

1989

John Quas v. State of Utah : Petition for Rehearing

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

890601A

	:	
Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890601-CA
Respondent.	:	Priority No. 2

PETITION FOR REHEARING

Petition for rehearing of the February 6, 1992 decision affirming judgment and conviction for criminal homicide, murder in the second degree, a first degree felony, in violation of Utah Code Ann. section 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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FILED

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IN THE UTAH COURT OF APPEALS

JOHN QUAS,	:	
Petitioner,	:	
v.	:	
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IN THE UTAH COURT OF APPEALS

JOHN QUAS,	:	
Petitioner,	:	
v.	:	
STATE OF UTAH,	:	Case No. 890601-CA
Respondent.	:	Priority No. 2

INTRODUCTION

In the February 6, 1992 Quas opinion, this Court relied on State v. Humphrey, 176 Utah Adv. Rep. 8 (Utah 1991), in holding that Mr. Quas' conviction mooted, cured and/or rendered harmless any defects in the bindover order. Quas at 2, 3, and 5.

This Court has not had the benefit of briefing by the parties on the Humphrey decision. Because this Court has not had the opportunity to fully consider the constitutional ramifications of the Humphrey decision in the context of this case, Mr. Quas respectfully requests rehearing.¹ See Brown v. Pickard, 11 P. 512 (Utah 1886) (explaining circumstances allowing rehearing); Cummings v. Nielson, 129 P. 619 (Utah 1913) (same).

1. In the original proceedings for rehearing of the June 18, 1991 Quas decision, counsel for Mr. Quas and counsel for the State agreed that the opinion's plain error analysis relating to expert testimony was confusing and should be modified, although the parties disagreed as to how the analysis should be modified. Petition at 7-8; response at 5-6. The February 6, 1992 Quas decision contains the same plain error analysis. Counsel for Mr. Quas maintain but do not repeat the argument raised in the original petition for rehearing concerning the plain error analysis, and refer to that argument here in order to preserve it.

A copy of this Court's February 6, 1992 opinion is in Appendix 1. A copy of the Humphrey decision is in Appendix 2.

ARGUMENT

I.

BECAUSE THE DEFECTIVE BINDOVER ORDER
CONSTITUTES A DEFECT IN THE JURISDICTION OF THE DISTRICT COURT,
IT CANNOT BE CURED, MOOTED OR RENDERED HARMLESS
BY THE CONVICTION.

The Quas opinion's holding that any error in the bindover order was mooted, cured or rendered harmless by Mr. Quas' conviction is based on footnote 6 of State v. Humphrey, 176 Utah Adv. Rep. 8 (Utah 1991), which states,

We note that if the orders of magistrates were in fact orders of a circuit court, the Utah State Constitution would provide an appeal as of right from these orders. Utah Const. art. I, §12, art. VIII §5. Interlocutory appeal to the court of appeals would not satisfy this requirement. We believe this right likewise would not be satisfied if the defendant first had to endure trial in the district court, because any challenges to the bindover order would be mooted by the trial verdict.² Our construction avoids this constitutional problem.

Id. at 10-11.

This portion of the Humphrey opinion is dicta.

2. This portion of the Humphrey opinion may be attributed to the briefs of the appellant/petitioners in Humphrey, which raised the mootness argument and failed to appreciate the jurisdictional nature of proper preliminary hearings. See briefs of appellants in case numbers 890424-CA, 890130-CA, 890666-CA; and of petitioners in case number 900434. Appellate counsel regrets the confusion arising from her argument.

The holding of Humphrey is key to understanding why the illegal bindover order was not mooted or rendered harmless by Mr. Quas' conviction. Repeatedly throughout the Humphrey opinion, the court held that a proper bindover order is essential to the jurisdiction of the district court over the criminal case, and that the district court has the obligation to review the bindover proceedings, to insure that the district court's original jurisdiction is invoked properly. Humphrey at 9 and 10 and nn. 2 and 5.³

Because a defective bindover order fails to properly invoke the jurisdiction of the district court, it cannot be considered harmless error under the state or federal constitutions. State v. Pay, 146 P.2d 300 (Utah 1950), was decided under the Utah Constitution. There, the court characterized deficiencies in the

3. Utah's conditioning of district court jurisdiction on a proper bindover order differs from decisions from other courts. See footnote 4 of State's supplemental brief at page 13 (arguing that this Court should follow case law from California holding that insufficient evidence at the preliminary hearing does not constitute a jurisdictional defect in the trial court). Humphrey and State v. Freeman, 71 P.2d 196 (Utah 1937), cited in footnote 2 of Humphrey for the proposition that district court jurisdiction is contingent upon the propriety of the bindover order, are decided under Utah statutes and the Utah Constitution. Therefore, the Utah Supreme Court's holdings conditioning district court jurisdiction on the propriety of the bindover order are binding on all state and federal courts. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 561 (1983) (jurisdictional provisions based in state constitutions are matters of state law, and the rulings of the state court control); State v. Pay, 146 P. 300 (Utah 1915) (in discussing how a district court's jurisdiction is contingent on the propriety of the bindover proceedings, the Utah court discussed law from other jurisdictions, but found the Utah Constitution controlling).

preliminary hearing as flaws in the trial court's jurisdiction. Id. at 302 and 305. Because of errors occurring in the preliminary hearing proceedings, the court reversed Mr. Pay's conviction beyond a reasonable doubt, and ordered the trial court to quash the information so that Mr. Pay's rights to proper preliminary proceedings would be protected. Id. at 306. The court did not apply harmless error analysis to the jurisdictional defect arising from deficiencies in the preliminary hearing.

