

2011

# Utah v. Boyle : Brief of Appellant

Utah Court of Appeals

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Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

Joanna E. Landau; Salt Lake Legal Defender Assoc.; Counsel for Appellant.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 : Case No. 20110947-CA  
 ANGELIQUE SARAH BOYLE, :  
 : Appellant is not incarcerated.  
 Defendant/Appellant. :

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**BRIEF OF APPELLANT**

This is an appeal from the October 25, 2011 judgment of conviction for two counts of retail theft in violation of Utah Code § 76-6-602, third degree felonies, amended to class A misdemeanors; and two counts of possession of a controlled substance in violation of Utah Code § 58-37-8, third degree felonies, amended to class A misdemeanors, entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bruce Lubeck presiding.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. : Case No. 20110947–CA  
ANGELIQUE SARAH BOYLE, :  
Defendant/Appellant. : Appellant is not incarcerated.

---

**JURISDICTIONAL STATEMENT**

This is an appeal of the October 25, 2011 sentence, judgment, commitment entered against Defendant/Appellant Angelique Sarah Boyle in district court cases: 101400266; 081400216 and 081400167. See Addendum A. Boyle filed a timely pro se notice of appeal of the sentence, judgment, commitment in the three cases the same day, October 25, 2011. R.59(101400266); 119(081400216); 124(081400167).<sup>1</sup> This Court consolidated the appeals into a single case July 30, 2012. This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(e).

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<sup>1</sup> For clarification, all citations to the court records in the three cases involved in this consolidated appeal are followed by the district court case number in which the document appears. This does not include R.79, which is the Sentencing Hearing Transcript for all three cases. Where the same document appears in all three volumes, only the record in case 101402782 is cited and where the same document appears in both cases 081400167 and 081400216, only the record in case 081400216 is cited.

## **STATEMENT OF ISSUES, STANDARD OF REVIEW, PRESERVATION**

**Issue I:** Whether the trial court abused its discretion when, as a result of Boyle’s July 5, 2011 guilty plea to retail theft in district court case 101400266 (20110949-CA), it revoked Boyle’s probation in cases 081400216 (20110948-CA) and 081400167 (20110947-CA) and imposed three concurrent jail sentences of 365 days.

***Standard of Review:*** This Court affords a “trial court wide latitude in sentencing and, generally, will reverse a trial court’s sentencing decision only if it is an abuse of the judge’s discretion.” State v. Bluff, 2002 UT 66, ¶66, 52 P.3d 1210 (quotation omitted). A “trial court abuses its discretion when it fails to consider all legally relevant factors, or if the sentence imposed exceeds the limits prescribed by law.” Id.

***Preservation:*** This issue was preserved when defense counsel asked the trial court whether it was “willing to go with the recommendation [of Adult Probation and Parole and] consider 30 days as a sanction for her retail theft.” R.79:13. In the alternative, this Court should reach the merits of Boyle’s claims under plain error review. See State v. Dean, 2004 UT 63, ¶15, 95 P.3d 276 (outlining plain error doctrine); State v. Tucker, 800 P.2d 819, 821 (Utah Ct. App. 1990) (preservation rule does not apply to plain error).

## **STATEMENT OF THE CASE**

On July 5, 2011, while serving probation on her three 2008 convictions in district court cases 081400216 and 081400167, Boyle pled guilty to retail theft and possession of a controlled substance in cases 101400266 and 101402782. R.49-50(101400266).<sup>2</sup>

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<sup>2</sup> Case 101402782 was closed as Boyle was granted credit for time served and released on that case. Case 10142782 is not before this Court on appeal.

On October 25, 2011, the trial court held a sentencing hearing for her guilty plea in case 101400266. R.79 (Sentencing Hearing Transcript). At the hearing, the trial court considered the State's arguments, statements from Boyle and her counsel, as well as the presentence report and recommendation from Adult Probation and Parole (AP&P). R.79. The trial court determined her guilty plea justified the unsuccessful termination of her probation in her 2008 cases and sentenced Boyle to 365 days in each of those two cases, as well as 365 days in jail for her guilty plea in case 101400266. R.79:20. The trial court ordered that all three 365-day sentences would run concurrently. R.79:20.

