

1990

State of Utah v. Joseph Michael Smith : Reply Brief

Utah Court of Appeals

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BRIEF

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900087

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee,

vs.

900087
Case No. *90087-CA*

JOSEPH MICHAEL SMITH,

Defendant-Appellant.

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Michael R. Murphy

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Salt Lake City, Utah 84114

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Attorney for Appellant

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COURT OF APPEALS

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REPLY BRIEF

The following Reply Brief is offered to the arguments made by the State in its Brief filed October 15, 1990.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT LACK JURISDICTION TO ENTERTAIN DEFENDANT'S MOTION TO WITHDRAW HIS NO CONTEST PLEA IN THAT HE WAS NOT GOVERNED BY THE 1990 AMENDMENT TO SECTION 77-13-6, U.C.A.

The chronology of this case is simple. On July 20, 1987 Defendant entered his no contest plea to the charge of attempted sexual abuse of a child. At that time Section 77-13-6, U.C.A. read as follows:

Withdrawal of Plea. A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

As noted by the State, "Under the original version of the statute, Defendant's ability to remedy his plea by filing such a motion began at the time of his plea and continued ad infinitum."

(Appellee's Brief, p. 9).

In 1989 the guilty plea statute was amended as follows:

A request to withdraw a plea of guilty or no contest is made by motion, and shall be made within thirty days after the entry of the plea.

Defendant filed his motion to withdraw his no contest plea on September 18, 1989. Thus, the State now argues that the amended statute is applicable and since Defendant did not file his motion within thirty days of his guilty plea there is no jurisdiction.

The argument raised by the State borders on the frivolous. At the time the amended statute was passed almost twenty months had elapsed since the time Defendant entered his plea. Even if Defendant had been aware of the new amendment to the statute, which he was not, he would still have been precluded from filing his motion since he did not do so within thirty days after the entry of his plea. Basically, the State is arguing that Defendant should be punished because he did not file his motion within thirty days after his plea was entered even though at the time and for almost two years later this was not required. Thus, according to the State, any person who entered a plea prior to February of 1989 is forever precluded from attacking such plea since that person did not have the foresight to make the attack within thirty days after the plea was entered relying instead upon the existing law that had been on the books for decades.

Aside from the obvious injustice that the State's argument would produce to those persons who entered pleas prior to the 1989 amendment, there is sound legal reasoning why the argument must fail. The Utah Supreme Court in the recent case of Smith v. Cook,

149 Utah Adv. Rep. 3 (Utah, Nov. 29, 1990) addressed an argument in which a probation statute was amended subsequent to a defendant's conviction restricting the number of months that probation could be utilized. The court first noted that Utah Code Annotated §68-3-3 (Supp. 1984) provides that "no part of these Revised Statutes is retroactive, unless expressly so declared." As in the Cook case, the present amendment to Section 77-13-6 does not declare itself retroactive.

The Supreme Court noted the exception to the rule as to statutes that are "procedural or remedial" in nature. The Court stated, "a statute is considered procedural or remedial, as opposed to substantive, if the statute does not enlarge, eliminate, or destroy vested rights." Id. at 4. The court noted in the Cook case that since the newly amended statute limits the time a person can be placed on probation it therefore enlarges the rights of an individual who is placed on probation and therefore the amendment is substantive and cannot be applied retroactively.

The same reasoning is equally applicable here. Rather than enlarging the rights of an individual who enters a plea, the present statute substantially reduces it. Whereas before such person could bring his motion for relief at any time after the plea was entered the new statute now restricts such right to within a thirty-day period. Thus, the amendment is substantive and is not procedural as claimed by the State. (Appellee's Brief, pp. 8-9).

In addition, the argument advanced by the State would

preclude the defendant from legal redress from an erroneous no contest plea. The application urged by the State would violate Article 1, Section 11 of the Utah Constitution commonly known as the open court provision. The Utah Supreme Court in Berry v. Beach Aircraft Corp., 717 P.2d 670 (Utah 1985) and Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989) struck down statutes of repose on the basis that an injured person who was injured six years after the date of purchase of a product as in Berry or who was injured seven years after the construction of a building as in Horton could not bring a suit against the tortfeasors even though their causes of action had not even arisen in which they could have taken any action. The Utah Supreme Court held that such statutes prevent an injured party from redress automatically based upon an arbitrary legislative time period and that there was no justification for allowing a person to sue a product's manufacturer because that person was injured five years after the purchase while denying that right to an identical plaintiff who was injured six years after the purchase.

This same principle applies in the instant case. Once thirty days had elapsed from Defendant's time of his plea he was, according to the State, forever barred from attacking the plea. Defendant, of course, did not know this until some two years later when the amendment was made. This is no different than a person who possesses a product for six years without injury only to be injured in the seventh year. There is no reason logically nor constitutionally to deny these individuals redress in the court system.

