

1996

West Valley City v. Caree F. McDonald : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

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DOCKET NO. 960471-CF

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

:

Plaintiff/Appellee,

:

:

Case No. 960471-CA

v.

:

:

Priority No. 2

CAREE F. MCDONALD,

:

:

Defendant/Appellant.

:

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Carlos A. Esqueda

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FILED

JUL 25 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellee,	:	
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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(e), Utah Code Annotated 1953, as amended.

STATEMENT OF THE ISSUES

- I. DOES DEFENDANT CAREE F. MCDONALD ("MCDONALD") HAVE A RIGHT TO A JURY TRIAL FOR A "PETTY" OFFENSE SUCH AS A MINOR TRAFFIC VIOLATION?

This issue is a conclusion of law, and should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

- II. IS IT WITHIN THE POWER OF THE TRIAL COURT, PRIOR TO TRIAL, TO LIMIT THE POTENTIAL SENTENCE THAT MAY BE IMPOSED BY REDUCING THE POTENTIAL SENTENCE FOR A SPEEDING VIOLATION FROM A CLASS "C" MISDEMEANOR TO AN INFRACTION?

This issue is a conclusion of law, and should be reviewed on a "correctness" standard. *State v. Pena*, 869 P.2d 932 (Utah 1994).

- III. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING MCDONALD'S REQUEST THAT THE HEARING ON HER MOTION FOR JURY TRIAL BE HELD PRIOR TO THE DAY OF TRIAL, AND IN DENYING HER MOTION FOR CONTINUANCE AFTER THE COURT HAD DENIED THE MOTION FOR JURY TRIAL?

This issue is within the sound discretion of the trial court, and should be reviewed on an "abuse of discretion" standard. *State v. Cabututan*, 861 P.2d 408 (Utah 1993).

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION
IN SENTENCING MCDONALD TO A FINE THAT
EXCEEDS THE RECOMMENDED FINE SET FORTH IN
THE UNIFORM FINE SCHEDULE?

This issue is within the sound discretion of the trial court,
and should be reviewed on an "abuse of discretion" standard.
State v. Yoder, 935 P.2d 534 (Utah Ct. App. 1997).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

United States Constitution, Amendment VI:

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Utah Constitution, Article I, Section 10:

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases, three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. 1896

Utah Constitution, Article I, Section 12:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been

committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

1994

Utah Code Annotated, Section 76-3-204:

76-3-204. Misdemeanor conviction - Term of imprisonment.

A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows:

- (1) In the case of a class A misdemeanor, for a term not exceeding one year;
- (2) In the case of a class B misdemeanor, for a term not exceeding six months;
- (3) In the case of a class C misdemeanor, for a term not exceeding ninety days.

Utah Code Annotated, Section 76-3-301:

76-3-301. Fines of persons.

(1) A person convicted of an offense may be sentenced to pay a fine, not exceeding:

- (a) \$10,000 for a felony conviction of the first degree or second degree;
- (b) \$5,000 for a felony conviction of the third degree;
- (c) \$2,500 for a class A misdemeanor conviction;
- (d) \$1,000 for a class B misdemeanor conviction;
- (e) \$750 for a class C misdemeanor conviction or infraction conviction; and
- (f) any greater amounts specifically authorized by statute.

(2) This section does not apply to a corporation, association, partnership, government, or governmental instrumentality.

Utah Code Annotated, Section 76-3-301.5:

76-3-301.5. Uniform fine schedule - Judicial Council.

(1) The Judicial Council shall establish a uniform recommended fine schedule for each offense under Subsection 76-3-301(1).

(a) The fine for each offense shall proportionally reflect the seriousness of the offense and other factors as determined in writing by the Judicial Council.

(b) The schedule shall be reviewed annually by the Judicial Council.

(c) The fines shall be collected under Section 77-18-1.

(2) The schedule shall incorporate:

(a) criteria for determining aggravating and mitigating circumstances; and

(b) guidelines for enhancement or reduction of the fine, based on aggravating or mitigating circumstances.

(3) Presentence investigation reports shall include documentation of aggravating and mitigating circumstances as determined under the criteria, and a recommended fine under the schedule.

(4) The Judicial Council shall also establish a separate uniform recommended fine schedule for the juvenile court and by rule provide for its implementation.

(5) This section does not prohibit the court from in its discretion imposing no fine, or a fine in any amount up to and including the maximum fine, for the offense.

