

2000

West Valley City v. Jasbir Singh Bhatia : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 990249-CA
v.	:	
	:	Priority No. 2
JASBIR SINGH BHATIA,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Paul G. Maughan

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FILED

Utah Court of Appeals

MAY 22 2000

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

STATEMENT OF THE ISSUES

I. CAN RE-SENTENCING CORRECT THE TRIAL COURT'S POTENTIAL ERROR IN ALLOWING THE DEFENDANT'S COUNSEL TO WITHDRAW PRIOR TO CONDUCTING A TRIAL IN ABSENTIA?

West Valley City concedes that it is potentially an error for the trial court to allow the defendant's council to withdraw prior to conducting a trial in absentia and sentencing the defendant to jail. The appropriate remedy to correct this potential error is remand to the trial court for re-sentencing.

The trial courts actions are issues of law should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

II. DID THE DEFENDANT WAIVE HIS RIGHT TO A JURY TRIAL?

This is a conclusion of law and should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE, AND RULES

United States Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULE 17. Utah Rules of Criminal Procedure [Sections (a)-(d)]

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct. Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

Rule 504. Lawyer-client, Utah Rules of Evidence [Sections (a), (b)]

(a) Definitions. As used in this rule:

(1) A "client" is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.

(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client or one specifically authorized to communicate with the lawyer concerning a legal matter.

(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.

(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case is a prosecution and conviction of a violation of Section 76-5-103. Utah Code Annotated, Attempted Aggravated Assault.

DISPOSITION IN TRIAL COURT

The defendant, Jasbir Bhatia ("Bhatia") did not appear for his jury trial which was scheduled before Judge Paul Maughan on March 11, 1999. Prior to the beginning of the trial, Bhatia's defense counsel presented to the court a written document whereby Bhatia had agreed that jury trial would be waived if he did not consult with his attorney at least two days prior to trial.

Record, p. 14. Bhatia's attorney then moved to withdraw. Trial Transcript, p. 4. Based upon counsel's representations and the document, Judge Maughan dismissed the jury, allowed defense counsel to withdraw, and conducted a bench trial in abstenia.

Bhatia was convicted of Attempted Aggravated Assault and a warrant for his arrest was issued. On April 26, 1999, Bhatia was sentenced to serve 180 days in jail. Record, p. 34. This sentence was to be served consecutively to the two consecutive one year sentences imposed upon Bhatia by Judge Boyden in Case No.981104396 and Case No. 981104398, respectively. Those cases are currently on appeal as Case No. 990247-CA.

COURSE OF PROCEEDINGS

The City accepts the Appellant's statement regarding the course of proceedings in this case.

STATEMENT OF THE FACTS

The City accepts the Appellant's statement regarding the relevant facts in this case.

SUMMARY OF THE ARGUMENTS

I. BECAUSE OF THE POTENTIAL FOR VIOLATING BHATIA'S RIGHT TO COUNSEL, THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR RE-SENTENCING.

The trial court allowed Bhatia's counsel to withdraw prior, without Bhatia's waiver of his right to counsel, prior to conducting a trial in absentia. This has created a potential

error since the court sentenced Bhatia to a six month jail term. However, since Bhatia has not yet begun serving the sentence, the his rights have not yet been violated. This is true since the right to counsel is triggered by actual incarceration, not just potential incarceration. All that exists at this time, is the potential that Bhatia's rights will be violated. If this case is remanded to the trial court for re-sentencing, and the court does not impose jail time, then Bhatia's argument is rendered moot.

Likewise, his argument that he suffered from ineffective assistance of counsel will be rendered moot by re-sentencing. If he is not entitled to counsel, then he cannot claim that his counsel was ineffective.

II. BHATIA WAIVED HIS RIGHT TO A JURY TRIAL.

By both written waiver presented to the court, and by his failure to appear for trial, Bhatia has waived his right to a jury. He agreed in writing to waive the jury under certain circumstances and those circumstances occurred. Also, he should not be allowed to profit from his failure to appear for trial.

