

1986

The State of Utah v. Johnny A. Turner : Brief of Appellant

Utah Supreme Court

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David L. Wilkinson; Attorney General; Attorney for Respondent.

Marlynn Bennett Lema; Attorney for Appellant.

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**UTAH SUPREME COURT
BRIEF**

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IN THE SUPREME COURT OF
THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
vs :
JOHNNY A. TURNER, :
Defendant-Appellant. : Case No. 860202

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and
for Carbon County, State of Utah, the Honorable Boyd Bunnell,
Presiding. (Category 2).

MARLYNN BENNETT LEMA (#1933)
248 East Main Street
Price, Utah 84501

Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

FILED
OCT 31 1986

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1986 with Forgery, a second degree felony, in violation of Utah Code Annotated (1953) as amended, Section 76-6-501.

DISPOSITION IN THE LOWER COURT

Upon verdict of guilty at trial to a jury held April 3, 1986; the Court, on April 3, 1986, sentenced Appellant to not less than one (1) nor more than fifteen (15) years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks relief from conviction and sentence as follows:

1. For an Order of this Court reversing judgment and sentence of the Court below; or, in the alternative;
2. For an Order of Remand to the Court below for a new trial; or in the alternative;
3. For Order of Remand for hearing on the issue of competency of counsel.

STATEMENT OF FACTS

On or about November 29, and/or December 2, 1985 [information as amended by interlineation,¹ Addendum 1; transcript p.43, 1.2-3; p.44, 1.23; transcript p.79, 1.16] Appellant made arrangements for repair of a vehicle belonging to one, Frances Sanchez, with one, Doug O'Brien [transcript p.45, 1.23-25; p.46, 1.1-15], who lives and operates a business located at Price, Utah [transcript p.40, 1.21-22; p.41, 1.14-15]. Testimony is conflicting whether Appellant filled in payee, date

1. Information initially set December 5, 1985 as date of occurrence.

and amount on a previously signed check [transcript p.78, 1.23-25; p.79] or whether Appellant filled out and executed said check [transcript p.46, 1. 23-25; p.47, 1.24-25, p.48, 1.1] Testimony is conflicting as to whether check was partially or wholly filled out in the presence of O'Brien [transcript p.47, 1.16-25; p.48, 1.1-21] or whether said check was filled out but not signed and tendered to another [transcript p.79, 1.7-17; p.80, 1.1-4].

Witness Doug O'Brien testified that he received check from Appellant [transcript p.48, 1.4-7; p.50, 1.8-9].

Witness Gaylene O'Brien testified that she deposited said check in the bank on December 3, 1985 [transcript p. 57, 1.5-6].

Witness Lieutenant Alec Shilaos testified that he received said check from Doug O'Brien on January 14, 1986, put it into evidence and it was entered into evidence at Preliminary Hearing on February 24, 1986. [transcript p.34, 1.19-23; p.35, 1.10-25; p.36, 1.1 - 5].

Appellant testified that one Wayne Wood signed the name of Paul Wood to said check [transcript p.78, 1.23-25; p.79, 1.1].

Witness Paul Wood testified that said check was written on an account which had belonged to him but which had been closed in 1976 or 1977; [transcript p.69, 1.20-25; p.70,1.1-2] and that witness did not sign said check. [transcript p.70, 1.5-12].

Check was entered into evidence without objection as Exhibit I. [transcript p.71, 1.18-21].

Testimony is conflicting as to weather conditions on day in question. [transcript p.51, 1.20-24; p.77, 1.20-22]

Testimony is conflicting as to whether Appellant told investigating officer, Lieutenant Alec Shilaos, that Paul Wood signed check [transcript p.88, 1.8-12] or that Wayne Wood signed check [transcript p.82, 1.24-25; p.83, 1.1-3]

Appellant in pro se brief filed herein and in letters to present counsel claims the following additional facts:

1. That counsel below failed to call as defense witnesses:
 - A. Bob Ritter from Denver
 - B. John Bueno
 - C. Tino Gutierrez
 - D. Owner or agent of Grako Tire
 - E. Rose Sandoval
 - F. Frances Sanchez²

Appellant alleges that the above witnesses would testify as follows:

- A. That Rose Sandoval met Wayne Wood.
- B. That Appellant spent the night of December 2 at Bob Ritter's home in Denver, Colorado.
- C. That Wayne Wood talked to someone at Grako Tire Company about the purchase of snow tires.
- D. That John Bueno saw Wayne Wood sign check.
- E. That Tino Gutierrez met Wayne Wood December 2, 1986.

