

2002

## Utah v. Dean : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No. 20020952-SC
v.	:	Ct. App. No. 20000340-CA
WALLACE WAYNE DEAN,	:	
Defendant-Respondent.	:	

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BRIEF OF PETITIONER  
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ON WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS

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**FILED**  
UTAH SUPREME COURT

MAY 27 2003

PAT BARTHOLOMEW  
CLERK OF THE COURT

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BRIEF OF PETITIONER

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court granted certiorari to review the Utah Court of Appeals' decision in *State v. Dean*, 2002 UT App 323, 57 P.3d 1106 (**Addendum A**), which reversed the district court's denial of defendant's motion to withdraw.

This Court has jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(a) (Supp. 2002).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. A defendant may not challenge plea proceedings directly on appeal, but is required to file a motion to withdraw his plea and, if the motion is denied, appeal from



that denial. Where a defendant's motion to withdraw is denied and he appeals, is the scope of appellate review limited to the trial court's denial of the motion, or may the appellate court also review the plea hearing for error not presented in the motion to withdraw?

This is a question of law, and review is for correctness. *See Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶¶ 18-19, 2 P.3d 451 (addressing scope of review when appeal challenges grant or denial of a motion).

2. In taking defendant's plea, the trial court explained that the plea waived the right to a trial by jury. Did the trial court err by not specifying that the plea waived the right to a *speedy* trial by an *impartial* jury?

This is also a question of law, and review is for correctness. *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540 (interpreting procedural rule).

3. If error occurred, was it plain, where no settled appellate law made it obvious and where defendant made no showing of harm?

To demonstrate plain error, a defendant must show that error occurred, that it should have been obvious to the trial court, and that he was prejudiced because of the error. *State v. Evans*, 2001 UT 22, ¶ 16, 20 P.3d 888.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statute and rule, set forth in **Addendum B**, are relevant to this petition:

Utah Code Annotated § 77-13-6 (1999), and  
Utah R. Crim. P. 11(e).

### STATEMENT OF THE CASE

Defendant was charged with one count of child abuse, a second degree felony; two counts of child abuse, a class A misdemeanor; commission of domestic violence in the presence of a child, a class A misdemeanor; assault, a class B misdemeanor; and threat against life or property, a class B misdemeanor. R. 1-4.

On March 8, 2000, defendant pled guilty to one count of child abuse, a second degree felony; one count of child abuse, a class A misdemeanor; and assault, a class B misdemeanor. R. 25. In connection with his plea, defendant executed a statement that included a paragraph describing each of the rights detailed in rule 11(e), Utah R. Crim. P. R. 29-35. The paragraph detailing defendant's right to a trial advised him of his right to a jury trial or, should he elect to waive that right, to a trial by the court. R. 34-35. The paragraph did not include the phrases "speedy trial" and "impartial jury." R. 34. The statement also advised defendant that a motion to withdraw his guilty plea had to be made within thirty days of the entry of the plea and would be granted only upon a showing of good cause. R. 32. Before accepting his guilty plea, the trial court asked defendant whether he had read the statement. R. 71:3. Defendant answered affirmatively. *Id.*

On April 10, 2000, the day before sentencing, defendant filed a motion to withdraw his guilty plea. R. 39-40. He argued that the trial court had failed to strictly comply with rule 11 in two ways. He first argued that he had not been advised of the time limit for filing a motion to withdraw his plea. R. 43 (Memorandum in Support, Point II). The trial court had, however, advised him of the thirty-day deadline. R. 32. Defendant did not specify the basis for the second violation. R. 43-44 (Memorandum in Support, Point I). He alleged that there were “two significant departures from procedures [used to ensure] . . . due process and[/]or equal protection under the law,” but did not indicate what those departures were. R. 43.

On April 11, the prosecutor filed a response, arguing that “Mr. Oliver did nothing to reasonably research the facts surrounding the entry of . . . defendant’s guilty plea” and that the motion was frivolous. R. 49.

That same day, the trial court conducted a sentencing hearing. R. 45-47. The motion to withdraw was discussed during the hearing, but the record does not indicate that defendant gave any further information about the unspecified errors being claimed. *Id.* The court denied defendant’s motion to withdraw because defendant had not shown good cause and pronounced sentence. R. 46, 48-53. On April 17, the court filed its judgment, sentence, and commitment. R. 56-57.

Defendant timely appealed his conviction. R. 59, 62, 64. He argued, for the first time on appeal, that the trial court committed plain error because he had not been advised of his right to a *speedy* trial before an *impartial* jury. *Dean*, 2002 UT App 323 at ¶ 10.

The court of appeals agreed, reversed the denial of the motion to withdraw, and vacated defendant's conviction. *Id.* at ¶ 13.

### STATEMENT OF THE FACTS

As defendant pled guilty and no trial was held, the statement of the facts is taken from the "Official Version of the Offense" and other information in the Pre-Sentence Investigation Report (PSI). *See* PSI.

In January 2000, defendant repeatedly punched his dying, then 85-pound wife in the stomach with a closed fist. *Id.* at 2-4. When defendant's eleven-year-old son heard his mother screaming for help, he tried to stop defendant and give his mother some ibuprofen and wine. *Id.* Defendant then grabbed the boy by the neck and tried to choke him, telling the boy not to touch the ibuprofen or the wine. *Id.* Defendant said, "[D]on't touch that or I'll break your hands." *Id.* at 4. A friend of the child observed the incident and corroborated the boy's account. *Id.* Defendant's wife died the following day. *Id.* at 2.

This incident was only one in defendant's long history of physically abusing his wife and children. *Id.* at 1-5, 9-10. During the year preceding the January 2000 beating of his dying wife, defendant got drunk, heated a knife on the stove, and placed it in his fifteen-year-old daughter's pierced and infected belly button. *Id.* at 3. He characterized this act as an attempt "to cauterize it." *Id.* While picking his daughter up at a football game that same year, defendant backhanded her across the face approximately ten times,

blackening both of her eyes. *Id.* In addition, defendant's wife left a journal with entries from 1991 through 1994, describing how defendant repeatedly beat her. *Id.* at 9-10.

On approximately February 4, 2000, an Adult Probation and Parole investigator conducted a field visit at defendant's residence in connection with defendant's supervised probation. *Id.* at 2. Defendant had been drinking alcohol in violation of his parole, and was taken into custody. *Id.* At the time of defendant's arrest, defendant's son told a police officer about the incident the day before his mother's death. *Id.* The children were subsequently interviewed and gave additional details about defendant's abuse. *Id.* The children both indicated that they were afraid of their father. *Id.* at 3-4.

#### SUMMARY OF ARGUMENT

1. A defendant may not directly appeal a conviction based on a guilty plea. Instead, he must move to withdraw his guilty plea in the trial court. If his motion is denied for failure to show "good cause," he may appeal the denial of his motion. He can prevail on appeal if he can show that the trial court abused its discretion because it denied the motion despite a showing of "good cause" to permit withdrawal.

