

1992

State of Utah v. Siodonne Phathmmavong : Motion and Order to Strike Defendant's Response Brief

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Appellee.

Cleve J. Hatch; Elkins and Associates; Attorney for Appellant.

Recommended Citation

Legal Brief, *State of Utah v. Siodonne Phathmmavong*, No. 920342 (Utah Court of Appeals, 1992).
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UTAH COURT OF APPEALS
BRIEF

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AUG 24 1993

Mary F. Noonan
Mary F. Noonan
Clerk of the Court

CKET NO. 920342CA

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, : MOTION AND ORDER TO
 : STRIKE DEFENDANT'S
 v. : RESPONSE BRIEF
 :
 SIODONNE PHATHMAVONG, :
 :
 Defendant/Appellant. : Case No. 920342-CA

Plaintiff, by and through Kenneth A. Bronston, Assistant Attorney General, hereby moves the above-entitled Court for an order striking defendant's submission of a "Response Brief," effectively a reply brief, in this case.

On this day of August 24, 1993, during oral argument, counsel learned for the first time that defendant had filed a reply brief, raising for the first time on appeal the issue of double jeopardy. This Court should decline to consider this argument for two reasons.

First, defendant's reply brief is untimely under rule 26(a), Utah Rules of Appellate Procedure. The mailing certificate on the reply brief indicates that it was only mailed on August, 16, 1993. At oral argument the Court indicated that it had been filed on August 19. As noted above, counsel only discovered on the day of oral argument that a reply brief had

been filed. Rule 26(a) states: "If a reply is filed, it shall be served and filed within 30 days after the filing and service of appellee's brief, [unless] oral argument is scheduled fewer than 35 days after the filing of appellee's brief" Utah R. App. P. 26(a) (emphasis added). The mailing certificate on the State's responsive brief indicates that it was mailed on March 19, 1993, 153 days before oral argument. Thus, the reply is untimely filed.

Second, perusal of defendant's opening brief does not reveal that the issue of double jeopardy was raised at all. In State v. Brown, 201 Utah Adv. Rep 4 (1992), the court refused to consider an alternative constitutional analysis raised for the first time in a reply brief:

In his response brief, Brown obviously realized his failure to include a state constitutional analysis and asserted this entirely new argument. If we were to review Brown's state constitutional analysis under those circumstances, he would be rewarded for his omission and given the opportunity to present an unopposed analysis. The State would be placed in the difficult position in future cases of either missing the opportunity to brief the state constitutional law issue or having to construct and then rebut the unbriefed issue. We prefer to review state constitutional law issues that both parties have had an opportunity to brief. Brown was aware that a state constitutional law claim might be useful to him when filing his opening brief. Because he did not analyze that issue at that time, we will not review it.

Id. at 10 n.1 (emphasis added). For the same reasons identified in Brown, this Court should not further consider the issue of double jeopardy raised for the first time in defendant's reply

brief.

For all these reasons, the State respectfully requests that defendant's reply brief be stricken and that the Court give no further consideration to matters raised in that brief.

DATED this 24th day of August, 1993.

FILED
Utah Court of Appeals


KENNETH A. BRONSTON
Assistant Attorney General

AUG 25 1993


Mary T. Noonan
Clerk of the Court

ORDER

Based upon the foregoing, and for good cause appearing, the Court finds that the submission of defendant's "Response Brief" is untimely filed under rule 26(a), Utah Rules of Appellate Procedure, and that the "Response Brief" improperly raises new arguments.

IT IS HEREBY ORDERED that defendant's "Response Brief" is stricken.

DATED this 25th day of August, 1993.

FOR THE COURT:



CERTIFICATE OF MAILING

I hereby certify that on the 25th day of August, 1993, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Cleve J. Hatch
Donald E. Elkins
Elkins & Associates
Attorneys at Law
100 South 60 East, Suite 100
Provo, UT 84601

and a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Attorney General's Office to be delivered to the party listed below:

Jan Graham
State Attorney General
Kenneth A. Bronston
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Dated this 25th day of August, 1993.

By *Shari Knighton*
Deputy Clerk