The only witness called by the defense was Appellant. [transcript

2. Frances Sanchez testified as State's witness. [transcript p.58, p.67].

p.74-83].

2. That counsel below failed to offer as evidence:

A. Telephone bill belonging to Frances Sanchez indicating a collect call from the Paul Wood home in Atlanta, Georgia.

B. A page out of the Atlanta phone book showing Paul Wood's phone numbers.

C. Letters from Wayne Wood written after Appellant's arrest admitting guilt.

D. A weather report showing storm conditions on date in question.

No exhibits were offered by defense at trial.

3. That the information filed in the Court below set forth the date of the crime as December 2, 1985 and that counsel for the State, in his opening statement, stated that the crime occurred on December 2, 1986. [Opening statement of counsel were not transcribed, transcript p.32].

4. That the trial court did not advise Appellant of his right to appeal. [The record is silent].

5. That testimony of Lieutenant Alec Shilaos at trial was perjured; to-wit, at preliminary hearing in another case (#2331) State v. Turner, Lieutenant Shilaos testified that Appellant told him Wayne Wood signed check and at trial below Lieutenant Shilaos testified that Appellant told him Paul Wood signed check. [transcript p.88, 1.5-13; there is no

transcript of preliminary hearing above referenced],

6. That testimony of Doug O'Brien was perjured when he testified that he saw Appellant sign check and that O'Brien privately stated to Appellant that he was coerced by Lieutenant Alec Shilaos to so testify. [The record is silent],

That O'Brien testified that the weather was nice when it was snowing.

That O'Brien testified that he saw Appellant's vehicle when at preliminary hearing he testified that he did not see the vehicle. [Preliminary Hearing was not transcribed, in support of this allegation of fact Appellant has furnished counsel with Answers to Interrogatories at Addendum 2],

7. That State's witness, Paul Wood, was incompetent at time of trial; newly discovered evidence. [In support of this allegation of fact Appellant has furnished counsel with Answer to Complaint at Addendum 3],

SUMMARY OF ARGUMENT

Appellant contends that he was denied effective assistance of counsel and compulsory process in contravention of his rights under the Sixth Amendment and Fourteenth Amendment to the United States Constitution; that the State's failure to prove date of crime as set forth initially on Information; the State's failure to prove venue, chain of custody of evidence, admission of perjured testimony and failure by the Court to advise Appellant of his right to appeal constituted a denial

of Appellant's right to due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

POINT I

WHETHER COUNSEL, APPOINTED TO REPRESENT APPELLANT AT PROCEEDINGS BELOW WAS INEFFECTIVE IN CONTRAVENTION OF APPELLANT'S RIGHT TO COUNSEL.

An accused person has the right to have the assistance of counsel at trial and the right to have process to secure witnesses in his behalf.³

The right to effective counsel is a fundamental one, guaranteed by the Sixth Amendment to the Constitution...⁴ citing Glasser v. U. S., 315 U.S. 60,69,62 S.Ct.457, 86L.Ed.680 (1942) [Other citation omitted].

Utah has adopted, through case law, the test for effectiveness of counsel.

This court has previously held the right of the accused to have counsel is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. He is entitled to the assistance of a competent member of the Bar, who shows a willingness to indentify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

-
3. United States Constitution, Amendment VI and XIV; Constitution of the State of Utah, Article I, Section 12; Utah Code Annotated 1953 as amended, Section 77-1-6(a)(e)
 4. St. v. Myers, 545 P2d 538 (1976) Wash.

The record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of a crucial defense reducing the trial to a "farce and a sham," [535 P2d 739 742 (1975)].

