

2011

Utah v. Duane Smith : Brief of Appellant

Utah Court of Appeals

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Mark L. Shurtleff; Office of the Attorney General; Attorneys for Appellee.

Brook J. Sessions; Anthony V. Rippa; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

DUANE SMITH,

Defendant/Appellant.

(Defendant is presently incarcerated in
connection with the case on appeal)

APPEAL FROM THE FOURTH
DISTRICT COURT, UTAH COUNTY,
STATE OF UTAH

Trial Ct Judge: Steven L. Hansen

Trial Ct No. 101402594

Appellate Ct No. 20110196-CA

'ANDERS' BRIEF

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160 East 300 South
Salt Lake City, Utah 84114

Attorneys for Appellee

Brook J. Sessions
Anthony V. Rippa
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Provo, Utah 84604

Attorneys for Appellant

**FILED
UTAH APPELLATE COURTS**

AUG 24 2011

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JURISDICTIONAL STATEMENT

Jurisdiction of the Utah Court of Appeals in this matter is proper pursuant to Utah Code Ann. §78A-4-103(2)(e).

ISSUE PRESENTED FOR REVIEW; STANDARD OF APPELLATE REVIEW; AND PRESERVATION OF ISSUE IN THE TRIAL COURT

The issue presented for review is as follows:

Issue: whether counsel for the appellant should be permitted to withdraw, whether the appeal should be dismissed, and whether the appellant's conviction should be affirmed, when the appeal presents no nonfrivolous issues for determination by the court.

Standard of Review: counsel for the appellant in a criminal case, where the appellant is indigent and counsel is appointed, should be permitted to withdraw, the appeal should be dismissed, and the appellant's conviction should be affirmed, when the appeal presents no nonfrivolous issues for determination by the court.

This issue presents a mixed question of law and fact. *See State v. Wells*, 2000 UT App 304, 13 P. 3d 1056 (per curium); *see also Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Preservation of the Issue: not applicable in the context of an *Anders* brief.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES,
AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE
OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

CONSTITUTIONAL PROVISIONS

Utah Const. art. I, § 7

No person shall be deprived of life, liberty or property, without due process of law.

U.R.App.P. 27 (Advisory Committee Note)

An *Anders* brief is a brief filed pursuant to *Anders v. California* [] in cases where counsel believes no nonfrivolous appellate issues exist.

STATEMENT OF THE CASE

This appeal arises from the appellant's conviction for possession or use of a controlled substance.

On or about August 24, 2010, the State filed an information charging the appellant Duane Smith (hereinafter, "Mr. Smith") with one count of possession or use of a controlled substance (a third degree felony), one count of purchase, transfer, possession, or use of a firearm by a restricted person (a third degree felony), and one count of possession of drug paraphernalia (a class B misdemeanor). (R: 1-2).

On or about December 14, 2010, as part of a plea bargain, Mr. Smith pled guilty to one count of possession or use of a controlled substance, a third degree felony, in violation of Utah Code Ann. §58-37-8(2). The court dismissed the

remaining charges. (R: 42). In conjunction with his plea Mr. Smith read and signed a statement in advance of guilty plea whereby he waived his right to appeal the conviction. (R: 43-49)

The court held a sentencing hearing on February 1, 2011, and sentenced Mr. Smith to zero to five years in the Utah State Prison, which sentence was in accordance with the sentencing statute. (R: 62-63). Mr. Smith is presently incarcerated in connection with this case.

A notice of appeal was filed on March 1, 2011, along with a request for a transcript of the sentencing hearing, a copy of which is attached to this brief. (R: 68).

STATEMENT OF FACTS

On or about December 14, 2010, Mr. Smith pled guilty to one count of possession or use of a controlled substance, a third degree felony, in violation of Utah Code Ann. §58-37-8(2). (R: 42). In conjunction with his plea Mr. Smith read and signed a statement in advance of guilty plea whereby he waived his right to appeal the conviction. (R: 43-49).

