1990

The State of Utah v. Michael David Hoff : Reply Brief of Appellant

Utah Supreme Court

Walter F. Budgen, Jr.; Attorney for Appellant.
R. Paul Van Dam; Utah Attorney General; Dan R. Larsen; Attorney for Appellee.

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
v.	:	No. 900096
MICHAEL DAVID HOFF,	:	
Defendant and Appellant	:	

REPLY BRIEF OF APPELLANT

Appeal from a final judgment entered in the
Third Judicial District Court for Tooele County,
State of Utah, the Honorable Raymond S. Uno.

WALTER F. BUGDEN, JR., #480
257 Tower, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
Attorney for Appellant

R. PAUL VAN DAM
Utah Attorney General
DAN R. LARSEN
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Appellee

Priority Classification: 3

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
v.	:	No. 900096
MICHAEL DAVID HOFF,	:	
Defendant and Appellant	:	

REPLY BRIEF OF APPELLANT

Appeal from a final judgment entered in the
Third Judicial District Court for Tooele County,
State of Utah, the Honorable Raymond S. Uno.

WALTER F. BUGDEN, JR., #480
257 Tower, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
Attorney for Appellant

R. PAUL VAN DAM
Utah Attorney General
DAN R. LARSEN
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Appellee

Priority Classification: 3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

INTRODUCTION

The jurisdictional statement, nature of proceedings, statement of issues on appeal and statement of facts are adquately covered in the Defendant's opening brief. This brief is submitted in reply to Respondent's brief.

SUMMARY OF ARGUMENT

There was neither strict nor substantial compliance with the mandate of Rule 11(e) of the Utah Rules of Criminal Procedure when the Defendant entered his guilty plea in this case. Although the Defendant executed an Affidavit when he pleaded guilty, the trial court did not determine on the record that the Defendant understood the nature and elements of the offense to which he entered his guilty plea. Significantly, the Amended Information was not read to the Defendant. Moreover, counsel and the trial court identified the offense with a variety of different names. The Defendant never admitted any facts on the record which constituted the offense of Attempted Aggravated Sexual Abuse of a Child. The trial court neither read the facts or elements recited in the "Affidavit of Defendant" nor requested that the Defendant acknowledge those facts or elements. Similarly, the trial judge did not advise the Defendant on the record of what sentence might be imposed before the guilty plea was received.

ARGUMENT

POINT I

(REPLY TO POINT I OF RESPONDENT'S BRIEF)

THE DEFENDANT'S GUILTY PLEA WAS NOT ENTERED IN COMPLIANCE WITH RULE 11(e)(4) AND (5) OF THE UTAH RULES OF CRIMINAL PROCEDURE.

The State's interpretation of State v. Thurston, 781 P.2d 1296 (Utah Ct.App. 1989) is creative but imprecise. The State interprets this case to mean that at least one panel of the Court of Appeals has abandoned the strict compliance rule articulated in State v. Vasilacopulos, 756 P.2d 92 (Utah Ct.App. 1988) and State v. Valencia, 776 P.2d 1332 (Utah Ct.App. 1989). However, the panel writing the decision in State v. Thurston made no such statement. The State may wish to interpret Thurston in such a fashion. But there is no clear prenouncement in Thurston that Vasilacopulos and Valencia were either abandoned or overruled by the panel which authored Thurston.

Moreover, the facts in Thurston involve a unique Rule 11 situation. Thurston really involved the interpretation of the principle that a defendant is entitled to specific performance of a plea negotiation; See Santobello v. New York, 404 U.S. 257 (1971). Thurston plead guilty to two counts of distribution of a controlled substance. The State agreed to dismiss the remaining charges against the defendant and to recommend probation rather

than incarceration. The State, by and through its deputy county attorney, fulfilled all the terms of the plea negotiation. That is to say, the State did dismiss the additional charges and did affirmatively recommend probation rather than incarceration. However, the unique problem which arose in Thurston was that notwithstanding the deputy county attorney's affirmative recommendation for probation, the presentence report included the opinion of the investigating officer "that fifteen years was not a long enough term of incarceration for the defendant." The Court of Appeals concluded that an investigating police offer is not bound by a prosecutor's plea bargain to recommend probation. Accordingly, the Court of Appeals decided that the defendant's plea bargain agreement had not been breached.

