2011

Carlos Vorher v. Honorable Stephen Henriod : Brief of Appellant

Utah Court of Appeals

M Douglas Bayly;Brent M. Johnson; Attorney for Appellee.
Richard G. Uday; Uday Law Office; Charles R. Stewart; Schatz Anderson and Associates; Attorney for Appellant.

IN THE UTAH SUPREME COURT

CARLOS VORHER,	)	
	(	
Petitioner/Appellant.	)	**BRIEF OF APPELLANT**
	(	**(on writ of certiorari)**
vs.	)	
	(	
HONORABLE STEPHEN HENRIOD,	)	**Case No. 20110737**
	(	
Respondent/Appellee.	)	**(not in custody)**

Appeal from the decision of the Utah Court of Appeals holding that the district court made no mistake of law and did not abuse its discretion when it sentenced the Appellant more severely on his voyeurism conviction following his de novo trial than the justice court had sentenced. Petition for Writ of Certiorari was granted by this Court by Order entered November 15, 2011.

M. Douglas Bayly, # 00251
Attorney for Appellee
Tooele City Corporation
90 North Main Street
Tooele, Utah 84074

RICHARD G. UDAY, # 5355
Attorney for Appellant
Uday Law Office
515 South 700 East, Suite 3-E
Salt Lake City, Utah 84102

Brent M. Johnson, # 05495
Attorney for Appellee
Administrative Office of the Courts
450 South State Street, N31
P.O. Box 140241
Salt Lake City, Utah 84114-0241

CHARLES R. STEWART, #1224
Attorney for Appellant
Schatz Anderson and Associates
57 West 200 South, Suite 200
Salt Lake City, Utah 84101

ORAL ARGUMENT REQUESTED

IN THE UTAH SUPREME COURT

CARLOS VORHER,	)	
	(	
Petitioner/Appellant.	)	**BRIEF OF APPELLANT**
	(	**(on writ of certiorari)**
vs.	)	
	(	
HONORABLE STEPHEN HENRIOD,	)	**Case No. 20110737**
	(	
Respondent/Appellee.	)	**(not in custody)**

Appeal from the decision of the Utah Court of Appeals holding that the district court made no mistake of law and did not abuse its discretion when it sentenced the Appellant more severely on his voyeurism conviction following his de novo trial than the justice court had sentenced. Petition for Writ of Certiorari was granted by this Court by Order entered November 15, 2011.

M. Douglas Bayly, # 00251
Attorney for Appellee
Tooele City Corporation
90 North Main Street
Tooele, Utah 84074

RICHARD G. UDAY, # 5355
Attorney for Appellant
Uday Law Office
515 South 700 East, Suite 3-E
Salt Lake City, Utah 84102

Brent M. Johnson, # 05495
Attorney for Appellee
Administrative Office of the Courts
450 South State Street, N31
P.O. Box 140241
Salt Lake City, Utah 84114-0241

CHARLES R. STEWART, #1224
Attorney for Appellant
Schatz Anderson and Associates
57 West 200 South, Suite 200
Salt Lake City, Utah 84101

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UTAH CONSTITUTION

UTAH STATUTES

STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter pursuant to Rules 45, 46 and 51of the Utah Rules of Appellate Procedure outlining the process for the Court to review a decision of the Utah Court of Appeals. A copy of the Utah Court of Appeals decision in Carlos Vorher v. Honorable Stephen Henriod, 2011 UT App. 199, is found at Addendum A. Appellant petitioned this Court through that process and obtained and order from the Court dated November, 15, 2011, granting his Petition for Writ of Certiorari permitting this appeal.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

In granting the Petition for Certiorari this Court identified the issue to be addressed as follows:

I: Whether the Court of Appeals erred in denying Appellant's request for extraordinary relief challenging the imposition of a more severe penalty following a de novo trial on appeal of his justice court guilty plea.

The Supreme Court Order granting the Petition for Writ of Certiorari identifying the issue is found at Addendum B.

Standard of Review:

This Court has identified the following standard of review for a writ of certiorari to the Utah Court of Appeals and for the issue presented herein.

> "On certiorari, we review the court of appeals' decision for correctness, giving its conclusions of law no deference." State v. Casey, 2003 UT 55, ¶ 10, 82 P.3d 1106.

State v. Spillers, 152 P.3d 315, 2007 UT 13, ¶ 10.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Amendment V, Constitution of the United States (full text)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Constitution of the United States (in pertinent part)

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALL OTHER CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

ARE FOUND AT ADDENDUM C

IN THE UTAH SUPREME COURT

CARLOS VORHER,	)	
	(	
Petitioner/Appellant.	)	**OPENING BRIEF**
	(	
vs.	)	
	(	
HONORABLE STEPHEN HENRIOD,	)	**Case No. 20110737**
	(	
Respondent/Appellee.	)	(not in custody)

OPENING BRIEF OF PETITIONER/APPELLANT

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

STATEMENT OF THE CASE

NATURE OF THE CASE:

This Court granted Mr. Vorher's Petition for Writ of Certiorari specifically articulating the issue to be addressed on appeal as whether the court of appeals erred in denying Mr. Vorher's request for extraordinary relief challenging the imposition of a more severe penalty following a de novo trial on appeal of his justice court guilty plea. The decision of the court of appeals is found in addendum A. See Order, granting certiorari review, Addendum B.

COURSE OF PROCEEDINGS:

Mr. Vorher was charged initially in the justice court with Voyeurism, a Class B misdemeanor. With the assistance of his first trial counsel, Mr. Vorher pleaded guilty to a reduced charge of Disorderly Conduct, a Class C misdemeanor, and was sentenced to the maximum 90 days jail allowed under that charge. He was ordered into custody and then through new (and his second) trial counsel, he exercised his right to appeal his conviction to obtain a de novo trial in the district court.

At the district court he chose to try the case and was convicted of the original voyeurism charge, the Class B misdemeanor. The trial judge, over the objection of counsel, sentenced Mr. Vorher to 180 days jail, the maximum allowable under the voyeurism charge. Counsel specifically argued that the Court was required to sentence no harsher than the sentence the justice court had imposed. Counsel indicated his preparedness to address case authority for his position. R. 75.

The trial court judge entertained no argument responding that Mr. Vorher appeal his decision. However, no further appeal is permitted following the de novo trial so Mr. Vorher petitioned the Utah Court of Appeals for extraordinary relief.

DISPOSITION BELOW:

Mr. Vorher urged the court of appeals to vacate the sentencing imposed by the district court as the 180 days sentence was more harsh and more severe than the 90 day sentence the justice court had imposed and ordered that he serve. The Court of Appeals found Mr. Vorher's petition to be properly presented for possible extraordinary relief but

denied his request finding that the district court had neither demonstrated a mistake of law nor that it abused its discretion. The Utah Court of Appeals decision is reproduced in Addendum A. Its citation is 2011 UT App 199.

STATEMENT OF THE FACTS

(TAKEN FROM THE OPINION OF THE COURT OF APPEALS)

On March 18, 2009, at approximately 5:20 a.m., a witness observed an individual lying on his stomach, on the grass, outside a residence in Tooele, Utah. The witness believed that individual was peering into a basement window. As the witness approached the residence in his vehicle, the person (a man) stood up and walked away. The witness noted the license plate of the man's vehicle and reported the matter to police. The vehicle was registered to Mr. Vorher.

