1999

# State of Utah v. Marha Tarnawiecki : Reply Brief

Utah Court of Appeals


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Lynn C. McMurray; McMurray, MMurray, Dale and Parkinson, P.C.; Attorneys for Appellant.

**IN THE COURT OF APPEALS FOR THE STATE OF UTAH**

STATE OF UTAH,

Plaintiff-Appellee

v.

MARHA TARNAWIECKI,

Defendant-Appellant

Case No. 990225-CA

Priority No. 2

# REPLY BRIEF OF APPELLANT MARHA TARNAWIECKI

APPEAL FROM THE DENIAL OF A MOTION TO EXTEND THE TIME TO FILE AND MOTION TO WITHDRAW A GUILTY PLEA IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH; HONORABLE SHEILA K. McCLEVE, PRESIDING


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## I.

**30 DAY LIMITATION RULE IS INAPPLICABLE SINCE TRIAL COURT MAY NOT ACCEPT GUILTY PLEA UNTIL IT HAS EXPRESSLY ADVISED DEFENDANT THAT SHE HAS THE RIGHT TO A SPEEDY TRIAL, THE MINIMUM SENTENCE, AND THAT THERE IS A FACTUAL BASIS FOR THE PLEA. THEREFORE, THERE CAN BE NO WAIVER OF SAID PREREQUISITES.**

The Utah Rules of Criminal Procedure, Rule 11. Pleas, specifically, Rule 11(e), in pertinent parts, state "(e) The court ... may not accept the plea **'until'** the court has found: ... (3) the **defendant 'knows'** of ..., the right to a speedy public trial before an impartial jury, ... and that by entering the plea, these rights are **waived**;(4)(A) 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 these elements beyond a reasonable doubt, and that the plea is an admission of all those elements;(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, .... (5) the defendant knows the minimum and maximum sentence, ...." Utah R. of Crim. P., Rule 11 (Emphasis added)

The Opening Brief of the Defendant (pages 4-13, inclusive) clearly sets out that the trial court failed to establish, on the record, neither in the plea affidavit nor in the colloquy of July 17, that the defendant was advised of the right to a speedy public trial before an impartial jury, that the defendant was advised of the minimum sentence, that there was a factual basis for the plea, and the defendant understood the nature and elements of the offense and the facts as related to the law were not articulated to the defendant. The

prosecution failed to address said issues in its' Reply Brief. Therefore, either the prosecution has admitted that defendant's points I-III, (pages 4-13, inclusive of Defendant's Opening Brief), are well taken or, (for some magical unstated reason), are legally incorrect. Since the prosecution is duty bound to point out any, and all, legally incorrect assertions by the defendant, it appears that the prosecution, at a minimum, admits that the trial court failed to advise the defendant of the aforementioned rights.

The significance of such omissions is that there can be no waiver by the defendant and the trial court could not accept the guilty plea, in the first instance. Therefore, since there was no compliance with the prerequisites expressly set in Rule 11, the 30 day rule limitation never applied. Rule 11 specifically mandates that the trial court may not accept a plea **"until"** the court has found that it has advised the defendant, on the record, of the aforementioned prerequisite rights. Without advisement, the trial court could not accept the guilty plea, thereby invoking the 30 day limitation. The language of Rule 11 precludes the trial court from accepting the plea unless it advises the defendant, on the record, of the prerequisite Rule 11 and constitutional rights.

It is appropriate to embellish defendant's discussion of waiver (Opening Brief of Defendant, page 6,) with some newly discovered Utah cases on waiver that are dispositive. The Utah Supreme Court in Soter's v. Deseret Federal Sav. & Loan, 857 P.2d 935, 942 (Utah 1993), held that "we hold that there is only one legal standard required to establish waiver under Utah law. We conclude that Phoenix, Inc. v. Health, 61 P.2d 308 (Utah 1936) properly

stated the requirements for waiver: A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be a n existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it." (Citation added) Rule 11 requires that any waiver be express and it must be contained in the record. See State v. Gibbons, 740 P.2d 1309 (Utah 1987).

In one of the latest cases approving *Soter's,* Geisdorf v. Doughty, 972 P.2d 67, 73 (Utah 1998), the Utah Supreme Court again affirms that *Soter's* is still the law and adds that a stricter standard is applied to express waivers versus implied waivers and "any waiver must be distinctly made". *Geisdorf, at 72.* There is no express waiver by the defendant in this fact pattern because she was never advised of her prerequisite Rule 11 and constitutional rights, therefore without knowledge there can be no distinct relinquishment. The right was never known or articulated by the trial court, as required.

## II.

## INEFFECTIVE REPRESENTATION OF COUNSEL IS INDEPENDENT OF 30 DAY LIMITATION.

The prosecution's Reply Brief fails to mention the impact of Defendant's contention that her right to counsel has been violated by ineffective representation, which is independent and can be reviewed for the first time in the Appellate Court. Ineffective counsel was raised in the trial court by defendant, but not decided. The absence of any opposition, coupled with

the duty to raise all legal arguments that would support the contrary position, strongly suggests that the prosecution has conceded the point. The prosecution has ignored Defendant's argument IV, (Defendant's Opening Brief, pages 14-28, inclusive). The defendant respectfully refers the court to her opening brief for authority supporting that contention.

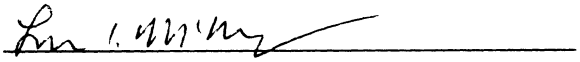
## III.

**APPELLATE INDEX, NUMBER 147, PROPERLY INCORPORATES TRANSCRIPT OF JULY 17, 1998, LOCATED IN MANILA ENVELOPE, MARKED "TRANSCRIPT OF JULY 17,1998."**

The prosecution has erroneously raised the contention that the Defendant has not provided the Appellate Court with the transcript of July 17, 1998, ostensibly failing to realize that the manila envelope, plainly marked "Transcript of July 17,1998", and the Index clearly refers to "Exhibit, Number 147". Therefore, such contention of the prosecution is in error. The transcript is part of the trial court record that was sent up to the Appellate Court from the Trial Court and said transcript was indexed in the appellate file.

Respectfully submitted,

Dated: February 1, 2000



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Certificate of Service

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