

1992

Utah v. Harris : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 920139-CA

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ANTHONY HARRIS,	:	Case No. 920139-CA
Defendant/Appellant.	:	Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Burglary of a Building, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Scott Daniels, Judge, presiding.

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COURT OF APPEALS

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INTRODUCTION

Appellant relies on his opening brief and replies only to the State's claim that a conditional plea could not be used to preserve the severance issue for appeal.

SUMMARY OF THE ARGUMENT

A conditional plea provides an efficient and economical means by which matters can be quickly resolved in the trial court. The need for agreement by the prosecutor, trial judge and defense counsel in order to properly preserve an issue for appeal where a defendant enters a conditional plea ensures that conditional pleas will be properly utilized. The fact that in rare cases the defendant will prevail on appeal and a trial will then be necessary does not detract from the efficiency of this type of procedure. In the majority of cases where the trial judge's ruling is affirmed on appeal, the use of a conditional plea precludes the needless expenditure of resources in the trial court since the conviction remains.

ARGUMENT

POINT. A CONDITIONAL PLEA WAS PROPERLY USED TO PRESERVE THE SEVERANCE ISSUE.

(Reply to State's Point III)

The conditional plea preserving the severance issue was agreed to by the State and judge and was properly preserved for this Court's review. R. 367.¹

Using a conditional plea to preserve a severance issue has the same benefits as using a conditional plea to preserve the denial of a motion to suppress. In most cases where the trial judge allows joinder of two distinct charges, the chances of conviction increase significantly. Requiring a defendant to go to trial to preserve such an issue would be a "pointless and wasteful exercise." State v. Sery, 758 P.2d 935, 941 (Utah App. 1988). While the defendant might choose to go to trial if the cases are tried separately, when tried together, the defendant may well decide to enter a plea as long as his legal issue can still be heard on appeal.

The procedure utilized in this case is a clearly delineated, economical approach to preservation of issues which saves valuable time without jeopardizing a defendant's rights or the

1. The State seems to suggest in fn. 9 of its brief at 40 that defense counsel should have ordered a transcript of the sentencing hearing to establish the conditional nature of the plea. Where the record does not otherwise indicate the conditional nature of the plea, a sentencing transcript is necessary. However, in a case such as this, where the plea statement indicates the conditional nature of the plea, ordering additional transcript seems an unnecessary expense. To the extent this Court believes a transcript is necessary, Appellant requests leave to supplement the record with such transcript after oral argument and an order of this Court.

State's ability to pursue its case. Upon entry of a plea, the parties agreed to preserve an appellate issue rather than go through a trial which would require a needless expenditure of resources. Even a bench trial on stipulated facts would have required significant time to work out the stipulation and present it to the court. Where the State and defendant are in accord that an issue is appealable and should be appealed, a conditional plea, expressly preserving that issue, should be available to expedite the process and clarify that no issue other than the ones expressly reserved by the defendant are appealable.

In State v. Kay, 717 P.2d 1294, 1297 (Utah 1986), the Utah Supreme Court held that acceptance of a conditional plea was not improper. In Kay, the defendant plead guilty on the condition that the trial court not impose the death penalty. The conditional plea in Kay required a trial in the event the condition was not met. On appeal, the Supreme Court determined that Rule 11, Utah Rules of Criminal Procedure did not prohibit a conditional guilty plea. Hence, Utah precedent exists for the acceptance of a plea conditioned on something other than preservation of a suppression issue.

Other jurisdictions allow a conditional plea to preserve appellate issues which do not deal with the suppression of evidence. In Cooksey v. State, 524 P.2d 1251 (Alaska 1974), the Alaska Supreme Court allowed the defendant to use a conditional plea to preserve his speedy trial issue for appellate review.

