

1999

Utah v. Turnbow : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee

v.s.

ANGELA TURNBOW,
Defendant and Appellant

BRIEF OF APPELLANT

Appellate Court No. 990849-CA

BRIEF OF APPELLANT

Appeal from a judgment of conviction and sentence for: Count I, Welfare Fraud; a 2nd degree felony in the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable G Rand Beacham, Judge, presiding.

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FILED

Utah Court of Appeals

MAY 17 2008

Wes D'Alessandro
Clerk of the Court

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(e) Utah Code Ann. 1953, as amended.

STATEMENT OF THE ISSUES

1. Did appellant receive ineffective assistance of counsel during the initial plea in

abeyance agreement?

2. Did the trial court err in concluding that it had jurisdiction over Appellant and her probation even though the initial 18 month probation period had expired?

STANDARD OF REVIEW

For the first issue presented herein the standard for review is abuse of discretion standard. State v Cloud, 722 P.2d 750, 752 (Utah 1986). There is abuse of discretion where there is harmful error. State v Verde, 770 P.2d 116, 120 (Utah 1989). In State v Knight, 734 P.2d 913, 919 (Utah 1987) the court held that in assessing whether harmless error occurred the court should focus on whether the error undermines the reviewing court's confidence in the verdict. The second issue is a question of law where this court accords the trial court's conclusions of law no particular deference and where this court reviews said conclusions for correctness. State v Grate, 947 P.2d 1161 (Utah Ct App. 1997).

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STATEMENT OF THE CASE

Appellant was charged in an information with Count I, Welfare Fraud, a 2nd degree felony. Rec. pg 1-3.

On or about October 17, 1996, Appellant executed a plea in abeyance agreement - Rec -

pgs 36-40 and pled guilty to Welfare Fraud, a 2nd degree felony wherein restitution in a set amount was ordered. T - 103 pgs 4-14. Appellant appeared before the trial court on an Order to Show Cause on June 10, 1999 for failure to pay restitution. T - 103 - pg 20-29. On September 2, 1999 Appellant's plea in abeyance was set aside and appellant was sentenced for a 3rd degree felony and placed on 36 months of supervised probation requiring appellant to pay \$5,888.72 in restitution. T - 103 pgs 61 - 68. Appellant now appeals her conviction and sentence.

STATEMENT OF FACTS

On Oct. 17, 1996 appellant entered into a plea in abeyance agreement to Welfare Fraud, a third degree felony, whereby appellant was placed on 18 months of bench probation and ordered to pay restitution in the amount of \$7997. The restitution amount was included in the plea in abeyance agreement. Rec. pg 37. The felony was to be reduced to a class A misdemeanor upon completion of the probation period. Rec. pg 38. Appellant now contends that her court appointed counsel did not effectively represent her because she alleges that he did not tell her she had the right to challenge the restitution amount.

On Aug. 5, 1998 the attorney general filed a motion to show cause. Rec. pg 48. On May 12, 1999, the Office of Attorney General filed another motion for order to show cause with warrant. Rec. pg 56. On June 7, 1999 Appellant was arrested on the Order to Show Cause warrant. Rec. pg 64. There were discussions concerning the court's jurisdiction over Appellant's probation. T - 103 pgs 22-26; T - 103 pgs 37, 39-40, 42, 46-47; and 59-60. On Sept. 2, 1999 the court stayed the execution of sentence for conviction of a third degree felony

and placed appellant on 36 months supervised probation. T - 103 pgs 61-68. The Appellant now appeals the entire judgment in this case.

SUMMARY OF THE ARGUMENT

The issues raised by Appellant have been researched by her appellant counsel and the first issue is considered by counsel to be meritless; however, counsel's opinion of the second issue is that it has merit.

Appellant's trial counsel stated for the record his understanding of the parties' plea agreement including the amount of restitution and permitted to be filed with the court the written plea agreement containing the same restitution figure. The appellant failed to object or cause her attorney to object to the restitution figure. Accordingly, this issue is without merit.

The state did not file an order to show cause seeking to revoke appellant's probation until some 20 months after appellant was placed on probation. The State filed another order to show cause and served appellant with the same 32 months after appellant was placed on probation. The court lost jurisdiction because appellant was not served until over a year after her plea in abeyance term had expired.

ARGUMENT

POINT I. DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE INITIAL PLEA IN ABEYANCE AGREEMENT?

