

1999

Utah v. Cindy Lou Young : Reply Brief

Utah Court of Appeals

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Richard Catten; attorney for appellee.

Delano S. Fiindlay; attorney for appellant.

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DELANO S. FINDLAY
Attorney for Appellant/Defendant
923 East 5350 South Suite E
Salt Lake City, Utah 84117
Telephone (801) 264-8040
Bar Number: 1074

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff-Appellee,	:	Priority No. 2
	:	
vs	:	
	:	COURT OF APPEALS
CINDY LOU YOUNG	:	Case No. 990575-CA
	:	
Defendant-Appellant.	:	

APPELLANT'S REPLY BRIEF

Appeal From the Third Judicial District Court, West Valley Department

The Honorable Anthony Quinn, District Judge

DELANO S. FINDLAY
Attorney for Defendant-Appellant
923 East 5350 South
Suite E
Salt Lake City, UT 84117

RICHARD CATTEN
Attorney for Appellee
3600 Constitution Blvd.
West Valley City, UT 84119

DELANO S. FINDLAY
Attorney for Appellant/Defendant
923 East 5350 South Suite E
Salt Lake City, Utah 84117
Telephone (801) 264-8040
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DELANO S. FINDLAY
Attorney for Defendant-Appellant
923 East 5350 South
Suite E
Salt Lake City, UT 84117

RICHARD CATTEN
Attorney for Appellee
3600 Constitution Blvd.
West Valley City, UT 84119

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II A. STATUTES

1. United States Constitution, Amendment VI.	2,12,13
2. Utah Constitution , Article I Section 12.	3,12,13

III. REFERENCES AND CITATIONS

References and citations in this brief shall have the following abbreviations:

The record or court's file on appeal - AR (Appellate Record)

Transcripts of hearings - TR

Exhibits --Ex

Affidavits - Aff & name

IV. STATEMENT OF JURISDICTION

1. Judgment or Order: This appeal seeks review of the judgment and order of the Third Judicial District Court in and for Salt Lake County, West Valley Department, the Honorable Anthony B. Quinn, dated and entered January 7, 1999 and the subsequent order of the Court on April 1, 1999, the Honorable Paul G. Maughan, denying defendant's Rule 59 Motion for a New Trial. No other motions pursuant to the Rules 50 (a) and (b) or 52 (b), 54 (b) of the Utah Rules of Procedure (URCP) have been filed.

2. Jurisdiction: This court has jurisdiction of this appeal pursuant to Utah Code Annotated § 78-2a-3(e) which confers jurisdiction on this Court to hear appeals in criminal cases from a Court of record "except those involving a conviction of a first degree or capital felony."

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Did the defendant have competent and adequate representation of counsel such that she was given a fair trial by an impartial and informed jury based upon an accurate and full presentation of the facts as guaranteed by the United States Constitution and the

Constitution of the State of Utah?

2. Did the failure of defendant's counsel to prepare adequately for trial result in the presentation of inaccurate information to and the failure to present critical and material information to the jury and thus deprive the defendant of a fair trial by an informed and impartial jury?

3. Did the failure of counsel for the defendant to interview witnesses before their appearance at the day of trial, under the facts of this case, and the failure to call certain witnesses at trial fall below the reasonable standard of required for effective representation of counsel and prejudice the defendant's case at trial?

4. Did the Court err in denying defendant's Motion for a New Trial based on ineffective assistance of counsel (TR, pp 146-151)

VI. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

1. United States Constitution, Amendment VI.

[Rights of accused.]

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 be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

2. Utah Constitution , Article I Section 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 behalf, 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 judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by the statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

VII. STATEMENT OF THE CASE

A. Nature of The Case.

Cindy Young was stopped by officer Lozano of the West Valley City PD on Friday, February 13, 1998 for expired license plates. Ms. Young was arrested by Officer Lozano and incarcerated on charges of driving on expired plates, a Class C Misdemeanor, assault on a peace officer, a Class A Misdemeanor and violation of a Protective Order, a Class A

Misdemeanor.

Ms. Young presented her trial counsel a list of witnesses which she had contacted and believed would be valuable to her defense. She advised counsel what she understood they would say. At trial, which lasted one day, Ms. Young was convicted of driving on expired plates and of assault on a peace officer. The violation of a protective order charge was dropped by the prosecution prior to trial upon learning that there had not been any violation of a protective order.

Counsel for Ms. Young failed to interview or interrogate witnesses prior to the trial. Counsel failed to adequately go over the evidence and prepare for trial. At the trial he put on two witnesses. Ms. Young and her neighbor Bobby Johnson who was an eye witness to part of the arrest. Counsel excused the other two witnesses during the trial, prior to putting on Ms. Young's defense. He interviewed none of the witnesses prior to the day of trial and on the day of trial only briefly and in a cursory fashion.

After the conviction Ms. Young, through other counsel, moved for a new trial on the basis of inadequate representation of counsel. The trial court did not allow her an evidentiary hearing on her motion and after hearing the arguments of counsel for the government and for Ms. Young, and after considering the memoranda for and against the motion, the trial judge denied Ms. Young's Motion for a new trial. This appeal followed.