Utah Code Annotated, Section 77-1-6:

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and
(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Utah Rules of Criminal Procedure, Rule 4:

Rule 4. Prosecution of public offenses.

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(c) The court may strike any surplus or improper language from an indictment or information.

(d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.

(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction in the Third Judicial District Court, West Valley Department, Salt Lake County, State of Utah, for a violation of Section 41-6-46, Utah Code Annotated 1953, as amended, "Speeding."

COURSE OF PROCEEDINGS

Prosecution in this case was commenced by the filing of charges against Defendant Caree F. McDonald on February 5, 1996. The actual date of the speeding violation, which was detected by the use of photo-radar, was January 6, 1996. (Record, p. 1.) On April 15, 1996, the City filed an Information, formally charging McDonald with a violation of Section 41-6-46. (Record, p. 5.) A pretrial conference was held before Judge Esqueda on May 1, 1996. McDonald was represented by counsel at the pretrial hearing; however, the case was not resolved and was set for a bench trial.

On May 7, 1996, McDonald filed a Motion to Dismiss (Record, pp. 8-9), to which the City filed a response (Record, pp. 27-31).

On June 7, 1996, the City filed an Amended Information. (Record, pp. 32-33.) The Amended Information contained the same speeding charges as the original Information, but reduced the penalty from class "C" misdemeanor to infraction status. This Amended Information was accepted by the trial court. On June 13, 1996, McDonald filed a Motion for Jury Trial.

On January 20, 1996, following a hearing on the matter, the trial judge denied McDonald's Motion to Dismiss and her Motion for Jury Trial, and then recessed to handle other matters. Upon resuming this case, the trial court denied McDonald's Motion for Continuance and proceeded to trial.

DISPOSITION IN TRIAL COURT

At the bench trial on June 20, 1996, the trial court convicted McDonald of speeding. The trial judge imposed fines and assessments in the amount of \$60 and required McDonald to complete traffic school. (Record, pp. 44-45.) McDonald's Notice of Appeal was filed on July 16, 1996. (Record, p. 55.)

SUMMARY OF THE ARGUMENTS

I. MCDONALD DOES NOT HAVE THE RIGHT TO A JURY TRIAL FOR A "PETTY" OFFENSE SUCH AS A MINOR TRAFFIC VIOLATION.

There exists no Utah case law interpreting the "right to a jury" provisions of the Utah Constitution. Therefore, it is appropriate to look to interpretations of analogous provisions of the United States Constitution for guidance in interpreting the Utah Constitution. The United States Supreme Court has unequivocally determined that no right to a jury under the United States Constitution exists for "petty" offenses. The classification of an offense as "petty" is determined by examining potential penalties and is based upon the historical lack of a right to a jury trial in "petty" cases. The interpretation of the

Utah Constitution based upon this type of analysis leads to the conclusion that McDonald was not entitled to a jury trial regardless of whether she was charged with a class "C" misdemeanor or an infraction, since both would be classified as "petty" offenses. This is especially true since the Utah Constitution provision regarding the right to a jury trial was drafted in more narrow language than the analogous United States Constitution provision. McDonald's alternate arguments founded upon Article I, Section 10 of the Utah Constitution and Section 77-1-6 of the Utah Code likewise do not establish her right to a jury trial.

II. IT IS WITHIN THE POWER OF THE TRIAL COURT, PRIOR TO TRIAL, TO ELIMINATE INCARCERATION AS A POTENTIAL PENALTY THAT MAY BE IMPOSED, BY REDUCING THE POTENTIAL SENTENCE FOR A SPEEDING VIOLATION FROM A CLASS "C" MISDEMEANOR TO AN INFRACTION.

McDonald's argument regarding the reduction in the penalty for speeding from a class "C" misdemeanor to an infraction focuses on the power of the prosecutor to make such a change. This argument mischaracterizes the issue. It is not the power of the prosecutor, but rather the discretion of the trial court judge, that allows this reduction in penalty to take place. The only effect of reducing the charge from a class "C" misdemeanor to an infraction is a reduction in the penalty that may be imposed by the trial judge. By allowing amendment of the charge down to an infraction, the trial judge is agreeing, prior to trial, to exclude incarceration from among his sentencing options. Trial court

judges in Utah are granted wide latitude with regard to their sentencing decisions, and this is simply an action within the judge's discretion with regard to sentencing.

