

1977

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

Utah Supreme Court

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Robert B. Hansen; Attorney for Plaintiff and Respondent;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LORRAINE HUNTER,

Defendant-Appellant.

APPEAL FROM  
JUDICIAL  
COURT

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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

----- : -----  
BRIEF OF RESPONDENT  
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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an order denying appellant's motion in arrest of judgment and for leave to withdraw her plea of guilty. The motion was denied by the Honorable John F. Wahlquist, Judge in the District Court of the Second Judicial District, in and for the County of Weber.

DISPOSITION IN LOWER COURT

On October 15, 1973, appellant pleaded guilty to an amended information charging her with obtaining merchandise by false representation, exceeding \$100.00, in violation of Utah Code Ann. § 76-20-8 (1953), as amended. The plea was accepted by the Honorable John F. Wahlquist, District Court

Judge of the Second Judicial District. Appellant was subsequently sentenced on November 5, 1973, and placed on probation. The special conditions of the probation agreement were that appellant serve sixty days in the Weber County Jail and not deal in any form of credit.

Appellant was subsequently returned to the court in February of 1974 for violating the terms of her probation and was committed to the Weber County Jail. Thereafter she was transferred to the Utah State Prison for a 90-day diagnostic evaluation. Upon completion of the evaluation, the Division of Corrections recommended that probation be denied. Pending pronouncement of the final sentence, appellant was released on her own recognizance and fled the State. She subsequently returned to this jurisdiction and was arrested on March 14, 1977.

On March 21, 1977, a hearing was held before Judge Wahlquist and appellant made a motion in arrest of judgment and for leave to withdraw her plea of guilty. The motion was denied, and the court placed appellant in the Utah State Hospital in Provo for a further pre-sentence evaluation. It is from the denial of the motion in arrest of judgment and for leave to withdraw a plea of guilty that appellant appeals.

## RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the Second Judicial District Court denying appellant's motions affirmed.

## STATEMENT OF FACTS

During October of 1972 appellant purchased a 1972 Chevrolet Station Wagon from Lyle's Used Cars in Ogden, Utah. The purchase price was \$3,995.00. At the time of sale, appellant paid \$1,000.00 down and filled out a credit application making certain false representations. The balance of the purchase price was financed by Lyle's Used Cars through the Bank of Utah over a period of 36 months at the rate of \$107.03 per month. Appellant purchased insurance for her car under a name different from the one she used to purchase the car (Transcript of Hearing, p. 5).

Appellant received her payment book and made the first three payments. She thereafter moved to Las Vegas, Nevada, in order to obtain employment, but was unsuccessful. She was also unable to obtain welfare because of her non-residence and thus discontinued 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, and further filed a complaint with the Weber County Attorney's Office charging the appellant with obtaining merchandise by false representation in violation of Utah Code Ann. § 76-20-8 (1953), as amended. Appellant was subsequently arrested in Nevada on a Utah warrant and was extradited to Utah where she was incarcerated in the Weber County Jail on or about the 20th day of September, 1973. She was unable to raise bail, having been refused O.R. release, and remained incarcerated.

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

Appellant was arraigned on September 20, 1973, the Court having appointed Maurice Richards of Ogden, Utah, as counsel for the appellant (R.8). On October 10, 1973, appellant pleaded not guilty at her arraignment in District Court (R.12). On the day of the trial, October 15, 1973, she pleaded guilty to an amended information (R.13). Apparently the county attorney offered to recommend that appellant be placed on probation in return for a guilty plea (Transcript of Hearing for Imposition of Sentence and Motion of Counsel, p. 2-3).

(See also R.14.)

On November 5, 1973, 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. She was also ordered not to deal in any form of credit (R.14).

Appellant served her sixty days and was released on December 21, 1973 (R.17).

On February 15, 1974, appellant appeared before Judge Wahlquist to show cause why her probation should not be revoked (R.18,21). An affidavit had been filed alleging that appellant had charged gas at a Texaco Station in Ogden under a fictitious name (R.20). Another affidavit charged appellant with petty theft, to-wit: stealing two cartons of cigarettes in Wangsgard Motel (R.23). To these alleged violations she pleaded guilty (R.18,48-54).

Appellant was committed by Judge Wahlquist on February 15, 1974, to the Board of Corrections at the Utah State Prison for a 90-day evaluation (R.24). She was returned to the court on May 14, 1974, for sentencing, which was continued to May 20, 1974. She was released on her own recognizance in the meantime. Appellant thereafter left the State of Utah, not to return until 1977. On May 24, 1974, a bench warrant

was issued against the appellant (R.28).