DETAIL OF THE ARGUMENTS

I. BECAUSE OF THE POTENTIAL FOR VIOLATING BHATIA'S RIGHT TO COUNSEL, THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR RE-SENTENCING.

The City does not contest Bhatia's argument that it is error for a trial court to allow a defendant's counsel to withdraw prior

to his trial in absentia and then, upon conviction, sentence the defendant to incarceration. The case of *Wagstaff v. Barnes*, 802 P.2d 774 (Utah Ct. App. 1990) is controlling on that issue. In *Wagstaff*, the court determined that the defendant's absence from trial, even the defendant's voluntary absence from trial, could not be construed as a waiver of the right to counsel. The City believes that proposition is applicable to this case and that the trial court erred when it allowed Bhatia's counsel to withdraw prior to trial and then sentenced him to jail.

However, at this point in time the error remains a potential error. Because Bhatia's jail time in this case does not commence until the previous two year commitment that he is serving ends, his rights have not been violated. The case law is clear that if Bhatia is not actually incarcerated then he has no right to counsel. This principle was first established by the United States Supreme Court in *Scott v. Illinois*, 440 U.S. 376(1979),. The Utah courts have followed this example and determined that a person's Sixth Amendment right to counsel is not applicable unless the person is actually imprisoned. *Layton City v Longcrier*, 943 P.2d 655(Utah Ct. App.1997).

In this case, Bhatia was sentenced to a six month jail term. However, that jail term is to run consecutive to the two consecutive one year sentences he had received from another judge for pornography convictions. (Those convictions are also on appeal

as case number 990247-CA.) Because the sentence is to run consecutively, it will not commence until April, 2001. Since Bhatia has not yet suffered actual incarceration, his Sixth Amendment right to counsel has not yet been violated.

This potential error can be corrected by the trial court. In this case, the error can be corrected by allowing the trial court the opportunity to re-sentence Bhatia. If the trial court re-sentences Bhatia to a penalty which does not include incarceration, then Bhatia's right to counsel argument become moot.

Re-sentencing by the trial court also renders Bhatia's ineffective assistance of counsel argument moot. If Bhatia is not incarcerated then he has no right to counsel. If a person has no right to counsel, then an ineffective assistance of counsel claim can not be supported. *State v. Grotepas*, 906 P.2d 890 (Utah 1995).

II. BHATIA WAIVED HIS RIGHT TO A JURY TRIAL.

The Bhatia's contention that he was denied his right to a jury trial is also not supported by the record. Bhatia waived his right to a jury trial both in writing, and by failing to appear for trial.

Bhatia specifically authorized his legal counsel, in writing, to waive his right to a jury trial if he had not been in contact with counsel prior to trial. A copy of this written document was submitted to the court by Bhatia's trial counsel prior to counsel's

withdrawal. (Record P.14) Despite Bhatia's protests to the contrary, this action by trial counsel does not violate the attorney/client privilege.

While Bhatia claims privilege with respect to the document that was submitted to the court, he does not explain why the information contained in the jury trial waiver is privileged. Communications are only confidential and, therefore, privileged if the communication is not intended to be communicated to third persons. Rule 504(6), Utah Rules of Evidence. Obviously to carry out the intent of this document it requires communication to a third party, in this case the court. The only purpose of the document is to provide for a waiver of Bhatia's right to a jury under certain conditions. Assuming those conditions are met, how would Bhatia's attorney communicate that waiver to the court without violating the alleged privilege?

The jury trial waiver signed by Bhatia and submitted by his trial counsel is a valid waiver which furthers the administration of justice. By agreeing to waive the jury trial under certain circumstances, the court is saved the time and expense of assembling a jury for a trial that may not occur. Written waivers, such as the one signed by Bhatia, are useful tools for reducing the number of citizens who are called for jury duty and then dismissed when the case is continued.

