

2000

West Valley City v. Jasbir Singh Bhatia : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff/Appellee

vs.

JASBIR SINGH BHATIA,

Defendant/Appellant

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Appellate No. 990249-CA

Priority No. 2

AN APPEAL FROM A CRIMINAL CONVICTION OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST VALLEY DEPARTMENT DATED MARCH 11, 1999
THE HONORABLE JUDGE PAUL MAUGHAN

REPLY BRIEF OF APPELLANT

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Utah Court of Appeals

APR 26 2000

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ARGUMENT

IV. THE DEFENDANT'S CONVICTION WAS UNCONSTITUTIONALLY OBTAINED WHEN HE WAS UNREPRESENTED AND HAD NOT WAIVED THE RIGHT TO COUNSEL AND RESENTENCING CANNOT CURE THE DEFECT.

Bhatia's conviction was unconstitutional where he was not represented at the trial and did not waive that right to representation. Under both the United States Constitution and the Utah Constitution, Bhatia had the right to assistance of counsel at all critical stages of his criminal proceeding. State v. Hamilton, 732 P.2d 505, 506-07 (Utah 1986); U.S. Const. amendment VI; and Utah Const. art. I, Section 12.

Utah law is settled on this point. "Absent evidence in the record of affirmative, knowing and intelligent action by [the Defendant] that might reasonably be construed as a waiver, . . . there has been no waiver and [the Defendant] is entitled to be represented by counsel at trial even if he chose not to be there himself. Because [the Defendant] was not represented by counsel at trial, his conviction was unconstitutionally obtained." Wagstaff v. Barnes, 802 P.2d 774, 779 (Utah App. 1990).

In the present case, the record is completely devoid of any affirmative, knowing and intelligent action by Bhatia which might be construed as a waiver of the right to be represented at trial. Rather, the record reflects that immediately prior to the commencement of the trial, Bhatia's counsel sought leave of the Court to withdraw with full knowledge that the court intended to go forward in absentia. TTP2. It is clear from the fact that Bhatia was not present at the time of either the motion or court order permitting his counsel to withdraw that Bhatia reasonably believed that his attorney was representing him in these proceedings even if he was absent.

It is clear that Bhatia did not waive the right to be represented at trial. The court having

permitted his attorney to withdraw based solely on Bhatia's absence, Bhatia was unrepresented at trial. Because the record is devoid of any evidence of waiver of the right to be represented at trial, Bhatia's conviction was constitutionally obtained and must be overturned. West Valley City admits that the conviction was obtained in violation of Bhatia's constitutional right to counsel.

West Valley City argues that because the action was a misdemeanor no right to counsel exists. While this is generally true, it does not apply where counsel has been appointed. Once the Defendant has asked for and received Court appointed counsel, he has the right to such counsel, regardless of the charges filed against him. Moreover, once the right to counsel has been granted by the Court, that right should attach throughout the proceedings regardless of the nature of the charges so filed. West Valley's attempt to diminish the impact of the unconstitutionally obtained conviction because of the nature of the charges simply ignores the facts of what transpired in this case. Bhatia's right to counsel once granted by the Court could not be vacated because of his absence from trial.

Similarly, West Valley's suggestion that the error may be cured by resentencing is incorrect. West Valley relies on the case of Scott v. Illinois, 440 U.S. 367 (1979), which stands for the proposition that the right to counsel does not attach to cases where there is only the possibility of incarceration, especially in misdemeanor cases. Id. at 371. Admittedly, that is what Scott states. However, the instant case is different. In Scott, the court discussed the right to have counsel appointed. In the present case, counsel was in fact appointed. Thereafter, counsel was permitted to withdraw prior to the trial based solely on Bhatia's absence. While the right to counsel may be denied a defendant in a misdemeanor case, Bhatia believes that once the Defendant has requested counsel and that counsel has been appointed, the Court may not then permit counsel to withdraw leaving the defendant unrepresented at trial without evidence of an express waiver of the right to

counsel previously granted Bhatia by the Court.

