

1994

Utah v. Kelstrom : Brief of Appellant

Utah Court of Appeals

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Jan Graham; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff,)	
)	
vs.)	
)	Case No: 940328-CA
DOYLE KELSTROM,)	
)	Priority No: Priority No. 082
Defendant.)	

BRIEF OF APPELLANT

**APPEAL FOR THE DENIAL OF APPELLANT'S MOTION
TO WITHDRAW GUILTY PLEA
IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH
THE HONORABLE JON M. MEMMOTT PRESIDING**

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COURT OF APPEALS

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BRIEF OF APPELLANT

JURISDICTION OF THE COURT AND
AND NATURE OF THE PROCEEDINGS

This is an appeal from a denial of Appellant's Motion to Withdraw Guilty Plea entered in the Second District Court, in and for Davis County, State of Utah. Appellant's appeal was originally filed in the Utah Supreme Court, however, was subsequently assigned to the Utah Court of Appeals and assigned Appellant's case a new number: 940328-CA.

This Court has jurisdiction to consider the Appellant's appeal pursuant to Utah Code Ann. § 78-2a-3(f) and Utah R. App. P. 3., as this Court has jurisdiction to review a final decision entered by a district court of the State of Utah.

**ISSUES PRESENTED ON APPEAL
AND STANDARD OF REVIEW**

1. Whether Appellant's guilty plea was made knowingly and voluntarily

2. Whether the State violated its plea agreement with the Appellant.

3. Whether Appellant received ineffective assistance of counsel because defense counsel Thomas V. Rasmussen failed to raise two issues with respect to the Appellant's Motion to Withdraw his Guilty Plea.

STATEMENT OF THE CASE

A. Nature of the Case

The above-captioned case is a denial of withdrawal of a guilty plea.

On or about April 29, 1992, Appellant was charged with Rape of a Child under Utah Code Ann. § 76-5-402.1 (1953 as amended). (R., #15.) On or about September 8, 1992, Appellant subsequently pled guilty to the amended charge of Attempted Sexual Abuse of a Child under § 76-5-404.1. (Id.) The district court sentenced Appellant to the Utah State Prison for an indeterminate term of five years to life and ordered Appellant to pay restitution to for any required counseling costs of the victim. (R., Judgment and Commitment Order, File # 47.)

Thereafter, Appellant represented by Thomas V. Rasmussen filed a Motion and Accompanying Memorandum of Points and Authorities to Withdraw Guilty Plea. (Id. at # 50 & # 53, respectfully.) The State filed its Memorandum in Opposition. (See id. at # 72.) The district court denied Appellant's Motion. (Id. at 77.)

Appellant represented by defense counsel Brad Rich then filed a Motion to Amend and for Reconsideration of Defendant's Motion to Withdraw Guilty Plea. (R., File # 83.) The State filed a response. (Id. at # 148.) The district court denied Appellant's Motion. (See id. at 152.) Appellant filed his Notice of Appeal in the Second Judicial District Court in and for Davis County, State of Utah. (R., File # 154.) However, the Utah Supreme Court dismissed Appellant's appeal because it was untimely. (R., File # 162.)

Represented by present counsel, Appellant then filed a Motion and Accompanying Memorandum of Points and Authorities for Relief. (R., File # 172, 174, respectfully.) The district court scheduled an evidentiary hearing for the matter. (R., File # 179.) The State filed its response. (R., File # 182.) The Court found that defense attorney Brad Rich did not perfect his appeal as requested and, accordingly, found that Appellant was denied his right to a timely appeal of his original sentence,

entered findings of fact, and ordered that Appellant's Motion to Withdraw his Guilty Plea is denied, and ordered that Appellant continue to serve his sentence. (R., File # 193-94.) Appellant then filed his Second Notice of Appeal in the Second Judicial District Court in and for Davis County, State of Utah.

B. Statement of the Facts

During Appellant's sentencing phase, the following colloquy occurred:

* * *

Mr. Namba: Your Honor, I would like to submit for the Court's consideration a certified document from --

* * *

Mr. Namba: That indicates that he was ordered to have psychological treatment in Oregon. We have really at this point in time no way of verifying whether or not that was actually done. He testifies that he has not had psychological counseling. I think the point is that he was in the system where it was made available to him and if it wasn't done, it was him. He certainly could have affected that on his own. And I've received two names of counselors to whom their billings have been sent to the family for services to the defendant. And I don't know if the Court wants to hear from the family members to support that or if the Court would just inquire of the defendant his relationship with those therapists, Dr. Deleporto and Lee Mauret. Apparently there has been some therapy that's been going on.

Mr. Kelstrom: Dr. Deleporto was marriage counselor therapy. I was married to June who's a;so present here in the Court and she can testify to this, of she would, it was strictly marriage counseling type of therapy. They had nothing to do with sexual abuse. . . . There was a therapist but it was also a marriage counselor type of situation, not a sexual abuse therapist. . . .

Mr. Namba: I guess the point for that is, your Honor, in marriage therapy the problems exist. Obviously he hasn't taken

advantage of -- those problems didn't surface in the therapy. He hasn't taken advantage of the therapy.

