

2006

State of Utah v. James C. Godfrey : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH
(Subject to transfer UTAH COURT OF APPEALS)

State of Utah Plaintiff/APPELLEE	CASE No. ²⁰⁰⁶⁰⁵¹⁶ 20060916
v. James C. Godfrey Defendant/APPELLANT	TRIAL No. 951900679

APPELLANT BRIEF

This is An appeal from Judge Jones', Second District Court of Utah, Ogden Dept., May 9th, 2006 Order denying Godfrey's Utah Rules of Criminal Procedure, Rule 22(e) motion

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UTAH APPELLATE COURTS

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JURISDICTION

The Utah Supreme Court has jurisdiction pursuant to U.C.A. 77-2-2(3)(c) and Utah Rules of Criminal Procedure, Rule 26 and subject to transfer UT.CT. APP.

STANDARD OF REVIEW

This issue before the Court presents a question of law, reviewed for correctness State v. Richards 843 P.2d 517 (UT.CT. APP. 1992) we review the legal standards applied by the Trial Court in denying the motion for correctness State v. Bisner, 2001 UT 99 at ¶ 31; 37 P.3d 1073

STATEMENT OF CASE

The Petitioner filed a motion to correct a sentence pursuant to UT.R.Cr.P. Rule 22(e) on April 17, 2006. On March 19, 1997 Godfrey was sentenced for Aggravated Kidnapping (mandatory 15 years to life) and Concurrent Aggravated Sexual Abuse of a Child (mandatory 3 years to life) This is an appeal from Judge Jones', Second District Court of Utah - Ogden Dept. May 9th 2006 decision denying Godfrey's Rule 22(e) motion

STATEMENT OF FACT

"In the afternoon hours of July 3rd 1995 (L.P.) then age 7, was playing in an abandoned field near her mother's home in Ogden, Utah. (R374) She was accompanied by... Jeff... Cody... Mario... Juan... Jordan. As they were playing in the field a man approached them, and fearing a reprimand for playing in the area, all of the children except Lisa scattered. (R67) The man took Lisa by the hand, indicated that he wished to speak to her about a nearby abandoned house, and led her to the South side of that house. (R374)

Crawling through an open basement window, the man led Lisa into the house. Once in the basement, the man made Lisa sit on an old couch, and then began rubbing her bare chest by reaching through the neck of her shirt. The man then unzipped her pants and placed his hand underneath her clothing, touching her genital area. Throughout this ordeal Lisa was crying and repeatedly told the man to stop. (R67) The man only responded that it would be their "secret". The man then unzipped his pants, removed his penis, made Lisa touch it, and asked Lisa to kiss it. Crying, Lisa refused and begged to leave. The man then attempted to get Lisa to lie down on the couch, but she refused, stating that she was going to leave. (R600) While the man attempted to make her stay, Lisa crawled out through the same window by which they entered. ... The man got into his truck that was parked in a nearby driveway and backed out quickly. (R374) (State of Utah's - Brief of Appellee, CASE No. 970310-CA - statement of facts.)

ISSUE ONE

THE TRIAL COURT COMMITTED ERROR WHEN THE COURT FAILED TO CORRECT AN ILLEGAL "DOUBLE PUNISHMENT" SENTENCE FOR THE SAME ELEMENT SAME ACT.

The Jury Instruction for Aggravated Kidnapping (6-3) provides, "... seized, confined, detained, or transported the victim." The Jury instruction for Aggravated Sexual Abuse of a Child (7-4a) provides, "The offense was committed by duress, intimidation, coercion, menace, or was committed during the course of a kidnapping and these terms are nouns (coercion, etc.) and verbs (confined, etc.) of the same sentence.

It seems quite clear these are the same act which may be punished as Aggravated Kidnapping or as increasing a Second Degree Sexual Abuse of a child to a First Degree Aggravated Sexual Abuse of a child, but not both, V.C.A. § 76-1-402(1) is controlling "the act shall be punishable under only one such provision...."

