

2000

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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

Mark L. Shurtleff; attorney general; counsel for appellee.

Recommended Citation

Brief of Appellant, *Utah v. Vicente*, No. 20000955 (Utah Court of Appeals, 2000).

https://digitalcommons.law.byu.edu/byu_ca2/2964

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

Appeal from a judgment of 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(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

JOAN C. WATT (3967)
NISA J. SISNEROS (6654)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

FILED
Utah Court of Appeals

MAR 20 2001

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

Appeal from a judgment of 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(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

JOAN C. WATT (3967)
NISA J. SISNEROS (6654)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION	1
TEXT OF RELEVANT RULES AND CONSTITUTIONAL PROVISIONS	5
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT IN ABSENTIA TO THE MAXIMUM ALLOWABLE SENTENCE WITHOUT ANY INPUT FROM EITHER PARTY.	8
A. THE TRIAL JUDGE VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 WHEN HE SENTENCED VICENTE WITHOUT CONSIDERING RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING THE PARTIES THE OPPORTUNITY TO SPEAK AT SENTENCING.	9
B. THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 BY SENTENCING VICENTE IN ABSENTIA.	15
1. The Record Does Not Demonstrate a Knowing Waiver of the Right to Presence at Sentencing.	15

	<u>Page</u>
2. The Public Interest Did Not Require That Vicente Be Sentenced in Absentia.	24
CONCLUSION	27
Addendum A: Judgment	
Addendum B: Sentencing Transcript	
Addendum C: Motion to Correct Illegal Sentence	
Addendum D: Findings of Fact and Conclusions of Law	
Addendum E: Text of Rules and Constitutional Provisions	

TABLE OF AUTHORITIES

Page

CASES

<u>Crosby v. United States</u> , 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993)	17
<u>Lowery v. State</u> , 759 S.W.2d 545 (Ark. 1988)	21
<u>People v. Bennett</u> , 557 N.Y.S.2d 731 (N.Y. Sup. Ct. 1990)	21
<u>People v. Christopher R.</u> , 522 N.Y.S.2d 28 (N.Y. Sup. Ct. 1987)	21
<u>People v. Harris</u> , 564 N.Y.S.2d 481 (N.Y. Sup. Ct. 1991)	21
<u>People v. Link</u> , 685 N.E.2d 624 (Ill. App. 1997)	21
<u>People v. Parker</u> , 440 N.E.2d 131 (N.Y. 1982)	25
<u>Smith v. Mann</u> , 173 F.3d 73 (2d Cir. 1999), <u>cert. denied</u> , 120 S.Ct. 200	25
<u>State v. Anderson</u> , 929 P.2d 1107 (Utah 1996)	2, 15, 16, 17, 18, 24, 25, 26
<u>State v. Bullock</u> , 791 P.2d 155 (Utah 1989), <u>cert. denied</u> , 497 U.S. 1024 (1990)	3
<u>State v. Dunn</u> , 850 P.2d 1201 (Utah 1993)	3, 13
<u>State v. Eldredge</u> , 773 P.2d 29 (Utah 1989)	3
<u>State v. Fettis</u> , 664 P.2d 208 (Ariz. 1983)	19, 20
<u>State v. Ham</u> , 910 P.2d 433 (Utah App. 1996)	2
<u>State v. Houtz</u> , 714 P.2d 677 (Utah 1986)	15

	<u>Page</u>
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985)	4, 9, 10
<u>State v. Irwin</u> , 924 P.2d 5 (Utah App. 1996)	4, 14
<u>State v. Johnson</u> , 856 P.2d 1064 (Utah 1993)	2, 3, 9, 10, 11, 13
<u>State v. Labrum</u> , 925 P.2d 937 (Utah 1996)	3
<u>State v. Lipsky</u> , 608 P.2d 1241 (Utah 1980)	4, 9, 11
<u>State v. McClendon</u> , 611 P.2d 728 (Utah 1980)	13
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	2
<u>Taylor v. United States</u> , 414 U.S.17 (1973)	18
<u>United States v. Fontanez</u> , 878 F.2d 33 (2d Cir. 1989)	24, 25
<u>United States v. Lastra</u> , 973 F.2d 952 (D.C. Cir. 1992)	19
<u>United States v. McPherson</u> , 421 F.2d 1127 (D.C. Cir. 1969)	15, 16, 17, 18
<u>United States v. Turner</u> , 532 F. Supp. 913 (1982)	19, 20
<u>Williams v. New York</u> , 337 U.S. 341 (1949)	9, 11

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 77-18-1(7) (1999)	14
Utah Code Ann. § 78-2a-3(2)(e) (1996)	1
Fed. R. Crim. P. 43	17
Utah R. Crim. P. 17(a)(2)	5, 22

	<u>Page</u>
Utah R. Crim. P. 22	1, 3, 4, 5, 7, 9, 10, 13, 15, 21
U.S. Const. amend. VI	15
U.S. Const. amend. XIV	5
Utah Const. art. I, § 7	5
Utah Const. art. I, § 12	4, 5, 15, 16, 21, 22

IN THE UTAH COURT OF APPEALS

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

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). The Honorable J. Dennis Frederick, Judge, Third District Court, Salt Lake County, State of Utah sentenced Defendant/Appellant Jose Luis C. Vicente ("Appellant" or "Vicente") and entered judgment of conviction for possession of marijuana with intent to distribute, a class A misdemeanor. A copy of the Judgment is in Addendum A.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue. Whether the trial judge violated due process, Appellant's right to appear and defend, and Utah R. Crim. P. 22 when he sentenced Appellant in absentia to the maximum sentence without affording defense counsel or the state an opportunity to speak at sentencing.

