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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
KELLY RAY DEBOARD,	:	Case No. 980387-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Possession of a Controlled Substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael L. Hutchings, Judge, presiding.

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UTAH COURT OF APPEALS
BRIEF

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Julia D'Alesandro
Clerk of the Court

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for Attempted Possession of a Controlled Substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), in the Third Judicial District Court, State of Utah, the Honorable Michael L. Hutchings, judge, presiding. Jurisdiction is conferred on this court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). See Addendum A (judgment and conviction).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue: Is Deboard's sentence invalid where the trial court sentenced him to 365 days in jail outside the presence of appointed counsel and without apprising him of his right to the presence of counsel?

Standard of Review: "[T]he determination that a defendant has intelligently waived his right to counsel 'turns 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'' the constitutionality of an accused's waiver of the right to counsel is a mixed question involving both fact and law." State v. McDonald, 922 P.2d 776, 780 (Utah App. 1996)

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(quotations omitted) (citing State v. Tenney, 913 P.2d 750, 753 (Utah App. 1996); State v. Pena, 869 P.2d 932, 936 (Utah 1994)).

PRESERVATION OF THE ARGUMENT

Appellant Kelly Ray Deboard's ("Deboard") issue is preserved on the record for appeal ("R.") at 61[3-7].

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following statute and constitutional provisions are determinative of the issues on appeal:

Rights of Accused, United States Const. Amend. VI (1991):

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defense.

Rights of Accused Persons, Utah Const. Art. I, § 12 (Supp. 1998):

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.

Rights of Defendant, Utah Code Ann. § 77-1-6 (1995):

> (1) In criminal prosecutions the defendant is entitled: (a) To appear in person and defend in person or by counsel.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Appellant Kelly Ray Deboard ("Deboard") was charged by information with possession of a controlled substance (methamphetamine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998) and an arrest warrant was issued. R.3-5. Deboard was appointed counsel from the Salt Lake Legal Defender Association ("LDA"). R.10. On December 23, 1997, he entered a guilty plea to attempted possession of a controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i). R.39.

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Prior to sentencing, Deboard was appointed substitute counsel from LDA when his original attorney left that office. R.32. The new attorney entered her appearance with the court on March 20, 1998. Id.

Meanwhile, Deboard was referred to ("AP&P") on December 23, 1997, to prepare a sentencing report. R.15. A sentencing hearing was also set for February 25, 1998. R.18. As of February 16, 1998, Deboard had not reported to AP&P. R.15. He also missed the February 25th hearing. R.19,20. An arrest warrant was issued on March 2, 1998. R.20. However, the warrant was recalled on March 12, 1998, since Deboard missed the hearing on account of a snow storm and impassable roads. R.28,61[4].

A second sentencing hearing was set for April 3, 1998. R.29. Deboard still had not reported to AP&P as of March 25th. R.30. He also failed to appear for the sentencing hearing and later explained that he did not receive notice of the new date. R.61[4]. No warrant was issued upon Deboard's failure to appear at the April 3rd hearing. R.61[4-5].

The sentencing date was reset for May 13, 1998. R.33. Deboard appeared for sentencing this time, but had not met with AP&P beforehand. R.34,36. Deboard was not accompanied by his attorney and, in fact, did not know the attorney's name on account of the earlier change in counsel. R.61[3].

Even though Deboard was not accompanied by his attorney, the judge did not inform Deboard of his right to the presence of his attorney at sentencing, nor did he ascertain whether Deboard

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voluntarily, knowingly and intelligently waived the right before proceeding with the hearing. R.61[3-7]. Instead, the judge immediately asked Deboard why he did not report to AP&P. R.61[3-6]. Deboard explained that he had an attorney, although he did not know her name. R.61[3]. He also explained that he had been in contact with "law enforcement" in an effort to "get these matters resolved." R.61[6].

Rather than granting a third continuance in order that Deboard may locate his attorney and meet with AP&P to finish the report, the judge sentenced Deboard to 365 days in jail. R.39,61[6]. Deboard requested "private counsel" upon the judge's sentence. R.61[6]. Rather than honoring Deboard's request, the judge reiterated the sentence and set a review date for June 19, 1998. R.61[7]. On June 19, Deboard and his attorney appeared for the review, at which time the court suspended the remaining 300 days in jail and placed Deboard on probation for three years. R.52-53,55. Deboard appeals from the sentence. R.56.

ARGUMENT

THE SENTENCE IMPOSED ON DEBOARD BY THE TRIAL COURT IS INVALID WHERE THE COURT IMPOSED THE SENTENCE OUTSIDE THE PRESENCE OF APPOINTED COUNSEL AND WITHOUT ESTABLISHING VALID WAIVER.

The trial court erred as a matter of law in sentencing Deboard where it failed to conduct a searching colloquy that established that Deboard was aware of his right to the presence of his attorney or that he waived such right knowingly, intelligently and voluntarily. Moreover, the circumstances of

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the case do not evince Deboard's appreciation of his right or valid waiver thereof.

