

1997

Mark Anthony Duran aka Mark Anthony Bresqko v. State of Utah : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Christine Soltis; Assistant Attorney General; Attorney for Plaintiff and Appellee State of Utah.

David W. Brown; Attorney for Defendant for Defendant & Appellant Mark Anthony Duran.

Recommended Citation

Brief of Appellant, *Duran v. Utah*, No. 970486 (Utah Court of Appeals, 1997).

https://digitalcommons.law.byu.edu/byu_ca2/1014

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

APPEAL 50
A10

970486-CA

IN THE UTAH COURT OF APPEALS

MARK ANTHONY DURAN,
aka MARK ANTHONY BRESQKO,

Plaintiff-Appellant,

vs.

STATE OF UTAH,

Defendant-Appellee.

BRIEF OF APPELLANT

Appeal No. 970486-CA

Appeal from the Second District Court, Davis County
Judge Jon M. Memmott
Argument - Priority No. 3

Attorney for Plaintiff and
Appellee State of Utah,

CHRISTINE SOLTIS
ASSISTANT ATTORNEY GENERAL
160 East 300 South
P. O. Box 140854
Salt Lake City, UT 84114-0854

Attorney for Defendant and
Appellant Mark Anthony Duran,

DAVID W. BROWN
Professional Plaza, Suite 220
2727 West 3500 South
West Valley City, UT 84119

FII

NOV 12 1997

COURT OF APPEALS

DAVID W. BROWN
Professional Plaza, Suite 220
2727 West 3500 South
West Valley City, UT 84119

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTION	1
ISSUES PRESENTED AND STANDARD OF REVIEW	1
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE	2
COURSE OF PROCEEDINGS	3
FINAL DISPOSITION	4
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	6
ARGUMENT.	7
I. The Trial Court Clearly Violated Appellant's Constitutional Rights By Failing To Comply With Rule 11(e) Of The Utah Rules Of Criminal Procedure When Accepting His Guilty Plea	7
A. The Plea Was Not Knowingly And Voluntarily Entered	9
B. The Court Failed To Explain The Nature And Elements Of The Crime To Duran	11
C. The Record Does Not Establish A Factual Basis For The Guilty Plea	14
D. One Of The Most Glaring Errors Was The Court's Failure To Inform Duran Of The Consequences Of His Plea	15
E. The Trial Court Never Informed Duran Of His Right To Withdraw The Guilty Plea	16
II. The Lower Court Misinterpreted The Case Law In Ruling That The Petition Was Barred For Failure To File A Direct Appeal	18
CONCLUSION	21
CERTIFICATE OF SERVICE	22
ADDENDUM	23
Transcript of Change of Plea Hearing, July 27, 1982	24
Ruling, Denying Petition, July 14, 1997	33
Utah Code Ann. § 76-6-401(3)	37
Utah Code Ann. § 76-6-404	38
Utah Code Ann. § 76-6-412	39
Utah Code Ann. § 77-13-6	40

TABLE OF AUTHORITIES

CASES:

<u>Brady v. United States</u> , 397 U.S. 742, 755 (1970)	16
<u>Boykin v. Alabama</u> , 395 U.S. 238, 243-44 (1969)	2, 11
<u>Casida v. Deland</u> , 866 P.2d 599, 601 Utah Ct. App. 1992)	1
<u>Gerrish v. Barnes</u> , 844 P.2d 315, 318-19 (Utah 1992)	1
<u>Haines v. Kerner</u> , 404 U.S. 519 (1972)	19
<u>Hart v. Risley</u> , 585 F.Supp. 269, 273 (D. Mont. 1984), aff'd, 772 F.2d 911 (9th Cir. 1985), <u>cert. denied</u> , (1985)	20
<u>Henderson v. Morgan</u> , 426 U.S. 637 (1976)	2, 8, 13
<u>McCarthy v. United States</u> , 394 U.S. 459 (1969)	2, 8-9, 14
<u>Parsons v. Barnes</u> , 871 P.2d 516, 519 (Utah 1994)	18, 19
<u>State v. Abeyta</u> , 852 P.2d 993, 995 (Utah 1993)	17
<u>State v. Beavers</u> , 859 P.2d 9, 12 (Utah Ct. App. 1993)	1
<u>State v. Breckenridge</u> , 688 P.2d 440, 443 (Utah 1983)	8, 12, 13
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987)	8, 9-12, 16-17
<u>State v. Hoff</u> , 814 P.2d 1119, 1123-24 (Utah 1991).	8
<u>State v. Holsworth</u> , 607 P.2d 845, 848-49 (Wash. 1980)	20
<u>State v. Morello</u> , 927 P.2d 646, 648 (Utah Ct. App. 1996)	10, 20
<u>State v. Parsons</u> , 781 P.2d 1275, 1278 (Utah 1989)	10, 11
<u>State v. Stilling</u> , 856 P.2d 666, 671 (Utah Ct. App. 1993)	9, 15
<u>State v. Valencia</u> , 776 P.2d 1332, 1335 (Utah Ct. App. 1989)	11
<u>State v. Vasilacopulos</u> , 756 P.2d 92, 94 (Utah Ct. App. 1988), <u>cert. denied</u> , 765 P.2d 1278 (Utah 1988)	9, 16, 18
<u>State v. Yates</u> , 918 P.2d 136, 138 (Utah Ct. App. 1996)	1
<u>Stewart v. State</u> , 830 P.2d 306, 308 (Utah Ct. App. 1992)	1

<u>United States v. Burt</u> , 802 F.2d 330, 335-36 (9th Cir. 1986) . . .	20
<u>United States v. Goldberg</u> , 862 F.2d 101, 106 (6th Cir. 1988) . .	14
<u>Willett v. Barnes</u> , 842 P.2d 860, 861 (Utah 1992)	13, 15

STATUTES, RULES OR OTHER AUTHORITIES:

18 U.S.C. § 924(e) (1)	20
Rule 11(e) of the Utah Rules of Criminal Procedure	
.	1, 2, 5, 6-11, 15-16, 19
Rule 65B of the Utah Rules of Civil Procedure	2, 5
Utah Code Ann. § 76-6-401	7, 11
Utah Code Ann. § 76-6-404	2, 4
Utah Code Ann. § 76-6-412(1) (a)	4
Utah Code Ann. § 77-13-6	2, 17
Utah Code Ann. § 78-2a-3(2) (e), (f)	1

JURISDICTION

This case involves a second degree felony and a writ for extraordinary relief; therefore, the Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(e), (f).

ISSUES PRESENTED AND STANDARD OF REVIEW

I. Whether the lower court erred in dismissing the Petition as frivolous, when the trial court failed to comply with the majority of the requirements in Rule 11(e) of the Utah Rules of Criminal Procedure.

