

1989

John Quas v. State of Utah : Petition for Rehearing

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.

R. Paul Van Dam; Attorney General; Attorney for Respondent.

Lisa J. Remal, Candice A. Johnson, Elizabeth Holbrook; Salt Lake Legal Defender Assoc.; Attorneys for Petitioner.

Recommended Citation

Legal Brief, *Quas v. Utah*, No. 890601 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2245

This Legal 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
.A10
DOCKET NO.

890601

IN THE UTAH COURT OF APPEALS

JOHN QUAS,	:	
Plaintiff/Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890601-CA
Defendant/Respondent.	:	Priority No. 2

PETITION FOR REHEARING

Petition for rehearing of decision affirming judgment and conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. section 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

LISA J. REMAL
CANDICE A. JOHNSON
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorneys for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
JUDITH S. H. ATHERTON
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL BUILDING
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

FILED

JUL 1991

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JOHN QUAS,	:	
Plaintiff/Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890601-CA
Defendant/Respondent.	:	Priority No. 2

PETITION FOR REHEARING

Petition for rehearing of decision affirming judgment and conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. section 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

LISA J. REMAL
CANDICE A. JOHNSON
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorneys for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
JUDITH S. H. ATHERTON
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
ARGUMENT	
I. THIS COURT SHOULD REWRITE THE <u>BRICKEY</u> ISSUE IN A MANNER THAT IS CONSISTENT WITH THE <u>BRICKEY</u> DECISION AND THE RECORD IN THIS CASE.	1
A. THIS COURT SHOULD OMIT THE DISCUSSION OF "GOOD CAUSE" FOR REFILEING CASES.	1
B. THIS COURT SHOULD APPLY <u>BRICKEY</u> IN THE CONTEXT OF THE RECORD IN THIS CASE.	4
II. THIS COURT SHOULD CLARIFY THE PLAIN ERROR ANALYSIS.	7
III. THIS COURT SHOULD OMIT FOOTNOTE 5, WHICH CONDITIONS THE APPEALABILITY OF ISSUES ON THE CONTENT OF THE NOTICE OF APPEAL AND DOCKETING STATEMENT.	9
CONCLUSION.	11

TABLE OF AUTHORITIES

Page

CASES CITED

<u>Brown v. Pickard</u> , 11 P. 512 (Utah 1886)	1
<u>Burkett v. Schwendiman</u> , 773 P.2d 42 (Utah 1989)	11
<u>Cummings v. Nielson</u> , 129 P. 619 (Utah 1913)	1
<u>Nunley v. Stan Katz Real Estate</u> , 388 P.2d 798 (Utah 1964)	10
<u>State v. Anderson</u> , 612 P.2d 778 (Utah 1980)	3
<u>State v. Brickey</u> , 714 P.2d 644 (Utah 1986)	passim
<u>State v. Johnny Medina Duran</u> , Case No. 900022-CA	11
<u>State v. Eldredge</u> , 773 P.2d 29 (Utah), <u>cert. denied</u> , 110 S.Ct. 62 (1989)	7, 8
<u>State v. Quas</u> , slip op. filed June 18, 1991, Case No. 890601-CA	passim
<u>State v. Rodney W. Smith</u> , Case No. 900214-CA	10

STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I § 12, Utah Constitution	11
Art. VIII § 5, Utah Constitution	11
Rule 3, Utah Rules of Appellate Procedure	10
Rule 9, Utah Rules of Appellate Procedure	10

IN THE UTAH COURT OF APPEALS

JOHN QUAS,	:	
Plaintiff/Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890601-CA
Defendant/Respondent.	:	Priority No. 2

INTRODUCTION

Mr. Quas requests rehearing of his case. See Brown v. Pickard, 11 P. 512 (Utah 1886) (explaining circumstances allowing rehearing); Cummings v. Nielson, 129 P. 619 (Utah 1913) (same).

A copy of this Court's opinion is in Appendix 1.

ARGUMENT

I.

THIS COURT SHOULD REWRITE THE BRICKEY ISSUE
IN A MANNER THAT IS CONSISTENT WITH THE BRICKEY DECISION
AND THE RECORD IN THIS CASE.

A. THIS COURT SHOULD OMIT THE DISCUSSION OF "GOOD CAUSE" FOR
REFILING CASES.

Quas is consistent with Brickey in limiting the
circumstances in which a prosecutor may refile a case to two
circumstances: 1) when the prosecutor presents new or previously
unavailable evidence, and 2) when the prosecutor presents other good
cause. Quas at 3.