Bhatia also waived his right to a jury by failing to appear for his trial. Since Bhatia was charged with a misdemeanor, there is no presumption that a jury will be held. Rather, a jury trial will be held only upon the written request of the defendant. Rule 17, Utah Rules of Criminal Procedure. Bhatia, who has the right to request a jury trial, also has the ability to waive his right to a jury trial. Utah courts have determined that the defendant's failure to appear can constitute a waiver of the right to a jury trial. In *State v. Jamison*, 767 P.2d 134 (Utah Ct. App. 1989), The court allowed defense counsel to waive the jury for the penalty phase of the trial. The defendant had been found guilty prior to the lunch break and did not return for the penalty phase. The court stated that "under the circumstances, it would be a miscarriage of justice to allow defendant to profit from his unexcused absence from the court." *Jamison*, at page 138. The court in *Jamison*, felt that the right to a jury could be waived through failure to appear much the same way that the right to be present at trial can be waived by a failure to appear. The *Jamison* court quoted extensively from *State v. Myers*, 508 P.2d 41 (1973) which stated:

"In the administration of justice the court cannot be rendered helpless and impotent in the devious and cunning ways adopted by the defendant in this case. The great weight of authorities sustains this proposition. (footnote omitted) To hold to the contrary would permit a mischievously inclined defendant to profit by his own wrongdoing and would be unfair to those individuals accused of crime who are not inclined to abscond, because

the courts would tend to revoke bail and hold defendants in custody to assure their presence at all times during the trial."

Myers, at pages 42-43.

Bhatia relies on *State v. Moosman*, 794 P.2d 474 (Utah 1990) and *State v. Cook*, 714 P.2d 296 (Utah 1986) for the proposition that Bhatia's right to a jury trial was violated. However a close reading of both of those cases indicate that they are not on point.

Both *Moosman* and *Cook* are felony cases not misdemeanor cases. Under Rule 17(c), Utah Rules of Criminal Procedure, a jury trial is required in a felony case, unless waived by the defendant in open court. That situation is not analogous to the case at bar. In this case, Bhatia was tried for a misdemeanor and neither presumption of a jury trial, nor the requirement for an open court waiver are applicable.

Also, in the *Cook* case the record was silent as to why the trial court vacated the jury trial setting. *Cook*, at page 297. The Court in *Myers* specifically distinguished *Cook* by finding that the record in *Myers* was not silent. *Myers*, at page 138. Likewise, the record in this case is not silent. In addition to the written waiver submitted to the court, Bhatia's trial counsel informed the court that he was sure Bhatia knew of the trial date and that he had been unsuccessful in attempting to contact him prior to trial. (Trial Transcript, P.4-5)

Based on the foregoing, it is clear that Bhatia waived his right to a jury trial both in writing and by his failure to appear for trial. He should not now be allowed to profit from his failure to appear and the trial court's ruling should be upheld.

CONCLUSION

The trial court incorrectly allowed Bhatia's counsel to withdraw and then conducted a trial in absentia without first obtaining Bhatia's waiver of his right to counsel. This creates a potential error since the court sentence Bhatia to a six month jail term. However the error is only a potential error, since Bhatia has not yet begun serving the sentence, the his rights have not yet been violated. This is true since the right to counsel is triggered by actual incarceration, not just potential incarceration. All that exists at this time, is the potential that Bhatia's rights may be violated. If this case is remanded to the trial court for re-sentencing, and the court does not impose jail time, then Bhatia's argument is rendered moot.

Likewise, the argument that he suffered from ineffective assistance of counsel will be rendered moot by re-sentencing. If he is not entitled to counsel, then he cannot claim that his counsel was ineffective.

Finally, Bhatia waived his right to a jury trial. This right was waived by both written waiver which was presented to the trial court by his counsel, and by his failure to appear for trial.

Bhatia's conviction should be affirmed and this case should be remanded to the trial court for re-sentencing.

DATED this 22nd day of May, 2000.


A handwritten signature in black ink, appearing to read "J. Richard Catten", is written over a horizontal line.

J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 22nd day of May, 2000, I served upon Jeffrey C. Howe, Attorney for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following addresses:

Jeffrey C. Howe
Family Law Practice
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Salt Lake City, Utah 84111



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee