2006

State of Utah v. Corey Evan Vonberg : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. COREY EVAN VONBERG, Defendant/Appellant.	Case No. 20060324-CA

REPLY OF APPELLANT VONBERG

Appellant Vonberg Replies to Appellee's brief regarding an appeal from a the Fifth Judicial Court, Iron County, State of Utah, The Honorable G. Michael Westfall presiding.

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REPLY BRIEF OF APPELLANT VONBERG

I. ARGUMENT

A. Appellant Should Have Been Allowed to Question Shawn Keith Regarding His Character for Truthfulness Pursuant to Utah Rules of Evidence 608 and 609.

In the case-at-bar, the only evidence produced by the State which corroborated the accuser was the testimony of Shawn Keith. Shawn Keith's veracity and whether he was truthful is an instrumental component of this case. Shawn Keith's criminal history was not provided to the Defense until the day before trial, although requested as part of discovery. When the State did provide the criminal history, it showed that Mr. Keith had been convicted of theft by deception, a crime which inherently involves deception and dishonestY and yet the trial court ruled that for the Defense to attempt to use the criminal history, written notice must be provided to the same person who was in possession of it to begin with or be barred from using it. Consequently, the Defense argues that the trial court did not properly engage in a probative value vs. prejudicial effect analysis, as

required under Rule 609, because the trial court found that notice had not been properly given when, in fact, the Defense was never in a position to provide notice because of the State's actions.

Appellant further argues that while Rule 609 is specific with regard to prior convictions, Rule 608 allowed the Defense to inquire into the specific instances of conduct which eventually resulted in a conviction. At a minimum, Defense counsel should have been allowed to inquire into those prior acts in order to call into question the witness's truthfulness. The appellant contends that the wholesale exclusion of all inquiry into conduct and/or conviction of Mr. Keith is an incorrect interpretation of Rules 608 and 609 as applied to the facts of this case and constitutes error. Furthermore, due to the instrumental role Mr. Keith played in the State's case and because the Defense was not allowed to call Mr. Keith's veracity into question with prior misconduct or evidence of a conviction, the erroneous application of Rules 608 and 609 prejudiced the Appellant.

B. Probation Was a Sentencing Option Which Should Have Been Considered by the Court and Argued by Defense Counsel.

Appellant should have been considered for probation pursuant to Utah Code Ann. § 76-5-406.5. The Appellee argues that the Defendant did not admit to his offense and that the failure to admit precludes the Court from considering probation. First, there was evidence before the trial court that the Defendant admitted to the crimes during conversations with the State's key witness, Shawn Keith. Second, a reading of Utah Code Ann. §76-5-406.5 makes it clear that the code section anticipates that a defendant convicted of sodomy on a child who could possibly prove factors §76-5-406.5(a) – (g)

should be provided a psychological and psychosexual evaluation by providers approved by the Department of Corrections to determine if probation is appropriate. The record does not reflect that the Appellant refused or would refuse to admit the offense when addressing the issues during psychological or psychosexual testing.[1]

C. Trial Counsel's Strategy During Jury Voir Dire was Flawed.

Regarding ineffective assistance of trial counsel, Appellee argues the presumption that favors conduct within the wide range of reasonable and professional representation. Moreover, it is contended that this Court should not second guess the trial attorney's legitimate and strategic choices however flawed such choices appear in retrospect. Appellee then offers as a possibility that counsel's decision to conduct the jury voir dire in this fashion was a sound strategy, suggesting that under the circumstances counsel may have reasonably decided first, that jurors' nonverbal responses to questions would be more telling than their oral responses and, second, that their nonverbal responses would be most telling if the question posed were concrete. In support of this supposition Appellee cites *People v. Trevino,* 64 Cal. Rptr. 2d 61, wherein it states that it may not be the answers given during voir dire but the manner in which they are given or the facial expressions that accompany them that most disclose to counsel concerning jurors' true feelings on an issue. While this may sound impressive in the theoretical realm, the practical reality of such a

[1] U.C.A. § 76-5-406.5(h) reads: "the defendant admits the offense of which he has been convicted and has been accepted for mental health treatment in a residential sexual abuse treatment center that has been approved by the Department of Corrections under Subsection (3);" This code section clearly anticipates that the admission required is under the context of amenability to treatment and not what is reported on a PSI by an Adult Probation and Parole agent. Furthermore, even if the applicable code section does not require the above-argued context of treatment, a convicted defendant, if given the opportunity to prove that one is a candidate for probation, could admit to the offense at a hearing subsequent to conviction.

position is more tenuous. That is because nonverbal communication is not recognized as a basis for challenge in the voir dire process. Had there been such nonverbal communication transmitted in this could, it would still have not given defense counsel relief in any fashion except for peremptory challenge.

