

1982

Timothy E. Crowe v. State of Utah and R. Don Brown : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

TIMOTHY E. CROWE,

Plaintiff/Appellant

No. 18227

vs.

THE STATE OF UTAH and R. DON
BROWN, County Attorney for
Sevier County,

Defendants/Respondents.

APPELLANT'S BRIEF

Appeal from the Judgment of the 6th
Judicial District Court of Sevier County
Hon. Don V. Tibbs, Judge

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STATEMENT OF THE KIND OF CASE

This was a complaint brought under section 65 B (i) for a post conviction hearing requesting the trial court to resentence the defendant so that he could timely file a Notice of Appeal.

DISPOSITION IN LOWER COURT

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The hearing was held in the Sixth Judicial District Court before the Honorable Judge Don V. Tibbs and a judgment was granted for the defendant dismissing plaintiff's Complaint, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and a judgment ordering the trial court to resentence the defendant.

STATEMENT OF FACTS

The appellant was convicted by a jury of the crime of attempted distribution of a controlled substance not for value on the 21st day of May, 1981. At the time the jury rendered its verdict, the trial judge, Judge Don V. Tibbs, advised the defendant:

"You have a right to appeal this conviction to the Supreme Court of the State of Utah if you so desire."

On June 17, 1981 the appellant was sentenced to serve one year in the Sevier County Jail and fined one thousand dollars (\$1,000). Sentence was stayed until June 29, 1981 when the defendant was to surrender to commence serving his sentence. The trial judge, Judge Tibbs, did not advise the defendant of his right to appeal or the time in which he must perfect his appeal at the time of sentencing. The defendant did not surrender to commence serving his sentence on June 29, 1981, but instead fled the jurisdiction and went to the State of Nevada. The time for the appellant to file and perfect the appeal of his conviction has expired. On December 14, 1981 the defendant voluntarily returned to the State of Utah and surrendered to the County Sheriff of Sevier County and commenced serving his one year sentence. On the 29th day of September, 1981 the appellant filed a Complaint under Section 65 B (i), requesting the court for a post-conviction hearing and requesting that the Court resentence the defendant so that he could file and perfect his Notice of Appeal. On the 20th day of January, 1982 a hearing was held in front of the honorable Don V. Tibbs, a judge of the District Court in Sevier County. At the conclusion of said hearing, the appellant's Complaint was dismissed. On January 25, 1982 the Court filed Findings of Fact and Conclusions of Law and a judgment dismissing the Complaint of the appellant. On January 27, 1982 a Notice of Appeal was filed with the clerk of the District Court in Sevier County.

STATEMENT OF POINTS

1. Failure of the Court to advise the defendant of his appellate rights pursuant to Section 77-35-22 Rule 22, Subsection (c) deprived defendant of his constitutional right to appeal.

2. The Courts advice at the time of the jury's verdict was not sufficient to waive the constitutional requirements of advising the defendant of his right to appeal.

ARGUMENT

Point 1. The failure of the Court to advise defendant of his appeal rights pursuant to Section 77-35-22, Rule 22, Subsection (c) deprived defendant of his constitutional right to appeal.

The Constitution of the United States, and of the State of Utah both guarantee the defendant in criminal cases the right to appeal his conviction. This right is further codified under the Utah Rules of Criminal Procedure, Section 77-1-6 Rights of the Defendant, Subsection (g). In addition, the Constitution of the United States of America and the State of Utah guarantee the defendant the right of equal protection and due process.

In furtherance of these constitutional rights, the Utah Legislature enacted the Utah Code of Criminal Procedure, Section 77-35-22, Rule 22, Subsection (c), which states as follows:

"Upon a verdict or plea of guilty or plea of no contest, the Court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. The following imposition of sentence, the Court shall advise the defendant of his right of appeal and the time within which any appeal may be filed."

It can be plainly seen from a reading of this rule that its sole purpose is to protect the constitutional rights of the defendant to appeal. Since the right to appeal in itself would mean nothing if the defendant does not know of this right and how he may perfect the appeal.

The question before this honorable Court is did the failure of the trial judge to comply with this rule deprive the defendant Crowe of his constitutional rights.

It is respectfully submitted to this honorable Court that the failure of Judge Tibbs to advise the defendant pursuant to the Utah Code of Criminal Procedure violated the

defendant's rights to equal protection and due process under the Constitution of the United States of America and the State of Utah. In support of appellant's proposition in that he was deprived of his constitutional rights, the appellant respectfully cites the United States ex rel Singleton v. Woods 440 F.2d 835 (1971), quoting the decision of the honorable Judge Kerner:

"Applying the reasoning of Griffin v. Illinois 351 U.S. 12, Douglas v. California, 372 U.S. 353; Gideon v. Wainright, 372 U.S., 335, and their progeny, we hold that the trial judge should have advised petitioner of his right to appeal and, as a constitutional corollary, his right to self-appointed counsel on appeal if he is indigent. Failure to give such advice violated petitioner's right to equal protection under the Fourteenth Amendment and his Sixth Amendment right to counsel, incorporated through the due process clause of the Fourteenth Amendment."