Appellate review, however, is limited to the proceedings of the trial court in denying the motion to withdraw. The appellate court may only determine whether the court abused its discretion in denying the motion to withdraw. A defendant may not file an appeal ostensibly challenging the denial of a motion to withdraw, but then on appeal seek review of the plea hearing. To do so would render the requirement for a motion to

withdraw perfunctory. Defendant may obtain review for plain error committed in the motion hearing, but not the plea hearing.

2. A trial court strictly complies with rule 11 when it advises a defendant, prior to accepting his guilty plea, that the plea will waive his right to trial by jury, even if the trial court does not specify that the right waived is the right to a *speedy* trial by an *impartial* jury.

3. If a failure to specify *speedy* and *impartial* is error, it does not constitute plain error where, at the time of trial, no settled appellate law required the use of the terms. Further, it does not constitute plain error where a defendant makes no demonstration of harm—where he neither alleges nor shows a probability that he would not have pled guilty but for the trial court’s omission of the words.

## **ARGUMENT**

### **Point I**

#### **APPELLATE REVIEW OF THE DENIAL OF A MOTION TO WITHDRAW A GUILTY PLEA IS LIMITED TO THE TRIAL COURT’S PROCEEDINGS ON THE MOTION; AN APPELLATE COURT EXCEEDS THE PROPER SCOPE OF APPELLATE REVIEW WHEN IT ALSO REVIEWS THE PLEA HEARING FOR ERROR NOT PRESENTED IN THE MOTION TO WITHDRAW**

Utah case law establishes that a defendant may not directly appeal a conviction based on a guilty plea. If a defendant believes that error occurred in the plea-taking process, he must file a motion to withdraw. If the trial court denies the motion and if a defendant believes that the denial of the motion constitutes an abuse of discretion, he may

appeal the denial. To prevail on his claim that the trial court abused its discretion when it denied the motion to withdraw, he must show that the trial court unreasonably denied his motion.

Further, a defendant could prevail on a plain error claim if he could show that the that “good cause” should have been obvious to the trial court ruling on his motion to withdraw. But no obvious error occurs in a trial court’s proceedings on the motion to withdraw simply because error occurred at an earlier plea-taking.

Defendant here filed a motion to withdraw. He then brought an appeal, ostensibly challenging the denial of his motion to withdraw. Instead of focusing on the denial of his motion to withdraw, however, defendant attacked the plea-taking, arguing that the trial court committed error not in denying his motion to withdraw, but in taking his plea. The court of appeals erred when it entertained this claim, which was outside the scope of appellate review.

#### **A. Background**

Defendant was represented at his March 8, 2000 plea-taking by public defender Dale W. Sessions. R. 25. Sentencing was set for April 11, 2000. *Id.* On April 10, 2000, D. Bruce Oliver entered an appearance of counsel and filed a motion to withdraw defendant’s guilty plea. R. 38-40. In his memorandum in support of the motion to withdraw, Mr. Oliver alleged defendant had not been advised of the time limits for withdrawing his guilty plea. R. 43. He further alleged that the plea had been taken in violation of rule 11, stating that “there are two significant departures from procedures

which have been used by the courts to ensure a person due process and[/]or equal protection under the law.” *Id.* He did not indicate what those departures were. He did not attach a copy of the plea affidavit, a transcript of the plea-taking, or any other record material in which the court may have found plea-taking error, had error occurred.

Although Mr. Oliver entered an appearance, Mr. Sessions did not withdraw as counsel. Sentencing was held on April 11, 2000, with Mr. Sessions, but not Mr. Oliver, present. R. 45-47. The minutes note that Mr. Sessions had received Mr. Oliver’s paperwork. *Id.* at 46. The minutes do not state whether argument was held on the motion to withdraw.<sup>1</sup> *Id.* The minutes, together with other record documents, do indicate that the court denied the motion to withdraw because (1) defendant had not shown good cause and (2) the motion was untimely.<sup>2</sup> R. 46, 48-53.

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<sup>1</sup>Nothing in the minutes suggests that Mr. Sessions, who had not prepared the motion to withdraw, argued anything at all in support of the motion, let alone detailed the nature of the alleged unspecified error.

<sup>2</sup>Defendant’s motion was untimely under then-controlling precedent requiring that a defendant make his motion within thirty days following the plea-taking. *See State v. Price*, 837 P.2d 578 (Utah App. 1992) (*overruled by State v. Ostler (Ostler II)*, 2001 UT 68, ¶ 11, 31 P.3d 528). Defendant’s motion would apparently be timely, however, under precedent established in the interim. *See Ostler II*, 2001 UT 68 at ¶ 11 (holding that the 30-day limitation runs from the date of final judgment). The State did not argue on appeal that the motion was untimely. The trial court denied the motion for two reasons: (1) because it was untimely, and (2) because defendant had not shown good cause. Either reason was, by itself, sufficient to support the trial court’s denial.



**B. Relevant case law establishes that appellate review of the denial of a motion to withdraw is limited to an examination of the trial court's actions in denying the motion.**

A review of the relevant case law begins with *State v. Reyes*, 2002 UT 13, 40 P.3d 630. In *Reyes*, this Court held that section 77-13-6 (1999), Utah Code Annotated, requires a defendant to file a timely motion to withdraw his guilty plea. *Id.* at ¶ 3. Failure to file the motion extinguishes a defendant's right to challenge the validity of the guilty plea on appeal. *Id.*

This Court's earlier decisions regarding appellate challenges to guilty pleas are consistent. In *State v. Johnson*, 856 P.2d 1064 (Utah 1993), this Court also declined to address a defendant's argument that error occurred in the plea-taking. *Id.* at 1066. This Court reasoned, "The State asserts that the issue is not properly before this Court because Johnson did not move to withdraw his guilty plea in the district court. We agree. A defendant is obliged to seek a trial court's ruling on an issue before the issue can be raised in an appellate court." *Id.*

In *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), the case where this Court first articulated the "strict compliance" doctrine, the defendant claimed that his guilty plea was entered in violation of rule 11 (then a statute) and due process. *Id.* at 1311. Noting that defendant had not filed a motion to withdraw and that the then-applicable plea statute set no time limit for filing a motion to withdraw, the Court remanded the case to the district court to allow defendant to file a motion to withdraw. *Id.* Thus, the Court declined to address any direct challenge to the plea-taking.

In *Summers v. Cook*, 759 P.2d 341 (Utah App. 1988), the court of appeals addressed the *Gibbons* decision, observing that “[i]n *Gibbons*, the Supreme Court determined that a defendant could not simply appeal a conviction based on a guilty plea.” *Id.* at 342. “Rather, [a] defendant must first file a motion to withdraw [the] plea, giving the court who took the plea the first chance to consider [the] the defendant’s arguments.” *Id.* Then, “[i]f the motion is denied, defendant could . . . appeal—not from the conviction per se, but from the denial of the motion to withdraw.”<sup>3</sup> *Id.*

These cases thus establish that a defendant cannot challenge error in his plea-taking directly on appeal. He can only challenge error in his plea-taking by filing a motion to withdraw. If the trial court then denies the motion to withdraw, the defendant can appeal the denial of the motion to withdraw.