In Gomez v. United States, 490 U.S. 858 (1989), the Court held that federal magistrates do not have jurisdiction to conduct voir dire in felony trials without the defendant's consent. The Court further held that jurisdictional defects can never be harmless error, stating,

Among those basic fair trial rights that "'can never be treated as harmless'" is a defendant's "right to an impartial adjudicator, be it judge or jury." Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

Id. at 876 (citations omitted, emphasis added). Gomez is a unanimous decision.

The Quas opinion relies on several cases to support the holding that the conviction mooted, or cured, defects in the

preliminary hearing in this case.⁴ The federal cases relied on do not support the holding, but are inapposite to this case because those cases do not involve jurisdictional flaws resulting from inadequacies in preliminary hearings, and because those cases were not decided under Utah law establishing the jurisdictional significance of preliminary hearings in this state.

Rather than supporting the holding that errors in preliminary hearings are cured or mooted by convictions beyond a reasonable doubt, Schreuder demonstrates the opposite. Quas correctly notes that Schreuder holds that an illegal arrest does not justify a reversal of a valid conviction. However, Schreuder reaches that conclusion only after determining that an illegal arrest is not a jurisdictional defect. 712 P.2d 264, at 272.

4. The opinion states,

This holding is supported by case law from the United States Supreme Court and from this state establishing that an error at the preliminary stage is cured if the defendant is later convicted beyond a reasonable doubt. United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938, 942 (1986) (presence of two witnesses in grand jury room, although illegal, is harmless beyond a reasonable doubt in light of subsequent conviction); Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 4 (1910) (conviction upheld where errors such as hearsay and incompetent evidence occurred at indictment stage); see also State v. Schreuder, 712 P.2d 264, 272 (Utah 1985) (the fact defendant was convicted cured any defect in temporary period of possibly wrongful detention) (citing Gerstein v. Pugh, 420 U.S. 103, 119, 95 S. Ct. 854, 866 (1975)).

Quas at 3.

In contrast to the non-jurisdictional illegal arrest issue, in disposing of the preliminary hearing issues, despite Mr. Schreuder's valid conviction beyond a reasonable doubt, the court did not apply harmless error analysis or declare that the conviction mooted defects in Mr. Schreuder's preliminary hearing. The court addressed each issue relating to the preliminary hearing fully on the merits, finding that Mr. Schreuder's preliminary hearing was conducted properly. 712 P.2d at 267-270.

Particularly because the jury conviction of Mr. Quas is nullified by the failure of the bindover order to invoke the trial court's jurisdiction, the jury conviction does not cure the improper bindover order. More importantly, because the jury may never have been selected in the absence of the improper bindover, the jury's conviction cannot be used to render the bindover error harmless. See Vasquez v. Hillery, 474 U.S. 254, 263, (1986) (Court could not rely on defendant's conviction to apply harmless error analysis to racial discrimination in the selection of the grand jury, because Court could not determine whether the defendant would have been indicted at all in the absence of the error occurring in the grand jury proceedings).

II.
THE PRELIMINARY HEARING ISSUE
MUST BE RESOLVED ON THE MERITS.

As the Quas opinion accurately relays, Mr. Quas has never had the opportunity for a resolution of his claim that this case should have been dismissed before trial because the prosecution's

refiling of the information in the successive preliminary hearing did not meet the Utah Constitution's due process standards set forth in State v. Brickey, 714 P.2d 644 (Utah 1986). Under Utah law, Mr. Quas has always had the right to challenge the improper bindover order, but the district court which had jurisdiction to quash the bindover order improperly ruled that it had no jurisdiction to review the bindover order, and the Utah Supreme Court declined Mr. Quas' petition for interlocutory review of that ruling. Quas at 2.

The Quas opinion's abstention from the merits, and holding that any errors in the bindover order are mooted, cured, or rendered harmless by the conviction entered in the trial court raise troubling concerns about due process, equal protection and uniform operation of laws. As is explained below, several constitutional guarantees require that Mr. Quas' challenge to the preliminary hearings in his case be heard on the merits.

Due process of law, provided by Article I section 7 of the Utah Constitution, requires the following essentials before a person's liberty may be taken by the state:

- (a) the existence of a competent person, body, or agency authorized by law to determine the questions;
- (b) an inquiry into the merits of the question by such person, body or agency;
- (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard;
- (d) the right to appear in person or by counsel;
- (e) fair opportunity to submit evidence, examine and cross-examine witnesses;
- (f) judgment to be rendered upon the record thus made.

Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). The due process violation stemming from the district court's lack of proper jurisdiction (resulting from the improper bindover order), is compounded by the fact that Mr. Quas has never had an opportunity to be heard on the merits concerning the district court's lack of jurisdiction. Id.