This reasoning was further codified in the case of Sutton v. Lash, 576 F.2d 738 (1978). The same principal was again followed in the Wisconsin case of State v. Argiz, 305 N.W.2d 124 and in the Colorado case of People v. Boivin, 632 P.2d 1038 and in the Washington case of State v. Sweet, 581 P.2d 579. It should be noted that while there is no Utah case reported which deals with this, in each of the other jurisdictions, Wisconsin, Colorado and Washington, each of these states had a statute similar to the Utah statute with regard to advising the defendant of his right to appeal. It would seem therefore unanimous that in every jurisdiction where this matter has been tested that the Courts have found that the failure of the Court to advise the defendant as is required by the state's statute was a denial of the defendant's constitutional rights.

Point 2. The Court's advice at the time of the jury's verdict was not sufficient to waive the constitutional requirement of advising the defendant of his right to appeal.

Judge Tibbs in his Findings of Fact and Conclusions of Law ruled (that while he admitted that he had not advised the defendant of his right to appeal as was required by the Utah Rules of Criminal Procedure) that his advice to the defendant at the time the jury verdict was rendered was sufficient to advise the defendant of his right to appeal and to satisfy the constitutional requirements. It is respectfully submitted that this advice given at the time that the jury rendered its verdict was grossly inadequate to comply with the constitutional requirements. While Argiz does state there may be times when the Court can fail to comply with the statute, providing the defendant is advised

of his constitutional right in another manner (in Argiz the Court gave the written rules to defendant's attorney and instructed defendant's attorney to read and explain these to his client and to have his client sign the bottom of the rules and to file them with the Court). The Court further stated that if the defendant did not understand these, that the Court would come back out on the record and advise the defendant orally. The Wisconsin appellate Court felt that while the judge may not have technically complied with the statute in that he did not personally read the appellate rights to the defendant that the giving of the written rights to the defendant having his attorney read them to him and having the defendant sign them satisfied the constitutional requirements that the defendant be advised of his right to appeal. I would not argue with that position and had that been the case in the matter before this Court, I would feel that the constitutional requirements had been met even though there was no technical reading of the statute.

At appellant's hearing, Judge Tibbs ruled that since the defendant was advised of his right to appeal at the time the jury verdict was rendered, that the constitutional requirements had been satisfied. A transcript of the proceedings of the Court at the time the jury found the defendant guilty will show that the Court stated to the defendant:

"I would advise you further that you have a right to appeal this conviction to the Supreme Court of the State of Utah if you so desire."

It is respectfully submitted that this cursory statement does not even advise the defendant of the time limitations involved in filing his appeal, and does not satisfy the constitutional requirement. The mere utterance of the words, "You have a right to appeal", such as was given to the defendant by Judge Tibbs has very little meaning to a defendant who is more than likely in a state of shock having just been found guilty by a jury. It is just for that reason that the Legislature of the State of Utah enacted the statute requiring the Court to advise the defendant of his right to appeal after pronouncing sentence and to advise the defendant of the time limitations involved.

This matter was dealt with directly in the Boivin case where the Court ruled:

"The question becomes whether non-compliance with the stated rules can be forgiven on the basis that a defendant acquired independent knowledge of his appellate rights. We hold that it cannot."

In the Sweet case the Supreme Court of Washington went even further. Holding that even the reading of the statute advising the defendant of his right to appeal may be insufficient to satisfy the constitutional requirements, absence a showing that the defendant clearly understood those rights and indicated so to the Court. While appellant does not urge that the trial court would be required to go as far as is outlined in Sweet it does urge that the mere cursory advice given to the defendant by the trial court at the time the jury verdict was grossly inadequate to protect the constitutional rights of the defendant.

CONCLUSION

It is respectfully submitted to this honorable Court that the defendant's constitutional rights were violated by the trial court in that it failed to advise the defendant of his right to appeal at the time of sentence or of the time limit involved in filing his appeal, and that the statement made by Judge Tibbs at the time the defendant was found guilty by the jury on May 21, 1981 in no way satisfied the constitutional requirements of advising the defendant of his right to appeal.

Therefore, it is respectfully submitted that the judgment dismissing appellant's Complaint be reversed and that an order be entered directing the Sixth Judicial District Court to resentence the defendant and advise him of his right to appeal and for such other and further relief as this Court may seem just under the circumstances.

RESPECTFULLY SUBMITTED this 9th day of March, 1982.



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