Tooele City law enforcement responded to the address where the vehicle was registered and attempted to contact Carlos Vorher, the registered owner. An officer made contact with Mr. Vorher's wife, who advised that her husband, Carlos, had left for work approximately 6:00 a.m., but did not know if he had left any earlier. Mr. Vorher later met with the investigating officer and exercised his right to an attorney and was released.

Law enforcement also conducted follow up at the residence. The mother there indicated that her daughter's bedroom is in the basement on the east side of the residence, the same area the witness had observed the male. She further indicated that her daughter had been awakened at 5:15 a.m. and would have been dressing and preparing for school

at that time. Law enforcement concluded its investigation and referred the case to the Tooele City Attorney, who subsequently filed the Class B misdemeanor Voyeurism charge against Mr. Vorher.

On December 14, 2009, in the Tooele County Justice Court, the Defendant represented by his first counsel pleaded guilty to Disorderly Conduct, a Class C misdemeanor. Tooele County Justice Court Judge Pitt sentenced the Defendant to pay a fine of $ 1,055.00 and to serve 90 days jail allowing him to report to the jail on December 21, 2009. R. 2.

On December 21, 2009, the Defendant reported to jail but subsequently retained new counsel who filed an appeal of Mr. Vorher's conviction to the Third District Court. On December 29, 2009, Mr. Vorher was released from jail and the appeal transferred to the Third District Court. R. 4-5.

A jury trial with the new trial counsel was held before Judge Henriod on April 23, 2010, and Mr. Vorher was convicted of the Class B Voyeurism charge. R. 61. Judge Henriod issued a no bail warrant and ordered Mr. Vorher to report to the Tooele County Jail by 8:00 a.m. on Saturday, April 24, 2010, where he was to be held pending sentencing on June 1, 2010. R. 62-63.

Defense counsel motioned to reschedule sentencing for an earlier date and was granted that request. R. 69. The Defendant appeared before Judge Henriod in the Third District Court for sentencing on May 25, 2010, and was ordered to serve 180 days in jail, with credit given for time served of 41 days. R. 72.

At sentencing, defense counsel attempted to present the trial court with case law addressing the issue whether the District Court was able to order a more severe sentence than what was handed down in the justice court. The Court rejected the argument and challenged defense counsel to appeal. R. 75. At this point, the following colloquy occurred:

> [Vorher's counsel]: Your Honor, it would be our—
>
> [The district court]: He can serve—
>
> [Vorher's counsel]:—our position that because he was sentenced to 90 days that the maximum amount this Court can sentence him to is 90 days.
>
> [The district court]: Because he got a deal in the justice court and rejected it and came back up here on a B, he doesn't get the 90 days. He gets the whole 180 days.
>
> [Vorher's counsel]: I think there's contrary case law, if I can speak to that, your Honor.
>
> [The district court]: Go ahead and appeal.

R. 75 at 6.

The district court also assessed a fine and surcharge of $ 1,850.00 against Mr. Vorher which exceeded the amount of the fine imposed by the justice court ($ 1,055.00). R. 2; 72. Mr. Vorher began service of jail on April 24, 2010, but requested counsel to initiate a Petition for Extraordinary Relief. R. 62. Four months later, on July 24, 2010, the appellate court granted counsel's request and issued a stay pending resolution of the petition. R. 77. Mr. Vorher served over 130 days before his release pending the decision from the petition.

The Utah Court of Appeals ultimately denied Mr. Vorher's petition concluding that the "broad exception" of Utah Code Ann. § 76-3-405(2)(b) controlled and that the trial court neither abused its discretion nor made a mistake of law. Vorher v. Henriod, 2011 Utah App. 199, ¶¶ 9-11. This Petition for Writ of Certiorari followed.

Mr. Vorher is not in custody.

SUMMARY OF THE ARGUMENT

Petitioner Carlos Vorher was wrongfully sentenced, in District Court, to a harsher punishment after appealing a final decision from justice court. The longstanding general rule based on due process and constitutional and statutory rights to appeal dictate that a defendant cannot be punished more severely for appealing a conviction from the justice court obtaining his right to appeal through the district court in the form of a de novo trial. "[T]he court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied." Utah Code Ann. 1953 § 76-3-405(1)

Furthermore, the United States Supreme Court has stated that imposing a harsher punishment after appealing a lower court decision is a violation of due process. North Carolina v. Pearce, 395 U.S. 711, 724 (1969). "[P]enalizing those who choose to exercise constitutional rights, would be patently unconstitutional. And the very threat inherent in the existence of such a punitive policy would . . . serve to 'chill the exercise of basic constitutional rights." Id. (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

The court of appeals recognized that justice courts and district courts appellate processes are different. Nonetheless the court erroneously concluded that the difference was insignificant enough to mandate that the exception to the rule found in -405(2)(b) did not apply to justice court cases. The result is to seriously chill the right of Mr. Vorher and other similarly situated justice court defendants to exercise their right to appeal and enjoy due process right afforded any defendant charged with committing a crime.

ARGUMENT

WHETHER THE COURT OF APPEALS ERRED IN DENYING MR. VORHER'S REQUEST FOR EXTRAORDINARY RELIEF CHALLENGING THE IMPOSITION OF A MORE SEVERE PENALTY FOLLOWING A DE NOVO TRIAL ON APPEAL OF HIS JUSTICE COURT GUILTY PLEA

Our courts have long held that constitutional considerations of due process and protected rights of appellate review prohibit an accused from being sentenced more harshly or more severely for exercising his right to appeal.

> [D]ue process of law requires that a defendant be freed from the apprehension that if he appeals his conviction successfully and is then convicted at a second trial the trial judge can retaliate by giving him an increased sentence. Consequently, the Court held, the sentence imposed after re-trial cannot be more severe than the original sentence, unless the reason for the increased sentence, based on identifiable conduct by the defendant following the original trial, appears in the record.

State v. Sorenson, 639 P.2d 179 (Utah 1981)(citing North Carolina v. Pearce, 395 U.S. 711 (1969)). This Court then explained that our state's position followed the Pearce

decision with clarity and emphasis on the constitutional right to appeal. This Court stated:

> In 1973, our Legislature implemented that [Pearce] requirement in a more stringent fashion that allows for no exceptions. So far as pertinent to this appeal, U.C.A., 1953, § 76-3-405 provides that where a conviction has been set aside on direct review, ***"the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence... ."*** In *Chess v. Smith,* Utah, 617 P.2d 341, 343 (1980), we held that section 76-3-405 also prevents the Utah constitutional right to appeal (Article VIII, § 9) from being impaired "by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so."

Sorenson, 639 P.2d at 179 (emphasis added).

Utah justice court defendants are especially entitled to these constitutional safeguards as they are treated differently in their quest for acquittal than those defendants who begin their cases in the district court and receive appellate rights through our state's appellate courts. "[P]enalizing those who choose to exercise constitutional rights, would be patently unconstitutional. And the very threat inherent in the existence of such a punitive policy would . . . serve to 'chill the exercise of basic constitutional rights." Id. (citing United States v. Jackson, 390 U.S. 570, 581 (1968)).

