1990

State of Utah v. Donald Wayne Brown : Response to Petition for Rehearing

Utah Supreme Court

Nathan Hult; Attorney for Appellant.
R. Paul Van Dam; Attorney General; David B. Thompson; Assistant Attorney General; Attorneys for Appellee.

BRIEF
DOCKET NO. 900148 IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
Plaintiff-Appellee,	*	Case No. 900148
vs.	*	
DONALD WAYNE BROWN,	*	Category No. 2
Defendant-Appellant.	*	

RESPONSE TO PETITION FOR REHEARING

NATHAN HULT (4704)
110 North 100 East
P.O. Box 543
Logan, UT 84323-0543

Attorney for Appellant

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Appellee

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Attorney for Appellant

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Appellee

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RESPONSE TO PETITION FOR REHEARING

DEFENDANT'S RESTATEMENT OF ISSUES

1. Is the request by the State for an evidentiary hearing on the issue of "Waiver" irrelevant, given the Court's rule of per se reversal wherever such dual representation is undertaken?

2. Did the Court properly reach the "plain error" question when it was raised in response to the State's argument of "waiver"?

STATEMENT OF THE CASE AND OF FACTS

Defendant accepts the statement contained in State's Petition for Rehearing.

SUMMARY OF ARGUMENT

1. The State waived the issue of whether or not the Defendant waived the conflict of his court-appointed part-time prosecutor attorney by not raising it at an earlier time in these lengthy proceedings. More importantly, the "inherent" conflict of such dual representation including its subconscious effects on the Defendant's attorney, the perception of impropriety, and its affect

on the public's confidence in the criminal justice system make a case-by-case analysis of waiver futile and irrelevant.

2. The State is seeking to have the Court circumscribe its discretion in its application of the plain error doctrine by requiring a Defendant to anticipate a State's affirmative response of "waiver." To so bind and limits its discretion would substantially defeat the purpose of the plain error doctrine.

INTRODUCTION

The Court has not overlooked relevant facts or authority, nor misapplied the law. Point 1 of the State seeks to avoid, through the back door, a per se rule announced by the court in this case. Point II of the State seeks to substantially decrease the discretion of this Court in its application of the plain error rule.

POINT I

BECAUSE THE CONFLICT OF A PART-TIME CITY PROSECUTOR IN REPRESENTING A DEFENDANT IS "INHERENT," THE STATE'S WAIVER ARGUMENT IS IRRELEVANT.

The State has produce an affidavit of Thomas Willmore, the part-time prosecutor who represented the Defendant at trial, which indicates that in November, 1989 (approximately 3 months prior to trial in February, 1990), Mr. Willmore advised the Defendant that he was a prosecutor for the City of Tremonton. The State, contending that this is not a fact it is seeking to establish, nevertheless requests an evidentiary hearing to establish this fact. Implicit in its request is the argument that if Mr. Willmore

had ever informed the Defendant of his status, the Defendant waived the conflict by not bringing it to the trial court's attention.

The Court correctly stated that "there is no evidence in the record that Brown knew of Willmore's status as a city prosecutor." (Brown, slip op. at 7.) The State had ample opportunity to raise this issue in appeal and declined to do so. Neither in the Brief of Appellee nor in subsequent proceedings including Appellant's Motion to Supplement the Record and the hearing on the Court's Notice Of Opportunity To Be Heard on the issue of judicial notice of Thomas Willmore's employment as a city prosecutor did the State propose that a waiver had occurred. The State did not object to the Court's proposal of judicial notice making it clear, however, that it was asking the Court to follow the dissent in People v. Rhodes, 115 Cal. Rptr. 235, 524 P.2d 3663 (1974) in requiring the Defendant to demonstrate "actual prejudice" rather than follow the majority analysis finding "inherent prejudice." (State's Supplemental Memorandum on Judicial Notice Issue, pp. 2, 3). The State has waived its "waiver" issue by not having raised it at any earlier point in the extended proceedings on the "conflict" issue in this appeal.

More importantly, however, the State's argument of waiver and request for an evidentiary hearing to establish such waiver is not congruent with the court's ruling of an "inherent conflict."

An analysis of the Court's opinion readily demonstrates that the conflict is not and should not be waivable. The conflict pertains not only to readily observable and obvious factors that

could afford a Defendant the opportunity to make a "knowing and intelligent" waiver, but also pertains to the very core, "the vital interests of the criminal justice system [that] are jeopardized...." (Brown, slip op. p. 7).

