2000

The State of Utah v. Wayne Jay Soules : Brief in Opposition to Certiorari

Utah Supreme Court

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V

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 981311-CA
v.	:	20000099-SC
WAYNE JAY SOULES,	:	Priority No. 12
Defendant/Petitioner.	:	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Does the Petition demonstrate that the court of appeals' application of well-established precedent to find that defendant's guilty plea constituted a waiver of all non-jurisdictional defects, including all alleged pre-plea constitutional violations, is sufficiently "special and important" to warrant certiorari review?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. App. P. 46. Considerations governing review of certiorari.

> Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE

Procedural history. Defendant was charged with possession of methamphetamine and amphetamine with intent to distribute (enhanced to first degree felonies due to prior convictions and proximity to public property), possession of marijuana, tampering with evidence, possession of drug paraphernalia, and assault (R.32-34). A preliminary hearing was held (R.71), and defendant was bound over on all charges (R.62). Defendant filed a motion to suppress evidence (R.79), which was denied by the trial court (R.132:8). Defendant pled guilty to one count of possession of methamphetamine with intent to distribute and one count of possession of amphetamine with the intent to distribute, reduced to second degree felonies (R.132:15). The remaining charges were then dismissed (R.132:16). As part of the plea, defendant

reserved the right to appeal the trial court's ruling on his motion to suppress (R.132:14-15). Defendant was sentenced to Utah State Prison for a term of 1-to-15 years on each count, to be served concurrently (R.115-116). In an unpublished Memorandum Decision, the Utah Court of Appeals unanimously affirmed defendant's conviction. *State v. Soules,* Case No. 981311-CA (Utah App. December 30, 1999) (Addendum A).

Statement of relevant facts. Defendant filed a motion to suppress the physical evidence gathered by police in this case, arguing that the officers lacked probable cause to detain him, a detention which led to his arrest and the discovery of the drugs which formed the basis for the charges against him (R.131:5-6).

At the beginning of the hearing on defendant's motion to suppress, defendant's counsel requested a continuance of the hearing due to a conflict between defendant and him (R.131:7-8) (Addendum B). The conflict apparently involved a disagreement over whether defendant should accept a plea offer: "There's been a plea offer made in this case. I think it's in his interest to accept the plea offer. He refuses." *Id.*

Defendant addressed the court personally, complaining that his counsel had not given him enough information about the applicable law. Defendant did not request substitution of counsel, asserting only that "if [counsel] feels he can't do this or that there is too big of a conflict between me and him, I would like to maybe get a new lawyer" (R.131:9). The court responded by stating that no adequate grounds had been

given for substitution of counsel, and denied the request to continue the suppression hearing (R.131:9-10).

Defendant later accepted a plea offer. At the change of plea hearing, the court asked defendant a series of questions about his relationship with counsel, and defendant informed the court that he had been able to fully discuss the issues with counsel and felt confident and comfortable with his counsel's advice (R.132:9-10) (Addendum C). In changing his plea, defendant reserved only his right to appeal the court's ruling on his motion to suppress (R.132:13-15).

ARGUMENT

POINT I

THE COURT OF APPEALS' CONCLUSION THAT DEFENDANT'S SUBSTITUTION OF COUNSEL CLAIM WAS WAIVED BY HIS GUILTY PLEA IS BASED UPON WELL-ESTABLISHED PRECEDENT, AND DOES NOT WARRANT CERTIORARI REVIEW

In support of his petition for a writ of certiorari, defendant challenges the court of appeals' ruling that his guilty plea operated to waive his claim that the trial court erred in failing to appoint substitute counsel, and argues that this issue is one of first impression in Utah. Petition, p. 7. To the contrary, the court of appeals' decision correctly applied well-established precedent which holds that a guilty plea operates as a waiver of all non-jurisdictional claims of error.

Defendant's guilty plea was entered without reservation of any issue other than the trial court's denial of his motion to suppress. Under established precedent, defendant's plea constitutes a waiver of all other claims of error in the trial court's rulings prior to the plea.

> '[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea....'

State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989), *quoting Tollett v. Henderson*, 411 U.S. 258, 267, (1973). The court of appeals noted that defendant never asserted that his guilty plea was anything other than voluntary and intelligent, and held that the issue of whether the trial court should have appointed substitute counsel was waived by defendant's guilty plea.

This waiver rule is well-established. "The general rule applicable in criminal proceedings, and the cases are legion, is that by pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects, including alleged pre-plea constitutional violations." *Parsons*, 781 P.2d at 1278 (citing cases); *see also State v. Munson*, 972 P.2d 418, 420 (Utah 1998) ("a knowing and voluntary guilty plea precludes reservation of issues for appeal, even those concerning alleged pre-plea constitutional violations.");

State ex rel. E.G.T., 808 P.2d 138, 140 (Utah App. 1991) (in order to raise a claim of constitutional defects in pre-plea proceedings, "petitioner would only be entitled to attack the voluntary and intelligent character of the guilty plea to show that the advice he received from counsel in entering the plea did not meet the appropriate standards.").

In support of his petition for review, defendant does not argue that the issue raised is of particular significance, asserting only that the application of the waiver rule to the facts of this case is an issue of first impression. Petition, p. 7. In order to make this assertion, however, defendant characterizes the issue raised by this case in a very limited manner; i.e., "whether, when a defendant enters a *Sery* plea reserving the right to appeal the outcome of a suppression hearing, he waives the right to appeal issues concerning the manner in which the court conducted the hearing," citing *United States v. Webb*, 83 F.3d 913 (7th Cir. 1996). In *Webb*, the Seventh Circuit found that a defendant's reservation of his right to appeal a suppression ruling included the right to challenge the trial court's conduct of the suppression hearing itself, in which defendant alleged that the trial judge improperly questioned the witnesses himself. *Webb*, 83 F.3d at 917.

The *Webb* ruling at most represents a minor corollary to the general rule of waiver, and the court of appeals implicitly found that the specific application of the waiver rule in *Webb* did not alter the analysis in this case. Indeed, the court in *Webb* did not consider itself to be announcing a new rule, and dealt with the waiver issue in

two sentences, without citation to other case law, simply as an application of the general waiver rule to the particular facts of that case. *Webb*, 83 F.3d at 917. The court of appeal's implicit finding that *Webb* is inapplicable to the specific facts of this case is not the sort of "important question" of law that needs to be established by this Court on certiorari review.

A writ of certiorari "will be granted only for special and important reasons." Utah R. App. P. 46. Defendant's petition presents no question of constitutional moment, no question of statutory interpretation, no conflict among panels, no departure from settled law, no call to revisit an obsolescent rule, and no question of major impact. The unanimous memorandum decision of the court of appeals simply applies a well-settled waiver rule to the specific facts of this case, and has no continuing importance beyond this case.

Further, even if the analysis employed by the court in *Webb* were viewed as significant extension of the general waiver rule, this Court's consideration of the appropriateness of adopting that rule would not affect the outcome in this case. Defendant does not challenge any rulings of the trial court in conducting the suppression hearing itself, as was the case in *Webb*. The court of appeals was therefore correct in finding that defendant's reservation of the right to appeal the trial court's suppression ruling did not also reserve for appeal the entirely separate issue of whether substitute counsel should have been appointed.

Finally, even if it were determined that the court of appeals erred in finding that this issue was waived by defendant's plea, the trial court did not err in failing to appoint substitute counsel. Both defendant and his counsel were given a full opportunity to discuss their disagreement over whether defendant should accept a plea offer, and the court properly found that such disagreement did not rise to a level requiring appointment of substitute counsel (R.131:7-10). The later plea colloquy in which defendant asserted satisfaction with his ability to discuss the issues with counsel confirms the fact that no conflict existed between them (R.132:9-10). *See State v. Lovell*, 1999 UT 40, ¶ ¶ 27-35, 984 P.2d 382.

This Court should not grant certiorari to review whether the court of appeals properly applied the uncontested waiver rule to the specific facts of this case.

CONCLUSION

For the reasons stated above, the writ should not issue.

RESPECTFULLY SUBMITTED this 1 day of March, 2000

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Appellant were mailed by first-class mail this 1 March, 2000 to the following:

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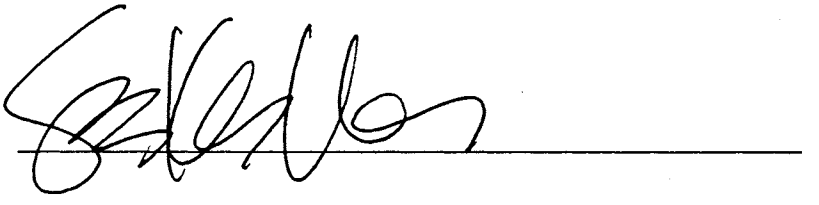

ADDENDA

ADDENDUM A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Wayne Jay Soules, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 981311-CA F I L E D (December 30, 1999) 1999 UT App 391

Eighth District, Vernal Department
The Honorable John R. Anderson

Attorneys: Wesley M. Baden, Vernal, for Appellant
Jan Graham and Scott Keith Wilson, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and Jackson.

JACKSON, Judge:

Soules appeals from guilty pleas to one count of possession of a controlled substance, methamphetamine, with intent to distribute, and one count of possession of a controlled substance, amphetamine, with intent to distribute. See Utah Code Ann. § 58-37-8 (Supp. 1999). Soules entered a conditional guilty plea, expressly reserving the right to appeal the trial court's denial of his motion to suppress evidence. See State v. Sery, 758 P.2d 935, 938-40 (Utah Ct. App. 1988). He now argues (1) the trial court erred when it denied him substitute appointed counsel and (2) the trial court failed to make adequate findings of fact when it denied his motion to suppress. We affirm.

By pleading guilty, Soules waived all nonjurisdictional defects, "including alleged pre-plea constitutional violations." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989); accord James v. Galetka, 965 P.2d 567, 570-71 (Utah Ct. App. 1998). "Examples of such nonjurisdictional issues that may be waived by a guilty plea 'involve[] . . . a number of important rights, including the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.'" James, 965 P.2d at 571 (alterations in original) (quoting Salazar v. Warden, Utah State Prison, 852 P.2d 988, 991 (Utah 1993)). Soules does not challenge the knowing and voluntary nature of his guilty plea. Further, he does not argue that his challenge is based on a

jurisdictional defect.[1] Thus, we will not address his contention that the trial court should have appointed substitute counsel.

Soules next argues the trial court's findings of fact were insufficiently detailed to support its denial of Soules's motion to suppress. When findings of fact on a particular issue do not appear on the record, "'we "assume that the trier of [the] facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it."'" State v. Robertson, 932 P.2d 1219, 1224 (Utah 1997) (alteration in original) (quoting State v. Ramirez, 817 P.2d 774, 787 (Utah 1991) (citation omitted)).

In this case, Soules's parole officer had the authority to ask Soules questions. See Minnesota v. Murphy, 465 U.S. 420, 432, 104 S. Ct. 1136, 1144 (1984) (stating "the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality").[2] The parole officer asked Soules whether he had been using drugs, and Soules admitted that he had. This admission gave the parole officer the reasonable suspicion necessary to perform a warrantless search. See State v. Davis, 965 P.2d 525, 529 (Utah Ct. App. 1998). We thus conclude the trial court correctly denied Soules's motion to suppress.

Accordingly, we affirm Soules's convictions.

