

2001

Utah v. Garry S. Dupont : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
GARRY S. DUPONT, : Case No. 20010952-CA
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Interfering with Legal Arrest, a Class B misdemeanor, in violation of Utah Code Ann. § 76-8-305 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Paul G Maughan, Judge, presiding.

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Clerk of the Court

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ARGUMENT

ISSUE: THE CONVICTION FOR INTERFERING WITH AN ARREST FAILS FOR INSUFFICIENT EVIDENCE.

A. Dupont Properly Marshaled the Evidence in Challenging the Sufficiency of the Evidence on Appeal.

The State asserts in its brief (“S.B.”) that Appellant Garry S. Dupont (“Dupont”) ignored two facts in contravention of his marshaling requirement on appeal. S.B. 17. The State does not, however, suggest that his appeal should be affirmed for lack of marshaling. S.B. Point I.C; see, e.g., Campbell v. Box Elder Cty. 962 P.2d 806, 808 (Utah App. 1998) (appellant's challenge to factual finding will be rejected for failure to marshal evidence; appellate court assumes evidence supports factual findings in such instances). As discussed below, such a position would be unfounded in this case since Dupont in fact fulfilled the marshaling requirement. See State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065 (citation omitted) (requiring appellant to fully marshal evidence in light favorable to conviction prior to demonstrating insufficiency of evidence on appeal).

Under Utah case law concerning the marshaling requirement, Dupont clearly

satisfied his burden on appeal. For example, in Neely v. Bennett, 2002 UT App 189, 51 P.3d 724, this Court ruled that the appellant did not meet her marshaling requirement because she merely “reargu[ed] the evidence presented at trial that was favorable to her position.” Id. at ¶12. In Heinecke v. Dept. of Commerce, Div. of Occupational and Prof'l Licensing, 810 P.2d 459 (Utah App. 1991), this Court similarly held that the appellant did not meet his marshaling requirement where he “reviewed in minute detail all the evidence before the Nursing Board,” rather than culling out the evidence that supported its findings. Id. at 464; see also West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991) (holding that appellant did not meet marshaling requirement where he only presented a “general catalogue of evidence” rather than facts that “correlate[d]” challenged findings).

Unlike the appellants in Neely, Heinecke, or Majestic, Dupont did not merely reargue his position in marshaling the evidence, nor did he catalogue every speck of evidence presented at trial, leaving it to this Court to discern which facts supported the jury's verdict. Rather, he assiduously noted the points of evidence that supported the verdict, even the damaging facts. See Appellant's Brief (“A.B.”) at 9-10. He marshaled evidence that Officer Wyant gave him the opportunity to take the shaving kit before the search, but that he declined to take the kit. A.B.9; R.286[91,94,130]. He also marshaled evidence that he repeatedly said, “give me my shaving bag, give me my shaving bag,” once it was discovered by Wyant. A.B.9; R.286[94]. He also noted that Wyant testified

he fled the scene and continued to run despite being told to stop and even after the officers gave chase. A.B.10; R.286[95-96]. He additionally marshaled evidence that he ran approximately 30 feet before being apprehended, as well as evidence of questionable statements that he made to the police, including “I give up, I give up” and “you didn't catch the big fish.” A.B.10; R.286[96,102,134,143]. Finally, Dupont noted that he was observed at a known drug house and with a known drug user just prior to the stop. A.B.10; R.286[114,116]. In short, Dupont appropriately played the “devil's advocate” in presenting this Court with evidence supporting the jury's verdict. Neely, 2002 UT App 189 at ¶11. Accordingly, the State's contention that he did not marshal evidence is without merit. S.B.Point I.C.

Moreover, the particular evidence that the State claims Dupont ignored is either exceedingly ambiguous in the record or does not support the jury's verdict for purposes of the marshaling requirement. First, the State posits that Officer Wyant testified during cross-examination and on redirect that he “told” Deputy Knighton to detain Dupont, in addition to motioning to him to do so. S.B.17 n.6; R.286[95,133,142]. Although Wyant did in fact use the word “told” in his testimony, R.286[133,142], the meaning of that word is quite unclear when read in context of his more thorough explanation of the event during direct examination, which was conducted by the prosecutor. There, the prosecutor asked:

What did you do when you saw these things [in the shaving kit]?

Wyant: At that point in time, I remained in the vehicle and motioned out to

Deputy Knighton to detain Mr. Dupont at that point in time.

Prosecutor: Did you tell Deputy Knighton why you wanted him to detain the defendant?

Wyant: No, I did not.

R.286[95].

When Wyant later testifies that he “told” Knighton to detain Dupont, it is in a much more cursory explanation of the events, and neither the prosecutor nor defense counsel is focused on the manner in which he “told” Knighton (i.e. - by motion or actual words). For example, the defense's cross-examination focused on what Dupont knew about whether he was free to leave; it was not an exploration of Wyant's semantics.

R.286[133]. Likewise, the prosecutor's redirect examination of Wyant was focused on the time line of events, and not necessarily on how Wyant “told” Knighton to detain Dupont. R.286[142]. There is no attempt at clarification of this point. Id.

Consequently, Wyant's use of the word “told” is exceedingly vague in the record.

R286[133,142]. It is much more clear, however, that he “motioned” to Knighton.

R.286[95].

The marshaling requirement requires that the appellant refrain from providing a “general catalogue” of evidence presented at trial and burdening this Court with the task of sifting through it to gauge which facts support the jury's verdict. Majestic, 818 P.2d at 1315; see also Heinecke, 810 P.2d at 464. In light of the substantial ambiguity of the evidence and the lack of clarification of Wyant's use of the word “told,” inclusion of that evidence among the marshaled facts would have amounted to the sort of meaningless

“catalogue” of evidence sanctioned in Majestic, 818 P.2d at 1315, and Heinecke, 810 P.2d at 464. Accordingly, the facts marshaled by Dupont in his opening brief are appropriate in that they present this Court with the evidence that supports the jury verdict. A.B.9-10.

The State also points to the fact that Dupont did not marshal his statement, “[t]hose items aren't mine,” uttered when Officer Wyant opened his shaving bag. R.286[132-33]. This evidence was not included among the marshaled facts because it supports Dupont's claim of innocence rather than the jury's verdict that he attempted to interfere with an arrest. Both at trial and in his opening brief, Dupont asserted that he was unaware of the drugs in his shaving kit and that he left the scene of the stop under the understanding that he was free to leave. A.B.Point I.A;286[259-80]. His statement disavowing ownership of the drugs goes directly to his defense. As noted above, appellants are expressly directed by this Court to refrain from “rearguing” their position in carrying out the marshaling requirement. Neely, 2002 UT App 189 at ¶12. Such does not serve the purpose of marshaling, which is to provide this Court with a crystalline set of facts supporting the jury's verdict. See id.

Moreover, like the evidence about whether Wyant “told” Knighton to detain Dupont, there is substantial ambiguity underlying this statement. Contrary to the State's assertion on appeal, it is not clear at all that Dupont made the statement right when Wyant opened the shaving kit. S.B.17. In fact, Wyant could not remember if Dupont

said those words at all. R.286[132]. Even when his recollection was refreshed by the prosecutor using Deputy Knighton's report, Wyant denied hearing the statement, saying:

[The report] says that I continue to process the vehicle. I don't recall Garry saying anything about those items. He may have to Deputy Knighton.

Prosecutor: Okay. You just didn't hear him.

Wyant: No. I didn't hear him.

R.286[133].

Consequently, there is substantial ambiguity surrounding Dupont's statement. Indeed, it is not even clear that the statement was made at all. To the extent that an appellant's marshaling duty is designed to provide this Court with the facts supporting the jury's verdict, and not a “general catalogue” of any and all evidence presented at trial, Dupont appropriately marshaled the evidence in his opening brief to include only the facts that “correlate[d]” the jury's guilty verdict. Majestic, 818 P.2d at 1315.

B. Trial Counsel Was Ineffective in Failing to Challenge the Sufficiency of the Evidence Underlying the Charge of Resisting Arrest.

The State contends that Dupont is arguing that defense counsel was per se ineffective for failing to challenge the sufficiency of the evidence insofar as he relies on State v. Holgate, 2000 UT 74, 10 P.3d 346. S.B.12. Contra ry to the State's assertion, Dupont duly recognizes that under the current law governing ineffective assistance claims an attorney's tactical decision to not challenge the sufficiency of the evidence may not fall below a reasonable standard of professional care in certain circumstances.

A.B.16 (citing Strickland v. Washington, 466 U.S. 668, 688-94 (1984); Taylor v.

Warden, 905 P.2d 277, 282 (Utah 1995)). Accordingly, Dupont recognizes that Holgate's holding is limited to the rule that “a defendant must raise [a challenge to] the sufficiency of the evidence by proper motion or objection to preserve the issue for appeal.” 2000 UT 74 at ¶16. It does not set forth a rule that states failure to do so is ineffective per se where the decision to not make a sufficiency challenge is tactical.

However, the present case does not present a scenario where such an omission can be justified as tactical or, as the State alleges, on the basis that it would have been futile. S.B.13; see State v. Kelley, 2000 UT 41, ¶26, 1 P.3d 546 (“[f]ailure to raise futile objections does not constitute ineffective assistance of counsel”). As noted in Dupont's opening brief, there is no tactical reason for not challenging the sufficiency of the evidence since such motion can readily and quickly be raised before the court and outside the presence of the jury. A.B.16. Moreover, such challenges are fairly routine and do not take a lot of research or preparation beyond familiarizing one's self with the particular facts of the defendant's case and the statutory offense at issue, in this case interfering with arrest. See Utah Code Ann. §76-8-305 (1999).

In addition, a challenge to the sufficiency of the evidence in this case cannot reasonably be viewed as futile considering the ambiguity of the evidence against Dupont. As discussed at length in his opening brief, there is considerable evidence that he was unaware of the drugs found in his shaving kit and that he thought he was free to go when he left the scene. A.B. Point I.A. Moreover, there was very little evidence beyond his

mere presence connecting him to the drug house or the activity of Lund, the known drug suspect who was originally under investigation in this case. Id. Indeed, the paucity of evidence in this case compelled the jury to acquit Dupont of the two felony possession offenses that he was charged with. R.255; see Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2000).

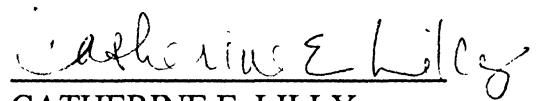
Considering the weak evidence against Dupont and the jury's willingness to acquit on all the drug charges, a challenge to the sufficiency of the evidence for the remaining interfering charge is a reasonable strategy in this case. A reasonable professional in defense counsel's position would have recognized the willingness of the jury to acquit, and consequently would have appealed to the judge in a final effort to plead his client's innocence. The judge may have shared in the jury's willingness to acquit. Coupled with a judge's superior knowledge of the legal aspects of the argument, a reasonable defense attorney would have at least made the argument. Indeed, it is the role of the defense attorney to advocate all reasonable stances at trial, including the innocence of the defendant of a particular charge. Accordingly, defense counsel's failure to challenge the sufficiency of the evidence cannot be justified as tactical and, therefore, within the bounds of reasonable professional advocacy. See Strickland, 466 U.S. at 688-94; Taylor, 905 P.2d at 282.¹

¹ Dupont submits on his opening brief in response to any arguments raised by the State that are not expressly addressed herein.

CONCLUSION

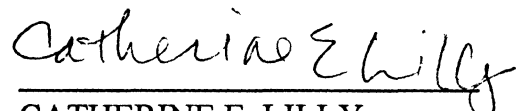
In light of the foregoing and based on the arguments set forth in his opening brief, Dupont respectfully requests this Court to reverse his conviction for interfering with arrest for lack of sufficient evidence supporting the verdict. Alternatively, Dupont requests this Court to reverse his conviction and remand to the trial court on the basis of the prejudicial submission of the flight instruction.

RESPECTFULLY submitted this 9th day of September, 2002.


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CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of September, 2002.


CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's
Office as indicated above this ____ day of September, 2002.