The Sixth Amendment to the United States Constitution and Article I, Section 12 of the Utah Constitution guarantee that a criminal defendant has the right to the presence and effective assistance of counsel at all critical stages of a criminal proceeding where substantial rights may be affected, including sentencing. See Mempa v. Rhay, 389 U.S. 128, 137, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (right to counsel under Sixth Amendment "extends to sentencing" since substantial rights of accused are at stake) (citing Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690) (1948)); Kuehnert v. Turner, 499 P.2d 839, 840-41 (Utah 1972) (Article I Section 12 of Utah Constitution guarantees right to presence of counsel at sentencing unless defendant executes a valid waiver) (citations omitted) (see Addendum B - copy of opinion); State v. Martinez, 925 P.2d 176, 178 (Utah App. 1996) (sentencing is a critical stage of criminal proceeding necessitating right to counsel); State v. Casarez, 656 P.2d 1005, 1007 (Utah 1982) (same); see also Utah Code Ann. § 77-1-6(1)(a) (1995) ("[i]n criminal prosecutions the defendant is entitled [t]o . . . defend in person or by counsel").

A defendant's right to the presence of counsel at sentencing exists on account of the particular impact that sentencing has on a defendant's liberty. As noted by the Third Circuit Court of Appeals, a defendant's "ultimate fate is [often] determined more by [sentencing] than the determination of guilt or innocence."

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United States v. Salemo, 61 F.3d 214, 220-22 (3d Cir. 1995). Hence, the presence of counsel at sentencing is "one of the most fundamental and cherished rights guaranteed by the Constitution." Id. Moreover, it is "necessary to insure fundamental human rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Some of the pitfalls faced by a defendant at sentencing necessitating the aid of counsel include complex guidelines wherein the judge may consider any relevant information and not just the "conduct that constitutes the offense of conviction. . . . In addition, a defendant who is unfamiliar with the post conviction process may inadvertently waive a meritorious argument that he/she might otherwise have raised on appeal." Id.; see also Salemo, 61 F.3d at 220 ("sentencing is a critical and often times complicated part of the criminal process that contains subtleties which may be beyond the appreciation of the average layperson"). Hence, the aid of counsel is necessary

> so that [a defendant has] a real opportunity to present to the court facts in extenuation of the offense or in explanation of the defendant's conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration and enforcement of penal laws.

Kuehnert, 499 P.2d at 840-41.

In light of the foregoing considerations, a sentence is sustainable on appeal only if the trial court conducts a colloquy on the record establishing that an unrepresented defendant understands his right to the presence of counsel, and that he voluntarily, knowingly and intelligently waives his right before

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proceeding with sentencing. See Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) ("waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege"). Alternatively, a sentence is valid if the totality of the circumstances reflected in the record evince the defendant's knowledge of his right to counsel, as well as his voluntary and intelligent waiver thereof. Id. (waiver may be inferred from totality of circumstances). Deboard's sentence is invalid because neither a colloquy conducted by the court nor other circumstances in the record establish that he understood his right and voluntarily waived it before the judge imposed sentence.

In a case factually similar to the case at bar, the Utah Supreme Court in Kuehnert invalidated a sentence under Article I, Section 12 of the Utah Constitution because the sentencing judge failed to inform the defendant of his right to an attorney, and circumstances of the case did not otherwise establish a valid waiver. 499 P.2d at 841-42. The Court reasoned that the appellant, a habeas corpus petitioner, was not accompanied by his attorney at his sentencing hearing. Id. at 841. Moreover, the record showed that Kuehnert was represented by an attorney when he entered his guilty plea and that "there was no entry of withdrawal of counsel prior to sentencing." Id. at 839. In addition, "[a]t the time of sentencing the trial court neither advised [Kuehnert] of his right to counsel nor made inquiry as to

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why counsel was not present." Id. Rather, "the court merely queried whether it was [Kuehnert's] desire not to wait but to be sentenced immediately, to which [Kuehnert] responded affirmatively." Id. at 840. The court then sentenced Kuehnert. Id.

Based on these facts, the Utah Supreme Court reversed the sentence and remanded for a new hearing since the court neither informed Kuehnert of his right to the presence of counsel nor established waiver of such right. Id. at 840-41. The Supreme Court also noted that "since [Kuehnert] was not informed of his right to the presence of counsel, there is no ground upon which to predicate a waiver of this right." Id. at 840 (citing In re Haro, 458 P.2d 500, 506 (Ca. 1969) ("we cannot condone . . . the failure of the trial court to reinform defendant of his right to counsel when he appeared for the first time without his counsel for sentencing, nor can we countenance the trial court's failure to require defendant's waiver of his right to counsel in open court before the rendition of sentence").

In light of Kuehnert and the other foregoing authority, Deboard's sentence is invalid because neither a colloquy nor other circumstances evident from the record establish that Deboard understood his right to the presence of an attorney, nor intelligently, knowingly or voluntarily waived such right before the court proceeded with the hearing.

