2010

State of Utah v. Lloyd Franklin Vit : Brief of Appellee

Utah Court of Appeals

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Case No. 20100710-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

LLOYD FRANKLIN VIT,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for possession of a dangerous weapon by a restricted person, and possession of a controlled substance, third degree felonies, in the Second Judicial District Court, Weber County, the Honorable Scott M. Hadley presiding

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Oral Argument Not Requested

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for possession of a dangerous weapon by a restricted person, a third degree felony, in violation of UTAH CODE ANN. § 76-10-503 (West 2004); and possession or use of a controlled substance, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (West Supp. 2010). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

1. Whether Defendant's trial counsel was ineffective in not moving to suppress evidence seized from his trailer?

Standard of Review. "An ineffective assistance of counsel claim is a mixed question of law and fact. We review the trial court's application of the law to

the facts under a correctness standard. If there are factual findings to review, we will not set them aside unless they are clearly erroneous." *State v. Lenhart*, 2011 UT 27, ¶ 20, 262 P.3d 1.

2. Whether the trial court plainly erred in not recognizing that defendant's trailer was illegally searched and that evidence was illegally seized?

Standard of Review. "To demonstrate plain error, a defendant must establish that (i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346 (alteration in original) (citation omitted).

CONSTITUTIONAL PROVISIONS AND RULES

The following constitutional provision and rule are attached at Addendum A:

U.S. Const. amend. IV;
Utah R. App. P. 23B.

STATEMENT OF THE CASE

Statement of the Facts[1]

A backhoe was stolen from a company, Staker Parsons. R149:105. The owner of the company asked his drivers to "keep an eye out for the backhoe" as

[1] The facts are recited most favorable to the jury's verdict. *State v. Hamblin*, 2010 UT App 239, ¶ 1 n.1, 239 P.3d 300, *cert. denied*, 245 P.3d 757 (Utah 2010).

they made their daily rounds. *Id.* While driving north on I-15 near Marriott-Slaterville, one of the company's drivers saw the backhoe in a field that was next to the freeway. *Id.* at 105, 124-25. The driver called his supervisor, who called Ogden City Police Officer John Thomas, who, with another officer, went to the location. *Id.* at 104-05.

Officer Thomas and the other officer saw the backhoe from the freeway. *Id.* at 105. They followed a road to gain access to the field. *Id.* Finding that the gate to the property was locked, they sought out and spoke to a neighbor, who told them that the property belonged to Defendant. *Id.* The officers returned to Defendant's property to try to confirm whether the backhoe they had seen from the freeway was the stolen equipment. *Id.* at 106. They climbed over a fence to try contact Defendant, but a large, chained-up dog prevented them from knocking on the door of a trailer. *Id.* at 12, 106. The officers were unable to get anyone to answer the door. *Id.* However, they were able, however, to view the VIN and other identifying marks on the backhoe. *Id.* at 106. From the identifying marks Officer Thomas provided, dispatch confirmed that the backhoe was stolen. *Id.* at 107.

Another Ogden City Police Officer, Detective Melcher, had arrived on the scene, and Officer Thomas asked her to remain at the property to assure that the backhoe was not removed while he went to the police station to write a search

warrant. *Id.* Soon after Officer Thomas arrived at the station, he learned that Defendant had arrived at his property and had consented to a search of the property. Officer Thomas stopped writing the warrant and instead immediately returned to the scene. *Id.* at 107-08. There, the officer asked Defendant if the police did, in fact, have his consent to "take a look" at the backhoe, and Defendant confirmed his consent. *Id.* at 108, 114. Officer Thomas did not notify Defendant that he had previously entered his property. *Id.* at 104-16. At about this time, agents from the Weber/Morgan Narcotics Strike Force arrived on the scene, including Deputy Steve Haney from the Weber County Sheriff's Office. *Id.* at 109, 173-74.

Before the discovery of the stolen backhoe, Deputy Haney had been investigating Defendant for narcotics and firearm activity and had asked local law enforcement officers "to keep an eye on the property" for any suspicious activity that would help develop probable cause for a search warrant. *Id.* at 175-76, 179-80. When he received a call informing him that a number of police officers were at Defendant's property, Deputy Haney immediately went to the scene. *Id.* at 176. There, he was briefed by Officer Thomas, who also told him that Defendant was going to allow detectives onto his property. *Id.* at 177.