To begin with, we have the divided loyalties of the attorney, a disinclination to vigorously cross-examine law enforcement officers, a hesitancy to attack the constitutionality of laws he is sworn to uphold, and other perhaps unconscious influences caused by the divided loyalty.

The relationship between the Defendant and his advocate can be compromised because of a natural hesitation to confide fully in a prosecutor. This may be experience as no more than a vague uneasy feeling and could not be identified sufficiently for a knowing and intelligent waiver.

Then there is the factor that "dual representation erodes public confidence in the criminal justice system." (Brown, slip op. p. 10). This includes the appearance of impropriety, perception of use of connections and influence, and concern about effect of alienation of law enforcement agencies on future prosecution.

The Court's analysis concludes with a per se rule of reversal in such conflicts rather than a case-by-case inquiry to weigh actual prejudice. The waiver inquiry which the State requests be undertaken in this case invites just such a case-by-case analysis that this Court has rejected. The Court has correctly recognized the fallacy of such an analysis. In the instant case, the State is requesting to make a record of what may have been said, thought,

and understood by Mr. Willmore and the Defendant in 1989, more than three years ago. Even if it were concluded that the Defendant fully understood and appreciated the future impact that the dual representation presented to him and his case (but it is anticipated that the Defendant would say he neither heard nor appreciated the alleged statement), the Defendant could hardly waive the impact on the public's interest in the integrity of the criminal justice system.

The Court's rejection of case-by-case analysis precludes the State's request for an evidentiary hearing.

POINT II

THE COURT PROPERLY ADDRESSED THE DEFENDANT'S "PLAIN ERROR" ARGUMENT.

The State is urging the Court to circumscribe the discretionary authority to avoid injustice under the "plain error" principle which it presently has.

In the instant case, at trial the Defendant made an objection to offered evidence of prior bad acts on the grounds that it was beyond the scope of cross-examination, without also mentioning that it was improper under rules 404 and 405 of the Utah Rules of Evidence. When the latter was raised on appeal as the more accurate and meaningful ground for the objection and error at trial, the State countered with its affirmative defense of a "waiver," thus avoiding any analysis of a rule 404 or 405 error. Defendant then countered the "waiver" argument by asserting "plain error."

The Court has used the "plain error" doctrine up to the present as a discretionary tool "to permit [the court] to avoid injustice." State vs. Eldridge, 773 P.2d 29, ftnt. 8, p. 35 (Utah, 1989). The State is asking the Court to limit its flexibility in using this tool by requesting a rule that a Defendant anticipate a State's "waiver" argument and raise the "plain error" argument in its initial brief.

Under RCP 8 (c), "waiver" is an affirmative defense. A Plaintiff is not obligated to anticipate such a response in its initial pleading. Similarly, while a Defendant-Appellant may at times be able to anticipate such a response by the State, it is certainly not clear that such a response could always be anticipated, and it would be a serious mistake to limit this Court's discretion by denying it the "plain error" tool where the Defendant didn't properly anticipate a "waiver" argument by the State.

The State further argues that the Court's rule that substantive legal issues, such as a state constitutional basis for an alleged error must be raised in the initial brief, should be extended to require that a procedural type issue such as plain error be raised in the initial brief. The two are clearly distinguishable. First, the substantive basis for error does not involve the anticipation of an affirmative avoidance of an issue by the State such as "waiver." Second, an analysis of constitutional law would usually be expected to be more extensive and complex than a "plain error" analysis.

The State cannot assert that it had no opportunity to respond to Defendant's "plain error" argument. Just as it argues that the Defendant could have anticipated its "waiver" argument, the State could have anticipated the "plain error" argument in its Brief of Appellee. In addition, it could have requested leave of court to file a further brief if it felt the issue required written analysis. URAP 24(c). Finally counsel for the State had the opportunity and did in fact argue against application of the "plain error" rule in oral argument. (See Pet. for Rehearing. p. 7).

The "plain error" principle is one that the Court has created to avoid injustice when an otherwise strict application of court rules would result in such injustice. It would be the ultimate irony if this Court were to circumscribe this rule with technical requirements such as that espoused by the State. It would no longer retain the broad discretion inherent to the purpose of the rule.

CONCLUSION

The Court should deny the request for a rehearing. The matter should be immediately remitted to District Court for the new trial ordered in the opinion of November 30, 1992.

RESPECTFULLY SUBMITTED this 25 day of February, 1993.

Nathan Hult
Attorney for Defendant-Appellant

MAILING CERTIFICATE

I hereby give notice that I mailed a copy of the following: RESPONSE TO PETITON FOR REHEARING to the below named individual on the 25 day of February, 1993.

David B. Thompson
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114