The error in the Quas decision lies in the interpretation
of the "good cause" limitation. In Quas, this court concluded that

if a prosecutor innocently miscalculates the evidence necessary to sustain a finding of probable cause, the prosecutor has "good cause" to refile the case after additional investigation. Under the Quas "good cause" analysis, a prosecutor could base a successive preliminary hearing on evidence that was readily available at the previous preliminary hearing(s) as long as he asserts good faith in doing so ("the ensuing investigation was not performed to procrastinate, harass, or shop for a more favorable magistrate"). Quas at 3. This interpretation of the "good cause" limitation thus eviscerates the "new or previously unavailable evidence" limitation and relies on the good faith of the prosecutor in claiming a mistaken assessment of the evidence necessary to support a finding of probable cause.

The Brickey court set forth the "new or previously unavailable evidence" limit for a reason--"[T]he prosecutor's good faith is a fragile protection for the accused." State v. Brickey, 714 P.2d 644 (Utah 1986).

- - -

The Quas "good cause" for refiling standard is adopted from the standard for establishing "good cause" to continue the preliminary hearing. Quas at 3 n.1. It is true that "Brickey does not distinguish between a continuance of a preliminary hearing and a refiling." Id. Lack of explicit distinction, however, does not blur the standards that apply to distinct remedies.

The Utah Supreme Court has recognized three remedies for a prosecutor facing a dismissal of an information: 1) continue the

case and obtain the necessary evidence; 2) appeal the magistrate's dismissal of the case; or 3) refile the case if there is new or previously unavailable evidence or other good cause to justify the refiling.¹ These remedies are adequate for the prosecution and must be interpreted strictly to insure that prosecutors provide constitutionally adequate preliminary hearings. See State v. Anderson, 612 P.2d 778, 783-784 (Utah 1980) (decided under Article I section 12 of the Utah Constitution; recognizing that preliminary hearings in Utah facilitate the right to a fair trial by giving criminal defendants notice and discovery of the State's case); State v. Brickey, 714 P.2d 644, 646 (Utah 1986) (decided under Article I section 7 of the Utah Constitution; recognizing that preliminary hearings in Utah are designed to protect the accused from groundless prosecutions, to conserve judicial resources, and to promote confidence in the system of justice).

If a prosecutor innocently miscalculates the quantum of evidence necessary to sustain a finding of probable cause, the

1. The Brickey court's footnote 5, found at pages 647 and 648 of Brickey states,

In Harper v. District Court, Okla., 484 P.2d 891 (1971), the Oklahoma court clarified Jones, holding that good cause to continue a preliminary hearing for further investigation might exist when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover and further investigation clearly would not be dilatory. 484 P.2d 897. In addition, the Oklahoma Supreme Court has added a new Rule 6 to the Rules of the Court of Criminal Appeals, permitting the state to appeal from an adverse ruling at a preliminary hearing. See State ex rel. Fallis v. Caldwell, 498 P.2d 426, 428-429.

magistrate should allow a reasonable continuance for the collection of evidence that is reasonably available, and which continuance would not cause undue delay. Since the prosecutor has the continuance remedy, however, it is not appropriate for a prosecutor to allow a case to be dismissed, and later refile the case, claiming an innocent miscalculation of the evidence. Rather, to refile the case, the prosecutor must present new or previously unavailable evidence, or other good cause to justify the refiling. Brickey.

- - -

On rehearing, this Court should omit the discussion blurring "good cause" for refiling and "good cause" for a continuance. Under Quas, a prosecutor has "good cause" to continue or to refile a case if he innocently miscalculates the evidence. Quas at 3. This case does not involve the prosecutor's innocent miscalculation of the evidence. Rather, the magistrate's dismissal of the case after the first preliminary hearing and continuance resulted from the prosecutor's failure to present the gunshot residue (GSR) tests, despite the magistrate's repeated requests for that evidence which was in the prosecutor's possession. See e.g. P.H.1 111-121, 167-169; T. 814 at 2-5. Because this case does not involve an innocent miscalculation of the evidence or any other good cause for refiling the information, the "good cause" discussion is neither pertinent nor necessary to the Quas opinion.

B. THIS COURT SHOULD APPLY BRICKEY IN THE CONTEXT OF THE RECORD IN THIS CASE.

Quas correctly notes that at the successive preliminary hearing in this case, "the State presented twelve new exhibits and five new witnesses," and the magistrate found that the evidence presented at the successive preliminary hearing "had not been available at the first hearing, or at least had been 'unavailable as set forth in State v. Brickey.'" Quas at 4.