Deputy Haney explained to Defendant who he and his officers were (they typically acted in an undercover capacity – long hair, beards, plain clothes) and

why they were there. *Id.* at 178. Once again, Defendant confirmed that Officer Thomas and Deputy Haney could "go ahead," and "look around." *Id.* The officers then followed Defendant to his trailer. Defendant unlocked the door, and he and Officer Thomas entered the trailer, in which Defendant lived. *Id.* at 178-79. Deputy Haney was "almost instaneous[ly]" called from within the trailer. *Id.* at 179. He walked to the doorway, where he could see firearms and paraphernalia "in plain view." *Id.* Deputy Haney told Officer Thomas to "stop this right now, I want to get the search warrant and make sure that this thing is all aboveboard." *Id.*

Deputy Haney left the scene and obtained the warrant. *Id.* at 180. While waiting for Deputy Haney to return, none of the officers searched the trailer or the backhoe; rather, "all the officers basically stood around," just "looking at the backhoe." *Id.* at 114-15. Enroute to Defendant's property, Deputy Haney immediately called his agents on the scene and told them that he had the warrant and directed them to search the trailer. *Id.* Inside the trailer, agents found multiple rifles and handguns, methamphetamine, and paraphernalia. *Id.* at 128-34, 148-52, 166, 169-70, 181.

Deputy Haney did not participate in the search, but instead interviewed Defendant away from the trailer. *Id.* at 181-82. He read Defendant his *Miranda* rights. *Id.* at 182. Defendant said he understood his rights and was willing to

answer questions. *Id.* In response to the deputy's questions, Defendant said that the trailer and all the property within belonged to him, that he was "not surprised" by the agents finding methamphetamine, that he had been "a constant user of methamphetamine for the last couple of years," and that he had last used methamphetamine two days earlier *Id.* at 182-86.

The Proceedings Below

1. Theft by receiving (Case no. 051904751).

Defendant pleaded guilty to theft by receiving, stemming from the discovery on his property of a stolen backhoe on August 29, 2005. R118 at 3-4 (Presentence investigation report, "PSI"); 144:3.

2. Possession of firearms by restricted person and possession of methamphetamine (Case no. 081901837) - This case.

After police officers saw firearms and contraband in plain view inside his trailer, Defendant was charged with possession of a firearm by a restricted person and possession or use of a controlled substance. *Id.* Due to delays following the death of his retained attorney, the charges were dismissed without prejudice. R141:3-4. On August 28, 2008, Defendant was recharged with the same two offenses. R1. Defendant was represented at trial by the public defender. R54. The jury convicted Defendant of both offenses. R51-52. The trial court sentenced Defendant to statutory zero-to-five-year terms, to be served concurrently in the Utah State prison. R120-21. The court suspended the prison

terms, placed Defendant on thirty-six months probation, and ordered Defendant to serve 120 days in jail, which might alternatively be served in the jail's work release/restitution program. R121. Defendant timely appealed. R111.

SUMMARY OF ARGUMENT

I.

Defendant claims that his counsel was ineffective in not moving to suppress evidence seized from his trailer following an alleged illegal entry onto his land to view a stolen backhoe. The claim fails because it is inadequately briefed.

To prove a claim of ineffective assistance of counsel, a defendant must show that his counsel rendered deficient performance which prejudiced him. Where the claim hinges on counsel's failure to raise a Fourth Amendment challenge, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Here, the sum and substance of Defendant's argument is that his trial counsel failed to use an alleged suppression motion that his privately retained counsel assertedly used to plead his theft by receiving case involving the backhoe down from a second-degree felony to a class a misdemeanor. But

Defendant does not include the alleged suppression motion in the record on appeal or show how a favorable outcome in the backhoe case would be useful in suppressing evidence later seized from his trailer in this case. Defendant does not analyze whether he actually had an expectation of privacy in the area on which the backhoe sat, and he completely disregards that he repeatedly gave consent to officers to search his property. Finally, even assuming that there was an unlawful entry to search the backhoe, Defendant's does not argue that his consent was insufficient to purge the taint of that illegality. This Court should summarily reject Defendant's claim.

II.

Defendant makes essentially the same claim, above, in the guise of plain error: the trial court plainly erred because it failed to recognize that evidence seized from the trailer should have been excluded at trial following law enforcement's illegal entry onto his land. This claim fails for the same reasons recited above.

INTRODUCTION

Defendant claims that his convictions should be reversed because his trial counsel was ineffective in not moving to suppress incriminating evidence found in his trailer after police allegedly entered on his land unlawfully. Aplt. Br. at 12-20. Alternatively, he claims the trial court plainly erred in not excluding that

evidence at trial, based on the same substantive argument. Aplt. Br. at 20-27. Because Defendant has not addressed the crucial legal issues or developed a sufficient record on appeal, he cannot prevail on appeal.

ARGUMENT

I.

