

1977

## State of Utah v. Jerome Yeck : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

-vs-

JEROME YECK,

Defendant.

GIVEN

JUDGMENT

AND

ORDER

IN

THE

CASE

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Ogden, Utah 84403

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## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	2
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I:     A MOTION TO WITHDRAW A GUILTY PLEA IS NOT AN ABSOLUTE RIGHT AND WHETHER IT IS GRANTED OR DENIED IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT-----	9
CONCLUSION-----	15

## CASES CITED

Everett v. United States, 336 F.2d 979 (10th Cir. 1964)-----	10,12,14
McGiff v. State, 514 P.2d 199 (Wyo. 1973)-----	12
Meyer v. United States, 424 F.2d 1181 (8th Cir. 1970)-----	12
State v. Forsyth, 560 P.2d 337 (Utah 1977)-----	12
State v. Garfield, 552 P.2d 129 (Utah 1976)-----	12
State v. Larson, 560 P.2d 335 (Utah 1977)-----	12
State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932)----	12
State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963)-	12

## STATUTES CITED

Utah Code Ann. § 76-6-405 (1953), as amended-----	3
§ 76-6-501 (1953), as amended-----	3
§ 76-7-405 (1953), as amended-----	2
§ 76-20-8 (1953), as amended-----	2

IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
STATE OF UTAH,

:

Plaintiff-Respondent,

Case Nos.

-vs-

:

14826

and

JEROME YECK,

:

14831

Defendant-Appellant.

:  
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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Jerome Yeck, appeals from an order denying his motion to withdraw his guilty plea to the charge of theft by deception, a third degree felony, and the judgment and sentence entered thereon in the Second Judicial District Court, Weber County, State of Utah, the Honorable Calvin Gould, presiding. The appellant also appeals from an order denying his motion to withdraw his guilty plea to the charge of theft by deception, a second degree felony, and the judgment and sentence entered thereon in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., presiding.

## DISPOSITION IN THE LOWER COURT

Appellant's motion to withdraw his guilty plea in the Second Judicial District Court was denied by the Honorable Calvin Gould on October 5, 1976, and appellant was sentenced to a term in the Utah State Prison "not exceeding five (5) years," with execution of the sentence stayed pending appeal. Appellant's motion to withdraw his guilty plea in the Third Judicial District was denied by the Honorable Stewart M. Hanson, Jr., on September 23, 1976, and appellant was sentenced to a term in the Utah State Prison of one of fifteen years, with execution of the sentence stayed pending his appeal.

## RELIEF SOUGHT ON APPEAL

Respondent requests that the orders in both the Second Judicial District and Third Judicial District denying appellant's motions to withdraw his guilty pleas be affirmed.

## STATEMENT OF FACTS

On April 7, 1976, a complaint was filed in Ogden City Court charging the appellant with theft by deception in violation of Utah Code Ann. § 76-7-405 (1953), as amended; on April 13, 1976, another complaint was filed in Ogden City Court charging the appellant with obtaining money by false pretenses in violation of Utah Code Ann. § 76-20-8 (1953), as amended. (Record of Second Judicial

District Court, hereinafter "Record-SJDC:" 1,2). On April 23, 1976, a complaint was filed in Salt Lake City Court charging the appellant with one count of forgery in violation of Utah Code Ann. § 76-6-501 (1953), as amended, and two counts of theft by deception in violation of Utah Code Ann. § 76-6-405 (1953), as amended. (Record of Third Judicial District Court, hereinafter "Record-TJDC:" 5).

Respondent essentially agrees with the appellant's assessment of other potential actions against him in that the appellant 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 unit," and that this office was prepared to file additional felony charges for alleged similar conduct against the appellant.

#### Charges in the Second Judicial District Court

On June 14, 1976, the appellant was arraigned on the charge of obtaining money under false pretenses in the Second Judicial District Court. (Record-SJDC: 24). The charge was apparently dismissed as there is no further reference to it in the record.

