

1977

# State of Utah v. Jerome Yeck : Consolidated Appeal

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STATE OF UTAH )  
Plaintiff-Respondent )  
vs. )  
JEROME YECK, )  
Defendant-Appellant )

Case No. ~~29511~~  
14826  
14831

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Consolidated Appeal from the Second Judicial District  
in and for Weber County, State of Utah, the Honorable Calvin  
Gould, Presiding; and Third Judicial District Court in and  
for Salt Lake County, State of Utah, the Honorable Stewart  
M. Hansen, Jr., Presiding.

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FILED

MAR - 4 1977

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Clerk, Supreme Court, Utah

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THE RIGHT TO TRIAL BY JURY IN CRIMINAL PROCEEDINGS  
IS A FUNDAMENTAL RIGHT, AND AN ESSENTIAL ELEMENT  
OF DUE PROCESS, AND WHEN REQUESTED BY THE ACCUSED  
AT ANY TIME PRIOR TO SENTENCING, CANNOT BE DENIED  
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Plaintiff-Respondent	)
-vs-	)
JEROME YECK,	)
Defendant-Appellant	)

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This cause arose from a denial of motions to withdraw guilty pleas made by Appellant Jerome Yeck, pursuant to Utah Code Annotated, §77-24-3 (1953), which were entered in response to criminal proceedings brought by the State of Utah, charging him in the Second Judicial District with theft by deception, a third degree felony, in violation of §76-6-405, Utah Code Annotated, 1953; and in the Third Judicial District with one count of forgery, a second degree felony, in violation of §76-6-501, Utah Code Annotated, 1953; and two counts of theft by deception, a second degree felony, in violation of §76-6-405, Utah Code Annotated, 1953.

DISPOSITION IN THE LOWER COURT

On or about September 1, 1976, the defendant-appellant

entered a plea of guilty to the crime of theft by deception, a third degree felony, in the District Court of the Second Judicial District in and for Weber County, State of Utah. On or about September 2, 1976, defendant entered a plea of guilty to one count of a three-count Information in the Third Judicial District to the charge of theft by deception, a second degree felony. Defendant's sentencing was scheduled for September 15, 1976, in the Second Judicial District, and September 16, 1976, in the Third Judicial District. Upon defendant's Motion, prior to those dates, the sentencing dates were vacated and on September 22nd and September 23rd, respectively, in the Second and Third Judicial Districts, Defendant moved to withdraw his plea. On September 23, 1976, Judge Stewart M. Hansen, Jr., ruled that Appellant's plea could not be withdrawn in the Third Judicial District case, and defendant was sentenced to a term in the state prison of one to fifteen years, sentence to be stayed pending this Appeal, and also pending a 90-day diagnostic evaluation at the Utah State Prison. On October 13, 1976, Judge Calvin Gould ruled that the Appellant's plea could not be withdrawn in the Second Judicial District case, and Appellant's sentence was stayed pending this Appeal.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing

the judgments rendered by the lower courts, and a ruling remanding this cause to the trial courts for trials on all of the counts, both those involved in the plea and those dismissed, against the defendant.

#### STATEMENT OF FACTS

Appellant Jerome W. Yeck is a resident of Salt Lake County, State of Utah, and during the years of 1974 through 1976, was engaged in various businesses in the northern Utah area, principally in Salt Lake County. Most of Appellant's business dealings were in the area of property development and other varieties of land transactions. All of the charges involved in the instant case arose from transactions involving sale or acquisitions of real property between Appellant, financial institutions, and other third parties. Appellant was initially charged in the Third Judicial District in and for Salt Lake County, State of Utah, with one count of forgery in violation of §76-6-501, Utah Code Annotated, 1953, a felony of the second degree, and two counts of theft by deception, in violation of §76-6-405, Utah Code Annotated, 1953, a second degree felony. Contemporaneously with these charges, Appellant was charged in the Second Judicial District Court in and for Weber County, State of Utah, with one count of theft by deception, in violation of §76-6-405, Utah Code Annotated, 1953, a third degree