DEFENDANT HAS FAILED TO ADEQUATELY SHOW THAT HIS COUNSEL WAS INEFFECTIVE IN NOT MOVING TO SUPPRESS EVIDENCE SEIZED FROM HIS TRAILER

A. Defendant assumes a heavy burden in proving that his trial counsel performed deficiently.

"To establish ineffective assistance of counsel, [a defendant] must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citing *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Moreover, where a claim of ineffectiveness hinges on counsel's failure to raise a Fourth Amendment challenge, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Utah's appellate courts have "consistently required defendants claiming ineffective assistance of counsel to affirmatively prove both prongs of the *Strickland* test to prevail." *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994); *accord*, *State v. Perez-Avila*, 2006 UT App 71, ¶ 6, 131 P.3d 864. As a result, "it is not necessary for [the reviewing court] 'to address both components of the inquiry'" if it determines that a defendant has made "'an insufficient showing on one.'" *Barnes*, 871 P.2d at 523 (quoting *Strickland*, 466 U.S. at 697); *State v. Medina-Juarez*, 2001 UT 79, ¶ 14, 34 P.3d 187 (same).

Defendant also bears the burden of assuring that "the record is adequate." *State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92. As a result, "an appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which [the] defendant is aware." *Id.* at ¶ 17. "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.*

With respect to the first *Strickland* prong, an appellate 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.'" *Strickland*, 466 U.S. at 689 (citation omitted).

This standard is appropriately deferential, recognizing the "variety of circumstances faced by defense counsel" and "the range of legitimate decisions regarding how to best represent a criminal defendant." *State v. Tyler*, 850 P.2d 1250, 1254 (Utah 1993). This deference also recognizes that, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (observing that it is "'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence," quoting *Strickland*, 466 U.S. at 689)).

Thus, any conceivable tactical basis for trial counsel's actions defeats a claim of deficient performance. *See State v. Clark*, 2004 UT 25, ¶ 7, 89 P.3d 162; *State v. Holbert*, 2002 UT App 426, ¶ 58, 61 P.3d 291. Because he bears the burden, Defendant must "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions." *Clark*, 2004 UT 25, ¶ 6 (emphasis in original) (quotations and citation omitted).

Defendant must ultimately demonstrate that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Harrington*, 131 S. Ct. at 787 (quotations and citation omitted). The ultimate "question is whether an attorney's

representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* at 788.

B. Because Defendant's claim is inadequately briefed, Defendant has not met his burden to show that his trial counsel performed deficiently in not moving to suppress evidence seized from his trailer following an alleged illegal entry onto his land.

Defendant argues that his trial counsel's performance was deficient because he did not move to suppress incriminating evidence seized from his trailer as "fruit of the poisonous tree" stemming from Officer Thomas's allegedly illegal entry onto his land. Aplt. Br. at 15-17, 27-29. In making this argument, Defendant baldly asserts, without analysis, citation to relevant authority, or record support, that Officer Thomas's entry plainly and necessarily violated the Fourth Amendment because it was made without a warrant or "reasonable suspicion" and "exigent circumstances." Aplt. Br. at 12, 23-26.[2] Because this claim is inadequately briefed, Defendant fails to sustain his heavy burden to show that his counsel performed deficiently.

"It is well established that Utah appellate courts will not consider claims that are inadequately briefed." *State v. Garner*, 2002 UT App 234, ¶ 8, 52 P.3d

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[2] Defendant expressly incorporates facts and arguments at Points II and III of his brief – plain error and expectation of privacy – to more fully articlulate his claim of ineffective assistance of counsel. Aplt. Br. at 20. Accordingly, the State also addresses those facts and arguments in its discussion of ineffective assistance of counsel. As discussed, however, all of Defendant's arguments are inadequately briefed and unsupported by a sufficient record.

467). An issue is inadequately briefed "when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998); *see also State v. Honie*, 2002 UT 4, ¶ 67, 57 P.3d 977 ("On appeal, the appellant is required to clearly define the issues and provide accompanying argument and authority; a reviewing court is not simply a depository in which the appealing party may dump the burden of argument and research."), *cert. denied*, 537 U.S. 863, 123 257, 154 L.Ed.2d 105 (2002). In *Kell v. State*, 2008 UT 62, 194 P.3d 913, the Utah Supreme Court rejected numerous claims of ineffective assistance of trial counsel, founded substantially on mere assertions of "per se" deficient performance and made without citation to authority or factual support. *Id.* at ¶¶ 30-34. This case exhibits the same defects.