First, like Kuehnert, the record is devoid of any meaningful or timely communication from the court regarding Deboard's right

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to his attorney's assistance at the hearing, let alone a colloquy establishing a valid waiver. See 499 P.2d at 840-41. In informing a defendant of his right to counsel and establishing intelligent and voluntary waiver, a court is not required to carry on a "rote dialogue." Salemo, 61 F.3d at 220. Recognizing that "sentencing hearings demand much less specialized knowledge than trials," the Third Circuit Court of Appeals stated, "the inquiry at sentencing need only be tailored to that proceeding . . . [and] need not be as exhaustive and searching as a similar inquiry [at] trial." Id. at 219.

"Nevertheless, sentencing is a critical and often times complicated part of the criminal process that contains subtleties which may be beyond the appreciation of the average layperson," wherein an unrepresented defendant may "inadvertently waive a meritorious argument," and which often times has more impact on a defendant's "ultimate fate" than the "determination of guilt" itself. Id. at 220; see supra 5-6 (discussing complexities of sentencing necessitating assistance of counsel). "Given these intricacies, it is particularly important that a sentencing court be certain that a defendant understands the perilous path he/she is going down [during] sentencing without benefit of counsel." Salemo, 61 F.3d at 220.

Accordingly, "at a minimum, a trial judge must make 'a searching inquiry sufficient to satisfy him[/her] that the defendant's waiver was understanding and voluntary, . . . [and] calculated to insure that the defendant is 'made aware of the

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dangers and disadvantages of self-representation, so that the record will establish that 'he[/she] knows what he[/she] is doing and [the] choice is made with eyes wide open.''"[1] Id. (quoting Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed.2d 268) (1942)). Moreover, a sentencing court must "indulge in every reasonable presumption against waiver." Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The following exchange demonstrates how the court proceeded to confront the unaccompanied Deboard regarding the substance of the issue underlying the court's decision to jail him, i.e. his delay in completing a presentence report, and then sentence Deboard to jail before the judge mentioned his attorney for the first time.

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[1] The Utah Supreme Court in State v. Frampton, 737 P.2d 183, 187 (Utah 1987), noted with regard to the defendant's right to counsel at trial that it is the court's duty to ensure that a defendant waives his right knowingly, intelligently and voluntarily. To this end, the Frampton Court expressed a preference for a "colloquy on the record," as opposed to an ad hoc discourse. Id. at 187-88. Absent a colloquy, there is a greater risk that a defendant's challenge based on the right to counsel will succeed on appeal if, under the totality of the circumstances, the record does not strongly evince the defendant's "actual awareness of the risks of proceeding pro se." Id. at 188.

> Generally, [a valid waiver] can only be elicited after penetrating questioning by the trial court. Therefore, a colloquy on the record between the court and the accused is the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation. Moreover, it is the most efficient means by which appeals may be limited.

Id. at 187.

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(R.61[3])

Court: Mr. Deboard, we were to impose sentence here today and I've received a note that you have not gone over for a presentence report.

Defendant: I was -- went down and got the papers last time I left court, they said to call the number that was on the presentence report or I could just mail it in. It's supposed to be handled by Wade Smith. And I don't know who my attorney is because my other one I guess she had her last day right before my last court date, they told me that day that it was Debbie or something.

. . . .

Court: I think this is about the second time we've continued your sentencing; is that right?

Deboard: This is correct.

. . . .

(R.61[4])

Court: Let's see, so you entered a plea [on December 23] . . . and failed to appear on the 25th of February [to complete the sentencing report.]

Deboard: Yeah, that's when we got snowed up in the canyon. And I had called the courts and was supposed to come in and get a court date and I thought they were going to mail me a court date.

. . . .

Court: And we set the sentencing over to . . . the 3rd of April and you didn't report for the presentence report?

Deboard: I had no idea that I was supposed to.

Court: So this would be our third (R.61[5]) continuance [if we granted your request] today?

Deboard: It would.

Court: I'm hesitant to do that. *What I'm going to do is set another sentencing date but order that you be held in the county jail until I impose sentence.* AP&P will come and visit you in the county jail.

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Deboard: *I -- is there a -- can I get private counsel?*

Court: You can hire your own lawyer if you like. . . . *But we have a legal defender who will represent you in the case . . . who has already contacted the clerk of the court.*

Deboard: Could I speak with you about these in private?

Court: I can't speak with you in private. If you want to speak here on the record here in court.

(R.61[6])

Deboard: I've been working with law enforcement in some cases, they are supposed to have contacted you guys. I've been trying to get these matters resolved for a long time now and they have -- you know, I don't know what's going on with--

Court: Well, all I know is I haven't been contacted recently by law enforcement.

Deboard: You can talk to Detective Odor.

Court: But nonetheless, . . . this is the third time around for us. I just don't think we can do that anymore. We need to get this case resolved. . . . [Y]ou haven't gone over for the presentence reports. I've ordered you to do things that you have not done and we're in a situation here where I've got to impose sentence and I have incomplete information here.

Deboard: I've really been trying to do--

Court: It's not that tough. All you have to do is go over to the presentence office . . . and then (R.61[7]) they'll tell you a time to come back and sit down and talk with them.

Deboard: The told me that I could mail my presentence report to them. I've talked to Mr. Witchman over at AP&P, he's been involved with Odor and myself and several others. I've been really trying to get this thing resolved.

Court: Well, I'm ordering you serve a term of 365 days in jail. I will review the decision which I have made on the 19th of June. . . . Thank you. [Hearing concluded].

R.61[3-7] (emphasis added).

The foregoing exchange does not amount to the sort of

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searching inquiry, "calculated to insure" that Deboard's waiver was "understanding and voluntary," contemplated by Salemo and similar cases. Salemo, 61 F.3d at 220. For instance, the court never formally informed the unaccompanied Deboard of his right to the presence of counsel in the first place. In fact, the judge only mentioned Deboard's attorney *after* he imposed sentence and upon Deboard's contemporaneous request for "private counsel." R.61[5]. As stated in Kuehnert, where a defendant is "not informed of his right to the presence of counsel, there is no ground upon which to predicate a waiver of that right." 499 P.2d at 840. The same is true for the instant case -- where Deboard was not informed of his right to the presence of counsel in the first place, a valid waiver cannot be established. Id. Consequently, the trial court erred as a matter of law in proceeding with the hearing and the sentence imposed is invalid. Id.

The trial court's error in failing to inform Deboard of his right to the presence of counsel in the first place is underscored given several warning signals that the court had indicating the need to re-inform Deboard of his right in this case. First, the very fact that Deboard appeared alone should have alerted the trial court to the necessity of informing Deboard of his right. As noted by Justice Black of the United States Supreme Court, a judge must exercise heightened sensitivity for a defendant's rights when that defendant stands alone before the court. See Von Moltke v. Gillies, 332 U.S. 708,

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722, 68 S.Ct. 316, 92 L.Ed. 309 (1948) ("[i]t is the solemn duty of a [] judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of [the right to counsel]").

Additionally, the court should have been alerted to its duty given that the court knew Deboard had appointed counsel at the time of the hearing. Not only did the trial court acknowledge that Deboard had a "legal defender" after it imposed sentence, R.61[5], but Deboard himself noted at the beginning of the hearing that he had an attorney although he did not know her name. R.61[3]. Moreover, the court knew that Deboard was represented by an attorney when he entered his guilty plea and had at no time prior to sentencing moved to withdraw counsel from his case. See Kuenhert, 499 P.2d at 839 (invalidating sentence base in part on fact that sentencing court failed to inform defendant of his right to the presence of counsel even though judge knew defendant was represented when he entered guilty plea and defendant did not subsequently move to withdraw counsel prior to sentencing). Finally, Deboard's new attorney had properly entered her appearance as substitute counsel on March 23, 1998, almost two months before the sentencing hearing. R.32. In sum, the court's error in imposing sentence is underscored by foregoing, obvious warning signals highlighting the need to inform Deboard of his right to the presence of counsel at the hearing.

Even assuming that the sentencing court had at least

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informed Deboard of his right to the presence of his attorney, the sentence would still fail because the exchange between the judge and Deboard is lacking in any conversation regarding Deboard's understanding of his right or indications that he knowingly, intelligently and voluntarily waived it. Id. at 841. As evidenced by the sentencing hearing transcript, the judge began to question Deboard about his delay in completing the sentencing report before he mentioned Deboard's attorney for the first time. R.61[3-5]. Just after the judge indicated that he would incarcerate Deboard, Deboard, of his own volition, requested "private counsel." R.61[5]. At that time, the court only mentioned that Deboard had a "legal defender who would represent you in *the case*." Id. The judge did not clarify on the record with Deboard that he had a right to his attorney in *this* hearing in particular. He likewise failed to ascertain whether Deboard understood the risks involved in proceeding without his attorney, and based on that understanding whether he voluntarily agreed to proceed without her. Where the record lacks any clarifying colloquy between Deboard and the court, the judge failed to establish a constitutionally valid waiver, rendering Deboard's sentence invalid under Article I, Section 12 of the Utah Constitution, Kuehnert, 499 P.2d at 841, and the Sixth Amendment of the United States Constitution. See Salemo, 61 F.3d at 221 (invalidating sentence under Sixth Amendment where sentencing judge failed to establish waiver on record).

In addition to the absence of a clear colloquy, the trial

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court erred as a matter of law in imposing sentence where the overall circumstances likewise fail to establish that Deboard understood his right to the presence of counsel or that he knowingly, voluntarily and intelligently waived such right. First, the record establishes that Deboard actually requested his attorney and never waived such right. As noted above, Deboard mentioned his attorney at the beginning of the hearing. R.61[3]. While Deboard's mention of his attorney was not an unequivocal request for her presence, under the circumstances, the judge should have been alerted to the fact that Deboard might want her assistance at the hearing and accordingly inform him of his right. In any event, Deboard unequivocally requested an attorney after the judge stated he would incarcerate Deboard. R.61[5]. At that time the judge definitely should have known to establish Deboard's knowing, voluntary and intelligent waiver before sentencing him to jail.

In addition to Deboard's request for an attorney, Deboard expressed genuine alarm and was hesitant to carry on with the hearing without his attorney once the judge stated that he would place him in jail. Id. For example, Deboard seemed to lose his train of thought and began to stutter once the judge indicated that he would incarcerate him. Id.; see Salemo, 61 F.3d at 221 (invalidating sentence of unrepresented defendant in part because defendant expressed reluctance in proceeding; "defendant's apparent reluctance to proceed without counsel should have alerted the court to the need to inform [him of his right and to

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establish waiver]"). These facts alone bear against any finding the court may have made that Deboard waived his right to the presence of an attorney and voluntarily proceeded without her.

The trial court's error is compounded, however, given that Deboard did not exhibit any sort of courtroom experience or education on the record that might lead the court to believe that he understood his right to counsel and yet proceeded voluntarily. See, e.g., United States v. Verkulien, 690 F.2d 648 (7th Cir. 1982) (waiver, although not explicit, established where defendant was a law student, expressed understanding of his right to counsel at sentencing, and appeared willing to proceed unrepresented); State v. McDonald, 922 P.2d 776, 783-84 (Utah App. 1996) (valid waiver of counsel at trial established where judge ascertained on the record that defendant understood charges, penalties, technicalities and rules of trial and had previously represented himself). If anything, Deboard seemed somewhat confused, albeit in earnest, about the procedure involved in completing the sentencing report. For example, Deboard was confused about his new attorney's name. R.61[3]. He explained that he was in touch with "law enforcement . . . trying to get these matters resolved for sometime." R.61[6]. He even gave the names of particular officers who he assumed would be in contact with the court. R.61[3,7]. In fact, according to the judge, Deboard was supposed to report directly to AP&P to complete the necessary report. R.61[5-7]. Where Deboard demonstrated a lack of courtroom experience and misunderstood the

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procedure involved in completing the report, the trial court erred in proceeding with the sentencing hearing. Cf. McDonald, 922 P.2d at 783-84 (valid waiver where defendant exhibited understanding of charges and trial procedure).[2]

The fact that Deboard's delay in completing the report was the impetus for sentencing him to jail further underscores the court's error in this case. Given Deboard's confused approach toward completing the necessary report, the court should have been all the more sensitive to the need to ensure that Deboard understood his right to the assistance of counsel during the confrontation between Deboard and the judge. As evidenced by the record, the sum of the judge's discourse, and the reasoning behind the jail sentence, concerned Deboard's delay in completing the report. Without the benefit of counsel, Deboard did not have "a real opportunity to present to the court facts in extenuation

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[2] Even if the judge subjectively felt that Deboard understood his right to the presence of counsel, appreciated the technicalities of the hearing, and voluntarily and intelligently waived such right, the sentence is nonetheless invalid since the judge did not establish his subjective beliefs on the record. As noted by the Salemo Court, "[w]e appreciate that the sentencing judge (who also conducted Salemo's trial) may have felt that he had sufficient familiarity with this defendant to accept a waiver of counsel for purposes of sentencing without a searching inquiry into Salemo's familiarity with, or appreciation of, the complexities of sentencing. . . . However, we cannot infer a valid waiver of the right to counsel based upon the district court's subjective overall impression. . . . We have previously stated 'that a colloquy . . . is the preferred method of ascertaining that a waiver is knowing, voluntary and intelligent.' . . . We reiterate that 'it is appropriate for this searching inquiry to appear on the record' so as to allow a reviewing court to examine the district court's determination in the event of an appeal. . . . [F]ailure to do this requires a remand for resentencing." 61 F.3d at 221 (quotations omitted).

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of . . . or in explanation of the [his] conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration and enforcement of penal laws." Kuehnert, 499 P.2d at 840-41.

As noted by the Salemo Court, a sentencing court need not allow itself to be "manipulated into granting a continuance." 61 F.3d at 221. Nonetheless, it is still obliged to insure that the defendant is informed of his right to the presence of counsel and executes a valid waiver before proceeding. Id. Indeed, the court in this case could have avoided any perceived manipulation by Deboard by simply calling Legal Defender's office. In doing so, the court could have kept Deboard in its presence and at the same time locate Deboard's attorney.[3] In the end, Deboard's right to the presence of counsel would have been honored.

As a final matter, the trial court's error in this case, i.e. the denial of Deboard's constitutional right to the presence of counsel, amounts to "constitutional error" and is therefore presumptively prejudicial, requiring remand. The United States Supreme Court has uniformly found constitutional error without any showing of prejudice when, as in the instant case, counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d

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[3] Although not reflected in the record, trial counsel indicated that she was in the courthouse while Deboard's sentencing hearing was underway.

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592 (1976); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); Brooks v. Tennessee, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972); Hamilton v. Alabama, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961); White v. Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 1051, 10 L.Ed.2d 193 (1963) (per curiam); Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); Williams v. Kaiser, 323 U.S. 471, 475-476, 65 S.Ct. 363, 366, 89 L.Ed. 398 (1945). The complete denial of the assistance of counsel is constitutional error because "impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the [government] is directly responsible, easy for the government to prevent." Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citing United States v. Cronic, 466 U.S. 648, 664 and n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

Accordingly, the Eleventh Circuit Court of Appeals likewise found presumptive constitutional error, and remanded for resentencing, in a factually similar case where the defendant was sentenced without benefit of counsel. See Golden v. Newsome, 755 F.2d 1478, 1482-83 (11th Cir. 1985). Based on the principals of an adversarial system, wherein "partisan advocacy on both sides of a case will best promote the ultimate objective [of justice]," and in light of the particular complexities inherent in sentencing, the Golden Court held the defendant's sentence to be "constitutionally infirm" on account of the wholesale denial of his right to the assistance of counsel. Id. at 484. "The Sixth

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Amendment recognizes the right to counsel because effective counsel plays a role that is critical to the ability of the adversarial system to produce just results. In this case, the justice of Mr. Golden's sentence has been rendered unreliable by a total breakdown in the adversary process at the sentencing stage of his trial. Having failed to pass through the crucible of meaningful adversarial testing, the sentence must be vacated." Id.

For the reasoning set forth above, Deboard's sentence is likewise rendered "constitutionally infirm" on account of the trial court's actions, which served to deny Deboard his right to the presence of counsel at his sentencing. Without counsel, he too was denied a meaningful opportunity his case for a more lenient sentence. "Having failed to pass through the crucible of meaningful adversarial testing," Deboard's sentence is presumptively invalid and the matter should be remanded. Id.

In sum, the trial court erred as a matter of law in proceeding with the sentencing hearing where Deboard was unrepresented by counsel. The court failed to conduct a colloquy on the record which would establish Deboard's understanding of his right to the presence of counsel and that he voluntarily, knowingly, and intelligently waived such right. Moreover, the circumstances of the case as reflected in the record do not establish that Deboard understood or validly waived his right. Accordingly, Deboard's sentence is invalid under the Sixth Amendment to the Federal Constitution and Article I, Section 12

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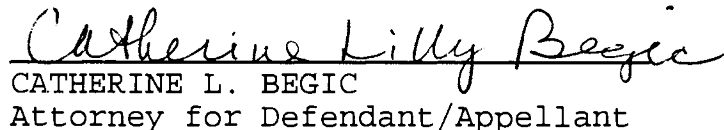
of the Utah Constitution. Finally, the trial court's error, which served to deny Deboard of his right to the presence of counsel altogether, amounts to presumptively prejudicial constitutional error.

CONCLUSION

Based on the foregoing, Deboard respectfully requests this Court to vacate and remand the sentence.

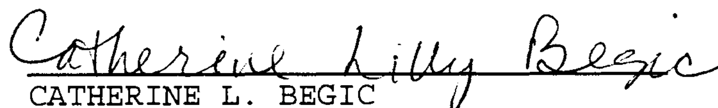


CATHERINE L. BEGIC
Attorney for Defendant/Appellant

DEBORAH KREECK MENDEZ
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE L. BEGIC, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of November, 1998.



CATHERINE L. BEGIC

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DELIVERED copies to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of November, 1998.

____

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ADDENDA

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ADDENDUM A

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Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/ORDER
Criminal/Traffic

CITY/STATE (circled: STATE) Plaintiff

-VS-

Kelly Deboard
Defendant

Case Number 971922472
Tape number ______ C # ______
Date 6/19/98 Time ______
Judge/Comm MLH
Clerk [illegible]

DOB: ___/___/___
Interpreter ______
CHARGES ______

Plaintiff Counsel ______
Defense Counsel ______
Amended ______
Amended ______

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) Jail 300 days Suspended all
Defendant to Commence Serving Jail Sentence ______

(2) Fine Amt. $______ Susp. $______ Fee $______ Fine Bal $______

TOTAL FINE(S) DUE $

Payment Schedule: Pay $______ per month/1st Pmt. Due ______ Last Pmt. Due ______

(3) Court Costs $ ______

(4) Community Service/WP ______ through ______

(5) Restitution $______ Pay to: ☐ Court ☐ Victim ☐ Show Proof to Court

Attorney Fees $ ______

(6) Probation 3 yrs ☐ Good Behavior ☐ AP&P ☒ ACEC ☐ Other

(7) **Terms of probation:**

- ☒ No Further Violations
- ☐ AA Meetings ______ / wk ______ / month
- ☒ Follow Program report regularly
- ☐ No Alcohol
- ☐ Antibuse
- ☐ Employment ______
- ☐ Proof of ______
- ☒ Counseling thru ACEC
- ☐ Classes ______
- ☐ In/Out Treatment ______
- ☒ Health Testing UA's 1 every 2 wk
- ☐ Crime Lab Procedure
- ☒ no association w/anyone who
- ☐ uses drugs or places.

(8) Plea in Abeyance Diversion ______

(9) Review ___/___/___ at ______

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

District Court Judge

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ADDENDUM B

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***839** 499 P.2d 839

28 Utah 2d 150

Max KUEHNERT, Plaintiff and Appellant,
v.
John W. TURNER, Warden, Utah State Prison, Defendant and Respondent.

No. 12656.
Supreme Court of Utah.
July 18, 1972.

Prisoner petitioner for writ of habeas corpus. The Third District Court, Salt Lake County, James S. Sawaya, J., entered order denying petition and the petitioner appealed. The Supreme Court, Callister, C.J., held that where defendant was represented by counsel at time his plea of guilty was entered and there was no entry as to withdrawal of counsel prior to sentencing at which defendant appeared without counsel and without receiving advice as to his right to counsel, absence of counsel rendered sentence invalid and cause would be remanded with directions to proceed to fix date for pronouncing sentence in proper manner.

Remanded with directions.

Ellett, J., concurred in the result and filed an opinion.

1. CRIMINAL LAW ⚿988
 110 ----
 110XXIII Judgment, Sentence, and Final Commitment
 110k985 Formalities in Pronouncing Sentence
 110k988 Presence of counsel.
Utah 1972.
Since habeas corpus petitioner was not informed of his right to the presence of counsel at time of sentencing, there was no ground upon which to predicate a waiver of this right by him. Const. art. 1, Secs. 12, 13.

2. CRIMINAL LAW ⚿988
 110 ----
 110XXIII Judgment, Sentence, and Final Commitment
 110k985 Formalities in Pronouncing Sentence
 110k988 Presence of counsel.
Utah 1972.
It is necessary to have counsel present at time of hearing so that there is a real opportunity to present to court facts in extenuation of offense or in explanation of defendant's conduct, to correct any errors or mistakes in reports of defendant's past record and to appeal to equity of court in its administration and enforcement of penal laws. Const. art. 1, Secs. 12, 13; U.C.A.1953, 77-35-17.

3. CRIMINAL LAW ⚿980(1)
 110 ----
 110XXIII Judgment, Sentence, and Final Commitment
 110k980 Sentence on Pleas of Guilty or Nolo Contendere
 110k980(1) In general.

Formerly 110k1181

[See headnote text below]

3. CRIMINAL LAW ⚿1181.5(8)
 110 ----
 110XXIV Review
 110XXIV(U) Determination and Disposition of Cause
 110k1181.5 Remand in General; Vacation
 110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
 110k1181.5(8) Sentence.
Utah 1972.
Where defendant was represented by counsel at time his plea of guilty was entered and there was no entry as to withdrawal of counsel prior to sentencing at which defendant appeared without counsel and without receiving advice as to his right to counsel, absence of counsel rendered sentence invalid and cause would be remanded with directions to proceed to fix date for pronouncing sentence in proper manner. Const. art. 1, Secs. 12, 13; U.C.A.1953, 77-35-17.

[28 UTAH2D 150] Margret S. Taylor, Salt Lake Legal Defender Assn., Salt Lake City, for plaintiff and appellant.

Vernon B. Romney, Atty. Gen., David S. Young, David R. Irvine, Asst. Attys. Gen., [28 UTAH2D 151] Salt Lake City, for defendant and respondent.

CALLISTER, Chief Justice:

Plaintiff appeals from an order of the district court

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denying his petition for a writ of habeas corpus.

The trial court determined that plaintiff was lawfully incarcerated in the Utah State Prison pursuant to a conviction of the crime of forgery based upon a guilty plea, knowingly, intelligently, and voluntarily entered, and that plaintiff's rights were not violated by lack of counsel at the sentencing proceeding.

On appeal plaintiff asserts that his sentence was invalid and void on the ground that he was without counsel at a critical stage of the criminal proceedings, namely, at the time of sentencing.

A review of the record reveals that plaintiff was represented by counsel at the time his plea of guilty was entered; furthermore, there was no entry of withdrawal of counsel prior to sentencing. At the time of sentencing the trial court neither advised plaintiff of his right to counsel nor made inquiry as to why counsel was not present. In the colloquy between the court and plaintiff, the court merely queried ***840** whether it was plaintiff's desire not to wait but to be sentenced immediately, to which plaintiff responded affirmatively and expressed appreciation for prompt attention, as his stay in the jail was 'dead time.'

[1] During the evidentiary hearing on plaintiff's petition, the court queried whether the State desired to show a waiver by plaintiff of counsel at the sentencing The State responded negatively. The State was of the opinion that lack of counsel at the sentencing constituted harmless error. The issue of waiver was, therefore, not presented to the trial court. However, it should be observed that since plaintiff was not informed of his right to the presence of counsel, there is no ground upon which ot predicate a waiver of this right. (FN1)

Article I, Section 12, Constitution of Utah, provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, ...

