2000

The State of Utah v. Jason Edward Payne : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JASON EDWARD PAYNE,	:	Case No. 20000497-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted possession/use of a controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 57-37-8 (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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SUMMARY OF THE ARGUMENT

Due process and Utah R. Crim. P. 22(a) work together to require the trial judge to ensure that a full and fair sentencing proceeding occur. When the trial judge does not afford counsel the opportunity to present mitigating factors at sentencing and otherwise does not base the sentence on reliable and relevant information, obvious error occurs. This error requires that the sentence be vacated without a harmless error review. Moreover, the error was not harmless in this case where Payne was a candidate for probation.

A defendant does not knowingly and voluntarily waive the constitutional right to presence at sentencing unless he is informed that sentencing will proceed even if he is not present. This rule, articulated in United States v. McPherson, 421 F.2d 1127 (D.C. Cir. 1969), has been embraced by a number of other courts. In fact, the United States Supreme Court acknowledged in Crosby v. United States, 506 U.S. 255, 113 S.Ct. 748,

752,122 L.Ed.2d 25 (1993), that knowledge that a proceeding will be held even if the defendant does not appear cannot be imputed to defendants. In addition, presence at sentencing is of even more critical importance than it is at trial. The different policy considerations governing the right to presence at sentencing require that a defendant not be sentenced in his absence unless extraordinary circumstances such as those in State v. Anderson, 929 P.2d 1107 (Utah 1996) exist.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED PAYNE IN ABSENTIA TO THE MAXIMUM ALLOWABLE SENTENCE WITHOUT ANY INPUT FROM THE PARTIES AS TO THE APPROPRIATE SENTENCE.

A. THE TRIAL COURT VIOLATED UTAH R. CRIM. P. 22 AND DUE PROCESS WHEN IT SENTENCED PAYNE WITHOUT CONSIDERING RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING THE PARTIES THE OPPORTUNITY TO SPEAK TO SENTENCING.

(Point IA of Appellant's opening brief; Point III of State's brief)

The plain language of Utah R. Crim. P. 22(a) places on the trial court the obligation to give defense counsel and the prosecutor the opportunity to speak regarding the nature of the sentence to be imposed. While Rule 22(a) mandates that the trial court give defense counsel the opportunity to speak regarding factors relevant to sentencing, due process as outlined in State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) requires that any sentence imposed by a trial judge be based on reliable and relevant information.

Working together, Rule 22(a) and Johnson place the responsibility on the trial judge to make sure that a fair sentencing proceeding which meets due process requirements occurs. The error in failing to afford defense counsel the opportunity to speak on behalf of her client and in otherwise failing to base the sentencing decision on reliable and relevant information from the parties was obvious in light of Rule 22(a) and Johnson. See generally State v. Dunn, 850 P.2d 1201, 1208-1209 (Utah 1993) (plain error occurs where an obvious error prejudices the defendant).

The obviousness of the error in failing to afford defense counsel the opportunity to present information relevant to sentencing is bolstered by Utah Code Ann. § 77-18-1(7) (1999) which mandates that the trial judge receive any information regarding the appropriate sentence which the parties desire to present. Utah Code Ann. § 77-18-1(7) states, "[a]t the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. The testimony, evidence, or information shall be presented in open court and in the presence of the defendant."

Moreover, it is evident from the record that the trial judge precluded defense counsel from speaking to sentencing and from completing her objections on the record. R. 49:2-3. The flat words of the trial judge demonstrate that he interrupted defense counsel when she was attempting to make her record and indicated that he did not want to hear anything further. The trial judge's tone, gestures and facial expressions on the

videotape may well offer additional indication that the trial judge precluded defense counsel from speaking further to this issue. Under such circumstances, especially where the error in not affording defense counsel the opportunity to address the court as to sentencing, the due process and Rule 22(a) error which occurred in this case was cognizable.

When error occurs under Johnson, the sentencing must be vacated and the case remanded for a new sentencing hearing. Johnson, 856 P.2d at 1071-75. In a case such as the instant case where the trial judge did not afford the defendant the opportunity to speak to sentencing and instead made the sentencing decision in a vacuum based solely on the defendant's failure to appear at sentencing, conducting a harmless error review would not serve the due process requirement of a full and fair sentencing. Indeed, because defense counsel was not afforded the opportunity to discuss information relevant to sentencing, the record necessarily would not include all information relevant to sentencing. Under such circumstances, a harmless error review of the record to determine whether the error in failing to allow defense counsel to fully address the sentencing issues and in failing to consider reliable and relevant information would be ludicrous.

