

1996

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY

Plaintiff and Appellee

vs.

CAREE F. MCDONALD

Defendant and Appellant

CASE NO. 960471-CA

Priority No. 2

BRIEF OF APPELLANT

**Appeal from Judgment of Conviction
Third Judicial District Court, West Valley Division
Salt Lake County, State of Utah
Honorable Carlos A. Esqueda, Pro Tempore Judge**

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JURISDICTION OF THE COURT

Jurisdiction is conferred upon this Court by virtue of § 78-2a-3(e), U.C.A.

ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND PRESERVATION OF ISSUE

1. **Issue**: Whether the trial court erred as a matter of law in ruling that the City has the power and authority to reduce the penalty portion of § 41-6-12, *U.C.A.*, from a Class C misdemeanor to an Infraction.

Standard of Review: This issue is a question of law and is therefore reviewed for correctness. *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994) (issue of waiver of constitutional rights is reviewed for correctness); *State v. McDonald*, 922 P.2d 776, 781 (Utah Ct. App. 1996).

Preservation of Issue: This issue was preserved at the end of oral argument on the Defendant's/Appellant's Motion for Jury Trial (R. 74.), and the Defendant/Appellant timely filed on July 16, 1996, her Notice of Appeal. (R. 55.)

2. **Issue:** Whether the trial court abused its discretion in permitting the City to amend its initial Information where the trial court failed to follow and hold the City to the provisions of Rule 4(d), *Utah R. Cr. P.*, and where such amendment prejudiced Caree's right to a trial by jury.

Standard of Review: This is an abuse of discretion issue and is reviewed for reasonableness. *See State v. Horton*, 848 P.2d 708, 714 (Utah Ct. App.), *cert. denied*, 857 P.2d 948 (Utah 1993).

Preservation of Issue: This issue was raised after oral argument on the Defendant's/Appellant's Motion for Jury Trial, (R. 5-6.) and the Defendant/Appellant timely filed on July 16, 1996, her Notice of Appeal. (R. 74.)

3. **Issue:** Whether the trial court erred in imposing a fine which substantially exceeds the Uniform Fine/Bail Schedule when no aggravating circumstances were present and the trial court made no findings which would reasonably justify such enhancement of the basic fine set forth by the Schedule.

Standard of Review: This issue is a matter of discretion and is reviewed under an abuse of discretion standard, except where the court's ruling is based upon a conclusion of law, and then it is reviewed for correctness. *See State v. Russell*, 791 P.2d 188, 192 (Utah 1990).

Preservation of Issue: This issue was raised when the Defendant/Appellant timely filed on July 16, 1996, her Notice of Appeal. (R. 74.)

4. **Issue:** Whether the trial court abused its discretion in (1) denying a hearing on Caree's Motion for Jury Trial on a date prior to the trial, and (2) denying her a continuance after denying her Motion where such denial substantially prejudiced her.

Standard of Review: This issue is a matter of discretion and is reviewed under an abuse of discretion standard, except where the court's ruling is based upon a conclusion of law, and then it is reviewed for correctness. *See State v. Russell*, 791 P.2d 188, 192 (Utah 1990).

Preservation of Issue: This issue was raised when the Defendant/Appellant timely filed on July 16, 1996, her Notice of Appeal. (R. 74.)

5. **Issue**: Whether the trial court abused its discretion in imposing a penalty on Caree that substantially exceeds the Uniform Fine/Bail schedule without finding any aggravating factors because such abuse has a chilling effect on Caree's right to trial and obviously prejudiced her.

Standard of Review: This issue is a matter of discretion and is reviewed under an abuse of discretion standard, except where the court's ruling is based upon a conclusion of law, and then it is reviewed for correctness. *See State v. Russell*, 791 P.2d 188, 192 (Utah 1990).

Preservation of Issue: This issue was raised when the Defendant/Appellant timely filed on July 16, 1996, her Notice of Appeal. (R. 74.)

STATUTORY PROVISIONS

UTAH CONSTITUTION, ARTICLE I, SECTION 10 (in part):

In capital cases the right of trial by jury shall remain inviolate. . . . A jury in civil cases shall be waived unless demanded. (emphasis added).

UTAH CONSTITUTION, ARTICLE I, SECTION 12 (in part):

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, . . . [and] to have a speedy public trial by an impartial jury . . . (emphasis added).

UTAH CONSTITUTION, AMENDMENT VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

UTAH CODE ANNOTATED, § 41-6-12 (pertinent part):

(1) A violation of any provision of this chapter is a class C misdemeanor, unless otherwise provided.

UTAH CODE ANNOTATED, § 41-6-16 (pertinent part):

The provisions of this chapter are applicable and uniform throughout this state and in all of its political subdivisions and municipalities. A local authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter. . .

UTAH CODE ANNOTATED, § 41-6-46 (pertinent part):

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, . . .

UTAH CODE ANNOTATED, § 76-3-102:

Offenses are designated as felonies, misdemeanors, or infractions.

