2004

State of Utah v. Conni Gulli : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. CONNI GULLI, Defendant/Appellant.	Case No. 20040146-CA

BRIEF OF APPELLANT

Appeal from a judgment, sentence and commitment filed on or about February 11, 2004, in the Fifth District Court in and for Iron County, District Court Case No. 021500873, Hon. J. Philip Eves.

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The Defendant/Appellant is incarcerated.

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STATEMENT OF JURISDICTION

This appeal is within the jurisdiction of the Utah Court of Appeals pursuant to Utah Code Annotated § 78-2a-3, having been referred to that Court by the Utah Supreme Court.

STATEMENT OF ISSUES

A. Suppression: Did the District Court err in denying the Defense's Motion to Suppress evidence found in a bag belonging to Defendant, which was searched without a warrant and without consent of the Defendant?

B. New Counsel for Sentencing: Did the District Court err in denying the Defendant's Motion for new counsel prior for sentencing, despite there being a bona fide issue being raised, and explored at an evidentiary hearing, as to whether the Defendant had had effective assistance of counsel at trial?

STANDARD OF REVIEW

A. Suppression: The District Court's legal conclusions in its ruling on a motion to suppress is reviewed *de novo*. *State v. Moreno*, 910 P.2d 1245, 1247 (Utah App. 1996).

B. New Counsel for Sentencing: District Court's rulings on motions for new public defense defense counsel are reviewed for abuse of discretion. *State v. Pursifell,* 746 P.2d 270, 272 (Utah App.1987).

PRESERVATION OF THE ISSUE

A. Suppression: The suppression issue was raised by motion. *See* R. at 72-82.

B. New Counsel for Sentencing: The motion for new counsel for sentencing, and the related issues of ineffective assistance of counsel at trial were raised to and heard by the Court in a post-trial, pre-sentencing evidentiary hearing. *See* Record at 0374.

STATEMENT OF THE CASE

Defendant/Appellant was convicted at jury trial of aggravated arson and sentenced to 5 to life in prison. *See* Judgment, R. at 353-356.

Prior to trial, the Defense moved the Court to suppress evidence linking the Defendant to the arson which was found in a car possessed and driven by the Defendant's son Joseph and his girlfriend, Emily. *See* R. at 72-82, 133-34. The facts, as found by the Court after evidentiary hearing on this motion, which findings are not challenged in this appeal – but rather the legal conclusions based thereon – included the following:

> At some point . . . a red Kia Sephia pulled into the driveway. The car was bein driven by Joseph Gulli . . . . In the car with Joseph were his girlfriend, Emily Green, and his mother, the defendant.
>
> . . .
>
> At some point, Investigator Hohbein asked Joseph for permission to search "his vehicle." Joseph readily agreed . . . Joseph produced keys for the vehicle from his pocket and opened the trunk and doors to the car. Joseph expressed no reluctance in agreeing to the search and placed no limitations on the search.
>
> In the rear seat of the car, Investigator Hohbein found a green and cream colored canvas bag. He removed it from the car and began to search it when he was told by Joseph that the bag belonged to his mother, the defendant. Joseph did not tell the investigator that the bag should not be searched. Instead he stood watching as the bag was emptied. During the search of the bag, Investigator Hohbein found within it a broken Mason jar smelling strongly of gasoline, lint and paper soaked in gasoline and an empty book of paper matches.

R. at 133-135.

The Court denied the motion to suppress based on the finding that consent had been given by Joseph and his girlfriend to search the car, and did not indicate that the bag could not be searched, reasoning that the Defendant did not have a reasonable expectation of privacy in the bag left in her

son's car, and that the son's consent justified the search thereof. *See* R. at 130-31.

The contents of the bag were introduced at trial and shown to link the Defendant to the arson. R. at 387: 224-231. The State's witnesses testified that the arson was carried out by use of gasoline as an accellerant, and further that a match found at the scene matched the matches found in the book of paper matches found in the bag. R. at 388, pp. 293-94, 304-05.

After trial, prior to sentencing, the Defendant moved the Court for new counsel, claiming that trial counsel had not afforded her effective assistance at trial, and that there were fundamental disagreements as to how to handle sentencing. *See* R. at 391. The District Court conducted an evidentiary hearing, at which trial counsel, as well as Defendant testified, and the issue of effective assistance of trial counsel were explored. *See* Record at 0374; *see particularly,* p. 7, line 17-18 ("The question is, did you get a fair trial? Were you competently represented?"). The Court ruled that defendant received effective assistance of trial and thus a fair trial. R. 333-338, *see particularly,* p. 335 ("The evidence presented by the Defendant does not demonstrate that the representation provided by Mr. Jackson was ineffective.") The Defendant represented herself at the hearing, and cross-examined trial counsel. *See* R. at p. 0374, 333-338. The District Court denied the Defendant's motion and ordered that trial counsel would continue as Defendant's counsel at sentencing. *See* R. at p. 333-338. Trial counsel represented the Defendant at sentencing. *See* R. at 392.

SUMMARY OF ARGUMENTS

A. Suppression: A person maintains a reasonable expectation of privacy in a personal bag left in her son's automobile, and the son's consent to search the car does not include the bag, when prior to searching its contents, the searching law enforcement officer is told that the bag belongs to a person other than the consenting party.

B. New Counsel for Sentencing: When a defendant has requested a new attorney for sentencing, and in connection with that request, has raised ineffective assistance of trial counsel, and

has cross-examines trial counsel in an evidentiary hearing regarding that issue, a conflict of interest exists between trial counsel and that defendant, such that the defendant's motion for new counsel should be granted for sentencing.

ARGUMENTS

A. Suppression

A person maintains a reasonable expectation of privacy in a personal bag left in her son's automobile, and the son's consent to search the car does not include the bag, when prior to searching its contents, the searching law enforcement officer is told that the bag belongs to a person other than the consenting party.

Utah law clearly recognizes a motor vehicle occupant's expectation of privacy in personal belongings left in the vehicle. *See State v. Bisseger*, 2003 UT App 256, 76 P.3d 178 (*cited in State v. Rynhart*, 81 P.3d 814, 818) (Utah App. 2003)); *see also, United States v. Salazar*, 805 F.2d 1394, 1396 (9th Cir.1986) (passenger had reasonable expectation of privacy in brown paper bag found on floorboard of companion's car) (*also cited in State v. Rynhart*, 81 P.3d 814, 818); *Arnold v. Commonwealth*, 17 Va.App. 313, 437 S.E.2d 235, 237 (1993) (passenger had legitimate expectation of privacy in closed plastic shopping bag on floor of car) (*also cited in State v. Rynhart*, 81 P.3d 814, 818).

The issue is whether the son's consent to search the car covered the search of the bag. In this case, the officer was informed upon picking up the bag that it belonged not to the consenting party, but to his mother.

The government bears the burden of proving the effectiveness of a third party's consent in justifying a search such as that at issue in this case. *Illinois v. Rodriguez*, 497 U.S. 177, 179, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990). The government can fulfill that burden in three ways. First, it can show both shared use and joint access and control over the searched item, or in other

words, actual authority to consent. *See United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir.1992) (citing *United States v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974)). In this case, there was no evidence of shared use, joint access, or joint control over the bag in question. Instead, all that was shown was that the third party (the son) indicated to the officer that the bag belonged to his mother. Second, the government can show that the owner of the item to be searched has expressly authorized a third party to give consent to the search. *Rodriguez*, 497 U.S. at 188, 110 S.Ct. at 2801. There was no showing of this, whatsoever. Finally, it may establish consent by means of the "apparent authority doctrine" under which a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent. *Id.* Again, there has been no such showing. The son's indication that the bag belonged to his mother, and his silence and non-objection, do not create a reasonable belief that the son had authority to grant consent.

Accordingly, the search of the bag was not justified by the consent defendant's son's consent to search the car, and the motion to suppress should have been granted.

The evidence from the bag was clearly prejudicial, as it directly linked the defendant to the arson. The contents of the bag were introduced at trial and shown to link the Defendant to the arson. R. at 387: 224-231. Investigator Hohbein found within it a broken Mason jar smelling strongly of gasoline, lint and paper soaked in gasoline and an empty book of paper matches. R. at 133-135. The State's witnesses testified that the arson was carried out by use of gasoline as an accellerant, and further that a match found at the scene matched the matches found in the book of paper matches found in the bag. R. at 388, pp. 293-94, 304-05.

The case should be reversed and remanded for a new trial without the evidence from the bag.

B. New Counsel for Sentencing

When a defendant has requested a new attorney for sentencing, and in connection with that request, has raised ineffective assistance of trial counsel, and has cross-examines trial counsel in an evidentiary hearing regarding that issue, a conflict of interest exists between trial counsel and that defendant, such that the defendant's motion for new counsel should be granted for sentencing.

Defendants have the same right to counsel at sentencing as they do at other stages of the adjudication of the criminal case brought against them. *See State v. Martinez*, 925 P.2d 176, 178 (Utah App. 1996); *Mempa v. Rhay,* 389 U.S. 128, 137, 88 S.Ct. 254, 258, 19 L.Ed.2d 336 (1967).

A conflict of interest arises between an indigent defendant and public defense counsel when an ineffective assistance claim is pursued post-trial, as was the case in the evidentiary hearing which occurred prior to sentencing in this case. *See, e.g., Jensen v. DeLand,* 795 P.2d 619, 621 (Utah 1989) (Utah appellate courts will consider ineffective assistance claim only if new lawyer represents defendant/appellate, since it is "unreasonable to expect [trial counsel] to raise the issue of his own ineffectiveness at trial on direct appeal."). The existence of a conflict of interest in this case, after the evidentiary hearing occurred, is particular clear given that in that hearing, the Defendant herself actually cross-examined the defense lawyer.