felony. Furthermore, defendant was informed at the time of his arraignment and at subsequent proceedings in the Third Judicial District, that the Utah State Attorney General's office had also received complaints to their "White Collar Crime Section", and that they were prepared to file additional felony charges for alleged similar conduct against the defendant. Appellant had the assistance of counsel throughout all proceedings in the courts below. At preliminary hearings in the Salt Lake City Court and the Ogden City Court, and at arraignment proceedings in the Second and Third Judicial District Courts, and at the proceedings specifically giving rise to this Appeal, Appellant was represented by Attorney Phil L. Hansen, a member of the Utah State Bar in good standing, from Salt Lake City, Utah. At the arraignments in both Districts, defendant initially entered pleas of not guilty to all charges. Trials were scheduled in late September. Prior to the trial dates and on or about the 1st and 2nd day of September, 1976, Appellant, upon advice of his counsel, entered into plea negotiations with the County Attorney's office in both Weber and Salt Lake County. The prosecutors involved were Robert L. Wallace for Weber County, and Robert Stott for Salt Lake County, and Joseph McCarthy, representing the White Collar Crime Division of the Utah State Attorney General's office. The



arrangement concluded from the negotiations was that the Appellant would enter a plea of guilty to the theft by deception charge in Weber County, and would plead guilty to one theft by deception count in Salt Lake County. In return for these pleas, Salt Lake County would dismiss the other two counts of the Information alleging forgery and theft by deception. The Weber County Attorney would agree that the Appellant should be sentenced to a maximum of only five years in the state prison, rather than 1-15 years, as the case had actually arisen prior to the criminal code revisions of 1973, and the Utah State Attorney General's office agreed not to proceed with any charges or complaints filed in their office. Appellant then entered guilty pleas in Weber and Salt Lake County, and was referred for presentence investigative reports in both counties by the Utah State Department of Adult Probation and Parole, and was scheduled for sentencing on September 15th and 16th, 1976, respectively, in Weber and Salt Lake Counties. At the time of the entering of the pleas, both Judge Stewart M. Hansen, Jr., in Salt Lake County, and Judge Calvin Gould in Weber County, examined the Appellant extensively, pursuant to the required inquiries of Boykin v. Alabama, 395 U.S. 238 (1969). Appellant responded appropriately to the questions posed by the judges, that he was entering his plea voluntarily,

without any duress or coercion, that he understood the consequences of his plea, that he was doing so on the advice of counsel, and that he understood that the judges had made and would make no advance promises as to the eventual sentence to be imposed. The pleas of guilty were accepted by both judges. Subsequent to appellant's entering pleas of guilty, but prior to sentencing, Appellant contacted Attorney John T. Caine, a member in good standing of the Utah State Bar, practicing in Ogden, Utah. Appellant explained to the attorney that he did not believe, in fact, that he was guilty of the offenses charged, that he had not intended to defraud or to do any acts which injured anyone. In reviewing the cases with the Appellant, Caine informed the Appellant that it was his opinion that he did have realistic and viable defenses to the charges, and that in fact, it appeared that his conduct was not criminal, but should more appropriately be adjudicated in a civil lawsuit, (see, Record on Appeal, Affidavit of Jerome Yeck and John T. Caine, filed with the Appellant's Motion to Withdraw a Plea).

Following this discussion, Appellant released Attorney Phil L. Hansen and retained John T. Caine to represent him in further proceedings. Appellant immediately filed motions for withdrawal of his plea in both the Second and Third Judicial Districts. At the time of

