

1995

West Valley City v. Michael A. Reid : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 950604-CA
v.	:	
	:	Priority 2
MICHAEL A. REID,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Circuit Court, West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Ronald E. Nehring

UTAH COURT OF APPEALS
BRIEF

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FILED

MAY 30 1996

COURT OF APPEALS

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(f), Utah Code Annotated 1953, as amended.

STATEMENT OF THE ISSUES

ISSUE 1: DID THE DEFENDANT, MICHAEL A. REID, HAVE A RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE IN A MISDEMEANOR CASE IN WHICH HE WAS CONVICTED, BUT NOT IMPRISONED?

This issue is a conclusion of law, and should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

ISSUE 2: IF REID DID HAVE THE RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE IN THIS CASE, DID THE TRIAL COURT COMMIT PLAIN ERROR BY FAILING TO CONDUCT AN ON-THE-RECORD DISCUSSION OF THE WAIVER OF SAID RIGHT WITH REID?

This issue is a conclusion of law, and should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

ISSUE 3: WAS SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT THE CONVICTION OF REID FOR IMPERSONATION OF OFFICER?

When reviewing the findings of a trial judge sitting without a jury, this Appellate Court will overturn a guilty verdict only if it is clearly erroneous. *State v. Taylor*, 818 P.2d 1030 (Utah 1991). Also, the Utah Supreme Court has stated:

When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact,

and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.

State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

Section 76-8-512, Utah Code Annotated:

76-8-512. Impersonation of officer.

A person is guilty of a class B misdemeanor who:

(1) impersonates a public servant or a peace officer with intent to deceive another or with intent to induce another to submit to his pretended official act;

(2) falsely states he is a public servant or a peace officer with intent to deceive another or to induce another to submit to his pretended official authority or to rely upon his pretended official act; or

(3) displays or possesses without authority any badge, identification card, other form of identification, any restraint device, or the uniform of any state or local governmental entity, or a reasonable facsimile of any of these items, with the intent to deceive another or with the intent to induce another to submit to his pretended official authority or to rely upon his pretended official act.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction for a violation of Section 76-8-512, Utah Code Annotated 1953, as amended, "Impersonation of officer," in the Third Circuit Court, West Valley Department, Salt Lake County, State of Utah.

COURSE OF PROCEEDINGS

Prosecution in this case was commenced by the filing of charges against Michael A. Reid on January 6, 1995. Reid was arraigned before Judge Henriod on February 15, 1995, and a pretrial

conference was held before Judge Nehring on March 16, 1995. A bench trial was conducted before Judge Nehring on March 30, 1995.

DISPOSITION IN TRIAL COURT

At trial, Reid was convicted of the class B misdemeanor "Impersonation of officer." On May 24, 1995, the court fined Reid \$450. The court imposed no jail sentence. On June 6, 1995, Reid, now represented by counsel, filed a motion for a new trial. A hearing on the motion was held before Judge Nehring on July 17, 1995. Judge Nehring denied the motion on August 3, 1995. Reid's notice of appeal was filed on September 5, 1995.

STATEMENT OF FACTS

1. Reid was employed as a security officer at the Tanglewood Apartment complex. (Record, p. 63).

2. In August 1994, Reid, acting in his capacity as a security officer, was involved in an argument with Brandon Gillis while Gillis was visiting friends at the Tanglewood Apartment complex. (Record, pp. 66-67, 77-78, 94.)

3. Reid believed that following the argument, Gillis may have slashed one of the tires on his automobile. (Record, p. 95.)

4. On the day following the argument, Gillis received a message on his pager to call an unfamiliar telephone number. When he returned the call, the person answering the telephone identified himself as Mike Reid, and Gillis recognized Reid's voice. During the telephone conversation, Reid accused Gillis of slashing the

tire on his automobile and requested approximately \$85 in payment for the tire. (Record, pp. 69-71.)

5. The following day, while at home, Gillis received a message on his pager to call what he believed to be the same number he had called the day before in making contact with Reid. (Record, pp. 72-73.)

6. Upon returning the call, the person answering the telephone identified himself as the West Valley City Police Department. Gillis recognized the voice as belonging to Reid. Reid requested the work telephone number of Gillis's mother. Since Gillis's mother was home at the time, Gillis called her to the telephone. (Record, p. 73.)

7. When Gillis gave the telephone to his mother, Vicky Green, he informed her that Reid was on the telephone pretending to be a police officer. (Record, p. 74.)