The standard of review, since the matter presents questions of law, is that no deference is accorded to the trial court's conclusions. The conclusions are reviewed for correctness. Stewart v. State, 830 P.2d 306, 308 (Utah Ct. App. 1992); Casida v. Deland, 866 P.2d 599, 601 (Utah Ct. App. 1993); State v. Yates, 918 P.2d 136, 138 (Utah Ct. App. 1996). See also, State v. Beavers, 859 P.2d 9, 12 (Utah Ct. App. 1993) (appellate courts review conclusions of law under non-deferential correctness of error standard when the facts are undisputed.) The facts should not be in dispute in this case.

II. Whether the lower court misinterpreted the case law in ruling that the Petition was barred for failure to file a direct appeal.

The same standard of review applies: The errors are questions of law which are reviewed by the Court for correctness, requiring no deference to the lower court's conclusions. Gerrish v. Barnes, 844 P.2d 315, 318-19 (Utah 1992).

DETERMINATIVE STATUTES

Statutes, rules and cases which are determinative of the respective issues include the following: Rule 11(e) of the Utah Rules of Criminal Procedure (formerly Rule 11(5)); Rule 65B of the Utah Rules of Civil Procedure; Utah Code Ann. §§ 77-13-6, 76-6-404; and the United States Supreme Court decisions in Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Henderson v. Morgan, 426 U.S. 637 (1976); McCarthy v. United States, 394 U.S. 459 (1969).

STATEMENT OF THE CASE

This appeal is from the July 14, 1997, ruling by Judge Jon M. Memmott of the Second District Court, denying Appellant's pro se Petition for Post Conviction Relief to Vacate Conviction. The Court ruled that the Petition was frivolous on its face and dismissed said Petition pursuant to Rule 65B(b)(5).

The Petition, which was filed pro se by Mark Anthony Duran, aka Mark Anthony Bresqko (hereinafter "Duran" or "Appellant"), raises numerous constitutional infirmities in his guilty plea of July 27, 1982, to the second degree felony charge of theft, Utah Code Ann. § 76-6-404. Appellant entered a guilty plea pursuant to an oral plea agreement, in which a third degree felony count was dismissed.

The transcript shows the guilty plea was not knowingly and voluntarily entered. The Court did not comply with Rule 11(e) of the Utah Rules of Criminal Procedure. The trial court failed to establish a factual basis for the crime, that Appellant obtained or exercised unauthorized control over another's vehicle with the intent to

permanently deprive the owner of said property. The Court did not explain the nature and elements of the crime to Appellant. No statement in advance of plea or plea affidavit was used to explain the elements of the crime or the constitutional rights to Appellant.

The Court failed to ascertain and obtain from the Appellant a waiver of his constitutional rights pertaining to: his presumption of innocence, the right to a speedy trial before an impartial jury, the right to confront and cross-examine witnesses in open court, and the right to compel the attendance of defense witnesses. The Court did not inform Appellant of the minimum and maximum sentence for such a felony.

The Court failed to advise Appellant of any right to withdraw his guilty plea, or the time frame in which to withdraw such a plea.

Duran claims the trial court erred in failing to comply with Rule 11 and by not ensuring that the guilty plea was knowingly and voluntarily entered. The lower court's denial of said Petition as frivolous is clearly erroneous and should be reversed. In the alternative, this Court should remand the case for further proceedings in the Second District Court.

COURSE OF PROCEEDINGS

Duran was charged in the Second District Court with second and third degree felonies. On July 27, 1982, he entered a guilty plea to theft of a motor vehicle, a second degree felony. Despite a Rule 402 Motion to reduce the charge to a third degree felony, Duran was

sentenced to one to fifteen years in the Utah State Prison. Duran has served and completed that sentence. However, Duran is still suffering the consequences of said conviction inasmuch as he is incarcerated in the Limon Correctional Facility in the State of Colorado. Based in part upon the second degree felony conviction from the Second District Court, Duran has been sentenced to a life sentence as an habitual criminal in the State of Colorado with a parole eligibility date only after serving 40 years. Without the conviction from the Second District Court, Duran would not be subjected to punishment as a habitual criminal.

Duran did not file a direct appeal of the 1982 judgment and conviction.

FINAL DISPOSITION

On or about October 4, 1994, a Petition for Post-Conviction Relief to Vacate Judgment was filed. The court's final ruling denying said Petition was entered on or about July 14, 1997. Duran filed a timely appeal thereof.

STATEMENT OF THE FACTS

1. Appellant was charged in the Second District Court with theft of a motor vehicle, a second degree felony pursuant to Utah Code Ann. §§ 76-6-404, 76-4-412(1)(a)(ii). Appellant entered a guilty plea on July 27, 1982, pursuant to an oral plea agreement in which another felony count was dismissed. (See transcript, attached hereto as Addendum (hereinafter "Add." at 24-32.) The trial court refers to the charge as "theft," and not theft of a motor vehicle.

2. No statement in advance of plea or plea affidavit was used to explain the elements of the crime or the constitutional rights to Appellant. Add. at 25-31.

3. The transcript shows the guilty plea was not knowingly and voluntarily entered. The court did not comply with Rule 11 of the Utah Rules of Criminal Procedure. Add. at 25-31.

4. The trial court failed to establish a factual basis for the theft, that Appellant obtained or exercised unauthorized control over another's vehicle with the intent to permanently deprive the owner of said property. The court did not explain the nature and elements of the crime to Appellant. Add. at 25-31.

5. The court failed to ascertain and obtain from the Appellant a waiver of his constitutional rights pertaining to: the right to a speedy trial before an impartial jury, the right to confront and cross-examine witnesses in open court, and the right to compel the attendance of defense witnesses. Add. at 25-31.

6. The court did not inform Appellant of the minimum and maximum sentence for such a felony. Add. at 25-31.

7. The court failed to advise Appellant of any right to withdraw his guilty plea, or the time frame in which to withdraw such a plea. Add. at 25-31.

8. Plaintiff's Petition for Post Conviction Relief to Vacate Conviction was denied by the Court on July 14, 1997. Pursuant to Utah Rule of Civil Procedure 65B(b)(7), said Petition was dismissed as frivolous on its face. Add. at 33-36. Appellant then timely appealed said dismissal.

9. Appellant is incarcerated in the Limon Correctional Facility in Colorado on a life sentence as an habitual criminal. He must serve 40 years before being eligible for parole. If the conviction from the Second District Court is set aside, Appellant will not be subject to the 40-year commitment.

SUMMARY OF ARGUMENT

The lower court committed plain error in dismissing Appellant's Petition for Post-Conviction Relief to Vacate Conviction as frivolous. This Court should reverse the lower court's dismissal on the basis of manifest error.

