

1977

## State of Utah v. Lorraine Hunter : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

STATE OF UTAH,

Plaintiff and Respondent,

vs.

LORRAINE HUNTER,

Defendant and Appellant.

---

CASE NO. 15150

BRIEF OF APPELLANT

\*\*\*\*\*

---

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL  
DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH,  
THE HONORABLE JOHN F. WAHLQUIST, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff and Respondent,	:	
vs.	:	BRIEF OF APPELLANT
	:	
LORRAINE HUNTER,	:	Case No. 15150
	:	
Defendant and Appellant.	:	
	:	

## STATEMENT OF THE KIND OF CASE

This is an appeal from a conviction following a guilty plea to a complaint filed against her under the old section 76-20-8 of the Utah Penal Code (repealed in 1973). The complaint in this matter arose from the purchase of an automobile from Lyle's Used Cars in Ogden, Utah. The Defendant-Appellant paid Lyle's Used Cars an amount of one thousand dollars (\$1000) in cash with the rest of the cost of the car to be financed. The State has alleged in its complaint that Mrs. Hunter made false statements in the credit application which was alleged to have been filled out by her, although the file contains no record whatsoever of said credit application. Defendant-Appellant was charged with obtaining money under false pretenses on September 20, 1973.

## DISPOSITION IN THE LOWER COURT

Defendant-Appellant, upon the advise of appointed counsel, changed her not guilty plea to guilty and the Honorable John F. Wahlquist, District Court Judge for the Second Judicial District, County of Weber, State of Utah, sentenced her, the Defendant-Appellant, to be placed under the supervision of the Adult Probation Department, one of the conditions of the probation agreement being that Defendant-Appellant should serve a term of sixty days (60) in the Weber County Jail.

Subsequently Defendant-Appellant was returned to the Court for an alleged parole violation and was placed in the custody of the Department of Corrections for a ninety-day (90) evaluation at the Utah State Prison. Upon completion of the evaluation, Defendant-

Appellant left the State of Utah and was subsequently arrested on



or about March 14, 1977, and after having made via counsel a motion in arrest of judgment and for leave to withdraw a plea of guilty, Defendant-Appellant was once again placed in the custody of the Department of Corrections for another ninety day evaluation at the Utah State Prison. The Motion in Arrest of Judgment and for Leave to Withdraw a Plea of Guilty having been denied by the Court, the Honorable John F. Wahlquist, presiding. From this denial of the Motion in Arrest of Judgment and for Leave to Withdraw a Plea of Guilty, the Defendant-Appellant appeals.

#### STATEMENT OF FACTS

On or about the 31st day of October, 1972, Defendant-Appellant purchased from Lyle's Used Cars in Ogden, Utah, a 1972 Chevrolet Station Wagon, having a total purchase price of \$3,995.00. Defendant-Appellant paid Lyle's Used Cars one thousand dollars in cash at the time of sale and filled out an allegedly false credit application containing allegedly some false representations. A copy of this alleged false credit application cannot be located in the file nor can it be located after further inquiry from the Weber County Attorney or the Weber County Clerk's Office. Subsequent to the sale of the car, Lyle's Used Cars through their agreement with the Bank of Utah was able to obtain financing in the amount of \$2,995.00 plus sales tax and license amounting to a total of \$3,185.00 for which Lyle's Used Cars received a check in that amount from the Bank of Utah.

In due time, Defendant-Appellant received a payment book and notice that she was to pay for the car at the rate of \$107.03 per month for a period of 36 months. Defendant-Appellant obtained

insurance on the automobile as requested by the bank and further made the payments each month for a period of three months. At that time, Defendant-Appellant moved to Las Vegas in order to obtain employment there and because of her non-union status, was unable to find employment in Las Vegas, was unable to obtain welfare because of her non-residence and was thus unable to continue to make payments on the automobile.