8. Green began a conversation with Reid. Reid identified himself as "Officer Briddem." Reid then told Green that her son, Gillis, needed to pay the security officer at the Tanglewood Apartment complex for a tire Gillis had slashed, or that charges would be pressed against Gillis and his friends at the complex would be evicted. (Record, pp. 84-85.)

9. Green did not believe the caller to be a police officer, so she requested the name of "Officer Briddem's" sergeant. She was told that it was "Sergeant West." When Green asked how she could

contact "Sergeant West," Reid told her to look up the number in the phone book under "West Valley P.D." (Record, p. 86.)

10. When Green heard Reid's voice in court, she thought that it sounded very familiar to her and that she recognized it as the voice she had spoken with on the telephone. (Record, pp. 87, 90.)

11. There is no "Officer Briddem" nor is there an "Officer West" or "Sergeant West" associated with the West Valley City Police Department.

SUMMARY OF THE ARGUMENT

I. REID HAS NO RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE IN A CRIMINAL TRIAL THAT DOES NOT RESULT IN IMPRISONMENT.

The trial court judge sentenced Reid to a fine of \$450, but imposed no imprisonment. Both Utah and federal case law have established that the defendant, in a case that does not result in imprisonment, has no right to the assistance of counsel for his defense. Since Reid had no right to counsel, it was unnecessary for the trial court judge to conduct a discussion on the record regarding Reid's right to counsel versus his choice of self representation. The only effect of failing to conduct such a discussion is to limit the trial court judge's ability to impose sentence to those penalties that do not deprive the defendant of his liberty.

II. REID FAILED TO RAISE ANY ISSUE REGARDING HIS
SELF REPRESENTATION BEFORE THE TRIAL COURT.

Reid failed to object or otherwise raise any issue regarding his right to counsel or choice of self representation before the trial court. This is the case, even though he was represented by counsel during his motion for a new trial. Also, the alleged error by the trial court cannot be reviewed under the "plain error" rule, since Reid has not demonstrated that the error should have been obvious to the trial court and was harmful and affected his substantial rights, or that there were exceptional circumstances in this case.

III. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS
SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE
CHARGE OF "IMPERSONATION OF OFFICER."

The witnesses at trial provided the trial court with sufficient evidence to prove each element of the crime of "Impersonation of officer." The lack of a complete trial transcript makes it impossible to determine if Reid has marshaled all of the facts supporting the conviction and, also, leaves any oral findings of fact made by the trial court unknown. However, there are sufficient facts and inferences contained in the partial transcript to support the conviction.

DETAIL OF THE ARGUMENT

I. REID HAS NO RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE IN A CRIMINAL TRIAL THAT DOES NOT RESULT IN IMPRISONMENT.

Reid's argument regarding the waiver of his constitutional right to the assistance of counsel for his defense is not grounded in competent law. The right to the assistance of counsel does not apply in petty offenses that do not result in the defendant's being deprived of his liberty. Reid was not sentenced to imprisonment as a result of his conviction and, therefore, has no right to counsel for his defense. That being the situation, this case is significantly different than the felony conviction in *State v. Bakalov*, 849 P.2d 629 (Utah App. 1993), which Reid relied upon. Since Reid did not possess a right to counsel for his defense, it was unnecessary for the trial judge to conduct a discussion of its waiver.

In a case addressing one aspect of the right to the assistance of counsel, specifically, the issue of appointment of indigent counsel in a petty offense, the United States Supreme Court, in *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), clearly limited the right to counsel in state criminal proceedings to cases that actually lead to imprisonment. The Court clarified its previous decision in *Argersinger v. Hamlin*, 407 U.S. 25, 32 L. Ed. 530, 92 S. Ct. 2006 (1972), and stated that, " . . . the central premise of *Argersinger* - that actual imprisonment is a penalty different in kind from fines or the mere

threat of imprisonment - is imminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, at 373. The Court also stated, "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense." *Scott*, at 373-74 (emphasis added).

In a case similar to the case at bar, the Utah Supreme Court followed the reasoning of the United States Supreme Court in *Scott v. Illinois*. In *Salt Lake City v. Grotepas*, 906 P.2d 890 (Utah 1995), the Utah Supreme Court cites numerous cases from other jurisdictions, both state and federal, to illustrate that the Sixth Amendment does not ensure an unlimited right to counsel in all criminal cases. In *Grotepas*, the Court twice noted that the defendant in that case was not sentenced to a term of imprisonment. *Grotepas*, at 893. The Court concluded that Grotepas, who had been charged with an infraction, was not entitled to a constitutional right to counsel and stated, " . . . Grotepas was not sentenced to a term of imprisonment, nor did he even face the possibility of imprisonment. [Citation deleted.] Accordingly, we conclude that Grotepas' Sixth Amendment rights were not implicated in the present case." *Grotepas*, at 893.

