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Utah v. Cindy Lou Young : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee,

vs.

CINDY LOU YOUNG

Defendant-Appellant.

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Priority No. 2

COURT OF APPEALS
Case No. 990575-CA

APPELLANT'S REPLY BRIEF

Appeal From the Third Judicial District Court, West Valley Department

The Honorable Anthony Quinn, District Judge

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ARGUMENT

Cindy Young, Appellant herein, submits this brief in reply to the answer brief of The State of Utah (West Valley City or Prosecution) in this appeal. The prosecution raises three primary objections to Young's appeal:

1. She presents as evidence, affidavits which are not admissible under the Utah Rules of Evidence.
2. Young received the benefit of a vigorous and competent defense consisting of trial counsel's decisions involved trial strategy *that were objectively reasonable*;
3. The jury verdict was strongly supported. Alleged errors by trial counsel did not affect the outcome of the trial.

Ms. Young agrees that she has only been able to present affidavits of most of the evidence of ineffective assistance of counsel at this stage of the proceedings. The trial court declined to receive testimony and this Court denied her motion for remand. Young has been denied the opportunity to put on competent evidence at an evidentiary hearing and this Court should either consider the affidavits or order the case remanded for the taking of evidence. Otherwise, Young cannot receive a fair trial and/or a fair appeal. Young respectfully disagrees that she received the benefit of vigorous and competent defense and that his alleged errors did not affect the outcome of the trial. It may have been vigorous, but it was ill fated from lack of preparation, knowledge and understanding of the facts to which the witnesses could and would testify in her defense.

Ms. Young does not disagree with the prosecution's citations of cases relating to the standard of review and the requirements for establishing ineffective assistance of counsel. She has stated those same standards for review and principles for this appeal in her opening brief. She does not disagree that defense counsel should be afforded some deference in making decisions as to how to conduct the trial. However, that deference has its limits which include having to adequately prepare and interview witnesses prior to trial, prior to the day of or commencement of the trial and be prepared with all of the information readily available to make decisions concerning strategy. Certainly, if counsel does not have adequate information or an accurate understanding of the case, counsel cannot make competent decisions of strategy.

Ms. Young does not disagree that affidavits are not evidence and that hearsay is not usually admissible as evidence. However, the decision of the trial court not to hear evidence on her motion for a new trial and the decision of this Court to deny her Rule 23(b) motion for remand, leaves her with nothing else to place before the Court. At least the Court should consider the affidavits in a light favorable to her in determining whether to remand the case to the trial court to take evidence. Denial of her Rule 23(b) motion for remand does not preclude such a result in this appeal. In *State of Utah v. Bredehoft* 966 P.2d 285 (Utah App. 1998) this court considered affidavits for the purpose of determining whether to remand the case for the taking of evidence on a Rule 23 (b) motion. A remand in the appeal in chief should not be any different. Where there is merit the Court should consider the affidavits and remand the case if it appears from the affidavits that Ms. Young can put on evidence to support her claim of ineffective assistance of counsel.

A. The Trial Court Should Have Allowed Testimony In Support of Young's Claims of Ineffective Assistance of Counsel.

The prosecution argues that most of the evidence which Young asserts in support of her claim for ineffective assistance of counsel is not in the trial record; it is contained in affidavits and they are not admissible as evidence. Small wonder that the information in support of her ineffective assistance of counsel claim is only in affidavits. It is because that evidence was not presented in defense of her case a trial. That is why Young asserts that her counsel's representation in her defense was inadequate. Because of this, the information in the affidavits should be given careful scrutiny.

This Court denied Young's Rule 23(b) motion for remand. It ruled Young did not show excusable neglect or in the Court's view, meet the procedural test, for the motion after the completion of briefing. However, Young had already approached the trial court for an evidentiary hearing on her motion for a new trial, a motion which the trial court denied and in the process declined to hold an evidentiary hearing. These denials speak well for the procedural niceties of the case. As a practical matter, they do not speak very well for the fair and substantive administration of justice as applied to Ms. Young..

