

2004

State of Utah v. Kevin R. Blanke : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 20040134-CA

STATE OF UTAH,

Plaintiff/Appellee,

vs.

KEVIN R. BLANKE,

Defendant/Appellant.

Case No. 20040134-CA

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT JUDICIAL COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION OF KIDNAPPING, A SECOND DEGREE FELONY, BEFORE THE HONORABLE ROBIN W. REESE.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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Case No. 20040134-CA

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e) (Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Blanke was deprived of effective assistance of counsel during the hearing for motion to withdraw guilty plea? “Ineffective assistance of counsel claims are reviewed on appeal as a matter of law.” *State v. Bradley*, 2002 UT App 348, ¶ 15, 57 P.3d 1139.

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions and rules are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Kevin R. Blanke appeals from the judgment, sentence and commitment of the Third District Court after being convicted of kidnapping, a second degree felony, in violation of Utah Code Ann. § 76-5-301.

B. Trial Court Proceedings and Disposition

Kevin R. Blanke was charged by information filed in the Third Judicial District Court on or about September 5, 2002, with aggravated kidnapping, a first degree felony, in violation of Utah Code Annotated § 76-5-302 (R. 2-3).

Michael A. Peterson entered his appearance of counsel in behalf of Blanke on September 10, 2002 (R. 16).

On October 17, 2002, Blanke filed a Motion to Dismiss, asserting that the four year statute of limitations had run prior to the time the State filed this action (R. 25-32). The State filed its opposition to the motion on December 13, 2002, contending that in 2002, the Utah Legislature amended Utah Code Ann. § 76-1-301 on May 6, 2002, which allowed the State to commence prosecution for aggravated kidnapping at any time (R. 54-60).

On January 24, 2003, a hearing was held regarding the Motion to Dismiss (R. 142). The trial court denied the motion on February 5, 2003 (R. 77).

On September 12, 2003, Blanke entered a plea of guilty to kidnapping, a second degree felony (R. 86-93, 140).

On November 6, 2003, Blanke filed pro se a Motion to Withdraw Guilty Plea, contending his court appointed attorney misled him into believing he could appeal the statute of limitations issue and that his attorney told him there was DNA evidence against

him when in fact there was none (R. 100-101). Blanke also asserted that a prison contract attorney incorrectly told him that any appeal would be frivolous since he plead guilty. Blanke further asserted that his plea was made under duress due to significant pain he suffered from ostio arthritis (R. 101).

On December 6, 2003, Blanke filed pro se a Motion to Enlarge, requesting the trial court to enlarge the 30-day appeal period (R. 102).

On January 7, 2004, the Hearing regarding Blanke's Motion to Withdraw Guilty Plea was held (R. 146). Blanke was represented by Julie George. The trial court ultimately denied the motion (R. 146: 30-31).

On February 2, 2004, Blanke was sentenced to an indeterminate term of not less than one nor more than fifteen years in the Utah State Prison (R. 111).

On February 4, 2004, the trial court entered Findings of Fact, Conclusions of Law and Order on the Defendant's Motion to Withdraw His Guilty Plea (R. 116). The Court found that the motion was timely pursuant to Utah Code Ann. § 77-13-6(2) since sentencing had not yet been pronounced, but held that Blanke "failed to present any evidence or proof that his defense attorney, Mr. Peterson, had 'duped' him or that his plea was involuntary."

On February 9, 2004, Blanke filed his Notice of Appeal from the judgment, sentence, and commitment in this case (R. 122). An Amended Notice of Appeal was filed on March 2, 2004 (R. 128).