Unfortunately, Quas does not address the key legal issue in dispute before the magistrate, before the trial court, and presented on appeal: Was the magistrate legally correct in adopting the State's position that "new or previously unavailable evidence" means evidence that was readily available to the State in previous preliminary hearings (P.H.2 151-152)? As the magistrate stated in pondering the question,

I don't have any question that I've heard a great deal of additional new evidence today, but I suppose that the argument that's going to be made, and I don't want to make your argument for you, Miss Remal and Miss Johnson, is that this was clearly available evidence at the time of the original preliminary hearing. Isn't that really the crux of the problem before the Court?

(P.H.2 138). See also opening brief of Appellant at 17-21 (discussing the legal meaning of "new or previously unavailable evidence"); brief of Appellee at 14-16 (same); reply brief of Appellant at 5-8 (same).

- - -

Quas accepts without scrutiny the magistrate's finding that evidence at the second preliminary hearing was "new or previously unavailable" on the basis that counsel for Mr. Quas failed to

marshal the evidence. Id. at 5.

Counsel for Mr. Quas did marshal the evidence. After extensive argument on the legal question of the meaning of "new or previously unavailable evidence," counsel for Mr. Quas marshalled the only evidence that met that standard--the testimony of Kristine Knudson. See opening brief of Appellant at 23-24, included in Appendix 2 to this petition. Counsel argued that the testimony of Kristine Knudson was not adequate to reverse the magistrate's previous dismissal of the information. See id. Counsel argued that the reversal was actually improperly based on the presentation of the pivotal gunshot residue evidence that was available and requested by the magistrate at the first preliminary hearing and at the continuance of the first preliminary hearing.² See id. at pages 22-24. Additionally, counsel for Mr. Quas addended a copy of the prosecution's marshalling of the evidence contained in the State's memorandum seeking to refile the case. See id. at page 23 n.22; opening brief of appellant, Appendix 2.

If the foregoing does not constitute "marshalling of the

2. This Court indicates in addition to the testimony of Kristine Knudson concerning conversations with Mr. Quas after the first preliminary hearing, the testimony of James Gaskill on the gunshot residue (GSR) tests "most clearly met the Brickey standard" because the tests were performed after the first preliminary hearing. Id. at 4.

The prosecutor admitted at the second preliminary hearing that Mr. Gaskill could have done the tests before the first preliminary hearing (P.H.2 at 137).

The State already had performed GSR tests through a different expert at the first preliminary hearing but declined to present the evidence when requested to do so by the magistrate (T. 814 at 2-5).

evidence," this Court should explain what is required in order to obtain appellate review of issues requiring marshalling of the evidence.

- - -

On rehearing, this Court should first address whether the magistrate was correct in interpreting "new or previously unavailable evidence" as meaning evidence that was reasonably available at previous preliminary hearing(s).

In the event that this Court finds that the magistrate's interpretation of the "new or previously unavailable evidence" was legally incorrect, this Court should reassess whether the State presented sufficient evidence meeting the Brickey standard to justify the reversal of the magistrate's initial dismissal of the information. Brickey, 714 P.2d at 647-648.

II.

THIS COURT SHOULD CLARIFY THE PLAIN ERROR ANALYSIS.

Quas correctly states the plain error test:

First, the error must be "plain," that is, "it should have been obvious to a trial court that it was committing error." Eldredge, 773 P.2d at 35. Second, the error must affect the substantial rights of the accused, that is, the error must be harmful.

Quas at 5-6.

The application of the test in Quas needs clarification. On page 7, the court states,

Third, even if the remark were prejudicial, it was not sufficiently obvious to invoke the plain error exception, especially in light of the corroborating evidence offered by this and other witnesses.

(emphasis added).

This conclusion mixes the two prongs of the plain error test. The plainness prong is to be determined by looking at the plainness of the legal impropriety of the ruling at issue in light of the legal context prevailing when the error was made, not by looking at other evidence supporting the verdict. The harmfulness, or prejudice prong is to be determined by looking at the impact of the improper ruling in light of other evidence. State v. Eldredge, 773 P.2d 29, 35 and n.9 (Utah), cert. denied, 110 S.Ct. 62 (1989).

The portion of Quas discussing prejudice, quoted above, needs additional clarification. If this Court is satisfied with the "corroborating evidence offered by this and other witnesses," then Dr. Grey's testimony was not prejudicial. But cf. Quas ("Even if the remark were prejudicial . . . in light of the corroborating evidence.").