Standard of Review. This issue involves a question of law which is reviewed for correctness. See State v. Anderson, 929 P.2d 1107, 1110 (Utah 1996) (issue of whether defendant was properly sentenced in absentia involves a question of law). In addition, the ultimate issue as to whether Appellant voluntarily absented himself from sentencing is reviewed for correctness. See generally State v. Ham, 910 P.2d 433, 438 (Utah App. 1996) (reviewing ultimate issue of whether consent to search was voluntary for correctness). While a trial judge ordinarily has discretion in sentencing, such discretion is not unlimited. See State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (recognizing trial court exceeds its discretion when it fails to sentence based on reliable and relevant information, and reviewing question of whether trial judge sentenced defendant based on reliable and relevant information as a question of law). Any underlying factual findings are reviewed for clear error. See generally State v. Pena, 869 P.2d 932, 935 (Utah 1994) (factual findings are reviewed for clear error).

Preservation. Although defense counsel was not given an opportunity to speak, the trial court nevertheless considered the issue of whether it was appropriate to proceed, and concluded that Appellant had voluntarily absented himself (R. 67[2]:1-2). A copy of the sentencing transcript is in Addendum B. The trial judge had considered this issue before, as indicated in his statement, "this is yet another sentencing on which we have neither an appearance of the defendant or a report" (R. 67[2]:1). He sentenced Manuel Samora, whose appeal is before this Court in Case No. 20000884-CA, on the same day. In

addition, trial counsel filed a motion to correct an illegal sentence, a copy of which is in Addendum C.

The trial court entered findings of fact and conclusions of law, a copy of which is in Addendum D (R. 48-49). In fact, although the parties were never given the opportunity to address the issue of whether proceeding in absentia was appropriate under the circumstances of the case, the prosecutor was able to prepare findings and conclusions on that issue. Because the trial court considered this issue below and entered an order, it is properly preserved for appellate review. See State v. Eldredge, 773 P.2d 29, 36 (Utah 1989) (purpose of requiring that an issue be raised in the trial court is to allow the trial judge to review the issue and correct an error).¹

Alternatively, the trial judge committed plain error in proceeding in absentia and in failing to base the sentencing decision on relevant and reliable information without affording defense counsel the opportunity to speak. See Johnson, 856 P.2d at 1071; Utah R. Crim. P. 22; State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (plain error occurs

¹ The purposes of the preservation rules are to: (1) allow the trial court the opportunity to review and correct any errors, and (2) preclude defense counsel from foregoing objections as a matter of strategy and when the strategy does not work and defendant is convicted, claiming error. Eldredge, 773 P.2d at 36; State v. Labrum, 925 P.2d 937, 939 (Utah 1996); State v. Bullock, 791 P.2d 155, 159 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990). In this case where the trial judge reviewed the issue of whether to proceed in absentia at sentencing and entered findings and conclusions on that issue and again had the opportunity to review the issue when the motion to correct an illegal sentence was filed, both of those purposes were met. The trial court had the opportunity to review the issue and correct the error, and no possible trial strategy existed for foregoing the objection. Accordingly, the issue was properly preserved for appeal.

when an error is obvious and prejudices the defendant). State v. Lipsky, 608 P.2d 1241, 1247 (Utah 1980) (due process requires full and fair sentencing hearing and sentence which fits offender and the crime); State v. Howell, 707 P.2d 115 (Utah 1985) (state due process requires that sentence be based on reliable and relevant information regarding various factors). Pursuant to due process and Utah R. Crim. P. 22(a), the error in failing to conduct a full sentencing hearing was obvious as was the denial of Vicente's right to presence at sentencing pursuant to Article I, section 12, Utah Constitution. The obvious error prejudiced Vicente since he received the maximum sentence when he otherwise was a candidate for probation; see discussion infra at 11.

Finally, the issue should also be reviewed because exceptional circumstances justifying review exist in this case. See State v. Irwin, 924 P.2d 5, 11 (Utah App. 1996). Utah R. Crim. P. 22(a) requires a trial judge to afford defendant the opportunity to provide relevant information at sentencing; due process requires the judge to conduct a full and fair sentencing hearing. See e.g. Lipsky, 608 P.2d at 1247. Where the judge does not afford counsel the opportunity to speak and does not conduct a full and fair sentencing hearing, a procedural anomaly requiring review exists. See Irwin, 924 P.2d at 11 (exceptional circumstances doctrine generally applies to rare procedural anomalies). In addition, the question of whether the trial judge imposed a legal sentence is of widespread interest as evidenced by the number of cases before this Court raising a similar issue. Id. (doctrine of exceptional circumstances may be applied where "matters

of extraordinary importance or widespread interest" exist). Without appellate review, the egregious violation of due process, Utah R. Crim. P. 22 and the right to presence which occurred in this case would go unchecked. In this case where the trial judge had the obligation to conduct a full and fair sentencing hearing and failed to do so, exceptional circumstances require that this Court review the issue on appeal.

TEXT OF RELEVANT RULES AND CONSTITUTIONAL PROVISIONS

The text of the following rules and constitutional provisions is in Addendum E:

Utah R. Crim. 17(a)(2);
Utah R. Crim. P. 22;
Utah Const. art. I, § 7;
Utah Const. art. I, § 12;
U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On April 7, 2000, the state charged Vicente with unlawful possession of a controlled substance with intent to distribute, a third degree felony, on or about March 4, 2000 (R. 02). On August 15, 2000, Vicente pled guilty to attempted unlawful possession of marijuana with intent to distribute, a class A misdemeanor, before the Honorable William W. Barrett (R. 67[1]:1-5). Judge Barrett scheduled sentencing for September 8, 2000 before the Honorable J. Dennis Frederick (R. 33, 35). When Vicente failed to appear at sentencing subsequently scheduled for September 22, 2000, Judge Frederick sentenced Vicente to the maximum one year sentence (R. 44-45). This appeal follows.

STATEMENT OF THE FACTS

According to the probable cause statement in the Information, a police officer followed another individual to a residence where Vicente answered the door (R. 03). The officer searched the residence and found five ounces of marijuana and a drug scale (R. 03).

At the plea colloquy before Judge Barrett, defense counsel indicated that the state would recommend thirty days jail with credit for time served (R. 67[1]:1). Vicente had served 15-20 days in jail when he pled guilty, and was released pending sentencing. The record contains a form indicating the date of sentencing as September 8, 2000 and referring Vicente to Adult Probation and Parole (AP&P) for a presentence report (R. 33). The form is in English. Vicente speaks Spanish and had an interpreter at the plea colloquy (R. 67[1]:1-5, 23).