Likewise, under federal due process standards, Mr. Quas is entitled to have the bindover issue resolved on the merits. The right to a proper preliminary hearing in Utah has been characterized by the Utah Supreme Court as "fundamental" and "sacred." State v. Nelson, 176 P.860, 862 (Utah 1918). Depriving Mr. Quas of this right because the trial court erroneously concluded that it did not have the jurisdiction to enforce the right would be so fundamentally unfair as to constitute both a substantive and procedural due process violation under federal standards.⁵ As the Court explained in Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930), "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or

5. Under federal law, "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." United States v. Salerno, 481 U.S. 739, 746 (1987) (citations omitted).

through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Id. at 681-682 (footnote omitted).

Principles of uniform operation and equal protection of the laws also require that Mr. Quas be heard on the merits concerning the improper bindover order. Under Quas, through no fault of his own, Mr. Quas has been denied the right, provided by the law to all Utah felony defendants,⁶ to have his preliminary hearings reviewed on the merits. But for the erroneous ruling of the district court, Mr. Quas would have had the remedy provided by the Utah Constitution under Brickey, dismissal of his case prior to trial. The trial court's error is not an acceptable reason to penalize Mr. Quas with the sacrifice of his right to review of the preliminary hearing under Article I section 24. See Malan v. Lewis, 693 P.2d 661, 670-671 (Utah 1984) (interpreting Article I section 24, the court explained, "When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit.").

Federal standards similarly require Utah courts to grant

6. See e.g. State v. Schreuder, 712 P.2d 264, 270 (Utah 1985) (no equal protection problem arose because defendant did have the opportunity, given to all felony defendants, for review of the preliminary hearing).

Mr. Quas equal protection of the laws granting the right to review of the bindover order. See Cooper v. Aaron, 358 U.S. 1 (1958) ("The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.'").

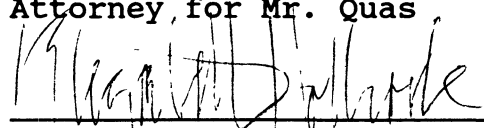
CONCLUSION

Mr. Quas requests rehearing of his case.

Respectfully submitted this 24 day of February, 1992.

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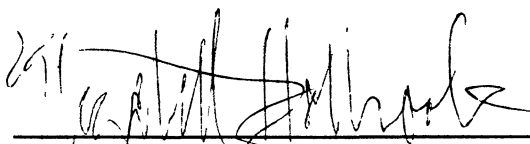
CERTIFICATION

I, Elizabeth Holbrook do hereby certify the following:

(1) I am the attorney for Petitioner in this case; and

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

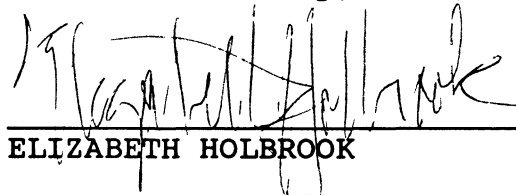
Respectfully submitted this 24 day of February, 1992.



ELIZABETH HOLBROOK
Attorney for Mr. Quas

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that 8 copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 24 day of Feb., 1992.



ELIZABETH HOLBROOK

DELIVERED by _____, this _____ day of _____, 1992.

Appendix 1

Quas decision

FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

FEB 6 1992

IN THE UTAH COURT OF APPEALS

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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State of Utah,)	OPINION
)	(For Publication)
Plaintiff and Appellee,)	
)	
v.)	Case No. 890601-CA
)	
John Quas,)	
)	F I L E D
Defendant and Appellant.)	(February 6, 1992)

Third District, Salt Lake County
The Honorable Kenneth Rigtrup

Attorneys: Lisa J. Remal, Candice A. Johnson, and Elizabeth
Holbrook, Salt Lake City, for Appellant
R. Paul Van Dam and Judith S.H. Atherton, Salt
Lake City, for Appellee

Before Judges Billings, Garff, and Orme.

GARFF, Judge:

Appellant, John Quas, appeals his conviction of second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1991). We affirm.

We recite the facts from the record in the light most favorable to the jury's verdict. State v. Johnson, 784 P.2d 1135, 1137 (Utah 1989). On the evening of June 15, 1987, appellant John Quas and his wife Susan Quas were at home. Both had been drinking. The two began to argue and to discuss divorce. Sometime that evening, appellant allegedly shot and killed Mrs. Quas. At 9:41 p.m. appellant called the Salt Lake County 911 operator to report that his wife had shot herself. A police officer and paramedics arrived within four minutes of appellant's call. Mrs. Quas was found dead, lying on some sheets in the living room with a gunshot wound in her left eye. Appellant said he had been in the shower, heard a gunshot, and came out to find his wife lying on the floor.

On June 16, 1987, appellant was charged with second degree murder. After a preliminary hearing before a magistrate, the information was dismissed for lack of probable cause to bind defendant over for trial. A year later, on July 5, 1988, the information was refiled. A second preliminary hearing was held

before the same magistrate. On October 24, 1988, the magistrate found that refiling was appropriate based on new or previously unavailable evidence. The magistrate determined that the new evidence, along with the evidence presented at the former hearing, gave rise to probable cause to bind appellant over to stand trial.