In searching the record for anything that might arguably support an appeal on this issue

it is necessary to refer to the record and trial transcripts to see if anything exists on the record that supports appellant's contention that she did not receive effective assistance of counsel. At the date of the entry of the plea the court admonished the appellant pursuant to Rule 11 of the Utah Rules of Criminal Procedure. The Court in State v Johnson, 823 P.2d 484, 487 (Utah App. 1991) held that the appellant can raise an issue for the first time on appeal where the record is adequate and he has new counsel. Here, appellant's trial counsel was different than his present counsel. Accordingly, and one prong of the test is satisfied; however, the other prong is lacking here. The record states nothing of appellant's disagreement with the restitution amount or that she indicated to her counsel any contrary amount. The plea in abeyance agreement itself which bears appellant's signature states the restitution amount of \$7997.00. Rec. 36-40. Further, the plea in abeyance agreement contains several handwritten modifications, but none to the restitution amount. Rec. 38. Moreover, appellant's trial counsel stated to the court the plea agreement including the restitution figure and the changes that were handwritten into the written plea agreement, Rec. 103 pgs 3, 4 and the court went further to calculate the monthly amount needed to pay the restitution off during the term of probation. Rec. 103 pgs 6,7. The court then questioned appellant concerning the plea agreement, and she told the court that she had read the plea agreement and had spoken with her counsel regarding the same and that he had made it "pretty clear" to her. Rec. 103 pgs 7,8. On June 10, 1999 when the appellant appeared before the trial court on an order to show cause she explained to the court that she knew she had to pay the \$8,000 and that due to emotional and financial problems she had been unable to do so. Rec. 103 pg 21. Throughout the record during both the plea and the final sentencing in the trial court appellant never once told the court that she had been misled or otherwise tricked into paying an unfair or incorrect amount of restitution. The record is completely void of any

indication that appellant had any disagreement with the restitution figure or that there was even a need for a restitution hearing. Even if there were an adequate trial record, there is a presumption of effective assistance of counsel and that such counsel exercises sound trial strategy. State v Villarreal, 857 P.2d 949, 954 (Utah App. 1993). The court in Strickland v Washington, 466 U.S. 668, 687; 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) set out the tests to determine ineffective assistance of counsel: (1) the appellant must show that the attorney rendered a deficient performance that fell below the objective standard of reasonable professional judgment and (2) that the attorney's deficient performance prejudiced the appellant. The appellant has the burden to show the deficient performance. State v Frame, 723 P.2d 401, 405 (Utah 1986). The court in Hill v Lockhart, 474 U.S. 52, 59 (1985) stated that to show sufficient prejudice the appellant had to show there was a reasonable probability that but for the attorney's errors he would not have pleaded guilty and would have insisted on going to trial. Here, the Appellant's burden on this issue is not supported by the record as recited above. This issue is raised for the first time on appeal and is without merit.

POINT II. DID THE TRIAL COURT ERR IN CONCLUDING THAT IT HAD JURISDICTION OVER APPELLANT AND HER PROBATION EVEN THOUGH THE INITIAL 18 MONTH PROBATION PERIOD HAD EXPIRED?

Most of the case law in this area concerns the imposition of sentence and the placing an individual on probation. This analysis should also apply to plea in abeyance probation because once the defendant is placed on probation she is being punished. The key point, whether there

is a stay of execution of sentence or imposition of sentence or a plea in abeyance, is whether or not probation is imposed. In trying to get around the court's loss of jurisdiction the state conceded this point in its argument in State v Moya, 815 P.2d 1312 (Utah App. 1991) that the probation had been imposed and not executed; however, the court noted that the state failed to explain how the incident report could have properly been filed if its argument were correct. Similarly, here appellant was placed on probation pursuant to a plea agreement; accordingly probation (or punishment) was imposed notwithstanding the fact that appellant had not actually been sentenced. The court in Moya reversed the trial court's revocation of defendant's probation and held that the defendant's probation was not "tolled" upon his violation of conditions during the time of his probation. In the instant case the state did not file its first Motion for Order to Show Cause until approximately 4 months after the plea in abeyance agreement was entered Rec. pg 48 although the violation(s) of not paying restitution arguably occurred during the term of her probation. Therefore, the fact that appellant may have been in violation during the term of her probation is insufficient to revoke her probation.