McDonald's arguments regarding the City's and the trial court judge's failure to follow Rule 4(d) of the Utah Rules of Criminal Procedure are without merit. Contrary to McDonald's assertion, Rule 4(d) does not require the City to petition the court for permission to file an Amended Information. Also, McDonald has provided no credible argument that a reduction in the possible penalty associated with her offense has deprived her of any substantial right.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MCDONALD'S REQUEST THAT THE HEARING ON HER MOTION FOR JURY TRIAL BE HELD PRIOR TO THE DAY OF TRIAL, AND IN DENYING HER MOTION FOR CONTINUANCE AFTER THE TRIAL COURT HAD DENIED THE MOTION FOR JURY TRIAL.

Utah trial courts are granted a great deal of discretion with respect to scheduling matters and granting or denying Motions for Continuance. Absent a clear abuse of that discretion, the trial court's decisions will not be disturbed on appeal. In this case, McDonald has failed to show any abuse of discretion whatsoever on the part of the trial judge. Her arguments are in conflict and confusing. First, she argues that the hearing on her Motion for Jury Trial should not have been held on the same day the case was set for a bench trial. Part of her rationale on this argument is

that the court was not prepared to go forward with a jury trial on that date and would have had to continue the case until a jury could be assembled. Then, she makes the argument that the denial of the Motion for Continuance deprived her of her right to adequately prepare for a bench trial, since she had apparently arrived at court prepared to conduct a jury trial. McDonald had received notice that a bench trial was to be held on June 20, 1996, and admits in her argument that she knew a jury trial could not be conducted on that day. If she was unprepared for a bench trial on June 20, it is simply through her own negligence and not through any fault of the courts. This argument by McDonald is without merit, and should be disregarded by this Court.

IV. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN SENTENCING MCDONALD TO A
FINE THAT EXCEEDS THE RECOMMENDED FINE
SET FORTH IN THE UNIFORM FINE SCHEDULE.

It is well established that Utah trial court judges have wide discretion in their sentencing decisions. Those decisions will not be overturned on appeal unless they are inherently unfair, excessive, or such that no reasonable person would take the view adopted by the trial court. In this case, the bail was set at \$57. The sentence imposed by the trial court was a fine of \$60 and attendance at traffic school, which costs an additional \$30. Fines and assessments in this case are obviously within the \$0 to \$750 range of fines applicable to infractions. McDonald makes no credible argument supporting her claim that the fine is excessive

or unfair. Also, her reliance on the Uniform Fine Schedule in establishing what she believes the fine should have been is misplaced. The Criminal Code provision establishing the Uniform Fine Schedule specifically grants judges the discretion to impose any fine allowed by law, whether or not it is in conformance with the recommended fine in the Fine Schedule. Also, McDonald is incorrect in stating that the bail for this offense was \$50. The Record clearly indicates that the bail set in this case was \$57.

DETAIL OF THE ARGUMENTS

I. MCDONALD DOES NOT HAVE THE RIGHT TO A JURY TRIAL FOR A "PETTY" OFFENSE SUCH AS A MINOR TRAFFIC VIOLATION.

McDonald does not have a right to a jury trial in a case involving a "petty" offense, regardless of whether that offense is classified as a class "C" misdemeanor or an infraction. McDonald points to the Utah Constitution as the source of her perceived right to a jury trial. However, a close analysis of the language of the Utah Constitution reveals that no such right exists.

Utah courts may determine that it is appropriate to interpret state constitutional provisions differently from federal constitutional provisions. *West v. Thompson Newspapers*, 872 P.2d 999 (Utah 1994). However, the Utah appellate courts have yet to render an opinion as to whether or not the Utah Constitution provides a right to a trial by jury in so-called "petty" offenses. Therefore, it is appropriate to examine the United States Supreme

Court's interpretation of similar provisions of the United States Constitution and to apply that analysis to the language of the Utah Constitution.

McDonald relies upon Article I, Section 12 of the Utah Constitution, which states in part: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed *Utah Const. art. I, § 12.* The analogous provision of the United States Constitution is found in the Sixth Amendment, which states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed *U.S. Const. amend. VI.* In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the United States Supreme Court held that, "There is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan*, at 159. The *Duncan* court found that historically there had been a class of "petty" crimes that had not been tried before juries. The court found that the framers of the United States Constitution intended to continue this practice when drafting the Sixth Amendment and that only "serious" crimes invoke the right to a jury trial. *Duncan*, at 159-160.