The argument raised by the State borders on the frivolous. At the time the amended statute was passed almost twenty months had elapsed since the time Defendant entered his plea. Even if Defendant had been aware of the new amendment to the statute, which he was not, he would still have been precluded from filing his motion since he did not do so within thirty days after the entry of his plea. Basically, the State is arguing that Defendant should be punished because he did not file his motion within thirty days after his plea was entered even though at the time and for almost two years later this was not required. Thus, according to the State, any person who entered a plea prior to February of 1989 is forever precluded from attacking such plea since that person did not have the foresight to make the attack within thirty days after the plea was entered relying instead upon the existing law that had been on the books for decades.

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The argument of the State also violates equal protection. The 1989 amendment to Rule 11 of the Utah Rules of Criminal Procedure specifically requires that the court will not accept a plea until it has found "that the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest." Furthermore, Section 6 provides:

Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty or no contest is not a ground for setting the plea aside but

may be the ground for extending the time to make a motion under §77-13-6.

Thus, the new rule recognizes both the importance of informing a defendant as to the time limit and also recognizes that the time provided in §77-13-6 is not fixed in stone and may be extended if such advice was not given. Clearly, Defendant was never advised of any time limit at the time of his sentence since no time limit was in existence. Also, he was never advised of any time limit as to any grace period or given any opportunity to comply with the newly enacted statute of the thirty-day requirement. Refusing to allow Defendant to now argue his motion would be a clear denial of equal protection of the law as compared with any defendant who is now being sentenced under the new procedure.

The argument made by the State that Defendant still has a remedy under the habeas corpus statute is equally without merit. If Defendant had a right to bring a habeas corpus action prior to the 1989 amendment he had a similar right after the amendment. In other words, the language contained in subsection 3 of the amended statute relating to habeas corpus is meaningless rhetoric and could have just as easily been included in the prior statute. This Court in Summers v. Cook, 759 P.2d 341 (Utah App. 1988) recognized that "challenge may be made to a guilty plea either directly or collaterally." This Court noted some of the distinctions between the two routes, such as giving the lower court who sentenced the defendant the opportunity to correct the sentence rather than referring the matter to a new judge in a

habeas corpus action. In addition, if a direct appeal is not taken by a defendant then the argument can be made in the habeas corpus proceeding that the defendant waived any right to proceed further. Wells v. Shulsen, 747 P.2d (Utah 1987).

Finally, it is interesting to note that in the Cook case in which the appellant filed a writ of habeas corpus as now is urged by the State, the State maintained that that action was barred by §78-12-31.1 which purportedly requires a habeas corpus action to be brought within three months from the time a defendant is aware or should have been aware of the grounds to be argued. The Supreme Court in Cook did not specifically address the validity of the three-month statute but instead held that defendant's imprisonment under a statute existing prior to 1987 tolled any time limitation. The court noted, however, that any ambiguity that may exist in these type of statutes should be resolved in favor of a criminal defendant. Id. at 4 citing Shelmidine v. Jones, 550 P.2d 207 (Utah 1976); State v. Tapp, 490 P.2d 334 (Utah 1971). See also concurring opinion of J. Zimmerman stating that the three-month limitation period is unconstitutional. Id. at 7.

Thus, the State's suggestion that this matter should be dismissed on jurisdictional grounds and refiled as a habeas corpus action is not supported by statutory interpretation or case law. Nor is it supported by equitable principles. Here, Defendant has been incarcerated since March of 1988. The hearing before the lower court occurred on December 18, 1989. Appellant's Docketing Statement was filed on March 15, 1990. Had the State truly believed that there was no jurisdiction in this case it could and

should have filed a motion for summary disposition pursuant to Rule 10 of the Utah Rules of Appellate Procedure thereby eliminating a substantial time period for Defendant to prepare his brief, for the State to reply, and for argument to be heard. There is, therefore, no legal justification nor equitable reason to require Defendant to start over once again in another court thereby severely prolonging his incarceration if he is entitled to a vacation of the plea of no contest.

For these reasons, therefore, this matter is properly before this Court and should be decided on the merits.

POINT II

THE LOWER COURT ABUSED ITS DISCRETION
IN FAILING TO SET ASIDE DEFENDANT'S
PLEA OF NO CONTEST SINCE THE PLEA WAS
LEGALLY DEFICIENT.

Defendant believes that his analysis of the law relating to guilty pleas is correct in light of both Rule 11 and the Gibbons opinion by the Utah Supreme Court. (Appellant's Brief, pp. 9-32). Since the State has only put forth a cursory effort to refute the defendant's factual and legal analysis, only a brief review of the State's arguments is required. First, the State contends that in "determining if denial was appropriate, this Court must consider: (1) whether defendant's no contest plea complied with Rule 11, Utah rules of Criminal Procedure and (2) whether the trial court met its obligation of insuring that defendant entered a voluntary and knowing plea." (Appellee's Brief, p. 11). This statement is inaccurate. The purpose of Rule 11 is to insure that a voluntary and knowing plea is entered.

