

2016

State of Utah, Appellee, vs. Robert Morgan Magness, Appellant.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Appellee,

vs.

Case No. 20150417-CA

ROBERT MORGAN MAGNESS,

Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY
HONORABLE ELIZABETH A. HRUBY-MILLS

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT.....	2
POINT I. THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT FINDINGS OF FACT TO ADDRESS THE UNDISPUTED EVIDENCE PROFFERED BY DEFENDANT.....	2
POINT II. THE PROSECUTORIAL MISCONDUCT OF THE DEPUTY DISTRICT ATTORNEY IN MISREPRESENTING THE DESIRES OF THE COMPLAINANT VIOLATED DEFENDANT’S DUE PROCESS RIGHTS AND CAUSED HIM TO FOREGO HIS RIGHT TO PRELIINARY HEARING AND TRIAL BY JURY.....	4
POINT III. ALTERNATIVELY, DEFENDANT IS ENTITLED TO WITHDRAW HIS GUILTY PLEA UNDER SECTION 77-13-6(2)(A) U.C.A. SINCE THE RECORD SHOWS THAT THE PLEA WAS NOT KNOWINGLY OR VOLUNTARILY MADE.....	8
CONCLUSION.....	11

CASES CITED

<u>Advanced Restoration v. Priskos</u> , 126 P.3d 786 (Utah 2005).....	6
<u>Angel Investors</u> , 2009 UT 40, ¶¶ 34-36.....	6
<u>State v. Sloan</u> , 72 P.3d 138 (Utah App. 2003).....	5
<u>State v. Bishop</u> , 753 P.2d 439, 450 (Utah 1988).....	6
<u>Utah v. Randy J. Montoya</u> , 837 P.2d 145 (Utah 1997).....	5

INTRODUCTION

Appellant Robert Magness in his opening Brief of October 29, 2015 raised three specific issues on appeal: (1) the trial court erred in failing to make sufficient findings of fact to address the undisputed evidence proffered by Defendant that was in conflict with the statements of the prosecutor ; (2) the prosecutorial misconduct of the deputy district attorney in misrepresenting the desires of the complainant violated Defendant's due process rights and caused him to forfeit his right to a preliminary hearing and trial by jury; and (3) alternatively, Defendant is entitled to withdraw his guilty plea under Section 77-13-6(2)(A) U.C.A. since the record shows that the plea was not knowingly or voluntarily made. (Appellant's Brief, p. i).

The State, for whatever reason, has chosen to consolidate its arguments solely as to the third issue raised by Appellant thereby causing defendant Magness and this Court to pick and choose portions of the State's Brief that may be pertinent to the first two issues. In order to maintain continuity, defendant Magness will address the original three issues as outlined in his opening Brief and will reply to the State's arguments whenever they can be discerned.

It should be emphasized, once again, however, that all of the relevant factual statements in this appeal are contained solely in the Affidavits submitted by the defendant and by the dialogue during the plea agreement proceeding. *See* all of the

affidavits in Addendum C of the State's Brief). In fact, the very attorney-- Tad May-- who prosecuted this case from the beginning of the alleged assault was unexplainably reassigned from this matter on the very date that the lower court was considering whether the plea agreement should be vacated; thus preventing even Mr. May from being able to explain his prior conduct.

Defendant submits that without any rebuttal evidence or affidavits submitted by the State, it must be assumed as a matter of law that the State had nothing in opposition to offer to contradict the version of facts submitted by Defendant and therefore, this Court must assume all factual statements relating to these issues are true as recited by Defendant.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT FINDINGS OF FACT TO ADDRESS THE UNDISPUTED EVIDENCE PROFFERED BY DEFENDANT.

The State has made no direct attack upon Defendant's argument that a remand for factual findings or an evidentiary hearing should be made as to the direct contradictions between the telephonic statements of the victim versus the in court statement made by prosecutor Tad May. The State attempts to minimize the telephone transcript that was proffered to the lower court on the basis that "the prosecutor merely misunderstood her priorities when he spoke with her at intake."