STATEMENT OF RELEVANT FACTS

At Blanke's motion to withdraw plea hearing, Blanke's defense counsel, Julie George, stated that Blanke had prepared and given him an affidavit of facts regarding the reasons for withdrawing the guilty plea, but George failed to submit the affidavit into evidence (R. 146: 9-10). According to the record, the affidavit explained that Mr. Peterson, Blanke's original defense counsel, told Blanke on or about September 15, 2003, that he could appeal the case within 30 days after sentencing on the basis of the statute of limitation issue (R. 146: 10). Mr. Peterson also told Blanke that there was DNA evidence against him, in effect lying to Blanke and duping him into taking a plea against his best interests (R. 146: 10). In fact, there was no DNA evidence against Blanke; the Prosecutor stated explicitly that while "it appears to me that they did find some hair and some fibers from the crime scene... they don't show any record of those items having been tested" (R. 146: 28).

George also read part of a letter from Peterson to Blanke dated November 13, 2003, wherein Peterson told Blanke: "Pursuant to our phone conversation of October 29, I informed you that your only realistic chance of preserving the statute of limitations issue for appellate review is to file an immediate motion to withdraw your guilty plea. If you do not withdraw your plea, the State and Federal appellate courts will rule that you waive the statute of limitations argument and appeal when you entered your rule rather than plead before Judge Reese" (R. 146: 29).

George never attempted to have Blanke sworn in to testify regarding his reasons for moving to withdraw the guilty plea, nor did George present any evidence before the

trial court regarding Blanke's reasons for withdrawing the plea, even though Blanke was present at the hearing and had presented George with an affidavit (R. 146).

After George's proffer, the trial court ruled:

[G]etting to the merits of the argument that Mr. Blanke makes, that he should be allowed to withdraw his guilty plea because his attorney lied to him about the quality of the evidence. I'm going to deny the motion, Mr. Blanke, and find that the defendant just simply hasn't provided any evidence of that at all today.

Number one, the – the request that Mr. Blanke filed is not verified in any way. It's just simply a letter signed by him that has several grounds listed for withdrawing the plea.

Number two, there had been no affidavit filed by Mr. Peterson, admitting that he made this mistake. There's been no sworn testimony from Mr. Blanke or Mr. Peterson, no opportunity to provide that evidence requested.

Just – my conclusion here today would be just simply that Mr. Blanke has made his allegation, it's nothing today more than an allegation, it's not been proven in any way, there's been no evidence offered to prove it. And in my judgment, at least, there's no merit to it, so I'm going to deny Mr. Blanke's motion to withdraw his guilty plea.

(R. 146: 31).

SUMMARY OF ARGUMENT

Blanke asserts that he was denied effective assistance of counsel at his hearing for motion to withdraw guilty plea. The record clearly indicates that Blanke was present at the hearing and ready and willing to testify and that he provided trial counsel an affidavit concerning the basis for the withdrawal of his plea. However, trial counsel failed to admit into the record any evidence regarding prior trial counsel's misrepresentations to Blanke concerning the weight of DNA evidence and the ability to file an appeal on the

statute of limitations issue. Because trial counsel admitted no evidence into the record, the trial court summarily found that Blanke had not carried his burden of proof.

The record further indicates that Blanke was duped by his original trial counsel into believing that the State had damning DNA evidence against him and that he would be able to appeal the statute of limitations issue before this Court. Blanke asserts that these misrepresentations led him to enter a plea of guilty that was not knowing and voluntary. Had trial counsel presented this evidence before the trial court at the hearing, the trial court would have granted Blanke's motion and ordered his plea withdrawn. Accordingly, this Court should remand this matter for a new hearing.

ARGUMENT

I. BLANKE WAS DENIED HIS RIGHT TO COMPETENT COUNSEL AT THE HEARING ON HIS MOTION TO WITHDRAW GUILTY PLEA BECAUSE HIS ATTORNEY FAILED TO ADMIT ANY EVIDENCE REGARDING WHETHER BLANKE'S PLEA WAS MADE INTELLIGENTLY AND KNOWINGLY

Blanke timely moved to withdraw his guilty plea and the trial court held a motion hearing to consider whether good cause was shown to withdraw the plea on January 7, 2004 (R. 146: 30). However, the trial court denied the motion after trial counsel, Julie George, failed to present any evidence as to whether the plea was not made intelligently and knowingly (R. 146: 30-31). Blanke asserts that George was ineffective for failing to present any evidence regarding his original defense counsel's misrepresentations regarding his ability to appeal the plea and misrepresentations regarding DNA evidence.