The court held a sentencing hearing on February 1, 2011. (R: 62-63). At the hearing Mr. Smith withdrew his motion to withdraw his guilty plea, which he had filed prior to sentencing, and the court proceeded with sentencing. (R: 70 at 2-3). The court gave Mr. Smith an opportunity to address the issues raised in the

presentence report. (R: 70 at 3). Mr. Smith asked the court to follow the recommendation by Adult Probation & Parole that he serve 365 days in jail with credit for time served, rather than send him to prison according to the statute. (R: 70 at 4). Both Mr. Smith and defense counsel were given time to speak to sentencing. (R: 70 at 3-5). The State objected and noted that Mr. Smith had an extensive criminal history consisting of multiple misdemeanor convictions and five felony convictions, which Mr. Smith did not dispute. The State informed the court that Mr. Smith has seven DUI convictions, two of which were felonies. The State also highlighted that Mr. Smith has been to prison six times in the past and that he had performed poorly on probation. (R: 70 at 5-6). Mr. Smith did not dispute any of this.

The court listened to the arguments and after giving defense counsel a final opportunity to be heard it sentenced Mr. Smith according to the statute. (R: 70 at 6-7). The court noted that it considered giving Mr. Smith one more chance and placing him on probation, but that given his extensive history, prior multiple chances, parole revocation, and substance abuse problems, it would not be right to put him on probation again. (R: 70 at 7).

SUMMARY OF ARGUMENT

Counsel should be permitted to withdraw, the appeal should be dismissed, and Mr. Smith's conviction should be affirmed, because this appeal presents no

nonfrivolous issues for the court to determine. Mr. Smith pled guilty and waived his right to appeal the conviction. Further, he was sentenced following an open and fair sentencing hearing and the sentence imposed was legal according to statute and without error

ARGUMENT

I. COUNSEL FOR THE APPELLANT SHOULD BE PERMITTED TO WITHDRAW, THE APPEAL SHOULD BE DISMISSED, AND THE APPELLANT'S CONVICTION SHOULD BE AFFIRMED, BECAUSE THE APPEAL PRESENTS NO NONFRIVOLOUS ISSUES FOR DETERMINATION BY THE COURT

An *Anders* brief should be filed whenever court appointed counsel for the indigent appellant in a criminal matter concludes, after having analyzed all possible claims on appeal, that the appeal presents no nonfrivolous issues for determination by the appellate court. *See State v. Wells*, 2000 UT App 304, 13 P. 3d 1056 (per curiam); *see also Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *State v. Clayton*, 639 P. 2d 168 (Utah 1981).

The *Anders* requirements or steps have been summarized as follows: (1) counsel must continue to act in the role of an active advocate for the defendant, (2) counsel must support the defendant's appeal to the best of his ability, (3) if counsel finds the appeal to be "wholly frivolous" after a "conscientious examination" of the record, then he should advise the court of this and request leave to withdraw, (4) said request should be accompanied by a brief referring to anything in the

record that might arguably support the appeal, (5) counsel should furnish a copy of said brief to the defendant and the court should allow the defendant enough time to raise any points he would like to raise, communicate those points to counsel, and have counsel incorporate them so far as is reasonable into the brief, (6) the court then decides if the appeal is wholly frivolous, (7) if the court decides that the appeal is frivolous it should grant counsel's request to withdraw and either dismiss the appeal or else proceed to a decision on the merits, (8) if the courts decides that the appeal is not frivolous it should allow the defendant the assistance of counsel to argue the appeal. *See Anders v. California*, 386 U.S. at 745; *see also State v. Clayton*, 639 P. 2d at 169-170. These requirements or steps guarantee the criminal defendant due process as a matter of federal constitutional law and have been adopted by the Utah Supreme Court as an expression of the requirements of due process under Article I, Section 7 of the Utah Constitution. *Id.* The brief referred to in step 4 should contain a statement of facts, a description of the proceedings in the trial court, citations to pertinent authorities, any points raised by the defendant "as appropriate," and a certification by counsel that he has delivered a copy of the brief to the defendant as required by step 5. *Id.* This should be done prior to filing the brief, or at least prior to the brief being considered by the court. *See In re D.C.*, 963 P. 2d 761, 765 (Utah Ct. App. 1998). A letter or short motion to the court requesting leave to withdraw and containing a mere statement or conclusion that

the defendant's appeal is without merit is not an adequate substitute for the defendant's right to full appellate review. *See Penson v. Ohio*, 488 U.S. 75, 81-82, 109 S. Ct 346, 102 L. Ed. 2d 300 (1988) (holding that counsel must conduct a detailed review of the case); *see also Anders v. California*, 386 U.S. at 742-743. Counsel should brief all potential issues and objectively demonstrate that those potential issues presented are frivolous. *See State v. Flores*, 855 P. 2d 258, 260 (Utah Ct. App. 1993)(per curium); *see also Dunn v. Cook*, 791 P. 2d 873, 877 (Utah 1990) (holding that the record should be searched and the law researched with the good faith intent of advancing the defendant's legitimate interest).