On or about the 11th day of July, 1973, the Bank of Utah caused the automobile in question to be repossessed in Las Vegas, Nevada, and further filed a complaint with the Weber County Attorney's Office charging the Defendant-Appellant with obtaining merchandise by false representation, Section 76-20-8, the Utah Code Annotated 1953. The Defendant-Appellant was subsequently arrested in Nevada on a Utah Warrant and extradited to Utah where she was incarcerated in the Weber County Jail on or about the 20th day of September, 1973, and remained incarcerated unable to raise bail, having been refused O.R. release.

The automobile was subsequently returned to Utah and sold by the Bank of Utah.

Defendant-Appellant was arraigned on September 20, 1973, the Court having appointed Maurice Richards Esq. Attorney at Ogden, Utah, as appointed counsel for the Defendant. Defendant-Appellant originally pleaded not guilty. However, upon the advise of her appointed counsel, Defendant changed her plea to guilty on October 15, 1973 and sentencing was set for November 5, 1973. On November 5, 1973, Defendant-Appellant was placed under the supervision of the Adult Probation and Parole Department and was ordered to serve a term of

sixty days in the Weber County Jail. Defendant-Appellant subsequently served 60 days in the Weber County Jail and was released on the 21st day of December, 1973.

Defendant-Appellant was again arrested on or about February 4, 1974 and it was alleged that she had charged some gas at a service station in Ogden, Utah, such being a violation of her probation agreement. However, no probation agreement can be located in the files of this case nor has the Weber County Attorney or the Utah Department of Probation and Parole been able to furnish the same.

Defendant-Appellant was also charged with another petty-crime alleged to have been committed several days after February 4, 1974, and as a result, on February 15, 1974 was ordered committed to the Board of Corrections at the Utah State Prison for a period not to exceed 90 days for an evaluation and study by John F. Wahlquist, Judge of the Second Judicial District Court in and for Weber County.

Defendant-Appellant served 90 days at the Utah State Prison designated as a study and evaluation and upon the completion of this study was released O.R. and the information that is available indicates that she was told that if she would enroll in a nursing course with a goal of becoming a nurse that she would continue to be on her own recognizance and able to properly care for and live with her children. Defendant thus applied for the nurses training course under the auspice of the State of Utah and subsequently received a notification from the nursing school that she would be unacceptable as a student inasmuch as she had been shown to have bad moral character i.e. had been convicted of a felony. Upon learning this Defendant-Appellant in a desperate effort to care for her children

and keep her family unit together, left the State of Utah not to return until 1977, at which time she purchased a home in Bountiful making a substantial down-payment where she lived with and cared for her six minor children, the youngest being less than one year old.

On or about the 14th day of March, 1977, she was arrested by the Weber County authorities and incarcerated in the Weber County Jail. Attempts were made by her attorneys to gain acceptance of an Undertaking of Bond with the Honorable John F. Wahlquist, Judge of the Second Judicial District Court in and for Weber County. However, such Undertaking of Bond was refused and Defendant-Appellant remained incarcerated.

On or about March 21st, 1977, which time was set for sentencing, she was again committed to the Board of Corrections at the Utah State Prison and at the Utah State Hospital for a 90 day psychiatric evaluation, pursuant to the order of District Judge, John F. Wahlquist, and the motions for Arrest of Judgment and for leave to withdraw her guilty plea and substitute a plea of not guilty were denied by the same Court and the Defendant-Appellant was incarcerated at the Utah State Hospital in Provo, Utah, for a period of approximately 45 days until being released on her own recognizance by an order of the Supreme Court of the State of Utah on May 2, 1977.

#### POINT 1

THE LOWER COURT JUDGE ABUSED HIS DISCRETION IN REFUSING TO ALLOW A WITHDRAWAL OF A GUILTY PLEA AND A SUBSTITUTION OF A NOT GUILTY PLEA PURSUANT TO A MOTION MADE AT THE HEARING SET FOR IMPOSITION OF SENTENCE AND MOTIONS OF COUNSEL

At a sentencing hearing held March 21, 1977, Defendant-Appellant's attorney made a motion for a Leave to Withdraw a Plea of Guilty and Arrest of Judgment. Such motions were denied by the lower court judge (hearing transcript p. 6).

