

1995

Utah v. Medel : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Appellee,

v.

FRANK MEDEL, JR.,

Appellant.

:

:

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: Case No. 950514-CA

: Priority No. 3

:

REPLY BRIEF OF APPELLANT

This is an appeal from the denial of Mr. Medel's motions to withdraw his guilty pleas to four first degree felonies, which denial was entered by the Honorable Tyrone E. Medley of the Third District Court of Salt Lake County, State of Utah.

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**UTAH COURT OF APPEALS
BRIEF**

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ARGUMENT

I.

MR. MEDEL'S FAILURE TO UNDERSTAND
THE ILLUSORY PLEA BARGAIN
ENTITLES HIM TO WITHDRAW THE PLEAS.

A. MR. MEDEL IS PREJUDICED BY THE INVOLUNTARILY ENTERED PLEA.

The State concedes that the trial court lacked the authority to sentence Mr. Medel in accordance with the plea agreement, which contemplated that the minimum mandatory offense, aggravated sexual assault, would be treated as a first degree non-minimum mandatory offense for sentencing purposes. State's brief at 10 and n.8.

However, the State contends that Medel has not met the prejudice prong of the plain error or ineffective assistance of counsel standards because both the trial court and the board of

pardons have treated Medel in accordance with the plea agreement, as though he were convicted of a non-minimum mandatory first degree felony. State's brief at 8-11 and n.9. The State cites no authority in support of its assertion that the proper focus in assessing prejudice is on whether or not the defendant's incorrect expectations were met.

Contrary to the State's argument, in the context of involuntarily entered pleas, the Courts do not engage in a prejudice analysis focusing on whether the defendant's expectations in the plea bargain were fulfilled. The violation of the defendant's substantial constitutional rights in the entry of the plea constitutes prejudice in this context.

This is demonstrated by State v. Pharris, 798 P.2d 772 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990), wherein this Court utilized the plain error doctrine to reverse the trial court's denial of Pharris's motion to withdraw the guilty plea. The Court stated,

The Utah Supreme Court has enunciated a two-part test for determining plain error. First, the error must be "plain," which means "from our examination of the record, we must be able to say that it should have been obvious to the trial court that it was committing error." Second, the error "must affect the substantial rights of the accused, i.e., that the error be harmful." Id.

The defendant's guilty plea in this case was

entered after the Gibbons case was decided. Therefore, it should have been obvious to the trial judge that strict compliance with Rule 11 was required. In addition, defendant's substantial constitutional rights were affected by this failure to strictly comply with Rule 11.

Id. at 774 n.5 (citations omitted).

Pharris is consistent with other Utah cases demonstrating that adequate prejudice is established to meet the plain error standard in the context of a motion to withdraw the plea, if the record reflects that the plea was constitutionally involuntary.¹

B. THE ERROR WAS NOT "INVITED" BY MR. MEDEL.

The State argues in a similar vein that Mr. Medel invited the error involved in his plea to a minimum mandatory offense under the understanding that it could be treated as a regular first degree felony. State's brief at 11-14.

Where the record shows that the trial court, defense attorney, and prosecutor apparently misunderstood the law which

¹ See e.g. State v. Breckenridge, 688 P.2d 440 (Utah 1983) (defendant pled guilty to arson and was sentenced to a term of zero to five years; court reversed order denying motion to withdraw guilty plea on basis raised for the first time on appeal - that defendant did not voluntarily enter the plea because there was no factual basis for plea, and record demonstrated defendant's lack of understanding of the nature and elements of the crime); State v. Brown, 853 P.2d 851, 853-54 (Utah 1992) (characterizing Breckenridge as "a case of plain error in which the Eldredge standard was clearly met.").

forbade them from treating a minimum mandatory offense as a non-minimum mandatory offense, particularly in the absence of one scintilla of evidence that Mr. Medel had any legal acumen at the time of his pleas, it is unreasonable to suggest that Mr. Medel himself managed to plant the error in the trial court. It is apparent from the stipulation of the parties that the plea bargain was not dictated by Medel, but was the fruit of negotiations between the prosecuting attorney and defense counsel. For instance, the stipulation entered in the record after the pleas were entered states, "In case CR87-387, it was Mr. Cope and defense counsel's intention from the inception of the second offer that they would stipulate that Aggravated Sexual Assault was a 1 [degree] felony, but not punishable as a minimum mandatory offense." (R. 262-263).