On March 14, 1977, appellant was arrested by the Weber County authorities and incarcerated in the Weber County Jail.

On March 21, 1977, appellant 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 an order by Judge Wahlquist (R.37). On the same day, appellant filed a motion in arrest of judgment and for leave to withdraw plea of guilty, which motion was denied by Judge Wahlquist (R.40). The denial of appellant's motion was appealed to the Utah Supreme Court, and is the subject of this brief. On May 2, 1977, appellant was released on her own recognizance pending the outcome of the appeal by order of the Supreme Court of the State of Utah on May 2, 1977.

## ARGUMENT

### POINT I.

#### UTAH STATUTORY LAW PRECLUDES THE WITHDRAWAL OF A GUILTY PLEA AFTER JUDGMENT.

Appellant pleaded guilty to a charge of obtaining merchandise by false representation in violation of Utah Code Ann. § 76-20-8 (1953), on October 15, 1973 (R. 13). Judgment was entered in November 5, 1973 (R. 14). On March 21, 1977, some 4 and 1/3 years later, appellant through counsel filed a Motion in Arrest of Judgment and For Leave to Withdraw Plea of Guilty (R. 36). Said motion was denied (Transcript of Hearing for Imposition of Sentence), and this appeal was filed subsequently by appellant (R. 41).

Before addressing the merits of appellant's motion in Points II and IV, respondent respectfully submits that pursuant to Utah Code Ann. § 77-24-3 (1953), appellant is precluded from withdrawing her plea of guilty. The statute states in part:

"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." (Emphasis added)

Unless the emphasized portion of the above statute is disregarded or considered superfluous, the plain impact of its language is to allow guilty pleas to be withdrawn only before

judgment. Similarly, Section 77-34-1, Utah Code Ann. (1953) also precludes appellant's Motion in Arrest of Judgment. That particular section states in part:

"The motion in arrest of judgment must be made before or at the time the defendant is called for judgment." (Emphasis added).

Seemingly, then, without further consideration of the merits of appellant's motion, such an attempt to have the judgment arrested and guilty plea withdrawn and substitute with a not guilty plea should be dismissed as untimely. Further discussion and review of similar statutes in other states (infra) support respondent's view.

The Utah Supreme Court has reviewed on several occasions cases in which defendants have attempted to withdraw guilty pleas following judgment, but has addressed itself to issues involving abuse of discretion rather than to the issue of untimeliness of the motion itself.

In State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932), the defendant entered a plea of guilty to the charge of murder in the second degree and was sentenced to an indeterminate term of imprisonment in the Utah State Prison. The defendant was released on a writ of habeas corpus because the indeterminate sentence was not authorized by law. Upon his release, the defendant was immediately arrested and returned to the district court for the

imposition of a proper sentence. The defendant objected to the jurisdiction of the district court, and without waiving that objection, insisted on withdrawing his former plea of guilty as a matter of right. The district court denied the motion, and sentenced the defendant according to law. The Utah Supreme Court affirmed on appeal in a lengthy opinion directed largely to the question of the district court's jurisdiction. On the issue of withdrawal of the guilty plea, the Court stated that the statute was permissive and not mandatory, that the trial court's refusal to allow withdrawal would only be reversed upon a showing of an abuse of discretion, and that no abuse had been shown. The question of the timeliness of the motion was not addressed, presumably because the initial sentence was held void and the motion was therefore "before judgment."

In State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963), this Court considered the question of whether a lower court had committed error in refusing to allow a defendant to withdraw a plea of guilty after sentence had been pronounced. This Court concluded that an abuse of discretion had not been shown and affirmed the lower court. On the question of whether the motion had been timely made, the Court stated:

"Were it not for the holding in State v. Lee Lim, supra, it would be the writer's personal opinion that coram nobis should be the court remedy in Utah. (See State v. Telavera, 76 Ariz. 183, 261 P.2d 997, and People v. Wade, 53 Cal. 2d 322, 1 Cal. Rptr. 683, 348 P.2d 116)." 378 P.2d at 672

Judge Jones did not state why he felt the Lee Lim decision controlled the result in Plum.