UTAH CODE ANNOTATED, § 76-3-105:

- (1) Infractions are not classified.
- (2) Any offense which is an infraction within this code is expressly designated and any offense define outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

UTAH CODE ANNOTATED, § 77-1-6 (pertinent part):

- (1) In criminal prosecutions the defendant is entitled:
 -
 - (f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;
- (2) In addition:
 -
 - (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 CODE ANNOTATED, § 78-21-1:

In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered.

UTAH RULES OF CRIMINAL PROCEDURE, RULE 4(d) (pertinent part):

(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.

....

(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. . . .

UTAH RULES OF CRIMINAL PROCEDURE, RULE 17 (pertinent part):

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. . . .

....

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

UTAH RULES OF CIVIL PROCEDURE, RULE 38 (pertinent part):

(a) Right preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee. . .

...

(d) . . . A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATEMENT OF THE CASE

1. The Plaintiff/Appellee, West Valley City ("City"), a political subdivision of the State of Utah, initiated this action pursuant to § 41-6-46, *U.C.A.*, against the Defendant/Appellant Caree F. McDonald ("Caree") by issuing a summons and citation to her for allegedly speeding on January 6, 1996, in West Valley City, Utah. (R. 1.) Caree was specifically charged with driving at a speed of 51 miles per hour in a 40 mile per hour speed zone, or 11 MPH over the posted speed limit. (R. 1, 5.)

2. Pursuant to § 41-6-12, *U.C.A.*, the penalty for violating § 41-6-46, *U.C.A.*, is a Class C Misdemeanor. *See Addendum 1*; (R. 5.)

3. The Uniform Fine/Bail Schedule provides for a \$50.00 fine when the offender is guilty of speeding 11-15 miles per hour in excess of the speed limit. *See Addendum 4*.

4. The City relied on Photo Radar as the sole means of determining the speed of Caree's vehicle. (R. 6.)

5. Caree resides in West Valley City, Utah, and has no record of any other traffic violations within the past five years. (R. 5.)

6. After a pre-trial conference, a trial was set for June 20, 1996. (R. 24.)

7. On May 22, 1996, Caree made her demand for a jury trial. (R. 25.)

8. On June 7, 1996, the City's Prosecutor filed an amended Information in which the penalty was reduced from a Class C Misdemeanor to an Infraction. (R. 32.)

9. On June 13, 1996, the trial court informed Caree that she would not be entitled to a jury trial since the City, through its Prosecutor, had amended the Information and had

reduced the penalty from a Class C Misdemeanor to an Infraction. (R. 34.)

10. On the same day, June 13, 1996, Caree filed a Motion for Jury Trial and requested “Expedited Disposition” and that the trial court set a hearing prior to the day of trial. (R. 36-42.) Notwithstanding Caree’s request, the trial court refused to set a hearing on her Motion for Jury Trial.

11. On June 20, 1996, the date set for trial, the trial court denied Caree’s Motion for Jury Trial. (R. 74.)¹ The trial court also denied Caree’s Motion for Continuance, which was orally made to the trial court immediately upon the trial court’s denial of a jury trial. (R. 34.)

12. The trial court forced Caree to proceed with a bench trial. (R. 75.) Caree, upon observing the hostile and brusque demeanor of the trial judge, desired to consider the Prosecutor’s plea offer. (R. 74.) However, the Prosecutor unexpectedly informed Caree and the trial court that the plea offer had expired the day prior to trial and prior to the hearing on Caree’s request for a jury trial. (R. 74.) Thus, the plea offer was withdrawn. (R. 74.)

13. The trial court proceeded with a bench trial and found Caree guilty of speeding as charged. (R. 76.)

¹ The trial court characterized its own action as merely approving the City’s action in amending the Information to an Infraction. (R. 75.) However, the trial court’s statement that “My ruling isn’t denying your client a jury trial,” strains the court’s credibility. (R. 75.)

14. The trial court then imposed, without finding any aggravating circumstances, a fine amount of \$60.00, an amount that exceeds by 20% the Uniform Fine/Bail Schedule and which exceeds the amount that Caree could have paid prior to the trial without considering any plea offer. (R. 44, 77.); *Addendum 4*. In addition, the trial court imposed a time and cost requirement for Caree to attend a Safety Driver's School at an additional cost of \$30.00. (R. 44-45, 47, 77.) The trial court failed to find any aggravating circumstances. (R. 76-75.) In fact, Caree stated to the trial court that she had no other traffic violations within the past five years. (R. 76.)

15. On July 15, 1996, Caree filed her Notice of Appeal, her Motion for Stay of Fine, and her Application for Certificate of Probable Cause. (R. 48-58.) On August 6, 1996, at the conclusion of oral argument before the Honorable Judith S.H. Atherton, the trial court granted Caree's Motion for Stay of Fine.

SUMMARY OF ARGUMENT

I. The trial court erred as a matter of law in ruling that the City has the power and authority to reduce the penalty portion of § 41-6-12, *U.C.A.*, from a Class C misdemeanor to an Infraction. Utah Code Annotated § 41-6-16, *U.C.A.*, expressly prohibits the City from enacting or enforcing an ordinance or rule that is inconsistent with the provisions of Chapter 6, Title 41. Hence, the City, nor its agent (i.e., the City's Prosecutor), had no authority to change the penalty for speeding from a Class C Misdemeanor to an

Infraction.