Although Judge Barrett told Vicente (through an interpreter) at the plea hearing that he must go to AP&P for a presentence report, the judge did not tell Vicente when he must go or the location of the AP&P office (R. 67[1]:4-5). Judge Barrett also did not tell Vicente on the record at the plea hearing the date on which sentencing would be held (R. 67[1]). Nothing in the record demonstrates that Vicente was informed in Spanish of the date of sentencing or that sentencing would occur before Judge Frederick.

On September 11, 2000, Judge Frederick revoked Vicente's release and issued an arrest warrant because Vicente had not appeared at AP&P for preparation of a

presentence report (R. 41). Sentencing was somehow rescheduled for September 22, 2000. The record does not reflect whether Vicente appeared at the courtroom of Judge Barrett or Judge Frederick on September 8, 2000 or whether Vicente was informed of the change in sentencing date.

On September 22, 2000, when Vicente did not appear before Judge Frederick for sentencing, without affording either party the opportunity to speak, Judge Frederick concluded that Vicente had voluntarily absented himself (R. 67[2]:1-2). Despite the recommendation of thirty days jail with credit for time served, Judge Frederick sentenced Vicente to the maximum one year jail sentence (R. 44).

SUMMARY OF THE ARGUMENT

The trial judge violated Utah R. Crim. P. 22(a) and due process by failing to afford the parties an opportunity to present information relevant to sentencing and by otherwise failing to base the sentence on relevant information or to conduct a full and fair sentencing hearing. Imposing a maximum sentence based solely on the failure to appear without considering the nature and circumstances of the crime, defendant's background or society's interests and without affording the parties the opportunity to present information relevant to sentencing violates the rule and due process and requires a new sentencing hearing.

The trial judge further violated due process and the Rules of Criminal Procedure by sentencing Appellant in absentia. Appellant did not knowingly waive his right to

presence at sentencing in this case where the record does not establish that Appellant was informed of the September 22, 2000 sentencing date or that Judge Frederick would sentence him, and Appellant was not informed that he would be sentenced even if he were not present. The critical role of presence at sentencing requires that the right to presence not be lightly forfeited. In this case where Appellant did not waive his right to be present at sentencing, the trial court erred in sentencing him in absentia and the sentence must be vacated.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT IN ABSENTIA TO THE MAXIMUM ALLOWABLE SENTENCE WITHOUT ANY INPUT FROM EITHER PARTY.

Judge Frederick began the sentencing proceeding by stating, "this is yet another sentencing on which we have neither an appearance of the defendant or a report, is that correct, [Defense Counsel]?" (R. 67[2]:1). Without affording either party an opportunity to speak, Judge Frederick then stated:

The defendant entered a plea of guilty on the, to a Class A Misdemeanor crime of attempted possession with intent to distribute and was given both oral and written notice to appear for the preparation of pre-sentence report, failed to do so and has failed likewise to appear here today notwithstanding both written and oral notice to do so.

It is my view, therefore, he has likewise voluntarily chosen not to appear and I will impose sentence accordingly. It is the judgment of this court that he serve the term provided by law in the Adult Detention Center one year for the Class A Misdemeanor crime and I will order a fine be

imposed of \$2,500 plus a surcharge on the fine and commitment issued forthwith upon his arrest.

(R. 67[2]:1-2). Judge Frederick then ordered the prosecutor to "likewise" prepare findings of fact and conclusions of law (R. 67[2]:2).

A. THE TRIAL JUDGE VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 WHEN HE SENTENCED VICENTE WITHOUT CONSIDERING RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING THE PARTIES THE OPPORTUNITY TO SPEAK AT SENTENCING.

The state and federal due process clauses "require[] that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing sentence." Howell, 707 P.2d at 118; see also Johnson, 856 P.2d at 1071 (state and federal due process protections applicable to sentencing require that judge make sentencing decision based on reliable and relevant information); Williams v. New York, 337 U.S. 341 (1949) (due process requires full and fair sentencing hearing where sentencer imposes sentence which fits offender and the crime); Lipsky, 608 P.2d at 1247 (same). A sentence which is not based on reliable and relevant information must be vacated. See id. at 1071-75 (vacating sentence based on unreliable hearsay report).

Utah R. Crim. P. 22(a) further attempts to effectuate the due process requirement of a full and fair sentencing hearing based on relevant and reliable information by requiring sentencing judges to give both the defendant and the prosecutor an opportunity

to present any information which might be material to the sentence. Utah R. Crim. P.

22(a) states in part:

Before imposing sentence the court *shall afford* the defendant an opportunity to make a statement and to present information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Utah R. Crim. P. 22(a) (emphasis added); see Howell, 707 P.2d at 118 ("[t]o ensure fairness in the sentencing procedure, [Utah R. Crim. P. 22(a)] directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed").

The plain language of Rule 22(a) places on the trial court the responsibility to afford defense counsel the opportunity to speak at sentencing and to present information relevant to sentencing.² While Rule 22(a) mandates that the trial court give the parties the opportunity to speak at sentencing, due process as outlined in Johnson, 856 P.2d at 1071, and Howell, 707 P.2d at 118, requires that any sentence imposed by trial judges be based on reliable and relevant information. Working together, Rule 22(a) and due process require a trial judge to make sure that a fair and full sentencing hearing which meets due process requirements occurs.

² Where a defendant is represented by counsel, defendant presents information through defense counsel.

In this case, the trial court did not afford defense counsel or the prosecutor the opportunity to present information relevant to sentencing. Failure to hold a full sentencing hearing and the concomitant failure to base the sentencing decision on complete and accurate information requires a new sentencing hearing pursuant to Johnson, Lipsky and Williams. In a case such as the present one where the trial judge did not afford defense counsel or the prosecutor the opportunity to present information pertinent to the sentencing decision, conducting a harmless error review would undermine the due process requirement of a full and fair sentencing hearing. Since defense counsel was not given the opportunity to present relevant information, complete information favorable to the defendant is not in the record. Moreover, the prosecutor had agreed to recommend that Vicente serve thirty days jail with credit for time served and then be placed on probation. Judge Frederick, who was not at the plea hearing when this agreement was made, was unaware of this recommendation. Since complete information mitigating the sentence is not in the record, conducting a harmless error review is difficult and not required under Johnson.