* * *

The Court: Anything else?

Mr. Namba: My agreement with counsel and with the Defendant in this matter with regard to my position at sentencing was that I would concur in the recommendation. But I think that's important to the Court to have --

* * *

Mr. Namba: I've at least made the portrayal for the Court to know what has happened. And I just the only other thing that I wanted to comment on was other cases we talked about. Counsel mentioned the McIntyre case. And I just I think we talked -- I think he's referred to Michael McIntyre case. This case is probably more proportional than the Mcintyre case.

SUMMARY OF THE ARGUMENT

Appellant received ineffective assistance of counsel when defense counsel Thomas V. Rasmussen failed to raise in Appellant's Motion to Withdraw his guilty plea two viable issues. Specifically, Rasmussen failed to raised the issue of whether Appellant's plea was made voluntarily and knowingly, and whether the State violated Appellant's signed plea agreement. Appellant asserts that his plea was not entered knowingly and voluntarily as required by Utah R. Crim. P. 11(e)(2), and supporting caselaw, and that the State violated the signed plea agreement that the State and the Appellant entered into.

ARGUMENTS

I. WHETHER APPELLANT'S GUILTY PLEA WAS MADE KNOWINGLY AND VOLUNTARILY

Utah R. Crim. P. 11(e) provides that "[t]he court may refused to accept a guilty plea . . . and may not accept the plea until the court has found: . . . (2) the plea is voluntarily made" Id. In addition,

[t]he standard for voluntariness of guilty pleas is that adopted by the Supreme Court in Brady v. United States [397 U.S. 742, 755 (1970)]: "'[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'"

Bailey v. Cowley, 914 F.2d 1438, 1440 (10th Cir. 1990) (Brady quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc) (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957), rev'd on other grounds, 356 U.S. 26, (1958)) (emphasis provided).

Applying the foregoing to the instant case, Appellant asserts that his guilty plea was not voluntarily because represented to Appellant the following: "The prosecutor will provide Adult Probation and Parole with all information in the prosecution file regarding any known contacts regarding this case. Thereafter, the prosecutor agrees not to take further

action to uncover or invite input in aggravation of sentencing." (See, R., File # 39, Affidavit of Defendant at ¶ 7(u).)

Although there was a representation made by the prosecutor (i.e., he would not take further action to uncover or invite input in aggravation of sentencing), that representation was not fulfilled.

The foregoing is a clear misrepresentation as to what the prosecutor indicated he would not do. In order to comply with his representation to the Appellant, the prosecutor should have not said anything, but simply submitted the matter for sentencing. Specifically, "the prosecutor agree[d] not to take further action to uncover or invite input in aggravation of sentencing." (See, R., File # 39, Affidavit of Defendant at ¶ 7(u).) Because the prosecutor did take further action to uncover or invite input in aggravation of sentencing (i.e., the prosecutor was presenting aggravating circumstances, specifically, that Appellant had not undergone therapy for his previous sexual offense conviction), the prosecutor misrepresented to Appellant (i.e., did not fulfill his promise) this material inducement and, accordingly, Appellant's plea cannot be said to be voluntarily made. See Bailey, 914 F.2d at 1440.

II. WHETHER THE STATE VIOLATED ITS PLEA AGREEMENT WITH THE APPELLANT

In Mabry v. Johnson, 467 U.S. 504 (1984), the United States Supreme Court stated:

We began by acknowledging that the conditions for a valid plea "presuppose fairness in securing agreement between an accused and a prosecutor. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises the essence of those promises must in some way be made known." It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand: '[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said part of the inducement or consideration, such promise must be fulfilled.

Id. at 509 (quoting Santobello v. New York, 404 U.S. 257, 261-62 (1971)) (footnote omitted). See also United States v. Gines, 964 F.2d 972, 979 (10th Cir. 1992).

Again, the prosecutor promised Appellant: "The prosecutor will provide Adult Probation and Parole with all information in the prosecution file regarding any known contacts regarding this case. Thereafter, the prosecutor agrees not to take further action to uncover or invite input in aggravation of sentencing." (See, R., File # 39, Affidavit of Defendant at ¶ 7(u).) But, again, that promise was clearly not fulfilled. Because "the prosecutor breache[d] its promise with respect to an executed plea agreement, [Appellant pled] guilty on a false premise, and hence his conviction cannot stand[,]" (see Mabry 467 U.S. at 509), and, accordingly, Appellant should be permitted to withdraw his guilty plea.

**III. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL DURING HIS MOTION TO WITHDRAW GUILTY PLEA**

A. Standard

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [appeal] cannot be relied on as having produced a just result." See State v. Holland, 230 Utah Adv. Rep. 18, 20 (1994) (Stewart, J. and Durham, J., concurring) (alteration inserted); see also United States v. Smith, 10 F.3d 724, 728 (10th Cir. 1993).