In this case, Reid was only fined and was not sentenced to any term of imprisonment whatsoever. (Record, p. 20.) Since Reid was

not deprived of his liberty, he possessed no right to counsel. Therefore, it was unnecessary for the trial court judge to conduct a discussion, on the record, regarding Reid's decision to represent himself at trial. The only effect of the failure to conduct such a discussion was that the trial court judge limited his sentencing options to sanctions other than imprisonment. *Scott*, at 374. The actions of the trial court in this case were entirely appropriate and should be upheld.

II. REID FAILED TO RAISE ANY ISSUE REGARDING HIS
SELF REPRESENTATION BEFORE THE TRIAL COURT.

The law in Utah is well settled that in order for an appellate court to consider an issue on appeal, the issue must have been raised before the trial court below. This requirement affords the trial court an opportunity to consider and correct the error. The Utah Court of Appeals has stated, "As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." *State v. Brown*, 856 P.2d 358, 359 (Utah App. 1993). The *Brown* court also stated:

Therefore, to ensure the trial court's opportunity to consider an issue, appellate review of criminal cases in Utah requires "that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record." *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987). See also *State v. Emmett*, 839 P.2d 781, 783-84 (Utah 1992); *State v. Shickles*, 760 P.2d 291, 301 (Utah 1988).

Brown, at 360.

The record below is clear that the issue now being raised regarding Reid's self representation at trial was not raised before the trial court. This is true even though Reid retained counsel following his conviction and thereupon filed a motion for a new trial. The motion for a new trial, prepared by Reid's counsel, did not raise the self representation issue before the trial court. The first notice of this issue in the record appears in the Docketing Statement filed after the appeal was commenced.

The only exception to the above stated rule is a demonstration by Reid of exceptional circumstances or plain error. *State v. Jennings*, 875 P.2d 566 (Utah App. 1994). Reid has not asserted exceptional circumstances; however, he does make a claim of plain error.

Reid's claim that the trial court's apparent failure to conduct a discussion on the record regarding his decision to represent himself is plain error, is without merit. Plain error should be found only if (1) the error should have been obvious to a trial court, and (2) the error was harmful and it affected the substantial rights of the defendant. *State v. Brown*, 853 P.2d 851, 853 (Utah 1992).

If indeed the trial court committed an error regarding Reid's exercise of his right to self representation, the error cannot be categorized as plain error as defined in *Brown* above. Neither prong of the plain error test has been met by Reid. The first

prong, the obviousness of the error, cannot be met since such error would not have been obvious to the trial court for at least three reasons.

First, both the *Scott* and *Grotepas* decisions cited above would lead the trial court to believe that no discussion regarding self representation was necessary unless it was the trial court's intention to impose imprisonment as a penalty. The trial court could have reasonably believed that the only effect of conducting an inadequate discussion of the right of self representation on the record was to limit the court's sentencing ability to a monetary fine rather than imprisonment. Second, the law is clear that an on-record discussion of self representation, while being the preferred approach, is not mandatory. *State v. Tenney*, 913 P.2d 750, 754 (Utah App. 1996). Third, Judge Nehring, the trial court judge, could have reasonably relied upon the docket sheet in assuming that a discussion regarding self representation had occurred between Reid and Judge Henriod at arraignment. The docket sheet contains a notation dated February 15, 1995, which indicates "DEF DOES NOT WISH APPT COUNSEL." (Record, p. 98.)

Reid makes no showing that the alleged error by the trial court was harmful and affected his substantial rights. Therefore, the second prong of the "plain error" test also has not been met.

Based on the foregoing, it is clear that the issues regarding Reid's self representation were not raised before the trial court. It is equally clear that the trial court committed no plain error

in failing to conduct an in-depth discussion with Reid regarding his choice of self representation prior to the commencement of the trial.

III. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS
SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE
CHARGE OF "IMPERSONATION OF OFFICER."

A challenge to the sufficiency of the evidence in a criminal case is governed by a clear and unambiguous standard. The Utah Supreme Court has articulated that standard as follows:

When reviewing the findings of a trial judge sitting without a jury, this court will overturn a guilty verdict only if it is clearly erroneous. *State v. Walker*, 743 P.2d 191, 192-93 (Utah 1987). The basis of this standard is rule 52(a), Utah Rules of Civil Procedure, "Findings by the court":

In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Taylor, at 1031 (footnote omitted).