It has been generally held that one who enters a plea to an accusatory pleading does not have the absolute right to withdraw the plea in order to file another plea. In the absence of a statute otherwise providing granting or refusing of Leave to Withdraw a Plea in a criminal case will rest in the sound discretion of the trial court, subject of course, to review for abuse of discretion. Good cause must always be shown for a change of plea. In other jurisdictions it has been stated that the discretion should always be exercised in favor of innocence and liberty (Lambert vs. State, 245 Miss. 227, 147 S.W. 2d 480; Henning v. State 184 Tenn. 508, 201 S.W. 2d 669).

Colorado Supreme Court in its opinion in the case of Champion vs. People 124 Colo. 253, 236 P.2d 127 (1951) quoted 14 Amer. Jur. Pru. p. 961, Sec. 287:

"As in other cases of discretionary power, no general rule can be laid down as to when a Defendant will be permitted to withdraw his plea. The decision in each case must have been to a great extent on the particular attendant circumstances generally, however, it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evidence that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. The least surprise of influence causing the Defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisably if any reasonable ground is offered for going to the jury."

The Court further quoted 22 C.J.S., Criminal Law sec. 421,  
p. 642:

"Accused should be permitted to withdraw a plea of guilty which is contrary to the truth \*\*\* Also the Court should permit the withdrawal of the plea where it appears that there is doubt of the guilt of the accused \*\*\*."

The Court there went on to quote from an earlier case of Gearhart v. People 113 Colo. 9, 154 P. 2d 47 as follows:

"The discretion thus repose in the court should be exercised liberally in favor of life and liberty, but where it is plain that substantial justice will not be promoted or the substantial rights of Defendant prejudiced the application for leave to withdraw the plea should be denied. "

The State of Montana in the case of State vs. McBane 128 Mont. 369, 275 Pac. 2d 218 (1954) states the following:

"All doubt should be resolved in favor of a trial on its merits."

The court goes on further and quotes part of its opinion the aforementioned quotation from 14 Amer. Jur. Pru. Sec. 287 P. 961.

Utah has a statute governing the withdrawal of guilty pleas found in Section 77-24-3 Utah Code Annotated (1953) which states:

"The Court may at any time before judgment upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted."

The language of this statute would seem to impart that leave to withdraw a plea of guilty may be made by a trial court at its discretion subject, of course, to review by a Superior Court. The Attorney General has mentioned that a number of states with similar statutes have held that withdrawal of a guilty plea may be made only before judgment, namely the Arizona

Supreme Court in the State vs. Churton 9 Ariz. App. 16, 448

pac. 2d, 888 (1968); the Iowa Supreme Court in the State vs. Rhinehart case 253 Iowa 1132, 125 N.W. 2d 242, 245 (1963); State vs. Erfurt rendered by the Colorado Supreme Court 157 Colo. 235, 402 Pac. 2d 75,77 (1965) although it should be mentioned that in the McBane and Champion cases cited earlier, the Colorado Supreme Court did in fact grant leave to withdraw a plea of guilty when the facts of the case so mandated its necessity. Also the California Supreme Court in People vs. Grant 16 Cal. App. 3d 27, 93 Cal. Reporter 658 (1971) held that the statute allowed withdrawal of a guilty plea and substitution of a not guilty plea only until the time of judgment. This Court in a previous case State vs. Lee Lim, 79 Utah 68, 7 Pac. 2d 825 (1932) indicates that a plea of guilty may be withdrawn at any time after judgment. The Court in this case states as follows:

"\*\*\*the overwhelming weight of authority is that this provision confers a discretionary power upon the trial court to allow or disallow the change of plea\*\*\* the general rule in the absence of statute is that it is discretionary with the court to permit or to refuse to permit a plea of guilty to be withdrawn for the purpose of interposing a plea of not guilty, and the court's discretion in the matter will not be reversed except for an abuse of discretion."

