

2000

Utah v. Jose Luis C. Vicente : Brief of Appellee

Utah Court of Appeals

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Joan C. Watt; Salt Lake Legal Defender Assoc; counsel for appellant.

Jeanne B. Inouye; assistant attorney general; Mark L. Shurtleff; attorney general; David E. Weiskopf; Deputy Weber County Attorney; counsel for appellee.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	Case No. 20000955-CA
	:	
JOSE LUIS C. VICENTE,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A SENTENCE IMPOSED UPON A CONVICTION FOR ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(iii) (1999), IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK PRESIDING.

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ORAL ARGUMENT OR PUBLISHED OPINION NOT REQUESTED

IN THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF THE PROCEEDINGS	1
ISSUE ON APPEAL AND STANDARDS OF REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	7
ARGUMENT	
DEFENDANT, A FUGITIVE FROM JUSTICE, CANNOT CALL ON THIS COURT TO DECIDE HIS APPEAL	4
CONCLUSION	5
ADDENDA	
ADDENDUM A - Utah Code Ann. § 58-37-8(1)(a)(iii) (1999)	
ADDENDUM B - District Court Docket, Case No. 991907447	

TABLE OF AUTHORITIES

STATE CASES

<i>Hardy v. Morris</i> , 636 P.2d 473 (Utah 1981)	2, 4, 5
<i>State v. Tuttle</i> , 713 P.2d 703 (Utah 1985)	4, 5

STATE STATUTES

Utah Code Ann. § 58-37-8 (1999)	1, 2
Utah Code Ann. § 78-2a-3 (1996)	1

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000955-CA
vs.	:	
JOSE LUIS C. VICENTE,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a sentence imposed upon a conviction for attempted possession of a controlled substance with intent to distribute, a class A misdemeanor, in violation of UTAH CODE ANN. § 58-37-8(1)(a)(iii) (1999), in the Third Judicial District, Salt Lake County, the Honorable J. Dennis Frederick presiding.

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (1996).

ISSUE ON APPEAL AND STANDARDS OF REVIEW

Should this court adjudicate the merits of defendant's appeal, where defendant is a fugitive from the law?

This is a question of law, reviewable for correctness. *See Hardy v. Morris*, 636 P.2d 473 (Utah 1981).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statute is reproduced in Addendum A:

UTAH CODE ANN. § 58-37-8(1)(a)(iii) (1999).

STATEMENT OF THE CASE

Defendant was charged by information with unlawful possession of a controlled substance with intent to distribute, a third degree felony. R. 2. Defendant was released under a federal consent decree to Pre-Trial Services. R. 4. When defendant failed to appear for his roll call, an arrest warrant issued. R. 18. Defendant was subsequently booked into jail. R. 20.

On August 15, 2000, defendant pled guilty to attempted possession of marijuana with intent to distribute, a class A misdemeanor. R. 25-32, 67:4. The court accepted his plea, again released him to Pre-Trial Services, ordered him to appear for preparation of a presentence investigation report (PSI), and notified him of his sentencing hearing. R. 31, 33, 36, 67:4. On August 16, the court rescheduled defendant's sentencing hearing. *See* district court docket (attached).

When defendant failed to appear for preparation of his PSI, the trial court ordered the issuance of a nonbailable arrest warrant. R. 39, 41-43. Defendant was not apprehended and did not appear for his sentencing hearing. R. 44, 67 (Tab 2 at

1). The trial court found that defendant had voluntarily absented himself from the sentencing hearing and sentenced him in absentia to a one-year jail term. R. 44-45, 67 (Tab 2 at 1). The trial court also ordered the prosecutor to prepare findings of fact, conclusions of law, and an order. R. 67 (Tab 2 at 2).

Defense counsel filed a motion to correct an illegal sentence, arguing that the trial court erred when it sentenced defendant in absentia. R. 46-47. The trial court subsequently signed the findings of fact, conclusions of law, and order prepared by the prosecutor. R. 48-49. The record, however, includes no order granting or denying the motion to correct an illegal sentence. Defendant timely appealed. R. 51. Defendant remains a fugitive. *See* district court docket (attached as Addendum B).