filing said Motions, Appellant had not been advised by either of the Adult Parole & Probation agencies in Weber or Salt Lake County, as to any recommendations made by them to the courts as to the sentence, nor was he advised by the court or any other office of the court, as to what his sentence would be (see, Record on Appeal, Affidavit of Jerome Yeck). On September 15 and 16, respectively, Appellant appeared with Attorney John T. Caine in Second and Third Judicial District Courts. At this time, the courts took note of the application for withdrawal of the plea, continued sentencing, and set Appellant's motion for argument on September 22nd and September 23rd, respectively. On September 22nd and September 23rd, a hearing was held before Judge Calvin Gould and Judge Stewart M. Hansen, Jr., respectively, on Appellant's applications for withdrawal of plea. Said application was made pursuant to §77-24-3, Utah Code Annotated, 1953. Affidavits had theretofore been presented to the court by Appellant and his attorney, and oral arguments were conducted in each hearing. Following oral arguments, Judge Gould took the case under advisement, and ruled on October 5, 1976, in a Memorandum Decision, that Appellant's plea had been entered voluntarily, that defendant could not have been unaware of the import of the court's questioning at the time the plea was entered, and therefore the motion was

denied. Judge Stewart M. Hansen, Jr., ruled on Appellant's motion immediately following the hearing. Judge Hansen's ruling was similar to Judge Gould's, with the additional finding that the state would not be prejudiced by allowing Appellant to withdraw his plea and go to trial on all charges, but that he believed in the exercise of his sound discretion, that withdrawal of the plea was not warranted in this case. It should be carefully noted that throughout the record and transcript in this Appeal, Appellant consistently stated that if the pleas were withdrawn, he would expect to be tried on all counts, and that all plea negotiations would be vitiated by such withdrawals. Subsequent to the above rulings, Appellant filed this Appeal, and pursuant to an agreement reached with Judge Stewart M. Hansen, Jr., underwent a 90-day diagnostic evaluation conducted in the community by the Utah State Prison staff. Judge Calvin Gould further agreed to stay any imposition of his sentence pending the outcome of the Appeal, and pending the 90-day evaluation. On January 14, 1977, Appellant appeared before Judge James Sawaya for sentencing, following the filing of the 90-day evaluation report. Judge Sawaya, acting upon the reports' recommendation, sentenced the defendant to serve a term in the Utah State Prison of not less than one, nor more than fifteen years. That sentence was later stayed,

pending resolution of the Appeal before this court, and defendant was continued at liberty on an appeal bond. No action has yet been taken as to sentencing by Judge Calvin Gould in the Second Judicial District.

#### ARGUMENT

THE RIGHT TO TRIAL BY JURY IN CRIMINAL PROCEEDINGS IS A FUNDAMENTAL RIGHT, AND AN ESSENTIAL ELEMENT OF DUE PROCESS, AND WHEN REQUESTED BY THE ACCUSED AT ANY TIME PRIOR TO SENTENCING, CANNOT BE DENIED UNLESS THE STATE DEMONSTRATES THAT IT WILL BE IRREPARABLY DAMAGED OR THAT THERE IS A COMPELLING STATE INTEREST WHICH MUST BE SERVED.

The Sixth Amendment to the United States Constitution states, in part: "That 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." This right to trial by jury is classified as are other important and basic concepts enunciated by the Constitution, as fundamental. This important classification makes it incumbent upon those attempting to deny such a right to demonstrate compelling reasons for their action. Trial by jury is an essential ingredient of due process, applicable to the states through the Fourteenth Amendment. (See, Klopfer v. North Carolina, 386 U.S. 213, (1967), reaffirmed in Barker v. Wingo, 407 U.S. 514 (1975), when the Supreme

Court held that the Sixth Amendment's guarantee to an accused of the right to trial is fundamental, and is imposed by the due process clause of the Fourteenth Amendment on the states.) Such a fundamental right should not and cannot be a subject of judicial discretion as to its imposition or its abrogation. This court has heretofore announced in the cases of State v. Lee Lim, 7 P.2d 825 (1932), and the more recent case of State v. Plum, 378 P.2d 671(1963), that in effect, the withdrawal of a plea of guilty by an accused is discretionary with the court. Both of these dealt inter alia with whether or not the trial judge within his sound discretion, exercised that discretion properly in refusing to allow the withdrawal of the plea. This court, in upholding the free exercise of judicial discretion in this area, did not focus on the more critical issue of the denial of the right to trial by jury through the exercise of that discretion. It is interesting to note that in the instant case, both judges and prosecutors took the position that the burden of proof to demonstrate why the plea should be withdrawn, was on the defendant-appellant, and that through some nebulous standard, the court would then determine whether that burden of proof was met and whether the courts' discretion should be exercised in the defendant's favor. This court should take careful note that, in effect, this is a complete