The trial court's total disregard for Rule 11 of the Utah Rules of Criminal Procedure in accepting the guilty plea requires reversal. The transcript of said plea colloquy shows that the plea was not knowingly and voluntarily entered and that the basic due process requirements of Rule 11 were ignored. The court failed to explain the elements of the second degree felony charge of theft to Duran. There was no factual basis for said plea. Duran was never informed of his right to withdraw the guilty plea. The court never informed Duran of the minimum and maximum sentence for such a felony.

The lower court, in dismissing the Petition as frivolous, did not deal with the significant constitutional violations of Duran's rights during the change of plea hearing. Instead, the court mistakenly found that by entering his guilty plea, Duran had admitted all essential elements of the crime and waived all normal jurisdictional effects. See Ruling, Add. at 34. The court further

found that the Petition could not be granted because Duran failed to file a direct appeal. Add. at 34.

The court's findings are not consistent with the overwhelming case law that such obvious unconstitutional convictions can be addressed through collateral attacks at any time.

ARGUMENT

I. The Trial Court Clearly Violated Appellant's Constitutional Rights By Failing To Comply With Rule 11(e) Of The Utah Rules Of Criminal Procedure When Accepting His Guilty Plea.

The facts in this case are undisputed. All of the pertinent facts are contained in the transcript of the July 27, 1982 change of plea hearing. See Add. at 24-32. At the time the Second Judicial District Court accepted Appellant's guilty plea to the second degree felony of theft of a motor vehicle, it did not establish that said guilty plea was knowingly and voluntarily entered. The record shows Appellant's due process rights were violated at said hearing.

Appellant's constitutional rights were violated when the trial court failed to comply with Rule 11 of the Utah Rules of Criminal Procedure, which states:

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses and that by entering the plea, these rights are waived;

(4) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

Utah R. Crim. P. 11(e), (f).

The transcript shows obvious violations of subparagraphs (2), (3), (4), (5), and (7) of Rule 11(e). The major violations included not establishing the plea was voluntary, not explaining the nature and elements of offense to Duran, not explaining minimum and maximum sentences, including the possibility of consecutive sentences, not advising Duran of his right to file a motion to withdraw his plea, and not explaining the right to confront and cross-examine witnesses.

Various cases support Appellant's position that such total failure to comply with Rule 11 renders the guilty plea fatally flawed. See, State v. Breckenridge, 688 P.2d 440, 443 (Utah 1983); State v. Gibbons, 740 P.2d 1309 (Utah 1987); State v. Hoff, 814 P.2d 1119, 1123-24 (Utah 1991); Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Henderson v. Morgan, 426 U.S. 637 (1976); McCarthy v. United States,

394 U.S. 459 (1969). When the guilty plea has been accepted in violation of Rule 11, the case should be remanded to give the defendant a chance to plea anew. McCarthy, 394 U.S. at 492.

Duran's limited plea colloquy clearly establishes that the court failed to comply with Rule 11(e). Although the current standard requiring strict adherence to Rule 11(e) was not established until State v. Gibbons, 740 P.2d 1309 (Utah 1987), the trial court's inquiry fails miserably under any test, particularly the "record as a whole" test. State v. Vasilacopulos, 756 P.2d 92, 94 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988). The test in 1982 required a showing that the court had substantially complied with the constitutional and procedural requirements. State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993).

A. The Plea Was Not Knowingly And Voluntarily Entered.

"A guilty plea must be knowingly and voluntarily made in order to protect a defendant's due process rights." State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993) (citing State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987)). When the court significantly departs from constitutional and procedural requirements it creates doubt as to the knowing and voluntary nature of the guilty plea. Stilling, 856 P.2d at 671. The determination of whether there has been substantial compliance with these requirements turns on the facts of the individual case. Id.

Courts have typically looked at the affidavit which is signed during the change of plea hearing and the plea colloquy to determine if the defendant's plea was knowingly and voluntarily

entered. "The use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point, in the pleading process." Gibbons, 740 P.2d at 1313.

The trial court may not rely on either defense counsel or affidavits to satisfy the specific requirements of Rule 11(e). State v. Vasilacopulos, 756 P.2d at 94. "Rather, with or without an affidavit or defense counsel's advice, the trial court must conduct an on-the-record review with defendant of the Rule 11(e) requirements." Id.

No affidavit or statement in advance of plea was used during Duran's July 27, 1982, hearing. Although the lack of an affidavit does not render the plea involuntary, it does force the court to review all of defendant's constitutional rights during the plea colloquy. In this case, the trial court failed to explain the consequences of his plea, did not ascertain whether Duran understood the nature and elements of the theft charge, did not determine whether there was a factual basis for the plea, failed to explain the right to confront and cross-examine witnesses or to compel the attendance of defense witnesses, and did not explain the right to withdraw the guilty plea. See Rule 11(e); Add. at 25-31.

The plea colloquy clearly was "materially and fatally defective" in a number of ways. State v. Morello, 927 P.2d 646, 648 (Utah Ct. App. 1996). The information provided to Duran at said hearing is a stark contrast to the plea colloquy in State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989), in which the court stated, "It is

clear from the record that great care was taken to ascertain the voluntariness of his plea."

Appellant's plea was not knowingly and voluntarily entered when there was no written affidavit or statement in advance of plea and the only information provided to Appellant regarding his constitutional rights was the brief plea colloquy with the court, which ignored the basic due process requirements of Rule 11.

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 394 U.S. 238, 241-42 (1969).

B. The Trial Court Did Not Explain The Nature, Elements of The Crime.

The plea colloquy shows that the trial court did not comply with Rule 11(e)(4), which requires a finding that Duran understood the nature and elements of the offense.

The type of brief, conclusory inquiry posed by Duran's trial judge has been frowned upon by the courts. See, State v. Valencia, 776 P.2d 1332, 1335 (Utah Ct. App. 1989). The defendant's "understanding of the elements of the charges and the relationship of the law and the facts may not be presumed from a silent or incomplete examination." Id. at 1335.

A guilty plea cannot be "knowing" when defendant does not "understand the elements of the crimes charged and the relationship of the law to the facts." State v. Gibbons, 740 P.2d at 1312.

[T]he factual elements of the charges against the defendant must be explained in the taking of a guilty plea so that the defendant understands and admits those elements:

[B]ecause a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts...

The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty...."

Id. at 1313.

The court did not explain to Duran the elements of the felony theft charge. To be found guilty of theft, the elements require that the defendant exercise or obtain unauthorized control over the property of another with the purpose of permanently depriving him of said property. Utah Code Ann. §§ 76-6-401(3), 404. Further, the court did not establish a factual basis for the alleged motor vehicle theft. The court's attempt to explain the elements and establish a factual basis was limited to the following:

THE COURT: What was your involvement in this and just the part of Count Two?

MR. DURAN: Just riding out to Bountiful. That's it.

THE COURT: Oh, what was taken?

MR. DURAN: From the car?

THE COURT: Well, I don't know. Theft, a felony of the second degree, did obtain or exercise unauthorized control--

MR. DURAN: The car?

THE COURT: It's a car?

MR. DURAN: Right

THE COURT: You were with somebody else, is that it?

MR. DURAN: Yes, sir.

THE COURT: Both of you did it together; is that correct?

MR. DURAN: Yes, sir.

THE COURT: Where were you going to go with the car?

MR. DURAN: Out to Bountiful.

THE COURT: Where did you take the car, from what city?

MR. DURAN: Salt Lake.

Transcript of July 27, 1982, hearing; Add. at 29-30.

The decision in State v. Breckenridge, 688 P.2d 440 (Utah 1983), supports Duran's position that the above-quoted element/factual

colloquy was constitutionally lacking. After analyzing the plea colloquy, the court in Breckenridge concluded that the defendant did not understand the nature and elements of the crime to which he pled guilty. The court stated that the transcript recited "no factual basis from which we might conclude that an arson ever occurred." Id. at 443. The court stated that the essential element of arson, that a person intentionally damaged property, had not been shown. Id.

In the instant case, the transcript shows that the court never outlined the elements of theft of a motor vehicle and never established by Duran's admissions or otherwise that he exercised unauthorized control over a motor vehicle with the purpose of permanently depriving the owner of said vehicle. Duran's statements to the court, that he was "just riding out to Bountiful," that he did "it" with "somebody else," and that they travelled from Salt Lake to Bountiful, fail to establish the crucial element of Duran's intent to permanently deprive the owner of said vehicle. Add. at 29-30.

Intent is such a crucial element that failure to address it requires reversal. In Henderson v. Morgan, 426 U.S. 637 (1976), a plea to second degree murder was deemed involuntary where the defendant was not informed that the intent to cause the victim's death was an element of the crime.

Duran's admissions, which more closely describe the offense of joy riding, fail to establish the required factual basis for the alleged theft. In fact, it would appear from the court's colloquy that it was not even aware that the theft involved a vehicle. At one point, the court asked, "What was taken?" Duran responded, "From the

car?" The trial court then responded, "Well, I don't know," and then made a brief and ineffective attempt to describe the theft. Add. at 29-30. Since the court obviously was confused about the charges, it is logical to conclude that Duran did not understand the nature and elements of the offense.

Appellant did not have the luxury of a written affidavit or statement in advance of plea. The only information he had pertaining to his constitutional rights was what the court provided to him during the plea colloquy. Therefore, even when this Court considers the "record as a whole," it is obvious the record fails to pass constitutional muster. The record seemingly mandates a reversal for a blatant violation of Appellant's rights. See, Willett v. Barnes, 842 P.2d 860, 861 (Utah 1992). The court's failure to comply with Rule 11 and satisfy itself there was a factual basis for the defendant's plea is not deemed harmless error. See, United States v. Goldberg, 862 F.2d 101, 106 (6th Cir. 1988).

The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

McCarthy v. United States, 394 U.S. 459, 467 (1969).

C. The Record Does Not Establish A Factual Basis For The Plea.

The court cannot be satisfied that a guilty plea is knowing and voluntary unless the record establishes facts that would place the defendant at risk of conviction should the matter proceed to trial.

Willett, 842 P.2d at 862. This requirement "has been described as the need for a factual basis for the plea." State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993). In Willett, the defendant filed a writ of habeas corpus to set aside his guilty plea to first degree murder. The court held that the trial court failed to establish a factual basis for the guilty plea. The following plea colloquy was found to be insufficient to establish said factual basis:

MR. WATSON: Perhaps the court would want to inquire whether or not there is a factual basis from this particular defendant with regard to the entry of this plea Your Honor.

THE COURT: Suppose you state for the court briefly Mr. Willett how exactly it happened on the 20th of November?

MR. HARLEY WILLETT: Well, I aided and abetted my father.

THE COURT: In doing what?

MR. HARLEY WILLETT: In the commission of killing Mr. Dan Okleberry.

THE COURT: I suppose that is adequate Mr. Watson.

Willett, 842 P.2d at 861-62.

When this Court compares the plea colloquy in Willett with the trial court's colloquy with Duran, it is clear that Duran's rights also were seriously violated. There is no way that Duran's guilty plea was entered based upon a sufficient factual basis.

D. One Of The Most Glaring Errors Was The Court's Failure To Inform Duran Of The Consequences Of His Plea.

One of the most glaring errors committed by the trial court was its total disregard for Rule 11(e)(5), which states that the court must find that the "defendant knows the minimum and maximum sentence ... including the possibility of the imposition of consecutive sentences."

The record of the plea colloquy is conspicuously absent in any reference to a minimum or maximum sentence which could be imposed

upon Duran for the second degree felony. The court never mentions that Duran could be sentenced to the Utah State Prison for the indeterminate sentence of 1 to 15 years for a second degree felony.

The United States Supreme Court has held that the defendant must be "fully aware of the direct consequences" of the plea. See, Brady v. United States, 397 U.S. 742, 755 (1970).

Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered. The basis for that duty is found in Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-12, 23 L.Ed.2d 274 (1969), where the United States Supreme Court stated: "What is at stake for an accused facing [punishment] demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."

State v. Gibbons, 740 P.2d, 1309, 1312 (Utah 1987).

The trial court neglected to inform Duran of the full consequences of his plea, "namely, the possibility of the imposition of consecutive sentences." State v. Vasilacopulos, 756 P.2d 92, 94 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988). The court was fully informed that Appellant was being sentenced on unrelated charges on August 18, 1982, just one week prior to the August 24, 1982, sentencing on the motor vehicle theft. Add. at 31. The plea colloquy lacks any reference to the possibility of Duran's sentence running concurrently or consecutively with any other charges.

E. The Trial Court Never Informed Duran Of His Right To Withdraw The Guilty Plea.

Rule 11(e) (7) requires the court to advise defendant of the time limits for filing any motion to withdraw the plea. A review of

the transcript shows the trial court made no reference to Duran having any right to withdraw his guilty plea. Add. at 25-31.

Utah Code Ann. § 77-13-6 governs the withdrawal of guilty pleas. At the time Duran entered his plea in 1982, § 77-13-6(2) read: "A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court." § 77-13-6(2) (1980); State v. Abeyta, 852 P.2d 993, 995 (Utah 1993). The statute was amended in 1989 to add the requirement that a motion to withdraw a guilty plea must be made within 30 days after entry of said plea. Abeyta, 852 at 995.

In State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987), the court noted that the statutory provision governing the withdrawal of the guilty plea sets no time limit for filing a motion to withdraw said plea. See Utah Code Ann. § 77-13-6 (1980).

Under the statute in place in 1982, Duran simply must show "good cause" to withdraw his guilty plea. The numerous constitutional infirmities outlined throughout this Brief clearly establish good cause.