West Valley's argument that Bhatia should not profit from his cunning ways is equally inapplicable to the case at hand. State v. Meyers, 508 P.2d 41 (Utah 1973). Bhatia is not suggesting that the trial court had no right to try him in absentia. Rather, while the Court had the right to so try Bhatia in absentia, it did not have the right to do so without Bhatia being represented where it had previously appointed counsel. Assuming that the Court elected to proceed in absentia, Bhatia would not have profited from his absence insofar as the trial would have proceeded with counsel for defendant even in his absence. Bhatia does not believe that he should profit from his absence, however to the degree that the conviction must be overturned, the profit to Bhatia arises not from his behavior but rather from the violation of his right to counsel was first granted by the Court and at the trial vacated without any evidence of waiver by Bhatia other than his nonappearance at the trial.

II. BHATIA DID NOT WAIVE HIS RIGHT TO A JURY TRIAL.

Bhatia did not waive his right to a jury trial. Admittedly, he executed a document between himself and his counsel which stated that if he failed to contact his counsel prior to the trial, he waived his right to a trial by jury. However, Bhatia does not believe that such a waiver should have been accepted by the Court.

Bhatia believes that the document he executed as subject to the attorney-client privilege which privilege he had not waived. West Valley argues that somehow the execution of the document infers the intent to communicate the subject matter thereof to a third party thereby destroying the privilege. Pursuant to Rule 504, Utah Rules of Evidence, it defines a communication as confidential

if it is 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.

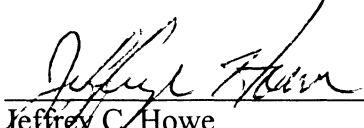
Rule 504, Utah Rules of Evidence. The document on its face does not evidence an intent on the part of Bhatia to disclose the document and its content to third parties. As such, without further evidence surrounding the execution of the document and the purposes behind its execution, there cannot be inferred an intent on Bhatia's part that the document would be disclosed to third parties.

Moreover, the case law of this state makes it clear that prior to the Court accepting a waiver of a right to a jury, it should carefully make a record of the extent and understanding of the defendant as to what is being waived. In State v. Garteiz, an immigrant defendant whose proficiency in English was marginal allegedly waived his right to a jury trial. State v. Garteiz, 688 P.2d 487 (Utah 1984). In the per curiam opinion by Justice Durham, the Court stated, "I urge trial courts to undertake a careful explanation of the nature of the right to a jury trial before accepting a defendant's waiver thereof, particularly where the defendant's circumstances may appear on their face to create obstacles to his clear understanding of the choice he is making." Id. In the instant case, there is no record of whether or not Bhatia's counsel undertook a careful explanation of the nature of the right to a jury trial which attached when requested and granted by the trial court. Moreover, in State v. Moosman, 794 P.2d 474 (Utah 1990), the Court stated, "This court places great emphasis on the importance of a defendant's understanding of the nature and extent of the waiver of a jury trial." Again, there is no record which evidences that Bhatia understood the nature and extent of the document executed which purportedly acted as his knowingly, intelligently, and voluntarily executed waiver of his right to a trial by jury.

CONCLUSION

Bhatia's right to counsel attached when he requested counsel and the court so appointed counsel. This fact is true regardless of the nature of the offense for which he was charged. The Court violated his constitutional right to counsel by permitting counsel to withdraw prior to a trial in absentia. Resentencing will not cure the defect. Bhatia did not voluntarily waive the right to a trial by jury. There is no evidence that Bhatia intended the executed document to be released to any third party. Additionally, the right to a trial by jury attached when requested and granted and absent a record that any document executed which purportedly waived that right to a trial by jury was executed after a carefully, thorough and complete explanation of the rights which were being waived should not have been accepted by the trial court.

Dated and Signed this 22nd day of June, 2000.

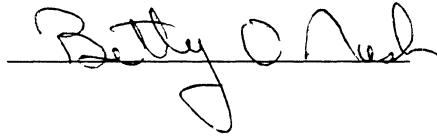


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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing **Reply Brief** was **MAILED**, postage prepaid, on this 23 day of June, 2000 to:

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A handwritten signature in cursive script, reading "Betty C. Neal", is written over a horizontal line.