Norman H. Jackson, Judge

I CONCUR:

Russell W. Bench, Judge

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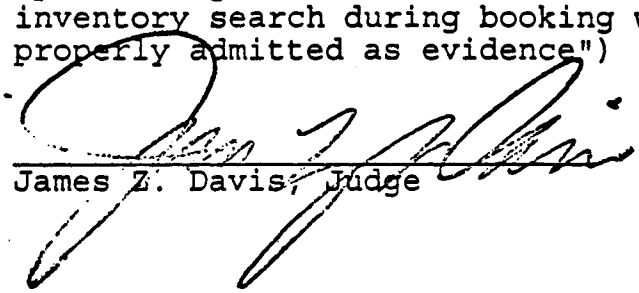
1. Instead, he merely asserts that if the alleged error were jurisdictional, it could not be waived. We agree. However, Soules has not cited any legal authority to indicate that this is the case.

2. When evaluating searches of probationers and parolees similar considerations typically apply to each group. See State v. Davis, 965 P.2d 525, 529 n.2 (Utah Ct. App. 1998) (citing 4 Wayne R. LaFave, Search and Seizure § 10.10(c), at 767-69 (3d ed. 1996)).

DAVIS, Judge (concurring):

The warrantless search conducted by the parole officer had little, if anything, to do with the charges to which defendant entered his Sery plea. See State v. Sery, 758 P.2d 935, 938-40 (Utah Ct. App. 1988). The drugs which were the subject matter of the charges resulting in the plea were discovered while defendant was booked into jail.

Based on defendant's involvement in the assault and his admission to his parole officer that he had been using drugs, the parole officer was justified in taking defendant into custody "on a 72 hour hold," and it is well settled that contraband discovered during the booking process is admissible. See State v. Maestas, 815 P.2d 1319, 1323 (Utah Ct. App. 1991) (holding, "piece of glass taken from defendant's pocket as part of an inventory search during booking was legally seized, and was properly admitted as evidence") (citation omitted).



James Z. Davis, Judge

ADDENDUM B

Your Honor. And I produced it on the understanding that there would be an order from the court that the document be sealed if it's offered into evidence. I don't intend to offer it into evidence.

MR. LUNNEN: We can stipulate, I think, to the time.

THE COURT: If you want to offer it we'll seal it. Okay?

MR. LUNNEN: Now, I know you will. All the witnesses are here. I have done some research on this case. And I want to put a few things on the record. And Mr. Soules can respond if he would like to. I have told Mr. Soules, I have advised him that there is no legal issue of probable cause. I have done the research on it. I have looked at the facts. In my mind, as his counselor, I have advised him there is no issue of probable cause. We disagree to that. I think we still disagree. He believes there is an issue. The case law that I have looked at indicates to me that there is not an issue. I am concerned that Mr. Soules and I have pretty hefty conflict because we don't agree about anything. He's upset with me. I am frustrated with him because we just are completely at odds. The reason I am bringing this up is I like to -- and I realize all the witnesses are here -- I

would like to ask for a continuance that he either be allowed to obtain another attorney or that I have a chance to go over this some more with him. I have talked to him several times about this issue. I think it's against his best interest. There's been a plea offer made in this case. I think it's in his interest to accept the plea offer. He refuses. And I feel ethically bound to at least put it on the record that in my mind there is no issue of probable cause. And I just want it on the record, Your Honor.

Wayne may want to say some things.

THE DEFENDANT: Yes. I would like to speak. Mr. Lunnen has seen me three times. I am facing three five to life's. I feel this is a pretty big, pretty important part of my case. I have more stuff that I want to show him and present my case to him. I have told -- he told me he would be in here to see me every day this week to prepare for this. I have not seen him. I have not been able to talk to him on the phone. The first time I talked to him was this morning in passing. And I still got more stuff that I want to show him and present to him. And I ain't even had a chance to present it to him. He's made the comment to me that he has 240 active cases, that he don't have the time to teach me the law. I am not

asking him to teach me the law. I am just asking him to teach me a little bit about my case. That way I could go in this with my eyes open. I mean, three five to life's. It's pretty big charges. And I would like to know what I am getting myself into before I take a plea bargain. And I would like to know some case law, some case history, something to help me in my mind believe that this is in my best interest.

