

2004

State of Utah v. Christena B. White : Brief of Appellee

Utah Court of Appeals

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Christena B. White; Attorney Pro Se.

Joanne C. Slotnik; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Charlene Barlow; Assistant Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20040201-CA
CHRISTENA B. WHITE, :
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF RESTITUTION IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT
LAKE COUNTY, THE HONORABLE JUDITH ATHERTON,
PRESIDING

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Attorney Pro Se

FILED
UTAH APPELLATE COURTS

OCT 25 2004

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STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20040201-CA
CHRISTENA B. WHITE, :
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20040201-CA
CHIRSTENA B. WHITE, :
Defendant/Appellant. :

BRIEF OF APPELLEE
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order of restitution following defendant's conviction on one count of securities fraud, in violation of Utah Code Ann. §§ 61-1-1 and 61-1-21 (2000), and one count of offer or sale by an unlicensed broker/dealer or agent, in violation of Utah Code Ann. §§ 61-1-3(1)&(2) and 61-1-21 (2000), both third degree felonies (R. 261). This court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2) (e) (2002).

STATEMENT OF THE ISSUES ON APPEAL AND

STANDARDS OF APPELLATE REVIEW

1. Does res judicata preclude this Court from hearing claims that defendant could or should have raised in her previous appeal, where the parties are the same in both appeals and the first appeal resulted in a final judgment on the merits?

Whether res judicata bars a subsequent action presents a question of law, reviewed for correctness. Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶17, 16 P.3d 1214.

2. Does defendant's claim that she suffered harm because the victim stalked her for restitution during the year between the sentencing and restitution hearings give rise to a claim for appellate relief?

Where defendant has not made a cognizable claim in this Court, no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No provisions, statutes, or rules are dispositive.

STATEMENT OF THE CASE AND FACTS

A jury convicted defendant of one count each of securities fraud and offer or sale by an unlicensed broker/dealer or agent, both third degree felonies. See State v. White, case no. 20030110CA, R. 3-5.¹ The court sentenced her to concurrent, suspended prison terms of zero-to-five years, fourteen days in the Salt Lake County jail, 300 hours of community service, 36 months of probation, and cognitive restructuring therapy. Id. at

¹ This Court may take judicial notice of the appellate record in State v. White, case no. 20030110CA, which is based on the same district court case as the instant appeal. See Utah R. Evid. 201 (governing judicial notice); State ex rel. F.M., 2002 UT App 340, ¶3 n.2, 57 P.3d 1130 (courts may take judicial notice of the records and prior proceedings in the same case). Most of the documents underlying this appeal were made part of the earlier appellate record but have not been duplicated for the appellate record in this appeal.

169-71 or addendum A. The court also ordered defendant to “[p]ay restitution as determined by Parole Officer.” Id. at 170.

Appealing from this judgment, defendant at first represented herself but then, before oral argument, engaged counsel.² In a unanimous, unpublished decision, this Court determined that “[e]ven if we were to be somewhat lenient in enforcing rule 24 [of the Utah Rules of Appellate Procedure], the briefs appellant submitted simply did not make a coherent, reasoned argument.” State v. White, 2004 UT App 177, ¶5 at addendum B. Consequently, this Court affirmed the decision below. Id.

During the pendency of defendant’s appeal, the trial court held a restitution hearing (R. 271).³ At its conclusion, the court denied defendant’s motion for certificate of probable cause and set restitution at \$8640.63 (R. 261-62 at addendum C; R. 271: 10-11). Defendant then filed the instant appeal (R. 263).

SUMMARY OF ARGUMENT

Defendant appeals from an order denying her motion for certificate of probable cause and setting the amount of restitution. Two of her claims are not related to the order from which she is appealing. They merely reiterate arguments she

² Defendant prepared her own briefs pro se, raising a broad array of issues. She then engaged counsel, who declined to request new or supplemental briefing and who chose to rely on defendant’s pro se briefs for his oral argument. See White, 2004 UT App 177, ¶1 (unnumbered).