- - -

The Quas opinion apparently concludes that the testimony of Dr. Grey and Mr. Marchant concerning whether Mrs. Quas' death fit the behavioral norms of suicide victims was not plain error because it was not sufficiently harmful, in light of other corroborating evidence. Id. at 7 and nn. 3 and 4.

Mr. Quas respectfully requests that this Court specify on which corroborating evidence the Court relies in reaching this

conclusion. Particularly since this Court declined to publish its analysis of numerous evidentiary questions raised in the trial court and briefed on appeal, Quas at 7, it is essential for purposes of further review of this Court's decision for this Court to show the specific evidentiary basis of this Court's ruling on the plain error question.

III.
THIS COURT SHOULD OMIT FOOTNOTE 5,
WHICH CONDITIONS THE APPEALABILITY OF ISSUES
ON THE CONTENT OF THE NOTICE OF APPEAL
AND DOCKETING STATEMENT.

In footnote 5, on pages 7 and 8, this Court indicates as follows:

In his brief, appellant asks us to consider issues surrounding the court's interlocutory order to bind him over for trial. These issues include whether the district court had jurisdiction to review the circuit court's decision to bind over, and whether his failure to appeal the bindover was timely. We decline to consider these issues because they were not raised in appellant's docketing statement. Also, the docketing statement and the notice of appeal indicate that this is an appeal from a final order of conviction. Finally, we have already disposed of the jurisdictional issue in State v. Humphrey, 794 P.2d 496, 497 (Utah App.), cert. granted, 150 Utah Adv. Rep. 28 (1990).

(emphasis added).

On rehearing, this Court should omit this footnote. There is neither precedent for nor logic in conditioning the appealability of issues on the content of the docketing statement and notice of appeal.

The rules governing docketing statements and notices of appeal have never before been interpreted as requiring parties to be familiar with and specify all conceivable issues. Utah Rule of Appellate Procedure 9 (docketing statement), Utah Rule of Appellate Procedure 3 (notice of appeal).

Docketing statements are designed for purposes unrelated to preservation of issues on appeal. Utah Rule of Appellate Procedure 9(b) ("The docketing statement is not a brief and should not contain arguments or procedural motions. It is used by the appellate court in assigning cases to the Supreme Court or to the Court of Appeals when both have jurisdiction, in making certifications to the Supreme Court, in classifying cases for determining the priority to be accorded them, in making summary dispositions when appropriate, and in making calendar assignments."). Notices of appeal are designed for a purpose unrelated to the preservation of issues on appeal. Nunley v. Stan Katz Real Estate, 388 P.2d 798, 800 (Utah 1964) ("[T]he object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a particular case.").

Given that appeals are frequently brought by appellate counsel who did not participate in the trial, requiring appellate counsel to be familiar with and specify all conceivable issues in the notice of appeal and docketing statement sets forth an impossible burden, especially since transcripts frequently are not prepared before the notice of appeal and docketing statement must be filed. See, e.g., State v. Rodney W. Smith, Case No. 900214-CA;

State v. Johnny Medina Duran, Case No. 900022-CA. Conditioning the appealability of issues on the content of the docketing statement and notice of appeal would violate the Utah constitutional right to appeal. Constitution of Utah, Article I section 12; Article VIII section 5.

Inasmuch as the issues that this Court declined to address in footnote 5 were mooted by the Court's analysis of the merits of the bindover issue, footnote 5 is unnecessary. See Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989) (mootness doctrine gives appellate court discretion to abstain from deciding issues that will not affect the rights of the parties).

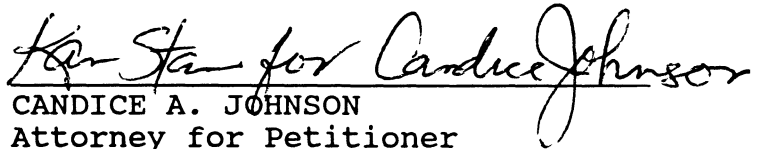
CONCLUSION

Mr. Quas requests rehearing of this case.

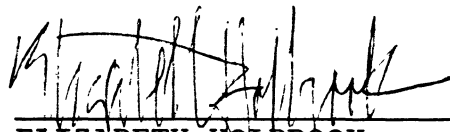
DATED this 7 day of July, 1991.



LISA J. REMAL
Attorney for Petitioner



CANDICE A. JOHNSON
Attorney for Petitioner



ELIZABETH HOLBROOK
Attorney for Petitioner

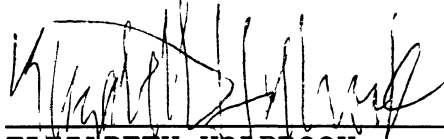
CERTIFICATION

I, ELIZABETH HOLBROOK, do hereby certify the following:

(1) I am the attorney for Petitioner in this case;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.