In other words, a defendant can raise on appeal any error the trial court committed in its disposition of the motion to withdraw. If a defendant did in fact demonstrate “good cause” for the withdrawal of his plea and if the trial court therefore abused its discretion in denying the motion, or if the court committed plain error in denying the motion, a

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<sup>3</sup>By contrast, the *Summers* court held, a defendant may bring a collateral attack on the plea itself, but the defendant must meet the standards for habeas review. *Summers*, 759 P.2d at 343. “[T]o successfully attack a guilty plea collaterally, a petitioner must demonstrate an obvious injustice or a substantial and prejudicial denial of a constitutional right in the reception of the plea and show cause why he or she took no direct appeal.” *Id.*

defendant may be entitled to relief on appeal.<sup>4</sup> But the scope of appellate review is limited to review of the denial of the motion to withdraw.

**C. The court of appeals erred by addressing claims that the trial court erred, not in denying the motion to withdraw, but in taking the plea.**

In this case, the court of appeals did not examine the proceedings of the trial court in acting on the motion to withdraw. *Dean*, 2002 UT App 323 at ¶¶ 10-12. Rather, the court of appeals examined the plea-taking proceeding for error: “Because the trial court committed plain error in advising [Dean] of his rights, we reverse [the denial of Dean’s motion to withdraw his plea, vacate his conviction] and remand for proceedings consistent with this opinion.” *Id.* at ¶ 13 (brackets in original) (internal quotation marks and citation omitted).

The court of appeals justified the expansion of its scope of review by reference to “plain error.” *Id.* at ¶ 10. The “plain error” doctrine permits, under limited circumstances, the review of unpreserved error. *See Dunn*, 850 P.2d at 1208. It is not however a theoretical basis for expanding the scope of review. In other words, it is

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<sup>4</sup>This Court’s decisions dictate that review of the denial of a motion to withdraw shall be for an abuse of discretion. In *State v. Martinez*, 2001 UT 12, 26 P.3d 203, for example, this Court held that “[t]he denial of a motion to withdraw is reviewed under an abuse of discretion standard, incorporating a clearly erroneous standard for findings of fact made in conjunction with that decision.” *Id.* at ¶ 14. A trial court cannot abuse its discretion when it fails to address a claim not presented. The court of appeals’ decision below is therefore inconsistent with *Martinez* and other decisions by this Court mandating that the denial of a motion to withdraw be reviewed for an abuse of discretion. *See, e.g., State v. Benvenuto*, 1999 UT 60, ¶ 10, 983 P.2d 556; *State v. Holland*, 921 P.2d 430, 433 (Utah 1996).

possible that a defendant might demonstrate plain error in a trial court's actions denying a motion to withdraw. A defendant might demonstrate that a trial court plainly erred in denying a motion to withdraw where "good cause" should have been obvious to the trial court ruling on the motion to withdraw, even though defendant did not specify it as a basis for his motion. "Good cause" might, for example, have been evident in the argument or documentation supporting the motion to withdraw.

But no obvious error occurs in the trial court's proceedings on the motion to withdraw simply because error occurred at an earlier plea-taking. Even if the trial judge acting on the motion to withdraw is the same judge who took the plea, he does not commit plain error at the motion to withdraw because he fails to remember some unspecified error that may have occurred during the plea-taking.

In its decision, the court of appeals misapplied the plain error doctrine and exceeded the appropriate scope of appellate review. The court of appeals did not determine and could not have concluded that the trial court "plainly erred" in denying the motion to withdraw. Rather, it improperly determined that the trial court "plainly erred" in taking defendant's plea. *Dean*, 2002 UT App 323 at ¶ 12. The court of appeals' plain error analysis disregards the plea statute, the mandates implicit in *Reyes*, *Johnson*, and *Summers*, its jurisdictional limits, and the dictates of sound policy. Its plain error analysis makes the motion for withdrawal of a plea, as required under statute and by the decisions of this Court, perfunctory.

Here, defendant filed a motion to withdraw. He raised two claims. First, he claimed that he had not been informed of the time limit for filing his motion. The trial court properly concluded that defendant had, indeed, been advised of the time limit. The trial court neither erred nor plainly erred in rejecting this basis for the motion to withdraw.

Second, defendant claimed that “two significant departures” had occurred at the plea-taking. R. 43. He did not indicate what those departures were. *Id.* The record does not indicate that the trial court had any information before it, other than the bald allegation that some rule 11(e) error had twice occurred. The trial court did not abuse its discretion in denying the motion. Neither did the trial court plainly err when it found no showing of “good cause” to support the motion to withdraw. To hold otherwise would be to render the motion to withdraw an empty formality. It would permit defendants to file skeleton motions, merely alleging error, knowing that they could later flesh out their claims on appeal.<sup>5</sup>

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<sup>5</sup>Appellate review of a trial court’s rulings on a motion is generally limited in scope. This can be seen most clearly in those cases where a defendant has no other avenue for appellate review. *Franklin Covey Client Sales, Inc. v. Melvin (Melvin)*, 2000 UT App 110, 2 P.3d 451, is illustrative. In that case, the trial court granted summary judgment in favor of Franklin. Melvin’s appeal of that ruling was denied because it was untimely. Melvin later timely appealed the trial court’s denials of two motions for relief of judgment under rule 60(b), Utah Rules of Civil Procedure (mistake, newly discovered evidence, and misrepresentation). The appellate court explained that its “review of the trial court’s rulings on these motions is limited in scope.” *Id.* at ¶ 19. “An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does *not*, at least in most cases, reach the merits of the underlying judgment from which  
(continued...)

## Point II

### **THE TRIAL COURT STRICTLY COMPLIED WITH RULE 11 WHERE IT ADVISED DEFENDANT OF HIS RIGHT TO A TRIAL BY JURY, EVEN THOUGH THE COURT DID NOT SPECIFY THE RIGHT TO A *SPEEDY* TRIAL BY AN *IMPARTIAL* JURY**

Defendant argued below that the trial court did not strictly comply with rule 11 when it advised him of his right to a trial by jury, but did not specify that he had a right to a *speedy* trial by an *impartial* jury. Relying on its own precedent in *State v. Tarnawiecki*, 2000 UT App 186, 5 P.3d 1222, and *State v. Hittle*, 2002 UT App 134, 47 P.3d 101, the court of appeals agreed.