II. The trial court also impermissibly permitted the City to amend its Information without regard to Rule 4(d), *Utah R. Cr. P.*, and without considering that such amendment denied Caree her substantial right to a trial by jury.

III. Even if, *arguendo*, the City could reduce the penalty for speeding from a Class C misdemeanor to an Infraction, the trial court erred in denying Caree a trial by jury because Utah's Constitution guarantees to Caree her right to a trial by jury. Whereas Utah's Constitution places no limits on Caree's right to trial by jury, Utah Code Annotated § 77-1-6(2)(e) impermissibly limits Caree's right to a trial by jury where the penalty is an Infraction. However, the Constitution does not carve out a classification for an "infraction" that is separate from "criminal" or "civil." Since the Constitution clearly grants all "criminal" and all "civil" actions the right to trial by jury, Utah Code Annotated § 77-1-6(2)(e) is without constitutional support.

IV. The trial abused its discretion in not setting a hearing on Caree's Motion for Jury Trial on a date prior to the date of trial and in not granting a continuance after denying Caree's Motion for Jury Trial because the burden on the trial court was slight, if any, and substantially prejudiced Caree.

V. The trial court, without finding any aggravating circumstances, abused its discretion by imposing a fine that is substantially greater than would have been imposed if Caree had simply plead guilty. The trial court's actions cast a disturbing chill over a

defendant's right to trial. In this instance, the trial court, in effect, penalized Caree simply because she elected to have a trial.

ARGUMENT

I. The trial court erred as a matter of law in ruling that the City has the power and authority to reduce the penalty portion of § 41-6-12, U.C.A., from a Class C misdemeanor to an Infraction.

Caree was charged by the City with speeding pursuant to the State's speeding statute, § 41-6-46, *U.C.A.* (R. 1.) The penalty for such violation is governed by § 41-6-12, *U.C.A.*, which states in part:

(1) A violation of any provision of this chapter is a class C misdemeanor, unless otherwise provided.

§ 41-6-12, *U.C.A.*

The City acknowledged that the penalty for speeding is a Class C misdemeanor when it filed its Information on April 15, 1996. *Addendum 1*; (R. 5.) The Information states in part:

Count 1: SPEEDING, a Class "C" misdemeanor, § 41-6-46, *U.C.A.* 1953, as amended, by operating a motor vehicle...

Addendum 1; (R. 5.)

The City's Information unequivocally declared the penalty for Caree's alleged violation to be a Class "C" misdemeanor. The Information also expressly referenced § 41-6-46, *U.C.A.*, for its authority.

Pursuant to Rule 17(d), *Utah R. Cr. P.*, Caree filed her jury demand, on May 23, 1996. The City, without the trial court's permission, filed its Amended Information on June 7, 1997.² *See Addendum 2*; (R. 25, 32.) The Amended Information is identical to the City's initial Information except that "a Class C misdemeanor" is replaced with "an Infraction." *See Addendum 2*; (R. 32.) The Amended Information also references § 41-6-46, *U.C.A.*, for its authority.

The City entirely ignored § 41-6-16, *U.C.A.*, even though this particular Code section was expressly brought to the City's attention in Caree's Motion for Jury Trial. *See* (R. 36-40.) This Code section governs the provisions of Chapter 6, Title 41:

The provisions of this chapter are applicable and uniform throughout this state and in all of its political subdivisions and municipalities. A local authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter. Local authorities may, however, adopt ordinances consistent with this chapter, and additional traffic ordinances which are not in conflict with this chapter.

§ 41-6-16, *U.C.A.* (emphasis added).

Section 41-6-16 is clear and unambiguous. The City is not permitted to "enact or enforce any rule or ordinance in conflict with the provisions of § 41-6-12, *U.C.A.*, which defines the penalty for a violation of § 41-6-46, *U.C.A.*, as a "Class C misdemeanor." *See Allgood v. Larson*, 545 P.2d 530, 532 (Utah 1976); *Richfield City v. Walker*, 790 P.2d 87, 90 (Utah Ct. App. 1990) ("penalty portion of an ordinance is void if it

² The City never petitioned the trial court nor filed a motion for permission to amend its Information, although Rule 4(d), *Utah R. Cr. P.*, expressly governs the procedure for amending an information.

conflicts with the general state law governing the subject”).

In *Allgood*, the court concluded that cities may not exceed the “public policy declared by the legislature.” *See Allgood*, 545 P.2d 530 at 532. The *Allgood* court also concluded that the treatise, McQuillin, correctly states Utah law:

If the ordinance penalty conflicts with that of the general law of the State covering the same subject, the ordinance penalty is void.

5 McQuillin, MUNICIPAL CORPORATIONS §17.15 at 326 (3d Ed.)

In the instant case, the City’s actions, changing the penalty from that set by § 41-6-12, directly conflicts with State law. Moreover, even without the provisions of § 41-6-16, which expressly forbids the City from actions which are inconsistent with the provisions of Chapter 6 of Title 41, the City is prohibited from setting a different penalty for speeding, since the State has expressly enacted laws covering the subject of speeding and setting forth the penalties for speeding violations. *See* 5 McQuillin, MUNICIPAL CORPORATIONS §17.15 at 326 (3d Ed.)