On August 11, 1976, when the appellant was to be tried for the charge of theft by deception, the jurors were called and sworn. The State asked one question after which the Court and counsel retired to chambers. The jurors were excused and the case was continued to August 12, 1976. (Record SJDC: 26). On August 12, 1976, the appellant, through his counsel, Phil L. Hansen, moved to withdraw his plea of not guilty and entered a plea of guilty. (Record-SJDC: 27). At this time the Honorable Calvin Gould questioned the appellant extensively as per constitutional requirements.

"THE COURT: Mr. Yeck, I need to talk to you for a few minutes. How old are you?

MR. YECK: Forty years old, your Honor.

THE COURT: And how much education do you have?

MR. YECK: I have about, all told, your Honor, ten years of college. I have never finished any one field. I started in East Los Angeles in Law School, two years; went to two years to dental school; and three years to Maryland University, an extension course, while I was in the Army serving in Germany, Maryland University of Munich, Germany; and came back and picked up some courses at Westminster College and Utah University.

THE COURT: And would I correctly assume that you have had some substantial experience in business affairs?

MR. YECK: Yes, sir.

THE COURT: You understand what it means, the phrase cheat or defraud?

MR. YECK: Yes, sir, I do.

THE COURT: And you understand what dollar values mean?

MR. YECK: Yes, sir, I do.

THE COURT: And are you acquainted with a person named Richard E. Nilsson?

MR. YECK: I am, your Honor.

THE COURT: Now, as you stand before me today, Mr. Yeck, you came here to the court room from your home, would that be correct?

MR. YECK: Yes, sir.

THE COURT: Have you had any occasion to have any intoxicating beverages or anything this morning?

MR. YECK: No, sir, I have not.

THE COURT: Have you been taking any drugs or anything?

MR. YECK: No, sir.

THE COURT: Have you been feeling in any sense ill this morning, other than maybe butterflies in your tummy from coming to court?

MR. YECK: No, sir, I haven't.

THE COURT: You are not suffering from any feelings of the flu or anything of that nature?

MR. YECK: No, sir, not to my knowledge, I haven't.

THE COURT: And you have had a chance to discuss this case now with your attorney, Mr. Hansen, is that correct?



MR. YECK: That's correct, sir.

THE COURT: And as you stand before me this morning you feel that you are able to think clearly and make sound judgments and decisions?

MR. YECK: I believe so, your Honor.

THE COURT: If he enters the plea of guilty, Mr. Hansen, it will be with your concurrence, I presume, based upon your view of the evidence?

MR. HANSEN: Not only my concurrence, but my advice.

THE COURT: If you enter the plea of guilty, Mr. Yeck, will it be because you were involved with Mr. Nilsson in a scheme of some kind which endeavored to cheat him or defraud him?

MR. YECK: I don't understand that.

THE COURT: Well --

MR. YECK: I went into a business transaction with Mr. Nilsson to cheat him?

THE COURT: Yes.

MR. YECK: No, sir, I didn't do that.

MR. HANSEN: By this, I have explained to you, Mr. Yeck, if you are going to plead guilty, it is tantamount to your admitting what they have alleged against you, and they have alleged against you that there has been some criminal acts involved here in that there were false pretenses. Now when you say you didn't intend to cheat him, this means in the law that to constitute a crime there must be an act and your intent. And they must concur at the same time, at the very time that this offense was to have taken place.

Now if in fact you intended to pay him back later, that's no defense. But if in fact you knew everything wasn't legal, according to Hoyle, at the time you received the money --

MR. YECK: Yes.

MR. HANSEN: Then it would be guilty.

MR. YECK: I will have to go with that, yes.

THE COURT: All right. Then to the -- is he ready to plead now, Mr. Hansen?

MR. HANSEN: Yes, your Honor.

THE COURT: To the Information charging you with obtaining money under false pretenses, a felony, what is your plea, guilty or not guilty?

MR. YECK: Guilty, your Honor.