Defendant particularly argues that trial counsel had available, but failed to use, a motion to suppress filed by his privately-retained counsel in the theft by receiving case involving the backhoe. Defendant argues that the motion "clearly had merit based upon the State agreeing to reduce a charge from a second-degree felony to a class A misdemeanor." Aplt. Br. at 15. This is the sum and substance of Defendant argument. It lacks merit for several reasons.

First, Defendant has failed to bring up the alleged motion to suppress. Considering that Defendant's claim is that his trial counsel performed

deficiently by not using the alleged suppression motion, Defendant on appeal should have included it in a motion for remand under rule 23B, Utah Rules of Appellate Procedure.[3] But he did not. *See Litherland*, 2000 UT 76, ¶ 16 ("If a defendant is aware of any 'nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective,' Utah R. App. P. 23B, defendant bears the primary obligation and burden of moving for a temporary re-mand."). Without the suppression motion, this Court cannot assess whether a suppression motion actually existed, or if it did exist, whether its contents related to Officer Thomas's consensual entry into the *trailer* in this case. Therefore, Defendant has failed to develop a record sufficient to show that his counsel was deficient in not using a suppression motion allegedly used in another case.

Second, the court in the backhoe case never ruled that Officer Thomas's entry onto Defendant's land violated the Fourth Amendment, R149:120-21, and

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[3] Utah R. App. P. 23B provides:

> (a) Grounds for Motion; Time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel.
>
> ....
>
> (b) Content of Motion; Response; Reply.... The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney.

Defendant has entirely failed to brief this issue on appeal. Here, Defendant's claims rest upon the simplistic and unbriefed assumption that an officer's warrantless entry onto property surrounded by a fence with a locked gate automatically violates his reasonable expectation of privacy in an area outside his home – the trailer – and in full view of the public. Aplt. Br. at 16-17, 24-25. The validity of that assumption, however, is far from clear. *See e.g., Oliver v. United States*, 466 U.S. 170, 184 (1984) (holding no reasonable expectation of privacy in "open fields" despite fences, gates, locks, and "no trespassing" signs). Defendant has cited the "reasonable expectation of Privacy" standard, but has engaged in no legal analysis, has cited no authority, and has not otherwise explained why his rights were violated under the facts of this case. In short, he has not carried his burden to "prove that his Fourth Amendment claim is meritorious." *Morrison*, 477 U.S. at 375. *Accord, Kell*, 2008 UT 62, ¶¶ 30-34 (unbriefed assertions that counsel's performance fit within recognized categories of per se deficient performance or prejudice inadequate to prove ineffective assistance of counsel).

Even assuming, arguendo, a sufficient showing that the initial police entry onto the lot was unlawful, Defendant must also demonstrate that such entry was "at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. 796, 815 (1984). And if he can show that, Defendant must

then demonstrate that his subsequent consent to look around did not "purge the evidence of any 'taint.'" *Id.* at 814. *See State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990) (recognizing "Supreme Court expressly declined to hold 'that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police,'" citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). Although Defendant asserts that the evidence is "fruit of the poisonous tree," Aplt. Brf. at 12,16-17,23-24,27-29, he engages in no analysis demonstrating why this is so. He simply writes, "All of the evidence gathered against the Defendant in the present case stems from the initial illegal seizure and subsequent search of the Defendant's property." Aplt. Br. 28. Once again, therefore, Defendant has not satisfied his burden to "prove that his Fourth Amendment claim is meritorious." *Morrison*, 477 U.S. at 375.

Indeed, although Defendant grudgingly acknowledges that "Officer Thomas stated Defendant consented" to the officer's looking at his "backhoe," Aplt. Br. at 10, he fails to mention that he separately gave Deputy Haney his consent that officers could "look around" his "property," and that he immediately opened his trailer door for Officer Thomas and Deputy Haney. R149:178-79.

Defendant thus does not even consider whether his subsequent consent purged any prior taint. *See State v. Bisner*, 2001 UT 99, ¶ 43, 37 P.3d 1073 (noting

search conducted with consent is "recognized exception to the warrant requirement"). This dearth of analysis suggests that Defendant's trial counsel recognized that he could not succeed in applying the relevant Fourth Amendment doctrines to suppress evidence seized from the trailer, and instead chose another strategy. In fact, counsel very deliberately tried to impeach Officer Thomas's credibility by trying not to suppress evidence of an alleged illegal search, but by suggesting in cross examination and to the court that the officer wantonly broke the law. R149:112-13, 118-121. Defendant fails to mention trial counsel's impeachment efforts, and thus fails to rebut that counsel had "no conceivable tactical basis" for his alternative strategy. *Clark*, 2004 UT 25, ¶ 6.