In this particular case Mr. Lee Lim was charged with murder in the second degree and had entered a plea of guilty and in the course of events had been sentenced to an indeterminate term in prison, which indeterminate sentence was later found to be not authorized by law and for that reason Mr. Lee Lim was to be resentenced. At this time he requested that he be given leave to withdraw his plea of guilty and substitute a plea of not guilty. No showing was made in any manner whatsoever that there was any evidence to indicate that he was not guilty of the crime or that he



had not made a knowledgeable guilty plea nor was there any showing that he had made his guilty plea illadvisedly or without the advise of counsel. The court goes on to state:

"It was not made to appear that the Defendant had entered his plea of guilty in ignorance of his rights or that he was influenced unduly or improperly either by hope or fear or that it was entered by reason of mistake or misapprehension or undue influence. The motion was not supported by any allegations of fact which called for an exercise of discretion favorable to the request. There was no abuse of discretion by the trial court in refusing to permit Defendant to change his plea."

Although no such factors were found in this case, the Court seemed to indicate that if a plea of guilty were entered in ignorance of your rights or if it were influenced unduly or improperly either by hope or fear or if it were entered by mistake or misapprehension or undue influence that the trial court would be obligated to permit a change of plea. Failing such action by the trial court, that the appellate court would over-rule the trial court and allow a change of plea in the interest of justice and liberty and in seeing that Defendant receives the benefit of every constitutional right and guarantee bestowed upon him by the Constitution of the State of Utah and of the United States. .

This court once again in the case of State vs. Plumb 14 Utah 2d 124, 378 Pac. 2d 671 states that it is within the sound discretion of the trial court to determine whether or not to allow withdrawal of a guilty plea, subject to review by a superior court. However, the facts in this case also indicate that Defendant Plumb wished to change his plea after receiving the judgment and sentence from the district judge which was more severe than that which he had originally anticipated.



In the case of State vs. Larsen 560 Pac. 2d 335, Defendant Larsen sought to withdraw a plea of guilty after receiving a jail sentence upon a guilty plea for the possession of marijuana.

In the State of Utah vs. William Forsyth 560 Pac. 2d 337 (1977) Defendant sought to withdraw a guilty plea following plea bargaining with the prosecution which resulted in the dismissal of four counts of a five count indictment against him. This court reviewed that case finding that refusal to allow a change of plea was the discretion of the trial court but that it could be reversed on the basis of abuse of discretion but that in that particular case Defendant was fully aware and had participated in plea bargaining sessions with the prosecution and that pursuant to these negotiations with the presecution, Defendant had freely made the choice, fully informed, without undue influence, to plead guilty. It would seem to be established then, that this court has amply demonstrated on other occasions that it can and will review situations such as the one at bar in which a Defendant seeks to withdraw a plea of guilty and substitute a not guilty plea when the same have been denied such a change of plea by the trial court. Such a denial by the trial court may be over-ruled by this court upon a finding that the trial court abused its discretion

It should be noted that in all of the above and aforementioned cases Defendants do not allege that new evidence has appeared showing that the crime was not committed nor do they allege that they were unduly influenced or under duress or that they were illadvised or that they had no knowledge of the facts upon which the crime as charged was constituted. Rather they seek to withdraw their guilty plea as a result of the imposition of a sentence which

was more severe than that which they had anticipated. Their situation contrasts markedly with the situation of the Defendant-Appellant presently at bar. Although the court in this preceeding does not ordinarily consider evidence, leaving that function to the trial court, it is certainly essential to the consideration of this case that the facts underlying and upon which the crime was charged be presented and it is certainly fundamental to the case that this Court be presented with the facts which have arisen and been brought to light subsequent to the entrance of the plea of guilty and the incarceration of the Defendant-Appellant.