Nearly thirty years ago this Court addressed the question of whether a Utah justice court defendant could be sentenced more harshly after exercising his right to a de novo appeal. This Court decided the following:

> "[A] person's decision to avail himself of the right to appeal guaranteed under art. VIII, sec. 9 of the Utah Constitution may not be impaired by making it conditional on taking the risk of a harsher sentence after the second trial. Plaintiffs are guaranteed the right to appeal from the justice court to the district court pursuant to art. VIII, sec. 9 of the Utah Constitution. They should not be required to take the risk of a longer jail

sentence in order to exercise that right.

Wisden v. District Court of Sevier County, 694 P.2d 605, 606 (Utah 1984).

The legal concept that "no harsher penalty may result from the second judge," became codified in Utah in 1973.

> Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

Utah Code Ann. 76-3-405 (1973). Then in 1997 the statue was amended to the following:

> 76-3-405. Limitation on sentence where conviction or prior sentence set aside.
> (1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.
> (2) This section does not apply when:
> (a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or
> (b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.

The introduction of subsection (2) into the statute presents a clash between the prior decisions outlined above and the exceptions identified in (2)(a) and (2)(b) from the 1997 amendment. The court of appeals decision in Vorher v. Henriod denied his request for emergency relief based on subsection (2)(b) claiming that because he entered a plea in the justice court he invalidated his conviction and sentence when he appealed that decision to the district court. Mr. Vorher's case requires a decision from this Court whether the court

of appeals erred in denying his request for extraordinary relief challenging the imposition of a more severe penalty following a de novo trial on appeal of his justice court guilty plea.

Mr. Vorher insists that the court of appeals did err in deciding that his district court sentence, which increased his jail time by 90 days and his fine by $ 800.00, was not a violation of his appellate rights and rights to due process. He asks this Court to grant him the relief the court of appeals denied him, and with its opinion would now deny other similarly situated justice court defendants by allowing the exception to dissolve the long standing general rule and by denying him his right to appeal and right to due process.

A. JUSTICE COURTS ARE DIFFERENT

In 2005 this Court reviewed a claim that justice courts in Utah were unconstitutional because of the appellate rules that permit a defendant to appeal from a judgment of the justice court and obtain a new trial in district court through a trial de novo while that initial judgment of guilty from the justice court remains in effect. That claim was addressed and rejected by this Court in a series of petitions joined on certiorari review in Bernat v. Allphin, 2005 UT 1.

In ruling that the justice court appellate process did not violate double jeopardy, due process or equal protection, this Court in Bernat relied on prior United States Supreme Court and Utah Supreme Court case authority concluding that while different the Utah justice court system is constitutional. The Court ruled, at least in part, the justice court

appellate system in constitutional because it provides more process than less process to Utah's justice court appellants. Id.

Specifically, this Court expressed that one of the additional processes due to Utah defendants appealing their justice court convictions is the inability of the de novo district court judge to sentence more harshly if convicted at the de novo trial. In Bernat this Court stated:

> A de novo trial is no less "anew," "afresh," or "a complete retrial upon new evidence" simply because it functions as a form of appellate review. The state bears the same burden of establishing a defendant's guilt in a trial de novo as it would had the case originated there, and a defendant is afforded a clean slate upon which to relitigate the facts as to his guilt or innocence. *The outcome of the prior justice court proceeding plays no part in the trial de novo,* ***except that a district court is prohibited from imposing a harsher sentence than that imposed by the justice court.***[(12)]
>
> ¶32 Moreover, we reject the contention that a trial de novo cannot be considered on par with more traditional appeals simply because it differs in form. Justice courts "are designed, in the interest of both the defendant and the [s]tate, to provide speedier and less costly adjudications than may be possible in criminal courts of general jurisdiction." Colten, 407 U.S. at 114. Due to this difference in design, it stands to reason that the differences between justice courts and district courts would necessitate different forms of appellate review. Because Utah justice courts are not "courts of record," it is not only constitutionally permissible to allow a defendant the opportunity to relitigate his or her case anew, but practically and reasonably sound.
>
> ***12. In this respect, our observation that an appeal from a justice court requires a de novo trial to proceed "as if it originated there," Pledger, 626 P.2d at 416 (internal quotation omitted), is, in the strictest sense, incorrect, given that a district court cannot impose a greater sentence than the sentence imposed in the justice court proceeding, Wisden, 694 P.2d at 605-06.***

Bernat, 2005 Utah 1, ¶¶ 31-32, n.12 (emphasis added).

The court of appeals decision relied on what it referred to as the "broad exception" of 76-3-405(2)(b) to defeat his request for relief despite recognizing that the justice court appeal process is different and that justice court defendants have otherwise lost the right to appellate review (unless the district court rules on an issue of constitutionality of a statute or ordinance). Vorher, 2011 UT App. 199, ¶ 12. Noteworthy, the appellate court conceded that the amendment to the statute was drafted without specific consideration of the practical differences between justice court appeals and district court appeals. The court of appeals stated:

> We recognize that, in a strict sense, Vorher and others who vacate their plea agreements in justice court by requesting a trial de novo in district court do not "stand in the same position as though the plea bargain, conviction, and sentence had never occurred," see id., because they have lost the right to appellate review. See id. § 78A–7–118(8) (Supp.2010) ("The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance."). ***However, we are not convinced that the legislature intended to exclude justice court plea agreements from section 76–3–405(2)(b)'s exception to the general rule against increased punishment following appeals. Rather, it appears that section 76–3–405 was intended to cover all criminal appeals but was drafted without specific consideration of the practical differences between justice court appeals and district court appeals.***[4]
>
> 4. The Utah Supreme Court has applied section 76–3–405 to justice court appeals even though the statutory language is in some ways inconsistent with the justice court appeal process. See Wisden v. District Court, 694 P.2d 605, 606 (Utah 1984) (per curiam) (applying section 76–3–405(1) to a trial de novo following an appeal from the justice court, despite the statute's language limiting its application to situations where a conviction was set aside on direct review or on collateral attack). Compare State v. Powell, 957 P .2d 595, 596–97 (Utah 1998) (holding that the successful withdrawal of a guilty plea, even after appeal, does not constitute the setting aside of a conviction on direct review or collateral attack).

Vorher, 2011 UT App 199, ¶ 12, n. 4 (emphasis added).

B. THE COURT OF APPEALS CONCLUSION THAT -405(2)(b) IS APPLICABLE TO JUSTICE COURT DEFENDANTS VIOLATES CONSTITUTIONAL RIGHTS TO APPEAL AND DUE PROCESS

Notably, footnote 4, quoted above indicates that this Court has applied 76-3-405 to justice court appeals despite its recognition of the differences of the justice court process. For support of its conclusion the court of appeals relied on Wisden and Powell. Neither case, however, justifies the court's conclusion.

