

1988

# State of Utah v. Dean Keith Hickman : Reply Brief

Utah Supreme Court

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**BRIEF**

880362

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent	:	CASE NO. <u>880362</u>
	:	
vs.	:	
	:	
DEAN KEITH HICKMAN,	:	PRIORITY 2
	:	
Defendant-Appellant	:	

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REPLY BRIEF OF APPELLANT

Appeal from order denying the Defendant/Appellant's motion to withdraw his plea of guilty entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, in criminal case number CR-84-1436, The Honorable Scott Daniels, Presiding Judge.

Dean Hickman

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**FILED**

MAR 31 1989

**Clerk, Supreme Court, Utah**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
 :  
 Plaintiff-Respondent : CASE NO. 880362  
 :  
 vs. :  
 :  
 DEAN KEITH HICKMAN, : PRIORITY 2  
 :  
 Defendant-Appellant :

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NOTE: SEVERAL OF THE AFOREMENTIONED CASES CITED BY THE DEFENDANT (DO NOT) CONTAIN A PAGE CITING OF REFERENCE. THE ABOVE CASES CITED WERE NOT AVAILABLE TO THE DEFENDANT AT THE TIME THIS REPLY BRIEF WAS FILED WITH THIS COURT.

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-vs- : CASE NO. 880362  
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Defendant-Appellant. :

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REPLY BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The aforementioned appeal is from a conviction of a first degree felony in the Third Judicial District Court. This court has jurisdiction to hear the appeal under the authority of the Utah Code Annotated S<sub>S</sub> 78-2-2 (3) (H) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. The defendant should have been allowed to withdraw his guilty plea on the grounds that the trial court failed to fully comply with Rule 11 (e) of the Utah Code of Criminal Procedure, 1988, in the acceptance of his guilty plea. The record as a whole (did not) support the finding that the plea was in fact entered voluntarily. SEE: Warner v. Morris, 709 p. 2d 309 (Utah 1985), and Brooks v. Morris, 709 p. 2d 310 (Utah 1985).

STATEMENT OF CASE

The Defendant appeared on January 18, 1985, before the Honorable Scott Daniels in the Third Judicial District Court and entered a plea of guilty to one count of aggravated robbery pursuant to a plea bargain agreement.

The Defendant, waived his right to be sentenced at a later date and did not wish to have a presentence report. And therefore, requested immediate sentencing (R.238 At 9). The defendant was sentenced to a term of five years to life in the Utah State Prison (R.238 at 9-10).

The Defendant moved to withdraw his guilty plea on July 6, 1988 (R.186-223). The Honorable Scott Daniels denied the motion on August 11, 1988 (R.114-115). The Defendant appealed from the trial court's denial of his motion to withdraw his plea of guilty.

STATEMENT OF FACTS

The relevant facts are contained in the statement of the case above and additionally in this reply argument portion of the reply brief.

SUMMMARY OF ARGUMENT

The Defendant's guilty plea (was not) voluntary, knowingly and intelligently made due to the fact that the trial court failed to comply with the "record as a whole test" as required by Utah law which is a direct violation of the Rule 11(e) mandate of the Utah Rules of Criminal Procedure, 1988. For this apparent reason, the trial court abused its discretion in refusing to allow said defendant to withdraw his plea of guilty.



## ARGUMENT

### POINT I

THE DEFENDANT (DID NOT) KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY PLEAD GUILTY AND THE TRIAL COURT IMPROPERLY DENIED HIS MOTION TO WITHDRAW HIS PLEA OF GUILTY.

The defendant moved to withdraw his guilty plea based on the fact it was unknowing, involuntary and unintelligently taken in violation of Rule 11(e) of the Utah Code of Criminal Procedure 1988, and Rule 3.6 Pleas of Guilty Rules of Practice in District Courts. Specifically, the defendant asserts that the trial court failed to comply with all the necessary requirements with respect to Rule 11(e) and the acceptance of his plea of guilty.

Also, this court has held that it will not overturn an order denying a motion to withdraw a plea of guilty unless it is a clear abuse of discretion. State v. Mildenhall, 747 P.2d 422 (Utah 1987). The "record as a whole test" in the instant case clearly shows that the Honorable Scott Daniels did in fact abuse his discretion in denying the defendant's motion to withdraw his plea of guilty because the trial court failed to comply with all the Rule 11(e) requirements in the acceptance of said defendant's guilty plea. See: Warner v. Morris, 709 P.2d 309 (Utah 1985), and Brooks v. Morris, 709 P.2d 310 (Utah 1985).

The defendant submits that there are (3) three (Utah State Statutory) provisions which cover "Taking of property from the person" and in such a specific regard this court has continually ruled for the past several decades that:

"When two statutory provisions cover the same conduct, and provide different penalties, the lesser penalty is then controlling."