B. Statement of Relevant Facts.

1. On March 13, 1998, defendant was charged in an information by West Valley City, a subdivision of Salt Lake County, State of Utah, with 1) operating a vehicle

a subdivision of Salt Lake County, State of Utah, with 1) operating a vehicle on an expired registration, a class C misdemeanor, 2) assault upon a police officer, a class A misdemeanor, and 3) with violation of a protective order, a class A misdemeanor. (A.R., pp 9, 11)

2. The Information was based upon an arrest by Officer Paula Lozano of the West Valley City Police Department on February 13, 1998 at the location of defendant's residence, 4068 South Claudia Street, West Valley City, UT 84120. (A.R., p 10, 73, T.R., pp 76-78)

3. At the time of the arrest officer Lozano accused the defendant of assaulting her and of attempting to prevent her from impounding the defendant's vehicle. (T.R., pp 87-89)

4. Officer Lozano testified that when she advised the defendant that she was going to impound the defendant's vehicle, the defendant attempted to drive the vehicle into defendant's garage. (T.R. pp 85-86)

5. Officer Lozano stated that she attempted to get defendant's keys out of the ignition and that defendant fought her and attempted to prevent her from doing so. (*id.*; A.R., p 75, T.R. pp 86-89)

6. Officer Lozano stated that the defendant grabbed her hand and attempted to get the keys from her and a struggle ensued in which the defendant deliberately dug fingernails into her hands and kicked her a couple of times in the chest. (*id*)

7. Officer Lozano called for the assistance of other officers, but did not wait for them to arrive. Instead she sprayed the defendant with O.C. (Oleoresin Capsicum) and stated she attempted to place handcuffs on the defendant. She stated she was able to get handcuff's on

one of the defendant's hands (left), but was unable to get the cuffs on the other hand until after the other officers arrived and assisted her. (T.R. 93, 94)

8. When she was sprayed the defendant experienced extreme pain and discomfort. Her face and eyes burned and she could not keep her eyes open. She wanted to rub her eyes with her hands. (T.R., pp 141, 142; A.R., pp 79, 82) It is an involuntary, uncontrollable or nearly uncontrollable action for someone who has been sprayed with OC to rub their eyes. (AR, pp 79, 93))

9 When the other officers arrived Officer Lozano had one of defendant's hands in handcuffs, They stated that the defendant kept pulling her other hand away. Officer Moore removed her from the vehicle, and they put the cuff on defendant's other hand and put her on the ground until the paramedics arrived to give the defendant assistance by washing the spray off her. (T.R. pp 53-56, 71, 93, 142, 170)

10. Officer Moore used the term flailing to describe the motion of the defendant with her hand while they were attempting to put it into the handcuffs. (Tr. p 70)

11. Officer Lozano testified that the defendant had dug her nails into the hand of Officer Lozano causing two of the officer's fingers on her right hand to bleed and kicked her in the chest. At the trial there was considerable testimony by Officer Lozano and other officers of blood coming for punctures on two of Officer Lozano's fingers. (T.R., pp 55, 72, 89, 95-96, 153)

12. Officer Lozano and Ms. Young were the only eye witnesses to what occurred during the time that Officer Lozano claimed that Ms. Young kicked her and dug fingernails

into her hand. The other officers did not arrive until about the time or just after Officer Lozano sprayed Ms. Young with OC. When Officer Moore arrived he could see Officer Lozano leaning inside the van and struggling.

(TR, p. 67)

13. When Officer Kishiyama arrived Officers Moore and Lozano were removing Ms. Young from the vehicle and were trying to get her other hand in the cuffs. He stated, she was "still fighting and —moving around." (TR 52) He helped to hold her against a wall while the other officers put her loose hand in the cuffs. She was yelling "just let me go. Let me go into the house." (TR, p. 53

13. When the paramedics (EMTs) arrived, Ms. Young was kneeling on the ground with her hands cuffed behind her. She asked them just to get the OC off her face. (AR, p. 111)

14. Prior to trial defendant retained David Maddox to represent her. She told him she had conferred with several people about the incident and that the testimony of the paramedics, the tow truck driver and her neighbor would corroborate her version of the incident. (A.R. pp79-81)

15. At the trial counsel called only Bobbi Johnson and the defendant as witnesses for the defense. Counsel excused the other two witnesses without their testifying. (TR)

16. At the hearing on the Motion for a New Trial, the trial judge did not allow Ms. Young to call Bobby Johnson, Dr. Wallace Graham or Anthony Glezos as witnesses. The Motion was heard strictly on the documents already in the Court's record and the arguments

of counsel for both sides.

(Hearing Transcript pp 5-6, AR, p 174)

17. Mr. Maddox obtained a continuance of the trial from August 5, 1998 to have adequate time for preparation. The trial was not held until November 18, 1998. (AR, pp. 25-37, 173)

18. Mr. Maddox did not prepare the case by doing many things the defendant expected him to do. Among other things he failed to do the obvious following things:

a) He did not confer with a medical expert concerning the photographs of Officer Lozano's hand and what they depicted. (A.R., p 82)

b) He did not interview the witnesses at length to determine what their testimony would be and how best to present their testimony at the trial. (A.R., pp 81, 110-111, 115-116)

c) He did not obtain any material or expert testimony on the effects of pepper spray or OC.

d) He did not introduce other evidence at trial relating to the agitation of Officer Lozano, particularly her filing a charge of violation of a protective order by the defendant without first reading carefully the order to see if a violation really occurred. (The protective order charge was dismissed by the prosecution just prior to the trial)

e) He did not plead the defendant to the expired registration prior to the trial in order to not make it an issue that further mitigated against the defendant at trial.

19. At the hearing on the Motion For a New Trial, Ms. Young had Dr. J. Wallace Graham and Bobbie Johnson were present and ready to testify. Defendant had a subpoena issued for EMT Anthony Glezos of the West Valley Fire Department.

20. The trial judge refused to allow any evidence and decided the motion on the record together with the affidavits submitted in support of the motion by Ms. Young.

