

1995

State of Utah v. Ayne S. Tippett : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

AYNE S, TIPPETT,

Defendant/Appellant.

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BRIEF OF APPELLANT

95-0280-CA

Case No. ~~94-0369~~

Priority No. 2

BRIEF OF APPELLANT

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY
HONORABLE JOHN R. ANDERSON, PRESIDING

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14 State Capitol Building
Salt Lake City, Utah 84114

FILED

JAN 31 1995

CLERK SUPREME COURT
UTAH

IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WAYNE S, TIPPETT,

Defendant/Appellant.

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IN THE UTAH SUPREME COURT

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Plaintiff/Appellee,

vs.

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Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 94-0369

Priority No. 2

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Section 78-2-3 (i).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea?

The court should review this case using an "abuse of discretion" standard, State vs. Mildenhall, 747 P.2d 422, (Utah 1987).

DETERMINATIVE STATUTORY PROVISIONS

This case is governed in part by Rule 11(e), Utah Rules of Criminal Procedure, which was at the time of the plea codified as Title 77, Chapter, 35, Section 11(e), Utah Code Annotated.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal of the Eighth District Court's denial of a Motion to Withdraw Guilty Plea submitted by the defendant/appellant on the 9th of June, 1994. The motion was denied by two separate rulings; one dated June 29, 1994 and a supplementary ruling dated July 12, 1994.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

The Defendant/Appellant was charged in the Eighth District Court for Uintah County, State of Utah on the 18th of February, 1986 with two counts of Aggravated Kidnapping in violation of Section 76-5-302 Utah Code Annotated. Each count also provided a Firearms Enhancement Provision pursuant to Section 76-3-23 Utah Code. On February 26, 1986 the Defendant/Appellant plead guilty to Count One of the Information. Count Two of the Information was dismissed. The record does not reveal that any affidavit was used to assist the court in an explanation of Defendant/appellant's Rule 11(e) rights at the time of plea. After a colloquy with the Honorable Richard Davidson, the court accepted the guilty plea. The matter came before the court for sentencing on the 26th day of March, 1986, the Honorable Boyd Bunnell presiding. The defendant/appellant was sentenced to a minimum mandatory sentence at the Utah State Prison of 15 years to life with a firearm enhancement requiring an additional 5 to 10 years to be served consecutively with the 15 years to life sentence. On May 20, 1987 at the request of the Chairman of the Board of Pardons, the court

reviewed the Defendant/appellant's sentence. The court, the Honorable Dennis Draney presiding, re-affirmed the sentence originally imposed. On June 9, 1994, Defendant filed a Motion to Withdraw Guilty Plea before the Eighth District Court. All the prior judges having retired, resigned, or being deceased, the case was re-assigned to the Honorable John Anderson. Judge Anderson issued a summary ruling with no response from the State of Utah on June 29, 1994 denying all aspects of Defendant's Motion to Withdraw Guilty plea excepting for a response by the State the issue of an inadequate explanation of the firearms enhancement. After considering the State's response, on July 12, 1994 Judge Anderson issued a ruling denying the Defendant's Motion to Withdraw Guilty Plea in its entirety stating that the court had substantially complied with the requirements of Rule 11(e).

SUMMARY OF ARGUMENT

The trial court's denial of the Motion to Withdraw Guilty Plea is in error. The court made no findings that the appellant waived his right to self incrimination. The court made no findings that the appellant understood the nature and elements of the crime and that his plea admitted each and every element. The court incorrectly advised the defendant as to the maximum sentence which could be imposed.

ARGUMENT

THE COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE IT FAILED TO COMPLY WITH RULE 11(e) OF THE RULES OF CRIMINAL PROCEDURE.

Rule 11(e) of the Utah Rules of Criminal Procedure in effect

at the time appellant made his guilty plea as codified in 77-35-11(e) provided as follows:

The court . . . shall not accept a (plea of guilty) until the court has made the findings:

(1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;

(2) That the plea is voluntarily made:

(3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights:

(4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements.

(5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and

(6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

The record of the entry of pleas is very limited. From the record, it appears that no plea affidavit was used, therefore the court can only determined the trial court's compliance with rule 11 (e) based on the oral representations made in open court.