If an actual conflict is established between the defendant and counsel, failure to substitute new counsel is per se error, without a requirement of showing ineffective assistance, with its attendant standards, thereafter. *See State v. Vessey*, 967 P.2d 960, 962 (Utah App. 1998).

Accordingly, it was an abuse of discretion to not appoint new counsel for the Defendant after the evidentiary hearing on her claims of ineffective assistance and on her motion for a new lawyer for sentencing. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (application of an

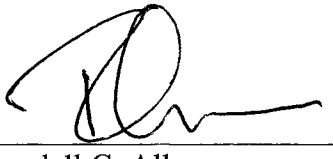
improper legal standard is necessarily an abuse of discretion).

CONCLUSION

Defendant/Appellant is entitled to reversal and remand for new trial based on the District Court's error in not suppressing the contents of her bag found searched in the course of the search of her son's automobile.

Defendant/Appellant is entitled to remand for re-sentencing with new counsel.

Dated this 12th day of Oct., 2005,



Randall C. Allen
Counsel for Defendant/Appellant

CERTIFICATE OF SERVICE

I certified that on the 12th day of October, 200__ I caused a true and correct copy of the foregoing to be served via mailing by US Mail first class postage prepaid to:

Assistant Attorneys General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Nicole Rudack

ADDENDUM

Judgment, Commitment and Sentence

SCOTT GARRETT (#8687)
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P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,	)	**JUDGMENT, SENTENCE, AND COMMITMENT**
Plaintiff,	)	
vs.	)	
CONNI GULLI,	)	Criminal No. 021500873
Defendant.	)	Judge J. Philip Eves

The Defendant, CONNI GULLI, having been found guilty pursuant to a jury trial and by a jury of her peers of the offense of AGGRAVATED ARSON, a First-Degree Felony, on October 30, 2003, and the Court having entered the verdict of guilty and thereafter having ordered the preparation of a presentence investigation report prior to sentencing, and after said report was prepared and presented to the Court, the above-entitled matter having been called on for sentencing on January 26, 2004, in Parowan, Utah, and the Defendant, CONNI GULLI, having appeared before the Court in person together with her attorney of record J. Bryan Jackson, and the State of Utah having appeared by and through Iron County Attorney Scott Garrett, and the Court having reviewed the presentence investigation report and the file in detail, and having further heard statements from all parties and

being fully advised in the premises, now makes and enters the following Judgment, Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, CONNI GULLI, has been convicted of the offense of AGGRAVATED ARSON, a First-Degree Felony, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, CONNI GULLI, and pursuant to her conviction of AGGRAVATED ARSON, a First-Degree Felony, is hereby sentenced to a term of imprisonment in the Utah State Prison for a period of five (5) years to life, and the Defendant is hereby placed in the custody of the Utah State Department of Corrections.

IT IS FURTHER ORDERED that no fine shall be imposed.

IT IS FURTHER ORDERED that the Defendant, CONNI GULLI, shall pay restitution in the sum and amount of two hundred fifty-eight thousand five hundred sixty-three dollars and three cents ($258,563.03).

IT IS FURTHER ORDERED that the Defendant shall be given consideration for credit for time served to date.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, CONNI GULLI, and deliver her to the Utah State Department of Corrections in Draper, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, and Commitment.

DATED this 5th day of February, 2004.

BY THE COURT:

J. Philip Eves

J. PHILIP EVES
District Court Judge

CERTIFICATE

STATE OF UTAH)
:ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true, and exact copy of the original Judgment, Sentence, and Commitment in the case entitled State of Utah vs. Conni Gulli, Criminal No. 021500873, now on file and of record in my office.

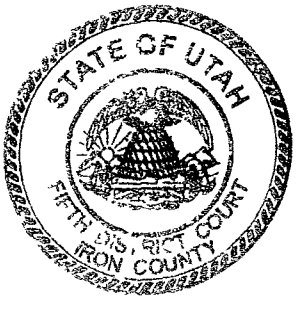
WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 13 day of February, 2004.

CAROLYN BULLOCH

CAROLYN BULLOCH
District Court Clerk

By: Michee Kramer
Deputy District Court Clerk

(SEAL)



CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I hand-delivered a full, true, and correct copy of the within and foregoing JUDGMENT, SENTENCE, AND COMMITMENT, on this 2nd day of February, 2004, to J. Bryan Jackson, Attorney for Defendant, at the office of the Iron County Attorney, 97 North Main Street, Suite 1, Cedar City, UT 84720.

Colleen Mason

Secretary