VIII. SUMMARY OF ARGUMENTS

A. Ineffective Assistance of Counsel

To prove inadequate representation of counsel, defendant Young must show trial counsel's representation fell below an objective standard of reasonableness and that she was prejudiced thereby in her defense.

B. Trial Counsel's Representation Fell Below The Objective Standard of Reasonableness for Representation Of Counsel

Trial counsel failed to adequately investigate and plan for trial including the failure to interview and call witnesses as suggested by the defendant. He did not interview any of the witnesses prior to the day of the trial. He did interview them the same day just prior to and during trial, but did not have time to interview them thoroughly. As a result did not call some witnesses that had critical testimony which would have supported the testimony of the defendant and countered the testimony of the prosecution's witnesses. The one witness that he did call was so ill prepared to testify that her testimony harmed rather than helped the defense. Counsel's failure to interview this witness thoroughly prior to trial precluded him from exercising sound judgment as to whether to call the

witness. His conduct fell below the objective standard of reasonableness required for effective assistance of counsel as required by the Sixth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of the State of Utah. Claims of ineffective assistance of counsel present this Court with a mixed questions of law and fact. On appeal the Court defers to the trial Courts findings of fact and overturns a finding only upon a showing from the evidence that it clearly erroneous.

C. The Inadequate Representation of Trial Counsel Was Prejudicial To Defendant At Trial.

Defendant's conduct prejudiced the defense of Ms. Young by allowing inaccurate and distorted testimony to be entered into evidence. Counsel's conduct further prejudiced the defendant by not providing corroborative testimony to bolster hers and by not showing that the testimony of the police officers was inaccurate and in part misleading. This allowed the jury to discredit the defendant when she was telling the truth and to give more weight and credit to the testimony of the police officers who, though perhaps inadvertently, exaggerated and distorted the truth to the advantage of the prosecution.

Counsel further failed to provide the jury with reasonable alternatives to the prosecution's evidence and arguments due to his failure to adequately prepare plan for trial. He failed to present medical testimony or otherwise to explain mis-perceived testimony concerning pictures of alleged wounds on the arresting officer's fingers, to present evidence showing the effect of OC spray on Ms. Young to explain her actions after that point. He failed to place in evidence facts which showed that the arresting officer had wrongfully cited Ms. Young with the violation of a protective order which

showed the officer was perfunctory in her arrest and the charges that she made against the defendant. By failing to plead her to the driving on expired registration charge, he left open the inference that Ms. Young was unreasonable in her defense and was merely fighting all of the charges. While some of these failures may be characterized as judgment calls and trial strategy, under the facts of this case they support and indicate inadequate consideration and planning of the defense in advance of trial which prejudiced the defendant.

D. Erroneous Conclusions and Findings of Fact

The trial court in denying the motion for a new trial made erroneous findings and conclusions with respect to weight to be given medical testimony rebutting testimony given about wounds inflicted on the arresting officer's hands by defendant's fingernails. The trial court's finding or conclusion that trial counsel did interview witnesses prior to trial and chose for whatever reason not to call some is clearly erroneous and against the overwhelming weight of the evidence.

XI. ARGUMENT

Standard of Review

In reviewing legal conclusions this Court gives no deference to the trial court, but reviews them for correctness. *State of Utah v. Kenneth Templin*, 805 P.2d 182, 149 Utah Adv. Rep. 14 (1990); accord, *State of Utah v. James Dean Classon, et. al.*, 935 P.2d 534, 312 Utah Adv. Rep. 26 (Utah App. 1997) Where a trial court has previously heard a motion for a new trial based on ineffective assistance of counsel, this Court is free to make an independent determination of the trial court's conclusions. *Utah v. Templin, supra*. The trial court's findings of fact are overturned only if they are clearly erroneous. *Id.*

A. Ineffective Assistance of Counsel.

Cindy Young appeals her conviction and the denial of her motion for a new trial on basis of ineffective assistance of counsel. The failure to have effective assistance of counsel resulted in the jury not having critical, relevant evidence and in the jury's being misinformed with inaccurate and false information upon which it in part, reached its verdict that she was guilty of the charges. The ineffective assistance of counsel deprived her of her right to require West Valley City to prove her guilty beyond a reasonable doubt by an impartial jury in contravention of her rights under Amendment VI of the United States Constitution, and under the Utah State Constitution, Article I. § 12. Both provide, among other things, that an accused has the right to a speedy trial by an impartial jury and appear and defend in person and by counsel. The right to appear and be represented by counsel means the right to competent and effective representation of counsel. *State of Utah v. Kenneth Templin, supra*, p. , 805 P.2d 182, 149 Utah Adv. Rep. 14 (1990) citing *Strickland v. State of Washington*, 446 U.S. 668, 104 S.Ct 2052, 80 L.Ed. 2d 674 (1984).

A determination of ineffective assistance of counsel involves a two pronged test: 1) whether counsel's representation fell below an objective standard of reasonableness, and 2) Whether the deficient representation prejudiced the defendant. *State of Utah v. Templin* and *State v. Classon, et. al., supra*, p.10. To demonstrate prejudice from ineffective representation, Ms. Young must "... show there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . ." *Id.*

In assessing performance of counsel, this Court must keep in mind "the wide variety

of circumstances faced by defense counsel and the range of legitimate decisions regarding how to best represent a criminal defendant." *State of Utah v. Templin, supra*. However, it is not enough that an attorney appear and be present with a party at trial. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough. . . . The Sixth Amendment recognizes the right of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *State of Utah v. Classon, supra*, 935 P.2d 524, ___, 312 Utah Adv. Rep. 26, 32 quoting *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063.

