2010

State of Utah v. Harry Miller : Reply Brief

Utah Court of Appeals

W. Andrew McCullough; Attorney for Appellant.
Kenneth A. Bronston; Assistant Utah Attorney General.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff and Appellee,	:	Case No. 20100792 -CA
	:	
vs.	:	
	:	
HARRY MILLER,	:	
	:	
Defendant and Appellant.	:	

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APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. WILLIAM BARRETT

REPLY BRIEF

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TABLE OF AUTHORITIES CITED

CASE AUTHORITY

RULES CITED

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SUMMARY OF ARGUMENTS

Defendant's right to counsel and his right to due process of law was infringed upon by the Court's refusal to allow him to withdraw a guilty plea which was entered without the assistance of Defendant's retained counsel. This issue was properly preserved in the District Court by Defendant's Motion to Withdraw the guilty plea; and it is properly before this Court.

The State has been unable to provide to this Court a single instance where an appellate court in the State of Utah has upheld a conviction of the crime of "attempted possession" of a controlled substance. This, along with the regular practice of

dismissal of possession cases where the substance turns out not to be a controlled substance, supports the argument that wanting to possess non-existent controlled substance is not within the statutory scheme aimed at prohibiting that possession.

ARGUMENT

POINT I

DEFENDANT WAS ENTITLED TO WITHDRAW HIS GUILTY PLEA

Rule 201 of the Utah Rules of Evidence allows a Court to take judicial notice of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Rule goes on to state that "a court may take judicial notice, whether requested or not." In this case, the plea entered by Defendant on August 3, 2010 followed all the rules. A Statement of Defendant in Support of Guilty Plea was entered, and was signed by the public defender, the Defendant and the prosecuting attorney. The Judge who took the plea had no actual physical notice that Defendant was represented by retained counsel, who had already filed a Motion to Dismiss and a Petition for Interlocutory Appeal. Nevertheless, pursuant to Rule 201 of the Rules of Evidence, the Court could have, and should have, taken judicial notice of those facts. Defendant does not contend that the public defender failed the minimum standards of representation. Defendant does contend,

however, that he had an inherent right to be represented by his retained counsel. While it is true that he did not spontaneously assert that right, he also did not waive it. The Court, being unaware of what would have been obvious if the file had been reviewed, did not ask him the status of his retained counsel, or whether he wished to consult with his counsel or needed additional time to determine his course of action. He had only been in the State a short time, he had not consulted with his previously retained counsel, and this action was all very quick. He was arrested on an unrelated matter, brought before the Court on a warrant, appointed counsel, and quickly entered a plea. A fully advised Court would have at least asked him about his retained counsel, and whether he wished to pursue the Motion that had previously been filed by that counsel.

When a person is accused of a crime and taken into custody, he is regularly advised of his rights to counsel and his right against self incrimination, as a part of a standard procedure, in compliance with the rule of Miranda v. Arizona, 384 U.S. 436 (1966). It is standard procedure to warn or remind a suspect in a criminal proceeding of his right not to incriminate himself, whether he is otherwise aware of that right ornot. If he incriminates himself without knowingly waiving his rights, the statement is suppressed. Certainly someone who is entitled to such a reminder and

warning is also entitled to a simple question by the Court, such as "It appears you have retained counsel. Would you like to talk to him before entering a plea?" Defendant is not finding fault with either the Court or the attorneys in the plea proceeding. Nevertheless, the system failed. While the State argues that any error was harmless, Defendant contends that proceeding without counsel who has been involved in this case for several months constitutes "plain error", should that standard apply here. According to this Court, in State v. Alfatlawi, 153 P.3d 804, UT App 511 (Utah App. 2006) :

> To establish plain error and to obtain appellate relief from an alleged error that was not properly objected to, Defendant must show 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 [defendant]." Id. at ¶ 12 (citations omitted).