Blank asserts that these misrepresentations caused his plea to be not knowing and voluntary, without which he would not have entered a plea of guilty (R. 100-101). But for counsel's ineffectiveness, the trial court would have granted Blanke's motion to withdraw his guilty plea. Accordingly, this matter should be remanded to the trial court to conduct a new hearing on the motion to withdraw guilty plea.

"Under the *Strickland* test, an individual has been denied the effective assistance of counsel if: (1) counsel's performance was deficient below an objective standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; (citing *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)).

In *State v. Ison*, 2004 UT App 252, 96 P.3d 374, defendant, owner of a travel agency, appealed from a conviction of two counts of communications fraud, claiming ineffective assistance of counsel. *Id.* at ¶ 1. The charges were based on defendant's alleged misrepresentations to clients regarding moneys paid for a cruise. *Id.* at ¶¶'s 2-9. A hearing was held before an Administrative Law Judge (ALJ) to determine whether defendant had made misrepresentations to clients regarding the cruise. *Id.* at ¶ 9. The ALJ concluded that defendant had committed no statutory violations. *Id.* During trial, counsel failed to admit the ALJ's findings that defendant "made no misrepresentations to any passenger" and never "assume[d] responsibility for the cruise and tour bookings in question." *Id.* at ¶ 15.

This Court found that "[t]rial counsel was aware of the ALJ decision," that the evidence "would have helped exonerate Defendant," and that "there was no strategic

reason for not moving for its admission.” *Ison*, 2004 UT App 252 at ¶ 19. Based on the nature of the evidence, the Court held that trial counsel’s failure to move to admit the ALJ’s decision amounted to an omission that fell ‘below the standard of reasonable professional assistance.” *Id.* (quoting *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993)). The Court further concluded that defendant was prejudiced by this omission and reversed and remanded for a new trial. *Id.* ¶¶’s 19, 23.

In *State v. Rojas-Martinez*, 2003 UT App 203, 73 P.3d 967, defendant, a Mexican citizen, enter a plea of guilty to one count of sexual battery. *Id.* at ¶ 2. At the plea hearing, the trial court found that defendant’s counsel “informed [him] that his guilty plea and conviction could lead to deportation, but it might or might not.” *Id.* The trial court then advised defendant of his various rights under Rule 11 of the Utah Rules of Criminal Procedure, after which defendant waived his rights and pleaded guilty. *Id.* at ¶ 3.

Defendant timely moved to withdraw his guilty plea, asserting that his counsel was ineffective for misrepresenting the law regarding the deportation consequences of his plea. *Rojas-Martinez*, 2003 UT App 203 at ¶¶ 4, 6. The trial court denied the motion, finding defendant’s counsel “did not affirmatively misrepresent the [deportation] consequences of ... defendant’s guilty plea.” *Id.* at ¶ 4. On appeal, defendant asserted that the trial court erred in finding his trial counsel afforded effective assistance of counsel and therefore erred in denying the motion to withdraw his guilty plea. *Id.* at ¶ 5.

This Court found that defendant’s counsel “affirmatively misrepresented the consequences of Defendant’s plea, and thus counsel’s ‘performance was deficient below an objective standard of reasonable professional judgment.’” *Rojas-Martinez*, 2003 UT

App 203 at ¶ 10 (quoting *Martinez*, 2001 UT 12 at ¶ 16). This Court further found that counsel's ineffectiveness prejudiced defendant since he would not have pleaded guilty had he known he would be deported. *Id.* at ¶ 11. This Court then concluded that "the trial court erred in ruling that Defendant was afforded effective assistance of counsel and therefore erred in denying his motion to withdraw his guilty plea." *Id.*