Respectfully submitted this 2 day of July, 1991.



ELIZABETH HOLBROOK
Attorney for Petitioner

CERTIFICATE OF DELIVERY

I, ELIZABETH HOLBROOK, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 2 day of July, 1991.



ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of July, 1991.

APPENDIX 1

FILED

JUN 18 1991

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

State of Utah,)	OPINION
)	(For Publication)
Plaintiff and Appellee,)	
)	
v.)	Case No. 890601-CA
)	
John Quas,)	
)	F I L E D
Defendant and Appellant.)	(June 18, 1991)

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Third District, Salt Lake County
The Honorable Kenneth Rigtrup

Attorneys: Lisa J. Remal, Candice A. Johnson, and Elizabeth
Holbrook, Salt Lake City, for Appellant
R. Paul Van Dam and Judith S. H. Atherton, Salt
Lake City, for Appellee

Before Judges Billings, Garff, and Orme.

GARFF, Judge:

Appellant, John Quas, appeals his conviction of second
degree murder, in violation of Utah Code Ann. § 76-5-203
(1990), a first degree felony.

FACTS

We recite the facts from the record in the light most
favorable to the jury's verdict. State v. Johnson, 784 P.2d
1135, 1137 (Utah 1989). On the evening of June 15, 1987
appellant John Quas and his wife Susan Quas were at home. Both
had been drinking. The two began to argue and to discuss
divorce. Sometime that evening appellant shot and killed Mrs.
Quas. At 9:41 p.m. appellant called the Salt Lake County 911
operator to report that his wife had shot herself. A police
officer and paramedics arrived within four minutes of
appellant's call. Mrs. Quas was found dead, lying on some

sheets in the living room with a gunshot wound in her left eye. Appellant said he had been in the shower, heard a gunshot, and came out to find his wife lying on the floor.

On June 16, 1987, appellant was charged with second degree murder. Those charges were dismissed for insufficient evidence after a preliminary hearing in the third circuit court to determine whether he should be bound over to stand trial. A year later, on July 5, 1988, the information was refiled based on new or previously unavailable evidence. A second preliminary hearing was held before the same circuit court judge. On October 24, 1988, the court found that refiling was appropriate based on new or previously unavailable evidence and that, coupled with the evidence presented at the former hearing, the court had probable cause to bind appellant over to stand trial as charged.

Appellant filed a motion in the district court to quash the bindover order. The State moved to strike appellant's motion to quash. The trial court granted the State's motion on the ground that it lacked jurisdiction to review the sufficiency of evidence presented at the preliminary hearing. Appellant petitioned the Utah Supreme Court for permission to appeal from the district court's interlocutory order and the court denied permission. Appellant was convicted of criminal homicide, murder in the second degree. He appealed the conviction to the Utah Supreme Court, which, pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1990), transferred the appeal to this court.

THE BRICKEY STANDARD

To consider the issues arising from the second preliminary hearing, we first review the standard for refiling previously dismissed criminal charges. This standard is found in State v. Brickey, 714 P.2d 644 (Utah 1986):

[D]ue process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling. . . . [W]hen a charge is refiled, the prosecutor must, whenever possible, refile the charges

before the same magistrate who does not consider the matter de novo, but looks at the facts to determine whether the new evidence or changed circumstances are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges.

Id. at 647 (citations omitted). The Brickey court elucidated the good cause exception, noting with approval that the court in Harper v. District Court, 484 P.2d 891 (Okla. Crim. App. 1971) held that "good cause to continue a preliminary hearing for further investigation might exist when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover and further investigation clearly would not be dilatory." 714 P.2d at 647-48, n.5 (citing Harper, 484 P.2d at 897).¹

To sum up the law of refiling as articulated in Brickey and set forth in Utah Code Ann. § 77-35-7(d)(1) (1982), refiling may take place in cases where new or previously unavailable evidence has surfaced, or other good cause justifies refiling. The good cause may include cases where a prosecutor miscalculated the quantum of evidence needed to bind over and the ensuing further investigation was not performed to procrastinate, harass, or shop for a more favorable magistrate. Brickey, 714 P.2d at 647. Finally, where possible, the second hearing should not be de novo and should