The analysis by the court of appeals is inconsistent with this Court's decision in *State v. Martinez*, 2001 UT 12, 26 P.3d 203, which implies that the rule 11 standard is met where a defendant is advised of his right to a trial by jury, even absent mention of the words *speedy* and *impartial*. In *Martinez*, the defendant moved in the district court to withdraw his guilty plea, claiming it was not knowing and voluntary. *Id.* at ¶ 11. The district court denied the motion, and Martinez appealed. *Id.* at ¶ 13. On appeal, this

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<sup>5</sup>(...continued)

relief was sought. *Appellate review of Rule 60(b) orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals.*" *Id.* (quoting James Wm. Moore et al., *Moore's Federal Practice* § 60.68[3] (3d ed. 1999) (first emphasis in Moore) (second emphasis in *Melvin*)).

These principles are applicable to appellate review of the denial of a motion to withdraw. A defendant has no right to directly appeal his plea-taking. He has only a right to appeal the denial of his motion to withdraw. Appellate review must therefore be narrowed lest appellate review of the motion to withdraw become a substitute for the otherwise proscribed direct appeal of the plea-taking.

Court held that the district court had “strictly complied with the constitutional and procedural requirements for entry of [Martinez’s] guilty plea,” including the mandates of rule 11. *Id.* at ¶ 26. This Court reasoned that “strict compliance with rule 11(e) creates a presumption that the plea was voluntarily entered” and affirmed. *Id.* at ¶ 22 (internal quotation marks and citation omitted). In so doing, the court opined that “the strict compliance requirement does not mandate a particular script or rote recitation of the rights listed. The purpose of rule 11 is to ensure that a defendant knows of his or her rights and thereby understands the consequences of a decision to plead guilty.” *Id.* at ¶ 22. The opinion observed, by way of background, that defendant understood his rights, among them, “the right to a jury trial.” *Id.* at ¶ 4. In its analysis of defendant’s rule 11 challenge, this Court again enumerated the rights that defendant acknowledged and understood, among them, “the right to a jury trial.” *Id.* at ¶ 23. Although nothing in the case suggested that the trial court had used the terms *impartial* and *speedy*, this Court nonetheless held that the colloquy “strictly complied” with rule 11. *Id.* at ¶ 26. By implication, therefore, *Martinez* overrules the court of appeals’ inconsistent decisions in *Tarnawiecki* and *Hittle*.

Moreover, the record here makes it clear that the trial court did not ignore the mandates of rule 11(e). Defendant’s rights were laid out in detail in the statement he made in connection with his plea. R. 29-35. The trial court ascertained that defendant had read and signed every paragraph of the statement. R. 71:3. The trial court thereby

informed defendant that he had a right to “a trial by jury” and that, in connection with that right,

- he would have the right to confront the witnesses against him;
- he had the right to have witnesses subpoenaed to testify in his behalf;
- he could, if he so chose, testify in his own behalf; and
- he could, however, choose not to testify, and the jury would be instructed that this could “not be held against [him].”

R. 34; *see also State v. Visser*, 2000 UT 88, ¶ 12, 22 P.3d 1242 (findings may be based on plea affidavit). The trial court also instructed defendant that the State must prove every element of the offense beyond a reasonable doubt and that the jury verdict must be unanimous. R. 34. Further, the trial court told him that by entering a plea, he would waive his trial rights. R. 33.

The trial court’s painstaking enumeration of defendant’s rights sufficed to meet the requirements of rule 11(e)(3). The trial court’s omission of the words *speedy* and *impartial* did not defeat the substantive goal of rule 11: to insure that defendant knew of his rights and understood the basic consequences of his decision to plead guilty. *See Visser*, 2000 UT 88 at ¶ 11.



### Point III

#### **ERROR, IF ANY, IS NOT “PLAIN” WHERE IT IS NEITHER OBVIOUS NOR HARMFUL.**

This Court has held that an appellant claiming unpreserved error must establish that error is plain, i.e., that (i) error exists, (ii) the error is obvious, and (iii) the error is harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). The court of appeals determined that the trial court’s failure to explain that defendant waived his right to a *speedy* trial before an *impartial* jury constituted plain error, despite the absence of any showing of obviousness or harm. In so doing, the majority rendered a decision inconsistent with this Court’s decision in *Dunn*.

#### **A. No “settled appellate law” made the trial court’s error, if any, obvious.**

Error is not obvious “where there is no settled appellate law to guide the trial court.” *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997). The trial court took defendant’s plea on March 8, 2000, before either *Tarnawiecki* or *Hittle* was decided. R. 71. Therefore, the decisions in those cases could not have guided the trial court.

#### **B. Defendant demonstrated no harm. He has not shown that, but for the alleged error, he would not have pled guilty.**

The court of appeals did not require that defendant make any allegation or showing of prejudice under the plain error doctrine. Despite the absence of any claim of prejudice on appeal, the court of appeals *sua sponte* presumed prejudice simply “because the omission dealt with a substantial constitutional right.” *Dean*, 2002 UT App 323 at ¶ 12. Citing its own case law which used the same presumption, the court of appeals reasoned,

“It is well established under Utah law that we will presume harm under plain error analysis when a trial court fails to inform defendant of his constitutional rights under rule 11.” *Id.* This decision has no basis in rule 11 precedent from this Court, and is contrary to this Court’s interpretation of the plain error doctrine. Further, it is inconsistent with federal precedent which, while non-controlling, is persuasive authority.

### **1. This Court’s precedent**

To demonstrate that unpreserved error is plain, an appellant must show that (i) error exists, (ii) the error is obvious, and (iii) the error is harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

Plain error and ineffective assistance of counsel share a “common standard” of prejudice. *State v. Litherland*, 2000 UT 76, ¶ 31 at n.14, 12 P.3d 92 (citing *State v. Verde*, 770 P.2d 116, 124 n.15 (Utah 1989)). A defendant claiming that his guilty plea resulted from counsel’s ineffectiveness must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Thus, a defendant attempting to show plain error under rule 11 must demonstrate that but for the trial court’s omissions, he would not have pled guilty but would have insisted on going to trial.<sup>6</sup>

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<sup>6</sup>Otherwise stated, defendant must establish that an obvious error so infected the plea-taking that the appellate court no longer has confidence in its underlying validity, because the plea was less than knowing and voluntary. *Cf. Dunn*, 850 P.2d at 1208-09; (continued...)

This is the tenor of the opinion in *State v. Kay*, 717 P.2d 1294, 1302 (Utah 1986), where this Court observed that technical violations of rule 11 should not automatically invalidate guilty pleas, reasoning that the “harmless error” rule is applicable. This Court stated: “If we were to hold that any violation of Rule 11 automatically voids the resultant plea, even when the plea is knowingly and voluntarily entered, we would encourage defendants, convicted and sentenced after such a plea, to attack their convictions for purely tactical reasons, either by direct appeal or by seeking habeas corpus long after the fact.” *Id.* at 1301. Because *Kay* preceded *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), it did not address the interplay of the “harmless error” and “strict compliance” doctrines. *Kay* nevertheless clearly explains why policy concerns support treating unpreserved rule 11 claims like all other unpreserved claims for purposes of plain error review.

