2010

State of Utah v. Eddie G. Kucharski : Brief of Appellee

Utah Court of Appeals

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Case No. 20100283 -CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Eddie G. Kucharski,
Defendant/Appellant.

Brief of Appellee

Appeal from sentencing for a conviction for communications fraud in the Second Judicial District Court of Utah, Davis County, the Honorable Thomas L. Kay presiding.

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Oral Argument Not Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

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STATEMENT OF JURISDICTION

Defendant appeals his sentence on a conviction for communications fraud. This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUE

1. Was trial counsel constitutionally ineffective for not filing a motion to recuse the sentencing judge based on the judge's comments directly concerning the issues before him?

Standard of Review: "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no determinative provisions of law to this case.

STATEMENT OF THE CASE

On September 18, 2004, Defendant was charged with one count of communications fraud, a second degree felony. R. 1. In the probable cause affidavit, the State alleged that while working for a window installer, Defendant had met with a prospective client and agreed to install windows for $8335. R. 2. "Defendant insisted that the victim make the check out in his name rather than" his employer. R. 2. After cashing the customer's check, Defendant "failed to produce the windows or do any work" on the victim's home. R. 2. The company's owner later stated that he had "never received a work order or request to do work at the victim's home." R. 2.

Defendant entered a plea of no contest to third-degree felony communications fraud. R. 27. AP&P submitted a Pre-Sentence Investigation Report (PSI). Defendant objected to the PSI, complaining of 17 alleged inaccuracies. R. 138-48. AP&P filed an itemized response to Defendant's objections. *See generally* R. 223.

At the beginning of the sentencing hearing, the trial court acknowledged that it had reviewed both Defendant's objection to the PSI and AP&P's response. R. 279: 76. Following argument from counsel and a statement from Defendant, the court

sentenced Defendant to 0-5 years in prison and ordered restitution. R. 158-59; 279: 80-81. The court did not, however, enter any findings on the record regarding Defendant's objections to the PSI. R. 79: 76-81.

Defendant timely appealed, claiming, among others, that: (1) his plea was unknowing and involuntary, and (2) the trial court violated its obligations under Utah Code Annotated § 77-18-1(6)(a) by not resolving his claimed inaccuracies in the PSI. *See generally* R. 228-231. This Court rejected Defendant's challenge to his guilty plea. R. 228-29. With respect to the sentencing issue, the State conceded that the trial court erred by not resolving Defendant's challenges to the PSI. R. 229. This Court accordingly "remand[ed] the case so the sentencing judge can consider the objections to the presentence report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to sentencing." R. 229. This Court noted that after resolving the "alleged inaccuracies in the presentence investigation report, the district court may revise the sentence as it deems appropriate." R. 229.

On March 4, 2010, the sentencing court held a hearing to consider Defendant's PSI objections. R. 242. Judge Thomas Kay, the judge who presided over Defendant's original sentencing hearing, presided at this hearing as well. R. 278-79.

On remand, Defendant claimed that there were 29 errors in the PSI (as opposed to the 17 errors previously identified). R. 278: 6. Pursuant to this Court's remand order, Judge Kay first considered each of the alleged errors in the PSI. In each instance, Defendant was allowed to identify the alleged inaccuracy, the State was allowed to respond, and Judge Kay issued a ruling either adopting the change or rejecting it. *See generally* R. 278: 6-31. On an Amended PSI included in the record, Judge Kay made handwritten changes reflecting any alterations. *See generally* R. 243-256.

As set forth in the Amended PSI, Judge Kay adopted most of the changes requested by Defendant. R. 278: 6-31. Many of the changes concerned minor details of Defendant's personal history. Among others, the PSI was altered to show that: Defendant had been transferred to Texas in the months following the original crime, rather than having moved to Arizona as originally indicated (R. 245); Defendant had served 75 days in jail before his original sentencing, rather than 52 as originally indicated (R. 246); the PSI had incorrectly described a medical condition Defendant had suffered when he was 19-years-old (R. 249); and the PSI had incorrectly recounted certain details about Defendant's educational background and work history (R. 249).