The court's failure to advise Duran of the time limits for filing a motion to withdraw the guilty plea is not grounds to set the plea aside, but "may be the ground for extending the time to make a motion under Section 77-13-6." Utah R. Crim. P. 11(f). Therefore, although the pro se Petition may not have specifically requested to withdraw the guilty plea, Duran requests that if this case is remanded to the Second District Court that he be permitted to file a formal

motion to withdraw his guilty plea at that time. It is an abuse of discretion to deny a motion to withdraw a guilty plea when the defendant did not have full knowledge and understanding of the consequences of his plea. State v. Vasilacopulos, 756 P.2d at 95.

There is no question that Duran's constitutional rights were violated at the time the trial court accepted his guilty plea. Any of the enumerated errors listed above are sufficient grounds to grant said Petition. The court did not take the required steps to ensure that the plea was knowingly and voluntarily entered, and that Duran had consciously waived his numerous constitutional rights.

II. The Lower Court Misinterpreted The Case Law In Ruling That The Petition Was Barred For Failure To File A Direct Appeal.

In dismissing the Petition as frivolous, the lower court cited two cases which stand for the proposition that this Petition could not be granted because Duran had not exercised his rights in filing a direct appeal. See Ruling, Add. at 34.

However, one of the cases cited by the court, Parsons v. Barnes, 871 P.2d 516, 519 (Utah 1994), supports Duran's position that his Petition is a proper means to attack the constitutional infirmities of his guilty plea. "Habeas relief is available where a defendant has suffered 'obvious injustice' or 'substantial and prejudicial denial of a constitutional right.'" Id. at 519. The court stated that normally such petitions are no substitute for appellate review and such issues should be raised on direct appeal. "However, where 'unusual circumstances are present to justify the failure to raise the issue on direct appeal, a court may entertain

such a claim raised for the first time in the habeas corpus petition.'" Id. The court in Parsons, even without a showing of unusual circumstances, went on to consider the merits of the constitutional arguments. Id.

Duran has met the "unusual circumstances" test. The plea colloquy ignored the Rule 11(e) requirements to such an extent that the injustice is obvious. The failure to inform Duran of his right to withdraw the guilty plea, the minimum and maximum sentence, including consecutive sentences, and the nature and elements of the felony, are such substantial and prejudicial constitutional violations that they satisfy the exception to the general rule.

Duran's argument that his Petition is not only timely but raises significant constitutional issues is enhanced by the fact that the trial court **never** informed him of his right to withdraw a guilty plea or to file any appeal related thereto. See hearing transcript, Add. at 24-32.

Since Duran had not been represented by counsel until the filing of this appeal, he should not be held to the same stringent pleading standards as if he had been represented by counsel. Haines v. Kerner, 404 U.S. 519 (1972). Duran apparently did not file a motion to withdraw his guilty plea, but if this Court remands the case for further proceedings in the Second District Court, he should be permitted to file a motion at that time.

Since Duran is facing 40 years as an habitual criminal in the State of Colorado, based upon the enhancements which include the prior 1982 conviction from the Second District Court, the argument

that this Court should consider the constitutional validity of such a prior conviction is even stronger. For example, under the Armed Career Criminal Act (hereinafter "ACCA"), 18 U.S.C. § 924(e)(1), a defendant who is convicted of being a felon in possession of a fire arm receives an enhanced sentence of at least 15 years if he has three prior convictions for a serious drug offense or a violent felony. Courts must consider constitutional challenges to the validity of prior convictions under the ACCA. The present use of a prior conviction in a sense renews the constitutional violation and requires that present constitutional standards be applied. United States v. Burt, 802 F.2d 330, 335-36 (9th Cir. 1986); see also, Hart v. Risley, 585 F.Supp. 269, 273 (D. Mont. 1984), aff'd, 772 F.2d 911 (9th Cir. 1985), cert. denied, (1985); State v. Holsworth, 607 P.2d 845, 848-49 (Wash. 1980).

The case law under the ACCA clearly permits constitutional challenges to the validity of prior convictions. These cases strengthen Duran's position that the lower court's cursory dismissal of his Petition without addressing the merits of the significant constitutional errors was totally inappropriate.

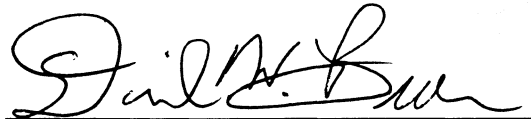
The availability of the transcript of the plea colloquy from 1982 provides further evidence that Duran's Petition should not be summarily dismissed. In State v. Morello, 927 P.2d 646 (Utah Ct. App. 1996), the court upheld the dismissal of a motion to withdraw guilty plea which was brought 12 years after the conviction. However, a crucial factor in the court's decision was that the transcript no longer was available. Id. at 648. Duran has provided a full

transcript for the Court's review, and there is no reason not to address the Petition on its merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court and grant the Petition for Post-Conviction Relief to Vacate Conviction. In the alternative, this Court should reverse the lower court's Ruling and remand for further proceedings in the Second District Court. If necessary, Duran should be permitted to file a Motion to Withdraw Guilty Plea.

DATED this 12th day of November, 1997.

A handwritten signature in cursive script, appearing to read "David W. Brown", written over a horizontal line.

David W. Brown
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copy of the foregoing BRIEF OF APPELLANT were hand delivered on this 12th day of November, 1997, to the following:

Christine Soltis
Assistant Attorney General
160 East 300 South
P. O. Box 140854
Salt Lake City, UT 84114-0854

A handwritten signature in cursive script, appearing to read "David W. Brown", is written over a horizontal line.

ADDENDUM

EXHIBIT-B

-EXH 103
89CR430
3/29/90
M.M.E.

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY

STATE OF UTAH

-o0o-

STATE OF UTAH,)	
)	
Plaintiff,)	Criminal No. 3967
)	
vs.)	REPORTER'S TRANSCRIPT
)	
MARK ANTHONY DURAN,)	OF PROCEEDINGS
)	
Defendant.)	

BE IT REMEMBERED that on Tuesday, July 27, 1982,
the above-entitled matter came on for PRE-TRIAL in the
Second Judicial District Court in and for Davis County,
State of Utah, before the HONORABLE DOUGLAS L CORNABY,
Presiding.

A P P E A R A N C E S:

For the Plaintiff: Steven C. Vanderlinden
Deputy County Attorney
Davis County Courthouse
Farmington, Utah 84025

For the Defendant: Thomas A. Jones
Attorney at Law
2111 East 300 South, #219
Salt Lake City, Utah 84111

Nancy H. Davis
Certified Shorthand Reporter

1 MR. JONES: Judge, we have the Duran matter and
2 that may be disposed of summarily.

3 THE COURT: Okay. Let's do it. State of Utah
4 versus Mark Anthony Duran, 3967. All right. Your date of
5 birth is September 20, 1961; is that correct?