B. Trial Counsel's Representation Fell Below The Objective Standard of Reasonableness for Representation Of Counsel.

a) Failure To Interview Witnesses Prior To The Day of Trial Does Not Meet the Objective Standard For Reasonableness For Representation of Counsel.

In *Templin*, the Utah Supreme Court reversed a denial of a motion for new trial and overturned a conviction because of ineffective assistance of counsel at the trial level. In that case counsel failed to investigate and interview witnesses prior to trial and failed to call some witnesses who had very relevant and cogent testimony. In many ways *State of Utah v. Templin*, is like the case at bar. Trial counsel failed to interview a number of witnesses whose identities were provided to him by Ms. Young at the time she retained him, well in advance of the trial.

This Court must give due consideration to the circumstances of the case and the trial counsel's exercise of his judgment in making tactical decisions for defending the charges. However, in no way under the facts of this case, can the failure to interview the witnesses, and to do so in detail, and the failure to otherwise prepare for trial, be excused as an exercise

of judgment and a tactical decision by counsel.

When she first retained trial counsel, Ms. Young told him she had talked to EMT Anthony Glezos of the West Valley Fire Department and the driver to the truck that towed her impounded van. She told him she also had a neighbor, Bobbie Johnson, who had witnessed the arrest incident. She said they would corroborate her story and testify favorable to her. She also told counsel she had been examined by Dr. Grant Fairbanks, a plastic surgeon for injuries she sustained from the OC spray. She discussed the fact that there were pictures of Officer Lozano's hand and Dr. Fairbanks wanted to see those pictures. (Young Aff., AR, pp. 80-81)

Notwithstanding this, trial counsel failed to talk to any of these witnesses prior to the day of the trial. Someone from his office telephoned Bobbie Johnson the evening before the day of the trial and reminded her to be present. Bobbie Johnson first met with trial counsel a few minutes before the trial started, (10 to 15 minutes) along with Ms. Young. He talked mostly with Ms. Young and asked Bobbie Johnson only a few questions. He did not go over what she had observed to find out in detail what her testimony would be. (Johnson Aff., AR, pp. 115-116)

At the meeting with her and Bobbie Johnson a few minutes prior to trial, trial counsel asked Ms. Young some questions about the incident and oriented both of them somewhat about the trial. However, he did not talk with Ms. Young about the incident in any real detail. She averred in her affidavit that he did not talk with her at any time prior to trial about the incident in any detail, but only in general. (Young Aff., AR, p 81)

Trial counsel did not interview Anthony Glezos or the tow truck driver prior to the beginning of the trial. Mr. Glezos and the tow truck driver were subpoenaed to the wrong

court and arrived after the trial had commenced. Trial counsel interviewed Mr. Glezos for a few minutes during a break in the trial and then without explanation excused him during the lunch hour and never called him as a witness.

Trial counsel did not confer with the plastic surgeon or any other medical practitioner about the pictures of Officer Lozano's hands or fingers as Ms. Young recommended.

b) Failure to Investigate The Effects of OC Spray on Persons.

Other than to obtain a statement of the policy of the West Valley Police Department, in the use of OC, trial counsel failed to investigate the effects of OC spray on individuals and to obtain and present any documentation that would show that is very difficult, if not impossible, to refrain from rubbing your eyes or your face with your hands after being sprayed with OC. This is critical to provide an alternative explanation of why Ms. Young resisted the officers who placed her second hand in the handcuffs. Under the evidence submitted at the trial, the jury was left with no way to reach any other conclusion than that she was intentionally resisting arrest.

c) Failure To Put On Evidence at Trial Concerning The Charge of Violation Of A Protective Order and To Plead To The Expired Registration Charge Prior to Trial.

At the time of the arrest, Officer Lozano learned that Ms. Young's former spouse had obtained and *Exparte* Protective Order against her. She listed as a charge against Ms. Young, a violation of the protective order. The charge was dropped just before trial when the prosecuting attorney learned from his investigation and trial preparation that there was no substance to the charge of a violation of the Order which had in reality been dismissed three days prior to her arrest. The most ridiculous part of the charge was that the order only

prevented Ms. Young from coming near her former husband's home on about 9800 South in Sandy, Utah. The basis of the charge was that she violated the order by being at the address of 4068 South Claudia in West Valley, which was her own residence. All of the officers present in the arrest were aware of the fact that it was Ms. Young's home.

Common sense alone would lead a normal person to conclude that a person would not be ordered to keep away from her own home. In any event, it demonstrates the cursory consideration which Officer Lozano gave to the circumstances at the time of the arrest and her penchant, so to speak, to throw the book at Ms. Young. It could and would likely have raised some question in the minds of one or more of the jurors concerning the basis for and the accuracy of all of the charges and the rationality or irrationality of Officer Lozano in making the arrest. It could well have caused jurors to have a reasonable doubt about Officer Lozano's charges that Ms Young assaulted her.

d) Failure to Plead to The Expired Registration Charge Prior To the Trial.

The jury was also required to consider the Class C Misdemeanor charge of driving on an Expired Registration. The evidence against Ms. Young on this charge was very conclusive and she had readily admitted it to the officers and the time of the arrest. While the Court may conclude whether to plead Ms. Young to the charge in advance of the trial was a tactical decision and a legitimate exercise of counsel's judgment in planning the defense, it is difficult to imagine how it could have helped by letting it go to the jury. It is more reasonable to infer or conclude, in light of the failure to prepare already set forth above, that counsel gave the charge little thought prior to trial and that it is another indication of his failure to adequately plan and prepare for trial. Requiring the jury to resolve that issue, made it appear that Ms. Young was unreasonable and fighting whatever charges the

government brought. It very likely caused the jury to question her motives and veracity with regard to trying the charge of assault of a peace officer.

