

1995

The State of Utah v. Kent Walter Bingham : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *The State of Utah v. Kent Walter Bingham*, No. 950109 (Utah Court of Appeals, 1995).
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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 950109 CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
KENT WALTER BINGHAM, : Case No. 950109-CA
Defendant/Appellant. : Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for one count of Theft by Receiving Stolen Property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (1953 as amended), and one count of Unlawful Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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COURT OF APPEALS

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STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

All statutes and constitutional provisions are referred to in Appellant's opening brief.

ARGUMENT

I. UTAH APPELLATE COURTS DETERMINE THE CORRECT STANDARD OF REVIEW TO BE APPLIED BY THOSE COURTS INDEPENDENT OF STANDARDS OF REVIEW SET BY FEDERAL COURTS

(Responding to State's brief at Point I, pp. 7-9)

The State asserts that Mr. Bingham has waived his right to argue for a "more intrusive standard of review" of the trial court's determination on a Batson challenge (Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). The State's waiver argument is based upon the assertion that Mr. Bingham never argued for a more intrusive standard of review before the trial court and that a "clearly erroneous" standard of review should apply. State's Brf. at 7-8. However, since no appellate standard of review is applicable at the trial stage, no such argument could have been made and the State's assertion is misplaced.

The State argues that the deferential standard of review for

Batson challenges set out in Hernandez v. New York, 500 U.S. 352, 114 L.Ed.2d 395 (1991), binds this Court. The State cites no authority supporting its assertion that Utah courts are unable to adopt a standard of review different from that used by federal courts. The responsibility of determining the correct standard of review to be applied by Utah appellate courts rests with Utah courts. See State v. Pena, 869 P.2d 932 (Utah 1994). As discussed in Mr. Bingham's opening brief, Pena established specific guidelines for making such a determination. Application of those guidelines suggests a de novo review of the trial court's ultimate conclusion on a Batson challenge. Appellant's Brf. at 1-5.

II. STRICTER SCRUTINY OF BATSON CHALLENGES UNDER UTAH LAW DOES NOT VIOLATE FEDERAL EQUAL PROTECTION

(Responding to State's brief at Point I, pp. 9-12)

In a footnote cited within a section of the State's brief entitled "Standard of Review," the State argues that a review of Batson challenges under Utah law that is "more intrusive" than that under federal law could actually violate equal protection law. State's Brf. at 9 n. 3. No such argument was presented by the State before the trial court and by the State's own cited authority, is necessarily waived. See State's Brf. at 8.

As noted in Mr. Bingham's opening brief, this Court has previously acknowledged that in State v. Cantu, 778 P.2d 517 (Utah 1989) ("Cantu II"), the Utah Supreme Court adopted additional "criteria" from those established by federal law for scrutinizing a Batson challenge. Appellant's Brf. at 19-20. Mr.

Bingham preserved this argument before the trial court citing to the two State v. Cantu cases during his Batson challenge.

Appellant's Brf., pp. 5, 9-10. The State made no argument that Cantu II violated equal protection and cannot now assert such an argument.

Even if the State had preserved its argument that Utah cannot adopt a stricter independent state standard for reviewing Batson challenges, the argument has no merit. In support of its position, the State cites as authority, Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Adarand is wholly inapplicable to the present issue. The question in Adarand was whether certain federal agency incentives to hire economically disadvantaged persons and minorities should be strictly scrutinized under equal protection. 132 L.Ed. 2d at 167-68. The Court held that these race based statutory incentives should be strictly scrutinized. Id. at 181-184. There is nothing in Adarand which supports the State's position that stricter scrutiny of constitutional challenges under state law conflicts with federal law and violates equal protection. Indeed, a state is always free to require a stricter standard for constitutional challenges than that required by federal law. See authority cited in Appellant's Brf. at 17-18.

The State's analysis of Mr. Bingham's Batson challenges ignores the stricter standard required by Cantu II. Based upon the independent analysis under Cantu II, the State was unable to provide race neutral reasons that were specifically related to


the case. Since the State is unable to rebut Mr. Bingham's prima facie case, he should receive a new trial.

Mr. Bingham relies on his opening brief in response to the remainder of the State's brief.

CONCLUSION

Based on the foregoing discussion, all issues in Mr. Bingham's appeal should be addressed on the merits. Mr. Bingham's conviction for Theft by Receiving Stolen Property should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 8th day of September, 1995.

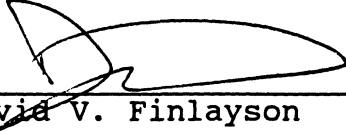


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CERTIFICATE OF DELIVERY

I, David V. Finlayson, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 8th day of September, 1995.



David V. Finlayson

DELIVERED/MAILED this _____ day of September, 1995.