reversal of any judicial treatment of a fundamental right guaranteed by the Constitution. In cases dealing with the preservation of fundamental rights as essential to due process, the burden has been and is on the state to show that there is a compelling interest which abrogates or overrides the necessity to preserve the fundamental right. The only way, therefore, that this juxtaposition can be corrected in the instant case, is for this court to reverse their previous decisions, and take the bold, but clearly, required step to place the burden of proof in denying the right to trial in the context of plea withdrawal squarely upon the state's shoulders. In the instant case, the Appellant requested, prior to sentencing, a trial by jury. He, in effect, through the Fourteenth Amendment, requested that the state insure due process and provide access to him of this most fundamental right. The state presented no compelling reason or compelling interest that would justify or require denial of Appellant's fundamental right to trial by jury. Furthermore, Judge Hansen ruled that the state would in no way be harmed should the Appellant be granted a new trial, but that in the exercise of his discretion, he did not feel that a new trial was warranted.

Some may argue that judicial discretion in this area is of legislative creation, and therefore more properly

a subject for legislative correction. It would be a severe mistake for this court to rely on that tenuous position. The only statute involved in this case is §77-24-3, Utah Code Annotated, 1953. This is a procedural provision rather than a substantive provision of the law. This provision of the Code allows a defendant to make application for withdrawal of a plea and a request for trial prior to judgment. The substantive application of the law in terms of allowing judicial discretion in this area has been court-created in this state. This court, therefore, can correct what is obviously an unconstitutional practice in which the denial of the fundamental right is discretionary, where the burden of proof is on that person asking to have his fundamental right enforced. There is no decision of this court or of any higher court which places the burden on the defendant to assume the burden of proof in asserting his fundamental right. The State of Utah, through the conduit of the Fourteenth Amendment, is required to guarantee due process of law in state criminal proceedings. The preservation of due process is an inherent duty of the trial court, and this court ought not to allow the abrogation of that duty and the erosion of due process apparent in this case to stand without careful consideration of the critical issues presented in this appeal. It would be very easy for this court to consider only



lower court discretion and speak in terms of abuse of that discretion in resolving this particular case, as Appellant readily concedes that there is no evidence to support an abuse of judicial discretion. However, the issue at the heart of this appeal is much more critical than to be given cursory review, or cursory judgment. This court has a responsibility, as the supreme judicial body of this state, to act as a guardian of individual rights, and it is incumbent upon this court to guarantee that those rights are not abrogated by a compulsion for protection of procedure in the criminal process. Appellant does not ask that this court reverse his conviction, nor does he ask that this court relieve him from the burden of being prosecuted by various state agencies. What Appellant does ask is that the state be required to present evidence to a finder of fact, and prove beyond a reasonable doubt, that defendant is guilty. The only method available to Appellant and to anyone desiring a forum for the presentation of all facts, is a trial. Some will argue that if this court takes a bold step in the preservation of individual rights in this particular instance, that everyone who enters into a plea negotiation and then later desires to withdraw his plea, will be allowed to do so and thus, plea negotiations will no longer be a viable alternative for prosecutors and defense attorneys, and

the court will never know whether his discussions with an individual, upon the taking of a plea, are meaningless or will later be challenged in a proceedings of this nature. This court should carefully consider, in responding to this argument, that the fundamental right guaranteed by the Constitution at issue herein is the right to a trial by jury, not the right to plea bargain, with its attendant advantages for prosecutors, defense attorneys, and the judiciary. Plea bargaining, as it is utilized in the processing of a criminal case in respect to the avoidance of trial by jury, is merely a procedural tool with which an accused may avail himself, if he so chooses. It does not take the place of a trial by jury in terms of constitutional protection, nor in our society, should it ever be considered as a surrogate for a decision by one's peers. Therefore, neither the state, the prosecutor nor the judiciary, should ever take the position that the inconvenience created by not being able to substitute an available procedure should take precedence over the protection of the fundamental right of trial by jury. Furthermore, judicial guidelines can and should be established to insure that the withdrawal of the plea and request for a trial is being done in good faith, without intent to delay or hinder prosecution, is timely made, and will not cause irreparable injury to the state.