This Defendant makes a challenge to the law as applied to him. If the challenge is sustained, the case must be dismissed. At least through the doctrine of judicial notice, "the error should have been obvious to the trial court"; and the error is prejudicial. The cavalier attitude of the Trial Court in denying the Motion to Withdraw the Guilty Plea without so much as holding a hearing to establish the validity of the request, is erroneous. During the discussion of the Motion, Defendant, through counsel, stated clearly that Defendant wished to withdraw the guilty plea.

The Court responded with "well I guess we'd have to have a hearing." Despite that statement, no hearing was held. The Judge before whom the Motion was made was the same Judge who had heard the Motion to Dismiss and denied it. He may well have believed that the defense would not be sustained in this Court. Nevertheless, the right to present defenses is contained in both the Sixth and Fourteenth Amendments. Any doubt should be resolved in favor of the Defendant in this situation. And there surely is doubt.

The State argues that Defendant's claim that his rights were violated by not having access to his retained counsel at the time of his plea, was "unpreserved". In fact, the State appears to argue that there was "invited error" in Defendant's entry of a plea without requesting that his retained counsel be present. The State points out that the plea, at the time, appeared to be voluntarily. It was done with the advice of counsel, Defendant indicated that he was "satisfied with the advice and assistance of his attorney." The appointed attorney further stated "that she believed that Defendant understood the Affidavit and the nature of the proceedings and the charges against him, and that she did not know of any reason why Defendant should not then plead guilty." (Rec. 82). That, of course, is the point. The appointed counsel did not know of any reason why the Defendant should not plead guilty, because she did not have

the opportunity to review his file. If she had, she would obviously had noticed that he had been represented by retained counsel, who had not withdrawn. She would have at least asked the question that the Court should have asked: "Why are you proceeding with appointed counsel, when you have retained counsel in this matter already?"

A claim has not been properly preserved for appeal when Defendant did not bring up the argument before the Trial Court, so as to allow the Trial Court to correct any error. Obviously, Defendant did bring up the error before the Trial Court, as part of his Motion to Withdraw his guilty plea. The Court did have the opportunity to rule on the error. In fact, the Court first indicated that a hearing would be necessary on the Motion. Then, rather suddenly and without the stated reason, the Court reversed itself, simply indicating that it would not entertain the Motion. The Motion was summarily denied; and sentencing went forward. At the point, the issue clearly was preserved for appeal. Trial Court had the opportunity to rule on the Motion. It compounded its error in denying the Motion. Therefore, this Court clearly has the issue before it, and need not proceed under "plain error" review.

POINT II

DEFENDANT MAKES A VALID CLAIM AGAINST THE APPLICATION OF

THE "ATTEMPT" STATUTE .

The State concentrates its arguments on the withdrawal of the guilty plea. It contends that the underlying argument that the charge against Defendant is invalid, is meritless. Obviously, then, any error that was made in going forward on the guilty plea without Defendant's retained counsel would be harmless. The State cites several cases which hold that failure to pursue "a legally untenable claim (St. Br. 23) does not constitute ineffective assistance of counsel. Regarding the claim that Defendant did not commit the crime charged, as a matter of law, the State relegates its arguments to about four (4) pages (St. Br. 23 through 26). First, the State points out that the general attempt statute contained in the criminal code does apply to the Controlled Substances Act. Defendant does not contest that legal conclusion. Rather, Defendant points out that the crime of possession of a controlled substance is a malum prohibitum offense without a specific mens rea attached. Thus, the act of attempting to do the crime is not itself prohibited, any more than is the crime of attempted speeding.

The State, in eight (8) lines on page 24 of its Brief, refers to two (2) cases in which this Court appears to have acknowledged the offense of attempted possession. Neither of the cases cited were published, and neither are therefore considered

precedential. In the first case, State v. Nunez, 2000 UT App 388 (Utah App. 2001), the Court, in a short Memorandum Decision, declined to find error in a Trial Court "when it refused to give defendant's requested jury instruction on the lesser-included offense of attempted possession of a controlled substance." The State contends that such a statement seems to confirm the existence of such an offense. That, however, was not the issue before the Court. The charge at trial was "arranging to distribute a controlled substance". The Court correctly ruled that "arranging to distribute a controlled substance does not, however, require possession or an intent to possess a controlled substance." Therefore, there was no lesser included offense. The Court made no attempt to analyze whether or not such a crime existed, most specifically in the absence of any actual drug.