"Duress, intimidation, coercion, menace, or kidnapping" (Agg. Sexual Abuse, Inst. 7-4a) happens to be "against the will of the victim (C.R.)" (Agg. Kidnapping, Inst. 6-2) which is the same element. Statutory Kidnapping, V.C.A. § 76-5-301, contains § 3(1)(a) detains or restrains another for any substantial period. In this case the prosecutor argued the kidnapping was instantaneous. Both Simple Kidnapping (Inst. 7-4a) and Aggravated Kidnapping (Inst. 6-3) involve "seized, confined, detained"

elements, but the jury nor Defendant happen to be legal scholars, when Aggravated Sexual abuse of a child element "... Or was committed during the course of a kidnaping" (Inst. 7-4a) was given to the jury the only definition of "Kidnap" before them was the one for Aggravated Kidnaping, "seized, confined, detained, or transported," (Inst. 6-3) Again the same element involving the same act.

By statute, U.C.A. § 76-5-302(2) a detention (same as confined) or movement, is deemed to be the result of 'force, threat, or deceit', (Agg. Kidnaping Inst 6-3) this is the same element involving the same Act/fact of "Duress, intimidation, coercion, or menace." (Agg Sexual Abuse. Inst. 7-4a)

The Trial Court committed error, citing State v. Enblayson, 994 P.2d 1243 stating, "i.e. confining, detaining or transporting a victim)" "is not an element of either of the sex offenses." While it is true, 'seized, confined, detained, or transported' (Agg. Kidnaping Inst 6-3) is not an element of a Second Degree, Sexual abuse of a child (Inst. 7-2 or 7-3) it is however in fact an element "duress, intimidation, coercion, menace, or kidnaping" (Inst 7-4a) of Aggravated Sexual abuse of a child. Without Count 2, Count 1 can not stand alone,

The Trial Court committed further error by finding only 1 of the 3 parts to the State of Kansas v. Burgs, 219 Kan. 203 (1976) test. "(c) some significance... that it makes the other 2 crime ... easier... or... lessens the risk of detection."

However the other 2 parts require, "(a) [Aggravated Kidnapping] must not be slight, inconsequential and merely incidental to the "[Duress, intimidation, coercion, menace, or was committed during the course of a kidnapping] element of Aggravated Sexual Abuse of a Child (Inst. 7-4a) and "(b) [Aggravated Kidnapping] must not be of the kind inherent in the nature of the [Duress, intimidation, coercion, menace, or was committed during the course of a kidnapping] element of Aggravated Sexual Abuse of a Child (Inst 7-4a) therefore Aggravated Kidnapping merges into Aggravated Sexual Abuse of a child.

MERRIAN/WEBSTER Dictionary, New Ed, 2004 defines: Kidnapping - to hold or carry a person away by unlawful force or by fraud and against one's will; CONFINED - to hold within a location. RIVERSIDE/WEBSTER II Dictionary Rev. Ed, 1996 defines: CONFINED - (1) to keep within bounds, limit or restrict (Restrict: Confine); DETAIN - (1) To hold back, delay (2) To hold in Custody: Confine; KIDNAP - (1) To seize and hold a person unlawfully; COERCION - (2) To dominate or restrain forcible (Restrain: Confined)

The State has "Double Punished" Godfrey using semantics, How is "Duress, Coercion, intimidation, menace, or Kidnapping" (Inst 7-4a) element of Aggravated Sexual Abuse of a Child different from "seized, confined, detained, or transported" element of Aggravated Kidnapping (Inst 6-3) the Blockburger v. United States, 52 S.Ct 180 (1932) test "... Whether

each offense contains an element not contained in the other; if not, they are the "same offense" and Double jeopardy bars additional punishment is controlling.

In the present case Count 1 (Inst 6-2) "against the will" is the same as Count 2 (Inst 7-4a) "Kidnaping" Count 1 (Inst 6-3) "seized, confined, detained or transported" is the same as Count 2 (Inst 7-4a) "Kidnaping." By statute, U.C.A. § 76-5-302(2) Count 1 (Inst 6-3) the "seized, confined, detained, or transported" was done by Count 2 (Inst 7-4a) "duress, intimidation, coercion, menace, or kidnaping" and "against the will".