The court of appeals ignored not just *Kay*, but the whole body of plain error precedent when it presumed that any rule 11 violation causes harm. In his argument on appeal, defendant did not assert, let alone demonstrate, that the alleged rule 11 violation was prejudicial. He did not claim that he would not have pled guilty, had the trial court informed him that he had a right not just to a trial by jury, but to a *speedy* trial by an *impartial* jury. See Br. Aplt., Case No. 20000340-CA at 4-20; cf. *State v. Tenney*, 913 P.2d 750, 756 (Utah App. 1996) (holding defendant’s “brief, conclusory statement”

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<sup>6</sup>(...continued)  
also *Visser*, 2000 UT 88 at ¶¶ 11-14.

insufficient to establish the prejudice required under the plain error doctrine). The court of appeals erred when it presumed harm.

## 2. Federal precedent

Precedent interpreting the federal rules of evidence is not controlling in this case. It is, nevertheless, instructive. Federal rule 11, like Utah rule 11, requires the trial court to advise a defendant of his rights before accepting a defendant's guilty plea. Fed. R. Crim. P. 11(c). Unlike Utah's rule, the federal rule has a specific provision governing harmless error. The relevant subsection provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h). This provision "rejects the extreme sanction of automatic reversal." Advisory Committee Note (1983 amendment). Thus, the Tenth Circuit has held, a rule 11 violation "warrants reversal only if it had a significant influence on appellant's decision to plead guilty." *United States v. Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993) (citing *United States v. Barry*, 895 F.2d 702, 704 (10th Cir. 1990)). Otherwise stated, the reviewing court will "examine the facts and circumstances of the . . . case to see if the district court's flawed compliance with . . . Rule 11 . . . may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty." *United States v. Gigot*, 147 F.3d 1193, 1198 (10th Cir. 1998) (quoting *United States v. Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc) (in turn quoting *United States v. Bachynsky*, 934 F.2d 1349, 1360 (5th Cir. 1991) (en banc))).

The United States Supreme Court recently rejected a claim that error should be presumed in cases where a trial court violated federal rule 11. In *United States v. Vonn*, 535 U.S. 55, 122 S. Ct. 1043 (2002), defendant pled guilty to armed bank robbery, conspiracy to commit bank robbery, and carrying a firearm during a crime of violence. *Id.*, 122 S. Ct. at 1047-48. Defendant claimed for the first time on appeal that the trial court violated rule 11 by failing to advise him of his right to counsel at trial. *Id.* at 1047-48. He argued that he had no appellate burden under the plain error rule to show prejudice, but that the State had the responsibility to establish harmlessness. *Id.* at 1050.

The Supreme Court rejected defendant's argument, holding that a silent defendant carries the burden on appeal of affirmatively establishing some prejudice or detriment to the legal system before benefitting from his silence at the plea hearing. *Id.* at 1046. In so doing, the Court recognized that rule 11 provides procedural safeguards which serve important constitutional interests in guarding against inadvertent and ignorant waivers of constitutional rights. *Id.* at 1050-51. The Court also noted that not all requirements under the rule are of equal importance relative to "the overarching issues of knowledge and voluntariness[.]" *Id.* at 1052. The Court pointed to the rules governing entry and withdrawal of pleas, with their emphasis on addressing plea-related mistakes where those mistakes can be corrected easily and on promoting finality "in a system as heavily dependent on guilty pleas as ours." *Id.* at 1053-54. The Court found that relieving a defendant of having to establish prejudice under the plain error doctrine on appeal would undermine these important goals by permitting the defendant to "choose to say nothing

about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness." *Id.* at 1053.

Utah's rule 11 contains no harmless error provision equivalent to the federal rule, but its plain error analysis does. *See Dunn*, 850 P.2d at 1208. Consequently, the analysis used by the United States Supreme Court and the Tenth Circuit is a useful guide to the application of harmless error analysis in the rule 11 context. To show that a rule 11 violation was harmful, a defendant must demonstrate that the errors significantly influenced or materially affected his decision to plead guilty. This is another way of saying that, but for the errors, he would not have pled guilty.

Defendant made no record in the trial court of why he decided to plead guilty and how the court's omissions affected his decision. While he filed a motion to withdraw, he did not allege or argue that he would have gone to trial instead of pleading guilty had he only known he was entitled to a *speedy* trial by an *impartial* jury. *See R.* 39-44. The record does not demonstrate prejudice. Further, in his claim on appeal, defendant did not allege, let alone demonstrate, harm. He did not claim that, but for the trial court's omission of the words *speedy* and *impartial*, he would not have pled guilty. *See Br. Aplt.*, Case No. 20000340-CA at 14-20. He did not, in fact, claim that the omissions affected him in any way. *Id.*

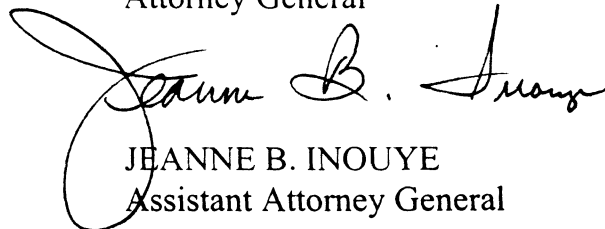
## CONCLUSION

The court of appeals exceeded the proper scope of appellate review when it reviewed the plea proceeding for error not presented in proceedings on the motion to withdraw. The court of appeals erroneously concluded that a trial court's failure to specify that a guilty plea waives not only the right to trial, but the right to a *speedy* trial before an *impartial* jury, constitutes error. Finally, the court of appeals erroneously held that defendant had established plain error, where he had shown neither that the error was obvious nor that it was harmful.

For the foregoing reasons, the State respectfully requests that this Court reverse the court of appeals' decision and remand the matter to the court of appeals for consideration of defendant's remaining appellate issue.

RESPECTFULLY submitted on 27 May 2003.

MARK L. SHURTLEFF  
Attorney General



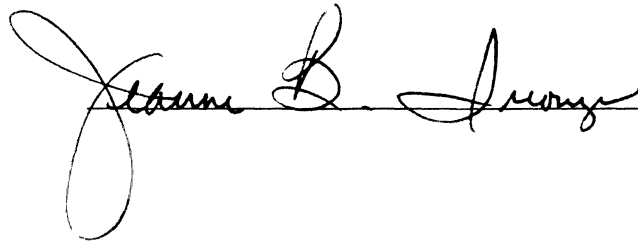
JEANNE B. INOUE  
Assistant Attorney General

# CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Certiorari were this  
27<sup>th</sup> day of May, 2003, hand-delivered to an agent for the following:

J. BRYAN JACKSON  
J. Bryan Jackson, P.C.  
157 East Denter Street  
Post Office Box 519  
Cedar City, UT 84721-0519

Counsel for Appellant

A handwritten signature in black ink, appearing to read "James B. Jackson", written over a horizontal line.



