance of counsel was not violated under the Sixth Amendment of the United States Constitution and Article I, Section 12 of the Utah Constitution.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE  
DEFENDANT'S MOTION FOR A CONTINUANCE

Granting a continuance is at the discretion of the trial judge and will not be reversed absent a clear abuse of discretion. State v. Creviston, 646 P.2d 750, 752 (Utah 1982). Here, the defendant argues the trial court abused its discretion because the denied motion for continuance violated his right to effective assistance of counsel. However, the defendant did not show good cause for substitution of counsel in this case.

The defendant is correct in asserting that an individual has a right to representation by an attorney of choice if able to employ counsel or if indigent to a court appointed attorney.

While an indigent defendant has a right to have counsel appointed to represent him, he does not have a constitutional right to a lawyer other than the one appointed, absent good cause.

State v. Pursifell, 746 P.2d 270, 272 (Utah 1987). In this case, the defendant was found indigent and an attorney was appointed. While he is not asking the court to appoint him a new attorney, the defendant is still requesting the court to accommodate his desire to substitute someone else for his court appointed attorney two days before trial.

The court has the duty to inquire into

...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 the substitution.

Pursifell, at 273. Here the trial court allowed the defendant ample time to articulate his concerns and dissatisfaction with present counsel.

The record indicates that the defendant's dissatisfaction in this case does not rise to the level of a constitutional violation. The defendant merely stated that he felt insecure about losing one of his co-counsel from the Legal Defender Association. However,

the Constitution does not guarantee to a defendant, a "meaningful relationship between counsel and accused." State v. Wulffenstein, 733 P.2d 120, 121 (Utah 1986) (citing Morris v. Slappy, 461 U.S. 1 (1983)). Further, the defendant has not demonstrated "a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with [his] attorney." Pursifell, at 274. Instead, the defendant testified that his present attorney was a good lawyer. Defendant made no claim of ineffectiveness of his counsel since the trial. While the defendant was concerned because he had less contact with the co-counsel on the case, he still received willing and competent counsel in this case.

Further, the judge did not abuse his discretion by refusing to allow substitution of counsel at such a late date. "Typically, motions for substitute counsel are less likely to be granted when they would result in a significant delay or mistrial or would otherwise impede the prompt administration of justice." Pursifell, 746 P.2d at 273. In the present case, the denial of the continuance may deny substitution of counsel but the defendant is not entitled to an unrestricted substitution at that late date before the trial.

Finally, the trial judge did not abuse his discretion in denying the motion to continue since the defendant had competent counsel who had adequate time to prepare for the case. In addition, the court had an interest in the effective administration of justice. The trial was already a year past the offense and the judge felt it would be unjust to continue the case. (T: 11).

POINT II


THE GRANTING OF A FURTHER CONTINUANCE FOR THE DEFENDANT BY THE COURT  
WOULD HAVE POSSIBLY RESULTED IN THE LOSS TO THE STATE OF ADDITIONAL  
EYE-WITNESSES MAKING PROSECUTION IMPOSSIBLE

After the defendant was granted a continuance to ensure an appropriate jury panel, one of the eye-witnesses critical to the State's case moved to California and became unavailable for the prosecution. (Tr. 8). Another witness critical to the State's case, David Reid, was transient and was only located the day before the trial. If the case were to be continued by the Court, there was no guarantee that the witness, David Reid, who was somewhat hesitant to testify in the first place because of the embarrassing nature of his testimony, would have been available or that the State would have had any idea where he was.

CONCLUSION

The trial court did not abuse its discretion in denying the defendant's motion for continuance. Thus, the State asks this court to confirm the conviction.

Respectfully submitted this 16 day of May, 1990.

  
\_\_\_\_\_  
JOHN N. SPIKES  
Deputy County Attorney



CERTIFICATE OF DELIVERY

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to Vernice S. Ah Ching, attorney for Defendant-Appellant by placing a copy of same in the Salt Lake Legal Defender Box located within our office.

DATED this \_\_\_\_\_ day of May, 1990.

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Michele R. Rowden