STATEMENT OF THE FACTS¹

An informant led a Salt Lake County sheriff's detective to defendant's home. R. 3. Defendant allowed the detective to enter his home and consented to a search of his residence. *Id.* The detective found five ounces of marijuana packaged for distribution, a drug scale, and a fraudulent alien resident card. *Id.* Defendant was arrested at the scene. *Id.*

¹This version of the facts is taken from the information. Because defendant pled guilty, no trial was held. Because he failed to appear for preparation of a PSI, no "Official Version" of the offense was prepared.

SUMMARY OF THE ARGUMENT

A defendant who is a fugitive from justice is not entitled to appellate review of his case. While he may be entitled to reinstatement of his appeal after he has been returned to custody, he is not entitled to pursue his appeal during his illegal absence.

ARGUMENT

DEFENDANT, A FUGITIVE FROM JUSTICE, CANNOT CALL ON THIS COURT TO DECIDE HIS APPEAL

Defendant argues that the trial court erred when it sentenced defendant in absentia and requests that this Court vacate his sentence. Br. Aplt. at 14, 27. Defendant, who was free on release, did not appear at sentencing and has not subsequently appeared. Although a bench warrant for his arrest has issued, defendant remains at large. Because defendant is a fugitive from justice, this Court should decline to adjudicate his claims and dismiss this appeal.

Under “the settled rule of *Hardy v. Morris*,” a fugitive defendant “places himself beyond the reach of the judicial system and any ruling cannot be enforced against him; therefore, he should not be allowed to pursue an appeal while out of custody.” *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985) (citing *Hardy v. Morris*, 636 P.2d 473 (Utah 1981)). “The dismissal of such an appeal is justified on the theory that the [fugitive] should not be allowed to reap the benefit of a decision in

his favor when the state could not enforce a decision in its favor.” *Hardy*, 636 P.2d at 474.

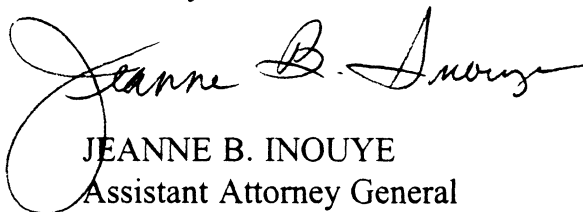
Defendant, who was conditionally released to Pre-Trial Services, did not appear either for preparation of his PSI or for sentencing. While a bench warrant for his arrest has issued, neither the record on appeal nor the district court docket indicates that the warrant has been recalled. Defendant is therefore apparently still at large. Assuming he remains at large, he cannot claim the privilege “to call upon the resources of the Court for determination of his claims.” *Id.*²

CONCLUSION

Defendant’s appeal should be dismissed.

RESPECTFULLY submitted on Nov. 26, 2001.

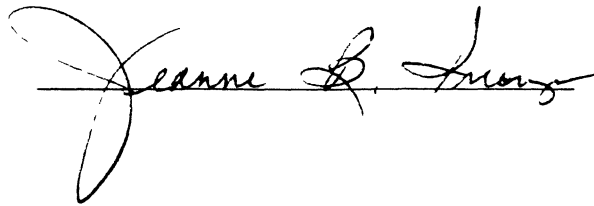
MARK L. SHURTLEFF
Attorney General


JEANNE B. INOUE
Assistant Attorney General

²Defendant may, however, be entitled to reinstatement of his appeal after he has been returned to custody. *See State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985).

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were either mailed, postage prepaid, or hand-delivered to Joan C. Watt, Attorney for Appellant, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, UT 84111, this 26th day of Nov., 2001.

A handwritten signature in cursive script, reading "Jeanne B. Long", is written over a horizontal line.

ADDENDA

ADDENDUM A

58-37-8. Prohibited acts -- Penalties.