(State's Brief, p. 22). The State makes no attempt to discuss the subsequent events after the "intake" that occurred months later at the scheduled preliminary hearing. The conflict of facts is striking: the Affidavits of Mr. Long and Mr. Magness unequivocally stated that at the time of the preliminary hearing Mr. May represented to defense counsel and Defendant that the victim did not seek prison time for the defendant. The lower court adopted this position in her ruling by noting that at the time he spoke with the victim she was not seeking prison time. (Ruling and Order, p. 2). On the other hand, the victim in her statement to defendant's investigator emphatically stated that she always sought prison time and had informed the prosecutor that from the moment of the sexual event she wanted to see Defendant go to prison and also to be listed as a sex offender. Obviously, either Mr. May was misrepresenting what he had been told by the victim or the victim was misrepresenting what she had told Mr. May. In either case, however, a material conflict clearly exists which requires a factual hearing and a ruling as to the truthfulness of one side or the other since it relates to both prosecutorial misconduct and the setting aside of the guilty plea.

As noted in the Defendant's opening Brief, appellate law requires that the lower court must assess the credibility of conflicting evidence and make detailed findings as to all relevant facts pursuant to Rule 12(c) of the Utah Rules of

Criminal Procedure. In spite of such a request, the lower court refused to do so. (Defendant's Brief p.21).

However, the issue of a remand for further factual findings or an evidentiary hearing becomes only relevant if this Court rejects Defendant's argument as to prosecutorial misconduct contained in Point II and/or rejects Defendant's Point III that the plea was not made voluntarily or knowingly in light of the misrepresentation of the victim's state of mind. If either of these issues is resolved in Defendant's favor then this remand request by Defendant becomes moot.

POINT II

THE PROSECUTORIAL MISCONDUCT OF THE DEPUTY DISTRICT ATTORNEY MISREPRESENTING THE DESIRES OF THE COMPLAINANT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS AND CAUSED HIM TO FOREGO HIS RIGHT TO PRELIMINARY HEARING AND TRIAL BY JURY.

Defendant in his opening Brief spent six pages extensively arguing that the conduct of the deputy district attorney Tad May during the preliminary hearing date of June 6, 2013 constituted actionable misconduct by misrepresenting the attitude and desires of the complaining witness. (Defendant's Brief pp. 22-27) The State in its Brief makes no reference whatsoever to this event. The Affidavits of Mr. Long and Mr. Magness clearly indicate that deputy district attorney Tad May was so upbeat in his assessment as to the victim's attitude towards leniency that they willingly gave up a scheduled preliminary hearing examination. In other

words, the statements of Mr. May at this proceeding planted the seeds that later grew and blossomed a year later in accepting the plea agreement.

The State has offered no contrary evidence or testimony to contradict the claim that Mr. May informed both the defendant and Mr. Long that the victim did not seek prison incarceration for the defendant and that a favorable plea agreement could probably be reached in the future based upon her attitude. The State has made no attempt to refute the legal authorities cited by Defendant that such misrepresentation violates the duty of a prosecutor to maintain a fair playing field in order to allow defendants to make knowledgeable decisions during the entire course of a legal prosecution.

Moreover, the State has failed in its briefing requirements to answer the contention raised by Defendant in his opening Brief. This Court has held that “an issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and arguments to the reviewing court.” State v. Sloan, 2003 UT App. Sec. 170, ¶ 13, 72 P.3d 138 (Utah App. 2003). Moreover, the argument portion of a brief must contain citations to the record as required by Rule 24 of the Utah Rules of Appellate Procedure. “A party may not rely upon this Court to make his arguments for him.” *Id.*

Similarly, this Court in Utah v. Randy J. Montoya, 837 P.2d 145 (Utah 1997) stated the following:

Under Rule 24(b), an appellee must provide an argument “containing the contentions and reasons of the [appellee] with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. When an appellee fails to comply with this rule, we will decline to address the issue because the “reviewing court is entitled to have the issue clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” State v. Bishop, 753 P.2d 439, 450 (Utah 1988). This Court has routinely failed to consider arguments which are not adequately briefed on appeal. (quoting State v. Yates, 834 P.2d 599 (Utah App. 1992).

