

2003

State of Utah v. Michael Fisher : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MICHAEL FISHER,

Defendant/Appellant.

Case No. 20030996-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM FIFTH DISTRICT COURT FROM ORDERS INVOLVING
VARIOUS CRIMINAL OFFENSES BEFORE THE HONORABLE
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 POINT I THE TRIAL COURT ABUSED ITS DISCRETION IN
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despite the recommendations from AP&P that the sentences should be concurrent, Fisher was sentenced to consecutive sentences on all three cases (R. 140: 12-14).

POINT II

IT WAS PLAIN ERROR FOR JUDGE SHUMATE TO RECUSE HIMSELF FROM SENTENCING FISHER

The State claims that Judge Shumate did not abuse his discretion in recusing himself (Br. of Appellee at 6), because a defendant is not entitled to demand a particular judge to impose his sentence (Br. of Appellee at 15). Fisher asserts that he is not demanding a particular judge impose his sentence. The public's confidence in the judiciary is required to show that justice is being perpetuated in the American legal system, and Fisher is requesting that the trial judge who entered into an agreement with him regarding his sentencing should honor his agreement. In *In re Discipline of Harding*, 2004 UT 100, 104 P.3d 1220, the Utah Supreme Court stated:

In the American system of justice, the fairness, impartiality, stability, and wisdom of our legal system depend in major part on the integrity of the men and women serving as judges. We expect those to whom we entrust our lives, fortunes, and honor to exemplify those virtues. Respect for the rule of law is necessary for a democracy to function and to flourish. As a consequence, respect for the rule of law by those we select as judges is mandatory.

Id. at ¶ 1.

The State further claims that even if Judge Shumate was not required to recuse himself, an unnecessary recusal, done out of an excess of caution, does not qualify as error. Fisher disagrees with this claim.

In *State v. Neeley*, 748 P.2d 1091 (Utah), *cert. denied*, 487 U.S. 1220, 108 S. Ct.

2876, 101 L. Ed. 2d 911 (1988), the defendants filed a pretrial motion to disqualify the assigned judge from presiding at their trial. In a supporting affidavit, they alleged bias and prejudice stemming from his serving as district attorney before coming on the bench. In that capacity, some twenty years prior, he had signed the criminal information in four earlier cases involving defendant Lynn Belt, and in one of the cases, he appeared in court to accept a guilty plea. The motion was held to be legally insufficient. Defendants filed an amended motion which was also denied. The Utah Supreme Court held that, under the Utah Code of Judicial Conduct, a "judge should recuse himself when his 'impartiality' might reasonably be questioned." *Id.* at 1094. Fisher was not questioning the judge's impartiality; in fact, the record shows that Fisher repeatedly told the judge that he would prefer to be sentenced by him, rather than another judge who did not know the "facts and circumstances" of the case (R. 108:4, 112:11).

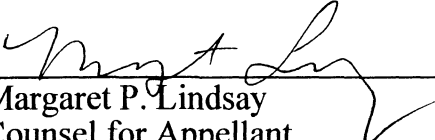
In the alternative, Fisher asserts that if Judge Shumate inappropriately talked with a member of the Board of Pardons before the hearing on the State's order to show cause, he should have recused himself before the order to show cause hearing on June 18, 2003 (R. 122:3). Fisher asserts that if a recusal was in fact required, then Judge Shumate abused his discretion by not entering a recusal when the basis for the recusal was clearly known to him—prior to the order to show cause hearing.

The State further claims that even if any error occurred, defendant failed to establish that the error was harmful (Br. of App. at 20). Fisher disagrees with this claim. The sentence that was imposed is obviously harmful, because the consecutive sentence adds years to his prison term.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Fisher asks this Court to reverse the trial court's sentencing order.

RESPECTFULLY SUBMITTED this 11th day of July, 2005.



Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 11th day of July, 2005.