The case of *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), reaffirmed the holding in *Duncan* and provided a test for

lower courts to determine whether a criminal defendant is entitled to a jury trial. In *Blanton*, the defendants were charged with first-time "driving under the influence of alcohol" charges. The D.U.I. charges carried a penalty of up to six months' incarceration and a fine of up to \$1,000. The *Blanton* court, therefore, was dealing with charges carrying a much greater penalty than that faced by McDonald, even if her charge is considered to be a class "C" misdemeanor. In Utah, a class "C" misdemeanor carries a maximum penalty of 90 days in jail and a fine of \$750. *Utah Code Ann.*, §§ 76-3-204(3) and 76-3-301(1)(e), (1953).

In *Blanton*, the United States Supreme Court focused upon the penalty attached to a crime in determining whether it was a "serious" crime requiring the opportunity for a jury trial, or whether the crime could be classified as "petty," in which case, no right to a jury trial exists. The Court particularly focused on the period of incarceration and stated:

Primary emphasis, however, must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender "a significant infringement of personal freedom," *id.*, at 151, but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975), it is the most powerful indication of whether an offense is "serious."

Blanton, at 542.

The Court went on to establish six months as the demarcation line between "serious" and "petty" offenses. Following its previous decision in *Baldwin v. New York*, 399 U.S. 66 (1970), the Court established that defendants are entitled to jury trials whenever the offense for which the person is charged carries a maximum authorized term of greater than six months. *Blanton*, at 543.

The *Blanton* Court declined to find that an offense carrying a maximum prison term of six months or less was automatically a "petty" offense. However, the Court established a presumption that such an offense is "petty" and stated:

A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line."

Blanton, at 543.

Last year, the United States Supreme Court reaffirmed its holding in *Blanton*. In *Lewis v. United States*, 116 S. Ct. 2163 (1996), the Supreme Court held that the defendant was not entitled to a jury trial, even though he was charged with two counts of "obstructing the mail," each of which carried a maximum authorized

prison term of six months, so that the aggregate maximum prison term exceeded six months.

The Court in *Lewis* stated: "The Constitution's guarantee of the right to a jury trial extends only to serious offenses." The Court also stated: "An offense carrying a maximum prison term of six months or less is presumed petty unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious." *Lewis*, at 2166.

It is clear from the foregoing United States Supreme Court analysis and case law that McDonald is not entitled to a jury trial on the basis of the language of the Sixth Amendment of the United States Constitution. The analysis that lead to this conclusion can likewise be applied to the language of Article I, Section 12 of the Utah Constitution.

As can be seen in the quotations set forth at the beginning of this argument, the language of the United States Constitution and the language of the Utah Constitution are virtually identical. However, there exists one very important difference.

The Sixth Amendment of the United States Constitution begins with the phrase, "In *all* criminal prosecutions" (Emphasis added.) The drafters of the Utah Constitution, however, chose to omit the word "all" when drafting the Utah Constitution. Article I, Section 12 of the Utah Constitution begins, "In criminal

prosecutions” By omitting the word “all,” the drafters of the Utah Constitution clearly intended to narrow the scope of the jury trial right in the Utah Constitution in comparison with the analogous provision of the United States Constitution.

As was demonstrated above in *Blanton* and the other United States Supreme Court cases cited, the United States Constitution, which contains the inclusive word “all,” has not been interpreted to include “petty” offenses. Based on the federal analysis and the difference in language between the two Constitutions, it seems elementary that if the right to a jury trial for an offense carrying a maximum penalty of 90 days’ incarceration and \$750 fine does not invoke the right to a jury trial under the expansive United States Constitution, then it certainly would not trigger such a right under the more narrowly written Utah Constitution.

McDonald makes the additional argument that the Utah Constitution affords her a right to trial by jury, even if the charges against her are characterized as civil. This argument is clearly inapplicable in this case, since the Record is devoid of any indication that the offense committed by McDonald was considered to be a civil offense. To the contrary, the City and the trial court considered the offense to be a criminal offense (either a class “C” misdemeanor or an infraction), albeit a “petty” criminal offense.