The aforementioned ruling by this court was held with respect to the following Utah cases: See: State v. Carmen, (1914), State v. Fair, (1969) State v. Shondel, (1969) State v. Trap, (1971), State v. Saxton, (1974) and State v. Loveless, (1978). Note: That page citing numbers were not available to this defendant.

Furthermore, the United States Supreme Court has now declared with respect to "equal protection" under the fourteenth amendment to the United States constitution that:

"All persons subject to state legislation who, under same like circumstances and similar situations, they must be treated the same both as to privileges conferred and liabilities imposed."

Therefore, as stated above the trial court erred by allowing the defendant's brother Boyd Keith Hickman in the same case to withdraw his plea of guilty under the same set of circumstances and violated this said defendant's rights by not allowing him that same right to withdraw his plea of guilty in violation of the standards as set forth in the equal protection provisions of the United States constitution. See: 1984 revision of Corpus Juris Jecundum on "Constitutional Law" volume 16 A and the authority cited therein.

Also, the Utah constitution under the provisions set forth in Article I, Section 24 states:

"All laws of a general nature shall have a uniformed operation."

Hornbook law on the statutory interpretation of the word "shall" does not allow for discretion to deviate.

Accordingly, applied to the instant case, under Utah law there cannot be one brand of justice for one Hickman defendant and another brand of justice for the other Hickman defendant where no material distinction (of law) can be made in the factual information.

Further, said defendant more specifically alleges that he could not have been found guilty of aggravated robbery because no property was actually taken and that he should not have been allowed to plead guilty to this particular crime (App. brief at 02).

The question of the trial court's jurisdiction may be raised at any time. State v. Monney, and in the instant case where "no property was actually taken" it must follow Utah law therein that no crime was committed and defendant was therefore convicted (without) evidence of his guilt and in such specific regard the United States Supreme Court has repeatedly ruled that:

"A conviction without evidence of fault or guilt violates a defendant's rights to due process of law."

See: Thompson v. Louisville, Garner v. Louisiana, Johnson v. Florida, Hannes v. United States, Vachon v. New Hampshire, Jackson v. Virginia, and Hadderly v. Florida, (above case page citings not available to defendant.)

#### POINT II

THE TRIAL COURT VIOLATED THE RULE 11(e) REQUIREMENTS  
IN THE ACCEPTANCE OF DEFENDANT'S PLEA OF GUILTY TO THE  
CRIME OF AGGRAVATED ROBBERY.

The trial court violated the rule 11(e) mandate when it accepted defendant's plea of guilty. The Boykin, record in the instant case is silent as to the rights of the defendant to exercise his privilege against any compulsory self-incrimination. The United States Supreme Court held this is enforceable against the states in Malloy v. Hogan, 378 U.S. 1 (1964). And "Waiver may not be presumed from a silent record." Carnley v. Cochran, (citing not available), and Boykin v. Alabama, 395 U. S. 238 (1969).

Further, the trial court violated defendant's rights against self incrimination by asking defendant if "he was guilty" without first informing the defendant that he "did not have to assist the state in securing his conviction." Rodgers v. Richmond, (citing not available).

And finally, the defendant claims that the trial court erred in failing to determine that his plea was not the result of threats or other inducements (App. brief at 5). The trial court did not expressly rule on this issue; however, the defendant is in belief that in fundamental basic fairness the trial court should have in fact informed him of this particular issue when the defendant was entering his plea of guilty to the crime of aggravated robbery.

### CONCLUSION

Because, "No property was taken" the defendant was in fact convicted without a charge properly made and thereby violated defendant's "rights to due process of law." DeJonge v. Oregon, Thornhill v. Alabama, Odle v. Arkansas, (citations not available). And hence, not being convicted under the Utah statutory provisions that "clearly covered" the case as required by this court in Ogden City v. McLaughlin, (Utah 1987). The trial court's subject matter with respect to this jurisdiction was not invoked properly and relative to the crime for which the defendant was charged. The United States Supreme Court held in Scviglia, Supra, that subject matter jurisdiction "may not" be waived nor conferred by the parties.

And therefore, as in the instant case, a judgement has been rendered without the trial court's jurisdiction having been invoked according to state and federal laws. The judgement of the trial court in the instant case must be declared null and void under the authority of State v. Telford, (page citing not available) Utah.

Accordingly, the trial court abused its discretion in denying defendant's motion to withdraw his plea of guilty. The trial court again cannot allow for the withdrawal of a guilty plea for one Hickman defendant and not for the other when the same "identical" issues and "circumstances" were in fact present.

Based upon the foregoing, the defendant now respectfully

requests this honorable court to reverse the decision of the lower court and to allow the defendant to withdraw his plea of guilty as a matter of Utah law.

Dated on this 30 day of March, 1989.

Respectfully submitted,

Dean Hickman

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CERTIFICATE OF MAILING

I, Dean Keith Hickman, do hereby certify that I have mailed (4) four true and correct photocopies of the foregoing, reply brief, postage prepaid, to the following individual on this 30 day of March, 1989.

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