THE COURT: That plea may be entered and stand. I suppose that we want to pre-sentence referral?  
(Record-SJDC: 55-58).

Appellant's sentencing date was set for September 1, 1976, and he was referred to Adult Probation and Parole for pre-sentence investigation and report. (Record-SJDC: 27). On September 1, 1976, appellant failed to appear for sentencing nor was he represented by counsel. A bench warrant was issued against him. (Record-SJDC: 32). On September 7, 1976, the appellant appeared but without counsel. The court continued the matter to September 15, 1976. (Record-SJDC: 35). Appellant obtained new counsel, and on September 15, 1976, upon request of new

counsel, the court continued the matter to September 22, 1976. (Record-SJDC: 43). Finally on September 22, 1976, the appellant moved to withdraw his guilty plea and the issue was argued before the Honorable Calvin Gould. The court took the motion under advisement. (Record-SJDC: 44). On October 5, 1976, the court denied appellant's motion to withdraw his guilty plea and set the sentencing date as October 13, 1976. (Record-SJDC: 45). On October 13, 1976, the Honorable Calvin Gould stayed imposition of sentence pending this appeal. (Record-SJDC: 46).

#### Charges in the Third Judicial District Court

Although the record is not as complete as in the Second Judicial District Court, it is clear that on July 15, 1976, the appellant was arraigned in the Third Judicial District Court, the Honorable Stewart M. Hanson, Jur., presiding. Through his attorney, Phil L. Hansen, he pled not guilty to the charges of forgery and theft by deception. The Court set his trial for September 20, 1976. (Record-TJDC: 10). On September 8, 1976, on the State's motion the Court dismissed the forgery count and one count of theft by deception and allowed the appellant to enter a plea of guilty to one count of theft by deception. Although the court's examination of the appellant as to the voluntariness of his plea does not appear, the appellant does not question on appeal the

the adequacy of this inquiry. Appellant made this plea on the advice of his attorney, Phil L. Hansen. The court set the sentencing date to be September 16, 1976. (Record-TJDC: 12, 25, 26).

On September 16, 1976, appellant changed legal counsel. At his new counsel's request, the court continued the matter to September 22, 1976. (Record-TJDC: 13). On September 22, 1976, the appellant moved to withdraw his guilty plea. The court heard arguments from both counsel and denied appellant's motion on the basis that the appellant's plea had been made voluntarily and knowingly. (Record-TJDC: 23). On September 23, 1976, the Court ordered the appellant to undergo a ninety-day diagnostic evaluation, and on September 25, 1976, the court stayed imposition of sentence pending this appeal. (Record-TJDC: 36).

#### ARGUMENT

##### POINT I

A MOTION TO WITHDRAW A GUILTY PLEA IS NOT AN ABSOLUTE RIGHT AND WHETHER IT IS GRANTED OR DENIED IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

Respondent in no way contends that a criminal defendant's right to trial is not an absolute right guaranteed to him by the Sixth Amendment of the United

States Constitution and applicable to the states through the Fourteenth Amendment. Respondent argues, however, that appellant has confused the constitutional right to trial and a defendant's request to withdraw a guilty plea after having made a constitutionally valid waiver of his right to trial. The law is clearly settled at both the federal and state level that whether or not a motion to withdraw a plea of guilty will be granted is within the sound discretion of the trial court. A less settled question perhaps, concerns differing standards in making that determination depending on whether the defendant made his request for plea change before or after imposition of sentence.

At the federal court level, in Everett v. United States, 336 F.2d 979 (10th Cir. 1964), the 10th Circuit Court of Appeals held that:

"Far from showing a 'fair and just reason' for a change of pleas to Count 4, appellant demonstrated by his repeated statements that he had no reason other than wanting a trial on a charge of which he admitted his guilt. Unlike Gearhart, appellant offered no defense to the charge, nor did he allege involuntariness or any other factor which would militate against the correctness and truth of his guilty plea to Count 4 which was entered when he was represented by retained counsel. His contention is virtually a claim of an absolute right to with-

draw a guilty plea prior to imposition of sentence. No court has ever so held; our use of the language 'freely allowed' plainly implies the existence of some circumstances in which a defendant is not entitled to withdraw a plea of guilty before sentencing, and negates any absolute right to do so. Overwhelming authority holds, as has this court, that withdrawal of a guilty plea before sentencing is not an absolute right but a decision within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of discretion.<sup>1</sup>"  
Id. 336 F.2d at 982, 983 (Emphasis added.)