Count 1 (Inst 6-4) "Sex offense" is the same as Count 2 (Inst 7-2) "touched" and (Inst 7-3) "indecent liberties" if under 14 Sexual Abuse Count 2 is "Against the will" (Inst 6-2) Jury Instruction 7 clearly states the Sexual Abuse, Aggravating Circumstances as "essential elements".

In this case Count 1 Aggravated Kidnaping contains no unique, separate, specific or independent element, act or fact not contained within the Count 2 Aggravated Sexual Abuse of a child offense. Blackberger, id. further explains, "where the same act or transaction(s) constitute a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." [Godfrey] took Lisa by the hand (duress) walked to the abandoned house (Intimidation)

went into the house. (coercion, or kidnaping) these are the same facts proving Aggravated Sexual abuse of a child and Aggravated Kidnaping. To sustain [the Aggravated Kidnaping] conviction and sentence... the prosecutor must show that the "seized, confined, detained, or transported"... was longer than the necessary "duress, intimidation, coercion, menace or kidnaping" involved in the commission of the [Aggravated] Sexual Abuse of a Child. State v. Couch, 635 P.2d 89 (Ut 1981) an impossible showing.

This to avoid merger "additional facts or separate elements [must be] required to prove" lesser crime after Greater crime is proven. The conviction on the lesser crime [Aggravate Kidnaping] is disregarded, and the conviction on the greater crime [Aggravated Sexual abuse of a child] remains unaffected. State v. Bradley 752 P.2d 874 (Utah 1985).

The facts show the Aggravated Kidnaping occurred simultaneously to the Aggravated Sexual abuse of a child, Godfrey's 15 years to life Aggravated Kidnaping sentence should be disregarded and Godfrey's 3 years to life Aggravated Sexual abuse of a child remain, unless now flawed.

The Sexual Abuse - Aggravating elements are now flawed. Inst (7-4a) provides a double punishment for "Kidnaping, (7-4b) a stranger, and (7-4c) a prior

"In the context of a sufficiency of the evidence challenge, we held that a general verdict of

guilty can not stand if the State's case was premised on more than one factual or legal theory of the elements of the crime." State v. Johnston 821 P.2d 1150 (Utah 1991)

The legal theory of Inst. 7-4a "...duress, intimidation, coercion, menace, or was committed during the course of a kidnaping and/or" now contains the flawed 'kidnaping' option. Double Jeopardy bars Count 1, Aggravated Kidnaping, however after the Jury found Count 1, the Jury may or may not have considered (4a) duress, intimidation, coercion, menace, or (4b) a stranger, or (4c) a prior. If the Jury instructions require "each and all of the essential elements without Count 1 Aggravated Kidnaping, Circumstance Count 2 (Inst. 7-4a) "Kidnaping" lack the requisite evidentiary foundation (this holding was based on our determination that where two alternative Aggravating factors were argued to the jury and could have caused the jury to convict the defendant of Attempted Aggravated Murder, 'it is impossible to determine whether the jury agreed unanimously on all of the elements of the crime Johnston, id) U.C.A. §76-1-402(5) allows the Court to find the lesser ["flawless"] Second Degree felony, Sexual abuse of a child, U.C.A. §76-5-404.1(2) One Second Degree (1 to 15 years) sentence remains Once the other (Issue Two - "inherent with") sentence errors are corrected Godfrey should be considered and released from prison - Time Served having served Ten of the (1 to 15) sentence.

ISSUE TWO

THE TRIAL COURT COMMITTED ERROR BY FAILING TO REDUCE AN ILLEGAL SENTENCE, WRONGFULLY INCREASED BY AGGRAVATING CIRCUMSTANCES INHERENT IN THE CRIME; AND BY FAILING TO FURTHER REDUCE AN ILLEGAL SENTENCE, IGNORING MITIGATING CIRCUMSTANCES.