In People v. Martinez the court cited the vital distinction between those cases where counsel failed to make a careful factual and legal investigation necessary for a constitutionally adequate defense and those wherein counsel, after making such an investigation, decides for tactical or strategic reasons, which from benefit of hindsight may appear wise or unwise, not to utilize the fruits of his labor.⁵

Appellant contends that trial counsel failed to provide a constitutionally adequate defense by his failure to call witnesses and offer documentary evidence; for his failure to object to the amendment by interlineation of the date of the crime as set forth on the information; for his failure to cross-examine witnesses to show inconsistencies in testimony (which Appellant claims as perjury); for his failure to object to the State's failure to prove venue; and for his failure to prove venue; and for his failure to object to admission of evidence absent a showing of chain of custody.

Trial counsel's failure to represent the interests of Appellant and present defenses proposed by Appellant constitute ineffective representation as defined by this Court in State v. McNichol, supra and exhibits ignorance of fact necessary

5. State v. McNichol, 554 P2d 203, 204 (1976) Utah; see Codianna v. Morris, 660 P2d 1101 (1983) Utah; State v. Lairby, 699 P2d 1187 (1984) Utah,

to establish a defense.⁶

Other states have defined the level of competency required of counsel in order to meet the Constitutional requirement of effective representation. Alaska follows the rule that conduct or omissions by counsel which contribute to conviction constitute constitutional deprivation of counsel.

Citing Beasley v. U. S., 491 F2d 687 (6th Cir, 1974) and using the standard that counsel perform ... "[A]s well as a lawyer with ordinary training and skill in the criminal law,..." at 696, the Alaskan Court set forth the following test:

In effect, we are promulgating a two-pronged test. Before reversal will result, there must first be a finding that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence which we have enunciated. Secondly, there must be a showing that the lack of competency contributed to the conviction. If the first burden has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome.⁷

The Supreme Court of Arizona in the case of State v. Watson, 559 P2d 121, (1976) Ariz., following the "farce and sham" standard applied in Utah addressed the issue of a post-conviction motion for relief on the grounds of ineffective counsel. The Arizona Court held that if the claim is "colorable" i.e., "has the appearance of validity," the issue must be remanded for hearing

6. State v. Pierren, 583 P2d 69 (1978) Utah,
7. Risher v. State, 523 P2d 421 (1974) Alaska; see also,
Tafoya v. State, 500 P2d 247 (1972) Alaska.

on the question of effective assistance of counsel,⁸

Appellant submits that his claim is "colorable" and that the issue of competency of counsel be remanded for hearing.

POINT II

WHETHER THE STATE FAILED TO PROVE DATE OF CRIME ALLEGED IN INFORMATION.

Appellant alleges that Information setting forth date of crime was amended by interlineation⁸ and counsel at trial failed to object to said amendment.⁹

Rule 4, UTAH RULES OF EVIDENCE requires a clear and definite objection to evidence at trial before appellate review can be requested. The assignments of error where no objection was made at trial, therefore, are considered only to the extent that they may bear upon the claim of incompetence of counsel. [Citations Omitted, Emphasis Added],¹⁰

POINT III

WHETHER TRIAL COURT ERRED IN IT'S FAILURE TO ADVISE APPELLANT OF HIS RIGHT TO APPEAL.

The Court below did not advise Appellant of his right to appeal as mandated by statute.¹¹ This Court in Grove v. State, 649 P2d 2 (1982), impliedly held that failure of the Court to advise a defendant at any time during the trial of his right to appeal would constitute reversible error. Counsel for Appellant did not object to the omission.¹²

8. Cf. Utah Code Annotated 1953 as amended, 77-35-30(a); 77-35-4(b); Rule 15, Utah Rules of Civil Procedure.

9. Utah Code Annotated, 1953 as amended, 77-35-12(d).

10. State v. Malmrose, 649 P2d 56, 58 (1982) Utah.

11. Utah Code Annotated, 1953 as amended, 77-1-6(g); 77-35-22.

12. State v. Malmrose, supra n. 10.

Appellant alleges at page 10 of pro se brief filed herein that he requested that trial counsel file an appeal and that trial counsel refused.

