

2003

Justin Brent Peterson v. Sheriff Aaron D. Kennard;
Chief Paul Cunningham; Salt Lake County Jail;
Taylorsville Justice Court : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JUSTIN BRENT PETERSON, :

Petitioner/Appellant :

v. :

SHERIFF AARON D. KENNARD; : Case No. 20030264-CA

CHIEF PAUL CUNNINGHAM; :

SALT LAKE COUNTY JAIL; :

TAYLORSVILLE JUSTICE COURT, :

Respondent/Appellees :

Appellant is not incarcerated

REPLY BRIEF OF APPELLANT

Appeal from a denial of a petition for post-conviction relief. Appellant was convicted of possession of a controlled substance in Taylorsville Justice Court and was sentenced to a suspended jail sentence. He subsequently filed a petition for post-conviction relief in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Sandra Peuler, Judge, presiding, which was denied.

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ARGUMENT

**POINT I. A THOUROUGH AND SEARCHING COLLEGUY IS NECESSARY
TO ESTABLISH A CONSTITUTIONALLY ADEQUATE WAIVER OF THE
RIGHT TO COUNSEL AT EVERY STAGE OF A CRIMINAL PROCEEDING.**

“A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial.” Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (citations omitted). Through case decisions, Utah has prescribed the type of “thorough inquiry of the defendant [necessary] to fulfill [a trial court’s] duty of insuring that the defendant’s waiver of counsel is knowingly, intelligently, and voluntarily made.” State v. Heaton, 958 P.2d 911, 918 (Utah 1998). Despite Appellees’ contentions, Utah’s case decisions addressing the colloquy necessary to obtain an effective waiver of counsel have not been overturned. Appellees’ Response Brief 26.

Appellees contend that the United States Supreme Court's decision in Iowa v. Tovar, 541 U.S. 77 (2004) overrules Utah's case decisions "require[ing] a more searching colloquy than Tovar." Appellee Response Brief 26. However, Tovar expressly limits its holding to the determination of whether the two specific admonitions required by the Iowa Supreme Court were required under the Sixth Amendment and, in fact, actually supports Utah's case decisions requiring a thorough colloquy before a defendant's waiver can be considered constitutionally adequate.

In Tovar, the defendant, in 1996, desired to plead guilty to operating a motor vehicle under the influence of alcohol (OWI). 541 U.S. at 82. The trial court then conducted the guilty plea colloquy as required by the Iowa Rules of Criminal Procedure.

Id. at 83 The trial court engaged in the following colloquy with Tovar:

[I]f Tovar pleaded not guilty, he would be entitled to a speedy and public trial by jury, and would have the right to be represented at that trial by an attorney, who "could help [Tovar] select a jury, question and cross-examine the State's witnesses, present evidence, if any, in [his] behalf, and make arguments to the judge and jury on [his] behalf. By pleading guilty, the court cautioned, "not only [would Tovar] give up [his] right to a trial [of any kind on the charge against him], [he would] give up [his] right to be represented by an attorney at that trial." The court further advised Tovar that, if he entered a guilty plea, he would relinquish the right to remain silent at trial, and the right to the presumption of innocence, and the right to subpoena witnesses and compel their testimony.

Id.

The court then informed Tovar of the maximum and minimum penalties for an OWI conviction. Id. Next, the court explained to Tovar that before it could accept his guilty plea, "the court had to assure itself that Tovar was in fact guilty of the charged offense." Id. The court then informed Tovar of the elements necessary for an OWI

conviction. Id. at 83-84. “[O]bserving that there was ‘a factual basis’ for [the plea]” and that Tovar had made his plea “voluntarily, with a full understanding of [his] rights, [and] . . . of the consequences of [pleading guilty],” the court accepted Tovar’s guilty plea. Id. at 84. As a result of his guilty plea, Tovar was sentenced to two days in jail and a fine. Id. In 1998, Tovar was charged with a second offense of OWI, an aggravated misdemeanor, which he plead guilty to with the assistance of counsel. Id. at 85. Then in 2000, Tovar was charged with his third offense of OWI which was enhanced to a felony based on his prior convictions. Id. With the assistance of counsel, Tovar moved to preclude the use of his 1996 conviction arguing that his waiver of his right to counsel was invalid “because he was never made aware by the court of the dangers and disadvantages of self-representation.” Id.

The trial court and the court of appeals affirmed Tovar’s conviction but the Iowa Supreme Court reversed, holding that in order to obtain a constitutionally valid waiver of the right to counsel at the plea stage:

[T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments.

Id. at 86-87.

Tovar did not receive these specific warnings, therefore, the Iowa Supreme Court held that his waiver was not constitutionally valid. Id. at 86. The United States Supreme

Court, granted certiorari to address “the sole question [of] whether the Sixth Amendment compels the two admonitions here in controversy.” Id. at 91-92.

Iowa argued that its “plea colloquy suffices both to advise a defendant of his right to counsel, and to assure that his guilty plea is informed and voluntary.” Id. at 90.

According to the state’s argument, the plea colloquy “‘makes plain that an attorney’s role would be to challenge the charge or sentence,’ and therefore adequately conveys to the defendant both the utility of counsel and the dangers of self-representation.” Id. The Supreme Court rejected the state’s broad sweeping argument, instead applying a type of totality of the circumstances approach. Id. The Court noted that because other factors exist in this case, it “need not endorse the State’s position that nothing more than the plea colloquy was needed to safeguard Tovar’s right to counsel” for the case to be resolved.

Id.