Indeed, appellate courts while applying a high standard of briefing on an appellant under Rule 24(a) of the Utah Rules of Appellate Procedure also require an equal burden on an appellee under Rule 24(b). In numerous instances appellees have voided their right to argue against an appellant for inadequate briefing. *See*, Angel Investors, 2009 UT 40, ¶¶ 34-36; Advanced Restoration v. Priskos, 126 P.3d 786 (Utah App. 2005); State v. Roberts, 2015 UT 24 (Utah 2015).

Defendant’s claim of prosecutorial misconduct permeates the entire proceeding and is not focused solely upon the change of plea hearing as contained in the third issue of Defendant’s Brief. Here, the defense was misled on June 6, 2013 by the misrepresentation of district attorney Tad May that the complaining witness did not seek prison and was so optimistic about her attitude that the long-experienced defense attorney Larry Long decided to waive the very critical preliminary hearing that was already prepared for cross examination of the complaining witness and her girlfriend. Obviously the statements made by Mr.

May were very persuasive and created a strong impression that the complaining witness was not vindictive over an incident that occurred while a drunken party was being held.

On January 5, 2015 the defense was ready to file a number of motions that had been postponed for over a year due to various circumstances. It was on this occasion that Mr. May once again approached the defense and offered the plea agreement again based upon his assertion that the complaining witness did not seek a prison incarceration. Thus, it was not only the isolated hearing of January 2015 focused upon by the State in its Brief, but it is also the prior events which occurred in 2013 that convinced two experienced defense attorneys to enter into a plea agreement based upon a high probability that the complaining witness was not vindictive and would not ask for a prison term.

The State in its Brief has completely failed to address the separate issue of prosecutorial misconduct which is separate and apart from the issue relating to the withdrawal of the guilty plea. The failure to offer any contradicting evidence or to even have the deputy district attorney Tad May present during the critical 2015 hearing for questioning by the trial court and examination by defense counsel, should cause this Court to default the State in any argument against the contentions raised by Defendant. This Court should grant Defendant's motion to reinstate the criminal proceeding with the right of a preliminary hearing and the right to

reinstate all of the prior motions and procedures that were terminated by the plea agreement.

POINT III

DEFENDANT IS ENTITLED TO WITHDRAW HIS
GUILTY PLEA UNDER SECTION 77-13-6(2)(A) U.C.A.
SINCE THE RECORD SHOWS THAT THE PLEA WAS
NOT KNOWINGLY OR VOLUNTARILY MADE.

The crux of the State's argument in attempting to refute this point (Appellee's Brief, pp. 13-24) is that it was not important what the victim previously had told the prosecutor as to her desire for the defendant to go to prison since the only crucial time period of her intent was at the future time of sentencing. Thus, the State's argument goes that since the prosecutor did not really know what the victim would desire at the time of sentencing, the defendant made the plea voluntarily and knowingly because he was aware that she could always recommend a prison sentence at the critical time of sentencing.

This argument has two fatal flaws. First, the State has mischaracterized the statements of the prosecutor at the time of the plea agreement. The State proclaims:

At the plea hearing the prosecutor expressly stated that his recommendation for no prison was wholly contingent on MC's wishes at sentencing because he had not talked to her since the initial intake and he was uncertain what her wishes would be by that time. *See R. 364: 3,A.* Indeed the condition itself made it clear that the prosecutor was unsure what MC's sentencing position was and that he was making no promises about what it would be by the time of sentencing. (Appellee's Brief, p. 16-17).

In reality, Mr. May stated to the Court;

When we met initially during the intake, her very first impression of the case was, actually, she was not seeking prison at the time and was fairly amenable to resolving the case. . . . Our recommendation is simply that we would honor the victim's wishes. (Tr. Jan. 5, p. 4).