6 MR. DURAN: Yes, sir.

7 THE COURT: Record can show that the defendant is
8 present in the court with counsel. Who is going to speak?

9 MR. VANDERLINDEN: If I could, briefly, your
10 Honor. This is a negotiated plea. There are two Counts
11 against Mr. Duran. Count One is a Third Degree Felony.
12 Count Two is a Second Degree Felony. On behalf of the Stat
13 I have agreed to dismiss Count One, a Third Degree Felony,
14 in return for Mr. Duran pleading guilty to Count Two, a
15 Second Degree Felony.

16 Also, I would not resist the 402 Motion if made b
17 Mr. Jones.

18 MR. JONES: That is correct, Judge.

19 THE COURT: Mr. Duran, you understand this
20 negotiated plea that has been stated to the Court today?

21 MR. DURAN: About the 402 Motion?

22 THE COURT: About the whole thing.

23 MR. DURAN: Yes.

24 THE COURT: First, you understand they are sayin'
25 we will dismiss Count One if Mr. Duran will plead guilty t

1 Count Two. Do you understand that?

2 MR. DURAN: Yes, sir.

3 THE COURT: And you are willing to do that; is
4 that correct?

5 MR. DURAN: Yes, sir.

6 THE COURT: And then counsel has said that I may
7 make a motion at the time of sentencing to reduce the Second
8 Degree Felony that you are going to plead guilty to a Third
9 Degree Felony.

10 MR. DURAN: Yes, sir.

11 THE COURT: He is going to make that motion, but
12 you understand the Court is not obligated to grant the
13 motion. In other words, I could sentence you as a Second
14 Degree Felony if you enter a plea of guilty today. Do you
15 understand that?

16 MR. DURAN: Yes, sir.

17 THE COURT: Are you agreeable to enter a plea on
18 that kind of basis?

19 MR. DURAN: Yes, sir.

20 THE COURT: Counsel, have you explained the
21 charges to him as it would be on the negotiated plea?

22 MR. JONES: Yes, I have, Judge.

23 THE COURT: Are you satisfied that he understands
24 his constitutional rights?

25 MR. JONES: Yes, I am, Judge.

1 THE COURT: Are you satisfied it's voluntary,
2 knowing and understanding the plea that he is going to be
3 making?

4 MR. JONES: Yes, sir, Judge.

5 THE COURT: Do you know of any reason why he
6 should not plead guilty today?

7 MR. JONES: No, sir, Judge.

8 THE COURT: Directing the questions to you, Mr.
9 Duran. Are you currently under the influence of alcohol or
10 drugs?

11 MR. DURAN: No, sir.

12 THE COURT: Are you currently being treated for
13 any physical disability or mental illness?

14 MR. DURAN: No, sir.

15 THE COURT: Have you ever been treated for a
16 mental disability?

17 MR. DURAN: No, sir.

18 THE COURT: You understand certain rights that you
19 have that you will be waiving by pleading guilty. Do you
20 understand?

21 MR. DURAN: Yes, sir.

22 THE COURT: There won't be a trial either before
23 court or before a jury. Do you understand that?

24 MR. DURAN: Yes, sir.

25 THE COURT: You have a right normally against

1 self-incrimination. You waive that by pleading guilty. Do
2 you understand that?

3 MR. DURAN: Yes, sir.

4 THE COURT: As a matter of fact, by pleading
5 guilty, that becomes a judicial confession to the offense of
6 theft, a felony of the second degree. Do you understand
7 that?

8 MR. DURAN: Yes, sir.

9 THE COURT: Where the State normally has an
10 obligation to prove you guilty beyond a reasonable doubt,
11 they then have no duty at all to prove anything. Do you
12 understand that?

13 MR. DURAN: Yes, sir.

14 THE COURT: A plea of guilty affects your right to
15 appeal, although you still have a right to appeal 30 days
16 after entering sentence if you want to. Do you understand
17 that?

18 MR. DURAN: What was that, sir?

19 THE COURT: A plea of guilty affects your
20 likelihood of your winning on an appeal. Do you understand
21 that?

22 MR. DURAN: Yes, sir.

23 THE COURT: Are you satisfied with the advice your
24 counsel has given you?

25 MR. DURAN: Yes, sir.

1 THE COURT: Do you have any questions you want to
2 ask him before we proceed further?

3 MR. DURAN: No, sir.

4 THE COURT: Have any promises been made to you as
5 to what the outcome of sentencing would be?

6 MR. DURAN: Only for that 402 Motion.

7 THE COURT: Okay. You understand that's not a
8 promise. That's just an attempt--

9 MR. DURAN: Right.

10 THE COURT: Has anybody used any force or coercio
11 or duress in any way to get you to enter into this plea
12 today?

13 MR. DURAN: No, sir.

14 THE COURT: You are doing it of your own free wil
15 and choice?

16 MR. DURAN: Yes, sir.

17 THE COURT: Are you pleading guilty because you
18 are, as a matter of fact, guilty?

19 MR. DURAN: Yeah, I'm guilty.

20 THE COURT: Any questions you want to ask the
21 Court before we proceed?

22 MR. DURAN: No, sir.

23 THE COURT: What was your involvement in this an
24 just the part of Count Two?

25 MR. DURAN: Just riding out to Bountiful. That'

1 it.

2 THE COURT: Oh, what was taken?

3 MR. DURAN: From the car?

4 THE COURT: Well, I don't know. Theft, a felony

5 of the second degree, did obtain or exercise unauthorized

6 control--

7 MR. DURAN: The car?

8 THE COURT: It's a car?

9 MR. DURAN: Right.

10 THE COURT: You were with somebody else, is that

11 it?

12 MR. DURAN: Yes, sir.

13 THE COURT: Both of you did it together; is that

14 correct?

15 MR. DURAN: Yes, sir.

16 THE COURT: Where were you going to go with the

17 car?

18 MR. DURAN: Out to Bountiful.

19 THE COURT: Where did you take the car, from what

20 city?

21 MR. DURAN: Salt Lake.

22 THE COURT: Okay. Do you still want to enter a

23 plea of guilty in the matter?

24 MR. DURAN: Yes, sir.

25 THE COURT: Okay. As to the charge, Count Two, a

1 felony of the second degree, theft, do you want your plea
2 entered as guilty or not guilty?

3 MR. DURAN: Guilty.

4 THE COURT: Court will accept the guilty plea and
5 order the charge in Count One to be dismissed. Is it
6 agreeable we set sentencing for August 24th at 1:30?

7 MR. JONES: Very much so, Judge.

8 MR. DURAN: Sir, I have got a sentencing on August
9 16 in Salt Lake City. Would that be of any problem to
10 either court?