Moreover, nonverbal communication without further interrogation is of no value. There is no way to precisely interpret the response or reaction in a way that is helpful in understanding whether it has prejudicial undertones or creates bias without further interrogation. In other words, Appellant argues that even if defense counsel's strategy was as suggested by Appellee in arguing the point, it does not constitute a sound trial strategy and does no more to show trial counsel's action or conduct as being within the range of reasonable professional assistance.

More importantly, the issue of homosexuality in a case involving sodomy of a teenage boy is precisely the kind of concern that should have been more cautiously considered, having a potentially disruptive impact upon the entire trial process by becoming eschewed toward issues of alternative sexual orientation. Yet for the obvious fear of such consideration, the appropriate question was not asked and without asking that one and only question of true significance the question of homosexuality is not relevant.

What happened during the voir dire process flipped the whole question on its head and the trial court was no longer in a position to scrutinize the admissibility in context of it being presented at trial as part of the evidence since the jury was given too much information to start. How can one not consider that such a disclosure would not in the normal setting have significant impact of bias or prejudice? This is evident from the

precedent previously cited in Appellant's brief in *State v. King*, 2006 UT App. 355. Appellant argues that the circumstances in the present case are more egregious than those presented in *King*. The distinction of two jurors in that case responding to questions suggesting bias and counsel doing nothing is minor compared to the trial strategy of declaring outward homosexuality has the impact of permeating through the entire jury and being the lens through which the entire trial is viewed by said jury from first to last. Ineffective assistance of counsel is as evident in the present case as it was in *King*.

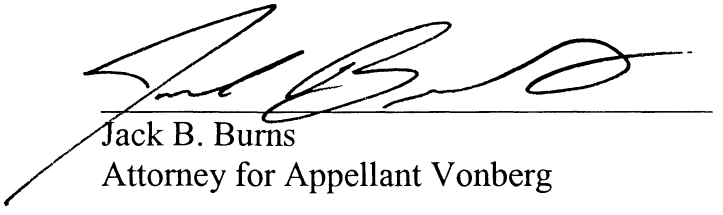
D. The Contention of Defense Counsel's Failure to Move for Mistrial Goes to the Issue of Ineffective Assistance and for that Purpose it has Been Adequately Briefed.

The record is sufficient for this Court to consider whether there was ineffective assistance by defense counsel in failing to move for mistrial when the evidence came in as it did. Appellant asserts that he has complied with the requirements to Rule 24 in providing the statutes and parts of the record relied upon and authority available. Unfortunately, there is no case directly on point. To argue that counsel is prohibited from raising a point that has not been considered or on which this Court has not previously ruled does not constitute grounds to reject the argument or assert that the matter ins inadequately briefed. The issues are currently defined as required and the argument has been asserted in good faith. Appellant contends that the issues are adequately briefed for this Court's consideration.

II. CONCLUSION

For the above-stated reasons and for the reasons contained in Appellant's Brief, the Appellant requests that the matter be reversed and that his case be remanded for re-sentencing or for retrial and for such other relief this Court deems equitable and proper.

DATED this 27 day of February, 2008.



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CERTIFICATE OF MAILING

I certify that on the 3 day of March, 2008, I caused to be mailed, by U.S. Mail, postage prepaid, a true and correct photocopy of the REPLY BRIEF OF APPELLANT VONBERG to the following:

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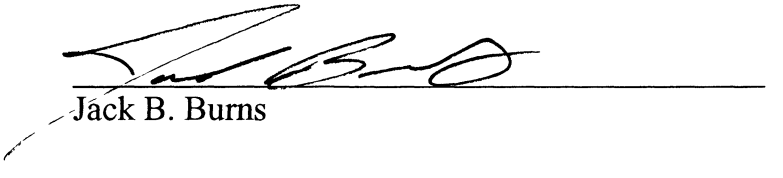

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