These guidelines could act as parameters for limited exercise of judicial discretion to insure the integrity of the system, without the relatively unfettered and indiscriminate abrogation of the right to trial by jury that currently exists under present conditions, where there are no guidelines and the burden is solely on the accused to justify his plea withdrawal, and his only recourse to demonstrate abuse of judicial discretion.

In the instant case, the defendant, through affidavit and in oral argument, demonstrated his good faith in requesting a trial by jury. This request was made at an appropriate time prior to the knowledge of a potential sentence and prior to the imposition of that sentence. There was no demonstrable irreparable harm or damage to the state, nor any compelling reason presented which would justify removal of the basic protection of the fundamental right of trial by jury afforded to Appellant by the Fourteenth Amendment, as an integral part of due process. Therefore, the trial courts, in both cases, were in error in not preserving trial by jury for the Appellant and this Court must now, to avoid any further vagueness or ambiguity in this critical area, demonstrate by judicial fiat that the right to trial by jury is paramount and is an essential element of due process which must be preserved through all stages of the criminal process until sentence is imposed.

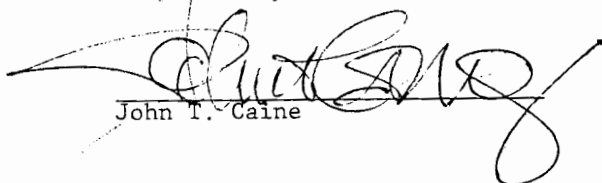
## CONCLUSION

The application for withdrawal of plea, pursuant to Utah Code Annotated, 1953, is procedural in nature. The concept of judicial discretion which has heretofore been adhered to by this court in reviewing the withdrawal of a plea in a criminal case, has been court-created and is not imposed by any statute. The right to trial by jury is a fundamental right guaranteed by the Sixth Amendment to the Constitution, and is a basic element of due process guaranteed to all individuals by the states through the Fourteenth Amendment. This court has never before reviewed the preservation of this fundamental right in the context of plea withdrawal in a criminal case. The preservation of trial by jury must be guaranteed by the trial court in all cases and where, in the context of a plea withdrawal, a jury trial is requested, the burden must shift to the state to show a compelling state interest or a compelling reason why the accused should not be allowed trial by jury. The trial court should have discretion to determine whether or not the application is in good faith and timely, and whether irreparable damage will be done to the state. In the instant case, the application was made in good faith, timely, and there was no showing by the state of any compelling reason or compelling state interest for the vitiation of the fundamental right of trial by jury, nor

was an irreparable damage to the state demonstrated.

Wherefore, Appellant respectfully requests that this court reverse the decisions of the Second and Third Judicial District Courts, and allow defendant-appellant to have a trial by jury on all counts heretofore filed against him by the Second and Third Judicial Districts, and pending against him by the Utah State Attorney General's office.

Respectfully submitted,



John T. Caine

STATE OF UTAH            )  
                              :   ss.  
COUNTY OF WEBER        )

Comes now Donna Czekala, being first duly sworn upon her oath, and deposes and says that she mailed a true and correct copy of the foregoing Appellant's Brief to the following persons:

Mr. Earl Dorius  
Assistant Attorney General  
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236 State Capitol Building  
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on this 4th day of March, 1977.

---

DONNA CZEKALA

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of  
March, 1977.

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NOTARY PUBLIC  
Residing at:

My Commission Expires:

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