

2017

**State of Utah, Plaintiff/Appellee, v. Robert Peter Mendez,
Defendant/Appellant**

Utah Court of Appeals

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JAN 31 2017

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's comments made at sentencing indicate a judicial bias that violated the defendant's rights to due process.

Standard of review: Because the issue was not preserved, the defendant asserts that this Court should reach the issue under the exceptional circumstances or plain error standard. "The exceptional circumstances doctrine allows this court to reach an unpreserved issue in cases involving 'rare procedural anomalies.' 'We . . . appl[y] the exception sparingly, reserving it for the most unusual circumstances where our failure to consider an issue that was not properly preserved for appeal would . . . result[] in manifest injustice.'" *State v. Munguia*, 2011 UT 5, 253 P.3d 1082 (quoting *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 23, 94 P.3d 186). "To demonstrate plain error, a defendant must establish that [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." *Id.* at ¶ 12 (quoting *State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346).

This issue was not timely raised in the trial court. Mr. Mendez argues that he is entitled to appellate review based on the doctrine of plain error.

2. Whether Mr. Mendez's trial counsel's failure to instruct him to file a motion to withdraw guilty plea prior to sentencing constituted ineffective assistance of counsel.

Standard of review: A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

"To warrant reversal of a conviction, a defendant alleging ineffective assistance of counsel must establish both 'that counsel's performance was deficient' and that 'the deficient performance prejudiced the defense.'" *Kell v. State*, 2008 UT 62, ¶27, 194 P.3d 913 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *Lafferty v. State*, 2007 UT 73, ¶11, 175 P.3d 530.

This issue was not raised in the trial court and is raised for the first time with this appeal. The Utah Supreme Court has recognized three instances in which an appellate court may address an issue for the first time on appeal. These include where a claim of ineffective assistance of counsel is raised on appeal. See *State v. Weaver*, 2005 UT 49, ¶ 18, 122 P.3d 566.

STATEMENT OF THE CASE

I. Nature of the Case.

This case involves an appeal of certain rulings of the Fifth District Court, the Honorable Judge G. Michael Westfall presiding, and questions whether the trial court's comments at sentencing indicate a judicial bias that violated the defendant's right to due

process and whether the defendant was provided with ineffective assistance of counsel based upon trial counsel's failure to instruct the Mr. Mendez to file a motion to withdraw guilty plea prior to sentencing.

II. Course of Proceedings.

On October 14, 2016, the defendant entered into a plea agreement wherein: (1) the defendant agreed to plead guilty to Forgery, a third degree felony; Possession or Use of a Controlled Substance (Methamphetamine), a class A misdemeanor; and Possession or Use of a Controlled Substance (Marijuana), a class B misdemeanor; (2) the State agreed to dismiss the count of Possession of Drug Paraphernalia, a Class B misdemeanor; (3) the defendant agreed to submit to a Pre-Sentence Investigation with Adult Probation and Parole (AP&P); and (4) the defendant agreed to check in with AP&P upon release, drug test within 24 hours, and complete treatment as approved by AP&P. R. 17-26 and 66-81. On March 30, 2016, the defendant was sentenced. R. 000141-000155. The defendant filed an appeal on April 25, 2016. R. 000051-000054.

III. Disposition in the Trial Court.

The trial court sentenced the defendant as follows: Count 1: Forgery, a third degree felony, serve zero to five years in the Utah State Prison, concurrently with Counts 2 and 3, and pay a fine in the amount of \$500.00, plus a \$43.00 court security fee; Count 2: Possession or Use of a Controlled Substance (methamphetamine), a Class A misdemeanor, serve up to one year in jail, concurrently with Counts 1 and 3, with no fine,

and pay a \$43.00 court security fee; Count 3: Possession or Use of a Controlled Substance (marijuana), a Class B misdemeanor, serve up to six months in jail, concurrently with Counts 1 and 2, with no fine, and pay a \$43.00 court security fee. R. 000154, lines 11 - 23.

IV. Statement of Relevant Facts.

During the sentencing hearing on March 30, 2016, and just prior to entering the defendant's sentence, the trial judge stated, "It kind of makes your argument that you're serious about changing sound a little bit hollow." R. 000153, lines 18-20.