(1) Prohibited acts A -- Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

[Sections in this Chapter](#)[|Chapters in this Title](#)[|All Titles](#)[|Legislative Home Page](#)

Last revised: Thursday, July 12, 2001

ADDENDUM B

Running Report ...
Displaying Report

THIRD DISTRICT COURT SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH vs. JOSE LUIS CASTRO VICENTE

CASE NUMBER 991907447 State Felony

CHARGES

Charge 1 - 58-37-8(1AIII) - ATTEMPTED POSS W/INTENT TO DIST
CONTR/CNTRFT SUBST (amended)

Attributes: Drug Schedule 1.

Class A Misdemeanor Plea: August 15, 2000 Guilty

Disposition: August 15, 2000 {Guilty Plea}

CURRENT ASSIGNED JUDGE

J. DENNIS FREDERICK

PARTIES

Plaintiff - STATE OF UTAH

casehist.288 (3%)[Press space to continue, q to quit, h for help]
JOSE LUIS VICENTE

Also Known As -

Defendant - JOSE LUIS CASTRO VICENTE

Represented by: NISA J SISNEROS

DEFENDANT INFORMATION

Defendant Name: JOSE LUIS CASTRO VICENTE

Offense tracking number: 10565067

Date of Birth: May 04, 1973

Jail Booking Number: 10565067

Law Enforcement Agency: COUNTY SHERIFF

LEA Case Number: 99-27767

Prosecuting Agency: SALT LAKE COUNTY

Agency Case Number: DAO99004536

Sheriff Office Number: 194152
Violation Date: March 04, 1999

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	4,625.00	
	Amount Paid:	0.00	
	Credit:	0.00	
casehist.288 (7%)	[Press space to continue, q to quit, h for help]		Balance:
4,625.00			

REVENUE DETAIL - TYPE: FINE

Amount Due:	4,625.00
Amount Paid:	0.00
Amount Credit:	0.00

Printed: 11/26/01 11:31:47 Page 1
^L
CASE NUMBER 991907447 State Felony

Balance: 4,625.00

CASE NOTE

*NEED SPANISH INTER *deft sentenced in absentia 9/22/00, no
PSI*

casehist.288 (10%)[Press space to continue, q to quit, h for help]PROCEEDINGS

04-07-99 Note: CASE FILED BY DET BAILLESS OF SLCO. DEF RELEASED CDR.
DEF

TOLD TO CONTACT COURT FOLLOWING RELEASE.	melissb
04-07-99 Case filed	melissb
04-07-99 ARR scheduled on April 21, 1999 at 09:30 AM in Arraignment - S31 with Judge ARRAIGNMENT.	melissb
04-07-99 Judge ARRAIGNMENT assigned.	melissb

04-16-99 Note: FILED FEDERAL CONSENT DECREE RELEASE

caroleo

04-16-99 Note: NOTIFIED AMY AT PRE-TRIAL SERVICES TO NOTIFY
DEFENDANT caroleo

04-20-99 ARR - CDR rescheduled on April 30, 1999 at 09:30 AM Reason:

On court's own motion.

connieg

04-20-99 Note: Jennifer PTS called and reset case for 4-30-99 connieg

04-30-99 Notice - WARRANT for Case 991907447 ID 328057 connieg

04-30-99 Warrant ordered on: April 30, 1999 Warrant Num: 972066155 Bail

Allowed

connieg

Bail amount: 10000.00

04-30-99 Warrant issued on: April 30, 1999 Warrant Num: 972066155 Bail

Allowed

connieg

Bail amount: 10000.00

Judge: DENNIS M. FUCHS

Issue reason: Issue warrant on Failure to Appear for non
mandatory court violation.

casehist.288 (16%)[Press space to continue, q to quit, h for help]04-30-99 Minute Entry -

Minutes for Sentence, Judgment, Commitme barbarrs

Judge: DENNIS M FUCHS

Clerk: barbarrs

Prosecutor: PARKER, PAUL

DEFT FAILED TO APPEAR. C/O BW TO BE ISSUED FOR \$10,000.00

11-29-99 Warrant recalled on: November 29, 1999 Warrant num: 972066155 eval

Recall reason: Warrant recalled because defendant was
booked.