Appellant moved the district court to quash the bindover order. The State moved to strike appellant's motion to quash. The district court granted the State's motion on the ground that it lacked jurisdiction to review the sufficiency of evidence presented at the preliminary hearing. Appellant petitioned the Utah Supreme Court for permission to appeal from the district court's interlocutory order, and the court denied permission. The district court then accepted the information, and appellant was tried and convicted of criminal homicide, murder in the second degree. He appealed the conviction to the Utah Supreme Court, which, pursuant to Utah Code Ann. § 78-2-2(4) (1991), transferred the appeal to this court.

The issues on appeal are: (1) whether the district court had jurisdiction to review the bindover order; (2) whether the district court correctly accepted the information for purposes of proceeding to trial; and (3) whether the court properly concluded that the trial testimony of expert witnesses from the State Medical Examiner's Office did not violate Rules 403, 404 or 702 of the Utah Rules of Evidence.

DISTRICT COURT REVIEW OF BINDOVER

The first issue is whether the district court had jurisdiction to review the bindover order. State v. Humphrey, 176 Utah Adv. Rep. 8 (Utah 1991) is dispositive of this issue. The Humphrey court held that "the district court has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked." Id. at 9. In other words, "it is always proper for a trial court, as a threshold jurisdictional matter, to consider whether it has jurisdiction over a criminal defendant." Id. at 10. Further, Rule 12(b)(1) of the Utah Rules of Criminal Procedure "explicitly gives district courts authority to review 'defects in the indictment or information.'" Id. at 9.

Applying Humphrey, we hold that the district court erred in its initial refusal to review the bindover order. However, this error was harmless. Humphrey suggests that a challenge to a bindover order is mooted once a defendant has been convicted beyond a reasonable doubt. Id. at n.6. The Utah Supreme Court held: "We believe this right [to a review of bindover orders] likewise would not be satisfied if the defendant first had to endure trial in the district court, because any challenges to the bindover order would be mooted by the trial verdict." Id.

This holding is supported by case law from the United States Supreme Court and from this state establishing that an error at the preliminary stage is cured if the defendant is later convicted beyond a reasonable doubt. United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938, 942 (1986) (presence of two witnesses in grand jury room, although illegal, is harmless beyond a reasonable doubt in light of subsequent conviction); Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 4 (1910) (conviction upheld where errors such as hearsay and incompetent evidence occurred at indictment stage); see also State v. Schreuder, 712 P.2d 264, 272 (Utah 1985) (the fact defendant was convicted cured any defect in temporary period of possibly wrongful detention) (citing Gerstein v. Pugh, 420 U.S. 103, 119, 95 S. Ct. 854, 866 (1975)).

Therefore, the question as to whether the information should have been quashed by the district court is moot because any defect was cured by defendant's conviction beyond a reasonable doubt.

EXPERT TESTIMONY

We now consider issues pertaining to the trial itself. Appellant argues that the testimony of Dr. Todd Grey, the medical examiner, and that of Brent Marchant of the State Medical Examiner's Office, to the effect that the nature of the victim's wounds was more consistent with homicide than with suicide, violated Rules 403, 404 and 702 of the Utah Rules of Evidence.

Because no contemporaneous objections to this testimony were made, appellant has waived his right to raise the matter on appeal, State v. Eldredge, 773 P.2d 29, 34-35 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62 (1989), unless the testimony is plain error, id.; State v. Braun, 787 P.2d 1336, 1341-42 (Utah App. 1990), or unless there are unusual circumstances. See State v. Archambeau, 820 P.2d 920, 922-26 (Utah App. 1991).

Rule 103(d) of the Utah Rules of Evidence provides "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." The Utah Supreme Court established a two-part test to determine plain error. First, the error must be "plain." That is, "it should have been obvious to a trial court that it was committing error." Eldredge, 773 P.2d at 35. Second, the error must affect the substantial rights of the accused. That is, the error must be harmful. Id. The policy behind the plain error test is to allow the court to reach justice in a given case. Id. at 35 n.8; Braun, 787 P.2d at 1342. See Utah R. Evid. 102.

The transcript reveals that Dr. Grey did not give psychological profile testimony, condemned in State v. Rimmasch, 775 P.2d 388, 400-03 (Utah 1989), nor did he vouch for the truthfulness of a witness's testimony based on anecdotal

"statistical" evidence, condemned in State v. Rammel, 721 P.2d 498, 501 (Utah 1986) and also in State v. Iorg, 801 P.2d 938, 941 (Utah App. 1990).

Instead, Dr. Grey addressed the issue of whether the victim died via suicide or homicide by examining the physical evidence of the victim's body and by demonstrating the hypothesis of suicide using a live model whose arm length was identical to that of the victim. He had the model hold the gun in various positions to see whether it was possible for Mrs. Quas to shoot herself with the muzzle sixteen to eighteen inches away from the entry wound and with the gun oriented so that the bullet path would correspond to that of the victim. He had the model hold the gun with either hand, with both hands, and in a position so she could fire using her thumb. He also had the model hold the gun in these various positions with her arms extended as far as possible. He testified that the gun could be held in the right hand at fourteen or fifteen inches away, in the left hand at fourteen inches away, or in both hands at twelve and a half or thirteen inches away. He concluded that, while it may have been technically possible for Mrs. Quas to shoot herself,

it's a very cumbersome and in my experience completely atypical way for somebody to commit suicide. When people shoot themselves, they usually put the gun where they want the bullet to go and pull the trigger. I've never seen a clearly proven suicide where the person has held the gun as far as away from their body as they possibly can before shooting.

