

1980

# The State of Utah v. Nathan J. Hill : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

- - - - -

THE STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No. 17234  
NATHAN J. HILL, :  
Defendant-Appellant. :

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APPELLANT'S REPLY BRIEF

- - - - -

APPEAL FROM THE JUDGMENT OF THE THIRD  
DISTRICT JUVENILE COURT, IN AND FOR UTAH  
COUNTY, STATE OF UTAH, THE HONORABLE  
MERRILL L. HERMANSEN, JUDGE

- - - - -

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POINT I

that these cases are distinguishable because the defendants in these cases "were sentenced to prison terms." (Respondent's brief at 14) Again it must be repeated that the incarceration or non-incarceration distinction relied upon here by the respondent has not been accepted in the case of a juvenile as shown by the Gault decision.

The Constitution of the State of Utah, Article I, Section 12, provides the juvenile in the instant case a right to counsel. In State v. Eichler, 25 U.2d 421, 483 P.2d 887 (Utah 1971), the court held that:

It is in accordance with the assurance of the State Constitution that an accused be provided with the assistance of counsel at every important stage of the proceeding against him inasmuch as such a hearing involves the possibility of changing the defendant's status from one of being at liberty to one of being in confinement. 483 P.2d at 889.

The Utah Constitution, independent of the United States Constitution, is consistent with Gault in protecting the right to counsel. The Utah Constitutional protection is broader than Scott and does not require confinement before a defendant has a right to counsel.

#### POINT II

THE COURT HAS DISCRETION TO DENY APPELLANT'S MOTION TO WITHDRAW A GUILTY PLEA ONLY IF THAT PLEA WAS VALID IN THE FIRST INSTANCE.

The respondent argues that under Utah law a judge has discretion to allow a guilty plea to be withdrawn

before judgment. The respondent cites State v. Forsyth, 560 P.2d 337 (Utah 1977), in which the court said that "the trial judge is allowed considerable latitude in the exercise of that discretion." 560 P.2d at 339 However, the Forsyth court had already determined that the guilty plea was a valid one:

We are in full agreement with the proposition that for a plea of guilty to be valid it must appear that the accused had a clear understanding of the charge without undue influence, coercion, or improper inducement voluntarily entered such plea. On the basis of the questions asked, on those matters and the defendant's answers thereto, there is ample basis for the trial court's conclusion that the just stated standard was met. 560 P.2d at 339.

The court plainly says that once the court has established that the guilty plea is a valid one, then the judge has discretion to withdraw it or leave it in place. Validity of the plea is a requisite to the judge's discretion.

In the instant case the plea is not a valid one. The court's test that the appellant must make the plea with a "clear understanding of the charge and without undue influence" is not met. The appellant did not fully understand the charge against him, nor the range of possible punishments. The appellant had also been influenced by the court's probation officer to make his plea of guilty. Since the plea is not a valid one, the judge has no such discretion as to its withdrawal.

### POINT III

THE PRESENCE OF THE APPELLANT'S FATHER AND PROBATION OFFICER AT THE JUVENILE PROCEEDINGS DOES NOT END THE INQUIRY INTO WHETHER HIS RIGHT TO COUNSEL WAS INTELLIGENTLY WAIVED.

The respondent has asserted that in the instant case the inference that a juvenile's waiver of counsel is not intelligently made is "rebutted by the fact that appellant's father, who was present when the plea was made, concurred with his son that they did not want to consult with counsel." (Respondent's brief at 11) An Arizona case relied upon by the respondent, Application of Estrada, 403 P.2d 1 (Ariz. 1965), (mistakenly referred to in Respondent's brief as Suiter v. Kurtz) suggests that the absence of relatives from the proceeding is only one factor in determining whether waiver of counsel was intelligent.

Focusing on the father's presence at a juvenile proceeding is not dispositive of the issue of whether the waiver was intelligently made by the juvenile, especially when as in this case the father has testified that he did not understand the charges. In some circumstances the influence or pressure of a parent may even have the effect of characterizing the waiver as non-voluntary. In Re H., Cal.Rptr. 76, 468 P.2d 204 (1970), is a case in which the California court decided that a waiver was invalid because



the decision to waive was based on parental influence which was not in the interest of the juvenile. Likewise, the presence and advice of a probation officer cannot be used to establish intelligent waiver of the right to counsel. The court in Gault said that the presence of a probation officer does not show that the defendant intelligently waived his rights. The court noted that the probation officer is not acting as the child's counsel and in fact is an instrument of the court. 387 U.S. at 36

#### CONCLUSION

The appellant submits that the court erroneously refused his motion to withdraw his admission. The appellant does have a right to counsel in the adjudicatory stage of any proceeding in which he faces the risk of confinement. This right was not intelligently waived and the presence of appellant's father and probation officer does not establish intelligent waiver. Further, the appellant submits that since the appellant's plea was invalid the judge had no discretion but should have allowed the appellant to withdraw it.

Respectfully submitted,

/s/

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ROBERT J. SCHUMACHER

CERTIFICATE OF MAILING

I hereby certify that I mailed 11 copies of the foregoing Appellant's Reply Brief to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, and 3 copies of the same to the Office of the Utah Attorney General at 236 State Capitol, Salt Lake City, Utah 84114, this 25<sup>th</sup> day of November, 1980.

Dantzel Maynard