1. Harper involved a continuance rather than a dismissal followed by a refiling, which is the case here. Brickey does not distinguish between a continuance of a preliminary hearing and a refiling. And Brickey specifically mentions that a finding of good cause can justify the refiling of dismissed charges. 714 P.2d at 647. Utah Code Ann. § 77-35-7(d)(1) (1982), as well as its replacement, Utah R. Crim. P. 7(8)(c), each require the magistrate to dismiss the information if probable cause is not established. In addition, both versions explicitly provide for refiling under appropriate circumstances: "The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense." In any event, the Brickey requirements of reviewing the evidence presented at the prior hearing and appearing before the same magistrate, where possible, are applicable whether the first hearing ended with a dismissal or with a continuance.

be before the same magistrate, who is in the best position to "determine whether the new evidence or changed circumstances are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." Id.

NEW OR PREVIOUSLY UNAVAILABLE EVIDENCE

Appellant urges us to set aside the findings underlying the circuit court's conclusion that the evidence presented at the second preliminary hearing was new or previously unavailable. Because the preliminary hearing was an action tried upon the facts without a jury, Utah R. Civ. P. 52(a) applies.² We will therefore not set aside the trial court's findings unless they are clearly erroneous. To establish clear error, the appellant "must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990); State v. Goodman, 763 P.2d 786, 786 (Utah 1988) (findings made upon bench trial will be sustained unless they are against the clear weight of the evidence). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." State v. Walker, 743 P.2d 191, 193 (Utah 1987) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)).

At the second preliminary hearing, the State presented twelve new exhibits and five new witnesses. Of this evidence, the testimony of James Gaskill from the Weber State Crime Lab and Kristine Knudson, appellant's former girlfriend, most clearly met the Brickey standard because each testified about tests or conversations occurring after the first preliminary hearing. Gaskill testified about gunshot residue (GSR) tests and Knudson testified to three conversations with appellant. After the second preliminary hearing, the magistrate found that the State had accumulated new evidence, and that such evidence had not been available at the first hearing, or at least had been "unavailable as set forth in State v. Brickey."

2. "The rules of civil procedure relating to appeals govern criminal appeals to the appellate court, except as otherwise provided." Utah R. Crim. P. 26(7).

In challenging this finding, appellant has not marshaled the evidence in support of the pertinent findings, nor has he demonstrated that the marshaled evidence, including all reasonable inferences drawn therefrom, is insufficient to support them. We therefore accept the court's finding that evidence presented at the second preliminary hearing was new or unavailable.

We next consider the issue of whether the Brickey standard was met. Given the court's findings, this issue presents a conclusion of law to which we accord no deference and which we review for correctness. State v. Humphrey, 794 P.2d 496, 497 (Utah App. 1990), cert. granted, 804 P.2d 1232 (1990).

Because the court correctly found that the evidence presented was new or unavailable, and because the second preliminary hearing was in the same forum and before the same magistrate as was the first preliminary hearing, and because the magistrate considered the record of the prior hearing along with the evidence presented at the second hearing, we see no error in the court's conclusion that the Brickey standard was met and that refiling was appropriate.

EXPERT TESTIMONY

Having found that the bindover was proper, we now consider the other issues pertaining to the trial. Appellant argues that the testimony of Dr. Todd Grey, the medical examiner, and that of Brent Marchant of the State Medical Examiner's Office, to the effect that the nature of the victim's wounds was more consistent with homicide than with suicide, violated Utah R. Evid. 403, 404 and 702.

Because no contemporaneous objections to this testimony were made, appellant has waived his right to raise the matter on appeal, State v. Eldredge, 773 P.2d 29, 34-35 (Utah), cert. denied, ___ U.S. ___, 110 S. Ct. 62 (1989), unless the testimony comes within the plain error analysis. Id.; State v. Braun, 787 P.2d 1336, 1341-42 (Utah App. 1990).

Utah R. Evid. 103(d) provides "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." The Utah Supreme Court, in interpreting this rule, has established a two-part test to determine plain error. First, the error must be "plain," that is, "it should have been

obvious to a trial court that it was committing error." Eldredge, 773 P.2d at 35. Second, the error must affect the substantial rights of the accused, that is, the error must be harmful. Id. The policy behind the plain error test is to allow the court to reach justice in a given case. Id. at 35 n.8; Braun, 787 P.2d at 1342. See Utah R. Evid. 102.

The transcript reveals that Dr. Grey did not give psychological profile testimony, condemned in State v. Rimmasch, 775 P.2d 388, 392 (Utah 1989), nor did he vouch for the truthfulness of a witness's testimony based on anecdotal "statistical" evidence, condemned in State v. Rammel, 721 P.2d 498, 501 (Utah 1986) and also in State v. Iorg, 801 P.2d 938, 941 (Utah App. 1990).

Instead, Dr. Grey addressed the issue of whether the victim died via suicide or homicide by examining the physical evidence of the victim's body and by demonstrating the hypothesis of suicide using a live model whose arm length was identical to that of the victim. He had the model hold the gun in various positions to see whether it was possible for Mrs. Quas to shoot herself with the muzzle sixteen to eighteen inches away from the entry wound and with the gun oriented so that the bullet path would correspond to that of the victim. He had the model hold the gun with either hand, with both hands, and in a position so she could fire using her thumb. He also had the model hold the gun in these various positions with her arms extended as far as possible. He found that the gun could be held in the right hand at fourteen or fifteen inches away, in the left hand at fourteen inches away, or in both hands at twelve and a half or thirteen inches away. He concluded that, while it may have been technically possible for Mrs. Quas to shoot herself,

it's a very cumbersome and in my experience completely atypical way for somebody to commit suicide. When people shoot themselves, they usually put the gun where they want the bullet to go and pull the trigger. I've never seen a clearly proven suicide where the person has held the gun as far as away from their body as they possibly can before shooting.

Here, the gist of the testimony goes to the fact that, if the victim had committed suicide, she chose a physically awkward and hence unlikely method to carry out the deed.

Both Rammel and Iorg condemn the use of evidence "concerning matters not susceptible to quantitative analysis such as witness veracity," because such evidence leads to undue prejudice. Iorg, 801 P.2d at 941-42. However, Rammel and Iorg do not apply in this case. First, Dr. Grey's testimony was not offered as statistical evidence that Mrs. Quas did not commit suicide. Rather, the testimony was offered to prove that, while it was technically possible to achieve suicide given the circumstances, it would have been "cumbersome" and "atypical." Second, Dr. Grey was not vouching for another witness's veracity, nor was he giving statistical probabilities for another's veracity. Third, even if the remark were prejudicial, it was not sufficiently obvious to invoke the plain error exception, especially in light of the corroborating evidence offered by this and other witnesses.³

Brent Marchant, an investigator with the State Medical Examiner's Office, did not opine as to whether the death was a homicide or suicide. Neither did he testify as to the profile of the hypothetical suicide victim. He testified that Mrs. Quas's wound was unusual because, from his ten years' experience investigating many of the one hundred and fifty gunshot suicides that occur in Utah each year, he had seen only one suicide gunshot wound inflicted in the eye. That wound was a direct contact wound, unlike that of the victim. Therefore, even if Marchant's statement were erroneous, it is not sufficiently obvious to invoke the plain error exception.⁴

As to the other issues appellant raises on appeal, we have reviewed them and find them to be without merit. See State v. Carter, 776 P.2d 886, 896 (Utah 1989).⁵

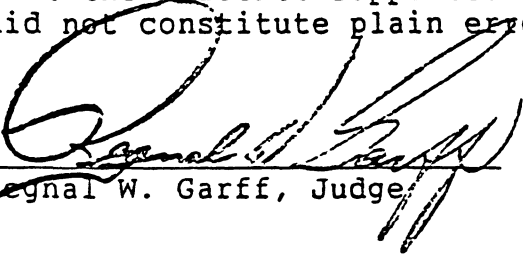
3. While the requirement of obviousness may be waived in cases of "a high degree of harmfulness," we do not find such a degree of harmfulness in this case in light of the corroborating evidence. Eldredge, 773 P.2d at 35 n.8; Braun, 787 P.2d at 1342.

4. See note 3.

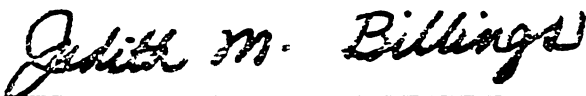
5. In his brief, appellant asks us to consider issues surrounding the court's interlocutory order to bind him over for trial. These issues include whether the district court had jurisdiction to review the circuit court's decision to bind over, and whether his failure to appeal the bindover was timely. We decline to consider these issues because they were not raised in appellant's docketing statement. Also, the

CONCLUSION

We find no error in the court's conclusions that evidence presented in the second preliminary hearing included new or previously unavailable evidence, that the refiling met the Brickey standard, and finally, that the experts' conclusion that the evidence supported a homicide rather than a suicide did not constitute plain error. We therefore affirm.