The defendant in Thurston also argued that his guilty plea was involuntary and should be stricken because he entered the plea in reliance upon the State's recommendation for probation, and that his reliance was misplaced because of the investigating police officer's contrary sentencing recommendation. In considering that contention, the Court of Appeals reviewed the record and determined that the defendant had been fully informed of his rights and the consequences of the guilty plea. In dismissing the defendant's contention that he should be permitted to withdraw his plea, the Court of Appeals noted that the "defendant's

mere subjective belief as to a potential sentence is insufficient to invalidate a guilty plea as involuntary or unknowing." 781 P.2d at 1302.

The facts in Thurston are unique and completely different from the Rule 11 violation in the instant case. Regardless of what standard was articulated by the Court of Appeals in Thurston, whether it was the record as a whole or strict compliance, there simply was no Rule 11 violation.

The State has also argued that Jolivet v. Cook, 784 P.2d 1148 (Utah 1989), and State v. Copeland, 765 P.2d 1266 (Utah 1988), stand for the proposition that the record as a whole test is the test to be applied regardless of whether the plea in issue was a pre- or post-Gibbons plea. The Defendant submits that the State is wrong in this regard. Jolivet, Copeland, and State v. Kay, 717 P.2d 1294 (Utah 1986), all involve guilty pleas entered prior to State v. Gibbons, 740 P.2d 1309 (Utah 1987). This is a significant distinction.

Although it is true that all three of these cases discuss the substantial compliance or record as a whole test, they are pre-Gibbons cases. State v. Gibbons was not given retroactive application. That was so because a new rule of criminal procedure constituting a clear break with the past will not be applied retroactively. Rather, in those circumstances where a defendant

challenges the voluntariness of his guilty plea under Rule 11 after State v. Gibbons was decided, but when the guilty plea was actually entered prior to the pronouncement of State v. Gibbons, supra, this Court has adopted the record as a whole test. See Warner v. Morris, 709 P.2d 309 (Utah 1985) and Brooks v. Morris, 709 P.2d 310 (Utah 1985).

Jolivet, Copeland, and Kay are not inconsistent with the rule announced in State v. Gibbons:

> Because of the importance of compliance with Rule 11(e) in Boykin, the law places the burden of establishing compliance with those requirements on the trial judge .... the use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point, in the pleading process .... the trial judge should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfill the other requirements imposed by Section 77-35-11 on the record before accepting the guilt plea. (Emphasis added).
>
> 740 P.2d at 1313.

In the instant matter, on the issues of whether the Defendant understood the nature and elements of the offense as well as the possible sentence, the State can only rely upon the "Affidavit of Defendant." The State's contention that the Defendant had previously appeared in Circuit Court where he had waived his preliminary hearing is hardly any support for the proposition

that the Defendant understood either the nature or the elements of the offense to which he pleaded guilty. Similarly, the State's argument that because the Defendant's counsel waived a formal reading of the Information and acknowledged that he (the defense counsel) had received a copy of the Information hardly supports the ineluctible conclusion that the Defendant understood the nature and elements of the offense to which he was pleading guilty.

CONCLUSION

This is not a case even remotely similar to Jolivet or Copeland where the record clearly demonstrates substantial efforts by the trial court to ensure that the Defendant understood the nature and elements of the offenses to which they pleaded guilty. In contrast, there is nothing but an affidavit in the instant case. The record in the instant matter establishes substantial confusion over even the title of the offense, much less the nature and elements of the offense. The record as a whole does not establish that the Defendant understood either the nature and elements of the offense or the possible sentence that could be imposed.

DATED this _____ day of _____, 1990.

_____
WALTER F. BUGDEN, JR.,
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, by first class postage prepaid, this _____ day of July, 1990, to:

Dan R. Larsen
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

_____