I do feel there is some legitimate points in my case. And I would like some -- I would like some case law. I have asked him, and I have asked through the jail, I have requested case law numerous amounts of times, and they have told me that I had to go through the County Attorney's Office and through my lawyer. I can't -- I ain't been able to get it yet. I am fighting for everything I got here. I mean, three five to life's is pretty steep. So I still think there is more that I need to present to Mr. Lunnen. If he feels he can't do this or that there is too big of a conflict between me and him, I would like to maybe get a new lawyer. But that's all I got to say.

THE COURT: Okay. At this point in time, there are, sometimes, conflicts between the court -- or counsel and the client. In this case, though, if

Mr. Lunnen has a duty to proceed to represent your interests, but the fact that you are not happy with how he's proceeding, isn't grounds to get a new attorney involved at this point.

This is a suppression motion. Mr. Lunnen has made a record indicating that he doesn't think probable cause is an issue. But I guess he's got a duty to proceed. And we'll make a record if he wants to supplement the probable cause hearing with a record, and he can develop his motion. Fine. My interest here is in protecting your rights and getting this matter set for trial. Are you incarcerated waiting trial in this matter?

MR. LUNNEN: Yes, he is, Your Honor.

THE COURT: Are you on parole hold or any other reason?

THE DEFENDANT: Yes, I am on parole hold.

THE COURT: We are here today. Let's develop the record with what evidence Mr. Soules thinks would be appropriate. And I'll -- we'll hear the motion. My interest, though, is to set the matter for trial if the motion is not warranted. Or even if it is, that won't, you know -- and you'll have enough time to prepare your case. This isn't the trial here today. In fact, I can't give you a trial date for a long

ADDENDUM C

likelihood would be looking at three to four years on the second degree felony minimum until the Board of Pardons decided to put you on parole. I'm not telling you I'll send you to prison. But I am telling you that you are looking at that as a maximum in the event I don't give you probation. You also have, apparently, you are on probation and the entry of this plea here today will -- are you on probation or parole?

THE DEFENDANT: Parole.

THE COURT: The fact that you are on parole, the entry of this plea will affect, may affect your status parole, and you may have to go back anyway. I want you to know that going in. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Knowing that those are the risks, do you think it's in your best interest to proceed in this manner or to go ahead and go to trial?

THE DEFENDANT: I think this is in my best interest.

THE COURT: Okay. Have you had time to weigh the options and take enough time with Mr. Lunnen to weigh what you are doing and make an intelligent choice about your options?

THE DEFENDANT: Yes, I have.

THE COURT: Are you -- has he advised you? Do you feel confident, comfortable with his advice?

THE DEFENDANT: I do.

MR. LUNNEN: Not always, but --

THE COURT: Well --

THE DEFENDANT: What this (inaudible).

MR. LUNNEN: We have discussed this ad nauseam. We have gone over this case many, many times together.

THE COURT: I am asking him.

THE DEFENDANT: We do butt heads a lot. But, yeah, I do believe this is in my best interest.

THE COURT: Factual basis?

MR. LUNNEN: What happened was, when they got down to the jail, he was being searched and had some bags with methamphetamine and, I think, also some marijuana concealed in his pants and, actually, in his rectal area, I think. They were pulled out and discovered at that point and thrown across the room. There was a little scuffle that took place and that's where they were found.

THE COURT: Count Three talks about amphetamines.

MR. LUNNEN: Same thing. It's just a

different --

THE COURT: Count One talks about marijuana. There were two substances.

THE DEFENDANT: There was a joint and crank, methamphetamine. I had no clue that I had amphetamine. I was charged with methamphetamine and amphetamine. Frankly, the difference, I didn't even know that there was a difference. I didn't even know I had two different substances. I thought it was -- and my understanding it was all one substance, was all the same stuff.