### **STATEMENT OF THE FACTS**

#### ***2008 Cases***

On February 26, 2008, Boyle pled guilty to one count of retail theft (Shoplifting), reduced from a third-degree felony to a class A misdemeanor. R.21(081400216). She also pled guilty to two counts of possession of a controlled substance, reduced from third-degree felonies to class A misdemeanors. R.29(081400167). The trial court sentenced Boyle on these guilty pleas June 30, 2008, ordering her to serve 365 days in the Salt Lake County Jail on each conviction, suspending that sentence and putting her on probation for thirty-six months. R.40-41(81400216); 41-42(81400167).

#### ***2010 Cases***

On January 26, 2010, AP&P filed an Affidavit in Support of Order to Show Cause for Boyle's probation violations. R.47(081400216). Boyle had served over thirty-one months on her thirty-six months of probation when the affidavit was filed. Boyle denied all the allegations made against her by AP&P and the matter was continued.



R.84(081400216). On February 3, 2010, Boyle was charged with criminal violations in cases 101400266 and 101402782. R.1(101400266). The order to show cause hearing was continued for disposition with these new cases. R.88(081400216).

On July 5, 2011, Boyle pled guilty to retail theft and possession of a controlled substance, however the retail theft charges are the only 2011 charges involved in this appeal. R.49(101400266). On October 25, 2011, the trial court held a sentencing hearing. R.79. At the hearing, the trial court disregarded the presentence report's recommendation of sixty days in jail and thirty-six months of probation. R.79-19-20. Instead of adopting this recommendation, the trial court revoked Boyle's probation for the 2008 cases and sentenced her to 365-days in jail in each 2008 case and to 365 days in jail on the retail theft plea in case 101400266. R.79. The trial court ordered Boyle to serve the three jail sentences concurrently and to complete C.A.T.S. R.79:20.

Boyle filed timely notices of appeal in the district court by informing that court of her desire to appeal each case. See R.59(101400266); 119(081400216); 124(081400167). This Court consolidated all three cases for appeal on July 30, 2012.

### **SUMMARY OF THE ARGUMENT**

Boyle contends that the trial court abused its discretion when, based on her July 5, 2011 guilty plea in case 101400266, it terminated her probation as unsuccessful in cases 081400167 and 081400216 and sentenced her to three concurrent sentences of 365 days in jail, despite the presentence report's recommendation of only sixty days in jail and thirty-six months of probation. Boyle contends the trial court abused its discretion in ordering this sentence because it openly disregarded the recommendations of AP&P and

AP&P had carefully considered all legally relevant factors in making its report and recommendation.

### **ARGUMENT**

#### **THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REVOKED BOYLE'S PROBATION AND SENTENCED HER TO THREE CONCURRENT SENTENCES OF 365 DAYS IN JAIL.**

A trial court abuses its sentencing discretion when it “fails to consider all legally relevant [sentencing] factors.” State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) (quotation omitted). When a trial court determines whether offenses should run concurrently or consecutively, it must consider “the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.” Utah Code § 76-3-401(2); see State v. Killpack, 2008 UT 49, ¶59 191 P.3d 17 (“[A] trial court's sentencing decision will not be overturned unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors, or the actions of the judge were so inherently unfair as to constitute abuse of discretion.”)(quotation omitted).

It may also be an abuse of discretion if a trial court fails to give “adequate weight to certain mitigating circumstances.” State v. Helms, 2002 UT 12, ¶15, 40 P.3d 626 (quotation omitted). A trial court’s “[a]buse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.” State v. Schweitzer, 943 P.2d 649, 651 (Utah Ct.App. 1997) (quotations omitted). This Court reverses for an abuse of discretion only when it concludes “no reasonable [person] would take the view adopted by the trial court.” Id.

(quotation omitted).

The due process clauses of both the United States and Utah Constitution “require[] that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence.” State v. Wanosik, 2001 UT App 241, ¶34, 31 P.3d 615 (quotation omitted). “A sentence in a criminal case should be appropriate for the defendant in light of [her] background and the crime committed and also serve the interests of society which underlie the criminal justice system.” Id. at ¶34 (quotation omitted). Although “the sentencing judge[] [has] discretion in determining what punishment fits both the crime and the offender,” Utah courts “have consistently sought to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion.” Id. (quotation omitted). Therefore, a trial court does not have discretion to violate the defendant’s due process “right to be sentenced based on relevant and reliable information regarding [her] crime . . . background, and the interests of society.” Id.

