

2011

State of Utah v. Adam Palombi : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee

v.

ADAM PALOMBI

Defendant/Appellant

Case No. 20110790-CA

ANDERS BRIEF

Appeal from judgment, sentence and commitment in the Fourth District Court, Utah County, State of Utah, the Honorable David N. Mortensen presiding, on one count of attempted damaging a jail, a class A misdemeanor.

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ANDERS BRIEF

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Ann. § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

After objectively reviewing the record in this case, appointed appellate counsel have concluded that there are no non-frivolous issues that can be raised on appeal, and move to withdraw. Appellate counsel have advised Appellant of this conclusion, and provided Appellant with a copy of this brief.

After giving Appellant time to raise any issues he wished to, Appellant has indicated that he wishes to raise the following claims before this Court:

1. That the damaging jails statute, Utah Code Ann. § 76-8-418, violates the Eighth Amendment to the United States Constitution on its face because it misclassifies damaging jails as a third degree felony level offense, thereby

- providing for maximum penalties which are constitutionally disproportionate to the culpability underlying the crime of damaging a jail;
2. That the damaging jails statute, Utah Code Ann. § 76-8-418, violates the Eighth Amendment to the United States Constitution as applied to Appellant because the statute's classification of attempted damaging a jail as a class A misdemeanor was disproportionate to Appellant's culpability in willfully and intentionally breaking a sprinkler head at the Utah County Jail;
 3. That the factual basis supporting Appellant's guilty plea was insufficient to meet the elements of attempted damaging a jail under Utah Code Ann. § 76-8-418;
 4. That Appellant was justified in committing the crime of damaging a jail under the forcible felony doctrine;
 5. That Appellant's guilty plea was not knowing and voluntary because trial counsel failed to advise Appellant that he would waive all nonjurisdictional defects in his conviction by pleading guilty;
 6. That Appellant's guilty plea was not knowing and voluntary because Appellant was denied access to computer resources at the Utah County Jail that were necessary for Appellant to effectively communicate his desire to withdraw his guilty plea to trial counsel and to the District Court;
 7. That the District Court erred by failing to allow Appellant an adequate opportunity to present mitigating factors at sentencing;
 8. That trial counsel provided ineffective assistance by failing to object to the

District Court's failure to allow Appellant an adequate opportunity to present mitigating factors at sentencing; and

9. That the District Court abused its discretion in sentencing Appellant to 24 months probation, 30 days jail, and a \$740 fine because that sentence was disproportionate to the relatively minor damage Appellant caused to the jail.

After reviewing the above issues, appointed appellate counsel have determined that these issues are also frivolous. Nevertheless, where appointed appellate counsel move to withdraw after having determined that there are no non-frivolous issues that can be raised on appeal, counsel must objectively demonstrate that any potentially meritorious issues raised are actually frivolous. *State v. Wickward*, 2011 UT App 379, ¶ 1, 264 P.3d 781; *see Anders v. California*, 386 U.S. 738 (1967); *State v. Clayton*, 639 P.2d 168 (Utah 1981).

CONTROLLING STATUTORY PROVISIONS

There are no controlling statutory provisions.

STATEMENT OF THE CASE

A. Nature of the Case

Adam Palombi appeals the judgment, sentence and commitment of the Honorable David N. Mortensen, Fourth District Court, after his conviction for attempted damaging a jail, a class A misdemeanor.

B. Trial Court Proceedings and Disposition

Adam Palombi was charged by criminal information filed May 20, 2011 with damaging a jail, a third degree felony, in violation of Utah Code Ann. § 76-8-418. R. 3-

2. The probable cause statement supporting the information alleged that Palombi broke a sprinkler head in his cell at the Utah County Jail on May 12, 2011. R. 3.

At arraignment on May 26, 2011, Palombi pled guilty to attempted damaging a jail, a class A misdemeanor. R. 16-15. At sentencing on August 4, 2011, the District Court placed Palombi on court-supervised probation for 24 months. R. 25. As a condition of probation, the Court ordered Palombi to serve 30 days jail concurrently with any other sentence. R. 26. The Court also ordered Palombi to pay a \$740 fine, and to complete a thinking errors class after his release from jail. R. 25.

Palombi filed a timely notice of appeal on August 30, 2011. R. 29.

STATEMENT OF RELEVANT FACTS

The State recited the following factual basis in support of Palombi's guilty plea at arraignment:

Your Honor on May 12, 2011 the defendant was incarcerated in the Utah County Jail. He intentionally broke a sprinkler head in the jail cell causing damage to the jail.

R. 32:6.

OBJECTIVE REVIEW OF ISSUES RAISED

After objectively reviewing the record in this case, appointed appellate counsel have determined that there are no non-frivolous issues that can be raised on appeal. Counsel have also determined that all nine claims raised by Palombi, outlined above in the "Issues Presented and Standards of Review" section of this brief, are frivolous for the reasons given below.