³ Apparently, the court expected AP&P to set restitution, while AP&P was waiting for the court to act. See R. 271 at 4-5.

raised but did not adequately brief in her initial appeal. These claims are barred by res judicata because the first appeal and this appeal involve the same parties, the claims could or should have been raised in the first appeal, and the first appeal resulted in a final judgment on the merits.

The only other issue defendant raises is not one on which this Court can grant her any relief.

ARGUMENT

POINT ONE

RES JUDICATA PRECLUDES THIS COURT FROM HEARING CLAIMS THAT DEFENDANT COULD OR SHOULD HAVE RAISED IN HER PREVIOUS APPEAL, WHERE THE PARTIES ARE THE SAME IN BOTH APPEALS AND THE FIRST APPEAL RESULTED IN A FINAL JUDGMENT ON THE MERITS

At the beginning of her pro se brief in this appeal, defendant lists 18 issues for this Court's review. See Br. of Aplt. at 4-6. Substantively, she offers arguments related to three issues. Id. at 10-11; 11-15; 15-17. Two of these claims are precluded by the doctrine of res judicata. First, defendant argues that "the appellant's convictions should be vacated because of federal exemptions" (Br. of Aplt. at 11). This argument relates to the statutory interpretation and constitutionality of certain sections of the Utah Uniform Securities Act. See id. at 11-15. Second, she argues that she received ineffective assistance of counsel at trial. Id. at 15-17. These issues are not properly before the Court for review.

The doctrine of res judicata, governing finality of judgments, "is based on the premise that the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause.'" In re J.J.T., 877 P.2d 161, 162 (Utah App. 1994) (quoting Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 453 (Utah App. 1988)). The doctrine of res judicata encompasses two branches - claim preclusion and issue preclusion. Claim preclusion, applicable here, will bar a defendant from raising claims in a subsequent cause of action if three requirements are met:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶20, 16 P.3d 1214 (quotations and citations omitted). All three elements must apply in order for a claim to be precluded. Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶58, 44 P.3d 663.

The three elements of claim preclusion apply here. First, identical parties are involved in the previous and instant appeals. Second, defendant's claims relating to the applicability of exemptions and the constitutionality of the Utah Uniform Securities Act as well as her claim of ineffective assistance of counsel were all brought before the Court in the first appeal. See Br. of Aplt., Case No. 20030110CA, at 14-18.

To the extent that these issues were inadequately briefed and disposed of on that basis, they nonetheless "could and should have been raised" in the first action because they arose directly out of the trial proceedings and the arguments were fully available to defendant at the time she filed her initial appeal. Third, this Court issued its opinion in the first appeal, affirming the trial court's decision. See State v. White, 2004 UT App 177 at addendum B. While defendant filed a petition for writ of certiorari, the pendency of that pleading does not affect the finality of the underlying judgment. See Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 390 (Utah 1987) ("A judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition") (citation omitted). Thus, because all three elements of claim preclusion are met, defendant's claims are barred by res judicata.

POINT TWO

DEFENDANT'S UNPRESERVED CLAIM THAT SHE SUFFERED PREJUDICE IN THE YEAR BETWEEN THE SENTENCING AND RESTITUTION HEARINGS DOES NOT GIVE RISE TO A CLAIM FOR APPELLATE RELIEF

Defendant's remaining argument seems to be that she was prejudiced by the delay of just over a year between her sentencing hearing and the time that the court set the restitution amount. See Br. of Aplt. at 10. She alleges that because the court did not set a specific restitution amount at

the sentencing hearing, she did not pay restitution at that time. Consequently, the victim of her crime stalked her, seeking payments, and thereby caused her harm. Id. She articulates no remedy, but suggests the need for legislation requiring a restitution hearing within three months of sentencing. Id. at 11. She also impliedly contends that her conviction should be vacated.

Defendant's complaint is not cognizable in this Court. First, her claim does not arise out of the order from which she purports to be appealing. That order set restitution in the amount of \$8460.63 and denied defendant's certificate of probable cause (R. 221-24). Defendant's claim of prejudice arising from the court's failure to set restitution right after sentencing is wholly unrelated to the order from which she appeals. Second, defendant's complaint on appeal - that the court should have set the restitution amount sooner - is directly contrary to what she requested at the restitution hearing. At that hearing, she explained:

So what I'm asking at this time, pursuant to Rule 27, staying appeal and also now we have a trial coming forth [in a civil matter], if we're able to go ahead and *stay restitution* at this point until we can figure out what it's going to be after we have this trial held. It was a default judgment, \$9,900 is way out of line. . . .

R. 271: 5 (emphasis added). For a claim to be considered on appeal, defendant must have made the same claim in the trial court and permitted that court to rule upon it. See, e.g., State


v. Bryant, 965 P.2d 539, 546 (Utah App. 1998) (objection must put trial court on notice "of the very error" of which defendant complains on appeal). Finally, defendant has not asked this Court for any remedy that is within its jurisdiction to order. While defendant requests a law that would require restitution to be set within a fixed period after sentencing, courts may not enact legislation. Moreover, defendant has cited no authority to support her implied contention that the victim's alleged harassment of her prior to the restitution hearing should result in reversal of her conviction on appeal. See, e.g., State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (declining to address issue when brief lacks supportive legal authority); Utah R. App. P. 24(a)(9) (requiring legal authority to support all arguments). For all of these reasons, defendant's argument fails.

CONCLUSION

For the reasons stated, this Court should affirm defendant's convictions for one count each of securities fraud and offer or sale by an unlicensed broker/dealer or agent, both third degree felonies.

RESPECTFULLY submitted this 25th day of October, 2004.

MARK L. SHURTLEFF
Attorney General



JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Christena B. White, attorney pro se, P.O. Box 1732, Salt Lake City, Utah 84110, this 25th day of October, 2004.

Jeanne C. Slotnick

Addenda

Addendum A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
: :
vs. : Case No: 021900588 FS
: :
CHRISTENA B WHITE, : Judge: JUDITH S ATHERTON
Defendant. : Date: January 27, 2003

PRESENT

Clerk: lorip
Prosecutor: BARLOW, CHARLENE
Defendant
Defendant's Attorney(s): BARBER, JAMES N.

DEFENDANT INFORMATION

Date of birth: April 9, 1961
Video
Tape Number: VIDEO Tape Count: 9:10

CHARGES

1. PENALTIES FOR VIOLATION OF SECURITIES - 3rd Degree Felony
Plea: Not Guilty - Disposition: 12/10/2002 Guilty
2. UNREGISTERED SECURITIES AGENT - 3rd Degree Felony
Plea: Not Guilty - Disposition: 12/10/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of PENALTIES FOR VIOLATION OF SECURITIES a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 021900588
Date: Jan 27, 2003

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

SUSPENDED PRISON TERM TO RUN CONCURRENT.

SENTENCE JAIL

Based on the defendant's conviction of PENALTIES FOR VIOLATION OF SECURITIES a 3rd Degree Felony, the defendant is sentenced to a term of 14 day(s) in the Salt Lake County Jail.

COMMUNITY SERVICE

Complete 300 hour(s) of community service.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 14 day(s) jail.
Defendant is to report to the Salt Lake County Jail.
Defendant is to report by January 31, 2003 by 9 p.m..

Defendant is to pay a fine of 0

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Violate no laws.
Pay restitution as determined by Probation Officer.
Perform community service hours.
MAINTAIN FULL TIME EMPLOYMENT AND/OR SCHOOL.
SUBMIT TO COGNITIVE RESTRUCTURING.

Case No: 021900588
Date: Jan 27, 2003

SENTENCE PROBATION SERVICE NOTE

AP&P TO SUPERVISE COMMUNITY SERVICE AND RESTITUTION

Dated this 27 day of Jan, 20 03

Judith S. Atherton

JUDITH S. ATHERTON
District Court



Addendum B



Not Reported in P.2d
 2004 WL 1368200 (Utah App.), 2004 UT App 177
 (Cite as: 2004 WL 1368200 (Utah App.))