11 THE COURT: No. No problem.

12 MR. DURAN: They can still go with that?

13 THE COURT: Yes. No problem. We will probably
14 have a probation officer that will be checking with you to
15 see what the sentence was, but other than that, there's no
16 problem. Thank you. We will be in recess for five minutes.

17 (Whereupon, the proceedings were concluded.)

18 -o0o-

19

20

21

22

23

24

25

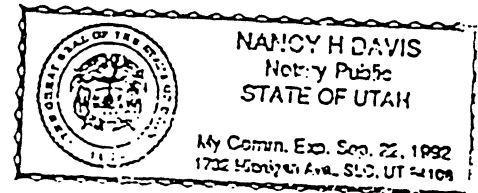
REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss:
COUNTY OF DAVIS)

I, Nancy H. Davis, Certified Shorthand Reporter,
State of Utah, do hereby certify that the foregoing
transcript, consisting of 8 pages, were stenographically
reported by me at the time and place hereinbefore set forth
that the same was thereafter reduced to typewritten form,
and that the foregoing is a true and correct transcription
of those proceedings requested to be transcribed.

Nancy H. Davis
Nancy H. Davis

Residing at 1732 Washington Ave. SLC, UT 84108



IN THE SECOND DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

MARK ANTHONY DURAN,
a.k.a. MARK ANTHONY BRESQKO,
Plaintiff,

v.

STATE OF UTAH,
Defendant.

RULING

Case No. 940700319 HC

Recently, the Court has received various communications from plaintiff Mark Anthony Duran, a.k.a. Mark Anthony Bresqko. The Court has received 2 letters, a pleading entitled "Motion for Extension of Time to File All Future Motions in this Court (**Motion for Extension of Time**)", and a pleading entitled "Response to Courts Motion to Deny or Dismiss Petition on Grounds of Frivolous (**Response**)". The Court's clerk has also received several telephone calls from an individual claiming to be defendant's cousin.

Several months ago the Court received a letter from defendant claiming to inquire into the status of his case, and asking if the Court had issued a ruling. In response, the Court sent defendant a copy of its "Ruling on Petition for Extraordinary Relief," which had been issued and previously sent to him October 26, 1994. Defendant, in his letters and in his Response, informs the Court that he is known in the Colorado prison where he is now being incarcerated by the name "Mark Anthony Bresqko," rather than "Mark Anthony Duran." He claims that the prison's policy is to deliver only correctly addressed mail to inmates, and that this policy prevented his timely reception of the Court's October 26, 1994 ruling.

The time for appeal now having long since expired, defendant wishes to have the Court reopen the case and revisit its prior ruling. Apart from there being no procedural basis

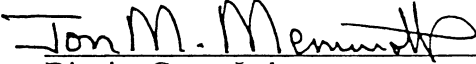
for a "Response" to a ruling by the Court, defendant has submitted no new evidence that may in any way justify such action. Nevertheless, the Court understands the procedural problems faced by his alleged non-reception of the Court's October 26, 1994 ruling. Therefore, the Court would today reissue the ruling to enable defendant's timely appeal. The ruling, in its entirety, is thus:

The Court has reviewed Plaintiff's Petition for Post Conviction Relief to Vacate Conviction, corresponding Memorandum of Authority, and the other documents on file with the Court. Having done so, and now being fully advised, the Court finds pursuant to Utah Rules of Civil Procedure 65(b)(7) that said petition is frivolous on its face and denies the same. See State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989) ("By pleading guilty, defendant is deemed to have admitted all essential elements of the crime charged and thereby waives all nonjurisdictional defects."); see also Pasqual v. Carver, 240 Utah Adv. Rep. 3, 4 (Utah 1994) ("Allegations of error cannot be pursued for the first time by writ of habeas corpus if they could have been raised on direct appeal."); Parsons v. Barnes, 871 P.2d 516, 519 (Utah 1994) ("The writ can neither be a substitute for, nor perform the function of, regular appellate review").

Furthermore, because the Court rules that this Court's final decision has been made, the Court would deny defendant's Motion for Extension of Time.

Dated July 14, 1997.

BY THE COURT:


District Court Judge

CERTIFICATE OF MAILING

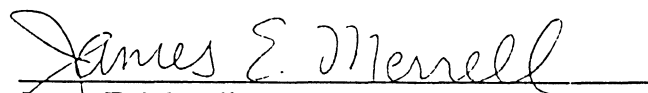

I certify that I mailed a true and correct copy of the foregoing Ruling on the 14th of
July 1997, postage prepaid, to the following:

Mark A. Bresqko
Reg. No. 62811
Colorado State Prison
Box 600 CCF
Canon City, CO 81215-600

Anthony Bresqko # 62811
C.C.F.
P.O. Box 600
Canon City, CO 81215-600

Mr. Mark A. Bresqko
Register Number 62811
Unit F-3-1
Box Number 600 CCF
Canon City, CO 81215-600

Mark Anthony Duran
Reg. No. 62811
Box 600 CCF
Canon City, CO 81215-600


James E. Merrell
Law Clerk to the
Honorable Jon M. Memmott 

Unloaded firearm.

Aggravated robbery may be committed with an unloaded firearm. *State v. Turner*, 572 P.2d 387 (Utah 1977).

Cited in *State v. Ortiz*, 712 P.2d 218 (Utah 1985); *State v. DeJesus*, 712 P.2d 246 (Utah 1985); *State v. Gutierrez*, 714 P.2d 295 (Utah 1986); *State v. Bishop*, 717 P.2d 261 (Utah

1986); *State v. Iacono*, 725 P.2d 1375 (Utah 1986); *State v. Griffiths*, 752 P.2d 879 (Utah 1988); *State v. Whittle*, 780 P.2d 819 (1989); *State v. Russell*, 791 P.2d 188 (Utah 1990); *State v. Severance*, 828 P.2d 1066 (Utah Ct. App. 1992); *State v. Lee*, 831 P.2d 114 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Am. Jur. 2d. — 67 *Am. Jur. 2d Robbery* § 3.
C.J.S. — 77 *C.J.S. Robbery* § 27.

A.L.R. — Fact that gun was unloaded as affecting criminal responsibility, 68 *A.L.R.4th* 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 *A.L.R.4th* 660.

Key Numbers. — Robbery ⇐ 11.

PART 4

THEFT

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

court properly refused to give an instruction proffered by defendant. *State v. Larsen*, 876 P.2d 391 (Utah Ct. App. 1994).

Pleading and practice.

Section 76-6-404 is the "general offense of theft" required to be pled by this section to invoke the provisions of consolidated theft. Once the prosecution charges a defendant with the general offense of "theft" under § 76-6-404, it may then present its evidence to prove the

theft was committed in any manner specified in §§ 76-6-404 to 76-6-410. *State v. Fowler*, 745 P.2d 472 (Utah Ct. App. 1987).

Receiving stolen property.