In sum, because Defendant has failed to analyze the legal substance or develop a relevant factual record intrinsic to the claim that his trial counsel performed deficiently, defendant's argument on the first *Strickland* prong fails. And because Defendant has failed to show that his trial counsel performed deficiently, his claim of ineffective assistance fails entirely. *See State v. Alfatlawi*, 2006 UT App 511, ¶ 43, 153 P.3d 804 ("Since both prongs of *Strickland* must be satisfied, *see State v. Litherland*, 2000 UT 76, ¶ 29, 12 P.3d 92, we need not reach the prejudice prong, and Defendant's ineffective assistance claim fails.")

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN NOT RECOGNIZING THAT DEFENDANT'S TRAILER WAS ILLEGALLY SEARCHED AND THAT EVIDENCE WAS ILLEGALLY SEIZED

Defendant claims that the trial court committed plain error in not recognizing that "his property was searched and seized in an illegal manner without Defendant present nor was reasonable suspicion or exigent circumstances present." Aplt. Br. at 20, 24. This argument is thus founded on the same claim made under the rubric of ineffective assistance of counsel: Officer Thomas illegally entered on his land to examine the backhoe, from which flowed all the evidence seized after the search of the trailer. Consequently, Defendant's claim of plain error also fails.

"To demonstrate plain error, a defendant must establish that (i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.'" *State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346 (alteration in original) (quoting *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

Here, as discussed above, Defendant has failed to adequately analyze or adduce facts to show that his consent to search his trailer did not purge the taint

of any illegal entry. Aple. Br. at I. This Court has repeatedly rejected plain error claims where lack of obvious error was evident. *See State v. Cooper*, 2011 UT App 234, ¶ 27, 261 P.3d 653 (holding that legal analysis requiring statutory interpretation not raised at trial "makes it clear that any error would not 'have been obvious to the trial court'"); *State v. Hale*, 2005 UT App 305U *1 (holding first of two claimed errors that prosecutor breached plea-in-abeyance agreement could not have been obvious to trial court because agreement was never put on record or otherwise made known to court until *after* defendant moved to withdraw his admission to allegations he violated terms of agreement); *State v. Jacob*, 2005 UT App 112U *1-2 (holding in rape prosecution any error in excluding evidence, claimed on appeal to show bias, could not have been obvious where evidence offered at trial only to show lack of sexual contact); *State v. Richins*, 2004 UT App 36, ¶ 11 n.3, 86 P.3d 759 (holding that claimed error in plea taking could not have been obvious where claim required hearing and "a rather elaborate explanation" before appellate court found it comprehensible).

Here, the alleged inadmissibility of evidence seized from the trailer could not have been obvious to the trial court, given the absence of any legal argument concerning the fruit of the poisonous tree doctrine, requiring detailed argument, and given Defendant's repeated consent to officers to "look around" his property. Lack of obvious error is particularly evident here where Defendant

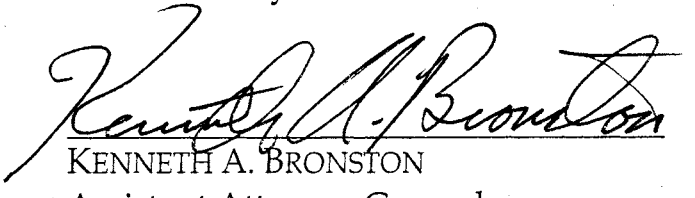
did not use the possibility of Officer Thomas's alleged unlawful entry to suppress evidence, but rather to impeach the officer's credibility and the prosecution's case. R149:112-13, 118-21. Given these circumstances, any alleged error in not sua sponte excluding evidence seized from the trailer could not have been obvious to the trial court. Thus, Defendant has failed to show that the trial court plainly erred in admitting evidence seized from the trailer.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted this 27th day of December, 2011.

MARK L. SHURTLEFF
Utah Attorney General



KENNETH A. BRONSTON
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Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on this 27th day of December, 2011, two copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

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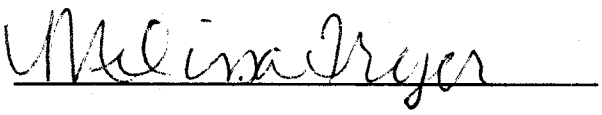
A digital copy of the brief was also included: ☒ Yes ☐ No



Addendum

Addendum A

U.S. Constitutional Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah R. App. P. 23B. MOTION TO REMAND FOR FINDINGS NECESSARY TO DETERMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

(a) Grounds for Motion; Time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) Content of Motion; Response; Reply. The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is served.

(c) Order of the Court. If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed

by the trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) Effect on Appeal. Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) Proceedings Before the Trial Court. Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) Preparation and Transmittal of the Record. At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate Court Determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.