Defendant-Appellant is an uneducated woman, having left school at the age of fifteen years to run away with an older man. She is presently the mother of six children, the youngest being less than two years of age at this writing. She lives in Bountiful in a home which she purchased approximately two years ago.

On the 31st day of October, 1972, she purchased from Lyle's Used Cars in Ogden, Utah, a 1972 Chevrolet Station Wagon having a total price of \$3,995.00. She paid one thousand (\$1,000.00) dollars downpayment filling out an allegedly false credit application, a copy of which I have been unable to locate.

Lyle's Used Cars obtained financing for the balance of the price of the car through the Bank of Utah in the amount of \$2,995.00 plus sales tax and license bringing the total finance to \$3,185.00, which payment was made from Bank of Utah to Lyle's Used Cars.

Defendant subsequently obtained insurance on the automobile and made three payments in the amount of \$107.03 each upon the car, certainly probitive of her intent in purchasing and paying for the

automobile.

She then moved to Nevada where she hoped to obtain work as a waitress in a casino but was precluded from obtaining such due to union contracts in the state and was unable to receive welfare and thus was unable to pay for the car.

It is ironic that at this point, due to the death of her former husband approximately two years earlier that she was eligible for approximately five or six hundred dollars per month in survivor benefit payments to her children but that due to the stubbornness of the Federal bureaucracy of the Social Security system, she was not able to receive such payments until 1975, at which time she received a lump sum payment which was used as a downpayment on her home. Had she been receiving these Social Security payments which were the right of the children and herself in 1972 and 1973 as she should have been, it is doubtful that she would have had this problem and would have been able to make the payments on the automobile as intended.

Because she was unable to find work, she was unable to make such automobile payments and in approximately July 1973, the automobile in question was repossessed in Las Vegas, Nevada, with Bank of Utah causing a complaint to be filed against her in Weber County, Utah. She was arrested in Nevada and extradited to Utah and incarcerated in the Weber County Jail, to be held without bond. Subsequent to that time, she has spent approximately nine months in the jails and prisons of the State of Utah. The following information was unknown to her inasmuch as she had no way to discern it and also apparently was not known to her attorney at the time she changed her plea to guilty and was sentenced.

However, from the records of the Bank of Utah, the following has been learned and it certainly would seem to be significant in terms of whether the Defendant was guilty of the crime of which she was charged.

Bank of Utah records show that a check was issued in the amount of \$3,185.00 to Lyle's Used Cars. After the repossession of the car, the Bank of Utah received a high bid in the amount of \$3,055.00, at which price the automobile was sold. Subtracting \$3,055.00 from \$3,185.00 leaves the bank with a \$130.00 loss.

Section 59-15-5 of the Utah Code Annotated (1953) dealing with sales tax would indicate that in the event of a repossession made under the terms of the sales contract which would be the case in this situation, the vendor would be entitled to a refund credit or rebate of the sales tax on the uncollected balance of the sales price. Deducting this sales tax refund in the amount of \$137.00 which should have been the amount of the rebate from the \$130.00 loss, leaves the bank at this point with a profit of \$7.00. Adding to that \$7.00 profit the \$321.09 payments which were made by the Defendant-Appellant during the time she had the car, we arrive at a \$328.09 gain to the bank. Calculating interest at the approximate rate of 13 and 1/2 % would indicate that without allowing for payments made in terms of reduced interest that interest on that amount for the period of time which she had the car would be approximately \$287.00 which leaves the bank with a \$41.00 profit on the transaction.

It would appear from these facts that Lyle's Used Cars lost nothing inasmuch as they were paid completely and in full for the automobile which they sold. The Bank of Utah lost nothing

inasmuch as they were completely repaid on their loan together with interest. The only person who seemed to lose on this transaction was the Defendant-Appellant who paid an amount in excess of \$1,300.00 plus insurance on this automobile and received its use for a period of approximately eight months and has since then spent nine months incarcerated in Utah jails and prisons and a considerably longer amount of time under threat of incarceration as a result of this transaction.