That record is bereft of any discussion with the appellant on several critical points included in the rule. There is no discussion whatsoever with the appellant concerning his right against compulsory self incrimination as required by subsection (3)

of the rule. There is no discussion of the nature and elements of the offense of aggravated kidnapping with a firearms enhancement as required by Subsection 4 of the rule. There is no discussion or record that the guilty pleas was an admission to each of the elements of the alleged crime as required by subsection 4 (Record, pp 4-7).

The record also reveals that the trial judge affirmative misrepresented to the appellant the maximum sentence possible as a result of the plea. Subsection 5 of the rule required a finding that the defendant understands both the minimum and maximum possible sentence. At line 12, page 7 of the record, the trial judge informed the appellant that a one to five year enhancement was possible in addition to the five years to life he originally explained. No correction of that error was made. The appellant was sentenced to a five to ten year firearm enhancement in direct contradiction to what had been explained.

The standard of review as previously stated is that of an abuse of discretion by the court. The companion cases of Warner v. Morris, 709 P. 2d 309 (Utah, 1985) and Brooks v. Morris 709 P. 2d 310, (Utah, 1985), established the standard by which a trial court accepts guilty pleas. The Supreme Court stated that a failure of to advise a defendant of his right concerning self-incrimination was not alone sufficient to invalidated a guilty plea provided that the record as a whole showed that the rule 11 requirements were substantially complied with. Subsequently the Supreme Court in State v. Gibbons, 740 P. 2d 1309 (Utah, 1987)

replaced the "substantial compliance" rule with a "strict compliance" standard. It has been ruled that the Gibbons rule was not retroactive, however the concepts set forth in Gibbons are useful. In Gibbons the court stated that the trial court may not rely on defense counsel or affidavits to satisfy the specific requirements of Rule 11(e). In his case, where there is no affidavit, the court has a situation much more akin to Gibbons factually than might typically be the case.

The case most similar to this which has reached the appellate courts is that of State v. Vasilacopulas, 756 P. 2d 92 (Utah App. 1988). The Utah Court of Appeals, using the Warner-Brooks test found that an absence of discussion concerning the possibility of consecutive sentences, and a failure to find that the defendant understood that possibility showed a failure to substantially comply with Rule 11(e). That alone was sufficient to mandate a reversal of the trial court's denial of the defendant's motion to withdraw guilty plea. The court did not consider a failure to comply with Rule 11(e)(4), citing the failure to comply with the sentencing portions of the rule as being sufficient. It can be presumed that if there had been a problem with an explanation of the elements of the offense as there was in this case, the Vasilacopulos Court could have only made its decision stronger. It is also interesting to note that one of the concurring judges in Vasilacopulos was Richard Davidson, the trial judge who took the plea in this case.

In this case, we have three major failures to even discuss

rights required by the rule. While the Warner and Brooks cases state that a failure to explain the right of self incrimination was not fatal in light of the record, the record there was more complete than here. Here as well, we have not only a failure to inform appellant of the maximum sentence, but a misrepresentation by the court as to the maximum sentence. When coupled with the failure to discuss the elements of the offense, the combination is fatal to the trial court's ruling that the requirements had been substantially complied with. Finally, even though there was some discussion of some of the Rule 11 requirements at the time the plea was entered, no findings were made except that the plea was knowingly made. (Record, p 8).

CONCLUSION

The record in this case shows affirmative mistakes by the court in the taking of appellant's plea. It does not show strict compliance, substantial compliance, or anything approaching the required standard. Appellant hereby prays that the court reverse the trial court's denial of his motion to withdraw guilty plea and remand the case for further proceedings.

Dated this 20th day of January, 1995.



Alan M. Williams
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a three true and correct copies of the foregoing brief were mailed or hand delivered to Jan. Grahan, attorney for appellee, at 236 State Capital on this 21st day of January, 1995.

Alan M. Wilman

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
JUN 30 1994
BY SHARON M. BECK, CLERK
C.W. DEPUTY

EIGHTH DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH, VERNAL DEPARTMENT

STATE OF UTAH, : RULING
Plaintiff, :
vs. :
WAYNE S. TIPPETT, : CASE NO.: 86CR14
Defendant. :

The Court has received and carefully reviewed the Pleadings filed by the Pro se Defendant, Wayne S. Tippett, in the above-captioned matter.

