

2003

Utah v. Gordon Lee Walls : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

)

)

Plaintiff/Appellee,

)

vs.

)

GORDON LEE WALLS,

) Case No. 20030139-CA

)

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM A CONVICTION BASED UPON A PLEA OF GUILTY BY THE DEFENDANT FOR MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-5-203 IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH. THE PLEAS OF GUILTY WERE TAKEN BEFORE THE HONORABLE PAMELA G. HEFFERNAN ON THE 26TH DAY OF MARCH 2002.

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Clerk of the Court

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vs.	:	
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Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

ARGUMENT

The State, in its Brief of Appellee, raises several issues, which were not fully addressed by the Appellant in the Appellant's brief. The first issue is that this Court should overturn a line of cases that allows the review of Rule 11 violations under the plain error doctrine. The second issue argues that the Defendant's actions constituted invited error, and therefore should be disallowed. The final claim is that the Defendant's constitutional claim that he was incompetent fails on the grounds that Appellant did not properly marshal the evidence. The Appellant will address each of these issues in the order listed above.

POINT I

THIS COURT SHOULD NOT OVERRULE THE LINE OF CASES ALLOWING APPELLATE REVIEW OF A RULE 11 VIOLATION UNDER THE PLAIN ERROR DOCTRINE

The State has argued in its brief that this Court should overrule a long line of cases that have applied the plain error doctrine in a Rule 11 violation. (See; *State v. Dean* 57 P.2d 1106, (Utah Ct. App. 2002), *State v. Hittle* 47 P.3d 101 (Utah 2003), *State v. Tarnawiecki* 5 P.3d 1222 (Utah 2002), *State v. Pharris*, 798 P.2d 772, (Utah Ct. App. 1990), *State v. Ostler*, 996 P.2d 1065, (Utah Ct. App. 2000), and *State v. Valencia*, 776 P.2d 1332, (Utah Ct. App. 1989)) The State has made this argument cognizant of the doctrine of stare decisis, and the substantial burden that is required in overturning prior precedent. Defendant agrees that the doctrine of stare decisis is applicable and that the burden required for overturning prior precedent is substantial. The Defendant disagrees with the State that this is an appropriate case in which to do so.

The Utah Appellate Courts have long recognized the plain error doctrine, and have applied it in numerous cases and settings. A small sampling of these cases include: *State in re T.M. v. State*, 73 P.3d959, (Utah Ct. App. 2003) (recognizing plain error on parental termination cases); *State v. Dominguez*, 72 P.3d 127, (Utah Ct. App. 2003) (plain error claim available in both hearsay testimony and the State eliciting testimony beyond the scope of a pretrial ruling);

State v. Smith, 65 P.3d 648, (Utah Ct. App. 2003) (plain error argument allowed in a failure to properly instruct a jury issue); *State v. Bloomfield*, 63 P.3d 110 (Utah Ct. App. 2003) (court allowed plain error analysis of a lack of foundation issue); *State v. Shumway*, 63 P.3d 94 (Utah 2002) (plain error doctrine applied to a failure to object to jury instruction); *State v. Samora*, 59 P.3d 604 (Utah Ct. App. 2002) (plain error review in an improper sentence case which resulted in a reversal. This case applied a plain error analysis despite the failure to brief such by appellant counsel); *State v. Bradley*, 57 P.3d 1139 (Utah Ct. App. 2002) (plain error review of prosecutorial misconduct); *State v. Diaz*, 55 P.3d 1131 (Utah Ct. App. 2002) (plain error analysis allowed in an insufficient evidence case); *State v. Calliham*, 55 P.3d 573 (Utah 2002) (plain error review of confrontation clause violation); and *State v. Bluff*, 52 P.3d 1210 (Utah 2002) (plain error review applied to an ineffective assistance of counsel case)

The State is requesting that this Court carve out a limited exception to the plain error doctrine seeking that it not be applied in Rule 11 cases. In doing so the State is asking that this Court ignore the very reason for the plain error doctrine. Utah Appellate Courts have long recognized the necessity of plain error doctrine to prevent a manifest miscarriage of justice due to the occasional inadequacies in trial counsel. In *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989) the Court stated:

The plain error rule permits the appellate court to assure that justice is done, even if counsel fails to act to bring a harmfully erroneous ruling to the attention of the trial court.