Wisden is a case that started in the justice court and following a conviction there the brothers appealed to the district court for a de novo trial. The district court found the brothers guilty and then sentenced them more harshly than the justice court had sentenced. Wisden v. District Court, 694 P.2d 605 (Utah 1984). Wisden supports the premise that this Court relied on authority including 76-3-405, to require reversing the second sentence and requiring a resentencing no harsher than the justice court imposed. Id. at 606. This Court expressly noted the basis of its decision.

> Our rule is not confined to the statutory limitation, however. In *State v. Sorensen, supra,* this Court followed ***due process requirements*** enunciated in *North Carolina v. Pearce,*395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), in ruling that a defendant should be freed of the apprehension of a more severe sentence as a retaliation for exercising his right of appeal. In *Chess v. Smith, supra,* we held that a person's decision to avail himself of ***the right to appeal*** guaranteed under art. VIII, sec. 9 of the Utah Constitution may not be impaired by making it conditional on taking the risk of a harsher sentence after the second trial. Plaintiffs are guaranteed the right to appeal from the justice court to the district court pursuant to art. VIII, sec. 9 of the Utah Constitution. They should not be required to take the risk of a longer jail sentence in order to exercise that right.

Wisden, 694 P.2d at 606 (emphasis added). Importantly, the court's reliance on the constitutional premises have more weight than does the statutory reference—which does not include subsection (2)(b) in any form as it was not yet a part of the statute.

Likewise, the court of appeals' reliance on Powell to support the (2)(b) application on Mr. Vorher also is misplaced. Powell began in the district court and following a guilty plea he moved to withdraw his plea. After withdrawing his plea he went to trial and was convicted of a greater crime and then sentenced to more than the first sentence. Powell, 957 P.2d at 595-96. This Court discussed 76-3-405 but found it not to apply to the situation where Powell had withdrawn his plea. Id. at 596. This Court nonetheless discussed the purpose of 76-3-405 as follows:

> The purpose behind th[is] provision[ ] [section 76-3-405] is to ***prevent the chilling effect on the constitutional right to appeal which the possibility of a harsher sentence would have on a defendant who might be able to demonstrate reversible error in his conviction.***" *Id.* at 88. In that case, we held that section 76-3-405 does not apply to a correction of an illegal sentence because "[t]he correction of an illegal sentence stands on a different footing than the correction of an error in a conviction." *Id.* This is so, in part, because "a defendant is not likely to appeal a sentence that is unlawfully lenient, and there is, therefore, minimal chilling effect on the right to appeal." *Id.*

Powell, 957 P.2d at 597 (emphasis added; quoting State v. Babbel, 813 P.2d 86 (Utah 1991)). Again, the basis for the reversal here was the inapplicability of 76-3-405 with an explanation of the important purpose of the statute to protect the right to appeal and not chill nor discourage that right. Id. Once again the (2)(b) subsection was not involved to support the decision of the court because still not in existence. Subsection (2)(b) is not the general rule but only an exception to that rule. It should not be permitted to overshadow the longstanding rule.

C. COMPELLING AUTHORITY SUPPORTS THAT -405(2)(b) SHOULD NOT IMPACT JUSTICE COURT DEFENDANTS

Contrary to the court of appeals' decision in Vorher, the decisions of this Court and even a number of cases from the court of appeals support that the strong purpose to protect a defendant's rights to due process and his right to appeal significantly dismisses the court of appeals' reliance on (2)(b) supports this Court's decision to provide relief to Mr. Vorher.

The court of appeals' decision to apply subsection (2)(b) to the justice court context is contrary to Bernat's expression of the long held rule from subsection (1) and how the justice court appellate process has operated and continues to operate despite the subsection (2)(b) amendment in 1997. A review of the history, purpose and implementation of the general rule's application to justice courts is worthy of review here.

Precisely because of the difference between the justice court appellate process and the district court process (de novo trial versus appellate court review of the record), this Court has consistently reviewed the justice court appellate process to disallow a more severe sentence at the de novo stage sentencing than the justice court sentence. The court of appeals decision in Vorher disregarded that history of justice court appellate review process finding that the exception in subsection 2(b) of 76-3-405 was also meant to cover justice court appeals.

This Court made clear in State v. Babbel, 813 P.2d 86 (Utah 1991), that the purpose behind the prohibition for sentencing more harshly in the second sentencing, codified at 76-3-405 in its original form and still present as the general rule and not the exception,

since the addition of subsection (2)(b), is to prevent the chilling effect of the possibility or a harsher or more severe sentence on the constitutional right to appeal where one might get a better decision. That blanket rule without exception was pronounced in Wisden v. District Court, 694 P.2d 605 (Utah 1984), specific to the justice court scenario with reliance on protection of constitutional safeguards as discussed earlier. Wisden has been discussed previously.

Notably, in Chess v. Smith, 617 P.2d 341 (Utah 1980), this Court found that a lawyer who had advised his client to forgo his appeal because he could receive a much harsher or severe sentence on retrial was found to be a misstatement of the law and justified reversal. Both the constitutional right to appeal and due process supported this decision.

In Taylorsville City v. Adkins, a case that began in the justice courts and was appealed to the district court where the City desired to re-prosecute companion counts which had resulted in acquittals at the justice court, the court of appeals relied on the constitutional right to appeal, under art. VIII, sec. 9 of the Utah Constitution, Wisden and the purpose of 76-3-405 to explain the ruling. The court of appeals stated:

> In reaching its conclusion, the *Wisden* court also determined that a person's decision to avail himself of the right to appeal guaranteed under art. VIII, sec. 9 of the Utah Constitution may not be impaired by making it conditional on taking the risk of a harsher sentence after the second trial. Plaintiffs are guaranteed the right to appeal from the justice court to the district court pursuant to art. VIII, sec. 9 of the Utah Constitution. They should not be required to take the risk of a longer jail sentence in order to exercise that right.
>
> *Id.* The court's reasoning in *Wisden* is equally applicable here. If we were to adopt the reasoning set forth by Taylorsville, a person who was convicted of one charge

> in justice court, but acquitted of others, would be forced into a Hobbesian choice. On the one hand, if he chooses to appeal the conviction he would risk being convicted of charges of which he was previously acquitted. On the other hand, if he chooses not to exercise his constitutional right to appeal, he would be forced to live with a conviction that may not be just. A person's right to an appeal may not by impaired in such a way.

Taylorsville City v. Adkins, 145 P.3d 1161 (UT App 2006). The same dilemma exists for the justice court defendant.

In State v. Mast, 2001 UT App 402, the court of appeals found that even an increase in the amount of fine imposed at the second sentence was in violation of the rule against no harsher or more sever sentencing.

The court of appeals also concluded in a 2002 opinion that prosecutors did not overcome the presumption of vindictiveness and the chilled effect on appeal when adding a restitution amount to the sentence. The court of appeals indicated that "the second sentence cannot exceed the first in appearance or effect, in the number of elements or in their magnitude." State v. Samora, 2002 UT App 384, 59 P.3d 64.

Notably, the court of appeals decision in Vorher did not address this issue of presumed vindictiveness and the chilling effect on Mr. Vorher. Given the colloquy provided herein at the district court sentencing, the presumption of vindictiveness for pursuing an appeal should have been addressed by the court of appeals in reaching its decision.