Even if McDonald was correct in categorizing this case as civil, her arguments are unpersuasive. McDonald's support for her "civil" jury trial argument rests primarily on the language in Article I, Section 10 of the Utah Constitution. She interprets the language "a jury in civil cases shall be waived unless demanded" as requiring a jury trial in all civil cases in which a jury demand is filed. This is clearly not the law in Utah. In *Hyatt v. Hill*, 714 P.2d 299 (Utah 1986), the Utah Supreme Court, in construing the meaning of Article I, Section 10, stated: "The constitutional right to a trial by jury is preserved and currently exists only in actions so triable when the Constitution was adopted." *Hyatt*, at 301. The Court has also stated that the right to a jury trial "extends only to cases that would have been cognizable at law at the time the Constitution was adopted." *Zions First National Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661 (Utah 1990). In a recent case, which determined that Article I, Section 10 of the Utah Constitution does not provide the right to a jury trial in parental rights termination proceedings, the Utah Court of Appeals concluded that if the action did not exist when the State Constitution was adopted, it was unnecessary to address whether or not it was the type of action that would have required a jury trial at that time. *T.R.B. v. State of Utah*, 311 Utah Adv. Rep. 23 (Utah Ct. App. 1997).

In applying this standard to the instant case, it is plain that no right to a jury trial based upon Article I, Section 10 is applicable. The annotations to Section 41-6-46 of the Utah Code, the section under which McDonald was convicted, indicate that the statute was first enacted in 1953. In fact, the oldest section contained in Article 6, Chapter 6 of Title 41, "Speed Restrictions," appears from the annotations to have been adopted in 1941. Since the Utah Constitution was adopted in 1896, before the invention of motor vehicles, it appears extremely unlikely that speeding violations existed at the time of the adoption of the Utah Constitution. Therefore, McDonald's argument must fail.

This historically-based rationale, which has been used by the Utah courts in interpreting Article I, Section 10 of the Utah Constitution, is philosophically very similar to the United States Supreme Court's historical analysis of the Sixth Amendment referred to earlier with regard to the interpretation of Article I, Section 12. For example, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the United States Supreme Court stated:

So-called petty offenses were tried without juries both in England and in the colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the framers intended to depart from this established common-law practice.

Duncan, at 160. This rationale has also been relied upon by other state courts, e.g., *Austin v. Denver*, 462 P.2d 600 (Colo. 1969).

McDonald also makes the statutory argument that Section 77-1-6 of the Utah Code provides a state law basis for the right to a jury trial. Section 77-1-6 states: "In criminal prosecutions the defendant is entitled . . . (f) To a speedy public trial by an impartial jury" This statute is virtually identical to the language contained in Article I, Section 12 of the Utah Constitution. The statute creates no right greater than that embodied in the Constitution; therefore, if Article I, Section 12 does not provide McDonald with a right to a jury trial in this case, neither would Section 77-1-6.

Finally, it should be noted that the Record contains no references to state constitutional provisions in the arguments made to the trial court. In previous cases, this Court has declined to address state constitutional issues that were not raised before the trial court. In those cases, it was found to be appropriate to proceed under a federal constitutional law analysis *State v. Dudley*, 847 P.2d 424 (Utah Ct. App. 1993); *State v. Bobo*, 803 P.2d 1268 (Utah Ct. App. 1990).

Based upon the foregoing, it is clear that the Utah Constitution creates no right to a jury trial for a "petty" offense. Since there is no case law interpreting the applicable sections of the Utah Constitution, the courts may look to interpretation of analogous provisions of the United States Constitution for guidance in interpreting the Utah Constitution.

The United States Supreme Court has unequivocally determined that no right to a jury under the United States Constitution would exist in this case, since McDonald, at worst, faced a maximum penalty of 90 days in jail and a \$750 fine. This analysis by the United States Supreme Court was based upon both the classification of the offense as "petty" due to its relatively minor penalties, and also upon the historical lack of a right to a jury trial in "petty" cases. An analysis of the Utah Constitution based upon these factors leads to the same conclusion; specifically, that McDonald is not entitled to a jury trial in a case involving a minor offense. This is especially true since the Utah Constitution provisions regarding the right to a jury trial were drafted in more narrow language than the United States Constitution. McDonald's alternate arguments founded upon Article I, Section 10 of the Utah Constitution and Section 77-1-6 of the Utah Code likewise do not establish her right to a jury trial. Regardless of whether the speeding offense that McDonald was charged with is considered a class "C" misdemeanor or an infraction, she has no right to a jury trial under the Utah Constitution, the United States Constitution, or the statutes of the State of Utah.