Here, the gist of the testimony goes to the fact that, if the victim had committed suicide, she chose a physically awkward and hence unlikely method to carry out the deed.

Both Rammel and Iorg condemn the use of evidence "concerning matters not susceptible to quantitative analysis such as witness veracity," because such evidence leads to undue prejudice. Iorg, 801 P.2d at 941-42. However, Rammel and Iorg do not apply in this case. First, Dr. Grey's testimony was not offered as statistical evidence that Mrs. Quas did not commit suicide. Rather, the testimony was offered to prove that, while it was technically possible to achieve suicide given the circumstances, it would have been "cumbersome" and "atypical." Second, Dr. Grey was not vouching for another witness's veracity, nor was he giving statistical probabilities for another's veracity. Third, even if the remark were prejudicial, it was not sufficiently obvious to invoke the plain error exception, especially in light

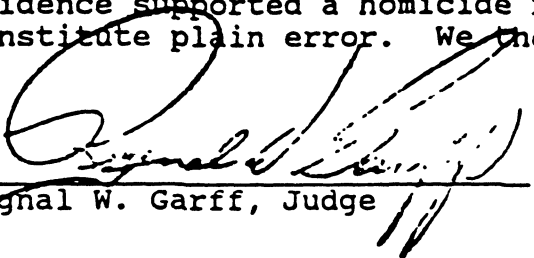
of the corroborating evidence offered by this and other witnesses.¹

Brent Marchant, an investigator with the State Medical Examiner's Office, did not opine as to whether the death was a homicide or suicide. Neither did he testify as to the profile of a hypothetical suicide victim. He testified that Mrs. Quas's wound was unusual because, from his ten years' experience investigating many of the one hundred and fifty gunshot suicides that occur in Utah each year, he had seen only one suicide gunshot wound inflicted in the eye. That wound was a direct contact wound, unlike that of the victim. Therefore, even if Marchant's statement were erroneously admitted, the error is not sufficiently obvious to invoke the plain error exception.

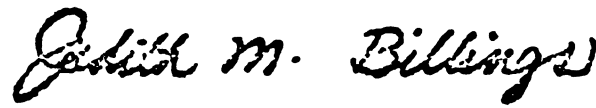
As to the other issues appellant raises on appeal, we have reviewed them and find them to be without merit. See State v. Carter, 776 P.2d 886, 896 (Utah 1989).

CONCLUSION

Appellant's conviction beyond a reasonable doubt mooted any defects in the bindover order. The experts' conclusion that the evidence supported a homicide rather than a suicide did not constitute plain error. We therefore affirm.


Regnal W. Garff, Judge

WE CONCUR:


Judith M. Billings, Judge


Gregory K. Orme, Judge

1. While the requirement of obviousness may be waived in cases of "a high degree of harmfulness," we do not find such a degree of harmfulness in this case in light of the corroborating evidence. Eldredge, 773 P.2d at 35 n.8; Braun, 787 P.2d at 1342.

Appendix 2

Humphrey decision

that when a motion to intervene is filed after settlement, a court lacks jurisdiction to decide the motion because there was no existing case in which to intervene. *Jennings*, 816 F.2d at 1491 n.4. However, some courts, in considering the issue of timeliness of a motion to intervene, have held that parties who have knowledge of contemplated intervention cannot cut off a right of intervention by a settlement. See Annotation, *Time Within Which Right to Intervene May Be Exercised*, 37 A.L.R.2d 1306, §18[b], at 1362 (1954).

2. Utah Code Ann. §63-46(b)-9(2) states in full:

The presiding officer shall grant a petition for intervention if he determines that:

(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

Utah Administrative Rule 861-1-5A(J), promulgated by the Commission, also provides for intervention. Rule 861-1-5A(I) provides, with respect to motions for consolidation, and by reference, motions for intervention, that the "presiding officer" has "wide discretion" in granting or denying motions.

3. The Tax Commission expresses the concern that it will have to give all governmental agencies that have some legal interest in a given proceeding prior notice of their statutory right to intervene. We fail to see any reason why such a notice would have to be given.

Cite as
176 Utah Adv. Rep. 8

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE of Utah,
Plaintiff and Respondent,

v.

Vaughn HUMPHREY, Harry Jamar Gordan,
and Bruce William Mathews,
Defendants and Petitioners.

No. 900434

FILED: December 18, 1991

Third District, Salt Lake County
Honorable James S. Sawaya
Honorable Frank G. Noel
Honorable Richard H. Moffat

ATTORNEYS:

R. Paul Van Dam, Sandra L. Sjogren, Salt
Lake City, for plaintiff

Elizabeth A. Bowman, James C. Bradshaw,
Vernice S. Ah Ching, Elizabeth Holbrook,
Salt Lake City, for defendants

On Certiorari to the Utah Court of Appeals

This opinion is subject to revision before
publication in the Pacific Reporter.