11-29-99 Note: BUDDY FROM PRE-TRIAL NOTIFIED CLERK FOR COURT DATE

caroleo

11-29-99 INITIAL APPEARANCE scheduled on December 01, 1999 at 09:30 AM

in Arraignment - S31 with Judge ARRAIGNMENT.

caroleo

11-29-99 Note: FILED: FEDERAL CONSENT DECREE RELEASE eval

12-01-99 Minute Entry - Minutes for Appointment of Counsel barbarrs

Judge: JUDITH S. ATHERTON

PRESENT

Clerk: barbarrs

Defendant

Interpreter: JACQUELINE GOMEZ

casehist.288 (23%)[Press space to continue, q to quit, h for help]

Printed: 11/26/01 11:31:56 Page 2

^L

CASE NUMBER 991907447 State Felony

Language: SPANISH

Video

Tape Number: 537 Tape Count: 1424

INITIAL APPEARANCE

The Information is read.

Defendant is arraigned.

APPOINTMENT OF COUNSEL

Court finds the defendant indigent and appoints Legal Defender
Office to represent the defendant.

Appointed Counsel:

casehist.288 (28%)[Press space to continue, q to quit, h for help]
Defender Office

Name: Legal

City:

Phone:

DRUG ROLL CALL is scheduled.

Date: 12/14/1999

Time: 09:00 a.m.

Location: To Be Determined

Third District Court

450 South State

Salt Lake City, UT 84111

Before Judge: ROGER BEAN

12-01-99 DRUG ROLL CALL scheduled on December 14, 1999 at 09:00 AM in To
Be Determined with Judge BARRETT. barbarrs

12-02-99 Filed: Order requesting Spanish Interpreter connieg

12-02-99 Note: FILED: Affidavit of Indigency - Judge Atherton signed and
appointed LDA to represent the defendant in this case. joannelb

12-03-99 Note: Bail remain CDR joannelb
12-07-99 Filed: Appearance of Counsel by Nisa J. Sisneros mauriem
12-07-99 Filed: Formal Request for Discovery mauriem
12-07-99 Filed: Notice of Bond Hearing mauriem
12-07-99 Note: Calendar Judge assignment changed from ROGER BEAN to
WILLIAM B. BOHLING for appearance on 12/14/1999 barbarrs
casehist.288 (34%)[Press space to continue, q to quit, h for help]12-07-99 Note: DRUG
ROLL CALL calendar modified. leonak
12-13-99 Note: Calendar Judge assignment changed from WILLIAM B. BOHLING
to WILLIAM W. BARRETT for appearance on 12/14/1999 barbarrs
12-13-99 Note: DRUG ROLL CALL calendar modified. terryb
12-14-99 Minute Entry - Roll Call continued carmelle
Judge: WILLIAM W. BARRETT
PRESENT
Clerk: carmelle
Prosecutor: NIELSEN, MATTHEW G.
Defendant

Printed: 11/26/01 11:32:05 Page 3

^L

CASE NUMBER 991907447 State Felony

Defendant's Attorney(s): DELLAPIANA, RALPH
Interpreter: RON GOMEZ

casehist.288 (39%)[Press space to continue, q to quit, h for help] Video

Tape Count: 10:39

CONTINUANCE

The Defendant's counsel DELLAPIANA, RALPH FOR SISNEROS, NISA has
made a motion for continuance of Roll Call.

The motion is granted.

Reason for continuance:

Conflict in attorney schedule

DRUG ROLL CALL is scheduled.

Date: 12/28/1999

Time: 09:00 a.m.

Location: To Be Determined

Third District Court

450 South State

Salt Lake City, UT 84111

Before Judge: ROBERT K. HILDER

12-14-99 DRUG ROLL CALL scheduled on December 28, 1999 at 09:00 AM in To

Be Determined with Judge HILDER. carmelle

12-14-99 DRUG ROLL CALL Continued.

12-28-99 Minute Entry - Minutes for Roll Call patd

Judge: ROBERT K. HILDER

casehist.288 (45%)[Press space to continue, q to quit, h for help] PRESENT

Clerk: patd

Prosecutor: POSTMA, MICHAEL E

Defendant not present

Defendant's Attorney(s): DELLAPIANA, RALPH

Video

Tape Number: 102059

HEARING

DEFT FAILED TO APPEAR C/O \$10,000 B/W TO ISSUE

12-28-99 Notice - WARRANT for Case 991907447 ID 491805 patd

12-28-99 Warrant ordered on: December 28, 1999 Warrant Num: 972096409

Bail Allowed patd

Bail amount: 10000.00

12-28-99 Warrant issued on: December 28, 1999 Warrant Num: 972096409

Bail Allowed patd

Bail amount: 10000.00

Judge: ROBERT K. HILDER

Issue reason: Failure to Appear.

07-31-00 Note: File referred to DRC clerk - Defendant booked on warrant joannelb

casehist.288 (52%)[Press space to continue, q to quit, h for help]

^L

CASE NUMBER 991907447 State Felony

07-31-00 Warrant recalled on: July 31, 2000 Warrant num: 972096409 joannelb
Recall reason: Warrant recalled because defendant was
booked.

08-01-00 DRUG ROLL CALL scheduled on August 03, 2000 at 09:00 AM in To
Be Determined with Judge MCCLEVE. terryb

08-03-00 Minute Entry - Minutes for INCOURT NOTE lauraj

Judge: SHEILA K. MCCLEVE

PRESENT

Clerk: lauraj

Prosecutor: POSTMA, MICHAEL E

Defendant

Defendant's Attorney(s): SISNEROS, NISA J

Interpreter: SONJA COUILLARD

casehist.288 (57%)[Press space to continue, q to quit, h for help]

Language: SPANISH

Video

Tape Number: 8/3/2000 Tape Count: 9:48:16

HEARING

C/O SET FOR PRELIMINARY HEARING 8/15/2000 AT 2PM BEFORE JUDGE
MAUGHAN. COURT DENIED ATD'S MOTION FOR A BOND REDUCTION.

PRELIMINARY HEARING is scheduled.

Date: 08/15/2000

Time: 02:00 p.m.

Location: Third Floor - W38

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84111-1860

Before Judge: PAUL G. MAUGHAN

CUSTODY

The defendant is ordered to the Salt Lake County jail.

08-03-00 Note: INCOURT NOTE minutes modified. lauraj
08-03-00 PRELIMINARY HEARING scheduled on August 15, 2000 at 02:00 PM in
casehist.288 (63%)[Press space to continue, q to quit, h for help] Third Floor - W38
with Judge MAUGHAN. lauraj
08-04-00 Filed: Supplemental Request for Discvoery cheril
08-15-00 Judge FREDERICK assigned. mauriem
08-15-00 Minute Entry - Minutes for Preliminary Hearing mauriem
Judge: WILLIAM W. BARRETT
PRESENT
Clerk: mauriem
Prosecutor: POSTMA, MICHAEL E
Defendant
Defendant's Attorney(s): SISNEROS, NISA J
Interpreter: MAYRA VILLAMA

Language: Spanish

Printed: 11/26/01 11:32:16 Page 5
^L
CASE NUMBER 991907447 State Felony

casehist.288 (68%)[Press space to continue, q to quit, h for help] Video

Tape Number: 2000-50 Tape Count: 4:09

The Information is read.
Court advises defendant of rights and penalties.
Defendant waives time for sentence.
A pre-sentence investigation was ordered.
The Judge orders Adult Probation & Parole to prepare a Pre-sentence
report.
Change of Plea Note
On States motion C/O Amend to Attempt a Class A
HEARING

TAPE: 2000-50 COUNT: 4:09

On Stipulated motion C/O Deft to be released to Pre-Trial
CASE BOUNDOVER

Defendant waived preliminary hearing, State consenting thereto.

This case is bound over. A Sentencing has been set on 9/8/00 at

08:30 AM in courtroom N41 before Judge J. DENNIS FREDERICK.

08-15-00 SENTENCING scheduled on September 08, 2000 at 08:30 AM in

Fourth Floor - N41 with Judge FREDERICK. mauriem

08-15-00 Note: Case Bound Over mauriem

casehist.288 (75%)[Press space to continue, q to quit, h for help]08-16-00 Filed order:

Order of Release to Pre-Trial Services mauriem

Judge wbarrett

Signed August 15, 2000

08-16-00 SENTENCING rescheduled on September 22, 2000 at 08:30 AM

Reason: Correct Calendar. cindyb

08-21-00 Filed: SUPERVISED RELEASE AGREEMENT eval

09-07-00 Filed: Memorandum to Judge from C B Stirling, Adult Probation &

Parole rhondam

09-11-00 Filed: Memo from APP - deft failed to schedule interview

appointment upon release from jail cindyb

09-11-00 Notice - WARRANT for Case 991907447 ID 677500 cindyb

09-11-00 Warrant ordered on: September 11, 2000 Warrant Num: 972122835

No Bail cindyb

09-11-00 Warrant issued on: September 11, 2000 Warrant Num: 972122835 No

Bail cindyb

Judge: J. DENNIS FREDERICK

Issue reason: The defendant failed to comply with the
Court's order.

09-22-00 Minute Entry - Minutes for SENTENCE, JUDGMENT, COMMITME

cindyb

Judge: J. DENNIS FREDERICK

PRESENT

Clerk: cindyb

Prosecutor: MURPHY, J KEVIN

casehist.288 (82%)[Press space to continue, q to quit, h for help] Defendant not
present

Defendant's Attorney(s): SISNEROS, NISA J

^L

CASE NUMBER 991907447 State Felony

Language: SPANISH

Video

Tape Number: 1 Tape Count: 10:39-10:40

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED POSS W/INTENT TO DIST CONTR/CNTRFT SUBST a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)

casehist.288 (87%)[Press space to continue, q to quit, h for help]

Commitment is to begin immediately.

SENTENCE FINE

Charge # 1 Fine: \$2500.00

Suspended: \$0.00

Surcharge: \$2125.00

Due: \$4625.00

Total Fine: \$2500.00

Total Suspended: \$0

Total Surcharge: \$2125.00

Total Principal Due: \$4625.00

Plus Interest

Pay fine to The Court.

The Court finds defendant voluntarily absented himself from sentencing proceedings and the Court sentences the defendant in absentia. Counsel for the State to prepare the findings and order. Defendant to be committed forthwith upon his arrest on this Court's bench warrant.

casehist.288 (92%)[Press space to continue, q to quit, h for help]09-27-00 Fine Account created Total Due: 4625.00 cindyb

09-29-00 Filed: Motion to Correct Illegal Sentence

rhondam

10-04-00 Filed order: (signed 10/2/00) Findings of Fact, Conclusions of
Law, and Order Sentencing Defendant in Absentia cindyb
Judge jfrederi
Signed October 02, 2000
10-20-00 Filed: Notice of Appeal rhondam
10-20-00 Filed: Request for Transcript rhondam
10-27-00 Note: Cert/copies of Notice of Appeal, Designation of Record,
Certificate and Request for Transcript sent to Court of Appeals susanc
11-13-00 Filed: Court of Appeals letter to Nisa J. Sisneros (COA #
20000955-CA) - Notice of Appeal filed with Court of Appeals kathys
11-27-00 Filed: Notice of Filing Transcript kathys
11-27-00 Filed: Reporter's Transcript of Proceedings: Plea Hearing on
08/15/00 & Sentencing on 09/22/00 (both transcripts in same
folder) kathys

Printed: 11/26/01 11:32:29 Page 7

^L

casehist.288 (98%)[Press space to continue, q to quit, h for help]CASE NUMBER
991907447 State Felony

12-07-00 Note: RECORD/INDEX FORWARDED TO COURT OF APPEALS: 1 FILE,
1

VOLUME OF TRANSCRIPTS

kathys

casehist.288 (99%)[Press space to continue, q to quit, h for help]

casehist.288 (99%)[Press space to continue, q to quit, h for help]