In the instant case counsel has scoured the record and researched the law in a good faith attempt to advance Mr. Smith's appeal. Mr. Smith's conviction for possession or use of a controlled substance was based on his voluntary plea of guilty as part of a plea bargain. Mr. Smith read and signed a statement in support of guilty plea and thereby waived his right to appeal that conviction. Therefore, the only thing he can appeal is the sentence itself. However, the record shows that the court gave Mr. Smith ample opportunity to be heard at his sentencing hearing and both Mr. Smith and defense counsel utilized that opportunity. The court considered their arguments in support of jail time and probation as opposed to a prison commitment. Judge Hansen even indicated that he had "thought hard, and seriously considered going backwards in this case and putting [Mr. Smith] on

probation, give [him] a chance to do this” but that Mr. Smith had “had lots of chances” and “opportunities.” He noted that Mr. Smith had been on parole before (which had been revoked) and that “it would not be right to grant [him] the privilege of probation with [his] extensive criminal record.” Mr. Smith never disputed that he had an extensive criminal history. Accordingly, the court sentenced him “to serve the indeterminate term as the Utah State Prison as provided by law.” This hearing was fair and afforded Mr. Smith the due process of law. Further, the sentence was legal and not erroneous.

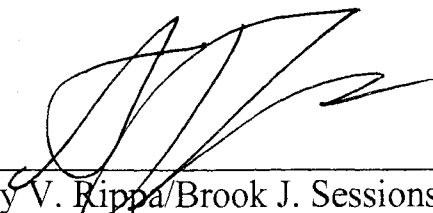
CONCLUSION

For the foregoing reasons the court should permit counsel to withdraw, dismiss the appeal, and affirm the conviction.

COUNSEL’S CERTIFICATION OF COMPLIANCE WITH STEP 5 OF THE ANDER’S REQUIREMENTS

Counsel hereby certifies that on July 25, 2011, he did cause a copy of the attached letter to be delivered to Mr. Smith at the Utah State Prison explaining to him that he had waived his right to appeal his conviction and that counsel could see no merit to an appeal attacking Mr. Smith’s sentence. That letter gave Mr. Smith 10 days within which to raise any points he wanted to make and communicate those points to counsel. As of August 22, 2011, counsel has not heard back from Mr. Smith.

DATED this 23rd day of August, 2011

A handwritten signature in black ink, appearing to be a combination of the names Anthony V. Rippa and Brook J. Sessions, written in a stylized, cursive-like font.

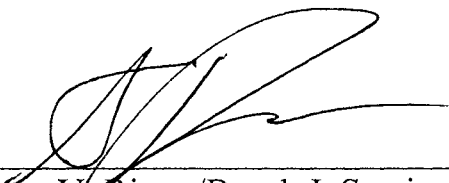
Anthony V. Rippa/Brook J. Sessions
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of August, 2011, I did cause two (2) true and correct copies of the foregoing *ANDERS BRIEF* to be deposited into the US Mail, postage prepaid, addressed to, or otherwise served in accordance with Utah law on, the following recipients:

Office of the Utah Attorney General
160 East 300 South
Salt Lake City, Utah 84114

Duane Smith (#57495)
Utah State Prison
14425 Bitterbrush Lane
PO Box 250
Draper, UT 84020-9501



Anthony V. Rippa/Brook J. Sessions
Attorneys for Defendant/Appellant

FILED

DEC 14 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

Duane Smith,

Defendant.