POINT IV

WHETHER TRIAL COURT ERRED IN ALLOWING TESTIMONY OF WITNESSES WHICH, APPELLANT CONTENDS, WAS PERJURED.

Counsel for Appellant did not object to testimony which Appellant contends was perjured.

If there is a likelihood that perjured testimony influenced the verdict, Appellant's right of due process had been violated.¹³

Argument set forth at Point II is hereby incorporated by reference.

POINT V

WHETHER THE STATE FAILED TO PROVE VENUE.

In a criminal prosecution, the burden is on the people to prove proper venue and venue is determined from all the evidence.¹⁴
[Citations Omitted] at 650.

A person accused of a crime has a right to be tried in the county where the offense is committed.¹⁵ The record from trial is silent regarding county of the offense.

Counsel for Appellant did not object nor move for dismissal on the ground that venue had not be established.¹⁶

Argument set forth at Point II is hereby incorporated by reference.

13. State v. Schrucder, 39 Utah Adv.Rep. 46 (1986);

Walker v. State, 624 P2d 687 (1981) Utah.

14. People v. Cortez, 703 P2d 648 (1985) Col.

15. Utah Code Annotated, 1953 as amended, 77-13-7; 77-1-6(f).

16. cf., State v. Wade, 40 Utah Adv.Rep. 6 (1986) Utah.

POINT VI

WHETHER THE STATE PROVED CHAIN OF CUSTODY PRIOR TO
ADMISSION OF DOCUMENTARY EVIDENCE.

Counsel for Appellant did not object to admission into evidence of check purportedly signed by Appellant on the ground that the State had failed to prove chain of custody.

Appellant contends that admission of said exhibit into evidence is reversible error absent a showing that "exhibit is in substantially in the same condition as at the time of the crime...." at 74.¹⁷

Argument set forth at Point II is hereby incorporated by reference.

POINT VII

WHETHER A WITNESS FOR THE STATE WAS MENTALLY INCOMPETENT
AT TIME OF TRIAL.

Appellant contends that subsequent to his filing of Notice of Appeal he discovered new evidence [Addendum 3] indicating that witness Paul Wood was mentally incompetent at time of trial.

Appellant requests remand for new trial on the basis of newly discovered evidence.


CONCLUSION

Errors and omissions of trial counsel enumerated in violation of Appellant's rights under the Sixth Amendment of the Constitution of the United States herein warrant reversal

17. State v. Eagle Book, Inc., 583 P2d 73 (1978) Utah,

of conviction or in the alternative; remand for hearing
on the issue of competency of counsel.

Respectfully Submitted,



MARLYNN BENNETT LEMA
ATTORNEY FOR DEFENDANT-APPELLANT
JOHNNY A. TURNER

CERTIFICATE OF MAILING

I hereby certify that I mailed ten (10) true and correct copies of the above and foregoing Brief of Appellant to the Utah Supreme Court, Utah State Capitol Building, Salt Lake City, Utah 84114; four (4) true and correct copies of the above and foregoing Brief of Appellant to David L. Wilkinson, Attorney General in and for The State of Utah, Office of Governmental Affairs, 236 State Capitol Building, Salt Lake City, Utah; and one (1) true and correct copy of the above and foregoing Brief of Appellant to Appellant, Johnny A. Turner, %P.O. Box 250, Draper, Utah 84020 this 29th day of October, 1986.


MARLYNN BENNETT LEMA

S. V. LITIZZETTE, #1973
Attorney for Defendant
30 South Main Street
Helper, Utah 84526
Telephone: 472-5811

IN THE ELEVENTH CIRCUIT COURT IN AND FOR
PRICE, CARBON COUNTY. STATE OF UTAH

JOHNNY A. TURNER)	
Plaintiff)	
vs.)	DEFENDANT'S ANSWERS TO
)	PLAINTIFF'S INTERROGATORIES
)	AND REQUEST FOR
DOUG O'BRIEN)	ADMISSIONS
Defendant)	Civil No. 86-CV 112

Pursuant to Rule 33 of the Utah Rules of Civil Procedure, defendant hereby answers under oath separately and in writing, each of the following interrogatories and herewith serves a copy of such answers upon plaintiff within 30 days after service thereof.