It is clear from a perusal of the records that the automobile was sold to the Defendant-Appellant only because of the one thousand dollars (\$1,000.00) in cash which she had as a downpayment. The logic of both the bank and car dealer being that with that large a downpayment, the repossession could always be made thus minimizing or eliminating any risk whatsoever for the dealer or the bank.

Under the code section which the Defendant-Appellant was charged and convicted, which is Code Section 76-20-8 Utah Code Annotated (1953) which is the old section which was repealed and replaced by another section shortly after the acts of the Defendant-Appellant took place. It reads as follows:

"OBTAINING MONEY BY FALSE PRETENSES-Every person who knowingly and designedly, by false or fraudulent representations or pretenses, obtains from any other person any chose in action, money, goods, wares, chattels, effects or other valuable thing, with intent to cheat or defraud any person of the same, if the value of the property so obtained does not exceed \$50, is punishable as in cases of petit larceny, and when the property so obtained is of the value of more than \$50, the person so offending is punishable as in cases of grand larceny."

The controlling rule under which a person was convicted under the foregoing statute was laid down in State vs. Casperson,

71 Utah 68, 262 Pac. 294 in which it was stated:

"The essential element of crime of obtaining money by false pretenses was commission of actual fraud; Pretense must have been false in fact; If the victim gets what was pretended and what he bargained for there was no fraud or prejudice; "

This rule was followed in the case of the State vs. Morris

5 Utah 210, 38 Pac. 2d 1097 (1934):

\*\*\*\*The only reasonable inference, however, which may be drawn from the evidence before us is that the purchase corporation receive, and at the time of the trial securities satisfy, the amount owing upon the contract which is purchased. Under such facts may it be said that the Defendant is guilty of the crime for which he stands convicted? We are of the opinion that the question must be answered in the negative. Before recovery may be had in a civil action on the grounds of fraud, it must be established that the complaining party has sustained some damage on account of the fraud. Were this a civil case in which the purchasing company was seeking a money judgment against the Defendant on account of the fraud complained of, no recovery could be had because the evidence fails to show that the purchasing company sustained any injury. The mere fact that a party to a transaction may not have received all they bargained for, does not give rise to civil liability. For stronger reasons the crime of obtaining money by false pretenses is not established in the absence of evidence showing, or tending to show, that the claimed victim has sustained a pecuniary or property loss by reason of the transaction relied upon."

The cases that followed, i.e. State vs. Timmerman

88 Utah 481, 55 Pac. 2d 1320 (1936) and State vs. Nuttall

16 Utah 2d 171, 397 Pac. 2d 797 (1964) the following rules

seem to have been set down. Under 76-20-8 Utah Code

Annotated(1953) the following elements and proof of them had to concur.

1. There must have been false or fraudulent representations or pretenses.
2. Representations must have been made knowingly and designedly.
3. There must have been concurring intent to cheat or defraud persons to whom the false or fraudulent representations or pretense were made.
4. Something of value must have been obtained because of false or fraudulent representation or pretenses.
5. Party to whom false or fraudulent representation or pretenses were made must have parted with something of value.

of value in reliance upon false or fraudulent representations or pretenses believing them to be true.

In this instance the automobile dealer as is charged in the complaint, parted with nothing inasmuch as he received \$1000.00 downpayment and was paid the rest in full by the Bank of Utah within a very short period of time.

The Bank of Utah lost nothing inasmuch as payments were made upon the automobile and when the payments were not made upon the said automobile, the bank repossessed and sold the automobile showing a profit on the transaction.

Defendant-Appellant obtained nothing of value inasmuch as for the time period for which she used the automobile in question she paid the amount of approximately \$1,300.00.