The vast majority of cases relied on by the State in support of its invited error argument does not involve an involuntarily entered plea.² The doctrine of invited error normally applies to

² See State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991) (defendant could not attack his own jury instructions on appeal); State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993) (defendant could not complain of trial court's pretrial ruling which may have resulted from the defendant's memorandum incorrectly stating the law); State v. Parsons, 781 P.2d 1275, 1285 (Utah 1987) (defendant precluded from raising jury voir dire issue which was expressly waived in the trial court); State v. Tillman, 750

intentional tactical decisions made by attorneys, see id., and to the knowledge of defense counsel, has never been applied by any Utah court to avoid a claim that a criminal defendant misunderstood his plea agreement and the offense to which he pled. Compare e.g. State v. West, 765 P.2d 891 (Utah 1988) (case remanded to trial court for determination of whether plea was involuntarily entered when it appeared that the parties and trial court misunderstood the governing law at the time of the entry of the plea); State v. Patience, 944 P.2d 381 (Utah App. 1997) (in remanding for resentencing to class A misdemeanor, despite the parties' belief at the time of entry of plea that offense was a third degree felony, the Court made no suggestion that the case could be disposed of on the basis of the defendant's having invited the error).³

P.2d 546, 561 (Utah 1987) (defendant could not attack prosecutor's argument which was invited by the argument of defense counsel); State v. Thompson, 170 P.2d 153, 161-62 (Utah 1946) (defendant barred from assailing on appeal jury instructions similar to those he himself submitted); State v. Gleason, 405 P.2d 793, 794-95 (Utah 1965) (defendant's requested jury instruction characterized as quasi-invited error, where request for instruction could have been made earlier to avoid the error).

³ It is noteworthy that in State v. Patience, 944 P.2d 381 (Utah App. 1997), where the State had mistakenly entered into a plea bargain in which the defendant was entitled to a lesser sentence than expected by the parties at the time of the plea, on appeal, the State did not claim that it had invited the error.

C. MODIFICATION OF THE JUDGMENT IS NOT APPROPRIATE.

The State recognizes that under State v. Babbell, 770 P.2d 987, 993-94 (Utah 1989), this Court may recognize a need to correct the illegal sentence currently being served by Medel. State's brief at 15. In apparent recognition that correction of the sentence would further jeopardize the pleas, the State argues that the appropriate remedy is to somehow alter the judgment from a minimum mandatory offense to a different first degree felony, to which Mr. Medel did not plead guilty. State's brief at 14-18.

The Utah case the State cites in support of this novel suggestion is State v. Bindrup, 655 P.2d 674 (Utah 1982), in which the Utah Supreme Court found that the second degree murder verdict found by the trial court following a bench trial was not supported by sufficient evidence. Id. at 676. Acting pursuant to Utah Code Ann. §76-1-402(5), the appellate court found that a conviction could enter for manslaughter, the next lower degree of offense for which there was sufficient evidence. Id.

Rather, the State claimed that the plea bargain should be rescinded because it was founded on a mutual mistake, and claimed that the defendant was attempting to take unfair advantage of the misunderstanding in seeking the lesser sentence to which she was lawfully entitled.

It would seem that the State's own theory in Patience reinforces Medel's claim that he is entitled to withdraw his guilty pleas. See id.

The statute permitting a modification of the judgment in Bindrup provides, in relevant part,

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.⁴

⁴ The entire statute currently reads,
§ 76-1-402. Separate offenses arising out of single criminal episode -- Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment

(3) A defendant may be convicted of an offense included in the offense charged but may not be

By its own terms, the statute has no application here, where the conviction is not jeopardized by insufficient evidence, but by an involuntarily entered plea. Moreover, Mr. Medel is not seeking a conviction on a lower category of offense, but seeks the withdrawal of his guilty pleas.

