

1978

State of Utah v. Frederick William Albert : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert B. Hansen; Attorney for Respondent Hansen and Hansen; Attorneys Appellant

Recommended Citation

Brief of Respondent, *Utah v. Albert*, No. 15551 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/999

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

FREDRICK WILLIAM ALBERT,

Defendant-Appellant.

:
:
:
Case No.
15551
:
:
:

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR
DUCESNE COUNTY, STATE OF UTAH, THE
HONORABLE ALLEN B. SORESENSEN, JUDGE.

ROBERT B. HANSEN
Attorney General

MICHAEL L. DEAMER
Deputy Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84111

Attorneys for Respondent

HANSEN AND HANSEN

250 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorneys for Appellant

FILE

JUN 20 1967

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I: THE TRIAL COURT ADEQUATELY DETERMINED THAT APPELLANT'S PLEA WAS BOTH VOLUNTARY AND GIVEN WITH AN UNDERSTANDING OF THE CONSEQUENCES OF A GUILTY PLEA-----	2
POINT II: UTAH CASE LAW CONCERNING DISTRICT COURTS' APPLICATION OF <u>BOYKIN V. ALABAMA</u> , 395 U.S. 238 (1968), ADEQUATELY PROTECTS A DEFENDANT'S CON- STITUTIONAL RIGHTS DURING THE TAKING OF A GUILTY PLEA-----	6
POINT III: APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL-----	7
CONCLUSION-----	9

CASES CITED

Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969)-----	8
Boykin v. Alabama, 395 U.S. 238 (1968)-----	2,3,6
State v. Forsyth, 560 P.2d 337 (Utah 1977)-----	6,8
Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969)-----	6

STATUTES CITED

Utah Code Ann. § 76-6-404 (1953), as amended-----	1
Utah Code Ann. § 76-6-412(1)(c) (1953), as amended---	1

RULES CITED

Rule 11, Federal Rules of Criminal Procedure-----	6
---	---

IN THE SUPREME COURT OF THE
STATE OF UTAH

:-----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
15551

FREDRICK WILLIAM ALBERT, :

Defendant-Appellant. :

:-----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with theft as defined in Utah Code Ann. § 76-6-412(1)(c) (1953), as amended, in violation of Utah Code Ann. § 76-6-404 (1953), as amended, a Class A misdemeanor.

DISPOSITION IN THE LOWER COURT

Appellant pled guilty to the crime as charged in the information and was sentenced to serve six (6) months in the Duchesne County Jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment of the court below.

STATEMENT OF THE FACTS

On October 26, 1977, appellant appeared for arraignment before the Honorable Allen B. Sorensen, Judge of the Fourth Judicial District Court. Appellant was not represented by counsel because he had been unable to pay his attorney a retainer fee and his attorney therefore refused to appear without payment of the fee (T.1,2).

Appellant nevertheless attempted to enter a guilty plea, but the court refused to entertain the plea until appellant was represented by counsel (T.2).

The prosecuting attorney then asked the court, "If they confer with counsel today, may this come back on at the end of the calendar?" (T.2).

Appellant conferred with attorney George E. Mangan and the matter came before the court again (T.20). At this proceeding appellant entered a plea of guilty (T.4).

ARGUMENT

POINT I

THE TRIAL COURT ADEQUATELY DETERMINED THAT APPELLANT'S PLEA WAS BOTH VOLUNTARY AND GIVEN WITH AN UNDERSTANDING OF THE CONSEQUENCES OF A GUILTY PLEA.

The constitutional standard for the taking of a guilty plea is set out in Boykin v. Alabama, 395 U.S. 238

(1968), which requires a court both to advise a defendant of the several constitutional rights that will be waived by entry of a guilty plea and to determine that the appellant's plea is being given voluntarily and with an understanding of its consequences.

In the present case appellant appeared in court with William Lester Mach, who had participated in the theft with appellant and who had been charged with the same crime. Mr. Mach also had been initially represented by Mr. Van Sciver. Mr. Mach's case was called up first and the court conducted the following interrogation:

"THE COURT: To the charge contained in the information what is your plea?

MR. MACH: Guilty.

THE COURT: How old are you?

MR. MACH: Thirty one.

THE COURT: How much schooling have you had?

MR. MACH: High school.

THE COURT: Can you read and write?