The claim that the Information was erroneous is without merit. Defendant was charged per the statute and the Pleading is dismissed as frivolous on its face. The Court will note, however, from carefully reviewing the file that although the arraignment hearing actually took place in the District Court by docket entry on February 26, 1986, the Court Reporter's transcript inaccurately reflects the Arraignment date as January 26, 1986.

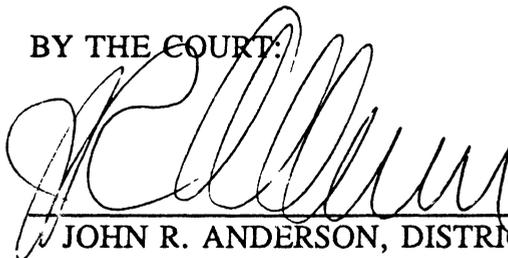
Since the case at the Arraignment hearing was Pre State vs. Gibbons, 740 P2d 1309 (Utah 1987), general compliance with Rule 11 of the Utah Rules of Criminal Procedure was the appropriate standard. In carefully reviewing the Arraignment transcript, the Arraignment Judge complied with Rule 11 so as to apprise Defendant of his Constitutional rights and of the consequences of entering his guilty plea.

The Motion for a New Trial and for Evidentiary Hearing has determined to be in the nature of a Rule 65 (B) Petition and the Court dismisses the complaints about Arraignment advice as being frivolous.

The Court, however, in carefully reviewing the Arraignment transcript will note and does have some concern about the Arraignment Judge's instructions on the maximum penalties for the firearm enhancements. That issue is referred to the Uintah County Attorney's Office for response by written Pleading within 23 days for further consideration by the Court.

DATED this 29 day of June, 1994.

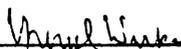
BY THE COURT:



JOHN R. ANDERSON, DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 30th day of June, 1994, true and copies of the Ruling were mailed, postage prepaid, or hand delivered to: Ms. JoAnn B. Stringham, Uintah County Attorney, at 152 East 100 North, Vernal, UT 84078 and to Mr. Wayne S. Tippett, Defendant, at Central Utah Correctional Facility, 255 East 300 North, P.O. Box 355, Gunnison, UT 84634.



Cheryl Weeks/Deputy Clerk

**EIGHTH DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH, VERNAL DEPARTMENT**

STATE OF UTAH, : **SUPPLEMENTAL RULING**
 Plaintiff, :
vs. :
WAYNE S. TIPPETT, : **CASE NO.: 86CR14**
 Defendant. :

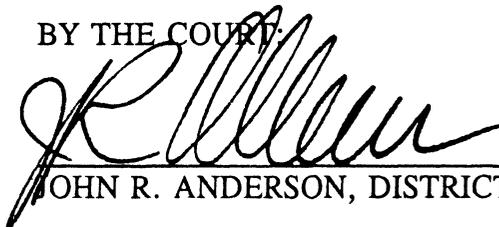
The Court having initially dismissed all of the elements of the Defendant's Petition for the reasons stated in its Ruling dated June 29, 1994 except for the issue of the Court's instruction concerning the Firearm Enhancement sentence; that matter having been referred to the State for a response. The Court having carefully read the Memorandum submitted by the State and having seen no response from the Defendant determines as a matter of law that the general requirements of Rule 11 were met by the arraignment Judge in this case.

The Court determines that there are no substantial issues of fact to warrant a hearing and that, as a matter of law, the Firearm Enhancement sentence that was imposed was in compliance with both the Information filed in the case and with the information given to the Defendant at the arraignment hearing, given the fact that it was only in the Defendant's mind and knowledge that there were multiple prior firearm convictions.

This will be a final Order dismissing in its entirety the Petition for Relief filed by Wayne S. Tippett.

DATED this 12 day of July, 1994.

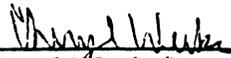
BY THE COURT:



JOHN R. ANDERSON, DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 12th day of July, 1994, true and correct copies of the Supplemental Ruling were mailed, postage prepaid, or hand delivered to: Ms. JoAnn B. Stringham, Uintah County Attorney, at 152 East 100 North, Vernal, UT 84078 and to Wayne S. Tippett, Defendant, at c/o Central Utah Correctional Facility, 225 East 300 North, P.O. Box 355, Gunnison, UT 84634.



Cheryl Weeks/Deputy Clerk