Nonetheless, if this Court were to attempt a review for prejudice, the record in this case demonstrates harm caused by the court's failure to afford counsel the opportunity to consider information relevant to sentencing. The record demonstrates that the state was willing to recommend a relatively short jail sentence of thirty days (R. 67[1]:1). Nothing in the record suggests that this crime or Vicente's background required a more severe

sentence. Had Judge Frederick conducted a full and fair sentencing hearing, he would have been aware of the state's recommendation and the circumstances which supported it. Probation, not the maximum sentence, would have been likely.

Vicente's nonappearance at sentencing does not alter the circumstances as to permit imposition of a maximum sentence. First, failing to appear at sentencing is punishable by other means and should not enter into the sentencing matrix. For example, a defendant who fails to appear at sentencing can be charged with a separate crime or held on a bench warrant after not appearing. In addition, if the judge sentences a defendant in absentia, the defendant loses the right to allocution which can play an important role in mitigating sentence; see discussion infra at 14-25 regarding impropriety of sentencing in absentia.

Common sense dictates that imposing a maximum sentence based solely on a failure to appear at sentencing can result in sentences which are not appropriate in light of society's interests, the nature of the crime or the defendant's background, and which impact profoundly on criminal justice resources. Filling the jail with misdemeanants serving maximum sentences who are irresponsible regarding their court dates but who otherwise do not present a threat to society nor deserve severe punishment makes little sense. Instead, the sentencing decision is more appropriately based on a complete review of the nature of the crime and the background of the defendant.

Additionally, even if nonappearance at sentencing were considered in determining the appropriate sentence, it would be only one of several factors to be considered.

"A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." State v. McClendon, 611 P.2d 728, 729 (Utah 1980). In other words, pursuant to McClendon, Johnson and due process, a sentence must be based not only on the circumstances of the crime, but also on other factors such as the defendant's background and the interests of society. The crime in this case where Vicente pled guilty to attempting to possess marijuana was relatively benign. Nothing in the record suggests Vicente had an extensive criminal history or was involved in violence, and the state recommended a short jail sentence with probation. Under these circumstances, probation was likely and Vicente was prejudiced by the judge's failure to conduct a full sentencing hearing.

As a final matter, even if this issue was not adequately preserved for review by the trial judge's ruling, it nevertheless was plain error requiring that the sentence be vacated. The error in failing to afford defense counsel the opportunity to speak on behalf of her client and in otherwise failing to base the sentencing decision on reliable and relevant information was obvious in light of Rule 22(a) and Johnson. See generally Dunn, 850 P.2d at 1208-09 (plain error occurs where error is obvious and prejudices defendant). The obviousness of the error in failing to afford counsel the opportunity to present information

relevant to sentencing is bolstered by Utah Code Ann. § 77-18-1 (7) (1999) which mandates that the trial judge receive any information regarding the appropriate sentence which the parties desire to present, and that such information "be presented in open court on the record and in the presence of the defendant." Utah Code Ann. § 77-18-1 (7) (1999).

While this due process error requires vacation of the sentence regardless of whether prejudice is apparent in the record (see discussion supra at 10), even if prejudice were required, the record demonstrates that Vicente was harmed by the judge's failure to conduct a full and fair sentencing hearing. As outlined supra at 11, the error in failing to afford defense counsel the opportunity to present information relevant to sentencing prejudiced Vicente since the trial judge was not fully informed of the nature and circumstances of the crime or the state's recommendation for a lenient sentence. Had the trial judge been fully informed and considered all relevant and reliable information, probation would have been the appropriate sentence.

In addition, exceptional circumstances require review of this issue. See Irwin, 924 P.2d at 11. The irregular procedure which occurred in this case whereby the judge sentenced Vicente in absentia without affording either party the opportunity to speak is an exceptional circumstance which requires review. See discussion supra at 4. Without review, the flagrant violation of Vicente's right to due process which occurred in this case would not be scrutinized nor corrected.

B. THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 BY SENTENCING VICENTE IN ABSENTIA.

In addition to failing to comply with Utah R. Crim. P. 22(a) and due process in conducting the sentencing hearing without affording counsel the opportunity to present relevant information, Judge Frederick violated Rule 22, due process and Article I, section 12, Utah Constitution by sentencing Vicente in absentia. Article I, section 12, Utah Constitution and the Sixth Amendment to the United States Constitution guarantee the right to be present at sentencing. See Anderson, 929 P.2d at 1109-10; United States v. McPherson, 421 F.2d 1127, 1129 (D.C. Cir. 1969). Because the right to presence at sentencing is constitutionally guaranteed, the trial judge may not proceed in absentia unless the defendant waives the right to presence.

1. The Record Does Not Demonstrate a Knowing Waiver of the Right to Presence at Sentencing.

Any waiver of the right to be present at sentencing "must be voluntary and involve an intentional relinquishment of a known right." Anderson, 929 P.2d at 1110 (further citation omitted). The burden is on the state to establish waiver, and a knowing and voluntary waiver may not be presumed by the trial court. State v. Houtz, 714 P.2d 677, 678-79 (Utah 1986).

In order to knowingly and voluntarily waive the right to presence at sentencing, the defendant must, at the very least, be given notice of the proceedings. Anderson, 929 P.2d at 1110. In addition, the directive given the defendant must provide sufficient warning

that the hearing will proceed even if the defendant is not present for a knowing waiver of the right to presence to occur. McPherson, 421 F.2d at 1129-30.