Over Defendant's objection, however, Judge Kay refused to revise the PSI's assessment of his "Attitude-Orientation." R. 244. The original PSI reported that Defendant's account of the underlying crime was contradictory to the accounts given by his victim and former employer, and that he had continued minimizing his role in the crime. R. 244. Defendant objected to this characterization, claiming that his actions had been authorized by the company, and thereby suggesting that he had not committed fraud. R. 278: 8-10.

Judge Kay rejected Defendant's requested change, noting that the victim had given a contrary account. R. 248. Judge Kay stated: "I'm not making any changes because I do not believe the facts are as Mr. Kucharski says. I believe they are as stated [in the PSI]," and "what was said at the time of sentencing by the victim in the case." R. 278: 11. When defense counsel again claimed that Defendant was not guilty of the underlying offense, Judge Kay responded: "I've had Mr. Kucharski on a case before this case, and I've had more stories that I have heard that he has been rebutted by a bunch of other people that he's plead guilty to and then he comes back and gets a new attorney and then he basically says all the same old stories again." R. 278: 12.

The PSI also stated that Defendant had repeatedly engaged in criminal conduct even after his arrest, and it accordingly concluded that he could not be

supervised in a less restrictive setting than prison. R. 244. Defendant did not object to the PSI's account of his prior criminal conduct, but he did object to its assertion that he was not conducive to supervision outside prison. R. 278: 14-15. Defendant claimed that this statement made it seem "as if prison was the only alternative based on his lack of compliance." R. 278: 14-15. Judge Kay rejected that requested change, noting that Defendant's prior criminal history was a "big, big, big issue" in its consideration of the proper sentence. R. 278: 15. Judge Kay then inserted a handwritten note next that portion of the PSI, stating: "key Issue." R. 244 (underlining and capitalization in original).

Notably, Defendant did not object to the PSI's account of his extensive adult criminal record. *See* R. 246-47; 278: 6-31. As detailed therein, Defendant had a series of criminal convictions before this one, including three convictions for issuing bad checks, one conviction for communication fraud, one conviction for the attempted issuance of a bad check, and one conviction for theft. R. 245-46. The PSI also noted that Defendant had received sentences of probation in each of the prior cases. R. 246.[1]

[1] Defendant requested, and received, the insertion of a comment in the PSI stating that at least some of the earlier criminal convictions were part of "one longer [criminal] episode." R. 244.

The PSI also noted that after being convicted in this case, Defendant had been charged in another case with issuing a bad check, this time for $38,000. R. 246. According to the PSI, that case had been dismissed pursuant to an agreement with the county attorney's office in which Defendant agreed to pay restitution. R. 246. Defendant did not object to this statement. R. 278: 6-31.

After completing its review of the alleged inaccuracies in the PSI, Judge Kay heard arguments about the impact of these changes on Defendant's original sentence. Defendant argued that the collective errors had incorrectly given "the court the opinion that he makes his money off of defrauding people and then flaunting the law." R. 278: 32. Although he had recently been released from prison and already out on parole, he still asked the court to complete revoke his original sentence and instead order that he only serve a period of "court probation" that would be unsupervised by AP&P. R. 274: 3; 278: 3-6, 32. In response, the State argued that Defendant "has led a trail of fraud" that "essentially show[ed] that he is a con man." R. 278: 32. The State also noted that Defendant committed the crime at issue here while on probation for his earlier crimes, and that Defendant's "record of fraud, of continuing crime, of violating or have committing a crime while he was on probation and just this case itself deserves a prison sentence." R. 278: 33-34.