The other case the State cites in support of its

convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

modification theory, Martin v. State, 480 N.E.2d 548 (Ind. 1985), has questionable legal underpinnings⁵ and is factually

⁵ The three authorities cited by the Martin court in support of its modification of the conviction seem to provide little support for the court's order. Subsection (N) of Indiana Rule of Appellate Procedure 15, provides the court's general authority on appeal, and currently states,

(N) Order or relief granted on appeal. An order or judgment upon appeal may be reversed as to some or all of the parties and in whole or in part. The court, with respect to all or some of the parties or upon all or some of the issues, may order:

- (1) A new trial;
- (2) Entry of final judgment;
- (3) Correction of a judgment subject to correction, alteration, amendment or modification;
- (4) In the case of claims tried without a jury or with an advisory order the findings or judgment amended or corrected as provided in Rule 52(B);
- (5) In the case of excessive or inadequate damages, entry of final judgment on the evidence for the amount of the proper damages, a new trial, or a new trial subject to additur or remittitur; or
- (6) Grant any appropriate relief, and make relief subject to conditions.

Neither this rule, nor any Utah provision cited by the State, purports to authorize a court to modify a judgment to reflect a conviction for an offense other than the offense pled to. The cases relied on by the Martin court are also of little value, inasmuch as they both involve correction of erroneous judgments following jury trials, and do not involve constitutionally involuntary pleas. See Ritchie v. Indiana, 189 N.E.2d 575 (Ind. 1963) (verdict of rape was not sustained by the evidence; court ordered modification of the judgment to reflect a conviction of a lesser included offense for which the defendant conceded there was sufficient evidence); McFarland v. Indiana, 384 N.E.2d 1104 (Ind. App. 1979) (following a trial wherein defendant was convicted of two offenses, appellate court ordered modification of judgment to remove one illegal conviction).

It appears that no court outside of the state of Indiana has

distinguishable from this case, in any event.

In Martin, the defendant was charged with attempted robbery, and the record of plea proceedings confirmed that he was in fact guilty of only attempted robbery. Id. at 550-551 and n.2.

Despite the fact that the plea bargain clearly contemplated that the defendant would plead guilty as charged to attempted robbery in exchange for a recommendation that he would serve only a year, the defendant ended up pleading guilty to armed robbery, a more serious offense. Id. at 551. After extended post-conviction proceedings, the Indiana Supreme Court found that inasmuch as the defendant had served the one year contemplated by the plea agreement, the fact that he had pled to a charge of which he was not guilty did not require withdrawal of the plea. The court found that the appropriate action was to modify the judgment to reflect a conviction for attempted robbery, in accordance with the plea agreement. Id.

Medel's case differs from Martin's in this important respect: Medel's guilty plea was entered under a fundamental misunderstanding of the governing law -- that a minimum mandatory offense could be treated as a non-minimum mandatory offense by

ever cited to or relied on Martin.

virtue of the agreement of the parties. Medel's failure to understand what he was doing in entering the legally impossible plea renders his plea constitutionally involuntary, and entitles him to withdrawal of the pleas. See e.g. State v. Copeland, 765 P.2d 1266, 1275-76 (Utah 1988).

Modification of the judgment would be highly inappropriate in the case involving a guilty plea, where the validity of the conviction hinges on the defendant's understanding of the offense to which he pleads guilty, and not on whether a different offense might be found to fulfill the "spirit" of the plea bargain.

Compare State's brief at 17 with e.g. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (guilt plea unconstitutional in absence of record proof that plea was knowing and voluntary).

D. THE STATE HAS NOT JUSTIFIED THE APPLICATION OF THE LACHES DOCTRINE.

The State asserts the doctrine of laches, and argues that it would be unconscionable, some ten years after the entry of the pleas, to permit withdrawal of the guilty pleas where Mr. Medel has received the benefit of his bargain. State's brief at 17. According to Angelos v. First Interstate Bank, 671 P.2d 772 (Utah 1983), "Laches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must

be established: (1) The lack of diligence on the part of plaintiff; [and] (2) An injury to defendant owing to such lack of diligence." Id. at 777 (citation omitted).

There has been no showing that Medel has been lacking in his diligence to obtain relief while acting as a pro se litigant incarcerated at the Utah State Prison. While significant time has passed since the entry of the pleas, it must be remembered that Mr. Medel began his efforts to obtain relief within one month of the entry of the pleas, on July 2, 1987, when he moved the trial court to provide a transcript of his cases, to facilitate his "prosecution" of the case under Utah Rule of Civil Procedure 65b(i) (R. 52-56; 163-67; 268-272). Following the denial of this motion, Medel's pro se post-conviction petition seeking withdrawal of the pleas was eventually filed in July of 1994 (R. 79), and the case has been in litigation since that time. See Statement of the Case, in Mr. Medel's opening brief at 5-6.