I. CLAIMS 1-6 ARE BARRED BECAUSE PALOMBI DID NOT MOVE TO WITHDRAW HIS GUILTY PLEA.

Claims 1-6 outlined above allege nonjurisdictional defects in Palombi's underlying conviction. These claims are barred because Palombi entered a guilty plea, and did not file a motion to withdraw his guilty plea.

Utah Code section 77-13-6 requires that a defendant file a motion to withdraw his guilty plea before sentence is announced. *See* Utah Code Ann. § 77-13-6(2)(b) (2012). If the defendant fails to timely file a motion to withdraw his plea, this court lacks jurisdiction to consider any claim except a challenge to the sentence itself.¹ *State v. Clark*, 2011 UT App 344, ¶ 2 n. 1, 263 P.3d 1222; *State v. Navarro*, 2010 UT App 302, ¶ 2, 243 P.3d 519; *State v. Merrill*, 2005 UT 34, ¶¶ 13-20, 114 P.3d 585. This jurisdictional bar is in place even if Appellant's failure to move to withdraw his plea is the result of ineffective assistance of counsel. *State v. Williams*, 2011 UT App 402, ¶ 2, 266 P.3d 196; *State v. Lee*, 2011 UT App 356, ¶ 2, 264 P.3d 239; *State v. Rhinehart*, 2007 UT 61, ¶ 14, 167 P.3d 1046.

Thus, because Palombi failed to timely move to withdraw his plea, this Court does not have jurisdiction to consider claims 1-6. On this basis, appellate counsel have determined that these claims are objectively frivolous.

¹ To the extent that claims 1-2 could be construed as attacks on the constitutionality of Palombi's sentence, these claims are also barred. *See State v. Davie*, 2011 UT App 380, ¶ 22, 264 P.3d 770 (unpreserved challenge to the constitutionality of a sentence as cruel and unusual could not be raised on direct appeal); *State v. Telford*, 2002 UT 51, ¶ 7, 48 P.3d 228 (unpreserved claim that appellant's sentence was unconstitutional under the Eighth Amendment where appellant alleged that the underlying offense was misclassified as a first degree felony was actually an attack on the underlying conviction, and could not be raised under Utah R. Crim. P. 22(e)).

II. CLAIMS 7-8 ARE FRIVOLOUS BECAUSE THEY ARE NOT SUPPORTED IN THE RECORD.

In claims 7-8 outlined above, Palombi alleges that the District Court judge failed to allow Palombi an adequate opportunity to present mitigating factors at sentencing.² "Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed." Utah R. Crim. P. 22(a) (2012); *see State v. Brooks*, 2012 UT App 34, ¶¶ 13-18. After objectively reviewing the record, appellate counsel have determined that claims 7-8 are frivolous because they are not supported in the record.

Palombi and trial counsel both presented mitigating factors at sentencing. Trial counsel argued to the District Court judge that Adult Probation and Parole had misclassified Palombi's criminal history. R. 33:3-4. Trial counsel also argued that Adult Probation and Parole had inappropriately elevated its jail recommendation because Palombi had been disruptive at the Utah County Jail. R. 33:5-6.

After the State responded to counsel's arguments, The District Court judge asked, "Mr. Palombi, is there anything you'd like to tell the court?" R. 33:9. Palombi then argued to the District Court judge that 365 days in jail would be excessive, given that

² Claim 7, which alleges that the District Court failed to allow Palombi an adequate opportunity to present mitigating factors, depends on claim 8, which alleges ineffective assistance of counsel. Since a challenge to Palombi's opportunity to present mitigating factors at sentencing was not preserved at the District Court, this Court could not consider the issue without an allegation of plain error, exceptional circumstances, or ineffective assistance of counsel. *See State v. Munguia*, 2011 UT 5, 253 P.3d 1082; *State v. Johnson*, 2006 UT App 3, ¶ 13, 129 P.3d 282.

Palombi would be required to pay a substantial fee for each day he spent in jail on a misdemeanor conviction. R. 33:9. The District Court judge then interrupted Palombi, and advised that he intended to sentence Palombi to only 30 days jail, and that Palombi would not be charged any fee for these days because he was being separately held on a felony charge. R. 33:9-10.

Palombi then asked, "Could I finish speaking now?" R. 33:9. The District Court judge answered, "Sure. I'm just telling you I don't need to hear why you don't want to spend 365." R. 33:9-10. Palombi responded "All right." R. 33:10.

Palombi then alleged that the cost to the Utah County Jail of fixing the sprinkler head Palombi had broken would be relatively minor, and argued that a \$740 fine would be excessive because it would be disproportionate to Palombi's culpability. R. 33:10. The District Court judge then interrupted Palombi again, and advised that the purpose of the fine was not restitution, but to convey the message that Palombi's conduct in breaking the sprinkler head was unacceptable. R. 33:11.

Palombi answered "All right. And I understand that." R. 33:11. Palombi then argued that he did not have a history of breaking sprinkler heads in jails. R. 33:11. Palombi further argued that some of the jail deputies were treating him poorly, and that conditions at the jail were generally bad. R. 33:11-12. Finally, Palombi argued that he was under a lot of stress because he was facing very serious charges in a separate case. R. 33:12.

After Palombi concluded his argument, the District Court pronounced sentence. R. 33:12-14. Neither Palombi or his counsel objected or in any way alleged that Palombi

had not been given an adequate opportunity to raise mitigating factors. After the District Court judge finished pronouncing sentence, Palombi stated, "So I can appeal that, right?" R. 33:17. The District Court judge responded in the affirmative. R. 33:13-14.

After objectively reviewing these facts, appellate counsel have concluded that Palombi's claim that the District Court judge did not afford an adequate opportunity to present mitigating factors at sentencing is arguably supported by the fact that the District Court judge twice interrupted Palombi while Palombi was presenting mitigating factors. *Cf. Brooks*, 2012 UT App 34 at ¶ 16 (trial court afforded defendant an adequate opportunity to present mitigating factors in part because trial court did not interrupt or cut off defendant's presentation).

However, appellate counsel have determined that, despite this arguable fact, claims 7-8 are objectively frivolous. Although the District Court judge twice interrupted Palombi's presentation, the interruptions appear to have been for clarification, and the judge allowed Palombi to continue after interrupting him until he was finished. The judge did not cut short Palombi's presentation, and there is no indication that Palombi or his counsel attempted to present additional mitigating factors and were denied the opportunity to do so.

In sum, after an objective review of the record, appellate counsel cannot argue in good faith that the District Court judge's two interruptions during Palombi's presentation of mitigating factors give rise to a colorable claim that Palombi was not afforded an adequate opportunity to present mitigating factors at sentencing. For this reason, appellate counsel have determined that claims 7-8 are frivolous.

III. CLAIM 9 IS FRIVOLOUS BECAUSE THE RECORD INDICATES THAT DISTRICT COURT WAS WITHIN ITS DISCRETION IN PRONOUNCING SENTENCE.

Issue 9 outlined above alleges that the District Court abused its discretion in sentencing Palombi to 24 months court probation, 30 days jail, a \$740 fine, and a thinking errors class. Appellate counsel have determined that this issue is also frivolous because the record indicates that the District Court was within its discretion in pronouncing sentence.

"In general, a trial court's sentencing decision will not be overturned unless it exceeds statutory or constitutional limits, the judge failed to consider all legally relevant factors, or the actions of the judge were so inherently unfair as to constitute an abuse of discretion." *State v. Loyo*, 2011 UT App 357, ¶ 2, 264 P.3d 561.

At sentencing, Adult Probation and Parole recommended to the District Court that Palombi serve 365 days in jail, pay a \$740 fine, pay a \$250 recoupment fee, and pay restitution as determined by the Utah County Attorney. R. 27. Palombi argued several mitigating factors, and in particular argued that a \$740 fine would be disproportionate to the relatively minor damage that Palombi caused at the jail. R. 33:10.

After considering argument by trial counsel, the State, and Palombi, the District Court sentenced Palombi to 24 months court supervised probation, 30 days jail, a \$740 fine, and a thinking errors class. R. 33:12-14. The District Court ordered the jail sentence to run concurrently with any other sentence. R. 33:13. The District Court struck the recoupment fee and restitution recommended by Adult Probation and Parole. R. 33:13.

Viewing the record objectively, the District Court's sentence was well below the statutory maximum sentence for a class A misdemeanor, which is 365 days in jail and a \$2,500 fine. Utah Code Ann. §§ 76-3-204 and 76-3-301. The District Court's sentence was also a significant downward departure from the recommendation of Adult Probation and Parole. *See* R. 27. The District Court considered Palombi's argument that a \$740 fine would be disproportionate to the damage caused. R. 33:10. Appellate counsel cannot locate any place in the record that would arguably support a claim that the judge failed to consider all legally relevant factors, or that the judge's actions were inherently unfair.

Appellate counsel also cannot locate in the record any evidence that would arguably support Palombi's contention that the cost of replacing the broken sprinkler head was minor. Furthermore, even if the cost of replacing the sprinkler head were minor, appellate counsel can locate no legal authority that would support Palombi's contention that the trial court abused its discretion by sentencing Palombi to pay a fine that was disproportionate to the cost of the damage Palombi caused, where the fine was well below the statutory limit.

Thus, after having objectively reviewed the record, appellate counsel have concluded that raising a claim that the District Court abused its discretion in sentencing Palombi to 24 months probation, 30 days jail, a \$740 fine, and a thinking errors class would be wholly frivolous.

CONCLUSION

There are no non-frivolous issues that can be raised on appeal, and the issues raised by Appellant are wholly frivolous. Therefore, appointed appellate counsel respectfully move to withdraw. Counsel have advised Appellant that he may supplement this brief with any written responses, which counsel will submit to this Court on Appellant's behalf.

DATED this 21st day of March, 2012.



MARGARET P. LINDSAY
MATTHEW R. MORRISE
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing *Anders* Brief to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 21st day of March, 2012.

