2005

State of Utah v. Marty Joe Galvan : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Appellee/Plaintiff, v. MARTY JOE GALVAN, Appellant/Defendant.	Case No. 20050005 (incarcerated)

OPENING BRIEF OF APPELLANT

This is the opening brief of appellant in an appeal from convictions for theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404, and assault, a class A misdemeanor, in violation of Utah Code Ann. § 76-5-102, entered in the Third District Court of Salt Lake County, State of Utah, the Honorable John Paul Kennedy, Judge, presiding.

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(e) provides this Court's jurisdiction over this appeal from third degree felony and class A misdemeanor convictions entered in a court of record.

ISSUES, STANDARDS OF REVIEW AND PRESERVATION

1. Does the prosecutor's breach of the plea agreement require resentencing before a new judge?

This issue was raised in the trial court (R. 84-1114, R. 146 at 26).

This Court will be addressing this issue as a matter of law, without deference to the trial court. See, e.g., *State v. Copeland*, 765 P.2d 1266, 1273-76 (Utah 1988) (remanding to the trial court to assess whether prosecutor's promise in plea bargain was illusory and required withdrawal of the plea without any apparent deference to the trial court).

2. Did the trial court have jurisdiction to rule on the 22(e) motion?

This issue was raised in the trial court (R. 140).

Jurisdictional issues pose questions of law, to be addressed without deference to the trial court. See, e.g., *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 10, 44 P.3d 724.

CONSTITUTIONAL PROVISIONS AND RULES

Pertinent constitutional provisions and rules are copied in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Mr. Galvan with one count of second degree felony robbery and one count of third degree felony attempted theft (R. 2-3). Michael A. Peterson of LDA represented Galvan (R. 42). Galvan waived his preliminary hearing (R. 47).

The State filed an amended information charging Galvan with third degree felony theft and class a misdemeanor assault (R. 53-54). Galvan entered no contest pleas to the amended charges on the condition detailed in the written plea form as follows:

> At sentencing, the state recommends jail time on the Class A with completion of CATS or a release to an intensive inpatient program. At the end of successful probation, the state does not oppose a 76-3-402 reduction.

(R. 56-62). At the plea hearing, counsel clarified:

> Mr. Sheffield [the prosecutor] will also recommend at the time of sentencing probation in this case, with some jail time, and a release to an intensive inpatient program.

(R. 146 at 11).

Judge Kennedy sentenced Galvan to consecutive terms of zero to five years in

prison and one year in jail (R. 68-70).

Counsel moved for a restitution hearing and filed a timely notice of appeal (R. 71, 76).

Present counsel was appointed to represent Galvan (R. 78).

Galvan moved to vacate his sentence pursuant to Utah R. Crim. P. 22(e) because the prosecutor had breached the plea agreement (R. 84-114).

Prior to the hearing on restitution and the motion to vacate, Galvan wrote to Judge Kennedy asking him to recuse himself for various reasons, including his failure to intervene when the victim of the assault was threatening Galvan at sentencing (R. 124).

At the hearing on restitution and the motion to vacate, present counsel asked Judge Kennedy to continue the matter until a transcript of the prior proceedings in the case could be prepared and reviewed (R. 125). The court agreed and continued the hearing (R. 125).

That same day, the court held a conference call with counsel for both parties and struck the hearing on restitution and the motion to vacate (R. 127). The final order regarding the conference call reflects that after setting the hearing, the court realized that LDA had filed a notice of appeal (R. 140). The court was concerned that this deprived him of jurisdiction (R. 140). Counsel for both parties stated their beliefs that the court did have jurisdiction to rule on the Rule 22(e) motion to vacate, and offered to research the matter for the court (R. 140). The court ruled that he did not have jurisdiction over the

22(e) motion, and would defer ruling on the restitution motion, despite having jurisdiction to address it while the matter was on appeal (R. 140).

Judge Henriod signed the final order (R. 140), and counsel filed a timely notice of appeal (R. 142).

Galvan moved this Court to consolidate his two appeals, and this Court granted the motion (R. 144).

STATEMENT OF FACTS

Galvan entered no contest pleas to the amended charges on the condition detailed in the written plea form as follows:

> At sentencing, the state recommends jail time on the Class A with completion of CATS or a release to an intensive inpatient program. At the end of successful probation, the state does not oppose a 76-3-402 reduction.

(R. 56-62). At the plea hearing, counsel clarified:

> Mr. Sheffield [the prosecutor] will also recommend at the time of sentencing probation in this case, with some jail time, and a release to an intensive inpatient program.

(R. 146 at 11).

At sentencing, after trial counsel identified the in-patient treatment facilities willing to accept Mr. Galvan, and after the victim spoke, the prosecutor, Paul Parker, stated:

> I just noticed from the pre-sentence report, your Honor, some things that are troubling. First of all, of course, is his history. It is long and extensive, and it is very troubling for violence, the type of things that the defendant says today, that it was just, you know, related to the alcohol.

> But yet it is replete back from the early days in the mid 1980s – or, 1982, with assaulting type offenses, and it runs the gamut up to the felony, which was an aggravated assault, apparently with a weapon. He has just done this almost all of his adult life, and this is – this is very concerning, particularly given the facts and the circumstances we have in this case.
>
> Secondly, I am concerned with his ability to really do well on a probation setting. I notice on the page that describes the probation history he has not done well. He has had some difficulties. He has not complied, and they've had to bring him back. I notice even under the criminal history, where it talks about the jail disciplinaries, that he was remanded for inciting, agitating other prisoners, using threatening and abusive language.
>
> Again, these are not wonderful indications of an individual that should be on probation, and it looks to me like he needs to be in prison, as the pre-sentence report has indicated. We'll submit it, your Honor.

(R. 146 at 23-24).

After Mr. Galvan pled for leniency with the court, trial counsel for Galvan approached for an unrecorded bench conference (R. 146 at 26). Following this, trial counsel noted that the prosecutor, Paul Parker, had breached the plea agreement reached between trial counsel and another prosecutor, Kelly Sheffield, after Mr. Sheffield had failed to leave a note for Mr. Parker informing him of the plea agreement (R. 146 at 26).

Mr. Parker interjected to explain that the plea agreement was not in his file, and that "to stable that agreement," he would withdraw his comments and "make an affirmative recommendation of probation." (R. 146 at 27).

The court indicated that regardless of the recommendations and regardless of what the victim said, on the basis of Mr. Galvan's history involving prior abusive conduct, the court would sentence him to consecutive terms of zero to five years in prison and one year in jail (R. 146 at 28).

SUMMARY OF ARGUMENTS

The prosecutor's breach of the plea agreement entitles Mr. Galvan to specific performance of the plea agreement in front of a new sentencing judge.

The trial court had jurisdiction to so rule, despite the filing of the first notice of appeal.

This Court should remand this matter to the trial court, with an order that the case be re-assigned for resentencing in compliance with the plea agreement.

ARGUMENTS

I.
MR. GALVAN IS ENTITLED TO RECEIVE THE BENEFIT OF HIS PLEA BARGAIN.

In *Santobello v. New York*, 404 U.S. 257 (1971), the Court recognized that when a guilty plea rests to a material degree upon the promise of a prosecutor, due process requires that the prosecutor fulfill his or her promise. *See id.* at 262.[1] The Court left to the discretion of the state courts the decision of whether a prosecutor's breach of a plea agreement should result in the withdrawal of the plea or specific performance of the promised recommendation in a resentencing before a different judge. *Id.* at 263.

Utah law has long recognized that when a defendant misunderstands the value of the inducement which leads him to enter his guilty plea, this renders the benefit of the

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[1]Due process of law is guaranteed by Article I § 7 of the Utah Constitution and by the Fourteenth Amendment to the United States Constitution.

plea bargain illusory and entitles him to withdraw his plea. *See, e.g., State v. Copeland*, 765 P.2d 1266, 1274-76 (Utah 1988) (court remanded to determine whether guilty pleas were induced by sentencing recommendation that was legally impossible to come to fruition, because if defendant misunderstood the value or the recommendation which induced him to enter the pleas, the illusory nature of the prosecutor's promise justified withdrawal of the plea).

As a matter of policy, most courts require prosecutors to comply with both the letter and spirit of their agreements, because integrity should be expected of the prosecution in all circumstances, and reliability of the prosecution is essential to the continuing functioning of the very important plea bargaining process. *See, e.g., United States v. Brye*, 146 F.3d 1207, 1211 (Utah 1998). Accordingly, these courts require the prosecutors to comply with both the letter and spirit of their agreements, and will find a breach of agreements when prosecutors technically comply with their obligations while making "thinly veiled" or very subtle efforts to persuade a court in a fashion inconsistent with the prosecutors' obligations under the agreements. *See id.* at 1211-1213.

The lengthy prison recommendation delivered by Mr. Parker in this case, followed by his perfunctory attempt to comply with the letter of the plea agreement, was no substitute for delivering the true inducement which led Mr. Galvan to enter his plea, and entitles him to withdraw his plea. *Cf. Copeland, supra.*

Because the prosecutor's breach of the plea agreement nullified the inducement

which led Galvan to enter the pleas and rendered Galvan's guilty pleas unknowing and involuntary, this Court should remand this matter to a different sentencing judge so that Galvan can receive the benefit of the plea bargain. *See Santobello, supra.*

This Court discussed *Santobello* and *Brye* and other pertinent authorities in this area of the law, in the recent decision, *State v. Smit*, 2004 UT App 222, 95 P.3d 1203.

In *Smit*, the prosecutor agreed at the time of the plea agreement not to recommend any jail time, but at the time of sentencing, recommended a jail sentence of three to six months. *Id.* at ¶¶ 3 and 4. On appeal from the trial court's denial of the motion to withdraw the plea, the Court first reviewed *Santobello*, and then surveyed Utah decisions and decisions from other jurisdictions, which likewise grant trial courts discretion to remedy prosecutorial breaches of plea agreements with withdrawal of pleas or specific performance. Id. at ¶¶ 10–17.

In *Smit*, the defendant did not seek specific performance in a resentencing before a different judge, one of the two remedies authorized by *Santobello*. *See Smit* at ¶ 35 (concurring opinion of Judge Thorne). Rather, he immediate sought specific performance in the sentencing before the original judge who heard the prosecutor's initial unlawful recommendation of a jail sentence. *Id.* When the prosecutor complied with the defendant's demand by correcting the recommendation to comport with the plea agreement and the judge imposed jail time, the defendant then moved to withdraw the plea, and the trial court denied this motion, concluding that the sentencing decision was

not influenced by the prosecutor's first unlawful recommendation, which was cured by the prosecutor's corrected recommendation. *See id.* at ¶¶ 35 (concurring opinion of Judge Thorne) and 20-21 (main opinion).

The fact that a judge is not influenced by a prosecutor's illegal recommendation does not mollify the prosecutor's breach of the plea agreement, which breach destroys the knowing and voluntary nature of the entry of guilty pleas. *See Santobello*, 404 U.S. at 262-63 (remanding for withdrawal of the plea or resentencing before a different judge, despite the fact that the judge below found that he was not influenced by the prosecution); *Smit*, 2004 UT App 222 at ¶¶ 13-15 (discussing Utah cases recognizing that if defendant enters guilty plea contingent on the promise of the prosecution which is not or cannot be fulfilled, this renders the plea unknowing and involuntary).

Smit should be read very narrowly and limited to its holding, that the trial court did not abuse its discretion in denying the motion to withdraw the guilty plea on the unique facts of that case. For if prosecutors were given *carte blanche* to make and then retract recommendations inconsistent with their obligations under plea agreements, this would undermine the integrity of their very important governmental office, and the reliability and advisability of utilizing the plea bargaining process. *Cf., e.g., Brye, supra.* It would also undermine the value of the plea bargains and negate their validity by rendering the inducements illusory. *Cf., e.g., Copeland, supra.*

This Court should remand this matter to the trial court and order that Mr. Galvan

be resentenced before a new sentencing court. *See Santobello, supra.*

II.
THE TRIAL COURT HAD JURISDICTION TO RULE ON THE 22(e) MOTION.

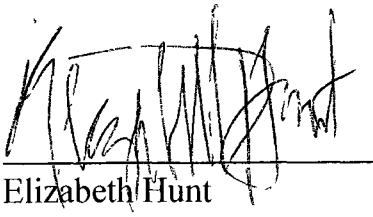
The trial court was in error in ruling that he had no jurisdiction to rule on the Rule 22(e) motion by virtue of the filing of the notice of appeal. Under the plain terms of Utah R. Crim. P. 22(e), a trial court "may correct ... a sentence imposed in an illegal manner ... at any time." *Cf. State v. Babbel*, 813 P.2d 86, 87-88 (Utah 1991) (trial courts are viewed as having continuing jurisdiction to correct void sentences).