The very concept of justice presumes that all individuals be treated equally. This is particularly necessary when those individuals are criminal defendants. The constant striving of courts to meet this concept of justice and equal protection under the law is a basic tenet to the very Constitution of this country. The 14th Amendment to the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (*Emphasis added*)

Likewise, the Constitution of the State of Utah, and Article I Section 2 provides; “All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit”.

While Appellant recognizes that this goal of justice and equal protection may not be universally attainable, this Court should do everything in its power in advancement of this noble objective.

The Merriam Webster's Dictionary definition of justice includes: "the quality of the being just, impartial, or fair"; and “the principal or ideal of just dealing or right action”. This definition is at the heart of the plain error doctrine. This Court has long recognized that occasionally criminal defendants are not adequately

represented. This Court has established the plain error doctrine to rectify those inequitable situations.

Finally, the State proposes that the plain language of Utah Code Ann. §77-13-6 somehow precludes appellate court review of a Rule 11 issue. The language of Utah Code Ann. §77-13-6 is not specialized in its directive that the trial court makes the original review. In many cases where the appellate courts have applied the plain error doctrine, there is a statute that specifically directed the trial court to make the original decision. (See Utah Rules of Evidence, Rule 104(a); Utah Rules of Criminal Procedure Rule 17(6); Utah Rules of Criminal Procedure Rule 19(e); Utah Rules of Criminal Procedure Rule 22(e); Utah Rules of Criminal Procedure Rule 24(a)). Furthermore, a review on appeal, as in the present case, promotes finality in that the defendant would thereafter be precluded from raising that issue under a Rule 65B¹ motion.

The State has cited the case of *State v. Brocksmith*, 888 P.2d 703 (Utah App. 1994) to support their position that the trial court should have the final say regarding the withdrawal the plea. (Appellee Br. 29) The court in *State v. Brocksmith* however noted the Appellant Courts duty to review, and reverse if necessary, an abuse of discretion by the trial court in a Rule 11 case in stating:

A trial court's failure to comply strictly with Rule 11 of the Utah Rules of Criminal Procedure in accepting a guilty plea is good cause,

¹ Rule 65B of the Utah Rules of Civil Procedure

as a matter of law, for the withdrawal of that plea. *State v. Smith*, 812 P.2d 470, 476 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992); *see also State v. Jennings*, 875 P.2d 566, 569 (Utah App. 1994) (holding that trial court has abused discretion as matter of law if it does not permit withdrawal of plea not made in strict compliance with Rule 11). (*State v. Brocksmith* Footnote 1 at 707)

The Appellee claims that this Court should overturn a number of cases that have sought to ensure justice. The Appellee offers little by way of reason for this departure from justice. The Defendant would submit that the interest of justice requires the upholding of this line of case law. By doing so, this Court can bolster public confidence in the court system with little detrimental effect. The result of granting the Appellant's request on appeal does not unjustly free him from all legal obligations. Rather the result is that the matter be sent back to the trial court for a proper and just disposition. That disposition will be either a trial on the merits, or the entry of a plea negotiation wherein the Defendant is fully informed of all of his rights. That disposition will not result in charges being dropped against the Defendant, nor does the Defendant seek that remedy.

Finally, the State asks this Court to reverse the plain error doctrine in Rule 11 cases because it lacks analytical support. The fact that this Court has not made an extensive analytical analysis of the plain error rule as applied to a Rule 11 violation does not mean that this Court has blindly applied the plain error rule in this circumstance. The doctrine of *stare decisis* allows this Court to simply cite a

case, with the understanding that the previous analysis contained in those cited cases would apply to the case at bar. To propose that the Appellate Courts be required to do otherwise would result in appellate decisions hundreds of pages long.

POINT II

DEFENDANT'S RULE 11 CLAIMS ARE NOT INVITED ERROR.

The State's next point is that the Defendant's Rule 11 claims should be rejected as invited error. Although the Appellate Courts have periodically ruled that if the defendant led the court into the error, they are precluded from claiming plain error under the invited error rule. (See *State v. Brown*, 948 P.2d 337, 343 (Utah 1997)) This Court has ruled that Rule 11 must be strictly adhered to, and any failure constitutes a violation. In *State v. Mora*, 2003 UT App 117, ¶ 23 the Court reiterated its long-standing requirement of strict compliance in Rule 11 cases.