Blanke asserts that his trial counsel, Julie George, was ineffective for failing to admit evidence that would have shown his plea was not knowing and voluntary. The facts and conclusion in *Ison*, wherein trial counsel was found ineffective for failing to admit exculpatory evidence, supports this position. As in *Ison*, George was ineffective for failing to admit any evidence regarding Blanke's basis for withdrawing his plea (R. 146). George stated to the trial court that he had an affidavit from Blanke explaining that prior trial counsel, Michael Peterson, had lied to him saying there was DNA evidence against him and that he could appeal the statute of limitations issue, but George failed to admit this affidavit into evidence (R. 146). The trial court specifically found against Blanke because "the request that Mr. Blanke filed is not verified in any way" and because George "just simply hasn't provided any evidence" of Mr. Peterson's misrepresentations (R. 146: 31). Not only did George fail to admit the affidavit to the trial court, but he failed to place Blanke on the stand to testify as to the basis of withdrawing his plea (R. 146). Either action would have presented the trial court with sufficient evidence to conclude that Blanke's plea was unknowing and involuntary.

Rojas-Martinez also provide support to Blanke's position that George afforded ineffective assistance of counsel. In *Rojas-Martinez*, this Court held that trial counsel is

ineffective if he “affirmatively misrepresent[s]” the consequences of a guilty plea. *Rojas-Martinez*, 2003 UT App 203 at ¶ 10. In this case, Blanke asserts that Peterson told him that he could appeal the statute of limitations issue and enter a plea of guilty (R. 100-101; 146: 9-11, 22, 29)¹. George read from Blanke’s affidavit confirming Peterson’s assertions, and also read to the trial court a letter that Peterson wrote to Blanke, confirming that Blanke wanted to appeal the statute of limitations issue (R. 146: 9-11, 29). However, George failed to admit either the affidavit or letter into evidence, and further failed to have Blanke testify to these matters (R. 146).

Additionally, it stands to reason that trial counsel is also ineffective if he misrepresents the weight of the State’s evidence, leading a defendant to enter a plea of guilty when he otherwise would not take a plea. Peterson told Blanke that there was DNA evidence against and advised him he should enter a plea of guilty (R. 100; 146: 10). This was simply untrue, as the prosecutor explained (R. 146: 28). Despite this fact, George failed to admit Blanke’s affidavit into evidence and failed to have Blanke testify as to what Peterson told him (R. 146).

As a result of these misrepresentations, Blanke pleaded guilty (R. 100-101). George’s failure to admit into evidence the basis for Blanke’s motion to withdraw his guilty plea, which was based on Peterson’s misrepresentations, constitute ineffective assistance of counsel. Had George admitted this evidence, the trial court would have found that Blanke’s plea was not knowing and voluntary and therefore, would have

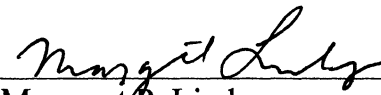
¹ There is no record that Peterson attempted to obtain a *Sery* Plea in order to preserve the statute of limitations issue for appeal. *See State v. Sery*, 758 P.2d 935 (Utah App. 1988).

granted the motion to withdraw his guilty plea. Thus, George's performance fell below an objective standard of reasonable professional judgment and but for the deficient performance, Blanke's guilty plea would have been withdrawn. Therefore, this Court should remand this case for a new motion hearing.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Blanke asks this Court to reverse his conviction and remand this case to the trial court for a new hearing.

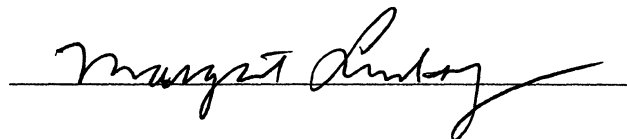
RESPECTFULLY SUBMITTED this 13th day of October, 2004.



Margaret P. Lindsay
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CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 13th day of October, 2004.



ADDENDA