2004

State of Utah v.Howard Oliver Voeltz, Jr. : Reply Brief

Utah Court of Appeals

Scott L. Wiggins; Arnold and Wiggins; Counsel for Appellant.
Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

IN UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20040019-CA
	)	
v.	)	
	)	
HOWARD OLIVER VOELTZ, JR.,	)	
	)	
Defendant / Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from the Sentence, Judgment, Commitment signed by the district court on December 10, 2003, but reflected as having been entered on December 8, 2003, in the Second District Court, Davis County, the Honorable Glen R. Dawson, presiding

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****ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED****

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STATE OF UTAH, Plaintiff / Appellee, v. HOWARD OLIVER VOELTZ, JR., Defendant / Appellant.	)))))))))	Case No. 20040019-CA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

Page(s)

Federal Cases

State Cases

STATUTES CITED

None.

RULES CITED

DETERMINATIVE AUTHORITY

ARGUMENTS

APPOINTED TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S COMMENTS CONCERNING MR. VOELTZ' SILENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL THAT IMPINGED UPON BOTH THE CONSTITUTIONAL RIGHT NOT TO TESTIFY AND THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State argues in its Brief that the prosecutor's rebuttal remarks addressed only the "'paucity or absence' of defendant's evidence" and not Defendant's silence. *See* Brief of Appellee, pp. 6-11. However, the consideration of T.V.'s trial testimony vis-a-vis the prosecutor's prejudicial remarks demonstrates otherwise.

The State correctly articulates that when making an ineffective assistance of counsel claim, a defendant must demonstrate first that his counsel rendered deficient performance, which performance fell below an objective standard of reasonable professional judgment. *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct 2052 (1984)). Second, the defendant must demonstrate that counsel's performance prejudiced the defendant. *Id.*

Under the deficient-performance prong, which is the first *Strickland* prong, the defendant is required to "rebut the strong presumption that 'under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct 2052) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955)). When

evaluating a claim of ineffective assistance of counsel, the appellate court gives "'trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them.'" *Id.* (quoting *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996)). Appellate courts do not typically second-guess matters of trial strategy. *State v. Labrum*, 925 P.2d 937, 939 (Utah 1996). However, where the error is "particularly obvious or egregious and would serve no conceivable strategic purpose, courts and opposing parties may not simply turn a blind eye to a manifest procedural or substantial injustice." *Id.*

In the instant case, T.V., the alleged victim, not only testified concerning the conversation between himself and Mr. Voeltz' trial counsel (R. 130:132-33), he testified at length that Mr. Voeltz had sexually abused him both orally and anally (R. 130:119-29). Notwithstanding T.V.'s testimony about the sexual abuse, the State's sole focus in its Brief is on T.V.'s testimony concerning the conversation with trial counsel. No mention, whatsoever, is made about the critical testimony of T.V. about the alleged sexual abuse.

Later, during the rebuttal portion of the State's closing argument, the prosecutor stated:

> You gotta base your decision on the evidence and the testimony that actually came in as evidence, folks. . . . Not on statements of things that supposedly happened that no witnesses were called to testify to or no stipulations were actually entered on the record during the presentation of evidence. You can't consider it folks. The jury instructions tell you, you can only consider the evidence that's presented during the trial. And [T.V.] told you about that conversation. *And nobody was called to rebut what [T.V.] said. Isn't that interesting? It's because [T.V.] told you the truth.*

(R. 130:241:8-23) (emphasis added). Defendant concedes that the prosecutor's comments were directed at the paucity or absence of evidence supporting the defense. However, the State's comments, when fairly viewed, also constituted an overt reference to the failure of Mr. Voeltz to testify and rebut T.V.'s testimony, as a whole.

During a subsequent portion of closing arguments, trial counsel objected to a separate comment made by the State during closing argument about whether T.V. had said that Mr. Voeltz had cancer (*See* R. 130:242:5-6). However, trial counsel inexplicably failed to object to the State's comments about Mr. Voeltz' silence at trial.