What great harm could come from a short evidentiary hearing in the process of clearing this matter up before the court's turn their backs on her case? In view of the information in her affidavits and the arguments she makes in her opening brief, one can hardly believe there is not considerable substance to her claim. Indeed it fits well within

the holding of the Utah Supreme Court in *State of Utah v. Kenneth Templin*, 805 P.2d 182, 149 Utah Adv. Rep. 14(1970), a case which is factually very close to the case at bar.

B. The Prosecution's Arguments That Defense Counsel's Decisions Were Strategic Decisions and Were Objectively Reasonable are Mere Speculation and Are Not Themselves Supported By The Trial Record.

The prosecution argues again and again that there is nothing in the record to support Ms. Young's factual contentions of what testimony would have been adduced had her counsel called other witnesses. How can Ms. Young point to such testimony in a record that is inadequate because her attorney did not put it into the record. The Prosecution argues the reason for EMT Glezo's being excused as a witness cannot be determined from the record. Ms. Young agrees. The prosecution then speculates that his testimony may have supported the injury to Officer's Lozano's hand. It refers to the testimony of Officer Lozano, the only reference in the trial record of what EMT Glezos said. He gave her a band-aid and instructed her how to treat them if her fingers had been injured as she claimed and which is hearsay in and of itself. In making this point the prosecution seems to assume that if Officer Lozano received an injury to her fingers it must have been done by Ms. Young. It fails to recognized that Officer Lozano could have received a wound, a superficial scrape as EMT Glezos would have described it, from her own exertions, from the key ring or the steering apparatus or even from the hand

cuffs she was putting on Ms. Young.

If EMT Glezos had testified as represented by present counsel, which the prosecution seemed willing to assume for a slight point on page 14 of its brief, his testimony would not have supported the prosecution's case. It would have been that he did not see blood on her hand. He saw only a superficial scrape. This accords with the proposed testimony of Dr. Wallace Graham who saw only one recent wound in the pictures of Officer Lozano's fingers. Dr. Graham characterized the wound as a superficial scrap and not capable of being ascribed to a wound by fingernails as so vociferously argued by the prosecution at trial. It appears from the trial record as though a major part of the prosecution's case depended upon its convincing the jury that there were two very distinct wounds on two of the Officer's fingers which bled profusely. (See Young's main brief pages 18-20). His testimony would have contradicted that and would have definitely supported the defense.

The prosecution continues and appears to argue that because there is nothing in the record to show why the tow truck driver was not called as a witness, it must have been because his testimony would not support the defense when it could have just as likely been that defense counsel did not have time during the break in the trial to interview him adequately.

The prosecution argues that the failure to put on evidence of Officer Lozano's filing of a false charge against Young of violating a protective order could have led to the jury's learning that at one time, much earlier, Ms. Young slapped her daughter once

lightly on the mouth for unleashing a string of filthy oaths and names at her brother. The argument is it may have harmed her case in front of the jury. Of course whether that would have come out is conjecture and if it had, it was not Ms. Young did anything that was wrong and something to fear. It may have and would have just as likely led several of the jurors to compare their own experiences with children to that of the defendant. Under those circumstances engaging in similar conduct would those jurors view themselves as being likely to assault a police officer as Young was charged with doing?

The prosecution attempts to dismiss with cursory comment, Ms. Young's contention that her attorney failed to discover and introduce any appreciable evidence about the effects of pepper spray by arguing that it occurred after the alleged attack upon the officer and is irrelevant. However, the prosecution overlooks the appreciable amount of testimony of Officer Lozano and Officers Moore and Kishiyama about the difficulty they had putting the handcuffs on Ms Young and the inference that it is continued resistance to arrest which goes to collaborate Officer Lozano's claim that Ms. Young assaulted her. Proper evidence about the effect so pepper spray would counter such an inference or impression by simply explaining why Young was flailing with her free hand as she was when the other officers arrived on the scene.