## ADDENDA

## ADDENDUM A

P

## Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,  
v.  
Wallace DEAN, Defendant and Appellant.

No. 20000340-CA.


Oct. 3, 2002.


Defendant pleaded guilty in the Fifth District Court, Cedar City Department, Robert T. Braithwaite, J., to assault and felony and misdemeanor child abuse. Defendant appealed denial of motion to withdraw plea. The Court of Appeals, Jackson, P.J., held that plain error occurred at guilty plea colloquy when defendant was not informed of his right to a speedy trial by an impartial jury.

Reversed and remanded.


Bench, J., filed a dissenting opinion.


## West Headnotes

[1] Criminal Law  1030(1)  
110k1030(1) Most Cited Cases


[1] Criminal Law  1141(2)  
110k1141(2) Most Cited Cases

To succeed on a claim of plain error, a defendant has the burden of showing: (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful.


[2] Criminal Law  274(9)  
110k274(9) Most Cited Cases

[2] Criminal Law  1026.10(3)  
110k1026.10(3) Most Cited Cases


Defendant filed a timely motion to withdraw his guilty plea to child abuse, and thus Court of Appeals had jurisdiction to review argument that trial court committed plain error at plea colloquy by not advising defendant of his right to a speedy trial by an impartial jury, and defendant was not instead limited to attacking his guilty plea collaterally, even though he failed to specify the basis for his motion to withdraw. Rules Crim.Proc., Rule 11(e).

[3] Criminal Law  274(1)  
110k274(1) Most Cited Cases

If a defendant fails to file a motion to withdraw his guilty plea, he may only attack his guilty plea collaterally.

[4] Criminal Law  273.1(4)  
110k273.1(4) Most Cited Cases

Trial court at guilty plea colloquy is required to advise the defendant of his right to a speedy trial by an impartial jury, as opposed to merely informing him of his right to a trial by a jury. Rules Crim.Proc., Rule 11(e).

[5] Criminal Law  1031(4)  
110k1031(4) Most Cited Cases

In child abuse case, trial court committed plain error at guilty plea colloquy by merely informing defendant of his right to a trial by jury, as it was required instead to advise him of the right to a speedy trial before an impartial jury. Rules Crim.Proc., Rule 11(e).

\*1106 J. Bryan Jackson, Cedar City, for Appellant.

\*1107 Mark L. Shurtleff, Attorney General, and Jeanne B. Inouye, Assistant Attorney General, Salt Lake City, for Appellee.

Before JACKSON, P.J., and BENCH and GREENWOOD, JJ.

## OPINION

JACKSON, Presiding Judge:

## BACKGROUND

¶ 1 On March 8, 2000, Dean pleaded guilty to one count of child abuse, a second degree felony, one count of child abuse, a class A misdemeanor, and assault, a class B misdemeanor. In connection with his plea, he executed a statement that detailed the constitutional rights he was waiving. Dean initialed each paragraph of the statement. Before accepting his guilty pleas, the trial court asked Dean if he had read the statement that he had executed and initialed each of the paragraphs. Dean answered affirmatively, and proceeded to plead guilty to the above-listed charges. Dean was not advised, either in his signed statement or by the trial court, that he

was waiving not only his right to a jury trial, but also his right to a speedy trial before an impartial jury.

¶ 2 On April 10, 2000, Dean filed a motion to withdraw his guilty plea. He argued that the trial court failed to strictly comply with rule 11 of the Utah Rules of Criminal Procedure in two ways. He first argued, incorrectly, that he had not been advised of the time limit for filing a motion to withdraw his guilty plea. However, the court did advise him of the thirty-day deadline. He did not specify the basis for the second violation. On April 11, 2000, Dean was convicted and sentenced after the trial court denied his motion to withdraw his guilty plea. He appeals that denial and his conviction.

### ISSUE AND STANDARD OF REVIEW

[1] ¶ 3 Dean argues for the first time on appeal that the trial court committed plain error because he was never advised of his right to a *speedy* trial by an *impartial* jury, as opposed to a mere trial by a jury. Dean filed a motion to withdraw his guilty plea, but on appeal challenges the denial of that motion "for the first time on appeal [on the basis] that the trial court failed to inform him of his right[s] to a speedy trial" and an impartial jury. State v. Hittle, 2002 UT App 134, ¶ 5, 47 P.3d 101. Thus, he "must show [that the trial court committed] plain error. To succeed on a claim of plain error, a defendant has the burden of showing (i)[a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *Id.* (quotations and citations omitted).

### ANALYSIS

#### I. Jurisdiction

[2] ¶ 4 Before reaching the issue Dean raises, we address the State's argument that we lack jurisdiction to review Dean's plain error argument. In order to effectively address the State's jurisdictional challenge, we first sketch Utah's previous decisions relating to challenges to guilty pleas.

[3] ¶ 5 In State v. Gibbons, the supreme court held that "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." 740 P.2d 1309, 1312 (Utah 1987). [FN1] However,

<sup>FN1</sup> "In Gibbons, this court adopted a 'strict compliance' test which superseded the 'record as a whole' test traditionally applied

on review in cases dealing with knowing and voluntary guilty pleas." State v. Maguire, 830 P.2d 216, 217 (Utah 1991).

[i]n Gibbons, the Supreme Court determined that a defendant could not simply appeal a conviction based on a guilty plea. Rather, defendant must first file a motion to withdraw [his] plea, giving the court who took the plea the first chance to consider defendant's arguments. If the motion is denied, defendant could then appeal--not from the conviction per se, but from the denial of the motion.

Sumners v. Cook, 759 P.2d 341, 342-43 (Utah Ct.App.1988). If a defendant fails to file a motion to withdraw his guilty plea, he may only attack his guilty plea collaterally. See *id.*

¶ 6 Once a guilty plea has been entered, a defendant has thirty days from "the entry of final judgment of conviction at the district \*1108 court" to file a motion to withdraw his plea. See State v. Ostler, 2001 UT 68, ¶ 11 & n. 3, 31 P.3d 528 (Ostler II). We have previously held that the time limit on withdrawing a guilty plea is jurisdictional. See State v. Price, 837 P.2d 578, 582-84 (Utah Ct.App.1992). "Accordingly, if a defendant is advised of the deadline when the plea is entered, the trial court lacks jurisdiction to consider a motion to withdraw filed after the thirty-day period." State v. Canfield, 917 P.2d 561 (Utah Ct.App.1996). Nevertheless, "in State v. Ostler, 2000 UT App 28, 996 P.2d 1065 (Ostler I), this court recognized a narrow exception to the jurisdictional rule in Price. We concluded that although district courts lack jurisdiction under Price to consider the merits of untimely motions to withdraw guilty pleas, we may review alleged violations of Rule 11 of the Utah Rules of Criminal Procedure ... for plain error." State v. Melo, 2001 UT App 392, ¶ 4, 40 P.3d 646; accord State v. Tarnawiecki, 2000 UT App 186, ¶ 11, 5 P.3d 1222.

