

2010

State of Utah v. David S. Nielsen : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah v. Nielsen*, No. 20100687 (Utah Court of Appeals, 2010).

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IN THE UTAH COURT OF APPEALS - SALT LAKE CITY

STATE OF UTAH

STATE OF UTAH,)	
)	REPLY BRIEF OF THE APPELLANT
Plaintiff/Appellee,)	
)	Court of Appeals Number 20100687 CA
vs.)	
)	District Court No. 091100141 FS
DAVID S. NIELSEN,)	District Court No. 091100142 FS
)	
Defendant/Appellant.)	
)	

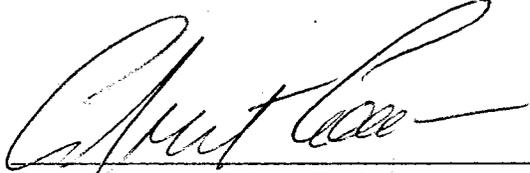
APPEAL FROM THE FIRST DISTRICT COURT OF

BOX ELDER COUNTY, STATE OF UTAH

JUDGE BEN H. HATFIELD

Dated this 30th day of May, 2011.

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FILED
UTAH APPELLATE COURTS
MAY 31 2011

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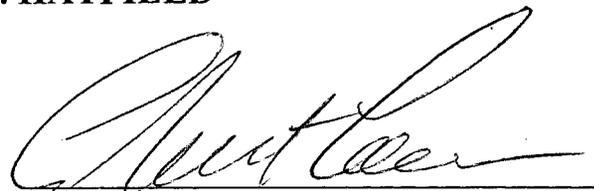
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This information is provided pursuant to Rule 24: “(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.”

TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGES</u>
Undisputed of Response	1
Reply to Marshaling Argument	1
The State Ignores Defendant's Mental State	2
Representation Has Been Ignored	3
Due Process Ignored	5
<u>CONCLUSIONS/RELIEF REQUESTED</u>	6
<u>CERTIFICATE OF MAILING</u>	7

TABLE OF AUTHORITIES

PAGE

CASES

Bluemel v. State, 173 P.3d 842, 2007 UT 90 (Utah, 2007) 4,5

Chen v. Stewart, 2004 UT 82, 100 P.3d 1177, 2004 UT 82 1

West Valley City v. Majestic Investment Co.,
818 P.2d 1311, Utah App. 1991 1,5

RULES

Rule 11 of the Utah Rules of Criminal Procedure 2,5

UNDISPUTED OF RESPONSE

Defendant/Appellant does not contest those portions of the Responsive Brief which are entitled Statement of Jurisdiction, Constitutional Provisions, Statutes and Rules or Statement of the Facts. Defendant, however, asserts that like the trial court, the State has missed the issues altogether and has not addressed those facing this court. As a result, the Responsive Brief of the State does little to help.

REPLY TO MARSHALING ARGUMENT

The State claims that Defendant has not “marshaled” all evidence in support of the pleas and the trial court’s denial to allow them to be withdrawn. The State cites Utah R. App. 24(a)(9) and such cases as *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, Utah App. 1991 and *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177, 2004 UT 82 for the proposition that an appellant must provide an exhaustive review of all of the evidence present at trial or an appeal is doomed.

Since *West Valley City* dealt with the interpretation of a statute and the application of the parol evidence rule in a civil case and not with a criminal case related to an abnormal defendant, it is inapplicable here. Likewise, Rule 24(a)(9) is misused by the state. Rule 24(a)(9) provides that “the argument [contained in a brief] shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in

the trial court, with citations to the authorities, statutes, and parts of the record relied on”. Defendant provided his contentions with citations in his Opening Brief.

It is only when “a party [is] challenging a fact finding must [he] first marshal all record evidence that supports the challenged finding”. In his Opening Brief, Defendant stated, as the State points out and acknowledges that “there is no dispute that Defendant said the right words at his plea hearing, signed the correct forms and responded to the Court’s inquiries with the proper answers.”

(Responsive Brief, P6 and Opening Brief, P13) The State, however, ignores the actual contentions of Defendant.

THE STATE IGNORES DEFENDANT’S MENTAL STATE

In his Opening Brief, Defendant sets forth, in compliance with Rule 24(a)(9), his “contentions and reasons with respect to the issues presented.....” wherein he believes the trial court erred. The State’s Responsive Brief ignores Defendant’s contentions that he was mentally ill when he entered his pleas. He also contents that even though the court followed Rule 11 of the Utah Rules of Criminal Procedure, his mental illness made pleas impossible. Finally, he contents he was not allowed counsel of his choice. The first thing that Defendant did in this appeal was acknowledge, as the State points out, that:

Our criminal justice system is not well equipped to handle people who are mentally ill and who commit criminal acts. As noted by Defendant’s

attorney, there was “no dispute between the parties” that Defendant was not your typical defendant. He had struggled for years with mental health issues. In looking at whether the trial court abused its discretion, the Court should consider whether the discretion properly took into account Defendant’s mental health. **If Defendant were a “normal” or “average” defendant, the Court would not need to read further in this brief to sustain the trial court. However, Defendant was and is not a “normal” or “average” defendant.** The Court acknowledged this simple fact. (Emphasis added.)