The issue decided by the court in State v Green, 757 P.2d 462 (Utah 1988) is helpful with regard to plea in abeyance probations. One of the issues the court in Green had to decide was whether the statute there automatically terminated defendant's probation after 18 months of probation regardless of the occurrence of a violation during the term of probation. The statute contained mandatory language that the defendant's probation would be terminated after the 18 months of probation if probation was completed without violation. The state argued that the statute does not automatically terminate defendant's probation unless the defendant commits no probation violations during the 18 month probation term. The state's argument is consistent with the trial court's ruling in the instant case for the court felt that appellant's plea in abeyance

would end in 18 months so long as she had complied with all her conditions of probation or in other words had no probation violations. Rec 103 pg 46 Ln 12-19. The Green court stated that the state's argument or interpretation of the statute at issue would create absurd results such as leaving defendants in a perpetual state of limbo serving a fictional probation would could theoretically be revoked decades later. Green at 464. Here, the appellant is in somewhat the same situation. Appellant's 18 month probationary term came and went without the state filing a motion for order to show cause. Approximately 4 months after appellant's probation had ended a motion was filed and then another motion for order to show cause was filed on May 12, 1999, and appellant was arrested on June 7, 1999 Rec. 56 - 64 a year after appellant thought her 18 month probation term had terminated. The court in Moya had this same concern for the state of perpetual limbo in situations where imposition of probation is indeterminately stayed as illustrated by the following:

The result eschewed in Green, that defendant could be potentially exposed to an indefinite probationary term, would similarly be present where imposition of probation was indeterminately stayed. Moya at 1317.

Accordingly, the issue discussed herein in the Green case is analogous to the instant case because there was a probation term that was to terminate within 18 months if no violations during that term, and the Moya case is analogous here because the court did discuss the undesirable effect of permitting revocation of an indeterminately stayed imposition of probation. Both cases were reversed and both courts expressed concern for leaving the defendant in a perpetual state of limbo.

The trial court cannot properly revoke a probationer's probation if there was not an order to show cause filed and appellant served with the order to show cause giving her notice of the hearing. State v Grate, 947 P.2d 1161 (Utah App. 1997). Here, a motion for order to show

cause was not filed within the time period of appellant's probation let alone service of the order to show cause. Finally, the statute governing plea in abeyance violations, Section 77-2a-4 of the Utah Code of Criminal Procedure, outlines a procedure much like that of a standard stay of imposition or stay of execution probation. In fact, subsection one states that "If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecutor or court" that a violation has occurred there may be an order to show cause filed. Accordingly, the cases set out above apply equally to a plea in abeyance situation as to a standard probation.

The trial court has jurisdiction to enforce restitution regardless of whether or not the probation term has expired. State v Dickey, 841 P.2d 1203 (Utah App. 1992). In the Dickey case the defendant was placed on twelve months of probation and approximately 4 years later an order to show cause was issued for his failure to pay restitution. Defendant was arrested a little over two years later. The trial court held a hearing and ordered defendant to pay the balance of the restitution in the amount of \$2,604.26 and entered judgment to that effect. The court in Dickey held that "Utah recognizes restitution as an independent legal remedy under the applicable criminal code and grants the court independent jurisdiction to compel its payment. Dickey at 1206. The Dickey trial court apparently entered a restitution judgment. Accordingly, the trial court had authority to enforce restitution in appellant's instant case by entering a judgment in the amount of restitution and leaving appellant on probation for continued enforcement. However, the trial court erred in the instant case by striking the plea in abeyance agreement and then finding appellant guilty of welfare fraud, a third degree felony, and staying the execution of sentence. The court went further than authorized by Dickey because striking appellant's plea

in abeyance and convicting her of a third degree felony had no correlation to collection of restitution. Accordingly, the court exceeded its jurisdiction.

CONCLUSION

For the reasons herein alleged, the Appellant was denied a fair trial in Case No. 961500447, and the judgment and sentence should be set aside and Appellant should be granted a new trial.

ADDENDUM

Please see Addendum

DATED on this the 12th day of May, 2000.

SHERRI PALMER & ASSOCIATES
By: Kenneth L. Combs
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief has been served on the Office of the Attorney General and upon appellant, by delivery of a true copy via regular mail on the 29th day of May, 2000.

KENNETH L. COMBS

ADDENDUM NO. 1

Rule 11 (e) of the Utah Rules of Criminal Procedure:

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a

ADDENDUM NO. 2

Section 77-2a-4(1) of the Utah Code of Criminal Procedure:

(1) If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that a defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered. Upon entry of judgment of conviction and imposition of sentence, any amounts paid by the defendant as a plea in abeyance fee prior to termination of the agreement shall be credited against any fine imposed by the court.