¶ 7 The supreme court recently eliminated this exception to the jurisdictional rule, stating that because the appellant failed to file a motion to withdraw his guilty plea, the court lacked jurisdiction to address his challenge to the plea, even for plain error. See State v. Reyes, 2002 UT 13, ¶ 3-4, 40 P.3d 630 ("This court may choose to review an issue not properly preserved for plain error. It cannot, however, use plain error to reach an issue over which it has no jurisdiction." (Internal citation omitted.)). Thus, the supreme court declined to hear Reyes's plain error argument, which directly attacked his guilty plea. See *id.*

¶ 8 Citing Reyes, the State asserts that because Dean's motion to withdraw his plea "did not claim the errors now alleged on appeal," his motion was somehow insufficient to allow appellate jurisdiction. Thus, the State argues that Dean's appeal amounts to nothing more than a direct attack on his guilty plea rather than a challenge to the denial of his motion to withdraw.

¶ 9 However, in Reyes, the supreme court did not address the sufficiency of a motion to withdraw a guilty plea. Rather, it stated that the defendant must file his motion within the thirty-day deadline. See id. Unlike the defendant in Reyes, Dean filed a timely motion to withdraw his guilty plea. Thus, although Dean failed to specify the basis for his motion to withdraw, the supreme court's ruling in Reyes does not preclude this court from reviewing his plain error argument. Accordingly, we review his challenge under the plain error standard.

## II. Plain Error

[4] ¶ 10 Dean argues for the first time on appeal that the trial court committed plain error because he was never advised of his right to a *speedy* trial by an *impartial* jury, as opposed to a mere trial by a jury. As we concluded in Hittle, which discussed identical issues, "[t]he trial court did not strictly comply with rule 11 because it failed to advise Defendant of his right[s] to a speedy [public] trial [and an impartial jury] either orally or in the plea affidavit. Therefore, the trial court erred." [FN2] Hittle, 2002 UT App 134 at ¶ 6, 47 P.3d 101 (concluding the trial court erred after analyzing Tarnawiecki).

[FN2] The State correctly notes that "[s]trict compliance ... does not mandate a particular script or rote recitation of the rights listed." State v. Visser, 2000 UT 88, ¶ 11, 22 P.3d 1242 (Visser I). However, "the trial court [must] ... establish on the record that the defendant knowingly waived his or her constitutional rights," id. (citation omitted), to a "speedy public trial before an impartial jury." Id. at ¶ 10 (quoting Utah R.Crim. P. 11(e)). This is a greater right than a mere right to a jury trial. Thus, although the terms "impartial" and "speedy" may be communicated by various means to the defendant, they may not be considered merely inconsequential modifiers to the jury trial right. Here, nothing in the record suggests the trial court established that Dean knowingly waived anything more than a right to a potentially partial and delayed jury

trial.

¶ 11 The State argues that State v. Martinez, 2001 UT 12, 26 P.3d 203 "is inconsistent with the decision[s] in Tarnawiecki [and Hittle] and, by implication, overrules" them. It contends that "nothing [in Martinez] ... suggested that the trial court had used the terms *impartial* and *speedy*, [yet] the [supreme court] nonetheless held that the colloquy 'strictly complied' with rule 11." However, nothing in Martinez suggests that the trial court had *not* used these terms in the plea colloquy. Moreover, whether the rights these terms convey were communicated to \*1109 the defendant in Martinez was not an issue before the court in that case. See id. Thus, we cannot say that Martinez overrules Tarnawiecki and Hittle.

[5] ¶ 12 Next, "in light of [State v. Visser, 1999 UT App 19, 973 P.2d 998 (Visser I), rev'd on other grounds by Visser II, 2000 UT 88, 22 P.3d 1242 [FN3]] and Rule 11, the error should have been obvious to the trial court." Tarnawiecki, 2000 UT App 186 at ¶ 18, 5 P.3d 1222.

[FN3] The dissent argues that "Tarnawiecki's reliance upon [Visser I] is ... suspect given that Visser I was reversed by the Utah Supreme Court in [Visser II]." However, Visser II was decided on November 14, 2000, after both Tarnawiecki, which was decided on June 15, 2000, and the trial court's denial of Dean's motion to withdraw his guilty plea on April 11, 2000. Thus, the trial court in this case was still constrained by Visser I as of the date of its denial of Dean's motion to withdraw

Moreover, the supreme court reversed Visser I not because a defendant is not entitled to be informed of his right to a speedy trial before an impartial jury, but because the record in that case reflected that Visser had been informed of his rights. In Visser II, the supreme court held that the trial court's colloquy, in light of the mid-trial context of the plea, provided an adequate basis in the record to conclude that the trial court strictly complied with rule 11.... [T]he record details Visser's personal trial experience up to the point of his plea agreement. We conclude that this experience communicated at least as much as would the mere oral recitation of the "right to a speedy public trial before an impartial jury."

Visser II, 2000 UT 88, ¶ 13, 22 P 3d 1242 (emphasis added).

In the present case, Dean's plea was not taken in a mid-trial context. Because the trial court's colloquy was given in a mid-trial context and there was no indication that the trial had been delayed, the supreme court in Visser II assumed that Visser had already received the benefit of his speedy trial right. See id. at ¶ 14. Similarly, the supreme court held that Visser's participation in his own jury selection process was instrumental in ensuring that his plea was voluntary. See id. at ¶ 16. In the present case, Dean's trial had not yet begun, and the jury had not yet been selected. Thus, we cannot say that the record in this case reflects "at least as much as would the mere oral recitation of the 'right to a speedy public trial before an impartial jury' " id. at ¶ 13.

Finally, the trial court's omission was harmful because the omission dealt with a substantial constitutional right. It is well established under Utah law that we will presume harm under plain error analysis when a trial court fails to inform a defendant of his constitutional rights under rule 11. See, e.g., Tarnawiecki, 5 P 3d 1222, 2000 UT App 186 at ¶ 18 (presuming harm when trial court failed to inform Defendant that she was entitled to a "speedy trial before an impartial jury"); State v. Ostler, 2000 UT App 28, ¶¶ 25-26, 996 P 2d 1065 (presuming harm where trial court failed to inform defendant that he would waive certain constitutional rights by pleading guilty).

Hittle, 2002 UT App 134 at ¶ 9, 47 P 3d 101 (first citation omitted). Accordingly, the trial court committed plain error by failing to advise Dean of his right to a speedy trial before an impartial jury [FN4].

[FN4] In light of this decision, we decline to address Dean's remaining arguments.

### CONCLUSION

¶ 13 "Because the trial court committed plain error in advising [Dean] of his rights, we reverse [the denial of Dean's motion to withdraw his plea, vacate his conviction] and remand for proceedings consistent with this opinion " Id. at ¶ 11.

