

2001

State of Utah v. Patti Preece : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

STATE OF UTAH,)	REPLY BRIEF
)	
Plaintiff-Appellee,)	
)	
vs.)	
)	Case No: 20010796-CA
PATTI PREECE,)	Priority : 2
)	
Defendant-Appellant)	<i>all parties listed on cover</i>

POINT I

THE DEFENDANT’S MOTION FOR NEW TRIAL WAS TIMELY FILED

As reflected in the time set forth of State’s Brief, the Defendant was sentenced in open Court and the Defendant’s Motion for New Trial was filed the day following the in court sentencing within the statutory period of time. *Rule 22. Sentence, judgment and commitment* provides:

c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

There is no requirement that the sentence is not effective until the written judgement is signed as contended by the State.

The Court took the Motion under advisement and issued a formal ruling denying the

Motion for New Trial after a transcript was prepared. The State never objected to the time line of the appeal in the lower court.

The applicable rule states:

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made **within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.**

Therefore the State has waived any objection if the Motion for New Trial was not timely filed. Further , the Court considered the Motion as being timely filed and the Court had the power to set the time for filing.

POINT II

THE DEFENDANT DID NOT WAIVE HER OBJECTION TO THE ESTABLISHED VARIANCE BETWEEN THE CHARGING DOCUMENT AND THE PROOF AT TRIAL

In this matter the case proceeded to jury trial and the State presented their evidence which did not conform to the charges set forth in the Information. The error which took place was fundamental error and violated the Defendant's due process rights to trial. The State had the burden of proving the charges in the Information and instead proved a different set of facts. In *State v. Marcum*, 750 P.2d 599 (Utah 1988) the Court stated:

A variance is material if it actually prejudices the accused with respect to a substantial right, or where the information is so defective that it results in a miscarriage of Justice *Watkins v Sheriff, Clark County*, 87 Nev 233, 236, 484 P 2d 1086, 1088 (1971) Where there has been a material variance, relief should be granted on appeal However, if a defendant's substantial rights are not prejudiced, a variance in the evidence from the date alleged in the information is not grounds for reversal so long as the evidence supports a conviction for the offense within the statute of limitations *State v. White*, 1 Kan App 2d 452, 571 P 2d 6 (1977), *State v. Sisson*, 217 Kan 475, 536 P 2d 1369 (1975)

The burden was on the State to file a Motion to Amend prior to the trial or at the close of the State's evidence and to prove the variance which the State acknowledges is not prejudicial. The State failed to do that and a continuance of a jury trial was not an appropriate remedy at the time of the Motion was made by the Defendant.

POINT III

THE DEFENDANT HAS MARSHALLED THE EVIDENCE IN THE STATEMENT OF FACTS

In the Statement of Facts the Defendant went through each and every material point of evidence in an objective fashion in order that this Court can review the Statement of Facts to determine the evidence. In the Brief before the Court the Defendant has therefore "marshalled" the evidence by setting forth all of the evidence in the Statement of Facts and arguing the point in the Brief.

The State always argues that there is no marshaling of the evidence and there must be some reasonable restriction on this argument, otherwise, the entire case would have to be retried and less than fifty pages. Further, the Respondent is wrong at page 13 and 14 of the

Brief when they refer to documents “found in the Defendant’s room or found in Hess’s house”. The evidence in this case was merely that these items were found and there was never any nexus or showing of when and where the day planner was placed in the room in which the State labeled as “Patti Price’s room”

The State has the burden at trial on an appeal of being able to clearly and objectively point out the nexus which they cannot do in this case because of the circumstantial and insufficient nature of the evidence.

POINT IV

IN LIGHT OF THE WEAK CIRCUMSTANTIAL EVIDENCE THE AFFIDAVIT WARRANTS A NEW TRIAL

The Defendant submits that the evidence which on its face shows that the key witness made substantial misstatements concerning the investigation, may not be sufficient if there was a strong case and clear evidence against the Appellant. However, the evidence here was that the Appellant was never present in the residence for thirty (30) days prior to the time when the police entered the residence and Richard Hess was the only person who could link the evidence to the Appellant.

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.. This duty, enunciated first by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), arises regardless of whether the defense requests

production of the favorable evidence at issue, *United States v. Bagley*, 473 U.S. 667, 682 (1985), since failure to disclose such evidence "violates due process . . . irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Likewise, the duty applies both to substantively exculpatory evidence and to that which may be used for impeachment. *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972)

Therefore, the Appellant submits that the Court must taken into account the weak circumstantial nature of the evidence in ruling on whether or not the material informants Affidavit warrants a new trial.

POINT V
THE ISSUE OF THE SENTENCING SCHEME IS IN THE POWER OF THIS COURT TO CORRECT

The Defendant has raised the legal issue concerning the statutory scheme in the State of Utah in which drug cases has been elevated to the same level as homicide and the most serious crimes of violence in the State of Utah.

In the case of *State v. Gardner*, 947 P.2d 630 (Utah 1997), the Utah Supreme Court conducted an Appellant review of the statutory scheme and found a specific criminal offense unconstitutional. The Defendant submits that when the same analysis is applied to the case before the Court the Court will find that the statutory sentence imposed against the Defendant in unconstitutional.

DATED this 16 day of May 2002.



RANDALL GAITHER
Attorney for the Appellant

MAILING CERTIFICATE

I hereby certify that on the ____ day of _____, 2002, a true and correct copy of the foregoing REPLY BRIEF was mailed First Class, postage prepaid to:

UTAH ATTORNEY GENERAL'S OFFICE
APPELLATE DIVISION
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114

DATED this ____ day of _____, 2002.

CONCLUSIONS AND REQUEST FOR RELIEF

The Appellant, Patti Price, requests the Court issue a remedy and reverse the Order denying the Motion to Dismiss made at the close of the State's case and after trial based upon the substantial and material variance of the facts at trial and the original charges. Secondly, in the alternative the Court should grant the Motion for insufficient evidence based upon the charges before the Court in light of the evidence as specifically set forth in the Statement of Facts.

In conclusion there was a criminal offense committed by the State's primary witness and he attempted to deflect his responsibility upon on Patti Price who may have resided temporary at the address in the past. However, there was no criminal offense on the date charged for which the Court or the jury could find the Defendant guilty. Therefore, justice requires the conviction be set aside.