MR. MACH: Yes, sir.

THE COURT: You understand that the penalty for this offense is up to a year in the Duchesne County jail?

MR. MACH: I do.

THE COURT: Have you seen the inside of the Duchesne County jail?

MR. MACH: Yes, sir.

THE COURT: You still want to plead guilty?

MR. MACH: Yes, sir.

THE COURT: You understand you have the right to compel the county attorney to prove everything contained in this charge against you to a jury of eight people and beyond a reasonable doubt?

MR. MACH: I do.

THE COURT: And you are asking me to let you waive that right?

MR. MACH: Yes.

THE COURT: You have a right to appeal that decision if it should be against you to the Supreme Court of this State.

MR. MACH: Yes.

THE COURT: You are asking me to let you waive that right, is that correct?

MR. MACH. Yes.

THE COURT: By entering a plea of guilty, you understand, you are doing more than just admitting the offense. You are entering that kind of verdict against yourself. Do you understand that?

MR. MACH: Yes, sir.

THE COURT: Has anybody promised you anything for entering a plea of guilty?

MR. MACH: No, sir.

THE COURT: Has anybody made any threats against you as to what would happen if you didn't enter a plea of guilty?

MR. MACH: No.

THE COURT: Do you have any reason to think the court would pronounce a different kind of judgment if you pleaded guilty than it would if you were tried and found guilty?

MR. MACH: No, sir.

THE COURT: What happened that makes you want to plead guilty? What did you do that brought this charge against you?

MR. MACH: I had some stolen property in my possession.

THE COURT: Did you know at that time that it was stolen?

MR. MACH: Shortly prior to that, yes.

THE COURT: What was the property?

MR. MACH: A lamp and a chandelier.

THE COURT: The court finds that the defendant is understandingly and voluntarily offering to enter a plea of guilty and directs entry of that plea." (T.6-8).

Immediately following the Mach matter, the appellant's case was called up and the court conducted the following inquiry:

"THE COURT: To the charge contained in the information what is your plea?

MR. ALBERT: Guilty, Your Honor.

THE COURT: Were these the same transactions?

MR. DRANEY: Yes, Your Honor.

MR. MANGAN: Yes.

THE COURT: You were with Mr. Mach I take it?

MR. ALBERT: Yes, sir.

THE COURT: Did you hear the questions I asked him about his wishes to enter a plea of guilty?

MR. ALBERT: Yes, sir, I did.

THE COURT: Would any of your answers to those questions be any different?

MR. ALBERT: No, sir.

THE COURT: The court finds the defendant is voluntarily offering to enter a plea of guilty and directs the clerk to enter that plea." (T.4).

Although the court did not conduct an extensive interrogation of appellant, Judge Sorensen was satisfied that appellant had listened to the questions asked and

responses given in the Mach case and that appellant would have given the same responses. Satisfied that appellant was pleading voluntarily and understood the consequences of his plea, the court accepted the guilty plea.

Respondent submits that the questioning of appellant in conjunction with the detailed interrogation reflected in the record of the companion matter meets the Boykin standard.

POINT II

UTAH CASE LAW CONCERNING DISTRICT COURTS'
APPLICATION OF BOYKIN V. ALABAMA, 395 U.S. 238 (1968),
ADEQUATELY PROTECTS A DEFENDANT'S CONSTITUTIONAL RIGHTS
DURING THE TAKING OF A GUILTY PLEA.

Respondent rejects the notion that Utah should adopt Rule 11 of the Federal Rules of Criminal Procedure (attached as Exhibit "A"), in order to safeguard a defendant's rights when a guilty plea is offered. If a new statute is required, the Utah legislature is the appropriate body to consider and impose such a statute. However, respondent contends that adoption of Rule 11 is not required to dispose of this case and that the court should limit its ruling to the more narrow issue of the trial court's compliance with Boykin, supra, Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969), and State v. Forsyth, 560 P.2d 337 (Utah 1977). These latter

Utah cases are state interpretations of Boykin, supra, and require that a guilty plea be made voluntarily, without undue influence or coercion and that the ends of justice be served by not allowing a person to enter a plea of guilty to a crime he did not commit.

POINT III

APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL.

Although appellant's former attorney, Robert Van Sciver, did not appear at the arraignment, he had previously consulted with his client. (See Exhibit "B".)