Even if a harmless error review were conducted, however, the sentence must be vacated because Payne was harmed by the trial judge's failure to conduct a full sentencing hearing. The state argues that the error was harmless because (1) the judge was informed of mitigating factors at a previous hearing, and (2) "the likelihood of

probation in this case was close to nil." State's brief at 17. Neither of these arguments withstand scrutiny.

First, the state argues that because defense counsel presented mitigating evidence regarding Payne's employment, substance abuse classes and high school diploma at a previous hearing, the judge was fully informed of these mitigating factors. State's brief at 17. Obviously, the information from the previous hearing was not presented with a focus on sentencing and, therefore, did not fully address factors relevant to sentencing. In addition, there is little likelihood that a busy trial judge with a multitude of cases would remember the specific information pertinent to Payne's pretrial release when he sentenced Payne in absentia a month and a half later. Hence, the fact that defense counsel provided the judge with a bit of information about Payne at a pretrial hearing does not make the error in failing to afford defense counsel the opportunity to fully present mitigating information at sentencing harmless.

Second, the state argues that Payne would not have been a candidate for probation because Payne failed to meet with AP&P in order to prepare a presentence report and failed to appear at sentencing. State's brief at 18. Even if a defendant's failure to appear at sentencing were an appropriate factor to consider in rendering sentence, the trial court nevertheless must have a complete picture of the defendant's background and the nature of the crime in order to conduct a full and fair sentencing proceeding. See State v. McClendon, 611 P.2d 728, 729 (Utah 1980) ("A sentence in a criminal case should be

appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system."). In other words, even if failing to appear at sentencing were a basis for sentencing more harshly, the trial judge nevertheless was required to afford the parties an opportunity to speak regarding sentencing, and to make the sentencing decision based on a complete review of reliable and relevant information. In this case where the minimal information in the record from a previous hearing shows that Payne had gotten his high school diploma, was attending substance abuse classes and held two jobs, and the crime itself involved simple possession of methamphetamine, Payne was a candidate for probation even though he did not appear at sentencing.

In addition, common sense dictates that imposing a maximum sentence based solely on a failure to appear at sentencing can result in an unfair sentence with a profound impact on the criminal justice resources. While ramifications for irresponsible behavior in regard to court dates should and do exist[1], the sentence itself should be based on a more complete view of the nature of the crime and the background of the defendant. In current circumstances where the Salt Lake County jail is releasing inmates due to overcrowding pursuant to a federal consent decree, filling the jail with misdemeanants who may be

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[1] When a defendant fails to appear at sentencing, the trial judge can issue a bench warrant for the defendant's arrest. The arrest itself and subsequent time spent in jail while waiting to see the judge are sufficient ramifications for failing to appear at sentencing.

irresponsible regarding court dates but who otherwise do not present a serious threat to society nor deserve a severe punishment makes little sense.

Moreover, the case cited by the state, State v. Hoover, 728 P.2d 689, 691 (Ariz. App. 1986), in support of its claim that imposing a maximum sentence based solely on a failure to appear at sentencing is permissible, indicates only that absconding from the jurisdiction is one of the factors a trial judge may consider at sentencing. In fact, in Hoover, the court held that it was permissible to aggravate the defendant's sentence based on *his prior criminal history and the fact that he had absconded from the jurisdiction* between trial and sentencing. Id. at 691. This contrasts with the present case where the trial judge apparently imposed the maximum sentence based solely on the failure to appear at sentencing. In addition, Payne's nonappearance at sentencing is a less serious transgression than absconding from the jurisdiction.

By failing to afford defense counsel the opportunity to present information relevant to sentencing and by otherwise failing to fully consider the nature of the crime, the background of the defendant and other information relevant to sentencing, the trial judge erred. This error requires that the sentence be vacated and the case remanded for a new sentencing.

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING PAYNE IN ABSENTIA.

