

2001

Jones v. Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID THAYNE JONES,	:	
Petitioner/Appellant,	:	
v.	:	Case No. 20010375-CA
STATE OF UTAH	:	Priority No. 2
Respondent/Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM DENIAL OF PETITION FOR POST-CONVICTION
RELIEF IN THE SECOND JUDICIAL DISTRICT COURT IN AND
FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE W.
BRENT WEST, PRESIDING

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FILED
Utah Court of Appeals

JAN 23 2002

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Petitioner appeals from the denial of a petition for post-conviction relief in connection with a conviction for attempted murder, a second degree felony, in violation of Utah Code Ann. §§ 76-4-101, 76-5-203 (Supp. 1986). This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 2001).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

- I. Did the trial court properly reject petitioner’s evidentiary claims where defendant was aware of the challenged evidence when he entered his guilty plea?¹**

On appeal from a dismissal of a petition for post-conviction relief, this Court reviews findings of fact for clear error and conclusions of law for correctness. *Boudreaux*

¹Petitioner raises evidentiary claims in Points I and II of his brief. *See* Aplt. Br. at 6-11. For ease of discussion, the State addresses these points together.

v State, 1999 UT App 310, ¶ 6, 989 P.2d 1103, *Matthews v Galetka*, 958 P 2d 949, 950 (Utah App 1998)

II. Do defendant's ineffective assistance of counsel claims fail where they were not raised below and, in any case, are not supported by the record?

Ineffective assistance of counsel claims raised for the first time on appeal are reviewed as questions of law. *State v Silva*, 2000 UT App 292, ¶ 12, 13 P.3d 604.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no constitutional provisions, statutes, or rules dispositive of this appeal.

STATEMENT OF THE CASE

On February 20, 1990, petitioner pleaded guilty and mentally ill to attempted murder (R. 448, 1016). He was sentenced to one to fifteen years in prison (R. 1016).

Petitioner's subsequent motion to withdraw his guilty plea was denied (R. 401-14, 449). His appeal from that denial was dismissed by the Utah Supreme Court for failure to prosecute (R. 895)

In July 1998, petitioner filed a motion to correct an illegal sentence, challenging both his plea and his sentence (R. 450). On November 19, 1998, the trial court denied most of petitioner's claims related to his underlying conviction because a rule 22(e) motion presupposes a valid conviction, but deferred ruling on three issues (R. 450-51). Petitioner attempted to appeal the trial court's order but the appeal was dismissed for lack of jurisdiction (1999 UT App 69).

Petitioner next filed a formal complaint and petition for writ of mandamus against the trial judge, Stanton M. Taylor (R. 451). Judge Taylor recused himself, and petitioner's case was referred to Judge W. Brent West (R. 451-52).

After a hearing, the trial court denied petitioner's remaining plea claims (R. 452, 54). However, the court ruled that petitioner's original sentence was illegal because the trial court had failed to hold a hearing before sentencing to determine whether petitioner was then mentally ill (R. 452, 454). Petitioner's subsequent motion to disqualify Judge West was denied and, after a proper hearing, the court re-sentenced petitioner to one to fifteen years in prison (R. 453-55). Petitioner appealed from the trial court's final order (R. 895). This Court affirmed the trial court's decision. *State v. Jones*, 2002 UT App 12.

On June 27, 2000, petitioner filed a petition for writ of habeas corpus (R. 1-9). The State subsequently filed a motion to dismiss petitioner's petition, arguing that "petitioner is currently not eligible for relief under the post-conviction remedies act because some of the issues raised in his petition are also raised on appeal, or could have been raised on appeal" (R. 349-50, 374). The trial court granted the State's motion as to all issues except the issue of prosecutorial misconduct because it "has never been previously [raised]" (R. 833). After an evidentiary hearing, the trial court denied the remainder of petitioner's petition (R. 1019).

Petitioner timely appealed (R. 1025).

STATEMENT OF THE FACTS²

On January 26, 1990, several police officers attempted to stop a station wagon driven by petitioner for going 55 miles per hour in a 40 mile per hour zone (R. 40-41, 46-47). Despite the use of police lights and sirens, petitioner did not stop (R. 40-41, 46-47). Instead, petitioner turned onto another road (R. 40-41, 46-47). At that point, Officer Peterson observed a car driven by Cheryl Bambrough approaching petitioner from the opposite direction (R. 40-41, 46-47). When Ms. Bambrough saw petitioner's car weaving back and forth on the road, she tried to get out of petitioner's way (R. 40-41, 46-47). However, "every evasive move [she] made the suspect would do the same" (R. 40-41, 46-47). Petitioner then hit Ms. Bambrough's car "head on" (R. 40-41, 46-47). At the time of the crash, petitioner was driving about 30 miles per hour (R. 94). He smelled strongly of alcohol (R. 40).