The cases presented above demonstrate a consistent approach to the general rule prohibiting a more severe sentence at the second stage of the justice court process.

D. NO DISTINCTION EXISTS BETWEEN THE PROTECTION AFFORDED JUSTICE COURT DEFENDANTS WHETHER AFTER A PLEA OR FOLLOWING A TRIAL

Importantly, no difference is, or ought to be, recognized in the justice court appellate context differentiating between whether a person tries the case in justice court and then seeks de novo review or if they simply plead guilty and then pursue the de novo appeal. The purpose of the general rule recognized in North Carolina v. Pearce remains the same—to protect against violations of due process and safeguarding appellate rights. The Pearce standard expressly forbids actions which chill the right to appeal by disallowing a more severe sentence at the second trial. State v. Sorenson, 639 P.2d 179 (Utah 1981)(citing North Carolina v. Pearce, 395 U.S. 711 (1969)).

Pearce did not recognize a distinction between the guilty plea and the trial; neither should this Court given the many reasons a defendant might have to exercise his right to appellate process of the justice courts and the option of de novo review in the district court.

The rules themselves do not limit a justice court defendant from appealing to the district court following a plea. Basic fundamental fairness allows justice court defendants the right to have a guaranty of a law trained judge who has been selected by the governor and approved by the senate, a jury trial in court of record and all the other companion rights that attach to the district court. Accompanying these rights, since well before Bernat but strongly reiterated there, is the right to not be sentenced any more harshly in the district court than had occurred in the justice court.

For example, in Colten v. Kentucky, 407 U.S. 104 (1972), the United States Supreme Court examined the two-tiered appellate process of Kentucky and noted that whether a trial occurred in the justice court or a plea occurred there, no significance attached to the right to de novo review.

> Kentucky, like many other States, has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors may be charged and tried in a so-called inferior court, where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. ***If convicted after trial or on a guilty plea, however, he has a right to a trial de novo in a court of general criminal jurisdiction, so long as he applies within the statutory time. The right to a new trial is absolute.***

Kentucky v. Colten, 407 U.S. at 112-13 (emphasis added; citations omitted). Later that Court further explained:

> We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. ***Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction.***

Colten, 407 U.S. at 118-19 (emphasis added).

The court of appeals has itself rendered an opinion making very clear that a defendant who enters a plea agreement and is sentenced in the justice court nonetheless maintains his/her right to appeal to the district court for de novo review. State v. Hinson, 966 P.2d 273 (UT App 1998). Hinson is instructive because the court of appeals performed the analysis there they failed to do here by examining the difference within the

justice court appellate process. The Hinsons, Cynthia and David, were charged in justice court with possession of a controlled substance and paraphernalia. They entered guilty pleas in justice court and were sentenced. Similar to Mr. Vorher they then obtained a new lawyer to pursue the de novo appeal to district court.

In district court the State relying on statute 78-5-120 urged the court to dismiss the appeal because the Hinsons had pleaded guilty in justice court. The State also argued based on statutory construction of the motion to withdraw requirements that the Hinsons would have to move to withdraw their pleas before appealing to the district court. The appellate court made several observations and importantly noted critical distinctions in the operation and practical application of the appellate processes of justice court and the so called "conventional" appeal of a case originating in the district court. The Hinson court stated:

> The State argues that the language in section 78-5-120, "whether rendered by default or after trial," limits a defendant in the justice court to a trial de novo in the district court to when he or she was found guilty by way of a default judgment, or by a guilty verdict after a trial. We do not read section 78-5-120 so narrowly. The language relied upon by the State is a dependent clause setting out a range of circumstances within which a judgment could result from justice court proceedings, but it does not preclude a defendant from appealing other judgments. The operative language provides that "[a]ny person not satisfied with a judgment rendered in a justice court .... is entitled to a trial de novo in the district court." Utah Code Ann. § 78-5-120 (Supp.1997).
>
> .....
>
> Moreover, to preclude the right of appeal after a guilty plea would require a person to submit to a trial or lose that right. When the constitutional right to appeal a judgment is satisfied by a trial de novo, it is illogical to require either the state or defendant to actually try the case as a prerequisite to the appeal. Additionally, because the justice court is not a court of record, the "appeal" does not involve a review of the justice court proceedings which result in a judgment.

> This notwithstanding, the State argues further that before a defendant can appeal his or her guilty plea entered in the justice court to the district court, the defendant must first make a motion to withdraw the guilty plea. Otherwise, the State maintains, there is nothing for the district court to review.
>
> In a conventional appeal environment, a motion to withdraw a guilty plea is required to "giv[e] the court who took the plea the first chance to consider defendant's arguments." *Summers v. Cook*, 759 P.2d 341, 342 (Utah Ct.App.1988). ***However, that underlying rationale has no place in an appeal from a justice court judgment on guilty pleas precisely because there is no record to review and the constitutional right to appeal from judgments of a justice court is satisfied by a trial de novo, upon the merits, without regard to the judgment entered in the justice court.*** *See* Utah Const. art. I, § 12; Utah Const. art. VIII, § 5; Utah Code Ann. § 78-5-120 (Supp.1997); Utah R.Crim. P. 26(12)(a); *City of Monticello,* 788 P.2d at 519. By appealing, the justice court judgment is stayed pursuant to Rule 4-608 of the Utah Code of Judicial Administration. The district court is not confined to the record before the justice court and need not defer to the justice court's findings and determinations. The district court neither reverses nor affirms the judgment of the justice court, but renders a new, distinct, and independent judgment. Accordingly, because the proceedings begin anew in the district court, a motion to withdraw a guilty plea would be superfluous and is thus not required.
>
> We therefore hold that a defendant may appeal to the district court a judgment of conviction on a guilty plea entered voluntarily in the justice court.

Hinson, 966 P.2d 273, 275-76 (emphasis added; citations in original).

The court of appeals erroneously concluded the applicability of -405(2)(b) to the justice court analysis. For justice court defendants, no distinction can be made differentiating between a plea and a trial verdict of guilty—both are convictions which carry and absolute right to appeal.

E. PRACTICAL CONSIDERATIONS REQUIRE REVERSING THE COURT OF APPEALS DECISION AS IT IS INCONSISTENT WITH THE PROCESS OF JUSTICE IN THE JUSTICE COURTS.

In relying on the exception to the general rule contained in Utah Code Ann. -405, the court of appeals first labeled the exception as a broad exception but then later

concluded that Mr. Vorher's appeal or request for a trial de novo "invalidated the justice court conviction." Vorher, at ¶ 11. That conclusion is contrary to this Court's explanation of the justice court to district court de novo process.

The plain language of the exception itself is difficult to shoehorn into Utah's justice court de novo process as approved by this Court in Bernat. The exception relied on by the court appeals is -405(2)(b) which reads as follows:

> (2) This section does not apply when:
> . . . . .
>
> (b) a defendant enters into a plea agreement with the prosecution and later successfully moves to *invalidate his conviction*, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.

Utah Code Ann. § 76-3-405. The language "invalidating his conviction" is inconsistent with this Court's recognition of the continuing jeopardy of convictions from justice courts and the rejection of double jeopardy arguments urged in Bernat.