In his ruling, Judge Kay first noted that he had reviewed all of Defendant's claims regarding the PSI, and that he had made most of the requested changes. R. 278: 35-36. But Judge Kay then noted that this Court's remand order still granted him discretion to determine whether any changes to the PSI warranted a different sentence. R. 278: 36. Judge Kay stated that even with "all of these changes" to the PSI, he still believed that prison was warranted "because Mr. Kucharski had had a history with me." R. 278: 36. Judge Kay noted that Defendant's undisputed criminal record still showed "instances of repetitive criminal conduct and continued criminal behavior," and he expressed his belief that this history was "critical" to this decision. R. 278: 36.

Judge Kay thus concluded that Defendant "deserved to go to prison because of the continued behavior. Probation hadn't changed him in the past under supervised probation, and he continued to commit crimes." R. 278: 37. The court accordingly ruled "as a matter of fact and law that all the inaccuracies that have been addressed here that I have agreed to and agreed to what Mr. Kucharski said would not and will not change the sentence that I gave him to go to zero to five years in prison. So I do not see any reason to revise the sentence because those things did not affect it." R. 278: 37.

Defendant again appeals, now alleging that his counsel was ineffective for not moving to disqualify Judge Kay. R. 260-61.

SUMMARY OF ARGUMENT

First, Defendant's trial counsel did not perform deficiently by not asking Judge Kay to disqualify himself. Although Judge Kay commented on Defendant's credibility and on the appropriate sentence, those comments did not show bias or prejudice as contemplated by the judicial rules, because they were directly tied to the issues before the court.

Second, Defendant's claim also fails because he has not shown prejudice. Even with the changes to the PSI, it remains undisputed that Defendant has several prior convictions for crimes of dishonesty; Defendant committed this crime in spite of having already received probation for all of his previous crimes; and Defendant continues to minimize his own criminal culpability in this case. Even if his trial counsel had successfully moved to disqualify Judge Kay, there is no reasonable probability that a different judge would have decided to give him yet another period of probation for this new crime of dishonesty.

ARGUMENT

I.

COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE FOR NOT MOVING TO DISQUALIFY JUDGE KAY

Defendant does not challenge Judge Kay's resolution of his objections to the PSI, nor does he directly challenge Judge Kay's ruling that the changes to the PSI did not warrant revising the original sentence. Instead, Defendant claims that his trial counsel was ineffective for "failing to request the disqualification of the sentencing judge." Aplt. Br. 9. According to Defendant, Judge Kay's comments about Defendant's credibility and the appropriate sentence "demonstrated actual bias or prejudice," thereby requiring recusal. Aplt. Br. 9.

To establish ineffective assistance of counsel, Defendant must show that trial counsel's performance was deficient—that is, that counsel's performance did not meet an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 690 (1984). When assessing this prong, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted).

Defendant must also show that, absent counsel's acts or omissions, there is a reasonable probability that Defendant would have received a "more favorable" result below. *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); *see also State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011) (quotations and citation omitted); *see also Hill v. Lockhart*, 474 U.S. 52, 57 (1985) ("[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Moreover, Defendant's proof or prejudice must be based on a "demonstrable reality and not a speculative matter." *Chacon*, 962 P.2d at 50.

In this case, Defendant's ineffective assistance of counsel claim fails under both *Strickland* prongs.

A. Trial counsel did not perform deficiently by failing to file a futile motion to disqualify Judge Kay.

It is well-established that trial counsel does not perform deficiently for failing to make a futile motion. *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546; *State v. Whittle*,

1999 UT 96, ¶ 34, 989 P.2d 52. In this case, trial counsel did not perform deficiently, because any motion to disqualify Judge Kay would have been futile under established law.

It has long been recognized in Utah that a district court is "afford[ed] . . . wide latitude in sentencing," and a sentencing decision will not be reversed absent an "abuse of the judge's discretion." *State v. Moreau*, 2011 UT App 109, ¶ 6, -- Utah Adv. Rep. -- (quotations and citations omitted). The "exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court." *Id.* (quotations and citations omitted).