When Officer Peterson later asked petitioner why he did not try to avoid Ms. Bambrough's car, petitioner stated, "Because I thought it was a fuckin cop" (R. 40-41, 46-47). Officer Sesserhood's report indicated that petitioner had told Officer Peterson "that he intentionally tried to crash his vehicle into [Ms. Bambrough] because he believed she was his ex-girlfriend and he wanted to kill her" (R. 91).

²Because petitioner pleaded guilty without a preliminary hearing, the facts of his crime are taken primarily from the police reports filed in connection therewith.

On February 20, 1990, pursuant to a plea agreement, petitioner pleaded guilty and mentally ill to attempted criminal homicide (R. 448, 1016). On June 27, 2000, petitioner filed a petition for writ of habeas corpus, claiming that: (1) the trial court lacked jurisdiction to convict him because “the prosecuting attorney . . . did deliberately conceal evidence” of petitioner’s intoxication at the time of the offense, (2) he “was incompetent at the original proceedings”; and (3) he was denied his Sixth Amendment right to the effective assistance of counsel (R. 1-9). The trial court granted the State’s subsequent motion to dismiss as to all issues except the issue of prosecutorial misconduct because it “has never been previously [raised]” (R. 833). The court then appointed Glen Neeley as petitioner’s counsel (R. 833-34, 886).

At the subsequent evidentiary hearing, petitioner argued that the State had improperly withheld from him a copy of the results of a blood alcohol test requested on the date of the accident (Tr. 4-6). Petitioner claimed that the test results were exculpatory because they supported a voluntary intoxication defense (Tr. 5). Petitioner further argued that the police reports containing his conflicting statements about who he thought was driving the other car, combined with the undisclosed test results, rendered the evidence insufficient to support his guilty plea (R. 5-6).

In addition to himself, petitioner called both the prosecuting attorney, William F. Daines, and his two trial counsel, Bernard Allen and John Caine, as witnesses.

Petitioner began by admitting that he knew he was quite intoxicated on the day of the crash (Tr. 181). Thus, he wasn't surprised to learn he'd been drinking that night (Tr. 182). However, he did not obtain copies of the police reports or the toxicology reports until October 4, 1999 (Tr. 169). In addition, petitioner testified that his defense counsel never discussed with him the possibility of a voluntary intoxication defense (Tr. 170). Rather, he only "stumbled across" that defense after he received the police reports in 1999 (Tr. 183). However, petitioner admitted he was told that if he pleaded guilty and mentally ill to attempted murder, the prosecutor would drop all the other charges and he'd be sent to the State Hospital for some treatment (Tr. 182). "And that's what I wanted to do" (Tr. 183).

The prosecutor, William F. Daines, testified that during the time petitioner's case was pending, the prosecutor's office maintained an open file discovery policy which allowed the petitioner or his counsel to review the prosecutor's files at any time (Tr. 77, 96). He further testified that he was almost positive the police reports were in the prosecutor's file because he would have used them to compile his preliminary hearing witness list (Tr. 81, 97-98). Daines was "certain these police reports were available to the defense" (Tr. 124).

Daines also testified that, although the toxicology report from petitioner's blood alcohol test was not received prior to petitioner's plea and was apparently never placed into petitioner's file, he had received the results verbally on the day of petitioner's

preliminary hearing and had written them on petitioner's case file that same day, February 5, 1990 (Tr. 86, 102). That information was then available to the defense through the State's open file discovery policy (Tr. 106).³ Moreover, allegations that petitioner had been drinking "were everywhere in the file" (Tr. 100).

Bernard Allen testified that he generally took liberal advantage of the prosecutor's open file discovery policy and that he did so in this case (Tr. 40-41). Thus, he was aware of the conflicting police reports when he and petitioner discussed the possibility of a plea (Tr. 65). He remembered that "[t]here was some question about what car [petitioner] was trying to drive into" (Tr. 46, 64). He also remembered talking to the officers about the conflicting statements because that "was a key issue about, you know, whether he had really said that or did he say something like that or" (Tr. 49). At the time, however, "there didn't seem to be any question of the fact that [petitioner] had purposely driven his car into another vehicle" (Tr. 46). There was also no dispute that petitioner's statements to the police indicated he was trying to kill someone (Tr. 46-47). John Caine testified that both police reports seemed familiar to him and that he was aware of the two conflicting reports when he was advising petitioner (Tr. 135-36, 150).

³Generally, a police department will not forward test results to the prosecutor until specifically requested to do so (Tr. 112). Here, the prosecutor may have requested the results to support a DUI charge if it became clear that the case was heading to trial (Tr. 112-13). However, where petitioner was already discussing a plea, the report was no longer necessary (Tr. 109, 112-13).

Concerning the results of petitioner's blood alcohol test, both Allen and Caine testified that they knew before petitioner entered his plea that petitioner was intoxicated at the time of the crime (Tr. 52-54, 59, 67). Allen testified that he knew of the actual test results when he discussed with petitioner his plea and trial options (Tr. 52, 53). He also specifically recalled discussing with petitioner the possibility of an intoxication defense (Tr. 55-56). However, Allen advised petitioner that any such a defense would be difficult in light of the inculpatory statements petitioner had made to the police (Tr. 45-47).

Caine testified that petitioner himself told Caine about his level of intoxication (Tr. 138). In addition, there was evidence of petitioner's intoxication in the initial police reports (Tr. 139). Caine recalled telling petitioner that the State had a strong case and that petitioner would likely be convicted if he went to trial (Tr. 164).

Finally, both Allen and Caine testified that, although petitioner suffered from mental illness, he was nonetheless competent to decide whether to enter a guilty plea. Allen testified that, although petitioner "was troubled and he did goofy things," he "really wasn't psychotic," nor did he "appear to be delusional" (Tr. 44). Rather, "when you talked to him he could be fine. . . . I mean, he felt like he knew what was best and he'd tell you what to do pretty much" (Tr. 44). "[H]e wasn't crazy at all" (Tr. 61). Caine testified that petitioner was a bright person who could converse about the matters that affected him (Tr. 142, 163). Caine "never believed that [petitioner] did something that he wasn't wanting to do at the time" (Tr. 164).

Based on this evidence, the trial court found that the State disclosed all the evidence it had to defense counsel prior to petitioner's plea and that petitioner and his counsel had knowledge of petitioner's intoxication and the conflicting police reports when they discussed the State's plea offer (R 1019). Thus, the trial court denied petitioner's petition (R 1019).

Petitioner timely appealed (R 1025).

SUMMARY OF ARGUMENT

When a criminal defendant pleads guilty, he waives the right to challenge the evidence upon which his original charge was based. This is especially so where the defendant knew about that evidence at the time of his plea. Here, petitioner knew about the conflicting police reports and his intoxication on the date of the accident when he pleaded guilty. Consequently, he waived any challenges to that evidence when he entered his plea.

Petitioner did not raise these specific ineffective assistance claims before the trial court. Thus, these claims are raised for the first time on appeal and should not be considered. In any case, the record does not support them.

ARGUMENT

I. PETITIONER WAIVED ANY EVIDENTIARY CHALLENGES TO HIS GUILT WHERE HE KNEW OF THE EVIDENCE WHEN HE PLEADED GUILTY

Petitioner claims that the trial court should have granted his petition for post-conviction relief because the police reports upon which his attempted murder charge was based “were conflicting, and even hearsay.” Aplt. Br. at 14. Petitioner also claims that the trial court committed “reversible error in ruling that evidence [of his blood alcohol level] was not withheld and was not exculpatory.” Aplt. Br. at 8. Thus, according to petitioner, the evidence “did not support a charge of attempted murder.” Aplt. Br. at 6. However, because petitioner was aware of the evidence he now challenges when he pleaded guilty, his claims fail.