Page 1

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
 v.
 Christeena B. WHITE, Defendant and Appellant.

No. 20030110-CA.

May 27, 2004.

Third District, Salt Lake Department; The
 Honorable Judith S. Atherton.

J. Garry McAllister, Riverton, for Appellant.

Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
 City, for Appellee.

Before Judges BENCH, JACKSON, and ORME.

MEMORANDUM DECISION (Not For Official
 Publication)

ORME, Judge:

*1 Appellant filed a brief and reply brief pro se. When the case was fully at issue, she obtained counsel. This court granted counsel's request for oral argument, but stated that "[c]ounsel for Appellant shall confine his arguments to the issues raised in Appellant's brief." Counsel did not seek leave to file new or supplemental briefs.

Under rule 24, Utah Rules of Appellate Procedure, an appellate brief "must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." Utah R.App. P. 24(j). "A

reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72 (quotations and citations omitted). "An issue is inadequately briefed 'when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)), *cert. denied*, 4 P.3d 1289 (Utah 2000).

"It is well established that a reviewing court will not address arguments that are not adequately briefed." *Thomas*, 961 P.2d at 304. Under rule 24, the appellant's argument "shall contain the contentions and reasons of the appellant with respect to the issues presented." Utah R.App. P. 24(a)(9). "Implicitly, rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Thomas*, 961 P.2d at 305. It is also fundamental that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Utah R.App. P. 24(a)(9).

"As a general rule, a party who represents [her]self will be held to the same standard of knowledge and practice as any qualified member of the bar [.]" *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983). "At the same time, we have also cautioned that 'because of [her] lack of technical knowledge of law and procedure [a lay person acting as her own attorney] should be accorded every consideration that may reasonably be indulged.'" *Id.* (citation omitted).

It is unclear to what extent this notion of leniency should apply in this case, where Appellant is actually represented by counsel, although she was not when she prepared her own briefs. Even if we were to be somewhat lenient in enforcing rule 24 in this case, the briefs Appellant filed simply did not make a coherent, reasoned argument. Far from

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2004 WL 1368200 (Utah App.), 2004 UT App 177
(Cite as: 2004 WL 1368200 (Utah App.))

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being a mere "procedural misstep," *Lundahl v. Quinn*, 2003 UT 11, ¶ 4, 67 P.3d 1000, the lack of meaningful analysis of applicable legal authority makes it impossible for Appellant to meet her burden of demonstrating error--much less prejudicial error. Accordingly, we affirm.

WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and NORMAN H. JACKSON, Judge.

2004 WL 1368200 (Utah App.), 2004 UT App 177

END OF DOCUMENT

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Addendum C

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : LAW AND MOTION
 :
 :
 :
vs. : Case No: 021900588 FS
 :
 :
CHRISTENA B WHITE, : Judge: JUDITH S ATHERTON
Defendant. : Date: February 4, 2004

PRESENT

Clerk: lorip
Prosecutor: BARLOW, CHARLENE
Defendant
Defendant pro se

DEFENDANT INFORMATION

Date of birth: April 9, 1961
Video
Tape Number: video Tape Count: 9:01

CHARGES

1. PENALTIES FOR VIOLATION OF SECURITIES - 3rd Degree Felony
Plea: Not Guilty - Disposition: 12/10/2002 Guilty
2. UNREGISTERED SECURITIES AGENT - 3rd Degree Felony
Plea: Not Guilty - Disposition: 12/10/2002 Guilty

HEARING

TAPE: video COUNT: 9:01

COURT DENIES CERTIFICATE OF PROBABLE CAUSE. COURT ORDERS
RESTITUTION TO BE PAID IN THE AMOUNT OF \$8460.63. STATE WILL
PREPARE ORDER AND SUBMIT TO COURT.

Case No: 021900588
Date: Feb 04, 2004

Dated this 4 day of February, 2004

Judith S. Atherton

JUDITH S. ATHERTON
District Court Judge