In Anderson, 929 P.2d at 1111, the Supreme Court held that sentencing the defendant in absentia did not violate the defendant's right to allocution where the defendant was informed of the trial date and signed a written waiver of his right to be present. Id. at 1110-11. The Court recognized that the right to allocution at sentencing "is an inseparable part of the right to be present" found in Article I, section 12, Utah Constitution. Id. at 1111. Anderson waived his right to allocution by his voluntary absence after being informed of the trial date, his execution of a written waiver of his right to be present, his failure to appear at trial, and his failure to keep in touch with counsel or appear at sentencing. Id. at 1110-11.

The Utah Supreme Court's decision in Anderson is consistent with the McPherson approach of requiring that the defendant be informed that the proceeding will be held without him in order to have a knowing waiver³, and must be read in light of the facts and policy considerations relevant to the circumstances under which Anderson failed to

³ McPherson focused on the nature of the communication with the defendant, i.e. on whether the defendant was informed the hearing would proceed in his absence, in determining whether the defendant knowingly waived his right to presence. McPherson, 421 F.2d at 1129-30. In fact, although the trial judge in McPherson made it clear that the defendant was to be present at sentencing and that serious consequences would occur if he was not, the appellate court concluded that a knowing waiver of the right to presence did not occur where the record did not show that the defendant was informed that the trial would proceed without him. Id.

appear. Because Anderson was warned of the consequences of failing to appear and had signed a written waiver of his right to presence in which he agreed to be tried in absentia, requiring that the defendant be warned of the consequences of nonappearance in order to find a knowing waiver of the right to presence fits squarely within the Anderson holding. See Anderson, 929 P.2d at 1110. Relying on McPherson, the Anderson court stated, "[t]o intentionally relinquish the right to be present, the defendant must have notice of the proceedings." Id. (citing McPherson, 421 F.2d at 1130). Since the notice required in McPherson was that sentencing would proceed without the defendant if he did not appear, this reliance on McPherson in Anderson requires that the defendant be given notice that the sentencing will occur even if he does not appear in order to sentence in absentia.

Requiring that a defendant be informed that sentencing will proceed without him for there to be a knowing and voluntary waiver of the right to presence is also consistent with United States Supreme Court case law interpreting Fed. R. Crim. P. 43. See Crosby v. United States, 506 U.S. 255, 256, 113 S.Ct. 748, 749, 122 L.Ed.2d 25 (1993). In Crosby, the Court recognized that it cannot be assumed that a defendant who fails to appear knows that a trial will go on without him. In fact, "'[s]ince the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients.'" Crosby, 506 U.S. at 261 (citation omitted). Moreover, while under the federal rules, a trial may continue to conclusion when a defendant disappears after the trial has begun, a trial in absentia is not

permitted if the defendant fails to appear at the beginning of trial. Id. at 262 (citing Taylor v. United States, 414 U.S.17 (1973)). In making a distinction between absenting oneself mid-trial and not appearing at the beginning of trial for purposes of determining whether a defendant waived his right to presence, the Supreme Court recognized that a defendant who flees mid-trial knows that the trial has begun and will proceed without him whereas a defendant who does not appear at the beginning of trial has no such knowledge. Hence, while a knowing waiver of the right to presence occurs when a defendant flees mid-trial, a knowing waiver is not demonstrated when the defendant fails to appear at all.

Although Anderson supports the McPherson approach, it also fails to control the issue before this Court because it involved circumstances which are different from those in the present case. The trial court properly tried Anderson in absentia based on a written waiver of the right to presence. In determining whether the subsequent sentencing could also be conducted in absentia, the Court looked to cases involving similar circumstances where a defendant was properly tried in absentia and had not shown up by the time of sentencing. Anderson, 929 P.2d at 1110. Because it would create an anomaly to be able to try in absentia a defendant who affirmatively waived his right to presence but then be unable to sentence him, the Supreme Court held that sentencing Anderson in absentia after he had expressly waived his right to presence at trial was appropriate. Id. The Anderson court did not consider the current circumstances, however, where a defendant

who had not been informed at the plea hearing that sentencing would occur without him later failed to appear at sentencing.

Moreover, because presence of the defendant at sentencing is even more critical than it is at trial, the right to presence at sentencing cannot be lightly forfeited. See United States v. Turner, 532 F. Supp. 913, 915 (1982); State v. Fettis, 664 P.2d 208, 209 (Ariz. 1983). "[T]he common law has traditionally required that the defendant be present at his sentencing." Turner, 532 F. Supp. at 915; United States v. Lastra, 973 F.2d 952, 955 (D.C. Cir. 1992) (citation omitted) ("The requirement that the defendant be present when sentence is passed has deep common law origins."). Presence is of critical importance to sentencing not only because it allows the judge to be presented with all of the information needed for a full and fair sentencing, but also because it allows the judge to question and admonish the defendant. Indeed, "[i]t is only when the defendant is before the court that a reasonable and rational sentencing can take place." Fettis, 664 P.2d at 209.

Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation for his conduct. The ceremonial rendering of judgment may also contribute to the

individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.

Turner, 532 F. Supp. at 915.

Presence of the defendant at sentencing also preserves the dignity of the individuals being sentenced as well as the court and the system itself.

Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of liberty. *It shows a fundamental lack of respect for the dignity of a man to sentence him in absentia.* The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

Turner, 532 F. Supp. at 915-16 (citations omitted) (emphasis added). The important policy considerations relating to presence at sentencing require that the right to presence at sentencing not be easily waived. See id. at 915 (important policy considerations supporting right to presence at sentencing "militate against a rule allowing presence at sentencing to be lightly waived").

