

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TIMOTHY E. CROWE, :  
Plaintiff-Appellant, :  
-v- : Case No. 18227  
THE STATE OF UTAH, and R. DON :  
BROWN, County Attorney for :  
Sevier County, :  
Defendants-Respondents. :

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BRIEF OF RESPONDENTS  
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Appeal from the Judgment of the Sixth Judicial District  
Court of Sevier County, the Honorable Don V. Tibbs, Judge,  
presiding.

---

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Sevier County, :  
Defendants-Respondents. :

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BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

Appellant was tried before a jury and convicted of attempted distribution of a controlled substance not for value. He was sentenced by the Honorable Don V. Tibbs on June 17, 1981 to serve one year in the Sevier County Jail. The appellant failed to take a direct appeal from that conviction and sentencing. On December 30, 1981 the appellant filed a motion for post-conviction relief pursuant to Utah Rules of Civil Procedure, Rule 65B(i).

DISPOSITION IN THE LOWER COURT

The appellant's Complaint seeking post-conviction relief pursuant to Rule 65B(i), Utah Rules of Civil Procedure was heard before the Honorable Don V. Tibbs in the Sixth Judicial District Court on January 20, 1982. The court denied the appellant's request to be resentenced nunc pro tunc.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the findings of fact and conclusions of law made by the trial court in its denial of his motion for post-conviction relief. In the alternative, the case should be remanded to the district court for an evidentiary hearing.

## STATEMENT OF THE FACTS

The appellant was convicted of a Class A misdemeanor for the attempted distribution of a controlled substance not for value at a jury trial held May 21, 1981. Immediately upon the rendering of the verdict, he was informed of his right to appeal by Judge Don V. Tibbs. On June 17, 1981 he was sentenced by Judge Tibbs, but the court did not advise him of his right to appeal subsequent to the imposition of the sentence (R. 16).

The appellant subsequently attempted to obtain post-conviction relief pursuant to Rule 65B(i). He filed this complaint on December 30, 1981, six months after sentencing. This complaint was denied on January 20, 1982 after the court found that: 1) the appellant was not prejudiced when he was told of his right to appeal when the verdict was announced instead of subsequent to sentencing; and 2) no violations of the appellant's constitutional rights had occurred (R. 16).

ARGUMENT

POINT I

THE SIXTH JUDICIAL DISTRICT COURT  
CORRECTLY DENIED APPELLANT'S COMPLAINT  
FOR POST-CONVICTION RELIEF WHERE THE  
APPELLANT FAILED TO SHOW A DENIAL OF HIS  
CONSTITUTIONAL RIGHT TO TIMELY APPEAL.

Every accused in a criminal case in Utah is entitled to a timely appeal of his conviction. Utah Constitution, Article 1, § 12; Weaver v. Kimball, 59 Utah 72, 202 P. 9 (1921); State v. Johnson, Utah, 635 P.2d 36 (1981). The timeliness of this appeal is measured by Utah Rules of Criminal Procedure, Rule 26(d), (§ 77-35-26d), which allows 30 days to file a notice of appeal from the entry of judgment. There is no question that the appellant in this case failed to timely file a notice of appeal.

Appellant argues that the trial court's failure to inform him of his right to appeal at the time of sentencing pursuant to the statutory provision, Utah Code Ann., § 77-35-22(c) (1953), as amended, necessarily results in a denial of his constitutional right to appeal. This reasoning fails where the totality of the facts demonstrate that the appellant was advised of his right to appeal. There is not a constitutional requirement that an individual be advised of his right to appeal. The statutory requirement is designed to give force to the constitutional right to appeal. In this

case, the appellant had been advised of his right to appeal at the verdict stage of the trial, as well as at the time of arraignment; therefore there is no basis upon which the appellant can claim that his right to appeal was denied.

The appellant relies on United States ex. rel. Singleton v. Woods, 440 F.2d 835 (1971) for the proposition that failure to advise of the right to appeal denies the accused's right to equal protection, and thus denies his constitutional right. However, this analysis is only appropriate where the petitioner is never informed of his right to appeal. Thus, the rationale does not support appellant's theory that the failure to give the information at the time of sentencing results in per se denial of the right to appeal. Each case must be taken in light of its facts, and the facts of this case show no prejudice to the appellant where he had previously been made aware of his right to appeal by the judge.

The appellant properly brought a post-conviction proceeding pursuant to Rule 65B(i), Utah Rules of Civil Procedure. This motion was denied because the trial court determined that there had not been so substantial an infringement on the appellant's right to appeal as to require nunc pro tunc resentencing. The trial court had given the following instruction to the appellant at the time the verdict was rendered:



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.

(R. 14). Thus, pursuant to Rule 65B(i), the court correctly determined that the appellant was not prejudiced by the error of not reaffirming the instruction at sentencing.

In State v. Johnson, supra, this Court indicated that Rule 65B(i) relief may be appropriate where:

within the statutory period for appeal [defendant] . . . requested counsel to take an appeal and counsel gave defendant reason to believe that he would but then failed to do so. . . .

Id. at 38. Another reason to grant relief under Rule 65B(i) would exist if the appellant had never been informed of his right to appeal. However, in this case the appellant could not and, in fact, failed to indicate in any way in his post-conviction Rule 65B(i) proceeding that he was denied his right to appeal solely because the judge failed to repeat the advice which appellant had already heard.

The cases cited by the appellant support post-conviction relief where the defendant was never informed of his right to appeal, or learned of his right from outside sources. Here, the purpose behind the statute requiring that an accused be informed of his right to appeal was accomplished, and the trial court in the Rule 65B(i) proceeding correctly determined that no prejudice or denial of appellant's rights occurred.

If this Court determines that the appellant is entitled to relief, the proper action at this point would be to remand the case to the district court for an evidentiary hearing to determine whether any prejudice substantially affecting the appellant's rights actually occurred. Appellant introduced no evidence in the Rule 65B(i) proceeding to establish whether he attempted to take an appeal or to indicate he would have appealed had he known of his right. Rather, the transcript shows appellant relied solely on the legal argument that failure to affirm the information at sentencing resulted in a denial of his rights.

This Court, in Bogges v. Morris, Utah, 635 P.2d 39, 41 (1981), recognized that:

The ends of justice demand that a convicted defendant have an opportunity to appeal in a timely fashion, but once the appellate process has concluded, society's interest in the effectiveness and integrity of the criminal justice system requires a finality of judgment that should severely limit repetitive appeals and collateral attacks.  
(footnote omitted)

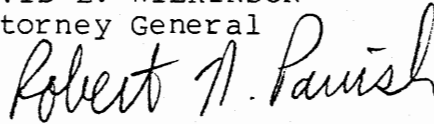
Because the appellant failed to, in any way, indicate that harm occurred to him as a result of the error by the trial court, this Court should put an end to the appellate process to protect the integrity of the criminal justice system.

CONCLUSION

The Sixth Judicial District Court correctly denied appellant's Rule 65B(i) request for post-conviction relief and such denial should be affirmed. In the alternative, this case should be remanded to the district court for an evidentiary hearing to determine if the appellant was in any way denied his right to appeal.

Respectfully submitted this 22nd day of March,  
1982.

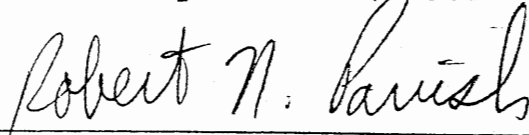
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Arthur L. Keesler, Jr., Attorney for Appellant, 60 East 100 South, Suite 201, Provo, Utah, 84601, this 22nd day of March, 1982.



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