

2006

State of Utah v. Jerad Lee Dominguez : Brief of Appellant

Utah Court of Appeals

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Dee W. Smith; The Public Defender Association of Weber County; Attorney for Defendant/Appellant .

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 vs. :
 :
 JERAD LEE DOMINGUEZ, : District Court Case No. 051905288
 :
 Defendant/Appellant. : Appellate Court No. 20060612

**BRIEF OF APPELLANT
(ANDERS BRIEF)**

THIS APPEAL IS FROM A PLEA AND SUBSEQUENT SENTENCING TO POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, AND WAS SENTENCED TO SERVE A TERM OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE ERNIE W. JONES, PRESIDING. DEFENDANT/APPELLANT IS CURRENTLY INCARCERATED IN THE UTAH STATE PRISON.

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Attorney for Defendant/Appellant

UTAH APPELLATE COURTS

DEC 20 2006

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant is appealing from a Judgment, Sentence and Commitment in the Second District Court for Weber County, Utah, dated February 27, 2006. The Defendant pled guilty to possession of a controlled substance, a third degree felony. He was sentenced to serve a term of zero to five years at the Utah State Prison. He did not file a motion to withdraw his guilty appeal. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78-2a-3(2)(e).

ISSUE ON APPEAL AND STANDARD OF REVIEW

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT TO PRISON?

Standard of Review: The Court must determine whether the trial court abused its discretion when it sentenced the Defendant to prison. “A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits.” *State v. Nuttall*, 861 P.2d 454, 456 (Utah Ct. App. 1993)..

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

§ 77-13-6. **Withdrawal of plea.**

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

§78-2a-3(2)(e) Court of Appeals jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

STATEMENT OF THE CASE

The Defendant was charged with possession of a controlled substance a third degree felony, obstruction of justice, a third degree felony and possession of drug paraphernalia, a class B misdemeanor. (R. 001-004). Through plea negotiations, the Defendant pled guilty to count one of the information, possession of a controlled substance, a third degree felony. (R. 044-45). Defendant was represented by attorney Michael Boyle. The Defendant was sentenced on February 22, 2006. He was sentenced to serve a term of zero to five years at the Utah State Prison. It was ordered to run concurrent to a second-degree felony sentence for aggravated assault. (R. 044-45). The Defendant did not file a motion to withdraw his plea prior to sentencing.

On May 4, 2006, the Defendant filed a pro se Rule 65B motion and memorandum in support of the motion. (R. 049-57). The Weber County Public Defender's office was asked by the trial court to assist the Defendant in the matter. A motion to reinstate a denied right to appeal was filed on May 25, 2006. (R. 58-60). A hearing was held on June 7, 2006, where the State

stipulated to reinstate the time to file a notice of appeal. (R. 061-62). A notice of appeal was filed on June 30, 2006. (R. 068-69).

Defendant's appellate counsel has carefully reviewed the record and has found no non-frivolous issues to appeal and is filing this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE FACTS

The Defendant pled guilty to possession of a controlled substance, a third degree felony. On February 27, 2006, he was sentenced to prison on a zero to five-year sentence and one to fifteen years on an unrelated second-degree felony for aggravated assault. (R. 044-45) On May 4, 2006, the Defendant sent in a pro se Rule 65B motion for re-sentencing. (R. 49-53). In his memorandum he stated that his attorney (Mr. Boyle) was suppose to have filed an appeal and didn't. He also alleged that Mr. Boyle had been ineffective in not reviewing an investigation on his case that had been performed by the public defender's office.

The Defendant pled guilty as part of a plea bargain and did not file a motion to withdraw his guilty plea. His basis for wanting to appeal is he believes that his attorney was ineffective in advising him to accept the plea bargain and plead guilty.

SUMMARY OF ARGUMENTS

Defendant's appellate counsel has diligently reviewed and researched this case and has found no non-frivolous issues to appeal. Defendant did not file a motion to withdraw his guilty plea and is therefore precluded from challenging the plea on appeal. In addition, he was sentenced to serve a term of zero to five years at the Utah State Prison. This is a legal sentence and is within the statutory guidelines for a third degree felony. For these reasons, counsel is filing this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981).

ARGUMENT

The sentencing decision of a trial court is reviewed for an abuse of discretion. *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1999)(per curium). This includes the decision to grant or deny probation. *See, State v. Chapoose*, 985 P.2d 915 (Utah 1999). An abuse of discretion occurs when "the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990)(citations and quotations omitted). Furthermore, an appellate court can only find an abuse of discretion "if it can be said that no reasonable [person] would take the view adopted by the trial court." *State v. Houk*, 906 P.2d at 909 (alteration in original)(quotations omitted).

In *State v. Baker*, 963 P.2d 801, 810 (Utah Ct. App. 1998), this Court stated that “[a]n abuse of discretion may be manifest if the actions of the judge in sentencing were ‘inherently unfair’ or the judge imposed a ‘clearly excessive’ sentence.” (citations omitted). In *State v. Rhodes*, 818 P.2d 1048 (Utah Ct. App. 1991), this Court stated that “[t]he trial court has broad discretion in imposing sentence within the statutory scope provided by the legislature.” *Id.* at 1051.

