

IN THE UTAH COURT OF APPEALS

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Michael A. Jones,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellant,	)	
	)	Case No. 20061002-CA
v.	)	
	)	F I L E D
State of Utah,	)	(August 23, 2007)
	)	
Respondent and Appellee.	)	<span style="border: 1px solid black; padding: 2px;">2007 UT App 283</span>

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Fourth District, Provo Department, 050403216  
The Honorable Anthony W. Schofield

Attorneys: Michael A. Jones, Gunnison, Appellant Pro Se  
Mark L. Shurtleff and Christopher D. Ballard, Salt  
Lake City, for Appellee

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Before Judges Bench, Greenwood, and Billings.

PER CURIAM:

Michael A. Jones appeals the district court's order granting the State's motion for summary judgment and dismissing his petition for post-conviction relief. We affirm.

In March of 2000, Jones was charged with first degree murder for the killing of a woman in 1991. In September of 2000, Jones pleaded guilty to a reduced charge of manslaughter, a second degree felony, with a dangerous weapon enhancement, based upon the fact that Jones had stabbed the victim with a knife. At the time of the plea, the district court went through an extensive colloquy with Jones, and Jones signed a plea affidavit acknowledging the rights he was giving up by pleading guilty. At the sentencing hearing, it was brought to the court's attention that the statute allowing for a dangerous weapon enhancement was amended after the commission of the crime but before Jones's plea deal. More particularly, the 1991 version did not include a knife within the definition of a dangerous weapon, but the subsequent version did. Accordingly, the district court informed Jones that it could no longer accept Jones's plea deal unless Jones also waived the ex post facto issue and agreed to be sentenced in accordance with the newer version of the statute. During the hearing the district court conducted another colloquy

to ensure that Jones understood his rights. Jones repeatedly acknowledged that he understood the ex post facto issue, as well as the rights he would be waiving, and wanted to go ahead with the plea agreement. Accordingly, the district court sentenced Jones based on the terms of the plea agreement.

Jones claims that the district court improperly participated in the plea bargaining process and coerced him to accept the plea. The record does not support Jones's argument. The district court informed Jones that it could not accept Jones's plea unless Jones also understood and waived the ex post facto issue. This did not constitute coercion or participation in the plea negotiation process but was a necessary statement of the law that allowed Jones to fully understand the rights he was waiving if he elected to proceed under the terms of the plea bargain. If such issue was not resolved, then the district court would have potentially imposed an illegal sentence. Accordingly, the district court explained the issue to Jones as well as the consequences of both accepting and rejecting the plea deal based upon the new ex post facto issue. After acknowledging that he understood the issues involved, Jones re-affirmed that he wished to waive the ex post facto issue and be sentenced in accordance with his plea agreement. Based upon these circumstances, Jones's plea was made both knowingly and voluntarily without any coercion by the court.

Jones next claims that his plea was not knowingly and voluntarily given because the district court failed to strictly comply with rule 11(h)(3) of the Utah Rules of Criminal Procedure by failing to call upon defendant to either affirm or withdraw the plea. Without discussing the applicability of the rule to Jones's plea,<sup>1</sup> we conclude that Jones's argument is without merit. The district court repeatedly informed Jones that he had the right to reject the plea agreement after discovery of the ex post facto issue. Jones refused and unequivocally stated that he wanted to proceed under the terms of the plea bargain. Thus, Jones was given the right to reject the plea bargain and declined to do so.

Jones next claims that the district court erred in deferring calculation of restitution to the Utah Board of Pardons. In so arguing, Jones relies on rule 21A(c)(2) of the Utah Rules of Criminal Procedure and its predecessor, rule 6-302(2) of the Utah Rules of Judicial Administration, which forbid delegating responsibility for calculating restitution to the Department of

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<sup>1</sup>Rule 11(h)(2)-(3) of the Utah Rules of Criminal Procedure discusses the district court's review of tentative plea agreements. See Utah R. Crim. P. 11(h)(2)-(3).

Corrections without the approval of the court, the prosecutor, defense counsel, and the defendant. Because, rule 21A(c)(2) was not adopted until 2003, it is inapplicable to this case. Accordingly, Jones must rely exclusively on rule 6-302(2) of the Utah Rules of Judicial Administration. However, the Rules of Judicial Administration are not binding procedural rules because they were promulgated by the Utah Judicial Council as opposed to the Utah Supreme Court. See Panos v. Third Judicial Dist. Court, 2004 UT 87, ¶14, 103 P.3d 695. Further, they "are not intended to, nor do they, create or modify substantive rights of litigants." Id. at ¶14 n.4. Therefore, rule 6-302(2) created no substantive or procedural rights upon which Jones could base his appeal. Even assuming that the district court impermissibly delegated the responsibility to determine the amount of restitution, Jones has failed to allege, let alone demonstrate, that he was prejudiced in any way by the district court's decision. Cf. Monson v. Carver, 928 P.2d 1017, 1027 (Utah 1996) (stating that the board of pardons must abide by the substantive and procedural standards set forth in Utah Code section 76-3-201 when imposing restitution). Therefore, even if the district court erred, the error was harmless.

Finally, Jones argues that his counsel was ineffective by (1) allowing him to plead guilty to the weapons enhancement, (2) failing to object to the restitution order, and (3) failing to investigate the facts of his case. In order to establish that trial counsel was ineffective, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by that deficient performance. See Strickland v. Washington, 466 U.S. 668, 688-92 (1984). In reviewing such claims the court observes a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." State v. Taylor, 947 P.2d 681, 685 (Utah 1987) (quotations and citation omitted). "If a rational basis for counsel's performance can be articulated, [this court] will assume counsel acted competently." State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993).

Under the facts of this case, any advice trial counsel gave to Jones concerning the efficacy of entering the plea agreement must be viewed as reasonable strategy. If Jones rejected the plea agreement and was convicted of first degree murder, he faced the potential of life in prison. On the other hand, if Jones waived the ex post facto issue and pleaded guilty to manslaughter with the weapons enhancement, the maximum length of his incarceration would be twenty years. Based upon the evidence linking Jones to the murder and the potential for life imprisonment, defense counsel's advice in waiving the ex post facto issue and agreeing to the plea bargain can only be viewed as reasonable. In regard to counsel's failure to object to the

restitution order, Jones has failed to demonstrate that he was prejudiced by the decision. As to the alleged failure to adequately investigate the facts of his case, Jones has failed to allege any specific facts or circumstances that his attorney could have discovered with reasonable investigation that could have altered the posture of his case. Accordingly, Jones pleaded no facts that would establish that he suffered prejudice as a result of the alleged ineffectiveness. Thus, the petition for post-conviction relief did not contain sufficient facts to state a cause of action for ineffective assistance of counsel.

The district court's order granting the State's motion for summary judgment and dismissing Jones's petition for post-conviction relief is affirmed.

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Russell W. Bench,  
Presiding Judge

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Pamela T. Greenwood,  
Associate Presiding Judge

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Judith M. Billings, Judge