

1994

Utah v. Snyder : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	Case No. 940600-CA
Plaintiff/Appellee,	:	
v.	:	Priority No. 2
JOY LYNN SNYDER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF ATTEMPTED
AGGRAVATED ASSAULT, A CLASS A MISDEMEANOR,
IN VIOLATION OF UTAH CODE ANN. §§76-4-102 &
76-5-103 (1990), IN THE FIFTH JUDICIAL DISTRICT
COURT, IN AND FOR IRON COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT T. BRAITHWAITE
PRESIDING.

UTAH COURT OF APPEALS

50

DOCKET NO. 940600

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FILED

Oral Argument Not Requested

FEB 07 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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	:	Case No. 940600-CA
Plaintiff/Appellee,	:	
v.	:	Priority No. 2
JOY LYNN SNYDER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction, pursuant to a guilty plea, of attempted aggravated assault, a class A misdemeanor, in violation of Utah Code Annotated §§76-4-102 & 76-5-103 (1990).

This Court has jurisdiction to hear the case pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1994).

STATEMENT OF THE ISSUE AND STANDARD OF APPELLATE REVIEW

Did the trial court properly deny defendant's motion to withdraw her guilty plea where defendant failed to establish good cause for the withdrawal? A trial court's determination that a defendant failed to show good cause will not be reversed absent an abuse of discretion. State v. Thorup, 841 P.2d 746, 747 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-13-6 (1994). Withdrawal of plea.

...

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

State statutes defining the crime of which defendant was convicted, are reproduced in Addendum A. Any relevant state and federal constitutional provisions are reproduced in the Addendum.

STATEMENT OF THE CASE

Defendant, Joy L. Snyder, was charged by information of attempted aggravated assault, a third degree felony, in violation of Utah Code Ann. §76-5-103 (1990), in Iron County (R. 2). After arraignment defendant entered into a plea agreement (R. 11). In exchange for defendant's guilty plea the State would amend the Information thereby charging a crime of attempted aggravated assault, a class A misdemeanor (R. 10 & 11). Defendant was sentenced to one year in the county jail (R. 11).

Nine days later defendant filed a motion seeking to withdraw her guilty plea claiming the trial court failed to comply with rule 11, Utah Rules of Criminal Procedure (R. 26 & 41). Following an evidentiary hearing the trial court held rule 11 had been complied with and therefore, no sufficient basis was found to allow the withdrawal (R. 41). Defendant timely appealed (R. 46).

STATEMENT OF FACTS¹

Defendant and her sister were engaged in a verbal argument which escalated to a fist fight. Defendant struck her sister on the head causing injury to the sister. The injury consisted of a large bump and red mark. Defendant was not injured (R. 3). The police were called to investigate the domestic disturbance and subsequently arrested defendant (R. 3).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by denying defendant's motion to withdraw her guilty plea. First, defendant's failure to: 1) provide an adequate record on appeal, 2) comport with the briefing rules or 3) provide any meaningful analysis in support of her argument, constitutes a waiver of review by this Court. Consequently, the trial court's denial of the motion to withdraw the guilty plea must be affirmed.

Second, even assuming defendant has not waived review, there is nothing in the existing record to support her claim that the trial court did not comply with the requirements of rule 11, Utah Rules of Criminal Procedure. Therefore, defendant cannot show that the trial court abused its discretion by denying defendant's motion for failure to show good cause.

¹The facts provided are from the fact sheet filled out by the police (R. 3), and the information filed by the county attorney (R. 2). No other source was available as defendant has failed to provide a record containing the facts.

ARGUMENT
POINT I

DEFENDANT'S FAILURE TO PROVIDE A RECORD,
LEGAL CITATIONS, LEGAL ANALYSIS OR COMPLY
WITH THE APPELLATE PROCEDURAL RULES PRECLUDES
THIS COURT FROM REVIEWING THE TRIAL COURT'S
DENIAL OF THE MOTION TO WITHDRAW HER GUILTY
PLEA.

Insufficient Record

In order to review defendant's allegation that the trial court abused its discretion in denying her motion to withdraw her guilty plea, this Court must be provided with a record of the lower court proceedings. Utah R. App. P. 11(e) (2) (1994) (If appellant challenges finding as unsupported or contrary to the evidence, appellant must include in the record a transcript of all evidence relevant to such a finding or conclusion); State v. Rawlings, 829 P.2d 150, 152 (Utah App. 1992) ("In the absence of an adequate record on appeal, we cannot address the issues raised and presume the correctness of the disposition made by the trial court").

The only hearings held in this case were the preliminary hearing in which the guilty plea was taken and two hearings on defendant's motion to withdraw the plea (R. 13, 33 & 36). Defendant did not order a transcript of the plea hearing or the final hearing on the motion to withdraw. Indeed, defendant filed a statement with this Court claiming that "a transcript has not been ordered because this party does not intend to rely on said transcript..." (R. 43).

Additionally, defense counsel was ordered to prepare "...an informal transcript" of

the first motion to withdraw hearing (R. 33); but, if indeed the transcript was prepared, it was not made a part of the record below, nor did defendant provide the transcript to this Court. Consequently, defendant has not provided any record to support her claim of an involuntary or uninformed plea.

When a defendant predicates error to this Court, he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.

State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1983), cert. denied, 460 U.S. 1044 (1983).

Without a record to support defendant's allegations of an improper plea proceeding, this Court must assume the regularity of the proceeding below. State v. Wetzel, 868 P.2d 64, 67 (Utah 1993) ("In the absence of an adequate record on appeal, this Court can only assume the regularity of the proceedings below"). See also Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989), cert. denied, 493 U.S. 1033 (1990); State v. Miller, 718 P.2d 403, 405 (Utah 1986); Wulffenstein, 657 P.2d at 293.

Improper Record

In an attempt to support her allegation that her plea was involuntary and uninformed, defendant attached an affidavit of her defense counsel to the Addenda of her brief (Addendum B, Appl. Br.) The affidavit was executed on January 4, 1995, and is not a part of the record on appeal. Utah R. App. P. 11 (a) & (d) (1).

It is improper for defendant to fail to provide an adequate record and then attempt

to bolster her claims by attaching a non-record document to her brief. State v. Montes, 804 P.2d 543, 546 (Utah App. 1991) (affidavits which are not a part of the record below will not be considered on appeal); State v. Aase, 762 P.2d 1113, 1117 (Utah App. 1988) ("affidavits which are not a part of the record below will not be considered unless they are juror affidavits and fall within well-delineated exceptions to the rule").

As the affidavit from defense counsel is improper and not a part of the record on appeal it should be struck from defendant's brief and not considered in review of her claim.²

Non-compliance with Appellate Rules

Defendant's brief fails to identify a standard of review and fails to provide citations to the record, contrary to the requirements of rule 24(a)(5), (a)(7) & (9).

Accordingly, this Court should refuse to rule on the merits of defendant's claim and affirm the district court's ruling. See State v. Garza, 820 P.2d 937, 939 (Utah App. 1991) (appellate court refused to reach issue because defendant's brief did not include a statement of facts with citations to the record); West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 n.1 (Utah App. 1991) (appellate court has prerogative to affirm district court's ruling solely on the basis of appellant's failure to comply with the Utah Rules of Appellate Procedure); Trees v. Lewis, 738 P.2d 612, 612-13 (Utah 1987) (appellate court dismissed appeal because appellant failed to support facts set forth in brief with citations in the record); State v. Steggell, 660 P.2d 252, 253 (Utah 1983) (failure to

²The State has filed a motion in conjunction with its brief to strike the affidavit from defendant's brief.

cite to the record in support of any of the alleged errors precludes defendant's objections to such error) See also State v. Wulffenstein, 657 P.2d at 293.

Lack of Meaningful Analysis

Furthermore, defendant's brief is devoid of any legal or factual analysis, rendering the "argument" meaningless. Utah Rule of Appellate Procedure 24 (a)(9) requires that the "argument" section of the brief contain "the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes and parts of the record relied on." However, defendant provides only "point" headings with one case citation under the heading. Defendant's failure to provide this Court with substantive argument should preclude review of her claim. State v. Yates, 834 P.2d 599, 602 (Utah App. 1992) (reviewing court refused to consider claims on appeal where defendant failed to comply with rule 24 (a)(9)).

For all these reasons the Court should summarily uphold the trial court's denial of defendant's motion to withdraw.

POINT II

**EVEN IF THIS COURT CONSIDERS THE MERITS, DEFENDANT
HAS FAILED TO DEMONSTRATE GOOD CAUSE TO SUPPORT
HER MOTION TO WITHDRAW HER PLEA.**

Even assuming the inadequacies of defendant's brief do not bar review of her claim, an examination of the merits evidences that defendant's plea was knowing and voluntary; therefore, the trial court's denial of the motion to withdraw her plea should be affirmed.

Rule 11 Requirements Were Met

The sole basis for defendant's challenge to her plea is that it was involuntary and

unknowing because the trial court failed to give her a written plea agreement in advance the plea (Appl. Br. 1, 2 & 4). However, rule 11, Utah Rules of Criminal Procedure does not mandate a written statement in advance of a plea, but does require that a defendant be made aware of certain rights and procedures, i.e. right to speedy trial, impartial jury, confront witnesses, the nature and elements of offense, burdens of proof, possible penalties and sentences, etc. Utah R. Crim. P. 11 (e) (1)-(8).