“Under both the Utah and United States Constitutions, the prosecution bears a ‘fundamental’ duty ‘to disclose material, exculpatory evidence to the defense’ in criminal cases.” *State v. Bisner*, 2001 UT 99, ¶ 32, 435 Utah Adv. Rep. 3 (quoting *State v. Bakalov*, 1999 UT 45, ¶ 30, 979 P.2d 799). However, “[e]vidence is not improperly withheld if the defense has knowledge of that evidence.” *State v. Penman*, 964 P.2d 1157, 1164 (Utah App. 1998) (quoting *State v. Jarrell*, 608 P.2d 218, 225 (Utah 1980)). Thus, “courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial.” *Bisner*, 2002 UT 99, at ¶ 33. In such cases, “the general rule applicable in criminal proceedings . . . is that by pleading guilty,

the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects.” *State v. Munson*, 972 P.2d 418, 420-21 (Utah 1998) (quoting *State v. Parsons*, 781 P.2d 1275, 1277 (Utah 1989)); see also *Bentley v. West Valley City*, 2001 UT 23, ¶ 4, 21 P.3d 210; *State v. Beck*, 584 P.2d 870, 872 (Utah 1978) (per curiam). “The sufficiency of the evidence to support a conviction is a nonjurisdictional error.” *Palacios v. State*, 942 S.W.2d 748, 750 (Tex. Ct. App. 1997); see also *People v. Robinson*, 65 Cal.Rptr.2d 406, 409 (App. 1997), review den’d (Oct. 22, 1997).

Here, the trial court found that, at the time petitioner pleaded guilty, (1) “[w]hether or not the actual [toxicology] report was in the [prosecutor’s] file is immaterial, because everyone was aware that the [defendant] was severely intoxicated”; (2) petitioner’s counsel “were aware of petitioner’s level of intoxication” and “of the voluntary intoxication statute”; (3) petitioner’s counsel “were aware of [defendant’s] inconsistent statements concerning his intent”; and (4) petitioner “was advised of his right to accept the plea offer or go to trial” (R. 1018). As set forth above, the evidence supports the trial court’s findings. See Statement of Facts *supra*.

Because petitioner and his counsel were aware of the evidence petitioner now challenges before petitioner pleaded guilty, he waived any claims based on this evidence when he entered his plea. *Bentley*, 2001 UT 23, at ¶ 4; *Munson*, 972 P.2d at 420-21; *Parsons*, 781 P.2d at 1277; *Beck*, 584 P.2d at 872.

Consequently, petitioner's evidentiary claims fail.⁴

II. THE RECORD DOES NOT SUPPORT DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Petitioner claims that his trial counsel were ineffective "where they allowed me to make a plea to a charge which the facts of the case did not support, by allowing conflicting statements of police, and hearsay to go uncorrected, by waiving a preliminary hearing . . . , by not providing a defense of intoxication, or mental illness when they allowed a plea of guilty but mentally ill . . . without having a hearing to determine mental illness." Aplt. Br. at 11.

However, it is not clear from petitioner's petition for post-conviction relief that he ever raised these claims below. Although petitioner makes several conclusory allegations as to his counsel's alleged ineffectiveness (R. 2, 4, 7), his only explicit claim is that "there

⁴Since petitioner was aware of the evidence before he pleaded guilty, this Court need not reach petitioner's challenge to the trial court's finding that the evidence was arguably not exculpatory. *See State v. Penman*, 964 P.2d 1157, 1163 (Utah App. 1998) (rejecting defendant's claim because "regardless of the . . . report's exculpatory or inculpatory nature, it was not improperly withheld by the prosecution because [defendant] and/or his attorney knew or should have known of it"). In any case, the evidence supports the trial court's finding. Petitioner's blood alcohol level was .22 on the date of the accident (R. 57). At the evidentiary hearing, when asked whether that blood alcohol level renders a person "pretty intoxicated," Daines responded that the answer "depends on the person. . . . I can't give you an average" (Tr. 88). Caine testified that "there are a lot of . . . factors that are involved in" how a person responds to alcohol (Tr. 156). "[O]ne person can be .23 and be completely cognizant of what's going on and another one might be passed out" (Tr. 156). *See State v. Johnson*, 784 P.2d 1135, 139 (Utah 1989) (holding that, to succeed with voluntary intoxication defense, defendant must "prove more than that he had been drinking"; he must show "that his mind was affected to such an extent that" he could not form the requisite intent).

exists a genuine conspiracy to cover up this obvious act of fraud [evidenced apparently by the conflicting police reports] of the prosecuting attorney . . . and the Weber County Public Defenders Association” (R. 006). “It is well established that this [C]ourt will not consider an issue on appeal ‘[w]hen there is no indication in the record on appeal that the trial court reached or ruled on an issue.’” *Call v. City of West Jordan*, 788 P.2d 1049, 1052 (Utah App. 1990) (quoting *Broberg v. Hess*, 782 P.2d 198, 201 (Utah App. 1989)).