In Egan v. Turner, 28 Utah 2d 143, 499 P.2d 286 (1972), defendant appealed to this Court from a decision of the District Court denying his petition for a writ of habeas corpus. In his petition, he alleged that the trial court had erred by refusing to permit him to change his plea after sentence had been pronounced. Defendant contended among other things that he had asked his counsel to request the trial court to permit him to change his plea to one of not guilty. In dismissing defendant's claim, this Court was unable to address itself to the issue of timeliness of such a request due to the fact that the record did not reveal whether defendant had applied to the trial court for permission to withdraw his guilty plea either before or after sentence was pronounced.

Subsequently, in State v. Garfield, 552 P.2d 129 (Utah 1976), this Court again had the opportunity to

address itself to the issue of whether a motion to withdraw a guilty plea is untimely if made subsequent to judgment. The Court again refused to allow such a change of plea following sentencing, but on the grounds that an abuse of discretion on the part of the trial court had not been shown.

The final two cases which have been heard by this Court involving motions to set aside guilty pleas following sentencing were State v. Soper, 559 P.2d 951 (Utah 1977), and State v. Harris, 585 P.2d 450 (Utah 1978). In Soper, the defendant became involved in a plea bargaining process between himself and two separate jurisdictions within the State. There occurred a breach of the plea bargain in one jurisdiction, but this breach was not called to the attention of his defense counsel or the court in either jurisdiction until some eight months after the breach occurred and five months following sentencing. The Supreme Court dismissed the appellant's contentions, but again on the grounds that no abuse of discretion had been shown. The Court did add however that one seeking to set aside a final order such as a sentence in a criminal case has the burden of producing convincing proof of a fact which constitutes a legal ground for setting aside such a sentence:

"A motion to set aside a plea after sentencing is addressed to the sound discretion of the trial court. Unless the allegations and



proof of facts have the effect of requiring the trial court, as a matter of law, to grant the motion, no abuse of discretion has been shown." 599 P.2d at 953, 954. (Emphasis added).

In Harris, supra, defendant's attempt to withdraw his guilty plea following an unfavorable sentence was rejected by this Court on the basis that no abuse of discretion had been shown in the trial court's refusal to grant the defendant's motion.

From an examination of the above authorities, it appears that the question of the timeliness of a motion to withdraw a plea of guilty after judgment and sentence has never been squarely put to this Court, nor has this Court ever held that a motion to withdraw a plea of guilty after judgment was properly granted.

Respondent therefore urges this Court to accept the rule embodied in Utah Code Ann. § 77-24-3 (1953), and to deny appellant's request to withdraw her plea of guilty as not timely. To do so would be in line with several courts of other states which have held that statutes similar to Utah's only allow withdrawal of guilty pleas before judgment. State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968); State v. Rinehart, 253 Iowa 1132, 125 N.W.

2d 242, 245 (1963); McConnell v. People, 157 Colo. 235, 402 P.2d 75, 77 (1965); and People v. Grand, 16 Cal. App. 3rd 27, 93 Cal. Rptr. 658 (1971).

Appellant cites two Colorado cases in support of her argument. Champion v. People, 124 Colo. 253, 236 P.2d 127 (1951); Gearhart v. People, 113 Colo. 9, 154 P.2d 47 (1944). It should be noted that in Gearhart, a motion for leave to withdraw a plea of guilty was denied. In the Champion case, the Colorado Supreme Court allowed defendant's guilty plea to be withdrawn because, among other reasons, defendant was not represented by counsel when he pled guilty, he did not understand the nature of the charges brought against him, and he did not understand the significance of pleading guilty. In 1964, however, in the case of Glaser v. People, 155 Colo. 504, 395 P.2d 461 (1964), the Colorado Supreme Court held that Rule 32(e) of the Colorado Rules of Criminal Procedure prohibited the withdrawal of a guilty plea after sentencing.<sup>1</sup> The implication of

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1 Rule 32(e) of the Colorado Rules of Criminal Procedure provides as follows:

" . . . A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended."

this Rule was again upheld in the later cases of McConnell v. People, supra; Bradley v. People, 485 P.2d 875 (Colo. 1971); and People v. Banks, 545 P.2d 1356 (Colo. 1976). In Banks the Court specifically held that a motion to withdraw a plea of guilty is addressed to the sound discretion of the court where the motion to withdraw is filed before sentencing. The Court, quoting from Glaser v. People, supra, reasoned as follows:

"'[t]here is no ambiguity in the rule [Crim. P. 32(e)] as adopted by this court. In plain language it says that a motion to withdraw a plea of guilty may be made only before sentence is imposed. Trial courts accept pleas of guilty to crimes after assurance that the defendant understands the consequences of that plea. The rule contended for by counsel for defendant would require that defendant also be satisfied with, and approve of, the consequences actually imposed by the court. . . ."