When determining the appropriate sentence, trial courts are entitled to consider a wide variety of factors. Among them is the defendant's background. As explained by the Utah Supreme Court, a "sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." *State v. McClendon*, 611 P.2d 728, 729 (Utah 1980). A trial court is therefore entitled to consider the "character and history of the defendant" when determining the appropriate sentence. *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997). A

sentencing court is therefore "'permitted to consider any and all information that reasonably may bear on the proper sentence for the particular defendant, given the crime committed.'" *State v. Sanwick*, 713 P.2d 707, 708 (1986) (quoting *Wasman v. United States*, 468 U.S. 559, 563 (1984)).

Under Utah's Code of Judicial Conduct, however, a judge is required to recuse himself when "the judge has a strong personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or a personal knowledge of disputed evidentiary facts concerning the proceeding." *State v. Munguia*, 2011 UT 5, ¶ 17, 673 Utah Adv. Rep. 32.

In this case, Defendant claims that Judge Kay's comments "demonstrate[d] actual bias or prejudice," thereby violating the rules of judicial conduct. Aplt. Br. 15-16. According to Defendant, Judge Kay's comments showed bias because: (1) he stated that he "simply did not believe the facts as Defendant attempted to present them to the court," and (2) Judge Kay stated that in spite of the corrections to the PSI, he had decided not to change Defendant's sentence. Aplt. Br. 15-16.

But Judge Kay's opinions about Defendant's credibility and the appropriate sentence cannot form the basis of a bias claim. To the contrary, "neither bias nor prejudice refer[s] to the attitude that a judge may hold about the subject matter of a lawsuit." *In re Young*, 1999 UT 81, ¶ 35, 984 P.2d 997 (quotations and citation

omitted); *accord Munguia*, 2011 UT 5, ¶ 17. The fact that a judge has "an opinion as to the merits of the cause or . . . has strong feelings about the type of litigation involved, does not make him biased." *Haslam v. Morrison*, 190 P.2d 520, 523 (Utah 1948). "Simply put, the concepts of bias and prejudice do not include the general views that a judge may have regarding legal issues presented in a lawsuit." *In re Inquiry Concerning a Judge*, 2003 UT 35, ¶ 6, 81 P.3d 758.

In this case, the "subject matter" of the March 4 hearing included a judicial determination of whether the alleged inaccuracies in the PSI warranted a different sentence. R. 229. In making this determination, Judge Kay was entitled to consider Defendant's "background," "character[,] and history." *McClendon*, 611 P.2d at 729; *see also Patience*, 944 P.2d at 389. This necessarily includes Defendant's past criminal behavior, as well as his credibility.

Moreover, there is nothing in the law that precludes a sentencing judge from considering the type of information at issue here. To the contrary, it is already settled in Utah that sentencing courts can consider "information" that "come[s] from . . . outside the record," so long as it is "reasonably reliable" and "reasonably may bear on the proper sentence for the particular defendant." *State v. Sanwick*, 713 P.2d 707, 708 (Utah 1986); *State v. Vigil*, 840 P.2d 788, 794 (Utah App. 1992). Moreover, courts from other jurisdictions that have considered this precise issue have

recognized that judges can consider information they learned about a defendant from presiding over a different case involving that defendant. *See, e.g., Liteky v. United States*, 510 U.S. 540, 554-55 (1994); *United States v. Giorgi*, 840 F.2d 1022, 1033-35 (1st Cir. 1988); *State v. Gibson*, 681 P.2d 1, 5 (Idaho App. 1984).

In short, Judge Kay "hardly could be expected to disregard what he already knew about [Defendant] from the other case," *Gibson*, 681 P.2d at 5, and the judicial bias rules did not require him to do so. If Defendant's attorney had filed a motion to disqualify on these grounds, it would therefore have failed. Consequently, defense counsel did not perform deficiently by not filing a futile disqualification motion.