Thus, the two cannot be separated as the State has done. More importantly, however, the State has not addressed the question as to whether the no contest plea in this case meets the criteria established by the Utah Supreme Court in Gibbons. This criteria is over and above the recipe list provided in Rule 11. Unless it is complied with a plea cannot be accepted. State v. Gentry, 141 Utah Adv. Rep. 26 (Utah App., Aug. 24, 1990); State v. Pharris, 143 Utah Adv. Rep. 35 (Utah App., Sept. 14, 1990).

Next, the State contends that the Court properly "asked whether Defendant understood the elements of the crime and whether he understood that by pleading no contest, he was giving up the right to require the State to prove the elements beyond a reasonable doubt." (Appellee's Brief, p. 12). The record shows that the entire dialogue concerning the elements of the crime as well as a synopsis of the defendant's acts between the Court and the defendant is as follows:

THE COURT: Now, do you also understand that if you were to go to trial on this matter, that the State would be required to prove beyond a reasonable doubt all those matters that are listed under the section called elements in this affidavit.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And there are some handwritten notations in that section as to elements, as to what those elements are. Do you understand those?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that the State's obligation of proof beyond a reasonable doubt relates to each of those elements?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And if you plead guilty as proposed, then you

will be giving up any rights to require the State to prove those elements beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes, Your Honor. (July 20, 1987 hearing, p. 6).

The statement in the affidavit which the Court was referring to was as follows: "Attempted abuse of child under 14--attempted to touch the genitals of a child under the age of 14 with intent to cause sexual gratification or pain."

It is obvious that neither the dialogue of the Court nor the affidavit specifically addressed the facts of this case. The affidavit was a mere recitation of the law and did not give anyone notice as to any of the circumstances concerning the alleged crime perpetrated by the defendant.

Since the Gibbons court specifically found that a "sufficient affidavit" should contain "a synopsis of the defendant's acts that establish the elements of the crimes charged" and furthermore "that the trial judge should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfil the other requirements imposed by Rule 11 on the record before accepting the guilty plea" it is obvious that this requirement was not met.

This Court has recently vacated two guilty pleas on the basis that the trial court did not comply with the Gibbons requirement of explaining the elements and facts of the crime to the defendant while taking the plea. In both State v. Gentry, supra, and State v. Pharris, supra this Court held that failure to inform a defendant of the nature and elements of the offense is fatal to a

guilty plea conviction and that a defendant's understanding of the elements of the crime charged and how those elements relate to the evidence presented may not be presumed.

The factual synopsis given by the county attorney does not meet the requirement of Gibbons that an actual dialogue occur between the court and the defendant concerning the understanding of the elements and the evidence. (Appellee's Brief, p. 15). Furthermore, the State has failed to refute the contention of the defendant that in cases where a defendant fails to acknowledge a memory of the facts giving rise to the crime that the court must satisfy itself that sufficient evidence exists independent of the defendant's plea. Here, the court made no effort to examine the underlying facts even though the court was aware that the defendant maintained he had no memory of any wrongdoing.

The second argument raised by the defendant concerning his ability to understand the plea agreement has also not been refuted by the State. Instead, the State has merely quoted the same language already quoted by the defendant in his brief in which counsel for the State indicated that Defendant was going to have to "acknowledge responsibility" and where the lower court informs him that the programs may not take him if he "claims factually that you did not do what you are charged with." (Appellee's Brief, pp. 13-14). Again, however, there is no evidence that anyone informed the defendant of the extensive requirements of the various programs that Defendant actually remember what occurred and that he actually believe in his own guilt. The mere acknowledging responsibility or in agreeing factually that he must

have committed a crime was clearly not sufficient to keep the defendant in the therapy programs.

Defendant believes that he has painstakingly outlined the legal requirements of a guilty plea in his opening brief and has specifically addressed the two areas which Defendant believes is deficient and which require a vacating of the plea. The State has simply failed to perform any detailed analysis of these contentions and has only superficially claimed that the trial court performed its function in light of Rule 11 and Gibbons. This is simply not the case however.

For these reasons, therefore, the trial court erred in failing to set aside Defendant's guilty plea.

CONCLUSION

The State has attempted to escape the merits of this case by arguing that Defendant is precluded from attempting to vacate his plea because of a statute which was passed some two years after his plea and which automatically would preclude him from ever being able to attack his plea in a direct appeal. Constitutional protection as well as common sense precludes the State from prevailing in this argument. Furthermore, to require the defendant to now initiate a habeas corpus action is equally without merit since the State would no doubt argue that that action is also precluded by a statute of limitation. The defendant has been incarcerated long enough and is entitled to have this matter adjudicated before his sentence expires or he is naturally parolled.

The State has failed to refute the contentions of the

defendant that the lower court did not comply with the Gibbons requirements as to the factual basis of the elements of the defendant's crime or as to his understanding of the plea agreement. Either or both of these elements is fatal to the validity of a no contest plea.

For these reasons, therefore, the no contest plea of the defendant should be vacated and this matter remanded to the lower court for further disposition.

Respectfully submitted,



Craig S. Cook
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Reply Brief to Charlene Barlow, Attorney for Plaintiff-Appellee, 236 State Capitol Building, Salt Lake City, Utah 84114 this 15th day of January 1991.