"MR. ALBERT: . . . We were in his office yesterday afternoon and talked with him at the time. . . And that he informed us of what was going to take place. There was a reduction in the charge if we were to come over here and waive our preliminary and plead guilty and be able to get it taken care of without his presence." (T.2).

In spite of appellant's willingness to enter his plea without an appearance by his attorney, the trial court refused to allow such a plea. The record is silent on the circumstances of the hiring of attorney George Mangan, although appellant's brief (page 8) indicates that Mr. Mangan happened to be in the courtroom on other business. Appellant conferred with Mangan and was accompanied by him when he returned to the courtroom to offer his plea.

Although appellant suggests that these facts are remarkably similar to those of Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969), a close analysis reveals that the only real similarity is that both cases involve a guilty plea. Alires had had no prior contact with an attorney and the one appointed in the courtroom exhibited no interest in the case beyond his \$100 fee and did not even remember at sentencing that he represented Alires. In the present case, such egregious facts are wholly absent. Appellant's unsupported allegation of ineffective assistance of counsel does not meet his burden of persuading the court that counsel failed in some manner to represent his interests. This Court considered the issue in State v. Forsyth, 560 P.2d 337 (Utah 1977), and made these remarks concerning Forsyth's complaint:

"It is not at all uncommon for one who finds himself in such trouble or 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. . . ."
560 P.2d at 339.

Beyond his unsubstantiated complaint, appellant has offered no evidence to support his claim, and respondent urges the Court to reject it.

CONCLUSION

As appellant knowingly and voluntarily entered his guilty plea and received adequate, effective assistance of counsel, respondent asks the Court to affirm the judgment of the lower court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

MICHAEL L. DEAMER
Deputy Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent

PLEAS

Rule 11

Rule 11. Pleas

(a) **Alternatives.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) **Nolo Contendere.** A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

Rule 11 RULES OF CRIMINAL PROCEDURE

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to

the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of *nolo contendere*, or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or *nolo contendere*, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372.

Historical Note

Effective Date of Amendments Proposed Apr. 22, 1974; Effective Date of 1975 Amendments. Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub.L. 94-64, effective Dec. 1, 1975, except with respect to the amendment adding subd. (e)(6) of this rule, effective Aug. 1, 1975, see section 2 of Pub.L. 94-64, set out as a note under rule 4 of these rules.

Notes of Committee on the Judiciary, House Report No. 94-247. A. Amendments Proposed by the Supreme Court. Rule 11 of the Federal Rules of Criminal Procedure deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or *nolo contendere*. The Supreme Court's amendments to Rule 11(b) provide that a *nolo contendere* plea "shall be accepted by the court only after due consideration of the views of the parties and the interest

of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advice that the court must give to the defendant before accepting the defendant's plea of guilty or *nolo contendere*. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or *nolo contendere* plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court

EXHIBIT "B"

DENNIS L. DRANEY
DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P. O. Box 1886
Roosevelt, UT 84066
(801) 722-4661

IN THE JUSTICE COURT OF THE STATE OF UTAH, ROOSEVELT PRECINCT

THE STATE OF UTAH,)
Plaintiff,)

WAIVER OF PRELIMINARY
HEARING

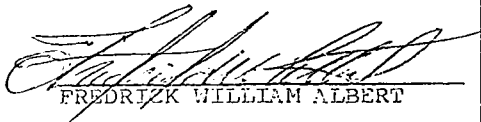
-vs-

FREDRICK WILLIAM ALBERT,)
Defendant.)

Criminal No. 827

Comes now the Defendant Fredrick William Albert,
being represented by his attorney, Robert Van Sciver, and
being fully advised of his rights to a Preliminary Hearing
on the charge in this matter, and does hereby waive his right
to said hearing.

DATED this 26th day of October, 1977.


FREDRICK WILLIAM ALBERT

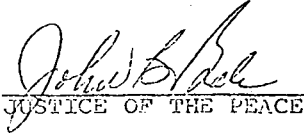
ROBERT VAN SCIVER
Attorney for Defendant

SIGNED before me this 26th day of October, 1977.

FILED
In the District Court Duchsene
County - State of Utah

OCT 28 1977

CLERK OF DISTRICT COURT
Duchene County, Utah


JOHN B. BECK
JUSTICE OF THE PEACE

59426