

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	Case No. 20080189-CA
)	
v.)	F I L E D
)	(May 15, 2008)
Leonard Preston Gall,)	
)	2008 UT App 174
Defendant and Appellant.)	

Third District, Salt Lake Department, 011919226
The Honorable Judith S. Atherton

Attorneys: David I. Goldberg, Fort Collins, Colorado, for
Appellant
Mark L. Shurtleff and J. Frederic Voros Jr., Salt
Lake City, for Appellee

Before Judges Billings, Davis, and McHugh.

PER CURIAM:

Leonard Preston Gall appeals the district court's amended minutes sentence, judgment, and commitment entered on February 7, 2008. This is before the court on Gall's motion for summary disposition. The State concedes that the trial court erred in holding only a limited evidentiary hearing.

On appeal, Gall asserts: (1) that the trial court did not conduct a full evidentiary hearing to determine whether he rescinded his trial counsel's termination before his sentencing hearing as directed by this court, and therefore his original sentence should be vacated;¹ (2) alternatively, if this court does not summarily vacate his original sentence, this court should summarily vacate the February 7, 2008 order and remand this matter for a proper evidentiary hearing; and (3) that under either option, this court should direct that future proceedings be conducted under a different trial court judge as the prior trial court judge may be called as a witness.

1. See State v. Gall, 2007 UT App 85, ¶ 14, 158 P.3d 1105.

Gall first asserts that the trial court erred in holding the December 6, 2007 evidentiary hearing without him present. Constitutional issues present questions of law that are reviewed for correctness. See Roosevelt City v. Curry, 2006 UT App 328, ¶ 7, 143 P.3d 309. This court previously concluded that if Gall did not rescind his counsel's termination and the trial court simply proceeded with his sentencing hearing anyway, Gall's Sixth Amendment right to counsel of his choice was violated. See State v. Gall, 2007 UT App 85, ¶ 13, 158 P.3d 1105. Because the record was silent on this issue, this court remanded the matter to the trial court with specific instructions to "make a full inquiry and determine whether and to what extent any problems with trial counsel had been resolved prior to sentencing." Id. ¶ 14.

Both the State and Gall agree that, upon remand, the trial court failed to undertake a "full inquiry" by holding an adequate evidentiary hearing. The basis for this assertion is that Gall was not invited to participate in the December 6, 2007 evidentiary hearing, he was not afforded his right to confront any witness claiming that he had rescinded his counsel's termination, and that he was not able to present testimony in his favor. A defendant in a criminal proceeding has the right to be present at every stage of trial and has a right to confront witnesses against him. See Faretta v. California, 422 U.S. 806, 819 (1975); see also Davis v. Alaska, 415 U.S. 308, 317-18 (1974). Thus, Gall was entitled to a full evidentiary hearing, wherein he could testify, cross-examine the witnesses, and call any witnesses that he had to support his assertion that he did not rescind his counsel's termination.

The December 6, 2007 evidentiary hearing was inadequate. It did not resolve the issue as to whether Gall rescinded counsel's termination before the sentencing hearing. Because this issue remains unresolved, there is no basis to summarily conclude that Gall's Sixth Amendment right was violated at his initial sentencing. Thus, there is no basis to reverse Gall's original sentence at this time. Gall is not entitled to re-sentencing from the original sentence unless he establishes at the future evidentiary hearing that he was denied his Sixth Amendment right to counsel of his choice.

Lastly, Gall asserts that this court should require that future proceedings be conducted before a different trial court judge. This is raised for the first time on appeal and is not properly before this court. Rule 29(c) of the Utah Rules of Criminal Procedure governs the disqualification of trial court judges. If Gall seeks to have his evidentiary hearing held before a different judge, Gall must comply with the specific provisions set forth therein.

Accordingly, we vacate the February 7, 2008 order and remand for a second evidentiary hearing in accordance with this court's directive set forth in Gall, 2007 UT App 85, ¶ 16.

Judith M. Billings, Judge

James Z. Davis, Judge

Carolyn B. McHugh, Judge