Information that is relevant to sentencing includes information related to the defendant’s rehabilitation, punishment, incapacitation, restitution and deterrence. See State v. Gardner, 947 P.2d 630, 634 (Utah 1997)(“The traditional justifications for punishment in the criminal law include retribution, incapacitation, deterrence, and rehabilitation.”(quotation omitted)). Where a presentence report “contains detailed information regarding not only the gravity and circumstances of the offenses, but also the history, character, and rehabilitative needs of the defendant” it may be integral to a trial court’s proper exercise of its sentencing discretion. See Helms, 2002 UT 12 at ¶13.

Boyle argues the trial court abused its discretion in her case, by revoking her probation and sentencing her to three concurrent 365-day jail sentences despite AP&P's recommendation for a much shorter sentence. The presentence report recommended thirty-six months of probation and sixty days in jail for Boyle's guilty pleas in both case 10142782 and 101400266. R.70(101400266). Where the trial court was only sentencing Boyle for her plea in case 101400266, even sixty days in jail would have been excessive based on the presentence report's recommendation of that amount for both guilty pleas. In making its recommendation for probation after serving some jail time, the presentence report considered aggravating and mitigating factors including Boyle's life history, criminal history, substance abuse history and rehabilitation needs. See R.70-78(101400266).

At sentencing, the trial court disregarded the presentence report's recommendation, stating:

I just don't think that their (AP&P) recommendations make[] sense to me in this instance, frankly. And so I really do think that, that I'm going to send you to jail and have you do CATS and then let you get out early if you do it. If you don't, you'll do, do the full time.

R.79-19-20. Although the trial court sentenced Boyle to concurrent terms, a trial court must consider "the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant" whether the court sentences a person to consecutive or concurrent terms. Utah Code § 76-3-401(2). The presentence report took these factors into consideration but the trial court disregarded it.

During the sentencing hearing, the trial court also heard from Boyle as to her disabilities that make it hard for her to be places on time. R.79:15-18 (problems with transportation, ability to be anywhere on time, learning disability and diabetes). Yet the trial court considered her untimeliness in sentencing Boyle, although it stated it was not sentencing her for being late. See R.79:15-17.

Although trial court has discretion to terminate probation at any time, Boyle claims the trial court's abuse of discretion is manifest in its decision to revoke her probation and reinstate both of her 2008 sentences for 365 days in jail for her voluntary guilty plea in case 101400266. See Utah Code § 77-18-1(10)(a)(i) ("Probation may be terminated at any time at the discretion of the court."). Boyle had served over thirty-one months of her thirty-six months of probation when she committed retail theft on January 15, 2011, and Boyle pled guilty to that crime. The trial court nonetheless reinstated the entirety of both of the 365-day sentences for the 2008 cases. Boyle contends the trial court's sentencing decision was an abuse of discretion because it was an inherently unfair sentence, not based on the relevant factors the trial court should have considered.

This Court should reverse Boyle's sentence and remand for a new sentencing hearing with instructions that the trial court must consider the presentence report and other mitigating factors.

### **THIS ISSUE WAS PRESERVED**

This issue is preserved where defense counsel asked the trial court to impose thirty days or accept the presentence report's recommended sixty days. R.79:13. See State v. Noor, 2012 UT App 187, ¶7 (mem.)(preservation requires that an argument on appeal be

“presented to the trial court in such a way that it could have understood and ruled on it.”)(quoting State v. Santonio, 2011 UT App 385, ¶29, 265 P.3d 822)). Trial counsel’s request that the court consider AP&P’s recommendation gave the trial court the opportunity to consider and accept the presentence report’s recommendation and impose a reasonable and fair sentence based on that recommendation.

**IN THE ALTERNATIVE, BOYLE’S CLAIM CAN BE REVIEWED FOR PLAIN ERROR.**

If Boyle’s counsel failed to preserve this argument sufficiently for appeal, Boyle contends that the issue can be considered by this Court under the doctrine of plain error. See State v. Cram, 2002 UT 37, ¶4, 46 P.3d 230 (listing plain error, among other exceptions to the preservation rule). “The plain error exception enables the appellate court to balance the need for procedural regularity with the demands of fairness” State v. Holgate, 2000 UT 74, ¶13, 10 P.3d 346, 350 (quotation omitted). To “prevail on grounds of plain error, an appellant must show that ‘(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.” State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993).