Although Sery dealt with a conditional plea which preserved the right to appeal an adverse ruling on a motion to suppress, the

opinion does not indicate, as suggested by the State, that "further prosecution would be barred" if the defendant were successful on appeal. In Sery, this Court simply reversed the trial judge's denial of the defendant's motion to suppress and remanded the case to the district court "for further proceedings consistent with this opinion." Sery, 758 P.2d at 447. The agreement among prosecutor, defense counsel and judge in Sery was that in the event the defendant were successful on appeal, he would be permitted to withdraw his guilty plea. See transcript in State v. Sery at 81. In neither the trial court nor this Court was it determined that the State was barred from further prosecution if it lost on appeal. Had the State wanted to pursue the case in Sery, it could have done so absent the suppressed evidence.²

Requiring that the State be barred from further prosecution if it is unsuccessful on appeal in order to allow a conditional plea is an unworkable and needless requirement. The State would essentially have to determine that its case was futile without the contested evidence before any such pleas would be allowed.

The conditional plea would not be available for numerous legal issues, including suppression issues, where the State has remaining evidence. Consider the scenario where, in a homicide case, the State has circumstantial evidence linking the defendant to

2. Appellant recognizes that in many drug cases, the State is left with very little evidence after a suppression motion is granted. However, granting the suppression motion is not equivalent to a dismissal or a bar from further prosecution; the State must still determine whether it has enough evidence or desires to go forward.

the crime but also seized a weapon in a warrantless search of the defendant's home. The defendant decides to enter a conditional plea (with the blessings of the prosecutor and trial judge) after the trial judge refuses to suppress the weapon. Pursuant to the State's argument, the conditional plea would not be permitted because prosecution would not be barred if the defendant were successful on appeal--it would only make it harder to prove the State's case.

Allowing the conditional plea nevertheless serves a useful purpose in such a case. The defendant was willing to forego a trial and the expenditure of resources related thereto as long as a higher court could consider the search issue. If the appellate court affirms, the conviction is in place in a much more economical fashion than if the defendant had been forced to go to trial in order to preserve his issue.

A better approach is to allow a conditional plea where a legal issue has been heard in the trial court and where the trial judge, prosecutor and defense counsel have considered the issue and agreed to allow the defendant to enter a conditional plea preserving that issue for appellate review.

Motions to sever are heard pretrial. The State's argument that cases must go to trial in order to "provide an adequate evidentiary record to judge the impact of the trial court's ruling" disregards the context in which the trial judge's ruling was made. A conditional plea sidesteps the impact of the evidence by offering an agreement that the plea can be withdrawn and the case will proceed if the appellate court determines that the pretrial legal

ruling was improper. Any pretrial ruling can be reviewed in this manner, without requiring a full blown trial.

In other words, the traditional "harmless error" analysis does not give appellate courts the leeway to uphold a conviction where a conditional plea is entered. The parties have already agreed the case will go back for trial if the legal ruling was incorrect.

Consider, again, a conditional plea preserving the right to appeal the fourth amendment issue in the hypothetical homicide case set forth supra at 4-5. The conditional plea agreement would allow withdrawal of the guilty plea if the search violated the fourth amendment, regardless of whether the appellate court believed admission of the weapon would be harmless. A conviction would remain in place, without a need for a trial, if the search was lawful.

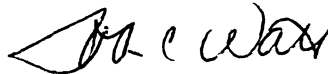
If this Court were to restrict conditional pleas, as suggested by the State, unnecessary expenditure of resources would occur. Allowing conditional pleas where a prosecution will ensue if the defendant is successful on appeal will result in trials only in those rare cases where the defendant is successful on appeal and the State decides to go forward after remand. On the other hand, if this Court were to restrict the use of conditional pleas, all cases which now come to the court as conditional pleas, except those cases where the State would have absolutely no way to proceed if it loses on appeal, will be first tried in the trial courts.

This restriction and expenditure of resources is unnecessary, especially where the parties and judge must agree before the conditional plea can be utilized.

CONCLUSION

Based on the foregoing, Appellant Harris respectfully requests that his convictions be reversed and the case remanded to the trial court for a new trial or dismissal.

SUBMITTED this 30 day of April, 1993.



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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 30 day of April, 1993.



JOAN C. WATT

DELIVERED/MAILED this _____ day of April, 1993.