In light of the foregoing facts and circumstances which have been and were uncovered subsequent to the entrance of the guilty plea while Defendant-Appellant was incarcerated in the Weber County Jail, Defendant-Appellant believes that substantial evidence and cause exists to justify the granting of leave to withdraw a plea of guilty inasmuch as it was entered by mistake and under a misconception of the nature of the charge. The State of Utah has no valid interest and or compunction to justify the further prosecution or the denial of a chance to prove her innocence in a court of law to the Defendant-Appellant when such convincing evidence and proof of her probable innocence by virtue of the failure of any of the parties involved to part with anything of value or to sustain any loss. The interests of the State of Utah of the judiciary of the prosecutor's office should run heavily toward vindication of those who have been accused wrongly and the protection of parties who may be parties and citizens of the State

of Utah who may be innocent of crimes of which they have been charged. Judges and trial judges in particular it would appear should have the duty of ascertaining the probability of guilt or innocence of parties which appear before them and when probability of such innocence does appear or is made known to the court it would seem to clearly be an abuse of discretion when such party making the allegation of innocence or facts which might show such innocence is denied the opportunity of presenting such evidence to the Court in order to prove such innocence and gain liberty for the party involved. This is especially true in Defendant-Appellant's case when as the mother of six children to support and care for, she stands accused of a felony and in danger of losing her liberty and her means to support her children as well as the love and affection of the children. The children through no wrong doing of their own stand to lose the support and affection and discipline of their mother. Every conceivable effort should be made and every conceivable lenience should be shown to allow her to prove her innocence and to remove herself from the possibility of incarceration.

## POINT II

DEFENDANT-APPELLANT WAS REPRESENTED BY INEFFECTIVE AND PERHAPS INCOMPETENT COUNSEL AND AS SUCH, DEFENDANT-APPELLANT WAS NOT AWARE OF HER RIGHTS NOR WAS SHE INFORMED ENOUGH TO MAKE AN INTELLIGENT, KNOWING DECISION AT THE TIME HER PLEA WAS CHANGED FROM NOT GUILTY TO GUILTY.

Defendant-Appellant, upon her incarceration and arraignment



received benefit of court appointed counsel inasmuch as she was indigent and unable to provide her own. Such counsel, the records shows, attended several hearings and urged her to change her plea to guilty apparently in an effort to resolve the case as expeditiously as possible and to avoid further work, discomfort and the consumption of further time on the part of counsel. Such records from the Bank of Utah as have been perused in order to bring forth the facts as set forth earlier were apparently not investigated by appointed counsel nor did there seem to be any interest on the part of appointed counsel in seeking to see that the County Attorney bring such records into Court.

Defendant-Appellant left school at the age of fifteen having attended only up until the eighth grade and certainly was not educated or versed in the law enough to have any conception of how to provide for her own defense. Rather she relied upon the counsel which had been provided for her by the Court and such counsel apparently made no effort whatsoever to ascertain any of the facts of the case and provide any defense whatsoever for the Defendant-Appellant. Counsel of this nature would seem to deprive the Defendant of her constitutional right to have and to make a knowing, willful and intelligent decision regarding changing her plea from not guilty to guilty. For these reasons the Defendant-Appellant should have been allowed by the trial judge to change her plea from guilty to not guilty and thus have been given the chance to prove her innocence and remove the threat of incarceration clouding her life at the present time.

Further, it can be maintained that inasmuch as Defendant received ineffective counsel she was thus denied her constitutional right

of counsel at all stages of proceedings and made an unknowing, illadvised and mistaken change of plea and thus the trial court could be said to have abused its discretion in failing to allow Defendant-Appellant to withdraw her guilty plea and substitute a plea of not guilty.