Examination of the cases heretofore cited, as well as a plain and simple reading of Utah Code Ann. § 77-24-3 (1953), leads to one inescapable conclusion - that finality of judgments should be accorded recognition and an accused should not be allowed to gamble with the Court's time and power. An accused should not be permitted to withdraw a guilty plea simply because the consequences turn out to be less favorable than when the plea was voluntarily and

intelligently made, particularly when the plea was tendered well over four years earlier. Respondent thus submits that the motion tendered by appellant in the case at bar was properly denied as untimely, and asks that this Court so hold.

#### POINT II

THE LOWER COURT DID NOT ABUSE ITS  
DISCRETION IN REFUSING TO ALLOW  
APPELLANT TO WITHDRAW HER GUILTY  
PLEA.

Appellant, having pled guilty to the offense with which she had been charged and thereby sentenced, returned involuntarily to the District Court approximately four and one-third years later and sought to withdraw her guilty plea. She has seemingly taken a "shotgun" approach in stating the grounds by which she feels her guilty plea should be withdrawn and a not guilty plea substituted. In her brief, she makes a flat allegation that the trial court abused its discretion in denying her motion, but does not give any specific examples or incidents as to how or why she may have been prejudiced. She does allege in Points II and III of her brief that she was denied effective assistance of counsel and that her plea was illicit through duress. Quite a substantial portion of her argument alleges that "new evidence" has been uncovered, which, if known at the time of her plea, may have provided her with a defense to the crime to which she pleaded guilty.

Appellant has more or less "lumped" her allegations together without giving specific examples or details of her alleged points of error. Respondent will, however, attempt to treat each allegation separately as far as possible for the sake of expedience, clarity, and hopefully the convenience of this Court.

Appellant has alleged that her motion to withdraw her guilty plea should have been granted by the lower court, and in so refusing there existed an abuse of discretion. The law in Utah is extremely clear on this point. As far back as 1932 when this Court decided State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932), the position of this Court has consistently been that a motion to withdraw a plea of guilty is addressed to the sound discretion of the trial court, and the trial court's decision can only be reversed where an abuse of discretion has been demonstrated. State v. Larson, 560 P.2d 335 (Utah, 1977), State v. Forsyth, 560 P.2d 337 (Utah 1977). This principle has recently been reaffirmed by this Court in the case of State v. Harris, 585 P.2d 450 (Utah 1978).<sup>2</sup>

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2 For other cases holding that Utah Code Ann. § 77-24-3 (1953) confere a discretionary power upon the trial court to allow or disallow the change of a plea, and such discretion will not be interfered with unless an abuse is shown, see the following: State v. Yeck, 566 P.2d 1248 (Utah 1977); State v. Olafson, 567 P.2d 156 (Utah 1977); State v. Gotschall, 570 P.2d 1029 (Utah 1977); State v. Garfield, 552 P.2d 129 (Utah 1976).

In determining whether this Court will find that a trial court has abused its discretion in denying a motion to set aside a judgment and allow a guilty plea to be withdrawn, a test has been set forth. In State v. Soper, 559 P.2d 951 (Utah 1977), the Utah Supreme Court, in denying petitioner's claim that his motion to vacate his plea of guilty should have been sustained, held that no abuse of discretion claim will be upheld unless facts are presented, which, as a matter of law, require that the trial court grant such a motion:

"A sentence in a criminal case is a final judgment, and one seeking to set aside such a final order has the burden of producing convincing proof of a fact which constitutes a legal ground for setting aside such a sentence. A motion to set aside a plea after sentencing is addressed to the sound discretion of the trial court. Unless the allegations and proof of facts have the effect of requiring the trial court, as a matter of law, to grant the motion, no abuse of discretion has been shown." 559 P.2d at 953, 954. (Emphasis added).

The Soper case is significant in that it parallels the case at bar in two respects: (1) in Soper the defendant remained silent, not moving for his guilty plea to be withdrawn until nine months after the plea was entered, and five months after sentencing. In the present case, appellant remained silent well over four years following her guilty plea and sentencing; (2) in both Soper and the present case

the motions to withdraw guilty pleas were made after sentencing.

It thus follows from Soper that appellant must allege and set forth facts which, as a matter of law, would require granting of her motion to vacate the guilty plea. Such a burden rests entirely upon her shoulders, and there is nothing in the record to substantiate her allegations of an abuse of discretion by the trial court.