¶ 14 I CONCUR PAMELA T. GREENWOOD, Judge

BENCH, Judge (dissenting):

¶ 15 I respectfully dissent. I cannot say that the trial court "plainly erred" in not advising Defendant of his right to a "speedy" trial by an "impartial" jury.

¶ 16 To establish plain error a defendant must show that "(1) an error exists; (2) the error *should have been obvious* to the trial court; and (3) the error was harmful." " State v. Ross, 951 P 2d 236, 238 (Utah Ct App 1997) (citation omitted) (emphasis added) "Utah courts have repeatedly held that a trial court's error is not plain where there is no settled appellate law to guide the trial court " Id. at 239, see also State v. Braun, 787 P 2d 1336, 1341-42 (Utah Ct App 1990) (rejecting a claim of plain error where " 'the trial court did not have the benefit of [a later] appellate decision' " (citation omitted) (alteration in original)) I disagree with the majority's conclusion that the trial court's \*1110 error in not advising Defendant of his rights should have been obvious to the trial court in light of State v. Hittle, 2002 UT App 134, 47 P 3d 101 and State v. Tarnawiecki, 2000 UT App 186, 5 P 3d 1222. Both of these cases were decided after Defendant in this case had entered his plea. Therefore, I fail to see how these decisions could have been obvious to the trial court. Tarnawiecki's reliance upon State v. Visser, 1999 UT App 19, 973 P 2d 998, (Visser I), is also suspect given that Visser I was reversed by the Utah Supreme Court in State v. Visser, 2000 UT 88, 22 P 3d 1242 (Visser II).

¶ 17 The law in this area remains unclear and unsettled. There is some question as to whether we even have jurisdiction to address Defendant's rule 11 arguments. See Utah R.Crim P 11. Defendant entered his plea on March 8, 2000 and moved to withdraw it 33 days later, on April 10, 2000. After denying his motion, the trial court sentenced Defendant on April 11, 2000. State v. Ostler, 2001 UT 68, ¶ 11, 31 P 3d 528, held that "the thirty-day limitation on filing a motion to withdraw a plea of guilty or no contest runs from the date of final disposition of the case" and not from the date of the plea colloquy. However, in a later case, State v. Reyes, 2002 UT 13, ¶ 3, 40 P 3d 630, the Utah Supreme Court concluded that it lacked jurisdiction to entertain the defendant's rule 11 arguments because the defendant "did not move to withdraw his guilty plea within thirty days after the entry of the plea" (Emphasis added.) Although Reyes cites Ostler, I cannot say that Reyes overruled Ostler. See State v. Menzies, 889 P 2d 393, 398-99 (Utah 1994).

(discussing the standard for overruling precedent)

¶ 18 Furthermore, there is some question as to whether a trial court must use the terms "speedy" trial and "impartial" jury, in order to strictly comply with the requirements of rule 11. In State v Martinez, 2001 UT 12, ¶ 22, 26 P 3d 203 and Visser II, our supreme court seems to intend to overrule Tarnawiecki and its progeny, but this was never done expressly. I therefore cannot say that Tarnawiecki and Hittle have been overruled. See Menzies, 889 P 2d at 398-99.

¶ 19 In Martinez the Utah Supreme Court concluded that the district court strictly complied with rule 11 by informing the defendant about "the right to a jury trial." 2001 UT 12 at ¶¶ 22-25, 26 P 3d 203. No use of the words "speedy" trial or "impartial" jury were needed to meet the requirements of rule 11. In Visser II, the supreme court stated that "[s]trict compliance, does not mandate a particular script or rote recitation of the rights listed" and "[s]trict compliance does not require a specific method of communicating the rights enumerated by rule 11." Visser II, 2000 UT 88 at ¶¶ 11, 13, 22 P 3d 1242. The court then proceeded to conclude that the trial court strictly complied with rule 11 although it did not specifically inform the defendant of his "right to a speedy public trial before an impartial jury." Id. at ¶ 13.

¶ 20 In contrast, Tarnawiecki concluded that the trial court plainly erred when it failed to specifically inform the defendant of her right to a speedy trial before an impartial jury. See Tarnawiecki, 2000 UT App 186 at ¶¶ 16-20, 5 P 3d 1222. Tarnawiecki relied upon the court of appeals decision in Visser I, which the supreme court later reversed in Visser II. Hittle then relies upon Tarnawiecki in concluding that "the trial court [plainly erred by failing] to advise [d]efendant of his substantial constitutional right to a speedy trial." Hittle, 2002 UT App 134 at ¶ 10, 47 P 3d 101.

¶ 21 Because the cases in this area are so inconsistent, the supreme court should reevaluate the caselaw and set up some base-line rules that are clear and easy to follow. In so doing, it should expressly overrule inconsistent cases. [FN1]

[FN1] Controversies such as the one before us should be relatively easy to avoid as a practical matter. The problem we now face could have been avoided if the plea agreement had exactly tracked the rights

mentioned in rule 11. In the modern era of word processing and computers, it would not be difficult to modify existing forms (or prepare new ones) that precisely track a defendant's rule 11 rights.

¶ 22 Based on the foregoing, I cannot say that the trial court plainly erred. I would therefore affirm.

57 P 3d 1106, 457 Utah Adv Rep 11, 2002 UT App 323

END OF DOCUMENT

## ADDENDUM B



Utah Code Annotated § 77-13-6 (1999)

**Withdrawal of plea.**

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2)(a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
- (2)(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.
- (3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

## Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty, or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

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

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

(2) the plea is voluntarily made;

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

(4) (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 those 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, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

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

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

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

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

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty

and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-8.

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

#### ADVISORY COMMITTEE NOTE

These amendments are intended to reflect current law without any substantive changes. The addition of a requirement for a finding of a factual basis in section (e)(4)(B) tracks federal rule 11(f), and is in accordance with prior case law. E.g. *State v. Breckenridge*, 688 P.2d 440 (Utah 1983). The rule now explicitly recognizes pleas under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and sets forth the factual basis required for those pleas. E.g. *Willett v. Barnes*, 842 P.2d 860 (Utah 1992).

The amendments explicitly recognize that plea affidavits, where used, may properly be incorporated into the record when the trial court determines that the defendant has read (or been read) the affidavit, understands its contents, and acknowledges the contents. *State v. Maguire*, 830 P.2d 216 (Utah 1991). Proper incorporation of plea affidavits can save the court time, eliminate some of the monotony of rote recitations of rights waived by pleading guilty, and allow a more focused and probing inquiry into the facts of the offense, the relationship of the law to those facts, and whether the plea is knowingly and voluntarily entered. These benefits are contingent on a careful and considered review of the affidavit by the defendant and proper care by the trial court to verify that such a review has actually occurred.

The final paragraph of section (e) clarifies that the trial court may, but need not, advise defendants concerning collateral consequences of a guilty plea. The failure to so advise does not affect the validity of a plea. *State v. McFadden*, 884 P.2d 1303 (Utah App. 1994), cert. denied, 892 P.2d 13 (Utah 1995).