The trial court erred when it disregarded the presentence report’s recommendation and revoked Boyle’s probation in the 2008 cases and sentenced her to three 365-day concurrent jail sentences based on her July 5, 2011 guilty plea, because this sentence was an abuse of discretion. This error was obvious as the trial court’s disregard of the

presentence report was blatant. At the time of Boyle's sentencing, due process required a sentencing court to rely on information that is "reasonably reliable and relevant."

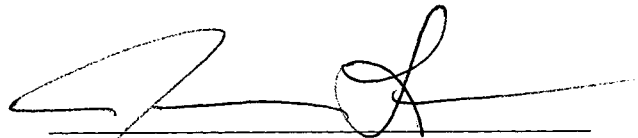
Wanosik, 2001 UT App 241 at ¶34 (quotation omitted). In not considering the information contained in the presentence report and deciding the sentence based on other factors, the trial court's abuse of discretion was obvious and prejudicial to Boyle.

The trial court's error was prejudicial to Boyle because the trial court subjected her to an excessive sentence that was not commensurate with the gravity of her crimes when it failed to consider the presentence report's recommendation for a lesser sentence. But for the prejudicial impact of the trial court's error the trial court would not have imposed such a severe and unfair sentence. This Court should reach the merits of Boyle's argument on appeal.

### **CONCLUSION**

This Court should reverse the trial court's sentencing decision and remand for resentencing.

SUBMITTED this 8th day of August, 2012.



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JOANNA E. LANDAU  
Attorney for Defendant/Appellant

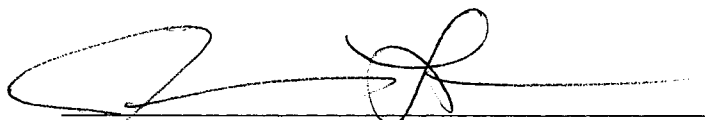
CERTIFICATE OF DELIVERY

I, JOANNA E. LANDAU, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 8<sup>th</sup> day of August, 2012.



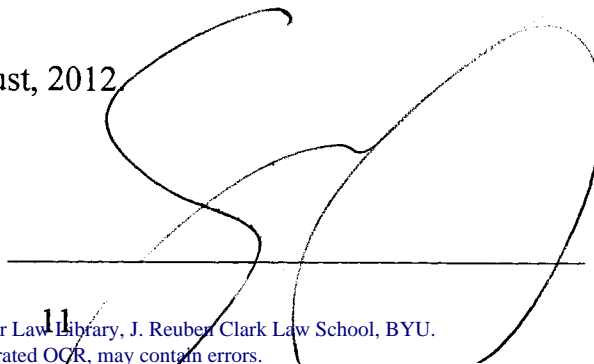
CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,470 words, excluding the table of contents, table of authorities and addenda. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.



JOANNA E. LANDAU

DELIVERED this 8<sup>th</sup> day of August, 2012





Tab A

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
 :  
vs. : Case No: 081400167 FS  
 :  
ANGELIQUE SARA BOYLE, : Judge: ROBERT ADKINS  
Defendant. : Date: June 30, 2008  
Custody: Pre-Trial Services

---

PRESENT

Clerk: pamfw

Prosecutor: WARNER, GREGORY M

Defendant

Defendant's Attorney(s): BERCEAU, DAVID J

DEFENDANT INFORMATION

Date of birth: May 17, 1970

Audio

Tape Number: 8107 Tape Count: 2:54

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE (amended) - Class A Misdemeanor  
- Disposition: 02/26/2008 Guilty
2. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE (amended) - Class A Misdemeanor  
- Disposition: 02/26/2008 Guilty

SENTENCE JAIL

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Case No: 081400167  
Date: Jun 30, 2008

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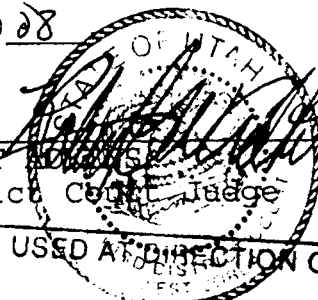
ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.