II. IT IS WITHIN THE POWER OF THE TRIAL COURT, PRIOR TO TRIAL, TO ELIMINATE INCARCERATION AS A POTENTIAL PENALTY THAT MAY BE IMPOSED, BY REDUCING THE POTENTIAL SENTENCE FOR A SPEEDING VIOLATION FROM A CLASS "C" MISDEMEANOR TO AN INFRACTION.

In this case, it was proper for the trial judge to allow amendment of the Information, charging McDonald with speeding, from a class "C" misdemeanor to an infraction. McDonald, in her Brief, mistakenly focuses on the power of the prosecutor to make such an amendment rather than on the power of the trial judge.

While it is true that the Amended Information was filed with the court by the prosecutor, it lies solely within the discretion of the trial court judge whether to accept such an amendment. Rule 4(d) of the Utah Rules of Criminal Procedure provides that the court may permit an Information to be amended. The court does not have to accept any amendment filed by the prosecutor.

When looked upon in that light, the analysis of this issue changes substantially. The only effect of reducing the charge from a class "C" misdemeanor to an infraction is a reduction in the penalty that may be imposed by the trial judge. A class "C" misdemeanor is punishable by a maximum penalty of 90 days in jail (Section 76-3-204(3)) and a fine of \$750 (Section 76-3-301(1)(e)), while an infraction is punishable by a maximum penalty of a fine of \$750 (Section 76-3-301(1)(e)), with no incarceration permitted. In effect, by allowing amendment of the charge down to an infraction, the trial judge is agreeing, prior to trial, to eliminate

incarceration from his sentencing options. The crime being charged and its elements do not change whatsoever; this is simply an action within the judge's discretion with regard to sentencing.

Trial court judges in Utah are granted a wide latitude with regard to their sentencing decisions. Their decisions regarding sentencing may be overruled only upon a showing of abuse of discretion, which has been described as "inherently unfair" or a "clearly excessive sentence." *State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997). The Appellee is unaware of any Utah case law that limits the trial judge's sentencing discretion solely to post-trial sentencing decisions.

The analysis is similar to that conducted by the United States Supreme Court in a Sixth Amendment "right to the assistance of counsel" case. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Supreme Court held that if the trial court judge fails to afford a defendant the right to assistance of appointed counsel in his defense, it had the effect of limiting the trial judge's sentencing options to non-incarceration penalties. The same analysis can be applied here. By declaring that he is going to consider the offense to be an infraction prior to trial, the trial court judge has limited himself to non-incarceration penalties. McDonald has not been harmed by this action. To the contrary, McDonald was benefitted by being relieved of the potential of being incarcerated.

McDonald argues that her right to a jury trial was eliminated when the charge was amended to an infraction. However, as was demonstrated in Argument I above, McDonald had no right to a jury trial even if the charge had remained a class "C" misdemeanor. Assuming *arguendo* that McDonald does have a jury trial right when charged with a class "C" misdemeanor, McDonald's two arguments that her rights were substantially impacted by the reduction in the penalty are still not persuasive.

First, she argues that the charge was reduced for the sole purpose of avoiding a jury trial. This charge is not based upon facts contained in the Record. To the contrary, at the motion hearing regarding the Amended Information, the prosecutor stated: "The City's interest is we don't have the desire to give the Defendant the possibility, however slim, of facing jail time; and we believe we have the discretion in prosecuting to represent those interests in not trying to seek a penalty that has the possibility of jail time." (Record, p. 73.) Furthermore, the trial judge, in denying the Defendant's objection to the Amended Information, stated: "I don't question the City's motives." (Record, p. 74.)

Second, McDonald argues that the reduction in penalty has deprived her of her substantial right to a jury trial. This is a disingenuous argument. In effect, McDonald is arguing that she has a right to face the maximum penalty it is within the judge's power to impose. Clearly, McDonald possesses no such right. It is

within the discretion of the prosecutor to determine what charge shall be brought, and within the discretion of the trial court to determine what penalty shall be imposed. McDonald has no "right" to face the maximum penalty. If the potential penalty is reduced to the level of an infraction, such as in this case, McDonald no longer possesses a right to a jury trial, for the reasons set forth previously in this Brief and based upon Section 77-1-6(2)(e) of the Utah Code.