C. The Inadequate Representation of Trial Counsel Was Prejudicial To Defendant At Trial.

a) Testimony By Police Officers About Wounds to Officer Lozano's Fingers Distorted the Facts ,Was Exaggerated, and Was Inflammatory.

From the failure of counsel to investigate, and adequately prepare and call witnesses with very cogent and even critical evidence at the trial, it is difficult to conclude how Ms. Young could not have been prejudiced in her defense. The government will argue that it is not conclusive that the jury would have reached a different verdict had trial counsel prepared better and had interviewed and called the witnesses on the list which Ms. Young gave him. While the burden to overcome a presumption that Counsel's conduct falls within the limits of reasonableness is on the defendant, could a reasonable person, juror not be concerned about the misinformation which was given to them at trial and the implications that it has on the credibility of the witnesses?

No one, other than Ms. Young and Officer Lozano were present to witness the actual incident at the time Officer Lozano claims that she was assaulted by Cindy Young. It is one party's work against the other. Though they should not, it is quite probable that people and the jury will give more weight to a peace officer' testimony than they will to that of a lay person under circumstances like those at bar. Therefor the credibility of each is very critical.

Officer Lozano testified that Ms Young attempted to prevent her from impounding the van because of the expired registration. She claims when she attempted to remove the keys from the ignition of the van, Ms. Young grabbed her hand and fought for the keys. In

the process of the tussle Officer Lozano testified that Ms. Young looked her in the eye and deliberately dug her fingernails into two of the fingers of the Officer's right hand. According to Officer Lozano she felt pain but realized only a minute or so later that her skin had been broken and her fingers were bleeding. She testified there was blood on her hands and blood on Cindy Young's pants. Officer Lozano also testified that at the same time Ms. Young kicked her in the chest a few times. (TR, 89-91, 96)

She also testified that pictures of her fingers placed into evidence showed where Ms. Young had punctured the skin on her fingers. She specifically referred to a half moon mark in one of the pictures (Ex, 2) which she attributed to Ms. Young's digging fingernails in to her hand as follows:

Q. Okay, What were the nature of those injuries, actually?

A. It – It's – actually, what happened, it broke the skin and I was bleeding.

Q. Okay, Where?

A. In my fingers around this area. This one was a half moon. You can – You could tell from the picture, its from the nail. (TR, p 95)

Q. The injuries that you had to your hand

A. Uh-huh, (Affirmative)

Q. –did they come from keys?

A. No. They were from digging her fingernails into my hand.

Q. They didn't come from the steering wheel?

A. No. they were moon-shaped on my finger and, I mean, she

looked at me as she went squeeze, squeeze, squeeze, squeeze
squeeze and squeeze. (TR, p 173)

Officer Kishiyama volunteered testimony about blood on Ms. Young's hand without even being asked. In response to another question he hastened to volunteer as follows:

Q. Okay. Were they able to handcuff her at that point in time?

A. They were. As soon – as I held her against the wall they were about to
To bring her hand back behind and I– I observed blood on Ms.
Young's hand and a cut on Ms. Lozano's hand. (TR. p 55)

Officer Moore testified that he saw blood on Officer Lozano's hand:

Q. Now did you happen to see blood one the defendant, Ms. Young?

A. I don't recall seeing blood.

Q. Did you see any blood on Officer Lozano?

A. Yes. On two of the fingers on her right hand, blood was oozing from - -
I don't recall exactly which two fingers, but there were two fingers
that were bleeding. (AR, p 72)

To the contrary, Cindy Young denied that she resisted the officer or dug her fingers in the officer's hand. She testified that when the officer asked for her keys she reached for them and the same time the officer reached for them and put her hand on top of hers, Young's, hand. Ms. Young said she couldn't understand what the officer was doing. She could not move her hand because the officer's hand was encompassing her hand. (TR, p. 138) On cross examination, the prosecutor asked her,

Q. Any explanation at all how those fingernail marks got there?

A. No, sir.

Q. Weren't from you?

A. Not that I recall, no, sir.

Q. Not from you digging into Lozano's hands as she was trying to get
The keys away from you?

A. No, sir.

Just before that testimony the prosecutor had asked Ms. Young repeatedly if she saw any blood on her hand or on her clothing and Ms. Young answered that she didn't. Had he been called by trial counsel as a witness, EMT Anthony Glezos would have stated he did not see any blood on either Ms. Young or Officer Lozano. All he saw was a small superficial scrap or abrasion that appeared to be fresh on Officer Lozano's finger. (AR, pp. 111-112)

Had trial Counsel conferred with a medical expert, he would have learned there was no half moon mark on Officer Lozano's hand caused by a fingernail of Ms. Young or any one else. Dr. J. Wallace Graham would have testified at the hearing on the motion for a new trial that in the picture, Ex. 2, he saw only one fresh, small superficial abrasion on one finger. It was aligned vertically and the distal bordered the interphalangeal skin crease (the crease in the lower joint of the finger) He saw one other older wound on the same finger that had started to scab and which must have been at least a day older. Dr. Graham did not see any other wounds on the officers hand(s) or any wound that could be attributed specifically to fingernails.