II. The trial court abused its discretion in permitting the City to amend its initial Information because the trial court failed to follow and hold the City to the provisions of Rule 4(d), Utah R. Cr. P., and because such amendment prejudiced Caree’s right to a trial by jury.

Rule 4(d), *Utah R. Cr. P.*, governs amendments to an information:

(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. . . .

(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. . . .

Rule 4(d), *Utah R. Cr. P.*

It is well established that Caree's right to a jury trial is a substantial right. *See State v. Cook*, 714 P.2d 296, 297-98 (Utah 1986) (a "criminal defendant's right to a jury trial is substantial and valuable and should be carefully safeguarded by our courts"). In *Cook*, the court also concluded that:

Had defendant been tried before a jury, the prosecution's failure to prove the offense charged might have resulted in an acquittal [rather than merely failing to prove the felony]. *Id.* at 298.

In the instant case, had Caree been tried before a jury, Caree might have been acquitted. Therefore, Caree's right to a jury trial is clearly substantial.

Caree timely filed her demand for a jury trial. (R. 25.) Two weeks after filing her demand, the City amended its Information without petitioning the trial court for permission, (R. 32.), which effectively denied Caree her statutory right to a trial by jury. The trial court never discussed Rule 4(d) nor the prejudice to Caree caused by the City's Amended Information. The trial court's actions were clearly in error where the City's Amended Information effectively eliminated Caree's statutory right to a trial by jury. Moreover, the City's purpose in amending its Information was for the sole purpose of denying Caree a jury trial.

III. Even if, arguendo, the City could reduce the penalty from a Class C misdemeanor to an Infraction, the trial court erred in denying Caree a trial by jury because Utah's Constitution guarantees to Caree a right to a trial by jury.

Utah's Constitution grants to every citizen, including Caree, the right to a trial by jury. Sections 10 and 12 and Amendment VII provide Caree's right to a trial by jury:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, [and] to have a speedy public trial by an impartial jury

UTAH CONST. § 12 (emphasis added).

In capital cases the right of trial by jury shall remain inviolate. .
A jury in civil cases shall be waived unless demanded.

UTAH CONST. § 10 (emphasis added).

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

UTAH CONST., Amendment VII (emphasis added).

Utah Code Annotated also generally reaffirms Caree's right to a trial by jury. If Caree's alleged violation is deemed to be criminal, § 77-1-6, *U.C.A.*, applies:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, [and] to have a speedy public trial by an impartial jury

§ 77-1-6(1)(f), *U.C.A.* (emphasis added).

If Caree's alleged violation is deemed to be civil, § 78-21-6, *U.C.A.*, applies:

In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered.

§ 78-21-6, *U.C.A.* (emphasis added).

Utah's Constitution does not limit Caree's right to a trial by jury, regardless of whether the charges against Caree are characterized as criminal or civil. The Constitution contains no express language nor any intent to carve out a distinct class of court actions that is separate from "criminal" or "civil." Therefore, an "Infraction" must either be classified as criminal or civil; there is no middle ground.³ Assume, *arguendo*, that the City was within its power and authority to change the penalty portion of its Information to an Infraction. The action against Caree must be deemed criminal or civil. Regardless of which classification is applicable, Caree is entitled to a trial by jury as granted by Utah's Constitution: Sections 10 and 12, Amendment VII.

Whereas § 77-1-6(1)(f), *U.C.A.*, places no limits on Caree's right to a trial "by an impartial jury," § 77-1-6(2)(e) allows a conviction for an "infraction" without a jury:

(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.

§ 77-1-6(1)(f), *U.C.A.*

³ Utah's Code provides a one-sentence designation for offenses: "Offenses are designated as felonies, misdemeanors, or infractions." § 76-3-102, *U.C.A.* From this Code section, it can be logically inferred that infractions are classified as "criminal" violations.

Rule 17(d), *Utah R. Cr. P.*, goes further:

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

Rule 17(d), *Utah R. Cr. P.*

Yet, the Code does not expressly define an infraction as criminal or civil, except by inference.⁴ Thus, subsection (2)(e) of § 77-1-6 places a limitation on the right granted in subsection (1)(f) merely by creating a new classification, “Infraction,” without any constitutional basis. Rule 17(d) is even more explicit. Section 77-1-6(2)(e), *U.C.A.*, and Rule 17(d), *Utah R. Cr. P.*, therefore, impermissibly limit Caree’s right to a trial by jury where the Constitution places no such limitations. The Constitution must trump the Code and the Rule.

IV. The trial court abused its discretion in (1) denying a hearing on Caree’s Motion for Jury Trial on a date prior to the trial, or (2) denying her a continuance after denying her Motion because such denial substantially prejudiced her.

On the same day that Caree was informed by the trial court that she was no longer entitled to a jury trial,⁵ Caree filed her Motion for Jury Trial. (R. 36-42.) She also requested the trial court to set a hearing prior to the day of trial. *Id.* However, the trial court refused to set a hearing prior to the date of trial.

⁴ See Footnote 3, *supra*.

⁵ On May 22, 1996, Caree filed her demand for a jury trial pursuant to Rule 17(d). On June 7, 1996, the City filed its Amended Information and changed the penalty to an infraction, thereby eliminating Caree’s right to a jury trial.

Since the trial court must have a pool of jurors ready for jury trials, the trial court had, in effect, made its decision to deny Caree's Motion for Jury Trial prior to hearing. Otherwise, the trial court would have provided for sufficient time between the date of hearing and the date of trial in the event the trial court granted Caree's motion.

It is true that had the trial court granted Caree's Motion for Jury Trial, the trial court could have then granted itself a continuance to assemble a jury. By the same token, the trial court, with slight burden, could also have granted Caree a continuance when it denied her Motion for Jury Trial. Whatever inconvenience the trial court or the City might experience from a continuance to assemble a jury is the same inconvenience, if any, created by granting Caree a continuance. Yet, the trial court was, if it had not prejudged Caree's motion, quite willing to be put in a position where it would have to grant a continuance for itself upon granting Caree's motion.

The trial court's abuse of discretion prejudiced Caree in two ways: (1) Caree's opportunity to negotiate for or accept a plea was foreclosed; and (2) Caree's trial preparation was geared to presenting her case to a jury and where the trial court failed to allow time for Caree to adjust her trial strategy.

V. The trial court abused its discretion in imposing a penalty on Caree that substantially exceeds the Uniform Fine/Bail schedule without finding any aggravating factors because such abuse has a chilling effect on Caree's right to trial and obviously prejudiced her.

The trial court abused its discretion by imposing a total fine of \$60.00 plus \$30.00 and attendance at a safety driving school. (R. 44-45, 47, 77.) Appendix C, *CJA*, sets

forth the uniform Fine/Bail schedule, incorporated herein as Addendum 4. For speeding 11-20 miles per hour over the speed limit, the Schedule sets a fine of \$50.00. See *Addendum 4*.

An abuse of discretion may be manifest if the actions of the trial court were inherently unfair or if the trial court imposed an excessive fine. *See State v. Russell*, 791 P.2d 188, 192 (Utah 1990) (*citing State v. Shelby*, 728 P.2d 987, 988 (Utah 1986); *State v. Gerrard*, 584 P.2d 885, 887-88 (Utah 1978)).

By imposing a greater fine than a defendant would ordinarily pay if he or she pleads *nolo contendere* or guilty, the trial court has cast a chilling net over those who may want to go to trial. Since Caree has a fundamental right to a jury trial, any effort by the trial court to undermine or curtail that right through intimidation or threat of an enhanced penalty is an abuse of the trial court's discretion.

CONCLUSION

The City's Amended Information is in direct conflict with State Law where State Law expressly prohibits the City from setting a penalty different than that proscribed by State Law for a speeding violation. Further, since the City's Amended Information prejudiced a substantial right of Caree, namely her right to a trial by jury, the trial court abused its discretion in permitting the City to amend its information.

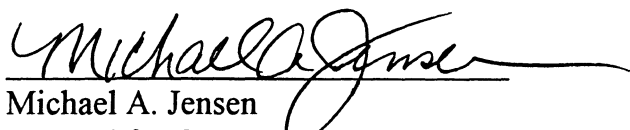
But even if the City could change the penalty portion of § 41-6-12, *U.C.A.*, to an infraction, Utah's Constitution guarantees Caree a trial by jury, notwithstanding Utah's Code section that limits jury trials to felonies, misdemeanors, and all civil cases. Utah's

Constitution does not contemplate a category of court actions different than “criminal” or “civil.” An infraction is an enigma that is created solely by Utah’s Code and with no support from Utah’s Constitution.

The trial court also abused its discretion by refusing to set a hearing on Caree’s Motion for Jury Trial on a date prior to the date of trial. The burden for the trial court to hold a hearing on Caree’s motion was slight, if any. The prejudice to Caree by not holding a hearing on a date prior to trial denied Caree a right to accept the City Prosecutor’s plea, which was withdrawn the day prior to the date of trial. Once the trial court denied Caree’s motion, it again abused its discretion by not granting a requested continuance. Such continuance would have been required if the trial court had granted Caree’s motion because the trial court would need to assemble a jury pool. Moreover, Caree was prejudiced by the trial court’s denial because she was not permitted to accept the City’s plea and was not provided time to adjust her trial strategy.

The Court of Appeals should reverse the judgments of the trial court, order a new trial with a jury, if Caree so desires, and order the trial court to disallow the City’s attempt to amend its Information. In addition, and partly in the alternative, the Court of Appeals should, in the interests of justice, dismiss the charges against Caree.

DATED this 23rd day of June 1997.


Michael A. Jensen
Counsel for Caree F. McDonald, Defendant/Appellant

CERTIFICATE OF SERVICE
Utah Court of Appeals Case No. 960471-CA
Third District Court, West Valley Division, Case No. 969002082TC

WEST VALLEY CITY


v.