### POINT III

DEFENDANT-APPELLANT'S INCARCERATION IN THE WEBER COUNTY JAIL AND FAILURE TO OBTAIN RELEASE WITHER ON HER OWN RECOGNIZANCE OR ON BOND DURING THE PENDENCY OF THE TRIAL OF THIS MATTER TENDED TO PUT HER UNDER DURESS AND EXERT UNDUE INFLUENCE TOWARD THE WITHDRAWAL OF A NOT GUILTY PLEA AND THE ENTRANCE OF A GUILTY PLEA IN AN EFFORT TO BRING HER INCARCERATION TO AN END AND FIND OUT WHAT THE NATURE OF HER SENTENCE WOULD BE. THUS, ELICITING A GUILTY PLEA IN AN EFFORT TO GET THE MATTER OVER WITH.

The record shows that Defendant-Appellant was incarcerated either in the jails of the State of Nevada or in the Weber County Jail from a period beginning in July 1973 and was held without possibility of release having been denied O.R. release and unable as being indigent to obtain release on bond. Defendant thus being incarcerated had no way to investigate the facts leading to her arrest to peruse the bank's records or to in any other way prepare defense. Such defense had to be prepared by her appointed counsel or by others whom the State might appoint for that purpose and of course, in the interest of the State, her interests were not paramount by her counsel in preparing her defense. Thus, through incarceration and failure to obtain release on bond, Defendant was prejudiced in being unable to prepare for her defense or to check

any bank records which might be pertinent to her defense. Had she been able to obtain release, an intelligent perusal of the bank records perhaps through consultation with her attorney, may have shown that she had some defenses to the crime of which she was charged. Her incarceration made that impossible and thus it would seem such incarceration would put her under duress and would unduly influence her decision to plead guilty and get it all over with more quickly, not even knowing that she had some possible defenses to the crime with which she was charged. For these reasons her conviction upon her guilty plea should be set aside and such matter should be remanded to the lower court for a trial of a matter on the merits.

#### CONCLUSION

DEFENDANT-APPELLANT THEREFORE MAINTAINS THAT THE LOWER COURT IN REFUSING TO ALLOW HER TO WITHDRAW HER PLEA OF GUILTY AND SUBSTITUTE A NOT GUILTY PLEA ABUSES DISCRETION, WHICH DISCRETION SHOULD BE FREELY USED IN THE FAVOR OF INNOCENCE, LIBERTY AND TRIALS AND PROOF OF CASES OF GUILT OR INNOCENCE UPON THE MERITS OF FACT WHICH HAVE BEEN UNCOVERED IN THIS CASE CLEARLY SHOW THAT DEFENDANT-APPELLANT HAS A DEFENSE TO THE CRIME OF WHICH SHE WAS CHARGED AND THAT PERCHANCE, AS A MATTER OF FACT, IS NOT GUILTY OF ANY CRIME WHATSOEVER. BUT, THAT DETERMINATION SHOULD CERTAINLY BE MADE IN A TRIAL COURT. IT IS HARD TO SEE ANY VALID PURPOSE OR ANY JUSTIFIABLE REASON WHY THE STATE OF UTAH SHOULD SEEK TO INCARCERATE DEFENDANT-APPELLANT WHEN EVIDENCE EXISTS AND CAN BE SUBSTANTIATED UPON THE BANK'S RECORDS THAT IN FACT, SUCH A CRIME AS CHARGED WAS NEVER COMMITTED.

The thought that Defendant-Appellant has up until this time

spent nine (9) months in the prisons and jails of the State of Utah for a crime which she may in effect may not have committed, for a crime in which no one was defrauded, no one lost any money, would seem to be repugnant to the American ideal of fair play, equality, and justice for its citizens. This woman and her children have been punished enough, in fact, have been punished excessively for an act which the State has constituted a crime, an act of which there were no victims except for the Defendant-Appellant herself.

Our system of justice is not so harsh that it demands that the State continue persecuting someone under these circumstances. The lower court's denial of the motion and request to withdraw the guilty plea and to enter a plea of not guilty should be reversed and the case remanded to the District Court for a trial on the merits in which all evidence pertinent to the case may be presented.