IF the Court Grants Issue 1 (A Single 1 to 15 years sentence remains) Issue 2 would be moot.

The Trial Court committed error stating, "the Petitioner has failed to cite any legal authority to support his claim for reduction in the sentence." (MEMORANDUM Pg 5) Not following the provisions of House Bill 209 is 'plain error' or a 'manifest injustice' U.C.A. § 76-3-201(6) required the 'imposition of the middle severity.' This was not done making Godfrey's sentence illegal. Utah Rules of Criminal Procedure Rule 22(e) gives the Court "legal Authority to reduce (correct) Godfrey's illegal sentence. Both Form 2 and Form 5 Associated with HB 209 were attached to the Rule 22(e) motion.

Upon closer examination of the trial transcript it appears the sentencing Judge did indeed find Aggravating Circumstances No. 2 and No. 3 on Form 2. On Form 2 No. 2 "history of such offenses" is inherent in the definition of the crime, Jury INSTRUCTION (7-4c) "was previously convicted... involving a sexual offense." On Form 2 No. 3 "extreme Cruelty or depravity" is inherent in the definition of the crime, Jury Instruction (7-3) "with intent to cause substantial emotional or bodily pain" and

Jury Instruction (7-4c) "duress, intimidation, Coercion, menace or kidnaping"; On Form 2 No 4, "Unusually vulnerable" is inherent in the definition of the crime, Jury Instruction (7-2) "said child being under the Age of 14" and Jury Instruction (7-4b) "a stranger"

The provisions of O.C.A. § 76-5-406.5 were not followed the 'middle severity' minimum 10 years to life should have been imposed - there being no Aggravating Circumstances which are not inherent in the definition of the Crime. Further on Form 5 No 1 (Criminal history) and No 9 (Sex offense) are implicit in the Conviction Inst. (7-4c) "Prior" and (7-2) "touched". On Form 5 No 3 (vulnerable) and No 5 (cruelty) are implicit in the Conviction Inst. (7-2) "cause substantial emotional or bodily pain" and (7-2) "under Age 14". On Form 5 No 7 are [is] implicit with "mandatory" prison.

Several mitigating factor 'manifestly' ignored and should have further reduced Godfrey's Sentence down to a minimum 5 years to life. On Form 2 No 4 Godfrey was a good candidate for treatment. On Form 5 No 1 the mother's victim indicated no serious harm was done. Forms No 5 and No 7 Godfrey was cooperative with law enforcement and appeared to every Court date on bail. Form 5 No 9 Godfrey has good family support.

Godfrey was illegally sentenced to the most severe 15 years to life min. mandatory sentence. Godfrey's sentence should be corrected/reduced to the lowest 5 years to life. The mandatory sentence has already been served and Godfrey should be released from Prison.

BRIEF REQUESTED

- (1) MERGE Aggravated Kidnaping into Aggravated Sexual Abuse of a child and disregard Godfrey's (15 years to Life) Aggravated Kidnaping Sentence, leaving the conviction and sentence of the (3 years to Life) Aggravated Sexual Abuse of a child unaffected and release Godfrey from prison, having served 10 years, well over the (3 years) mandatory time.
- (2) Fail the flawed Sexual Abuse - Aggravating elements; find the lesser "flawless" Second Degree felony, Sexual Abuse of a child, U.C.A. § 76-5-404.1(2), Resentence Godfrey to a Single (4 year to 15 years) Second Degree felony and release Godfrey from prison, having served ten years of the 1 to 15 years sentence.
- (3) Reduce Godfrey's Aggravated Kidnaping minimum mandatory sentence to the less severe (5 years to Life), Resentence Godfrey and Grant Defendant's release from prison having served the mandatory sentence time.
- (4) Relief the Court deems appropriate.

Dated this ~~26th~~ day of ~~MAY~~ 2006 18 June 2006
by James Godfrey

Service // CERTIFICATE OF MAILING

I James Godfrey hereby certify that a true and correct copy of Appellant Brief was mailed to:
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This 26th day of MAY 2006
by James Godfrey
GA