The second case, State v. Renaga-Gutierrez, 2000 UT App 111 (Utah App. 2002) also dealt with the refusal of the trial Court to give a requested jury instruction on attempted possession, as a lesser included offense. Once again, the Court found no basis for such an instruction. This Court, quoting the trial Court, stated "[t]here is no evidence. . . suggesting that this defendant intended [or] attempted to purchase a controlled substance." Once again, for purposes of that argument, the Court may have assumed that such an offense existed. Once again, however, that was not an issue; and

the Court did not rule that such an offense existed. If these two brief references in unpublished opinions are the best the State can do to support its position, it certainly belies its argument that Defendants contention is meritless. In fact, this Court has never upheld the existence of the offense of attempted possession of a controlled substance. A fortiori, the Court has never had an opportunity to explore the parameters of such an offense. Certainly, this Court has never ruled that an attempted possession can take place when the drugs are non-existent. The simple expression of a desire to possess drugs would seem to be protected under the First Amendment right to free speech. Given the regular dismissal of possession cases when a controlled substance is not present, it is nonsensical to convict for attempting to posses those non-existent drugs.

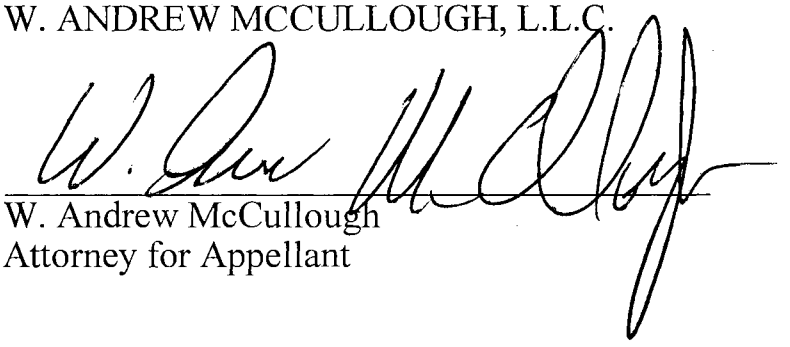
CONCLUSION

Defendant should be allowed to withdraw his guilty plea to the crime of "attempted possession" of drugs; and the charges should be dismissed. No drugs were involved; and the act of asking for what did not exist is not a violation of the law. Further, because no intent is necessary, other than knowing possession, there is no requisite mens rea such that the crime of attempted possession could be

committed.

DATED this 9 day of August, 2011.

W. ANDREW MCCULLOUGH, L.L.C.



W. Andrew McCullough
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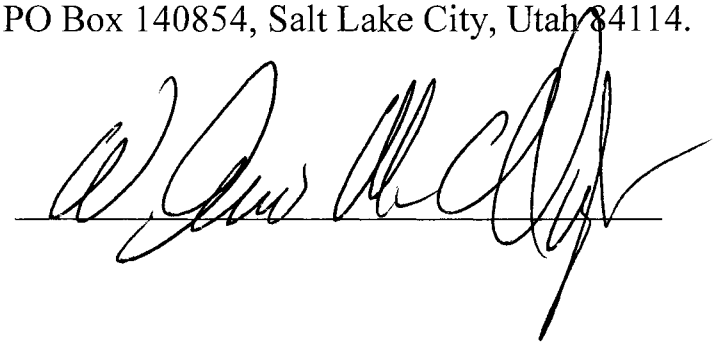
CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of August, 2011, I did mail two true and correct copies of the above and foregoing Reply Brief, postage prepaid, to the Utah Attorney General, Appeals Division, PO Box 140854, Salt Lake City, Utah 84114.



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