SUMMARY OF ARGUMENTS

ARGUMENT

Pursuant to Utah Code Ann. § 77-13-6(2), and the Court's opinion in *State v. Gailey*, 2016 UT 35, ¶ 37, 122 P.3d 628, the scope of defendant's appeal is substantially limited. Mr. Mendez's argument is based on the assertions that he was not afforded effective assistance of counsel, and that the trial court's comments made at sentencing indicate a judicial bias that violated Mr. Mendez's rights to due process. However, the record indicates that Mr. Mendez failed to motion the trial court to withdraw his guilty plea prior to sentencing. Therefore, after reviewing the record, and discussing the matter with the defendant, counsel has been unable to find any meritorious arguments from the issues raised by defendant, and therefore requests permission to withdraw as counsel pursuant to the Court's ruling in *State v. Clayton*, 630 P.2d 168, (Utah 1981) because

counsel has determined that Mr. Mendez's arguments are wholly frivolous and without merit. Notwithstanding the above, and in accordance with *State v. Clayton*, 630 P.2d 168, (Utah 1981) (following *Anders v. California*, 386 U.S. 738, 744 (1967)), counsel will highlight all the arguments that Mr. Mendez has communicated, which Mr. Mendez believes will support his appeal. Pursuant to the Court's ruling in *State v. Wells*, 2000 UT App 304, 13 P.3d 1056, counsel certifies that counsel has provided this brief to Mr. Mendez and requested him to raise any additional issues so that they may be incorporated herein.

I. THE COMMENTS MADE AT SENTENCING INDICATE A JUDICIAL BIAS.

Mr. Mendez asserts that some of the statements made by the trial court at sentencing indicate a judicial bias based upon race. Mr. Mendez specifically refers to the following statements to support this assertion.

. . . . I have a lot of people who when I release them on circumstances similar to yours, they go out, they get treatment and they show up at sentencing with a certificate saying, "I've completed my outpatient treatment, Judge." I don't have that with you, and I'm really concerned about that. It kind of makes your argument that you're serious about changing sound a little bit hollow.

In addition, we've got this huge criminal record. You know, there reaches a point where the - - society has been patient long enough, and they've worked with you. They've tried to encourage you to behave appropriately.

R. 153, lines 14 - 24. Counsel has been unable to determine, and Mr. Mendez has been unable to articulate, how these statements indicate a judicial bias; however, whether the

trial court's comments indicate a judicial bias that violated the defendant's rights to due process is a moot point if this Court does not have jurisdiction to hear Mr. Mendez's appeal.

Utah Code Ann. § 77-13-6 (2) states:

(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C Utah Rules of Civil Procedure.

Utah Code Ann. § 77-13-6 (2) (2008). This Court has previously found that it lacks jurisdiction to consider challenges to the validity of a guilty plea when no timely motion to withdraw the plea is filed. *See State v. Gailey*, 2016 UT 35, ¶18, 379 P.3d 1278.

Mr. Mendez failed to withdraw his guilty plea prior to sentencing. Therefore, pursuant to the plea withdrawal statute and the Court's ruling in *Gailey*, counsel has determined that Mr. Mendez cannot now challenge the validity of his guilty plea on a direct appeal and "any remaining rights to appeal [would be] necessarily limited to appealing [his] sentence." *See Manning v. State*, 2005 UT 61, ¶ 37, 122 P.3d 628.

Mr. Mendez does not challenge the sentence *per se* (and counsel sees no basis for such challenge), rather Mr. Mendez asserts that the trial court denied him due process of

the law by calling his attempts to obtain treatment “hollow.” Mr. Mendez asserts that the trial court’s statement demonstrates that the trial court maintained some sort of judicial bias against him based upon race. Counsel has been unable to find any instance on the record that would support these claims, and further Mr. Mendez has been unable to specifically point to other statements that would support his claim. Mr. Mendez asserts that he felt that, as the trial court commented at sentencing, he felt that there was a racial bias against him which violated his constitutional rights.

While, “a criminal defendant has a constitutional right to an impartial judge under the Due Process Clause of the Fourteenth Amendment [a]nd the presence of a judge who is not impartial constitutes a structural defect in the trial mechanism that violates the United States Constitution [which would] require reversal,” Mr. Mendez must be able to do more than simply assert a feeling of racial bias. *State v. Munguia*, 2011 UT 5, ¶ 15; 253 P.3d 1082. Mr. Mendez must be able to cite to instances in the record that would demonstrate actual bias and allow the Court to reasonably conclude that the trial court was influenced by an extrajudicial source or prejudice. *See Id.* at ¶ 19.

In *State v. Munguia*, the Utah Supreme Court was asked to determine whether comments made by the trial court at sentencing merited a reversal based on judicial bias. The Court reasoned that “none of [the] comments show that [the trial court’s] ill will toward Mr. Munguia was influenced by an extrajudicial source, and there is more than

enough information in the record to indicate that any bias against Mr. Munguia stemmed from 'occurrences in the proceedings before the judge.'" *Id.*

Here, after examining the record, counsel has determined that the record is devoid of any instances that would support Mr. Mendez's claim that the trial court maintained some sort of extrajudicial bias (based upon race or otherwise); however, the record contains examples of a bias that stemmed from occurrences in the proceedings.

At sentencing the trial court states:

THE COURT: How much treatment did he get?

TRIAL COUNSEL: He's been going to the AA. He's got that substance abuse evaluation.