McDonald makes several additional arguments regarding the reduction in the penalty associated with the speeding violation. All of these arguments are meritless. She argues that the City is violating Section 41-6-16 of the Utah Code, which indicates that local authorities may not enact or enforce rules or ordinances in conflict with provisions of the Motor Vehicle Code. This argument is clearly inapplicable, since there is no allegation or indication in the Record that the City has enacted any rule or ordinance that conflicts with the Motor Vehicle Code as specified in Section 41-6-16.

McDonald also argues that the trial court and the City failed to follow the provisions of Rule 4(d) of the Utah Rules of Criminal Procedure in amending the Information. Specifically, McDonald charges that ". . . the City amended its Information without petitioning the trial court for permission (Appellant's Brief, p. 18.)

Rule 4(d) of the Utah Rules of Criminal Procedure does not require the City to petition the court, by motion or otherwise, nor does it require the court to hold a hearing prior to amending an Information. Rule 4(d) states, in part, as follows: "The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced." The trial court followed the proper procedure in this case, and, even though she filed no objection to the Amended Information, McDonald's concerns were heard by the court at the hearing on her Motion for Jury Trial.

An analysis of the Amended Information, in light of the language of Rule 4(d), leads to the conclusion that the court made a proper ruling. First, no additional or different offense was charged in the Amended Information. The charge remained a violation of Section 41-6-46 of the Utah Code. The only change contained in the Amended Information was a reduction in the possible sentence to be imposed. Also, the substantial rights of McDonald were not prejudiced. As has been stated previously in this Brief, McDonald possessed no right to a jury trial under either the original Information or the Amended Information. A right that she does not possess cannot be a substantial right. Even if the court determines that there is a jury trial right in the case of a class "C" misdemeanor but not in the case of an

infraction, McDonald's rights are still not prejudiced. By reducing the potential penalty to be applied to McDonald, she is no longer facing the possibility of incarceration and, therefore, is no longer entitled to a jury trial. As was argued previously, the only right that has been affected by the reduction in potential penalty is her perceived right to face the maximum potential penalty associated with her crime. This is a right that simply does not exist and, therefore, is inappropriate for consideration by the court with regard to the impact of Rule 4(d).

Based on the foregoing, it is clear that the trial court possesses the sentencing discretion to reduce, prior to trial, the potential penalty faced by a defendant, by reducing the classification of a crime from a class "C" misdemeanor to an infraction and, therefore, eliminating the potential for incarceration as a penalty. The Record reveals that the Amended Information was filed and treated by the trial judge in accordance with Rule 4(d) of the Utah Rules of Criminal Procedure and, therefore, that the trial judge did not abuse his discretion in permitting the Information to be amended.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MCDONALD'S REQUEST THAT THE HEARING ON HER MOTION FOR JURY TRIAL BE HELD PRIOR TO THE DAY OF TRIAL, AND IN DENYING HER MOTION FOR CONTINUANCE AFTER THE TRIAL COURT HAD DENIED THE MOTION FOR JURY TRIAL.

McDonald argues that the trial court judge abused his discretion by holding the hearing on her Motion for Jury Trial on the same day that the bench trial had been scheduled. She further asserts that the trial court judge abused his discretion by denying her Motion for Continuance, which was made orally to the court following the court's denial of the Motion for Jury Trial and prior to commencement of the bench trial. McDonald's Brief completely fails to provide this Court with any facts upon which it could determine that the trial court abused its discretion in scheduling the hearing and in denying the Motion for Continuance.

The Appellee has been unable to locate any Utah case law regarding the discretion given to a trial court in scheduling matters appearing before the court. However, it is well established in Utah courts that trial court judges control their own calendars. Surely, this is an area in which trial court judges would be given considerable freedom under the principles of appellate review discussed by Chief Justice Zimmerman in *State v. Pena*, 869 P.2d 932 (Utah 1994).

Closely related, since it also involves a scheduling issue, is the denial of a Motion for Continuance. Utah appellate courts have

consistently held that the decision to grant or deny a continuance lies within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *State v. Horton*, 848 P.2d 708 (Utah Ct. App. 1993); see also *State v. Cabututan*, 861 P.2d 408 (Utah 1993).

In this case, McDonald has failed to show any abuse of discretion whatsoever on the part of the trial court judge. McDonald admits in her Brief that any scheduling problems created by holding the hearing on the Motion for Jury Trial on the day scheduled for a bench trial could have been easily corrected by the court, since the court could have issued a continuance for the purpose of assembling a jury if it had granted the Motion. (Appellant's Brief, p. 22.)