DURHAM, Justice:

Petitioners Vaughn Humphrey, Harry Jamar Gordan, and Bruce Mathews are criminal defendants in unrelated felony cases pending in the district courts of this state. A circuit court judge acting as a magistrate bound each defendant over for trial in district court. Each defendant then moved the district court to quash the bindover order. In each case, the district court denied the motion, holding that it lacked jurisdiction to quash bindover orders. Each defendant filed an interlocutory appeal with the Utah Court of Appeals. That court affirmed the district court rulings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990) (consolidating Humphrey's and Gordan's appeals); *State v. Mathews*, No. 890666-CA (Utah Ct. App. June 21, 1990). All three cases, now consolidated, are before us on a writ of certiorari. We reverse.

The issue before us is whether, in light of recent statutory and constitutional changes associated with the creation of the Utah Court of Appeals, the district courts no longer have jurisdiction to quash bindover orders. This is solely a question of law, which we review under a correctness standard. We thus give no deference to the decisions below. See *City of Monticello v. Christensen*, 788 P.2d 513, 516 (Utah), cert. denied, 111 S.Ct. 120 (1990).

Prior to 1986, the jurisdictional provision governing district courts gave them "appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same." Utah Code Ann. §78-3-4 (Supp. 1985). A 1986 amendment eliminated this appellate jurisdiction. Judicial Article Implementation Act, ch. 47, §50, 1986 Utah Laws 136-37.¹ In each of the cases consolidated here, the trial court's conclusion that it lacked jurisdiction to quash a bindover order was premised on this statutory change and a determination that quashal was an appellate function. The court of appeals similarly concluded that an attack on a bindover order "falls squarely within the classic definition of an appeal." *Humphrey*, 794 P.2d at 498. Before this court, the State urges the same conclusion, arguing that "what [defendants] sought was review on the record from the circuit court of the sufficiency of the evidence presented to that court.... This type of on-the-record review of the sufficiency of the evidence ... can be nothing other than appellate review."

This characterization of motions to quash bindover orders is twice flawed. First, it mis-

nding that there is probable cause to believe the defendant has committed the crime charged in the information. See Utah R. Crim. P. 7(8)(b). By the bindover order, the magistrate requires the defendant "to answer [the information] in the district court." *Id.* The information is then transferred to the district court, permitting that court to take original jurisdiction of the matter.² At that point, the district court has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked. In doing so, the district court need show no deference to the magistrate's legal conclusion, implicit in the bindover order, that the matter may proceed to trial in district court, but may conduct its own review of the order.

Our rules of criminal procedure help clarify the authority of district courts to control their original jurisdiction. Rule 25(a) permits the court to dismiss an information "[i]n its discretion, for substantial cause and in furtherance of justice." Utah R. Crim. P. 25(a). Rule 12(b) provides, "Any defense [or] objection ... which is capable of determination without the trial of the general issue may be raised prior to trial." Utah R. Crim. P. 12(b). This authority to review pretrial defects must be interpreted to encompass review of the procedure by which the matter came before the district court. Furthermore, rule 12(b)(1) explicitly reserves district courts authority to review defects in the indictment or information." Utah R. Crim. P. 12(b)(1). When prosecution occurs by information rather than by indictment, a preliminary hearing and bindover order are integral parts of the prosecution; without the bindover, an information would not be before the district court. From the district court's perspective, therefore, a defect in the bindover order may be treated as a defect in the information.³

Jurisdiction over a motion to quash a bindover order thus fits squarely within Utah Rule of Criminal Procedure 12 and follows logically from rule 25.⁴ The motion focuses a district court's attention on the propriety of exercise of original jurisdiction, requiring a determination of whether it can proceed with the case. Although the examination of preliminary proceedings may involve a "review on the record" of the magistrate's order, consideration of a motion to quash a bindover order does not constitute "appellate review" in formal sense. The conclusion that the motion is equivalent to an appeal is erroneous.⁵ The second flaw in the State's characterization of defendants' motions lies in its claim that defendants sought "review on the record in the circuit court." This mischaracterization results in the erroneous conclusion, used by the State and adopted by the court

bindover order is through an interlocutory appeal to the court of appeals pursuant to Utah Code Ann. §78-2a-3(2)(d) and (e). These statutes do not permit direct interlocutory appeal of magistrates' bindover orders. Section 78-2a-3(2)(d) gives the court of appeals jurisdiction over "appeals from the circuit courts," and section 78-2a-3(2)(e) gives it jurisdiction over "interlocutory appeals from any court of record in criminal cases." In the instant cases, however, the records were not created in a circuit court or any other court of record; rather, they were created before a magistrate, as provided by Utah Rule of Criminal Procedure 7(7). Although the magistrate in each case also happened to be a circuit court judge (as is true in most cases), our statutory provisions make an unmistakable distinction between the functions and powers of a judicial officer acting as magistrate and one acting as judge of a court. By definition, "[m]agistrate" means a justice of the Supreme Court, a judge of the district courts, a judge of the juvenile courts, a judge of the circuit courts, a judge of the justice courts, or a judge of any court created by law." Utah Code Ann. §77-1-3 (Supp. 1990). These individuals, "when sitting as magistrates hav[e] the jurisdiction and powers conferred by law upon magistrates and not those that pertain to their respective judicial offices." *Van Dam v. Morris*, 571 P.2d 1325, 1327 (Utah 1977); cf. Utah Code Ann. §78-7-16 (powers of judges contradistinguished from powers of their courts). Magistrates are not "circuit courts."⁶ Furthermore, because the statutory definition of magistrate includes judges of courts not of record, as defined in Utah Code Ann. §78-1-2, the respective functions of courts of record and magistrates are not coextensive.

