

2000

Utah v. Jose Luis C. Vicente : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 JOSE LUIS C. VICENTE, : Case No. 20000955-CA
 :
 Defendant/Appellant. : Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted possession of a controlled substance with intent to distribute, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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JAN 25 2002

Paulette Stagg
Clerk of the Court

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SUMMARY OF THE ARGUMENT IN REPLY

The state makes no attempt to argue that the sentence in this case was legally imposed. In light of this Court's decision in State v. Wanosik, 2001 UT App 241, there is no question this sentence was imposed illegally and must be vacated.

The state's request that the appeal be dismissed fails. The record does not demonstrate a knowing, intentional and voluntary waiver of the right to appeal. Due process, fairness and the integrity of the criminal justice system require that this case be decided on the merits.

ARGUMENT

POINT I. THE SENTENCE WAS PATENTLY ILLEGAL.

The state makes no attempt to argue that the sentence imposed in this case did not violate Utah R. Crim. P. 22(a) and due process. Given this Court's decision in State v. Wanosik, 2001 Utah App. 241, its treatment of additional defendants raising similar

issues (see e.g. State v. Samora, 2001 UT App 266 (vacating sentence imposed in a similar manner)), and the added fact in this case that Vicente spoke Spanish and there is no record showing that he was informed in Spanish of the sentencing date, there is no question that this sentence was illegally imposed and should be vacated.

POINT II. THE FACT THAT VICENTE HAS NOT BEEN ARRESTED ON THE PENDING BENCH WARRANT AND IS THEREFORE NOT YET SERVING THE ILLEGAL SENTENCE DOES NOT REQUIRE DISMISSAL OF THIS APPEAL.

Despite the fact that there is no question that this sentence was illegally imposed and must be vacated, the state claims that because Vicente "did not appear at sentencing and has not subsequently appeared" (State's brief at 4), this Court should dismiss this appeal. The state's claim fails because, just as Vicente did not knowingly and voluntarily waive his right to presence at sentencing (see Appellant's opening brief at 15-26), he likewise did not knowingly and voluntarily waive his right to appeal. Moreover, because there is no question the sentencing procedure violated due process and Utah R. Crim, 22(a) and it takes a significant amount of time to resolve an appeal, this illegal sentence should be vacated at this juncture rather than requiring Vicente to be held under the unlawful sentence before allowing him to overturn it on appeal.

Article I, Section 12 of the Utah Constitution guarantees a fundamental right to appeal a criminal conviction. That right is "essential to a fair criminal proceeding" and cannot be lightly forfeited. State v. Tuttle, 713 P.2d 703, 704 (Utah 1985). In a case such

as this, where there is no question the sentence was illegally entered, the right to appeal ensures fairness and due process by providing a means to review and vacate the illegal sentence.

In Tuttle, the Court held that "[i]n light of the fundamental nature of the right to appellate review of a criminal conviction and the lack of any sound practical or policy justification for refusing to hear the appeals of escapees after they are returned to custody, we conclude that a criminal appeal dismissed after escape may be reinstated unless the State can show that it has been prejudiced by the defendant's absence and consequent lapse of time." Id. at 705. The rationale for allowing reinstatement of the **appeal** was that "an escape cannot [] be said to be a knowing waiver of appeal rights" Id. at 704. According to Tuttle, the focus is on whether the defendant knowingly and voluntarily waived his right to appeal when he absconded; moreover, Tuttle clearly indicates that escape is not a knowing waiver of the right to appeal.

While Tuttle did not directly overrule Hardy v. Morris, 636 P.2d 473, 474 (Utah 1981), it does call the holding of Hardy into question, particularly in the context of this case. In Hardy, the Court held that an appeal could be dismissed when a defendant escapes. The recognition in Tuttle of the importance of the right to appeal, and the further recognition that escape does not constitute a knowing and voluntary waiver of that right, suggest that the present appeal should not be dismissed simply because Vicente did not appear at sentencing and has not appeared as of this date. Tuttle tells us that a defendant

who escapes does not knowingly and voluntarily waive his right to appeal. In this case where Vicente does not speak English and the record does not indicate that he was informed in Spanish of the sentencing date or otherwise establish that he knowingly and voluntarily waived his right to presence at sentencing, the fact that Vicente has not been arrested on the bench warrant does not amount to a knowing and voluntary waiver of his right to appeal.

In addition, even if Hardy still allows for dismissal of an appeal when a defendant escapes, it would not require dismissal in this case. The holding in Hardy was based on the Court's determination that it would be unfair to allow Hardy to appeal because the state would be unable to enforce any judgment in its favor. Hardy, 636 P.2d at 474 ("the escaped prisoner should not be able to reap the benefit of a decision in his favor when the state could not enforce a decision in its favor") (citation omitted).

By contrast, in the present case, no unfairness exists in allowing the appeal to proceed even though the defendant is still absent. If the state were to win on appeal, it could enforce a favorable ruling just as it could and did without the appeal by proceeding with the sentencing in absentia. In other words, despite Vicente's absence, the state was able to proceed with sentencing and obtain a severe sentence which is currently in place. If the state were to win on appeal and have that sentence affirmed, the state would be in the same position of enforcing the in absentia sentence as it was when the trial court went forward with sentencing; hence, there is no unfairness to the state in proceeding with the

appeal. In fact, unfairness would exist only if the state were permitted to sentence a defendant even though he was absent, and the defendant was then precluded from appealing the illegal sentence because of his absence.

Additionally, given this Court's recent decision in Wanosik and its subsequent rulings in various cases raising similar sentencing issues, it is evident that this sentence was illegally entered and will be vacated. Any concern that proceeding with the appeal would be unfair because the state could not enforce a ruling in its favor is irrelevant in this case where the state will not prevail.

Moreover, Vicente did not escape; instead, he did not appear at a sentencing. While Hardy had an appeal in place and nevertheless chose to leave, thereby arguably abandoning his appeal, Vicente did not know that the case would proceed in his absence and therefore did not knowingly abandon his right to presence at sentencing or his right to appeal. The state has reaped the benefit of sentencing Vicente in absentia; an illegal sentence of one year is in place and will be enforced when Vicente is arrested unless this Court vacates the sentence. It would be fundamentally unfair to allow the state to proceed with sentencing in absentia then refuse to review that sentence where the state has proceeded despite Vicente's absence and benefitted from that absence.

This Court's decision in State v. Moya, 815 P.2d 1312 (Utah App. 1991) also supports Vicente's claim that this appeal should proceed. In Moya, this Court decided the merits of Appellant's claims even though Moya was "a fugitive from the criminal justice

system." Id. at 1318 (Bench, J., dissenting). Although one judge thought the appeal should be dismissed, the majority rejected that notion and decided the appeal on its merits even though Moya had absconded. The fact that the majority considered the issue suggests that (1) review was required to protect the fundamental right to appeal, and (2) Moya's fugitive status did not establish a knowing and voluntary waiver of the right to appeal. Like the present case, the issue raised in Moya went to the heart of whether the sentence was legal, making an appeal essential to a fair proceeding regardless of whether Moya was in custody.

If this Court were to dismiss this appeal, it would create the ultimate unfair paradox: a trial court could illegally sentence a defendant in his absence, but the defendant could not ask a higher court to review the illegality of the sentence because he was absent. In other words, absence from the proceedings would affect the ability to go forward only when proceeding might benefit the defendant. A judge could impose an illegal sentence on an absent defendant without ramifications. Such an approach would severely undermine the integrity of the system.

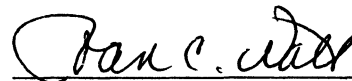
Finally, because appeals often take more than a year, if Vicente's appeal is put on hold until he is arrested, he will receive little or no benefit from a positive result because he will have been held pursuant to the illegal sentence while waiting for his appeal to be resolved. This, too, would undermine the integrity of the system by allowing courts to impose and carry out illegal sentences without review until after the defendant has been

required to serve the sentence. The fundamental nature of the right to appeal and fairness require that this Court review at this point the legality of the sentencing procedure utilized by the trial court in sentencing Vicente. In this case where there is no question that the sentence was illegally imposed and where Vicente has not knowingly and voluntarily waived his right to be present for sentencing, let alone his right to appeal, this Court should deny the state's request that the appeal be dismissed.

CONCLUSION

Appellant/Defendant Jose Luis Vicente respectfully requests that this Court vacate the illegally imposed sentence and remand the case for a full and fair sentencing hearing.

SUBMITTED this 29th day of January, 2002.

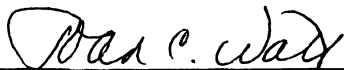


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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 29th day of January, 2002.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of January, 2002.