The Supreme Court has defined the "clearly erroneous" standard as follows:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Further clarification is offered by Wright & Miller:

The appellate court . . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Finally, the Utah Court of Appeals followed the guidance of the Utah Supreme Court in *State v. Germonto*, 868 P.2d 50 (Utah 1993), by stating:

In considering the challenge to the sufficiency of the evidence, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict If, during the review, we find some evidence or inferences upon which findings of all the requisite elements of the crime can reasonably be made, we affirm.

State v. Perry, 871 P.2d 576, 581 (Utah App. 1994).

An examination of the record of this case demonstrates that the evidence presented to the trial court was more than sufficient to sustain a conviction. Reid has failed to provide a complete transcript of the trial; therefore, it is unknown what findings of fact the trial court judge placed on the record. However, the following evidence, which supports the conviction, can be found in the record:

1. Reid was a security officer at Tanglewood Apartments. (Record, p. 63).

2. In August 1994, Reid was involved in an argument with Brandon Gillis. (Record, pp. 66-67,77-78, 94.)

3. Reid believed that Gillis may have slashed one of the tires on his automobile following the argument. (Record, p. 95.)

4. On the day following the argument, Gillis received a message on his pager to call an unfamiliar telephone number. Upon returning the telephone call, the person at the unfamiliar number identified himself as Mike Reid, and Gillis recognized Reid's voice. During the telephone conversation, Reid accused Gillis of slashing the tire on his automobile and requested approximately \$85 in payment for the tire. (Record, pp. 69-71.)

5. The following day, while at home, Gillis received a message on his pager to call what he believed to be the same number he had called the day before in making contact with Reid. (Record, pp. 72-73.)

6. Upon returning the call, the person answering the telephone identified himself as the West Valley City Police Department. Gillis recognized the voice as belonging to Reid. (Record, p. 73,.) Under cross examination, he confirmed that he was "a hundred percent sure" the voice was that of Reid's. (Record, pp. 76-77.)

7. Gillis informed his mother, Vicky Green, that Reid was on the telephone pretending to be a police officer and gave the telephone to his mother. (Record, p. 74, 83-84.)

8. Green began a conversation with the person on the telephone. The person said he was a police officer and identified himself as "Officer Briddem". "Officer Briddem" then told Green that Gillis needed to pay the security officer at the apartment complex money for a tire he had slashed, or that charges would be pressed against Gillis. (Record, pp. 84-85, 89.)

9. Green requested the name of "Officer Briddem's" sergeant, and was told that it was "Sergeant West." When asking how she could contact "Sergeant West," "Officer Briddem" told her to look the number up in the phone book under "West Valley P.D." (Record, p. 86.)

10. Green testified that when she heard Reid's voice in court, it sounded very familiar to her, and she thought that she recognized it as the voice she has spoken with on the telephone. (Record, pp. 87, 90.)

11. Officer Coy Acocks of the West Valley City Police Department testified that he is familiar with all of the police officers associated with West Valley City. He further testified that there is no "Officer Briddem," nor is there an "Officer West" or "Sergeant West" associated with West Valley City.

The transcript provided by Reid does not include the cross examination of Reid by the prosecutor; the City's rebuttal witness, Officer Acocks; or Reid's cross examination of Officer Acocks. This testimony may have contained additional information or facts upon which the court based its conviction. Also, without a

complete transcript, it is impossible to tell if Reid has complied with his requirement to marshal all of the evidence against him which supported his conviction. *State v. Moosman*, 794 P.2d 474 (Utah 1990). However, it is clear from the information available in the partial transcript, as set forth above, that the trial court was presented with sufficient evidence or inferences upon which the findings of all the elements of the crime of "Impersonation of officer" can be made. Also, the trial court was in the best position to judge the credibility of the witnesses and any other factors, such as the relative distinctiveness of Reid's voice, in making its judgment.

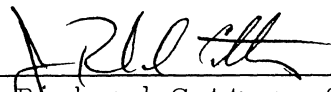
The verdict of the trial court in this case is supported by sufficient evidence in the record, and should be affirmed.

CONCLUSION

Based on the foregoing, the City respectfully requests that Reid's appeal be denied, and that the conviction of the trial court be affirmed.

DATED this 30th day of May, 1996.

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 30th day of May, 1996, I served upon Steven B. Wall two (2) copies of the Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

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WEST VALLEY CITY

A handwritten signature in black ink, appearing to read "J. Richard Catten", is written over a horizontal line.

J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee