

1992

State of Utah v. Don Ralph Thorup : Reply Brief

Utah Court of Appeals

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BRIEF

STATE

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DOCKET NO.

92-0404-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff and Appellee, : **APPELLANT'S REPLY BRIEF**

v. :

DON RALPH THORUP : Appellate No. 920404-CA

Defendant and Appellant : Priority 2

**APPEAL FROM THE ORDER OF THE FOURTH DISTRICT COURT
JUDGE GEORGE E. BALLIF PRESIDING**

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**POINT I
PRESENTENCE MOTIONS TO WITHDRAW PLEAS OF GUILTY
ARE TO BE LIBERALLY GRANTED**

The appellee correctly states that the standard of review in this case is whether the Court has abused its discretion in denying the appellant's presentence motion for withdrawal of his guilty pleas. The appellee then incorrectly cites a number of cases to define an abuse of discretion. The cases cited by the appellee do not define an abuse of discretion where the defendant has made a presentence motion to withdraw a guilty plea. In fact, a number of the cases cited by the appellee have nothing to do with guilty pleas at all.

In a number of cases cited by the appellee the defendant's motion to withdraw a guilty plea was made during or after sentencing, not as in the instant case where the motion was made prior to the court's imposition of sentence. State v. Gallegos 748 P.2d 1040 (Utah 1987) is a case where the issue was whether the trial court abused its discretion in denying a defendant's presentence motion to withdraw a plea of guilty. In Gallegos the court stated that in considering a motion to withdraw a guilty plea the trial court is to determine whether the reasons offered for the withdrawal "show a fair and just reason for granting leave to withdraw the plea". Id. at 1042.

The lesson of Gallegos is that a court abuses its discretion in denying a presentence motion to withdraw a guilty plea where the defendant has shown fair and just reason. In the instant case the defendant has shown a fair and just reason why his plea was not voluntary. The defendant's thought process was assaulted by constant pressure from his attorney and then his family, to do what he did not want to do.

POINT II

THE DEFENDANT'S IN-COURT Demeanor DEMONSTRATES THAT HIS PLEA WAS INVOLUNTARY AND COERCED

The appellee cites a number of cases for the proposition that this court should defer to the trial court's judgment. The appellee points out that the trial court had the opportunity to observe the defendant's demeanor at the change of plea hearing. A review of the transcript demonstrates that the defendant's plea of guilty was not voluntary and was at most a momentary lapse of the defendant's otherwise steadfast intention to cling by his plea of not guilty and proceed to trial.

At the hearing on the defendant's motion to withdraw plea of guilty, the defendant testified that at the change of plea hearing "his attorney poked him in the side and said, 'Don, speak up and make the judge think you really want to do this'". This testimony of the defendant as to his uncertainty at the change of plea hearing is made indisputable by the testimony offered by his

counsel. At the hearing the appellee called the defendant's former counsel as a witness. At this hearing the defendant's former counsel testified that at the change of plea hearing

"(a) He had 'strongly urged' the appellant to plead guilty, to the extent of poking Don with his elbow in an attempt to get the appellant to unequivocally plead. T.-100,101; (b) The appellant had always been hesitant to plead guilty, even up to an hour before the hearing was to convene. T-85; (c) The appellant had often spoken of taking the case to trial. T.94.

The testimony of the defendant's former counsel makes clear that even as the defendant appeared before the court and told the court that he understood his rights and decided to plead guilty, his demeanor told another story. As the defendant had to be physically coaxed by and (literally) elbowed in the stomach, his demeanor belied the true involuntary nature of his plea.

POINT III

JUSTICE BEFORE ECONOMY

The appellant cites United States v. Stitzer, 785 F.2d 1506 (11th Cir. 1986) for a number of propositions, one of which is that the trial court's decision should be affirmed in the name of judicial economy. Stitzer, like the instant case, involved a trial court's denial of a motion to withdraw a plea of guilty. That is the only similarity. In Stitzer, a number of defendants were on trial for the inception and/or participation in a cocaine sales

network. Once the trial had commenced, one of the defendants, Baldwin, told his lawyer that he wished to negotiate a plea. Baldwin's lawyer did two things; first, he notified the court of his client's wish to enter a plea. Secondly, Baldwin's attorney informed the court of his own concern that Baldwin had been threatened or coerced by one of the co-defendant's attorneys to enter a plea. At the change of plea hearing the trial judge was concerned, due to Baldwin's counsel's belief that Baldwin had been coerced. To address this concern, the judge asked Baldwin several pointed questions as to whether he had been threatened to enter a plea by one of the attorneys. Each time Baldwin indicated that he had not been threatened. Baldwin's plea was accepted as voluntary and the trial of the other defendants proceeded without Baldwin. Baldwin then filed a presentence motion to withdraw his guilty plea. The motion was denied. The appellate court's affirmation of the trial court's denial of Baldwin's motion to withdraw a guilty plea rests on two premises. First, where there was concern that Baldwin had been threatened, the trial court properly made repeated inquiries to make certain that Baldwin's plea was not the result of a threat. Secondly, the court determined that re-trying Baldwin would be a "prodigal" use of judicial resources.