Even now, the State ignores the assertion that “there was ‘no dispute between the parties’ that Defendant was not your typical defendant”. (Opening Brief at 13) The issue may more precisely be whether an “abnormal” (by mental illness) defendant should be treated like a “normal defendant” and the same standard used in determining if the exercise of discretion was proper. Since justice is the ultimate goal of all that occurs in criminal cases, why should not more be required in the case of a defendant who may be competent to stand trial, but not competent to make a proper decision about a plea.

REPRESENTATION HAS BEEN IGNORED

The State ignored the issue of representation. Nowhere in the State’s Response is this addressed. Under Defendant’s “Summary of Arguments”, he states first:

Defendant asserts that the trial court abused its discretion in failing to allow him to withdraw his pleas **and to be represented by counsel of his choice at the plea withdrawal hearing given his mental health problems.** The mental health implications are shown in the Pre-Sentence Report. Defendant

will do whatever a person in authority tells him must be done. (Confidential Envelope Containing Pre-Sentence Report and Addendum - A12) (Emphasis added.) (Opening Brief at 12)

The State's Brief focuses solely on the requirements of entry of plead agreements as those apply to a normal mentally healthy defendant and ignores the major issues raised in this appeal by Defendant. Was it an abuse of discretion to not allow a defendant who is mentally ill and represented by an attorney not of his choosing and who he suspects did not have his best interest at heart, to withdraw his pleads. Defendant needs a lawyer that will take his mental illness into account and who will work with his mental health provider in sheparding him through the criminal justice system. In *Bluemel v. State*, 173 P.3d 842, 2007 UT 90 (Utah, 2007), the Utah Supreme Court faced a case much like this case:

On May 3, 2004, over two years after sentencing, Bluemel filed a petition for post-conviction relief under the PCRA. In her petition, Bluemel claimed that the conviction obtained by the guilty pleas was "unlawfully induced or not made voluntarily with understanding of the nature of the charges and the consequences of the plea[s]." **This claim was based on her allegation that, at the time she entered her guilty pleas, she was taking a number of medications the combination of which prevented her from entering voluntary and knowing pleas. Bluemel also claimed that she was denied the effective assistance of counsel and that she should be granted post-conviction relief on that basis. Specifically, Bluemel alleged that her counsel was ineffective in failing to request a competency hearing for her despite knowing that her use of the above-mentioned prescription medications rendered her unable to enter knowing and voluntary pleas, in failing to file a motion to withdraw her guilty pleas, and in failing to file any other post-conviction motions.....** (Emphasis added.)

In *Bluemel*, the State's motion to dismiss was granted and the trial Court sustained by the Court of Appeals. In reversing the Court of Appeals, the Utah Supreme Court said:

We remand to the court of appeals for consideration of Bluemel's claims that, first, her pleas were not knowing and voluntary because she was using a variety of prescription medications at the time she pleaded guilty and, second, that her counsel rendered ineffective assistance in failing to request a competency hearing and in failing to file post-conviction motions challenging her guilty pleas.

DUE PROCESS IGNORED

The State ignores the due process claims of Defendant, assuming that compliance with Rule 11 of the Utah Criminal Rules is sufficient to meet this constitutional requirement. While Rule 11 is designed to meet the due process requirements of the law, compliance with the rule does not always insure due process. See *Bluemel*, supra. In *West Valley City.*, supra., cited by the State, the appellate court discussed the due process issue:

Constitutional issues, including questions regarding due process, are questions of law that we review for correctness. In re K.M., 96,5 P.2d 576 (Utah Ct. App. 1998) (citing *State v. Holland*, 921 P.2d 430, 433 (Utah 1996) ("[T]he ultimate question of **whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law** that is reviewed for correctness.")). **Due process, however, "is not a technical conception with a fixed content unrelated to time, place, and circumstances."** *Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 49, 13 P.3d 581 (quoting *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). **"The requirements of due process depend upon the specific context in which they are**

applied." V-1 Oil Co., v. Dep't of Env'tl. Quality, 939 P.2d 1192, 1196 (Utah 1997). However, because this question requires the application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations. State v. Hubbard, 2002 UT 45, ¶ 22, 48 P.3d 953. (Emphasis added.)

CONCLUSIONS/RELIEF REQUESTED

Defendant suffered from mental impairment **at the time he entered his plea**. His counsel should have acted to protect Defendant from himself. The trial Court knew of Defendant's mental health problems, but treated Defendant as he would a defendant without a mental health problem. The State has ignored these vital issues in its response as well as all other issues raised by Defendant. This Court should grant the motion to set aside the pleas.

Dated this 30th day of May, 2011.

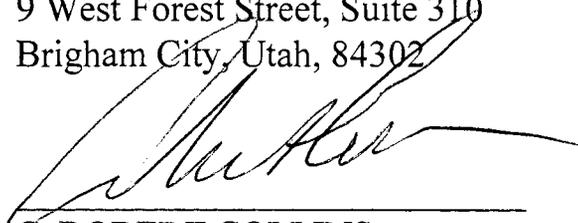


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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, on the 31st day of May, 2011, to the following:

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