(Point IB of Appellant's Brief; Point I of Appellee's Brief)

The state incorrectly claims that the trial judge's decision to sentence Payne in absentia should be reviewed for clear error. State's brief at 7. State v. Anderson, 929 P.2d 1107, 1108 (Utah 1996) directs that the issue of whether a trial judge properly sentenced a defendant in absentia involves a question of law which is reviewed for correctness. Id. Moreover, when an appellate court reviews questions as to voluntariness, the ultimate issue as to whether a defendant knowingly and voluntarily waived a right is reviewed for correctness. See generally State v. Ham, 910 P.2d 433, 438 (Utah App. 1996) (reviewing ultimate conclusion as to whether consent to search was voluntary for correctness). Regardless of whether the findings and conclusions characterize a voluntariness determination as a factual finding, the trial judge's ultimate conclusion in this case that Payne should be sentenced in absentia because he knowingly and voluntarily waived his right to presence is reviewed for correctness.

The right to presence at trial and the right to presence at sentencing are distinct rights which are controlled by distinct policy considerations. See United States v. Turner, 532 F. Supp. 913, 915 (1982); State v. Fettis, 664 P.2d 208, 209 (Ariz. 1983). While trying a defendant in absentia may be appropriate in some cases, different considerations and stricter controls should apply when deciding whether to sentence a defendant in absentia. See Turner, 532 F. Supp. at 915; Fettis, 664 P.2d at 209. The reason for this distinction is that while a defendant's decision to absent himself from trial "may immobilize or frustrate the justice system," such a danger "has largely although not

entirely disappeared" after the defendant has been convicted. Turner, 532 F. Supp. at 915. Conversely, presence at sentencing is of critical importance to a full and fair sentencing hearing." Id.; see also Fettis, 532 F. Supp. at 915. The minimal risk associated with the delay of an appeal and possible retrial caused by failing to appear at sentencing is therefore far outweighed by importance of presence at a sentencing hearing. Turner, 532 F. Supp. at 915.

"[T]he common law has traditionally required that the defendant be present at his sentencing." Id.; see also United States v. Lastra, 973 F.2d 952, 955 (D.C. Cir. 1992) (citation omitted) ("'The requirement that the defendant be present when sentence is passed has deep common law origins.'"). Presence is of critical importance to sentencing not only because it allows the judge to be presented with all of the information needed for a full sentencing hearing, but it also allows the judge to question and admonish the defendant. Indeed, "[i]t is only when the defendant is before the court that a reasonable and rational sentencing can take place." Fettis, 664 P.2d at 209.

> Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation for his conduct. The ceremonial rendering of judgment may also contribute to the

> individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.

Turner, 532 F. Supp. at 915.

In addition to ensuring that a full and fair sentencing occur, presence of the defendant at sentencing preserves the dignity of individuals being sentenced as well as the system itself.

> Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of liberty. *It shows a fundamental lack of respect for the dignity of a man to sentence him in absentia.* The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

Turner, 532 F. Supp. at 915-916 (citations omitted) (emphasis added). The important policy considerations relating to presence at sentencing "militate against a rule allowing presence at sentencing to be waived." Id. at 915.

Because of the critical importance of presence to sentencing, many jurisdictions refuse to allow sentencing in absentia except in extraordinary circumstances. Fettis, 664 P.2d at 209. Such extraordinary circumstances, while "rare indeed" (Fettis, 664 P.2d at 209), include circumstances where a defendant has expressly waived his right to be present at sentencing. See Turner, 532 F. Supp. at 916 (citing United States v. Brown, 456 F.2d 1112, 1114 (5th Cir. 1972), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974)). Extraordinary circumstances allowing sentencing in absentia may

also include circumstances where the defendant has been fully informed that sentencing will proceed in his absence if he does not appear at the sentencing hearing. See Lowery v. State, 759 S.W.2d 545, 546 (Ark. 1988) (court unwilling to find defendant waived right to presence at sentencing "in the absence of language specifically advising an accused that he is subject to being sentenced prospectively without his being present"); People v. Link, 685 N.E.2d 624, 626 (Ill. App. 1997) (court requires that defendant must be "warned his failure to appear may result in the proceedings continuing in absentia" in order to sentence a defendant in absentia); People v. Bennett, 557 N.Y.S.2d 731, 732 (N.Y. Sup. Ct. 1990) (court reasons that sentencing in absentia was permissible where defendant was fully advised that sentencing would occur in his absence if he failed to appear); People v. Harris, 564 N.Y.S.2d 481 (N.Y. Sup. Ct. 1991) (same); People v. Christopher R., 522 N.Y.S.2d 28 (N.Y. Sup. Ct. 1987) (same).