It is noteworthy that this Court in Soper, when referring to the portion of its opinion wherein the burden of producing facts constituting legal grounds for setting aside judgments is placed on the petitioner, uses the term "convincing proof" in describing such facts. Perhaps a degree of proof such as "convincing" or "clear and convincing" is required. See People v. Cruz, 116 Cal. Rptr. 242, 526 P.2d 250 (1974). Be that as it may, appellant has not met such a standard, nor has appellant carried the burden of producing any facts to substantiate her allegations as required by State v. Soper, supra, and State v. Larson, supra.

In order for appellant's motion for withdrawal of her guilty plea to have been granted, it would seem that the plea itself must be made to appear void or defective because of one of the reasons set forth in State v. Plum, supra:

"It has not been made to appear that the accused entered his plea of guilty in ignorance of his rights, or that he was immature or illiterate, or that he was influenced unduly or improperly either by hope or fear, or that his plea was entered by reason of mistake, misapprehension or undue influence. . . ." 378 P.2d at 673.

The record does not substantiate a claim by appellant based upon any of the foregoing reasons. In her brief, she has alleged no facts tending to show an abuse of discretion.

A.

THERE HAS BEEN NO SHOWING, THAT  
APPELLANT'S PLEA WAS INVOLUNTARY.

There have been no facts set forth by appellant in the record which would indicate that her plea of guilty was anything but voluntarily and intelligently given. The record indicates that, having been advised of her rights by Judge Wahlquist, appellant pleaded guilty (R. 13). She had pleaded not guilty five days earlier (R. 12). Her plea of guilty was apparently entered with the understanding that the prosecutor would recommend probation at the sentencing hearing. The court sentenced appellant to serve 60 days in jail and thereafter to be placed on probation. The plea bargain was fulfilled, and appellant does not challenge her guilty plea on the basis that the plea bargain was breached.



It is noteworthy, however, that under Utah law, even if the trial court had not followed the prosecutor's sentencing recommendation, the guilty plea would have been valid and a motion to withdraw the plea based upon abuse of discretion by the trial court would have been frivolous. State v. Plum, supra; State v. Forsyth, supra; State v. Garfield, supra; State v. Harris, supra; Guglielmetti v. Turner, 27 Utah 2d 341, 496 P.2d 261 (1972).

If appellant is to have the guilty plea vacated as being involuntary or unintelligently given, several presumptions must be overcome. It has been held that when a defendant enters a plea of guilty upon the advice of a competent attorney, the plea is deemed to be intelligently entered. Guglielmetti v. Turner, supra, at 496 P.2d 262. In Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970), this Court said that a plea of guilty is presumed to be voluntary and knowledgeable. Similarly, the Arizona Supreme Court in State v. McCallister, 107 Ariz. 143, 483 P.2d 558 (1971), stated:

" . . . , a presumption exists that when a defendant who is represented by counsel changes his plea at trial from not guilty to guilty as a result of plea bargaining, he does so with full knowledge of the facts and consequences thereof. State v. Martinez, 102 Ariz. 215, 427 P.2d 533 (1967)." 483 P.2d at 560.

It cannot be said that the prosecution or the trial judge reneged on their portion of the plea bargain in the present case. If anything, appellant violated her part of the agreement when, after being released from jail and put on probation as agreed, she violated the terms of her probation. Her guilty plea was accepted in good faith after having been tendered in good faith. This is supported by the record in this case. Respondent therefore submits that appellant cannot now claim that her plea was anything other than voluntary and intelligent.

B.

THERE HAS BEEN NO SHOWING THAT  
APPELLANT'S PLEA WAS THE PRODUCT  
OF INEFFECTIVE OR INCOMPETENT  
COUNSEL.

Appellant alleges in Point II of her brief that she received the assistance of ineffective counsel, and thus her guilty plea was unknowing, ill advised, and mistaken. She bases this assumption on the theory that counsel urged her to change her plea to guilty in an effort to resolve the case as expeditiously as possible and to avoid further work, discomfort, and consumption of time. It is of extreme importance to emphasize that this theory propounded by appellant is totally unsupported by any factual representation whatsoever in the record in this case. What appellant has done some four years after her plea was

tendered is to finally recognize the inconvenience and ramification of her irreputable life-style, and now seek to vindicate her past through the legal process by conjuring up all the arguments usually set forth by those in her circumstance, one of these arguments being that her counsel is to blame for her present "unjustified" predicament. Here again, appellant alleges that her counsel failed to uncover evidence which would have served as a basis for her defense. This evidence is presented for the first time in her brief, and is nowhere to be found in the record. Such issues will be discussed more fully in respondent's Points III and IV, infra.

Focusing specifically on the allegation by appellant that her plea was involuntary because of ineffective and incompetent counsel, and thus the trial court abused its discretion in denying her motion to withdraw the plea, Respondent calls the Court's attention to State v. Forsyth, supra, at 560 P.2d 339, where the Court addressed a claim of ineffective assistance of counsel where a guilty plea was involved:

"In this proceeding defendant had the burden to persuade the court that his counsel failed in some manner to represent his interests, which resulted in prejudice to his defense, in which burden he failed. 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. On the basis of the record before us and what has been said herein, we are not persuaded that there was any such abuse of discretion."

It becomes evident from Forsyth, that: (1) the burden rests upon the defendant to show ineffective assistance of counsel; (2) if there is a failure to adequately represent the interests of the defendant, such a failure must result in prejudice to the defense; (3) such failure to adequately represent the defendant must appear on the record, and not be merely an allegation by one, who having plead guilty, now finds himself in distress. Referring to the latter technique, used quite frequently by those who find themselves incarcerated following conviction, this Court said in the Forsyth, opinion:

"In regard to the defendant's contention that he was not accorded the right to effective counsel, this is to be said: it is not at all uncommon for one who finds himself in such trouble as having been found or pleaded guilty to a crime to turn upon and impute fault to one who has previously tried to assist him. But the mere assertion of such a

charge does not prove the fact.  
This is especially so because the  
assertion is suffused with such  
self-interest that the trial court  
is not bound to believe it . . ."  
Id. at 339.

Respondent submits that appellant is one of the  
many convicted to which the above quote is directed.  
Appellant has not carried the burden showing that there has  
been ". . . a flagrant abuse of legal procedure as to  
amount to bad faith on the part of the lawyer." Jaramillo  
v. Turner, 24 Utah 2d 19, 465 P.2d 343 (1970); Forsyth, supra.

In State v. McNicol, 554 P.2d 203 (Utah 1976),  
this Court again addressed the issue of effective assistance  
of counsel and the burden incidental thereto on defendant  
to show such:

"A defendant bears the burden of  
establishing the inadequacy or in-  
effectiveness of counsel, and proof of  
such must be a demonstrable reality  
and not a speculative matter. . . ."  
554 P.2d at 204. (Emphasis added)

Respondent submits that appellant's allegations  
are purely speculative, without foundation in or outside  
of the record. She entered the plea, represented by  
competent counsel, and as such the plea must be deemed  
intelligently entered, Guglielmetti v. Turner, supra, and  
done with full knowledge of the facts and consequences  
thereof. State v. McCallister, supra.

Appellant seemed very willing at the time of trial to enter a guilty plea in exchange for 60 days in jail and probation thereafter. The record indicates the plea was entered following her being advised of her rights by Judge Wahlquist (R. 13). If such a plea was recommended by her counsel, it certainly will fall within the "ambit of an attorney's legitimate exercise of judgment as to the trial tactics or strategy. State v. McNicol, supra, at 554 P.2d 205. What was said in McNicol is equally appropriate in the present case, that being "there is no basis to hold counsel so inept the proceedings become a farce or sham." Id. 554 P.2d 205. In the present case, the proceedings were nothing other than orderly, and as such, respondent submits that no ineffective assistance of counsel resulting in prejudice to appellant's defense can be found in this case, on or off the record.

C.

THERE HAS BEEN NO SHOWING THAT APPELLANT'S PLEA WAS THE PRODUCT OF DURESS, COERCION, OR UNDUE INFLUENCE.

Appellant, in Point III of her brief, alleges that her guilty plea was elicited because of her self-imposed duress. She alleges that this duress was the result of her desires to bring her incarceration to an end and "find out" what her sentence would be. She also alleges that because of her incarceration due to her failure to obtain bond, she was unable to investigate the facts leading to her arrest.

Respondent respectfully submits that these claims are frivolous at best, and state no claim for relief. There simply are no facts to substantiate these claims--merely allegations. Even if there was a factual foundation on the record to support appellant's allegations, there would be no legal basis to sustain a finding that these allegations exerted undue influence to the point that her guilty plea was the result of coercion.