In any case, petitioner’s claims fail on the merits. To succeed on an ineffective assistance of counsel claim, petitioner must demonstrate both “that counsel’s performance was deficient, in that it fell below an objective standard of reasonable professional judgment,” and “that counsel’s deficient performance was prejudicial—i.e., that it affected the outcome of the case.” *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (holding defendant must “rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy” (citations and internal quotation marks omitted)). “[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.” *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (quoting *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)). Moreover, “[a]ppellants bear the burden of proof with respect to their appeals, including the burdens attending the preservation and presentation of the record.” *Litherland*, 2000 UT 76, at ¶ 17. “The necessary consequence of this burden is that an appellate court will

presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware.” *Id.*

A. Defense counsel was not ineffective in allowing defendant to plead guilty to attempted murder where the State’s evidence supported that plea.

Petitioner pleaded guilty to one count of attempted murder (R. 1016). He now claims his counsel was ineffective because the evidence, which included conflicting police reports, did not support that charge. Aplt. Br. at 19. Petitioner’s claim lacks merit.

The State charged petitioner with attempted murder, alleging that he “intentionally and knowingly attempted to cause the death of C. Bambrough” (R. 33). The State made this charge based on police reports indicating that, on January 26, 1990, petitioner intentionally drove his car head-on into a car driven by Cheryl Bambrough (R. 40-41, 46-47). When Officer Peterson asked petitioner why he did not try to avoid the vehicle, petitioner stated, “Because I thought it was a fuckin cop” (R. 40-41, 46-47). Officer Sesserhood then reported that petitioner had told Officer Peterson “that he intentionally tried to crash his vehicle into [the other] because he believed she was his ex-girlfriend and he wanted to kill her” (R. 91).

Defense counsel correctly concluded that this evidence was sufficient to support an attempted murder charge. Defense counsel Allen recalled that “[t]here was some question about what car [petitioner] was trying to drive into,” i.e., whether he intended to hit a cop or his girlfriend (Tr. 46, 64). However, “there didn’t seem to be any question of

the fact that he had purposely driven his car into another vehicle” (Tr 46) In addition, there was no dispute that petitioner’s statements to the police indicated he intended to kill someone (Tr 46-47)

Because defense counsel reasonably concluded that the evidence supported an attempted murder charge, counsel was not ineffective in allowing petitioner to plead guilty to that charge in return for the dismissal of all other charges and, as petitioner wanted, the possibility of receiving treatment at the State Hospital (R, 1018, Tr 182-83)

Consequently, petitioner’s claim fails

B. Defense counsel made a reasonable strategic decision to waive the preliminary hearing.

Petitioner claims that his counsel was ineffective for “waiving a [preliminary] hearing to examine the offense as a matter of course ” Aplt Br at 19 However, “[i]f the challenged act or omission might be considered sound trial strategy, [this Court] will not find that it demonstrates inadequacy of counsel ”” *State v Parker*, 2000 UT 51, ¶10, 4 P 3d 778 (citation omitted)

John Caine represented petitioner at the preliminary hearing (Tr at 133) During the post-conviction evidentiary hearing, Caine testified that “the only reason to have a prelim, in my view, is if there’s some realistic chance that the case might not be bound over or if a witness doesn’t show up” (Tr 145) Otherwise, “if I have the evidence and it’s obvious to me that there is sufficient evidence to bind it over, unless I see a real need to preserve testimony in some fashion I’ll waive a prelim” (Tr 145) This is

particularly so, Caine explained, when there is conflicting testimony, “unless I believe that it was so conflicting that it might not bind the case over” (Tr. 149). “[T]he one thing I don’t want to do is cross-examine two people on conflicting testimony and then give the State the opportunity to get it clarified before a trial” (Tr. 149).

Here, the evidence was clearly sufficient to support a bind-over. *See* Point II.A. *supra*; *State v. Clark*, 2001 UT 9, ¶¶ 10, 15-16, 20 P.3d 300 (noting State’s burden at this stage is “‘relatively low,’” requiring only production of “believable evidence of all the elements of the crime charged” to “support a reasonable belief that an offense has been committed and that the defendant committed it” (citations and internal quotation marks omitted)). In addition, the evidence contained conflicting testimony that might be useful to the defense at a trial. *See* Point II.A. *supra*. Under these circumstances, defense counsel reasonably concluded that petitioner was best served by waiving a preliminary hearing.