<sup>1</sup>The last sentence of this quotation is footnoted in the Court's opinion as follows:

Vasquez v. United States, 279 F.2d 34, 37 (9th Cir. 1960); United States v. Lester, *supra* note 10 at 500 of 247 F.2d; United States v. Panbianco, *supra* note 10, at 239 of 208 F.2d; Williams v. United States, 192 F.2d 39, 40 (5th Cir. 1951); Goo v. United States, 187 F.2d 62 (9th Cir.) (per curiam), cert. denied, 341 U.S. 916, 71 S.Ct. 733, 95 L.Ed. 1351 (1951); Bergen v. United States, 145 F.2d 181, 186 (8th Cir. 1944); United States v. Colonna, *supra* note 10; see United States v. Hughes, *supra* note 10; Rachel v. United States, 61 F.2d 360, 362 (8th Cir. 1932); Swift v. United States, 79 U.S.App.D.C. 287, 288, 148 F.2d 361, 362 (1945) (ditto); cf. Hoyt v. United States, 252 F.2d 460, 462 (10th Cir. 1958). And see Note, *Withdrawal of Guilty Pleas*, 55 *COLUMBIA L. REV.* 366, 379 (1955).

High v. United States, *supra* note 11, 110 U.S.App.D.C. at 29, 288 F.2d at 431; United States v. Hughes, *supra* note 10; United States v. Guerin, 296 F.2d 23, 34 (4th Cir. 1961); United States v. Moore, 290 F.2d 501 (2d Cir.) (per curiam), cert. denied, 368 U.S. 837, 82 S.Ct. 49, 7 L.Ed.2d 38 (1961); Vasquez v. United States, *supra* note 15; United States v. Nigro, *supra* note 10 at 787, 202 F.2d; United States v. Lester, *supra* note 15; United States v. Marcus, 213 F.2d 230, 232 (7th Cir.), cert. denied, 348 U.S. 824, 75 S.Ct. 39, 99 L.Ed. 650 (1954); United States v. Panbianco, *supra* note 15;

Goo v. United States, *supra* note 15; Bergen v. United States, *supra* note 15 at 186-187, of 145 F.2d; Swift v. United States, *supra* note 15; United States v. Colonna, *supra* note 10; United States v. Fox, *supra* note 10 at 59-60 of 130 F.2d; Ward v. United States, 116 F.2d 135, 136 (6th Cir. 1940); Scheff v. United States, 33 F.2d 263, 264 (8th Cir. 1929); see United States v. Smiley, 322 F.2d 218, 219 (2d Cir. 1963) (per curiam); cf. Tomlinson v. United States, 68 U.S.App.D.C. 106, 108, 93 F.2d 652, 654 (1937), cert. denied sub nom., Pratt v. United States, 303 U.S. 642, 59 S.Ct. 645, 82 L.Ed. 1102 (1938); Hoyt v. United States, *supra* note 15; United States v. Lias, *supra* note 11. *But cf.* Kadwell v. United States, *supra* note 14. In the recent *Nagelberg* case, the Supreme Court held that the District Court had discretion to permit the withdrawal of a guilty plea on a motion in which the Government had acquiesced because of defendant's extensive cooperation. The Court vacated the judgment of the Court of Appeals, 323 F.2d 936 (2d Cir. 1963) (per curiam), and remanded the case to the District Court for further proceedings in conformity with its opinion; it did not direct that leave to withdraw the plea be granted. *Nagelberg v. United States*, 377 U.S. 296, 84 S.Ct. 1252, 12 L.Ed.2d 200 (1964) (per curiam).