CAREE F. MCDONALD

I, Michael A. Jensen, Counsel for Caree F. McDonald in the above action, hereby certify that on this day I personally served the foregoing BRIEF OF APPELLANT by personally depositing two copies thereof with the United States Postal Service, postage prepaid, to:

J. Richard Catten, #4291
Senior Attorney
West Valley City
3600 Constitution Boulevard
West Valley City, Utah 84119
(801) 963-3271; FAX: 963-3366
Attorney for
Plaintiff/Appellee

DATED this 23rd day of June 1997.



MICHAEL A. JENSEN, Esq.

ADDENDUM INDEX

Addendum 1

Initial Information, filed April 15, 1996 (R. 5.)

Addendum 2

Amended Information, file June 7, 1996 (R. 32.)

Addendum 3

Transcripts dated June 20, 1996; (1) Pre-trial Motion Hearing on Motion for Jury Trial, (2) Verdict; (3) Sentencing (R. 70-77.)

Addendum 4

Uniform Fine/Bail Schedule, Appendix C, *CJA*

Addendum 5

Utah Constitution, Utah Code Annotated, Utah Rules Criminal of Procedure, and Utah Rules of Civil Procedure

Tab 1

Tab 2

Keith L. Stoney (3868)
City Prosecutor
West Valley City
3600 Constitution Boulevard
West Valley City, UT 84119
(801) 963-3331

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

STATE OF UTAH (WVC)

Plaintiff,

v.

MCDONALD, CAREE F.
4360 WEST BENVIEW DRIVE
WEST VALLEY CITY, UTAH 84120

Defendant.

A M E N D E D
I N F O R M A T I O N

Case No. 969002082

The undersigned, **DAVID L. CLARK**, under oath, states on information and belief that the defendant, on or about 6 JANUARY 1996, at the vicinity of 3300 WEST 4100 SOUTH, West Valley City, Utah, did unlawfully commit the crime(s) of:

COUNT 1: SPEEDING, an "Infraction", 41-6-46, U.C.A. 1953, as amended, by operating a motor vehicle at a speed of at least 11 MPH over the posted limit.

This information is based on evidence obtained from the following witnesses:

SGT MCLACHLAN

PROBABLE CAUSE STATEMENT:

Your affiant bases this information on the following:

Tab 3

IN THE THIRD JUDICIAL DISTRICT COURT
WEST VALLEY CITY DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY,)
 Plaintiff,)
 v.)
CAREE McDONALD,)
 Defendant.)

Case No. 969002082

BEFORE THE HONORABLE CARLOS A. ESQUEDA

June 20, 1996

Pre-Trial Motion Hearing, Verdict, and Sentencing

A P P E A R A N C E S

For Plaintiff: John Huber
Assistant West Valley City Prosecutor
West Valley City
3600 Constitution Blvd.
West Valley City, Utah 84119

For Defendant: Michael A. Jensen
Attorney at Law
900 First Interstate Plaza
170 South Main
Salt Lake City, UT 84101-1655

1 June 20, 1996

2 PROCEEDINGS

3
4 THE COURT: Go ahead Mr. Jensen.

5 MR. JENSEN: Your Honor, there is a statute that very clearly states that this
6 speeding ordinance shall be uniform and no municipality may enact or enforce any rule, or
7 ordinance in conflict with the provisions. And the provisions are very clear that it's a Class
8 C misdemeanor. Secondly, in a more recent case of Richfield City, in which case, by the
9 way, the city was promoting a Class B misdemeanor and the State was also Class B
10 misdemeanor. But the court held that a penalty portion of an ordinance is void if it conflicts
11 with the general State law governing the subject. Now, it doesn't invalidate the ordinance
12 when the city has an ordinance in which the penalty portion is different from the State, but
13 the penalty portion is clearly void. There are other cases that I can cite as well, that was a
14 Court of Appeals case, 1990. There is also a 1976 Supreme Court case which says basically
15 the same thing: Allgood v. Larson, said the same thing. If the ordinance penalty conflicts
16 with that of the general law of the State covering the same subject, the ordinance penalty is
17 void. I don't believe that the prosecutor can unilaterally just change that, and particularly
18 change its ordinance for the express purpose of avoiding jury trial, Your Honor. Do you
19 have any questions on that?

20 THE COURT: I have no questions of you, Mr. Jensen. Mr. Huber, do you
21 have any response to Mr. Jensen's argument?

22 MR. HUBER: Your Honor, (inaudible) specifically (inaudible)

23 THE COURT: Well, specifically what he just enunciated in court today that
24 you're abusing your discretion, that the city has no authority in which to amend charges
25 down if it conflicts with the sentencing statutes in accordance with the Utah Code

1 Annotated of state law.

2 MR. HUBER: The city's response is that the prosecutors should have at their
3 discretion the ability to amend a charge lower, to notch it down. We don't have the
4 discretion to notch it up. In other words, we couldn't have charged the defendant with a
5 Class B in this case. Our position is that we can amend that down. The city's interest is
6 we don't have the desire to give the defendant the possibility, however slim, of facing jail
7 time; and we believe we have the discretion in prosecuting to represent those interests in not
8 trying to seek a penalty that has the possibility of jail time. In summary, Your Honor, our
9 position is that the prosecutors do have the discretion to amend the charge to a lower
10 degree, but not to a higher degree.