Instead, a magistrate's statutory role is to assist courts of record in various preliminary matters in felony cases and to be more extensively involved with misdemeanor cases.⁷ A magistrate's contribution to a felony proceeding is entirely nonadjudicative: "A preliminary hearing is not a trial, and a magistrate ... does not sit as a judge of a court and exercises none of the powers of a judge" *Morris*, 571 P.2d at 1327. The fact that a magistrate's dismissal of a charge does not preclude subsequent prosecution of the same offense, see Utah R. Crim. P. 7(8)(c), substantiates the determination that magistrates do not adjudicate.⁸ We thus conclude, contrary to the court of appeals' decision below, see 794 P.2d at 500, that a judicial officer functioning as a magistrate is not functioning as a circuit court or other court of record. Because magistrates are not courts of record when they conduct preliminary hearings and issue bindover

to conclude that magistrates are not courts, a conclusion we reached fifteen years ago in *Morris*, we are aware that other case law and some provisions of our rules of criminal procedure and our statutes are inconsistent with this holding. In *State v. Schreuder*, 712 P.2d 264, 270 (Utah 1985), we held that a bindover order entered by a district court judge could be challenged by interlocutory appeal to this court.¹⁰ Dicta in *Schreuder* suggested that interlocutory appeal also was possible "from bindover orders entered in any court." 712 P.2d at 270. Our choice of this language was probably the result of a common but technically incorrect practice of referring to magistrates as courts. This imprecision in *Schreuder* was immaterial, however, because at the time the appellate jurisdiction of this court was not specifically limited to review of courts of record (and the Utah Court of Appeals did not yet exist). See Utah Code Ann. §78-2-2 (1977). We must be more careful today, now that the more precise jurisdictional statutes of both this court and the court of appeals have limited jurisdiction over interlocutory criminal orders to review of "appeals from any court of record." Utah Code Ann. §§78-2-2(3)(h), 78-2a-3(2)(e) (1991).

To the extent that language in the Utah Rules of Criminal Procedure also implies that some functions of magistrates continue to be reviewable on interlocutory appeal, the rules will need revision to conform with the actual status of magistrates and the recent statutory modifications in jurisdiction. Legislative revisions may also be in order to ensure that all statutory provisions recognize the distinction between the functions of magistrates and courts.

Magistrates are not courts or tribunals. They exercise magisterial, not adjudicatory, functions. Review of their orders cannot properly be subjected to appellate review under our statutory scheme. More importantly, it is always proper for a trial court, as a threshold jurisdictional matter, to consider whether it has jurisdiction over a criminal defendant. We therefore reverse and remand these cases to the district courts for consideration of the merits of the motions to quash.

Reversed and remanded.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Michael D. Zimmerman, Justice

¹⁰ A subsequent amendment once again granted district courts some appellate jurisdiction, but this added jurisdiction is limited to review of informal agency adjudicative proceedings. District courts still have no "supervisory control" of "inferior courts,"

and this could not occur until after the magistrate's preliminary hearing and bindover. See Utah Code Ann. §77-17-1 (1978); see also *State v. Freeman*, 71 P.2d 196, 199 (Utah 1937) (holding that information can be filed properly in district court "only after the accused has been duly bound over and held to answer in the district court by a magistrate"). Although under the current statutory scheme a felony information (rather than a complaint) is first filed before a magistrate, see Utah R. Crim. P. 5(a) & 7(2), it is still true that the district court does not acquire jurisdiction until after a bindover order issues and the information and all other records are transferred to the district court. See Utah R. Crim. P. 10(a) (arraignment to occur only when all records are received by district court after bindover); cf. Utah Const. art. I, §13 (permitting offenses to be "prosecuted by information after examination and commitment by a magistrate, unless the examination be waived").

3. Indeed, as petitioners suggest, there may be no meaningful difference between quashal of a bindover order and dismissal of an information. Historically, an information could not be filed until after a preliminary hearing and bindover order, see *supra* note 2, and thus defects in the hearing or order would infect the information. We do not decide whether, under our current statutory scheme, there is a difference between quashal of a bindover order and dismissal of an information. We conclude only that the district court's authority to review defective informations includes the authority to review defective bindover orders.

4. As petitioners point out, this reading of rules 12 and 25 is also consistent with rule 10(c). That rule, however, is not directly at issue in these cases because these cases do not involve guilty pleas.

