

1992

Utah v. Louis H. Knight : Reply Brief

Utah Court of Appeals

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BRIEF

UTAH
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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DOCKET NO. THE STATE OF UTAH 920453-CA

:

Plaintiff/Appellee, :

v. :

LOUIS H. KNIGHT, : Case No. 920453-CA
Priority No. 2

Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for one count of incest, a third degree felony, in violation of Utah Code Ann. § 76-7-102, and two counts of sexual abuse of a child, second degree felonies, in violation of Utah Code Ann. § 76-5-401.1(1), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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FILED
Utah Court of Appeals

APR 20 1993


Mary T. Noonan
Clerk of the Court

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STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

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STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The sixth amendment to the United States Constitution provides:

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Article I, section 12 of the Utah Constitution provides:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to testify against himself; a wife shall not be compelled to testify against her husband, nor a husband against his

wife, nor shall any person be twice put in jeopardy for the same offense.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether AP&P's improper calculation of Mr. Knight's Criminal History Category is reviewable on appeal?

Standard of Review. Because prior defense counsel did not object below, this matter is subject to a plain error analysis.

When objections are not made at trial and properly preserved, appellate review is under a "plain error" standard. Plain errors are those that "should have been obvious to the trial court and that affect the substantial rights of the accused."

State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) (quoting State v. Morgan, 813 P.2d 1207, 1210-11 (Utah App. 1991)).

Alternatively, this matter may be reviewed for ineffective assistance of counsel.

In order to bring a successful ineffective assistance of counsel claim pursuant to the Sixth Amendment, a defendant must show that trial counsel's performance was deficient in that it "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 [, 80 L.Ed.2d 674, 693] (1984); see also State v. Templin, 805 P.2d 182, 186 (Utah 1990).

State v. Garrett, No. 920054-CA, slip op. at 2-3 (Utah App. Feb. 26, 1993).

ARGUMENT

POINT I. AP&P'S ERROR IN CALCULATING MR. KNIGHT'S CRIMINAL HISTORY CATEGORY IS REVIEWABLE ON APPEAL.

In Mr. Knight's Presentence Investigation Report, AP&P calculated Mr. Knight's Criminal History Category incorrectly by failing to give Mr. Knight credit for over ten years of arrest free street time. AP&P calculated his Total Placement Score correctly, but used the Total Placement Score rather than the Final Placement Score to determine a Criminal History Category of "good," rather than the "excellent" that Mr. Knight rightfully deserved.

Appellee's brief argues that Mr. Knight cannot raise on appeal the improper calculation of his Criminal History Category by AP&P. Rather than accept the inevitable conclusion that the State has committed error in calculating Mr. Knight's Criminal History Category, the State seeks to avoid this issue altogether on appeal with its familiar waiver argument. Traditional due process notions of fundamental fairness require more of this court.

A. PLAIN ERROR.

AP&P's improper calculation constitutes plain error. Litigants are precluded from asserting a claim on appeal for the first time unless the trial court committed plain error. State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991).

The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. The second requirement for a finding of plain

error is that the error affect the substantial rights of the accused, i.e., that the error be harmful.

State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989) (cites omitted). In appropriate cases, the court may "dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect." Id. at 35, n. 8.

The Guidelines, Appendix E to Code of Judicial Administration, Utah Court Rules Ann. (1992), spell out the appropriate method of determining a criminal history category, and are not difficult to understand:

Subtract 1 point.

One point should be subtracted for each consecutive year of arrest-free street time since the last arrest. Street time is time not under correctional supervision. The purpose of this category is to reward those offenders who have changed their lives. The reference arrest should be the most recent criminal offense (non-traffic) which could either be as a juvenile or an adult.

Final Placement Score.

The final placement score is the "Total Placement Score" minus the number of points subtracted for arrest-free street time since last arrest.

Criminal History Category.

Using the "final placement score," identify the proper criminal history category (poor, fair, excellent, etc.).

Id. at 1278. In this case, it is quite evident that

4-10~~4~~.

The error in this case is plain.

Even if this court cannot say that "it should have been obvious to [the] trial court that it was committing error," this

court should "dispense with the requirement of obviousness so that justice can be done," State v. Eldredge, 773 P.2d at 35 n.8, and review this error on appeal.

Appellate courts require preservation of error in the trial court so that the trial court has an opportunity in the first instance. Appellate courts are properly concerned about "invited error" resulting from defense counsel's strategic decision not to object. See State v. Bullock, 791 P.2d 155 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990). In this case, however, Mr. Knight's prior defense counsel could not possibly have had any reasonable strategic reason not to object. This error has been invited, if at all, by AP&P, an agency of the State. Mr. Knight should not suffer as a result of error invited by the State.

Mr. Knight's presentence investigation report will be used in the future by the State in assessing Mr. Knight's eligibility for parole. Regardless of how it is used in his sentencing, Mr. Knight's due process rights require that the State correct the erroneous presentence investigation report.

The harm to Mr. Knight resulting from the erroneous PSI was fully set forth in Mr. Knight's opening brief. In short, erroneous information in the PSI indicating that Mr. Knight's criminal history is more serious than it actually is prejudiced Mr. Knight's right to be sentenced in a fair manner based on accurate information. "The fair administration of justice at the least requires that the information upon which the judge relies in

imposing punishment is accurate." State v. Lipsky, 608 P.2d 1241, 1249 (Utah 1980).

B. INEFFECTIVE ASSISTANCE.

To the extent this Court might decline to consider AP&P's calculation as plain error, it must be addressed as ineffective assistance of counsel. Mr. Knight was represented by different counsel below. Prior counsel's failure to object to the inaccurate calculation contained in the PSI constitutes ineffective assistance of counsel in violation of his rights under the sixth amendment and article I section 12, and entitles Mr. Knight to a new sentencing hearing.

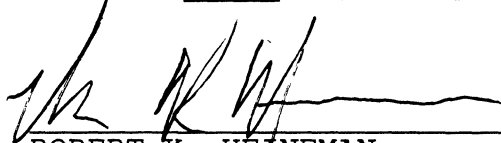
Prior counsel should have verified the information contained in the PSI, and should have reviewed the accuracy of AP&P's calculations. Her failure to do so has prejudiced Mr. Knight. Had Mr. Knight's presentence investigation report been accurate, it would have revealed that Mr. Knight's prior criminal history was not as serious as the judge was led to believe. Had the judge been aware of the correct information, it is probable that Mr. Knight's sentence would have been less severe. This is especially so in light of the uniform recommendation of AP&P, the prosecutor, defense counsel, the victims, and the victims' mother that Mr. Knight receive in-patient treatment at the Fremont facility.

CONCLUSION

Under any standard of review, 4-10#4. AP&P's failure to consider Mr. Knight's ten years of arrest free street time is plain error and is reviewable on appeal. Alternatively, prior counsel's failure to object constitutes ineffective assistance of counsel.

Mr. Knight respectfully requests that his sentence be reversed, and that this case be remanded so that his Pre-Sentence Investigation Report may be corrected, and he be sentenced in accordance with the recommendations of AP&P (as concurred in by all other parties involved in this action).

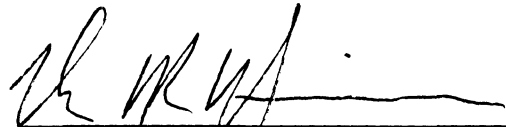
RESPECTFULLY SUBMITTED this 20th day of April, 1993.



ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 20th day of April, 1993.



Robert K. Heineman

DELIVERED/MAILED this _____ day of April, 1993.