11 THE COURT: Your response to that, Mr. Jensen.

12 MR. JENSEN: Yes, Your Honor. I think it's all good if the city's intent really
13 was to reduce the penalty by reducing and taking away jail time. But, it's clear from their
14 actions that the city has taken here that they didn't do that until we requested a jury trial.
15 So their sole motivation in this case wasn't the issue of jail time, it was simply to eliminate
16 the jury trial. So, it's a little bit deceptive to talk about jail time because that was never an
17 issue in this case and it hasn't been done except in those cases where a jury trial has been
18 requested, Your Honor.

19 THE COURT: It could be an issue if the case is remaining as a Class C
20 misdemeanor because the maximum sentence is 90 days in jail and a \$750 fine, would you
21 agree?

22 MR. JENSEN: I absolutely agree. All I'm talking about is the motivation of the
23 city in doing that. The motivation wasn't the jail time. The motivation was to remove the
24 access to a jury trial. That's all I have.

25 THE COURT: Thank you. I'm going to deny the defense motion in regards to

1 this case. I believe that the city prosecutor, as well as any prosecutor within the state, has
2 the power and the authority in which to amend down any charge when they feel the facts
3 substantiate that. I don't believe the city's motives, I don't question the city's motives. It's
4 within their complete discretion to do so. I previously ruled on that. Mr. Jensen, I'm going
5 to deny your motion as I previously have in your other cases. Where do we rest? Do we
6 need to put this trial on today?

7 MR. JENSEN: Your Honor, why don't I make a motion to continue this in
8 order so I have time to talk to my client to see if we want to, now that there's not a jury
9 trial available, to see whether or not they want to take the plea bargain instead.

10 THE COURT: Talk to your client and see if they're willing to take the plea
11 bargain. I'm not willing to continue the case.

12 MR. HUBER: At this time, I believe that Mr. Jensen has been informed earlier
13 that if his client wished to take our offer, that we have to do that the day before the trial
14 because we have taken great efforts to prepare this trial and we're ready to proceed. We
15 withdraw that plea offer. So, I think choice is to proceed or plead guilty.

16 MR. JENSEN: Your Honor, that was never communicated, and besides this
17 whole issue was predicated on whether there was a jury trial.

18 THE COURT: Well, Mr. Jensen, I'm going to disagree with you cause we've
19 gone through this before and I told you last time that if you're going to run these kind of
20 issues, these kind of motions, that we're going to put the trial on. Frankly, I'm willing to
21 give you another chance, but apparently, the prosecution isn't willing to offer those plea
22 bargains today. Is that correct, Mr. Huber?

23 MR. HUBER: Yes, Your Honor.

24 THE COURT: So, we're either going - Ms. McDonald either has a choice of
25 entering a plea today, or we'll put the trial, we'll put the bench trial on right now. Do you

1 want time to talk it over with Ms. McDonald?

2 MR. JENSEN: Well, I'm not clear. You're saying that there is no plea bargain.

3 THE COURT: That's right. The offer is plead guilty today or we'll put the trial
4 on.

5 MR. JENSEN: That's sort of no choice, is it?

6 THE COURT: No, that is a choice. Do you not understand the question, Mr.
7 Jensen? Does your client want to present evidence today and have the trial--

8 MR. JENSEN: Yes.

9 THE COURT: Or is she willing or does she want to enter a guilty plea
10 considering the city prosecutor has just rescinded their offers?

11 MR. JENSEN: We do, Your Honor. We would like to preserve the Court's
12 Order then denying a jury trial for appeal purposes.

13 THE COURT: I didn't deny your jury trial. I found that there was no basis in
14 your motion, which states that the prosecution has no authority to amend down the charge.

15 MR. JENSEN: We would just like to preserve that for appeal, Your Honor.

16 THE COURT: Under my words, yes. Under your's, no. That's not an accurate
17 statement of my ruling. My ruling isn't denying your client a jury trial. My ruling is, in my
18 opinion, under the laws of this State, that the city has the authority to amend down their
19 information, which they properly did.

20 MR. JENSEN: That's fine, but, I mean, I just want to preserve that.

21 THE COURT: That's on the record, Mr. Jensen. Now back to my original
22 question. Are you prepared to proceed to trial or is your client going to enter a guilty plea
23 today?

24 MR. JENSEN: We're ready, we're ready, Your Honor.

25 THE COURT: Okay. We'll do one sentencing prior to this and that's

1 [The proceedings were temporarily diverted to another case]

2 [The trial followed after the temporary diversion]

3
4

5
6 [Following the trial, the Court rendered its verdict as follows, followed by
7 sentencing]

8
9 THE COURT: The most convincing evidence came from Ms. McDonald's own
10 words in that she probably did not look at the 40 m.p.h. sign. If she probably did not look
11 at the 40 m.p.h. sign, she probably did not look at the posted sign that warns her and gives
12 her notice that photo radar is about to be used; and you ought to slow down and make sure
13 your speed is 40 m.p.h. She doesn't believe that she is speeding. She doesn't recall if she
14 was speeding. She doesn't state in her testimony that she specifically looked at her
15 speedometer and noted that she was doing 40 m.p.h. on 4100 South. Based upon that
16 testimony, I find Miss McDonald guilty of speeding, an infraction. Do you wish sentence to
17 be imposed today, Mr. Jensen?