Thus, the general rule that the filing of a notice of appeal divests the trial court of jurisdiction does not apply in this context. *Cf. State v. Sampson,* 806 P.2d 233, 234 (Utah App. 1991) (because rule and statute pertaining to certificates of probable cause specifies that petitions for certificates are to be filed with the trial courts, the general rule that the filing of the notice of appeal divests a trial court of jurisdiction does not apply).

CONCLUSION

This Court should remand this to the trial court for resentencing in compliance with the plea agreement before a new judge.

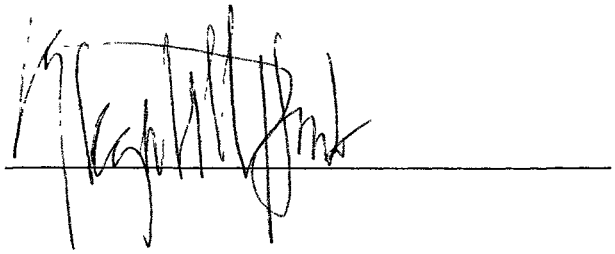
Respectfully submitted on June 6, 2005.



Elizabeth Hunt
Counsel for Mr. Galvan

CERTIFICATE OF MAILING

I hereby certify that on June 6, 2005, I mailed two true and correct copies of the foregoing to Utah Attorney General Mark Shurtleff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854.



ADDENDUM

CONSTITUTIONAL PROVISIONS AND RULE

Constitution of Utah, Article I § 7

No person shall be deprived of life, liberty or property, without due process of law.

United States Constitution, Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah R. Crim. P. 22

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.
Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner,

at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

TRIAL COURT RULING

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IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Appellee, v. MARTY JOE GALVAN, Defendant/Appellant.	ORDER REGARDING JURISDICTION Case No. 0041904272FS Judge John Paul Kennedy

On January 24, 2005, this matter came on for hearing regarding restitution and Mr. Galvan's motion to vacate his sentence pursuant to Utah R. Crim. P. 22(e). Mr. Galvan was present with his counsel, Elizabeth Hunt, and the State was represented by Kelly R. Sheffield.

Because Mr. Galvan had written a letter to the Court seeking recusal, this Court set the matter for further hearing on March 7, 2005 at 10:00 a.m., in order to give Ms. Hunt an opportunity to review the record and to file whatever pleadings she felt were in order on the recusal issue.

After the hearing, the Court realized that a notice of appeal had been filed on Mr.

Galvan's behalf, and the Court's clerk initiated a conference call with counsel for the parties because the Court was concerned that the notice of appeal may have deprived the Court of jurisdiction.

During the conference call, Ms. Hunt indicated her belief that the Court did have continuing jurisdiction over the restitution matter and the Rule 22 motion to vacate, and offered to brief the jurisdictional issue for the Court. Mr. Sheffield indicated his belief that the Court did have continuing jurisdiction over the restitution matter, and indicated that he would have a clerk research the Court's jurisdiction over the Rule 22 motion to vacate.

The Court concluded that the Court did not have jurisdiction over the Rule 22 motion, and that, while it does have continuing jurisdiction over the restitution issue, the Court would defer hearing the restitution issues until the appeal is complete.

Accordingly, the hearing of March 7, 2005 is stricken.

So ordered this 31 day of January, 2005.

STATE OF UTAH

3/3/05

THE HONORABLE JOHN PAUL KENNEDY
JUDGE OF THE THIRD DISTRICT COURT

approved as to form:

Kelly R. Sheffield

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2005, I mailed, e-mailed and faxed a true and correct copy of the foregoing to Kelly R. Sheffield, Deputy District Attorney, 111 East Broadway, Suite 400, Salt Lake City, Utah 84111.