Consequently, petitioner’s claim fails.

C. The evidence refutes petitioner’s claim that defense counsel never discussed with him the possibility of an intoxication defense before he pleaded guilty.

Petitioner claims his counsel was ineffective because they did not discuss with him the possibility of an intoxication defense before advising him to plead guilty to attempted murder. Aplt. Br. at 19. However, the evidence defeats petitioner’s claim.

First, petitioner does not challenge the trial court's findings that "everyone was aware that the petitioner was severely intoxicated" at the time of the crime and that "[p]etitioner's counsel were aware of the voluntary intoxication statute" (R. 1018). *See State v. Andreason*, 2001 UT App 395, ¶ 4 n.3, ___ Utah Adv. Rep. ___ (holding that, to challenge sufficiency of the evidence to support a trial court's findings, defendant must both marshal all the evidence in support of the findings and then demonstrate that such evidence and all reasonable inferences drawn therefrom, is insufficient to support the findings).

Second, Bernard Allen specifically testified that he discussed the possibility of an intoxication defense with petitioner prior to petitioner's entering his plea (Tr. 55-56). The problem, according to Allen, was that petitioner's statements to the police, indicating that he purposefully hit the other car, would make any defense difficult (Tr. 45-47). *Cf. State v. Marvin*, 964 P.2d 313, 316 (Utah App. 1998) (concluding counsel not ineffective for not pursuing voluntary intoxication defense where "there were witnesses who would testify that [defendant] acted in a calm and deliberate manner").

Because the record indicates that petitioner's counsel did in fact discuss with him the possibility of a voluntary intoxication defense before petitioner pleaded guilty, petitioner's claim fails.

D. Defense counsel was not ineffective in allowing petitioner to plead guilty without first requesting a competency hearing where nothing in petitioner's conduct indicated he was incompetent at the time he entered his plea.

Petitioner claims his trial counsel was ineffective for allowing “a mentally incompetent person” to plead guilty. Aplt. Br. at 12, 19. However, nothing in the record supports petitioner's claim.

Trial counsel is not ineffective in allowing a defendant to plead guilty without first requesting a competency hearing when nothing in defendant's conduct indicates that he is incompetent to enter that plea. *See State v. Marvin*, 964 P.2d 313, 316 (Utah App. 1998) (holding counsel not ineffective for not ordering medical examination where, to counsel, “[defendant] appeared to be a ‘pretty savvy individual’”). *Cf. State v. Young*, 780 P.2d 1233, 1238 (Utah 1989) (holding trial court did not err in failing to hold competency hearing where defendant's trial testimony “was clear and coherent” and “[n]o observable, objective facts such as a suicide attempt raised a reasonable doubt as to the defendant's competence”); *see also Jacobs v. State*, 2001 UT 17, ¶ 17, 20 P.3d 382; *York v. Shulsen*, 875 P.2d 590, 597 (Utah App. 1994).

Here, both Bernard Allen and John Caine testified that, although petitioner suffered from mental illness, they considered him competent to guide his defense and decide whether to plead guilty. Allen testified that, although petitioner “was troubled and he did goofy things,” he “really wasn't psychotic,” nor did he “appear to be delusional” (Tr. 44). Rather, “when you talked to him he could be fine. . . . I mean, he felt like he

knew what was best and he'd tell you what to do pretty much" (Tr 44) Petitioner "kind of had ideas about what he thought ought to happen in this case and he just ran the case in a way to try to get to that position" (Tr. 56) "[H]e wasn't crazy at all" (Tr 61).

Caine testified that petitioner was a bright person who could converse about the matters that affected him (Tr 142, 163). Caine "never believed that [petitioner] did something that he wasn't wanting to do at the time" (Tr. 164).

Because petitioner's conduct at the time of his plea raised no doubt as to his competency, trial counsel was not ineffective for not requesting a competency hearing before petitioner entered his plea.

Consequently, petitioner's claim fails.

CONCLUSION

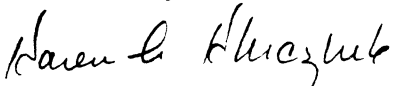
Based on the foregoing, the State asks this Court to affirm petitioner's convictions and sentences.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED 23 January 2002.

MARK L. SHURTLEFF
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Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 23 January 2002, I caused to be mailed, by U S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to David Thayne Jones, 14425 South Bitterbrush Lane, Draper, Utah 84020-0250, Appellant, pro se.