THE COURT: We're talking clear back in October that he was released.

TRIAL COUNSEL: Correct.

THE COURT: You say on the condition that he would get some treatment, and all he's done between then and now is go to AA and get an evaluation.

TRIAL COUNSEL: A part of that was because of his new charge. He didn't want to spend the money on treatment that he'd have to spend only to risk the - - risk losing that money if he were convicted of that new charge.

THE COURT: That suggests to me that his motivation in getting treatment was not to get treatment.

R. 147, lines 3 - 17.

Well, Mr. Mendez, I am convinced that at some level you have some remorse, and at some level you do want to be better, but what really frustrates me is that sometimes people are released to just see how they're going to do, to see how serious they are about changing their lives. The fact that you were released and then you got an evaluation and here we are, almost - - well, four months later - - almost four months later, and there's been no treatment other than AA.

What that suggests to me is that I'm not dealing with somebody who really wants to change. I'm dealing with somebody who wants to change

because the current circumstances motivate him to give me the impression he wants to change.

R. 153, lines 1 - 12.

The record shows that the trial court was biased against Mr. Mendez because the trial court did not believe that he was actually motivated to seek treatment. It is apparent that the trial court believed that if Mr. Mendez sincerely wanted to seek treatment, he would have done more than attend AA and get an evaluation. Although there is evidence of bias, it is bias that stems from the proceedings and not the extrajudicial bias needed for a reversal. Therefore, counsel has determined that Mr. Mendez's claims regarding racial bias are wholly frivolous, without merit and barred jurisdictionally. Nevertheless, and in accordance with *State v. Clayton*, 630 P.2d 168, (Utah 1981) (following *Anders v. California*, 386 U.S. 738, 744 (1967)), counsel requests that the Court consider Mr. Mendez's claims and reverse and remand.

II. MR. MENDEZ WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Mendez next asserts that trial counsel failed to provide effective assistance of counsel, because trial counsel failed to instruct Mr. Mendez to file a timely motion to withdraw his guilty plea prior to sentencing. A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. "To warrant reversal of a conviction, a defendant alleging ineffective assistance of counsel must establish both 'that counsel's performance was deficient' and

that ‘the deficient performance prejudiced the defense.’” *Kell v. State*, 2008 UT 62, ¶27, 194 P.3d 913 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *Lafferty v. State*, 2007 UT 73, ¶11, 175 P.3d 530.

Mr. Mendez does not claim, and the record is devoid of any instance where, Mr. Mendez asked the trial court or trial counsel about withdrawing his plea prior to sentencing. Rather, the record contains the following:

I understand that if I want to withdraw my guilty plea, I must file a written motion to withdraw my plea before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

R. 24 & 25 (emphasis in original) (Statement of Defendant in Support of Guilty Plea and Certificate of Counsel signed by Mr. Mendez).

“THE COURT: Now, Mr. Mendez, you have the right to file a motion to withdraw your pleas of guilty at any time before sentence is announced.”

R. 80, lines 11 & 12. Therefore, counsel has determined that this argument is without merit and wholly frivolous. Nevertheless, and in accordance with *State v. Clayton*, 630 P.2d 168, (Utah 1981) (following *Anders v. California*, 386 U.S. 738, 744 (1967)), counsel requests that this Court consider Mr. Mendez’s claims and reverse and remand.

Mr. Mendez would also like the Court to consider that Mr. Mendez had two off the record

telephonic conversations with his appointed counsels, one with Mr. Taylor, and the other with Mr. Terry. In each conversation Mr. Mendez expressed concern about filing a motion to withdraw his guilty plea prior to sentencing. In his conversation with Mr. Taylor, Mr. Taylor informed him that he was no longer his attorney due to a conflict of interests. In the conversation with Mr. Terry, Mr. Mendez asserts that Mr. Terry talked him out of filing the motion to withdraw his guilty plea.

CONCLUSION

Based upon the above, the defendant respectfully requests that this Court reverse and remand.

RESPECTFULLY SUBMITTED this day of January, 2017.



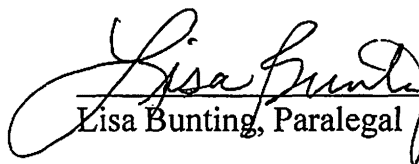
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Certificate of Service

I hereby certify that on this 31 day of January, 2017, I mailed a true and correct copy of the foregoing Appellant's *Anders* Brief to:

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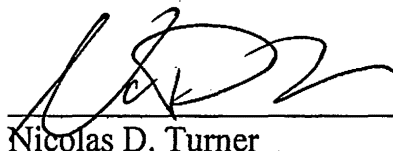
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CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rules of Appellant Procedure 23(f)(1)(C), I hereby certify that the Brief of the Appellant contains 2,827 words, and therefore complies with the type-volume limitation.



Nicolas D. Turner