STATEMENT OF DEFENDANT
IN SUPPORT OF GUILTY PLEA
AND CERTIFICATE OF COUNSEL

Case No. 101402594

I, _____, hereby acknowledge and certify that I have
been advised of and that I understand the following facts and rights:

Notification of Charges

I am pleading guilty (or no contest) to the following crimes:

	Crime & Statutory Provision	Degree	Punishment Min/Max and /or Minimum Mandatory
A.	<u>Possession of Meth.</u> <u>58-37-2(2)(a)(i)</u>	<u>F3</u>	<u>0-5 yrs USP</u>
B.	_____	_____	_____
C.	_____	_____	_____
D.	_____	_____	_____

☐ Enhanceable Second Offense. (Only if checked.)

I know that if I am convicted in the future of this same crime, the second conviction will be a [Class ____ Misdemeanor/ ____ Degree Felony]. The maximum penalty for that crime is ____

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

Def. did knowingly and intentionally possess meth.

I understand that by pleading guilty I will be admitting that I committed the crime(s) listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) plea(s) and prove the elements of the crime(s) to which I am pleading guilty (or no contest).

On/abt 8/17/10 I was found in possession of a syringe containing meth. I admitted it was mine.

Waiver of Constitutional Rights

I am entering this/these plea(s) voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

Counsel. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not)(have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have **not** waived my right to counsel, my attorney is Anthony Rippa. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Jury Trial. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

Confrontation and cross-examination of witness. I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself, if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Right to compel witnesses. I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Right to testify and privilege against self-incrimination. I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify

Presumption of innocence and burden of proof. I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Appeal. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty (or No Contest) Plea

Potential penalties. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Consecutive/concurrent prison terms. I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the Court to impose consecutive sentences unless the Court finds and states on the record that consecutive sentences would be inappropriate.

Plea agreement. My guilty (or no contest) plea(s) (is/are not) the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

I will plead to Count I and the State will dismiss Counts II and III.

Trial judge not bound. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

Defendant's Certification of Voluntariness

I am entering this plea of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.


I am 39 Years of age. I have attended school through the 12 grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of drug, medication, or intoxicants which would impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I can file a motion to withdraw my plea(s) before sentence is pronounced. I understand that for


a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Dated this 14 day of Dec., 2010.


DEFENDANT

Certificate of Defense Attorney

I certify that I am the attorney for Duane Smith, Defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of Defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations by Defendant in the foregoing affidavit, are accurate and true.


ATTORNEY FOR DEFENDANT
Bar No. 9594

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against Duane Smith, defendant. I have reviewed this Statement of Defendant and find that the factual basis of Defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

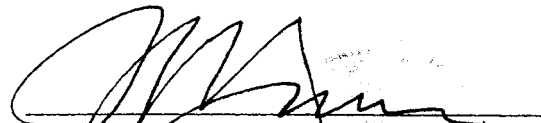

PROSECUTING ATTORNEY

Order

Based on the facts set forth in the foregoing Statement and the certification of Defendant and counsel, and based on any oral representations in Court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that Defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 14 day of Dec., 2010.


DISTRICT COURT JUDGE

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DUANE SMITH,

Defendant.

COPY

Case No. 101402594 FS

Sentence, Judgment & Commitment
Electronically Recorded on
February 1, 2011

BEFORE: THE HONORABLE STEVEN L. HANSEN
Fourth District Court Judge

APPEARANCES

For the State:

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51 South University Avenue
Suite 206
Provo, Utah 84601
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Transcribed by: Wendy Haws, CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

P R O C E E D I N G S

(Electronically recorded on February 1, 2011)

MR. RIPPA: Hi, Judge.

THE COURT: Hello.

MR. RIPPA: If we could call No. 8 on the calendar, Duane Smith. We're here for sentencing today, your Honor. There's also matter No. 58; I don't know if there's an attorney assigned yet on that. He is in custody, and that's an initial appearance on another charge. So it's 8 and 58.

THE COURT: Do you want to take care of that? Are you representing him on both cases?

MR. RIPPA: I don't represent him on 58, but I thought we maybe could just -- it's just for an initial appearance, and so --

THE COURT: Let's take care of it.

MR. RIPPA: Yeah.

MS. GAVIDEN: Your Honor, I'm actually going to move to dismiss this case. We talked about it before it was filed that I -- we wouldn't file it, but then it did get filed. So --

THE COURT: No. 58 is dismissed.