A review of exhibits 2 and 3 about which Officer Lozano was testifying when she said one of the wounds was in the shape of a half moon, does not show any wound in a half moon shape. Nor did Dr. Graham see any such wound in the pictures. A close and sensible look at the pictures shows that any half moon shaped mark in the pictures is merely a crease

in the skin from the lower joint or joints in the finger. The curve of the half moon is in the wrong direction, position, to be caused by someone from behind who has their hand over the fingers or knuckles.

Trial counsel attempted to point out that the half moon shaped lines on the fingers in the picture were not made from finger nails, but he called them cuts which in a way corroborated the Officer's testimony. Had he conferred with a medical expert, he would have learned that they were not cuts at all, but were mere interphalangeal creases in the skin, in the joint where the fingers bend and he could have then easily pointed that out to the jury.

As it turned out in the trial, the jury was left with the impression that defendant Young was not telling the truth; that her testimony was overwhelmingly contradicted by the testimony of the officers and there was nothing to rebut that testimony. The emphasis on a lot of blood by the police officers was inflammatory or in the least caused the members of the jury to experience feelings of indignation toward the defendant. Had trial counsel investigated the facts prior to the trial and interviewed the witnesses suggested by Ms. Young, the jury would then have learned that the prosecution, whether advertent or inadvertent, had been providing them with inaccurate and false information about the wounds in the pictures. They would have been able to realize that the police officers were taking advantage of the situation to embellish and exaggerate the true facts in the case.

b) Testimony About Sitting The Defendant On The Ground Was Erroneous And Discredited The Defendant's Testimony.

The prosecutor seized upon testimony of Ms. Young, that she was kneeling with her hands cuffed behind her, to discredit her testimony before the jury. (TR p. 142) All of the officers testified that after she was placed in hand cuffs they sat her on the ground until the

paramedics arrived. To the contrary Ms. Young testified that she was kneeling on the ground with her hands cuffed behind her. Bobby Johnson perceived that Cindy Young was placed face down on the ground in the prone position by the police. Her testimony was at odds with both that of the police and the testimony of Ms. Young.

The prosecutor made much of this in front of the jury. On rebuttal, he asked Officer Lozano,

Q. And when she was sat down, was she knelt down or sat down.

A. She was sitting.

Q. So if someone were to testify that she was kneeling, that wouldn't be accurate?

A. I don't think so.

Officer Kishiyama testified on rebuttal:

A. . . . And once she was handcuffed. Like I 'd stated previously, after double locking her handcuffs and that, I— I sat her down on the ground. I assisted her in sitting down. That's when I stayed with her.

Q. Okay. Now was she sitting or kneeling?

A. She was sitting on her buttocks.

Q. So if someone were to say that she was kneeling, she would be wrong as well?

A. Correct.

EMT Glezos, had he been called, would have testified that when the paramedics arrived, Cindy Young was kneeling with her hands cuffed behind her. By seizing upon the issue of whether Ms. Young was sitting or kneeling, the prosecution further improperly

impeached the credibility of Ms. Young. In fact the evidence given was inaccurate and false. Had counsel known in detail the testimony of EMT Glezos, he could have rebutted the otherwise useless issue of whether the defendant was sitting or kneeling as she said she was and would have corroborated her testimony to the jury.

c) The Testimony of Bobbi Johnson Did Not Corroborate The Testimony of Defendant Cindy Young.

Cindy Young, after talking with her neighbor, Bobbi Johnson, believed that her neighbor's testimony would corroborate hers. The observation that when they pulled her out of the van she was motionless and not resisting would counter that of the West Valley Police Officers that stated she was struggling and that they had to place her up against a wall to get the cuffs on her. However, to Ms. Young's great surprise, her neighbor's testimony was very inconsistent and contradictory. The effect of her not being interviewed in detail or apprized of what to expect, of not having refreshed her memory during pretrial preparation turned her testimony into a fiasco.

Ms. Johnson testified that she was able to see Cindy Young all of the time after the officers took her out of the van. She saw them lay her down her face and put the cuffs on her. She did not see them put Ms. Young up against the wall to put the cuffs on her. She testified that the tow truck driver was there to tow the van when the officers removed Ms. Young from the van when in fact the tow truck driver did not arrive until much later. She equivocated at points in her testimony and seemed unsure of some critical points. In short it appeared that counsel did not know what she was going to say and she had not had an opportunity to go over the events in her mind to place them in proper sequence. This fact clearly comports with her affidavit that trial counsel had not bothered to interview her or go

over her testimony with her prior to the trial.

The effect of her testimony appeared to be a deficit rather than a benefit to Ms. Young. Trial counsel should have interviewed her in detail to ascertain what her testimony would be and to help her refresh her recollection or to at least discover that it would not be in the best interest of the defense to use her as a witness. The Utah Supreme Court stated in its opinion in *State of Utah v. Kenneth Templin, supra*, page __ 805 P.2d 182, __ “It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call a particular witnesses for tactical reasons.” As it turned out, her testimony further hurt the credibility of Ms. Young which was impugned and impeached by inaccurate and distorted information about a lot of blood and cuts on Officer Lozano’s hand and about whether the defendant was kneeling or sitting all of the time after the handcuffs were placed on her.

e) Counsel’s Failure To Investigate And Present The Probable Effect of OC Spray On The Defendant Prejudiced The Defense.