Reginal W. Garff, Judge

WE CONCUR:


Judith M. Billings, Judge


Gregory R. Orme, Judge

(Footnote 5 continued)
docketing statement and the notice of appeal indicate that this is an appeal from a final order of conviction. Finally, we have already disposed of the jurisdictional issue in State v. Humphrey, 794 P.2d 496, 497 (Utah App.), cert. granted, 150 Utah Adv. Rep. 28 (1990).

APPENDIX 2

C. THE MAGISTRATE IN THIS CASE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS IN ISSUING THE BINDOVER ORDER ON THE BASIS OF EVIDENCE PRESENTED AT THE SECOND PRELIMINARY HEARING THAT WAS READILY AVAILABLE TO THE PROSECUTION AT THE FIRST PRELIMINARY HEARING.

In the instant case, the magistrate indicated prior to the second preliminary hearing that she would bind the case over if Mr. Matheson would present the gunshot residue test foundation and results that Mr. McConkie had previously refused to present upon the magistrate's request at the first preliminary hearing (T.814 2-5, 7). Given this assurance, the State proceeded to present evidence additional to the pivotal gunshot residue tests (which were available at the first preliminary hearing), not to secure a bindover order, but to insure that Appellant's conviction could withstand appellate review (T.814 6-7). See Appendix 1.

It is doubtful that the Brickey court set forth the Utah due process standard for refiling dismissed cases with an eye to improving the appearance of appellate records. Rather, it seems that the court set forth the standard for refiling cases to force prosecutors to present their cases forthrightly the first time at preliminary hearing.²¹

dismissal).

In Utah also, a prosecutor faced with an improper dismissal for lack of probable cause can appeal the ruling. Utah Rule of Criminal Procedure 26(3)(a). See also R. 17, where the State concedes that extraordinary writs provide the State with relief from an improper dismissal.

²¹ See Brickey at 714 P.2d at 647 (indicating that "fundamental fairness" requires judicial restraint of prosecutors in this context, because the good faith of prosecutors is "a

Given the misapplication of the Brickey standard in this case, perhaps this Court should refrain from engaging in Brickey analysis altogether. Nonetheless, Appellant provides that analysis infra.

Inasmuch as the magistrate adopted a due process standard that permitted refileing of the information because the prosecution presented evidence in addition to that presented at the first preliminary hearing (P.H.2 152), the magistrate did not make findings indicating whether the State had presented any evidence during the second preliminary hearing that was not reasonably available at the first preliminary hearing.²²

Appellant maintains his position that the only evidence presented by the State during the second preliminary hearing that might have met the Brickey due process standard was the testimony of Kristine Knudson, who testified that after the first preliminary hearing, Appellant made statements to her concerning the night of Susan's death (P.H.2 73-84).²³ While the magistrate

fragile protection for the accused.").

22 A summary of the evidence presented at the first and second preliminary hearings was filed by the prosecution, and can be found at R. 18-30 and in Appendix 2 to this brief. While the summary is not completely accurate, it is adequate to give this Court a purview of the evidence presented at the preliminary hearings, and to show that, with the exception of the testimony of Kristine Knudson, all of the evidence presented at the second hearing was reasonably available at the first hearing.

23 Ms. Knudson indicated, "He said he couldn't tell where she had gotten shot, and he said that he picked up her head and that there was blood coming out the back of her head. Then he said that he put a sheet under her." (P.H.2 75-76). She indicated that Appellant also told her that when he heard the shot and left the shower, he could tell Susan was already dead,

did indicate that the statements referred to by Ms. Knudson during the second preliminary hearing were "clearly inconsistent" with Appellant's statements to the investigating officers (P.H.2 140), the magistrate did not indicate that this previously unavailable evidence was the reason for the bindover order in the second case.

Because the magistrate at the first preliminary hearing indicated her disbelief of Appellant's statements to the investigating officers (P.H.1 169), it can hardly be assumed that this previously unavailable evidence from Ms. Knudson resulted in the bindover order. Rather, the bindover order was a result of the presentation of the previously available evidence presented at the second hearing, the gunshot residue tests.

But as explained by the Brickey court, it was the State's burden to demonstrate with previously unavailable evidence that the initial dismissal should not stand.²⁴

Without meeting the Brickey standard (neither for purposes of appellate review, nor for purposes of fulfilling the

and went downstairs to check the wash prior to calling for help (P.H.2 77).

24 The Brickey court explained, The Jones court further held that when a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider that matter de novo, but looks at the facts to determine whether the new evidence or changed circumstances are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges. Id. at 171-72.
714 P.2d at 647.