MR. RIPPA: Okay. Judge, I have looked at the pre-sentence report, and I have reviewed that with Mr. Smith pretty extensively. A few days ago Mr. Smith and I did discuss a motion to withdraw, and that motion was filed.

However, I've discussed the legal issues involved in

1 that motion with Mr. Smith, and we'd like to withdraw -- not
2 the plea, but withdraw the motion, if that's okay.

3 THE COURT: I understand.

4 MR. RIPPA: So that's by the wayside.

5 THE COURT: Okay.

6 MR. RIPPA: So if we can just discard that motion for
7 now --

8 THE COURT: So there's no legal reason why we shouldn't
9 proceed, then, right?

10 MR. RIPPA: We will proceed with sentencing.

11 THE COURT: Motion to withdraw the guilty plea has been
12 withdrawn. All right, there's no legal reason, then. He's
13 here before the Court for one count of possession or use of a
14 controlled substance, a third-degree felony. You've seen the
15 pre-sentence report?

16 MR. RIPPA: Yes.

17 THE COURT: You and your client --

18 MR. RIPPA: Uh-huh.

19 THE COURT: -- may address the issues. Go ahead.

20 MR. RIPPA: Okay, Judge. There are a number of recom-
21 mendations. We don't take any factual -- exception to any of
22 the factual allegations in the report, nor the recommendations.
23 It's 36 months supervised probation, fines, fees.

24 Mr. Smith's criminal history, which we admit is pretty
25 extensive, places him on the criminal history matrix on the

1 cusp of imprisonment and intermediate sanctions. I know the
2 State is asking for prison. AP&P have stated in their report
3 that while prison may be an appropriate penalty, sentence, that
4 lengthy incarceration followed by treatment and probation could
5 benefit Mr. Smith. Therefore he is a viable candidate for
6 supervised probation.

7 Therefore, we would agree with AP&P's recommendation
8 that he do 365 days in the Utah County Jail, with credit for
9 73 days served, and that -- you know, that he do a substance
10 abuse evaluation and follow through and complete treatment,
11 and thereafter be on supervised probation.

12 He has done prison in the past; but Mr. Smith informs
13 me that he's never really done a jail term of this length.
14 We're looking at about 200 -- 292 days here in jail, combined
15 with substance abuse treatment and supervised probation. This
16 is what he would like. We would be willing to accept zero
17 tolerance on probation, if the State will be agreeable to that,
18 in recommending jail time as opposed to prison time.

19 THE COURT: Okay, anything further?

20 MR. RIPPA: That -- that's it, from us. We are other-
21 wise in agreement with all the rest of the recommendations.

22 THE COURT: Okay. Mr. Smith, would you like to say
23 anything on your own behalf?

24 MR. SMITH: Yes, sir.

25 THE COURT: Go ahead.

1 MR. SMITH: I wasn't prepared today -- for sentencing
2 today. Your Honor, you've sent me to prison twice. I'm --
3 it's just like a second home to me up there. I mean, I've
4 never really agreed to any treatment programs or anything like
5 that. I've tried to get into them this time, you know, either
6 do the drug Court or mental health Court or whatever. I talked
7 to AP&P. He said that maybe DORA would accept me.

8 That's, you know -- I mean, I filled out in my report
9 I'm sorry for continuing to use methamphetamines, and you know,
10 possessing them and everything that goes along with it, you
11 know. I don't think -- I don't think prison's the answer for
12 me. I've been doing that for the last -- for the last ten
13 years, you know.

14 If you'd give me this opportunity, this one chance,
15 you know, and zero tolerance if I mess up, you know, send me
16 back, and you know, we'll -- I guess we'll go from that, but I
17 appreciate this chance.

18 THE COURT: Okay, thank you. State's position?

19 MS. GAVIDEN: PSI writer felt that he was a moderate
20 risk. He has an extensive criminal history. If I count
21 it correctly, there are 22 misdemeanors, including lots of
22 substance abuse, some theft, 5 prior felonies. Those included
23 bad checks, DUI and drugs. He has a total of 7 DUI offenses,
24 including two felony DUI's.

25 I mean, if -- according to my criminal history, he's

1 been in prison six times. Most recently he was released on
2 April 20th, 2010, less than four months before this offense
3 occurred.