18 MR. JENSEN: Yes, Your Honor.

19 THE COURT: Is there anything you want to tell me before I impose sentence,
20 Mr. Jensen?

21 MR. JENSEN: Ms. McDonald has a clean record, never had a violation, at least
22 in the last five years to her memory (inaudible).

23 THE COURT: Miss McDonald, is there anything you want to add before I
24 impose sentence?

25 MS. MCDONALD: No.

1 THE COURT: Mr. Huber, any recommendations from the city?

2 MR. HUBER: No, judge.

3 THE COURT: I think the problem here, as with all speeding tickets, is that
4 when we all get a speeding ticket, and I dare to say that if there is anyone in this court room
5 that hasn't received a speeding ticket, that's amazing and congratulations to you, because
6 I've been a victim of a speeding ticket myself. I don't like it. I don't personally think it's
7 fair, simply because, why should I get caught when everyone else is doing it? Why doesn't
8 everybody get caught? Well, in a perfect world, we wouldn't need speed limits. We would
9 all drive carefully. We wouldn't need laws. Well, Miss McDonald, on this occasion you
10 got caught. It doesn't mean you're a terrible driver. It doesn't mean you're a terrible
11 person. It just means that on a particular day, January 6, 1996, you were speeding. It's as
12 simple as that. Based upon that, I'm going to impose a \$60.00 fine. I ask that you go to
13 traffic school and to provide proof of that within the next 45 days. How long do you need
14 to pay the \$60.00 fine?

15 MS. MCDONALD: 30 days.

16 THE COURT: Okay, one month to pay the \$60.00 fine. Please see the court
17 Ms. McDonald before you leave.

18

19 (end of proceedings)

20

21

22

23

24

25

Tab 4

ADDENDUM 4

SPEEDING VIOLATIONS

41-6-46 Speeding

MPH Over Speed Limit			
0-10 MPH		40.00	40.00
11-15 MPH		50.00	50.00
16-20 MPH		60.00	60.00
21-25 MPH		80.00	80.00
26-30 MPH		100.00	100.00
31-35 MPH		120.00	120.00
36-40 MPH		140.00	140.00
For speeding offenses in school zone add:			
41+ MPH		20.00	20.00
41+ MPH		300.00	see Mandatory
matrix Court			
			Appearance
41-6-46	Speed too fast for existing conditions (no accident)	50.00	50.00
41-6-49	Driving too slow	50.00	50.00

Tab 5

ADDENDUM 5

UTAH CONSTITUTION:

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. 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.

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.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

UTAH CODE ANNOTATED:

41-6-12. Violations of chapter - Penalties.

(1) A violation of any provision of this chapter is a class C misdemeanor, unless otherwise provided.

(2) A violation of any provision of Articles 2, 11, 15, and 17 of this chapter is an infraction, unless otherwise provided.

41-6-16. Uniform application of chapter - Effect of local ordinances.

The provisions of this chapter are applicable and uniform throughout this state and in all of its political subdivisions and municipalities. A local authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter. Local authorities may, however, adopt ordinances consistent with this chapter, and additional traffic ordinances which are not in conflict with this chapter.

41-6-46. Speed regulations

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, giving regard to the actual and potential hazards then existing, including when:

- (a) approaching and crossing an intersection or railroad grade crossing;
- (b) approaching and going around a curve;
- (c) approaching a hill crest;
- (d) traveling upon any narrow or winding roadway; and
- (e) special hazards exist due to pedestrians, other traffic, weather, or highway conditions.

(2) If no special hazard exists, and subject to Subsection (4) and Sections 41-6-47 and 41-6-48, the following speeds are lawful:

- (a) 20 miles per hour in a reduced speed school zone as defined in Section 41-6-20.1;
- (b) 25 miles per hour in any urban district; and
- (c) 55 miles per hour in other locations.

(3) Except as provided in Section 41-6-48.5, any speed in excess of the limits provided in this section or established under Section 41-6-47 or 41-6-48, is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

(4) The governor by proclamation in time of war or emergency may change the speed limits on the highways of the state.

UTAH CODE ANNOTATED:

76-3-102. Designation of offenses.

Offenses are designated as felonies, misdemeanors, or infractions.

76-3-105. Infractions.

- (1) Infractions are not classified.
- (2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

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.

78-21-1. Right to jury trial.

In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered.

UTAH RULES OF CRIMINAL PROCEDURE:

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.

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

- (1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;
- (2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and
- (3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

- (1) misdemeanor cases when defendant is in custody;
- (2) felony cases when defendant is in custody;

- (3) felony cases when defendant is on bail or recognizance; and
- (4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impanelled and sworn, the trial shall proceed in the following order:

- (1) The charge shall be read and the plea of the defendant stated;
- (2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
- (3) The prosecution shall offer evidence in support of the charge;
- (4) When the prosecution has rested, the defense may present its case;
- (5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
- (6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and
- (7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay

or at a specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

UTAH RULES OF CIVIL PROCEDURE:

Rule 38. Jury trial of right.

(a) Right preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) Same: Specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.