Cases in which evidence has been presented alluding to greater claims of coercion than in the present case have been rejected by this Court: Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971), where a husband pleaded guilty to free his wife from a felony charge, it was held:

~~a. Defendant did not argue coercion in Strong v. Turner.~~

22 Utah 2d 294, 452 P.2d 323 (1969), where defendant pleaded guilty in return for a promise by the prosecutor that remaining charges would be dropped, it was held no coercion existed. See also State v. Gutierrez, 20 Ariz.App. 337, 512 P.2d 869 (1973); and State v. Parle, 110 Ariz. 517, 521 P.2d 604 (1974).

Appellant has alleged that she was precluded from investigating her case because of her pre-trial incarceration. She apparently bases this theory on an assumption that her attorney could not or did not investigate her case. If this were the case, she should have moved the court for appointment of new counsel after so advising the court of her situation. Such was not done, and the record gives no indication that it should have been.

It is apparent on the face of appellant's brief that she experienced the normal anticipations and hopes of most people who are faced with incarceration. Such anxieties, said this Court in State v. Garfield, 552 P.2d 129 (Utah 1976), are not sufficient to invalidate guilty pleas:

" . . . a mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the prosecutor or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing." 552 P.2d at 131.

By comparison, it should be noted that in the present case



the prosecutor fulfilled appellant's hopes and desires by recommending probation after the guilty plea was tendered.

Certainly appellant should not, four years after her guilty plea, be allowed to claim that her plea was involuntarily made because she wanted to "hurry up" and find out the nature of her sentence. Nor should she be granted relief by merely alleging, without proof, that she was precluded from investigating her case due to incarceration. Such statements are self-serving allegations unsupported by facts in the record, and as the Court enunciated in Klotz v. Turner, 23 Utah 2d 303, 462 P.2d 705 (1969), form no basis for a finding that appellant's plea was coerced:

"Lastly, Klotz says that the allegations of his petition alone should entitle him to the full treatment,-- . . . We think and hold that under the Rule mentioned, its very language eliminates such red-carpet treatment on the sole say of one who has pleaded guilty and obviously attempts some kind of detour from his own voluntary admissions, and an uncontradicted record, by simply shouting 'coercion,' with no legitimate proffer of substance save his own contradictory gratuity." 462 P.2d at 706.

Respondent thus submits that appellant's allegations regarding coercion of her plea are unfounded in the record and should not be given credence by this Court.

### POINT III

APPELLANT'S ALLEGATIONS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HER MOTION IN ARREST OF JUDGMENT AND FOR LEAVE TO WITHDRAW HER PLEA OF GUILTY SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE SUCH ALLEGATIONS AND ANY FACTS TENDING TO SUPPORT THEM ARE NOT CONTAINED IN THE RECORD.

Appellant has alleged that her guilty plea should be withdrawn for several reasons, including allegations that the plea was the product of coercion, undue influence and duress; that she was provided ineffective assistance of counsel; and that "new evidence" has been uncovered which would have provided her a valid defense at trial. There are no facts in the record to support these allegations. Facts referring to claims that appellant has uncovered "new evidence" are merely conjecture and theory on her part, with no substantiation in the record. Issues related to appellant's allegations of ineffective assistance of counsel and a guilty plea illicit through duress have been dealt with previously. However, no facts substantiating any of these claims have been asserted or produced in the record by appellant. None of these issues were raised at the time set for trial when her guilty plea was entered. Suddenly, four years later when appellant finds herself in danger of being incarcerated again, these issues are raised for the first time.

This Court has held that it is not inclined to

reverse a condition on matters outside the record.

State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965). In State v. Kelsey, 532 P.2d 1001 (Utah 1975), this Court said that it would not review a claim of error not raised in the lower court, except in some unusual exigency where it is necessary to do so to rectify a manifest injustice. See also Jaramillo v. Turner, *supra*, at 465 P.2d 344.

More specifically, it has been held time and again by most courts in various states that factual matters presented in briefs filed by defendants but not found in the record are not entitled to consideration. State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972); People v. Strickland, 114 Cal.Rptr. 632, 11 Cal.3d 946, 523 P.2d 672 (1974); State v. Day, 7 Wash.App. 965, 503 P.2d 1098 (1972); McConnell v. People, 402 P.2d 75 (Colo. 1965).

Appellant has presented to this Court no reason to go outside the record for the purpose of considering those facts she has alleged in her brief but which are not found in the record. No "manifest injustice" has been shown, thus no need for rectification. Respondent thus submits that this Court is precluded from consideration of those issues presented by appellant which are not supported by facts in the record itself.

Appellant produced no transcript of the proceedings at which the guilty plea was taken. No witnesses were called or evidence presented at the hearing four years later on the motion to withdraw the guilty plea. What was said was merely a statement of theory propounded by the appellant. Since there is no transcript of the evidence in the proceedings in which the guilty plea was taken, a presumption of regularity and that the proceedings were carried on in conformity with law exist. Wheton v. Turner, 28 Utah 2d 47, 497 P.2d 856, cert. denied, 94 S.Ct. 81, 414 U.S. 862, 38 L.Ed.2d 112, reh. den. 94 S.Ct. 1459, 415 U.S. 939, 39 L.Ed.2d 498. There is thus no need for this Court to review the proceedings below, and appellant's claim should be dismissed without further consideration.

#### POINT IV

APPELLANT'S ALLEGED DEFENSES TO THE CRIME OF OBTAINING MERCHANDISE BY FALSE PRETENSES ARE NOT VALID NOR SHOULD THEY BE CONSIDERED ON APPEAL.

In appellant's brief, a theory as to why she should not be convicted as charged is presented. Appellant also alleges that the false credit application which she filled out is not to be found.

Before addressing the merits of her claim, respondent submits that by her plea of guilty, appellant has admitted the existence of all of the elements of the

necessity for the taking of evidence, Farrow v. Smith, 541 P.2d 1107 (Utah 1975); Combs v. Turner, supra; and waiving the right to be convicted by proof beyond all reasonable doubt. State v. Tourtellotte, 564 P.2d 799 (Wash. 1977). In Combs, this Court said:

"A plea of guilty dispenses with the necessity of proof, and the issue of innocence or guilt cannot here be relitigated any more than it could be after a jury verdict of guilty." 483 P.2d at 439.

Appellant, by now asking this Court to overturn the trial judge, thereby allowing a not guilty plea to be entered and her "defense" presented, is in effect asking this Court to hold that her unsubstantiated theory has merit, thus having the effect of relitigating the matter to which she pled guilty. This is contra to this Court's thinking as well as other state courts. The reason is obvious, as stated by the Iowa Supreme Court in State v. Rinehart, supra:

". . . it may be observed that if the mere fact that a defendant who has pleaded guilty and been sentenced may then be permitted to withdraw his plea because he has, or claims to have, a defense, he would then be permitted to gamble on the sentence; and if it did not please him, to demand a trial. . . ." 125 N.W.2d at 245.

A time lapse of more than four years has passed between the plea of guilty and sentencing, and the motion

to withdraw the guilty plea. To require the State to prosecute this case again and try it on its merits would be grossly prejudicial to the State, particularly in the area of locating witnesses and key documents. Some witnesses may have moved during the past four years, and documents may have been misplaced or lost.

Assuming arguendo that appellant's alleged defenses could be examined by this Court, respondent submits that they are not persuasive. Appellant argues that the crime of obtaining merchandise by false pretenses was not committed because the auto dealer assigned the fraudulent finance agreement to the bank, and the victim, therefore, lost nothing. The logical extension of this argument is that a thief could steal any item without committing a crime as long as the owner was properly insured, because the owner would be compensated for his loss. This argument is clearly without merit.

Appellant also claims that inasmuch as the car was recovered and resold, the bank suffered no out of pocket loss and the crime of false pretenses was not committed. Again, the extension of this argument is that a thief commits no crime unless the stolen goods are disposed of and the proceeds dissipated. This argument too is without merit.

Finally, appellant argues that the fact that some payments were made on the car, and that the car was insured, conclusively demonstrates a lack of fraudulent intent. These factors are probative of the petitioner's intent, but they must be weighed against the fact that the appellant did fill out a fraudulent credit application. Unless the appellant intended to make payment in full at the time the falsified application was made, she cannot make out this defense. Even on the facts as alleged by appellant, it cannot be said that reasonable minds could not differ as to the appellant's intent.

Respondent submits that appellant's defense theories are without merit and should not be considered.

#### CONCLUSION

Respondent respectfully submits that appellant's petition should be dismissed for the following reasons: (1) the motion in arrest of judgment and for leave to withdraw a plea of guilty was untimely pursuant to Utah Code Ann. § 77-24-3 (1953); (2) the trial court, in denying appellant's motion, did not abuse the discretion vested in it by Utah Code Ann. § 77-24-3 (1953); (3) appellant's plea was intelligent and voluntary, and not illicit through undue influence, coercion, or duress or ineffective

counsel; (4) allegations by appellant are not supported by facts contained in the record; (5) appellant's alleged defenses to the crime of obtaining merchandise by false pretenses are not valid and should not be considered on appeal.

Respectfully submitted,

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