4 The defendant in his statement to the PSI writer said
5 that he feels the need -- that he needs to shoot meth just to
6 keep going, and uses on average twice a week. He's been on
7 probation before, and his history was described as poor.

8 I think he poses a risk to the community. He can't
9 or he won't stop using drugs. Luckily in this case he wasn't
10 driving a vehicle; but he does have a history of that, and that
11 is of great concern to the State.

12 The State would ask for prison; but if the Court is
13 inclined to grant probation, we would agree with the 365 days,
14 and request that he be placed on zero tolerance probation. We
15 don't object to the 73 days he initially served on this case.

16 THE COURT: Final word?

17 MR. RIPPA: Judge, again, it is a -- you know, the
18 prison term on a third degree is zero to five. They are recom-
19 mending a one year in the jail. It is a lengthy period of
20 incarceration. I think incarceration alone hasn't always
21 helped Mr. Smith before. He needs to start taking substance
22 abuse treatment seriously. That is the root of his problem.

23 I think that this lengthy period of incarceration,
24 combined with treatment, zero tolerance probation and continued
25 probation for two more years or whatever it is after, you know,

1 he is released -- 36 months, sorry -- I think we have enough
2 there to -- if it doesn't work, then after that, the only
3 option is to spend a lot longer in prison.

4 (Counsel conferring with defendant off the record)

5 MR. RIPPA: There is a recommendation, you know, that
6 -- for DORA, as well.

7 THE COURT: Be the judgment and the sentence of the
8 Court, Mr. Smith, for the offense of possession or use of a
9 controlled substance, a third-degree felony, that you be
10 sentenced to serve the indeterminate term at the Utah State
11 Prison as provided by law. Sentence will commence forthwith.

12 Mr. Smith, I thought hard, and seriously considered
13 going backwards in this case and putting you on probation,
14 give you a chance to do this, but I think you've had lots of
15 chances. I think you've had opportunities. I can't believe
16 that you haven't had opportunities at the prison to seek help,
17 and when you've been released. You were on parole and revoked.
18 You just -- it would not be right to grant you the privilege of
19 probation with your extensive criminal history.

20 MR. SMITH: All right.

21 THE COURT: Okay. Good luck to you, sir.

22 MR. SMITH: Thanks.

23 THE COURT: Thank you.

24 MR. RIPPA: Thank you, Judge.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

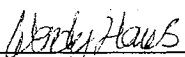
That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have authorized Wendy Haws to prepare said transcript, as an independent contractor working under my license as a certified court reporter appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

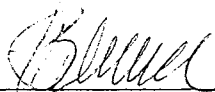
That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.



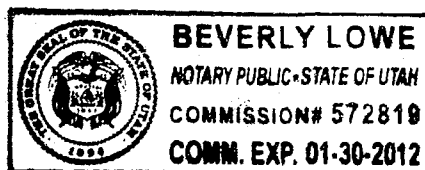
Wendy Haws
Certified Court Transcriber

WITNESS MY HAND AND SEAL this 21st day of March 2011.

My commission expires:
February 24, 2012



Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



NOYES, SESSIONS, WILLIAMS P.C.

3325 North University Avenue, Suite 200

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(801) 375-9957

July 25

~~May 2~~, 2011

RE: Appeal # 201110196

Duane A. Smith (Inmate # 57495)

Utah State Prison

14425 Bitterbrush Lane

PO Box 250

Draper, UT 84020-9501

Dear Mr. Smith,

I am preparing a brief in connection with your case, known colloquially as an *Anders* Brief. The reason I have done so is because I have reviewed the record in your case and researched the law and I cannot find any legal issues which would support the appeal. You pled guilty and waived your rights, including the right to appeal your conviction. Therefore the only thing that you can appeal is Judge Hansen's sentence. However, Judge Hansen sentenced you according to statute and I cannot pinpoint any error in his sentencing.

Accordingly, please review the attached transcript and if you think there are any valid legal issues which we can raise then please communicate those to me in writing within 10 days of this letter. You may want to utilize the law library at the prison if one is available to you. Once I have received your letter I will incorporate your points – if I determine that they have any legal merit – into the body of the brief and I will then file it with the court for consideration.

Yours truly,



Antony V. Rippa

Attorney-at-law