The State has articulated no prejudice that would befall it in the event of the withdrawal of Mr. Medel's pleas.

Most importantly, contrary to the State's assertion, Medel has not received the benefit of his bargain because he currently stands convicted of a minimum mandatory offense; and because the

bargain was fundamentally flawed from the outset by the parties' misunderstanding of the governing law, and by the trial court's failures to inform Mr. Medel of the rights he was sacrificing in entering into the plea agreement.

Because Mr. Medel was induced to enter his pleas on the mistaken belief that the prosecutor and defense attorney had the power to exempt his aggravated sexual assault conviction from the mandatory sentence required by the legislature, the pleas were involuntary, and subject to withdrawal on Mr. Medel's motion. See Copeland, supra. See also State v. West, 765 P.2d 891, 896 (Utah 1988) ("[I]n order to plead voluntarily, a defendant must know the direct consequences of his plea, including the actual value of any commitments made to him. Where, as here, counsel's alleged advice, corroborated by the information supplied by the court, grossly exaggerated the benefit to be derived from the pleas of guilty, it would follow that the pleas were not voluntary.") (citations omitted).

E. BECAUSE THE TERMS OF THE PLEA BARGAIN CANNOT BE FULFILLED, ALL PLEAS MUST BE WITHDRAWN.

In footnote 7 of its brief, the State suggests that if the entry of the plea to aggravated sexual assault in case number 387 is considered involuntary, the guilty pleas to the pleas in cases

280 and 386 should nonetheless stand. State's brief page 9 n.7.

Throughout the proceedings in the lower courts, the parties and courts have recognized that all of the pleas were entered in the three separate cases as part of one overriding plea bargain (e.g. R. 262-264). The record in the instant case clearly demonstrates that Mr. Medel had no intention of entering into a plea agreement unless he would avoid all minimum mandatory offenses, and that his entry into the plea agreement encompassing all three cases was contingent on the absence of a minimum mandatory conviction (e.g. R. 262-264). The lower courts and parties have similarly treated Mr. Medel's claims regarding various inadequacies in the entry of his pleas as supporting his overall motion to withdraw all guilty pleas, which were encompassed in the one plea bargain (e.g. R. 315-336).

The fact that the pleas entered failed to comport with Medel's condition and understanding of the plea agreement renders them all constitutionally involuntary and subject to withdrawal. See e.g. Copeland, *supra*. See also e.g. State v. Gibson, 634 P.2d 1294, 1295 (N.M. App. 1981) ("If a plea agreement is not followed in all its parts, the entire agreement is rejected.") (citing Eller v. State, 582 P.2d 824 (N.M. 1978)), cited in State v. Patience, 944 P.2d 381 (Utah App. 1997).

II.
THE RECORD AS A WHOLE
FAILS TO DEMONSTRATE COMPLIANCE WITH RULE 11.

Mr. Medel maintains the factual and legal arguments set forth in his opening brief, and without further argument, asks this Court to determine that the lower court abused its discretion in finding that the record as a whole demonstrates compliance with Rule 11.

CONCLUSION

This Court should reverse the trial court's order denying Mr. Medel's motion to withdraw the guilty pleas.

Dated this 20th day of January, 1998.

A handwritten signature in black ink, appearing to read 'Patrick L. Anderson', written over a horizontal line.

Patrick L. Anderson
Counsel for Mr. Medel

CERTIFICATE OF MAILING/DELIVERY

I, Patrick L. Anderson, hereby certify that I have caused to be hand-delivered/mailed, first-class postage pre-paid two copies of the foregoing to Kenneth A. Bronston, Assistant Attorney General, Heber M. Wells Building, 160 East 300 South, 6th Fl., Salt Lake City, Utah 84114, this 20th day of January, 1998.

A handwritten signature in dark ink, appearing to read 'P. L. Anderson', written over a horizontal line.

Patrick L. Anderson
Counsel for Mr. Medel

DELIVERED/MAILED this 20th day of January, 1998.

A handwritten signature in dark ink, appearing to read 'P. L. Anderson', written over a horizontal line.