B. Defendant's claim also fails because he has not shown prejudice.

Even if the motion would have been succeeded, Defendant's claim still fails because he has not shown prejudice. *See Strickland*, 466 U.S. at 697 (stating that a defendant must prove both prongs to prevail on an ineffective assistance claim).[2]

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[2] The "presence of a judge who is not impartial constitutes a structural defect in the trial mechanism that violates the United States Constitution" and ordinarily "requires reversal." *Munguia*, 2011 UT 5, ¶ 15. But because Defendant has argued that he received ineffective assistance of counsel, he still must show prejudice. *See State v. Cruz*, 2005 UT 45, ¶ 18, 122 P.3d 543 ("a defendant claiming constitutional error who did not object at trial may only argue plain error or ineffective assistance of counsel on appeal and thus must prove prejudice, even if the constitutional error claimed on appeal is structural in nature"); *State v. Malaga*, 2006 UT App 103, ¶ 11, 132 P.3d 703 (when reviewing for ineffective assistance, "Defendant has the burden of demonstrating prejudice despite the fact that he has alleged structural error").

As noted, Defendant can prevail only by demonstrating that if counsel had performed reasonably – i.e. by successfully moving to recuse Judge Kay – there is a reasonable probability that Defendant would have received a "more favorable result" below. *See Chacon*, 962 P.2d at 50; *Litherland*, 2000 UT 76, ¶ 19.

But Defendant was not entitled to a new sentencing hearing following this Court's remand. He was entitled only to a resolution of his claims regarding the PSI's accuracy, and whether any changes warranted a different sentence. R. 229; *see also State v. Veteto*, 2000 UT 62, ¶ 14, 6 P.3d 1133 (stating that a trial court is required to "consider the party's objections to the [PSI], make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to the issue of sentencing" (citation omitted)).

Here, even if defense counsel had successfully moved to recuse Judge Kay, there is no reasonable probability that Defendant would have received a more favorable sentence from a different judge. This is because the three central factors that led to his prison sentence remained unchallenged.

First, Defendant never challenged the PSI's account of his criminal history. This included: a December 1, 1997, conviction for issuing a bad check, a third degree felony; a June 3, 1998, conviction for issuing a bad check, a class A misdemeanor; a August 10, 1998, conviction for issuing a bad check, a class A misdemeanor; a

February 16, 1999, conviction for communications fraud, a second degree felony; a May 26, 1999, conviction for attempted issuing a bad check, a class A misdemeanor; November 10, 2000, convictions for providing false title information and theft, both class A misdemeanors; the conviction for communications fraud at issue here, a second degree felony; and a subsequent conviction on June 27, 2007, for issuing a bad check (worth $38,000), a second degree felony. R. 245-46.

Second, Defendant also never challenged the fact that he had received probation in each of the prior cases, and yet still engaged in this criminal conduct that led to this charge. R. 246. Among others, this would demonstrate to any sentencing judge that Defendant has already received leniency in the past, and yet is still willing to continue committing crimes.

Third, although Defendant pleaded guilty in this case (and received a sentence reduction as a result), he nevertheless continued minimizing and even denying his own culpability. In a 2006 statement to AP&P, as well as his comments to Judge Kay in the March 2010 hearing, he continued to assert that his crime had been authorized by his employer and that this was all a misunderstanding. R. 245; 278: 10-12.

Thus, even if a different judge had ultimately heard this case, the judge still would have been confronted with Defendant's long criminal record; Defendant's

continued pattern of criminal dishonesty even after repeatedly receiving leniency; and Defendant's continued unwillingness to accept responsibility for his criminal conduct. In these circumstances, there is no reasonable probability that a different judge would have concluded that the minor inaccuracies in the PSI were important enough to warrant revisiting the original prison sentence, thereby granting Defendant yet another period of probation for yet another act of criminal dishonesty.

CONCLUSION

Defendant has proved neither deficient performance nor prejudice. The Court should accordingly affirm the trial court's decision not to resentence Defendant.

Respectfully submitted June 16, 2011.

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CERTIFICATE OF SERVICE

I certify that on June 16, 2011, two copies of the foregoing brief were

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