Furthermore, McDonald's arguments that she was prejudiced by the decisions of the trial court are without merit. First, she claims that she was deprived of the opportunity to negotiate or accept a plea bargain. This argument ignores the facts of the case. On May 1, 1996, the judge conducted a pretrial conference in this case, at which time plea negotiations were unsuccessful. The transcript contained in the Record also indicates that a negotiated plea bargain had been available to McDonald up until the day before the hearing and subsequent bench trial. (Record, p. 74.) Finally, McDonald obviously has no right to a plea bargain, and she has not provided case law that would indicate otherwise.

McDonald's second argument is that she was prejudiced when the Motion for Continuance was denied, because her trial preparation was geared to presenting her case to a jury, and she did not have time to adjust her trial strategy for a bench trial. This argument once again ignores the facts of the case and conflicts with her own argument regarding the Motion for Jury Trial hearing. On June 13, 1996, the court issued a Notice of Bench Trial. (Record, p. 34.) Therefore, she had seven days' notice that the trial to be held on June 20, if any, was to be a bench trial. Any preparations she made should have been made for a bench trial. By her own argument on page 22 of Appellant's Brief, McDonald acknowledges that no jury was assembled on June 20 and that the court would have had to grant a continuance to assemble a jury had it granted her Motion for Jury Trial. Therefore, it is crystal clear that she was well aware that no jury trial would be held on June 20, and that if any trial was to be held, it would be a bench trial. If she was unprepared to proceed with a bench trial on that date, it is wholly through the fault of McDonald and her counsel, and certainly not the fault of the court.

McDonald's argument, that she was prejudiced and that the trial court abused its discretion in denying her a hearing date prior to the trial date and in denying her Motion for Continuance, is without merit, and should be disregarded by this Court.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING MCDONALD TO A FINE THAT EXCEEDS THE RECOMMENDED FINE SET FORTH IN THE UNIFORM FINE SCHEDULE.

It is well established that trial court judges have wide discretion in their sentencing decisions. In *State v. Wright*, 893 P.2d 1113 (Utah Ct. App. 1995), the court stated:

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. Nutall*, 861 P.2d 454, 457 (Utah App. 1993); accord *State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989). An abuse of discretion may be manifest if the actions of the judge in sentencing were "inherently unfair" or if the judge imposed a "clearly excessive" sentence. *State v. Russell*, 791 P.2d 188, 192-93 (Utah 1990) (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)). The exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court. *Gerrard*, 584 P.2d at 887 (citing *State v. Harris*, 10 Wash. App. 509, 518 P.2d 237 (Wash. 1974)).

Wright, at 1120.

The court has also stated: "This court 'may only find abuse 'if it can be said that no reasonable [person] would take the view adopted by the trial court.'" *Yoder*, at 548.

Contrary to McDonald's assertion otherwise, the bail set in this case was \$57, as shown in the notice of the citation. (Record, p. 1.) The sentence imposed by the court was a fine of

\$60 and attendance at traffic school, which costs \$30 to attend. This fine and traffic school requirement are obviously within the \$0 to \$750 range of fines applicable to infractions.

The penalty in this case is certainly not excessive, inherently unfair, or such that no reasonable person would take the view adopted by the trial court.

Finally, in her argument McDonald refers to the Uniform Fine Schedule as if it set a mandatory fine amount from which the judge cannot stray. This is certainly not the law in Utah. Section 76-3-301.5(5) of the Utah Code, which establishes the Uniform Fine Schedule, specifically states: "This section does not prohibit the court from in its discretion imposing no fine, or a fine in any amount up to and including the maximum fine, for the offense."

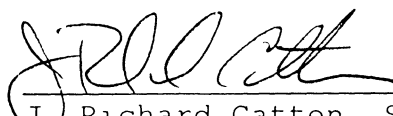
McDonald makes no credible argument supporting her claims that the sentence was excessive or unfair. Therefore, the sentencing decision of the trial court should be upheld.

CONCLUSION

Based on the foregoing, the City respectfully requests that McDonald's appeal be denied, and that the conviction be affirmed.

DATED this 25TH day of July, 1997.

WEST VALLEY CITY




J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 25TH day of July, 1997, I served upon Michael A. Jensen, Attorney for Defendant/Appellant, two (2) copies of the Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

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WEST VALLEY CITY



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