The prosecution attempts to dismiss Ms. Young's claim that she was kneeling with her arms cuffed behind her as not being central to the prosecution's case. It was not, but why did the prosecutor make so much of it. It is very relevant to the credibility of Ms Young and to impeach the credibility of the police officers that EMT Glezos would have

testified that she was on her knees with her hands cuffed behind her when he arrived. The prosecution clearly used this little bit of testimony, which they now say was not central to their case, to try to discredit the credibility and the testimony of Ms Young. (Young appeal brief, p. 142)

The prosecution argues that the jury's verdict is strongly supported by the evidence. That is so only because the whole truth was not put before the jury; it simply did not come out. The jury had to view the case with inaccurate, exaggerated and in some instances, untrue information.

**C. Young's Trial Counsel's Representation Did Not Meet
The Standard For Objectively Reasonable Representation
and Young Does Meet The First Part Of The Strickland Test.**

To meet the first part of the test for ineffective assistance of counsel Ms Young must show that the representation of her defense attorney did not meet an objectively reasonable standard of representation. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052 (1984) The prosecution raises several speculations as to why defense counsel may have done the things he did at trial. All kinds of speculation can be made about what caused defense counsel to make the decision he did at trial. However, one thing is clear, **he did not interview the witnesses before the day of the trial** and his interviews were cursory and did not uncover any appreciable detail about the facts of the case. Under the Supreme Court's holding in *Templin.*, *supra*, p. That conduct cannot be characterized as

reasonably professional representation.

The Templin case held that failure to interview witnesses prior to the day of trial constitutes ineffective assistance of counsel. In Templin, the Utah Supreme Court stated :

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.

That is precisely what happened in Ms. Young's case below when counsel failed, among many other things, to interview the witnesses before the commencement of the trial and then summarily dismissed EMT Glezos whose testimony was critical to her case. (Young's Appeal Brief pp. 20-23. 26-29)

The prosecution attempts to distinguish *Templin* by arguing that in *Templin*, the defense counsel failed entirely to contact some of the potential witnesses whose names the defendant supplied to him. In this case Ms. Young's trial counsel failed to contact Grant Fairbanks, a plastic surgeon, with whom Ms. Yong had discussed the case and who expressed an interest in the case, and even requested that he be allowed to see the pictures allegedly depicting wounds on Officer Lozano's fingers. Counsel's performance during the trial reflects his failure to do that.

In *Templin*, the Court noted that the fact that counsel interviewed or contacted some of

the witnesses did not excuse the fact that he did not contact or interview others. Further the Supreme Court in *Templin* noted that defense counsel failed to interview one of the other witnesses until the day of trial. It was not only the failure to contact some of the witnesses in *Templin* that caused the Supreme Court to overturn the case, It was the failure to find and use evidence available to the defense which would have been material to the case. The Court there determined that the failure to call these witnesses resulted from inadequate preparation for trial. The Court stated that counsel's reliance on the defendant, Templin's, and his friend Johnson's testimony as "adequate information about the sexual activity between the defendant and the victim" was not a tactical decision which could be "characterized as reasonable professional assistance." Similarly trial counsel's decision to use only the Ms. Young and her neighbor Bobbi Johnson as witnesses of the circumstances around the arrest was not a tactical decision that can be characterized as "reasonable professional assistance" in the case at bar. Ms. Young has met the first part of the *Strickland* test.

Trial counsel's failure to interview witnesses before the day of the trial is more than ample evidence of his inadequate preparation. As stated in *Templin*, only after an adequate investigation has been made can counsel make a reasonable decision to call or not to call a particular witness. The result of defense counsel's failure to make adequate investigation and trial preparation is set out in detail in Young's opening appeal brief. In view of the trial court refusal to hold an evidentiary hearing fairness would demand that all reasonable inferences from the affidavits should be drawn in Young's favor. If in

light of those inferences the evidence therefrom would have been likely to have been considered significant by one or more jurors, the matter should be remanded in the least for an evidentiary hearing on her motion for a new trial. Only after that information has stood the scrutiny of an evidentiary hearing and reasonable steps taken thereafter can it be said that Young received a fair trial.

