

1990

# Utah v. Richard W. Jones : Petition for Rehearing

Utah Court of Appeals

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Jerome H. Mooney; Mooney and Associates; Attorney for Defendant/Appellant.

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900526

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee,

vs.

RICHARD W. JONES,

Case No. 900526-CA  
Priority No. 2

Defendant-Appellant.

PETITION FOR REHEARING

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**FILED**

AUG 21 1991

Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

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PETITION FOR REHEARING

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IN THE UTAH COURT OF APPEALS

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vs.

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Defendant-Appellant.  
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THIS COURT SHOULD GRANT A PETITION FOR  
REHEARING AND ALLOW ORAL ARGUMENT TO  
TAKE PLACE

On August 7, 1991 this Court issued a per curiam opinion affirming the decision of the lower court not to grant specific performance to the defendant. Defendant respectfully requests that this matter be reheard and that oral argument be permitted. The following facts are offered in support of this position.

The original brief filed by the appellant was for the most part written by the appellant himself at the Utah State Prison. Mr. Jones believed that because of his college education and understanding of contractual law gained from real estate transactions that he could adequately represent his position to this Court. Accordingly, Appellant's counsel in deference to Defendant's decision merely edited a draft submitted by the defendant and incorporated that into Appellant's opening brief. See pp. 5-6 of Appellant's Brief for explanation of counsel.

After receiving the reply of the Attorney General and examining it in detail it became apparent that the brief written by

the appellant did not clearly present the position of the defendant in this case. Upon analysis the misunderstandings and ambiguities became apparent in light of the arguments raised by the Attorney General. In addition, the State made several factual errors in its brief which required correction.

Accordingly, it was decided that the Reply Brief would be written solely by counsel with the purpose of clarifying the position of the defendant and to answer those misconceptions and misstatements made by the State. Because of various scheduling problems, illness, and vacations, it was necessary to obtain a thirty-day extension as to the Reply Brief. Accordingly, this Court gave the defendant until July 29 in which to file his Reply Brief.

Because Defendant wanted input into the Reply Brief and to review the work performed by his attorneys, a draft was sent to him at the Utah State Prison. Unfortunately, however, this draft did not arrive at the prison and it was necessary to send a new draft to him. When it was seen that the July 29 deadline could not be reached associate counsel Craig S. Cook contacted the Assistant Attorney General Judith Atherton and informed her that the Brief may be several days late in order to allow Defendant to review it. Defendant's attorney did not request a stipulated extension since it was believed that the Brief would be filed within the next few days and that an extension would therefore serve no purpose. In fact, the Brief was mailed to the Court on August 5, 1991 and therefore pursuant to Rule 21 of the Utah Rules of Appellate Procedure was deemed filed that day.

Apparently, the Reply Brief arrived almost simultaneously with the decision issued by this Court. There was no notice given to the defendant or the State that this matter would not be set for oral argument or that it would be expedited and would be decided before cases which were much older and which are still pending before this Court.

Thus, Defendant believes that this Court did not have the benefit of the Reply Brief in making this per curiam decision which would have corrected some of the misstatements contained in the present decision. Essentially, there are two main errors which the Reply Brief addressed. First, the per curiam decision does not address Defendant's argument that the lower court accepted the plea bargain pursuant to Rule 11(8)(b) of the Utah Rules of Criminal Procedure. There is no discussion in the opinion whatsoever concerning this rule. Instead, the Court focuses its entire attention on whether the promises of the State as to the plea agreement were fulfilled. Defendant has never disputed that the State honored its obligations under the plea agreement. Instead, Defendant contended that at the time he made the plea it was based upon the assumption that the lower court had accepted it under Rule 11(8)(b) and that therefore Defendant was essentially guaranteed a treatment program rather than incarceration. The Reply Brief of the defendant outlines in detail the chronological sequence which occurred in this case and also the statements of the lower court which he relied upon in believing that a conditional plea bargain had in fact been granted by the lower court. Essentially, therefore, the entire thrust of Defendant's appeal has been

misconstrued in the per curiam opinion.

Second, the per curiam opinion fails to note that Defendant was never advised during the second July 31st hearing that the lower court was not bound by the plea bargain agreement. A careful review of the transcript of the two days as again outlined in the Reply Brief shows that the lower court failed to make the normal statement concerning binding agreements and that this omission again led the defendant into believing that the plea agreement had in fact been accepted and that prison was no longer an alternative.

Defendant and his counsel understand the confusion raised in Appellant's opening Brief and the Reply Brief filed by the State. It is for this reason that substantial time and effort was invested in the Reply Brief in order to clarify for both the Court and the State the exact position being urged by the defendant. It is believed that a review of the Reply Brief in light of the other briefs will clarify the position of the defendant and will reveal that the present opinion now written by this Court is simply erroneous and fails to meet the issues raised by the defendant.

Further, it is believed that this case is not one which can be summarily decided without oral argument. There are presently no cases from this Court concerning the criteria of a conditional plea agreement provided for by Rule 11(8)(b). The Utah Supreme Court decision of State v. Kay, 717 P.2d 1294 (Utah 1986) contains dicta as to the Rule 11(8)(b) requirement but does not squarely address the problem. It is submitted, therefore, that this Court should issue an opinion which is published and which has had the benefit of oral argument clarifying how a Rule 11(8)(b) plea is

made in order to eliminate any misunderstanding on the part of a defendant or his counsel as to future efforts to comply with Rule 11(8)(b).

Because Defendant faces a prison sentence of up to fifteen years as opposed to his belief based upon the circumstances of this case that he would not be incarcerated and would receive supervised therapy, it is respectfully submitted that Defendant is entitled to a full opportunity to allow this Court to review his Reply Brief in detail and to schedule oral argument in this matter concerning the important implications of a Rule 11(8)(b) plea. It is therefore respectfully submitted that this matter should be reheard and that the present per curiam opinion should be vacated.

DATED this 21st day of August, 1991.

MOONEY & ASSOCIATES

By Jerome H. Mooney  
Jerome H. Mooney  
Attorneys for Appellant  
236 South 300 East  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Rehearing to Judith Atherton, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 21st day of August, 1991.

Jerome H. Mooney

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff-Appellee,

CERTIFICATE OF GOOD  
FAITH

vs.

RICHARD W. JONES,

Case No. 900526-CA  
Priority No. 2

Defendant-Appellant.  
-----

Counsel for Petitioner hereby certifies that this Petition is presented in good faith and not for delay.

DATED this 21st day of August, 1991

MOONEY & ASSOCIATES

By



Jerome H. Mooney  
Attorneys for Appellant  
236 South 300 East  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Certificate of Good Faith to Judith Atherton, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 21st day of August, 1991.