Evidence that establishes receiving stolen property under § 76-6-408 is sufficient to sustain a conviction of theft without the necessity of establishing theft by taking. *State v. Taylor*, 570 P.2d 697 (Utah 1977).

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

History: C. 1953, 76-6-404, enacted by L. 1973, ch. 196, § 76-6-404.

Cross-References. — Motor vehicles, spe-

cial anti-theft laws, § 41-1a-1308 et seq. Shoplifting Act, § 78-11-14 et seq.

NOTES TO DECISIONS

ANALYSIS

Bailments.
Comment on defendant's silence.
Corpus delicti.
Elements of offense.
Evidence.
—Weight and sufficiency.
Included offenses.
—Possession.
Instructions.
Intent.
Pleading and practice.
Possession of recently stolen property.
"Purpose to deprive."
Separate offenses.
Unauthorized control.
Venue.
Cited.

Bailments.

Bailor could be guilty of stealing his own property, if done with intent to charge bailee. *State v. Parker*, 104 Utah 23, 137 P.2d 626 (1943).

Comment on defendant's silence.

Where defendant charged with theft of building materials from construction site did not testify in his own defense and offered no evidence to explain his late-night presence at the site, prosecutor's comment that: "The defense has presented no evidence as to why defendant was out there. What was he doing out there?" was a legitimate comment on what the total evidence did or did not show; it was not impermissible comment on defendant's failure to testify. *State v. Kazda*, 540 P.2d 949 (Utah 1975).

Corpus delicti.

In prosecution for larceny it was not essential that corpus delicti be established by evidence independent of that adduced to prove that defendant was perpetrator of crime; the same evidence could be used to prove both. *State v. Hall*, 105 Utah 151, 139 P.2d 228 (1943), rev'd on other grounds, 105 Utah 162, 145 P.2d 494 (1944).

Corpus delicti for offense of theft consists of the elements that one entitled to possession of the property has been deprived of possession and such deprivation has been accomplished by a felonious taking; evidence of the property having been taken from the possession of the owner without his knowledge or consent is evidence of both of the elements of the corpus delicti. *State v. Chesnut*, 621 P.2d 1228 (Utah 1980).

Elements of offense.

State is not required to prove conclusively who the real owner of the property is, but only that defendant obtained or exercised unauthorized control over the property of another. *State v. Simmons*, 573 P.2d 341 (Utah 1977).

This section requires a finding of only one of two disjunctives, "obtained" or "exercised unauthorized control" over the property of another with a purpose to deprive him thereof; conviction for theft can be upheld without a finding that defendant "obtained" the property, so long as there is a finding that he "exercised unauthorized control" over it. *State v. Walker*, 649 P.2d 16 (Utah 1982).

Evidence.

Proof of identity of stolen goods could be by either direct or circumstantial evidence. *State*

demands by owner, court, sitting without a jury, was not required to believe defendant's testimony that he gave typewriter to his business partners to return, since partners were not called to corroborate his story, and defendant conveniently forgot important details. *State v. Knepper*, 18 Utah 2d 215, 418 P.2d 780 (1966).

Evidence supported conviction of embezzlement, where defendant had been given permission to continue to use car on somewhat open-ended contract after initial rental period had expired, but defendant failed to return car on specific date on which he was finally told that he must return it. *State v. Heemer*, 26 Utah 2d 309, 489 P.2d 107 (1971).

"Gross deviation."

As used in this section, the term "gross de-

viation" has the common sense meaning of being an extreme deviation. *State v. Owens*, 638 P.2d 1182 (Utah 1981).

Use related to purpose of agreement.

Subsection (1) assumes that the property may be used by the custodian for purposes properly related to the purpose of the entrustment; only a use that constitutes "a gross deviation from the agreed purpose," without express consent for personal use, is a crime. *State v. Dirker*, 610 P.2d 1275 (Utah 1980).

Cited in *State v. Owens*, 753 P.2d 976 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 *Am. Jur. 2d Larceny* § 89.
C.J.S. — 52A *C.J.S. Larceny* §§ 46,47.

Key Numbers. — *Larceny* ☞ 15.

76-6-411. Repealed.

Repeals. — Section 76-6-411, as enacted by L. 1973, ch. 196, § 76-6-411, relating to theft by failure to make required payment or disposi-

tion of property subject to legal obligation, was repealed by Laws 1974, ch. 32, § 41.

76-6-412. Theft — Classification of offenses — Action for treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable:

- (a) as a felony of the second degree if the:
 - (i) value of the property or services exceeds \$1,000;
 - (ii) property stolen is a firearm or an operable motor vehicle;
 - (iii) actor is armed with a deadly weapon at the time of the theft; or
 - (iv) property is stolen from the person of another;
- (b) as a felony of the third degree if the:
 - (i) value of the property or services is more than \$250 but not more than \$1,000;
 - (ii) actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or
 - (iii) property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry;
- (c) as a class A misdemeanor if the value of the property stolen was more than \$100 but does not exceed \$250; or
- (d) as a class B misdemeanor if the value of the property stolen was \$100 or less.

(2) Any person who has been injured by a violation of Subsection 76-6-408(1) may bring an action against any person mentioned in Subsection 76-6-408(2)(d) for three times the amount of actual damages, if any sustained by the plaintiff, costs of suit and reasonable attorneys' fees.

NOTES TO DECISIONS

ANALYSIS

Conditional plea
Cited

tion on appeal of the purportedly preserved issue would not have necessarily ended the prosecution of the case State v Montoya, 858 P2d 1027 (Utah Ct App 1993).

Conditional plea.

Trial court should not have accepted a conditional no contest plea since a favorable resolu-

Cited in State v. Sery, 758 P2d 935 (Utah Ct App 1988).

77-13-4. Felonies — Entry in open court.

All pleas in felony cases shall be entered by the defendant in open court and the proceedings recorded.

History: C. 1953, 77-13-4, enacted by L. 1980, ch. 15, § 2.

77-13-5. Failure to plead — Not guilty entered.

When a defendant does not enter a plea, the court shall enter a plea of not guilty for him.

History: C. 1953, 77-13-5, enacted by L. 1980, ch. 15, § 2.

NOTES TO DECISIONS

Waiver.

One accused of crime could waive mere formality of entering plea of not guilty before

going to trial *State v Estes, 52 Utah 572, 176 P 271 (1918)*

COLLATERAL REFERENCES

Am. Jur. 2d. — 21A Am Jur 2d Criminal Law § 447

C.J.S. — 22 C.J.S Criminal Law § 378
Key Numbers. — Criminal Law ☞ 266.

77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

History: C. 1953, 77-13-6, enacted by L. 1980, ch. 15, § 2; 1989, ch. 65, § 1; 1994, ch. 16, § 1.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, substituted "Rule 65B" for "Rule 65B(1)" in Subsection (3)