Defendant was made aware of the rights and procedures, through oral colloquy with the court, as required by the rule (R. 12). Indeed, defendant admits in her brief that "her rights were read to her in open court" (Appl. Br. 4). State v. Smith, 812 P.2d 470, 476 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992) ("strict Rule 11 compliance [must] be demonstrated on the record at the time the guilty or no contest plea is entered...Therefore, if an affidavit is used to aid Rule 11 compliance, it must be addressed during the plea hearing.") (citations omitted, emphasis added). As such, defendant has failed to establish any rule 11 violation.

Record Supports a Knowing and Voluntary Plea

Similarly, defendant asserts that her plea was not knowingly entered, yet she admits that she "had the opportunity to understand her rights in open court" (Appl. Br. 3). Further, there is nothing in this existing record to suggest that defendant's plea was anything but a knowing and voluntary plea, therefore this Court must presume the regularity of the proceedings below:

Parties claiming error below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record. "Absent that record defendant's assignment of error stands as a unilateral allegation which the

review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.'"

Wetzel, 868 P.2d at 67. (Citations omitted).

Additionally, through plea negotiations the charge was reduced from aggravated assault, a third degree felony, to attempted aggravated assault, a class A misdemeanor (R. 13). The minimal record provided on appeal establishes that at the time of the plea the court advised defendant of her rights which she waived (R. 11), and that after the initial hearing on defendant's motion to withdraw her plea (R. 33), the court reviewed the tapes of the plea hearing and determined that the requirements of rule 11 had been met (R 39).

CONCLUSION


For these reasons the State respectfully requests that this Court affirm the trial court's order denying the motion to withdraw defendant's guilty plea; thereby affirming her conviction.

ORAL ARGUMENT NOT REQUESTED

Because the facts and legal arguments are adequately presented in the briefs, oral argument would not significantly aid the Court in deciding this case.

RESPECTFULLY SUBMITTED the 8th of February, 1995

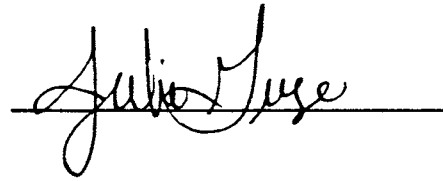
JAN GRAHAM
Attorney General



JULIE GEORGE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing motion was mailed, first-class, postage prepaid, to James M. Park, Attorney for Appellant, 965 south Main, Suite 3, P.O. Box, 765, Cedar City, Utah 84720, this 8th day of February, 1995.

A handwritten signature in cursive script, reading "Julie Huse", is written over a horizontal line.

ADDENDA

ADDENDUM A
STATUTORY & RULE PROVISIONS

Relevant Utah Statutes

76-5-103. Aggravated assault. (1990)

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

- (a) intentionally causes serious bodily injury to another; or
- (b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a third degree felony.

76-5-102. Assault. (1991)

(1) Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

76-1-601. Definitions. (1990)

...
(5) "Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

- (a) the actor's use or apparent use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or
- (b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

76-4-101. Attempt- Elements of offense. (1990)

(1) for purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

RULES OF APPELLATE PROCEDURE

Utah R. App. P. 24 (1994 AS AMENDED). Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

...

(2) A table of contents, including the contents of the addendum, with page references.

...

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority, and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

...

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

...

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

ADDENDUM B
TRIAL COURT ORDER

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IRON COUNTY
BY Hea

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

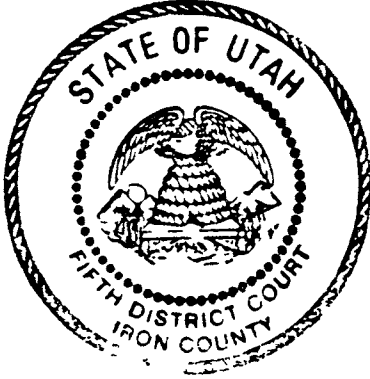
STATE OF UTAH,)	ORDER DENYING DEFENDANT'S
)	MOTION TO WITHDRAW PLEA OF
Plaintiff,)	GUILTY
vs.)	
JOY LYNN SNYDER,)	Criminal No. 941500583
Defendant.)	Judge Robert T. Braithwaite

The above-entitled matter having come before the Court on September 6, 1994, in Cedar City, Utah, and the above-named Defendant, JOY LYNN SNYDER, having appeared in person together with her attorney of record, James M. Park, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having previously reviewed the Defendant's motion to withdraw plea of guilty, and thereafter having reviewed the recording tapes of the Defendant's entry of plea of guilty on July 22, 1994, and the Court having determined that it followed Rule 11 of the Utah Rules of Criminal Procedure, and the Court having further determined that no sufficient basis has been set forth by the Defendant as to why her plea of guilty should be withdrawn, and no cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's motion to withdraw her plea of guilty should be, and hereby is, overruled and denied

DATED this 7 day of September, 1994.

BY THE COURT.





ROBERT T. BRAITHWAITE
Fifth District Judge