Instead, the Court evaluated the case as it does all cases regarding the validity of waivers of the right to counsel, basing its decision on “the particular facts and circumstances surrounding [a] case.” Id. at 93. The Court noted that this was the mistake the Iowa court made in “overlook[ing the Court’s] observations that the information a defendant must have to waive counsel intelligently will ‘depend, in each case, upon the particular facts and circumstances surrounding that case.’” Id. at 92 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). While the Court has never “prescribed any formula or script to be read to a defendant who states” that he desires to proceed without the assistance of counsel,

The information a defendant must possess in order to make an intelligent election, [the Supreme Court's] decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

Id. at 88.

Under the particular facts in Tovar, the Court stated “it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar’s decision whether to seek counsel or to represent himself.” Id. at 93. Rather, as suggested by the United States as amicus curiae, such specific warnings “might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one.” Id. While specifically limiting its holding to the determination “that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution,” the Court noted “that States are free to adopt by . . . decision any guides to the acceptance of an uncounseled plea they deem useful.” Id. at 94. Utah case decisions have adopted such guidelines to ensure a defendant is not denied his right to counsel. See State v. Heaton, 958 P.2d 911 (Utah 1998); State v. Pedockie, 2004 UT App 224, 95 P.3d 1182, cert granted 106 P.3d 743.

In 1998, the Utah Supreme Court decided Heaton, where it stated that

before [a] court may permit [a] defendant to proceed without the assistance of counsel, [it] must conduct a thorough inquiry of the defendant to fulfill its duty of insuring that the defendant’s waiver of counsel is knowingly, intelligently, and voluntarily made. In making this determination, the court must advise the defendant of the dangers and disadvantages of self-representation “so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open. . . .’” In addition, the trial

court should (1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to represent himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, . . . and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

Heaton, 958 P.2d at 918 (internal citations omitted).

The Court then recommended that trial courts follow a sixteen-point colloquy “as an effective means by which to determine whether the defendant has validly waived his right to counsel.” Id. at 918 n.5 (citing State v. Frampton, 737 P.2d 183, 187 n.12 (Utah 1987)). Pedockie, a case decided three months after Tovar was issued, reaffirmed the supreme court’s holding in Heaton regarding the validity of a defendant’s waiver of counsel. 2004 UT App 224 at ¶37.

Like the analysis in Tovar, this Court in Pedockie began its inquiry of whether the defendant’s waiver of counsel was knowing and intelligent by looking at “the particular facts and circumstances surrounding [the] case.” Id. at ¶35 (quotations and citations omitted). This Court noted that the supreme court “has repeatedly and strongly recommended, but not mandated, that trial courts address [the dangers and disadvantages of self-representation] using the sixteen-point colloquy set forth in State v. Frampton.” Id. at ¶35 n.6 (citing State v. Bakalov, 1999 UT 45 ¶¶23-24, 979 P.2d 799; Heaton, 958 P.2d at 918 n.5). However, at a minimum, a trial court should engage defendant in a colloquy addressing the three factors in Heaton. Id. at ¶35.

Under the particular facts and circumstances of Peterson's case, this type of thorough inquiry necessary for a knowing and intelligent waiver of the right to counsel did not occur. See Appellant's Opening Brief 25-46. In addition to the omissions outlined in Appellant's Opening Brief, most glaring is the omission of any evidence from either the justice court docket or from the justice court judge's testimony that the elements of the crimes were ever explained by the court to Mr. Peterson or that a factual basis to support his guilty plea was ever established. The waivers signed by Mr. Peterson lack a factual basis for the plea. See Addendum E in Appellant's Opening Brief. The only testimony offered by the justice court judge was regarding his general practice in accepting guilty pleas where he stated in part that "I read them the charges, the date that it allegedly occurred, location." R. 145:55. No testimony was offered regarding what this entails or that it was actually done in Mr. Peterson's case. Moreover, the justice court judge does not appear to include a factual basis as part of his general practice. We do not know whether the judge actually outlined the elements of the crimes and established a factual basis for each or whether the judge simply stated the code section Mr. Peterson was alleged to have violated along with the date and location.

At a minimum, in order to have a constitutionally valid waiver of the right to counsel it is necessary that the nature of the offenses and a factual basis be explained to a defendant. See Heaton, 958 P.2d at 917 (requiring judge to ascertain that defendant understands nature of the charges and proceedings for there to be a constitutionally valid waiver of counsel). A defendant will not appreciate the full measure of a waiver of counsel in a case where he has not been properly advised of the charges and the elements

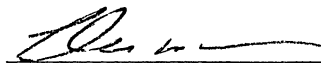
necessary for guilt under the statute. This is supported not only by Utah's case decisions regarding constitutionally valid waivers of the right to counsel but also Tovar. See Heaton, 958 P.2d at 917; Tovar, 541 U.S. at 81.

The omission of any evidence to support that the nature of the crime and a factual basis were discussed with Mr. Peterson alone precludes a determination that a constitutionally valid waiver of the right to counsel occurred. However, as outline in Appellant's Opening Brief, several other factors support that Mr. Peterson's waiver was invalid. Therefore, the trial court erred in concluding that Mr. Peterson waived his right to counsel.

CONCLUSION

For the reasons set forth herein and in Appellant's Opening Brief, Justin Brent Peterson, respectfully requests this Court to reverse the lower court's decision and order that his suspended jail sentence be vacated.

RESPECTFULLY SUBMITTED this 12 day of April, 2006



Debra M. Nelson
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to George B. Hofmann, Parsons Kinghorn Peters, 111 East Broadway, 11th Floor, Salt Lake City, Utah 84111, this 12 day of April, 2006.



DEBRA M. NELSON

DELIVERED to George B. Hofmann, Parsons Kinghorn Peters, as indicated above this 12 day of April, 2006.