Because of the critical importance of presence to sentencing, many jurisdictions refuse to allow sentencing in absentia except in extraordinary circumstances. Fettis, 664 P.2d at 209. Such extraordinary circumstances, while "rare indeed" (id.), may include circumstances where a defendant has expressly waived his right to be present at sentencing. See Turner, 532 F. Supp. at 916 (citation omitted). Extraordinary circumstances allowing sentencing in absentia may also include circumstances where the

defendant has been fully informed that sentencing will proceed in his absence if he does not appear at the sentencing hearing. See Lowery v. State, 759 S.W.2d 545, 546 (Ark. 1988) (court unwilling to find defendant waived the right to presence at sentencing "in the absence of language specifically advising an accused that he is subject to being sentenced prospectively without his being present"); People v. Link, 685 N.E.2d 624, 626 (Ill. App. 1997) (court requires that defendant must be "warned his failure to appear may result in the proceedings continuing in absentia" in order to sentence a defendant in absentia); People v. Bennett, 557 N.Y.S.2d 731, 732 (N.Y. Sup. Ct. 1990) (court reasons that sentencing in absentia was permissible where defendant was fully advised that sentencing would occur in his absence if he failed to appear); People v. Harris, 564 N.Y.S.2d 481 (N.Y. Sup. Ct. 1991) (same); People v. Christopher R., 522 N.Y.S.2d 28 (N.Y. Sup. Ct. 1987) (same). These cases support the notion that at the very least, a defendant must be informed that the sentencing will occur even if he is not present in order to knowingly waive his right to presence.

While Utah R. Crim. P. 22(a) facilitates due process and the Article I, section 12, Utah Constitution right to appear and defend by allowing a defendant to speak and present information relevant to sentencing, Rule 22(b) allows sentencing to proceed even though the defendant is not present "[o]n the same grounds that a defendant may be tried in defendant's absence." Utah R. Crim. P. 22(b). The grounds on which a defendant may be tried in his absence are circumstances where the defendant has knowingly and

voluntarily waived his right to presence; in the context of sentencing, a knowing waiver does not occur unless the defendant has been informed that the sentencing will proceed even if he is not present.

Utah R. Crim. P.17(a)(2), which recognizes that in order to proceed in absentia at trial, the defendant must knowingly and voluntarily waive his right to presence, does not affect the determination of whether the constitutional right to presence at sentencing was waived. Utah R. Crim P. 17(a)(2) states in part, "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present."

While this rule suggests that voluntary absence from trial after notice of the time for trial constitutes a knowing waiver of the right to presence at trial, it does not outline what constitutes a knowing waiver of the right to presence at sentencing. More importantly, even if Rule 17(a)(2) applied to sentencing hearings rather than trial, the Article I, section 12 right to presence at sentencing would override the rule. Because of the greater importance of presence at sentencing, the fundamental, common law roots in requiring presence at sentencing and the lack of awareness by most people that a sentencing will be held if the defendant is not present, the right to presence at sentencing cannot be waived except in extraordinary circumstances which may include circumstances where the defendant was informed that the sentencing would be held even if he did not appear.

In the present case, the record fails to demonstrate that Vicente knowingly and voluntarily waived his right to be present at sentencing. Vicente speaks Spanish, used an interpreter at the plea hearing and signed a plea form which was in English and Spanish (R. 23, 24, 33, 35, 67[1]:1-5). At the plea hearing, Judge Barrett referred Vicente to AP&P and told Vicente, through an interpreter, he must go to AP&P for the preparation of a presentence report (R. 67[1]:4-5). Judge Barrett did not, however, orally state that Vicente must return for sentencing or the date on which the sentencing would be held or the fact that the sentencing would be held before a different judge, Judge Frederick (R. 67[1]:1-5). Judge Frederick's finding that Vicente was orally informed of the sentencing date is therefore clearly erroneous.

The record also fails to demonstrate that Vicente was informed of the September 22, 2000 sentencing date. The district court file contains a copy of a form which was filled out on the date of the plea hearing and which indicates that sentencing is to be held on September 8, 2000 (R. 33). That form is in English and there is nothing in the record demonstrating that the information in the form was conveyed to Vicente in Spanish. Moreover, sentencing was somehow rescheduled for September 22, 2000, and there is nothing in the record indicating that Vicente was ever informed of that date. Vicente may well have appeared in the courtroom of Judge Frederick or Judge Barrett on September 8, 2000. While the record does demonstrate that Vicente was informed in Spanish at the plea hearing that he needed to go to AP&P for preparation of a presentence

report, the failure to go to AP&P does not establish that Vicente knew of the sentencing date and knowingly failed to appear. In addition, Vicente was not informed that sentencing would proceed without him if he did not appear.

Because Vicente was not informed of the sentencing date and, further, was not informed that sentencing would proceed without him, Judge Frederick incorrectly concluded that Vicente knowingly and voluntarily waived his right to presence at sentencing. The trial judge therefore erred in sentencing Vicente in absentia.

2. The Public Interest Did Not Require That Vicente Be Sentenced in Absentia.

In determining whether the right to presence has been waived thereby allowing for sentencing in absentia, a trial court must also weigh whether the public interest in proceeding without the defendant outweighs the defendant's interest in being present.

See Anderson, 929 P.2d at 1111 (court relies on practical considerations which supported proceeding with the sentencing in absentia); United States v. Fontanez, 878 F.2d 33, 36 (2d Cir. 1989) (court considers whether public interest in proceeding with sentencing in absentia outweighed defendant's interest in being present in deciding whether to uphold sentencing in absentia).

In Anderson, the Supreme Court upheld the sentencing in absentia after concluding that "[p]ractical considerations . . . mitigate[d] in favor of in absentia sentencing."

Anderson, 929 P.2d at 1111. Anderson had executed a written waiver of his right to be

present, then left the state. The Court was concerned that Anderson could absent himself for years "and the eventual sentencing would have to be performed by a judge who was unfamiliar with the case and had no access to relevant information." Id.

Concerns about dilatory defendants who attempt to delay the administration of justice by failing to appear at sentencing are remedied by requiring trial judges to exercise their discretion to proceed in absentia by balancing "the public interest in proceeding [without the defendant]" against the defendant's interest in being present. Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 200; see also Fontanez, 878 F.2d at 36-37; People v. Parker, 440 N.E.2d 131, 137 (N.Y. 1982). Requiring that trial courts balance the public interest in proceeding against the defendant's interest in being present ensures that trial courts "vigorously safeguard" the right to presence. Fontanez, 878 F.2d at 36.