"Generally, an appellant cannot raise an ineffective assistance of counsel claim for the first time on appeal because the trial record is insufficient to allow the claim to be determined." State v. Villarreal, 857 P.2d 949, 953 (Utah App. 1993) (citing Humphries, 818 P.2d at 1029; accord State v. Alvarado, 845 P.2d 966, 970 (Utah App. 1993); State v. Schnoor, 845 P.2d 947, 950 (Utah App. 1993); Smith, 10 F.3d at 728; United States v. Kay, 961 F.2d 1505, 1508 (10th Cir. 1992); Beaulieu v. United States, 930 F.2d 805, 806 (10th Cir. 1991)). "However, an appellant can raise such a claim if the trial record is adequate to permit determination of the issue and there is new counsel on appeal." Alvarado, 845 P.2d 966 (citing Humphries, 818 P.2d at 1029 and State v. Johnson, 823 P.2d 484, 487 (Utah App. 1991)). With respect to the foregoing, Appellant asserts that his claim

satisfies the Humphries standard inasmuch as the trial record is adequate to permit determination of his claim and he is represented by new counsel.

"In considering claims of ineffective assistance of counsel, Utah courts have consistently applied the test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 [sic] (1984)." State v. Hallett, 856 P.2d 1060 1062 (Utah 1993) (internal quotations omitted) (citations omitted).

"In order to constitute ineffective assistance, counsel's performance must, first, fall below an objective standard of reasonableness and , second, prejudice the outcome of the proceedings." State v. Goddard, 871 P.2d 540, 545 (Utah 1994) (citing Strickland, 466 U.S. at 689). Accord State v. Templin, 805 P.2d 162, 186 (Utah 1990); accord State v. Alvarado, 845 P.2d 966, 970 (Utah App. 1993); Harris v. Champion, 15 F.3d 1538, 1569 (10th cir. 1994). "A defendant must overcome the strong presumption that 'counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Smith, 10 F.3d at 728 (quoting Strickland, 466 U.S. at 689); accord Laycock v. State of New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1987); Templin, 805 P.2d at 186.

A. Deficient Performance\Objective Standard of Reasonableness

To establish deficient performance, Appellant "must show counsel's performance 'fell below an objective standard of reasonableness' measured by 'prevailing norms.'" Harris, 15 F.3d at 1569 (quoting Strickland, 466 U.S. at 688). Appellant asserts that in Appellant's Motion to Withdraw his Guilty Plea defense counsel Rasmussen's performance fell below an objective standard of reasonableness because he failed, first, to raise the issue of whether Appellant's plea was made knowingly and voluntarily and, second, whether the prosecution violated the plea agreement.

B. Prejudice\Reasonability Probability

"To show prejudice under the second component of the test, a defendant must proffer sufficient evidence to support 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Parsons v. Barnes, 871 P.2d 516, 522 (Utah 1994) (quoting Strickland, 466 U.S. at 694); accord Templin, 805 P.2d at 187; State v. Carter, 776 P.2d 886, 894 n.30 (Utah 1989); Harris, 15 F.3d at 1569. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; e.g., Parsons 871 P.2d at 522.


By not raising the foregoing issues before the trial court and arguing well-established caselaw, there is a reasonable

probability sufficient to undermine confidence in the outcome because the trial court would have concluded, first, that the prosecutor did take action to uncover or invite impute in aggravation of sentencing, a clear misrepresentation of the prosecutor's promise to Appellant and, second, that action broke the terms of plea agreement and, accordingly, permit Appellant to withdraw his guilty plea.

CONCLUSION

Based upon the foregoing Appellant should be granted the relief requested.

DATED this 1 day of July, 1994.



David L. Grindstaff
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing **APPELLANT'S BRIEF** was **HAND-DELIVERED**, postage prepaid this 1 day of July, 1994 to:

Jan Graham
Attorney General
236 State Capitol
SLC, Utah 84114

A handwritten signature in black ink, appearing to read "Paul R. Jones", is written over a horizontal line.

ADDENDUM

FILED IN CLERK'S OFFICE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

JAN 7 11:17 AM '93

STATE OF UTAH,

:

Plaintiff,

:

vs.

:

DOYLE CLARENCE KELSTROM,

:

Defendant.

:


RULING ON DEFENDANT'S
MOTION TO WITHDRAW
PLEA OF GUILTY
Criminal No. 921700309

Comes now the Court having reviewed Defendant Doyle Kelstrom's Motion to Withdraw His Plea of Guilty pursuant to Utah Rules of Civil Procedure 65B(b) and his memorandum in support thereof and having reviewed Plaintiff, the State of Utah's memorandum in opposition thereto and being fully advised in the premises; based upon the facts of this case, the statutory law as provided in Section 76-4-102 U.C.A., and based upon the arguments set forth in Plaintiff's Memorandum in Opposition, the Court hereby denies Defendant's Motion to Withdraw Plea of Guilty.

Plaintiff's counsel is to prepare findings and an order in accordance with the Court's ruling and submit the same to the defendant at least five days prior to the time it is submitted to the Court for signature.

Dated this 7th day of January, 1993.

BY THE COURT:


Jon M. Memmott
District Court Judge