Trial counsel rendered deficient performance by failing to object to the State's improper comments concerning the failure of Mr. Voeltz to testify. In its Brief, the State argues that the

claim of ineffective assistance of counsel fails because an objection would have been futile. *See* Brief of Appellee, pp. 6-7. The State's argument, however, is premised upon a case whose analysis is inapposite to the instant case. In *State v. Whittle*, 1999 UT 96, 989 P.2d 52, which the State cites in support of its proposition, the defendant argued that his trial counsel ineffectively failed to object to allegedly inconsistent prior statements under Utah Rule of Evidence 801(d)(1)(B). *Id.* at ¶¶33-34. The supreme court rejected the argument by concluding that the challenged statement was admissible under Utah Rule of Evidence 801(d)(1)(C), which, unlike the instant case, specifically demonstrated the admissibility of the statement as "one of identification of a person made after perceiving the person." *Whittle*, 1999 UT 96 at ¶34.

Trial counsel's failure to object is particularly troubling and all the more prejudicial in the case at bar because the prosecutor's comment impinged upon a "fundamental right protected by both the federal[1] and Utah Constitutions."[2] *State v. Kazda*, 540

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[1]*See* U.S. Const. amend. V., which states, in relevant part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." A true and correct copy of the Fifth Amendment to the United States Constitution is attached hereto as Addendum D.

[2]*See* Utah Const. art. I, § 12, which states, in relevant part, "In criminal prosecutions the accused shall have the right . . . to testify in his own behalf . . . ." The accused shall not be

P.2d 949, 951 (Utah 1975). The exercise of the constitutional right against self-incrimination should not prejudice the defendant "in the eyes of the court or jury." *Id.* (citation omitted); *see also State v. Nelson-Waggoner*, 2004 UT 29, ¶31, 94 P.3d 186; *Griffin v. State of California*, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 1232-33 (1965). Moreover, the State's case was based almost exclusively upon T.V.'s testimony some seven years after the alleged crime had occurred.

Trial counsel's performance in the instant case fell below an objective standard of reasonable professional judgment. The failure of trial counsel to object allowed and even encouraged the jury, as the finder of fact, to draw an adverse conclusion based upon Mr. Voeltz' constitutional right and decision not to testify. In fact, the failure of counsel to object allowed the prosecutor's comments on Mr. Voeltz' silence to be utilized as evidence of guilt.

CONCLUSION

Based on the foregoing as well as that set forth in the previously filed Brief of Appellant, Mr. Voeltz respectfully requests that this Court reverse his convictions and remand the

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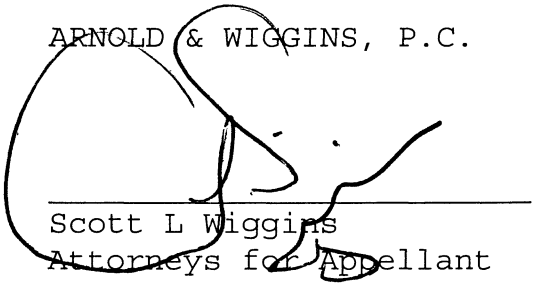
compelled to give evidence against himself . . . ." A true and correct copy of Article I, § 12, of the Utah Constitution is attached hereto as Addendum E.

case for further proceedings consistent with the Court's instructions as set forth in its opinion.

RESPECTFULLY SUBMITTED this 7th day of January, 2005.

ARNOLD & WIGGINS, P.C.



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CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 7th day of January, 2005:

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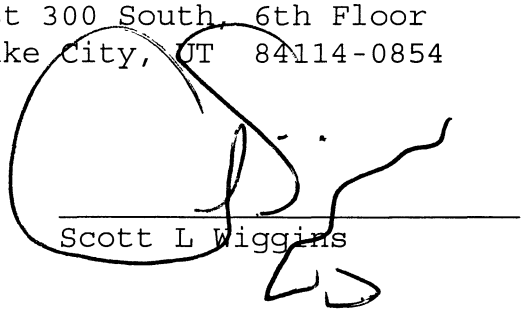

Scott L Wiggins

ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).