PROBATION CONDITIONS

No other violations.  
Comply with Adult Probation and Parole.  
Timely payments of all fines, attorney fees and restitution.  
Not to possess/consume alcohol or non prescribed controlled substance.  
Notify probation agent of any prescribed medication.  
Submit to search of self or property by probation agent.  
UA's at least 2 times a month.  
Assessment from ARS.  
Only one prescribing physician.  
Sign medical release for APP to receive medical information.  
Give APP a list of all current and future prescriptions within 48 hours.  
Fine in the amount of \$525.00.  
Recopment in the amount of \$200.00  
Restitution of \$75.00 payable to Smith's Food and Drug.  
This case is oncurrent to 081400216.

Dated this 30 day of June, 2008

A circular seal of the State of Utah is stamped over the signature. The seal contains the text "STATE OF UTAH" at the top and "1896" at the bottom. The signature "Robert M. [unclear]" is written across the seal.  
By Robert M. [unclear]  
District Court Judge  
STAMP USED AT DIRECTION OF JUDGE

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
: :  
vs. : Case No: 081400216 FS  
: :  
ANGELIQUE SARA BOYLE, : Judge: ROBERT ADKINS  
Defendant. : Date: June 30, 2008  
Custody: Pre-Trial Services

---

PRESENT

Clerk: pamfw  
Prosecutor: WARNER, GREGORY M  
Defendant  
Defendant's Attorney(s): BERCEAU, DAVID J

DEFENDANT INFORMATION

Date of birth: May 17, 1970  
Audio  
Tape Number: 8107 Tape Count: 2:54

CHARGES

1. RETAIL THEFT (SHOPLIFTING) (amended) - Class A Misdemeanor  
- Disposition: 02/26/2008 Guilty

ALSO KNOWN AS (AKA) NOTE

MICHELLE BOYLE  
ANGELIQUE EHLERS

SENTENCE JAIL

Based on the defendant's conviction of RETAIL THEFT (SHOPLIFTING) a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Case No: 081400216  
Date: Jun 30, 2008

---

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.

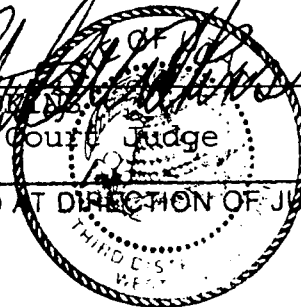
PROBATION CONDITIONS

No other violations.  
Comply with Adult Probation and Parole.  
Timely payments of all fines, attorney fees and restitution.  
Not to possess/consume alcohol or non prescribed controlled substance.  
Notify probation agent of any prescribed medication.  
Submit to search of self or property by probation agent.  
Random UA's at least 2 times a month.  
Only one prescribing physician.  
Only one pharmacy to fill prescription.  
Sign medical release for APP to allow them access to your medical records.  
Give APP list of all current and future medications within 48 hours.  
Report to APP within 48 hours.  
This case is consecutive to 081400167.  
Report to ARS for assessment/comply with treatment.

Dated this 30 day of June, 2008.

  
ROBERT ADAMS  
District Court Judge

USED AT DIRECTION OF JUDGE



3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
vs. : Case No: 101400266 FS  
ANGELIQUE SARAH BOYLE, : Judge: BRUCE LUBECK  
Defendant. : Date: October 25, 2011

---

PRESENT

Clerk: lyndsaym  
Prosecutor: NEILL, ROBERT G  
Defendant  
Defendant's Attorney(s): LEVI, DEBORAH K

DEFENDANT INFORMATION

Date of birth: May 17, 1970  
Sheriff Office#: 236842  
Audio  
Tape Number: 32 Tape Count: 10.40..20

CHARGES

1. RETAIL THEFT (SHOPLIFTING) (amended) - Class A Misdemeanor  
Plea: Guilty - Disposition: 07/05/2011 Guilty

ALSO KNOWN AS (AKA) NOTE

ANGELIQUE SHARAH EHLERS

SENTENCE JAIL

Based on the defendant's conviction of RETAIL THEFT (SHOPLIFTING) a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

The Defendant is to report by November 1, 2011 by 5:00 pm.

SENTENCE JAIL RELEASE TIME NOTE

The Court will consider early release upon completion of CATS.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

The Court orders count I to run concurrent with the time ordered on case# 081400167 and on case# 081400216.  
Defendant must complete the CATS program.

Case No: 101400266 Date: Oct 25, 2011

Date: 25 Oct

  
BRUCE LUBECK  
District Court Judge