The factors to be considered when balancing the public interest in proceeding in absentia against the defendant's interest in being present include whether there is a possibility that the defendant could be contacted and brought to court within a reasonable amount of time, the difficulty in rescheduling the sentencing hearing, the burden on the state in not proceeding, and whether there is a possibility that information relevant to sentencing will be lost. See Parker, 440 N.E.2d at 1317; Fontanez, 878 F.2d at 36; Anderson, 929 P.2d at 1111.

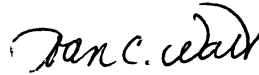
In this case, Judge Frederick erred in sentencing Vicente in absentia where the judge did not balance the public interest in proceeding against Vicente's interest in being present, and the record fails to demonstrate that the public interest required that Vicente be sentenced in absentia. Continuing the sentencing hearing to another date would not have been difficult; sentencing hearings take a relatively short amount of time and are often rescheduled. The state would not have been burdened by a continuance since it presented no information pertinent to sentencing; the state could have easily done the same thing if the sentencing had been rescheduled, and there was no threat that information relevant to sentencing would be lost if sentencing were rescheduled. Since Judge Frederick had taken the case from another judge, was not present when the plea was taken and had no specific knowledge that would be lost, the public had no interest in maintaining him as the judge; even if a delay in sentencing caused reassignment of the case, information pertinent to sentencing would not be lost and the effective administration of justice would not be undermined since Judge Frederick did not sit through the trial as the Anderson judge had, and did not take the plea.

Vicente's fundamental, critical interest in being present for sentencing was not outweighed by the public interest in proceeding. The trial judge therefore erred in sentencing Vicente in absentia and the sentence must be vacated.

CONCLUSION

Defendant/Appellant Jose Vicente respectfully requests that this Court vacate his sentence and remand his case for a full and fair sentencing hearing.

RESPECTFULLY SUBMITTED this 20~~th~~ day of March, 2001.



JOAN C. WATT
Attorney for Defendant/Appellant

NISA J. SISNEROS
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 20th day of March, 2001.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of March, 2001.

ADDENDA

ADDENDUM A

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

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
 :
 :
 :
vs. : Case No: 991907447 FS
 :
JOSE LUIS CASTRO VICENTE, : Judge: J. DENNIS FREDERICK
Defendant. : Date: September 22, 2000
Custody: Salt Lake County Jail

S.O.# 194152

PRESENT

Clerk: cindyb
Prosecutor: MURPHY, J KEVIN
Defendant not present
Defendant's Attorney(s): SISNEROS, NISA J

DEFENDANT INFORMATION

Language: SPANISH
Date of birth: May 4, 1973
Video
Tape Number: 1 Tape Count: 10:39-10:40

CHARGES

1. ATTEMPTED POSS W/INTENT TO DIST CONTR/CNTRFT SUBST (amended)
Class A Misdemeanor
Plea: Guilty - Disposition: 08/15/2000 Guilty Plea

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)

Commitment is to begin immediately.

Case No: 991907447
Date: Sep 22, 2000

SENTENCE FINE

Charge # 1 Fine: \$2500.00
 Suspended: \$0.00
 Surcharge: \$2125.00
 Due: \$4625.00

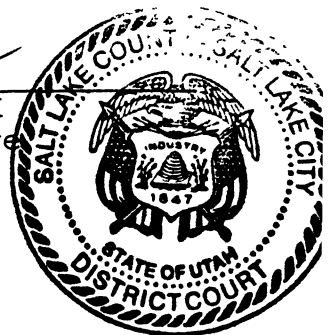
 Total Fine: \$2500.00
 Total Suspended: \$0
 Total Surcharge: \$2125.00
Total Principal Due: \$4625.00
 Plus Interest

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.

Dated this 22nd day of Sept, 2000.


J. DENNIS FREDERICK
District Court Judge



ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 991907447 FS
	:	
Plaintiff/Appellee,	:	
	:	
v	:	
	:	
JOSE LUIS C. VINCENTE,	:	
	:	
Defendant/Appellant.	:	

August 15, 2000
September 22, 2000

PLEA HEARING
SENTENCING

Page 1
Tab 2

BEFORE

THE HONORABLES J. DENNIS FREDERICK and WILLIAM W. BARRETT

FILED DISTRICT COURT
Third Judicial District

NOV 27 2000

SALT LAKE COUNTY
By K. Shupe
County Clerk

ORIGINAL

FILED

DEC 07 2000

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

COURT OF APPEALS

20000955-CA

APPEARANCES

For the Plaintiff:

**J. KEVIN MURPHY
DEPUTY DISTRICT ATTORNEY
231 East 400 South #300
Salt Lake City, Utah 84111**

For the Defendant:

**NISA J. SISNEROS
SALT LAKE LEGAL DEFENDERS
424 East 500 South, #300
Salt Lake City, Utah 84111**

*** * ***

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SALT LAKE COUNTY; UTAH SEPTEMBER 22, 2000
HONORABLE J. DENNIS FREDERICK PRESIDING
P R O C E E D I N G S

THE COURT: All right, Miss Sisneros, thank you. Do you have any other matter, another non-show right?

MS. SISNEROS: One other, a Jose Vicente, number 24.

THE COURT: Very well this is yet another sentencing on which we have neither an appearance of the Defendant or a report, is that correct, Ms. Sisneros?

MS. SISNEROS: That is correct.

THE COURT: And you have no knowledge as to this Defendant's present whereabouts likewise?

MS. SISNEROS: No, I don't.

THE COURT: In this matter, this is case number CR997447, the Defendant entered a plea of guilty on the, to a Class A Misdemeanor crime of attempted possession with intent to distribute and was given both oral and written notice to appear for the preparation of pre-sentence report, failed to do so and has failed likewise to appear here today notwithstanding both written and oral notice to do so.

It is my view therefore, he has likewise voluntarily chosen not to appear and I will impose sentence accordingly. It is the judgment of this court that he serve the term provided by law in the Adult Detention Center one year for the Class A Misdemeanor crime and I will order a fine be imposed of \$2,500

1 plus a surcharge on the fine and commitment issued forthwith
2 upon his arrest. A warrant has been previously issued.
3 Likewise Mr. Murphy findings of fact and conclusions and order.