5. The court of appeals cited *State v. Schreuder*, 712 P.2d 264 (Utah 1985), for the proposition that attacks on bindover orders constitute appeals. *Humphrey*, 794 P.2d at 498. *Schreuder* is inapposite. It presented an equal protection claim at a time (before the recent jurisdictional modifications that gave rise to the cases before us today) when district courts routinely reviewed bindover orders of circuit court judges. Atypically, in *Schreuder* the defendant's preliminary hearing had been conducted by a district court judge. The defendant therefore made an equal protection argument that he did not have the opportunity, available to defendants bound over by circuit court judges, for "superior court" review. We held that in this circumstance the defendant could seek superior court review of his preliminary hearing through interlocutory appeal to this court. 712 P.2d at 270. But the availability of interlocutory appeal is irrelevant to whether a trial court also has the authority to satisfy itself that a defendant is properly before it. *Schreuder* is further inapposite because we conclude below that under our current statutory scheme, interlocutory review of a magistrate's bindover order is no longer available.

6. We note that if the orders of magistrates were in fact orders of a circuit court, the Utah State Constitution would provide an appeal as of right from these orders. Utah Const. art. I, §12, art. VIII, §5. Interlocutory appeal to the court of appeals would not satisfy this requirement. We believe this right likewise would not be satisfied if the defendant first had to endure trial in the district court because

this constitutional problem.

7. Currently, the powers and duties of magistrates are scattered through various provisions of titles 77 and 78 of the Utah Code and through the Utah Rules of Criminal Procedure, especially rule 7. The partial codification of the authority of magistrates in new section 78-7-17.5 of the Utah Code, effective January 1, 1992, further reinforces our conclusion that magistrates do not exercise adjudicatory authority.

8. We also note that magistrates routinely issue search warrants to assist in the administration of justice and district courts routinely review those warrants without functioning as appellate courts. In its brief, the State argues that this review is not the same as reviewing bindover orders, because "[a] district court reviews the sufficiency of the search warrant only to determine whether evidence will be admissible in the trial pending in that court. It does not issue an order overturning the order of another court" But a district court's review of the sufficiency of the preliminary hearing and bindover order similarly serves only to determine whether the information will be accepted in that court for the purposes of proceeding to trial. When quashal is appropriate, the district court does not overturn the order of another court; it vacates the order of the magistrate.

Of course, once a district court has refused to quash a bindover order, the district court's ruling could then become the subject of an interlocutory appeal.

9. See *supra* n.5.

Cite as
176 Utah Adv. Rep. 11

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

Percy MOUNTEER,
Plaintiff and Petitioner,

v.

UTAH POWER & LIGHT COMPANY,
Defendant and Respondent.

No. 890212

LED: December 26, 1991

Honorable Richard H. Moffat
Third District, Salt Lake County

ATTORNEYS:

**Bert B. Sykes, Mitch Vilos, Phillip Kent
Card, M. Gale Lemmon, Salt Lake City, for
petitioner**

**Bert Gordon, Samuel F. Chamberlain, Paul
H. Proctor, Salt Lake City, for respondent**

On Certiorari to the Utah Court of Appeals

**This opinion is subject to revision before
publication in the Pacific Reporter.**

HOWE, Associate Chief Justice:

We granted certiorari to review a memorandum decision of the court of appeals which affirmed the trial court's dismissal of plaintiff Percy Munteer's complaint against defendant Utah Power & Light Company (UP&L). *Munteer v. Utah Power & Light Co.*, 773 P.2d 405 (Utah Ct. App. 1989). The dismissal was for plaintiff's failure to state a claim upon which relief may be granted. Utah R. Civ. P. 12(b)(6).

Plaintiff was employed by UP&L in its mining activities in Emery County. In December 1984, a fire at the Wilberg Mine caused the death of twenty-one miners. Plaintiff was on duty when the fire broke out, and as a result of his involvement in endeavoring to control the fire, he developed symptoms of post-traumatic stress syndrome. However, he continued in his employment. Some time later, Niki Larsen, an in-house security guard employed by UP&L, was assigned to investigate plaintiff for suspected drug use. During an interview of plaintiff at his work, she allegedly called the mine superintendent over a loudspeaker and accused plaintiff of being on drugs. Other employees heard the accusations. Plaintiff asserts that this accusation aggravated his post-traumatic stress syndrome, requiring him to be treated at a psychiatric hospital and rendering him permanently disabled from employment.

Plaintiff brought this action for slander, intentional infliction of emotional distress, and negligent infliction of emotional distress. UP&L moved to dismiss the complaint pursuant to rule 12(b), Utah Rules of Civil Procedure, for failure to state a claim upon which relief may be granted. The motion was premised on our decision in *Bryan v. Utah International*, 533 P.2d 892 (Utah 1975), which held that an employee acting in the course and scope of his or her employment who intentionally injures a co-worker is not protected by the exclusivity provision of our Workers' Compensation Act, Utah Code Ann. §35-1-60. However, the employer is liable only to the extent of workers' compensation benefits unless the employer directed or intended the injurious act. In the instant action, the trial court granted the motion to dismiss after reviewing the complaint and finding that plaintiff had failed to allege facts supporting an inference that UP&L had intended or directed Larsen's injurious act. The court of appeals agreed that *Bryan* was controlling and affirmed the dismissal.

Plaintiff first contends that the court of appeals erred in holding that his claim for slander against UP&L was barred by Utah Code Ann. §35-1-60, which provides: