

1997

# State of Utah v. Joshua Dean Roundy : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff and Appellee.

vs.

JOSHUA DEAN ROUNDY,

Defendant and Appellant.

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Case No. 970330-CA

Priority 2

**BRIEF OF APPELLANT**

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APPEAL FROM ORDER ENTERING DEFENDANT'S GUILTY PLEA HELD IN  
ABEYANCE AND FROM THE JUDGMENT AND SENTENCE IMPOSED AS A  
CONSEQUENCE THEREOF ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT,  
WASHINGTON COUNTY, HONORABLE JAMES L. SHUMATE PRESIDING

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**UTAH COURT OF APPEALS  
BRIEF**

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CKET NO. 970330-CA

**FILED**

**FEB 14 1998**

**COURT OF APPEALS**

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IN THE UTAH COURT OF APPEALS

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 )  
 Defendant and Appellant, ) Priority 2

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BRIEF OF APPELLANT

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APPELLATE JURISDICTION

The power to hear and decide this appeal is conferred upon the court of appeals by provision of Utah Code Ann. § 78-2a-3(2)(e).

ISSUES AND STANDARDS

1. Can a plea of guilty held in abeyance by agreement pursuant to the provisions of Title 77, chapter 2a, Utah Code Annotated 1953, as amended, be entered and sentence imposed after the term of the agreement has expired? This is a question of law, reviewed for correctness. *See State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993).

2. Can such an agreement be terminated without first serving the defendant with an order to show cause why it should not be terminated? Question of law. *See Thurman, supra*.

3. Can a judge who has declared that he cannot hear a case as the result of prejudice against counsel unilaterally "reassume" jurisdiction for the purpose of entering judgment by default against persons who are represented by said attorney when counsel in reliance upon the judge's earlier declaration, fails to appear at a scheduled hearing? Question of law. *See Thurman, supra.*

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Defendant relies upon the plain language of Utah Code Ann. §77-2a-4 which reads in relevant part as follows:

If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that the defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered.

#### STATEMENT OF THE CASE

**Nature of the Case.** This is an appeal from an order of the Fifth Judicial District Court, the Honorable James L. Shumate presiding, by which defendant's plea in abeyance was ordered entered.

**Proceedings in the Lower Court.** Defendant resolved a criminal proceeding by terms of an agreement under which he plead guilty to driving under the influence of alcohol, which plea was to be held in abeyance for a period of 12 months pursuant to the terms of a written agreement which was

approved by the court. Thereafter, the state's prosecutor moved the court for an order entering defendant's plea of guilty.

**Proceedings in the Lower Court.** The district court ordered the plea-in-abeyance agreement terminated and entered defendant's plea of guilty.

#### RELEVANT FACTS

Defendant was charged with a criminal offense in October 1990. R 001. He entered into a plea in abeyance agreement on January 29, 1996, under the terms of which his guilty plea to a charge of driving under the influence was to be held in abeyance for a period of twelve (12) months, after which it could be withdrawn and the case would be dismissed. R 052-54.

The state attempted to terminate the agreement and have defendant's plea entered by motion which was filed on March 12, 1997, almost two months after the plea in abeyance agreement had expired by its express terms. R 057-61. The motion alleged that defendant had been convicted of driving under the influence during the term of the abeyance agreement. R 057-61. The state's prosecutor served defense counsel with the motion by placing a copy of it in counsel's file at the county attorney's office. R 058. No order requiring defendant's appearance was issued by the court or served upon the defendant.

In February 1997, Judge Shumate had declared that his personal prejudice against defendant's attorney compelled him to recuse himself in all cases in which Mr. Pendleton was acting as counsel. Accordingly, counsel did not notify defendant of the pending motion because it was apparent that Judge Shumate would not and indeed could not act in this matter and that he would recuse himself when the matter came on for hearing. Such had been Judge Shumate's practice since first declaring his prejudice against counsel. R 064-66.

When the matter was called on for hearing, Judge Shumate granted the state's motion notwithstanding the following: (1) Judge Shumate had previously stated that he would not hear Mr. Pendleton's cases; (2) no order had issued requiring the defendant to appear and show cause; (3) no evidentiary hearing was conducted; and (4) the abeyance period had expired prior to the initiation of any action by the state's prosecutor. R 062-63, 067-70.

Defendant attempted to have the order set aside. R 064-66. The state successfully resisted the motion on the grounds that the rules of criminal procedure do not expressly recognize the right to petition the district court to reconsider its rulings. R 077. Defendant filed a timely notice of appeal from Judge Shumate's order. R 075-76.

#### SUMMARY OF ARGUMENT

Proceedings to terminate defendant's plea-in-abeyance were not timely initiated, nor was defendant properly brought before the court for an evidentiary hearing.

#### ARGUMENT

Proceedings to terminate a plea-in-abeyance agreement must be initiated "at any time during the term of the plea in abeyance agreement." Utah Code Ann. § 77-2a-4. The defendant must be brought before the court on an order to show cause. *See id.* And an evidentiary hearing must be conducted wherein the court determines whether or not the defendant has breached the agreement. *See id.* The state's prosecutor failed to timely initiate proceedings to terminate the plea in abeyance. *Cf. State v. Moya*, 815 P.2d 1312 (Utah App.1991).

Moreover, having recused himself from all matters wherein Mr. Pendleton was acting as counsel, it was improper for Judge Shumate to undertake to rule upon this matter. A judge should

not refuse to hear a case except upon some constitutional, statutory, or ethical basis. Inasmuch as Judge Shumate had indicated his inability to be fair and impartial in cases in which Mr. Pendleton was a participant, it was improper for him to arbitrarily reverse the position he had earlier taken and to render judgment in these proceedings.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the district court's order purporting to terminate the plea-in-abeyance agreement and enter defendant's guilty plea was improperly entered and must be reversed.

RESPECTFULLY SUBMITTED this 14 day of February, 1998.

  
\_\_\_\_\_  
Gary W. Pendleton  
Attorney for Defendant and Appellant

MAILING CERTIFICATE

I do hereby certify that on this 14 day of February, 1998, I did personally mail two true and correct copies of the above and foregoing document to:

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\_\_\_\_\_  
Gary W. Pendleton