D. There Is a Reasonable Probability That Defense Counsel's Failure to Adequately Interview Witnesses and Adequately Prepare For Trial Was Enough To Undermine Confidence in The Outcome Of The Prosecution's Case. Young Has Met The Second Part Of The *Strickland* Test.

The second part of the *Strickland* test requires that Ms. Young show her defense was prejudiced by counsel's failure to meet the objective test of reasonableness in his representation.

Critical to any trial is the credibility of the witnesses. The only persons present at the time of the alleged assault on Officer Lozano were the officer and Cindy Young. The credibility of the testimony of each is critical to the outcome of the trial. The government's attack on the credibility of Cindy Young's testimony on rebuttal by going over again the difference in her testimony about the alleged wounds and blood on officer Lozano's fingers and about whether or not she was kneeling or sitting, could not have other than affected the decision of each juror. It made it appear to the jury that Ms. Young was not being entirely truthful in her testimony when in fact exactly the opposite was true. Had EMT' Glezos testified that Ms. Young was kneeling with her hands cuffed

behind her as Ms Young herself testified and had he and Dr. Wallace Graham, or another expert medical witness, testified that there was only a superficial scrap on one, not two, of Officer Lozano's fingers, that EMT Glezos did not see any blood on either Ms. Young or Officer Lozano, in other words, that there was not blood oozing all over the place it would have corroborated Ms. Young's testimony and would likely have had a dramatic affect on the perspective from which the jurors viewed the case. Had defense counsel been familiar enough with the case and with the pictures of the officers's fingers to point out to the jury that it was impossible for Ms. Young to make a half moon mark with her fingernails in the officers finger, it would have had monumental effect upon the jury's perception of the Officer's and Ms Young's credibility at trial. Further, introduction into evidence of the baseless charge of violating a protective order would have given the jury a glimpse into the state of mind of the arresting officer, Lozano; her agitation, her willingness to charge Ms. Young with a crime without looking carefully to determine that there was a factual basis. It would have allowed the jury to draw an inference that the arresting officer may have been as cursory and willing to bring any charge she thought she could find some reason, however slight, to bring and could have led to the jury's questioning the accuracy of officer Lozano's testimony at trial; that is to question or even doubt that Cindy Young actually assaulted her and dug her fingernails into the officer's fingers. It would have made alternative explanations of how the officer's fingers were wounded more viable.

While the claim is now supported only by affidavit, if given the opportunity, there

is a very strong likelihood that Ms. Young can support the claims by solid evidence.

Who could doubt that the above outlined information, if put to the jury, would undermine their confidence in the prosecution's case. This information indicates that the ineffective assistance of Young's counsel did prejudice her defense and that she has or can, if allowed to put on evidence, meet the second part of the *Strickland* test.

CONCLUSION

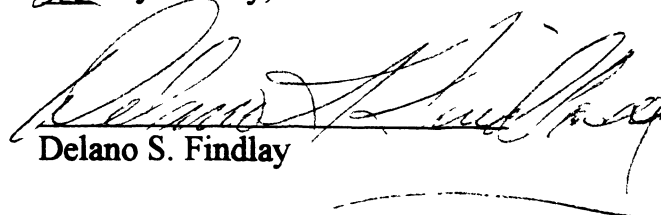
Young has shown, *prima facie*, by affidavit that she can meet both parts of the *Strickland* test. Trial Counsel's representation did not meet the objective standard of reasonableness for effective representation. Her credibility before the jury was compromised and that of the police officers strengthened by misleading and inaccurate information. As a result, her defense was prejudiced.

Young did not receive a fair trial; a fair consideration by an impartial jury based upon wholly true and untainted evidence. The trial court erred in not granting Young a new trial or in the least allowing her to put on the evidence shown to be available by her affidavits in support of her claim.

The Court should overturn the jury's verdict of guilty. In the alternative, this Court should remand the case to the trial court to take evidence on her claim of ineffective

assistance of counsel at trial.

Respectfully submitted this 22 day of May, 2000.


Delano S. Findlay

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 22nd day of May, 2000:

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