In the case of In re Boyce, (FN2) the court held that under Article I, Section 13, of [28 UTAH2D 152] the Constitution of California, which is substantially similar to Article I, Section 12, of the Constitution of Utah, a defendant was entitled to counsel when judgment was pronounced and sentence imposed. The court held the judgment must be set aside and the matter remanded for resentencing with counsel present, where it appeared that defendant had been represented by counsel at all prior stages of the proceedings but was without counsel at the time the judgment and sentence were pronounced. This ruling was considered particularly applicable where there was nothing in the record to indicate that defendant was informed of his right to counsel or that he knew that he was entitled to the aid of an attorney. (FN3)

In Lee v. State, (FN4) the court stated that while there was a sharp conflict in authorities as to whether the presence of counsel for an accsed was necessary at the time of sentence, they thought the better rule was that when counsel had not been waived, the absence thereof invalidated the sentence. The court observed that if there were any time that a defendant on a criminal charge might be in need of an attorney to speak in his behalf or to advise him of his legal rights it could well be at the time of sentencing.

In this jurisdiction, Section 77--35--17, U.C.A.1953, grants the trial judge power to place the defendant on probation.

> . . . The granting or withholding of probation involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling. These matters, which are to be considered in connection with the prior record of the accused, are of such nature that the problem of probation must of necessity rest within the discretion of the judge who hears the case. . . . (FN5)

[2] The foregoing indicates the necessity of the presence of counsel at the time of sentencing; so that there is a real opportunity to present to the court facts in extenuation of the offense or in explanation of the defendant's conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration ***841** and enforcement of penal laws. (FN6)

The conflict in the authorities to which the court made reference in Lee v. State (FN7) has been resolved by the United States Supreme[28 UTAH2D 153] Court. In McConnell v. Rhay, (FN8) the

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court stated:

> As we said in Mempa (v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336), 'the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.' 389 U.S. at 135, 88 S.Ct. at 257, 19 L.Ed.2d at 341. The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.

[3] In the instant action, since the record does not indicate that plaintiff knowingly and intelligently waived his right to counsel at the time of sentencing, we are compelled to hold his sentence invalid. However, this does not mean that the plaintiff is entitled to an absolute discharge.

> The defect in the first sentence did not inhere in the judgment of conviction. The defendant pleaded guilty, and made no attack on any of the proceedings except the sentence. Had he appealed from the illegal sentence, as he had a right to do, notwithstanding his plea of guilty, this court would have set aside the sentence as void and have remanded the case to the trial court for a valid sentence. (Citation) There is no principle on which it can be successfully maintained that, by serving part of a void sentence instead of appealing from it, but later attacking it in collateral proceedings, the defendant can obtain immunity from being sentenced to the judgment provided by law. (Citation) (FN9)

This cause is remanded to the district court with directions to proceed to fix a date for pronouncing sentence upon plaintiff in a manner consistent with the views herein expressed.

TUCKETT, HENRIOD and CROCKETT, JJ., concur.

ELLETT, Justice (concurring in the result):

I concur in the result, not because there was any error below, but simply to avoid having the matter taken before the federal courts, where the defendant would be released. There is no federal question involved in this matter. (FN1)

Even if the provisions of the Sixth Amendment were applicable to this case, it [28 UTAH2D 154] should not require a release of the defendant on a habeas corpus proceeding. So far as pertinent to this matter, that Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

At the time of the adoption of this Amendment there was no right to counsel in the courts of England in felony cases. In fact, it was not until 1826, 50 years after the Amendment, that a defendant charged with felony in the courts of England could be represented by counsel at trial.

It was a determination by the people of the 13 colonies to see that the new federal entity did not follow the rule of the English courts which prompted the language above quoted to be included in the Amendment.

***842.** The Amendment does not say, and it never was meant to say that a criminal must have counsel. All it ever said was that he had a right to have counsel to assist him.

In this case the defendant was never denied any right to have counsel and so I would affirm the trial court in what was done. However, I can see no harm in permitting a new sentence to be imposed upon the defendant.

FN1. See In re Haro, 71 Cal.2d 1021, 80 Cal.Rptr. 588, 594, 458 P.2d 500, 506 (1969), wherein the court stated: '. . . we cannot condone in the present case the failure of the trial court to reinform defendant of his right to counsel when he appeared for the first time without his counsel for sentencing, nor can we countenance the trial court's failure to require defendant's waiver of his right to counsel in open court before the rendition of sentence.'

FN2. 51 Cal.2d 699, 336 P.2d 164, 165 (1959).

FN3. Also see People v. Horton, 174 Cal.App.2d 740, 345 P.2d 45, 47 (1959).

FN4. 99 Ariz. 269, 408 P.2d 408, 409 (1965).

FN5. State v. Sibert, 6 Utah 2d 198, 205, 310 P.2d 388, 393 (1957).

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FN6. See Martin v. United States (C.A. 5th 1950), 182 F.2d 225, 22 A.L.R.2d 1236, 1239--1240.

FN7. Note 4, supra.

FN8. 393 U.S. 2, 4, 89 S.Ct. 32, 21 L.Ed.2d 2, 4 (1968).

FN9. State v. Lee Lim, 79 Utah 68, 72, 7 P.2d 825, 826 (1932); also see Ex Parte Folck, Folck v. Watson, 102 Utah 470, 473, 132 P.2d 130 (1942).

FN1. See my lonesome opinion in Dyett v. Turner, 20 Utah 2d 403, 439 P.2d 266 (1968).

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