The back-up officers were not present when the conduct occurred between Officer Lozano and Cindy Young for which Young is charged with assault. When they did arrive just moments after Officer Lozano sprayed Ms. Young with OC, it appeared to them that she was fighting and physically resisting arrest as Officer Lozano had described. However, it is very likely, more likely, that what they saw was Ms. Young’s involuntary responses to the spray. She testified her eyes were open and that it hit her right in the eyes and the face. She stated that it was “horrendous.” She testified that it was the most “terrifying, painful, horrible” thing she had ever experienced in her life. Her face was burning, “absolutely on fire” and she could not open her eyes. (TR, p. 161) She averred in her affidavit that she was

trying to rub her face with her hands. (AR, p. 82) She asked EMT Glezos when he arrived to get the spray off her face and at that time she was kneeling, she was nauseated and felt like she was going to vomit. (TR, p. 162) EMT Glezos stated she was kneeling when he arrived and it appeared to him like she was trying to vomit. (AR, p. 111)

The materials which are attached as exhibits B through D of defendant Young's affidavit, show the effects of OC spray and that it was not only possible, but probable, that Ms. Young was experiencing an uncontrollable urge to rub her face with her hands. Officer Moore described her actions as "flailing" and officer Kishiyama described the scene as "very chaotic" when he arrived. (TR, pp. A54 & 70) These descriptions sound more like Ms. Young was reacting to the OC spray than deliberately resisting arrest. The jury was deprived of information with which to make an informed judgment on this issue because trial counsel failed to adequately prepare for trial and present corroborating documentary evidence..

f) Counsel's Failure To Put Into Evidence The Fact That Officer Lozano Listed As One Of Defendant's Violations, The Violation of A Protective Order Likely Prejudiced The Defense.

The listing as one of the her violations, that Defendant Young violated a protective order, goes far to show the cursory conduct and casual attitude of Officer Lozano who booked her into the jail. Of course the prosecution dropped the charge before trial. The prosecutor did not want to have the jury learn how careless the arresting officer was by not reading and assuring herself that the protective order had been violated. It was obvious to the arresting officer that the address at which she arrested Ms. Young, was Ms. Young's residence. All she needed to do was to obtain and read a copy of the *ex parte* protective order before she listed it as a violation at the time of booking. It was not only logical, but reasonable for her to do so. Had the jury known that Officer Lozano was so casual or

careless in bringing this charge they could have well drawn a reasonable inference that Officer Lozano also brought the other charges casually and carelessly and without a sufficient basis. Further , since the protective order had been dismissed for lack of merit there was no tactical risk in raising that issue by the defense.

The jurors were deprived of circumstances surrounding the arrest that were material to their making an informed decision by the failure of trial counsel to adequately prepare and weigh the facts surrounding the arrest.

g) The Failure To Plead To The Charge Of Driving On An Expired Registration Contributed To The Prejudice Of The Defense.

It is clear from defendant Young's testimony at trial that she did not contest the expired registration charge. (Tr, pp 148-149) It is likely that the Jury inferred that Ms. Young was unreasonably contesting everything notwithstanding she had engaged in the conduct and that such a feeling poured over to the charge of assault on a peace officer. While the prosecution may argue that this was a mere tactical decision, it appears more like it was an oversight and in light of the other failures to prepare for trial, it was, like other issues, not considered because of lack of adequate trial preparation and planning. It does not take much, in light of the failure to dispose of the driving on expired registration charge in advance, for the jurors to believe that Cindy Young was just fighting everything. That aspect further damaged her credibility.

To show prejudice to her case, Ms. Young must show that there is a reasonable probability, but for trial counsel's errors the outcome would have been different. The Utah Supreme Court stated in the *Templin* decision, *supra*, 805 P.2d 182, ____, 149 Utah Adv. Rep. 14, 16, that "a reasonable probability is a probability sufficient to undermine confidence

in the outcome.” *See also, Parsons v. Barnes*, 871 P.2d 516, 230 Utah Adv. Rep. 3 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986)

The case at bar is very much like *Templin*. Reasonable persons sitting on the jury could have had a reasonable doubt as to the accuracy of the testimony of the police officers. If a reasonable person could have had a reasonable doubt, a reasonable probability existed that, but for the failure to put on the testimony of the other witness(s) the outcome would have been different.

Trial counsel failed to contact and interview witnesses with information critical to the defense of the case. Does it take much, in light of the above specified pretrial and trial conduct to find a probability that undermines confidence in the outcome of the case; that had the jury had accurate and complete facts, they would have likely had a reasonable doubt of the guilt of defendant Young? As in *Templin* where the Court held the failure to investigate and call one particular witness to the stand prejudiced the defendant’s case, the same failure in this case, to investigate and adequately prepare for trial and call EMT Glezos and a medical expert to the stand, together with the other inadequate conduct set out above, prejudiced Cindy Young’s defense. The verdict of guilty and the denial of her motion for a new trial should be overturned and the case remanded for a new trial or at least for an evidentiary hearing on her motion for a new trial, based upon ineffective assistance of counsel in violation of her constitutional right to have a fair trial and have the effective assistance of an attorney.

D. Erroneous Conclusions and Findings of Fact

After the hearing on Cindy Young's Motion for a New Trial the court entered mixed Findings of Fact and Conclusions of Law. In doing so the Court did not delineate which

were findings of fact and which were conclusions of law. The findings and conclusion do not deal adequately with the information which Cindy Young presented to the Court by way of affidavit which showed that the jury was given inaccurate and false information. Without taking evidence, the Court found or concluded that the evidence that would have been given by an expert medical practitioner about the alleged wounds on officer Lozano's hands shown in photographs entered as exhibits, would have been of little weight. The court found or concluded that the pictures of the injuries to Officer Lozano's hands were consistent with the allegation that they were caused by defendant's fingernails. In reaching this finding or conclusion the Court wholly ignored the letter opinion of Dr. J. Wallace Graham attached as Ex. A to Cindy Young's affidavit.(AR, pp. 85-86) That opinion clearly stated that there was only one injury that could have happened on the day of the arrest where the officers testified there were two. It stated that there were two injuries on one finger; one fresh and one at least a day older. It stated that both the older and the fresh injury were nonspecific, superficial abrasions and that there were no injuries depicted on another finger as claimed by officer Lozano. It stated that there were no injuries that could be specifically attributed to being caused by fingernails.