Thus, the record shows that unlike the representation made by the State, the prosecutor did not inform the court that he had no idea as to what the victim would be seeking at the time of the sentencing. Rather he affirmatively stated that she did not seek prison incarceration from his prior interaction with her.

Also, he did not inform the court as to his interaction with the victim at the time of the preliminary hearing in 2013.

Second, the State notes that contract principles may be useful in assessing whether a guilty plea was knowingly made. (Appellate Brief, pp. 15-16). Defendant concurs with this analysis. A similar example to the instant case will suffice to illustrate why this plea should be withdrawn. Presidential candidate Ricky Ricardo enters into a written contract with former president Fred Murtz that President Murtz will endorse candidate Ricardo for \$500,000 one month prior to the party convention unless candidate Ricardo is indicted by the IRS for tax fraud. The \$500,000 consideration is paid and is nonrefundable. Five weeks before the convention the IRS files an indictment against candidate Ricardo and President Murtz therefore does not endorse him. This scenario would be similar to the

arguments made by the State in its Brief that since neither party knew what was going to occur in the future, each took their chance in making their contract and could not therefore complain as to the future outcome.

Now, assume instead that President Murtz had inside information from his beloved wife IRS Commissioner Ethel Murtz that candidate Ricardo was about to be indicted by the IRS within the next few months prior to the convention. In other words, President Murtz knew that his promise for an endorsement was completely illusory and that he would be able to keep the \$500,000 without an endorsement. Under this scenario the fact that a future event was about to occur is immaterial and the focus instead is what the parties knew at the time that the deal was made.

The arguments made by the State, therefore, fail to recognize that the uncontroverted evidence offered by the defendant --with no opposing affidavits or testimony from any witnesses or prosecutor of the state-- clearly shows that the intention of the victim from the very moment of the event was to imprison the defendant. All of the cases previously cited by Defendant in his opening Brief support the legal principle that when making plea agreements all parties must be dealing with the same information and that no misleading or false relevant information can be used by the State to induce a guilty plea. (Defendant's Brief pp.28-30).

Would candidate Ricky Ricardo have paid the \$500,000 to former President Murtz if he had been informed by Murtz that the IRS was intending to indict him within a few months? Certainly not. Neither would this defendant have plead guilty and waived all of his constitutional rights to a jury trial had he been informed that the victim from the time of the incident always emphatically wanted him to be imprisoned.

In summary, therefore, this case does not involve whether the victim could change her mind at the time of sentencing as argued by the State—a risk clearly assumed by the defendant—but instead involves a misrepresentation of a material fact at the time of the plea agreement which induced the plea agreement to occur in the first place.

For this reason, therefore, and for the reasons stated in the opening Brief of Defendant this plea agreement should be set aside so that a proper trial can take place.

CONCLUSION

The failure of the State to respond in a logical and sequential manner requires a somewhat unusual evaluation of this case. First, if this Court adopts the unopposed arguments made by Defendant as to prosecutorial misconduct contained in Point II of his opening Brief, this matter should be remanded and allowed to

proceed at the preliminary hearing stage with all other motions and defenses reinstated. In such a case, Points I and III become irrelevant.

If this Court decides Point II adversely to Defendant (even though the State has filed no opposition to it), then the Points I and Points III become relevant. If this Court finds that the defendant did not make a knowing and voluntary plea as argued in Point III of Defendant's Brief, then the plea should be vacated and the matter should proceed to trial. In such a case, Point I relating to the remand for findings is again immaterial and becomes moot.

Finally, if this Court rejects both Point II relating to prosecutorial misconduct and Point III relating to the knowing and voluntary plea, then Point I becomes relevant since the lower court must enter findings to resolve the inconsistency of the representations made by district attorney Tad May to the Court versus the statements made by the victim to the defendant's investigator

Defendant requests that this Court carefully examine the contentions of this Defendant in spite of the inarticulate opposition filed by the State.

DATED this 29th day of February, 2016.


Craig S. Cook
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Reply Brief of Appellant to Marion Decker, Assistant Attorney General, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854 this 29th day of February, 2016.


Craig S. Cook