This Court in the case of *State v. Corwell* 74 P.3d 1171 (Utah App. 2003) was presented with a case with almost identical facts to the case at bar. In *Corwell*, the court ruled:

The State contends that by failing to include the right to a speedy trial and the provision concerning the limited right to appeal in the plea statement, and by failing to point out the omissions when the trial judge asked "if there was anything either one of you would have me ask your client regarding Rule 11 appointments," Corwell invited error. We disagree. "[I]t is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of

the affidavit." [*State v Gibbons*, 740 P.2d 1309,1313 (Utah 1987)]. The duty to ensure that defendants know and understand the rights they are surrendering when pleading guilty rests not on the parties, but on the trial court. (*State v. Corwell* at 1175)

In the present case the State contends that by stating to the trial court, that the plea hearing colloquy complied with Rule 11, the defendant invited the trial court error. The holding in *State v. Corwell infra* would indicate otherwise. Furthermore the argument of the defendant in his motion to withdraw plea was that the plea was not voluntarily entered. Although the majority of that hearing focused on the defendant's mental capacity to enter the plea, the issue of voluntariness clearly was raised at the trial court level. The fact that defense counsel did not raise the issue of the illusory promise of the plea negotiations is exactly the type of issue this court should here on appeal. If defense counsel was ignorant of the illusory nature of the prosecutors promise to write to the Board of Pardons, then the plain error standard would apply. If defense counsel knew that the prosecutors promise was of no effect, and thereafter allowed his client to enter a plea without informing him of this critical fact, then plain error needs to apply.

POINT III

THE DEFENDANT DID PROPERLY MARSHAL THE EVIDENCE WITH REGARDS TO THE DEFENDANT'S MENTAL STATUS AT THE TIME OF THE ENTRY OF PLEA.

The State contends that the Defendant did not properly marshal the evidence and therefore this Court should summarily reject Defendant's claims. (Appellee Br. 38) The State contends that the Defendant made only two references to the alienist's findings in their brief. (Appellee Br. 39) The State fails to describe to the Court the extensive marshaling of evidence in the statement of facts. At the risk of becoming duplicative the Defendant submits the following as evidence of its attempt marshal evidence. This is found at pages 12 and 13 of Appellant Brief.

Mr. Potter interviewed the defendant and found "Bottom line on it was that seemed to me he was tracking appropriately, that he understood what the charges were, he understood the possible penalties." (R. 183/17) He testified that the defendant told him that he heard voices, which had told him to enter the guilty plea, but Mr. Potter stated, "With the information that he gave me about the way the voices were ostensibly acting at that point in time did not seem consistent with the way that auditory hallucinations work with a person who has schizophrenia." (R. 183/20) Mr. Potter stated that at the time of the interview that he "felt him to be competent" but that he didn't make a specific finding of competence for the period of March 26, 2002. (R. 183/25)

Dr Rick Hawks also evaluated the defendant for mental competency. He testified that it was possible that the defendant was faking mental illness. (R. 183/32) He also found originally that the defendant may have so mental illness, including schizophrenia, but could not make such a finding, or rule such a diagnosis out. (R. 183/32,33) Furthermore, he did not do an analysis of the defendant's mental state as of the date of the plea, and therefore the court continued the hearing, appointed another psychologist, and instructed both to determine the defendant's mental competency as of the date of the plea. (R. 183/63-67)

After additional examinations Dr. Hawks produced an amended report, and testified on Jan28, 2003 that at the time of the plea the defendant "appeared to comprehend and appreciate the charges and allegations against him." (R. 184/10) He demonstrated the ability to disclose to counsel pertinent facts, events, and states of mind," (R. 184/10) and was able to "adequately [comprehend] and [appreciate] the range and nature of possible penalties." (R. 184/10) He understood the adversary nature of the proceedings against him" and manifested appropriate courtroom behavior on March 26 [2002]" (R. 184/10,11) Dr. Hawks testified that the defendant did have a mental

illness in the “schizophrenic spectrum”, “a psychotic thought disorder, perhaps.” (R. 184/15)

Dr. Beverly O’Connor, a neuropsychologist was then called to testify.

She testified that although it was possible the defendant was faking a mental illness, she thought he was trying to cooperate, and not faking a mental illness. (R.184 / 27,33)

The Defendant then made his arguments and condensed this lengthy recitation of facts into two very clear conclusory statements. The defendant has adequately marshaled the evidence, and therefore this Court should address the issue raised.

DATED this ____ day of November, 2003.

RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Reply Brief of Appellant to Karen A. Klucznik, Assistant Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this ____ day of November, 2003.

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