This opinion is consistent with the statement made to counsel by EMT Anthony Glezos of the West Valley Fire Department that when he arrived a few minutes after the incident and the arrest he saw no blood on officer Lozano's hand and only a small, fresh, superficial abrasion. (Affidavit of Counsel, AR, pp. 110-111) Whether that information would have been of little weight to the jury, is for this Court to decide. But in view of the effect on the credibility of the defendant's testimony and the testimony of Officer Lozano at trial, one can hardly imagine that it would not have been of great weight.

In paragraph 4, of the Findings and Conclusions, the Court states that "Defendant's own argument demonstrates that trial counsel spoke to certain witnesses before trial and chose, for whatever reason, not to call a particular witness. This finding, if a finding it be, is clearly erroneous. It is clear from the trial record that the only persons who were called as witnesses, were the defendant, herself, and Bobbi Johnson. It is also clear from the affidavits of Bobbi Johnson, defendant Cindy Young and of Counsel, that trial counsel did not speak to Anthony Glezos prior to trial, but only briefly during a break at trial and then excused him. It is also clear from those affidavits that he spoke for only few minutes immediately before trial with Bobbi Johnson.

As stated by the Utah Supreme Court in the Templin decision,

If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

State of Utah v. Templin, supra, 805 P.2d 182, ___, 149 Utah Adv. Rep. 14, 16.

X. CONCLUSION

In her motion for a new trial Ms. Young pointed out to the Court that her defense attorney did not interview any witnesses prior to the day of trial and then interviewed Bobbi Johnson only in a perfunctory manner for a few minutes along with her immediately prior to the commencement of the trial. He did not interview her in real detail prior to the day of the trial. He did not investigate aspects of her case of which she urged him to take special notice. Two days after the arrest, she had pictures taken of her face and neck and other parts of her upper body which she showed to Dr. Grant

Fairbanks, a plastic surgeon. She told Dr. Fairbanks pictures had been taken of Officer Lozano's hands which Officer Lozano alleged had been cut by Ms. Young's fingernails digging into them. Dr. Fairbanks wanted to see the pictures of Officer Lozano's hand. Ms. Young told her counsel of Dr. Fairbanks request and understood he would confer with the doctor regarding what the pictures showed. This he failed to do. The failure resulted in counsel not being informed of what the pictures really showed and in his allowing inaccurate and false testimony which was critical, to go to the jury.¹

At trial counsel was surprised and the defense suffered harm because of the confused and inconsistent testimony of the only witness, other than the defendant, that trial counsel called for the defense. Further, defendant Young has outlined above the inability of counsel to deal with some issues at trial when they arose because he was not adequately prepared. An example is the reference of Officer Lozano to the "half moon"

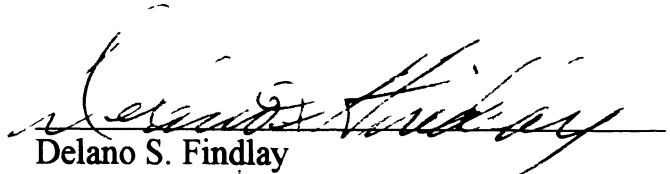
¹ Defendant Young does not accuse the prosecution of deliberately falsifying testimony to the jury. Rather, as discovered by showing the pictures after the trial to him, Dr. J. Wallace Graham, a clinical pathologist, found only two wounds on the right third finger of the Officer's hand. One he described as having scarring and being at least a day old when the pictures were taken. The other was fresh and occurred earlier in the day the pictures were taken. This wound he described as being a nonspecific and superficial abrasion. He did not find any wounds on other fingers of the officer's hand and sated he did not find any that could specifically be attributed to fingernails. Dr. Graham was present at the hearing on the Motion For A New Trail, but the trial judge would not allow Ms. Young to put on any witnesses. The motion was decided strictly on the record and affidavits which Ms. Young had submitted to the Court.

This evidence was critical because it contradicted testimony given at trial by Officer Lozano and other officers to the effect that she had cuts in two fingers which were bleeding from Ms. Young digging in her fingernails. Further EMT Anthony Glezos of the West Valley Fire Department who had been excused from trial by defense counsel without testifying would also have testified that he saw only a small superficial scrape of abrasion that was fresh and that he saw no blood on either of Officer Lozano or Ms. Young. Mr. Glezos arrived within about 20 minutes after Officer Lozano pulled Ms. Young over and within 7 minutes of the time Ms. Young was taken into custody (West valley Police Department Incident Report and West Valley Fire Department EMS Report)

appearance on her finger that she stated was one of the wounds caused by defendant Young's fingernails.

For the reasons stated above, this Court should overturn the conviction of defendant Young or in the alternative remand the case for an evidentiary hearing on her motion for a new trial.

Respectfully submitted this 7th day of December 1999.


Delano S. Findlay
Attorney for Respondent/Appellant

XI. APPENDIX

No appendix is needed because the text of the statutes and rules upon which the case turns are set out in full in Section IV of the Brief which includes statutes and rules.

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Brief on Appeal to be mailed, first class postage prepaid, to the below named person this 7th day of December 1999:

Richard Catten
West Valley City Attorney's Office
3600 Constitution Boulevard
West Valley City, UT 84119