At the state level also, this Court has held on numerous occasions that a guilty plea is addressed to the sound discretion of the trial court and that a criminal defendant may not withdraw a guilty plea as a matter of sight. State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963); State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932). These concepts have just recently been reaffirmed in State v. Forsyth, 560 P.2d 337 (Utah 1977) and in State v. Larson, 560 P.2d 335 (Utah 1977). In Forsyth, this Court stated:

"The motion to withdraw a plea of guilty is addressed to the discretion of the court; and as in all discretionary matters, due to his prerogatives and his advantaged position, the trial judge is allowed considerable latitude in the exercise of that discretion, which the appellate court will not interfere with unless it plainly appears that there was abuse thereof." Id. at 339.

This Court in Larson stated also:

"A motion to withdraw a plea of guilty is addressed to the sound discretion of the trial court and a criminal defendant may not withdraw a guilty plea as a matter of right." Id. at 336.

See also State v. Garfield, 552 P.2d 129 (Utah 1976); McGiff v. State, 514 P.2d 199 (Wyo. 1973); and Meyer v. United States, 424 F.2d 1181 (8th Cir. 1970).

What appellant would have this Court do is decide against the great weight of authority and hold that

a defendant has the absolute right to withdraw a guilty plea at any time before his sentencing. Such a holding would make plea bargaining an ineffective tool in the criminal justice system because a criminal defendant could stall final disposition of his charge indefinitely. Further, to allow a defendant to withdraw a constitutionally valid waiver of his right to trial only on the basis of his own self-serving declarations makes a mockery of any kind of constitutionally valid waiver. A valid waiver is either a solid waiver or it is not: a defendant cannot have it both ways.

Appellant's argument that he only seeks to be tried for the offenses with which he was charged and that therefore no prejudice results the state misses the whole premise on which his plea of guilty was based. The point is, appellant has had his opportunity; he had a constitutional right to be tried by a jury for the offenses with which he has charged. After deliberation with his attorney, by appellant's own admission one of the best criminal defense attorney's in the state, the appellant plead guilty. Two different court's questioned the appellant as to his understanding and his voluntariness in entering the pleas. Appellant is a man of considerable



education.<sup>1</sup> He in no way argues that there was anything deficient about either court's examination of him. In short, the appellant waived his right to trial by jury. Since he does not contest the validity of his waiver he cannot now re-claim his right to trial merely because he has changed his mind. Regardless of any good faith he might have, there exists no court authority anywhere in this country standing for the proposition appellant now asserts. Once a defendant makes a valid waiver he must make some kind of showing (e.g. a "fair and just reason" as in the Tenth Circuit jurisdiction Everett v. United States, supra.) before he should be granted permission to change his plea. Appellant has not cited any authority, nor does any exist, that a defendant's change of mind constitutes a "fair and just reason" requiring a trial court to change his plea.

Respondent respectfully submits that appellant's contention runs against the grain of federal courts' and this state court's decisions on the issue of whether to accept a defendant's request for withdrawal of a guilty plea after a constitutional waiver. For this Court to reverse its past decisions and the great

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<sup>1</sup>The appellant, in response to questioning by the Honorable Calvin Gould responded that he has had about ten years of college, including two years in law school, two years in dental school, and extension courses in Maryland University and in the Army in Germany. (Record-SJDC: 55).

weight of authority in this country would be unwise and would work a most severe hardship on our criminal justice system. The two trial courts' refusals to allow appellant to withdraw his pleas of guilty were within the discretion granted those courts by law. Respondent submits that the trial courts' refusals to allow the plea changes be affirmed.

#### CONCLUSION

Based on the foregoing points and authorities respondent respectfully submits that the refusal of the trial courts to allow appellant to withdraw his guilty pleas were well within the discretion granted those courts by law. The judgments and sentences of the district courts are without error and should be affirmed by this Court.

Respectfully submitted,

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