Both this Court and the Utah Supreme Court have held in the past that probation is not a right. *See, State v. Sibert*, 310 P.2d 388, 393 (1957). In *State v. Rhodes*, this Court stated that “[t]he defendant is not entitled to probation, but rather the court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest.” *State v. Rhodes*, 818 P.2d at 1051. This court also held that rehabilitation is not the only factor that a trial Court may consider when it makes a sentencing decision. “Other factors include deterrence, punishment, restitution, and incapacitation.” *Id.*

Furthermore, the Defendant didn’t file a motion to withdraw his plea and has not preserved any issues for appeal. Because the Defendant did not make a timely motion to withdraw his plea he is precluded from challenging his plea on appeal. *See, State v. Reyes*, 40 P.3d 630 (Utah 2002)(holding that failure to

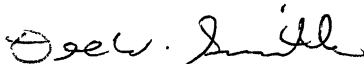
file a motion to withdraw a guilty plea “extinguishes a defendant’s right to challenge the validity of the guilty plea on appeal.”) Utah Code Annotated Section 77-13-6 requires a defendant to move to withdraw his plea prior to the time of sentencing.

Counsel has diligently researched the applicable statutory and case law and has been unable to find any law to support the Defendant’s position. Counsel has complied with the requirements set forth in *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Defendant was mailed a copy of this brief thirty days ago and has not responded to it. (See Addendum B, letter to Defendant/Appellant dated November 20, 2006). For these reasons, counsel respectfully requests permission to withdraw from further representation of the Defendant.

CONCLUSION

Counsel is unable to find any non-frivolous issues to appeal. For this reason, counsel respectfully requests this Court to release him as appellate counsel.

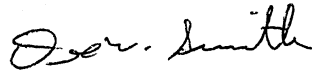
DATED this 20th day of December 2006.



DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 20th day of December 2006.



DEE W. SMITH
Attorney at Law

ADDENDUM A

**THE PUBLIC DEFENDER ASSOCIATION, INC.
OF WEBER COUNTY, STATE OF UTAH
APPELLATE DIVISION**

2550 Washington Boulevard, Suite 300
Ogden, Utah 84401
Telephone: (801) 399-4191

Randall W. Richards
Dec W. Smith

November 20, 2006

Jerad Dominguez
Inmate # 24353
Utah State Prison
P.O. Box 250
Draper, UT 84020

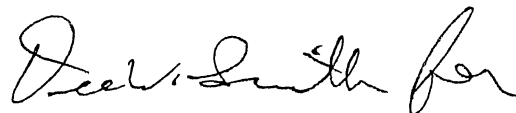
Re: SOU v. Dominguez

Mr. Dominguez

I have included with this letter a copy of the brief I intend to file with the Court of Appeals. I've had to do what is called an Anders brief wherein I tell the Court of Appeals that there are no legitimate issues on your appeal. The problem you have with your appeal is that you pled guilty and were sentenced. To have a legitimate appeal there has to be issues that have been preserved. In your case there are no issues to appeal. If you would have filed a motion to withdraw the guilty plea prior to sentencing then we would have something to work with. I know you don't feel that you received adequate representation. However, this isn't an issue you can raise for the first time on appeal where you pled guilty without filing a motion to withdraw the plea. I obtained a copy of the report on the investigation that was done by the Public Defender's investigator. I reviewed the report, and I didn't find anything in the report that would have helped you if you had gone to trial on the first-degree felony.

You have thirty days to respond with any additional issues that you feel need to be addressed. I'm sorry there isn't anything we can do on this case. If you'd like copies of the case law please let me know.

Sincerely,



RANDALL W. RICHARDS
Attorney at Law

RWR/jmr
enclosure

ADDENDUM B

2006 FEB 27 P 1:24

SECOND DISTRICT COURT - DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 051901212 FS
	:	
JERAD LEE DOMINGUEZ,	:	Judge: ERNIE W JONES
Defendant.	:	Date: February 22, 2006

FEB 27 2006

PRESENT

Clerk: vennaw
Prosecutor: BEATON, BRENDA J
Defendant
Defendant's Attorney(s): BOYLE, MICHAEL J

DEFENDANT INFORMATION

Date of birth: March 28, 1973
Video
Tape Number: J022206 Tape Count: 2:25

CHARGES

2. AGGRAVATED ASSAULT - 2nd Degree Felony
Plea: Guilty - Disposition: 12/15/2005 Guilty

HEARING

This is the time set for sentencing. The defendant is present and represented by Michael Boyle. Brenda Beaton is present representing the State of Utah. Attorney Boyle and the defendant address the Court. The State agreed to remain silent at sentencing. The Court proceeds with sentencing.

Case No: 051901212
Date: Feb 22, 2006

SENTENCE PRISON

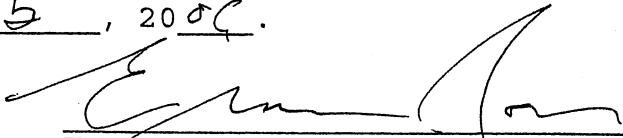
Based on the defendant's conviction of AGGRAVATED ASSAULT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE RECOMMENDATION NOTE

The defendant is granted credit for all time previously served in this case. The defendant shall pay restitution in the amount of \$28,057.37, to be remitted to the Office of Crime Victims Reparation; this should become a requirement of parole.

Dated this 27 day of Feb, 2006.



ERNIE W JONES
District Court Judge