There are a number of differences between Stitzer and the instant case. Baldwin was repeatedly questioned to make certain he

was acting pursuant to his will. In the instant case, the defendant had to be physically prodded in order to respond to questioning concerning the voluntariness of his plea. Despite the defendant's apparent reluctance, the court made no further inquiries. In light of the fact that Baldwin's plea was made during the trial, and as the trial went on for a month with the remaining defendants, and as the court had found that Baldwin was the central figure in the conspiracy, judicial economy may have been an appropriate consideration. While judicial economy may be an appropriate consideration in some circumstances, it must never overshadow a defendant's precious constitutional rights.

The Gallegos decision makes clear that in Utah, judicial resources takes a backseat to a defendant's constitutional rights:

"The entry of a guilty plea involves the waiver of several important constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Because the entry of such a plea constitutes such a waiver, and because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted." Id. at 1042.

The Gallegos decision is consistent with decisions rendered by courts of sister states. For example, in State v. Johnson, 816 P.2d 364 (Idaho App. 1991), the court stated:

"...relief will be granted absent a strong showing of prejudice by the state". Id. at 367.

State v. Dockery, 821 P.2d 188 (Ariz. App. 1991) where the court stated that a withdrawal of the rule interpreting a withdrawal of a guilty plea is to be:

"liberally interpreted, and doubts are to be resolved in favor of allowing withdraw of plea". Id. at 189.

Bigpond v. State, Okl.Cr., 463 P.2d 989 in which the court stated

"The law favors the trial of criminal cases on the merits". Id. at 989.

State v. McAllister, 96 Mont. 348, 30 P.2d 821 in which the court stated:

"If there is any doubt that the plea is not voluntary, the doubt should be resolved in his favor. On application to change of plea, all doubts should be resolved in favor of a trial on the merits."

POINT IV

DISTINCTIVE DIFFERENCES

There are other cases cited in appellee's brief that are so different than the case at hand that they have no precedential value. Appellee contends that in State v. Saunders, 699 P.2d 738 (Utah 1985) "the court considered an argument similar to Thorup's" (Appellee's Brief, p. 11). In Saunders, the defendant contended that a 1977 conviction should not have been considered for the purposes of determining whether the defendant was a habitual

criminal in a subsequent proceeding. The court held that as all procedural requirements were complied with in the 1977 proceeding, there was a presumption that the defendant had understood what he was doing when he pled guilty. Unlike the instant case, the defendant in Saunders never made a motion to withdraw his plea of guilty. The defendant in Saunders did not claim, as does the defendant in the instant case, that the unrelenting pressure of his attorney and his family deprived the defendant of his decision to proceed to trial.

The appellee also claims that the case of United States v. Nigro, 262 F.2d 783 (Ct. App. Third Cir. 1959) presents a similar fact pattern as in the instant case. Not so. In Nigro, the trial court, prior to a change of plea, had been apprised that the defendant was entering his guilty pleas as a matter of convenience. Prior to accepting Nigro's pleas, the trial judge asked additional questions to make certain that Nigro had made a willful decision to plead guilty. In the instant case, there was no heightened inquiry despite the fact that the defendant's demeanor in court warranted an additional inquiry.

CONCLUSION

The trial court abused its discretion in denying defendant Don Thorup's motion to withdraw the pleas of guilty. The defendant had presented a fair and just reason why the pleas should have been

withdrawn. The testimony of the defendant, his family, and his former counsel (called as a witness by the appellee) verify the intense pressure that was brought to bear against the defendant. When his attorney could not convince the defendant to plead guilty, he appealed to the defendant as a friend and religious leader. Despite the defendant's protestations, former counsel persuaded the defendant's family who then brought additional pressure against the defendant. This pressure negated the defendant's ability to stand by his decision to proceed to trial and allow a jury to determine his innocence or guilty.

DATED this 21st day of September, 1992.

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By: Harry Caston
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IN THE UTAH COURT OF APPEALS

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Plaintiff and Appellee, : **CERTIFICATE OF SERVICE**
v. :
DON RALPH THORUP : Appellate No. 920404-CA
Defendant and Appellant : Priority 2

**APPEAL FROM THE ORDER OF THE FOURTH DISTRICT COURT
JUDGE GEORGE E. BALLIF PRESIDING**

I hereby certify that on the 21st day of September, 1992, I hand delivered four copies of Appellant's Reply Brief in the above-entitled matter to the following:

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