These cases requiring that the defendant be informed that sentencing will proceed if he fails to appear in order to sentence in absentia adopt the standard outlined in McPherson, 421 F.2d at 1129 and advocated by Payne in his opening brief at 14-15. Contrary to the state's assertion on pages 9-11 of its brief, the McPherson rationale that a defendant cannot knowingly and voluntarily waive his right to presence at sentencing unless he is informed that sentencing will proceed in his absence remains good law and is supported by a number of decisions. In addition, the state's claim that Taylor v. United States, 414 U.S. 17 (1973) "effectively overruled" McPherson (state's brief at 10) is

disproved by the existence of these post-Taylor cases applying the rationale utilized in McPherson.

A review of Taylor itself also demonstrates that Taylor does not preclude the McPherson analysis or otherwise "effectively overrule" McPherson. Significantly, Taylor involved a defendant's failure to appear at trial rather than sentencing. Taylor, 414 U.S. at 19. Because different policy considerations and analyses govern the issue of whether a trial can proceed when a defendant is absent than govern the issue of whether sentencing can proceed without the presence of the defendant, the holding in Taylor does not impact on McPherson.

Moreover, since Taylor absented himself after the trial had started, Taylor's knowledge that the proceedings which had already begun would be concluded in his absence was evident. See Crosby v. United States, 506 U.S. 255, 256, 113 S.Ct. 748, 749, 122 L.Ed.2d 25 (1993) (recognizing that mid-trial flight demonstrates a knowing and voluntary waiver of the right to be present whereas nonappearance at the beginning of trial does not demonstrate such waiver). Subsequent to Taylor, the United States Supreme Court recognized the distinction between absenting oneself after trial has begun and not appearing at all. Id. at 752. Accordingly, the Court held that a trial in absentia could not be held pursuant to Fed. Rule Crim. P. 43 when a defendant was not present at the beginning of trial. Id. at 752-753.

The Supreme Court's analysis in Crosby provides further support for the McPherson requirement that a defendant must be informed that sentencing will proceed in his absence if he does not appear in order to knowingly and voluntarily waive his right to presence at sentencing. The Supreme Court recognized that it cannot be assumed that a defendant who fails to appear knows that the proceedings will go on without him. The Court stated, "'[s]ince the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." Crosby, 113 S.Ct. at 752 (citation omitted). In this case where Payne did not absent himself after the proceeding had begun and instead did not appear at the beginning of the proceeding, Taylor does not require a determination that Mr. Payne waived his right to presence.

The Annotation cited by the state demonstrates that a significant number of jurisdictions require something more than a failure to appear in order to proceed with sentencing in the defendant's absence. See State's brief at 11 (citing Christopher Hall, Annotation, *Voluntary Absence of Accused When sentence is Pronounced*, 59 A.L.R. 5th 135 (1998)). Rather than demonstrating a clear majority position, the Annotation shows that a number of jurisdictions ordinarily require that a defendant be present for sentencing when the defendant has not been warned of the consequences for failing to appear. Id. at 149-153, 158.

The Utah Supreme Court's decision in Anderson is consistent with the McPherson approach and must be read in light of the facts and policy considerations relevant to the circumstances under which Anderson failed to appear. Because Anderson was warned of the consequences of failing to appear and had signed a written waiver of his right to presence in which he agreed to be tried in absentia, requiring that a defendant be warned of the consequences of nonappearance in order to find a knowing waiver of the right to presence fits squarely within the Anderson holding. See Anderson, 929 P.2d at 1110. Relying on McPherson, the Anderson court stated, "[t]o intentionally relinquish the right to be present, the defendant must have notice of the proceedings. United States v. McPherson, 421 F.2d 1127, 1130 (D.C. 1969)." Anderson, 929 P.2d at 1110. Since the notice required in McPherson was that sentencing would proceed without the defendant if he did not appear, and the defendant in Anderson likewise had notice that the proceedings would continue without him if he did not appear, this reliance on McPherson in Anderson should be read as requiring that the defendant be given notice that the sentencing will occur even if he does not appear in order to sentence in absentia.