Request for Admission No. 1 Doug O'Brien is the defendant in this action. Answer: Yes

Request for Admission No. 2 The defendant is acquainted with the plaintiff. Answer: Yes, if the plaintiff is the person who represented himself as Paul Wood.

Request for Admission No. 3 The defendant is owner or co-owner of O'Brien Engine and Machine Shop. Answer: Yes

Request for Admission No. 4 The defendant has interviewed the plaintiff at his shop in Price, Utah. Answer: Defendant admits he had a conversation with plaintiff, if plaintiff is the person who represented himself as Paul Wood to defendant.

Interrogatory No. 1 Mr. O'Brien would you please state the date the plaintiff was at your shop? Answer: If plaintiff is the person who represented himself as Paul Wood, in the latter part of November when Paul Wood postdated a check dated December 2, 1985.

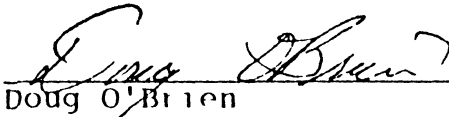
Interrogatory No. 2 Mr. O'Brien when the plaintiff walked out of your shop did you see him go to his car and get in to leave? Answer: I saw the person who represented himself to be Paul Wood go to a pickup truck and get in and leave.

Interrogatory No. 3 Mr. O'Brien did you see the plaintiff fall in your drive way at his car door? Answer: No

Interrogatory No. 4 Mr. O'Brien did you see what type of automobile the plaintiff was driving the day he was at your shop? Answer: Yes, if plaintiff is the person who represented himself as Paul Wood.

Interrogatory No. 5 The defendant is aware that the plaintiff took a fall in his drive way? Answer: No.

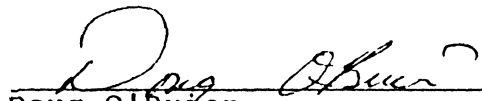
Dated this 25 day of August, 1986.



Doug O'Brien

STATE OF UTAH)
) §
COUNTY OF CARBON)

The undersigned, being sworn, says that the answers set forth above are true and correct to the best of his knowledge and belief.



Doug O'Brien

Subscribed and sworn to before me this 25th day of August, 1986.



Notary Public
Residing at: Helper, Utah

My Commission Expires:
12/13/89

CERTIFICATE

I hereby certify that a true and correct copy of the above and foregoing interrogatories and request for admissions were mailed to:

Johnny A. Turner
Utah State Prison
P. O. Box 250
Draper, Utah 84020

on this 28th day of August, 1986.

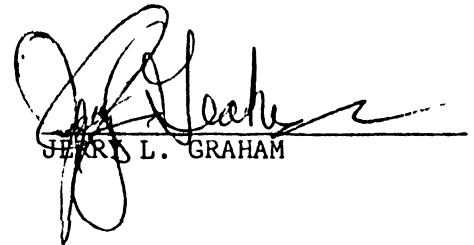


S. V. LITIZETTE

which Plaintiff states he did for the Defendant. On or around September 18, 1985 the Defendant was admitted to the Georgia Regional Hospital for use of hallucinogenic drugs. Soon thereafter the Defendant was declared mentally disturbed. Therefore the Defendant is not responsible for his actions in this Complaint.

WHEREFORE, Defendant prays as follows:

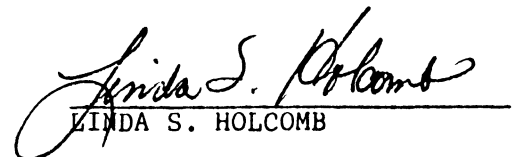
1. That Plaintiff take nothing by his Complaint and the same be dismissed.


JERRY L. GRAHAM

CERTIFICATE OF MAILING:

"I hereby certify that I mailed a true and correct copy of the foregoing answer, postage prepaid, on this 9th Day of July, 1986 to:

Johnny A. Turner,
Utah State Prison
P.O. Box 250
Draper, Utah 84020"


LINDA S. HOLCOMB