4 MR. MURPHY: Yes, Your Honor.

5 THE COURT: All right, Ms. Sisneros does that take
6 care of your matters?

7 MS. SISNEROS: That's all I have Your Honor.

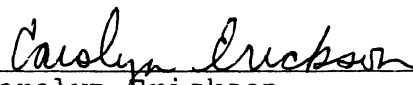
8 THE COURT: All right, thank you.

9 (Whereupon the hearing was concluded).
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

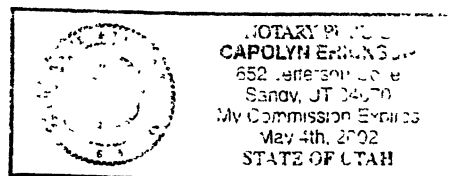
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge J. Dennis Frederick was transcribed by me from a videotape and is a full, true and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 24th day of November 2000 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



ADDENDUM C

NISA J. SISNEROS (6654)
Salt Lake Legal Defender Association
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

FILED
THIRD JUDICIAL DISTRICT COURT
00 SEP 29 AM 6:37
SALT LAKE DEPARTMENT
BY DM
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT

STATE OF UTAH,	:	MOTION TO CORRECT
	:	ILLEGAL SENTENCE
Plaintiff,	:	
	:	
-v-	:	
	:	
JOSE LUIS CASTRO VICENTE,	:	Case No. 991907447FS
	:	JUDGE J. DENNIS FREDERICK
Defendant.	:	

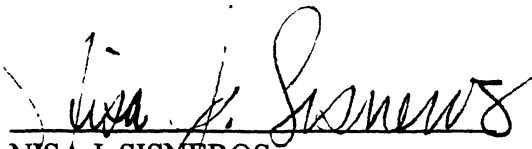
Defendant, Jose Luis Castro Vicente, by and through counsel, Nisa J. Sisneros, hereby objects to the sentence imposed by the court on September 22, 2000 and moves the court to correct it's illegal sentence pursuant to Rule 22(e) of the Utah Rules of Criminal Procedure, State v. Wagstaff, 772 P.2d 987 (Utah Ct. App. 1989), and State v. Anderson, 929 P.2d 1107 (Utah 1996). Mr. Vicente was not present at the sentencing. The court found that he had voluntarily absented himself from the proceedings and sentenced him to the maximum jail sentence allowed by law. However, Rule 22(a) of the Utah Rules of Criminal Procedure states a defendant is entitled to "make a statement and to present any mitigation of punishment, or show any legal cause why sentence should not be imposed". Any imposition of sentence without Mr. Vicente's presence violated his rights to due process and to allocution as found in the Constitution of Utah

art. I, §§ 7 & 12, and the 5th, 8th and 14th Amendments of the United States Constitution. In addition counsel for Mr. Vicente was not given the opportunity to address sentencing. At the time of sentencing both the court and counsel were unaware as to why Mr. Vicente was not present.

Rule 22 (b) allows the court to issue a bench warrant if a defendant fails to appear for sentencing. Therefore, Mr. Vicente requests that the court correct it's sentence and issue a bench warrant for his arrest allowing him to address the court prior to being sentenced.

Mr. Vicente requests the court set this matter for hearing.

DATED this 27th day of September, 2000.



NISA J. SISNEROS
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office,
231 East 400 South, Salt Lake City, Utah 84111 this ____ day of September, 2000.

ADDENDUM D

FILED DISTRICT COURT
Third Judicial District

OCT - 4 2000

By C. Bailey
SALT LAKE COUNTY
Deputy Clerk

DAVID E. YOCOM
District Attorney for Salt Lake County
KEVIN MURPHY, 5768
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- JOSE LUIS C. VICENTE, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER SENTENCING DEFENDANT IN ABSENTIA Case No. 991907447 DA Case No. 99004536 Hon. Judge Frederick
---	--

This case was called for sentencing on September 22, 2000. The State was represented by Kevin Murphy of the Salt Lake District Attorney's Office; defense counsel Nisa Sisneros was present. However, defendant did not appear. The court enters the following—

FINDINGS OF FACT

1. The Court record reflects, and the Court finds, that defendant had written and oral notice of the September 22, 2000, 8:30 AM sentencing hearing.
2. The Court finds that defendant has voluntarily absented him/herself from the sentencing hearing.

CONCLUSIONS OF LAW

1. Pursuant to Utah R. Crim. P. 22(b), it is appropriate that the defendant be sentenced in absentia.

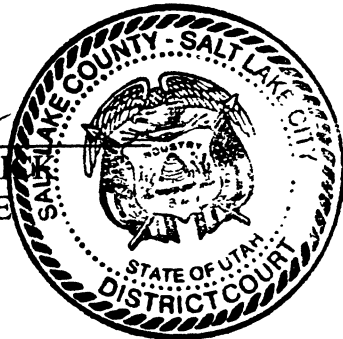
ORDERS

1. Based upon his conviction for Attempted Possession of Controlled Substance with Intent to Distribute, a class A misdemeanor, the defendant is sentenced to a term of one year in the Salt Lake County Adult Detention Center.
2. The defendant is sentenced to pay a fine of \$2500.00.
3. A no-bail warrant is issued for the defendant's arrest.
4. Defendant's one year jail commitment shall commence upon his/her arrest and booking into the Salt Lake County Adult Detention Center on the warrant.

DATED this 11 day of Oct September, 2000.

BY THE COURT


JUDGE DENNIS FREDERIKSEN
DISTRICT COURT JUDGE



DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order Sentencing Defendant in Absentia was delivered to Nisa Sisneros, Attorney for Defendant Jose Vicente at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the 27th day of September, 2000.

J. Richbauer

ADDENDUM E

UTAH RULES OF CRIMINAL PROCEDURE

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present;

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995; January 1, 1996.)

CONSTITUTION OF UTAH

Sec. 7. [Due process of law.]

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

Sec. 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.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

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.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.