Anderson is distinguishable from the present case because the trial court properly tried Anderson in absentia based on a written waiver. The Supreme Court looked to similar circumstances where a defendant was properly tried in absentia and had still not shown up by the time of sentencing. Anderson, 929 P.2d at 1110. Because it would create an anomaly to be able to try in absentia a defendant who affirmatively waived his

right to presence but to then be unable to sentence him, the Supreme Court held that sentencing Anderson in absentia after he had expressly waived his right to presence at trial was appropriate. Id. The Anderson court did not consider, however, the current circumstances where a defendant had entered a plea but later failed to appear at sentencing.

The present case is also distinguishable from Anderson because the balance between society's interest in sentencing in absentia and Anderson's interest in being present tipped in favor of proceeding with sentencing, whereas in the present case, the balance tipped in favor of not proceeding with the sentencing in absentia. Anderson had left the state with the permission of the court. Anderson, 929 P.2d at 1108. He executed a "written and oral agreement to be tried in his absence should he fail to appear at trial." Id. "Although Anderson contacted pretrial services shortly before the trial date, he subsequently disappeared." Id. Because Anderson knew he would be tried in absentia and disappeared while out of state, the Court reasoned that Anderson could remain absent from the jurisdiction for years, thereby impeding the administration of justice. Id. at 1111. By contrast, as set forth in Payne's opening brief at 18, the potential for Payne absenting himself for years did not exist in this case where Payne had lived at the same address for twelve years and had held the same job for five years. R. 7.

As a final matter, Rules 22(b) and 17(a)(2) of the Utah Rules of Criminal Procedure do not preclude a requirement that a defendant be warned that sentencing will

proceed without him if he does not appear in order to have a knowing and voluntary waiver of the right to presence at sentencing. Rule 22(b) allows a defendant to be sentenced in his absence, "[o]n the same grounds that a defendant may be tried in defendant's absence." Rule 17(a)(2) states, "the defendant's voluntary absence from 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 the defendant had been present."

When read togther, Rules 22(b) and 17(a)(2) arguably refer to the Anderson situation, clarifying that if a defendant is tried in absentia, he may also be sentenced if he later fails to appear at sentencing. In other words, the "same grounds" referred to in Rule 22(b) are the grounds that made the trial in absentia permissible. Morever, Rule 17(a)(2) clarifies that a defendant's absence will not prevent him from being tried, but does not outline all of the considerations for proceeding with a trial in absentia. The rules must be interpreted to comply with constitutional requirements. See State v. Mohi, 901 P.2d 991, 995 (Utah 1995). In order to comply with the constitutional right to presence found in Article I, section 12 of the Utah Constitution, the rules must be read to allow the court to proceed in the defendant's absence only if the defendant *knowingly* and voluntarily waives his right to presence; for there to be a knowing waiver, the defendant must be informed that sentencing will proceed even if he is not present. See discussion in Appellant's opening brief at 13-18; supra at 8-13. The notice and grounds required to

sentence a defendant in absentia therefore include notice that the hearing will proceed if the defendant does not appear.

REQUEST FOR ORAL ARGUMENT AND PUBLISHED OPINION

This case presents an important question as to whether a trial judge can sentence a criminal defendant in absentia when the defendant was not informed that the sentencing would occur in his absence. The circumstances in this case differ substantially from those in Anderson, 929 P.2d 1107 and require clarification from this Court as to (1) whether a distinction exists between sentencing a defendant in absentia where the defendant has executed a written waiver of the right to presence at trial, and sentencing a defendant in absentia where the defendant has appeared for trial proceedings but fails to appear at sentencing, and (2) whether a defendant must be informed that sentencing will proceed if he does not appear in order to have a knowing and voluntary waiver of the right to presence at sentencing. In addition, this case raises an important issue as to whether the trial judge is required to ensure that a full and fair sentencing proceeding occurs by affording counsel the opportunity to present any information relevant to sentencing he or she desires. The significant number of defendants being sentenced in absentia by a single trial judge to serve maximum sentences and the concomitant drain on resources without serving criminal justice purposes requires that this issue be fully analyzed and explored, and that a controlling decision be issued.

CONCLUSION

Defendant/Appellant Jason Edward Payne respectfully requests that this Court vacate his sentence and remand the case for a full and fair sentencing hearing.

RESPECTFULLY SUBMITTED this 15th day of December, 2000.

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Attorney for Defendant/Appellant

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Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of December, 2000.

Joan C. Watt
JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of December, 2000.

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