Further, the court of appeals also incorrectly concluded that the exception applied to Mr. Vorher because he had entered a plea in the justice court finding no reason to reject the exception to a justice court de novo review. The court of appeals incorrectly concluded as follows:

> We recognize that, in a strict sense, Vorher and others who vacate their plea agreements in justice court by requesting a trial de novo in district court do not "stand in the same position as though the plea bargain, conviction, and sentence had never occurred," *see id.*, because they have lost the right to appellate review. *See id.* § 78A–7–118(8) (Supp.2010) ("The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance."). However, we are not convinced that the legislature intended to exclude justice court plea agreements from section 76–3–405(2)(b)'s exception to the general rule against increased punishment following appeals. ***Rather, it appears that section 76–3–405 was intended to cover all criminal***

> ***appeals but was drafted without specific consideration of the practical differences between justice court appeals and district court appeals.***

Vorher at ¶ 12 (emphasis added; footnote omitted).

These conclusions of the court of appeals are contrary to carefully crafted reasoning of this Court distinguishing how our two-tiered justice court system maintained constitutional attack from double jeopardy, due process and equal protection grounds. The court's reliance on the subsection (2)(b) exception ignores the Bernat analysis and previous conclusions and expressions of this Court.

Moreover, the public policy concerns expressed by the court of appeals are incorrect and require this Court to evaluate and correct the decision of the court of appeals. Our criminal process has long recognized a practical and common sense approach to jurisprudence, particularly when considering issues of judicial economy. In State v. Sery, 758 P.2d 937, 938-939 (Utah App 1988), practical considerations approved allowing the defendant whose motion to suppress was denied in district court to enter a conditional plea there and then appeal the trial court's decision. That decision obviated the need for a trial in district court to preserve the right to appeal the denial of the pre-trial motion. Sery has expedited cases through our process efficiently and without need for extra time consuming and costly trials. Notably, this Court has previously ruled that a defendant who pleads in justice court is still entitled to the de novo appellate process. State v. Hinson, 966 P.2d 273 (Utah 1988).

The court of appeals decision herein requires this Court to evaluate under its supervisory powers the practical effect of the decision of the court of appeals which would

have the (2)(b) exception to -405 to swallow the rule and require all defendants who want to have a trial before a district court judge necessarily to have a trial in the justice court first. Such a decision would be completely burden and chill the appellate rights of an enormous number of justice court defendants impacting on their expenses for litigation, the consumption of time for them and the prosecutors' offices and courts alike.

CONCLUSION

The decision of the court of appeals in this case is not in harmony with the constitutionally protected rights to appeal, rights to due process, Bernat and long standing rulings by our Supreme Court and court of appeals referenced above. The decision of the court of appeals recognizes the differences in appealing from justice court to district court as compared to a district court appeal to the appellate courts in Utah. Section 405(2)(b) should not apply in the justice court appellate process and to the extent it does it violates constitutional rights of the justice court defendant.

For any or all reasons urged above, this Court should grant Mr. Vorher and the unknown many of justice court defendants similarly situated.

RESPECTFULLY SUBMITTED this 29th day of March, 2012.

RICHARD G. UDAY
Attorney for Petitioner/Appellant

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

   ☑ this brief contains 7,212 [*number of*] words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or

   ☐ this brief uses a monospaced typeface and contains _____[*number of*] lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 [*name and version of word processing program*] in 13 Times New Roman [*font size and name of types style*], or

   ☐ this brief has been prepared in a monospaced typeface using _____ [*name and version of word processing program*] *with* _____ *[name of characters per inch and name of type style].*

Attorney's or Party's Name

Dated: 3/29/12

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of March, 2012, I have caused one original and nine true and correct copies of the foregoing BRIEF OF APPELLANT to be filed with the Clerk of the Utah Supreme Court and two additional copies to be mailed first class to the following:

M. Douglas Bayly
Attorney for Appellee
Tooele City Corporation
90 North Main Street
Tooele, Utah 84074

Brent M. Johnson
Attorney for Appellee
Administrative Office of the Courts
450 South State Street, N31
P.O. Box 140241
Salt Lake City, Utah 84114-0241

RICHARD G. UDAY
Attorney for Appellant

I mailed/delivered the number of copies to the Utah Supreme Court, M. Douglas Bayly and Brent M. Johnson, as indicated above this ___ day of March, 2012.

ADDENDA

Addendum A: Vorher v. Henroid, 2011 UT App 199
Addendum B: Supreme Court Order Granting Petition for Writ of Certiorari
Addendum C: Constitutional Provisions, Statutes and Rules

Addendum A

VORHER v. HENRIOD

Carlos VORHER, Petitioner, v. Honorable Stephen HENRIOD, Respondent.

No. 20100573–CA.

-- June 23, 2011

Before Judges ORME, THORNE, and VOROS.

Charles R. Stewart, Salt Lake City, for Petitioner.M. Douglas Bayly, Tooele; and Brent M. Johnson, Salt Lake City, for Respondent.

OPINION

¶ 1 Carlos Vorher petitions for extraordinary relief pursuant to rule 65B(d) of the Utah Rules of Civil Procedure, seeking to vacate a criminal sentence imposed by the district court.[1] See generally Utah R. Civ. P. 65B(d) (governing the availability of extraordinary relief to remedy the wrongful use of judicial authority). Vorher was originally charged in justice court with class B misdemeanor voyeurism. Pursuant to a plea agreement, he pleaded guilty to a lesser charge of class C misdemeanor disorderly conduct and was sentenced to ninety days in jail. Vorher then exercised his right to a trial de novo in the district court, where he was charged with and convicted of the original voyeurism charge and sentenced to 180 days in jail. Vorher argues that Utah Code section 76–3–405 prohibits the district court's sentence from exceeding the ninety-day sentence imposed by the justice court. See generally Utah Code Ann. § 76–3–405 (2008) (limiting the imposition of increased sentences after successful appeal). We decline to grant Vorher's petition for extraordinary relief.

BACKGROUND

¶ 2 On March 18, 2009, at about 5:20 a.m., a witness observed a man lying on his stomach in the grass outside a residence in Tooele, Utah. The man appeared to be peering into a basement window of the residence. As the witness approached, the man got up and walked away. The witness noted the license plate number of the man's vehicle and reported the incident to police. The vehicle was registered to Vorher.

¶ 3 The investigating officer went to Vorher's house and spoke with his wife, who advised the officer that Vorher had left the house for work that morning about 6:00 a.m. Vorher's wife did not know if he had left the house any earlier. The officer also spoke with M.N., who lived in the residence where the peeping had allegedly occurred. M.N. told the officer that her teenage daughter, K.B., occupied a basement room on the side of the house where the man had been observed and that at 5:20 a.m. K.B. would have been

dressing and preparing for school. The officer also met with Vorher, who invoked his right to an attorney and apparently made no statement. The officer concluded his investigation and referred the matter to the Tooele City Attorney, who subsequently filed a class B misdemeanor voyeurism charge against Vorher in Tooele County's justice court.

¶ 4 On December 14, 2009, Vorher pleaded guilty in justice court to a reduced charge of class C misdemeanor disorderly conduct. Although there is no formal plea agreement in the record, it appears that Vorher's guilty plea resulted from a plea bargain or agreement whereby Vorher agreed to plead guilty in exchange for a reduction in the charge against him.[2] The justice court sentenced Vorher to pay a fine and serve ninety days in jail. On December 21, Vorher reported to jail as ordered but also filed an appeal of his conviction to the district court pursuant to Utah Code section 78A–7–118. Shortly thereafter, Vorher was released from jail and the matter was transferred to district court for a trial de novo.

¶ 5 On April 23, 2010, the district court conducted a jury trial at which Vorher was convicted on the original charge of class B misdemeanor voyeurism. Vorher was placed into custody pending sentencing, which occurred on May 25. The district court sentenced Vorher to 180 days in jail with credit for forty-one days already served. At this point, the following colloquy occurred:

[Vorher's counsel]: Your Honor, it would be our—

[The district court]: He can serve—

[Vorher's counsel]:—our position that because he was sentenced to 90 days that the maximum amount this Court can sentence him to is 90 days.

[The district court]: Because he got a deal in the justice court and rejected it and came back up here on a B, he doesn't get the 90 days. He gets the whole 180 days.

[Vorher's counsel]: I think there's contrary case law, if I can speak to that, your Honor.

[The district court]: Go ahead and appeal.

The district court also assessed a fine and surcharge against Vorher. Vorher now asks this court to grant him extraordinary relief in the form of vacating the district court's sentence and remanding for a new sentence not to exceed that originally imposed by the justice court.

ISSUE AND STANDARD OF REVIEW

¶ 6 Vorher's petition for extraordinary relief argues that, pursuant to Utah Code section 76–3–405, the district court's sentence after trial de novo cannot exceed the sentence originally imposed by the justice court. See generally Utah Code Ann. § 76–3–405(1)

(2008) ("Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence."). Accordingly, Vorher asks this court to vacate the district court's sentence and remand the matter to the district court for entry of a new sentence that is no more harsh than Vorher's sentence in the justice court.

¶ 7 This court is granted broad discretion in reviewing a petition for extraordinary relief under rule 65B(d). See State v. Barrett, 2005 UT 88, ¶¶ 23–26, 127 P.3d 682. "Unlike a party filing a direct appeal, a petitioner seeking rule 65B(d) extraordinary relief has no right to receive a remedy that corrects a lower court's mishandling of a particular case." Id. ¶ 23. "Rather, whether relief is ultimately granted is left to the sound discretion of the court hearing the petition." Id. Thus, even a petitioner who can establish grounds for relief-in this case, an alleged abuse of discretion by the district court, see Utah R. Civ. P. 65B(d)(2)(A)-has no right to such relief and the reviewing court retains the discretion to deny the petition.[3] See Barrett, 2005 UT 88, ¶ 24. "In sum, if a petitioner is able to establish that a lower court abused its discretion, that petitioner becomes eligible for, but not entitled to, extraordinary relief." Id.

ANALYSIS

¶ 8 Vorher seeks extraordinary relief from his district court sentence pursuant to rule 65B(d) of the Utah Rules of Civil Procedure. See generally Utah R. Civ. P. 65B(d). Vorher has no direct right to appeal his sentence because the district court did not rule on the constitutionality of a statute or ordinance. See Utah Code Ann. § 78A–7–118(8) (Supp.2010) ("The decision of the district court [on appeal from the justice court] is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance."). Accordingly, Vorher has "no other plain, speedy and adequate remedy," Utah R. Civ. P. 65B(a), and his " 'pursuit of an extraordinary writ is procedurally correct,' " Taylorsville City v. Adkins, 2006 UT App 374, ¶ 3, 145 P.3d 1161 (per curiam) (quoting Dean v. Henriod, 1999 UT App 50, ¶ 8, 975 P.2d 946).

¶ 9 However, we conclude that Vorher is not eligible for extraordinary relief because he has not established an abuse of discretion on the part of the district court. Vorher correctly asserts that Utah Code section 76–3–405(1) generally prohibits the imposition of a greater sentence after a defendant successfully appeals. See generally Utah Code Ann. § 76–3–405(1). However, this case falls outside of the general rule because Vorher's original conviction and sentence resulted from a plea agreement. See generally id. § 76–3–405(2)(b). Thus, while a mistake of law "may constitute an abuse of discretion," Barrett, 2005 UT 88, ¶ 26, there was no mistake of law here because section 76–3–405(1)'s prohibition on increased sentences does not apply when the original sentence results from a plea agreement that is later repudiated.

¶ 10 Utah Code section 76–3–405 provides that, upon a defendant's reconviction after a successful appeal, the sentencing court "shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied." Utah Code Ann. § 76–3–405(1). And, section 76–3–405 has been held to govern appeals from the justice court to the district court. See Wisden v. District Court, 694 P.2d 605, 606 (Utah 1984) (per curiam) ("[T]he district court sentences were contrary to section 76–3–405."); Adkins, 2006 UT App 374, ¶ 12 ("The Wisden court concluded that Utah Code section 76–3–405(1) applied to justice court defendants."). Thus, Vorher is correct in his assertion that the punishment imposed by the district court following a trial de novo cannot ordinarily exceed that originally imposed by the justice court for an offense or offenses based on the same conduct. See Wisden, 694 P.2d at 606.

¶ 11 However, section 76–3–405 contains a broad exception for situations where the original sentence is the result of a plea agreement: "This section does not apply when . a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred." Utah Code Ann. § 76–3–405(2)(b) (2008). Vorher's justice court conviction resulted from a plea agreement whereby Vorher pleaded guilty to a reduced charge, and his appeal to the district court invalidated the justice court conviction. Under these circumstances, section 76–3–405's prohibition on increased sentences "does not apply." See id.

¶ 12 We recognize that, in a strict sense, Vorher and others who vacate their plea agreements in justice court by requesting a trial de novo in district court do not "stand in the same position as though the plea bargain, conviction, and sentence had never occurred," see id., because they have lost the right to appellate review. See id. § 78A–7–118(8) (Supp.2010) ("The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance."). However, we are not convinced that the legislature intended to exclude justice court plea agreements from section 76–3–405(2)(b)'s exception to the general rule against increased punishment following appeals. Rather, it appears that section 76–3–405 was intended to cover all criminal appeals but was drafted without specific consideration of the practical differences between justice court appeals and district court appeals.[4]

¶ 13 Our decision today that the exception contained in Utah Code section 76–3–405(2)(b) applies to justice court plea agreements invalidated by appeals to the district court is informed by the policies expressed by the Utah Supreme Court in addressing situations in which a district court defendant successfully withdraws a guilty plea. That court has stated,

We also believe that it would be unwise to hold that a sentence imposed pursuant to a plea agreement should limit a sentence subsequently imposed at trial after defendant has

withdrawn his plea. Plea bargains are entered into so that both sides may avoid the expense and uncertainty of a trial. In exchange for conserving State resources, defendant usually receives a lower charge or lesser sentence. Thus, it would be anomalous to allow a defendant to keep the benefit of an agreement he repudiated while requiring the State to proceed to trial and prove its case.

State v. Powell, 957 P.2d 595, 597 (Utah 1998); see also State v. Maguire, 957 P.2d 598, 600 (Utah 1998) (stating that exclusion of withdrawn plea agreements from rule against greater subsequent sentences "advances public policy by preventing a defendant from retaining the benefits of a plea bargain while rescinding his part of the agreement"). Here, Vorher seeks to retain the benefit of his original plea agreement "while rescinding his part of the agreement," Maguire, 957 P.2d at 600, a result that would clearly run contrary to the public policies surrounding plea agreements.[5]

CONCLUSION

¶ 14 We conclude that the district court made no mistake of law and did not exceed its permitted discretion when it sentenced Vorher to 180 days in jail on his class B misdemeanor voyeurism conviction. Although Utah Code section 76–3–405(1) prohibits the imposition of a more severe sentence after a successful appeal, section 76–3–405(2)(b) creates an exception to the general rule for cases such as Vorher's, where "a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction," Utah Code Ann. § 76–3–405(2)(b). Accordingly, Vorher has not demonstrated that he is eligible for the extraordinary relief that he seeks, and his petition for extraordinary relief is denied.

FOOTNOTES

1. Tooele City filed an opposition memorandum to Vorher's petition as the real party in interest to this controversy. The named respondent, the Honorable Steven L. Henriod, filed a notice in this court agreeing that Tooele City is in the best position to litigate Vorher's petition.

2. In its memorandum opposing Vorher's petition, Tooele City additionally asserts that Vorher's plea agreement in the justice court included terms providing that the prosecutor would not make a sentencing recommendation regarding jail time and that Vorher would not appeal his conviction to the district court. These assertions are not inconsistent with the record before us, but neither does the record establish that these terms were a part of Vorher's plea agreement. Accordingly, we do not rely on these assertions in our analysis of Vorher's petition.

3. Once a petitioner has demonstrated that he is eligible for extraordinary relief, the reviewing court "will consider multiple factors when determining whether or not to grant

the relief requested." State v. Barrett, 2005 UT 88, ¶ 24, 127 P.3d 682. Such factors include "the egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error, and additional factors." Id.

4. The Utah Supreme Court has applied section 76–3–405 to justice court appeals even though the statutory language is in some ways inconsistent with the justice court appeal process. See Wisden v. District Court, 694 P.2d 605, 606 (Utah 1984) (per curiam) (applying section 76–3–405(1) to a trial de novo following an appeal from the justice court, despite the statute's language limiting its application to situations where a conviction was set aside on direct review or on collateral attack). Compare State v. Powell, 957 P .2d 595, 596–97 (Utah 1998) (holding that the successful withdrawal of a guilty plea, even after appeal, does not constitute the setting aside of a conviction on direct review or collateral attack).

5. We also note the possibility that prosecutors might be less willing to entertain justice court plea agreements at all if defendants could lock in their maximum sentence with a plea agreement and then demand a trial de novo in the district court.

THORNE, Judge:

¶ 15 WE CONCUR: GREGORY K. ORME and J. FREDERIC VOROS JR., Judges.

Addendum B

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Carlos Vorher,

Petitioner,

v. Case No. 20110737-SC

Honorable Stephen Henriod,

Respondent.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on August 25, 2011.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue.

Whether the court of appeals erred in denying Petitioner's request for extraordinary relief challenging the imposition of a more severe penalty following a de novo trial on appeal of his justice court guilty plea.

A briefing schedule will be established hereafter.

For The Court:

Dated 11-15-11

Matthew B. Durrant
Associate Chief Justice

Addendum C

UTAH CONSTITUTION

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Article VIII, Section 5. [Jurisdiction of district court and other courts -- Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

76-3-405. Limitation on sentence where conviction or prior sentence set aside.

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.
(2) This section does not apply when:
(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or
(b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.

Amended by Chapter 291, 1997 General Session

78A-7-118. Appeals from justice court -- Trial or hearing de novo in district court.

(1) In a criminal case, a defendant is entitled to a trial de novo in the district court only if the defendant files a notice of appeal within 30 days of:
(a) sentencing after a bench or jury trial, or a plea of guilty in the justice court resulting in a finding or verdict of guilt; or
(b) a plea of guilty in the justice court that is held in abeyance.
(2) If an appeal under Subsection (1) is of a plea entered pursuant to negotiation with the prosecutor, and the defendant did not reserve the right to appeal as part of the plea negotiation, the negotiation is voided by the appeal.
(3) A defendant convicted and sentenced in justice court is entitled to a hearing de novo in the district court on the following matters, if the defendant files a notice of appeal within 30 days of:
(a) an order revoking probation;
(b) an order entering a judgment of guilt pursuant to the person's failure to fulfil the terms of a plea in abeyance agreement;
(c) a sentence entered pursuant to Subsection (3)(b); or
(d) an order denying a motion to withdraw a plea.
(4) The prosecutor is entitled to a hearing de novo in the district court on:
(a) a final judgment of dismissal;
(b) an order arresting judgment;
(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
(d) a judgment holding invalid any part of a statute or ordinance;
(e) a pretrial order excluding evidence, when the prosecutor certifies that exclusion of that evidence prevents continued prosecution of an infraction or class C misdemeanor;
(f) a pretrial order excluding evidence, when the prosecutor certifies that exclusion of that evidence impairs continued prosecution of a class B misdemeanor; or
(g) an order granting a motion to withdraw a plea of guilty or no contest.
(5) A notice of appeal for a hearing de novo in the district court on a pretrial order excluding evidence under Subsection (4)(e) or (f) shall be filed within 30 days of the order excluding the evidence.
(6) Upon entering a decision in a hearing de novo, the district court shall remand the case to the justice court unless:
(a) the decision results in immediate dismissal of the case;
(b) with agreement of the parties, the district court consents to retain jurisdiction; or
(c) the defendant enters a plea of guilty in the district court.
(7) The district court shall retain jurisdiction over the case on trial de novo.
(8) The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance.

Amended by Chapter 215, 2010 General Session

78A-5-102. Jurisdiction -- Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.
(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.
(3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.
(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.
(5) The district court has appellate jurisdiction over judgments and orders of the justice court as outlined in Section **78A-7-118** and small claims appeals filed pursuant to Section **78A-8-106**.
(6) Appeals from the final orders, judgments, and decrees of the district court are under Sections **78A-3-102** and **78A-4-103**.
(7) The district court has jurisdiction to review:
(a) agency adjudicative proceedings as set forth in Title 63G, Chapter 4, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings; and
(b) municipal administrative proceedings in accordance with Section **10-3-703.7**.
(8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:
(a) there is no justice court with territorial jurisdiction;
(b) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed, or has not formed and then dissolved, a justice court; or
(c) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.
(9) If the district court has subject matter jurisdiction pursuant to Subsection (5) or (8), it also has jurisdiction over offenses listed in Section **78A-7-106** even if those offenses are committed by a person 16 years of age or older.
(10) The district court has jurisdiction of actions under Title 78B, Chapter 7, Part 2, Child Protective Orders, if the juvenile court transfers the case to the district court.

Amended by Chapter 34, 2010 General Session