MR. LUNNEN: It was later determined through testing that one was amphetamine, apparently. It's a lesser of a pure, I guess.

THE COURT: One is just a salt of the other.

MR. WALLENTINE: It is, Your Honor. There are two refinement processes, different methods of manufacturing.

THE COURT: How did you get to the distribution quantity in the marijuana?

MR. LUNNEN: That's not one of the ones that he's pleading to.

MR. WALLENTINE: No. It's the amphetamine and methamphetamine. There were 2.5 grams of amphetamine, 1.3 grams of methamphetamine packaged

together.

THE COURT: I'm sorry. Count One is methamphetamine. Count 3 is amphetamine. Okay.

MR. WALLENTINE: That's correct, Your Honor.

THE COURT: I misread that. All right. They were packaged separately?

THE DEFENDANT: Yes.

THE COURT: Okay. You are, except for the issue you are preserving on appeal you are waiving all of your defenses and all your rights, including a right to pick a jury and go to trial on that. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. There is an affidavit on the podium that sets forth all of your rights. Have you read that?

THE DEFENDANT: I have read it and signed it.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, I do.

THE COURT: Have you asked Mr. Lunnen any questions about it?

THE DEFENDANT: Yes, I have. And he's answered them all thoroughly.

THE COURT: Any other questions.

THE DEFENDANT: No.

THE COURT: Okay. You need make a motion through him to withdraw this plea within 30 days or I won't consider it. Go ahead and sign it if you are satisfied.

MR. LUNNEN: He's already signed it, but I am having him sign it again.

THE COURT: That's okay. Did you sign it here?

THE DEFENDANT: Yes, I did, just now.

THE COURT: Okay. I'll accept that. Do you have any questions of me?

THE DEFENDANT: I just -- I would like to ask you something.

THE COURT: Go ahead.

THE DEFENDANT: I'm on parole anyway, so I am going back to prison when I am found guilty of these charges. I just ask --

MR. LUNNEN: He doesn't want to know about sentencing yet. I think he wants to know if you have any questions about this.

THE COURT: I'll let him talk to me later about that. But for right now, do you have any questions about what's happening and what you are doing?

THE DEFENDANT: Just that I do -- preserving

my right to appeal of evidentiary hearing and the process the cops went about, because I honestly feel there is big gaps that the cops -- I mean, on the stand and all their different transcripts, there is a bunch of lies -- well, maybe not lies, but they proceeded differently than any other report they have ever given, they proceeded differently. So I feel there is a bunch of obscurities there that they have done.

THE COURT: And your right to appeal --

THE DEFENDANT: (inaudible)

THE COURT: -- on this how they found the evidence and your detention and so forth will be preserved.

THE DEFENDANT: All right.

THE COURT: That doesn't mean that -- I have already ruled on those against you.

THE DEFENDANT: I know. I feel you haven't heard all the evidence, though.

MR. LUNNEN: That's why you are preserving --

THE DEFENDANT: Yes.

THE COURT: Now, any other defenses, your right to go to trial, pick a jury, you understand you are giving up those rights?

THE DEFENDANT: Yes, I am. Also, I

understand that if I do beat on that right for appeal that all of this is void, then I get to go back through the process again, right?

THE COURT: If the Court of Appeals reverses me and says that the evidence should have been suppressed, they will likely either discharge you, dismiss the matter, or order a new trial. Then you'll come back to a new trial and the state won't have the evidence, and then we'll see what happens. You may have to go -- you may have to have a trial again. You know, you may have to post a bond while you are in trial. Any questions about that?

THE DEFENDANT: No.

THE COURT: Okay. To the charge contained in Count One, second amended information, possession of controlled substance with intent to distribute, a second degree felony, on or about September 28th, 1997, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: To Count Three, possession of a controlled substance with intent to distribute a second degree felony, same date, different substance, amphetamine, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: The court will accept the pleas,